

IN THE SUPREME COURT OF IOWA

NO. 19-0767

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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.

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

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APPLICATION FOR FURTHER REVIEW  
FROM THE DECISION OF THE IOWA COURT OF APPEALS  
FILED SEPTEMBER 2, 2020

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## **QUESTIONS PRESENTED FOR REVIEW**

1. Whether the Court of Appeals Erred When it Reversed the District Court's Grant of Summary Judgment for Impermissible Weighing of the Evidence Where the District Court Properly Evaluated Admissibility as Part of its Summary Judgment Analysis.
2. Whether the Court of Appeals Erred When it Reversed the District Court's Grant of Partial Summary Judgment Regarding Whether a Duty is Owed Where the District Court set Forth Legitimate Policy Reasons in Support of its No-Duty Determination.

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## **STATEMENT SUPPORTING FURTHER REVIEW**

Further review is necessary because the Court of Appeals' decision is in conflict with decisions of this Court. Iowa R. App. P. 6.1103(1)(b)(1).

The Court of Appeals misapplied Iowa law when it reversed the district court's grant of summary judgment for impermissible weighing of the evidence where the district court properly evaluated admissibility as part of its summary judgment analysis. *See Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96–97 (Iowa 2012) (“We also note that the court should only consider ‘such facts as would be admissible in evidence’ when considering the affidavits supporting and opposing summary judgment.”) (citations omitted); *Matter of Estate of Van Ginkel*, 940 N.W.2d 443 (Iowa Ct. App. 2019) (“in order to survive summary judgment, plaintiffs must set forth specific, admissible evidence”).

The Court of Appeals also misapplied Iowa law when it reversed the district court's grant of partial summary judgment regarding whether a duty is owed where the district court set forth legitimate policy reasons in support of its no-duty determination. *See Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (court still analyzes whether a principle or strong policy consideration supports a no-duty determination even if the

lower court considered foreseeability in its duty analysis); *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772 (Iowa 2013) (same).

Accordingly, this case is suitable for further review pursuant to the criteria set forth in Iowa R. App. P. 6.1103(1)(b).

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**BRIEF IN SUPPORT OF APPLICATION FOR FURTHER  
REVIEW**

**STATEMENT OF FACTS**<sup>1</sup>

**Background.** 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.

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 remains as the only defendant.

**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

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<sup>1</sup> 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.

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. 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.

**Ms. Rieder's surgery.** Dr. Segal operated on Ms. 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.

**IBM Statement of Charges filed regarding unrelated patients and unrelated conduct.** 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. 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. It is undisputed that 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.*

**The Rieders certify their standard of care expert and provide his opinion.** 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. [Pietrafesa Certification and Disclosures]; 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." [Id.]; App. 73.

This opinion prompted Mercy's February 15, 2019 motion for partial summary judgment.

**Prior Lawsuits.** As part of their resistance to Mercy's motion for partial summary judgment, the Rieders filed exhibits outlining that Dr. Segal had, in the past, been the subject of unrelated 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.

**IBM Executive Director Kent Nebel provides background information as to 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. Only about 25 complaints usually result in founded disciplinary action. [*Id.* at 11:1-6]; App. 435.

**District Court grants partial summary judgment to Mercy as to duty.** On March 14, 2019, the district court 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 the Rieders' expert, Dr.

Pietrafesa, may not present that conclusion at the time of trial. [Order Granting PMSJ]; App. 346.

**The Rieders' expert expands his opinion.** On March 25, 2019, Rieders provided their expert's 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." [Rebuttal and Supplemental Expert Disclosures]; 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.

**Mercy seeks summary judgment as to the negligent credentialing claim as a whole.** Mercy moved for summary judgment<sup>2</sup> 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 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.

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<sup>2</sup> 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.

The appeal was transferred to the Iowa Court of Appeals. On September 2, 2020, the Iowa Court of Appeals issued its decision. The Court of Appeals reversed and remanded the district court’s grant of summary judgment, holding that “the [district] court’s application of the evidentiary rule [5.403] amounted to an impermissible weighing of the evidence.” [Court of Appeals Decision, p. 5].

The Court of Appeals also reversed and remanded the district court’s initial grant of partial summary judgment, holding that “the district court [improperly] considered foreseeability in determining that Mercy did not owe the Rieders a duty. [Court of Appeals Decision, p. 8].

Mercy seeks further review of both determinations.

## ARGUMENT

### **I. The Court of Appeals Erred When it Reversed the District Court’s Grant of Summary Judgment for Impermissible Weighing of the Evidence Where the District Court Properly Evaluated Admissibility as Part of its Summary Judgment Analysis.**

#### **A. Standard of review.**

When considering an application for further review, this Court has the discretion to review any or all of the issues raised on appeal. *Cannon v. Bodensteiner Implement Co.*, 903 N.W.2d 322, 326 (Iowa 2017) (citing *In re Marriage of Mauer*, 874 N.W.2d 103, 106 (Iowa 2016)). This Court’s

review of the district court's grants of summary judgment 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 may “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).

**B. The district court properly evaluated the admissibility of the Rieders’ proffered evidence as part of its summary judgment inquiry as to whether sufficient evidence exists to submit the case of negligent credentialing against Mercy.**

The Court of Appeals disregarded the entirety of the district court’s summary judgment inquiry and instead improperly reversed based upon the district court’s initial evaluation as to admissibility of the evidence to be presented to the jury.

In its second summary judgment ruling, the court concluded, “[T]aking the admissible evidence in the light most favorable to Plaintiffs and giving them the benefit of all reasonable inferences therefrom, the Court finds there is no basis upon which a reasonable jury could conclude that [Mercy] was negligent as alleged in the Petition.” In reaching that conclusion, the court applied a rule 5.403 balancing test, which requires a court to balance the probative value of evidence against its prejudicial effect. See Iowa R. Evid. 5.403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . .”). *The Rieders contend the court’s application of the evidentiary rule amounted to an impermissible weighing of the evidence. We agree. Because the court was not allowed to weigh the evidence on summary judgment, we reverse the court’s second summary judgment ruling.*

Opinion, p. 5 (emphasis added).

As set forth herein, this amounts to clear error on the part of the Court of Appeals. A district court's evaluation of admissibility is a necessary precursor to evaluating sufficiency of the evidence. Here, the only items examined using the Rule 5.403 balancing test were unrelated prior lawsuits.<sup>3</sup>

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.* 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.*

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<sup>3</sup> The Court of Appeals did not address or acknowledge the district court's determination that Dr. Segal's peer review materials and records are protected from disclosure and statutorily inadmissible pursuant to Iowa Code Section 147.135(2).

[Order Granting MSJ]; App. 815 (emphasis added).

The district court explained: “[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.” *Id.*

This is not an impermissible weighing of the evidence. Iowa courts must evaluate admissibility as part of their summary judgment analysis. *See Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d at 96–97 (“We also note that the court should only consider ‘such facts as would be admissible in evidence’ when considering the affidavits supporting and opposing summary judgment.”) (citations omitted); *Matter of Estate of Van Ginkel*, 940 N.W.2d at 443 (“in order to survive summary judgment, plaintiffs must set forth specific, admissible evidence”).

The Rieders cannot rely on inadmissible evidence to survive summary judgment. Simply put, admissibility is implicit within the required inquiry, i.e. “whether a reasonable jury, faced with the [admissible] evidence presented, could return a verdict for the nonmoving party.” *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Further, the district court need only consider legitimate inferences. *McIlravy*, 653 N.W.2d at 328. Inferences are legitimate when they are “rational, reasonable, and otherwise permissible under the governing substantive law.” *Id.* (quoting *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)). Iowa courts commonly exclude reference to 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).

Similarly here, the district court properly determined the evidence would be speculative, improper, unfair, and not supported in law.<sup>4</sup> [*Id.*];

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<sup>4</sup> 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

App. 815. The Court of Appeals erred when it characterized the district court's analysis as impermissible weighing of the evidence. This Court should affirm the district court's grant of summary judgment.

**II. The Court of Appeals Erred When it Reversed the District Court's Grant of Partial Summary Judgment Regarding Whether a Duty is Owed Where the District Court set Forth Legitimate Policy Reasons in Support of its No-Duty Determination.**

**A. Standard of review.**

When considering an application for further review, this Court has the discretion to review any or all of the issues raised on appeal. *Cannon v. Bodensteiner Implement Co.*, 903 N.W.2d at 326 (citing *In re Marriage of Mauer*, 874 N.W.2d at 106). This Court's review of the district court's grants of summary judgment 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 at 102 (citing *Putensen v. Hawkeye Bank*, 564 N.W.2d at 407).

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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).

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.*, 684 N.W.2d at 247–48 (quoting *Crippen*, 618 N.W.2d at 565). 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*, 688 N.W.2d at 71 (quoting *McIlravy*, 653 N.W.2d at 328) (citations omitted); *see also In re Kerndt's Estate*, 103 N.W.2d at 736 (“Inferences can assist in establishing a basic fact, but they cannot in and of themselves create evidence.”).

This Court may “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 at 662.

**B. The district court properly granted partial summary judgment where it set forth legitimate policy reasons to support a no-duty determination.**

The narrow question before the district court was: Does *mere notification* of an IBM investigation by a physician *raise a duty* by a hospital to take immediate action to limit the physician’s privilege?

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. 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 district court explained the narrow focus of its ruling, as opposed to the broader duty argued by the Rieders and proceeded to enumerate numerous policy reasons to support a “no-duty determination:”

*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 deprivation 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).

The Court of Appeals agreed that “[t]here is indeed no dispute that Dr. Segal simply notified Mercy of the fact of an investigation by IBM and not the results.” Opinion, p. 9. However, the Court of Appeals reasoned that “the Rieders do not attack this undisputed fact” and instead stated the Rieders “assail the court’s determination as a matter of law that the hospital could not nor should not have known of the risks posed by Dr. Segal when it was notified of the IBM investigation.” *Id.* at 7.

The Court of Appeals then held: “That determination implicates the concept of foreseeability.” *Id.* (citing *Lawrence v. Grinde*, 534 N.W.2d 414, 419 (Iowa 1995)) (additional citations omitted).

**1. The Court of Appeals misinterpreted the district court’s “could not nor should not” language as implicating the concept of foreseeability.**

The “could not nor should not” language used by the district court was used in the context of analyzing the confidentiality surrounding an IBM investigation and the protections of due process in connection with a medical license, not foreseeability. It was part and parcel of the district court’s consideration of the basic principles of due process owed physicians and the confidentiality surrounding IBM investigations because “formal charges had not been filed yet and no final decision had been made.” [Order Granting PMSJ at 5]; App. 346 (emphasis added). The district court emphasized that the purpose of the investigation and the due process it protects would be nullified were a hospital required to restrict privileges “upon generic knowledge of an ongoing investigation alone.” *Id.*

Here, rather than engaging in an impermissible consideration of foreseeability, the district court specifically acknowledged the obligation

under *Hoyt* to refrain doing so and specifically left such questions for the jury:

If the Court elects to find there was no duty owed in regard to immediate action on the basis of the IBM investigation, the matter will still proceed to trial on 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.

PSJ Order, p. 3.

This Court should find, even viewing the facts in the light most favorable to the Rieders, the district court properly determined that no hospital may, or should, ignore the due process due its physicians by summarily restricting or terminating his or her practice upon mere notification of an investigation.

2. **Even if the district court's opinion can be fairly read to have considered foreseeability, *Thompson* does not require an appellate court wholly reject a district court's policy analysis in support of a no-duty determination.**

Having interpreted that portion of the district court's opinion as implicating foreseeability, the Court of Appeals erred when it wholly rejected the district court's no-duty determination rather than properly evaluating the district court's policy analysis:

We recognize the district court also considered a policy reason for finding no duty. But *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) authorizes the incorporation of policy considerations in the duty analysis only after foreseeability is removed from the equation. 774 N.W.2d at 835. Because the district court considered foreseeability in determining that Mercy did not owe the Rieders a duty, we also reverse the district court's first, partial summary judgment ruling.

Opinion, p. 8.

In *Thompson*, this Court determined that: "The district court clearly considered foreseeability in concluding the defendants owed no duty in this case." *Id.* at 835. The Court then noted: "When the consideration of foreseeability is removed from the determination of duty, as we now hold it should be, there remains the question of whether a principle or strong policy consideration justifies the exemption of [defendants] from the duty to exercise reasonable care." *Id.* The Court did not conclude that the analysis stops if there was a consideration of foreseeability. While the Court ultimately determined there was a duty owed under the circumstances of that case, the Court still examined whether a principle or strong policy consideration supported a no-duty determination.

Similarly, in *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 777 (Iowa 2013), this Court determined that the district court clearly considered foreseeability when granting summary judgment to a bar sued

for injuries suffered by a patron assaulted in the bar's parking lot. The Court noted that it was not clear "whether the judgment was based on a no-duty determination or a reasonable care determination." *Id.* However, the Court did not stop there and proceeded to remove foreseeability from its duty analysis to "consider whether some principle or strong policy consideration justifies exempting [the defendant bar], or the class of tavern owners in general, from the duty to exercise reasonable care." *Id.* Again, the question remained for the Court to consider whether there was a policy supporting a no-duty determination.

In the present case, the district court engaged in an extensive policy analysis, noting: "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 deprivation of due process, especially in the case of the 575-675 physicians against whom no misconduct is ever founded." [Order Granting PMSJ at 5]; App. 346 (emphasis added). Rather than remand, the Court of Appeals should have evaluated the district court's policy arguments.

Upon further review, this Court should affirm the district court's determination 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 and thus affirm the district court's grant of partial summary judgment.

### CONCLUSION

The district court properly granted summary judgment as to whether sufficient evidence exists to submit the case of alleged negligent credentialing against Mercy and 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. The district court should thus be affirmed.

Respectfully submitted,

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/s/ Dawn M. Gibson

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE  
REQUIREMENTS AND TYPE-VOLUME LIMITATION**

This Application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because this Application has been prepared in a proportionally spaced typeface using Calisto MT in 14, and contains 4,787 words, excluding the parts of the Application exempted by IOWA R. APP. P. 6.1103(4)(a).

/s/ Dawn M. Gibson

September 22, 2020

Date

**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

I certify that, on September 22, 2020, 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 all attorneys and parties of record. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

/s/ Dawn M. Gibson

IN THE COURT OF APPEALS OF IOWA

No. 19-0767  
Filed September 2, 2020

**ROXANNE RIEDER and TONY RIEDER,**  
Plaintiffs-Appellants,

**vs.**

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

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Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge.

Roxanne and Tony Rieder appeal the district court's order granting summary judgment in favor of Mercy Medical Center. **REVERSED AND REMANDED.**

Bruce L. Braley, Brian N. Aleinikoff, and Timothy J. Luetkemeyer of Leventhal Puga Braley P.C., Denver, Colorado, for appellants.

Christine L. Conover, Carrie L. Thompson, and Dawn M. Gibson of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, for appellees.

Considered by Vaitheswaran, P.J., and Mullins and Ahlers, JJ.

**VAITHESWARAN, Presiding Judge.**

This is an appeal from summary judgment rulings in favor of a medical center on a negligent credentialing claim raised by a former patient.

The following facts are essentially undisputed. Roxanne Rieder underwent surgery at the hands of Dr. David Segal of Eastern Iowa Spine and Surgery Center, an affiliate of Mercy Medical Center (Mercy) in Cedar Rapids, Iowa. On the date of her discharge from the hospital, the Iowa Board of Medicine (IBM) filed a “statement of charges” against Dr. Segal, alleging in part that he “demonstrated professional incompetency . . . when he failed to provide appropriate neurosurgical care to several patients in Cedar Rapids, Iowa.” Rieder conceded she was not one of the patients implicated in the charges.

Rieder experienced complications from the surgery. She and her husband Tony sued Mercy, alleging the medical center (1) “was negligent in credentialing Dr. Segal as a member of its staff in that it failed to exercise reasonable care in investigating and selecting medical staff to permit only competent and qualified physicians the privilege of using its facilities”; (2) Mercy “knew, or should have known, that Dr. Segal did not possess the proper professional competency to practice”; and (3) Mercy’s negligent credentialing of Dr. Segal caused Roxanne injuries and damages.<sup>1</sup> They also raised a loss-of-consortium claim.

Mercy filed a motion for partial summary judgment “as to the narrow issue of 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

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<sup>1</sup> The Rieders voluntarily dismissed the remaining defendants.

investigation by” IBM. Specifically, Mercy asserted, “[N]o such duty exists as a matter of law due to the confidentiality provisions surrounding IBM investigations.”

The district court granted the partial motion.

Mercy then filed a second motion for summary judgment on the ground that there was “[n]o factual basis” to support the Rieders’ claim of negligent credentialing. Following a hearing, the district court granted the second motion and entered judgment in favor of Mercy.

On appeal, the Rieders argue (1) “the peer review privilege is unreasonable when applied in negligent credentialing cases” and (2) the district court “fail[ed] to view the evidence in the light most favorable to the [Rieders],” “abused its discretion by weighing the evidence,” and “abused its discretion in excluding highly relevant evidence.” Mercy preliminarily responds that error was not preserved on the peer-review-privilege argument. See Iowa Code § 147.135(2) (2016) (“Peer review records are privileged and confidential, are not subject to discovery, subpoena, or other means of legal compulsion for release to a person other than an affected licensee or a peer review committee, and are not admissible in evidence in a judicial or administrative proceeding other than a proceeding involving licensee discipline or a proceeding brought by a licensee who is the subject of a peer review record and whose competence is at issue.”). The Rieders counter that if the statutory peer review privilege could “hamstring” them from proving their negligent credentialing case, there was all the more reason to grant them “wide latitude” to prove their case by other means. See *id.* (“This subsection shall not preclude the discovery of the identification of witnesses or documents known to a peer review committee.”); cf. *Day v. Finley Hosp.*, 769 N.W.2d 898,

902 (Iowa Ct. App. 2009) (“Day also argues that it would be impractical and absurd to have negligent credentialing claims without allowing plaintiffs access to credentialing files. This, however, puts the cart before the horse. The legislature has spoken and has directed that peer review files be kept confidential, even when requested in litigation. The legislature has never approved negligent credentialing claims. It makes no sense to argue that express statutory language should yield to the needs of a cause of action that the legislature has never recognized.”). We need not wade into the effect of the statutory peer review privilege on the Rieders’ negligent credentialing claim because we find a portion of the Rieders’ second argument dispositive.

In considering that argument, we begin with the well-established summary judgment standard. Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” See Iowa R. Civ. P. 1.981(3). “In ruling on a motion for summary judgment, the court does not weigh the evidence.” *Linn v. State*, 929 N.W.2d 717, 730 (Iowa 2019). “Instead, the court inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party.” *Id.* “When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party.” *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 763 (Iowa 2006).

In its second summary judgment ruling, the court concluded, “[T]aking the admissible evidence in the light most favorable to Plaintiffs and giving them the benefit of all reasonable inferences therefrom, the Court finds there is no basis upon which a reasonable jury could conclude that [Mercy] was negligent as alleged in the Petition.” In reaching that conclusion, the court applied a rule 5.403 balancing test, which requires a court to balance the probative value of evidence against its prejudicial effect. See Iowa R. Evid. 5.403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . .”). The Rieders contend the court’s application of the evidentiary rule amounted to an impermissible weighing of the evidence. We agree. Because the court was not allowed to weigh the evidence on summary judgment, we reverse the court’s second summary judgment ruling.

Our opinion could end here, but because we are remanding for further proceedings, we feel compelled to address the district court’s conclusion in its first summary judgment ruling that Mercy owed no duty to the Rieders.

The Iowa Supreme Court has not formally recognized the tort of negligent credentialing. See *Hall v. Jennie Edmundson Mem’l Hosp.*, 812 N.W.2d 681, 685 (Iowa 2012). The court assumed “without deciding that the tort is actionable in this state.” *Id.*

The district court followed suit, citing Mercy’s position of “assum[ing], but not conced[ing] that negligent credentialing [was] a viable claim in Iowa.” The court proceeded to the question of whether Mercy owed a duty “to take immediate action with regard to a doctor’s privileges upon finding out there is an open investigation by the Board of Medicine.” See *Thompson v. Kaczinski*, 774 N.W.2d 829, 834

(Iowa 2009) (“An actionable claim of negligence requires ‘the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages.’” (citation omitted)). The court noted the issue was a question of law for the court. See *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 775 (Iowa 2013). The court next cited *Hoyt*’s reaffirmation of a duty analysis that removed foreseeability from the equation and underscored the importance of “an articulated countervailing principle or policy” in “denying or limiting liability in a particular class of cases.” *Id.* (quoting *Thompson*, 774 N.W.2d at 835; see also *id.* (“We joined the drafters of the Restatement (Third) in explicitly disapproving of the use of foreseeability, or lack thereof, in making no-duty determinations.”)). The court concluded, “Mercy . . . , without knowing the basis of the investigation, could not have had a duty to ‘restrict or terminate Dr. David Segal’s surgical privileges’” before IBM filed public charges against the physician. The court reasoned Mercy “*could not have known nor should it have known that he posed a serious risk to his patients*” at that juncture. (Emphasis added.) The court further reasoned, “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.”

The Rieders take issue with the court’s determination that Mercy “could not have known nor should it have known that he posed a serious risk to his patients.” They argue, “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.” In their view,

“This is exactly the type of situation where a jury could infer other connected facts which reasonably follow.”

Mercy concedes “the Rieders preserved error as to the district court’s grant of partial summary judgment.” The hospital argues that “[t]he **undisputed** factual circumstance in this case was Dr. Segal’s mere notification to Mercy of inquiries by the IBM.”

There is indeed no dispute that Dr. Segal simply notified Mercy of the fact of an investigation by IBM and not the results. But the Rieders do not attack this undisputed fact. As noted, they assail the court’s determination as a matter of law that the hospital could not nor should not have known of the risks posed by Dr. Segal when it was notified of the IBM investigation.

That determination implicates the concept of foreseeability. See *Lawrence v. Grinde*, 534 N.W.2d 414, 419 (Iowa 1995) (“Foreseeability means that which it is objectively reasonable to expect, not merely what might conceivably occur.” (quoting *Greives v. Greenwood*, 550 N.E.2d 334, 338 (Ind. Ct. App. 1990))). As discussed, foreseeability is no longer a component of the duty analysis. See *Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689, 702 (Iowa 2013) (reiterating “we have adopted the duty principles of the Restatement (Third) and will not consider foreseeability, or lack thereof, in making duty determinations” (citing *Hoyt*, 829 N.W.2d at 776–77; *Thompson*, 774 N.W.2d at 835)). Whether Mercy could or should have known Dr. Segal posed a risk to his patients at the time Dr. Segal notified it of the IBM investigation is precisely the type of question the supreme court relegated to the fact finder. See *Hoyt*, 829 N.W.2d. at 776 (“[F]oreseeability is central to the fact finder’s inquiries regarding breach and the

range of harms for which an actor may be liable.”). As the Rieders assert, the question “[w]hat did Mercy know about Dr. Segal’s incompetence” was a “question of fact,” not an issue of law.

We recognize the district court also considered a policy reason for finding no duty. But *Thompson* authorizes the incorporation of policy considerations in the duty analysis only after foreseeability is removed from the equation. 774 N.W.2d at 835. Because the district court considered foreseeability in determining that Mercy did not owe the Rieders a duty, we also reverse the district court’s first, partial summary judgment ruling.

**REVERSED AND REMANDED.**



IOWA APPELLATE COURTS

State of Iowa Courts

**Case Number**  
19-0767

**Case Title**  
Rieder v. Segal

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