IN THE SUPREME COURT OF IOWA
NO. 21-0859

REED DICKEY, MICHAEL DICKEY, and ANDREA DICKEY,

Plaintiffs-Appellants,

v.

JEREMY HOFF, JENNIE EDMUNDSON MEMORIAL HOSPITAL, METHODIST JENNIE EDMUNDSION HOSPITAL and LOESS HILLS BEHAVIORAL HEALTH, JEFF RUTLEDGE, THE SCHOOL DISTRICT OF LINCOLN, (a/k/a LINCOLN PUBLIC SCHOOLS), and EMILY GORMAN,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR
POTTAWATTAMIE COUNTY
THE HONORABLE MICHAEL D. HOOPER

FINAL APPEAL BRIEF OF APPELLEES JENNIE EDMUNDSON MEMORIAL HOSPITAL, METHODIST JENNIE EDMUNDSON HOSPITAL LOESS HILLS BEHAVIORAL HEALTH, AND EMILY GORMAN

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1001 provides that the Supreme Court shall retain the following types of cases: "(a) Cases presenting substantial constitutional questions as to the validity of a statute, ordinance, or court or administrative rule…" This appeal presents a substantial constitutional question related to the validity of the Court's Supervisory Orders issued in response to the COVID-19 pandemic. This issue is of broad public importance because the Court's decision in this litigation will affect the substantive rights and responsibilities of parties to other litigation currently before District Courts in the State of Iowa, as well as litigation that may come before the Courts in the near future.

STATEMENT OF THE CASE

Plaintiffs' Statement of the Case leaves out several salient points that will affect the Court's review of this case. Specifically, Plaintiff Reed Dickey (hereinafter "Reed") was required to file a Certificate of Merit Affidavit in the first case by April 5, 2020, 60 days after Defendant Methodist Jennie Edmundson Hospital (hereinafter "Jennie Ed") filed its Answer to Reed's

Petition. (Def. Jennie Ed.'s Answer to Pl's Petition – first case). Jennie Ed filed a Motion for Summary Judgment on September 10, 2020, premised upon Reed's failure to timely file a Certificate of Merit Affidavit pursuant to Iowa Code § 147.140. Reed voluntarily dismissed the first case prior to the hearing on Jennie Ed's Motion for Summary Judgment.

Jennie Ed and Emily Gorman disagree that this matter was timely filed as it was filed on December 11, 2020, four days after the expiration of the statute of limitations on December 7, 2020. The Supervisory Orders issued by the Iowa Supreme Court, including its March 17, 2020, April 2, 2020, May 8, 2020 and May 22, 2020 Orders, Unconstitutionally tolled the statute of limitations for civil actions such as the above-captioned matter in violation of the Separation of Powers Clause and Due Process Clause of the Iowa Constitution, and as such, should not be considered when determining the timeliness of Plaintiffs' claims.

Jennie Ed and Emily Gorman also disagree with Plaintiffs' characterization of their Motion to Reconsider, Enlarge, or Amend the District Court's May 14, 2021 Order. Plaintiffs' Motion was solely directed at the Court's rulings granting Defendant Lincoln Public School's and Jeff Rutledge's Motion to Dismiss. (Pl's Mot. to Reconsider). Plaintiffs' Motion

did not request the Court to Reconsider, Enlarge or Amend its Order as it pertains to Jennie Ed and Emily Gorman. (Pl's Mot. to Reconsider).

STATEMENT OF THE FACTS

Plaintiffs' Statement of the Facts makes a statement as to the requirements of Iowa Code §280.13C and when a student should be removed from participation when a student exhibits signs or symptoms related to a concussion or brain injury. (Pls/Appellants' Brief). Plaintiffs' statements are not facts related to this case, but rather are statements of law that may or may not be applicable to this case and should not be considered in this Court's review of this case. Aside from this statement of Law, these Appellees generally concur with the facts as set forth in Plaintiffs' Statement of Facts, and further concur in the facts as asserted in Appellee Hoff's Final Brief.

ARGUMENT

1. The District Court correctly dismissed Plaintiffs' claims on the Grounds that the Iowa Supreme Court Acted Unconstitutionally in Tolling the Statute of Limitations Through its Supervisory Orders

A. Plaintiffs did Not Properly Preserve this Issue for Appellate Review

Plaintiffs did not properly preserve this issue for Appellate Review. Plaintiffs assert in their brief that they timely resisted Defendants' Pre-Answer Motions to Dismiss, and timely filed a Motion to Reconsider, Enlarge or Amend, pursuant to Iowa R. Civ. P. 1.904(3), the District Court's May 14,

20201 Order dismissing Plaintiffs' claims against Jennie Ed and Emily Gorman. Plaintiffs' Motion to Reconsider, Enlarge or Amend the Court's May 14, 2021 ruling dismissing Plaintiffs' claims was directed **solely** towards the Court's ruling dismissing Plaintiffs' claims against Defendants Jeff Rutledge and The School District of Lincoln a/k/a Lincoln Public Schools. (Pl's Mot. to Reconsider). Plaintiffs' Motion did not ask the Court to reconsider, enlarge or alter its rulings as it pertains to Jennie Ed and Emily Gorman. As such, Plaintiffs' Notice of Appeal as it pertains to Jennie Ed and Emily Gorman was filed after the 30-day deadline provided in Iowa R. App. P. 6.101(1)(b) and Plaintiffs' appeal with respect to Jennie Ed and Emily Gorman should be dismissed as out of time.

B. Scope and Standard of Review

Appellees agree with Appellants' standard of review as cited in their Brief.

C. Argument

I. <u>The Courts Cannot Act or Use their Authority to Adopt Rules When the General Assembly Has Expressly Acted</u>

a. The Iowa General Assembly Previously Acted When It Passed the Statute of Limitations in Iowa Code § 614.1.

The Iowa General Assembly previously acted when it passed the Statute of Limitations contained in Iowa Code § 614.1. The predecessors to

Iowa Code § 614.1, were initially enacted in 1838-1839. Iowa Code § 614.1 or its predecessors have been amended several times, including most recently in 2021. Plaintiffs concede in their Brief that the Assembly set statutes of limitations for civil actions in Iowa; however, Plaintiffs argue the legislature did not specifically act to "…adjust statutes of limitations for civil actions in response to the global COVID-19 pandemic…" (Pls/Appellants' Brief). Plaintiffs provided no case law, statute, or other authority that the Iowa General Assembly, or any state legislature in the United States, is required to act to either change or reaffirm existing state law, specifically statutes of limitations, in response to a global health crisis or other disaster or emergency situation, in order for the law to remain in effect during a disaster or emergency. Plaintiffs believe the Iowa General Assembly should have passed a bill, signed into law by Governor Reynolds, modifying the statutes of limitations for civil actions in response to COVID-19. That did not occur, and as stated below, it is within the province of the Iowa General Assembly's authority to make policy decisions such as changing, modifying or extending statutes of limitations. Moreover, Defendants' review of various actions taken by the state legislatures throughout the United States in response to COVID-19 indicates that **no** state legislature in the United States reaffirmed existing state law in either 2020 or 2021. National Council of State Legislatures, State

Action on Coronavirus (COVID-19) (Nov. 5, 2021 3:33 p.m.), ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx. Further, Plaintiffs' suggestion would lead to a waste of resources to reaffirm existing state law when the Iowa General Assembly needed to focus on how to best address the issues facing the citizens of the State of Iowa due to the pandemic. Without any statute passed by the Iowa General Assembly and signed into law by Governor Reynolds changing the statute of limitations for civil actions, Iowa Code § 614.1 remains the law of the State of Iowa applicable to Plaintiffs' case.

b. The Iowa General Assembly has the Authority to Make Policy Decisions

The Iowa General Assembly has the exclusive authority to make policy decisions, such as changing statutes of limitations applicable in various civil actions. The people vested the legislative authority inherent in them to the general assembly, and then imposed certain restrictions upon the exercise of that authority. *Knorr v. Beardsley,* 240 Iowa 828, 38 N.W.2d 236 (Iowa 1949). It follows, then that the legislative power of the general assembly is supreme and bounded only by the limitations written in the constitution. *Id.* at 244. Thus, the "power to declare legislation unconstitutional is one which courts exercise with great caution, and only when such conclusion is unavoidable." *Id.* at 839. The Iowa Supreme Court has specifically stated that it is not within

its province or power to question the wisdom and propriety of policy. *Id.* at 862. The Iowa Supreme Court has also stated that the judicial branch's authority to regulate practice and procedure in its Court must give way when the legislative department has acted. *State v. Thompson,* 2021 WL 401071 (Iowa 2021).

In the instant case, the Iowa General Assembly made a policy decision not to change the statutes of limitations for civil actions in response to the COVID-19 pandemic. In fact, the Iowa General Assembly passed several pieces of legislation, both in 2020 and 2021, related to COVID-19 relief. Specifically, the Iowa General Assembly passed legislation providing protection from liability to businesses and individuals for COVID-19 exposure or infection and providing instructional time waivers for school districts and private schools due to COVID-19-related interruptions. National Council of State Legislatures, State Action on Coronavirus (COVID-19) (Nov. 5, 2021 3:33 p.m.), ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx. Not only that, the Iowa General Assembly continued to introduce and pass COVID-19 legislation during its 2021 session, including legislation allowing parents or guardians to select full-time in-person instruction, and prohibiting mandatory disclosure of a person's vaccination status. National Council of State Legislatures, State Action on

Coronavirus (COVID-19) (Nov. 5, 2021 3:33 p.m.), ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx. The General Assembly's silence speaks volumes about its policy decisions related to COVID-19. The General Assembly's silence related to statutes of limitations means it did not believe it was necessary to change the statutes of limitations in civil actions in response the COVID-19 pandemic, and that Iowa Code § 614.1 should remain the law of the State of Iowa. This determination is exclusively within the General Assembly's ability to make policy decisions affecting Iowa law.

Plaintiffs further argue that the Iowa Supreme Court had to act because the Iowa General Assembly suspended its session in response to COVID-19. It is irrelevant that the Iowa General Assembly suspended its session in response to COVID-19. Plaintiffs provided no case law, statute, Constitutional or other authority that allows a co-equal branch of government to unilaterally elect to exercise the powers expressly provided in the Iowa Constitution to the legislative branch when the Iowa General Assembly is unable to act. In fact, the Iowa Constitution expressly states "…no person charged with the exercise of powers properly belonging to one of these departments **shall** exercise any function appertaining to either of the others." Iowa Const. art. III, § 1. It is Jennie Ed and Emily Gorman's position, as

described above and below, that the checks and balances and the rights and obligations provided in the Iowa and United States Constitutions become even **more** essential during times of uncertainty and crisis, such as a global pandemic. If a global health crisis is reason enough for the judicial branch to act as a legislative branch, then there is no telling what crisis or disaster may be concerning enough for a wayward executive to take the legislative and judicial power for himself or herself, thereby destroying our system of government.

Moreover, the Iowa General Assembly was not alone in suspending its activities. Twenty-seven other state legislatures suspended or modified their sessions to accommodate social distancing and to slow the spread of COVID-19, similar to actions taken by many industries to prevent the spread of COVID-19. Every state that suspended or modified their legislative activities at the beginning of the COVID-19 pandemic, including the State of Iowa, later resumed their sessions to complete their legislative work. Other states called special sessions to pass COVID-19-related legislation or to pass other legislation previously up for debate prior to the pandemic. A short suspension to prevent the spread of an infectious disease among the General Assembly, which would have stopped the session if enough Representatives and Senators became infected, made no impact on the General Assembly's ability to

complete its work and should not considered as part of the Court's review of this case.

c. Iowa Code § 614.1 was Adopted by the Iowa General Assembly and has been Upheld as Constitutional Countless Times; No Authority Existed for the Iowa Supreme Court to Abrogate the Legislative Mandate and Rights of Repose Held in the Citizenry by Its Supervisory Orders

The Iowa Constitution divides the powers of government into three separate departments, legislative, executive and judicial, "and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others." Iowa Const. art. III, § 1. The Judicial power vested in the Iowa Supreme Court is found at Article 5, section 4: "The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state." Iowa Const. art. V, § 4. The Legislature is vested with authority to pass laws limiting or barring a remedy for tort claims brought after the expiration of certain periods and has done so with respect to claims for injuries to persons and for medical malpractice. *See,* Iowa Code § 614.1(2) and § 614.1(9).

Statutes of limitations have long been upheld as Constitutional by the Iowa Supreme Court in cases properly before the Supreme Court. *Miller v. Boone Cty. Hosp.,* 394 N.W.2d 776, 783 (Iowa 1986)("We have long recognized that statutes of limitation have been enacted 'to afford security against stale demands, after the true state of the transaction may from a variety of causes, be either forgotten, or rendered in capable of explanation.' *Penley v. Waterhouse,* 3 Iowa 418, 441 (1856). 'The public has a legitimate interest in limiting time for bringing suits.' *Conner v. Fettkether,* 294 N.W.2d 61, 63 (Iowa 1980).)". The Judicial Branch is strictly limited in its review of legislative action and cannot act as a legislative body undoing the properly exercised powers of the legislature at its whim:

> It is of course understood the legislature may enact any law desired provided it is not clearly prohibited by some provision of the Federal or State Constitution. And in *Green v. City of Mount Pleasant*, 256 Iowa 1184, 1196, 131 N.W.2d 5, this Court held: The judicial branch of the government has no power to determine whether legislative Acts are wise or unwise, nor has it the power to declare an Act void unless it is plainly and without doubt repugnant to some provision of the Constitution."

Farrell v. State Bd. of Regents, 179 N.W.2d 533, 537 (Iowa 1970) *citing Graham v. Worthington*, 259 Iowa 845, 850 - 851, 146 N.W.2d 626 (1966). "Perhaps no canon of statutory construction is more firmly established than the one prohibiting courts from meddling with the general assembly's exclusive power of determining what laws it should enact. Of the countless

cases to this effect we cite only a few of the more recent ones. *Diamond Auto Sales, Inc. v. Erbe*, 251 Iowa 1330, 1333, 105 N.W.2d 650, 651; *Spurbeck v. Statton*, 252 Iowa 279, 284, 106 N.W.2d 660, 663; *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 1196, 131 N.W.2d 5, 13; and *Danner v. Hass*, 257 Iowa 654, 661, 134 N.W.2d 534, 539." *Frost v. State*, 172 N.W.2d 575, 584 (Iowa 1969).

Paragraph 20 of the March 17, 2020 Order, paragraph 33 of the April 2, 2020 Order, paragraph 3 of the May 8, 2020 Order, and paragraph 45 of the May 22, 2020 Order, overstep the mere supervisory or administrative operations of the court system, and strip citizens of substantive rights of limitation guaranteed by statute. The Supreme Court – in acting as a legislative body seeking to toll all statutes of limitations – overstepped its Constitutional authority and the paragraphs listed above lack force and effect to toll the application of Iowa Code § 614.1 to bar Plaintiffs' action and subject the entire case to dismissal with prejudice. It matters **not** how necessary or prudent the members this Court believe this extension was or is. The **only** question that matters is that the Court lacked the Constitutional Authority to undo what the General Assembly specifically addressed, and what the General Assembly chose not to address in response to COVID-19.

II. The Iowa Supreme Court's Supervisory Orders, including the May 22, 2020 Order, are Unconstitutional.

a. The Iowa Supreme Court's Supervisory Orders, including the March 17, 2020, April 2, 2020, May 8, 2020 and May 22, 2020 Supervisory Orders, were Issued when the Court had no Case or Controversy Before it.

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The Iowa Supreme Court's March 17, 2020, April 2, 2020, May 8, 2020 and May 22, 2020 Supervisory Orders (hereinafter "Supervisory Orders") tolling the statutes of limitations for civil actions were issued when the Court had no case or controversy before it. The United States Constitution allows the judicial power to be used to decide cases and controversies arising under the Constitution, the laws of the United States, and treaties made under their authority. U.S. Const. art. 3, §2. The "case and controversy" requirement means that a Plaintiff, throughout the litigation, has suffered or has been threatened with an actual injury traceable to the Defendant, and is an injury likely to be redressed with a favorable judicial decision. *Spencer v. Kemna,* 523 U.S. 1,118 S.Ct. 978, 140 L.Ed.2d 43 (1998). The "case and controversy" limitation requires an actual controversy to exist at all stages of review and adjudication. *Arizonans for Official English and Park v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). The "case or controversy" limitation is crucial to maintain the allocation of power among the legislative, executive,

and judicial branches of government set forth in the Constitution. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

Iowa's doctrine on standing largely parallels the federal doctrine, although standing under federal law is derived from constitutional restrictions not directly included in the Iowa Constitution. *Alons v. Iowa Dist. Court for Woodbury County,* 698 N.W.2d 858 (Iowa 2005). Most jurisdictions share these restrictions on judicial action based on policy grounds that explain a general, compatible approach to standing in federal and state law. *Reitz,* 50 Am .J. Comp. L. at 459-61.

In the instant case, the Iowa Supreme Court issued the Supervisory Orders as part of its ongoing response to the COVID-19 pandemic. The Supervisory Orders were not issued as part of any particular case or controversy before the Court. Instead, the Supervisory Orders were issued with the intention to direct the administrative functions of the Iowa State Courts while impacting the substantive rights of citizens previously codified by the Assembly, specifically the right of citizens to the elimination of stale claims in Iowa Code § 614.1. As such, to the extent they attempt to modify Statutes of Limitations, the Supervisory Orders must be declared

Unconstitutional, and the District Court's Order granting Defendants' Motions to Dismiss must be affirmed.

b. The Iowa Supreme Court's Supervisory Orders are an Unconstitutional Violation of Separation of Powers Clause of the Iowa Constitution.

The Supervisory Orders are an Unconstitutional violation of separation of powers. As stated above, the powers of the government of the State of Iowa are divided into the legislative, executive and the judicial, with the legislative authority vested in the General Assembly, consisting of a Senate and a House of Representatives. Iowa Const. art. 3, part 2, §2; Iowa Const., art. 3, § 1.

The doctrine of separation of powers requires a branch of government not to impair another in the exercise of their constitutional duties. *State v. Phillips,* 610 N.W.2d 840 (Iowa 2000). The doctrine of separation of powers is violated if one branch of government attempts to use powers clearly forbidden or granted to another branch. *Klouda v. Sixth Judicial Dist. Dept. of Correctional Services*, 642 N.W.2d 255 (Iowa 2002). In *Klouda*, the Iowa Supreme Court struck down statutes which created a pilot program in the Sixth Judicial District that transferred jurisdiction of probation cases from judges to administrative law judges. *Id.* The Iowa Supreme Court determined that the statutes creating the pilot program infringed on the District Court's jurisdiction over civil and criminal matters. *Id.* These matters, specifically

revoking probation, are akin to sentencing, which are functions clearly reserved to the judiciary. *Id.*

The Iowa Constitution reserves to the legislative branch the authority to regulate the practice and procedure in all Iowa Courts. *Thompson* at 7. Specifically, Article V, Section 14 of the Iowa Constitution provides that the general assembly will provide for a general system of practice in all of the Iowa Courts. *Id.* With that being said, the Court has recognized that the courts have the power to adopt rules for the management of cases on their dockets **in the absence of statue**. *Iowa Civil Liberties Union v. Critelli,* 244 N.W.2d 564 (1976). Thus, the judicial department's authority to regulate the practice and procedure must give way where the legislature has acted. *Thompson* at 6, Iowa Const. art. 5, § 14.

Other District Courts have faced the issue of the Court's supervisory orders extending the statutes of limitations in civil actions, and similarly determined that the Supervisory Orders were unconstitutional. In the case *Carter v. Dvensson and Estrada,* the Iowa District Court for Polk County granted summary judgment, in part, to the Defendants on the basis that Plaintiff's action was time-barred under Iowa Code § 614.1(2). *Carter v. Dvensson & Estrada*, Case No. LACL148145 (D. Polk Cnty. Sep. 15, 2021). The Court reasoned that the legislature has the authority to regulate the

practice and procedure in all Iowa courts, including the appellate courts. *Id.* Moreover, this Court has previously held it may not change statutory terms under the guise of judicial administration. *Id.* As such, the Court ruled that the Supreme Court's supervisory orders pertaining to tolling statutes of limitations are unconstitutional and do not alter the time limit for a Plaintiff to pursue their claim. *Id.*

In the case sub judice, the Iowa Supreme Court usurped the legislature's exclusive authority by changing the Statutes of Limitation applicable to all cases brought in the Iowa Courts. Iowa's statutes of limitations, including the statute of limitations for medical malpractice cases, are set by statute. Those statutes were passed by the Iowa General Assembly and signed into law by the Governor. The Iowa General Assembly has not passed any laws abrogating this authority, or delegating it to the judicial branch, either in general or specifically as it relates to the COVID-19 pandemic. Thus, the ability to regulate practice and procedure as it relates to deadlines to commence actions in the Iowa Courts remains with the legislative branch. The Supervisory Orders substantively amended those statutes, and essentially created new law in violation of the separation of powers doctrine, and the District Court's Order granting Defendants' Motion to Dismiss must be affirmed.

c. The Supervisory Orders also Unconstitutionally Deprive These Defendants of the Right to Dispose of Stale Claims Against Them Without Due Process of Law.

The Supervisory Orders also unconstitutionally deprive Jennie Ed and Emily Gorman of the right to dispose of stale claims against them without due process of law. Article 1, Section 1 of the Iowa Constitution states that all men and women have certain inalienable rights – among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness. Iowa Const. art. 1, §1. Article 1, Section 9 of the Iowa Constitution provides that "no person shall be deprived of property without due process of law." Iowa Const. art. 1, §9.

Due Process involves two forms: substantive due process and procedural due process. Substantive due process is the principle that Courts are allowed to protect fundamental rights from government interference, even if there are procedural protections in place, or if the rights are not specifically mentioned in the United States Constitution. U.S. Const. Amends. 5, 14. Procedural due process requires the federal government to provide an individual notice, the opportunity to be heard, and a decision by a neutral

decision maker prior to depriving an individual of a life, liberty, or property interest. U.S. Const. Amends. 5, 14.

In the case *Thorp v. Casey's General Store*, a mother of a child killed by a drunk driver brought a dram shop action against the state and various establishments where the driver purchased a bottle of whiskey prior to the accident. *Thorp v. Casey's General Stores, Inc. d/b/a Casey's General Store et. al.*, 446 N.W.2d 457 (Iowa 2010). The Iowa District Court of Guthrie County dismissed the suit because a 1985 amendment to Iowa Code §123.92 required an establishment to sell and serve beer or liquor to an intoxicated person. *Id.* The Court found that the amendment applied to all cases filed on or after July 1, 1986, even if the cause of action accrued prior to the amendment. *Id.* The Iowa Supreme Court reversed the District Court's ruling, because the statutory amendment at issue in Thorp took away a previously existing cause of action. *Id.* Statutory amendments that take away a cause of action that previously existed and does not give a remedy where no remedy or a different remedy existed previous is substantive, not procedural, legislation. *Thorp, citing Vinson v. Linn-Marr Comm. School Dist.*, 360 N.W.2d 108 (Iowa 1984).

Substantive law creates, defines, and regulates rights. *Schmitt v. Jenkins Truck Lines, Inc.*, 260 Iowa 556, 149 N.W.2d 789 (1967). Remedial statutes

may also violate due process when applied retroactively to alter or remove a vested right. *Thorp* at 462. A legislature may alter a remedy as long as it does not violate a party's vested right, and leaves the parties without a substantial remedy. *Ettor v. City of Tacoma*, 228 U.S. 148 (1913).

Iowa law also indicates that the legislature cannot cut off all remedy, such as the right to sue within the existing statute of limitations. *Thoeni v. City of Dubuque,* 115 Iowa 482 (1902). A statute also will not be given retroactive effect, unless express provision or implication indicates that was the legislature's intent. *Id.*

As stated in *Thorp*, a legislature cannot retroactively remove a cause of action once the cause of action is accrued. That is exactly what happened in this case. The Supervisory Orders, most recently the May 22, 2020 Order retroactively tolled all statutes of limitations from March 17, 2020 to June 1, 2020, totaling 76 days. 76 days are then tacked on to the end of all statutes of limitations, thus ostensibly giving Plaintiffs an additional 76 days to file suit that is otherwise not permitted by Iowa law, if the applicable statute of limitations was set to run between March 17, 2020 to December 31, 2020. The Supervisory Orders, including the May 22, 2020 Order, thus retroactively and prospectively removed a Defendant's ability to file a Motion to Dismiss due to the expiration of an existing statute of limitations. As it applies to Jennie

Ed and Emily Gorman, their substantive right to expiration of stale claims was unilaterally abrogated by the Court. The Supervisory Orders take that substantive right away from these Defendants, and similarly situated persons, and is thus an unconstitutional violation of substantive due process.

Even if the Supreme Court acting as a quasi-legislature were not a violation of substantive due process, the action here amounted to a violation of procedural due process. As noted above, procedural due process requires the government to provide an individual notice, the opportunity to be heard, and a decision by a neutral decision-maker prior to depriving an individual of a life, liberty or property interest. U.S. Const. Amends. 5,14. Due process is flexible and requires procedural protections as a particular situation may demand. *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Prior decisions from the United States Supreme Court indicate that dictates of due process generally require consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedure safeguards; and (3) the government's interest, including the function involved in the situation, and the fiscal and administrative burdens of additional or substitute procedural requirements. *Id.*

As stated above, the Iowa Supreme Court, not the Iowa legislature, changed the statutes of limitations in civil actions with its Supervisory Orders. The elected General Assembly had every opportunity to pass-as part of its own COVID-19 emergency response – a tolling provision. Such an action would have given the Defendants and similarly situated persons notice of a potential change in the statutes of limitations, as well as the opportunity for their opinions to be heard related to any prospective changes. This process would not have required any additional procedures, or administrative or fiscal resources, because the proper procedure is already built into the state's system of government. If the General Assembly wanted to immediately change a statute of limitations, statute of repose, or similar deadline, the Iowa General Assembly's rules allow them to designate an immediate effective date in a bill in response to an emergency situation. The General Assembly took no such action. Instead, the Iowa Supreme Court unilaterally, and without notice or the opportunity to be heard, altered all statutes of limitations in civil actions, depriving Defendants of substantive rights properly granted by the Legislature, specifically the right to repose of stale claims and the right to early dismissal of suits due to the expiration of any applicable statutes of limitations, especially those statutes of limitations that expired on the same day as the initial March 17, 2020 Order, or those that expired after the March

17, 2020 Order but before the Court issued any of the other Supervisory Orders. As such, Supervisory Orders tolling the statutes of limitations in civil actions must be invalidated as a violation of due process.

d. There is no Emergency Basis for the Court's Unconstitutional Action.

Finally, there is no emergency basis for the Court's Unconstitutional Action. Chapter 16 in the Iowa Rules of Electronic Procedure Rule 16.302 requires electronic filing by "[a]ll attorneys authorized to practice law in Iowa, all attorneys admitted pro hac vice, and all self-represented persons, except as this chapter provides, must register to use EDMS as provided in rule 16.304(1)." There are some exceptions for self-represented defendants who are not yet registered filers, confined parties, self-represented parents in a juvenile case, self-represented criminal defendants, or self-represented persons excused from electronic filing for good cause. Iowa R. Elec. P. 16.302(2). Plaintiffs, in the first case **and** in the second case, do not fall within the categories, and as such, are required to use electronic filing. Plaintiffs have previously electronically filed documents, including the Petition in this case, electronically filed on December 11, 2020 at 4:10pm. Based on the record, there was no risk of exposure to illness in this case which prevented Plaintiffs from timely filing their lawsuit.

The same is true for other Plaintiffs in other cases. Plaintiffs could timely file without any exposure to illness, and then ask the trial judge to stay proceedings if real concerns existed related to their ability to prosecute their action due to COVID-19. Any stays permitted due to COVID-19 would be a permissible exercise of the trial court's authority to control and administer their dockets, and would have been a proper exercise of the Iowa Supreme Court's authority to control the administration of the Courts. Instead, the Iowa Supreme Court improperly tolled the statute of limitations in all cases as part of its Supervisory Orders, which the District Court struck down as unconstitutional. The District Court's ruling granting Defendants' Motion to Dismiss on constitutional grounds must be affirmed.

III. Other States' Responses to COVID-19 are not Binding Precedent and are, in Most Cases, Inconsistent With the Action taken by the Iowa Supreme Court

Plaintiffs also argue the District Court's Order granting Defendants' Motion to Dismiss should be reversed because 22 other states extended statutes of limitations due to the COVID-19 pandemic. (Pls/Appellants' Brief). Plaintiff fails to analyze in any depth or detail the specifics of those decisions, and the mere blanket statement does not address Defendants' valid argument that the Iowa Supreme Court's Order violates the Iowa Constitution in several ways. Plaintiffs' argument also fails to take into account that other states have differing statutes, regulations, constitutional provisions, and case

law that allowed for those extensions. Further analysis demonstrates those 22 states took varying action to extend their statutes of limitations, some of which may be the subject of litigation at a later date. For example, Plaintiffs pointed to Kansas Senate Bill No. 102, which provided the Chief Justice of the Kansas Supreme Court the authority to issue an order to extend or suspend any deadlines or time limitations established by statute when the Chief Justice determines that such action is necessary to secure the health and safety of court users, staff and judicial officers during a state of disaster emergency. S.B.102, 2020 Leg., 2020 Sess. (Ks. 2020). Plaintiffs' argument ignores the fundamental distinction that the Kansas Legislature **specifically passed a law** delegating legislative authority to the judicial branch to allow the Chief Justice to extend or suspend any deadline or time limitations established by statute. This Court, on the other hand, acted in place of the Iowa General Assembly in changing time limitations established in Iowa Code § 614.1 without any delegation of legislative authority.

In other states, such as California, the Governor issued executive or administrative orders granting the Courts in their state the authority to adopt emergency rules in response to the pandemic. Ca. Exec. Order No. N-38-20 (March 27, 2020). Gov.ca.gov/wp-content/uploads/2020/03/3.27.2020-N-38-20.pdf. Indiana, Maryland, and Michigan courts extended their respective

statutes of limitations as part of a judicial emergency declared after their Governor declared a state of emergency. *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, March 23, 2020; *Administrative Order on Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters,* April 3, 2020; *Amendment of Administrative Order No. 2020-3*, May 1, 2020. In Delaware, a pre-existing state statute already permitted that state's Supreme Court to extend statutes of limitations as part of a judicial emergency once the state's Governor declared a state of emergency. 10 Del. C. §2004, 10 Del. C. §2007. Other states such as Connecticut extended their statutes of limitations through executive orders signed by their Governor. Conn. Exec. Order No. 7G, (March 19, 2020), portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive Orders/Executive-Order-No-7G.pdf. Given the varying avenues used to extend statutes of limitations, and various authorities used to support those declarations, this Court should look solely to Iowa authority to review the District Court's Order granting Defendants' Motion to Dismiss.

Further, Plaintiffs' position related to statutes of limitations due to the COVID-19 pandemic is a minority viewpoint. Although 23 states extended

statutes of limitations due to the COVID-19 pandemic, 27 states did not. The Alabama Supreme Court expressly declined to extend their state's statutes of limitations, recognizing the limitation on judicial authority where the legislature has constitutional authority to act, stating: "This Court cannot extend any statutory period of repose or statute of limitations period." *In Re: COVID-19 Pandemic Emergency Response,* Administrative Order Suspending All In-Person Court Proceedings for the Next Thirty Days, March 13, 2020. The South Carolina Supreme Court similarly acknowledged that it would be inappropriate to intervene as to the relief afforded to a litigant who could not file a civil action due to the COVID-19 pandemic. RE: Operations of the Trial Courts During the Coronavirus Emergency, Order April 3, 2020. Other states, including Arkansas, Missouri, Nebraska, South Dakota and Wisconsin, simply did not take action to extend their statutes of limitations. Arkansas Judiciary, Arkansas Supreme Court Statement on Novel Coronavirus Outbreak and the Courts (March 17, 2021 10:45AM), arcourts.gov/Arkansas-supreme-court-statement-novel-coronavirus-outbreak-and-courts. Missouri Courts, Missouri Judiciary Responses to Coronavirus (COVID-19), (March 17, 2021 10:47AM), courts.mo.gov/pandemic. Nebraska Judicial Branch, Judicial Orders Regarding COVID-19, (March 17, 2021 10:48AM)

supremecourt.nebraska.gov/nebraska-judicial-branch-emergency-status-information/orders. South Dakota Unified Judicial System, COVID-19 Response (March 17, 2021 10:49AM). ujs.sd.gov/uploads/news. Wisconsin Court System, COVID-19 Orders & Information, (March 17, 2021 10:50AM) wicourts.gov/covid19.htm.

Defendants acknowledge that the COVID-19 pandemic drastically changed almost every aspect of life; however, crises – no matter how grievous or broad – do not abrogate the Constitutional mandates binding on the branches of government. Where powers are specifically granted to the General Assembly – such as the power to establishing limitations period for the filing of lawsuits, it is only for the General Assembly to modify or change its Code provisions in response to a pandemic. With respect to COVID-19, the General Assembly did, in fact, meet and pass laws for the Governor's signature specifically in response to the pandemic and its effect on daily life. Plaintiffs and the Chief Justice of the Iowa Supreme Court may find it unwise that the General Assembly did not act to extend statutes of limitations. But long-standing judicial precedent holds that no matter how unwise or distasteful the Court may find the General Assembly's Code sections (or inversely the General Assembly's failure to draft Code language) the Court is not free to substitute its own language or law unless the General Assembly's

acts or omissions are unconstitutional, at which point the Court may strike down those acts or omissions. The General Assembly is free to do (or not do) as it wishes and the Court is not free to act as a pseudo-Assembly making legislative pronouncements where the Assembly takes no action. Plaintiffs' Action is time barred. To the extent that Plaintiffs rely on the provisions of the Supervisory Orders that tolled the statutes of limitations for civil actions, it is incumbent on this Court to rule that the Supervisory Orders, specifically the provisions related to tolling statutes of limitations, are unconstitutional as violating the Constitutional provision regarding separation of powers and affirm the District Court's Order granting Defendants' Motion to Dismiss. However, even though much was made of the emergency nature of the global pandemic, ultimately nothing about the COVID-19 virus or its effect on daily life interfered with Plaintiffs' ability to timely electronically re-file their lawsuit.

IV. Plaintiffs' Claims Would be Barred Under Typical Circumstances

Plaintiffs' claims would be time barred under typical circumstances. Iowa Code § 614.1(9)(a) states that cases "founded on injuries to the person or wrongful death against any physician any physician and surgeon, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse, licensed under chapter

147, or a hospital licensed under chapter 135B, arising out of patient care" must be commenced within two years after the date the claimant knew, or through the use of reasonable diligence should have known of the existence of the injury or death which damages are sought in the action. Iowa Code 614.1(9)(a). Under Iowa Code § 614.1(9)(a), Plaintiffs' claims needed to be filed by December 7, 2020.

This Court should rely on other Iowa Supreme Court precedent wherein the Court has held it does not have the authority to modify certain procedural rules, where those rules are confined to the authority of the General Assembly. For example, in *Root v Toney*, as part of a cost-saving measure this Court issued a supervisory order which limited the hours of operation of one of the local courthouses; which in turn led to a one day delay in filing an appeal by a party seeking to appeal a decision from that Court. The Iowa Supreme Court stated that "the time allowed to file a notice of appeal cannot be reduced without legislative approval." *Root v. Toney,* 841 N.W.2d 83, 90 (Iowa 2013). The Court went on to explain that the legislature has a role in the Court's rulemaking process, such as Iowa Rule of Appellate Procedure 6.101(1)(b) which sets the thirty-day deadline to file a Notice of Appeal. Iowa Code § 602.4201(3)(d). As such, the Court's supervisory order at issue in *Root* could

not "trump the general assembly's authority to set the time to file a notice of appeal." *Root* at 90.

The reasoning used in *Root v. Toney* can be extended to other Iowa rules. Iowa Code § 602.4201(3) states that several rules are subject to the rulemaking process set forth in Iowa Code § 602.4202, including the Iowa Rules of Civil Procedure. Iowa Code § 602.4201(3). Iowa Code § 602.4202 requires the Supreme Court to submit a rule or form prescribed under Iowa Code § 602.4201(3) to the legislative council and report the rule or form to the chair and ranking members of the Senate and House judiciary committees. Iowa Code § 602.4202. The legislative council may take action to delay the effective date of the rule or form. Iowa Code § 602.4202. The General Assembly may also enact a bill changing a rule or form, which would supersede a conflicting provision submitted to the legislative council by the Iowa Supreme Court. Iowa Code § 602.4202.

In the instant case, Plaintiffs agree with Defendants that the two-year statute of limitations expired on December 7, 2020 and would operate as a bar to all causes of action pled. Plaintiffs then go on to admit that their Petition was filed four days late, on December 11, 2020. The only thing that may have saved their case from an immediate dismissal is the Iowa Supreme Court's Orders extending the statute of limitations. As stated above and in the

Defendants' briefing to the District Court in support of their Motion to Dismiss, the Iowa Supreme Court lacked the authority to toll or extend any statute of limitations. Rather, the proper procedure was to submit the change to the legislative council, or to allow the Iowa General Assembly to enact a law temporarily changing civil statutes of limitations due to the COVID-19 pandemic. The District Court, relying on existing precedent, properly ruled that the Order tolling the statutes of limitations in civil action was unconstitutional and dismissed Plaintiffs' claims. The District Court's Order granting Defendants' Motion to Dismiss must be affirmed on the same grounds.

V. Equity Does not Save Plaintiffs' Claims from Dismissal

Finally, equity does not save Plaintiffs' claims from dismissal. Certain equitable doctrines have been recognized as extending a Plaintiff's deadline to file their case. Plaintiffs' argument requires the Court to apply equitable tolling or equitable estoppel to reverse the District Court's Order.

Equitable tolling occurs when a Plaintiff, despite reasonable due diligence, is unable to obtain vital information to discover their injury. *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830 (2002). Equitable tolling does not apply to Plaintiffs' claim in this case because they discovered their alleged injuries within the applicable statute of limitations period. Reed previously

filed a lawsuit for his alleged injuries. [Petition - first case] He later dismissed his lawsuit after he failed to file a Certificate of Merit Affidavit to support his claims against Jennie Ed and Defendant Jeremy Hoff, and after they filed their Motions for Summary Judgment. [Jennie Ed. Mot. For Summ. J.-first case, Notice of Dismissal-first case] His parents' claims were also easily discovered because any expenses or damages incurred as a result of Reed's injuries were incurred after the December 7, 2018 incident until Reed reached the age of majority. Plaintiffs could have filed suit in the first case for those damages, but chose not to do so. [Petition-first case]. Clearly all Plaintiffs knew of their injury and damages, but for some inexplicable reason failed to re-file their case until four days after the statutes of limitation expired. It is noteworthy that in the first-case, Reed filed his notice of dismissal via the Court's electronic filing system – precisely the reason that an omnibus, global tolling Order was unnecessary. Plaintiffs could have re-filed their action (subject to the dismissal argument under §147.140) and sought tolling by the trial court of case progression requirements. However, the doctrine of equitable tolling is inapplicable based on the facts conceded by the Plaintiffs and their clear knowledge of their claim within the statutory period.

Plaintiffs' claim for equity also fails under the doctrine of equitable estoppel. Equitable estoppel requires a Plaintiff to demonstrate four elements:

(1) **The Defendant** made a false representation or has concealed material facts; (2) The Plaintiff lacks knowledge of the true facts; (3) **The Defendant** intended the Plaintiff to act upon such representations; and (4) The Plaintiff relied upon such representation to their prejudice. (emphasis supplied) *Sioux Phar, Inc. v. Summit Nutritionals Int'l, Inc.,* 859 N.W.2d 182, 191 (Iowa 2015). Equitable estoppel prevents one party who has made certain misrepresentations from taking unfair advantage of another when the party making the representations changes their position to the prejudice of the party who relied upon the representations. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.,* 681 N.W.2d 596, 606 (Iowa 2004).

Plaintiff has not demonstrated Jennie Ed or Emily Gorman made some false representation upon which they relied to their detriment. Instead, Plaintiffs relied upon the Iowa Supreme Court's unconstitutional pronouncement, and which should somehow work to these Defendants' detriment to overcome their statutory right to dismissal of stale claims. The doctrine of equitable estoppel seeks to prevent **a party** of prejudicing an opponent's rights through scurrilous or fraudulent conduct. Here the conduct relied upon by the Plaintiffs was not that of Defendants, but the Iowa Supreme Court; their remedy is against the Iowa Supreme Court – not these Defendants.

Equity affords no remedy to Plaintiffs. The General Assembly has spoken and this case must be dismissed with prejudice. Based upon controlling precedent from the Iowa Supreme Court, the statutory bar passed by the General Assembly and signed by the Governor is constitutional and controlling. The District Court's Order dismissing Plaintiffs' case must be affirmed.

2. The District Court Correctly Dismissed Defendants Jennie Edmundson and Emily Gorman on Grounds of Non-Compliance with Iowa Code § 147.140 in the Previously-Filed Suit.

A. Plaintiffs did not Properly Preserve this Issue for Appellate Review.

Plaintiffs did not properly preserve this issue for Appellate Review. Plaintiffs did not file a Motion to Reconsider, Enlarge or Amend the District Court's May 14, 2021 Order, and filed their Notice of Appeal after the 30 day deadline provided in Iowa R. App. P. 6.101(1)(b). Plaintiffs' appeal should be dismissed as against Jennie Ed and Emily Gorman.

B. Scope and Standard of Review

Appellees agree with Appellants' standard of review as cited in their Brief.

C. Argument

Plaintiffs' Petition failed to state a claim against Jennie Ed and Emily Gorman because the failure to file a Certificate of Merit Affidavit requires the District Court's Order to be affirmed.

I. Iowa Code § 668.111 is Irrelevant and Distinguishable From Iowa Code § 147.140

Plaintiffs assert that Iowa Code § 668.11 allows a Plaintiff to voluntarily dismiss and re-file their Petition to prevent dismissal with prejudice after failing to file a Certificate of Merit Affidavit as required by Iowa Code § 147.140. Iowa Code § 668.11 is wholly irrelevant to the issue before the Court, and is easily distinguished from Iowa Code § 147.140. Iowa Code § 668.11 applies to all "professional liability case[s] brought against a licensed professional." Iowa Code §668.11. Iowa Code §147.140, on the other hand, is applicable solely to "any action for personal injury or wrongful against a health care provider based upon the alleged negligence in the practice of that profession or occupation or in patient care…" Iowa Code §147.140.

The plain language of Iowa Code § 668.11 sets out a different remedy for a party's noncompliance. Iowa Code § 668.11(2) states that "[i]f a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for discovery, **the expert shall be prohibited from testifying in the action** unless leave for the expert's testimony is given by the court for

good cause shown." (emphasis supplied) Iowa Code §668.11. Iowa Code §147.140(6), on the other hand plainly states that "[f]ailure to substantially comply with subsection 1 **shall result, upon motion, in dismissal with prejudice of each cause of action** as to which expert testimony is necessary to establish a prima facie case." (emphasis supplied) Iowa Code §147.140.

Iowa Code § 668.11 merely imposes a discovery sanction upon the party who fails to comply, while Iowa Code § 147.140 imposes the sanction of dismissal with prejudice upon a party who fails to timely and sufficiently comply upon the mere motion of the defense. Iowa Code § 147.140 is self-executing and mandates dismissal with prejudice upon motion for failure to comply with the statute. Iowa Code §147.140. The Iowa General Assembly did not require that a hearing be held on the motion, or that the failure of the plaintiff to timely file is subject to a post-hoc analysis, instead plainly stating that the right of a defendant to dismissal with prejudice is self-executing and attaches upon Plaintiff's failure coupled with Defendant's filing of a motion.

Statutory interpretation first requires the Court to determine if the language has a plain and clear meaning within the context of a particular dispute. *State v. Wiederien,*709 N.W.2d 538, 541 (Iowa 2006). The Court does not look beyond the express language of a statute when that language is plain and the meaning is clear. *Voss v. Iowa Dep't of Transp.,* 621 N.W.2d 208, 211 (Iowa

2001). The Court only applies the rules of statutory construction when the terms of the statute are ambiguous. *Wiederin* at 541. The plain language of Iowa Code § 668.11 and Iowa Code § 147.140 make them clearly distinguishable. As such, they cannot be interpreted to allow a Plaintiff to voluntarily dismiss their Petition, re-file the case, and avoid a substantive dismissal of the entire cause with prejudice to the filing of a new action. The fact that the General Assembly included the language that dismissal would be "with prejudice" demonstrates the plain and unambiguous intent of the legislature that a Plaintiff, having availed himself of the tort system specific to medical malpractice cases, may not avoid the sanction within the statute if he fails to comply with the Certificate of Merit Affidavit requirement. Plaintiffs concede that Reed filed a prior action alleging medical negligence on the part of these Defendants and concedes that he failed to timely file a Certificate of Merit Affidavit; but instead argues the irrelevant point that another statute might allow him to avoid the sanction of dismissal with prejudice.

The Iowa Court of Appeals has weighed in on this issue and found this same argument lacking in legal merit. In the case *McHugh v. Smith*, 958 N.W.2d 610 (Iowa 2021), the Iowa Court of Appeals upheld the dismissal of Ms. McHugh's medical malpractice action after she failed to timely file a

Certificate of Merit Affidavit. *Id.* The Iowa Court of Appeals reasoned that the legislature intended to place higher demands on medical malpractice plaintiffs by requiring verified information about the allegations to the Defendants and requiring such verification early in the litigation process. *Id.* Iowa Code §147.140 also gives a defending health care professional an opportunity to defeat a baseless allegation early in the litigation process if Plaintiff fails to have a qualified expert certify that the Defendant breached the standard of care. *Id.* As it applied to Ms. McHugh's case, the Court agreed with the trial court that Ms. McHugh's initial disclosures did not sufficiently identify the expert witness who would certify that her claim had colorable merit. *Id.* Her interrogatory responses also did not replicate the signed affidavit required under Iowa Code §147.140 because the responses do not require a signature from an individual who met the qualifying standards of Iowa Code §147.139, including licensure, practice field, board certification, and other criteria. *Id. McHugh v. Smith* cites favorably to the trial court's analysis of the differing burden placed upon a medical malpractice plaintiff. The Court of Appeals inquired:

> Given the statute's similarity to section 668.11, why did the legislature add the seemingly duplicative requirement of a certificate of merit affidavit? The district court explained, "Section 147.140 is more narrowly tailored to simply require the certificate of one expert . . . to show that the plaintiff's claim at least has colorable merit." That explanation is a cogent rationale for the sixty-day deadline. And it is

> consistent with the provision allowing dismissal with prejudice, a remedy our courts have traditionally considered a "harsh" consequence for noncompliance. Iowa Code § 147.140(6); see, e.g., *Rucker v. Taylor*, 828 N.W.2d 595, 604 (Iowa 2013); *Hays v. Hays*, 612 N.W.2d 817, 819 (Iowa Ct. App. 2000).

McHugh v. Smith, 958 N.W.2d 610 (2021). The *McHugh* Court also notes that a Court is not free to "read in" requirements that the Statute does not include, instead the Court must use "what the general assembly said" to guide its interpretation. *Id.* at 614. Iowa Code § 147.140 does not permit a Plaintiff to avoid the "harsh sanction" of dismissal with prejudice by dismissal of the Action only to allow for refiling later. Likewise, the McHugh Court focused its ultimate inquiry on "whether [Plaintiff's] conduct frustrated "the reasonable objectives of the statute." *Id.*, *citing Superior/Ideal, Inc. v. Bd. Of Rev.*, 419 N.W.2d 405 (Iowa 1988).

In the present case, Reed filed a lawsuit alleging medical negligence by Jennie Ed (vicariously through its employee Emily Gorman) and Jeremy Hoff. Then, having failed to comply with the mandate of § 147.140, and after Jennie Ed moved for summary judgment, dismissed his action. Reed and his parents then re-filed ostensibly the same suit, and added additional Defendants, causing substantial expense, delay and frustration to these healthcare Defendants. Clearly Plaintiffs' actions in failing to timely file a Certificate of Merit Affidavit and then dismissing and re-filing the same suit frustrates the

objective of § 147.140, which is the prompt and summary dismissal of meritless cases, and the avoidance of needless delay, expense and attorney's fees to healthcare defendants caused by frivolous malpractice suits. For these reasons, coupled with the Iowa Court of Appeals' decision in *McHugh v. Smith*, Reed's failure to comply with Iowa Code §147.140 is fatal to all claims of the Plaintiffs. The District Court's decision dismissing Plaintiffs' Petition, with prejudice, must be affirmed.

II. Plaintiffs Failed to Timely File a Certificate of Merit Affidavit in the First Case, as Required by Iowa Code § 147.140

Plaintiffs' Petition asserted two causes of action against the Defendants: negligence per se and common law negligence. Plaintiffs asserts Defendants, specifically Emily Gorman, were negligent per se, pursuant to Iowa Code §280.13C, and negligently breached the standard of care owed to the Plaintiffs by failing to remove Reed from a wrestling match after he exhibited signs, symptoms and behaviors of a brain injury. (Petition ¶78,91, App. pp. 13, 15). As it applies to Jennie Ed, Plaintiffs allege medical malpractice, through a theory of *respondeat superior* related to Defendant Emily Gorman's alleged negligence. (Petition ¶83, 96, App. pp. 13, 16). Plaintiffs allege Reed sustained damages in the form of personal injury; permanent injury; past, present and future pain and suffering; past, present and future emotional distress; past, present and future lost income; past, present and future cost of

medical treatment; and past, present and future loss of the use of his body. (Petition ¶80, App. p. 13). Plaintiffs also allege Reed's parents, Andrea and Michael Dickey, sustained past, present and future loss of consortium, services, companionship, and society of Reed; past, present and future emotional distress; past, present and future medical and other expenses incurred until Reed reached the age of majority; and lost income due to the time necessary to take Reed to appointments for his injuries while he was a minor. (Petition ¶82, App. p. 13).

Iowa law is clear that in actions for "personal injury or wrongful death against a health care provider based upon the alleged negligence in the practice of that profession or occupation or in patient care, which includes a cause of action for which expert testimony is necessary to establish a prima facie case, the Plaintiff ***shall***, prior to the commencement of discovery in the case and within sixty days of the defendant's answer, serve upon the defendant a certificate of merit affidavit signed by an expert witness with respect to the issue of standard of care and an alleged breach of the standard of care." Iowa Code §147.140.

The certificate of merit affidavit must be signed by the expert witness and certify the following: (1) The expert witness's statement of familiarity with the applicable standard of care; and (2) the expert witness's statement that the

standard of care was breached by the health care provider named in the petition. *Id.* Failure to substantially comply with subsection 1 shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case. *Id.*

a. Expert Testimony

First among the questions to be answered by the Court is whether the claims as pled are ones which require expert testimony to establish Plaintiffs' prima facie case. As the Court is aware, generally, when the ordinary care of a physician is an issue, only experts can testify and establish the standard of care and the skill required. *Kennis v. Mercy Hosp. Med. Ctr.,* 491 N.W.2d 161, 165 (Iowa 1992), *citing, Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992). This general rule has likewise been extended by the Iowa Supreme Court to other licensed health professions, such as: physician's assistants (*See, Bazel v. Mabee,* 576 N.W.2d. 385 (1998)), nurses/long term care facilities (*See, Thompson v. Embassy Rehab. & Care Ctr.,* 604 N.W.2d 643, 646 (Iowa 2000), dentists (*See, Hill v. McCartney*, 590 N.W.2d 52, 56 (Iowa Ct. App. 1998)) and importantly, licensed counselors at a high school. (*See, Wilson v. Darr*, 553 N.W.2d 579, 584 (Iowa 1996)). Plaintiffs' claim against Jennie Ed is that its licensed athletic trainer Emily Gorman failed to properly assess

Reed's alleged concussion symptoms and stop his participation in a high school wrestling match.

The test adopted by the Iowa Supreme Court for whether or not expert testimony is required to prove the standard of care for a defendant's activity and any deviation from that standard of care, is set forth in *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 14 (Iowa 1999):

> if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation.

Schlader did not involve a claim of negligence against a licensed health care provider, and stood for the proposition that expert testimony may be helpful to understand stray-voltage cases such as that plaintiff's electrocution claim, but expert testimony was not necessary for the plaintiff to prove a prima facie case. *Id.* This test has been modified by the Iowa Supreme Court previously; however, depending on the special facts of the case before it. For example, in *Thompson v. Embassy Rehab. & Care Ctr., supra,* the Iowa Supreme Court cited to the *Schlader* test in a case involving a patient who developed pressure ulcers at a skilled nursing facility, purportedly due to the nursing staff's failure to reposition the patient despite his resistance to such repositioning and the staff's failure to return the patient to a hospital for surgical management of the

ulcer in a timely fashion. Summary judgment was granted for the Defendant nursing facility after Plaintiff failed to present expert testimony in opposition to Defendants' motion. Plaintiff argued on appeal that the act of repositioning a patient in bed is ministerial and not technical requiring expert testimony. The Supreme Court disagreed:

> Such acts on the surface appear to have been ministerial and thus subject to a standard of proof not requiring expert testimony. . . . But the special circumstances of the present case are such that the issue had become one of forced repositioning of the care facility resident contrary to his own wishes. We believe that under these circumstances the proper course of action was not a matter that would be within the common understanding of the jury.

(internal citations omitted) *Thompson*, 604 N.W.2d at 646.

In *Miller v. Trimark Physicians Group, Inc.*, 672 N.W.2d 334 (Iowa Ct. App. 2003)[1] the Iowa Court of Appeals was confronted with the question of whether expert testimony was required for a patient to demonstrate a prima facie showing of negligence where a physician removed a bandage from the patient's finger and left the patient unattended for approximately one minute, and the patient suffered a fainting spell and was injured. Patient argued no expert was needed because the injury occurred during care that was non-medical, administrative, ministerial or routine. The *Miller* court cited to the

[1] The *Miller* case is an unpublished decision of the Iowa Court of Appeals and is offered for its persuasive reasoning only and not as authority for any particular proposition.

Schlader test above, and found that essentially all the primary facts were of common understanding. However, citing to *Thompson*, the Court found that elements of the claim were not of common understanding, such as whether the physician owed a duty to protect the patient from fainting under the circumstances, and whether he breached that duty. The Court cited favorably to the *Thompson* decision and to the underlying district court decision, stating:

> Expert testimony is required to discuss the appropriate standard of care for preventing fainting in someone with no symptoms or no record of fainting spells. Expert testimony is also required to establish signs or symptoms that Dr. Wolff should have observed and precautions that should have been taken under the circumstances. Without expert testimony, laypersons will have to draw complex medical conclusions about what caused the Plaintiff to faint and about any standard of care that may have been breached. . . .
> We find no error in this ruling.

Miller, supra at 334 (Iowa Ct. App. 2003).

Although no appellate case has specifically held that Athletic Trainers and the rendering of a medical assessment of whether or not a patient has sustained a head trauma requires particularized or professional knowledge, Jennie Ed and Emily Gorman urge this Court to rule that Plaintiffs' case requires expert testimony and is therefore subject to the Certificate of Merit Requirement. First, as established by the affidavit of Emily Gorman, filed with Jennie Ed's Motion for Summary Judgment in the first case – the Jennie Edmundson employee whose care is placed at issue in Plaintiffs' action –

Athletic Trainers are licensed health care professionals sharing all the hallmarks of such other professionals as nurses, physician's assistants, and licensed counselors. (Gorman Aff. ¶5 – first case). They are a profession governed by a State statutory licensure; they are responsible to a professional Board whose regulations impose certain duties commensurate with licensure and which can subject the licensee to discipline; there is a required curriculum which must be attained before licensure can be attained; and they are required by law to maintain 50 hours of continuing education every two years.[2] (Gorman Aff. ¶5 – first case). Aside from the undoubted professional nature of athletic training as a licensed health care profession, the special circumstances of this case require expert testimony to establish the standard of care applicable to Ms. Gorman's conduct. Ms. Gorman was required to perform an examination consistent with Athletic Training knowledge and principles: to know the signs and symptoms of head trauma including concussion; perform a physical and mental examination of Reed to assess if he suffered a head trauma or a concussion; to apply her education training and experience to differentiate head trauma from other benign physical and mental

[2] It is noteworthy that Athletic Trainers are required to maintain 10 more hours of continuing professional education per year than Attorneys – a profession that undoubtedly requires expert testimony to establish a prima facie showing of negligence under Iowa jurisprudence.

presentations, such as exhaustion; and apply such principals to assess the degree to which such head trauma – if it existed – was severe enough to place Reed at further risk of injury so as to bar his further participation in the match. These special circumstances all require expert testimony to establish what duty was required of Ms. Gorman and therefore Jennie Ed, and also whether the specific conduct was a breach of that duty.[3]

b. Mandatory as Opposed to Discretionary Disclosure

As used in Iowa Code §147.140, the word "shall" indicates mandatory – rather than discretionary – language. *See, In re Marriage of Thatcher,* 864 N.W.2d 533, 539 (Iowa 2015) ("Our legislature has codified the rule of construction that '[u]nless otherwise specifically provided by the general assembly,... [t]he word "shall" imposes a duty.' *Id.* § 4.1(30)(a). 'In a statute, the word 'shall' generally connotes a mandatory duty.' *In re Dept. of Fowler,* 784 N.W.2d 184, 187 (Iowa 2010) (recognizing word "shall" in Iowa Code §

[3] Although the discussion herein focusses on expert testimony to establish the standard of care for these Defendants and purported breach thereof, Emily Gorman and Jennie Edmundson further assert that expert testimony is further required to establish causation, in that, Plaintiffs claim that Reed suffered some degree of head trauma, and that he suffered additional injury from subsequent trauma. Expert medical testimony would be required – and has not been proffered – to distinguish between that injury which occurred from the initial insult, and that which may have purported to result from the subsequent injury and therefore the alleged negligence of defendants. Plaintiffs have identified no expert on causation.

229A.7(3) imposed mandatory duty)). This statute is not subject to interpretation by the Court, and mandated dismissal of Reed's Petition, as against Jennie Edmundson. It similarly mandates affirmance of the District Court's Order granting Defendants' Motion to Dismiss.

As noted above, the Iowa Court of Appeals has tested Iowa Code § 147.140 and found that Iowa Code § 147.140 was designed to weed out frivolous cases early in the proceedings in order to prevent professionals from spending time, effort and expense in defending these claims. *McHugh* at 613. The Court also found that even though dismissal is an extreme sanction, it does not have the discretion to choose any other sanction based on the express language of the statute. *Id.*

Iowa Code §147.140 applies to causes of action for personal injury against a health care provider based upon alleged negligence in patient care. Plaintiffs' allegations against Emily Gorman and Methodist Jennie Edmundson Hospital require expert testimony to establish a prima facie case against them. An expert witness is required to testify on the standard of care when a layperson could not say, without the aid of expert testimony, that the harm would not have occurred in the ordinary course of events if reasonable care was used. *Nationwide Agribusiness v. Structural Restoration, Inc.,* 705 F.Supp.2d 1070, 1082 (S.D. Iowa 2010). Iowa cases involving the standard of

care in medical treatment require expert testimony because the standard of care for medical treatment is outside the common understanding of a jury. *Thompson* at 644. Testimony related to the standard of care for medical treatment is highly technical, and expert testimony is necessary to help the jury understand what is considered reasonable care within a particular medical specialty. See *Cockerton v. Mercy Hosp. Ctr.,* 490 N.W.2d 856, 859 (Iowa Ct. App. 1992).

As applied to the instant case, a Certificate of Merit Affidavit signed by an appropriate healthcare provider was required to have been submitted either prior to the commencement of discovery, or by April 5, 2020, sixty days after Jennie Ed filed its Answer in the first case. Jennie Ed. Mot. Summ. J. No such affidavit was provided by the Plaintiff. (Mooney Affidavit ¶9 – first case). The Affidavit was necessary not only to demonstrate that Plaintiff's claim has colorable merit, but also to establish a prima facie case against Jennie Ed. Without expert testimony, Plaintiffs cannot establish a prima facie case for negligent medical care against Jennie Ed, or its Athletic Trainer, Emily Gorman, mandating affirmance of the District Court's Order.

III. Reed Cannot Re-File His Case in Order to Avoid Dismissal, With Prejudice, From the First Case

Plaintiffs' lawsuit was nothing more than a second attempt at suit, filed in order to avoid dismissal of the case with prejudice, which was mandated by

Iowa Code § 147.140. Reed previously filed a lawsuit on December 6, 2019 alleging negligence per se and common law negligence against Defendants Jeremy Hoff and Jennie Ed. (Petition – first case). Reed subsequently dismissed this suit after Defendants Jeremy Hoff and Jennie Ed filed Motions for Summary Judgment on the basis of his failure to file a Certificate of Merit Affidavit.

Iowa Ct. R. 1.943 provides that a party may dismiss their Petition, counterclaim, cross-claim, cross-petition, or petition of intervention up until 10 days before trial is set to begin. A voluntary dismissal operates as "without prejudice", unless otherwise stated or if the party previously dismissed a cause of action against the same Defendant. Iowa R. Civ. P. 1.943. In those cases, the dismissal must operate as an adjudication against that party. Iowa R. Civ. P. 1.943. Iowa R. Civ. P. 1.943 does not apply in this case because Iowa Code § 147.140 requires a dismissal with prejudice.

In other states where the legislature has adopted statutory merit affidavit systems similar to Iowa's, courts have ruled that a Plaintiff cannot start a time period anew with an amended complaint or subsequent suit. For example, the Supreme Court, Appellate Division, First Department in New York found that the dismissal of a medical malpractice suit was tantamount to an order of preclusion for failure to comply with a discovery demand or to file

a certificate of merit. *Colon v. New York City Health and Hospitals Corp.,* 166 A.D.2d. 291 (1990). The Supreme Court, Appellate Division, Second Department in New York came to a similar conclusion in the case *Kalkan v. Nyack Hospital et.al.,* 227 A.D.2d. 382 (1996), and noted that if noncompliance with a disclosure order results in an order of preclusion that effectively closes a Plaintiff's proof, the dismissal is on the merits.

The Superior Court of Pennsylvania in the case *O'Hara v. Randall, M.D., et al.,* 879 A.2d 240 (2005) found that the sixty-day limitation period for filing a certificate of merit does not start anew when a Plaintiff amended an original complaint. Aa part of the decision, the Court noted that Pennsylvania's certificate of merit statute did not contain an exception for cases where an amended complaint was filed. *Id.* Specifically, the Court noted that the term "filing" refers to the "initial commencement of an action". *Id.* Moreover, if it adopted Appellee's position that filing an amended complaint automatically gives a Plaintiff an additional sixty days to file a certificate of merit, an unscrupulous Plaintiff could repeatedly undermine the trial court's authority to deny a motion for extension of time by filing multiple amended complaints. *Id.*

Iowa Code § 147.140 is even more narrow than Pennsylvania's certificate of merit statute. Iowa Code § 147.140 states that a Plaintiff must

file a certificate of merit affidavit within 60 days of Defendant's answer, and that failure to do so must result in dismissal with prejudice. The statute allows for an extension prior to the expiration of the time limit, but only by agreement of the parties upon Motion by the Plaintiff prior to the expiration of the time limit and for good cause shown. Iowa Code § 147.140. In this case, Plaintiff Reed did not request an extension to file a certificate of merit affidavit, nor did the Court issue an order extending his deadline for good cause shown. The "with prejudice" dismissal in § 147.140 creates a substantive right to dismissal with prejudice for Defendants upon Plaintiffs' failure to timely file.

In this case, to allow Plaintiffs to voluntarily dismiss their suit after failing to comply with Iowa Code § 147.140 would give Plaintiffs a second attempt to prosecute their suit, after a substantive right to dismissal had attached. Iowa Code § 147.140 does not provide for such a second "bite at the apple." Thus, the District Court's Order properly granted Jennie Ed's and Emily Gorman's Motion to Dismiss.

IV. Because Reed's Claims are Barred Based on the Substantive Dismissal with Prejudice From the First Case, Michael and Andrea's Vicarious Claims are Likewise Barred.

Reed's claims are barred based on the substantive dismissal with prejudice from the first case, Michael and Andrea's vicarious claims are likewise barred. "Derivative" is defined in Black's Law Dictionary as coming from another,

taken from something preceding, or that which owes its existence to something foregoing. Black's Law Dictionary Free Online Legal Dictionary (2nd Ed.). In this case, Michael and Andrea's claims include claims for medical expenses and loss of income related to Plaintiff Reed's medical care and treatment as a result of Jennie Ed's and Emily Gorman's alleged negligence.

The Illinois Appellate Court, First District, First Division, in the case *Beck v. Yatvin*, 235 Ill.App.3d 1085 (1992) barred a claim for medical expenses paid on behalf of a minor child after the statute of limitations ran on the minor child's claim against the Defendants. Specifically, the Court noted that actions pursuant to Illinois' Family Expense Statute are derivative because the right of action arises out of injury to another; thus, the statute of limitations for damages deriving from the injury to another applies. *Id.*

Michael and Andrea raise additional claims for Reed's medical expenses while he was a minor, loss of services, companionship and society, emotional distress, loss of income for time used to care for Reed during his minority in this case. Their claims are directly derived from Reed's claims as their claims would not exist but for Reed's claims. Michael's and Andrea's claims are not independent or separate claims against Jennie Ed or Emily Gorman. Thus, Michael's and Andrea's claims are similarly barred due to the substantive dismissal of Reed's claims from the first case.

CONCLUSION

For the reasons set forth above, Plaintiffs' Petition fails to state a claim for which could be granted against Jennie Ed and Emily Gorman. Defendants Jennie Ed, Methodist Jennie Edmundson Hospital and Loess Hills Behavioral Health, and Emily Gorman respectfully request this Court affirm the District Court's Order granting their Motion to Dismiss, dismissing Plaintiffs' claims against them with prejudice, and for such other and further relief as may be just and equitable.

REQUEST FOR ORAL ARGUMENT

Appellees hereby state that they desire to be heard in oral argument upon submission to the Iowa Supreme Court.

PROOF OF FILING AND SERVICE

I hereby certify that on January 11, 2022, I electronically filed the foregoing Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the below listed attorneys. Per Rule 16.317(1)(a), this constitutes service of the document for the purposes of Iowa Court Rules:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 12,482 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally space typeface using Word for Mac in Times New Roman 14-point font.

DATED this 11th Day of January, 2022.

/s/ Robert A. Mooney