

**IN THE SUPREME COURT OF IOWA**

---

**No. 22-1927**

---

**BRITNI HILTS  
Plaintiff-Appellee**

**vs.**

**ADAM B. SMITH, M.D., ADAM B. SMITH, M.D., P.C. and TRI-STATE  
SPECIALISTS, LLP  
Defendants-Appellants.**

---

**APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT CASE  
NO. LACV191256**

**THE HONORABLE JAMES N. DAANE  
PRESIDING JUDGE**

---

**DEFENDANTS-APPELLANTS' FINAL BRIEF**

---

**JEFF W. WRIGHT, AT0008716  
ZACK A. MARTIN, AT0014476  
1128 Historic 4<sup>th</sup> Street  
P.O. Box 3086  
Sioux City, Iowa 51102  
Phone: (712) 255-8838  
Fax: (712) 258-6714  
[Jeff.Wright@heidmanlaw.com](mailto:Jeff.Wright@heidmanlaw.com)  
[Zack.Martin@heidmanlaw.com](mailto:Zack.Martin@heidmanlaw.com)**

**ATTORNEYS FOR DEFENDANTS  
ADAM B. SMITH, M.D.; ADAM  
SMITH, P.C.; AND TRI-STATE  
SPECIALISTS, LLP**

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES .....3

STATEMENT OF ISSUE.....5

ROUTING STATEMENT.....6

STATEMENT OF THE CASE.....6

STATEMENT OF THE FACTS .....7

ARGUMENT .....9

    I.    Dr. Marfuggi Was Not Licensed to Practice When he Signed the Certificate  
          of Merit Affidavit Served by Plaintiff. ....9

    II.   Plaintiff’s Certificate of Merit Affidavit did not Substantially Comply with  
          the Requirements of the Certificate of Merit Affidavit Statute. ....17

CONCLUSION.....23

REQUEST FOR ORAL ARGUMENT .....24

CERTIFICATE OF COMPLIANCE.....25

CERTIFICATE OF FILING.....26

PROOF OF SERVICE.....27

ATTORNEY’S COST CERTIFICATE.....28

## TABLE OF AUTHORITIES

### CASES CITED

<i>Butler v. Iyer</i> , 2022 WL 1100275 (Iowa Ct. App. 2022) .....	19
<i>Doe v. State</i> , 943 N.W.2d 608 (Iowa 2020) .....	9
<i>Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.</i> , 987 N.W.2d 834 (Iowa 2023) .....	15, 19, 20, 22
<i>Fischer v. Gallagher et al.</i> , Polk County Case No. LACL152813 (Jan. 3, 2023) .....	18, 19, 20, 21
<i>Freeman v. Grain Processing Corp.</i> , 848 N.W.2d 58 (Iowa 2014) .....	10, 15
<i>Hantsbarger v. Coffin</i> , 501 N.W.2d 501 (Iowa 1993) .....	17, 18, 19
<i>Jahnke v. Inc. City of Des Moines</i> , 191 N.W.2d 780 (Iowa 1971) .....	10
<i>May v. Donich Neurosurgery &amp; Spine, L.L.C.</i> , 2019-Ohio-4246 (Ohio Ct. App. 2019) .....	12
<i>McHugh v. Smith</i> , 966 N.W.2d 285 (Iowa Ct. App. 2021) .....	passim
<i>Mears v. Multi Care et al.</i> , Woodbury County Case No. LACV195645 (Mar. 30, 2023) .....	passim
<i>Nedved v. Welch</i> , 585 N.W.2d 238 (Iowa 1998) .....	19
<i>Seamans v. MacMillan</i> , 2002 WL 31307257 (Iowa Ct. App. 2002) .....	16
<i>State v. Iowa Dist. Ct. for Scott Cnty.</i> , 889 N.W.2d 467 (Iowa 2017) .....	10
<i>State v. Richardson</i> , 890 N.W.2d 609 (Iowa 2017) .....	9, 10
<i>State v. Zacarias</i> , 958 N.W.2d 573, 582 (Iowa 2021) .....	11
<i>Struck v. Mercy Health Servs.-Iowa Corp.</i> , 973 N.W.2d 533 (Iowa 2022) .....	6

*Wood v. Montgomery County Memorial Hospital,*  
Montgomery County Case No. LACV0220000 (Sep. 25, 2020) .....18, 19, 20, 21

**STATUTES CITED**

IAC 653-9.14 .....8, 11, 14, 15

Iowa Code § 4.4 .....10, 14

Iowa Code § 147.1 .....10

Iowa Code § 147.2 .....passim

Iowa Code § 147.139 .....passim

Iowa Code § 147.140 .....passim

Iowa Code § 668.11 .....passim

N.J. Admin. Code. § 13:35-3.14 .....8, 11, 16

N.Y. Educ. Law § 6502 .....8, 11, 16

**OTHER AUTHORITIES**

BLACK’S LAW DICTIONARY (11th ed. 2019) .....11

Iowa R. App. P. 6.1101 .....6

## STATEMENT OF ISSUE PRESENTED FOR REVIEW

- I. Whether the district court erred in finding that Dr. Marfuggi satisfied the expert witness standards.

*Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.*,  
987 N.W.2d 834 (Iowa 2023)

*Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014)  
IAC 653-9.14

Iowa Code § 147.2

Iowa Code § 147.139

Iowa Code § 147.140

N.J. Admin. Code. § 13:35-3.14

N.Y. Educ. Law § 6502

- II. Whether the district court erred in finding that Dr. Marfuggi's certificate of merit affidavit substantially complied with the statutory requirements.

*Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.*,  
987 N.W.2d 834 (Iowa 2023)

*Hantsbarger v. Coffin*, 501 N.W.2d 501 (Iowa 1993)

Iowa Code § 147.139

Iowa Code § 147.140

Iowa Code § 668.11

*McHugh v. Smith*, 966 N.W.2d 285 (Iowa Ct. App. 2021)

## **ROUTING STATEMENT**

This case involves the requirements for a certificate of merit affidavit under Iowa Code section 147.140. This issue has been thoroughly addressed by published decisions of this Court and the Court of Appeals. *See Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 538–45 (Iowa 2022); *McHugh v. Smith*, 966 N.W.2d 285, 287–92 (Iowa Ct. App. 2021). This case presents the application of existing legal principles such that it should be transferred to the Court of Appeals. *See Iowa R. Civ. P. 6.1101(3)(a)*.

## **STATEMENT OF THE CASE**

Plaintiff filed suit against Defendants on March 4, 2020. App. 6–24. Plaintiff’s claims arise from alleged medical negligence of Defendant, Adam Smith M.D. (“Dr. Smith”). *See id.* On March 17, 2020, Plaintiff filed a certificate of merit affidavit which purportedly satisfies the requirements of Iowa Code section 147.140. App. 25–26.

Defendants moved for dismissal with prejudice of Plaintiff’s claims on April 25, 2022. App. 42–95. In support thereof, Defendants argued that the certificate of merit affidavit offered by Plaintiff and signed by Dr. Richard Marfuggi (“Dr. Marfuggi”) did not meet the statutory requirements because, when Dr. Marfuggi signed the certificate of merit affidavit, he held retired/inactive licenses under which

he was not permitted to practice medicine. *See id.* Plaintiffs resisted, arguing that Dr. Marfuggi’s retired/inactive licenses were sufficient under Iowa law. App. 96–213.

On October 20, 2022, the Honorable Judge James N. Daane entered a Ruling denying Defendants’ Motion. App. 235. The district court concluded that Dr. Marfuggi’s retired/inactive licenses satisfied the requirement that he be “licensed *to practice*” at the time he offered his certificate of merit affidavit against Dr. Smith. App. 231 (citing Iowa Code § 147.139(1)) (emphasis added). The district court also concluded that, even if Dr. Marfuggi was not “licensed to practice,” factors relevant to substantial compliance suggested that his certificate of merit affidavit nevertheless substantially complied with the requirements. *See* App. 233–234.

Defendants filed a timely Application for Interlocutory Appeal on November 21, 2022. App. 237–275. Plaintiffs did not resist Defendants’ Application. This Court granted Defendants’ Application and stayed district court proceedings on January 30, 2023. App. 276.

### **STATEMENT OF THE FACTS**

Plaintiff alleges that Dr. Smith negligently performed a reconstructive rhinoplasty and failed to provide informed consent regarding the procedure. App. 6–24. In support of her claim, Plaintiff produced a certificate of merit affidavit signed by Dr. Marfuggi. App. 25–26.

In his affidavit, filed March 17, 2020, Dr. Marfuggi stated that “[u]ntil my retirement from clinical practice on July 1, 2019, I was a Doctor licensed and in good standing in the State of New Jersey to practice plastic [s]urgery in all areas relevant to this matter.” App. 25 at ¶ 1. At the time he offered the certificate of merit affidavit, Dr. Marfuggi held retired/inactive medical licenses in New Jersey and New York. App. 67–68. Holders of retired/inactive licenses cannot practice medicine. *See* N.J. Admin. Code. § 13:35-3.14(g); N.Y. Educ. Law § 6502; IAC 653-9.14(1)(c). To practice, inactive licensees must first reactivate their license under applicable New Jersey, New York, and Iowa law. *Id.*

During his deposition, Dr. Marfuggi confirmed that he was first contacted by Plaintiff’s counsel sometime in the fall of 2019, after he had retired. App. 65–66 at lines 32:22–33:16. Dr. Marfuggi also confirmed that he had retired effective July 1, 2019, and did not maintain a license permitting the practice of medicine at the time he reviewed the case or signed the certificate of merit affidavit. *See* App. 61–63 at lines 5:22–6:2, 13:11–14.

In response to Defendants’ motion alleging that Dr. Marfuggi was insufficiently qualified because his license did not allow him to practice, Dr. Marfuggi began the process of reactivating his New Jersey license. Aff. of Dr. Marfuggi (July 28, 2022). Plaintiff has represented by way of filings in another case that as of October 2022, Dr. Marfuggi’s New Jersey license has been changed to a



status which again allows Dr. Marfuggi to practice medicine, unlike his retired license, which did not permit practice. *Hanner v. Smith et al.*, Woodbury County Case No. LACV191581, Aff. of Dr. Marfuggi (Oct. 31, 2022).

## ARGUMENT

### **I. Dr. Marfuggi Was Not Licensed to Practice When he Signed the Certificate of Merit Affidavit Served by Plaintiff.**

The Iowa legislature enacted the certificate of merit affidavit requirements in 2017. *See* Iowa Code § 147.140. In the same bill that enacted section 147.140, the legislature modified the expert witness standards in medical malpractice cases. *Compare* Iowa Code § 147.139 *with* Iowa Code § 147.139 (2008) (pre-2017 amendments).

Iowa law requires that a certificate of merit affidavit be provided by an expert who meets the expert witness standards. Iowa Code § 147.140(1)(a). Those standards include that the expert is “licensed *to practice* in the same or a substantially similar field as the defendant.” Iowa Code § 147.139(1) (emphasis added). In addition to a certificate of merit affidavit from a witness not “licensed to practice” being deficient, such a witness shall not testify at trial on the standard of care or breach thereof. *See* Iowa Code § 147.139.

“[O]nly the text of a piece of legislation is enacted into law.” *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020). “Any interpretive inquiry thus begins with the language of the statute at issue.” *Id.* If statutory language is plain and unambiguous,

a court's inquiry also "stops" with the text. *State v. Richardson*, 890 N.W.2d 609, 616 (Iowa 2017).

Courts use traditional principles of statutory interpretation when attempting to determine the meaning of statutory language. *Doe*, 943 N.W.2d at 610. Among these principles is the presumption that, in enacting a statute, the legislature intends for all the statutory terms and language to be given meaning and effect. *See* Iowa Code § 4.4(2). This Court presumes statutes do not contain superfluous words and will reject interpretations which render words in a statute superfluous or without meaning. *See State v. Iowa Dist. Ct. for Scott Cnty.*, 889 N.W.2d 467, 474 (Iowa 2017).

Another canon of interpretation provides that "[t]he legislature is presumed to know the existing state of the law when the new statute is enacted." *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 88 (Iowa 2014) (citing *Jahnke v. Inc. City of Des Moines*, 191 N.W.2d 780, 787 (Iowa 1971)). "[T]he new provision is presumed to accord with the legislative policy embodied in prior statutes." *Id.* "When prior and later statutes deal with the same subject matter . . . they should as far as reasonably possible be construed in harmony with each other." *Id.*

Chapter 147 defines "licensed," when applied to a health care professional, as meaning "a person licensed under this subtitle." Iowa Code § 147.1(3). Chapter 147 does not define "practice." *See* Iowa Code § 147.1. Nevertheless, Chapter 147

expressly distinguishes between licensure and practice when providing that “[a] person shall not engage in the *practice* of medicine . . . unless the person has obtained a *license*.” Iowa Code § 147.2. Statutory language regarding obtaining a *license to practice* and medical professionals being *licensed to practice* is used throughout Chapter 147. *See generally* Iowa Code Chapter 147.

To the extent “licensed to practice” is not sufficiently defined within Chapter 147, courts appropriately turn to dictionary definitions. *See State v. Zacarias*, 958 N.W.2d 573, 582 (Iowa 2021). The dictionary definitions similarly support the distinction between licensing and practice recognized in Iowa Code section 147.2. A person who practices medicine, also known as a practitioner, is a person who is “engaged in the practice of a profession, esp. law or medicine.” *Practitioner*, BLACK’S LAW DICTIONARY (11th ed. 2019). Licensing, on the other hand, involves “[a] governmental body’s process of issuing a license.” *Licensing*, BLACK’S LAW DICTIONARY (11th ed. 2019).

Also supportive of the distinction between a person being licensed and that person practicing medicine is the privileges recognized for medical professionals who elect inactive/retired licensure status. *See* N.J. Admin. Code. § 13:35-3.14(g); N.Y. Educ. Law § 6502; IAC 653-9.14(1)(c). Under the governing law in each state, at the time Dr. Marfuggi signed the certificate of merit affidavit, he held the *privilege of licensure* but could not *practice medicine*. *See id.*

The Ohio Court of Appeals recently addressed Ohio’s expert qualifications standards for its state’s required affidavit of merit. *See May v. Donich Neurosurgery & Spine, L.L.C.*, 2019-Ohio-4246 (Ohio Ct. App. 2019). Ohio similarly requires that any such expert be “licensed to practice medicine.” Ohio Rev. Code §2743.43 (expert witness standards); *see also* Ohio R. Civ. P. 10(D)(2)(a) (affidavit of merit required from qualified expert).

The expert in *May*, like Dr. Marfuggi, held an “inactive” medical license at the time he signed the affidavit. *May*, 2019-Ohio-4246 at ¶ 18. The appeals court held that the district court did not err in excluding the expert because the expert did not meet the requirement of being “licensed to practice” medicine at the time he signed the affidavit. *See id.* at ¶ 33. “[Plaintiff’s expert] was, at the time he signed the [] affidavit of merit, neither engaged in the active clinical practice of medicine, nor teaching medicine at an accredited institution.” *Id.* at ¶ 18.

Dr. Marfuggi was similarly not engaged in the practice of medicine when he signed the certificate of merit affidavit. *Compare id. with App. 25* at ¶ 1; *see also* Iowa Code § 147.2 (holding a license a prerequisite to the “practice of medicine”). As his license did not permit practice, it necessarily follows that Dr. Marfuggi could not have been “licensed to practice” for purposes of the expert witness standards. Iowa Code § 147.139(1). As a result, Dr. Marfuggi fails to meet the standards, and his certificate of merit affidavit against Defendants is deficient. *See* Iowa Code §

147.139 (the court “shall only” allow testimony from an expert who meets the standards); Iowa Code § 147.140(1)(a) (expert witness providing a certificate of merit affidavit “must meet the qualifying standards of section 147.139”).

The district court and Plaintiffs offer various explanations for why “licensed to practice” in section 147.139(1) means something other than holding a license which permits practice. None of these explanations overcome the plain language of the statute. The district court properly looked to the other criteria in section 147.139, specifically the required experience set forth in subsection (2), in trying to discern the meaning of subsection (1). *See Doe*, 943 N.W.2d at 610. The district court erred, however, by conflating the distinct yet complementary requirements under subsections (1) and (2).

Iowa Code section 147.139(1) is a *present* tense requirement related to *licensure*:

The person is licensed to practice in the same or a substantially similar field as the defendant, is in good standing in each state of licensure, and in the five years preceding the act or omission alleged to be negligent, has not had a license in any state revoked or suspended.

Iowa Code § 147.139(1). Subsection 2 relates to *prior experience* in the five years preceding the care at issue:

In the five years preceding the act or omission alleged to be negligent, the person actively practiced in the same or a substantially similar field as the defendant or was a

qualified instructor at an accredited university in the same field as the defendant.

Iowa Code § 147.139(2).<sup>1</sup> All of the section 147.139 criteria must be satisfied for Dr. Marfuggi to be qualified to offer a certificate of merit affidavit in this case. Iowa Code § 147.139.

The district court reasons that if “licensed to practice” in subsection (1) required a license that permits practice, the legislature would have chosen the language “the person is actively practicing” rather than “the person is licensed to practice.” App. 231. This ignores the distinction between license status and practice experience made clear by subsections (1) and (2), when read as a whole. *See* Iowa Code § 147.139.

The district court’s position fails to account for why subsection (1) includes the language “licensed *to practice*,” if “licensed to practice” includes a ceremonial license that *does not permit practicing medicine*, as the district court concludes. *Compare* Iowa Code § 147.139(1) *with* App. 231. The district court’s interpretation effectively reads “to practice” out of the statute. *See* Iowa Code § 4.4(2) (in enacting a statute, it is presumed that the entire statute is intended to be effective). “Licensed to practice” is synonymous with being licensed to actively practice medicine. IAC 653-9.14(1)(c); *see also* Iowa Code § 147.2.

---

<sup>1</sup> Plaintiffs have two years to file malpractice lawsuits after the incident itself, so the legislature was certainly considering two different points in time.

The legislature is presumed to have been aware of the requirement in section 147.2 that a person be *licensed* before they may *practice* medicine when enacting the expert witness standards which require a license to practice. *Freeman*, 848 N.W.2d at 88. The legislature was also presumptively aware that those with inactive licenses may not practice medicine without first reactivating their license. IAC 653-9.14(1)(c). Reading the expert witness standards in harmony with other code provisions on the same subject matter supports the finding that Dr. Marfuggi does not satisfy those standards.

The legislative history also does not support the district court’s conclusion. *See Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.*, 987 N.W.2d 834, 839–40 (Iowa 2023) (this Court using legislative history when construing Iowa Code § 147.140). Draft versions of the expert witness standards were amended to remove their applicability to causation experts and permit practice in a “substantially similar” and not just the same field. *Compare* S.F. 465, 87th G.A. (Mar. 6, 2017 version) *with* Iowa Code § 147.139. However, the legislature maintained the requirement that the expert witness be “licensed *to practice*.” *Id.* (emphasis added).

As noted in *Butterfield*, the decision to keep or omit specific language reflects “a conscious policy decision” made by the legislature. *Butterfield*, 987 N.W.2d at 841. In this case, that policy choice was that experts who wish to testify against physicians must be “licensed *to practice*.” *See id.*; Iowa Code § 147.139(1). No

amendment was made to add or delete “to actively practice” because “licensed to practice” is a synonymous present tense requirement. *See* Iowa Code § 147.2.

The district court further concluded that Defendants’ plain reading of the statute, even if correct, would create practical problems with respect to claims brought by minors for which the statute of limitations is tolled and would also preclude defendant-physicians who are no longer “licensed to practice” from testifying in their own defense. App. 232–233. The first of the district court’s concerns is addressed by the six-year statute of repose applying to claims of minors, irrespective of the tolling statute. *Seamans v. MacMillan*, 2002 WL 31307257, at \*1 (Iowa Ct. App. 2002). The second concern is addressed by the language of section 147.139 providing that the expert witness standards apply only to “a person *the plaintiff designates* as an expert witness.” Iowa Code § 147.139 (emphasis added).

The text of the statute is straightforward. “Licensed to practice” as used in Iowa Code section 147.139(1) means a license that permits its holder to practice medicine. Dr. Marfuggi’s medical licenses did not permit him to practice at the time he signed the certificate of merit affidavit. Defs.’ Mot. Summ. J., Exs. D–E; *see also* N.J. Admin. Code. § 13:35-3.14(g); N.Y. Educ. Law § 6502. As a result, Dr. Marfuggi did not satisfy this required criterion for persons offering certificate of merit affidavits. Iowa Code § 147.139(1); Iowa Code § 147.140(1)(a). The district court erred in reaching the contrary result.



## **II. Plaintiff’s Certificate of Merit Affidavit did not Substantially Comply with the Requirements of the Certificate of Merit Affidavit Statute.**

“Failure to substantially comply with [the certificate of merit affidavit requirements] 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.” Iowa Code § 147.140(6). Since 1986, Iowa law has placed heightened expert disclosure requirements on plaintiffs bringing claims against medical professionals. *See* Iowa Code § 668.11. The purpose of these requirements is to protect medical professionals from lawsuits unsupported by the requisite expert testimony. *See Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993).

In 2017, the legislature enacted the further requirement that plaintiffs in medical malpractice cases serve on each named defendant a certificate of merit affidavit from a qualified expert, within 60 days of the answer of that defendant. *See* Iowa Code § 147.140(1). “By enacting section 147.140, layered over the existing mandates of section 668.11, the legislature placed higher demands on medical malpractice plaintiffs.” *McHugh v. Smith*, 966 N.W.2d 285, 290 (Iowa Ct. App. 2021).

“Although not specifically addressed by the statute, *Hantsbarger* held substantial compliance was sufficient under section 668.11. Hewing to that same line, the legislature built substantial compliance into section 147.140.” *Id.* at 288 (citing *Hantsbarger*, 501 N.W.2d at 504; Iowa Code § 147.140(6)). “Substantial

compliance means compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.” *Id.* at 288–89; *see also Hantsbarger*, 501 N.W.2d at 504.

The district court considered substantial compliance when assuming for purposes of argument that Dr. Marfuggi was not “licensed to practice” as required by subsection (1) of Iowa Code section 147.139 and concluded:

[T]here is no indication that Dr. Marfuggi is anything but a board-certified plastic surgeon who had practiced for 36 years with no issues with his license, including the period encompassing the year of plaintiff’s surgery by the defendant doctor. In a light most favorable to plaintiff, Dr. Marfuggi’s resume . . . evidences his considerable expertise in the subject area of this alleged negligence. The court’s determination that his certifications, reports and testimony may be used will provide at least the same quality of opinion on the standard of care that existed at the time of the subject procedure, or on the existence of any standard of care violations by the defendant doctor, than would those of a plastic surgeon who is currently “actively practicing”, but did not even begin practicing until just prior to March 8, 2013 (30 years after Dr. Marfuggi began his practice in this field).

Order at pp. 10–11.

The district court’s substantial compliance analysis is inconsistent with the application of the substantial compliance standard to certificate of merit affidavits. *See McHugh*, 966 N.W.2d at 287–92. Designation of an unqualified expert within the 60-day window does not amount to substantial compliance with the certificate of merit affidavit statute. *See, e.g., Mears v. Multi Care et al.*, Woodbury County

Case No. LACV195645, Combined Ruling on Summary Judgment (Mar. 30, 2023); *Fischer v. Gallagher et al.*, Polk County Case No. LACL152813, Ruling on Defendants’ Motion to Dismiss, (Jan. 3, 2023); *Wood v. Montgomery County Memorial Hospital*, Montgomery County Case No. LACV0220000, Ruling on Motion to Dismiss, (Sep. 25, 2020). As a result, Dr. Marfuggi’s certificate of merit affidavit did not substantially comply with the statutory requirements. Iowa Code § 147.140(6).

Substantial compliance with the certificate of merit affidavit requirements is “compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.” *McHugh*, 966 N.W.2d at 288–89 (quoting *Hantsbarger*, 501 N.W.2d at 504). Beginning with *Hantsbarger*, this Court and the Court of Appeals articulated the contours of the substantial compliance standard in the context of deficient expert disclosures in medical malpractice cases. A claim being non-frivolous does not support a finding of substantial compliance with either section 668.11 or the certificate of merit affidavit requirements when the expert disclosure is untimely or otherwise deficient. *Id* at 289; *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998); *Butler v. Iyer*, 2022 WL 1100275, at \*6 (Iowa Ct. App. 2022).

When determining the legislature’s objectives in enacting the 2017 medical malpractice tort reform statutes, this Court has recently turned to legislative history.

*See Butterfield*, 987 N.W.2d at 839–40. As discussed above, the legislative history shows that the requirement for the expert to be “licensed to practice” remained unchanged despite other revisions in the drafting stage of section 147.139. *Compare* S.F. 465, 87th G.A. (Mar. 6, 2017 version) *with* Iowa Code § 147.139. This indicates that requiring a license that permits practice was an objective of the expert witness standards, such that finding Plaintiff substantially complied with the requirements would be improper. *See McHugh*, 966 N.W.2d at 288–89.

The issue of whether a timely certificate of merit affidavit from an unqualified expert substantially complies with the statutory requirements was considered by three separate Iowa district courts. Each held that procedurally timely but substantive deficient certificate of merit affidavits fail to substantially comply with the requirements of section 147.140. *Mears*, Woodbury County Case No. LACV195645 (Mar. 30, 2023) at p. 18; *Fischer*, Polk County Case No. LACL152813 (Jan. 3, 2023) at p. 11; *Wood*, Montgomery County Case No. LACV0220000 at pp. 8–9. In finding the substantial compliance standard was not satisfied, *Wood* makes the following observation when comparing the deficient certificate of merit affidavit there with the untimely affidavit in *McHugh*:

Unlike in *McHugh*, where the plaintiff’s expert was found acceptable but untimely, Plaintiffs’ expert was timely, but has been found to be unqualified under the Code.

...

Even though Plaintiffs met the procedural requirement of providing the certificate of merit in a timely manner, the certificate is substantively deficient due to the expert not meeting the qualification standards of the Code. The essential substantive information was, therefore, not provided on time in the instant case, even though the initial offering was timely.

The Court finds that to hold there has been substantial compliance without the required and acceptable substantive information being given in a timely manner, would go against the objective of Sections 668.11, 147.140 and the Code. For these reasons, the Court further finds Plaintiffs have not substantially complied with 147.140 and, as Iowa statute offers no discretion regarding the penalty for noncompliance other than dismissal with prejudice, dismissal is appropriate.

*Wood*, Montgomery County Case No. LACV0220000 at p. 9.

The district court in *Wood* reached the correct result under Iowa law that a certificate of merit from an unqualified expert filed within 60 days of an answer does not substantially comply with the certificate of merit affidavit requirements. *Id.* at pp. 8–9; *see also Mears*, Woodbury County Case No. LACV195645 (Mar. 30, 2023) at p. 18; *Fischer*, Polk County Case No. LACL152813 (Jan. 3, 2023) at p. 11. In reaching a different result from *Wood* and other district courts, the district court in this case relied on Dr. Marfuggi’s breadth of experience in the field of plastic surgery and a lack of prejudice to Defendants, even if Dr. Marfuggi does not strictly comply with the “licensed to practice” requirement. App. at 233–234.

Dr. Marfuggi's experience cannot serve as the basis for substantial compliance, however, in light of the legislature's purposeful modification of the expert witness standards in 2017 that eliminated language related to the expert's qualifications generally. *Compare* Iowa Code § 147.139 *with* Iowa Code § 147.139 (2008) (pre-2017 amendments); *see also* *Mears*, Woodbury County Case No. LACV195645 (Mar. 30, 2023) at p. 15 (“[u]nder the current version of §147.139, it is no longer the experts ‘qualifications’ that are under scrutiny, the determining factor is now the field in which the expert is ‘licensed to practice’”). Defendants would also suffer inherent prejudice were an expert who fails to meet the statutory qualifications permitted to offer opinions against Dr. Smith, in contradiction of the mandate from the legislature that a court “shall only allow a person the plaintiff designates as an expert witness to qualify as an expert witness and to testify on the issue of the appropriate standard of care or breach of the standard of care if all of the [expert witness standards] are established by the evidence.” *Id.*

The legislative history surrounding the enactment of the expert witness standards supports a finding that Plaintiff has failed to comply with the reasonable objectives of the statute. *See Butterfield*, 987 N.W.2d at 840. Despite making other changes to the standards and their applicability, the legislature consistently maintained the requirement that the expert witness be “licensed to practice.” *Compare* S.F. 465, 87th G.A. § 4 (Mar. 6, 2017 version) *with* Iowa Code § 147.139.

The appropriate conclusion from the legislative history is the legislature meant what it said and said what it meant: to qualify as an expert witness and offer a certificate of merit affidavit against a defendant, an expert must have a license that permits the practice of medicine. *See* Iowa Code § 147.139(1).

Failure to substantially comply with the certificate of merit affidavit requires dismissal with prejudice of all claims which require expert testimony. Iowa Code § 147.140(6). Dr. Marfuggi's deficient certificate of merit affidavit did not amount to substantial compliance. As a result, Defendants are entitled to dismissal with prejudice as to all claims against them, as all such claims require expert testimony to establish a prima facie case. *See id.*

### **CONCLUSION**

Plaintiff's claims require a certificate of merit affidavit. *See* Iowa Code § 147.140(1)(a). A certificate of merit affidavit must be provided by an expert witness who meets the qualifying standards of section 147.139. *Id.* Those standards include that the expert be "licensed to practice" in the same or a substantially similar field as the defendant. Iowa Code § 147.139(1) (emphasis added).

Dr. Marfuggi was not "licensed to practice" when he signed the certificate of merit affidavit in this case because the retired/inactive licenses he held did not permit him to practice medicine. Therefore, Plaintiff's certificate of merit affidavit is deficient and does not substantially comply with the statutory requirements. As a

result, Defendants are entitled to dismissal with prejudice of all Plaintiff's remaining claims. *See* Iowa Code § 147.140(6). The district court's contrary ruling should be reversed.

**REQUEST FOR ORAL ARGUMENT**

The Defendants-Appellants requests that this case be submitted with oral argument.

DATED this 13<sup>th</sup> day of July, 2023.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright  
JEFF W. WRIGHT, AT0008716  
ZACK A. MARTIN, AT0014476  
1128 Historic 4<sup>th</sup> Street  
P.O. Box 3086  
Sioux City, Iowa 51102  
Phone: (712) 255-8838  
Fax: (712) 258-6714  
[Jeff.Wright@heidmanlaw.com](mailto:Jeff.Wright@heidmanlaw.com)  
[Zack.Martin@heidmanlaw.com](mailto:Zack.Martin@heidmanlaw.com)  
ATTORNEYS FOR DEFENDANTS  
ADAM B. SMITH, M.D.; ADAM SMITH,  
P.C.; AND TRI-STATE SPECIALISTS,  
LLP



## CERTIFICATE OF COMPLIANCE

Defendants-Appellants, Adam B. Smith, M.D.; Adam Smith, M.D., P.C.; and Tri-State Specialists, LLP, pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 4,306 words of a 14-point proportionally spaced Times New Roman font and it complies with the 14,000-word maximum permitted length of the brief.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright  
JEFF W. WRIGHT, AT0008716  
ZACK A. MARTIN, AT0014476  
1128 Historic 4<sup>th</sup> Street  
P.O. Box 3086  
Sioux City, Iowa 51102  
Phone: (712) 255-8838  
Fax: (712) 258-6714  
Jeff.Wright@heidmanlaw.com  
Zack.Martin@heidmanlaw.com  
ATTORNEYS FOR DEFENDANTS  
ADAM B. SMITH, M.D.; ADAM SMITH,  
P.C.; AND TRI-STATE SPECIALISTS,  
LLP

**CERTIFICATE OF FILING**

I, the undersigned, hereby certify that I will electronically file the attached Defendants-Appellants' Final Brief with the Clerk of the Supreme Court by using the EDMS filing system.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright  
JEFF W. WRIGHT, AT0008716  
ZACK A. MARTIN, AT0014476  
1128 Historic 4<sup>th</sup> Street  
P.O. Box 3086  
Sioux City, Iowa 51102  
Phone: (712) 255-8838  
Fax: (712) 258-6714  
[Jeff.Wright@heidmanlaw.com](mailto:Jeff.Wright@heidmanlaw.com)  
[Zack.Martin@heidmanlaw.com](mailto:Zack.Martin@heidmanlaw.com)  
ATTORNEYS FOR DEFENDANTS  
ADAM B. SMITH, M.D.; ADAM SMITH,  
P.C.; AND TRI-STATE SPECIALISTS,  
LLP

**PROOF OF SERVICE**

I, the undersigned, hereby certify that I did serve the attached Defendants-Appellants' Final Brief on all other parties electronically utilizing the EDMS filing system, which will provide notice to:

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright  
JEFF W. WRIGHT, AT0008716  
ZACK A. MARTIN, AT0014476  
1128 Historic 4<sup>th</sup> Street  
P.O. Box 3086  
Sioux City, Iowa 51102  
Phone: (712) 255-8838  
Fax: (712) 258-6714  
Jeff.Wright@heidmanlaw.com  
Zack.Martin@heidmanlaw.com  
ATTORNEYS FOR DEFENDANTS  
ADAM B. SMITH, M.D.; ADAM SMITH,  
P.C.; AND TRI-STATE SPECIALISTS,  
LLP

**ATTORNEY'S COST CERTIFICATE**

The undersigned attorney does hereby certify that the actual cost of preparing the foregoing Defendants-Appellants' Final Brief was the sum of \$0.00 exclusive of service tax, postage, and delivery charges.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright  
JEFF W. WRIGHT, AT0008716  
ZACK A. MARTIN, AT0014476  
1128 Historic 4<sup>th</sup> Street  
P.O. Box 3086  
Sioux City, Iowa 51102  
Phone: (712) 255-8838  
Fax: (712) 258-6714  
Jeff.Wright@heidmanlaw.com  
Zack.Martin@heidmanlaw.com  
ATTORNEYS FOR DEFENDANTS  
ADAM B. SMITH, M.D.; ADAM SMITH,  
P.C.; AND TRI-STATE SPECIALISTS,  
LLP