IN THE SUPREME COURT OF IOWA

ROXANNE RIEDER and TONY RIEDER, **Appellant,** **vs.** **MERCY HOSPITAL, CEDAR RAPIDS, IOWA d/b/a MERCY MEDICAL CENTER, CEDAR RAPIDS, IOWA,** **Appellee.**	**No. 19-0767**

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
HONORABLE JUDGE IAN K. THORNHILL

APPELLANTS' FINAL BRIEF

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17. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524 (Iowa 1995).

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30. Iowa R. Civ. P. 1.981(3)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case. The issues presented in this appeal are crucial to the future of health care negligent credentialing jurisprudence in Iowa.

This case presents "substantial questions of enunciating or changing legal principles." Iowa R. App. P. 6.1101(2)(f). The Iowa Supreme Court has never fully articulated Iowa law with respect to the viability of negligent credentialing claims. *See Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681, 685–86 (Iowa 2012) ("We assume without deciding that the tort [of negligent credentialing] is actionable in this state); *Day v. Finley Hospital*, 769 N.W.2d 898, 901-02 (Iowa Ct. App. 2009) (implicitly recognizing the tort of negligent credentialing by analyzing what evidence is discoverable to prove such a claim). The Court in *Hall* explained its reasoning for its assumption:

> Prominent among the reasons we defer a decision on the existence of the tort of negligent credentialing is the fact that the defendants have not claimed the tort should not be recognized and we prefer to confront and decide the issue in a case in which the matter is disputed and briefed by the parties.

Hall, 812 N.W.2d at n.4. Nor do the parties in this case expressly dispute the viability of a negligent credentialing claim. But the issues presented in this appeal have a tangible, practical effect on the viability of negligent credentialing claims; when critical evidence is precluded pursuant to the Iowa Peer Review Privilege, a negligent credentialing claim is nothing more than a paper tiger.

STATEMENT OF THE CASE

1. Introduction

This is a negligent credentialing case. The case stems from a negligent spine surgery that Dr. David Segal performed on Roxanne Rieder on May 8, 2015 at Mercy Medical Center in Cedar Rapids. The surgery left Ms. Rieder permanently impaired and in severe, chronic pain.

Plaintiffs-Appellants Roxanne and Tony Rieder ("the Rieders") originally filed suit against David Segal, M.D.; Theodore Donta, M.D., Ph.D.; Eastern Iowa Brain and Spine Surgery, PLLC; Radiology Consultants of Iowa, PLC; and Mercy Hospital, Cedar Rapids Iowa d/b/a Mercy Medical Center, Cedar Rapids, Iowa ("Mercy Hospital" or "Mercy") on December 20, 2016. (Pet. at 1, App. 12). The Rieders alleged four claims for relief: (1) Medical Negligence against David Segal, M.D.; (2) Medical Negligence against Theodore Donta, M.D., Ph.D.; (3) Negligent Credentialing against Mercy Hospital Cedar Rapids, Iowa; and (4) Loss of

Consortium against all defendants. (*Id.* at 7-9, App. 18-20). The Defendants answered and discovery commenced.

The Reiders resolved and dismissed their claims against all defendants except Mercy on October 24, 2018.

2. Motion for Partial Summary Judgment

On February 15, 2019, Mercy filed a partial motion for summary judgment. (Def.'s Mot. for Partial Summ. J., App. 35). Mercy argued that, as a matter of law, it owes "no duty to immediately limit, restrict, or suspend privileges of a credentialed physician merely upon the notification of an inquiry and/or investigation by the Iowa Board of Medicine." (*Id.* at 2, App. 36). The foundation of Mercy's argument was that Iowa Board of Medicine ("IBM") investigations are confidential, and therefore:

> [T]he confidentiality of IBM investigations limits any duty by Mercy to affirmatively act as Plaintiffs claim Mercy should have in this manner. Even if Mercy (or Dr. Segal) had contacted IBM to try to obtain details about the investigation, they would not have received any information. *See* Iowa Admin. Code 653-24.2(8). It is patently unreasonable and lacking in any legal basis for Plaintiffs to allege breach where Mercy is not entitled to

> information that Plaintiffs claim Mercy should have somehow obtained.

(*Id.* at 5-6, App. 42-43).

Plaintiffs responded by arguing that Mercy very well could have, and in fact was obligated to, investigate and obtain "information concerning Dr. Segal's professional competency and the IBM investigation from sources ***other than*** the IBM, including Dr. Segal himself." (Pls.' Mem. Authorities Supp. Resistance to Mot. Partial Summ. J. at 8, App. 86). Plaintiffs supported their argument with competent evidence: expert opinion from Dr. Charles Pietrafesa. (Ex. 18 to Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Partial Summ. J., App. 291). Indeed, Dr. Segal admitted that he informed Mercy of the investigation well before the IBM released the formal charges. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Partial Summ. J. at 4, App. 93).

The trial court began by addressing the "initial question of whether negligent credentialing is recognized as a claim in Iowa." (Order on Mot. Partial Summ. J. at 3, App. 344). Due to the fact that Mercy assumed that negligent credentialing was, in fact, a claim in Iowa, the court "continue[d] in the assumption that negligent credentialing is a claim in Iowa." (*Id.* at 4, App. 345).

The trial court next addressed the question of duty. The court explicitly noted that "Plaintiff's argument presumes that the hospital learned that the

physician's competency was under investigation. However, that is mere speculation as no formal charge was released until May 15, 2016 [sic] and the Board of Medicine routinely investigates a more broad range of offenses." (*Id.*). The court went on to conclude that Mercy had no duty to restrict Dr. Segal's surgical privileges as of May 8, 2015 because it "could not have known nor should it have known that he posed a serious risk to his patients, as the formal charges had not been filed yet and no final decision had been made." (*Id.* at 5, App. 346). As discussed more fully in the Argument section of this brief, this conclusion ignored the evidence and improperly infringed upon the jury's function as the trier of fact.

The trial court ultimately concluded that Mercy did not owe a duty to immediately suspend or revoke Dr. Segal's credentials or privileges at the hospital based solely upon the knowledge that an investigation had been opened by the IBM, and that Dr. Pietrafesa would be "further restricted from presenting that conclusion at the time of trial." (*Id.*). Mercy's Motion for Partial Summary Judgment on that "narrow issue" was granted on March 14, 2019. (*Id.*).

3. Motion for Summary Judgment

Trial in this case was set for April 15, 2019. (*Id.* at 1, App. 342). The scheduling order filed on March 6, 2017 established a deadline for filing dispositive motions on February 14, 2019. (*See* Trial Scheduling and Discovery Plan). On March 28, 2019 … 42 days after the deadline for filing dispositive

motions … Mercy filed a Motion for Leave to File Motion for Summary Judgment past the deadline for dispositive motions. (Def.'s Mot. for Leave, App. 348). Plaintiffs resisted, but the trial court granted Mercy's Motion on April 2, 2019. (Order on Def.'s Mot. for Leave, App. 508).

In its Motion for Summary Judgment, Mercy argued that "no factual basis exist[ed] to support Plaintiffs' negligent credentialing claim." (Def.'s Mem. of Law Supp. Mot. Summ. J. at 1, App. 365). The crux of Mercy's argument was that Plaintiffs had no "admissible and/or relevant evidence" to support their claim. (*Id.* at 4, App. 368). Mercy claimed: (1) the Peer Review Statute precluded Mercy from presenting any evidence of their investigation (or lack thereof) into Dr. Segal's competency to practice medicine; (2) any evidence relating to the pending IBM investigation would be speculative; (3) evidence of prior lawsuits filed against Dr. Segal would be irrelevant and prejudicial because the final resolution of those lawsuits was unknown; and (4) evidence of Dr. Segal's Parkinsonism was irrelevant because it "arose long after Ms. Rieder's care." (*Id.* at 5-11, App. 369-75).

The Rieders argued that the trial court was required to weigh all the evidence - direct and circumstantial - in the light most favorable to them; that the weight and credibility of the evidence was a question for the jury to decide, not the trial court; that circumstantial evidence is just as valuable as direct evidence; that Mercy could

not use the peer review privilege as both a shield and a sword; and that all of the evidence must be viewed together – not in a vacuum. (Pls.' Mem. Authorities Supp. Resistance to Mot. Summ. J. at 4-14, App. 517-27). Plaintiffs identified thirty-nine disputed facts which precluded summary judgment. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Summ. J. at 1-7, App. 619-25).

The Court held a hearing on the Motion for Summary Judgment on April 8, 2019. (Tr. Hr'g on Mot. Summ. J., App. 818-53). On April 9, the trial court granted Mercy's Motion for Summary Judgment. (Order on Mot. Summ. J. at 5, App. 816). It noted that "[w]hile this is not primarily an evidentiary ruling, the Court cannot determine if there is sufficient evidence to survive summary judgment without considering what evidence can properly be submitted to the jury." (*Id.* at 3, App. 814).

The court first held that "Mercy Hospital's file for Dr. Segal" was privileged pursuant to Iowa Code section 147.135(2) ("the Peer Review Statute") and therefore inadmissible. (*Id.*). It went on to explain that "Mercy itself is disadvantaged" by the Peer Review Statute, that both parties would be precluded from offering any evidence whatsoever about what is in the file, that Plaintiffs would be precluded from insinuating that Mercy took no action in relation to Dr. Segal based on the lack of evidence, and that any inferences about Mercy's knowledge of Dr. Segal's competency evaluation would be "nothing more than

speculation as to what Mercy did or did not know and what follow-up action they did or did not take. This is not appropriate." (*Id.* at 4, App. 815). The trial court improperly concluded that strong circumstantial evidence of Mercy's negligent credentialing constituted "speculation."

Next, the court precluded evidence that Dr. Segal was sued at least ***ten times*** for medical malpractice in New York, Maryland, and Iowa, and expert testimony that these lawsuits demonstrated a pattern of negligence, pursuant to Iowa Rule of Evidence 5.403. (*Id.*). The court explained its holding by stating "the only way a jury could rely on this evidence in finding Mercy was negligent is to assume or speculate that Dr. Segal was in fact negligent on those prior occasions." (*Id.*). This conclusion ignores the fact that Dr. Segal's application for hospital privileges at Mercy required him to identify all prior medical malpractice complaints (not just verdicts or judgments) and also made clear that he had an ongoing duty to notify Mercy of any future complaints filed against him. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Partial Summ. J. at 4, App. 93).

Finally, the court reiterated its prior ruling precluding any reference to or inference of an investigation by the Iowa Board of Medicine because the formal complaint against Dr. Segal was filed shortly after he operated on Roxanne Rieder, even though Dr. Segal admitted that he had informed Mercy of the investigation prior to that surgery. (Order on Mot. Summ. J. at 5, App. 816). The trial court

ignored the fact – and again infringed upon the jury's fact-finding role – that Mercy could have, should have, and ***did*** have knowledge of the IBM investigation prior to the filing of formal charges against Dr. Segal, and did nothing to restrict his privileges while it determined whether Dr. Segal should be operating on patients like Roxanne Rieder.

The Rieders appeal the trial court's rulings on Mercy's Motion for Partial Summary Judgment (Order on Mot. Partial Summ. J., App. 342-46) and Mercy's Motion for Summary Judgment (Order on Mot. Summ. J., App. 812-16). On May 9, 2019, the Rieders timely filed their Notice of Appeal. (Notice of Appeal, App. 854).

STATEMENT OF THE FACTS

1. Relevant Parties

Roxanne Rieder and Tony Rieder are a married couple. (Pet. at 1, App. 12). At all relevant times, Defendant David Segal, M.D. was a physician specializing in neurosurgery and practicing in Linn County, Iowa. (*Id.*). Defendant Mercy Hospital is an Iowa Corporation doing business as Mercy Medical Center in Cedar Rapids. (*Id.* at 2, App. 13).

2. Dr. Segal negligently performed Roxanne Rieder's spine surgery.

In April of 2015, Ms. Rieder was suffering from neck and left arm pain. (*Id.*). She went to Dr. Segal for treatment, and he recommended she undergo an

anterior cervical discectomy with fusion and plate at the C5-C6 and C6-C7 levels, i.e. – spine surgery in her neck. (*Id.* at 3, App. 14). Shortly after that recommendation, Ms. Rieder began suffering from new pain in her lower back, or lumbar region. (*Id.*). Because of that, Dr. Segal decided to perform surgery on Ms. Rieder's lumbar spine at the same time as the originally-planned cervical spine procedure. (*Id.*).

On May 8, 2015, Ms. Rieder was admitted to Mercy Hospital to undergo the two-stage spine surgery. (*Id.*). The first stage was an anterior cervical discectomy with fusion (upper neck surgery). (*Id.*). The second stage was decompressive lumbar laminectomy (lower back surgery). (*Id.*).

In the days after her surgery, while on numerous painkillers, Ms. Rieder was in enormous pain and began experiencing lower-body weakness. (*Id.* at 4, App. 15). The pain continued to worsen and post-operative day two, Ms. Rieder could no longer move her left leg. (*Id.*). Despite Ms. Rieder's worsening condition, Dr. Segal did not order a lumbar MRI to investigate the cause until May 10, 2015. (*Id.*). While it was later discovered that this MRI showed that an epidural hematoma was compressing Ms. Rieder's spinal cord, Dr. Segal did not note the epidural hematoma at the time. (*Id.* at 5, App. 16). Finally, on May 12, 2015, Dr. Segal decided to take Ms. Rieder back to the emergency room for an additional surgery to, in his own words, "fix her." (*Id.* at 4, App. 15).

Dr. Segal performed reexploration decompressive laminectomies at L4 and L5, and decompressions of the nerve roots at L4 and L5. (*Id.* at 5, App. 16). Again, Dr. Segal failed to note the presence of the epidural hematoma. (*Id.*). In the ensuing weeks, Ms. Rieder was still in a tremendous amount of pain, and opted for a second opinion. (*Id.*).

On June 5, 2015, Ms. Rieder went to Dr. Chad Abernathy for the second opinion. (*Id.*). Dr. Abernathy noted that Ms. Rieder's post-operative, May 10 MRI showed an epidural hematoma. (*Id.*). He ordered another MRI. (*Id.*). On June 12, Ms. Rieder had another MRI, which showed that the epidural hematoma had been surgically removed by Dr. Segal. (*Id.* at 6, App. 17). In other words, Dr. Segal had removed the epidural hematoma that he caused during the original surgery, without noting it in the medical record.

The negligent surgery and resulting epidural hematoma, which went undiagnosed for days, ultimately caused spinal cord compression and consequential neurologic difficulties, including foot drop, pain, paresthesia in Ms. Rieder's buttocks, thighs, calves, and legs. (*Id.*). The Rieders settled their claims against Dr. Segal and proceeded to trial on their negligent credentialing claims against Mercy.

3. Mercy should have limited Dr. Segal's surgical privileges when it knew or should have known that he was not competent to perform surgery.

Dr. Segal was first granted privileges to perform neurologic surgery at Mercy Hospital in 2009. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Summ. J. at 2, App. 620). Dr. Segal continued to hold these privileges until he relinquished them in a settlement with the Iowa Board of Medicine on December 16, 2016. (*Id.*).

Dr. Segal was licensed to practice medicine in New York in July 1993. (*Id.*). Dr. Segal was sued for medical malpractice in New York in 2004, 2005, 2006, and 2007. (*Id.*). Mercy Hospital was aware of these lawsuits at the time Dr. Segal applied to practice there. (*Id.* at 3, App. 621).

Dr. Segal was licensed to practice medicine in Iowa in April 2009. (*Id.*). When becoming licensed to practice medicine in Iowa, Dr. Segal was required to disclose anytime that he had been named in a medical malpractice suit regardless of whether the suit resulted in a finding of negligence. (*Id.* at 3-4, App. 621-22).

In 2012, the IBM sent Dr. Segal for evaluation to the Center for Personalized Education for Physicians ("CPEP") due to concerns with his clinical competency. (*Id.* at 6, App. 556). Dr. Segal was again sued for medical malpractice in Iowa in October 2014. (*Id.* at 4, App. 622). Dr. Segal was sued again in November 2015, alleging negligence for a November 2013 spinal surgery. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Partial Summ. J. at 2, App. 91). Another

lawsuit was filed against Dr. Segal in May 2016, alleging negligence stemming from an April 2014 spinal surgery. (*Id.*).

On May 15, 2015, the day Ms. Rieder was released from Mercy Hospital following her surgical complications, the Iowa Board of Medicine filed formal disciplinary charges against Dr. Segal relating to at least five separate complaints from 2011 to 2013. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Summ. J. at 4, App. 622). The charges against Dr. Segal state that he violated the laws and rules governing the practice of medicine in Iowa when he failed to provide appropriate neurological care to numerous patients in 2011, 2012, and 2013. (*Id.* at 4-5, App. 622-23).

The IBM investigation included allegations that Dr. Segal showed willful or repeated gross malpractice; willful or repeated gross negligence; a substantial lack of knowledge or ability to discharge professional obligations within the scope of his practice; a substantial deviation from the standard of learning or skill ordinarily possessed and applied by other surgeons in the state of Iowa; and willful or repeated departure from the standard of care. (*Id.*).

As a result of its investigation, the IBM found that Dr. Segal was professionally incompetent and had a track record of incompetence. (*Id.* at 7, App. 625). Such a finding of professional incompetence is reserved for the most egregious cases. (*Id.*).

Dr. Segal relinquished his surgical privileges in May 2016, allegedly due to unsteadiness in his hands caused by Parkinsonism. (Ex. 14 to Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Partial Summ. J., App. 207). In December 2016, Dr. Segal settled with the IBM and further agreed not to perform surgery in Iowa. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Partial Summ. J. at 5, App. 94).

Before May 2015, both Dr. Segal and Mercy Hospital were aware that he was under investigation by the Iowa Board of Medicine. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Summ. J. at 6; App. 624). Before May 8, 2015, Dr. Segal notified Mercy that he had been contacted regarding an Iowa Board of Medicine investigation. (*Id.*). Furthermore, as part of the investigation, Mercy would have received subpoenas for medical records, requests for personnel and credentialing files, and Dr. Segal's complication rates. (*Id.* at 5, App. 623).

Yet, no one at Mercy Hospital ever interviewed Dr. Segal or even questioned him about the Board's investigation. (*Id.* at 6, App. 624). Dr. Segal testified that he was not interviewed or questioned by anyone at Mercy about the Board's investigation. (*Id.*). Mercy Hospital is responsible for monitoring and improving the quality of patient care at its hospital. (*Id.* at 7; App. 625). As part of this responsibility, Mercy is responsible for monitoring the performance and quality of care provided by those who are granted privileges. (*Id.*).

Accepted standards of care required Mercy to contact Dr. Segal and to conduct their own investigation into his competency, especially given Mercy Hospital's awareness of prior claims alleging medical malpractice, the fact that he was under investigation by the Iowa Board of Medicine, the fact that he had been referred for professional improvement by the Iowa Board of Medicine, and Mercy's duty to protect its patient's by conducting its own inquiry given this information. All Mercy had to do was search Iowa Courts Online and it would have revealed the other medical malpractice claims filed against Dr. Segal in Iowa prior to his surgical treatment on Roxanne Rieder. (*Id.*). Plaintiffs endorsed an unquestionably qualified hospital administration expert, Dr. Charles Pietrafesa, who expressed the opinion that Mercy Hospital breached accepted standards of care in failing to further investigate Dr. Segal based on his track record. (Pls.' Mem. of Authorities Supp. Resistance to Mot. Summ. J. at 10-12; App. 523-25).

Dr. Pietrafesa testified that close scrutiny of neurosurgeons, like Dr. Segal, is required given the "risky nature of the work they do." (Ex. 16 to Pl. Statement of Disputed Facts Supp. Resistance to Mot. Summ. J. at 77, App. 764). Furthermore, based on the allegations and charges against Dr. Segal, Dr. Segal showed a systemic lapse in competency involving multiple patients across various areas of care. (*Id.*).

Mercy did nothing to limit Dr. Segal's surgical privileges before Ms. Rieder's botched spine surgery, even given the overwhelming amount of information at their disposal regarding Dr. Segal's professional incompetence. Had Mercy done so, Ms. Rieder would have never suffered the devastating injuries that she now must live with.

ARGUMENT

I. The district court erroneously granted summary judgment in favor of Mercy Hospital by failing to view the evidence in totality in the light most favorable to Roxanne and Tony Rieder, and abused its discretion in excluding key relevant evidence that generated a question for the jury to determine.

Preservation of Error

Plaintiffs preserved error by resisting Mercy's Motions for Partial Summary Judgment, (Pls.' Resistance to Mot. Partial Summ. J., App. 75) and Summary Judgment (Pls.' Resistance to Mot. Summ. J., App. 510). The trial court granted these motions on March 14, 2019, and April 9, 2019, respectively. (Order on Mot. Partial Summ. J., App. 342; Order on Mot. Summ. J., App. 812). Plaintiffs' counsel also appeared at the April 8, 2019, hearing on Mercy's Motion for Summary Judgment. (Tr. Hr'g on Mot. Summ. J., App. 818).

Standard of Review

Review of a summary judgment ruling is for corrections of errors of law. *Kennedy v. Zimmermann*, 601 N.W.2d 61, 63 (Iowa 1999). The Court's function

on appeal is "to determine whether a genuine issue of material fact exists and whether the law was correctly applied." *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995).

When considering a motion for summary judgment, the Court must consider the entire record, including pleadings, the motion, the resistance, affidavits, admissions, deposition testimony, and exhibits. Iowa R. Civ. P. 1.981(3); *Porter v. Good Eavespouting*, 505 N.W.2d 178, 182 (Iowa 1993). Summary judgment is only appropriate when the entire record, reviewed **in the light most favorable to the nonmoving party**, demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007)(emphasis added).

Evidentiary rulings are reviewed for an abuse of discretion. *Hall v. Jennie Edmundson Mem'l Hosp*, 812 N.W.2d 681, 685 (Iowa 2012).

Argument

In this case, there was substantial direct and circumstantial evidence which, when viewed in the light most favorable to the Rieders, should have precluded entry of summary judgment on their negligent credentialing claim against Mercy. The trial court erroneously failed to view the entirety of the evidence in the light most favorable to the Rieders, and abused its discretion in improperly excluding admissible evidence that supported the Rieders' negligent credentialing claim.

If the trial court had viewed the direct and circumstantial evidence in the light most favorable to the Rieders, and had properly considered that evidence in its ruling on Mercy's dispositive motions, a Linn County jury would have weighed the evidence and determined whether or not Mercy was negligent in failing to take action to restrict Dr. Segal's credentials. This Court should reverse the trial court's decision to grant summary judgment and remand this case for trial on the merits.

1. **The trial court erred by failing to view the evidence in the light most favorable to the Plaintiffs.**

The evidence offered by the Rieders in resisting Mercy's motions for summary judgment consisted of: (1) Mercy's internal file materials on Dr. Segal; (2) the Iowa Board of Medicine long-term investigation into Dr. Segal's surgical competency; (3) multiple lawsuits filed against Dr. Segal in New York, Maryland and Iowa before Roxanne Rieder's surgery, which Mercy knew or should have known about; (4) expert witness opinions from Dr. Charles Pietrafesa, a nationally-recognized expert in hospital administration; and (5) circumstantial evidence, including all reasonable inferences from the evidence described above that jurors are allowed to make in determining fact issues in cases of negligent credentialing. The trial court did not view any of this evidence in the light most favorable to the Rieders. Instead, the trial court viewed it in the light most favorable to Mercy, and then decided to exclude it.

"The test for determining [the] admissibility [of circumstantial evidence] is

that the offered proof must lead to a reasonable inference and not a mere suspicion of the existence of the fact sought to be proven." *Smith v. Pine*, 12 N.W.2d 236, 242 (Iowa 1943). Courts should afford "wide latitude" in admitting circumstantial evidence, "especially where direct evidence is lacking." *Id.* The law is well settled that where a party must rely on circumstantial evidence to prove a theory, the court should be very liberal and allow "great latitude" in admitting such evidence. *Hayes v. Stunkard*, 10 N.W.2d 19, 23 (Iowa 1943). Circumstantial evidence is especially relevant in negligent credentialing claims because direct evidence is precluded by Iowa's peer-review statute.

Direct evidence is the evidence of the witnesses to facts which they have knowledge of by means of their senses, and circumstantial evidence is the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. Put another way:

> The basic distinction between direct and circumstantial evidence is that in direct evidence the witnesses testify of their own knowledge as to the ultimate facts to be proved, while circumstantial evidence relates to instances where proof is given of facts and circumstances from which the finder of fact may infer other connected facts which reasonably follow, according to the common experience of mankind.

Jennings v. Farmers Mut. Ins. Ass'n, 149 N.W.2d 298, 301 (Iowa 1967).

Evidence is not rendered less persuasive by being circumstantial. *Wroblewski v. Linn-Jones FS Servs., Inc.*, 195 N.W.2d 709, 712 (Iowa 1972). The Iowa Supreme Court has "repeatedly held that circumstantial evidence is admissible and can form the basis or in some cases a part of the basis for submission of the case to the jury." *Turner v. Hansen*, 75 N.W.2d 341, 345 (Iowa 1956). "Knowledge, of course, may be proved by circumstantial evidence." *Loghry v. Capel*, 132 N.W.2d 417, 420 (Iowa 1965). And while direct and circumstantial evidence are "equally probative," *Thacker v. Eldred*, 388 N.W.2d 665, 670 (Iowa Ct. App. 1986), circumstantial evidence is even "more reliable than direct evidence" in some cases. *State v. Stamper*, 195 N.W.2d 110, 111 (Iowa 1972); *see also Turner*, 75 N.W.2d at 345 ("The facts may be established as well, and sometimes better, by circumstantial evidence than by the direct testimony of witnesses.").

To prove a claim by circumstantial evidence, the evidence must be "reasonably probable and not merely possible." *Jennings*, 149 N.W.2d at 301. "But this means only the evidence must be such as to raise a jury question within the limits of the foregoing rule; it need not be conclusive." *Wroblewski*, 195 N.W.2d at 712. Nor must it "exclude every other possible theory." *Jennings*, 149 N.W.2d at 301. And, as is critical here, "it is generally for the trier of fact to say whether circumstantial evidence meets this test." *Wiley v. United Fire & Cas. Co.*, 220

N.W.2d 635, 635 (Iowa 1974).

Here, the jury did not need to "speculate" that Mercy was aware Dr. Segal was under investigation by the IBM, because Dr. Segal himself admitted as much. The jury very well could have put two and two together to conclude that if Mercy was receiving medical record requests for Dr. Segal's patients, coupled with requests for Dr. Segal's complication rates from the IBM, then Mercy knew or should have known that Dr. Segal was under investigation. This is exactly the type of situation where a jury could "infer other connected facts which reasonably follow" as approved by the Court in *Jennings,* 149 N.W.2d at 301, *supra.* And that is the exact conclusion that the trial court would have come to, had it viewed the evidence in the light most favorable to the Rieders. The trial court's conclusion that it would be speculation to suggest Mercy had knowledge of the IBM investigation prior to the filing of formal charges improperly views the evidence in the light most favorable to Mercy.

Similarly, Dr. Segal was sued at least ten times for medical malpractice from 2004 to 2015. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Partial Summ. J. at 1-2, App. 90-91). Obviously, when viewed in the light most favorable to Plaintiffs, one reasonable interpretation of this fact is that Dr. Segal was engaging in a pattern of negligence of which Mercy should have been aware. Plaintiffs further supported this evidence with expert testimony explaining that

such a pattern demonstrates substandard professional judgment. The trial court excluded this evidence, and all circumstantial inferences, presumably because the final dispositions of those lawsuits are unknown. Again, that is one interpretation of the evidence, but it is an interpretation that views the evidence in the light most favorable to Mercy, not the light most favorable to the Rieders.

2. The Peer Review Privilege is unreasonable when applied in negligent credentialing cases.

The Iowa Peer Review Statute limits the discovery and admissibility of peer review records in civil proceedings through imposition of a statutory privilege. *See* Iowa Code § 147.135. Peer review means "evaluation of professional services rendered by a person licensed to practice a profession." Iowa Code § 147.1(4). Peer review records are defined as "all complaint files, investigation files, reports, and other investigative information relating to licensee discipline or professional competence in the possession of a peer review committee or an employee of a peer review committee." *Id.* at 147.135(2). The statute goes on to provide that "[p]eer review records are privileged and confidential, are not subject to discovery, subpoena, or other means of legal compulsion for release to a person other than an affected licensee or a peer review committee, and are not admissible in evidence in a judicial or administrative proceeding other than [circumstances not applicable here]." *Id.*

The peer review privilege, however, does not provide for a blanket exclusion

of any and all information that may have found its way into a peer review record. As the trial court correctly noted earlier in this case, information does not become privileged merely because it is in the peer review file. (Ex. 22 to Pls.' Mem. Of Authorities Supp. Resistance to Mot. Summ. J., App. 580). This limitation is clear in the text of section 147.135 itself: "Information or documents discoverable from sources other than the peer review committee do not become nondiscoverable from other sources merely because they are made available to or are in the possession a peer review committee." Iowa Code § 147.135(2).

The peer review privilege must be viewed through the lens that "[d]iscovery rules are to be liberally construed to effectuate disclosure of all relevant and material information to the parties." *Hutchinson v. Smith Laboratories, Inc.*, 392 N.W.2d 139, 140 (Iowa 1986). When a privilege is asserted, it must be "narrowly construed because it is an exception to our rules governing discovery." *Id.* at 141; *Carolan v. Hill*, 553 N.W.2d 882, 886 (Iowa. 1996).

The Iowa Supreme Court has articulated its perception of the policy underlying the peer review privilege:

> It allows a physician to consult with peers about his [or her] care and treatment of a particular patient. It also allows critical retrospective analysis of cases to learn better methods of treatment for the future. Similarly, it

> encourages peers to lodge complaints and initiate disciplinary action against those who are practicing substandard care, without fear of disclosure or retribution.

Carolan, 553 N.W.2d at 886. In other words, peer review privilege "encourage[s] an ***effective review*** of medical care." *Id.* (emphasis added). That policy is not furthered by allowing a hospital, such as Mercy, to skirt the consequences of failing to perform an "effective review" of Dr. Segal's substandard medical care by hiding behind the peer review privilege.

The privilege's policy is clearly aimed at promoting candor and eliminating the threat of liability for *physicians* who participate in the peer review process. The primary purpose of the privilege is to allow *physicians* to participate, without fear of their participation coming back around to bite them. In a negligent credentialing case such as this one, this policy goal is a moot point. The sole remaining defendant is Mercy Hospital; no physician faces liability.

The privilege also enables defendants like Mercy to use it as both a sword and a shield. This is impermissible. *See Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681, 687 (Iowa 2012) ("We adverted to the 'sword and shield' problem in *Cawthorn*, noting that other cases have held that 'as a matter of fairness, a party cannot simultaneously rely on peer review materials for its defense while asserting the privilege' against disclosure of the materials to the other

party."). That is exactly what Mercy did in this case. Mercy unequivocally used the privilege as a shield to avoid disclosure of the peer review file. Then, it used the privilege as a sword by offering expert testimony from five credentialing experts that it has a robust peer review process in place, but at the same time, it can't show that the process was followed in regard to Dr. Segal due to the peer review statute.

Aside from policy considerations, practical considerations also favor limiting the peer review privilege in negligent credentialing cases. A trial court abuses its discretion when "such discretion is exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable." *Hoekstra v. Farm Bureau Mut. Ins. Co.*, 382 N.W.2d 100, 108 (Iowa 1986).

Here, it is clearly unreasonable that a hospital's ***credentialing*** file for a physician is nondiscoverable and inadmissible in a negligent ***credentialing*** lawsuit. The trial court found, and Mercy itself argued, that even Mercy was put at a disadvantage by the peer review privilege. (Order on Mot. Summ. J. at 4, App. 815) ("Mercy itself is disadvantaged by being unable to defend its actions or explain what it knew or didn't know with regard to Dr. Segal's fitness to practice at the time of Plaintiff Roxanne Rieder's surgery.").

Plaintiffs, too, were disadvantaged by being unable to access or present evidence from the peer review file. (*Id.*) ("Both parties are precluded from offering evidence of what is in the peer-review file, and the Court will not allow Plaintiffs

to insinuate that because no one has access to know what information is contained in that file or what action was taken, that Mercy Hospital in fact took no action to Dr. Segal."). In a negligent credentialing case, where the critical question is whether a hospital's credentialing actions or inactions were within the standard of care, there is no evidence more probative than the credentialing file itself. In a case like this one, where both sides claim prejudice resulting from the peer review privilege and where both sides are unable to prove or defend their case, the smoke and mirrors of the privilege should give way to transparency for the sake of justice.

"A trial is a search for the truth." *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004) (quoting *People v. Zack*, 184 Cal.App.3d 409, 229 Cal.Rptr. 317, 320 (1986)). If this maxim is going to hold true in negligent credentialing claims in Iowa, then information about Mercy's credentialing process must be admissible as evidence.

3. The trial court abused its discretion by weighing the evidence.

A trial court cannot weigh the evidence. *Clinkscales v. Nelson Secs., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005). Dr. Segal was sued at least ten times for medical malpractice, but the trial court weighed that evidence and decided to exclude it. (Order on Mot. Summ. J. at 4, App. 815) ("[T]he probative value of evidence that Dr. Segal had been sued in the past, without any evidence as to the nature or results of those lawsuits, is substantially outweighed by the danger of

unfair prejudice to Mercy as well as the danger of misleading the jury. The only way a jury could rely on this evidence in finding Mercy was negligent is to assume or speculate that Dr. Segal was in fact negligent on those prior occasions."). This was an abuse of discretion.

There are countless reasons that a lawsuit could terminate prior to a finding of negligence. Parties enter into settlements, defendants are dismissed for strategic reasons, and issues of causation or damages – even when a violation of the standard of care has occurred – lead to disposition of an action. Dr. Segal has been sued a number of times in a multitude of states. To suggest that such a pattern has marginal probative value in a negligent credentialing case defies logic. There is nothing unfairly prejudicial about allowing a jury to consider the evidence, and make its own determination as to whether it sheds light on Mercy's negligence. At trial, Mercy's counsel would have been free to argue to the jury the probative value of these prior lawsuits, and to cross examine Plaintiffs' expert as to the disposition of these prior lawsuits.

Similarly, the Rieders put forth evidence that Dr. Segal was under investigation by the Iowa Board of Medicine prior to performing surgery on Roxanne Rieder; that Mercy knew Dr. Segal was under investigation prior to performing surgery on Ms. Rieder; and that even with this knowledge, Mercy did not prohibit Dr. Segal from performing surgery on patients like Ms. Rieder. The

fact that formal IBM charges against Dr. Segal were not made public until after Ms. Rieder's surgery should have been information for the jury to weigh, not the trial court.

Even assuming the peer review privilege should remain intact in negligent credentialing cases, evidence of the IBM investigation into Dr. Segal's competence should still be admissible in this case. "Information or documents discoverable from ***sources other than the peer review committee*** do not become nondiscoverable from the other sources merely because they are made available to or are in the possession a peer review committee." Iowa Code § 147.135(2).

Here, that "other source" was Dr. Segal himself. Dr. Segal knew he was under investigation by the IBM for years prior to performing surgery on Roxanne Rieder. (Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Summ. J. at 6, App. 624). And he unequivocally admitted in the course of discovery in this case that he told Mercy that he was under investigation by the IBM. (*Id.*). Further, Mercy's own bylaws *required* Dr. Segal to report the IBM investigation. Those bylaws required Dr. Segal to "promptly notify Mercy medical Center Medical Staff office if an event occur[ed] at any time during the course of [his] Medical Staff membership that would change [his] answer in response to a question regarding his [] health status or professional liability and credentials on the application [for Medical staff membership]." (Pls.' Statement of Disputed Facts Supp. Resistance

to Mot. Partial Summ. J. at 4, App. 93).

Plaintiffs also offered expert testimony regarding the IBM investigation inquiry process, which is yet another "other source" of information separate and distinct from the peer review file itself. (Ex. 17 to Pls. Statement of Disputed Facts Supp. Resistance to Mot. Summ. J., App. 767-71). When the IBM begins an investigation into a physician, the IBM subpoenas medical records. (*Id.* at 2, App. 768). When there are multiple complaints against a doctor, like there were against Dr Segal, the IBM will also request hospital personnel and credentialing files relating specifically to the doctor in question. (*Id.*). When the doctor in question is a surgeon, complication rates are also requested. (*Id.*). The subpoenas clearly state that they are issued from the Iowa Board of Medicine and that the purpose of the subpoenas are for an IBM investigation. (*Id.*). The request for medical records is sent to Mercy's legal department. (*Id.*). If the peer review file itself was inadmissible, then the only way Plaintiffs could possibly prove their claim is with circumstantial evidence such as this.

Even if the peer review privilege precludes the jury from hearing evidence as to what exactly Mercy did or did not do with that knowledge, one thing is clear: Dr. Segal's surgical privileges were not suspended or terminated at the time he operated on Ms. Rieder. It was within the province of the jury, not the trial court, to determine whether or not that was negligent. *See Clinkscales v. Nelson*

Securities, Inc., 697 N.W.2d 836, 841 (Iowa 2005) ("[Q]uestions of negligence or proximate cause are ordinarily for the jury—only in exceptional cases should they be decided as a matter of law.").

The trial court weighed the direct and circumstantial evidence of prior lawsuits and the IBM investigation, and then decided to exclude it. The proper decision would have been to let the jury weigh the evidence instead. A reasonable jury could take this evidence, coupled with all of the other evidence Plaintiffs have to offer in this case (including competent and qualified expert testimony), and conclude that Mercy was negligent by allowing Dr. Segal to perform surgery at its hospital.

4. Had the trial court not abused its discretion in excluding highly relevant evidence, summary judgment would have been improper.

Summary judgment is only appropriate when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007).

An issue of material fact exists if reasonable minds can differ on how the issue should be resolved. *See McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 327-28 (Iowa 2002). A court does not weigh the evidence but merely determines whether a reasonable jury could find for the nonmoving party based on the evidence presented. *Clinkscales v. Nelson Secs., Inc.*, 697 N.W.2d 836, 841 (Iowa

2005). Accordingly, "[m]ere skepticism of a plaintiff's claim is not a sufficient reason to prevent a jury from hearing the merits of a case." *Id.* The Court reviews the evidence in the light most favorable to the nonmoving party. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005).

It is a "well-settled maxim that questions of negligence or proximate cause are ordinarily for the jury—only in exceptional cases should they be decided as a matter of law." *Clinkscales*, 697 N.W.2d at 841. *See also Speed v. State*, 240 N.W.2d 901, 904 (Iowa 1976) ("Ordinarily, questions of negligence and proximate cause are for the trier of fact.").

"Because resolution of issues of negligence and proximate cause turns on the reasonableness of the acts and conduct of the parties under all the facts and circumstances, actions for malpractice 'are ordinarily not susceptible of summary adjudication.'" *Campbell v. Delbridge*, 670 N.W.2d 108, 110 (Iowa 2003) (citation omitted). "The question of whether negligence is established under the evidence is almost without exception said to be inappropriate for summary judgment treatment." *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989). And, as is pertinent here, "the critical issue in this case is not whether there was *negligence* in the actions of the defendant but whether there was *evidence* upon which liability could be found." *Id.*

Plaintiffs identified 39 disputed facts which should have precluded summary

judgment. (*See* Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Summ. J., App. 619-27). If the trial court would not have abused its discretion by excluding all of Plaintiffs' evidence and failing to view *any* of the evidence in the light most favorable to Plaintiffs, there would have unquestionably been a myriad of disputed facts for the jury to determine. What did Mercy know about Dr. Segal's incompetence? What actions did Mercy take to investigate Dr. Segal's performance? The question of fact could go on and on.

It is clear that the trial court substituted its own judgment for that of the jury. It is also clear that none of the precluded evidence was viewed in the light most favorable to Plaintiffs. These are foundational errors which must be reversed.

The jury trial is a sacrosanct pillar of the American justice system. The purpose of the jury trial is to determine the truth. The truth remains a mystery here, because Plaintiffs were never given the opportunity to present their case to a jury.

CONCLUSION

Plaintiffs-Appellants Roxanne and Tony Rieder respectfully request this Court reverse the trial court's Order granting summary judgment in favor of Defendant Mercy Hospital, and remand this case so that it may proceed to trial.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants Roxanne and Tony Rieder respectfully request oral argument on all issues raised herein.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1), (2) because:

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/s/ *Bruce Braley* 10/17/19

SIGNATURE DATE

CERTIFICATE OF COST

The undersigned certifies on this 17th day of October, 2019 that the cost of producing the necessary copies of Appellant's Brief was **$0.00**.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on the 17th day of October, 2019, the undersigned electronically filed this document using the electronic filing system, which will send notification of such filing to the following:

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