IN THE SUPREME COURT OF IOWA

No. 24–1704

RICHARD RARICK and TERESA RARICK,
Plaintiffs–Appellants

vs.

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

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY NO. LACL154849

THE HONORABLE COLEMAN J. MCALLISTER
PRESIDING JUDGE

BRIEF OF DEFENDANTS–APPELLEES

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court for decision because it presents substantial questions of enunciating or changing legal principles. Iowa R. App. P. 6.1101(2)(f).

NATURE OF THE CASE

This is a medical malpractice case in which Plaintiffs assert that Defendants breached the standard of care in treating Richard Rarick. (*See generally*, Petition; D0001). On June 17, 2024, shortly after this Court issued its decisions in *Miller v. Cath. Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367 (Iowa 2024) and *Shontz v. Mercy Med. Ctr.-Clinton,*

Inc., 7 N.W.3d 775, 2024 WL 2868931 (Iowa 2024), Defendants filed a Motion to Dismiss pursuant to Iowa Code section 147.140 because Plaintiffs' certificate of merit was not signed by an expert under oath or penalty of perjury. (Defs' MTD; D0032 (6/17/24)). The district court granted Defendants' Motion to Dismiss and dismissed Plaintiffs' action with prejudice. (Ruling on MTD; D0053 (9/9/24)). Plaintiffs now appeal the district court's ruling.

STATEMENT OF THE FACTS

Plaintiffs' Petition at Law and Jury Demand was filed on January 31, 2023. (Petition; D0001 (1/31/23)). Plaintiffs pled medical negligence claims against Defendants. *Id.*

Defendants filed their Answer on March 14, 2023. (Answer; D0008 (3/14/23)). Plaintiffs served a certificate of merit signed by Dr. Tad Gerlinger on March 14, 2023. (NOS COM; D0011 (3/14/23)). The certificate of merit signed by Dr. Gerlinger contains two relevant provisions. First, the certificate of merit states that "[t]he undersigned, being first duly sworn on oath, deposes and states as follows" following which Dr. Gerlinger states his opinions. (*Id.*). After his opinions and before his signature appears the phrase: "[t]he above information is true

and correct to the best of my knowledge and belief." Plaintiffs' Certificate of Merit, however, does not contain a jurat. (*See* Defs' MTD Ex. B; D0032). Plaintiffs' Certificate of Merit does not contain any indication that Dr. Gerlinger conducted an oath or affirmation in front of a qualified officer. (*See id.*). Plaintiffs' Certificate of Merit does not contain the phrase "under penalty of perjury." (*See id.*).

On June 7, 2024, two weeks after the Iowa Supreme Court held that a certificate of merit not sworn under oath or affirmation in front of a qualified officer or signed under penalty of perjury fails to substantially comply with Iowa Code section 147.140, Defendants notified Plaintiffs' counsel they were evaluating a motion to dismiss consistent with this Court's ruling. *Miller v. Cath. Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367 (Iowa 2024). On June 17, 2024, Defendants filed their Motion to Dismiss. (Defs' MTD; D0053 (6/17/24)). Prior to the *Miller* decision, Defendants engaged in typical litigation activities, including written discovery, depositions, and motion practice. (*See generally*, Docket).

Defendants filed their Motion to Dismiss ninety-eight (98) days before trial, prior to the dispositive motion deadline, prior to the

discovery deadline, and over 3 months prior to the September 23, 2024 trial date. (TSDP, D0013 (4/14/23); Order Setting Trial; D0015 (05/4/23)).

ARGUMENT

I. WHETHER DEFENDANTS WAIVED THEIR RIGHT TO DISMISSAL UNDER IOWA CODE SECTION 147.140

Preservation of Issue

Issues must ordinarily be both raised and decided by the district court in order to be preserved for appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Defendants agree that the issue of waiver was preserved for appeal.

Standard of Review

The Iowa Supreme 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. Cath. Health Initiatives-Iowa, Corp.,* 7 N.W.3d 367, 373 (Iowa 2024).

DEFENDANTS DID NOT WAIVE THEIR RIGHT TO DISMISSAL UNDER IOWA CODE SECTION 147.140

Plaintiffs cannot meet the high burden of establishing that Defendants engaged in conduct clearly demonstrating their intent to relinquish, abandon, or waive the right to dismissal of this action under

Iowa Code section 147.140. Waiver is the voluntary or intentional relinquishment of a known right. *Scheetz v. IMT Ins. Co. (Mut.),* 324 N.W.2d 302, 304 (Iowa 1982). The essential elements of waiver are the existence of a right, knowledge of the right, and an intention to relinquish such right. *Id*. "A waiver of either a statutory or constitutional right must be a voluntary, intentional act done with actual knowledge of the existence and meaning of the rights involved and with full understanding of the direct consequences of the waiver." *State v. Jones*, 238 N.W.2d 790, 792 (Iowa 1976) (citing *Brady v. United States*, 397 U.S. 742 (1970)). "The party asserting waiver . . . bears the burden of proof." *Hyland v. Sheldon*, 686 N.W.2d 198, 202 (Iowa 2004) (citing *Grandon v. Ellingson*, 144 N.W.2d 898, 903 (Iowa 1966)).

A. Defendants Did Not Have Knowledge of Their Right to Dismissal Pursuant to Iowa Code Section 147.140 Until Shortly Before They Filed Their Motion to Dismiss and Had No Knowledge That it was Possible to Waive the Right to Dismissal

Again, a waiver of a statutory right must be a voluntary, intentional act done with actual knowledge of the existence and meaning of the right involved. *Jones*, 238 N.W.2d at 972. Iowa Code section 147.140 confers a statutory right to dismissal with prejudice if the plaintiff's certificate of

merit affidavit does not substantially comply with the statute. Iowa Code § 147.140(6). Accordingly, in order for Defendants to have waived their statutory right to dismissal in this case, they must have had actual knowledge that Plaintiffs' certificate of merit affidavit, which was signed by an expert "being first duly sworn on oath"[1] but not notarized or signed under penalty of perjury, was deficient such that Defendants were clearly and unambiguously entitled to dismissal. In this case, there is no evidence in the record that Defendants had actual or even constructive knowledge of the clear, unambiguous right to dismissal on that basis until late in the litigation, when this Court handed down its decision in *Miller v. Cath. Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367 (Iowa 2024).

In analyzing the issue of waiver in *S.K. by & through Tarbox v. Obstetric & Gynecologic Assocs. of Iowa City & Coralville, P.C.*, No. 22-1317, 2024 WL 4714425 (Iowa Nov. 8, 2024), the Iowa Supreme Court did not discuss the knowledge prong of the waiver analysis and focused entirely on the intent to waive prong, utilizing an implied intent analysis whereby a party may impliedly waive their right to dismissal through litigation conduct. The Court's analysis excluding the knowledge element

[1] But without actually having been placed under oath in this case.

of waiver was appropriate only in the context of the cases it relied upon, where the parties who were deemed to have waived their rights through litigation conduct clearly had knowledge of the relevant right at the early stages of litigation or even before litigation.

For example, in *LaLonde*, upon which the Court relied in *S.K.* and Plaintiffs focus their arguments, the plaintiff entirely failed to file a certificate of merit along with the lawsuit, as required by statute. *LaLonde v. Gosnell*, 593 S.W.3d 212, 216 (Tex. 2019).[2] Thus, it would have been immediately apparent to the defendant that it had a right to dismissal as soon as the plaintiff filed its lawsuit unaccompanied by a certificate of merit. The *Lalonde* Court viewed this as significant in its analysis. *See Lalonde*, 593 S.W.3d at 227 (noting that the defect in plaintiff's pleadings existed from day one and was "open and obvious" and therefore "the right to dismissal was manifest."); 224 (noting that participating in discovery indicates an intent to litigate and thus waive the right to dismissal, which is "especially so in a case like this where the

[2] *Compare* to Iowa Code § 147.140, where a Certificate of Merit is due 60 days after Defendant's Answer.

fatal defect—the lack of a certificate of merit—exists at the outset of litigation.").

In *Modern Piping*, another case relied upon in *S.K.*, the right at issue was the right to enforce a contractual arbitration agreement. *Mod. Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.,* 581 N.W.2d 616, 621 (Iowa 1998). In that case, as well as in the vast majority of cases involving waiver of the right to arbitrate, such a right is clearly known to all parties to the contract even before litigation commences, as the arbitration clause is contained directly in the contract the parties signed. *See Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047, 1050 (8th Cir. 2016) (concluding that the movant knew of its existing right to arbitration because it possessed the arbitration agreement).

This case presents an entirely different scenario. Here, Defendants' right to dismissal due to Plaintiffs' defective certificate of merit affidavit was not immediately apparent at the time the certificate was served. Defendants had no knowledge of an "open and obvious" right to dismissal at that time. While Iowa Code section 147.140 unambiguously provides that a certificate of merit affidavit must be signed under the oath of the expert, until *Miller* was decided, Defendants did not have knowledge that

a certificate of merit not sworn under oath in front of a qualified officer and not signed under penalty of perjury was non-complaint such that there was a clear right to dismissal.[3] *See Miller v. Cath. Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367, 374–77 (Iowa 2024).

In fact, during the pendency of this litigation, Defendants had every reason to believe that there was no such right to dismissal for unsworn certificates of merit given that several district courts had denied motions to dismiss brought on such grounds, including the district courts in *Miller* and *Shontz*. *See Miller*, 7 N.W.3d at 370 (noting the district court held that the plaintiff's unsworn but signed letter substantially complied with the affidavit requirement); *Shontz v. Mercy Med. Ctr.-Clinton, Inc.*, 7 N.W.3d 775, 2024 WL 2868931, *1 (Iowa 2024) (same). Thus, until *Miller* was decided, Defendants certainly had no knowledge, either actual or constructive, that they had an unambiguous right to dismissal under section 147.140 based on Plaintiffs' unsworn certificate of merit such that their participation in standard litigation activities could imply waiver. Upon obtaining knowledge as to the existence and meaning of the right

[3] Indeed, while Defendants may have had knowledge that the certificate of merit was not an "affidavit," it was not clear that this defect entitled Defendants to dismissal.

to dismissal pursuant to *Miller*, Defendants promptly asserted their right by filing their Motion to Dismiss just weeks after *Miller* was published.

Thus, the circumstances of this case are thus readily distinguishable from *Lalonde* and *Modern Piping*, where the right at issue was immediately apparent from the inception of the case and therefore *all* litigation conduct was inconsistent with the rights later asserted. *See Lalonde*, 593 S.W.3d at 221 ("We thus begin our implied-waiver analysis with the observation that *all* of the Engineers' conduct in this case was inconsistent with their rights under section 150.002."). This is not a case like *Lalonde* where the plaintiff wholly failed to file a certificate of merit affidavit by the statutory deadline such that Defendants would have clearly known of the right to dismissal as soon as the deadline passed. Rather, the issue of whether Plaintiffs' certificate of merit complied with Iowa Code section 147.140 and therefore whether Defendants were entitled to dismissal was not immediately apparent at the time the certificate was served, and in fact, it appeared that while the certificate may be deficient, there was no clear right to dismissal based on the court rulings available at the time and the conduct of various district courts prior to the *Miller* decision. Thus, with respect to the

knowledge prong of the waiver analysis, there is no evidence that Defendants had actual or constructive knowledge of their right to dismissal at the time Plaintiffs' certificate of merit was served. Therefore, there can be no waiver where Defendants did not engage in a voluntary, intentional act done with knowledge of the existence of the right to dismissal.

Similarly, Defendants did not have knowledge of the "meaning of the rights involved" or a "full understanding of the direct consequences of the waiver" because Defendants did not have knowledge that it was even possible to waive the statutory right to dismissal under Iowa Code section 147.140 through litigation conduct. *Jones*, 238 N.W.2d at 972. Prior to the *S.K.* decision, the Iowa appellate courts had consistently held that Iowa Code section 147.140 did not impose a deadline within which to seek dismissal and that a defendant *could not waive* the right to dismissal. Indeed, the Iowa Court of Appeals previously held that it "cannot read a waiver clause into" Section 147.140 "that the legislature did not communicate through its drafting." *Butler v. Iyer*, 978 N.W.2d 98, 2022 WL 1100275, *5 (Iowa Ct. App. 2022).

Regarding waiver in the context of Iowa Code section 147.140, the Iowa Court of Appeals has also stated:

> The Estate argues Chautauqua waived the statutory requirement for a certificate of merit affidavit. Similar to the foregoing contractual analysis, we do not find the requisite intent to waive the certificate of merit affidavit. **The statute sets forth a mandatory course of action with no expiration or other timeline**. We have previously found that agreeing to an extension involving discovery requests does not "constructively waive" the requirement for a timely certificate of merit affidavit. Accordingly, we find Chautauqua did not waive the requirement.

Id. (emphasis added) (citation omitted); *Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.*, 987 N.W.2d 834, 837 (Iowa 2023) (affirming the court of appeals' decision regarding waiver).

The Court of Appeals also flatly rejected a waiver argument in *Butler*, noting that "[v]iewing section 147.140 in its entirety, we find no hint that a defendant can waive the plaintiff's obligation to timely serve an affidavit." *Butler*, 2022 WL 1100275 at *5. "At bottom, we reject Butler's argument that the discovery reference [in section 147.140] is an oblique route for defendants to waive their opportunity to receive an expert affidavit from the plaintiff." *Id*.; *see also McHugh v. Smith*, 966 N.W.2d 285, 291 (Iowa Ct. App. 2021) ("Nothing in the statutory

language supports [plaintiff's] proposition that [defendant] constructively waived the requirement that she timely file the certificate of merit affidavit.").

As such, reasonably relying upon the precedential value of these appellate decisions, Defendants could not have knowledge that it was possible to waive the statutory right to dismissal under Iowa Code section 147.140 through litigation conduct alone, particularly when the dispositive motions deadline had not yet expired. Defendants' ability to rely upon cemented appellate decisions is a hallmark of our legal system, operating as a force of stability and predictability in the law. *See Youngblut v. Youngblut*, 945 N.W.2d 25, 40 (Iowa 2020). In fact, stare decisis is a "venerable doctrine" that requires "the highest possible showing that a precedent should be overruled before taking such a step." *Vaudt v. Wells Fargo Bank, N.A.*, 4 N.W.3d 45, 50 (Iowa 2024), *as amended* (May 9, 2024).

Consistent with that principle, it is also important to note that in several cases, the defendants had engaged in extensive litigation, yet the Iowa appellate courts affirmed the right to dismissal under Iowa Code section 147.140. *Est. of Butterfield*, 2022 WL 3440703 at *1 (finding no

waiver despite the fact that the parties exchanged initial disclosures, interrogatories, requests for production, and reports of expert witnesses during a period of well over a year after the petition was filed); *Hummel v. Smith*, 999 N.W.2d 301, 302 (Iowa 2023) (affirming dismissal for noncompliant certificate of merit where defendant sought dismissal over two years after the petition was filed and after the exchange of expert reports); *Est. of Knop v. Mercy Health Servs. Iowa Corp*, 978 N.W.2d 815, 2022 WL 1487124, *1-2 (Iowa Ct. App. 2022) (affirming dismissal for failure to serve a certificate of merit where dismissal was sought roughly a year and a half into the litigation and after the exchange of expert reports and expert depositions).

Given the plain language of the statute and the state of the case law prior to the filing of Defendants' Motion to Dismiss, there was simply no indication that the right to dismissal under Iowa Code section 147.140 could be waived through typical, pre-trial litigation conduct alone. Because Defendants did not have knowledge of the nature and extent of the right to dismissal or any knowledge that the right to dismissal could be waived as a consequence of engaging in litigation, Plaintiffs cannot meet their burden to establish the knowledge prong of waiver. *See In re*

Briggs, 746 N.W.2d 279, 2008 WL 239020, *4 (Iowa Ct. App. 2008) ("Waiver requires a knowledge of the facts basic to the exercise of the right waived, with an awareness of its consequences.") (citing Am.Jur. Estoppel, § 202).

Accordingly, with respect to the intent to waive prong of the waiver analysis, discussed below, the Court must analyze Defendants' litigation conduct in light of the fact that there was no knowledge of the right to dismissal until the late stages of the litigation and no knowledge of the consequences of engaging in litigation conduct. Indeed, the *Lalonde* Court specifically noted that "[c]ases involving a missing certificate are analytically different than those in which a certificate has been filed but is later challenged as defective or otherwise noncompliant. In the latter case, one might reasonably expect some litigation activity would be essential to "learn more about the case" and avoid being disadvantaged if a dismissal motion challenging the adequacy of an expert certification is denied." *Lalonde*, 593 S.W.3d at 21, fn. 34.

As discussed more fully below, Defendants' litigation conduct in this matter does not clearly and unequivocally evidence an intent to waive their right to dismissal under Iowa Code section 147.140,

especially in light of Defendants' lack of knowledge of the right to dismissal or knowledge that the right to dismissal could be waived. It is not as if Defendants knew they were entitled to dismissal based on Plaintiffs' unsworn certificate of merit and knew that such a deficiency could be waived and yet voluntarily chose to sit on their hands and continue with the litigation rather than seek immediate dismissal. This situation is also dissimilar from *S.K.*, where the Defendants evidenced an intent to defend the case on the merits by proceeding to trial. *S.K.*, 2024 WL 4714425. Here, as in most cases, until the expiration of the dispositive motion deadline (and perhaps after in some instances), Defendants always retained their right to challenge the viability of the case through motion practice, including a motion to dismiss. It was entirely prudent for Defendants to wait to file their Motion to Dismiss until the issue of unsworn certificate of merit affidavits was decided on appeal, rather than spend time and resources filing a motion that appeared unlikely to be successful based upon other district court rulings to that point, especially in light of the Iowa case law holding that the right to dismissal could not be waived.

B. Defendants' Litigation Conduct is *Not* Clear and Compelling Evidence of Their Intent to Waive the Statutory Right to Dismissal Under Iowa Code Section 147.140

In analyzing whether a party has waived its right to dismissal under Iowa Code section 147.140, a majority of this Court in *S.K.* endorsed the application of an "implied waiver by litigation conduct" standard as set forth in cases such as *LaLonde* and *Modern Piping*. *S.K.*, 2024 WL 4714425 at *20–21 (Iowa Nov. 8, 2024) (Waterman, Concurring). In *Lalonde*, the Texas Supreme Court stated that "the universal test for implied waiver by litigation conduct is whether the party's conduct—action or inaction—clearly demonstrates the party's intent to relinquish, abandon, or waive the right at issue[.]" *Lalonde*, 593 S.W.3d at 219–20. Under *Modern Piping*, which involved a contractual right to arbitrate, the mere delay in seeking a stay of litigation to enforce the right to arbitrate with some resulting prejudice to the non-moving party cannot be deemed a waiver of the right to arbitrate. *Modern Piping*, 581 N.W.2d at 620. Rather, "[t]he essential test for waiver of arbitration requires conduct or activity inconsistent with the right to arbitration *and* prejudice to the party claiming waiver." *Bryant v. Am. Exp. Fin. Advisors, Inc.,* 595 N.W.2d 482, 487 (Iowa 1999).

The party seeking to establish a waiver of another party's rights bears a high burden and must present clear and compelling evidence of waiver. *Lalonde*, 593 S.W.3d at 220 (stating that the test for implied waiver by litigation conduct "is a high standard."); *Clinton Nat. Bank v. Kirk Gross Co.*, 559 N.W.2d 282, 284 (Iowa 1997) ("Our supreme court has stated that evidence of waiver must be compelling."); *MidWestOne Bank v. Heartland Co-Op*, 941 N.W.2d 876, 888 (Iowa 2020) ("'[I]n order to establish waiver by conduct, there must exist clear, unequivocal, and decisive conduct demonstrating intent to waive.'").

The test for waiver is a "totality of the circumstances" test that "necessitates consideration of all the facts and circumstances attending a particular case."[4] *Lalonde*, 593 S.W.3d at 220. The Iowa Supreme Court

[4] The Iowa Supreme Court has not set a firm deadline for the filing of motions to dismiss under Iowa Code section 147.140. *S.K.*, 2024 WL 4714425 at *18 ("Our court does not decide today the precise point at which a motion challenging a certificate of merit affidavit becomes untimely. . ."). However, the Court did reference the dispositive motion deadline several times in *S.K.* If there is a deadline to seek dismissal under Iowa Code section 147.140, which Defendants do not believe there is, then it should be the dispositive motion deadline. If that is the case, the Court need not engage in the "totality of the circumstances" analysis given that Defendants' motion was filed well before the dispositive motion deadline, as noted by the district court.

has expressed the relevant considerations in the arbitration context as follows:

> The issue of whether one has waived his right to arbitrate turns on the significance of the action taken in a judicial forum. The issue is one for the court to decide. Delay and the extent of the moving party's trial-oriented activity are material factors in assessing a claim of prejudice. Prejudice may result from lost evidence, duplication of efforts, or the use of discovery methods unavailable in arbitration.

Modern Piping, 581 N.W.2d at 620 (citation omitted).

The *Lalonde* Court also identified several factors to be considered in determining whether a party has waived a right to dismissal, including participation in discovery, the time elapsed in the litigation and the stage of litigation at which the motion to dismiss is brought, seeking affirmative relief, and participating in alternative dispute resolution. *Lalonde*, 593 S.W.3d at 224-225.

Here, the totality of the circumstances demonstrates that this case is materially distinguishable from *S.K.* and the cases upon which it relies and that there is no clear and compelling evidence that Defendants intended to waive their right to dismissal under Iowa Code section 147.140.

1. Time Elapsed and Stage of Litigation

Again, in the arbitration context, the Iowa Supreme Court has noted that "[t]he mere delay in seeking a stay of litigation with some resultant prejudice to a party cannot be deemed a waiver." *Modern Piping*, 581 N.W.2d at 620. The Eighth Circuit Court of Appeals agrees with other circuit courts of appeals that delay by the party seeking to compel arbitration "does not itself constitute prejudice." *Stifel, Nicolaus & Co. Inc. v. Freeman*, 924 F.2d 157, 159 (8th Cir. 1991); *see also Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 483-85 (5th Cir. 2002) (confirming that "mere delay falls far short of the waiver requirements"); *Lalonde*, 593 S.W.3d at 223 (noting that "merely waiting to move for dismissal is insufficient to establish waiver.").

First, as noted above, Defendants did not have clear and unambiguous knowledge of the right to dismissal until the *Miller* decision was handed down on May 24, 2024. Defendants notified Plaintiffs of a potential Motion to Dismiss a mere two weeks later, on June 7, 2024, the date this Court issued its Ruling in *Shontz v. Mercy Med. Ctr.-Clinton, Inc.*, 7 N.W.3d 775 (Iowa 2024). Defendants filed their Motion to Dismiss based upon that authority shortly thereafter, on June 17, 2024. (Defs'

MTD; D0032 (6/17/24)). The timing of Defendant's knowledge is a key circumstance that the Court must take into consideration in applying the totality of the circumstances test with regard to waiver. *See Kemp v. Rockwell Collins, Inc.*, No. 19-CV-92-LRR, 2020 WL 13735206, *6 (N.D. Iowa June 22, 2020) (analyzing whether the plaintiff waived the right to arbitrate through litigation conduct starting on the date the arbitration agreement was disclosed in discovery and thus the date plaintiff had knowledge of the right to arbitrate). A matter of taking a few weeks to assert a right after it becomes known or clarified is clearly not evidence of an intent to waive that right under any standard.

Even if Defendants are charged with knowledge of their right to dismissal from the date Plaintiffs served their certificate of merit, Defendants' Motion to Dismiss was filed in a much shorter timeframe than the motion filed in *S.K.* In *S.K.*, the defendant sought dismissal under Iowa Code section 147.140 approximately four and a half years after the plaintiff served the certificate of merit affidavits. *S.K.*, 2024 WL 4714425 at *18. By stark contrast, Defendants filed their Motion to Dismiss fifteen months after receiving Plaintiffs' certificate of merit. (Pl.s' NOS COM, D0011 (3/14/23); Defs' MTD, D0032 (6/17/24)).

Defendants' Motion to Dismiss was also brought much earlier than the *Lalonde* defendant's motion, which was filed over three years after the plaintiff's certificate of merit was filed. *Lalonde*, 593 S.W.3d at 217. Further, Defendants' delay was much less significant than in other cases where Iowa courts have found a waiver. *See*, *e.g.*, *Heartland Co-op Co. v. Murphy*, 888 N.W.2d 680, 2016 WL 5408302, *4 (Iowa Ct. App. 2016) (party waived right to arbitration where they sought to force arbitration 31 months after the petition was filed and 3 days before trial).

In fact, in contrast to the above cases, the amount of time that elapsed between service of Plaintiffs' certificate of merit affidavit and the filing of Defendants' Motion to Dismiss is closer to cases where no waiver was found. *See Wesley Retirement Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 30 (Iowa 1999) (holding the district court properly found no waiver of the right to arbitrate where the request for arbitration was raised 9 months after suit was commenced); *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 387 (Tex. 2014) (referred to by the *Lalonde* Court as "typical of no-waiver cases," where the defendant moved for dismissal eight months into the lawsuit).

As stated in *Lalonde* with respect to the length of the delay in asserting a right, "[i]t certainly takes a long time to be 'enough'" to constitute a waiver of the right. *Lalonde*, 593 S.W.3d at 225. Here, Defendants' brief delay in asserting its right to dismissal under Iowa Code section 147.140 was simply not long enough to evidence a clear and unequivocal intent to waive such a right, particularly in light of the state of the law in Iowa prior to *Miller* and *Shontz*.

Similarly, Defendants' Motion in this case was filed at a much earlier stage in the litigation than the motion in *S.K.* In holding that the defendant impliedly waived its right to seek dismissal under 147.140, the Court in *S.K.* repeatedly emphasized the fact that the defendant waited until after the dispositive motion deadline, after final judgment, and indeed after appellate briefs had been fully submitted before filing its motion. As noted by Justice Waterman, "[i]n my view, the clinic impliedly waived its right to dismissal under section 147.140(6) by failing to raise the issue before final judgment, by the dispositive motion deadline, or indeed at any time during nearly four and a half years of litigation until its appellate motion to reverse." *S.K.*, 2024 WL 4714425 at *18.

Here, in stark contrast to *S.K.*, Defendants filed their Motion to Dismiss prior to the dispositive motion deadline, prior to the discovery deadline, and more than 3 months prior to the September 23, 2024 trial date. (TSDP, D0013 at ¶ 7 (4/14/23); Order Setting Trial; D0015 (5/4/23)). Defendants did not wait until after any applicable deadline had expired, nor until after final judgment, nor until the matter was on appeal. Rather, Defendants' Motion in this case was filed well in advance of trial and all pretrial filing deadlines. Therefore, the *S.K.* Court's determination that a motion pursuant to section 147.140 is untimely if filed after final judgment simply has no application to this case. *See S.K.*, 2024 WL 4714425 at *18 ("Our court does not decide today the precise point at which a motion challenging a certificate of merit affidavit becomes untimely, but we have no trouble saying that it is too late once the district court issues its final judgment."). The extreme and easily distinguishable facts in *S.K.* do not dictate a finding of waiver in this case or, presumably, in most cases where dismissal is sought pursuant to Iowa Code section 147.140.

With respect to the stage of litigation at which Defendants brought their Motion to Dismiss, this case is also distinguishable from the

Lalonde and *Modern Piping* cases relied upon in the *S.K.* concurrence and in Plaintiffs' briefing. In *Lalonde*, the defendant sought dismissal after litigating the case for over three years and brought its motion on the eve of trial, after the discovery deadline. *LaLonde*, 593 S.W.3d at 216. In *Modern Piping*, the Iowa Supreme Court held that the defendant waived its right to arbitrate a contract dispute by litigating in district court for eighteen months before moving to compel arbitration just five days before trial. *Mod. Piping*, 581 N.W.2d at 621–22. Again, Defendants' Motion to Dismiss was filed within a shorter period, before the dispositive motion and discovery deadlines, and well before the eve of trial and the commencement of pretrial preparation. Therefore, neither the time elapsed in the litigation nor the stage of litigation at which Defendants filed their Motion to Dismiss is indicative of a clear and unequivocal intent to waive the right to dismissal.

2. Participation in Alternative Dispute Resolution

The fact that the parties agreed to participate in mediation of this matter does not constitute clear and compelling evidence that Defendants intended to waive their right to dismissal under Iowa Code section 147.140. While the *Lalonde* Court identified participation in

mediation as a potential factor to consider in the waiver analysis, the Court specifically noted that such a factor "may be of limited value" and "on its own does not clearly demonstrate an intent to forgo the right to dismissal." *Lalonde*, 593 S.W.3d at 225-226. Indeed, Iowa caselaw on the issue of waiver reflects that the Iowa Supreme Court likewise views participation in mediation as having limited value as part of the waiver analysis. *See Wesley Retirement Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 30 (Iowa 1999) (finding no waiver of the right to compel arbitration where the request to arbitrate was raised 9 months after suit was commenced, 4 months before trial, and after the parties conducted a full day of mediation).

Further, as recognized in *Lalonde* and by the Iowa Supreme Court, mediation is encouraged and is an effective tool for resolving disputes outside of court. *Lalonde*, 593 S.W.3d at 225; *Davis v. Horton*, 661 N.W.2d 533, 536 (Iowa 2003) (noting that mediation of disputes is "encouraged" and "frequently beneficial."); *Miller v. Component Homes, Inc.*, 356 N.W.2d 213, 216 (Iowa 1984) (noting the "public policy favoring settlement of disputes."). To hold that participating in mediation to amicably resolve a dispute can be considered evidence of a party's waiver

of a substantive statutory right such as the right to dismissal under Iowa Code section 147.140 would discourage participation in mediations and thereby subvert the public policy preference in favor of inexpensive and mutually agreeable forms of resolution.

Additionally, participation in mediation does not constitute an admission of liability or an indication that a claim has merit but instead merely reflects a party's willingness to reach a reasonable resolution outside of the litigation process—including to avoid the need for motion practice and appeals. *See* Iowa R. Evid. 5.408; *Davis*, 661 N.W.2d at 215–16 (noting that offers of settlement do "not necessarily reflect the belief that the adversary's claim has merit, "but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered.") (citing IV J. Wigmore, *Evidence in Trials at Common Law* § 1061, at 36 (1972)).

Indeed, it is common for litigants to file dispositive motions immediately prior to mediation or immediately after an unsuccessful mediation. Thus, participation in mediation is not in any way indicative of a party's belief as to the validity of their claims or defenses and

certainly is not indicative of an intent to waive a legal defense entitling a party to dismissal. There are situations where a defendant may seek to participate in mediation even where it believes strongly in the right to dismissal, such as where the plaintiff has indicated an intent to file an appeal of an adverse ruling. For the foregoing reasons, participation in mediation should not weigh in favor of a finding that Defendants waived their right to dismissal. In fact, the fact that Defendants withdrew all settlement offers after mediation was unsuccessful and, instead, pursued dispositive relief unequivocally demonstrates Defendants' affirmative intent to *not* waive their right to dismissal under Iowa Code section 147.140.

3. Participation in Discovery and Seeking Affirmative Relief

Defendants' participation in the normal methods of discovery in this matter should likewise not be seen as clearly evidencing an intent to waive the right to dismissal. A defendant does not waive the right to challenge a plaintiff's certificate of merit simply by engaging in discovery. *See McHugh v. Smith*, 966 N.W.2d 285, 291 (Iowa Ct. App. 2021) (stating "[n]othing in the statutory language supports [plaintiff's] position that [defendant] constructively waived the requirement that [plaintiff] timely

file a certificate of merit affidavit" by engaging in discovery); *S.K.,* 2024 WL 4714425 at *21 (stating "[t]he court of appeals correctly rejected the waiver argument and affirmed the district court's dismissal" in *McHugh*); *see also Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 394 (Tex. 2014) (addressing whether a defendant waived a certificate of merit requirement and stating, "[q]uite simply, attempting to learn more about the case in which one is a party does not demonstrate an intent to waive the right to move for dismissal" (internal quotation omitted). Participation in discovery especially lacks indicia of intent to waive the right to dismissal in cases such as this, where a certificate of merit affidavit was in fact filed but may contain deficiencies that are not immediately apparent. *See Lalonde*, 593 S.W.3d at 21, fn. 34 ("[c]ases involving a missing certificate are analytically different than those in which a certificate has been filed but is later challenged as defective or otherwise noncompliant. In the latter case, one might reasonably expect some litigation activity would be essential to "learn more about the case" and avoid being disadvantaged if a dismissal motion challenging the adequacy of an expert certification is denied.").

There are numerous instances where it may be prudent or even necessary to engage in discovery prior to seeking dismissal pursuant to Iowa Code section 147.140. Information gathered during a deposition, in written discovery, or through expert disclosures may shed light on a plaintiff's compliance with section 147.140. For example, information regarding a plaintiff's expert's licensing, board certification, or practice area may arise during discovery indicating the expert did not meet the qualifications set forth in Iowa Code section 147.139 and, therefore, was not qualified to sign the certificate of merit. *See* Iowa Code § 147.139; *see also Hummel v. Smith*, 999 N.W.2d 301 (Iowa 2023)(where discovery was required to fully determine Dr. Marfuggi's lack of qualifications under Iowa Code § 147.139, thereby giving rise to grounds for dismissal under Iowa Code § 147.140.). Further, it is not always clear from the petition whether expert testimony is required to establish a prima facie case and therefore whether a certificate of merit is even required in the first place. While a plaintiff may cast the petition in terms of ordinary negligence, discovery may reveal that expert testimony is in fact required. Additionally, a plaintiff may later add a claim that was not clearly asserted in the petition, requiring a defendant to re-assess certificates of

merit to ensure the additional claim is supported. Claims involving respondeat superior liability also present numerous issues that are not apparent until after extensive discovery, such as whether or not a certificate of merit must be served on a particular care provider or entity or whether a certificate of merit served upon an entity adequately addresses the alleged breach by a particular care provider employed by that entity.

It is not uncommon for several of the above issues to arise in a single case. The interests of judicial economy and sound practice weigh in favor of engaging in discovery prior to filing a motion to dismiss under section 147.140 so that all potential issues can be fully vetted and raised in a single motion. The fact that Defendants engaged in forms of discovery that are typical of medical malpractice suits, such as written discovery, depositions, and expert disclosures, simply does not amount to clear and compelling evidence that Defendants knowingly and voluntarily intended to waive their right to dismissal under Iowa Code section 147.140.

While certain limited forms of dispositive relief, such as pre-answer motions to dismiss, must be brought together in a single motion, there is

no such rule preventing a defendant from seeking dispositive relief and then later filing a motion to dismiss under Iowa Code section 147.140. *See* Iowa R. Civ. P. 1.421(3). Indeed, common practice and Iowa case law indicate that a defendant may file multiple dispositive motions based on separate grounds. *See, e.g., Rieder v. Segal*, 959 N.W.2d 423 (Iowa 2021) (discussing two summary judgment motions at issue in the appeal); *Legg v. West Bank*, 873 N.W.2d 763 (Iowa 2016) (addressing an appeal on three separate motions for summary judgment). The legislature was aware of Rule 1.421 and could have drafted section 147.140 in a similar manner – it did not. *See Albaugh v. Reserve*, 930 N.W.2d 676, 696 (Iowa 2019) (Iowa courts "presume the legislature is aware of existing law") (citation omitted). The fact that Defendants moved for dismissal under Iowa Code section 147.140 after engaging in some discovery was entirely proper under Iowa law and cannot be characterized as clear and compelling evidence of Defendants' intent to waive the right to dismissal under section 147.140.

C. The Timing of Defendants' Motion to Dismiss Does Not Thwart the Cost Saving Purpose of Iowa Code Section 147.140

In addition to the foregoing factors lacking indicia of Defendants' intent to waive the right to dismissal, the rationale supporting the finding of waiver in *S.K.* and the cases upon which it relies simply does not apply here. The Court's determination of waiver in *S.K.* was based in large part on the conclusion that the defendant's extreme delay in filing the motion to dismiss thwarted the cost saving purpose of section 147.140. The Iowa Supreme Court has noted that "[e]arly disposition of potential nuisance[ ] cases, and those which must ultimately be dismissed for lack of expert testimony, would presumably have a positive impact on the cost and availability of medical services." *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 541 (Iowa 2022) (alteration in original) (quoting *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993) (en banc)). Thus, the *S.K.* Court concluded that the "cost-avoidance purpose is thwarted when the defendant healthcare clinic waits until after the jury trial to challenge an unsworn signature." *S.K.*, 2024 WL 4714425 at *18; *see also Lalonde*, 593 S.W.3d at 220, 229 (noting that "by enabling defendants to quickly jettison meritless lawsuits, the certificate-

of-merit requirement saves parties the expense of protracted litigation" and that "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."); *Modern 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.").

By contrast, a dismissal of Plaintiffs' claims in this matter would further the cost saving goal of Iowa Code section 147.140. Again, Defendants filed their Motion to Dismiss months before trial and well prior to the discovery deadline. Pursuant to the Trial Scheduling and Discovery plan, discovery could still be conducted at the time Defendants' motion was filed. (TSDP; D0013 at ¶ 7). In fact, as this Court is well aware, the parties often continue discovery beyond the deadlines and, Defendants would have undoubtedly incurred additional discovery costs. Defendants would have also incurred substantial expense associated with preparing pre-trial motions and other required pre-trial filings, such

as witness and exhibit lists, jury instructions, and verdict forms, as well as the costs associated with trial preparation and a two week, 10-day trial, including significant expert expenses associated with trial preparation and trial attendance.

In *S.K.*, none of these costs were avoided because the defendant waited until after trial and after appeal to raise its certificate of merit challenge, thereby thwarting the cost-avoidance purpose of the statute. In this case (and in almost any case where a motion is filed prior to trial), however, because Defendants filed their Motion prior to the close of discovery and well before trial, all of the aforementioned costs were avoided upon dismissal pursuant to section 147.140. Trial and trial preparation often account for the most significant portion of a party's litigation expenses. Clearly, the cost-avoidance purpose of Iowa Code section 147.140 is furthered rather than thwarted when a defendant files a motion to dismiss months prior to trial and thereby avoids all trial-related expenses. *See Nelson v. Lindaman*, 867 N.W.2d 1, 7 (Iowa 2015) ("Summary judgment is an important procedure in ... immunity cases because a key purpose of the immunity is to avoid costly litigation, and that ... goal is thwarted when claims subject to immunity proceed

to trial."). Therefore, the principal rationale underlying the waiver determination in *S.K.*, that dismissal would thwart the cost-avoidance purpose of section 147.140, dictates a different result in this case.

D. Other Equitable Doctrines, Including Consent, Estoppel, and Laches Do Not Prevent DMOS from Asserting Their Right to Dismissal Under Iowa Code Section 147.140

Plaintiffs present limited argument as to other equitable doctrines. None of their arguments, however, carry any weight and should be disregarded by this Court.

1. Defendants Did Not Consent to Plaintiffs Certificate of Merit

Plaintiffs do not contend that Defendants provided affirmative consent to Plaintiffs' certificate of merit. Rather, Plaintiffs claim that, through Defendants' defense of the case and others like it, they effectively acquiesced to the form and content. Plaintiffs do not cite any Iowa law establishing that a defendant may consent to the form of a certificate of affidavit through inaction or participation in litigation.

Plaintiffs' argument on "consent" is, in function, an alternative waiver theory, akin to estoppel by acquiescence, which they also affirmatively advance. "Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects

to do so for such time as would imply an intention to waive or abandon the right." *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005) (citations omitted). "Although this doctrine bears an 'estoppel' label, it is, in reality, a waiver theory." *Westfield Ins. Cos. v. Econ. Fire & Cas. Co.,* 623 N.W.2d 871, 880 (Iowa 2001). Unlike equitable estoppel, estoppel by acquiescence does not require a showing of detrimental reliance or prejudice. *Id.* Estoppel by acquiescence applies when (1) a party "has full knowledge of his rights and the material facts"; (2) "remains inactive for a considerable time"; and (3) acts in a manner that "leads the other party to believe the act [now complained of] has been approved." *Markey*, 705 N.W.2d at 21 (citing 28 Am. Jur. 2d *Estoppel and Waiver* § 63, at 489–90 (2000)). When considering the arguments advanced by plaintiffs surrounding "consent," this is precisely the position they take—i.e. that Plaintiffs were lead to believe their certificate of merit was approved when Defendants did not raise this issue earlier.

The party asserting estoppel by acquiescence has the burden to establish its elements by clear, convincing, and satisfying proof. *Dierking v. Bellas Hess Superstore,* 258 N.W.2d 312, 315 (Iowa 1977). First, estoppel by acquiescence is an affirmative defense that must be raised in

the pleadings by the party asserting it. "Estoppel by acquiescence is an affirmative defense against a party who, aware of an enforceable right, neglects to enforce the right for such length of time that the law implies it is waived or abandoned." *In re Estate of Warrington,* 686 N.W.2d 198, 204 (Iowa 2004). "Unless a party raises estoppel by acquiescence in the pleadings, it is generally deemed waived." *In re Marriage of Van Veen*, 837 N.W.2d 681, 2013 WL 3458255, *4 (Iowa Ct. App. 2013) (citing *Holi–Rest, Inc. v. Treloar,* 217 N.W.2d 517, 523 (Iowa 1974) (noting while party need not use precise words, at least allegations to support the theory must appear in pleadings)). Here, Plaintiffs did not raised estoppel by acquiescence in the pleadings and therefore waived the right to assert the defense.

Further, as an affirmative defense, the doctrine of estoppel by acquiescence does not apply to a situation such as this, where a defendant is simply seeking dispositive relief from the claims against it rather than seeking to enforce some substantive legal right. Indeed, the cases applying the doctrine of estoppel by acquiescence involve a defendant or respondent asserting the affirmative defense against a plaintiff or claimant who seeks to enforce a right to recovery after failing to do so for

a substantial length of time. *See, e.g.*, *In re Marriage of Nielsen*, 759 N.W.2d 345, 350 (Iowa Ct. App. 2008) (holding that the doctrine of estoppel by acquiescence barred a former husband from recovering unreimbursed medical expenses from his former wife, where the husband knew that the divorce decree obligated him to pay 75% of the children's medical expenses but he had paid 100% of the expenses for eight years prior to seeking reimbursement of 25% of the expenses from the former wife); *Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978) (holding that a wife was equitably estopped from enforcing back child support from former husband because of her almost 20-year acquiescence in the former husband's nonpayment); *Anthony v. Anthony,* 204 N.W.2d 829, 834 (Iowa 1973) (applying doctrine of estoppel by acquiescence where plaintiff knew of her right to child support for seventeen years before she pursued it); *Morrow v. Morrow*, 746 N.W.2d 280 (Iowa Ct. App. 2008) (estoppel by acquiescence barred plaintiff's claim of underpaid spousal support against former husband's estate where plaintiff accepted same amount each month for 15 years without objection).

The doctrine of estoppel by acquiescence simply does not apply to the case at bar. Defendants are not now trying to enforce a right to

recovery that they have failed to enforce for a lengthy amount of time, such as a right to child support payments, spousal support, or medical expenses. Rather, Defendants sought dispositive relief as to Plaintiffs' claims. Plaintiffs cite no authority, and the undersigned has found none, where the doctrine of estoppel by acquiescence or "consent" has been applied to estop a defendant from filing a motion to dismiss based on a meritorious defense that arose during the course of the litigation merely because the defense was not raised earlier in the litigation. The affirmative defense of estoppel by acquiescence, whether couched as "consent" or otherwise, is wholly inapplicable in the context of Defendants' Motion to Dismiss.

2. The Doctrine of Laches Does Not Estop Defendants from Bringing a Motion to Dismiss

As discussed above, estoppel by acquiescence does not apply to these circumstances and does not operate to bar Defendants' from pursuing this Motion to Dismiss. Neither does the Doctrine of Laches. Simply stated, laches is inapplicable to these circumstances.

Laches is an equitable defense. *Markey v. Carney*, 705 N.W.2d 13, 22 (Iowa 2005). The elements of laches are 1) an unreasonable delay in asserting a right, and 2) prejudice to the opposing party. *Id.* Although

delay is an element, delay alone does not constitute laches. *Davenport Osteopathic Hosp. Asso. v. Hosp. Serv., Inc.*, 154 N.W.2d 153, 162 (Iowa 1967). Not all prejudice warrants the application of laches; the party asserting laches must establish "substantial prejudice." *State ex rel. Holleman v. Stafford*, 584 N.W.2d 242, 245-46 (Iowa 1998). Courts do "not infer prejudice from the mere passage of time." *Life Inv'rs Ins. Co. of Am. v. Estate of Corrado*, 838 N.W.2d 640, 645 (Iowa 2013). "The party asserting the defense has the burden to establish all the essential elements thereof by clear, convincing, and satisfactory evidence." *Markey*, 705 N.W.2d at 22 (citation omitted). This is a "heavy burden[.]" *Holleman*, 584 N.W.2d at 245-46. Plaintiffs have not, and cannot, meet their burden to establish that laches bars Defendants' Motion to Dismiss.

i. Laches does not apply to Defendants' statutory Motion to Dismiss

As laches is an equitable doctrine, it is "a defense to equitable remedies but not a defense to bar a claim of legal relief." *Life Inv'rs Ins. Co. of Am*, 838 N.W.2d at 644 (citing 1 Dan B. Dobbs, Dobbs Law of Remedies § 2.4(4), at 105 (2d ed. 1993)); *see also, id.* ("Laches may be a defense to a suit in equity, but not to an action at law" (citation and alteration omitted). Laches does not apply to Defendants' Motion to

Dismiss in two respects. First, laches is a defense to a claim or suit, not to a motion seeking dismissal of a claim or suit. *See Smith v. Clinton Cty. Hosp., Inc.*, 2019 WL 994150 (Ky. Ct. App. Mar. 1, 2019).

Second, even if laches could apply to a motion, it would only apply to motions for equitable relief, not legal relief. Unless otherwise specified, statutory actions are at law, not in equity. *Compare Papillon v. Jones*, 892 N.W.2d 763, 769 (Iowa 2017) ("A civil action for damages under section 808B is tried at law") *with* Iowa Code § 572.26 (specifying that actions to enforce mechanic's liens are "by equitable proceedings"). This distinction follows from broader principal that "[a] party seeking equitable relief must show the inadequacy of a legal remedy." *De Jong v. Munson*, 987 N.W.2d 440, 2022 WL 3050706 at *5 (Iowa Ct. App. 2022); *see also CMI Roadbuilding, Inc. v. Iowa Parts, Inc.*, 920 F.3d 560, 566 (8th Cir. 2019) (applying Iowa law and noting "[w]here a party seeks damages pursuant to both a statutory and an equitable claim, the very existence of the statutory claims bars recovery on the equitable claim").

Here, Section 147.140(1) required Plaintiff to serve a certificate of merit affidavit. That same statute provides Defendants an adequate remedy for Plaintiff's failure to substantially comply: dismissal under

Section 147.140(6). Thus, Defendants' motion seeks a remedy "at law," not in equity, so laches does not apply. *See Life Inv'rs Ins. Co. of Am*, 838 N.W.2d at 644-45; *see also McMahan v. Greenwood*, 108 S.W.3d 467, 494 (Tex. App. 2003) (holding the equitable doctrine of unclean hands did not bar a motion for summary judgment under the statute of limitations because "limitations is a statutory defense not grounded in equity").

ii. *Plaintiffs have not met their burden to establish either element of laches.*

a. The timing of Defendants' moving to dismiss was reasonable.

First, the timing of Defendants' moving to dismiss was reasonable and prudent practice. As explained above, the doctrine of laches applies to claims for relief, not statutory motions. Most claims for relief are subject to a statute of limitations, and "laches cannot ordinarily be claimed against one bringing an action within the statute of limitations[.]" *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37, 41 (Iowa 1979). If there is not a statute of limitations, courts look to the statute of limitations for an analogous claim to determine whether laches applies. *See Wilson v. Iowa S. Utils. Co.*, 293 N.W. 77, 81 (Iowa 1940). Section 147.140 includes no deadline before which a defendant must bring a

motion to dismiss. The closest analog is the motions deadline set forth in the Trial Scheduling and Discovery Plan and adopted by the Court. (D0013; D0015). As is undisputed, Defendants moved before the dispositive motion deadline and prior to trial. Defendants' motion was timely and any delay in bringing it was not unreasonable under the circumstances, particularly where Defendants acted once the Iowa Supreme Court released a case directly on point.

b. Plaintiffs have not established substantial prejudice.

The party asserting laches must also establish that the delay caused "disadvantage or prejudice[.]" *Holleman*, 584 N.W.2d at 245. In other words, the party asserting laches must have "changed his position in a manner that would not have occurred but for the … delay." *Reiff Funeral Homes, Inc. v. Reiff*, 928 N.W.2d 157 (Iowa Ct. App. 2019). Plaintiffs fail to do so here, where their alleged prejudice is the expenditure of time and resources associated with this litigation. Spending money on litigation is not the kind of prejudice or change in position that supports the application of laches. The doctrine of laches is intended to avoid delays that prevent a party from defending a claim on its merits. *See Chadek v. Alberhasky*, 111 N.W.2d 297, 301 (Iowa 1961)

(holding there is sufficient prejudice to support applying laches when "the rights of third parties have intervened or material evidence has been lost while the claimant slept on his rights").[5] The fact that Plaintiffs continued to spend money after failing to serve a properly sworn certificate of merit is not the type of substantial prejudice to support the application of laches. *See Ustanik v. Nortex Found. Designs, Inc.*, 320 S.W.3d 409, 414 (Tex. App. 2010) (holding plaintiffs hiring a new attorney and incurring an additional $22,000 in fees and costs after failing to file certificate of merit was "not the type of 'change in position' sufficient to establish" the prejudice element of laches).[6]

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[5] *See also Baczor v. Atl. Richfield Co.*, 424 F. Supp. 1370, 1377 (E.D. Pa. 1976) ("A laches defense necessarily implicates the merits of a controversy since it constitutes an averment that defendant has been so prejudiced by plaintiff's inexcusable delay in instituting suit that defendant cannot adequately defend on the merits."); *In re Estate of Reilly*, 933 A.2d 830, 838 (D.C. 2007) (rejecting laches defense where the defendant failed to establish how the plaintiff's delay "prejudiced his ability to defend the action.").

[6] *See also 122 Spring St. Realty, LLC v. Gugliotti*, 2019 WL 10058876 (Conn. Super. Ct. Dec. 10, 2019) (rejecting laches defense when the alleged prejudice was "that defendants have been forced to spend money for counsel" because "[t]he defendants have not claimed any diminished ability to present a defense, however, or that they changed their position for the worse."); *Guare v. Marner*, 22017 WL 5664651, at *5 (Az. Ct. App. Nov. 24, 2017) ("Cynthia maintains she was prejudiced by having to initiate a motion to hold James in contempt, and by incurring associated attorney fees … [b]ut we conclude this does not reflect an injury or a

Plaintiffs do not assert that the timing of Defendants' motion hindered their ability to respond to Defendants, nor do they allege that they otherwise changed their position or approach to their case to their detriment. Thus, Plaintiffs have failed to meet their heavy burden to establish laches.

II. WHETHER PLAINTIFFS' CERTIFICATE OF MERIT SUBSTANTIALLY COMPLIES WITH IOWA CODE SECTION 147.140

Preservation of Issue

Issues must ordinarily be both raised and decided by the district court in order to be preserved for appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Defendants agree that the issue of substantial compliance was preserved for appeal.

Standard of Review

The Iowa Supreme 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. Cath. Health Initiatives-Iowa, Corp.,* 7 N.W.3d 367, 373 (Iowa 2024).

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change in position as a result of the delay required to establish laches." (citation and internal quotation marks omitted)).

A. Plaintiffs' Certificate of Merit Does Not Substantially Comply With Iowa Code Section 147.140

Plaintiffs argue that their certificate of merit was substantially compliant. The main thrust of "substantial compliance" is to ensure "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Superior/Ideal, Inc. v. Board of Review of City of Oskaloosa*, 419 N.W.2d 405, 406 (Iowa 1988). The reasonable objectives of the certificate of merit statute are to "(1) provide verified information about the medical malpractice allegations to the defendants and (2) do so earlier in litigation." *McHugh*, 966 N.W.2d at 289. The absence of showing that the certificate of merit was under oath/affirmation or under penalty of perjury goes to both prongs, but particularly the "verified information" prong. *Id.*

In *Miller*, the Iowa Supreme Court specifically rejected the argument that a document that was not signed under oath consistent with Iowa Code Section 622.85 and did not contain specific "under penalty of perjury" language consistent with Iowa Code section 622.1(2) substantially complied with Iowa Code Section 147.140(1)(b). *Miller*, 7 N.W.2d at 374-76. The Court quoted approvingly the proposition that "'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.'" *Id.* at 375 (quoting *Tunia v. St. Francis Hospital*, 363 N.J. Super. 301, 832 A.2d 936, 939 (N.J. Super. Ct. App. Div. 2003). The Court also determined that the "under penalty of perjury" language was essential to compliance with Iowa Code Section 622.1(2). *Id.*

In *Shontz*, the Court reaffirmed and cemented its holding in *Miller* that Section 147.140 "unambiguously requires the expert to timely sign the certificate under oath and that [an expert's] unsworn signature did not substantially comply with the affidavit requirement." 2024 WL 2868931 at *1. Applying that holding to a certificate of merit that contained substantially the same language that Plaintiffs' certificates did in this case, the *Shontz* Court rejected the plaintiffs' claim of substantial compliance. *Id.* at *1–2.

Here, Plaintiffs have 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).[7] Absent those essential features,

[7] In fact, if Plaintiffs' arguments are accepted, their expert will have perjured himself, claiming he was under oath while not actually having been sworn upon or placed under oath.

controlling Iowa authority holds that the document does not substantially comply with Section 147.140. Plaintiffs' assertion that the language "being first duly sworn on oath, deposes" is sufficient for substantial compliance ignores the *Miller* Court's approval of the proposition that a jurat or specific "under penalty of perjury" is a substantive requirement that goes to the heart of the affidavit itself. *Miller*, 7 N.W.2d at 375. Indeed, this argument was made by the plaintiffs in *Shontz* and rejected by the Iowa Supreme Court. (*Shontz* Pls.' Br. at 14–17, Defs' MTD Reply Ex. A; D0063). Contrary to Plaintiffs' assertion, an expert's failure to sign a certificate of merit under oath or penalty of perjury is not a mere procedural deficiency and cannot be substantial compliance.

In *Shontz,* the plaintiffs asserted that the language "affirms and states as follows" accomplished substantial compliance. 2024 WL 2868931 at *1–2. The dictionary definition of an affirmation is "[a] solemn pledge equivalent to an oath but without reference to a supreme being or to swearing." Affirmation, Black's Law Dictionary (11th ed. 2019). The Iowa legislature has made oaths and affirmations interchangeable. *See* Iowa Code § 4.1(19). Thus, the Iowa Supreme Court's rejection of the

mere language "affirms" is also a rejection of the mere language "sworn on oath" as substantially compliant. Indeed, in *In re Est. of Entler*, 398 N.W.2d 848, 850 (Iowa 1987), the Iowa Supreme Court specifically rejected the language "the undersigned, being duly sworn (or affirmed)" as sufficient to satisfy the requirement of an affidavit. *See also State v. Carter*, 618 N.W.2d 374, 376 (Iowa 2000) (en banc) (explaining that a signature for an application that the content was "true and correct" did not comply with section 622.1). While the language in Plaintiffs' certificate of merit is not precisely the same as the language rejected in *Shontz*, it is not *distinguishable* under the Iowa Supreme Court's jurisprudence such that this Court can find substantial compliance with the affidavit requirement of Iowa Code Section 147.140 in spite of *Miller* and *Shontz*.

Simply put, Plaintiffs' certificate of merit does not substantially comply with Iowa Code section 147.140 under this Court's jurisprudence. Dr. Gerlinger did not sign the certificate of merit after being administered an oath or affirmation by a qualified official, nor did he sign

the certificate "under penalty of perjury." The certificate's[8] use of words or phrases such as "being first duly sworn on oath" or "deposes" does not overcome the lack of an administered oath or affirmation or the lack of compliance with Iowa Code section 622.1's "under penalty of perjury" language. Plaintiffs' arguments to the contrary entirely ignore the clear holdings in *Miller* and *Shontz*. In fact, the failure of all of their arguments is highlighted by the final words of Dr. Gerlinger's certificate, which state that the statements contained therein represent those which he *will* testify to under oath (*i.e.*, in the future, once actually placed under oath).

[8] Plaintiffs' 10-page semantic argument that a Certificate of Merit Affidavit does not actually have to be an "affidavit," but can be an unsworn "certificate," is a red herring argument that does not warrant meaningful time or attention from this Court. It is also belied by the fact 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**." Here, there's no question that Dr. Gerlinger's Certificate of Merit Affidavit was <u>not</u> made under penalty of perjury, as it lacked a jurat or "under penalty of perjury" language. Thus, Defendants do not believe said arguments warrant substantive discussion and believe that the existing jurisprudence of this court on Iowa Code section 147.140 makes clear that a substantially compliant affidavit is required, not some other form of certificate or unsworn declaration. *See Miller, passim*.

B. Dr. Gerlinger's Subsequent Affidavit Does Not Cure the Defect

Plaintiffs' reliance on a subsequently served affidavit from Dr. Gerlinger stating that he believed his conscience was bound and that he was stating his opinions under penalty of perjury does not cure the deficiencies in Plaintiffs' certificate of merit. If there is no jurat, the party submitting the affidavit needs to provide independent proof that a proper administration of an affirmation occurred to the signer of the affidavit. *Entler*, 398 N.W.2d at 850. Dr. Gerlinger's affidavit provides no such proof and offers no evidence that Dr. Gerlinger was administered an oath by a qualified official. This affidavit claiming Dr. Gerlinger "believed" he was under oath does not and cannot cure the fact he was not placed under oath or affirmation by an officer qualified to do so and the fact that the certificates did not include "under penalty of perjury" language required by Iowa Code section 622.1 at the time of signing.

For example, in *State v. Carter*, the prosecution did not depend on whether the defendant believed they were under oath or signed on penalty of perjury when they signed the document. Rather, the *Carter* Court's inquiry was whether the defendant was actually given an oath or signed a document under penalty of perjury to sustain a perjury

conviction. *See Carter*, 618 N.W.2d at 377-78. Further, in *Miller*, the Court rejected the plaintiff's argument that a subsequently filed report signed under penalty of perjury cured the violation of section 147.140. *Miller*, 7 N.W.3d at 367; *see also Est. of Fahrmann by Fahrmann v. ABCM Corp.*, 999 N.W.2d 283, 287–88 (Iowa 2023) (holding a properly sworn affidavit served 44 days after the statutory deadline did not cure the violation). As such, Plaintiffs' attempts to cure the deficient certificates of merit cannot save this case from mandatory dismissal pursuant to Iowa Code section 147.140.

Lastly, Plaintiffs' argument that the "under penalty of perjury" language contained in Iowa Code section 622.1 is not essential to bind the conscience of the declarant is specifically precluded by Iowa case law. In *Carter*, the Court noted that "[a] certification which does not contain language which substantially complies with this phrase ["under penalty of perjury"] is outside the statute [section 622.1]." *Carter*, 618 N.W.2d at 378. The Court later clarified in *Miller* that "[t]he 'under penalty of perjury' language **must be included**." *Miller*, 7 N.W.3d at 375 (emphasis added). The fact that Dr. Gerlinger signed his certificate of merit with the language "first duly sworn on oath" does not constitute substantial

compliance with Iowa Code section 622.1 and their textual arguments to wriggle out of established law are unavailing.[9]

III. WHETHER APPLICATION OF IOWA CODE SECTION 147.140 IS CONSTITUTIONAL

Preservation of Issue

Issues must ordinarily be both raised and decided by the district court in order to be preserved for appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Defendants agree that the issue of the constitutionality of Iowa Code section 147.140 was preserved for appeal.

Standard of Review

Constitutional claims are reviewed de novo. *State v. Anspach*, 627 N.W.2d 227, 231 (Iowa 2001).

A. Iowa Code Section 147.140 Is Constitutional

As an alternative argument, Plaintiffs ask this Court to overlook the failure to substantially comply with Section 147.140 and find the statute unconstitutional. Iowa Code Section 147.140 is constitutional because it is a reasonable procedural requirement like those the Iowa Supreme Court and other state supreme courts have upheld. Thus, the

[9] Particularly where, like here, he was not "duly sworn on oath".

Court must apply a rational basis standard, and Section 147.140 is rationally related to a legitimate governmental interest in reducing the cost and increasing availability of health care.

B. Statutes are Presumptively Constitutional

When a statute is enacted, it is presumed that the statute is intended to comply with the Iowa and United States Constitution. Iowa Code § 4.4(1). Even before courts determine the appropriate level of scrutiny, they note that "statutes are cloaked with a presumption of constitutionality." *Hensler v. City of Davenport*, 790 N.W.2d 569, 578 (Iowa 2010) (citation omitted). The party challenging the constitutionality of a statute must prove that it is unconstitutional beyond a reasonable doubt. *Iowa State Educ. Ass'n v. State*, 928 N.W.2d 11, 15 (Iowa 2019).

C. The Court Must Apply a Rational Basis Review because Iowa Code Section 147.140 does not Deprive Plaintiffs of a Fundamental Right of Access to the Courts

1. Statutes That Treat Malpractice Plaintiffs Differently Than Other Litigants Do Not Burden Fundamental Rights and Are Reviewed Under Rational Basis Review

Iowa Code Section 147.140 regulates health care malpractice actions. The Iowa Supreme Court has noted that most challenges to

"legislation regulating malpractice litigation" are resolved using a rational basis test. *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 557 (Iowa 1980); *see also Koppes v. Pearson*, 384 N.W.2d 381, 384 (Iowa 1986) (reviewing medical malpractice specific statute of limitations under rational basis); *Fitz v. Dolyak*, 712 F.2d 330, 332 (8th Cir. 1983) (applying Iowa law) ("We agree with the district court that the proper level of analysis here is the rational basis test. As the majority of courts have held, legislation regulating medical malpractice litigation involves neither a suspect classification, nor a fundamental right so the strict scrutiny standard is inappropriate." (footnotes omitted)). The legislature can adopt different procedures for different classes of litigants, as long as the classification is reasonable and all litigants in the same class are treated equally. *Thomas v. Fellows*, 456 N.W.2d 170, 172 (Iowa 1990). Section 147.140 treats all similarly situated litigants equally, *i.e.*, plaintiffs asserting malpractice claims against health care providers, and its purpose is rationally related to legitimate governmental goals in reducing the cost of and increasing access to health care. Thus, Section 147.140 is constitutional.

2. Iowa Code Section 147.140 is a Reasonable Procedural Requirement.

Even assuming Plaintiffs have a right to access the courts for their claims in this case, Section 147.140 does not improperly burden that right. Section 147.140 does not create the need for expert testimony. Claims for professional negligence, like health care malpractice claims, generally require expert testimony as a matter of common law. *See Humiston Grain Co. v. Rowley Interstate Transp. Co.*, 512 N.W.2d 573, 575 (Iowa 1994); *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 402 (Iowa 2017). Section 147.140 only applies to claims that already required expert testimony to establish a prima facie case. The only financial impact of Section 147.140 is that it moves up the time at which a plaintiff needs to consult with an expert witness. The Iowa Supreme Court has analyzed similar statutes and found that reasonable procedural requirements do not burden the right to access the courts. *See, e.g., Thomas v. Fellows*, 456 N.W. 2d 170 (Iowa 1990).

Iowa Code Section 668.11 is similar to Section 147.140. Section 668.11 requires, in relevant part, that a plaintiff in a professional negligence case designate expert witnesses within 180 days of the defendant's answer unless the Court extends that time. Iowa Code §

668.11(1). If the plaintiff fails to timely designate the expert, the Court "shall" prohibit the expert from testifying unless the plaintiff shows good cause. *Id.* at § 668.11(2). The Iowa Supreme Court has found that Section 147.140, like Section 668.11, is intended to require plaintiffs to assemble their proof early in litigation to reduce litigation costs. *See Miller*, 7 N.W.3d at 374; *Struck*, 973 N.W.2d at 539.

Plaintiffs' access to the courts argument is identical to the arguments against Section 668.11 that the Iowa Supreme Court rejected in *Thomas v. Fellows*, 456 N.W. 2d 170 (Iowa 1990). The plaintiffs argued that Section 668.11 abridged their right to access the courts, and thus strict scrutiny should apply. *Id.* at 172. The Iowa Supreme Court held "[S]ection 668.11 does not abridge the plaintiffs' right of access to the courts; it merely establishes reasonable procedural requirements in the exercise of that right. We therefore reject the plaintiffs' strict scrutiny argument and apply the traditional 'rational basis' test." *Id.* Just like the expert designation deadline in Section 668.11, the certificate of merit requirement is a reasonable procedural requirement applicable to cases that otherwise require expert witnesses, and therefore the Court must analyze Section 147.140

under the rational basis standard.

3. Other States Have Found That Similar Certificate of Merit Statutes Do Not Improperly Burden a Plaintiff's Ability to Access the Courts

Other jurisdictions with similar certificate of merit statutes have found that they do not violate a plaintiff's right to access courts. Illinois' certificate of merit statute is more restrictive than Iowa's. It requires, subject to certain exceptions, that the plaintiff attach the certificate of merit to the petition. *See* 735 Ill. Comp. Stat. Ann. 5/2-622. The Illinois Supreme Court held that the certificate of merit requirement did not improperly burden a plaintiff's ability to access the courts. *See DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139 (Ill. 1992). Similar to the reasoning in *Kennis*, the Court held "the legislature may, consistent with the separation of powers principle, impose requirements governing matters of procedure and the presentation of claims. Such measures do not fail on constitutional grounds simply because noncomplying actions may suffer dismissal." *Id. at* 1146. The Court also noted that the certificate of merit requirement was consistent with the substantive law requiring expert testimony to establish a healing arts negligence claim, noting that the certificate of

merit statute "merely accelerates the time by which an expert opinion must be obtained." *Id.* at 1144.

The Missouri Supreme Court also addressed an access-to-courts challenge to Missouri's certificate of merit statute. The Court employed largely the same analysis as *Kennis* and *DeLuna*:

> The right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes. The substantive law requires that a plaintiff who sues for personal injury damages on the theory of health care provider negligence prove by a qualified witness that the defendant deviated from an accepted standard of care. Without such testimony, the case can neither be submitted to the jury nor be allowed to proceed by the court. The affidavit procedure of § 538.225 serves to free the court system from frivolous medical malpractice suits at an early stage of litigation, and so facilitate the administration of those with merit. Thus, it denies no fundamental right, but at most merely redesigns the framework of the substantive law to accomplish a rational legislative end. The affidavit procedure neither denies free access of a cause nor delays thereafter the pursuit of that cause in the courts. It is an exercise of legislative authority rationally justified by the end sought, and hence valid against the contention made here.

Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 510 (Mo. 1991) (cleaned up). *See also Barlett v. N. Ottawa Cmty. Hosp.*, 625 N.W.2d 470, 476 (Mich. Ct. App. 2001) (upholding certificate of merit statute because it did not divest plaintiff of cause of action or prohibit

plaintiff from filing a cause of action, it simply required an affidavit that a health care provider reasonably believed the case has merit).

Like the certificate of merit statutes in Missouri and Illinois, Section 147.140 does not deny any fundamental right or change the substantive law. It simply moves up the deadline by which the plaintiff must show that it can offer the necessary expert testimony to make a prima facie case of negligence against a health care provider. Such reasonable procedural requirements do not deny any fundamental rights and are constitutional if they have any rational basis.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants respectfully request that the Court affirm the district court's Ruling granting Defendants' Motion to Dismiss.

REQUEST FOR ORAL ARGUMENT

Defendants respectfully request that this matter be set for oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitations of Iowa Rs. App. P. 6.903(1)(g) and 6.903(1)(i)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 font and contains 12,472 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

/s/ *Joseph F. Moser* Date: January 15, 2025

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on January 15, 2025, the undersigned did serve the Defendants–Appellees' Brief and Request for Oral Argument with the Iowa Supreme Court and upon counsel for the other parties appearing in this appeal through the EDMS system to:

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