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

SUPPLEMENTAL BRIEF OF DEFENDANTS–APPELLEES

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ARGUMENT

On March 20, 2025, this Court ordered supplemental briefing "regarding the application of the court's decision in *Banwart v. Neurosurgery of North Iowa P.C.*, No. 24-0027, 2025 WL 727791 (Iowa Mar. 7, 2025)." While Plaintiffs' lengthy brief styled as "Plaintiffs' Motion for Supplemental Briefing" called for creation of a loophole to avoid affirmation of the district court's dismissal, Defendants argue that the *Banwart* decision is fully dispositive of the substantive issues on appeal and requires affirmation of the dismissal.

Consistent with this Court's holdings and bright-line waiver rule espoused in *Banwart*, this Court should affirm the district court's dismissal. Alternatively, to best serve the interests of judicial economy

under the circumstances of this recently rendered decision, Defendants request and move this Court to utilize its authority under Iowa R. App. P. 6.1006(2) to affirm the district court's dismissal of this action, as this matter is legally indistinguishable from the recently published *Banwart* decision and the grounds for affirmation are now apparent.

I. *BANWART* IS DISPOSITIVE OF WHETHER DEFENDANTS WAIVED THEIR RIGHT TO DISMISSAL UNDER IOWA CODE SECTION 147.140

This Court's decision in Banwart conclusively and dispositively addresses the majority of the arguments before it in this matter with respect to "waiver." These include (1) whether waiver can occur prior to the dispositive motion deadline; (2) whether participation in discovery can result in waiver; and (3) the purpose of the cost savings provision in the statute. In *Banwart*, this Court held:

> The legislature included no deadline within section 147.140(6) to challenge a deficient certificate of merit affidavit. **We have already recognized that defendants, by conducting discovery, do not "constructively waive[ ]" their right to challenge deficient certificates of merit under section 147.140(6). Using the dispositive motion deadline as a bright line for determining waiver avoids a fact-intensive inquiry into how much discovery is too much**. Going forward, parties should rely upon this bright line rather than statements we made in *S.K.* We note, however, that the outcome in *S.K.* is consistent with the bright-line rule here.

> **The cost avoidance purpose of section 147.140 is for the protection and benefit of medical malpractice defendants, not plaintiffs.** "Section 147.140(3) incorporates by reference, and works in tandem with, the expert disclosure requirements in Iowa Code section 668.11 (requiring disclosure of expert witnesses in professional liability cases 'within one hundred eighty days of the defendant's answer')." **In our view, defendants may control the timing of their motions for summary judgment, subject to the district court's dispositive motion deadline, without waving their rights under section 147.140.**
>
> We hold as a matter of law that the defendants did not waive their statutory right to dismissal under Iowa Code section 147.140(6) when their motion for summary judgment was filed before the district court's dispositive motion deadline.

Banwart v. Neurosurgery of N. Iowa, P.C., No. 24-0027, 2025 WL 727791, at *7–8 (Iowa Mar. 7, 2025) (internal citations omitted) (emphasis added).

As argued in Defendants' opening briefing, Defendants in this case 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)). Given that Defendants' Motion in this case was filed well in advance of trial and all pretrial filing deadlines, including the dispositive motion deadline, the bright-line rule established by *Banwart* conclusively disposes of Plaintiffs' waiver arguments and mandates affirmation of the district court's decision that the Motion was

both timely and that Defendants did not waive their right to seek dismissal under Iowa Code § 147.140.

Plaintiffs argue that the bright line rule espoused in *Banwart* does not apply according to the Court's prior ruling in *S.K. by & through Tarbox v. Obstetric & Gynecologic Assocs. of Iowa City & Coralville, P.C.*, 13 N.W.3d 546 (Iowa 2024), *as amended* (Jan. 14, 2025). They claim *Banwart* does not operate to allow Defendants to "unwaive" a right that they supposedly already "waived" by engaging in litigation conduct. Plaintiffs are mistaken. *Banwart* unambiguously say the opposite is true and Defendants cannot have waived their rights through litigation conduct. Thus, *Banwart* affirmatively disposes of such a patently flawed argument.

First and foremost, as a matter of law clearly established in *Banwart*, Defendants cannot and did not waive any right by engaging in litigation conduct or conducting discovery. Further, in *Banwart*, the Court specifically noted that "the outcome in *S.K.* is consistent with the bright-line rule here." *Banwart*, 2025 WL 727791 at *7. In other words, the Court's holding that the *S.K.* Defendants waived their right to dismissal because they took their case through a jury trial without

raising the issue is consistent with the bright line rule in *Banwart*. The *S.K.* defendants sought dismissal *after* the dispositive motion deadline, after a jury verdict and while on appeal. Thus, while the *S.K* defendants had waived their right to dismissal by waiting to request that relief until on appeal, nothing in *S.K.* dictates the conclusion that Defendants in this case had "already waived" their right to dismissal by engaging in litigation conduct prior to the *Miller*[1] and *Schontz*[2] decisions.

In fact, again, *Banwart* says the opposite. The ruling Plaintiffs seek would actually be inconsistent with the clarity this Court has attempted to provide by establishing a bright line rule. In contrast to *S.K.*, the Defendants in this case filed their motion to dismiss prior to the dispositive motion deadline. The bright line rule in Banwart clearly applies to all cases "going forward," including cases such as this that are to be finally decided on appeal after this court's decision in *Banwart*. Pursuant to *Banwart*, the district court's dismissal must be affirmed.

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[1] *Miller v. Cath. Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367 (Iowa 2024).

[2] *Shontz v. Mercy Med. Ctr.-Clinton, Inc.*, 7 N.W.3d 775 (Iowa 2024).

II. *BANWART* IS DISPOSITIVE OF WHETHER PLAINTIFFS' CERTIFICATE OF MERIT SUBSTANTIALLY COMPLIES WITH IOWA CODE SECTION 147.140

Banwart likewise disposes of Plaintiffs' arguments that their certificate of merit was substantially compliant with Iowa Code section 147.140. In *Banwart*, this Court addressed whether the Certificates of Merit "affirmed" by the experts were substantially compliant. *Banwart*, 2025 WL 727791, at *3. This Court reaffirmed its holdings in *Miller* and *Shontz*, reiterating that "the expert must sign the certificate of merit under oath or 'under penalty of perjury.'" *Id*. (*citing Miller v. Cath. Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367 (Iowa 2024); *Shontz v. Mercy Med. Ctr.-Clinton, Inc.*, 7 N.W.3d 775 (Iowa 2024)). In discussing the *Banwart*'s focus on "affirmation" as substantially compliant, the Court noted that the lack of a jurat or the "under penalty of perjury" remains fatal to Plaintiffs' substantial compliance arguments. The Court specifically confirmed that: "If the certificate lacks a jurat, then the "under penalty of perjury" language must be included to satisfy section 147.140. *Id.* (citing *Miller*, 7 N.W.3d at 375; *State v. Carter*, 618 N.W.2d 374, 377–78 (Iowa 2000) (en banc) (affirming dismissal of perjury charge because the "under penalty of perjury" phrase was missing).

Further, here, where Plaintiffs are fully committed to their claim that the inclusion of the word "oath" is sufficient, despite the fact that the affiant was not actually placed under oath, their affidavit lacked a jurat, and their affidavit failed to include "under the penalty of perjury," language, this Court's inclusion of Footnote 3 in *Banwart* is conclusively "fatal" to Plaintiffs' arguments. This Court noted:

> *See* Iowa Code § 4.1(19) (**"The word 'oath' includes affirmation in all cases where an affirmation may be substituted for an oath, and in like cases the word 'swear' includes 'affirm.'"** (emphases omitted)). An affidavit requires a third person authorized to administer the oath, and the permissible substitute for an affidavit requires the statement that the person is signing under "penalty of perjury." *Id.* § 622.1(1). **The <u>omission of that language is fatal</u>** to the Banwarts' case.

Banwart, 2025 WL 727791, at *4, fn. 3. (emphasis added)

As in *Banwart*, Plaintiffs' certificate's[3] use of words or phrases such as "being first duly sworn on oath" or "deposes" does not overcome the

[3]There is no question that Dr. Gerlinger's Certificate of Merit Affidavit was <u>*not*</u> made under penalty of perjury, as it lacked either a jurat or "under penalty of perjury" language. While Plaintiffs' counsel argues this failing should be excused, there is no question that Plaintiffs' counsel did not actually place Dr. Gerlinger under oath, nor did Dr. Gerlinger sign "under penalty of perjury." This failing cannot be excused by this court, lest it undermine the precedent it has routinely cited in relation to compliance with affidavit requirements. *Banwart*, 2025 WL 727791, at

lack of an administered oath or affirmation, the lack of a jurat, nor the lack of compliance with Iowa Code section 622.1's "under penalty of perjury" language. *Banwart*, 2025 WL 727791, at *4, fn. 3. As such, the door on their substantial compliance arguments is firmly slammed shut by *Banwart*. Once again, *Banwart* mandates affirmation of the district court's ruling dismissing this case.

III. *BANWART* IS INSTRUCTIVE ON WHETHER APPLICATION OF IOWA CODE SECTION 147.140 IS CONSTITUTIONAL

A. Iowa Code Section 147.140 Is Constitutional

It bears repeating that challenging the constitutionality of Iowa Code section 147.140 is Plaintiffs' alternative, fallback position. They ask this Court to overlook both the fact that Defendants' did not waive their right to seek dismissal and Plaintiffs' 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 Court must apply a rational basis standard

*5. *See* Pltf. Supp. Br. at p. 7, fn. 1. The fact that the signed document was sent to a notary, who did not place the affiant under oath, is of no consequence.

and find Section 147.140 is rationally related to a legitimate governmental interest in reducing the cost and increasing availability of health care.

Banwart confirms as much. In discussing whether section 147.140's "oath" and "substantial compliance" provisions are unconstitutionally void for vagueness, this Court determined they are not, stating:

> As we have held repeatedly, the statute unambiguously requires that the expert sign the certificate of merit under oath or under penalty of perjury. We reject void-for-vagueness challenges to unambiguous statutes.
>
> "[I]n determining whether a statute is unconstitutionally vague, this court presumes the statute is constitutional and gives 'any reasonable construction' to uphold it." The "challengers to a statute must refute 'every reasonable basis' upon which a statute might be upheld." The void-for-vagueness doctrine is typically applied to criminal statutes when it is unclear what conduct is prohibited. Criminal statutes are subject to stricter scrutiny than those imposing only civil penalties. "Civil statutes ... generally receive less exacting vagueness scrutiny." "A civil statute is generally deemed unconstitutionally vague only if it commands compliance in terms 'so vague and indefinite as really to be no rule or standard at all.' The Banwarts cannot even show section 147.140 is ambiguous, and they fall well short of demonstrating that this civil statute is so vague as to be unconstitutional.
>
> . . .

> We hold that Iowa Code section 147.140 is not unconstitutionally void for vagueness.

Banwart, 2025 WL 727791, at *6 (internal citations omitted).

B. Iowa Code section 147.140 is Presumptively Constitutional

As discussed in *Banwart*, 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

As *Banwart* again conclusively states, Iowa Code section 147.140 unambiguously requires that the expert sign the certificate of merit under oath or under penalty of perjury. *Banwart*, 2025 WL 727791, at *6 (internal citations omitted). Since the statute is unambiguous and conclusively found not to be void for vagueness, Plaintiffs turn to

another alternative argument, claiming that it impacts Plaintiffs' access to the courts. Even assuming Plaintiffs have a right to access the courts for their claims in this case, however, 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). 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).

This 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 at 172.

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.

CONCLUSION

WHEREFORE, for the foregoing reasons and those addressed in Defendants' prior briefing, Defendants respectfully request that the Court affirm the district court's Ruling granting Defendants' Motion to Dismiss.

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 2,451 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1) and consistent with this Court's order limiting supplemental briefing to 3,250 words.

/s/ *Joseph F. Moser* Date: April 14, 2025

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on April 14, 2025, the undersigned did serve the Defendants–Appellees' Supplemental Brief 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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