

IN THE SUPREME COURT OF IOWA

No. 22-1572

**RENEE HUMMEL
Plaintiff-Appellee**

vs.

**ADAM SMITH, M.D., ADAM SMITH, M.D., P.C., TRI-STATE
SPECIALISTS, L.L.P.,
Defendants-Appellants**

**APPEAL FROM THE WOODBURY DISTRICT COURT CASE
NO. LACV187747**

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

PLAINTIFF-APPELLEE'S FINAL BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court was correct in finding that Dr. Marfuggi satisfied the expert witness standards.

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

ROUTING STATEMENT

This appeal involves the application of well-established legal principles. Transfer to The Court of Appeals would seem appropriate. *See*, Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This case is an appeal from an Order denying Defendants' Motion for Summary judgment in the Iowa District Court for Woodbury County in the matter of case number LACV191517, *Hummel v. Adam Smith, M.D., et al.* The case involves claims for injuries by Plaintiff Renee Hummel arising out of breast surgery performed on April 26, 2018 and related care in the time period following by Defendant Adam Smith, M.D. The Petition in this matter was filed on March 23, 2020. App. 6-24. On June 15, 2020, Plaintiff filed the Certificate of Merit Affidavit of Dr. Richard Marfuggi, certifying that Dr. Smith's medical care and

treatment of Ms. Hummel did not meet the standard of care for a plastic surgeon.

On April 25, 2022, Defendants filed a Motion for Summary Judgment, asking that the Court dismiss Plaintiff's claims against Defendants. The alleged basis for Defendants' motion was a failure by the Plaintiff to comply with Iowa Code §§ 147.139 and 147.140 because the Plaintiff's expert witness, Dr. Richard Marfuggi, was retired at the time he issued his Certificate of Merit Affidavit in this matter. After being granted an enlargement of time to file a Resistance, on May 31 and June 1, 2022, Plaintiff filed a Resistance and supporting documentation to Defendants' Motion for Summary Judgment.

On June 16, 2022, a Hearing was held on Defendants' Motion for Summary Judgment before the Honorable Roger Sailer.

On August 22, 2022, the Honorable Judge Roger Sailer entered a ruling denying Defendants' Motion for Summary Judgment, holding that Dr. Marfuggi satisfied the requirements of Iowa Code § 147.139 and that therefore Plaintiff's Certificate of Merit Affidavit substantially complied with Iowa Code § 147.140. On September 21, 2022, Defendants filed an Application for Interlocutory Appeal, which was unresisted. On January 30, 2023, this Court granted Defendants' Application and stayed district court proceedings.

STATEMENT OF THE FACTS

Renee Hummel underwent breast surgery performed by Defendant Adam B. Smith, M.D. on April 26, 2018. App. 6-24. Ms. Hummel received follow-up treatment from Defendant Dr. Smith on May 2, 2018. App. 6-24. On March 23, 2020, Plaintiff filed her Petition alleging medical negligence against, among others, Adam Smith, M.D. (“Defendant Smith”). App. 6-24. On June 15, 2020, Plaintiff filed a certificate of merit affidavit, pursuant to the requirements of Iowa Code Section 147.140, within which Richard Marfuggi, M.D. asserted that Defendant Smith breached the standard of care with respect to the care he provided to Ms. Hummel. App. 95-107.

In the years prior to Ms. Hummel’s initial surgery in April 2018, Dr. Marfuggi was practicing as a board-certified plastic surgeon in the states of New York and New Jersey. App. 95-107. Dr. Marfuggi retired from actively practicing plastic surgery on July 1, 2019. App. 95-107. Marfuggi’s licenses were switched from “active” to “inactive” in New York and from “active” to “retired” in New Jersey. App. 95-107.

ANALYSIS

I. Dr. Marfuggi Was Licensed to Practice When he Signed the Certificate of Merit Affidavit Served by Plaintiff.

Plaintiff does not dispute that Iowa Code §§ 147.139 and 147.140 apply to this matter. As the district court correctly found, Plaintiff's expert witness Dr. Marfuggi met the requirements of Iowa Code §§ 147.139 and 147.140 when he signed the Certificate of Merit Affidavit served by the Plaintiff in this matter.

Iowa Code § 147.139 states as follows:

147.139 Expert witness standards.

If the standard of care given by a health care provider, as defined in section 147.136A, is at issue, the 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 following are established by the evidence:

1. 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.
2. 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.
3. If the defendant is board-certified in a specialty, the person is certified in the same or a substantially similar specialty by a board recognized by the American board of medical specialties,

the American osteopathic association, or the council on podiatric medical education.

4. a. If the defendant is a licensed physician or osteopathic physician under chapter 148, the person is a physician or osteopathic physician licensed in this state or another state.

b. If the defendant is a licensed podiatric physician under chapter 149, the person is a physician, osteopathic physician, or a podiatric physician licensed in this state or another state.

86 Acts, ch 1211, §16; 2008 Acts, ch 1088, §98; 2017 Acts, ch 107, §3, 5; 2018 Acts, ch 1172,

§46

Referred to in §147.140

2017 amendment applies to causes of action that accrue on or after July 1, 2017; 2017 Acts, ch 107, §5

Iowa Code § 147.140 states as follows:

147.140 Expert witness – certificate of merit affidavit

1. *a.* In any action for personal injury or wrongful death against a health care provider based upon the alleged negligence in the practice of that profession or occupation or in patient care, which includes a cause of action for which expert testimony is necessary to establish a prima facie case, the plaintiff shall, prior to the commencement of discovery in the case and within sixty days of the defendant's answer, serve upon the defendant a certificate of merit affidavit signed by an expert witness with respect to the issue of standard of care and an alleged breach of the standard of care. The expert witness must meet the qualifying standards of section 147.139.

b. 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 all of the following:

(1) The expert witness's statement of familiarity with the applicable standard of care.

(2) The expert witness's statement that the standard of care was breached by the health care provider named in the petition.

c. A plaintiff shall serve a separate certificate of merit affidavit on each defendant named in the petition.

2. An expert witness's certificate of merit affidavit does not preclude additional discovery and supplementation of the expert witness's opinions in accordance with the rules of civil procedure.

3. The parties shall comply with the requirements of section 668.11 and all other applicable law governing certification and disclosure of expert witnesses.

4. The parties by agreement or the court for good cause shown and in response to a motion filed prior to the expiration of the time limits specified in subsection 1 may provide for extension of the time limits. Good cause shall include but not be limited to the inability to timely obtain the plaintiff's medical records from health care providers when requested prior to filing the petition.

5. If the plaintiff is acting pro se, the plaintiff shall have the expert witness sign the certificate of merit affidavit or answers to interrogatories referred to in this section and the plaintiff shall be bound by those provisions as if represented by an attorney.

6. Failure to substantially comply with subsection 1 shall result, upon motion, in dismissal with prejudice of each cause of action to which expert testimony is necessary to establish a prima facie case.

7. For purposes of this section, "*health care provider*" means the same as defined in section 147.136A.

Under New York law, “A license *shall be valid during the life of the holder unless revoked, annulled or suspended* by the board of regents or in the case of physicians, physicians practicing under a limited permit, physician's assistants, specialist's assistants and medical residents, the licensee is stricken from the roster of such licensees by the board of regents on the order of the state board for professional medical conduct in the department of health.” *See*, N.Y. Educ. Law § 6502, Duration and Registration of a license. In July 2019, Dr. Marfuggi switched to an “inactive license” in the state of New York. *See*, New York License Search Results for Richard Marfuggi, M.D.

Similarly, New Jersey defines a “licensee” as “A physician or podiatrist licensed and subject to regulation by the Board of Medical Examiners (the “Board”)", and New Jersey law specifically recognizes the status of a “*licensee holding an inactive or retired license*.” *See*, New Jersey Admin. Code § 13:35-6.15. In June 2019, Dr. Marfuggi switched to a “retired license” in the state of New Jersey. *See*, New Jersey License Search Results for Richard Marfuggi, MD. This did not mean that he ceased to have a medical license in either state, and therefore that he ceased to be “licensed” – rather, it simply meant that Dr. Marfuggi had the inactive/retired category of license.

Similarly, and importantly, Iowa law also states a physician with an inactive

license should still be categorized as “licensed.” IAC § 653 – 9.14(1) states as follows:

9.14(1) Definition of inactive status. An inactive license is any license that is not a current, active license.

- a. “Inactive status” may include licenses formerly known as delinquent, lapsed, or **retired**.
- b. A physician with an inactive license may not practice medicine until the license is reinstated to current, active status.
- c. **A physician whose license is inactive continues to hold the privilege of licensure** in Iowa but may not practice medicine under an Iowa license until the license is reinstated to current, active status.”

See, IAC § 653 – 9.14(1) (emphasis added).

The district court made the correct interpretation of Iowa Code § 147.139, which is that a retired licensed physician who complies with all other statutory requirements is an eligible expert witness. As the Iowa Supreme Court stated in *Auen v. Alcoholic Beverages Div.*, “The goal of statutory construction is to determine legislative intent.” *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586 at 590 (Iowa 2004).

Under Iowa law, the court gives words their “ordinary and common meaning by considering the context in which they are used absent a statutory definition or an established meaning in the law.” *City of Des Moines v. Employment Appeal Bd.*, 722

N.W.2d 183 at 196 (Iowa 2006), citing *Midwest Auto. III, L.L.C. v. Iowa Dep't of Transp.*, 646 N.W.2d 417 at 426 (Iowa 2002).

As the Iowa Supreme Court state in *Matter of Guardianship of Radda*, “[L]egislative intent is expressed by omission as well as by inclusion.” *Matter of Guardianship of Radda*, 955 N.W.2d 203 (Iowa 2021), citing *Marcus v. Young*, 538 N.W.2d 285 at 289 (Iowa 1995). The district court correctly held that Dr. Marfuggi met the requirements of Iowa § 147.139 (and therefore of Iowa Code § 147.140) by having the status of a retired licensee at the time of the signing of his Certificate of Merit in this matter. If the legislature had intended to require what Defendants urge this Court to adopt – i.e. that the signatory to a Certificate of Merit not be retired at the time that he or she sign their Certificate of Merit – the legislature would have substituted “the person is licensed to practice” in subsection 1 of Iowa Code § 147.139 of with “the person is actively practicing.” As the Iowa Supreme Court stated in *Miller v. Marshall County*, “We assume the legislature intends different meanings when it uses different terms in different portions of the statute.” *Miller v. Marshall County*, 641 N.W.2d 742 at 749 (Iowa 2002).

Additionally, subsection 2 of Iowa Code § 147.139 states that “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.*” See, Iowa

Code § 147.139(2) (emphasis added). If the term “licensed to practice” in Iowa Code § 147.139(1) means “actively practiced” – the interpretation Defendants urge – there would have been no reason for the legislature to add the provision of Iowa Code § 147.139(2) which allows persons who are qualified instructors at an accredited university in the same field as the defendant but have not been actively practicing in the same field to be experts. If this was the correct interpretation, the “licensed to practice” requirement of Iowa Code § 147.139(1) would subsume the “actively practiced” language of Iowa Code § 147.139(2), and the “actively practice” language would be redundant or irrelevant. As the Iowa Supreme Court stated in *Schadendorf v. Snap-On Tools Corp.*, “[W]e avoid interpreting a statute in such a way that portions of it become redundant or irrelevant. *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330 at 337 (Iowa 2008), citing *T & K Roofing Co. v. Iowa Dep’t of Educ.*, 593 N.W.2d 159, 162 (Iowa 1999).

Defendants-Appellants make much of the fact that Iowa Code § 147.139(1) uses the phrase “licensed to practice.” However, the phrase does not end there. The relevant portion of Iowa Code § 147.139(1) states in full, “The person is licensed to practice in the same or a substantially similar field as the defendant.” This language should be made in its entirety. The proper interpretation of the legislative intent this phrase is that the signatory to a Certificate of Merit should be an expert in the same or substantially similar field as the Defendant.

The District Court correctly held that Dr. Marfuggi was an eligible expert under Iowa Code § 147.139.

C. Plaintiff's Certificate of Merit Affidavit Substantially Complied With the Requirements of the Certificate of Merit Affidavit Statute

As the district court correctly held, Plaintiff's Certificate of Merit Affidavit substantially complied with Iowa Code § 147.140 because Dr. Marfuggi met the requirements of Iowa Code § 147.139. Because Dr. Marfuggi's status as a retired licensee fulfilled the requirements of Iowa Code § 147.139, Dr. Marfuggi was an eligible expert for purposes of complying with Iowa's Certificate of Merit statute, with which the Plaintiff both fully and substantially complied. Therefore, the district court properly denied Defendants' Motion for Summary Judgment.

CONCLUSION

Plaintiff substantially complied with the requirements of Iowa Code § 147.140 because Dr. Marfuggi was licensed to practice when he signed the certificate of merit affidavit in this case. Therefore, Defendants were not entitled to dismissal with prejudice on Plaintiff's claims. The district court's ruling was the correct outcome and should be affirmed.

REQUEST FOR ORAL ARGUMENT

We request to be allowed 10 minutes for oral argument.

Respectfully submitted,

/s/ Jon Specht

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PROOF OF FILING AND SERVICE

The undersigned hereby certifies that he, or a person acting on his behalf, electronically filed the Plaintiff-Appellee's Proof Brief on the 21st day of July, 2023, and further certifies that he, or a person acting on his behalf, served the Appellee's Proof Brief on all other parties to this appeal via EDMS.

By: /s/ Jon Specht
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