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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' REPLY BRIEF

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STATEMENT OF THE CASE

Richard and Teresa Rarick (the "Raricks") submit the following argument in reply to the brief filed by Des Moines Orthopaedic Surgeons, P.C. and Dr. Wesley Smidt (collectively, "DMOS"). While the Raricks' opening brief adequately addresses the issues presented for review, a reply is appropriate to address certain contentions raised by DMOS.

ARGUMENT

I. DMOS Waived its Unsworn Certificate of Merit Challenge. The Record Supports No Other Conclusion.

It is important to recognize what this case is and what it is not. This case is not about a certificate-of-merit challenge based on hidden facts or false statements that suddenly emerged in discovery. Rather, this case is about a simple unsworn certificate-of-merit challenge based on a missing notarial jurat that DMOS knew was absent from day one. For fifteen months, DMOS immersed itself in merits-based fact and expert discovery in this straightforward medical malpractice case. At all times, the parties agreed a standard of care expert was required, and DMOS admitted respondeat superior in its Answer. DMOS took *no discovery whatsoever* regarding the certificate of merit, and DMOS has identified no facts supporting its motion to dismiss that were unavailable to it from day one.

A defendant impliedly waives an unsworn certificate-of-merit challenge when it engages in conduct or activity inconsistent with the right of dismissal under section 147.140 and the non-moving party suffers prejudice as a result. *S.K. ex rel. Tarbox v. Obstetric & Gynecologic Assocs.*, 13 N.W.2d 546, 569–573 (Iowa 2024) (Waterman, J., concurring opinion for the majority). Despite the simplicity of this framework, DMOS now seizes onto legal bromides regarding "knowledge," and asserts, for the first time on appeal, its own ignorance or error of law excuses its inconsistent litigation conduct that caused the Raricks' to suffer prejudice, namely, the expiration of their statute of limitations that extinguished their right of dismissal without prejudice so they could refile.

Even if this issue were preserved (it is not), it would be foreclosed by *S.K.* In that case, Justice Waterman's concurrence stated "*Miller* did not change the law" and "No Iowa appellate decision had previously held an expert's certificate of merit neither sworn nor signed under penalty of perjury substantially complied with the oath and affidavit requirement." 13 N.W.3d at 570 (Waterman, J., concurring opinion for the majority) (citing *Miller v. Catholic Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367

(Iowa 2024)). "*Miller* simply enforced the statutory requirement that had been in effect since section 147.140's enactment in 2017." *Id.* at 570 n.5.

DMOS cites no authority supporting its newfound argument that a party's self-proclaimed legal error or ignorance of the law obviates its waiver to the detriment of the opposing party. To the contrary, "it is a well-established principle that ignorance of the law is no excuse," and the Court has "consistently held that individuals are presumed to know the law." *Clark v. Iowa Dep't of Revenue and Fin.*, 644 N.W.2d 310, 319 (Iowa 2002); *see also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Hearity,* 812 N.W.2d 614, 621 (Iowa 2012) ("An ostrich-like, head-in-the-sand approach' does not 'immunize attorneys from an inference of actual knowledge."). Citizens are charged with knowledge of the law and "provisions of statutes," "even when it can be complex and confusing." *Id.* "[I]f [a party] knew the facts he is presumed to know the law." *Creshire v. Taylor*, 20 Iowa 492, 494 (1870). This presumption applies to waiver just as it applies in other areas of law. *See id.* (waiver); *Cnty. Sav. Bank v. Jacobson*, 211 N.W. 864, 867 (Iowa 1927); *Hughes v. Bowen*, 15 Iowa 446, 448–49 (1864); *see also Benz v. Paulson*, 70 N.W.2d 570, 574 (Iowa 1955);

Ambuehl v. Citizens State Bank, 1999 WL 1020424, at *4 (Iowa App. Nov. 10, 1999).[1]

In this case, DMOS does not dispute that on March 14, 2023 it knew the facts underlying its unsworn certificate-of-merit challenge, namely, that the certificate was missing a jurat. This alleged defect is open and obvious in any meaningful sense of the phrase, and the missing jurat is *the* fact upon which DMOS predicated its unsworn certificate-of-merit challenge. DMOS itself admits it "had knowledge that the certificate of merit was not an 'affidavit.' " DMOS Brief at 15 n.3. Because DMOS knew the facts, it is presumed to know the law.

Even if DMOS's legal error or ignorance were an excuse (it is not), it would not apply in this case. In the district court proceedings, DMOS relied on *Estate of Entler v. Entler*, 398 N.W.2d 848 (Iowa 1987) to argue

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[1] A party can waive their right to dismissal under section 147.140 by doing nothing, which belies DMOS's contention that ignorance or mistake of law excuses a party's waiver. *See* Iowa Code § 147.140 (dismissal "upon motion"); *see Consumer Fin. Protec. Bureau v. CashCall, Inc.*, 124 F.4th 1209, 1216 (9th Cir. 2025) ("We have never held that a party's legal error can vitiate its waiver of a jury-trial right, or that a party must demonstrate a correct understanding of the law for its waiver to be effective. Such a rule would be inconsistent with the settled understanding that a party can waive the right to a jury trial simply by doing nothing . . . .").

"The Iowa Supreme Court has conclusively rejected this language [of the certificate of merit] as insufficient to establish that a proper affirmation was administered to the signer." D0032, M.T.D. at 10 (6/17/24). DMOS's reliance on *Entler* establishes that DMOS's argument underlying its unsworn certificate-of-merit challenge has been available to it since 1987, and, under *Entler*, a defendant's delay in challenging an affidavit as unsworn can be fatal to an unsworn affidavit challenge. *See id.*; *see also* DMOS Brief 56.

Further, section 147.140 is "non-jurisdictional nor self-executing," *S.K.*, 13 N.W.3d at 570, and long before the codification of section 147.140 Iowa appellate courts held non-jurisdictional defects are obviated by consent, waiver, and estoppel. *See, e.g.*, *State v. Yodprasit*, 564 N.W.2d 383, 385 (Iowa 1997). Waiver by litigation conduct entails "garden-variety waiver principles" that are applied in "specific litigation contexts," *In re Pawn Am. Consumer Data Breach Litig.*, 108 F.4th 610, 613–14 (8th Cir. 2024), and is routinely applied in many other contexts. *See, e.g.*, *Olson v. BNSF Ry.*, 999 N.W.2d 289, 294 (Iowa 2023) (waiver of error in jury instructions); *Mueller v. St. Ansgar State Bank*, 465 N.W.2d 659, 660 (Iowa 1991) (waiver of error when a party fails to renew the directed verdict

motion at the end of trial)'; *In re Marriage of Bruns*, 535 N.W.2d 157, 163 (Iowa Ct. App. 1995) (waiver of defects in service of process); *Converse v. Warren*, 4 Iowa 158, 171–72 (1857) (similar); *Gill v. Vorhes*, 885 N.W.2d 829 (Iowa App. 2016) (waiver of missing verification in a derivative action); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 458 (7th Cir. 2011) (noting type of litigation conduct that "waive[s] . . . sovereign immunity"); *Phx. Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) ("consciously deciding to participate in ... litigation may constitute an implied waiver of [foreign sovereign] immunity"); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990) (objections to personal jurisdiction "may be waived[ ] ... by not asserting them in a timely manner").[2]

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[2] *Kemp v. Rockwell Collins, Inc.*, 2020 WL 13735206, at *6 (N.D. Iowa June 22, 2020), which DMOS cites, supports waiver. Just as a party has knowledge of her right to arbitrate when she receives a copy of her arbitration agreement, a defendant has knowledge of an unsworn certificate of merit challenge when she receives a certificate with a missing notarial jurat.

Curiously, DMOS now claims it was aware of "several" district court decisions addressing unsworn certificate of merit challenges under 147.140. If true, this establishes that DMOS actually *knew* others were arguing an "unsworn certificates of merit" requires dismissal under section 147.140. Yet, despite this knowledge, DMOS chose not to file a similar challenge until after the Raricks' statute of limitations expired.

Also, DMOS says its motion "was brought much earlier than the *LaLonde* defendant's motion." DMOS Brief 27–28. DMOS, however, omits that the defendant in *LaLonde v. Gosnell*, filed its answer much later in the litigation, and the court held—in the alternative—a twenty-month delay after the defendant's answer supports a finding of waiver as well. 593 S.W.3d 212, 228 (Tex. 2019). The court explained:

> *Even if the Engineers had been unaware of the lawsuit until the day they filed their original answer (and they were not), twenty months elapsed before they exclaimed, "King's X!"* In finding waiver, only one appellate case has considered a longer time period, and that was only an additional month. The time elapsed here thus easily falls on the "too long" end of the spectrum.

LaLonde, 593 S.W.3d at 228 (emphasis added). Like *LaLonde*, DMOS plunged itself into merits-based litigation conduct for fifteen months "before they exclaimed, "King's X!" just *after* the Raricks' statute of limitations expired.[3] *Id.* This "falls on the 'too long' end of the spectrum." *Id.*

DMOS's reliance on *Wesley Retirement Servs., Inc. v. Hansen Lind Meyer, Inc.*, is also misplaced. 594 N.W.2d 22, 30 (Iowa 1999). That case involved a *nine*-month delay. *See id.* The Court held the non-moving

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[3] "King's X" is "used as a cry in children's games to claim exemption from being tagged or caught or to call for a time out." KING'S X, Merriam Webster's Dictionary.

party did not suffer prejudice because the party moving for arbitration "initiated no discovery," did not obtain the benefit of discovery methods unavailable in arbitration, there was no lost evidence, and the parties "engaged in activities that would be duplicated in the arbitrary proceeding."[4] *Id.* Unlike *Wesley Retirement Servs., Inc.*, DMOS engaged in extensive discovery and the Raricks suffered tremendous prejudice, independent of the cost of litigation: DMOS's delay caused the Raricks' statute of limitations to expire and deprived them of their right to dismiss without prejudice and refile suit. It is a telling omission that DMOS's sixty-seven-page brief does not mention the fact that DMOS's merits-based litigation conduct resulted in the expiration of the Raricks' statute of limitations.

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[4] The fact that the parties discuss settlement in the arbitration context reveals little regarding waiver because a successful motion to arbitrate moves the dispute to another forum and does not otherwise end the legal dispute altogether. This is in stark contrast to the situation presented when a party has a right to dismiss the plaintiff's entire case *with prejudice* yet prepares for and participates in a full-day mediation, Attachment to D0038, App. at 12–13 (7/17/24), tenders what DMOS describes as a "substantial settlement offer," D0050, DMOS Res. to M.I.L. at 4 (8/15/24), and leaves the offer open following mediation to allow the Raricks to consult family and financial advisors, Attachment to D0038, App. at 13–14.

DMOS proffers a string of hypotheticals in which it says discovery could be "prudent or even necessary" regarding the certificate of merit. DMOS Brief at 36. This argument is belied by the text and purpose of section 147.140, which expressly creates a *pre*-discovery screening tool to weed out frivolous cases *before* discovery commences. In any event, this argument is easily be disposed of in this case: Here, DMOS does not claim that any of its merits-based discovery activity in *this case* related to the certificate of merit in the slightest. Waiver is based on the specific facts of each case, and, in *this case*, it is undisputed that DMOS performed no discovery related to the Raricks' certificate of merit. It didn't need to: The alleged defect (i.e., missing jurat) was known to DMOS from day one.

DMOS also suggests "it is not always clear from the petition whether expert testimony is required to establish a prima facie case." *Id.* But, again, this hypothetical has no bearing on *this case*. In this case, it has never been disputed that the Raricks' claims required a standard of care expert, and the Raricks never amended their petition to "later add a claim that was not clearly asserted in the petition." *Id.* Similarly, DMOS asserts that "[c]laims involving respondeat superior liability also present numerous issues that are not apparent until after extensive

discovery . . . .," *Id.* at 37. But DMOS omits that it *admitted* respondeat superior liability *in its Answer*. D0008, Answer at 3, ¶¶ 18, 20 (3/14/23); *see Peppmeier v. Murphy*, 708 N.W.2d 57, 63 (Iowa 2005).

In short, while DMOS professes that "several of the above issues" may "arise in a single case," DMOS Brief 33, none of the issues arose *in this case*. Ever. Accordingly, in this case, there was no need for *any* discovery to test the legal sufficiency of the Raricks' certificate of merit, and DMOS does not (because it cannot) identify a single fact that it learned in discovery to justify its belated motion to dismiss. This case involves a simple unsworn certificate-of-merit challenge due to a missing jurat. *See Entler*, 398 N.W.2d at 850. Despite DMOS's admitted knowledge that the certificate of merit was not an affidavit and it lacked a jurat, DMOS declined to file a motion to dismiss sixty days after its answer. Instead, DMOS fully participated in merits-based litigation and, in doing so, caused the Raricks to lose their right to dismiss without prejudice and refile because their statute of limitations lapsed.[5]

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[5] DMOS's reliance on the facts in *S.K.* is also misplaced. The test for implied waiver is whether the moving party engaged in inconsistent conduct that resulted in prejudice to the non-moving party, which is a fact-specific inquiry unique to each case. The facts in *S.K.* offer little guidance here. It is worth noting, however, that in *S.K.*, the Court remanded the

II. DMOS Consented to the Raricks' Certificate of Merit.

DMOS asserts the Raricks "do not cite any Iowa law establishing that a defendant may consent to the form of a certificate of merit affidavit through inaction or participation in litigation." DMOS Brief at 42. This is incorrect. In *State v. Yodprasit*, this Court held non-jurisdictional impediments are obviated by consent. 564 N.W.2d 383, 385 (Iowa 1997). Because section 147.140 "is neither jurisdictional nor self-executing," *S.K.*, 13 N.W.3d at 569–70, a defect in a certificate of merit is obviated by a party's consent. *Id.*

DMOS conflates the doctrines of consent and waiver. This Court adopted the definition of "consent" in the Restatement (Second) of Torts section 892. *See Anderson v. Low Rent Housing Commission of Muscatine*, 304 N.W.2d 239, 251 (Iowa 1981). Iowa law recognizes consent in fact

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case for a new trial, so the district court will set a new trial date, retains discretion to allow additional discovery, and may reset pre-trial deadlines, including the dispositive motion deadline. Dismissal under section 147.140 would have avoided the cost of the second trial in *S.K.* and any additional needed discovery, too. But the Court found implied waiver anyway. Further, the observation in *LaLonde* that analytically different does not apply where, as here, the alleged defect (e.g., a missing notarial jurat) is obvious on the face of the certificate of merit. In this situation, it is not analytically different from cases in which no certificate of merit had been served.

and apparent consent. *See id.*; Restatement (Second) of Torts § 892, cmt. *c* (1979). Consent in fact "means that the person concerned is in fact willing for the conduct of another to occur." Restatement (Second) of Torts § 892, comment *c*. Consent in fact "may equally be manifested by silence or inaction, if the circumstances or other evidence indicate that the silence or inaction is intended to give consent." *Id.* Also, apparent consent will be found where the person does not in fact agree but the person's actions or inaction manifest a consent justifying the other's reliance on them. *Id.* Both consent in fact and apparent consent can be proven by reference to industry custom. *Id.*, cmt. *d*.

In this case, DMOS's actions and industry custom—including DMOS *and* its counsel's customary consent to the same certificate of merit form used by the Raricks and approved by the Iowa Practice Series—establish both consent in fact and apparent consent *in addition* to implied waiver.[6]

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[6] If, as DMOS now asserts, it had actually concluded that the Raricks' certificate of merit was substantially compliant with section 147.140 due to district court and unpublished court of appeals decisions, this is powerful—if not conclusive—evidence that DMOS *consented* to the Raricks' certificate of merit. While DMOS now contends its legal conclusion was wrong, it is too late because DMOS had already consented to the Raricks' certificate of merit and the Raricks' parties relied on this consent while

III. Estoppel and Laches Bar DMOS's Unsworn Certificate of Merit Challenge.

In the district court proceedings, DMOS argued section 147.140 involves a statutory *right* of dismissal with prejudice for certificates that fail to substantially comply with the requirement of the statute. *See, e.g.*, D0042, M.T.D. Reply at 9, 12 (8/2/24) ("Indeed, the language, content, and structure of Iowa Code Section 147.140 confer a substantive right of dismissal upon appropriate motion and are not consistent with the nature of affirmative defenses under Iowa law."), 12 (similar). Although DMOS now assets section 147.140 does not involve a "right," it was correct the first time. *See* RIGHT, Black's Law Dictionary (12th ed. 2024) (stating a "right" is ""'[s]omething that is due to a person by just claim, *legal guarantee*, or moral principle"); *see also* PROCEDURAL RIGHT,

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their Raricks' statute of limitations expired and they incurred substantial litigation expenses.

Also, pursuant to Iowa Rule of Civil Procedure 1.503(6), counsel's signature certified that the discovery was "[n]either unreasonable or unduly burdensome or expensive, *considering the needs of the case*." Iowa R. Civ. P. 1.503(6)(a)(2)–(3) (emphasis added). This important certification was contained on each and every merits-based discovery request and response throughout this litigation and is irreconcilable with the assertion that DMOS did not consent to the Raricks' certificate of merit, particularly considering DMOS performed no certificate-of-merit discovery whatsoever.

Black's Law Dictionary (12th ed. 2024; SUBSTANTIVE RIGHT, Black's Law Dictionary (12th ed. 2024).

Without a hint of irony, DMOS asserts the Raricks waived estoppel by acquiescence because they "did not raised [sic] estoppel by acquiescence in the pleadings . . . ." DMOS Brief at 44. DMOS did not assert the certificate-of-merit defense in its answer (as it was required to do)[7] or in *any* of its pleadings or discovery responses. And DMOS never requested leave to supplement its answer to add a certificate-of-merit defense. *See* Iowa R. Civ. P. 1.402(4), 1.414. The Raricks' asserted estoppel by acquiescence at their first opportunity when DMOS filed its motion to dismiss.

Tellingly, DMOS does not address equitable estoppel in its brief and does not challenge the Raricks' reliance on *Knorr v. Smeal*, 836 A.2d 794, 798–801 (N.J. 2003). As in *Knorr*, DMOS's "forbearance in filing the dismissal motion" caused the Raricks to incur "significant expert and deposition costs." DMOS's forbearance also caused the Raricks' statute of limitations to expire.[8] *Knorr*, 836 A.2d at 799–800. "[E]quitable estoppel is

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[7] This fact alone is sufficient to hold DMOS waived its unsworn certificate of merit challenge.

[8] In this case, the district court distinguished *Knorr* on the grounds that the dispositive motion deadline had not passed. In *Knorr*, however, the New Jersey Supreme Court only referenced the dispositive motion

founded on fundamental principles of justice and fair dealing," and dismissal with prejudice "would work an injustice by ridding the system not of an unmeritorious claim, but a meritorious claim."[9] *See id.*

In addition, the court in *Knorr* applied the doctrine of laches to its affidavit-of-merit statute. *Knorr*, 836 A.2d at 800. In contrast, DMOS cites no caselaw holding laches *does not* apply in the certificate of merit context. *See State ex rel. Holleman v. Stafford,* 584 N.W.2d 242, 245

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deadline in the factual background section of the opinion, and the court in *Knorr* did not rely on the timing of the dispositive motion deadline in its analysis regarding estoppel and laches. The reference to the dispositive motion deadline in the factual background section of the *Knorr* opinion was dictum. *See id.*

In addition, in *Knorr* the defendant filed the motion "more than *four months* after the deadline for filing dispositive motions." 836 A.2d at 797 (emphasis added). In this case, however, the motion deadline was *sixty days before trial*, and DMOS filed the motion to dismiss just *three* months *before trial*. Given standard litigation practice in Iowa and the impending trial date in this case, DMOS actually filed its motion to dismiss at a more *advanced* stage in the litigation than the defendant in *Knorr*. Further, the motion deadline in this case was *after* the summary judgment deadline. D0013, T.S.D.P. at 4 (4/14/23); D0015, Order Setting Trial at 1 (5/4/23). DMOS's contention that a motion to dismiss under section 147.140 should be filed *after* the summary judgment deadline and at the dispositive motion deadline collapses of its own weight.

[9] DMOS's discussion of the legal uncertainties surrounding section 147.140 before *Miller* and *Shontz*, further support the conclusion that the *Miller* and *Shontz* should be applied prospectively. *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).

(Iowa 1998). While DMOS quotes *Life Investors Ins. Co. of Am. v. Estate of Corrado*, 838 N.W.2d 640 (Iowa 2013), it omits the full sentence, stating, "*Some courts* have referred to the doctrine of laches as a defense to equitable remedies but not a defense to bar a claim of legal relief." 838 N.W.2d 640, 644 (Iowa 2013) (emphasis added); *see* DMOS Brief at 47 (omitting italicized portion). The Court in *Life Investors* further noted "*Ordinarily* the doctrine of laches does not apply within the statute of limitations *unless there is a showing of a special detriment to another*." *Life Inv'rs Ins. Co. of Am.*, 838 N.W.2d at 645 (emphasis added). In this case, a certificate-of-merit challenge is not subject to a "statute of limitations," and, regardless, the Raricks suffered "special detriment" at least because DMOS's unreasonable and unexplained delay caused the Raricks' own statute of limitations to expire.

Regardless, the remedial provision of section 147.140 utilizes the doctrine of substantial compliance, which is an *equitable doctrine* and, as such, involves the application of equitable principles such as laches. *See* Iowa Code § 147.140(6); 3 Sutherland Statutory Construction§ 57:26 (8th ed.); *see Beck v. Trovato*, 150 N.W.2d 657, 659 (Iowa 1967); *Mart v. Mart*, 824 N.W.2d 535, 544 (Iowa Ct. App. 2012); *see also, e.g.*, *Prudential Ins.*

Co. of Am. v. Kamrath, 475 F.3d 920, 924 (8th Cir. 2007) (substantial compliance is an equitable doctrine). The laches doctrine is also applied in similar contexts, such the timeliness of amended or supplemental pleadings under the Iowa Rules of Civil Procedure.[10] *See Johnston v. Percy Const., Inc.*, 258 N.W.2d 366, 371 (Iowa 1977) ("We should not find an abuse of discretion in the present case unless the trial court erred in denying the amendments on grounds of laches . . . ."); 6A Wright & Miller, Fed. Prac. & Proc. Civ. § 1504 (3d ed.) ("If the moving party is guilty of inexcusable delay or laches, the supplemental pleading will not be permitted.").

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[10] As argued in the district court and opening brief, this Court should recognize, as many other jurisdictions have, that a defective certificate-of-merit defense is an affirmative defense that must be pleaded in the defendant's answer, similar to defective service of process and other defenses. Rarick Opening Br. 34 n.8. Contrary to the district court's rationale for rejecting this argument, the Iowa Rules of Civil Procedure specifically contemplate a procedure for a defendant to supplement its answer for affirmative defenses arising *after* the defendant files its answer. Iowa R. Civ. P. 1.414 ("By leave of court, upon reasonable notice and upon such terms as are just, or by written consent of the adverse party, a party may serve and file a supplemental pleading setting forth transactions or occurrences or events *which have happened since the date of the pleading sought to be supplemented*." (emphasis added)). Iowa jurisprudence regarding the nature of affirmative defenses—as well as prudence and common sense—compel this conclusion, particularly if, as DMOS now says, there is ever a case in which "extensive" certificate-of-merit discovery could be justified. *See* DMOS Brief at 36–37.

As in *Knorr*, DMOS's belated motion to dismiss was unreasonable because its unsworn certificate-of-merit challenge was predicated on a fact it knew when it filed its Answer. DMOS has not identified any fact revealed during discovery to justify its fifteen-month delay in filing the motion to dismiss. DMOS's delay is unexplained, inexcusable, and unreasonable. And, as a result of this delay, the Raricks' statute of limitations lapse. DMOS's motion to dismiss is barred by the doctrine of laches.

IV. The Raricks' Certificate of Merit Substantially Complies with Iowa Code Section 147.140.

A. An Expert's Objectively Reasonable State of Mind that He or She is Under Oath and Subject to Criminal Prosecution Achieves the Reasonable Objectives of the Oath Requirement, Namely, to Bind the Expert's Conscience.

As an equitable doctrine, the doctrine of substantial compliance invokes the district court's equitable powers and ensures a case will not be dismissed when the certificate of merit achieves "the reasonable objectives of the statute." *Superior/Ideal, Inc. v. Bd. of Review of City of Oskaloosa*, 419 N.W.2d 405, 406 (Iowa 1988). In this case, it is undisputed that the Raricks' strictly complied with the *substantive* requirements of section 147.140. DMOS solely contends the Raricks' certificate of merit did not satisfy the *procedural* component of section 147.140(1)(*b*) that the

statement be "under the oath of the expert." Yet, DMOS does not address the elephant in the room: Whether Dr. Gerlinger's objectively reasonable state of mind that he was under oath and subject to criminal prosecution when he signed his certificate of merit affidavit satisfies the *substantial compliance* doctrine by achieving the *reasonable objective* of the oath requirement. *See generally* DMOS Brief 52–57. This is critical because the expert's state of mind that he is under oath achieves the reasonable objective of the *oath* requirement, namely, to bind the *expert's* conscience. *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). *State v. Carter* did *not* involve the application of the substantial compliance doctrine and the defendant did *not* admit he knew he was under oath and subject to criminal penalty. 618 N.W.2d 374, 375–76 (Iowa 2000). And in *Miller*, the expert's subsequent affidavit did not state she knew she was under oath and subject to criminal prosecution, and the plaintiff did not argue the expert's objectively reasonable state of mind satisfied the purpose of the oath requirement for purposes of substantial compliance. 7 N.W.3d at 370–77.

Unlike *Carter* and *Miller*, Dr. Gerlinger reasonably believed he was

under oath and subject to criminal prosecution and professional discipline if his statements were false.[11] His veracity is not contested, D0032 at 13 ("[W]e do not question Dr. Gerlinger's veracity."), and his uncontested "state of mind when he signed the affidavit . . . ensured that the purpose of [section 147.140's] 'Oath or affirmation' requirement was fulfilled." *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002). The doctrine of substantial compliance requires no more.

B. DMOS Does Not, Because it Cannot, Rebut the Fact that a Plaintiff Substantially Complies with Section 147.140 by Serving a "Certificate" Subjecting the Expert to Prosecution for Fraudulent Practices Under Section 714.8(3).

DMOS does not provide any response to perhaps the most basic and dispositive question in this case: Does a certificate of merit that subjects the expert to prosecution for the crime of fraudulent practices pursuant to section 714.8 substantially comply with section 147.140? We know that, under *Miller*, an affidavit under section 622.85 and certification under penalty of perjury under section 622.1 substantially comply. The only

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[11] Dr. Gerlinger practices medicine in Illinois, and his prior litigation experience includes multiple Illinois cases. Attachment to D0038, Appendix at 31, 43 (Dr. Gerlinger Curriculum Vitae). The certificate-of-merit affidavit Dr. Gerlinger signed likely satisfies the requirements of an affidavit under Illinois law. *See Robidoux v. Oliphant*, 775 N.E.2d 987, 998 (Ill. 2002).

question that remains after *Miller* and *Shontz* is whether the third category of section 714.8, namely, a certificate, also substantially complies by subjecting the expert to the same criminal penalties.

The confusion among courts and practitioners wrought by *Miller* and *Shontz* is likely derived from the fact that *Miller* and *Shontz* did not address this simple and straightforward issue. And, as DMOS's own arguments regarding waiver and its purported lack of knowledge due to its own alleged legal error demonstrate, DMOS itself apparently believed that a certificate under section 714.8(3) satisfied section 147.140, at least before *Miller* and *Shontz*. But now, DMOS ignores this issue altogether. *See Iowa Supreme Court Attorney Disciplinary Bd. v. Ouderkirk*, 845 N.W.2d 31, 45 (Iowa 2014); *Gonzalez–Servin v. Ford Motor Co.,* 662 F.3d 931, 934 (7th Cir.2011) ("The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless."). DMOS silence on this issue speaks volumes.

The only legal basis DMOS provides to support its characterization of this important issue as merely a "semantic argument" and "red herring" that does not "warrant meaningful time or attention from this

Court," is that "the very section of the Iowa Code to which Plaintiffs point as consequential, Iowa Code § 714.8(3), requires a certificate to be a "certification **under penalty of perjury**." DMOS Brief 57. But that's wrong. The text of the statute could not be clearer: the crime of fraudulent practices is committed by one who executes a false affidavit, false certification under penalty of perjury, *or* a false certificate. Iowa Code § 714.8(3). Any doubt about this is resolved by the legislative history of section 714.8(3), which shows the legislature *added* the "certification under penalty of perjury" language to section 714.8(3) in 1984 without removing "false certificates" from the statute, which had been around since at least 1976. Iowa appellate courts have consistently held a document that is unsworn and does not contain "under penalty of perjury" language is a "certificate" under section 714.8(3). *See, e.g.*, *Gentile*, 515 N.W.2d at 19–20; *See Horton*, 509 N.W.2d at 454; *State v. Morse*, 52 Iowa 509, 509, 3 N.W.498, 499 (1878); *State v. Toben*, 2009 WL 3337669, at **4–5 (Iowa Ct. App. Oct. 7, 2009); *see also Walker*, 574 N.W.2d at 287.

In this case, DMOS does not (because it reasonably cannot) dispute that Dr. Gerlinger's certificate of merit and certified expert report were, at a minimum, "certificates" under section 714.8(3). Under Iowa law, by

executing and submitting his certificate in this medical malpractice lawsuit, Dr. Gerlinger subjected himself to *more* severe criminal penalties than the crime of perjury. *Compare* Iowa Code § 714.9 (fraudulent practices in the first degree is a class "C" felony) *with* Iowa Code § 714.2 (perjury is a class "D" felony). By serving a certificate of merit that subjected the expert to criminal prosecution for fraudulent practices, class "C" felony, the Raricks met and exceeded the reasonable objectives of section 147.140's oath requirement to bind the expert's conscience, thereby satisfying the doctrine of substantial compliance. *See also* Iowa Code § 4.4, § 4.6 (directing courts to presume its laws are intended to have "a just and reasonable result" and to interpret its statutes considering "[t]he circumstances under which the statute was enacted," "[t]he legislative history," and "[t]he consequences of a particular construction").

C. The Raricks' Certificate of Merit Substantially Complies with the Requirements of an Affidavit.

DMOS's substantial compliance argument is predicated on its argument that the Raricks "offered no evidence in the document or otherwise that the expert witness was *actually* placed under oath or affirmation and did not include language in their certificate consistent with Iowa Code Section 622.1(b)." DMOS Brief 54 (emphasis in original). "Absent

these essential features," DMOS contends, "controlling Iowa authority holds that the document does not substantially comply with Section 147.140." *Id.* at 54–55. This is incorrect. Under established Iowa law, a formal administration of an oath is *not* required to support a valid oath. *State v. Walker*, 574 N.W.2d 280, 286 (Iowa 1998); *Swanson v. Pontralo*, 238 Iowa 693, 696, 27 N.W.2d 21, 23 (1947); *Dalbey Bros. Lumber Co. v. Crispin*, 234 Iowa 151, 155–58, 12 N.W.2d 277, 280 (1943). Under the holding of *Swanson* and *Dalbey Brothers*, the Raricks' certificate of merit affidavit substantially complies with the oath requirement at least because Dr. Gerlinger presented the certificate of merit affidavit—which expressly included a statement that he was making his statements "on oath"—to a notarial officer and an officer of the Court, an act which this Court has held is sufficiently "calculated to appeal to the conscience of the person" to satisfy the oath requirement under Iowa law. *Swanson*, 238 Iowa at 696, 27 N.W.2d at 23; *Dalbey Bros.*, 234 Iowa at 155–58, 12 N.W.2d at 280; *see also Robidoux v. Oliphant*, 775 N.E.2d 987, 998 (Ill. 2002).

In *Entler*, there was no evidence aliunde showing the affiant presented the affidavit to a notarial officer, and the affiant presented no

other evidence aliunde to show the person's conscience was bound in any way. 398 N.W.2d at 848–50. The Court distinguished *Dalbey Brothers* on that basis, observing that *Dalbey Brothers* was "based upon independent proof that an oath had been administered." *See id.* As Justice Smith observed in his concurring opinion in *Dalbey Brothers*, "*Attached to the written statement was a* ***written oath***: 'State of Iowa, Polk County, SS: I, Robert T. Dalbey, *on oath depose and say.*" *Dalbey Bros.*, 234 Iowa at 160, 12 N.W.2d at 281 (Smith, J., concurring) (italicized emphasis in original, bolded emphasis added). Justice Smith explained,

> The dissenting opinion, following the language of the Indiana court, refers to this oath as a "self–serving recital." This is entirely inaccurate. It is rather in the nature of an "admission"–an admission that the subscriber has bound himself by an oath. The statute requires him to so bind himself. That is the price the law exacts from him for the privilege of availing himself of a mechanic's lien. After he signed the oath and acknowledged before the officer that he signed it, and after the fact is certified by such officer and the claim thus verified is filed, surely the claimant could not be heard to repudiate the act with all its implications,–he was bound by the oath he had signed. No words that could have been added by the notary would have made it more binding. . . .

Id.; *see also Robidoux*, 775 N.E.2d at 998 (similar).

This case is no different: The affidavit contained the same "written oath" as in *Dalbey Brothers*, and Dr. Gerlinger presented his sworn

written oath to a notarial officer and officer of the court for submission in a legal proceeding. And while the certificate *itself* did not include an acknowledgment by the notarial officer, there is no dispute in this case that the notarial officer and officer of the court had participated in multiple oral and written communications before and after the execution of the certificate and verified Dr. Gerlinger was the person who signed the affidavit and that he was of sound mind when he did so, thereby satisfying the purpose and objectives of Iowa's notary and remote notary statutes.[12] *See generally* Iowa Code § 9B.14A.

D. The Raricks' Certificate of Merit Includes Sufficient "Penalty of Perjury Language" Because it States, *Inter Alia*, Dr. Gerlinger was "on Oath" and "Deposes" his Statements, Which Literally Means "Under Penalty of Perjury."

Contrary to DMOS's assertions, the Raricks do not contend that " 'under penalty of perjury' language contained in Iowa Code section

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[12] The document in *Entler* was not sworn "on oath," and it was not presented to a notary. Also, *State v. Carter*, 618 N.W.2d 374 (Iowa 2000) requires sufficient "presence of the official to participate in the process in such a manner to assure the person's conscience is bound." In 2019, the Iowa legislature adopted the "Revised Uniform Law on Notarial Acts," which allows notarial acts to be performed outside the notary's *physical* presence. *See* Iowa Code § 9B.6(2); Rev. Uniform Notarial Act, Prefatory Note to 2018 Amendments, at p. 3–4. Tn this case, there was sufficient "presence of the official to participate in the process in such a manner to assure the person's conscience is bound." *Carter*, 618 N.W.2d at 377.

622.1 is not essential to bind the conscience of the declaration." DMOS Brief at 59. Rather, unlike the report in *Miller* and the certificate of merit in *Shontz*, Dr. Gerlinger's certificate contains substantially complaint "penalty of perjury language," because, on its face, the certificate states it is "sworn *on oath, deposes* and states, and his formal certification that his report contains an accurate statement of his opinions to which "I will testify under oath." Attachment to D0038, Appendix at 25, 29. Several decisions in other jurisdictions have held this language substantially constitutes "penalty of perjury" language to satisfy unsworn declarations statutes, Rarick Opening Brief 61–62 (collecting cases), and DMOS does not attempt to address, let alone distinguish, this authority. In any event, any doubt about whether substituting "penalty of perjury" with "on oath" and "deposes" substantially satisfies section 622.1 is resolved by the fact that the word "oath" literally means the person is subject "to penalties of perjury if the testimony is false." OATH, Black's Law Dictionary.[13]

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[13] In *Shontz*, the plaintiff did not argue compliance with section 622.1 or offer evidence aliunde. The certificate in *Shontz* stated the expert "affirms and states," not that the expert is "sworn on oath." This distinction is significant, as other courts have held the former is insufficient but the latter is sufficient, Rarick Opening Brief 61–64, and this distinction was what primarily upheld the "written oath" in *Dalbey Brothers*, but resulted in the written statement in *Entler* falling short.

E. Iowa Code Section 147.140 is Unconstitutional.

The Raricks' opening brief adequately addresses the constitutional issues surrounding Iowa Code section 147.140.

V. Conclusion.

The Raricks diligently filed suit with fourteen months to spare on their statute of limitations and served their certificate of merit and a certified expert report the same day DMOS filed its Answer. The Raricks substantially complied with section 147.140, and they should not bear the brunt of DMOS's purported mistake or ignorance of the law and dilatory conduct. For the reasons stated above and in Raricks' opening brief, the district court's order dismissing the Raricks' case should be reversed.

Respectfully Submitted,

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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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