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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 REPLY BRIEF

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REPLY TO ARGUMENT

This Reply Brief addresses a number of discrete points raised in Mercy's Brief. The Rieders otherwise rest on the arguments in their "Appellants' Final Brief."

Roxanne and Tony Rieder presented a mountain of evidence to the trial court. It is difficult to imagine a more egregious and clear negligent credentialing case – Mercy allowed Dr. Segal to perform surgery at its hospital despite the fact that Dr. Segal had been sued at least ten times for medical malpractice; despite the fact that Dr. Segal had previously been sent to undergo a competency evaluation program by the Iowa Board of Medicine; and despite the fact that Dr. Segal was under investigation by the Iowa Board of Medicine when he botched Roxanne Rieder's surgery and post-surgical care.

But Mercy got off scot-free in the trial court, and the Rieders will get no redress from Mercy absent a reversal, because the trial court precluded the Rieders from presenting any of that evidence to prove their case. The Court should remedy this injustice.

I. The Rieders preserved error.

Mercy claims it is "confus[ed]" regarding the Rieders' Iowa Code Section 147.135 ("peer review") argument. Mercy Br. at 54. Mercy argues that the Rieders

have not properly preserved that issue. *Id.* at 27. Mercy clearly misunderstands the Rieders' legal arguments in this case.

The Rieders are not arguing, nor did they argue in the trial court, that the peer review privilege is unreasonable in negligent credentialing cases and therefore must be disposed of.

The Rieders argue that *given* the unreasonableness of the peer review privilege in negligent credentialing cases, rulings on non-privileged evidence must reflect that unreasonableness. In other words, if the peer review privilege is going to hamstring plaintiffs like Roxanne Rieder from proving their negligent credentialing cases with evidence of the credentialing file itself (which is, of course, the most probative evidence in the case), then the trial court should afford wide latitude with respect to the other, non-peer review evidence.

This argument was preserved in:

- Plaintiffs' Memorandum of Authorities Supporting their Resistance to Mercy's Motion for Partial Summary Judgment, (App. 86-88);
- Plaintiffs' Memorandum of Authorities Supporting their Resistance to Mercy's Motion for Summary Judgment, (App. 519) ("No doubt the statutory provisions protecting peer review records have affected the manner in which Plaintiffs have developed evidence and will impact how they must present their case at trial to support their negligent credentialing

claim."); (App. 523) ("Due to the peer review privilege Mercy has consistently hid behind throughout this case – including in this motion – Plaintiffs' negligent credentialing claim relies heavily on circumstantial evidence … Indeed, negligent credentialing cases rise or fall on circumstantial evidence because direct evidence is often barred by operation of peer review statutes."); and

- Plaintiffs' oral arguments made at the April 8, 2019 Hearing on Mercy's Motion for Summary Judgment, (App. 841-47) (Plaintiffs were "denied access to Mercy's credentialing files on Dr. Segal and being denied access to the Iowa Board of Medicine files detailing the extent of their investigation and their communications with Mercy is a huge challenge for the Plaintiff, but it is one that is clearly not insurmountable under the law or the Iowa Supreme Court would have rejected this theory of recovery out of hand.").

II. Mercy's due process argument is without merit.

Mercy argues that "no hospital may, or should, ignore the due process due its physicians and summarily restrict his or her practice." Mercy Br. at 41. *See also id.* at 24, 33. This argument is fatally flawed from both a legal and practical perspective.

1. Due process is not implicated because Mercy is not a state actor.

The first flaw in Mercy's due process argument is a legal one. Mercy argues, "a physician is afforded due process where his license to practice medicine is sought to be taken from him." *Id.* at 24 (citing *Gilchrist v. Bierring*, 14 N.W.2d 724, 732 (Iowa 1944)). As an initial matter, *Gilchrist* addresses cosmetology licensing, not physician licensing. 14 N.W. 2d at 725. The case arose "when the ***board of cosmetology examiners*** refused to approve plaintiff's application" for a renewal of his license to operate the Ft. Dodge Beauty Academy, a school of cosmetology. *Id.* (emphasis added). Even assuming that the case applies to physician licensing, it still isn't on point.

Mercy's only legal authority supporting its due process argument is not helpful because this case lacks the critical element necessary to invoke due process: state action. The Fourteenth Amendment to the United States Constitution and article I, sections 1 and 9 of the Iowa Constitution both "prohibit the State from depriving a person of 'property, without due process of law.'" *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W. 2d 234, 238 (Iowa 2006). "Yet, the provisions only limit state action. They do not refer to individual activity." *Id.* (internal citations omitted).

In *Green*, the plaintiff jockeys were excluded from a racetrack. They brought due process claims against the racetrack defendant. The claims failed because the

racetrack "is a private, nonprofit corporation, licensed to do business in Iowa" and could "only be liable under a due process claim if it was a state actor." *Id.*

Here, Mercy's due process argument fails for the same reason. Mercy is a private corporation, licensed to do business in Iowa. (Pet. at 2; App. 13). Mercy is not a state actor. *Gilchrist* is distinguishable – and critically so – because in that case, there was state action; the state board of cosmetology examiners refused to renew the plaintiff's license. 713 N.W.2d at 725. Because *Gilchrist* does not apply, Mercy has cited zero legal authority to support its due process argument.

Finally, *even if* Mercy were a state actor (it's not), Due Process *still* would not be implicated because physicians have no legitimate liberty or property interest in surgical privileges. *See Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002) ("Our first inquiry in a procedural due process analysis is whether a protected liberty or property interest is involved."). The property interest lies with the medical license, not the surgical privileges.

2. Mercy's due process argument, if adopted, would lead to absurd and unjust results.

Mercy's due process argument is flawed not only legally, but also from a practical perspective. If a hospital cannot restrict surgical privileges until the Iowa Board of Medicine ("IBM") issues formal charges, then many plaintiffs would be precluded from proving liability or causation in negligent credentialing claims until

the statute of limitations had already run. Roxanne Rieder's case is a perfect example.

The statute of limitations on medical negligence claims in Iowa is two years, and begins accruing when the plaintiff knows or should have known of the harm.[1] *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 457 (Iowa 2008); Iowa Code Section 614.1(9).

Here, the Iowa Board of Medicine issued its formal charges against Dr. Segal on May 15, 2015. (Pls. Statement of Disputed Facts Supp. Resistant to Mot. Summ. J. at 4; App. 622). But those formal charges relate to complaints filed as early as 2011. (*Id.*). A person whom Dr. Segal injured in 2011 would have a claim that expired in 2013. If Mercy's position were adopted, that person would be precluded from proving a negligent credentialing lawsuit, prior to the statute of limitations, because Dr. Segal's "due process" rights weren't adjudicated until 2015.[2]

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[1] The Rieders acknowledge that this is a negligent credentialing case, not a medical malpractice case. Because the Iowa Supreme Court has assumed, without deciding, that negligent credentialing is a viable cause of action, this argument will also assume that the two-year statute of limitations for hospital malpractice applies to negligent credentialing claims.

[2] Interestingly, Mercy's position would *actually* implicate constitutional equal protection concerns, because a person injured in 2014, under this hypothetical, would not suffer the same injustice.

Such an absurd and unjust result cannot be the law of Iowa.

3. The trial court's adoption of Mercy's due process argument was error of law.

The trial court adopted Mercy's due process argument. (Order on Mot. Partial Summ. J. at 5; App. 346). It held:

> A physician is afforded due process where his license to practice medicine is sought to be taken from him. *Gilchrist v. Bierring*,14 N.W.2d 724, 732 (Iowa 1944). That due process was only beginning at the time the Plaintiff encountered Dr. Segal. Therefore, Mercy Hospital, without knowing the basis of the investigation, could not have had a duty to "restrict or terminate Dr. David Segal's surgical privileges" as of May 8, 2016 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. To find that such a duty does attach as soon as an investigation commences would be to nullify the purpose of the investigation and the due process it protects. If hospitals were obligated to suspend the privileges of every one of the 600-700 physicians against whom a complaint is filed in a given year, it would result in a substantial depravation of due process, especially in the case of the 575-675 physicians against whom no misconduct is ever founded.

Id. For the reasons outlined above, this was an error at law warranting reversal.

The Rieders are not claiming and have never claimed that Mercy should be expected to suspend the privileges of any physician it has given privileges to simply because a complaint has been filed against that physician with the Iowa

Board of Medicine. But when a physician has a known track record like Dr. Segal, then an accredited credentialing hospital like Mercy has a clear duty to intervene.

III. The Iowa Supreme Court should retain this case.

The Iowa Supreme Court should retain this case, because it presents "substantial questions of enunciating or changing legal principles." Iowa R. App. P. 6.1101(2)(f).

This case has nothing to do with "advisory opinions" as Mercy suggests. Mercy Br. at 13. The Rieders' claims for negligent credentialing were dismissed by summary judgment without a jury trial based on erroneous evidentiary and substantive rulings by the trial court. The issues addressed in the Rieders' briefs lie at the heart of this case. Those issues are in controversy. The manifest injustice that the Rieders suffered in the trial court can be remedied by this appeal; this is a justiciable controversy. No "advisory opinion" is implicated. *Cf. Stream v. Gordy*, 716 N.W.2d 187, 193 (Iowa 2006) (Advisory opinion implicated when "there is no justiciable controversy.").

Because Iowa law on negligent credentialing is limited to date, it is important for the Supreme Court to retain jurisdiction and clarify some basic principles governing necessary proof to generate a jury question on negligent credentialing claims. Appellants' Final Br. at 7-8.

IV. Mercy's Rule 5.403 argument fails to consider that this is a negligent credentialing case, not a medical malpractice case.

Mercy argues that "familiar Rule 5.403 balancing test commonly utilized, and utilized by the district court here … is a standard motion commonly used in ***malpractice cases*** in Iowa to exclude reference to any other medical malpractice lawsuits or claims involving a party or any of its experts." Mercy Br. at 51 (emphasis added).

This is not a medical malpractice case. This is a negligent credentialing case. The Rieders acknowledge that prior lawsuits likely would not be admissible in a standard medical malpractice case against a physician. But a negligent credentialing case against a hospital is a different animal entirely.

The prior lawsuits against Dr. Segal are one of the most probative pieces of evidence in this case, *especially* given the fact that the Rieders were deprived of the evidence in Dr. Segal's Mercy credentialing file to clearly establish what Mercy knew about Dr. Segal's problems, when Mercy knew it, and what Mercy did or failed to do about it. The trial court held that "[t]he jury in this case will not be in a position to adjudicate the merits of those prior cases and will not be permitted to rely on the mere fact that lawsuits were brought to speculate Dr. Segal was negligent on those prior occasions." (Order on Mot. Summ. J. at 4; App. 815). This analysis misses the point. There's no need for the jury to "adjudicate the merits" of those prior cases; the circumstantial inference is that competent doctors

don't get sued nearly a dozen times for malpractice. It is the pattern of behavior that the jury should have been allowed to consider, particularly given the fact that Mercy's credentialing process required Dr. Segal to notify them of any claims that had been brought against him in the past or were brought against him in the future. (Ex. 17 to Pls.' Statement of Disputed Facts Supp. Resistance to Mot. Partial Summ. J.; App. 231, 238, 242).

Would the court have found the evidence more probative had Dr. Segal been sued 15 times previously? 50 times? 100 times? 1,000 times? The simple truth is that the weight to be given to this evidence is a question for the jury to decide, not a judge. It is a matter of degree. And it is a question that a jury should have been permitted to answer. Taking that evidence out of the case, especially given the unreasonableness of the peer review privilege as applied in a negligent credentialing claim, was an abuse of discretion.

V. Mercy appears to concede that the trial court did not view the evidence in the light most favorable to the Rieders.

In ruling on a motion for summary judgment, a trial court must view the evidence in the light most favorable to the nonmoving party. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). Here, the Rieders were the nonmoving party, but the trial court instead viewed the evidence in the light most favorable to Mercy.

Mercy references this standard in a number of headings in its brief. *See* Mercy Br. at 33, 41, 46. Mercy's discussion, however, fails to offer even a scintilla of analysis as to how the trial court actually viewed the evidence in the light most favorable to the Rieders.

For example, the trial court looked at the fact that "there were a number of lawsuits filed against Dr. Segal in New York, Maryland, and Iowa for medical malpractice, and to allow their expert to conclude that the mere number of lawsuits filed against Dr. Segal demonstrates a pattern of negligence." (Order on Mot. Summ. J. at 4; App. 815). As described above, the Court viewed the evidence in the light most favorable to Mercy by focusing on the fact that the dispositions of those lawsuits are unknown. (*Id.*) Viewing the evidence in the light most favorable to the Rieders would have led to the conclusion that the numerous lawsuits establish a pattern of sub-par medical care. The trial court failed to do that.

Similarly, the trial court looked at the fact that Dr. Segal was under investigation by the IBM, but viewed it in the light most favorable to Mercy by focusing on the fact that formal IBM charges had not yet been filed at the time of Roxanne Rieder's surgery. (*Id.* at 5; App. 816). Viewing the evidence in the light most favorable to the Rieders would have led to the conclusion that the IBM investigation itself shed light on whether Dr. Segal should have been performing surgery.

Mercy has not, and cannot, point to a single reasonable inference that the Rieders were afforded, nor has it nor can it point to a single piece of evidence that was viewed in the light most favorable to the Rieders.

VI. Mercy's own cited authority supports the Rieders' position that, given the unreasonableness of the peer review privilege in negligent credentialing cases, circumstantial evidence should have been permitted in this case.

Mercy cites *Smith v. Pine*, 12 N.W.2d 236 (Iowa 1943) for the proposition that a trial court "'usually has considerable discretion in ruling on the admissibility of circumstantial evidence,' with ***wide latitude*** generally allowed 'in admitting it especially ***where direct evidence is lacking***.'" Mercy Br. at 37 (emphasis added).[3]

That precisely states the Rieders' position: where the most probative direct evidence in the case (Dr. Segal's credentialing file at Mercy) is lacking because of the application of peer review privilege, wide latitude must be allowed in admitting other circumstantial, non-privileged evidence. That wide latitude was not allowed by the trial court in admitting key circumstantial, non-privileged evidence that generated a jury question on the negligent credentialing claims.

[3] Mercy then turns around and argues that the Rieders' argument that "circumstantial evidence is especially relevant in negligent credentialing claims because direct evidence is precluded by Iowa's peer review statute" is "conclusory." Mercy Br. at 38. But Mercy also acknowledges that the Rieders cited *Smith* for this very proposition. Mercy Br. at 36. It just goes to show that Mercy's arguments strain credibility.

CONCLUSION

If promoting patient safety is an important public policy in the State of Iowa, then providing patients like Roxanne Rieder a remedy for negligent credentialing is an equally-important public policy. A remedy must be more than a statement of law; it has to present injured patients with a legitimate opportunity to prove their claim by both direct and circumstantial evidence. When competing public policies like the peer review privilege limit critical relevant evidence that could be offered to support a claim of negligent credentialing, trial courts in Iowa should give broad latitude to injured patients to survive summary judgement with direct and circumstantial evidence of the hospital's wrongdoing in approving or failing to restrict a physician's privileges to perform surgery. If the trial court's ruling is allowed to stand, it will effectively extinguish claims for negligent credentialing in Iowa once and for all.

This Court should reverse the trial court's summary judgment rulings, and allow the Rieders to present their evidence to a jury.

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*	10/21/19
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