

IN THE SUPREME COURT OF IOWA

No. 19-0767

ROXANNE RIEDER and TONY RIEDER,

Appellants,

vs.

**MERCY HOSPITAL, CEDAR RAPIDS, IOWA d/b/a MERCY MEDICAL CENTER,
CEDAR RAPIDS, IOWA,**

Appellee.

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

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

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DISAGREEMENT WITH QUESTIONS PRESENTED FOR REVIEW

Roxanne and Tony Rieder (“Plaintiffs/Appellants”) disagree with Appellee Mercy Medical Center’s (“Mercy”) “Questions Presented for Review.” The proper questions presented for review are:

1. Whether this Court should exercise judicial discretion and its stated presumption against granting further review in normal circumstances to interfere with a decision by the Court of Appeals reversing a grant of summary judgment by the district court?
2. Whether the Court of appeals properly concluded that genuine issues of material fact were raised by the Rieders at the district court and summary judgment was improper under Iowa Rule of Civil Procedure 1.981(3)?

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RESISTANCE TO STATEMENT SUPPORTING FURTHER REVIEW

Mercy seeks further review under Iowa Rule of Appellate Procedure 6.1103(1)(b)(1). It argues “[f]urther review is necessary because the Court of Appeals’ decision is in conflict with decisions of this Court.” Application at 4.

Mercy’s Application should be denied because Mercy does not properly and completely articulate a subsection of Iowa R. App. P. 6.1103(1)(b) under which it can seek relief. Mercy’s Statement most closely resembles reference to Iowa R. App. P. 6.1103(1)(b)(1) which provides “the court of appeals has entered a decision in conflict with a decision of this court or the court of appeals *on an important matter.*” Mercy’s Statement completely omits this last, critical clause. The Court of Appeals decision at issue here involves well-settled summary judgment standards – this is not a novel or groundbreaking decision that the Supreme Court should consider for further review.

Mercy’s request is two-part. First, it argues that weighing the evidence was proper because “the district court properly evaluated admissibility as part of its summary judgment analysis.” *Id.* As required by Iowa R. App. P. 6.1103(1)(c)(3), Mercy cites two cases that it claims are in conflict with the Court of Appeals’ ruling: *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96-97 (Iowa 2012) and *Matter of Estate of Van Ginkel*, 940 N.W.2d 443 (Iowa Ct. App. 2019). There is no conflict between these cases and the Court of Appeals decision because *Pitts* and

Van Ginkel both involve hearsay evidence that is *per se* inadmissible under the Iowa Rules of Evidence. Here, however, the Reiders' evidence only became "inadmissible" *after* the trial court weighed it under Iowa Rule of Evidence 5.403.

Second, Mercy argues that the district court properly found no duty because "the district court set forth legitimate policy reasons in support of its no-duty determination." Application at 4. Mercy cites *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) and *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772 (Iowa 2013). There is no conflict between these cases and the Court of Appeals decision because *Thompson* and *Hoyt* contemplate public policy considerations entirely removed from any foreseeability analysis. Here, the trial court never engaged in any public policy analysis that did not implicate foreseeability. Further, these cases were clarified in *Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689, 702 (Iowa 2013) which held "we have adopted the duty principles of the Restatement (Third) and will not consider foreseeability, or lack thereof, in making duty determinations." This comports with the Court of Appeals decision in this case.

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BRIEF

I. Statement of Facts

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

On May 8, 2015, Ms. Rieder was admitted to Mercy Hospital to undergo spine surgery to be performed by Dr. Segal. (*Id.*). The surgery was a disaster. (*Id.* at 15-17).

The negligent surgery and resulting epidural hematoma, which went undiagnosed for days, ultimately caused spinal cord compression and consequential neurologic difficulties, including foot drop, pain, and paresthesia in Ms. Rieder's buttocks, thighs, calves, and legs. (*Id.* at 17).

Dr. Segal was first granted privileges to perform neurologic surgery at Mercy Hospital in 2009. (*Id.* at 620). Dr. Segal continued to hold these privileges until he relinquished them in a settlement with the Iowa Board of Medicine ("IBM") on December 16, 2016. (*Id.*).

Dr. Segal was licensed to practice medicine in New York in July 1993. (*Id.*). Dr. Segal was sued for medical malpractice in New York in 2004, 2005, 2006, and

2007. (*Id.*). Mercy Hospital was aware of these lawsuits at the time Dr. Segal applied to practice there. (*Id.* at 621).

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

In 2012, the IBM sent Dr. Segal for evaluation to the Center for Personalized Education for Physicians (“CPEP”) due to concerns with his clinical competency. (*Id.* at 556). Dr. Segal was again sued for medical malpractice in Iowa in October 2014. (*Id.* at 622). Dr. Segal was sued again in November 2015, alleging negligence for a November 2013 spinal surgery. (*Id.* at 91). Another lawsuit was filed against Dr. Segal in May 2016, alleging negligence stemming from an April 2014 spinal surgery. (*Id.*).

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

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

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

Dr. Segal relinquished his surgical privileges in May 2016. (*Id.* at 207). In December 2016, Dr. Segal settled with the IBM and further agreed not to perform surgery in Iowa. (*Id.* at 94).

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

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

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

Dr. Pietrafesa testified that close scrutiny of neurosurgeons, like Dr. Segal, is required given the “risky nature of the work they do.” (*Id.* at 764). Furthermore, based on the allegations and charges against Dr. Segal, Dr. Segal showed a systemic lapse in competency involving multiple patients across various areas of care. (*Id.*).

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

II. Statement of Procedural History

Roxanne and Tony Rieder (“the Rieders”) originally filed suit against David Segal, M.D.; Theodore Donta, M.D., Ph.D.; Eastern Iowa Brain and Spine Surgery, PLLC; Radiology Consultants of Iowa, PLC; and Mercy Hospital, Cedar Rapids Iowa d/b/a Mercy Medical Center, Cedar Rapids, Iowa (“Mercy Hospital” or “Mercy”) on December 20, 2016. (App. 12). The Rieders alleged four claims for relief: (1) Medical Negligence against David Segal, M.D.; (2) Medical Negligence against Theodore Donta, M.D., Ph.D.; (3) Negligent Credentialing against Mercy Hospital Cedar Rapids, Iowa; and (4) Loss of Consortium against all defendants. (*Id.* at 18-20). The Defendants answered and discovery commenced. The Reiders

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

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

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

(*Id.* at 42-43).

Plaintiffs responded by arguing that Mercy very well could have, and in fact was obligated to, investigate and obtain “information concerning Dr. Segal’s professional competency and the IBM investigation from sources *other than* the IBM, including Dr. Segal himself.” (*Id.* at 86). Plaintiffs supported their argument with competent evidence, including expert opinions from Dr. Charles Pietrafesa. (*Id.* at 291). Indeed, Dr. Segal admitted that he informed Mercy of the investigation well before the IBM released the formal charges. (*Id.* at 93).

The trial court concluded 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 346). Mercy’s Motion for Partial Summary Judgment on that “narrow issue” was granted on March 14, 2019. (*Id.*).

Mercy filed another Motion for Summary Judgment on March 28, 2019, arguing that “no factual basis exist[ed] to support Plaintiffs’ negligent credentialing claim.” (*Id.* at 365). Mercy argued: (1) the Peer Review Statute precluded Mercy from presenting any evidence of their investigation (or lack thereof) into Dr. Segal’s competency to practice medicine; (2) any evidence relating to the pending IBM investigation would be speculative; (3) evidence of prior lawsuits filed against Dr. Segal would be irrelevant and prejudicial because

the final resolution of those lawsuits was unknown; and (4) evidence of Dr. Segal's Parkinsonism was irrelevant because it "arose long after Ms. Rieder's care." (*Id.* at 369-75).

The Rieders argued that the trial court was required to view all the evidence - direct and circumstantial - in the light most favorable to them; that the weight and credibility of the evidence was a question for the jury to decide, not the trial court; that circumstantial evidence is just as valuable as direct evidence; that Mercy could not use the peer review privilege as both a shield and a sword; and that all of the evidence must be viewed together – not in a vacuum. (*Id.* at 517-27). Plaintiffs identified thirty-nine disputed facts which precluded summary judgment. (*Id.* at 619-25).

On April 9, the trial court granted Mercy's Motion for Summary Judgment. (*Id.* at 816). The court first held that "Mercy Hospital's file for Dr. Segal" was privileged pursuant to Iowa Code section 147.135(2) ("the Peer Review Statute") and therefore inadmissible. (*Id.*). It went on to explain that "Mercy itself is disadvantaged" by the Peer Review Statute, that both parties would be precluded from offering any evidence whatsoever about what is in the file, that Plaintiffs would be precluded from insinuating that Mercy took no action in relation to Dr. Segal based on the lack of evidence, and that any inferences about Mercy's knowledge of Dr. Segal's competency evaluation would be "nothing more than

speculation as to what Mercy did or did not know and what follow-up action they did or did not take. This is not appropriate.” (*Id.* at 815). The trial court improperly weighed the evidence.

Next, the court precluded evidence that Dr. Segal was sued at least *ten times* for medical malpractice in New York, Maryland, and Iowa, and expert testimony that these lawsuits demonstrated a pattern of negligence, pursuant to Iowa Rule of Evidence 5.403. (*Id.*). The court explained its holding by stating “the only way a jury could rely on this evidence in finding Mercy was negligent is to assume or speculate that Dr. Segal was in fact negligent on those prior occasions.” (*Id.*). The trial court infringed upon the jury’s fact-finding role by completely ignoring other reasonable interpretations of that evidence.

Finally, the court reiterated its prior ruling precluding any reference to or inference of an investigation by the Iowa Board of Medicine because the formal complaint against Dr. Segal was filed shortly after he operated on Roxanne Rieder, even though Dr. Segal admitted that he had informed Mercy of the investigation prior to that surgery. (*Id.* at 816). The trial court ignored the fact – and again infringed upon the jury’s fact-finding role – that Mercy could have, should have, and *did* have knowledge of the IBM investigation prior to the filing of formal charges against Dr. Segal, and did nothing to restrict his privileges while it

determined whether Dr. Segal should be operating on patients like Roxanne Rieder.

The Rieders appealed. On September 2, 2020, the Court of Appeals of Iowa reversed both of the trial court's summary judgment rulings and remanded the case for trial.

The Court of Appeals construed the Rieders' arguments as "(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.'" Opinion at 3. It determined that "[w]e 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.*" *Id.* (emphasis added). It held:

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 at 5 (emphasis added). The Court further noted “[o]ur 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.” *Id.* It concluded “[b]ecause 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.”

Id. at 8.

III. The Court of Appeals properly applied Iowa law which precludes a trial court from weighing evidence on summary judgment.

Standard of Review

Review of a summary judgment ruling is for corrections of errors of law. *Kennedy v. Zimmermann*, 601 N.W.2d 61, 63 (Iowa 1999). The Court’s function on appeal is “to determine whether a genuine issue of material fact exists and whether the law was correctly applied.” *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995).

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

“[A] court deciding a motion for summary judgment must not weigh the evidence.” *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005); *Linn v. State*, 929 N.W.2d 717, 730 (Iowa 2019).

“[Q]uestions of negligence or proximate cause are ordinarily for the jury— only in exceptional cases should they be decided as a matter of law.” *Clinkscates v. Nelson Securities, Inc.*, 697 N.W.2d at 841.

Argument

The Rieders’ evidence 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 weighed this evidence in deciding to exclude it, which is clear error.

Here, the trial court’s order states on its face that it weighed the evidence:

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.

(App. 815). The plain language of the order is a direct violation of the plain language of numerous decisions of this Court which preclude a trial court from weighing evidence at the summary judgment stage. *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005); *Linn v. State*, 929 N.W.2d 717, 730 (Iowa 2019).

Mercy relies on *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96-97 (Iowa 2012) and *Matter of Estate of Van Ginkel*, 940 N.W.2d 443 (Iowa Ct. App. 2019). These cases are not on point because they involve inadmissible hearsay evidence, which does not require the same weighing of the evidence that Iowa Rule of Evidence 5.403 contemplates.

In *Pitts*, the defendant moved for summary judgment and argued that statements were “inadmissible hearsay, or a violation of the parol evidence rule, and therefore the statements could not be considered when ruling on a motion for summary judgment.” *Pitts*, 818 N.W.2d at 107.

Similarly, in *Van Ginkel*, the evidentiary issue was hearsay. *See Matter of Estate of Van Ginkel*, 940 N.W.2d at *4. *Van Ginkel* is particularly inapposite because Mercy’s quoted parenthetical for its citation to this case does not actually cite the Iowa Court of Appeals’ language, but rather a quote from the trial court.

See id. at *3.

Neither the hearsay rule codified at Iowa Rule of Evidence 5.803 nor the Parole Evidence Rule which “forbids use of extrinsic evidence to vary, add to, or subtract from a written agreement” require any evidence weighing. *See Pitts*, 818 N.W.2d at 107. In contrast, Iowa Rule of Evidence 5.403 expressly contemplates evidence weighing. *See* Iowa Rule of Evidence 5.403 (“The court may exclude relevant evidence if its probative value is substantially *outweighed* by a danger of one or more of the following...”) (emphasis added).

This Court need not look further than the plain language of the trial court’s order and the plain language of Iowa Rule of Evidence 5.403 itself. Both clearly discuss “weighing” the evidence, which is not permissible on summary judgment.

Because the Court of Appeals decision was not in conflict with any decision of this Court or the Court of Appeals regarding weighing of the evidence, Mercy’s Application for Further Review on this issue should be denied.

IV. The Court of Appeals properly applied Iowa law which precludes a trial court from considering foreseeability in its duty analysis.

Standard of Review

Review of a summary judgment ruling is for corrections of errors of law. *Kennedy v. Zimmermann*, 601 N.W.2d 61, 63 (Iowa 1999). The Court’s function on appeal is “to determine whether a genuine issue of material fact exists and

whether the law was correctly applied.” *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995).

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

“When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgement 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).

Argument

Iowa has “adopted the duty principles of the Restatement (Third) and will not consider foreseeability, or lack thereof, in making duty determinations.”

Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 702 (Iowa 2013) (citing *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 776-77 (Iowa 2013) and *Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2009)).

“In *Thompson*, we adopted the general duty formulation set forth in section 7 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm and explained that ‘the assessment of the foreseeability of a risk’ is no longer part of the duty analysis in evaluating a tort claim, and instead is to be considered when the fact finder decides whether a defendant has failed to exercise reasonable care.” *Hoyt*, 829 N.W.2d at 774.

Public policy considerations arise only once foreseeability has been removed from the duty analysis. *Id.* at 777.

Here, the Court of Appeals correctly concluded that the trial court considered foreseeability in its duty analysis on Partial Summary Judgment. The trial court held

[T]he 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 ... A physician is afforded due process where his license to practice medicine is sought to be taken from him. 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. Segal’s surgical privileges” as of May 8, 2016 because it could not have know 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 ... Therefore, the Court is unwilling to find that the Defendant owed such a duty upon generic knowledge of an ongoing investigation alone.

App. 346. The trial court placed great consideration on what Mercy knew or didn’t know, a concept which lies at the heart of foreseeability principles.

The Court of Appeals properly found “[t]hat determination implicates the concept of foreseeability ... 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.” Opinion at 8. This conclusion was consistent with *Mitchell*, *Hoyt*, and *Thompson* and indeed the Court of Appeals cited these three cases throughout its opinion. *See id.* at 5, 6, 7, 8.

Mercy, however, argues that – even though the Court of Appeals cited these cases – the decision conflicts with *Thompson* and *Hoyt* because “rather than remand, the Court of Appeals should have evaluated the district court’s policy

arguments.” Application at 28. But here, there was no public policy consideration to consider once foreseeability was removed. The trial court’s public policy revolved around due process concerns for physicians precisely *because* the eventual disposition of their investigation is not foreseeable. Foreseeability was inextricably intertwined throughout the trial court’s public policy analysis and therefore Mercy’s argument should be denied.

Finally, Mercy argues that 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.” Application at 26. This argument is without factual basis or merit because the Court *did* evaluate the district court’s policy analysis and specifically addressed that policy analysis in its order: “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.” Opinion at 7-8.

Here, once foreseeability was removed from the equation, there was no policy analysis left to consider. Mercy’s application for further review on this issue, therefore, should be denied.

Even if the trial court had properly excluded foreseeability from its no duty requirement – which it did not – summary judgement would have nonetheless been improper on the basis of Mercy’s policy argument because the Rieders advanced a

legitimate, conflicting policy argument in opposition to a no-duty finding. “When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgement 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).

CONCLUSION

Plaintiffs-Appellants Roxanne and Tony Rieder respectfully request this Court deny Mercy’s Application for Further review because the Court of Appeals decision was not in conflict with any decision of this Court or the Court of Appeals.

The trial court clearly weighed the evidence under Iowa Rule of Evidence 5.403, which is expressly prohibited by controlling Iowa precedent. Summary judgment, therefore, was inappropriate.

The trial court impermissibly considered foreseeability in its no-duty finding, and therefore Partial Summary Judgment was also inappropriate.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This Resistance complies with the typeface and type-volume requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

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/s/ Bruce Braley

10/2/20

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Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on the 2nd day of October, 2020, the undersigned electronically filed this document using the electronic filing system, which will send notification of such filing to the following:

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