

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 REPLY 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)

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.

Iowa Code § 147.139

Iowa Code § 147.140

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

ARGUMENT

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

Plaintiff cherry picks governing New York, New Jersey, and Iowa law when arguing that Dr. Marfuggi met the requirement of being “licensed *to practice*” at the time he signed the certificate of merit affidavit. *See* Pl.’s Br. at p. 12 (emphasis added) (citing Iowa Code § 147.139(1)). Plaintiff relies upon New York, New Jersey, and Iowa law which recognizes license holders electing inactive or retired status. *See* N.Y. Educ. Law § 6502; N.J. Admin. Code. § 13:35-6.15; IAC § 653-9.14(1)(c). Plaintiff contends language granting licensees the privilege of licensure satisfies the criterion in Iowa Code section 147.139(1). *See* Pl.’s Br. at p. 14.

The analysis does not end there, however. New York, New Jersey, and Iowa law specifically declare that inactive/retired licensees *cannot practice medicine*. N.Y. Educ. Law § 6502; N.J. Admin. Code. § 13:35-3.14(g); IAC § 653-9.14(1)(c). In New York, licensees “must *register* with the [State Board of Medicine] . . . to *practice* in [New York].” N.Y. Educ. Law § 6502(1) (emphasis added). “No licensee resuming practice after a lapse of registration shall be permitted to practice without [re-registering].” N.Y. Educ. Law § 6502(3). Contrary to Iowa Code section 147.139(1), inactive/retired licenses are not “licensed to practice” under New York law. *See id.*; Iowa Code § 147.139(1).

Dr. Marfuggi's New York license was last registered through July 2019. App. 67. Accordingly, Dr. Marfuggi could not practice medicine in New York, under his inactive license, at the time he signed the certificate of merit affidavit. N.Y. Educ. Law § 6502(1), (3). New Jersey law specifically provides that “[a] licensee who elected inactive status . . . *shall not engage in practice.*” N.J. Admin. Code. § 13:35-3.14(g). Dr. Marfuggi's retired New Jersey license therefore similarly cannot provide the basis for Dr. Marfuggi holding the required “license[] *to practice.*” See App. 68; Iowa Code § 147.139(1).

While Iowa law does not govern Dr. Marfuggi's lack of practice privileges under his New York and New Jersey licenses, defined terms within Chapter 147 and IAC Chapter 653 further illustrate the distinction Iowa draws between a physician being *licensed* and being licensed *to practice*. See, e.g., Iowa Code § 147.1(3); Iowa Code § 147.2; IAC § 653-9.1. The terms “current, active status,” “inactive license,” and “practice” are all specifically defined in IAC section 653-9.1 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.

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

IAC § 653-9.1 (emphasis added).

IAC section 653-9.14 defines “inactive status” to include licenses formerly known as *retired* and provides that “[a] physician whose license is inactive . . . *may not practice medicine* under an Iowa license until the license is reinstated to current, active status.” IAC § 653-9.14(1)(a), (c). In perhaps the most blatant example of Plaintiff picking and choosing her preferred statutory language, Plaintiff highlights the language in IAC section 653-9.14(1)(c) noting that retired physicians hold the privilege of licensure while wholly ignoring the specific prohibitory language which states that retired physicians “*may not practice medicine* under an Iowa license until the license is reinstated to current, active status.” Pl.’s Br. at p. 11 (citing IAC § 653-9.14) (emphasis added).

“The legislature is presumed to know the existing state of the law when [a] 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.*

When amending the expert witness standards, the legislature is presumed to have had knowledge of Iowa’s statutes and regulations distinguishing between the privilege of licensure and licensure *to practice*. *See id.* This presumption of knowledge compels interpretation of Iowa Code section 147.139(1) by its plain language. *See, e.g., State v. Boone*, 989 N.W.2d 645, 650 (Iowa 2023) (quoting *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020)) “Licensed *to practice*” means a license which *permits the practice of medicine*. *See* Iowa Code § 147.139(1); *Compare* IAC § 653-9.1 (“‘Current, active status’ means a license that is in effect and grants the privilege of practicing”) *with* IAC § 653-9.14(1)(c) (“[a] physician whose license is inactive . . . may not practice medicine under an Iowa license until the license is reinstated to current, active status”).

Plaintiff argues that if the legislature had intended that Dr. Marfuggi not be retired at the time he signed the certificate of merit affidavit, the legislature would have replaced “the person is licensed to practice” with “the person is actively practicing.” *See* Pl.’s Br. at p. 12. This argument ignores the complementary yet distinct requirements that an expert witness have sufficient practice experience *and* hold a “license to practice” at the time the certificate of merit affidavit is provided. *Compare* Iowa Code § 147.139(1) *and* (2).

Plaintiff’s change, in the context of the applicable regulations, is a distinction without a difference. All applicable regulations prohibit the practice of medicine if

the physician is retired. *See* N.Y. Educ. Law § 6502; N.J. Admin. Code. § 13:35-3.14(g); IAC § 653-9.14(1)(c). Plaintiff does not even dispute that Dr. Marfuggi could not practice medicine when he signed the certificate of merit affidavit. *See generally* Pl.’s Br.

The position of Plaintiffs and the district court that the legislature could or should have used “actively practicing” in subsection (1) conflates the different considerations in subsections (1) and (2). Subsection (1) relates to *licensure*, specifically, licensure which is in good standing and permits practice *at the time the certificate of merit affidavit is offered*. *See* Iowa Code § 147.139(1). Subsection (2) asks whether the expert has sufficient *experience*, either as a practicing physician or qualified instructor, *in the five years preceding the care at issue*. *See* Iowa Code § 147.139(2).

Iowa Code section 147.139(1) is a *present* tense requirement related to *licensure*, whereas subsection (2) relates to *prior experience* in the five years preceding the care at issue. *See id.* Plaintiff’s argument that the legislature would have used “actively practicing” if it intended subsection (1) to preclude testimony from retired physicians who are not “licensed to practice” 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.

Defendants’ interpretation of the requirements in subsections (1) and (2) do not read words into or out of the statute. The term “licensed to practice” is well defined in Iowa law and means a licensee who can practice medicine. *See* IAC § 653-9.1; IAC § 653-9.14. The legislature adopted the “licensed to practice” definition contained in the regulations when enacting the expert witness standards. *Compare id. with* Iowa Code § 147.139(1); *see also Nahas v. Polk Cnty.*, --- N.W.2d ----, 2023 WL 3906488, at *6 (Iowa 2023) (when a word or term is “obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it”) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012)).

Conversely, Plaintiff’s position fails to account for why subsection (1) includes the language “licensed to practice” if that includes a ceremonial license that does not permit practicing medicine. *See* Pl.’s Br. at pp. 12–13. Plaintiff’s preferred interpretation, adopted by the district court, reads “to practice” out of subsection (1), such that *any* license satisfies the criterion. *See State v. Iowa Dist. Ct. for Scott Cnty.*, 889 N.W.2d 467, 474 (Iowa 2017); Iowa Code § 4.4(2) (Supreme Court presumes statutes or rules do not contain superfluous words and that the entire statute is intended to be effective). Plaintiff’s interpretation also ignores the 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”).

This Court has recently turned to legislative history when interpreting the certificate of merit statute. *See Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.*, 987 N.W.2d 834, 839–40 (Iowa 2023). 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 practicing” from subsection (1) 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).

Neither Dr. Marfuggi's New York nor New Jersey licenses authorized *him to practice medicine* at the time he signed the certificate of merit affidavit. N.Y. Educ. Law § 6502; N.J. Admin. Code. § 13:35-3.14(g). Iowa law clearly defines “licensed to practice” as meaning a physician-licensee who has practice privileges. IAC 653-9.1; IAC 653-9.14(1)(c). Retired physicians holding inactive licenses, such as Dr. Marfuggi, do not meet this standard. *Id.* As a result, Dr. Marfuggi fails to meet the first criteria of the expert witness requirements. *See* Iowa Code § 147.139(1).

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

Plaintiff does not even attempt to argue that Dr. Marfuggi's certificate of merit affidavit would “substantially comply” with the statutory requirements if Dr. Marfuggi is found not to have met all the required expert witness criteria. *See* Pl.'s Br. at p. 14 (citing Iowa Code § 147.140(6)). Plaintiff merely reasserts that Dr. Marfuggi does meet the requirements and therefore “Plaintiff both fully and substantially complied” with the certificate of merit affidavit statute requirements. *Id.*

“Substantial compliance means compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.” *McHugh v. Smith*, 966 N.W.2d 285, 288–89 (Iowa Ct. App. 2021) (quoting *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993)). The reasonable objectives of the certificate of merit affidavit statute include protecting medical professionals from lawsuits unsupported

by the requisite expert testimony. *See id.* at 289; *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 542 (Iowa 2022).

In *McHugh*, the Court of Appeals found that a certificate of merit affidavit filed two-and-a-half months after the deadline failed to substantially comply with the requirements, resulting in dismissal with prejudice of plaintiff's claims. *McHugh*, 966 N.W.2d at 291–92. Three separate Iowa district courts have held that a timely but substantively deficient certificate of merit affidavit fails to substantially comply with the requirements set forth in section 147.140. *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 noted in *Wood*, the substantive requirements for a certificate of merit affidavit were met in *McHugh*, with the procedural missing of the deadline resulting in dismissal. *Wood*, Montgomery County Case No. LACV0220000 at pp. 8–9. Where the designated expert is timely but unqualified, a certificate of merit is substantively and not merely procedurally deficient. *Id.* at p. 9. This substantive deficiency precludes any finding that the certificate of merit affidavit in question substantially complied with the statutory requirements. *Id.*

Similar to the certificate of merit affidavits at issue in *McHugh* in the cited district court cases, Dr. Marfuggi's deficient certificate of merit affidavit does not substantially comply with the statutory requirements. *See* Iowa Code § 147.140(6). As all of Plaintiff's claims require expert testimony to establish a prima facie case, mandatory dismissal with prejudice of all claims against Defendants is required by subsection (6). *See id.*

CONCLUSION

Plaintiff's claims require a certificate of merit affidavit that must be provided by an expert witness who meets the qualifying standards of section 147.139. Iowa Code § 147.140. 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" 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.

Appellants request that this Court reverse the decision of the district court and order entry of summary judgment in favor of Appellants.

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 2,288 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' Reply 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' Reply 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' Reply Brief was the sum of \$0.00 exclusive of service tax, postage, and delivery charges.

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