IN THE SUPREME COURT OF IOWA
NO. 19-0767

ROXANNE RIEDER and TONY RIEDER,
Plaintiffs-Appellants,
vs.
DAVID SEGAL, M.D., MERCY HOSPITAL, CEDAR RAPIDS, IOWA d/b/a MERCY MEDICAL CENTER, CEDAR RAPIDS, IOWA, et al.
Defendants-Appellees

UPON FURTHER REVIEW FROM THE IOWA COURT OF APPEALS
APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY,
THE HONORABLE IAN K. THORNHILL

BRIEF OF AMICUS CURIAE-IOWA ASSOCIATION FOR JUSTICE SUPPORTING PLAINTIFFS-APPELLANTS

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IDENTIFICATION OF *AMICUS CURIAE* AND STATEMENT OF INTEREST

The Iowa Association for Justice ("IAJ") submits this *Amicus Curiae* Brief to assist the Court in resolving the issue of whether it should recognize negligent credentialing, as well as clarifying the proper standard for ruling on a party's motion for summary judgment.

The objectives of IAJ include the promotion of the administration of justice for the public good, the advancement of the cause for those who are damaged in person and/or property and who must seek redress through our civil justice system, and broadly to uphold and improve the adversary system and the right of trial by jury.

Presently comprising more than 600 members, IAJ member attorneys collectively represent thousands of injured Iowans each year. As the leading organization for attorneys practicing in the plaintiff's bar in this state, the members of IAJ are experienced in the application of Iowa law and Iowa legal principles to the issues facing plaintiffs seeking a hearing in our state's courts, redress of grievance, compensation for injury, as well as defense in a criminal proceeding.

As the Court decides the questions before it in this case, IAJ can provide the Court with the prospective of the state's plaintiff's bar as it pertains not only to the issue of negligent credentialing, but the summary judgment process

itself. In doing so, IAJ hopes the court can provide clarity to the law of negligent credentialing and also reiterate summary judgment principles as they apply in any type of case where a party may be limited in evidence that exists but is not provided or available to them because of statutory or other protections.

This brief is submitted by the above signed attorney members of IAJ's *Amicus Curiae* committee, none of whom are counsel for the parties in this case. Further, no party's counsel authored this brief in whole or in part nor did any person, party, or party's counsel contribute money to fund the preparation or submission of this brief.

ARGUMENT

I. THE COURT SHOULD RECOGNIZE THE TORT OF NEGLIGENT CREDENTIALING.

The tort of negligent credentialing has been defined in multiple ways by various courts. Essentially, the tort recognizes that hospitals and other healthcare facilities owe a duty of care[1] to their patients to act within the standard of care in granting privileges to medical professionals who practice at their facilities and provide care to patients. Patients trust in and rely upon the screening process of these institutions.

Negligent credentialing has been a recognized tort for over 50 years. In 1965, the Supreme Court of Illinois first recognized the tort in *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253 (Ill. 1965). In doing so, the court acknowledged the tort was necessary given the evolution of medical care, observations which are now more applicable than ever before:

> The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and

[1] As established law, the term "reasonable care" is used throughout this brief. While medical negligence cases substitute "reasonable care" for the customary "standard of care," in the context of a duty analysis these terms are interchangeable. Using "standard of care" is simply an elucidation of the reasonable care required of a medical professional.

> internes, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility

Id. at 257. Over twenty-seven states thereafter recognized the tort, something noted by the Supreme Court of Minnesota when it followed suit in 2007 and, in *Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007), undertook an extensive review of negligent credentialing before deciding to recognize the tort.

While this Court has never explicitly recognized negligent credentialing, most recently it stated, "[w]e assume without deciding that [negligent credentialing] is actionable in this state." *Hall v. Jennie Edmundson Memorial Hosp.*, 812 N.W.2.d 681, 685 (Iowa 2012). In declining to formally recognize the tort at that time, the Court elected to wait for the issue to come before it again as a disputed and fully briefed matter. *Id.* at fn. 4.

That time has come, and this case presents the opportunity for all sides to fully participate in the debate as to whether Iowa should join the majority of states in recognizing negligent credentialing as an actionable tort.

a. <u>Iowa common law and this Court's precedents support recognizing negligent credentialing as an actionable tort.</u>

Negligent credentialing is little more than a new context in which to apply long held concepts of duty, as well as recent clarifications provided by

this Court through adoption of parts of the Restatement (Third) of Torts: Liab. for Physical Harms (hereinafter Restatement (Third)).

To begin the required duty analysis one must look to Restatement (Third) § 7(a) which states that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (adopting general duty analysis of Restatement (Third)). The risk of harm created by negligent credentialing is the same as the risk created by negligent medical care itself and alleged negligent credentialing of a medical provider can be the precipitating event in a chain of events leading to harm to a patient.

Such a chain of causation is allowed even if one event is somewhat removed and does not directly cause any physical harm *See Asher v. OB-Gyn Specialists, P.C.*, 846 N.W.2d 492, 500 (Iowa 2014) (overruled on other grounds) (recognizing that one link or act in a chain of medical errors can be actionable even if that specific initial act did not literally cause any injury, but when the act set in motion a series of events leading to the actual injury). If there was a case where the negligence in credentialing had nothing to do with a provider's actual abilities or qualifications to provide care, it could be disposed of through a scope of liability determination by the fact finder. *Thompson,* 774 N.W.2d at 837-38 (limiting an actors liability to those physical harms that result from the risks that made the actor's conduct tortious).

While the foreseeability of harm from any particular instance of negligent credentialing is debatable, this is not a proper consideration in a duty analysis or recognition of the tort as actionable. Instead, foreseeability has been delegated to the fact finder in deciding whether a defendant failed to exercise reasonable care. *Thompson*, 774 N.W.2d at 835.

In recognizing negligent credentialing in Minnesota, the *Larson* court weighed policy considerations on both sides. Ultimately, the court decided that the policy considerations in favor of the cause of action outweighed those against it because the state's peer review statute adequately protected confidential peer review materials and recognition of the tort did not erode those privileges. *Larson*, 738 N.W.2d at 309-10. The court recognized, as have others, that plaintiffs can prove negligent credentialing without access to protected peer review materials and therefore recognition of the tort does not jeopardize the protections afforded by peer review statutes. *Id.*

In a scenario much akin to that facing the Court in this case, the Montana Supreme Court held in 2012:

> While we have not formally recognized the tort of negligent credentialing, we foreshadowed its adoption 40 years ago. . . . We did not reach the negligent issue . . . [h]owever, we acknowledged that the rise of the modern hospital imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges: 'The integration of a modern hospital becomes readily apparent as the various boards, reviewing committees, and designation of privileges are found to rest on a structure designed to control, supervise, and review the

> work within the hospital. The standards of hospital accreditation, the state licensing regulations, and the [hospital's] bylaws demonstrate that the medical profession and other responsible authorities regard it as both desirable and feasible that a hospital assume certain responsibilities for the care of the patient.' This reasoning is even more persuasive 40 years later, with the development of hospitals into 'comprehensive health care' facilities. We are persuaded that the gradual evolution of the common law supports the recognition of the tort of negligent credentialing. We therefore recognize negligent credentialing as a valid cause of action in Montana.

Brookins v. Mote, 292 P.3d 347, 360-61 (Mont. 2012)(internal citations and quotations omitted).

To err is human and plenty of highly trained and qualified physicians have made negligent mistakes leading to death or injury. The risk of error, negligence, and physical harm is certainly increased when a less than well trained or qualified physician is allowed to practice in a medical facility who holds itself out as providing good care. In other words, physical harm caused by a medical provider who was negligently credentialed increases the risk of harm.

Under the general duty formulation of the Restatement (Third), as well as *Thompson* and it's progeny, this Court should explicitly recognize the tort of negligent credentialing. Only if "an articulated countervailing principle or policy warrants denying or limiting liability in [negligent credentialing] cases" should the cause of action be disavowed. *Thompson*, 774 N.W.2d at 835 (citing

Restatement (Third) § 7(b)). As discussed below, the public policy greatly weighs in favor of recognition.

b. Public policy considerations weigh in favor of recognizing negligent credentialing as an actionable tort.

Negligent credentialing recognizes that the general public places nearly complete trust in medical facilities to adequately screen their care providers. Iowans enter hospitals and clinics every day assuming their providers have the necessary skills and qualifications to be there and provide care. For various reasons, patients cannot be expected to independently verify the credentials of their physician, nurse, or surgeon. Patients may lack the sophistication or wherewithal to do so. Due to geography or exigent circumstances patients may have no choice but to seek care from a particular medical provider working at a particular clinic. Additionally, because of statutory peer review protections and other systems put in place by legislatures and the medical industry to conceal information such as discipline, lawsuits, settlements, or complication rates of particular care providers, patients are largely barred from uncovering certain facts about medical providers.

When patients choose hospitals for care they typically do not choose the individual providers they see. They choose a hospital and trust that they will receive reasonably safe care by physicians who were properly vetted to do their jobs. Hospitals are not just buildings filled with independent operators.

Modern hospitals provide key oversight to nearly every part of the patient experience, not the least of which involves proper credentialing and privileging of physicians. A cause of action for negligent credentialing supports the safety of the people of Iowa by holding hospitals accountable.

In short, there is a sacred trust between patients and health care facilities. Trust that facilities will only allow those who are well-qualified to provide care. Trust that the institutions with access to the information will properly use it to keep Iowans safe. When that trust is broken, through negligent credentialing, Iowans should be entitled to seek a legal remedy.

The State of Iowa has always recognized safety as an "inalienable right." Iowa Const. Article I, Section 1. Medical errors are a threat to the safety and livelihood of our communities. Preventable medical errors have recently been cited as the third-leading cause of death in the United States. Martin A. Makary & Michael Daniel, *Medical error – the third leading cause of death in the US*, BMJ, 2016; 353; i2139. This accounts for nearly 1 out of every 10 deaths in the United States. *Id.* In 2013, the Journal of Patient Safety estimated that "210,000 adverse events per year contributed to the death of hospitalized patients." John T. James, *A New, Evidence-based Estimate of Patient Harms Associated with Hospital Care*, J. of Patient Safety 9(3), 125.

Even where patients survive medical errors, the impact on their lives and livelihoods is substantial. In 2008, medical errors cost an estimated $19.5

billion, including additional medical cost, loss of productivity, and increased use of disability insurance. Andel, *et. al*, *The Economics of Health Care Quality and Medical Errors*, J. of Health Care Finance, Fall 2012;39(1), 42. Beyond solely economic impact, errors cause a toll in pain, loss of ability, loss of enjoyment and in trust in the medical system.

A large portion of medical errors come from the same physicians. According to the New England Journal of Medicine, 1% of physicians account for 32% of all paid malpractice claims. Studdert, et. al, *Prevalence and Characteristics of Physicians Prone to Malpractice Claims*, N. Engl. J. Med. 374: 356 (2016). The public has very limited ability to learn anything meaningful about their physicians and the quality of care they provide, as much of this information is not easily ascertained by the general public.

Hospitals are in a superior position to know which physicians are qualified and capable. The National Practitioner Data Bank, started by Congress in 1986, keeps track of physicians' malpractice actions, disciplinary actions, actions against a physician's clinical privileges, actions by professional societies, actions by the Drug Enforcement Agency, and exclusions from Medicare, Medicaid and other federal programs, among other data. https://www.npdb.hrsa.gov/resources/tables/reportingQueryAccess.jsp. While this information is available to hospitals, medical boards and other professional entities, it is not available to the public.

Likewise, the Iowa Board of Medicine discloses whether a physician has been disciplined in the State of Iowa, but not whether they have been disciplined in other states, have been excluded from Medicare or Medicaid, have lost hospital privileges, have paid malpractice claims, or many other data points that could be useful to the public. Instead, that information is actively withheld and shielded. John Fauber, Matt Wynn and Kristina Fiore, "Prescription for Secrecy," *MedPage Today/Milwaukee Journal Sentinel*, February 28, 2018, https://projects.jsonline.com/news/2018/2/28/is-your-doctor-banned-from-practicing-in-other-states.html.

This creates a situation where the people of Iowa have no choice but to trust that the hospitals where they receive care employ qualified and capable physicians. This gives rise to the tort of negligent credentialing – when hospitals fail to use their knowledge as gatekeepers of public health and safety. Recognizing the tort will incentivize hospitals to thoroughly investigate their physicians and only give privileges to those who can capably handle the job. Likewise, current physicians will be incentivized to make sure they maintain levels of competence and education throughout their careers as medicine and technology changes.

II. THE PROPER STANDARD FOR AND THE DISTRICT COURT'S SCOPE OF INQUIRY IN SUMMARY JUDGMENT RULINGS REQUIRES REITERATION.

This case also involved summary judgment and questions about the proper scope of inquiry in cases wherein evidence is barred from production (as discussed in the previous section). While a plaintiff may not avoid summary judgment by resting on the allegations in their petition or complaint, it is conversely inadequate for a defendant to rest on its denials and simply allege that plaintiff cannot prove their case. Iowa R. Civ. P. 1.981(5). In ruling on a summary judgment motion, it is not enough just to say that the plaintiff cannot meet her burden at trial. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Instead, the non-moving party must point out the specific portions of the record and demonstrate the absence of a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

This Court has said that summary judgment is the "put up or shut up moment" rather than the "dress rehearsal or practice run." *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 808 (Iowa 2019). However, especially in negligence cases, the district court must still indulge in every reasonable inference possible in favor of the non-moving party and deny summary judgment in those cases in which cases any reasonable juror could find for the plaintiff. Regarding such cases, the Court in *Virden v. Betts & Beer Const. Co.*, 656 N.W.2d 805, 807 (Iowa 2003) held:

> While negligence cases do not ordinarily lend themselves to summary adjudication, summary judgment may be rendered when the material facts fail to show a causal link between the negligence and the injury. Issues of proximate cause, like negligence, are generally for the jury to resolve. They may, however, be decided as a matter of law in an exceptional case. We have observed that an exceptional case is one in which after construing the evidence in its most favorable light and resolving all doubts in favor of the party seeking to establish proximate cause, the relationship between cause and effect nonetheless is so apparent and so unrelated to defendant's conduct that no reasonable jury could conclude defendant's fault was a proximate cause of plaintiff's injuries." (emphasis added) (internal citations omitted)).[2]

"Uncontradicted" and "unimpeached" evidence of the moving party may also be believed, "at least to the extent that [such] evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (emphasis added). Jurors–not district court judges—are entitled to weigh the credibility of witnesses and to disregard self-serving testimony. *Guthrie v. J.C. Penney, Inc.*, 803 F.2d 202, 207 (5th Cir. 1986) (emphasis added) Thus, at the summary judgment stage, **the Court must disregard all the movant's evidence provided by biased, interested, or non-credible witnesses, whose testimony a jury is not required to believe.** *Reeves*, 530

[2] "A proper grant of summary judgment depends on the legal consequences flowing from the undisputed facts or from the facts viewed most favorably toward the resisting party." *Boles v. State Farm Fire and Cas. Co.*, 494 N.W.2d 656, 657 (Iowa 1992). The Court must "indulge in every legitimate inference that the evidence will bear" in Plaintiff's favor. *Schneider v. State*, 789 N.W.2d 138, 144 (Iowa 2010).

U.S. at 151 (emphasis added). Summary judgment can only be granted on evidence the jury is not at liberty to disbelieve. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 625 (1944). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, **not those of a judge**." *Carr v. Bankers Trust Co.,* 546 N.W.2d 901, 905 (Iowa 1996) (emphasis added).

Due to restricted access to direct, documentary evidence, cases of negligent credentialing rely heavily on circumstantial evidence and personal testimony. This is similar to the evidence available to plaintiffs in employment litigation, where motive is rarely stated and direct evidence is scant. As such, it is ever more important that the evidence of the nonmoving party in such cases be believed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986) ("[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

Courts "must be particularly deferential to the party opposing summary judgment" when liability depends on inferences rather than direct evidence. *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir. 1999). Similar to the situation in employment law cases, there is extreme difficulty or impossibility in medical cases in gathering the direct evidence needed for a plaintiff to directly prove their case. Instead plaintiffs must rely on circumstantial evidence. *See Christie v. Foremost Ins. Co.*, 758 F.2d 584, 586 (7th Cir. 1986) (because employers have

sole access to almost all the evidence in discrimination cases, workers "often have great difficulty in gathering information and can present only circumstantial evidence of discriminatory motives."); *see also Marsh v. Hog Slat, Inc.*, 79 F. Supp. 2d 1068, 1075 (N.D. Iowa 2000) (since employer will rarely admit discrimination and third-party witnesses are often unavailable, the outcome of employment cases frequently boils down to credibility of the parties).

The proper lens through which to view negligent credentialing cases at the summary judgment stage requires strong guidance from this court. Such a lens must display the utmost deference to the non-moving party. *Chuang v. Univ. of Calf. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)).

The similarities in proving employment cases and resisting a motion for summary judgment are numerous when considering a negligent credentialing case and the deference to trial by jury, as opposed to summary adjudication should be equally applicable. In both types of cases, deliberations and information regarding decisions to hire and fire based on infractions or violations of rules or medical error rates take place in a very tight, confined, and often times secretive process. It is even more notable in negligent credentialing cases due to the statutorily granted protections of the evidence that in a normal case could constitute a smoking gun.

In cases where a plaintiff cannot produce all relevant evidence due to confidentiality or otherwise unavailable evidence, district courts should take care to ensure that a case is not dismissed at the summary judgment phase because of an overly restrictive view of what a reasonable jury could find from circumstantial evidence and fair inferences. The shrinking number of civil jury trials in Iowa may suggest not that there are too many useless trials, but that perhaps certain cases are prematurely dismissed when they otherwise deserve the consideration of an Iowa jury.

In addition, as it should only be the exceptional case where summary judgment should be granted based on considerations of negligence and causation, this Amicus argues that the Court can and should take this opportunity to remind Iowa litigants that summary judgment is truly an extraordinary remedy, rather than one that is common or routine. *See Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987) ("[s]ummary rulings are the direct antithesis of the full and fair process found in an adversary proceeding."); *Melvin v. Car-Freshener Corp.*, 453 F.3d 1000, 1004 (8th Cir. 2006) (Lay, J., dissenting) ("The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.").

Indeed, Iowa's district court judges are empowered with other tools to manage disputes, including that of a directed verdict or judgment notwithstanding the verdict. Tools that judges can employ *after* the parties have had the opportunity to present all of their evidence. With these tools in mind, the Iowa Rules of Civil Procedure are overwhelmingly geared toward giving Iowa litigants their day in open court and their opportunity to be heard. Our civil system is designed to allow the vast majority of trials to proceed in order to allow the Court weigh actual evidence in the record, and to allow, where warranted, the Court to end proceedings before verdict or change the outcome based on the actual trial court record, as opposed to arguing over what a cold summary judgment record attempts to convey.

It is the element of a jury's shared experience coming together to decide a case after hearing the most real version of the evidence possible that is at the heart of our jury system. Summary judgment hearings are ill-equipped to make the same determinations and for that reason, summary judgment should be the overwhelming exception and not the rule.

CONCLUSION

Iowa patients must be able to trust that the medical professionals employed by hospitals, healthcare systems, and other facilities have the basic qualifications to practice. Because some of the most pertinent information regarding a medical professional's past and qualifications is shielded from

public view, Iowa patients rely almost entirely on the credentialing process of hospitals and healthcare systems. There arises a duty to act according to the applicable standard of care because an actor should not be able to totally escape liability by shrouding their actions in secrecy. When a plaintiff can produce non-privileged and non-confidential evidence to prove a negligent credentialing case, they should not be stripped of that right. Doing otherwise would remove any deterrent effect and provide for zero consequences when a hospital or healthcare system acts negligently or with wanton disregard for who they allow to care for or operate on Iowa citizens.

Negligent credentialing should be a cause of action available to injured Iowans and they should have their day in court, receiving deference at the summary judgment stage because of the huge information imbalance between the parties.

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CERTIFICATE OF COST

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I, Eashaan Vajpeyi, hereby certify that on the day 18th of November, 2020, I electronically filed the foregoing Brief of Amicus Curiae – Iowa Association of Justice with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

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