IN THE SUPREME COURT OF IOWA

NO. 19-0767

ROXANNE RIEDER and TONY RIEDER,
Appellants,

vs.

DAVID SEGAL, M.D., THEODORE DONTA, M.D., PH.D,
EASTERN IOWA BRAIN & SPINE SURGERY, PLLC,
RADIOLOGY CONSULTANTS OF IOWA, PLC and
MERCY HOSPITAL, CEDAR RAPIDS, IOWA, d/b/a
MERCY MEDICAL CENTER, CEDAR RAPIDS, IOWA,
Appellees.

Appeal from the Iowa District Court for Linn County
The Honorable Ian K. Thornhill
No. LACV086697

APPELLEE'S BRIEF

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ROUTING STATEMENT

This appeal presents issues commonly decided on appeal that require the application of existing legal standards. As such, it is appropriate to transfer this case to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

In their routing statement, the Rieders inaccurately cast this matter as "crucial to the future of health care negligent credentialing jurisprudence in Iowa." Rieder Brief at 7. This is not the case envisioned by the Supreme Court in *Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681 (Iowa 2012) wherein it stated: "we prefer to confront and decide the issue [of whether the tort of negligent credentialing exists] in a case in which the matter is disputed and briefed by the parties." *Id.* at note 4. Here, the parties did not dispute the existence of the tort before the district court. *See* [Order on Motion for Partial Summary Judgment ("Order Granting PMSJ")]; App. 345 ("Mercy Hospital, has assumed, but not conceded that negligent credentialing is a viable claim in Iowa. Therefore, this Court will turn to the substance of the Defendants' argument, and continue in the assumption that negligent credentialing is a claim in Iowa."). The Rieders admit as much when they state: "Nor do the parties in this case expressly dispute the viability of a negligent

credentialing claim." Rieder Brief at 8. The Rieders provide no legal authority for the Supreme Court's retention of issues involving duty and sufficiency of the evidence, both commonly decided on appeal.

Instead, the Rieders argue the issues before this Court "have a tangible, practical effect on the viability of negligent credentialing claims." *Id.* The Rieders provide no legal support for this claim. In essence, the Rieders improperly ask this Court to issue an advisory opinion. The Iowa Supreme Court has repeatedly stated that it has neither the authority nor duty to issue advisory opinions:

> We will address any unanswered questions when a party presents the court with actual cases raising those issues. That is how the law progresses in this state. We do not issue advisory opinions.

Schmidt v. State, 909 N.W.2d 778, 800 (Iowa 2018) (citing *Linn v. Montgomery*, 903 N.W.2d 337, 344 (Iowa 2017)); *see also* (*Hartford–Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997) ("[t]his court has repeatedly held that it neither has a duty nor the authority to render advisory opinions").

STATEMENT OF THE CASE

Mercy is not satisfied with the Rieders' statement of the case as it is incomplete, editorialized, and in violation of Iowa's appellate rules. *See*

Iowa R. App. P. 6.903(f) ("The statement shall indicate briefly the nature of the case, the relevant events of the prior proceedings, and the disposition of the case in the district court."). Mercy will address arguments improperly raised in the Rieders' statement of the case in the argument section of this brief.

A. Nature of the Case.

This case is a medical malpractice case wherein Roxanne and Tony Rieder alleged medical negligence by David Segal, M.D., and Theodore Donta, M.D., Ph.D., and their respective clinics, in relation to their care and treatment of Roxanne Rieder in May of 2015. [Petition]; App. 12-20. The Rieders also alleged negligent credentialing as to Defendant Mercy Hospital, Cedar Rapids, Iowa, d/b/a Mercy Medical Center, Cedar Rapids, Iowa ("Mercy"). [*Id.* at ¶¶83-86]; App. 19.

B. Relevant Events of the Prior Proceedings and Disposition of the Case Before the District Court.

On or about October 22, 2018, the Rieders dismissed David Segal, M.D., and his clinic. They also dismissed Theodore Donta, M.D., Ph.D., and his clinic, *without payment*. Mercy Hospital remained as the only defendant.

On February 14, 2019, the Rieders certified Charles A. Pietrafesa, M.D., MBA to provide testimony as to the standard of care regarding the Rieders' negligent credentialing claim and provided his opinion. [Plaintiffs' Certifications of Expert Witnesses Pursuant to Iowa Code § 668.11(a) and First Supplemental Disclosures of Expert Testimony Pursuant to Iowa R. Civ. P. 1.500(2) ("Pietrafesa Certification and Disclosures") attached as Ex. C to Mercy's Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment ("Mercy PMSJ SUF")]; App. 64-74.

Dr. Pietrafesa opined, in relevant part, "that based on the Iowa Medical Board's allegations, the testimony of Dr. Segal that he alerted Mercy about these allegations, the standard of care required Mercy to take swift and immediate action to limit, restrict, or suspend Dr. Segal's privileges with respect to care of any patients at Mercy at that time, including but not limited to Ms. Rieder, even on a conditional or temporary basis." [Pietrafesa Certification and Disclosures]; App. 73.

On February 15, 2019, Mercy filed for partial summary judgment based on Dr. Pietrafesa's standard of care opinion seeking a determination that Mercy had 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 ("IBM"). [Mercy's Motion for Partial Summary Judgment ("Mercy PMSJ"), Memorandum of Law in Support of Motion for Partial Summary Judgment ("Mercy PMSJ Memo"), Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment ("Mercy SUF")]; App. 35-74.

On March 4, 2019, Mercy deposed the Rieders' negligent credentialing expert, Dr. Pietrafesa. [Deposition of Charles A. Pietrafesa, M.D.]; App. 324.

On March 4, 2019, shortly after their negligent credentialing expert's deposition, the Rieders filed their Resistance to Mercy's motion for partial summary judgment, including exhibits outlining lawsuits brought against Dr. Segal. [Plaintiffs' Resistance to Motion for Partial Summary Judgment ("P-Resistance to PMSJ"), Memorandum of Authorities Supporting Their Resistance to Motion for Partial Summary Judgment ("Memo in Support of P-Resistance to PMSJ"), Statement of Disputed Facts Supporting Their Resistance to Motion for Partial Summary Judgment ("SDF in Support of P-Resistance to PMSJ")]; App. 75-313.

On March 5, 2019, the Rieders deposed IBM Executive Director Kent Nebel. [Mercy's Statement of Undisputed Facts in Support of Motion for Summary Judgment ("Mercy MSJ SUF"), Ex. E]; App. 433.

On March 14, 2019, the district court granted Mercy's motion for partial summary judgment and held that Mercy had 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 IBM and ordered that Dr. Pietrafesa may not present that conclusion at the time of trial. [Order Granting PMSJ]; App. 346. The district court ordered that the trial would move forward as to "any other actions or inactions of the Defendant which may have contributed to Dr. Segal operating upon the Plaintiff on May 8, 2016, including any potentially independent investigation that the Defendant might have conducted." [*Id.*]; App. 345.

On March 25, 2019, the Rieders served Rebuttal and Supplemental Expert Disclosures to Mercy. [Rebuttal and Supplemental Expert Disclosures]; App. 453-457. In this disclosure the Rieders provide an expanded opinion, indicating: "Dr. Pietrafesa will first explain how Mr. Nebel's testimony further supports the opinions previously expressed in his disclosure and at his deposition" and to "clarify his opinions as to

how Mercy breached accepted standards of care as Defendant's experts seem to mis-understand his opinions." [*Id.*]; App. 453-454.

On March 28, 2019, Mercy filed a motion to strike the Rieders' rebuttal opinion of Dr. Pietrafesa as blatantly contravening the district court's Order on Mercy's PMSJ, setting forth the same rank speculation already acknowledged and dismissed by the district court, inaccurately invoking Mr. Nebel's deposition testimony as support, and presenting improper rebuttal evidence. [Mercy's Motion to Strike Rebuttal Opinions]; App. 442-471. On April 4, 2019, the Rieders resisted. [Resistance to Mercy's Motion to Strike Rebuttal Opinions]; App. 472-507.

On March 28, 2019, Mercy concurrently moved for leave to file for summary judgment past the deadline for dispositive motions. [Mercy's Motion for Leave to File Motion for Summary Judgment]; App. 348-361.

On March 28, 2019, the Rieders resisted Mercy's motion for leave. [Plaintiffs' Resistance to Defendant's Motion for Leave to File Motion for Summary Judgment]; App. 438-441. On April 2, 2019, the district court granted leave. [Order Granting Leave]; App. 508-509.

Mercy moved for summary judgment as to the Rieders' negligent credentialing claim as a whole where the record reflected that the Rieders "have not and cannot provide any admissible and/or relevant evidence of actions or inactions of Mercy" which may have contributed to Dr. Segal operating upon Ms. Rieder on May 8, 2016, including any potentially independent investigation that Mercy might have conducted. [Defendant's Memorandum of Law in Support of Motion for Summary Judgment ("Mercy MSJ Memo")]; App. 365-377.

On April 4, 2019, the Rieders resisted. *See* [Plaintiffs' Resistance, Memorandum of Authorities, Response to Statement of Undisputed Facts, and Statement of Disputed Facts]; App. 510-805.

On April 5, 2019, Mercy replied. [Defendant's Reply to Resistance to Motion for Summary Judgment]; App. 806-811.

On April 8, 2019, the district court heard oral argument primarily on Mercy's pending motion for summary judgment with the intent to address *limine* motions to the extent time allowed, while noting that the pending *limine* motions were also "wrapped up in the issues for the summary judgment." [Transcript of Hearing at 4]; App. 821. The district court noted that it had all of the *limine* motions in front of it and would

rule on them to the extent they remained relevant after ruling on summary judgment. [*Id.* at 5]; App. 822.

On April 9, 2019, the district court granted Mercy's motion, thus rendering the remaining *limine* motions, including Mercy's Motion to Strike Rebuttal Opinions, moot. [Order Granting Defendant's Motion for Summary Judgment ("Order Granting MSJ")]; App. 812-817.

On May 9, 2019, the Rieders filed their Notice of Appeal as to the district court's grant of partial summary judgment and summary judgment. [Notice of Appeal]; App. 854-856.

STATEMENT OF THE FACTS

Mercy is also dissatisfied with the Rieders' statement of the facts to the extent it is incomplete, editorialized, filled with inaccuracies and/or misrepresentations, and in violation of Iowa R. App. P. 6.903(f), which provides "[t]he statement shall recite the facts ***relevant to the issues presented for review***" and "[a]ll portions of the statement ***shall be supported by appropriate references to the record or the appendix*** in accordance with rule 6.904(4)." (emphasis added).

The Rieders have three sections to their Statement of Facts, titled: (1) Relevant parties; (2) Dr. Segal negligently performed Roxanne Rieder's spine surgery; and (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. Rieder Brief 15-22.

Parsing their Statement of Facts is a study in patience. Sections 1 and 2 largely appear to restate allegations contained in their Petition. *Compare* Rieder Brief at 15-17 *and* [Petition]; App. 12-20. It is exceedingly difficult to decipher because they fail to cite the specific paragraphs of the Petition and also paraphrase the allegations so that even if the page is identified, the reader need search the page to see likely sources for the allegation. At page 17 of their brief, the Rieders state, without any citation: "In other words, Dr. Segal had removed the epidural hematoma that he caused during the original surgery, without noting it in the medical record."

In any event, the Rieders' recitation of allegations in their Petition fails to comply with Rule 6.903 as none of these purported "facts" regarding Dr. Segal's alleged negligence are relevant to this Court's consideration. Mercy moved for summary judgment due to the lack of a factual basis to support the Rieders' negligent credentialing claim *even if* the Rieders were able to establish Dr. Segal's underlying negligence. [Mercy MSJ at ¶3]; App. 363. In other words, the district court was not presented with and did not rule as to whether Dr. Segal was negligent. *See*

[Order Granting PMSJ]; App. 342-347; [Order Granting MSJ]; App. 812-817. Further, the Rieders "may not rest upon the mere allegations of [their] pleading but must set forth specific facts showing the existence of a genuine issue for trial." *Hlubek v. Pelecky*, 701 N.W.2d 93, 95–96 (Iowa 2005) (citations omitted).

As set forth below, the relevant facts here are those considered and ruled upon by the district court in its grant of partial summary judgment and subsequent grant of summary judgment. Mercy will address arguments improperly raised in the Rieders' statement of the facts in the argument section of its brief.

A. Facts[1] Relevant to the District Court's Grant of Partial Summary Judgment.

Notification to Mercy of IBM inquiries. Dr. Segal informed Mercy Hospital at some point prior to the May 8, 2015 surgery in this case, he had been contacted by the Iowa Board of Medicine regarding an inquiry. [Excerpt from January 23, 2019 Deposition of David Segal, M.D., attached as Ex. A to Mercy's PMSJ SUF at 181:4-19 ("Segal Depo.")]; App. 54. IBM investigations are confidential. Iowa Admin.

[1] The Rieders did not dispute *any* of the facts Mercy set forth in its Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment. *Compare* [Mercy PMSJ SUF] *and* [SDF in Support of P-Resistance to PMSJ]; App. 45-51 *and* 90-96.

Code 653-24.2(8). The IBM has the authority to order a physician to cease practice on an emergency basis as well as after a full contested case. Iowa Admin. Code 653-25.25. No such order was ever issued in this case.

IBM Statement of Charges. A public statement of charges was filed on May 15, 2015, the same day that Ms. Rieder was discharged from surgery. [May 15, 2015 Statement of Charges attached as Ex. B to Mercy's PMSJ SUF ("Statement of Charges")]; App. 55-60. On February 14, 2019, Plaintiffs certified Charles Pietrafesa, M.D., MBA to provide expert testimony on the negligent credentialing claim. [Pietrafesa Certification and Disclosures]; App. 64-74.

Prior Lawsuits. Dr. Segal had been the subject of numerous medical malpractice actions, both in New York and in Iowa. [SDF in Support of P-Resistance to PMSJ, Exs. 2-6; 8-12]; App. 173-177; 179-199. On May 15, 2015, the Iowa Board of Medicine filed formal disciplinary charges as discussed above. Prior to that time Dr. Segal had notice that he was under investigation. [Excerpt from January 23, 2019 Deposition of David Segal, M.D., attached as Ex. 15 to SDF in Support of P-Resistance to PMSJ at 175:20-177:5]; App. 210.

Mercy Bylaws. Under the Mercy's Medical Staff Bylaws, Dr. Segal was required to report any changes in professional liability and

credentials. [Mercy Medical Center Medical Staff Bylaws ("Mercy Bylaws") attached to SDF in Support of P-Resistance to PMSJ as Ex. 17]; App. 225-290. Mercy had the authority to limit, restrict, or suspend his privileges at the hospital ([Mercy Bylaws at Art. IV and Art. VII]; App. 244-250 and 258-260), but the Rieders state that Mercy Hospital never took any action against him. [Memo in Support of P-Resistance to PMSJ]; App. 79-89.

December 2016 Press Release. On December 22, 2016, more than a year and a half after Dr. Segal performed surgery on Ms. Rieder, the IBM issued a Press Release in which it stated that Dr. Segal had entered into a Settlement Agreement with the Board on December 16, 2016, agreeing to surrender his license to practice surgery. [Press Release, attached to SDF in Support of P-Resistance to PMSJ as Ex. 19]; App. 313 ("In May 2016, Dr. Segal discontinued his surgical practice due to his health condition of Parkinsonism, which impacts the steadiness of his hands during surgery. . . . Dr. Segal agreed that he will not engage in the practice of surgery under his Iowa medical license.").

IBM Investigations. As presented through deposition testimony from IBM Executive Director Kent Nebel, an investigation is merely an investigation. [Excerpt from March 5, 2019 Deposition of Kent Nebel

attached as Ex. E to Mercy MSJ SUF at 10:1-11:6]; App. 434-435. Six to seven hundred complaints are filed per year with the Iowa Board of Medicine and approximately seventy percent of those result in investigations. [*Id.* at 10:13-25]; App. 434. Yet only about 25 complaints result in founded disciplinary action. [*Id.* at 11:1-6]; App. 435. The initial investigation is not a conclusion of improper conduct, nor is it even a public charge of such improper conduct. [Order Granting PMSJ]; App. 346. That public charge was made on May 15, 2016, after the time period at issue in this action. [*Id.*]; App 346.

Due Process. A physician is afforded due process where his license to practice medicine is sought to be taken from him. [*Id.*] (citing *Gilchrist v. Bierring*, 14 N.W.2d 724, 732 (Iowa 1944))]; App. 346. That due process was only beginning at the time the Plaintiff encountered Dr. Segal. 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, 201[5] 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.*]; App. 346. 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. [*Id.*]; App. 346. 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.*]; App. 346.

The district court concluded:

> Based on the foregoing, the Court finds that Defendant Mercy Hospital did not owe a duty to suspend or revoke Dr. Segal's credentials or privileges at the hospital in any way based solely upon the knowledge that an investigation had been opened by the Iowa Board of Medicine. The Plaintiff's expert is further restricted from presenting on that conclusion at the time of trial.

[*Id.*]; App. 346.

B. Facts Relevant to the District Court's Grant of Summary Judgment as to Whether Sufficient Evidence Exists to Submit Negligent Credentialing Claim Against Mercy.

In its Ruling on Mercy's Motion for Summary Judgment, the court noted: "[f]or the sake of brevity, the Court relies on its outline of the factual history of this matter as set forth in the Court's order of March 14, 2019, and incorporates the same herein." [Order Granting MSJ]; App. 812.

The district court elaborated further in its Order Granting MSJ. At the hearing on the motion for summary judgment, the Rieders argued that

in addition to circumstantial evidence regarding numerous prior and subsequent lawsuits, direct evidence in the form of the hospital's credentialing file, to the extent portions of it were produced, and Dr. Segal's own affidavits support their position. [*Id.*]; App. 813.

The district court discussed the evidence as follows:

> There are a number of pieces of evidence discussed by both parties. They include Mercy's alleged awareness of the process and directives of the IBM investigation, the prior lawsuits filed against Dr. Segal, both in New York and Maryland and the one known in Iowa, and the affidavit of Dr. Segal in which he states he told Mercy about the investigation and that Mercy failed to interview him further. Plaintiffs also intend to rely to some degree on Dr. Segal's diagnosis and the timing of that announcement as evidence of his credibility regarding his prior practice.

[Order Granting MSJ]; App. 814.

The district court set forth additional relevant facts in its legal discussion, finding that "much of this evidence will be inadmissible at trial." [*Id.*]; App. 814. Ultimately, upon review of "the ***admissible evidence*** in the light most favorable to Plaintiffs and giving them the benefit of all reasonable inferences therefrom," the district court determined there was "no basis upon which a reasonable jury could conclude that Mercy Hospital was negligent as alleged in the Petition." [*Id.*]; App. 816 (emphasis added). To the extent that additional facts are relevant to the

issues before this Court, Mercy will set them forth in its Argument Section.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT AS TO DUTY AND PROPERLY GRANTED SUMMARY JUDGMENT ON THE NEGLIGENT CREDENTIALING CLAIM.

A. Preservation of Error.

Mercy agrees that the Rieders preserved error as to the district court's grant of partial summary judgment and the district court's subsequent grant of summary judgment.

Mercy does not agree that the Rieders preserved error as to their new arguments as to the viability of negligent credentialing claims or the reasonableness of Iowa Code Section 147.135 "when applied in negligent credentialing cases." Rieder Brief at 8, 28. These issues were not raised, argued, or ruled upon in the district court. It is a basic proposition that "a party must ordinarily raise an issue in the district court and the district court must decide that issue before [the reviewing court] may decide it on appeal." *Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 585 (Iowa 2017) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)).

B. Standard of Review.

Mercy agrees that the proper standard of review for this Court is for correction of errors at law. Iowa R. App. P. 6.907. When reviewing a grant of summary judgment, the Court undertakes a two step analysis of the record: (1) Are there any genuine issues of material fact? and, if not, (2) Did the District Court correctly apply the law? *See Diggan v. Cycle Sat, Inc.,* 576 N.W.2d 99, 102 (Iowa 1998) (citing *Putensen v. Hawkeye Bank,* 564 N.W.2d 404, 407 (Iowa 1997)).

Iowa courts "indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question." *Coralville Hotel Assocs., L.C. v. City of Coralville*, 684 N.W.2d 245, 247–48 (Iowa 2004) (quoting *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000)). An inference is legitimate if it is "rational, reasonable, and otherwise permissible under the governing substantive law." On the other hand, an inference is not legitimate if it is "based upon speculation or conjecture." *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 71 (Iowa 2004) (quoting *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002)) (citations omitted); *see also In re Kerndt's Estate*, 103 N.W.2d 733, 736 (Iowa 1960) ("Inferences can assist in establishing a basic fact, but they

cannot in and of themselves create evidence."). This Court can "affirm the summary judgment ruling on a proper ground urged below but not relied upon by the district court." *Kern v. Palmer Coll. of Chiro.*, 757 N.W.2d 651, 662 (Iowa 2008).

Review of rulings interpreting a statutory privilege is for correction of errors at law. *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019) (citations omitted).

C. The District Court Properly Granted Partial Summary Judgment as to the Narrow Issue as to Whether a Hospital has a Duty to Immediately Limit, Restrict, or Suspend Privileges of a Credentialed Physician Merely Upon the Notification of an Inquiry and/or Investigation by the IBM.

In their Petition, the Rieders generally alleged that Mercy "knew, or should have known, that Dr. Segal did not possess the proper professional competency to practice" at Mercy. [Petition at ¶85]; App. 19. Mercy's receipt and review of Dr. Pietrafesa's opinion on February 14, 2019 provided the impetus for Mercy's motion for partial summary judgment as it was Mercy's first notice of the specific allegations claimed by the Rieders. *See* [Pietrafesa Certification and Disclosures]; App. 64-74.

Mercy filed for summary judgment the very next day once it realized Dr. Pietrafesa planned to testify "that based on the Iowa

Medical Board's allegations, the testimony of Dr. Segal that he alerted Mercy about these allegations, the standard of care required Mercy to take swift and immediate action to limit, restrict, or suspend Dr. Segal's privileges with respect to care of any patients at Mercy at that time, including but not limited to Ms. Rieder, even on a conditional or temporary basis." [Pietrafesa Certification and Disclosures]; App. 73. Mercy asked the district court to determine, as a matter of law that no such duty existed and requested the district court strike that portion of the expert's report. [Mercy PMSJ Memo]; App. 43-44. As set forth herein, the district court carefully considered the arguments of the parties, in addition to public policy concerns, and properly did so.

1. Mercy Met its Burden to Establish the Absence of Any Genuine Issue of Material Fact.

Mercy established, and the Rieders did not dispute,[2] the following: Some time prior to May 8, 2015 (the date Dr. Segal performed surgery on Ms. Rieder), Dr. Segal notified Mercy that he had been contacted regarding an Iowa Board of Medicine inquiry. [Segal Depo. at 181:4-19];

[2] The record demonstrates that the Rieders did not dispute *any* of the facts Mercy set forth in its Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment, including the fact that Dr. Segal informed Mercy Hospital at some point prior to the surgery in this case, May 8, 2015, that he had been contacted by the IBM regarding an inquiry. *See* [SDF in Support of P-Resistance to PMSJ]; App. 90-96.

App. 54. As a matter of law, IBM investigations are confidential. Iowa Admin. Code 653-24.2(8). The IBM is prohibited from providing information about an ongoing confidential investigation. *Id.* The IBM has the authority to order a physician to immediately cease practicing "[t]o the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare." Iowa Admin. Code 129-6.33(1). The Rieders did not allege and there is no evidence that any such order was issued at any time. Dr. Segal operated on Plaintiff Roxanne Rieder on May 8, 2015 and May 12, 2015. She was discharged on May 15, 2015. [Petition at ¶¶30-34; 51; 57]; App. 14; 16.

On May 15, 2015 (the date Ms. Rieder was discharged from Mercy following surgery by Dr. Segal), the IBM filed a public statement of charges against Dr. Segal containing allegations as to the following specific conduct:

a. Maintenance of pre-signed prescriptions;
b. Inappropriate use of epidural blood patches to manage postoperative spinal leak fluids discovered following spinal surgery;
c. Inappropriate management of infections following neurostimulator placement; and
d. Failure to establish appropriate call coverage.

[Statement of Charges at 5]; App. 59.

The Rieders did not allege and there is no evidence that any of the allegations of negligent conduct contained in the IBM Statement of Charges involved Dr. Segal's care and treatment of Plaintiff Roxanne Rieder. *See id.* and Petition. The Rieders claimed Dr. Segal was negligent in the following aspects:

a. Failure to properly evaluate, diagnose, and treat Roxanne Rieder's back pain after her May 8, 2015 surgery;
b. Failure to timely order an MRI;
c. Failure to properly interpret Roxanne Rieder's post-operative May 10, 2015 MRI; and
d. Failure to timely take Roxanne Rieder back to surgery.

[Petition at ¶78]; App. 18.

None of the allegations of negligent conduct contained in the IBM Statement of Charges involved the same type of conduct alleged by Plaintiffs as negligent as to Dr. Segal's care and treatment of Plaintiff Roxanne Rieder. *Compare* [*Id.*] *and* [Statement of Charges]; App. 18 *and* 55-60.

In its Reply, Mercy argued against the Rieders' contention in their Resistance that notification of an IBM inquiry/investigation was the equivalent of learning a physician lacked professional competency. [Defendant's Reply in Support of Motion for Partial Summary Judgment ("Mercy PMSJ Reply")]; App. 318. Mercy noted that Iowa Admin. Code 653-24.2(5) provides that the purpose of an IBM investigation is to

gather information to determine if probable cause exists to file a statement of charges. In other words, an investigation does not always end in a charge and a charge does not always end in finding a physician violated the laws or standards of the practice of medicine. [Mercy PMSJ Reply]; App. 318.

The district court ultimately agreed, finding that the Rieders' arguments inferring knowledge on Mercy's part as to a lack of competency, upon mere notification of an IBM investigation, to be speculation. [Order Granting PMSJ]; App. 342-347. Mercy also emphasized and outlined the due process concerns implicated by the Rieders' theory of the case. [*Id.*]; App. 342-347.

2. The District Court Properly Viewed the Admissible Evidence in the Light Most Favorable to the Rieders; No Genuine Issue of Material Fact Exists.

Where Mercy meets its initial burden, the Rieders must set forth specific facts showing the existence of a genuine issue for trial in order to avoid summary judgment. *Hlubek*, 701 N.W.2d at 95-96 (citing Iowa R. Civ. P. 1.981(5)); *Hoefer v. Wis. Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 338–39 (Iowa 1991)).

When considering Mercy's motion, the district court considered whether the facts alleged by the Rieders precluded summary judgment.

The beginning of the Rieders' argument on appeal appears to start in their Statement of the Case. Rieder Brief at 9. The Rieders interpret the "foundation" of Mercy's argument to have been that "the confidentiality of IBM investigations limits any duty by Mercy to affirmatively act as Plaintiffs claim Mercy should have in this manner." *Id.* The Rieders describe their response as "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." Rieder Brief at 10 (citing to [Memo in Support of P-Resistance to PMSJ at 8]); App. 86 (emphasis in the Rieders' brief). In other words, the Rieders do not and did not dispute the confidentiality surrounding IBM investigations. Instead, the Rieders claimed Dr. Pietrafesa's opinion provided the necessary competent support. *Id.*

In their brief, the Rieders take issue with the district court's characterization of their argument as to Mercy's duty as speculative:

> 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. 344).

Rieder Brief at 10-11. The Rieders continue: "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." *Id.* at 11.

In their Argument section, however, the Rieders set forth a summary of the evidence they contend was offered "in resisting Mercy's motions for summary judgment," without citation to the record and without identifying what evidence was offered in resistance to partial summary judgment as to the narrow issue of duty owed vs. the subsequent summary judgment as to their negligent credentialing claim:

> 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.

Rieder Brief at 24.

For the purpose of structure, Mercy will address the claimed evidence to the extent it is relevant to each motion.

The Rieders' vague reference to "the Iowa Board of Medicine long-term investigation into Dr. Segal's surgical competency" (Rieder Brief at 24) and later argument (also without a record cite) that "[t]he 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" (Rieder Brief at 27) presumably is intended to continue the argument begun earlier by the Rieders in their Statement of the Case.

The Rieders describe their fifth category of evidence offered to resist Mercy's motions for summary judgment simply as "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." Rieder Brief at 24. The Rieders proceed with listing the following propositions as to circumstantial evidence. *Id.* at 24-27.

The Rieders admit that "[t]he 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***." Rieder Brief at 24-25 (citing *Smith v. Pine*, 12 N.W.2d 236, 242 (Iowa 1943)) (emphasis added).

Rather than aid their argument, *Smith* provides an example where the offered circumstantial proof was properly precluded where it led to an unreasonable inference. *Id.* In *Smith*, both parties alleged the other was at fault in an automobile collision. *Id.* The relevant issue on appeal was whether the district court properly precluded the defendant driver's intended presentation of circumstantial evidence offered to prove that the plaintiff driver had been drinking. *Id.* at 241-242.

The Court acknowledged the district 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." *Id.* (citations omitted). In its analysis, the Court acknowledged that "[e]vidence that plaintiff was under the influence of liquor or had been drinking was doubtless admissible as bearing on the care he exercised." *Id.* (citation omitted). That noted, the Court found no reversible error where the defendant driver's "offered

proof ***raises no more than a suspicion or conjecture and affords insufficient basis for a reasonable inference*** that plaintiff had been drinking." *Id.* (emphasis added).

The Rieders continue with general pronouncements of legal authority in relation to circumstantial evidence without actually connecting the pronouncements to specific evidence they contend the district court failed to properly evaluate, along with a conclusory statement that "[c]ircumstantial evidence is especially relevant in negligent credentialing claims because direct evidence is precluded by Iowa's peer-review statute." Rieder Brief at 25.

At page 27 of their brief, the Rieders finally return to the argument they referenced in their Statement of the Case (*Id.* at 11), stating: "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 Rieders do not and cannot provide record support for this argument as it is inaccurate. Dr. Segal's specific testimony was: "At some point I informed – I informed some people at Mercy that I received inquiries." [Segal Depo. at 181:4-14]; App. 54. He agreed that it was before May 8, 2015. [*Id.* at 181:18-19]; App. 54. For the purposes of the question before the district court, however, abstract awareness of an IBM

investigation did not present a material fact. [Order Granting PMSJ]; App. 342-347 (finding no duty based on abstract awareness or generic knowledge of an ongoing investigation).

In their Resistance to Mercy's PMSJ, the Rieders conceded: "[w]hether, under a given set of facts, such a duty exists is a question of law." [Memo in Support of P-Resistance to PMSJ]; App. 82 (citing *Leonard v. State*, 491 N.W.2d 508, 509 (Iowa 1992)). The district court agreed. [Order Granting PMSJ at 4]; App. 345 ("Whether a duty is owed based on the undisputed factual circumstances of a case is a question of law for the Court.") (citing *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772 (Iowa 2013)).

The ***undisputed*** factual circumstance in this case was Dr. Segal's mere notification to Mercy of inquiries by the IBM and formed the basis for Mercy's motion to establish the lack of duty in relation to such notification.

The Rieders, however, argued that the following constituted circumstantial evidence that should have been considered by the district court: "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." Rieder Brief at 27 (emphasis added). The Rieders do not and cannot provide record support for this argument. *Id*.

The record demonstrates the Rieders presented ***no evidence*** to the district court in its Resistance to PMSJ that "Mercy was receiving medical record requests for Dr. Segal's patients, coupled with requests for Dr. Segal's complication rates from the IBM." Rieder Brief at 27. *See* [Memo in Support of P-Resistance to PMSJ]; App. 79-89; [SDF in Support of P-Resistance to PMSJ]; App. 90-313. To the extent this argument was (arguably) raised in connection with the district court's subsequent grant of summary judgment as to their negligent credentialing claim, Mercy will address it in the MSJ section.

The Rieders next argue:

> 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.

Rieder Brief at 27.

The Iowa Supreme Court's analysis in *Jennings v. Farmers Mut. Ins. Ass'n*, 149 N.W.2d 298, 301 (Iowa 1967), however, does not assist the Rieders' argument. In *Jennings*, the Court examined whether the district court properly determined that the plaintiff dairy farmer's circumstantial evidence was sufficient to sustain a finding that his defendant neighbor willfully or maliciously placed open cans of paint next to a line fence between their properties so as to injure the plaintiff's cattle. *Id.* The Court noted:

> We have often said, in order to establish a proposition by circumstantial evidence, ***the evidence must be such as to make the claimant's theory reasonably probable and not merely possible, and more probable than any other theory based on the evidence***, but the evidence need not exclude every other possible theory.

Jennings, 149 N.W.2d at 301 (emphasis added).

The Court explained that "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." *Id.* Here, where none of the Rieders' arguments have support in the record, no reasonably connected facts can follow.

3. Even Viewing the Facts in the Light Most Favorable to the Rieders, No Hospital May, or Should, Ignore the Due Process Due its Physicians and Summarily Restrict or Terminate his or her Practice; the District Court Properly Determined that Legitimate Policy Reasons Preclude the Imposition of a Specific Duty to Restrict Dr. Segal's Privileges in Relation to an Abstract Awareness of an IBM Investigation.

In its duty analysis, the district court considered the Rieders' argument for "a more broad duty that the hospital owes its patients to ensure that its credentialed physicians have the professional competency to exercise the privileges the hospital allows them and that this is merely one outworking of that duty." [Order Granting PMSJ]; App. 345. However, the district court noted that the Rieders failed to "cite authority for the duty and [the Rieders] proceed[ed] to argue the public policy that it should exist." [*Id.*]; App. 345.

In their Resistance to Mercy's PMSJ, the Rieders argued "important policy concerns" supported imposing such a duty such as: (1) deterring negligent conduct; (2) compensating patients injured by such conduct; and (3) the interests of patients in receiving adequate treatment and care. [Memo in Support of P-Resistance to PMSJ]; App. 83. The Rieders argued: "At the heart of the matter, whether a duty exists is a policy decision based upon all relevant considerations that a particular

person is entitled to be protected from a particular type of harm." [Memo in Support of P-Resistance to PMSJ]; App. 83 (citing *Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281, 285 (Iowa 1981)).

The Rieders failed, and fail, to acknowledge that the district court did exactly that--the district court properly rejected the Rieders' policy arguments for imposing such a duty when considered in conjunction with countervailing, and significant, policy concerns regarding due process:

> ***However, the Court believes that there are legitimate policy reasons to not allow the Plaintiff to speak of a specific duty to restrict Dr. Segal's privileges in relation to an abstract awareness of an IBM investigation.*** As presented through deposition testimony from IBM Executive Director Kent Nebel, an investigation is merely an investigation. Exhibit E, *Nebel Depo*. 10:1-11:6. Six to seven hundred complaints are filed per year with the Iowa Board of Medicine and approximately seventy percent of those result in investigations. *Id.* Yet only about 25 complaints result in founded disciplinary action. *Id.* ***The initial investigation is not a conclusion of improper conduct, nor is it even a public charge of such improper conduct.*** That public charge was made on May 15, 2016, after the time period at issue in this action. 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. Therefore***, the Court is unwilling to find that the Defendant owed such a duty upon generic knowledge of an ongoing investigation alone.***

[Order Granting PMSJ at 5]; App. 346 (emphasis added).

Here, where the district court carefully considered the relevant arguments raised by the Rieders in connection with the narrow issue of duty, this Court should affirm the district court's grant of partial summary judgment.

D. The District Court Properly Granted Summary Judgment as to Whether Sufficient Evidence Exists to Submit the Case of Alleged Negligent Credentialing Against Mercy.

As noted previously, Mercy became aware of the Rieders' specific allegations of breach by Mercy on February 14, 2019, and immediately filed for summary judgment the next day. [Mercy MSJ Memo]; App. 366. In short order, the parties took depositions of Dr. Pietrafesa on March 4, 2019, and IBM Executive Director Kent Nebel on March 5, 2019. [Mercy MSJ Memo]; App. 366-368. Ultimately, the district court granted Mercy's motion for PMSJ on March 14, 2019. [*Id.*]; App. 366-368.

On March 25, 2019, the Rieders served an expanded opinion from Dr. Pietrafesa styled as a "Rebuttal and Supplemental Expert Disclosures" to Mercy. [Rebuttal and Supplemental Expert Disclosures]; App. 453-457. On March 28, 2019, Mercy filed a motion to strike the Rieders' rebuttal opinion of Dr. Pietrafesa as blatantly contravening the district court's Order on Mercy's PMSJ and setting forth the same rank speculation already acknowledged and dismissed by the district court, inaccurately invoking Mr. Nebel's deposition testimony as support, and presenting improper rebuttal evidence. [Mercy's Motion to Strike Rebuttal Opinions]; App. 442-471. Since the Rieders included and incorporated Dr. Pietrafesa's new opinion in their Resistance, the arguments asserted by Mercy in its motion to strike were before the district court and are relevant here.

Mercy determined that once the district court order granting partial summary judgment was taken into account, all that remained was inadmissible evidence in the form of: (1) peer review protected information; (2) unrelated lawsuits; (3) charges published and settlements reached after Dr. Segal's care of Ms. Rieder; and (4) health issues of Dr. Segal that arose after Ms. Rieder's care. [*Id.*]; App. 442-471. As such, even if the Rieders could establish Dr. Segal's underlying negligence as to Ms.

Rieder, Mercy asserted that the Rieders could not prove up their negligent credentialing claim against Mercy and thus Mercy sought leave to file the instant motion. [*Id.*]; App. 442-471.

1. The District Court Properly Viewed the Admissible Evidence in the Light Most Favorable to the Rieders; the Rieders Failed to Establish a Genuine Issue of Material Fact.

As noted previously, the Rieders summarize the evidence they claim creates a genuine issue of material fact as follows:

> (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.

Rieder Brief at 24.

The district court described the evidence as follows:

> There are a number of pieces of evidence discussed by both parties. They include Mercy's alleged awareness of the process and directives of the IBM investigation, the prior lawsuits filed against Dr. Segal, both in New York and Maryland and the one known in Iowa, and the affidavit of

> Dr. Segal in which he states he told Mercy about the investigation and that Mercy failed to interview him further. Plaintiffs also intend to rely to some degree on Dr. Segal's diagnosis and the timing of that announcement as evidence of his credibility regarding his prior practice. [3]

[Order Granting MSJ]; App. 814.

a. Mercy never produced, and the Rieders never moved to compel, the peer reviewed materials contained within Mercy Hospital's file for Dr. Segal.

The Rieders argued at the hearing on summary judgment that direct evidence existed in the form of the hospital's credentialing file, to the extent portions of it were produced. [Order Granting MSJ]; App. 813. However, Mercy did not produce peer review files. Such documents are statutorily privileged and even if Mercy were to waive privilege (which it did not), the documents would have been inadmissible in this litigation. Iowa Code §147.135(2); *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 289 (Iowa 2011) ("Iowa's law not only specifies that peer review records are privileged, it also contains a separate prohibition

[3] On appeal, the Rieders appear to have dropped their additional arguments regarding "the alleged suspicious timing under which Dr. Segal announced his own diagnosis of Parkinsonism at the same time he relinquished his surgical rights but retained his medical license, and the diagnosis of Parkinsonism approximately year after Ms. Rieder's surgery" and thus Mercy will not address those issues here.

on their admissibility in evidence. Even if the privilege could have been waived here, the rule against admissibility would remain in effect.").

b. The district court correctly interpreted and applied the peer review privilege.

The district court properly interpreted "Iowa Code section 147.135(2) as protecting from disclosure the peer-reviewed materials contained within Mercy Hospital's file for Dr. Segal." [Order Granting MSJ]; App. 814. The court noted that Mercy has maintained the file as privileged and Mercy has not waived the privilege. Furthermore, the records are statutorily inadmissible such that they cannot under any circumstances be used in the presentation of this case. [*Id.*]; App. 814-815.

Where the Plaintiffs appear to concede that they would not use peer reviewed materials, the district court did not find that Mercy had improperly utilized the privilege as both a sword and shield. [*Id.*]; App. 815. The court noted:

> 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. Both parties are precluded from offering evidence of what is in the peer-review file, and the Court will not allow the 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 in relation to Dr. Segal. This includes any knowledge that Mercy may or may not have possessed regarding Dr.

> Segal's attendance at the prior competency evaluation required by IBM.

[*Id.*]; App. 815.

The district court's analysis was appropriate and consistent with broad scope of the peer review privilege under the statute. *Carolan v. Hill*, 553 N.W.2d 882, 886 (Iowa 1996). To that end, the district court stated: "While 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." [Order Granting MSJ]; App. 814.

c. The district court properly determined that evidence of prior lawsuits brought against Dr. Segal constituted impermissible and prejudicial speculation.

The district court noted: "Plaintiffs seek to introduce evidence 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 Granting MSJ]; App. 815 (emphasis added). The district court found it significant that the Rieders sought "to introduce only the fact that the lawsuits were initiated without

any explanation of their underlying facts, merits, or dispositions." [*Id.*]; App. 815. The court concluded:

> At a minimum, the Court has performed the balancing test as required by Iowa Rule of Evidence 5.403 and concludes that ***the 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.***

[Order Granting MSJ]; App. 815 (emphasis added). The Court determined the evidence would speculative, improper, unfair, and not supported in law. [*Id.*]; App. 815.

On appeal, the Rieders inexplicably contend that the district court abused its discretion by "weighing the evidence." Rieder Brief at 32 (citing *Clinkscales v. Nelson Secs., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005)). The Rieders argue:

> 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. 747) ("[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.

Rieder Brief at 32-33. Neither the Rieders' factual argument nor their legal arguments are on point.

The Rieders cite to *Clinkscales* in support of their argument. Rieder Brief at 32. In that case, the Court outlined two principles it found especially important for resolution of the appeal. 697 N.W.2d at 841. The second principle was: "a court deciding a motion for summary judgment must not weigh the evidence, but rather simply inquire whether a reasonable jury faced with the evidence presented could return a verdict for the nonmoving party." *Id.* (citing *Bitner v. Ottumwa Cmty. Sch. Dist.,* 549 N.W.2d 295, 300 (Iowa 1996)).

The common principle outlined in *Clinkscales* bears no relation to familiar Rule 5.403 balancing test commonly utilized by trial courts, and utilized by the district court here. [Order Granting MSJ]; App. 815. It 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. *See Linn v North Iowa Anesthesia Associates, P.C.*, No. LACV070154, 2018 WL 6515387, at *1 (Iowa Dist. Sep. 24, 2018) (unresisted motion to exclude testimony or commentary about prior lawsuits initiated by Plaintiffs is granted); *Williamson v Hemann*, No. CL105437, 2009 WL 5946443 (Iowa Dist. Dec. 07, 2009) (motion in

limine as to prior or ongoing claims for medical negligence granted as the probative value of such evidence would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury).

References to unrelated lawsuits involving unrelated parties bear no relevance. The presentation of any such evidence causes undue delay and confusion of the issues. If any testimony regarding any such suits is allowed, the parties and the Court must expend substantial time trying each of those suits during this trial.

Several courts around the country have held that evidence of prior medical malpractice lawsuits or claims, not resulting in a jury's finding of negligence, are inadmissible as irrelevant and/or prejudicial. *See, e.g., Lai v. Sagle*, 818 A.2d 237, 247 (Ct. App. Md. 2003) ("[S]imilar acts of prior malpractice litigation should be excluded to prevent a jury from concluding that a doctor has a propensity to commit medical malpractice"); *Cerniglia v. French*, 816 So.2d 319 (La. Ct. App. 2002); *Jones v. Tranisi*, 326 N.W.2d 190 (Neb. 1982).

The Rieders argued, without any authority, that:

> 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.

Here, the district court properly 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 Granting MSJ]; App. 815.

d. The Rieders failed to preserve error as to their new arguments that the Peer Review Privilege is unreasonable when applied in negligent credentialing cases and should be narrowly construed.

On appeal, however, the Rieders vaguely assert "[t]he Peer Review Privilege is unreasonable when applied in negligent credentialing cases." Rieder Brief at 28. The Rieders failed to preserve error as to their new arguments as to the viability of negligent credentialing claims or the reasonableness of Iowa Code Section 147.135 "when applied in negligent credentialing cases." Rieder Brief at 8, 28.

These issues were not raised, argued, or ruled upon in the district court. It is a basic proposition that "a party must ordinarily raise an issue in the district court and the district court must decide that issue before [the reviewing court] may decide it on appeal." *Estate of Gottschalk by Gottschalk*, 893 N.W.2d at 585 (citing *Meier*, 641 N.W.2d at 537).

The Rieders' arguments regarding the Peer Review Privilege are confusing and contradictory. They begin with acknowledging that: "[t]he Iowa Peer Review Statute limits the discovery and admissibility of peer review records in civil proceedings through imposition of a statutory privilege. Rieder Brief at 28 (citing Iowa Code § 147.135).

The Rieders then point to the district court's statement that "information does not become privileged merely because it is in the peer review file." Rieder Brief at 29 (citing [Ruling on Motion to Compel and Motion to Bifurcate at 7 attached as Ex. 22 to Plaintiffs' Memorandum of Authorities Supporting Their Resistance to Motion for Summary Judgment]); App. 586. The Rieders quote Iowa Code § 147.135(2) for the proposition that: "[i]nformation 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." Rieder Brief at 29.

The Rieders subsequently depart from accurate pronouncements of the statutory privilege and argue that the scope of the peer review privilege should be narrowly construed to not apply to a negligent credentialing case:

> 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.

Rieder Brief at 30.

To support this narrow construction, the Rieders improperly cherry-pick citations from *Carolan*, 553 N.W.2d at 886, arguing:

> 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).

Rieder Brief at 29.

The full excerpt from *Carolan* states:

> The district court is vested with wide discretion in rulings on discovery matters. *Pierce v. Nelson*, 509 N.W.2d 471, 473 (Iowa 1993). Discovery rules are to be liberally construed to effectuate disclosure of all relevant and material information to the parties. *Hutchinson v. Smith Lab., Inc.*, 392 N.W.2d 139, 140–41 (Iowa 1986). ***A party may defeat discovery by establishing that the material sought is privileged or irrelevant.*** *AgriVest Partnership v. Central Iowa Prod. Credit Ass'n*, 373 N.W.2d 479, 482 (Iowa 1985). One resisting discovery through assertion of privilege has the burden of showing that a privilege exists and applies. *Hutchinson*, 392 N.W.2d at 141. An asserted privilege is narrowly construed because it is an exception to our rules governing discovery. *Id*.
>
> ***However, Iowa has a broad statutory privilege for the writings and other records generated by a peer review committee, explicitly set forth in a 1986 amendment to Iowa Code section 147.135 (1985). Id. When an asserted privilege is based on a statute, the terms of the statute define the reach of the privilege. AgriVest, 373 N.W.2d at 483.***

Carolan, 553 N.W.2d at 886 (emphasis added).

In *Carolan*, the Iowa Supreme Court rejected the plaintiff's urging of an analogous narrow reading of the statute as "not intended by the legislature" noting: "[w]e have already held that the statutory privilege of Iowa Code section 147.135 is broad." *Id.* (citing *Hutchinson*, 392 N.W.2d at 141). As this is a new argument on appeal, it should similarly be rejected here.

e. The district court properly disregarded claims already addressed in its prior Order granting partial summary judgment.

The Rieders again argue that the IBM investigation should constitute sufficient evidence:

> 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.

Rieder Brief at 27.

The Rieders again provide no citations to the record. Had they done so, the record would reveal the absence of support for their asserted "connected facts."

The record does not establish that "Mercy was aware Dr. Segal was under investigation by the IBM, because Dr. Segal himself admitted as much." Dr. Segal testified that at some point prior to May 8, 2015, he

"informed some people at Mercy that he received inquiries." [Segal Depo. at 181:4-19]; App. 54.

The record contains no evidence that "Mercy was receiving medical record requests for Dr. Segal's patients, coupled with requests for Dr. Segal's complication rates from the IBM." IBM Executive Director Nebel *generally* explained the Board's investigative process in his deposition. Nowhere in his deposition testimony does Mr. Nebel state nor is there a legitimate basis for inferring that Mercy knew or should have known, about the Board's investigation.

- Mr. Nebel testified: "we're typically requesting information based on the patient name, not the provider's name." [Nebel Depo. at 36:7-8]; App. 459.
- Mr. Nebel clarified:

> Q. In other words, if a facility or a hospital receives a subpoena for medical records, that facility may not have any understanding of the specific issue that the investigator is looking for by requesting those records?
> A. That is correct. It wouldn't be spelled out in the subpoena. We're just providing the information necessary to identify the records we're requesting.

[*Id*. at 74:12-21]; App. 465.

> Q. In other words, if the board is investigating a complaint or multiple complaints about an individual physician, there is no public or private communication

to hospitals or facilities or employers notifying them that somebody who's practicing in their midst in under an investigation?

A. Correct.

Q. And, in fact, the confidentiality rules prohibit the board from doing that?

A. Correct. The only communication we should really be having is enough to collect the information the board needs to make a decision.

[*Id*. at 68:7-19]; App. 464.

Q. And you're not necessarily providing any information about the concerns the board has, the reason for requesting the records? You're simply giving the patient name, date of birth, whatever information the facility needs to be able to obtain those records and send them back to you?

A. That is correct.

[*Id*. at 74:22-75:3]; App. 465-466.

Q. … if a facility, such as a hospital, receives a subpoena from the board in the course of an investigation that the board is conducting and the patient perhaps has been seen by multiple providers within that facility, there is, typically, nothing about that subpoena that tells whoever it is looking at it at that facility which provider the board is even concerned about?

A. That is correct.

[*Id.* at 94:11-20]; App. 469.

Q. (By Mr. Aleinikoff) So you understand -- correct me if I'm wrong -- that even though the hospital isn't provided with a formal statement from the Iowa Board of Medicine that it is investigating complaints against a particular physician, there very well could be circumstantial evidence that the hospital is aware of that leads it to that conclusion, correct?

MS. CONOVER: Object to form and foundation. Calling for expert opinion.

A: I think that calls for speculation.

[*Id.* at 89:15-90:1]; App. 467-468.

In any event, the district court properly considered and rejected the Rieders' argument, noting that Mercy was restricted, by statute, from providing evidence of what was in the peer review file to demonstrate what knowledge they may or may not have possessed. [Order Granting MSJ]; App. 815. Specifically, the district court noted that 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." [*Id.*]; App. 815. The district court explained its reasoning:

> Both parties are precluded from offering evidence of what is in the peer-review file, and the Court will not allow the 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 in relation to Dr. Segal. This includes any knowledge that Mercy may or may not have possessed regarding Dr. Segal's attendance at the prior competency evaluation required by IBM.
>
> Whether or not Mercy was aware that Dr. Segal completed the evaluation is unknown. It is further unknown whether any adverse determination was made. Thus, any conclusions a jury may draw from this information can 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.*]; App. 815.

The Rieders argue that: "[e]ven 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." Rieder Brief at 33-34. The district court, however, held that: "[a]ny argument that Mercy should have reacted to the fact that there was an ongoing IBM investigation into Dr. Segal has already [been] precluded by this Court's prior ruling." [Order Granting MSJ]; App. 816.

Ultimately, upon review of "the ***admissible evidence*** in the light most favorable to Plaintiffs and giving them the benefit of all reasonable inferences therefrom," the district court determined there was "no basis upon which a reasonable jury could conclude that Mercy Hospital was negligent as alleged in the Petition." [*Id.*]; App. 816 (emphasis added).

CONCLUSION

The District Court properly granted partial summary judgment as to the narrow issue as to whether a hospital has a duty to immediately limit, restrict, or suspend privileges of a credentialed physician merely upon the notification of an inquiry and/or investigation by the IBM and properly granted summary judgment as to whether sufficient evidence

exists to submit the case of alleged negligent credentialing against Mercy. The district court should thus be affirmed.

REQUEST FOR ORAL ARGUMENT

Counsel for Mercy requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of IOWA RS. APP. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Calisto MT and contains 11,339 words, excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(*g*)(1).

/s/ Christine L. Conover

October 30, 2019
Date

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on October 30, 2019, I electronically filed the foregoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

/s/ Christine L. Conover