

IN THE SUPREME COURT OF IOWA

No. 22-1573

ALYSSA PRATT
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. LACV187747**

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.

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.

A. Dr. Marfuggi's retired and/or inactive New York and New Jersey licenses did not permit him "to practice" medicine under New York, New Jersey, or Iowa law.

Plaintiff relies on New York and New Jersey law recognizing Dr. Marfuggi's inactive/retired *licenses* to support her claim 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 (citing Iowa Code § 147.139(1)). Defendants' Motion for Summary Judgment did not challenge the validity of Dr. Marfuggi's inactive/retired New York and New Jersey licenses. Plaintiff correctly cites New York and New Jersey law which specifically recognizes license holders electing inactive or retired status. *See* N.Y. Educ. Law § 6502; N.J. Admin. Code. § 13:35-6.15. Iowa similarly recognizes that "[a] physician whose license is inactive continues to hold the privilege of *licensure*." IAC § 653-9.14(1)(c) (emphasis added).

Unfortunately for Plaintiff, the analysis does not end there. New York, New Jersey, and Iowa law further declare that holders of inactive/retired licenses *cannot practice medicine*. *Id.*; N.Y. Educ. Law § 6502; N.J. Admin. Code. § 13:35-3.14(g). 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).

Dr. Marfuggi’s New York license was last registered through July 2019. App. 82. 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. 83; 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 under Iowa law 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. 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).

“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 distinction provides additional support to reading subsection (1) of the expert witness standards as its plain language provides—“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 substituted “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).*

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). As a result, Dr. Marfuggi fails to meet the first criteria of the expert witness requirements. *See Iowa Code § 147.139(1).*

B. The “licensed to practice” and “actively practiced” requirements in Iowa Code § 147.139(1) and (2) are distinct.

Given that the “licensed to practice” requirement of the expert witness standards is clear and unhelpful to Plaintiff, it is unsurprising that the Plaintiff turns

the focus to the *separate* requirement that the expert have “actively practiced” in the same or a substantially similar field as the defendant in the five years preceding the care at issue, unless the expert is a qualified instructor in the same field as the defendant. *See* Pl.’s Br. at pp. 12–13 (citing Iowa Code § 147.139(1)–(2)). Notably, *all* the expert witness standards must be met for a person designated by a plaintiff to qualify to testify against a defendant health care professional on standard of care and breach. Iowa Code § 147.139.

Plaintiff contends that the exception for qualified instructors from the “actively practiced” requirement in subsection (2) indicates that the “licensed to practice” requirement under subsection (1) cannot be interpreted to mean “actively practiced.” *See* Pl.’s Br. at p. 13. Defendants agree that the requirements in subsections (1) and (2) are distinct. However, Plaintiff’s argument conflates the separate and distinct *licensure* requirements of subsection (1) and the *practice and/or experience* requirements under subsection (2). *Compare* Iowa Code § 147.139(1) *and* (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. To the extent a qualified instructor is ‘exempt’ from certain expert witness criteria, this applies only to the prior experience requirement of subsection (2) and not the “licensed to practice” requirement in subsection (1). *See* Iowa Code § 147.139(1)–(2)

Plaintiffs’ position regarding the language of subsection (2) also 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. *See* Pl.’s Br. at pp. 12–13. Plaintiff’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). Plaintiff’s interpretation simply ignores the plain language of Iowa Code section 147.139(1) and IAC 653.9-14(1)(c), which compel that a physician be able “to practice” before being allowed to testify and that physicians electing inactive status may not practice medicine. *See* Iowa Code § 147.139(1); IAC 653-9.14(1)(c).

Dr. Marfuggi could not practice under his inactive/retired licenses. N.Y. Educ. Law § 6502; N.J. Admin. Code. § 13:35-3.14(g). He therefore was not “licensed to practice” at the time he offered his certificate of merit affidavit. *See* Iowa Code § 147.139(1). As a result, Dr. Marfuggi may not testify as to standard of care or breach in this case. *See* Iowa Code § 147.139.

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 26th day of June, 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 2,046 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 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' Final 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' Final Reply Brief was the sum of \$0.00 exclusive of service tax, postage, and delivery charges.

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