

**IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 23-0719
Clinton County No. LACV048488**

ESTATE OF SHIRLEY KAY GOMEZ, by GLORIA ANN SHONTZ,
Administrator, ANDREA MARIE BELL, individually, KRISTINA
CHRISTIAN LINCOLN, individually, and KIM MARIE KERR,
individually,

Plaintiffs-Appellees,

vs.

MERCY MEDICAL CENTER-CLINTON, INC., and AMARESHWAR
CHIRUVELLA, M.D.,

Defendants-Appellants.

**APPEAL FROM THE IOWA DISTRICT COURT
FOR CLINTON COUNTY
HON. STUART WERLING**

Final Brief for Defendants-Appellants

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AMARESHWAR CHIRUVELLA, M.D.

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STATEMENT OF ISSUES

I. Plaintiffs' Certificates of Merit were not Affidavits, Signed Under A Properly Conducted Oath, Affirmation or Under Penalty of Perjury as Required by Iowa Code section 147.140. Substantial Compliance Does Not Save This Deficiency. Dismissal with Prejudice of the Entire Action Was Required Pursuant to Iowa Code section 147.140(6).

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II. Plaintiffs Should Only Be Allowed to Pursue a Cause of Action Substantiated by their Certificates of Merit

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ROUTING STATEMENT

Mercy Medical Center – Clinton Inc. and Amareshwar Chiruvella [hereinafter Defendants] argue that this appeal should be retained by the Iowa Supreme Court. Whether a certificate of merit that is not an affidavit satisfies the substantial compliance standard and what content a certificate of merit affidavit must sufficiently provide presents substantial issues of first impression, and fundamental and urgent issues of broad public importance requiring ultimate determination by the Iowa Supreme Court, and/or a substantial question of enunciating or changing legal principles. Iowa R. App. P. 6.1101(2)(c-d, f). Notably, this appeal may further delineate the substantial compliance standard that the Iowa Supreme Court will clarify in other retained appeals involving Iowa Code section 147.140. *See, e.g., Estate of Fahrman et. al. v. ABCM Corporation et. al.*, No. 22–0495 (Iowa submitted Nov. 15, 2023); *Miller et. al. v. Catholic Health Initiatives – Iowa Corp. et. al.*, No. 22–1574 (Iowa retained Apr. 25, 2023).

STATEMENT OF THE CASE

This is a medical malpractice case. Plaintiffs filed a petition on August 26, 2022 alleging that Mercy Medical Center – Clinton, Inc. and Amareshwar Chiruvella, M.D. were negligent in their post-treatment care of Shirley

Gomez.¹ *See generally* App. 515 (Petition at Law and Jury Demand (D0001)). Specifically, the plaintiffs allege that Dr. Chiruvella failed to properly care for Ms. Gomez’s risk of deep vein thrombosis and/or a pulmonary embolism. App. 515 (Petition at Law and Jury Demand (D0001) ¶¶ 14–29). Defendants filed an answer on October 12 denying the allegations. *See generally* App. 2029 (Answer (D0015)).

A first certificate of merit was served on September 21, 2022, by Dr. Leo Gordon “regarding the care of Shirley Gomez by Dr. Amareshwar Chiruvella.” *See generally* App. 18–19 (Certificate of Merit Affidavit of Leo M. Gordon, M.D. Regarding Defendant Mercy Medical Center-Clinton, Inc. (D0007)). This document stated that “Leo A. Gordon, M.D. does hereby affirm and state as follows:” *Id.* Based on his review of the medical record, he explained that Dr. Chiruvella “breached the standard of care for a general surgeon with respect to the care and treatment of Shirley Gomez in September 2020 by failing to timely refer Mrs. Gomez for appropriate work-up and treatment of possible pulmonary embolism.” *Id.* at ¶ 7. The certificate of merit did not contain a jurat nor was it signed under penalty of perjury. *Id.*

¹The Petition also named MercyOne and MercyOne Clinton Specialty Care. These fictitious entities were dismissed without prejudice on December 1, 2022.

On January 24, 2023, plaintiffs served another certificate of merit apparently signed and dated by Dr. Gordon on January 23, 2023. *See generally* App. 3334 (Certificate of Merit Affidavit of Leo M. Gordon, M.D. Regarding Defendant Mercy Medical Center-Clinton, Inc. (D0022)). The only substantive difference between this certificate of merit and the one served on September 21, 2022 was that this Certificate of Merit was “Regarding Defendant Mercy Medical Center – Clinton Inc” in the header and that the certificate of merit mentioned Dr. Chiruvella was an employee of the Mercy Medical Center. *Id.* Like the first certificate of merit, the second certificate of merit did not contain a jurat nor was it signed under penalty of perjury. *Id.*

On February 24, defendants filed a motion to dismiss for failure to substantially comply with Iowa Code section 147.140(1)(b). *See* App. 35 (Mercy Medical Center-Clinton, Inc. and Amareshwar Chiruvella’s Motion to Dismiss For Failure to Substantially Comply with Iowa Code section 147.140 (D0025)). The motion requested that the District Court dismiss the case in its entirety because the certificates of merit failed to show Dr. Gordon signed the document under oath or affirmation as required by Iowa Code section 147.140(1)(b) or otherwise signed the certificate of merit under penalty of perjury. *Id.* at 36. The motion to dismiss also requested dismissal of all other cause of actions or allegations in the petition that were not supported by Dr.

Gordon's certificates of merit: namely allegations other than Dr. Chiruvella failed "to timely refer Mrs. Gomez for appropriate work-up and treatment of possible pulmonary embolism." *Id.* at 37.

Plaintiffs filed a timely resistance via extension on March 13. Plaintiffs argued that the phrase "affirms and states as follows" in Dr. Gordon's certificates of merit constituted a proper affirmation like an oath, even though plaintiffs did not provide evidence of the time, place, and individual of who administered the affirmation. *See* App. 40 (Plaintiffs' Resistance to Defendants Motion to Dismiss (Oral Argument Requested) (D0030)). Alternatively, plaintiffs argued that this statement was sufficient to meet the substantial compliance standard. *Id.* at 44–47. Regarding defendants' other point, plaintiffs argued that the certificate of merit affidavit statute only requires the plaintiff's expert to specify one breach in the standard of care which could open the door to other causes of action. *Id.* at 49–51.

Defendants filed a timely reply on March 16. *See* App. 52 (Defendants Reply to Plaintiff's Resistance in Support of Their Motion to Dismiss for Failure to substantially Comply with Iowa code section 147.140 (D0032)). The reply explained that simply stating "affirms and states as follows" in a certificate is not sufficiently an oath or affirmation because there was no declaration made to an authorized individual to receive it under binding Iowa

caselaw or that it substantially complied with the phrase “under penalty of perjury.” *Id.* at 53–59. Defendants further argued that substantial compliance could not save a deficient certificate of merit that was not sworn or affirmed to or otherwise signed under penalty of perjury. *Id.* Defendants also argued that the purpose of the certificate of merit statute was to ensure that all claims in plaintiffs’ petition could be supported by expert testimony. *Id.*

An unreported oral hearing was held on April 4, 2023. On May 1, 2023, an order was entered denying defendants’ motion to dismiss. *See* App. 64 ((Proposed) Order on Defendants’ Motion to Dismiss). On the first appealed issue, the court held “that the Certificates of Merit served by the Plaintiffs in this matter were in substantial compliance with Iowa Code § 147.140.” *Id.* at 64. On the second appealed issue, the Court denied the dismissal of any causes of action outside of whether Dr. Chiruvella failed “to timely refer Mrs. Gomez for appropriate work-up and treatment of possible pulmonary embolism” as “premature.” *Id.* at 65.

A timely application for interlocutory appeal followed. *See* App. 67 (Mercy Medical Center-Clinton Inc. and Amareshwar Chiruvella Application for Interlocutory Appeal). The application for interlocutory appeal was granted on July 17, 2023. *See* App. 112 (Order).

STATEMENT OF THE FACTS

The facts relevant to this appeal are relatively simple. Plaintiffs’ petition alleges that Dr. Chiruvella, and Mercy Medical Center – Clinton, Inc. breach the standard of care on the following: failing to properly communicate with the nursing and other support staff acting pursuant to his orders; In failing to provide appropriate medical care; In failing to properly monitor and care for Shirley Gomez; In failing to timely and properly respond to signs and symptoms during Shirley Gomez’s care and treatment; In failing to act as a reasonable physician would act under the circumstances. App. 10–11, 13–14 (Petition at Law and Jury Demand (D0001) ¶¶ 38(a-e) 54(a-e)).

Plaintiffs filed two certificates of merit that are nearly identical. *See generally* App. 18–19, 33–34 (Certificate of Merit Affidavit of Leo M. Gordon, M.D. Regarding Defendant Mercy Medical Center-Clinton, Inc. (D0007); Mercy Medical Center-Clinton, Inc. and Amareshwar Chiruvella’s Motion to Dismiss For Failure to Substantially Comply with Iowa Code section 147.140 (D0025)). Both state that Dr. Gordon “affirms and states as follows.” *Id.* However, neither certificates of merit contain a jurat or a signature by Dr. Gordon that he signed the document “under penalty of perjury.” *Id.* As applied to the content, both certificates state that Dr. Chiruvella failed “to timely refer Mrs. Gomez for appropriate work-up and treatment of possible pulmonary embolism.” *Id.*

ARGUMENT

I. Plaintiffs' Certificates of Merit were not Affidavits, Signed Under a Properly Conducted Oath, Affirmation or Under Penalty of Perjury as Required by Iowa Code section 147.140. Substantial Compliance Does Not Save This Deficiency. Dismissal with Prejudice of the Entire Action Was Required Pursuant to Iowa Code section 147.140(6).

A. Error Preservation.

An issue is preserved if the “court’s ruling indicates that the court considered the issue and necessarily ruled on it, even if the court’s reasoning is ‘incomplete or sparse’ the issue has been preserved.” *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)). Error has been preserved on whether the Plaintiff adequately filed a substantially compliant certificate of merit in relation to the affidavit or “under oath” requirement in Iowa Code section 147.140. *Lamasters*, 821 N.W.2d at 864; *see* App. at 35 (Mercy Medical Center-Clinton, Inc. and Amareshwar Chiruvella’s Motion to Dismiss For Failure to Substantially Comply with Iowa Code section 147.140 (D0025)); *see also* App. at 64 ((Proposed) Order on Defendants’ Motion to Dismiss).

B. Standard of Review.

A motion to dismiss and statutory interpretation principles are reviewed for correction of errors at law. *Struck v. Mercy Health Servs.*, 973 N.W.2d 533, 538 (Iowa 2022). However, the appellate court can treat defendants’

motion to dismiss as a motion for summary judgment, if necessary, considering the District Court reviewed and relied on the certificates of merit in its order. *In re Guardianship of J.W.*, 991 N.W.2d 143, 148 (Iowa 2023) (“[H]olding an evidentiary hearing on that issue was thus also analogous to construing the ‘motion to dismiss’ as one for summary judgment, since at such hearings the parties present, and the court considers, evidence beyond that contained in the petition.”); *George v. D.W. Zinser Co.*, 762 N.W.2d 865, 867 (Iowa 2009) (“As the motion to dismiss in this case relied on matter outside the pleadings and both parties and the court treated it as a motion for summary judgment, we will do so as well.”); *see also* Brief in Support of Mercy Medical Center-Clinton, Inc. and Amareshwar Chiruvella’s Motion to Dismiss For Failure to Substantially Comply with Iowa Code section 147.140 (D0025 Attach.) at Pg. 5 n.2) (citing this principle).²

Factual determinations are binding if there is substantial evidence to support a claim. *Cf. Shams v. Hassan*, 829 N.W.2d 848, 853 (Iowa 2013). “Evidence is substantial when a reasonable mind would accept it as adequate

²Alternatively, the court may take judicial notice of the certificates of merit that were filed as part of the district court’s docket on EDMS. *See* Iowa R. Evid. 5.201; *State v. Washington*, 832 N.W.2d 650, 655 (Iowa 2013) (“Judicial notice may be taken on appeal.”); *see also Luman v. Luman*, No. 17-0223, 2018 Iowa App. LEXIS 180, at *1 n.1 (Iowa Ct. App. Feb. 21, 2018) (explaining judicial notice can be taken from documents filed with the district court).

to reach a conclusion.” *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001) (quoting *Hasselmann v. Hasselman*, 596 N.W.2d 541, 545 (Iowa 1999)).

C. Background of Iowa Code section 147.140 and its Requirements.

In 2017, the Iowa legislature enacted additional safeguards for healthcare providers in medical malpractice suits. *See generally* 2017 Iowa Acts ch. 107. These revisions included a non-economic damages cap, strengthened expert testimony requirements, and a new certificate of merit affidavit statute. *Id.* (codified at Iowa Code § 147.136A, .139, .140).

The new certificate of merit affidavit statute requires a plaintiff to file an affidavit by a medical expert within sixty days of the defendant’s answer against each healthcare provider. Iowa Code § 147.140(1). “[T]he legislature enacted section 147.140 to provide a mechanism for early dismissal with prejudice of professional liability claims against healthcare providers when supporting expert testimony is lacking.” *Struck*, 973 N.W.2d at 539. “The new legislation imposes two extra burdens: (1) provide verified information about the medical malpractice allegations to the defendants and (2) do so earlier in litigation.” *McHugh v. Smith*, 966 N.W.2d 285, 289 (Iowa Ct. App. 2021). Failure to substantially comply with the statute’s requirements requires dismissal of “each cause of action as to which expert witness testimony is

necessary to establish a prima facie case” with prejudice. Iowa Code § 147.140(6).

D. Iowa Code section 147.140 Requires the Certificate of Merit to be an Affidavit or Signed under Oath. An Oath or Affirmation of Plaintiffs’ Expert Requires the Presence of Another to Ensure the Expert is Conscience Bound. The Only Exception to the Presence of Another is if a Document is Signed Under Penalty of Perjury.

Iowa Code section 147.140 contains several provisions to ensure the plaintiff is providing “verified information” to the court. *McHugh*, 966 N.W.2d at 290. Of relevance to this appeal, is that the “*certificate of merit affidavit* must be signed by the expert witness and certify the purpose for calling the expert witness by providing *under the oath³ of the expert witness all of the following:*” Iowa Code § 147.140(1)(b) (emphasis added). The first question for this appellate court to determine what an “affidavit” is or what an “oath” constitutes.

“The first step in our statutory interpretation analysis is to determine whether the statute is ambiguous.” *State v. Middlekauff*, 974 N.W.2d 781, 793 (Iowa 2022) (quoting *State v. Zacarias*, 958 N.W.2d 573, 581 (Iowa 2021)). “Our inquiry ends with the plain language if the statute is unambiguous.” *Id.* (quoting *Zacarias*, 958 N.W.23d at 581)); see also *State v. Shorter*, 945

³Iowa Code section 4.1(19) provides that “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.’ ”

N.W.2d 1, 7 (Iowa 2020) (“If the legislature does not provide a definition, ‘we look to the context in which the term appears and give it its ordinary and common meaning.’ ” (quoting *State v. Mathias*, 936 N.W.2d 222, 227 (Iowa 2019))). A court “may refer ‘to prior decisions of this court and others’ ” in understanding what statutory requirements are. *Middlekauff*, 974 N.W.2d at 793 (quoting *Good v. Iowa Dep’t of Hum. Servs.*, 924 N.W.2d 853, 860 (Iowa 2019)). “If the statute is ambiguous, we ‘rely on principles of statutory construction to resolve the ambiguity.’ ” *Carreras v. Iowa Dep’t of Transp.*, 977 N.W.2d 438, 446 (Iowa 2022) (quoting *State v. Ross*, 941 N.W.2d 341, 346 (Iowa 2020)).

The dictionary definition of “[a]n ‘oath’ is ‘[a] solemn declaration, accompanied by a swearing to God or a revered person or thing, that one’s statement is true or that one will be bound to a promise[.]’ ” *Oath*, *Black’s Law Dictionary* (11th ed. 2019). Likewise, the dictionary definition of an affirmation is “[a] solemn pledge equivalent to an oath but without reference to a supreme being or to swearing.” *Affirmation*, *Black’s Law Dictionary* (11th ed. 2019). The purpose of an oath or affirmation is to ensure that an individual is conscience bound when they provide information to another party. *State v. Carter*, 618 N.W.2d 374, 376 (Iowa 2000) (en banc). “[O]ur prior cases revealed a common aspect of an oath [or affirmation] [is] the presence of an

official to participate in the process in such a manner to assure the persons conscience is bound.” *Id.* at 377.⁴ “Thus, it is essential that a person appear before a designated officer to satisfy the oath or affirmation requirement.” *Id.*

“[T]he only [Iowa] statute which eliminates the presence of another requirement for an oath or affirmation is found in section 622.1.” *Carter*, 618 N.W.2d at 377.

When the laws of this state or any lawful requirement made under them requires or permits a matter to be supported by a sworn statement written by the person attesting to the matter, the person may attest the matter by an unsworn statement if that statement recites that the person certifies the matter to be true under penalty of perjury under the laws of this state, states the date of the statement’s execution and is subscribed by that person.

Iowa Code § 622.1.

“Although our legislature permits a written attestation to be accomplished alone, it requires the certification to expressly impress upon the

⁴*See, e.g., City of Cedar Rapids v. Atsinger*, 617 N.W.2d 272, 276 (Iowa 2000) (en banc) (“We are convinced that the factor of binding one’s conscience . . . is not to be accomplished alone in the oath-taking process. Some person must be present to assure that this occurs.”); *Dalbey Bros. Lumber Co. v. Crispin*, 12 N.W.2d 277, 289 (Iowa 1943) (“Hence, to make a valid oath, there must be in some form, in the presence of an office authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath.”). American Jurisprudence on oaths and affirmations similarly agrees. Am. Jur. 2d *Oath and Affirmation* § 17 (1989) (“To make a valid oath, the declarant must take upon him-or herself the obligations of an oath in the presence of an officer authorized to administer it.”).

person that it is made under penalty of perjury.” *Carter*, 618 N.W.2d at 378. “This is an important requirement because the under penalty of perjury language, like the administration of an oath by an official, acts to bind the conscience of the person and emphasizes the obligation to be truthful.” *Id.*

The requirement for another person to administer the oath or affirmation is consistent with how the Iowa legislature has defined an affidavit. *See Shorter*, 945 N.W.2d at 7. The Iowa Code defines an affidavit as “a written declaration made under oath, without notice to the adverse party, *before any person authorized to administer oaths* within or without the state.” Iowa Code § 622.85 (emphasis added).

Consistency with what a properly conducted oath or affirmation means and what affidavit constitutes is important in the context of Iowa Code section 147.140. This statute is entitled “Expert witness – certificate of merit *affidavit*.” *See generally* Iowa Code § 147.140 (emphasis added); *see State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004) (“Although the title of a statute cannot limit the plain meaning of the text, it can be considered in determining legislative intent.” (quoting *T & K Roofing Co. v. Iowa Dep’t of Educ.*, 593 N.W.2d 159, 163 (Iowa 1999))). Furthermore, the statute references five different times that the document to be submitted is a “certificate of merit *affidavit*.” Iowa Code § 147.140(1(a-c), 2, 5) (emphasis added); *see also*

Certificate of Merit, Black's Law Dictionary (11th ed. 2019) (“Many states have a law mandating certificates of merit . . . [i]f the law requires the certificate to be signed under oath or penalty of perjury, it is sometimes called an affidavit of merit.”).

Essentially, a certificate of merit affidavit requires either 1) evidence that plaintiff’s expert signed this certificate under a properly conducted oath or affirmation administered in the presence of an appropriate officer or 2) that the document was signed under penalty of perjury.

E. Plaintiffs’ Certificates of Merit are Not Affidavits as They Are Not Signed Under Oath, Affirmation or Otherwise Signed Under Penalty of Perjury.

Generally, an affidavit will have a jurat on the document. A jurat is “[a] certificate added to an affidavit stating when, before whom, and where it was made.” *Jurat, Merriam-Webster*, <https://www.merriam-webster.com/dictionary/jurat>; *see also Jurat, Black's Law Dictionary* (11th ed. 2019) (“A certification added to an affidavit . . . stating when and before what authority the affidavit . . . was made.”). “The purpose of the jurat is to prove the oath was administered.” *Miller v. Palo Alto Board of Supervisors*, 84 N.W.2d 38, 40 (Iowa 1957). Yet, neither of the certificates of merit in this appeal contain a jurat. *See App. at 18–19 3334* (Certificate of Merit Affidavit of Leo M. Gordon, M.D. Regarding Defendant Dr. Amareshwar Chiruvella

(D0007); Certificate of Merit Affidavit of Leo M. Gordon, M.D. Regarding Defendant Mercy Medical Center- Clinton, Inc. (D0022)).

“[I]ndependent proof of the administration of the oath is ordinarily necessary in order to cure the absence of a jurat on an instrument.” *Entler v. Entler*, 398 N.W.2d 848, 850 (Iowa 1987). Plaintiffs failed to provide any evidence in their respective certificates of merit, or in their briefing at the district court level, that Dr. Gordon properly undertook any oath or affirmation in front of an individual with authority to sufficiently bind his conscience for his certificates of merit. *See Farmers State Sav. Bank v. J.B.H. Enterprises*, 561 N.W.2d 836, 838 (Iowa Ct. App. 1997) (“Holtz failed to prove such proof that an oath had been administered. The court correctly ruled that the document on its face was not an affidavit.”); *see* App. at 40 (Plaintiffs’ Resistance to Defendants’ Motion to Dismiss (Oral Argument Requested)). Consequently, the evidence establishes that no properly conducted oath or affirmation was conducted in front of the presence of another.

Additionally, the “affirms and states as follows” language in the certificates of merit also comes nowhere close to the specific “under penalty of perjury” language required under Iowa Code section 622.1 to excuse the presence of another. *See* App. at 18–19, 33–34 (Certificate of Merit Affidavit of Leo M. Gordon, M.D. Regarding Defendant Dr. Amareshwar Chiruvella

(D0007); Certificate of Merit Affidavit of Leo M. Gordon, M.D. Regarding Defendant Mercy Medical Center- Clinton, Inc. (D0022)). For example, in *Carter*, the Iowa Supreme Court analyzed whether a certification on a Board of Pharmacy registration form stating “that the information I have provided on this registration application is *true and correct*” was sufficient to establish a charge of perjury under Iowa Code section 622.1. 618 N.W.2d at 375 (emphasis added). A unanimous Iowa Supreme Court concluded that the “true and correct” language “fell *far short* of substantially complying with the language required by the statute.” *Id.* at 378 (emphasis added); *see also In re Foley*, No. 16-1676, 2017 Iowa App. LEXIS 848, at *6 (Iowa Ct. App. Aug. 16, 2017) (“But, without some language showing an effort at compliance with the ‘under penalty of perjury’ requirement, the answer is fundamentally flawed.”). “Affirms” and “true and correct” are essentially synonyms that both fall woefully short of the explicit ‘under penalty of perjury’ certification required under Iowa Code section 622.1 to establish Dr. Gordon was sufficiently “conscious bound” when he signed the certificates of merit. *See Carter*, 618 N.W.2d at 378.

The District Court correctly held that that the document was presented was a certificate of merit; not a certificate of merit **affidavit**. App. at 64

((Proposed) Order on Defendants’ Motion to Dismiss) (D0040)); *see also* Iowa Code § 147.140(1(a-c), 2, 5).⁵

F. Failure to Sign a Certificate of Merit in Affidavit Form with Evidence of a Properly Conducted Oath, Affirmation or Signature Under Penalty of Perjury Does Not Substantially Comply with the Statute.

However, the District Court was incorrect that a certificate of merit, that is not a proper affidavit, is substantially compliant with Iowa Code section 147.140. The main thrust of “substantial compliance” is to ensure “compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.” *Superior/Ideal, Inc. v. Board of Review of City of Oskaloosa*, 419 N.W.2d 405, 406 (Iowa 1988). The reasonable objectives of Iowa Code section 147.140 are to “(1) provide verified information about the medical malpractice allegations to the defendants and (2) do so earlier in litigation.” *McHugh*, 966 N.W.2d at 289. The absence of showing that the certificate of merit was under oath, affirmation or under penalty of perjury goes to both prongs, but particularly the “verified information” prong. *Id.* This is supported by 1) the plain text of Iowa Code section 147.140, 2) the statute’s relationship to our rules of civil procedure, 3) overall purpose of the statute,

⁵If the Appellate Court construes the District Court’s Order to rule that the certificates of merit were affidavits, then such a factual holding would not be supported by substantial evidence considering the absence of a jurat and lack of signature indicating it was made under penalty of perjury.

and 4) other state statutes and caselaw which conclusively show that the failure to provide an affidavit is a serious deficiency. Consequently, showing plaintiff's expert signed under a properly conducted oath, affirmation or under penalty of perjury when they signed their certificate of merit is an essential matter to ensure the objective of providing "verified information" to the Court and to the defendants. *McHugh*, 966 N.W.2d at 289.

1. *The plain text of the Iowa Code section 147.140 shows that the oath, affirmation or signature under penalty of perjury is an essential matter.*

"A certificate of merit affidavit *must* be signed by the expert witness and certify the purpose for calling the expert witness by providing under the oath of the expert witness." Iowa Code § 147.140(1)(b) (emphasis added). The word "must" indicates that a properly conducted oath or affirmation is a mandatory requirement to comply with the statute. Iowa Code § 4.1(30)(b) ("The word 'must' states a requirement."); *see also State Pub. Defender v. Iowa Dist. Ct.*, 663 N.W.2d 413, 416 (Iowa 2003) (explaining that "A 'requirement is defined, in part, as 'a requisite or essential condition' (quoting *Webster's Third New International Dictionary* 1929 (unabr. ed. 1993))). The mandatory nature of the word "must" applies to both the expert signature provision and the oath provision in section 147.140(1)(b) through the conjunctive cannon. Antonin Scalia & Bryan A. Garner, *Reading Law: The*

Interpretation of Legal Texts 116 (2012) (“With a conjunctive list, all three things are required”); *see also And, Merriam-Webster*, <https://www.merriam-webster.com/dictionary/and> (explaining that the term “and” joins “sentence elements of the same grammatical rank and function.”).

If the legislature did not believe the oath provision was essential, then they would not have utilized the “must” language in section 147.140(1)(b). *Ronfeldt v. Shelby Cnty.*, 984 N.W.2d 418, 426 (Iowa 2023) (“We assume ‘when a legislature enacts statutes it is aware of the state of the law.’”). Furthermore, the legislature would not have repeatedly used the term “affidavit” throughout the statute if it did not believe an oath, affirmation or signature under penalty of perjury was essential. *See generally* Iowa Code § 147.140 (using the specific phrase “certificate of merit affidavit” five times in the statute). Lastly, the legislature would not have explicitly teased out that an oath must be conducted under 147.140(1)(b) when the term “affidavit” is already referenced several times within the statute. *Id.*; *see* Iowa Code § 622.85; *see also Middlekauff*, 974 N.W.2d at 801 (explaining the legislature does not add language “for no reason”). The plain text of Iowa Code section 147.140 easily supports the notion that a properly conducted oath or affirmation or signature under penalty of perjury is an essential matter to the statute.

One unpublished Iowa Court of Appeals case has already taken the view that the plain text requires an affidavit or submission of the certificate under oath. *See Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 Iowa App. LEXIS 560 (Iowa Ct. App. July 21, 2021). In *Schmitt*, the Iowa Court of Appeals was faced with whether medical records attached to the petition could be considered substantially compliant under Iowa Code section 147.140. *Id.* at *4. The Iowa Court of Appeals adopted the District Court’s reasoning that there was no substantial compliance with the statute because medical records were not “in affidavit form or otherwise submitted under oath.” *Id.* at *5.

2. *Iowa Code section 147.140’s reference to the rules of civil procedure indicates that a properly conducted oath, affirmation or signature under penalty of perjury to the certificate of merit affidavit is an essential matter.*

Iowa Code section 147.140’s reference to our rules of civil procedure further evidences the legislature’s intent to require the certificate of merit to be in affidavit form or signed under a properly conducted oath, affirmation or signed under penalty of perjury. *See* Iowa Code § 147.140; *see also Ronnfeldt*, 984 N.W.2d at 426 (noting that our legislature was aware of our rules of civil procedure when drafting the statute); *Kirlin v. Monaster*, 984 N.W.2d 412, 415 (Iowa 2023) (same).

First, Iowa Code section 147.140 contains distinctly different requirements from retained expert reports required under Iowa Rule of Civil

Procedure 1.500(2)(b). See *Jud. Branch v. Iowa Dist. Ct.*, 800 N.W.2d 569, 576 (Iowa 2011) (“When construing a statute, we ‘must be mindful of the state of the law when it was enacted and seek to harmonize the statute, if possible, with other statutes on the same subject matter.’ ” (quoting *State v. Dann*, 591 N.W.2d 635, 638 (Iowa 1999))). Expert reports are required when the expert is “retained for litigation purposes” much like a certificate of merit affidavit. *McGrew v. Otoadese*, 969 N.W.2d 311, 321 (Iowa 2022). But the expert report under our rules of civil procedure only must be “prepared and signed by the witness.” Iowa R. Civ. P. 1.500(2)(b). Noticeably absent, is a requirement that this expert report be signed under a properly conducted oath, or be an affidavit, like the certificate of merit affidavit statute explicitly lays out. Compare *id.* with Iowa Code § 147.140(1)(b). This diversion shows the intent of the legislature was to have a heightened and distinct requirement for the certificate of merit affidavit as compared to a retained expert report under Iowa Rule of Civil Procedure 1.500(2)(b).

Second, *pro se* plaintiffs are also subject to the same strictures of a properly conducted oath, affirmation, or signature under penalty of perjury as a represented plaintiff. Iowa Code section 147.140(5) allows a *pro se* plaintiff to provide “answers to interrogatories” in lieu of a certificate of merit affidavit. Answers to interrogatories are governed by Iowa Rule of Civil

Procedure 1.509. Specifically, “each interrogatory must, to the extent it is not objected to, be answered separately and fully in *writing under oath*.” Iowa R. Civ. P. 1.509(1)(c) (emphasis added); *see also id.* r. 1.501(4) (“A rule requiring a matter to be under oath may be satisfied by an unsworn written statement in substantially the following form: ‘I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the proceeding is true and correct.’ ”). So, even *pro se* plaintiffs must provide information regarding qualified experts that is either sworn under oath, affirmation or made under penalty of perjury. This concept further evidences the legislature’s intent to require the certificate of merit to have a binding of the conscience element to it by making it an affidavit or requiring the expert to be under oath. *See Carter*, 618 N.W.2d at 377.

3. *The purpose of Iowa Code section 147.140 indicates an oath, affirmation or signature under penalty of perjury serves is an essential matter.*

“[T]he certificate of merit requirement serves to ‘identify and weed non-meritorious malpractice claims from the judicial system efficiently and promptly.’ ” *Struck*, 973 N.W.2d at 541 (quoting *Womer v. Hilliker*, 908 A.2d 269, 275 (Pa. 2006)). Requiring that the expert is under a properly conducted oath or affirmation while signing the certificate or is signing under penalty of perjury, *i.e.* signing to an affidavit, ensures that the expert understands the

gravity of the allegations they make in their certificate of merit affidavit. *Carter*, 618 N.W.2d at 375. Essentially, such a requirement works in tandem with deterring frivolous actions by making the plaintiff's expert think long and hard about the allegations they will be substantiating. *See Struck*, 973 N.W.2d at 539. Without signing the certificate while under a properly conducted oath, affirmation or signing it under penalty of perjury, a plaintiff's expert may not properly acknowledge or weigh which allegations in the petition have merit.

An interpretation that allows certificates of merit to not be affidavits or otherwise be signed while under a properly conducted oath, affirmation or signed under penalty of perjury creates serious consequences. *Cf.* Iowa Code § 4.6(5) (“If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: The consequences of a particular construction.”). It would “effectively exempt [plaintiffs’ experts in this case] from possible prosecution for perjury while claimants who comply with section [147.140] would remain subject to possible prosecution for perjury.” *In re Foley*, 2017 Iowa App. LEXIS 848, at *6. Additionally, by holding that no affidavit is necessary to fulfill the substantial compliance standard, no plaintiff would be incentivized to submit their expert to take an oath, affirmation or sign the certificate of merit under penalty of perjury. *Cf.*

id. Such a consequence would render a plainly articulated provision of a statute into a nullity. *Middlekauff*, 974 N.W.2d at 801. This consequence cannot be what the legislature had in mind when it purposefully chose to incorporate an under-oath requirement into the statute and continuously reference the necessary document as a certificate of merit affidavit.

Defendants' argument is consistent with the Iowa Supreme Court's numerous references to "expert testimony" in *Struck*. 973 N.W.2d 533. Our rules of evidence require that "[b]efore testifying, a witness must give an *oath or affirmation* to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." *See* Iowa R. Evid. 5.603 (emphasis added). Having the certificate of merit that is under oath, affirmation or under penalty of perjury also shows to the defendant and Court the plaintiffs have a witness who would be willing to give the same type of information that they would at trial *i.e.* testimony. *Carter*, 618 N.W.2d at 376; *see also Shorter*, 945 N.W.2d at 11 ("The formalities of being placed under oath, both the presence of an official to administer it and the use of the language 'under penalty of perjury,' are intended to 'bind the conscience' of the person taking the oath, *i.e.* impress upon them the gravity of testifying.").

Defendants' argument is further consistent with how courts regularly disregard affidavits that are not made under oath, affirmation or certified

under penalty of perjury during motion practice. *McCoy v. State*, No.17-1919, 2020 Iowa App. LEXIS 646, at *7 (Iowa Ct. App. June 17, 2020) (“Because the statement is neither notarized nor certified under penalty of perjury, we do not treat it as part of the record.”); *see also Provident Life and Accident Ins. Co. v. Goel*, 274 F.3d 984, 1000 (5th Cir. 2001) (“Unsworn expert reports . . . do not qualify as affidavits or otherwise admissible evidence for [the] purpose of [summary judgment], and may be disregarded by the court when ruling on a motion for summary judgment.”); *Maytag Corp. v. Electrolux Home Prods.*, 448 F. Supp. 2d 1034, 1064 (N.D. Iowa 2006) (“More recently, a number of courts, including federal Circuit Courts of Appeals, have held that unauthenticated or unverified expert reports may not be considered on summary judgment.”). The failure to show Dr. Gordon’s certificates of merit are affidavits or were signed under an oath, affirmation or under penalty of perjury is as if the plaintiffs never submitted a timely certificate of merit in the first place.

4. *Similar state tort reform statutes and cases support the notion that the affidavit requirement or signing under oath, affirmation or under penalty of perjury is an essential matter.*

Defendants’ argument for requiring an affidavit or requiring that the certificate of merit be signed under oath pursuant to the text of the statute is nothing new in the national tort reform context. *Estate of Butterfield v.*

Chautauqua Guest Homes, Inc., 987 N.W.2d 834, 841 (Iowa 2023) (comparing other state tort reform statutes to interpret Iowa Code section 147.140). Many state tort reform statutes typically require such supporting documents to be in affidavit form. *See, e.g.*, Ariz. Rev. Stat. § 12-2603(b) (requiring “a preliminary expert opinion **affidavit**”); Ark. Rev. Stat. § 16-114-209(b)(2) (requiring that “[t]he **affidavit shall be executed under oath**”); Del. Code Ann. Tit. 18, § 6853 (requiring “[a]n **affidavit** as to each defendant signed by an expert witness”); Ga. Code Ann. § 9-11-9.1(a) (requiring that “the plaintiff shall be required to file with the complaint an **affidavit** of an expert competent to testify”); 735 Ill. Comp. Stat. § 5/2-622 (“In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff’s attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an **affidavit**, attached to the original and all copies of the complaint.”); Ky. Rev. Stat. Ann. § 411.167(2) (“Certificate of merit means an **affidavit** or declaration.”); 24 Me. Stat. tit. 24, § 2903 (1977) (requiring a pre-suit notice of claim “setting forth **under oath** the nature and circumstances of the injuries); Mich. Comp. Laws Ann. § 600.2912d (requiring an “**affidavit** of merit signed by a health professional”); Minn. Stat. § 145.682 subd. 2 (requiring the plaintiff to serve “an **affidavit** as provided in

subdivision 3”); Mo. Rev. Stat. § 538.225 (requiring plaintiffs to “file an **affidavit** with the court stating he or she has obtained the written opinion of a legally qualified health care provider”); Nev. Rev. Stat. Ann. § 41A.071 (“If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an **affidavit**”); N.J. Stat. Ann. § 2A:53A-27 (“[P]rovide each defendant with an **affidavit** of an appropriate licensed person that there exists a reasonable probability that the care . . . fell outside acceptable professional or occupational standards or treatment practices.”); N.D. Cent. Code § 28-01-46 (requiring “an **affidavit** containing an admissible expert opinion to support a prima facie case of professional negligence”); Ohio R. Civ. P. 10(D)(2)(a) (“[A] complaint that contains a medical claim . . . shall be accompanied by one or more **affidavits** of merit . . .”).

Many states have held that the absence of evidence that the individual’s conscience was bound when they signed a document is a critical importance to a statute and cannot be ignored under the substantial compliance doctrine. *See, e.g., Ly-Carter v. Macagy*, No. F076715, 2019 Cal. App. Unpub. LEXIS 6864, at *13 (Cal. Ct. App. Oct. 11, 2019) (“The certification or declaration under penalty of perjury is not a mere formality. Section 2015.5 seeks to enhance the reliability of all declarations used as hearsay evidence by

disclosing the sanction for dishonesty. Thus, the statute requires some acknowledgement on the face of the declaration that perjured statements might trigger prosecution under California law.” (cleaned up) (internal citations omitted)); *Dishmon v. Fucci*, 32 A.3d 338, 342 (Del. 2011) (“In order to satisfy the prima facie burden, an Affidavit of Merit must only contain an expert’s sworn statement that medical negligence occurred, along with confirmation that he or she is qualified to proffer a medical opinion. By signing an affidavit, an affiant is under the penalty of perjury for any false assertion.”); *Sood v. Smeigh*, 578 S.E.2d 158, 161 (Ga. Ct. App. 2003) (“However, this affidavit was not sworn to and executed in the presence of a notary public prior to filing the compliant, which rendered the affidavit fatally defective ab initio for absence of a notary public swearing the witness in person.”); *Essig v. Advocate BroMenn Med. Ctr.*, 33 N.E.3d 288, 299 (Ill. App. Ct. 2015) (“The most obvious fatal deficiency is that Copeland’s written report was not an affidavit, meaning it was not sworn to, notarized, or otherwise made under oath.”); *Paradis v. Webber Hosp.*, 409 A.2d 672, 675 (Me. 1979) (“The oath provision in a statute is more than a mere technicality. Its function is both to make clear the significance of filing the document itself and to provide a basis for a perjury action upon proof of falsification.”); *Holmes v. Michigan Capital Med. Ctr.*, 620 N.W.2d 319, 324 (Mich. Ct. App.

2000) (“Because no indication exists that the doctor confirmed the document’s contents by oath or affirmation before a person authorized to issue the oath or affirmation, the document does not qualify as a proper affidavit.”); *Tschakert v. Fairview Health Servs.*, No. A10-611, 2011 Minn. App. Unpub. LEXIS 79, at *8 (Minn. Ct. App. Jan. 25, 2011) (“Here, appellant submitted an unsworn letter signed by Dr. Lopez; as it was not sworn to by Dr. Lopez ‘before an officer authorized to administer oaths,’ the letter does not constitute an affidavit. . . . As such, the district court properly rejected appellants’ letter of November 8, 2009, because it was technically deficient.”); *MountainView Hosp., Inc. v. Eighth Jud. Dist. Ct.*, 273 P.3d 861, 866 (Nev. 2012) (“The acknowledgment does not contain any statement that Dr. McNamara swore to or affirmed that the statements in the document are true. Thus, based upon the record, we cannot conclude that Dr. McNamara’s opinion letter constitutes an affidavit.”); *Tunia v. St. Francis Hosp.*, 832 A.2d 936, 939 (N.J. Super. Ct. App. Div. 2003) (“Failure to place a declarant under oath is not a mere ‘technical’ deficiency. In our view, it goes to the very nature of what an affidavit is.”); *Bride v. Trinity Hosp.*, 927 N.W.2d 416, 420 (N.D. 2019) (“Although Bride stated in her complaint that an admissible expert opinion supporting her allegations had been obtained, this does not satisfy the affidavit requirement. . . . Bride contends she substantially complied with the affidavit

requirement . . . [but] the letter of a clear and unambiguous statute cannot be disregarded under the pretext of pursuing its spirit.”).

For the aforementioned reasons, having the certificate of merit be an affidavit that is signed under a properly conducted oath, affirmation or signed under penalty of perjury is an essential matter of Iowa Code section 147.140. This statute’s requirement of an affidavit was purposefully crafted by the legislature to serve the goals of deterring frivolous claims against healthcare provider. Such a requirement is consistent with many other state tort reform statutes and cases interpreting them. A certificate of merit that is not an affidavit or otherwise signed under oath, affirmation or under penalty of perjury does not bind the conscience of the expert. Consequently, the certificates of merit served in this case are not substantially compliant. Dismissal with prejudice is required under section 147.140(6).

II. Plaintiffs Should Only Be Allowed to Pursue a Cause of Action Substantiated by their Certificates of Merit.

A. Error Preservation.

Defendants raised the issue of what “causes of action” should be allowed to proceed in its briefing at the district court level. *See App. 35* (Mercy Medical Center-Clinton, Inc. and Amareshwar Chiruvella’s Motion to Dismiss For Failure to Substantially Comply with Iowa Code section 147.140 (D0025)). The Court ruled denied this request as “premature.” *App. 64*

((Proposed) Order On Defendants’ Motion to Dismiss (D0040).
Consequently, error has been preserved as to this claim. *Lamasters*, 821
N.W.2d at 864.

B. Standard of Review.

Appellants incorporate their analysis regarding the standard of review
from the previous section.

**C. Plaintiffs’ Cause of Action Should be Limited to What was
Substantiated in the Certificate of Merit Affidavit.**

Iowa Code section 147.140(6) requires dismissal for “each cause of
action” not supported by a substantially compliant certificate of merit
affidavit. The Iowa Supreme Court has explained that a “cause of action” is
“the act on the part of the defendant which gives plaintiff cause for
complaint.” *Iowa Coal Mining Co. v. Monroe Cty.*, 555 N.W.2d 418, 429
(Iowa 1996); *see also Cause of Action*, Ballentine’s Law Dictionary (2010)
 (“[T]he fact or facts which establish or give rise to a right of action, in other
words, give to a person a right to judicial relief.”); *Each*, Merriam-Webster
<https://www.merriam-webster.com/dictionary/each> (“[B]eing one of two or
more distinct individuals having a similar relation and often constituting an
aggregate.”).

Each set of facts creating Plaintiffs’ cause of complaint, *i.e.* causes of
action, needed to be supported by a substantially compliant certificate of merit

under the plain language of Iowa Code section 147.140(6). Or otherwise stated, the certificate of merit functions as a gatekeeping tool to ensure “each cause of action” as applied to each healthcare provider has merit. *Butler v. Iyer*, No. 21-0796, 2022 Iowa App. LEXIS 291, *16–18 (Iowa Ct. App. Apr. 13, 2022). Essentially, one set of facts making up an allegation in a plaintiff’s petition may have merit, while another set of facts may not have merit. That’s why the legislature identified “each cause of action” rather than an entire count of negligence in section 147.140(6). Simply put, defendants’ interpretation “require[s] the plaintiff’s attorney to do what good practice and economics dictate: perform the due diligence necessary to determine the claim is meritorious before instituting litigation.” *Struck*, 973 N.W.2d at 541–42. Essentially, the certificate of merit affidavit is designed to lay out and frame what a plaintiff’s case is going to entail and to funnel the discovery process on the meritorious set of facts and its breach that are supported by an expert witness.

The only set of facts that Dr. Gordon was able to state had merit was that Dr. Chiruvella failed “to timely refer Mrs. Gomez for appropriate work-up and treatment of possible pulmonary embolism.” *See* App. 19, 34 (Certificate of Merit Affidavit of Leo M. Gordon, M.D. Regarding Defendant Mercy Medical Center-Clinton, Inc. (D0007); Mercy Medical Center-Clinton,

Inc. and Amareshwar Chiruvella’s Motion to Dismiss For Failure to Substantially Comply with Iowa Code section 147.140 (D0025)). Dr. Gordon explicitly does not find that Dr. Chiruvella breached the standard of care on the following alleged from the petition: failing to properly communicate with the nursing and other support staff acting pursuant to his orders; In failing to provide appropriate medical care; In failing to properly monitor and care for Shirley Gomez; In failing to timely and properly respond to signs and symptoms during Shirley Gomez’s care and treatment; In failing to act as a reasonable physician would act under the circumstances. App. 5 (Petition at Law and Jury Demand (D0001) ¶¶ 38(a-e) 54(a-e)).

The District Court’s rationale, explaining that the motion was “premature” is legal error. Iowa Code section 147.140 only provides one outcome to whether a certificate of merit affidavit does not cover a cause of action: dismissal with prejudice. *See* Iowa Code § 147.140(6). Consequently, if certain causes of action or factual allegations are not supported by Dr. Gordon’s certificates of merit, then they must be dismissed. Defendants respectfully request that the allegations of this case be limited to whether Dr. Chiruvella failed “to timely refer Mrs. Gomez for appropriate work-up and treatment of possible pulmonary embolism.”

CONCLUSION

Iowa Code section 147.140 explicitly requires that the certificate of merit affidavit is signed under the oath of the expert witness. The certificates of merit filed in this case were not affidavits as they were not signed under the oath or affirmation of the expert witness or signed under penalty of perjury. Substantial compliance does not save a certificate of merit that is not in affidavit form. Defendants respectfully request that the entire action should be dismissed on this ground pursuant to Iowa Code section 147.140(6).

If the Court does not dismiss in its entirety, the certificates of merit in this case only substantiate that Dr. Chiruvella failed “to timely refer Mrs. Gomez for appropriate work-up and treatment of possible pulmonary embolism.” No other breaches in the standard of care are described. Consequently, Defendants request that the case be limited to the following cause of action: whether Dr. Chiruvella failed “to timely refer Mrs. Gomez for appropriate work-up and treatment of possible pulmonary embolism.”

REQUEST FOR ORAL ARGUMENT

Defendants request oral argument to the extent these issues are not resolved in other appeals.

Dated March 6, 2024.

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INC., and AMARESHWAR
CHIRUVELLA, M.D.,
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type and contains 7,890 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theodore T. Appel
Signature

March 6, 2024
Date

ATTORNEY COST CERTIFICATE

I hereby certify the cost of printing the foregoing Defendants-Appellants' Final Brief was the sum of \$0.00.

/s/ Theodore T. Appel
Signature

March 6, 2024
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this proof brief was electronically filed and served on March 6, 2024 upon the Clerk of Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service) to those registered:

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