

IN THE SUPREME COURT OF IOWA

No. 22-1572

**RENEE HUMMEL
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. LACV191517**

**THE HONORABLE ROGER L. SAILER
PRESIDING JUDGE**

DEFENDANTS-APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES 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 653-9.1

IAC 653-9.2

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 August 7, 2019. App. 6–27. Plaintiff’s claims arise from alleged medical negligence of Defendant, Adam Smith M.D. (“Dr. Smith”). *See App. 6–27*. In response to Defendants’ Motion to Strike, Plaintiff filed an Amended Petition on February 5, 2020. *See App. 28–49*. Defendants answered the Amended Petition on February 6, 2020. App. 50–56. On February 24, 2020, Plaintiff filed a certificate of merit affidavit which purportedly satisfies the requirements of Iowa Code section 147.140. App. 57–58.

Defendants moved for dismissal with prejudice of Plaintiff’s claims on April 25, 2022. App. 59–64. 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* App. 59–110. Plaintiffs resisted, arguing that Dr. Marfuggi’s retired/inactive licenses were sufficient under Iowa law. App. 111–241.

On August 22, 2022, the Honorable Judge Roger L. Sailer entered a Ruling denying Defendants’ Motion. App. 265. 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. *See* App. 258–262 (citing Iowa Code § 147.139(1); IAC 653-9.2(2)(c)–(f)).

Defendants filed a timely Application for Interlocutory Appeal on September 21, 2022. App. 268–304. Plaintiffs did not resist Defendants’ Application. This Court granted Defendants’ Application and stayed district court proceedings on January 30, 2023. App. 305.

STATEMENT OF THE FACTS

Plaintiff alleges that Dr. Smith negligently performed breast reduction surgery and failed to provide informed consent regarding the procedure. App. 28–49. In support of her claim, Plaintiff produced a certificate of merit affidavit signed by Dr. Marfuggi. App. 57–58.

In his affidavit, filed February 24, 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. 57 at ¶ 1 (emphasis added). At the time he offered the certificate of merit affidavit, Dr. Marfuggi held retired/inactive medical licenses in New Jersey and New York. App. 82–83. 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 in connection with another matter against Dr. Smith, Dr. Marfuggi confirmed that he was first contacted by Plaintiff’s counsel sometime in the fall of 2019, after he had retired. App. 80–81 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. 76–78 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 that references medical professionals obtaining a *license to practice* and being *licensed to practice* is used throughout Chapter 147. *See generally* Iowa Code Chapter 147.

New York and New Jersey recognize special privileges for medical professionals electing inactive status, like Dr. Marfuggi, which clearly distinguishes that status from an active license to practice. *See* N.J. Admin. Code. § 13:35-3.14(g); N.Y. Educ. Law § 6502; IAC 653-9.14(1)(c). In both states, at the time Dr. Marfuggi signed the certificate of merit affidavit, he merely held the *privilege of licensure* but he could not *practice medicine*. *See id.*

Additional provisions and defined terms in IAC Chapter 653, regulating licensure to practice medicine, are particularly instructive. The terms “current, active status,” “inactive license,” “inactive status,” and “practice” are all specifically defined. IAC 653-9.1; IAC 653-9.14(1)(a). These terms are defined as follows:

“*Current, active status*” means a license that is in effect and *grants the privilege of practicing* administrative medicine, medicine and surgery or osteopathic medicine and surgery, as applicable.

“*Inactive license*” means any license that is not in current, active status. A physician whose license is inactive continues to hold the privilege of licensure in Iowa but *may not practice* under an inactive Iowa license until the inactive license is reinstated to active status.

“*Inactive status*” may include licenses formerly known as delinquent, lapsed, or retired.

“*Practice*” means the practice of medicine and surgery or osteopathic medicine and surgery.

Id.

Chapter 653 further provides for situations in which licensure is not required. *See* IAC 653-9.2(2). For out-of-state physicians holding licenses in other states, only “a *current, active* license in good standing” permits the participation in patient care under the supervision of an Iowa physician. IAC 653-9.2(2)(c)–(f) (emphasis added). Licensed and holding a license to practice are definitively distinct under Iowa’s administrative regulations. *See generally* IAC Chapter 653. The Iowa legislature clearly understood the distinction when it required plaintiffs’ experts be “licensed to practice” rather than simply “licensed.” *See* Iowa Code § 147.139(1); *Freeman*, 848 N.W.2d at 88.

To the extent “licensed to practice” is not considered sufficiently defined within Chapter 147 and IAC Chapter 653, 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).

The Ohio Court of Appeals recently addressed Ohio’s expert qualifications standards, regarding Ohio’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. 57 at ¶ 1; *see also* Iowa Code § 147.2 (holding a license a prerequisite to the “practice of medicine”); IAC 653-9.14(1)(c) (a physician “whose license is inactive . . . *may not practice medicine* under an Iowa license”). 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).¹ 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 used the “actively practiced” requirement used in subsection (2). App. 261. 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 reasoning 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) (“licensed *to practice*”) with App. 261 (“[t]he Court finds that ‘*licensed*’ means ‘*licensed*,’ not something else, and finds that Dr.

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

Marfuggi is ‘licensed *to practice*’ as that term is used in Iowa Code § 147.139(1)’). The district court’s interpretation effectively reads “to practice” out of the statute, despite very clear distinctions between a license to practice and licenses which do not permit a doctor to practice. *See* IAC 653-9.1 *and* IAC 653-9.14(1)(a) (defining “current, active status,” “inactive license,” “inactive status,” and “practice”); IAC 653-9.14(1)(c) (physician with inactive license cannot practice medicine without reactivating license to “current, active status”); Iowa Code § 4.4(2) (in enacting a statute, it is presumed that the entire statute is intended to be effective).

The plain language of the statute is further explained by Iowa’s regulatory scheme addressing the licensure and practice of physicians. In fact, the specific provisions of which the district court relies on to reach the alternate conclusion instead support Defendants’ plain reading of “licensed to practice.” *See* App. 262 (citing IAC 653-9.2(2)(c)–(f)). The district court focuses on the distinction between “active status” and “good standing.” *See* App. 262. The critical distinction is that Dr. Marfuggi could not practice under his inactive/retired license, which is a required expert witness criterion. Iowa Code § 147.139(1). Iowa’s statutory scheme requires that only those with “current, active status” licenses may practice medicine. *See* IAC 653-9.2(2)(c)–(f).

“Licensed to practice” is synonymous with being licensed to actively practice medicine. IAC 653-9.14(1)(c); *see also* Iowa Code § 147.2. Further confirmation

comes from “practice” and various forms of “license” being specifically and separately defined by Iowa law. Iowa Code § 147.1(3); IAC 653-9.1. Pursuant to those definitions, only a physician holding a license with “current active status” may practice medicine. IAC 653-9.1. A “current, active status” license “grants the privilege of practicing medicine,” whereas a physician whose license is inactive “*may not practice medicine* under an Iowa license.” *Id.* (emphasis added).

The legislature is presumed to have been aware of the requirement in section 147.2 and 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, and that the distinction between licensure—both inactive and active—and practice is specifically spelled out by Iowa law. IAC 653-9.1; IAC 653-9.14(1)(c). Iowa’s expert witness standards, read in harmony with other code provisions on the same subject matter, disqualify Dr. Marfuggi from signing a certificate of merit affidavit.

The legislative history similarly compels reversal of the district court. *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 “actively practiced” because “licensed to practice” is a synonymous present tense requirement that is well-defined by the Code and regulations. *See* Iowa Code § 147.2; IAC 653-9.1; IAC 653-9.14(1)(c).

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*, 966 N.W.2d at 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.

A finding that Dr. Marfuggi’s certificate of merit affidavit substantially complied with the requirements 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. LAACL152813, 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).

As discussed previously, this Court has recently turned to legislative history when determining the legislature’s objectives regarding the 2017 medical malpractice tort reform statues. *See Butterfield*, 987 N.W.2d at 839–41. 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. Plaintiff cannot be found to have substantially complied with the expert witness standards when the legislative history makes clear that the legislature intended that experts be licensed to actually practice. *See McHugh*, 966 N.W.2d at 288–89.

Whether a timely certificate of merit affidavit from an unqualified expert substantially complies with the statutory requirements has been considered by three separate Iowa district courts. Each held that procedurally timely but substantively 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. As further recognized by these district court rulings, Dr. Marfuggi’s experience cannot establish substantial compliance, based on 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 suffer inherent prejudice were an expert who fails to meet the statutory qualifications be permitted to offer opinions against Dr. Smith. Permitting Dr. Marfuggi’s testimony is 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, in addition to supporting Defendants’ interpretation of “licensed to practice,” also 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.

This indicates that requiring a license to practice was a “reasonable objective” of the expert witness standards. *See McHugh*, 966 N.W.2d at 288–89; *Hantsbarger*, 501 N.W.2d at 504 (defining “substantial compliance”). 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 request that this case be submitted with oral argument.

DATED this 24th day of July, 2023.

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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 4,552 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.

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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.

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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.

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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.

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