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' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Raricks submit the following supplemental brief pursuant to the Court's March 20, 2025 Order to address *Banwart v. Neurosurgery of N. Iowa*, No. 24-0027, 2025 WL 727791 (Iowa March 7, 2025). For the reasons discussed below, *Banwart* supports substantial compliance in this case, and *Banwart*'s "waiver" discussion applies to cases "[g]oing forward" and did not overrule *S.K. ex rel. Tarbox v. OBYGN-Associates*, 13 N.W.3d 546 (Iowa 2024) (Waterman, J., concurring opinion for the majority), which was filed four months earlier.

A. Substantial Compliance.

Dr. Gerlinger's certificate of merit and certified report were both made under the oath of the expert. Unlike *Banwart*, Gerlinger's certificate and certified report were not merely "affirm[ed]." 2025 WL 727791, at **4–5. The certificate of merit—following the Iowa Practice Series formbook—expressly states the expert was "duly sworn, on oath" and "deposes" his statements, and Gerlinger certified the statements in both documents were true and accurate. Attachment to D0038, App. 25–29 (6/13/24). Each constitutes a written "oath" under Iowa law—as

recognized by this Court and confirmed by Gerlinger in his subsequent affidavit and declaration.[1] *See Dalbey Bros.*, 234 Iowa at 160, 12 N.W.2d at 281 (Smith, J., concurring) (written statement containing "on oath depose and say" is a "written oath" that constitutes "an admission that the subscriber has bound himself by an oath"); *see State v. Hall*, 969 N.W.2d 299, 305 (Iowa 2022) ("In *State v. Carter*, we affirmed the district court's dismissal of a perjury charge where the defendant filed a false application *under oath* but did not appear before a designated officer that administered the oath." (emphasis added)); *see also* Iowa Code § 9B.2(18); *State v. Japone*, 202 Iowa 450, 209 N.W.2d 468, 470 (1926); *Cap. One Bank (USA) v. Taylor*, No. 13-2043, 2015 WL 7567398, at *5 (Iowa Ct. App. Nov. 25, 2015).

In *Banwart*, the Court approved the Maine Supreme Court's decision in *Paradis v. Webber Hospital*, 409 A.2d 672 (Me. 1979), which

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[1] Unlike the plaintiff in *Banwart*, the Raricks presented evidence aliunde confirming compliance with the oath provision, including evidence showing the expert knew he was under oath and subject to criminal punishment and professional discipline if his statements were false. For this reason alone, *Banwart* is inapposite. The signed oaths were also remotely presented to a notarial office and officer of the court. *See* Iowa Code §§ 9B.14A, .26 ("[T]he failure of a notarial officer to perform a duty or meet a requirement specified in this chapter does not invalidate a notarial act performed by the notarial officer.").

held an oath provision's "function is both to make clear the significance of filing the document itself and to provide a basis for a perjury action upon proof of falsification."[2] 2025 WL 727791, at *5. The Court's approval of *Paradis* is significant for at least two reasons.

First, forty years after *Paradis*, the Maine Supreme Court held an *unsworn* notice in a medical malpractice case "may be subject to amendment that relates back to the date that the notice was originally filed." *Frame v. Millinocket Reg. Hosp.*, 82 A.3d 137, 143 (Me. 2013). The court held, although an "oath" provision is not a "mere technicality," an unsworn notice is a "technical defect" that may be cured by a sworn amendment that relates back to the original. *Id.* A subsequent *sworn* amendment, the court reasoned, "fulfills the statutory objectives of deciding claims on their merits and encouraging the early withdrawal of meritless claims" and "the now-sworn notice provides the Hospital with a basis for a perjury action against" the plaintiff. *Id.* (citing *Edelman v. Lynchburg College*, 535 U.S. 106, 116 (2002) ("Where a statute . . . requires an oath, courts have shown a high degree of

[2] These are the "essential matters" of an oath provision for substantial compliance purposes. *See Hampe v. Charles Gabus Ford*, No. 22-1599, 2025 WL 1085241 (Iowa April 11, 2025).

consistency in accepting later verification as reaching back to an earlier, unverified filing.")). By approving *Paradis*, *Banwart* teaches that—while an oath provision is not a "mere technicality"—an unsworn certificate is a "technical defect" that can be cured by a sworn amendment. Here, because "the [Raricks'] now-sworn notice provides [DMOS] with a basis for a perjury action," the oath provision is satisfied. *See id.*

Second, the criminal deterrence rationale of an oath provision is further satisfied given unique provisions of Iowa law. In *Hall*, the Court explained the document in *Carter* was signed "under oath," but it did not support a *perjury* conviction because the applicant did not appear before a notary. *Hall*, 969 N.W.2d at 305. However, under Iowa's fraudulent practices statute, the written oath in *Carter* ("I certify the information . . . is true and correct") ***does*** support a conviction for fraudulent practices because section 714.8(3) criminalizes "false certificate[s]" *and* "false affidavit[s]." *See State v. Horton*, 509 N.W.2d 452, 454 (Iowa 1993)); *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). Therefore, *Banwart*'s criminal deterrence rationale firmly supports a finding of substantial compliance in this case because, in

addition to perjury, Gerlinger subjected himself to prosecution for fraudulent practices, a class "C" felony, regardless whether the document is an "affidavit."

In fact, the statutory text demonstrates that a certificate containing a written oath *strictly* complies with section 147.140. Black's Law defines "certificate of merit" as a "certificate," which is "[a] document in which a fact is formally attested to." CERTIFICATE OF MERIT and CERTIFICATE, Black's Law Dictionary (12th ed. 2024). Black's Law continues, stating, "If the law requires the certificate to be signed under oath or penalty of perjury, it is sometimes called an affidavit of merit." *Id.* Under the ordinary meaning of the terms, a "certificate of merit" does not require an oath, but an "affidavit of merit" does. *Id.* About thirteen states use the term "certificate" (or similar language) and fourteen states use "affidavit of merit" or simply "affidavit." *See* Opening Br. p. 45 n. 23. In keeping with the dictionary definition, the "certificate" jurisdictions do not include an oath provision, but the "affidavit" jurisdictions do. Had the legislature intended to strictly limit section 147.40 to "affidavits," it

would have said so by simply adopting the phrase "affidavit of merit" or "affidavit," like many other states.[3]

Iowa is one of two states using a hybrid of the two by classifying the requirement as a "certificate of merit affidavit." The other is West Virginia. *See* W. Va. Code Ann. § 55-7B-6. There, the requirement is satisfied when the plaintiff makes a "good faith and reasonable effort" to comply. *Cline v. Kresa-Reahl*, 728 S.E.2d 87, 95 (W. Va. 2012). This illustrates the hybrid "certificate of merit affidavit" is a more flexible standard with "play in the joints."

Under Iowa law, a document signed under the written oath of the declarant is a "certificate" under Iowa Code section 714.8(3). *See Horton*, 509 N.W.2d at 454; *Morse*, 3 N.W. at 499. Thus, a "certificate" containing a written oath is "signed by the [ ] witness [or affiant]," and is certified "under the oath of the expert," in compliance with section 147.140.

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[3] Notably, hyphenations are generally used when a compound modifier modifies a noun, such as "affidavit." *The Chicago Guide Manual of Style* 269 (17th ed. 2016); *The Cambridge Grammar of the English Language* 1762 (2002). Section 147.140 does not hyphenate "certificate of merit" as a compound modifier of term "affidavit." The legislature's grammar evidences the legislature did not intend to limit section 147.140 to "affidavits" and exclude "certificates" under section 714.8(3). *See Nielsen v. Preap*, 586 U.S. 392 (2019); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012) (grammar cannon).

An interpretation strictly requiring an "affidavit" would rewrite the statute by excluding the legislature's use of the term "certificate" six times. What's more, this interpretation would cause the language "under the oath of the expert" to be redundant because affidavits, by definition, must be under oath. Iowa Code § 622.85. It's the *expert's* oath (i.e., the oath *of the expert*) that's required. And, unlike other Iowa statutes requiring affidavits and affidavit-of-merit statutes in other jurisdictions, section 147.140 does not refer to an "affiant," but rather the "expert." *See, e.g.*, 735 Ill. Comp. Stat. Ann. 5/2-622. Relatedly, when the Iowa legislature requires a "notarized" document, it expressly says so. Opening Br. at 48 n.13 (collecting statutes).

Section 147.140 isn't the only Iowa statute using the term "affidavit" to encompass documents that don't meet the strict definition of "affidavit" under section 622.85. At least one other statute expressly uses the term "affidavit" to describe a document that "need not be notarized or witnessed." *See* Iowa Code § 53.44.

Regardless, any doubt is resolved by the legislature's use of the doctrine of substantial compliance. And because perjury is fundamentally the same as fraudulent practices under section 714.8(3),

the criminal deterrence objectives of an oath provision are satisfied regardless whether the plaintiff provides a certificate or an affidavit. Moreover, the Court evaluates the substance, not form, of a statement in determining whether it should be given the effect of an affidavit. For example, in *Royal v. Hawkeye Portland Cement Co.*, the Court held the "certificates" at issue in that case "should at least have equal weight with an ex parte affidavit." 192 N.W. 406, 407 (Iowa 1923). Similarly, an attorney's professional statement "has the effect of an affidavit" due to the disciplinary rules governing attorneys—similar to those governing licensed and practicing physicians like Gerlinger. *See State v. Fetner*, 959 N.W.2d 129, 135 (Iowa 2021).

B. Waiver.

Banwart also discussed waiver.[4] In district court, the plaintiff didn't argue waiver or present evidence supporting waiver. Similarly, the

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[4] *Banwart* didn't address equitable estoppel, laches, or consent. In *Miller v. Catholic Health Initiatives-Iowa Corp.*, 7 N.W.2d 367 (Iowa 2024), this Court cited New Jersey caselaw in *Tunia v. St. Francis Hospital*, 832 A.2d 936 (N.J. Super. App. Div. 2003). The New Jersey Supreme Court recognizes safeguards to stem the tide of litigation created by decisions like *Tunia*. One case directly on point is *Knorr v. Smeal*, 836 A.2d 794 (N.J. 2003). *Knorr*, like *Banwart*, held the defendant did not waive its challenge to the plaintiff's affidavit of merit because the statute didn't contain a motion deadline. 836 A.2d at 798–99. However,

plaintiff didn't argue waiver on appeal, and the plaintiff mentioned "waiver" for the first time in a notice of supplemental authority, which would not preserve error even if the notice were a reply brief. *See* Iowa R. App. P. 6.903(3).

Given the procedural context of *Banwart*, *Banwart* did not overrule *S.K.* It would have been curious—to say the least—for the Court to have done so, considering *S.K.* was decided four months earlier, the issue was not raised by the plaintiff in the district court or timely on appeal, and the defendant did not argue *S.K.* should be overruled. Instead, the decisions in *S.K.* and *Banwart* are harmonious in at least three ways relevant to this appeal.

First, *Banwart* noted "[*g*]*oing forward*, parties should rely upon this bright line rather than statements we made in *S.K.*" *Banwart*, 2025 WL 727791, at *7 (emphasis added). This admonition effectively warns "parties" that prejudice from needless discovery costs faces headwinds "[g]oing forward" due to a potential "bright line" deadline for motions. *See*

Knorr held equitable estoppel and laches applied to prevent the defendant from raising an objection for the first time fourteen months later. The same is true here, particularly because the Raricks' SOL expired in the meantime.

id.; *Roquet ex rel. Roquet v. Jervis B. Webb Co.*, 436 N.W.2d 46, 49 (Iowa 1989) (holding judicial decisions should be applied prospectively where "[t]he equities weigh in favor of a prospective only application.").

Banwart, however, didn't state its admonition applies "going backward," and the decision doesn't purport to "un-waive" a right the defendant already waived under the garden-variety waiver principles recognized in *S.K. See In re Pawn Am. Consumer Data Breach Litig.*, 108 F.4th 610, 613 (8th Cir. 2024) (waiver by litigation conduct involves "garden-variety waiver principles" that are simply translated in "specific litigation contexts."). Thus, when—under *S.K.*—a defendant had *already* waived its unsworn certificate-of-merit challenge as of March 7, 2025, the *Banwart* admonition doesn't apply because the damage has been done.

Second, *Banwart*'s admonition regarding *S.K.* relates to prejudice arising from needless *discovery costs* to avoid a "fact-intensive inquiry into how much discovery is too much."[5] *See* 2025 WL 727791, at *7. This

[5] The answer to this question is so simple that it's hiding in plain sight: Given the interplay between expert certification and disclosure deadlines of section 668.11 and Iowa Rule of Civil Procedure 1.500(2), discovery "too much" if it advances beyond the expert certification stage under section 668.11 and expert disclosure deadline under Iowa Rule of Civil Procedure 1.500(2). At that advanced stage, summary judgment is the means by which a defendant obtains "early" dismissal if the plaintiff's

concern, however, doesn't apply to prejudice caused by "an intervening expiration of the statute of limitations," which was expressly recognized in *S.K. See S.K. ex rel. Tarbox*, 13 N.W.3d at 573. *Banwart* is inapplicable where—as here and in *S.K.*—the defendant's merits-based litigation conduct causes the plaintiff's SOL to expire near the *close* of discovery and *long* after the plaintiff's expert certification and disclosure deadlines.

Third, *Banwart*'s "bright line" relates to the timing of a *motion* to dismiss under section 147.140, but *S.K.* applies when the defendant fails to timely *object* under section 147.140 and the plaintiff suffers prejudice.[6] The plain language of section 147.140(1) requires compliance "prior to the commencement of discovery," thereby creating an objection to any discovery on the merits until the defendant is satisfied the certificate of merit satisfies the requirements of the statute. *Banwart*, however,

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expert certification and disclosures fail to make a prima facie case, and attorneys who falsely certify that they intend to call an expert in their section 668.11 certifications are subject to sanctions, professional discipline, and likely criminal prosecution under section 714.8(3).

[6] The defendant's failure to timely raise a substantive *objection* under section 147.140 is particularly important considerations under the doctrines of equitable estoppel, consent, and laches.

doesn't alter the rules of procedure requiring defendants to seasonably identify affirmative defenses and substantive objections in the litigation.[7]

For example, a defendant must seasonably plead its affirmative defenses in its answer or supplementation, or else they are waived. *See* Iowa R. Civ. P. 1.402(4), 1.414, 1.419; *Matter of Est. of Franken*, 944 N.W.2d 853, 858 (Iowa 2020); 6A, Wright & Miller, Fed. Prac. & Proc. Civ. § 1510 (3d ed.). Because section 147.140 "rest[s] on facts not necessary to support plaintiffs' case" it is an affirmative defense the defendant must plead. *See Henschel v. Hawkeye-Security Ins. Co.*, 178 N.W.2d 409, 420 (Iowa 1970); *see also Struck v. Mercy Health Services-Iowa Corp.*, 973 N.W.2d 533, 539 (Iowa 2022) (identifying elements of a medical malpractice action after section 147.140 was promulgated).

[7] Under *S.K.*, the court doesn't evaluate the defendant's litigation conduct *before* it learns of the material facts supporting the objection, such when it learns the expert was untruthful later in the litigation. Waiver is measured based on the actions of the defendant *after* it learns the material facts supporting an objection under section 147.140. When, as here, an objection attacks compliance with the "oath" provision due to a missing jurat, the defendant knows of the potential defect upon receipt.

Further, under the civil rules of procedure, a party waives substantive objections that are not timely identified in the litigation.[8] Because section 147.140 creates an absolute objection to discovery on the merits, a defendant must timely identify its objection under section 147.140 or else the objection is waived. *See* Iowa R. Civ. P. 1.509(1)(*c*) ("Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. A party may respond to a request in whole or in part subject to an objection without waiving that objection."); Iowa R. Civ. P. 1.512(2)(*b*)(3) (requests for production); Iowa R. Civ. P. 1.717(1) (depositions).[9] In short, a substantive *objection* under section 147.140 must be timely identified during the litigation or it's waived, while a *motion* on a *preserved* objection under section 147.140 may be filed later under *Banwart*. The garden-variety waiver principles recognized in *S.K.* address the timing of the defendant's substantive

[8] This illustrates courts are often required to engage in a fact-intensive inquiry regarding the timeliness of objections, such as objections under section 147.140.

[9] Notably, objections to errors or irregularities as to "the oath" requirement in a deposition are also "waived unless seasonably objected to during the deposition." Iowa R. Civ. P. 1.717(4).

objection under section 147.140, while *Banwart* addresses the procedural timing of the defendant's motion under the court's motions deadline.

Further, the rules impose critical requirements on *both* parties to prevent undue surprise in these circumstances. Under Iowa law, *every* discovery request and response made by a medical malpractice defendant includes a certification to the opposing party that they are "*warranted by existing law*," not interposed to "needlessly increase the cost of litigation," and are "[n]either unreasonable or unduly burdensome or expensive, *considering the* ***needs*** *of the case* . . . and the importance of the ***issues at stake*** *in the action*." Iowa R. Civ. P. 1.503(6) (emphasis added). These certifications are vital in civil lawsuits and "advance[] the basic notion of fairness that underlies our rules aimed at elimination of 'trials by ambush.' " *State ex rel. Hager v. Carriers Ins. Co.*, 440 N.W.2d 386, 389 (Iowa 1989). By rule, parties are expected to rely on these certifications throughout litigation. Iowa R. Civ. P. 1.503(7). These certifications are incompatible with a defendant who—instead of identifying an objection under section 147.140 in any way—itself lifts section 147.140's discovery moratorium and then engages in fact and expert discovery on the merits for over a year until the opposing party's SOL expires.

Section 147.140 "is meant to end cases *early* (sixty days after the answer)," and "serves to identify and weed out non-meritorious malpractice claims from the judicial system efficiently and promptly." *Struck*, 973 N.W.2d at 542. This Court would frustrate the text and purpose of the statute—at the expense of Iowans who've been legitimately injured by medical negligence—if it were to interpret the statute to allow defendants to fully participate in discovery on the merits until the plaintiff's SOL expires without pleading section 147.140 in its answer or, at a minimum, timely raising its objection in the litigation. Such an interpretation would not only *encourage* defendants to conceal objections until the plaintiff's SOL expires: It would also flip the statute's text and purpose on its head and would ***obligate*** defense counsel to conceal objections under section 147.140 until *after* the plaintiff's SOL expires given their professional duty of zealous advocacy. This is not what the statutory text permits, it is not what the legislature intended, and it should not become the law through judicial interpretation.

II. CONCLUSION

Gerlinger's certificate of merit, amended certificate of merit, declaration, and certified report subjected him to four counts of

fraudulent practices and four counts of perjury, and DMOS didn't object until the Raricks' SOL expired well over a year later. The Raricks' complied with section 147.140, and DMOS's ex post exclamation of "King's X!" after the Raricks' SOL lapsed was too late. The district court's judgment should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COST

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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1. This brief complies with the type-volume limitation of the Court's Order dated March 20, 2025 because this brief contains 3,249 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(*i*)(1).

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