IN THE SUPREME COURT OF IOWA

No. 22-0403

ALYSSA PRATT
Plaintiff-Appellant

vs.

ADAM B. SMITH, M.D., ADAM B. SMITH, M.D., P.C. and TRI-STATE SPECIALISTS, LLP
Defendants-Appellees.

APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT CASE NO. LACV187747

THE HONORABLE ROGER L. SAILER
PRESIDING JUDGE

DEFNEDANTS-APPELLEES' FINAL BRIEF

JEFF W. WRIGHT, AT0008716
ZACK A. MARTIN, AT0014476
1128 Historic 4th Street
P.O. Box 3086
Sioux City, Iowa 51102
Phone: (712) 255-8838
Fax: (712) 258-6714
Jeff.Wright@heidmanlaw.com
Zack.Martin@heidmanlaw.com

ATTORNEYS FOR DEFENDANTS ADAM B. SMITH, M.D.; ADAM SMITH, P.C.; AND TRI-STATE SPECIALISTS, LLP

TABLE OF CONTENTS

TABLE OF CONTENTS....2

TABLE OF AUTHORITIES....4

STATEMENT OF ISSUE....7

ROUTING STATEMENT....8

STATEMENT OF THE CASE....8

STATEMENT OF THE FACTS....12

ARGUMENT....14

I. The District Court Correctly Held That Expert Testimony is Needed to Establish Plaintiff's Negligent Retention of Professional Staff Claims. 14

A. The only relevant facts are those which Defendants knew or should have known at the time Dr. Smith treated Plaintiff. 14

B. Based on the relevant facts, expert testimony is required to prove Plaintiff's negligent retention of professional staff claims. 16

i. Plaintiff's negligent retention of professional staff claims are not within the realm of lay knowledge. 16

ii. Plaintiff's negligent retention of professional staff claims do not arise out of a nonmedical, administrative, or ministerial act. 21

iii. Expert witness testimony is needed on the issues of standard of care and causation/scope of liability. 22

II. The Requirement of Expert Testimony Triggers Iowa Code Section 147.140 and Results in the Mandatory Dismissal with Prejudice of Plaintiff's Negligent Retention of Professional Staff Claims. 26

CONCLUSION....31

REQUEST FOR ORAL ARGUMENT 32

CERTIFICATE OF COMPLIANCE.....33

CERTIFICATE OF FILING.....34

PROOF OF SERVICE.....35

ATTORNEY'S COST CERTIFICATE.....36

TABLE OF AUTHORITIES

CASES CITED

Bandstra v. Covenant Reformed Church, 913 N.W.2d 19 (Iowa 2018) 15, 24, 31

Bazel v. Mabee, 576 N.W.2d 385 (Iowa Ct. App. 1998) 23

Brookins v. Mote, 292 P.3d 347, 364 (Mont. 2012) 18, 19

DeBower v. Spencer, 2021 WL 4887976 (N.D. Iowa 2021) 24

Dine v. Williams, 830 S.W.2d 453 (Mo. Ct. App. 1992) 19

Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.,
2022 WL 3440703, (Iowa Ct. App. 2022) 24, 25

Est. of Harris v. Papa John's Pizza, 679 N.W.2d 673 (Iowa 2004) 14, 15, 24

Godar v. Edwards, 588 N.W.2d 701 (Iowa 1999) 14, 23, 24, 31

Hantsbarger v. Coffin, 501 N.W.2d 501 (Iowa 1993) 29

Kastler v. Iowa Methodist Hosp., 193 N.W.2d 98 (Iowa 1971) 21, 22

Kennis v. Mercy Hosp. Med. Ctr.,
491 N.W.2d 161 (Iowa 1992) 16, 19, 20, 21, 23

Landes v. Women's Christian Ass'n,
504 N.W.2d 139 (Iowa Ct. App. 1993) 21, 22

MacPete v. Bolomey, 185 S.W.3d 580, 586 (Tex. App. 2006) 19

Mass v. Bartholomew, 28 So. 3d 520 (La. Ct. App. 2009) 19

Morrow v. United States, 2021 WL 4347682 (N.D. Iowa 2021) 29, 30

Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990) 20

Palms W. Hosp. Ltd. P'ship v. Burns,
83 So. 3d 785 (Fla. Dist. Ct. App. 2011) 17, 19, 20

Ray v. Scot. Rite Children's Med. Ctr., Inc., 555 S.E.2d 166 (Ga. App. 2001) 17

Rieder v. Segal, 959 N.W.2d 423 (Iowa 2021) 18, 19, 20

Schneider v. Jennie Edmundson Mem'l Hosp.,
2021 WL 1016599 (Iowa Ct. App. 2021) 29

Schmitt v. Floyd Valley Healthcare,
2021 WL 3077022 (Iowa Ct. App. 2021) 16, 23, 24, 25, 29

Shearer v. Hirschbach Motor Lines, Inc.,
2022 WL 2317443 (N.D. Iowa 2022) 15, 23, 24

Struck v. Mercy Health Servs.-Iowa Corp., 973 N.W.2d 533 (Iowa 2022) .....passim

Thompson v. Embassy Rehab. & Care Ctr.,
604 N.W.2d 643 (Iowa 2000) 16, 21, 22

Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009) 15, 23, 25, 31

Wolfe v. Shenandoah Med. Ctr., 2022 WL 2160449 (Iowa Ct. App. 2022) ...passim

Wright v. Univ. Hosp. of Cleveland, 563 N.E.2d 361 (Ohio Ct. App. 1989*)* 19

Zaw v. Birusingh, 974 N.W.2d 140 (Iowa Ct. App. 2021) 20

STATUTES CITED

Iowa Code § 4.1 30

Iowa Code § 135P.1 27

Iowa Code § 147.135 23

Iowa Code § 147.136A 27

Iowa Code § 147.140 .....passim

Iowa Code § 668.11 30

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (11th ed. 2019) 27

Iowa R. App. P. 6.1101 8

Iowa R. Evid. 5.801 23

Iowa R. Evid. 5.802 23

Iowa R. Evid. 5.803 23

Iowa R. Evid. 5.804 23

STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. Whether the District Court correctly held that Iowa Code section 147.140 applied to Plaintiff's negligent hiring, retention, and supervision claims.

Iowa Code § 147.140
Struck v. Mercy Health Servs.-Iowa Corp., 973 N.W.2d 533 (Iowa 2022)
Wolfe v. Shenandoah Med. Ctr., 2022 WL 2160449 (Iowa Ct. App. 2022)

ROUTING STATEMENT

This case presents the application of existing legal principles, specifically with respect to the applicability of the certificate of merit affidavit requirements, pursuant to Iowa Code section 147.140, to negligent hiring, retention, and supervision of professional staff claims against health care professionals.[1] *See, e.g.*, *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 544 (Iowa 2022); *Wolfe v. Shenandoah Med. Ctr.*, 2022 WL 2160449, at *3 (Iowa Ct. App. 2022) (final publication decision pending). Therefore, the Supreme Court should appropriately transfer it to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

In the 2017 legislative session, the Iowa Legislature made various amendments and additions to the statutes governing medical malpractice claims in Iowa Code Chapter 147. Among the changes was the enactment of Iowa Code section 147.140, which "provides that the plaintiff in a medical malpractice action requiring expert testimony must file a certificate of merit signed by a qualified expert within sixty days of the defendant's answer." *Struck*, 973 N.W.2d at 538 (citing Iowa Code § 147.140(1)). A certificate of merit is required if a plaintiff asserts "a cause

[1] Plaintiffs' specific allegations suggest that Smith P.C. and Tri-State should have terminated Dr. Smith upon being made aware of complaints and concerns during his tenure of employment. Accordingly, Defendants will hereinafter refer to these claims solely as "negligent retention," for sake of simplicity.

of action for which expert testimony is necessary to establish a prima facie case." Iowa Code § 147.140(1)(a).

The "legislative goal" of the statute is "to enable healthcare providers to quickly dismiss professional negligence claims that are not supported by the requisite expert testimony." *Struck*, 973 N.W.2d at 541. Iowa Code section 147.140 "applies to causes of action that accrue on or after July 1, 2017." Iowa Code § 147.140. The failure to substantially comply with its requirements "*shall* result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case." Iowa Code § 147.140(6) (emphasis added).

Plaintiff's Amended Petition, filed February 5, 2020, asserts medical negligence and failure to provide informed consent claims against Defendant, Adam B. Smith, M.D. ("Dr. Smith"). App. 150–156. These claims arose from a breast reduction surgery, performed by Dr. Smith on September 20, 2017, and a follow-up procedure performed on June 20, 2019. App. 150. Plaintiff claims that Defendants, Adam Smith, M.D., P.C. ("Smith P.C."); and Tri-State Specialists, LLP ("Tri-State"), are vicariously liable for these claims. *Id.* at Counts VI–IX. Plaintiff also alleges that Smith P.C. and Tri-State were directly liable for negligently retaining Dr. Smith. App. 157–158, 160–161. This appeal centers around Plaintiff's negligent retention claims.

On February 24, 2020, a certificate of merit affidavit was filed by Dr. Richard Marfuggi ("Dr. Marfuggi"). App. 177–178. Dr. Marfuggi alleged that Dr. Smith breached the standard of care with respect to the September 20, 2017 surgical procedure. App. 178. Plaintiff designated Dr. Marfuggi as her sole expert witness. In his report, Dr. Marfuggi also only provides opinions on the care by Dr. Smith. App. 270. Neither the certificate of merit affidavit nor the report opines that Smith P.C. and Tri-State negligently retained Dr. Smith. App. 270; App. 177–178.

On December 15, 2021, Defendants moved for partial summary judgment on Plaintiffs' negligent retention claims. Defendants contended that expert testimony is required to prove a prima facie case of negligent retention of professional staff against health care providers such as Smith P.C. and Tri-State. *Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *3. The requirement for expert testimony means a certificate of merit is needed for these claims. *See* Iowa Code § 147.140(1)(a). Pursuant to the statute, "[f]ailure to substantially comply" with the certificate of merit requirements "*shall result*, upon motion, *in dismissal with prejudice* of each cause of action as to which expert witness testimony is necessary to establish a prima facie case." Iowa Code § 147.140(6) (emphasis added); *see also Struck*, 973 N.W.2d at 544 (affirming dismissal of negligent retention claims related to professional staff employed by a health care provider for failure to comply with certificate of merit requirements).

On February 4, 2022, the Honorable Judge Roger L. Sailer granted Defendants' Motion for Partial Summary Judgment from the bench. App. 263. Judge Sailer concluded that expert testimony was required both with respect to whether Smith P.C. and Tri-State breached the standard of care by retaining Dr. Smith and whether there is a sufficient causal connection between any such breach and Plaintiff's claimed damages. App. 262 (referencing Iowa Code § 147.140). Judge Sailer entered a written Ruling consistent with his findings on the record after the hearing concluded. App. 145–146.

Plaintiffs' lawsuit is one of several currently proceeding against these Defendants, alleging that Dr. Smith's treatment fell below the standard of care and that Smith P.C. and Tri-State were negligent for retaining Dr. Smith, at the time he provided the medical care at issue. Defendants filed substantially similar partial summary judgment motions in each of those other cases. The district court's Ruling in this case is consistent with three other district court Rulings on these same facts. *Hummel v. Smith, et al.*, Woodbury County Case No. LACV191517 (District Court Ruling, Jan. 11, 2022); *Hilts v. Smith, et al.*, Woodbury County Case No. LACV191256 (District Court Ruling, Jan. 18, 2022); *Hanner, et al. v. Smith, et al.*, Woodbury County Case No. LACV191581 (District Court Ruling, Feb. 18, 2022).

Plaintiff filed an Application for Interlocutory Appeal and Stay of Further Proceedings on March 2, 2022. Plaintiff relied heavily on a district court Ruling,

currently subject to its own interlocutory appeal, which was an outlier on these facts and against the weight of appellate authority, finding that a certificate of merit was not required. Pl.'s Appl. Interlocutory Appeal at 6–7 (citing *Jorgensen v. Smith, et al.*, Woodbury County Case No. LACV19192198 (District Court Ruling, Feb 2, 2022)). Defendants did not resist Plaintiff's Application. On June 22, 2022, this Court entered an Order granting Plaintiff's Application for Interlocutory Appeal and Stay of Further Proceedings.

STATEMENT OF THE FACTS

Dr. Smith was an employee of Smith P.C. and Tri-State. Pl.'s Br. at 5. On July 31, 2017, Dr. Matthew Steele ("Dr. Steele")—a physician formerly employed by Tri-State—sent a letter to Tri-State, alleging misconduct against Dr. Smith. *Id.* at 6. The only concrete allegation of medical negligence against Dr. Smith referenced in Dr. Steele's letter resulted in a defense verdict for Dr. Smith. *Tarsila Ramirez, et al. v. Adam Smith, MD, et al.*, Woodbury County Case No. LACV180143 (Verdict Form, August 26, 2019).

Plaintiff underwent a breast reduction surgery, performed by Dr. Smith, on September 20, 2017. App. 150. Plaintiff alleges that Dr. Smith negligently performed this procedure and a June 20, 2019 follow-up procedure. *See* App. 150. On February 5, 2020, Plaintiff filed an Amended Petition, alleging claims in connection with the care provided by Dr. Smith and direct claims against Smith P.C.

and Tri-State, alleging negligence in retaining Dr. Smith. *See generally* App. 148–169.

In Plaintiff's certificate of merit, provided on February 24, 2020, Dr. Marfuggi opines that Dr. Smith "breached the standard of care with respect to the breast reduction surgeries and follow up care provided to [Plaintiff]." App. 178 Dr. Marfuggi provides no opinion regarding whether Smith P.C. and Tri-State were negligent in retaining Dr. Smith. *See generally* App. 178. Dr. Marfuggi's report, filed on October 14, 2020, similarly opines that Dr. Smith "breached the standard of care for a plastic surgeon with respect to his care and treatment of Alyssa Pratt." App. 270. The report is silent on the issue of Smith P.C.'s and Tri-State's alleged negligent retention. *See* App. 270.

In light of Plaintiffs' failure to comply with the certificate of merit affidavit requirements as to the negligent retention claims, Defendants moved for partial summary judgment on December 16, 2021. *See* App. 198–201. In resisting summary judgment, Plaintiffs rely solely on the allegations contained in Dr. Steele's letter in support of their claim that Tri-State knew or should have known of allegations of wrongdoing which would warrant Dr. Smith's termination on the relevant dates he provided care to Plaintiff.[2] Plaintiff further argued that the breach of Smith P.C. and

[2] Before the district court and again in its Brief, Plaintiff routinely relies upon information about Dr. Smith which came to light after Dr. Smith treated Plaintiff. *See* Pl.'s Br. at 7–9, 12–13 (addressing facts which came to light in 2020 and 2021).

Tri-State was within the realm of lay knowledge and questioned the applicability of Iowa Code section 147.140 to negligent retention claims generally.

ARGUMENT

I. The District Court Correctly Held That Expert Testimony is Needed to Establish Plaintiff's Negligent Retention of Professional Staff Claims.

A. The only relevant facts are those which Defendants knew or should have known at the time Dr. Smith treated Plaintiff.

Plaintiff spills considerable ink detailing allegations of improper billing practices and other misconduct leveled against Dr. Smith in 2020 and 2021. *See id.* The allegations of improper Medicare/Medicaid billing practices in Michigan were charged in late 2019, after Plaintiff received the care at issue and after Dr. Smith left Tri-State. *See id.* at 9. The Iowa Board of Medicine made allegations against Dr. Smith in November 2020. *Id.* at 8. A civil judgment related to the Medicare/Medicaid billing practices was entered in late 2021. Pl.'s Br. at 9, 12.

To recover on a negligent retention claim, a plaintiff must show that the employer knew or should have known of the unfitness "at the time the employee engaged in wrongful or tortious conduct." *Est. of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 680 (Iowa 2004). "[T]he 'knowledge' element [] concern[s] what the

---

For reasons set forth in further detail below, these facts are irrelevant to Plaintiffs' negligent supervision claims. *See Godar v. Edwards*, 588 N.W.2d 701, 708–09 (Iowa 1999) (to recover on a negligent retention claim, the plaintiff must show the employer knew or should have known of the employee's unfitness at the time of the alleged wrong).

employer knew at the time of the alleged wrongful conduct by the employee." *Shearer v. Hirschbach Motor Lines, Inc.*, 2022 WL 2317443, at *20 (N.D. Iowa 2022). The "core predicate" for imposing liability for negligent retention is the foreseeability of the harm based on what the employer knew or should have known about the allegedly unfit employee. *See Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 40–41 (Iowa 2018) (citing *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009)).

Consistent with the relevant standard, the knowledge of Smith P.C. and Tri-State is determined by what was known at the time Plaintiff alleges Dr. Smith's treatment fell below the standard of care. *Harris*, 679 N.W.2d at 680. Plaintiff's reliance on allegations against Dr. Smith *after* his care of Plaintiff had concluded is misplaced. Defendant acknowledges that it was made aware of the existence of these allegations by way of Dr. Steele's July 31, 2017 letter. *See* Pl.'s Br. at 9. However, those allegations and anything Defendants should have otherwise known at the time of Plaintiff's care serves as the entire factual basis upon which Plaintiff can rely in support of her position that Dr. Smith was negligently retained. *Harris*, 679 N.W.2d at 680.

B. Based on the relevant facts, expert testimony is required to prove Plaintiff's negligent retention of professional staff claims.

i. Plaintiff's negligent retention of professional staff claims are not within the realm of lay knowledge.

When considering only the facts that were know or should have been known to Smith P.C. and Tri-State at the time Dr. Smith provided care to Plaintiff, Plaintiff's negligent retention claims are not within the realm of lay knowledge. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *3. Expert testimony is required in claims against health care providers where an issue is "beyond the common knowledge of laypersons and requires expert evidence." *Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 166 (Iowa 1992). "The test for determining if expert testimony is required is whether, when the primary facts are accurately and intelligently described, the jurors are as capable of comprehending the primary facts and drawing correct conclusions from them as an expert." *Schmitt v. Floyd Valley Healthcare*, 2021 WL 3077022, at *1 (Iowa Ct. App. 2021) (citing *Thompson v. Embassy Rehab. & Care Ctr.*, 604 N.W.2d 643, 646 (Iowa 2000)).

Consistent with these principles, this Court recently held in *Struck* that the district court properly dismissed claims alleging negligent hiring, retention, or supervision of professional staff because the plaintiff failed to offer the required expert testimony. *Id.* at 539, 544. The Court noted that its determination that expert testimony is required for such claims aligns Iowa with other states which have similarly held expert testimony is required for such claims; triggering additional filing requirements akin to a certificate of merit affidavit. *See Struck*, 973 N.W.2d at

544 (citing *Palms W. Hosp. Ltd. P'ship v. Burns*, 83 So. 3d 785, 788 (Fla. Dist. Ct. App. 2011); *Ray v. Scot. Rite Children's Med. Ctr., Inc.*, 555 S.E.2d 166, 168–69 (Ga. App. 2001)) ("[o]ther courts have held pre-suit requirements and limitations including a certificate of merit apply to the patient's negligent retention claims against the hospital").

Notably, the *Burns* and *Ray* cases cited approvingly by this Court provide that expert testimony is needed specifically on the issue of a health care provider's negligence in retaining professional staff. *See id.* When a health care provider exercises its duty "to select and review health care personnel," a professional or modified standard of care applies. *See Burns*, 83 So. 3d at 788–89. An expert opinion regarding deficiency in the treatment provided, though sufficient for purposes of vicarious liability, does not satisfy the requirement of expert testimony for a direct negligence claim arising out of retention of professional staff. *See id.*

Recently, the Iowa Court of Appeals, relying on *Struck*, affirmed a district court's dismissal of another plaintiff's negligent supervision of professional staff claims against a health care provider. *Wolfe*, 2022 WL 2160449, at *3. *Wolfe* observed the multitude of concepts which a factfinder would need to be knowledgeable of to adjudicate a negligent supervision claim in this context, including, but not limited to:

- the medical industry's standards for supervision of a medical professional treating a patient with plaintiff's condition;

- what is and is not acceptable in the supervision of said medical professional;
- an understanding of the patient's condition and why particular actions are taken or not taken;
- an understanding of how actions and procedures, whether taken or not taken, affect the patient's condition;
- whether permitting or prohibiting those actions in their supervision constitutes negligence;
- whether defendant's adherence or deviation from this standard constitutes negligence;
- sufficient comprehension of the situation to determine if and how the alleged negligent supervision did or did not cause or contributorily cause the injury.

Id. at *2. These concepts are not within the ordinary knowledge of laypersons and instead require expert testimony. *Id.* at *2–3.

The result reached in *Struck* and *Wolfe* is consistent with this Court's approach regarding the analogous claim of negligent credentialing against a hospital, as well. *See Rieder v. Segal*, 959 N.W.2d 423, 431 (Iowa 2021) (quoting *Brookins v. Mote*, 292 P.3d 347, 364 (Mont. 2012) ("*[t]he plaintiff in a negligent credentialing claim must present expert testimony* establishing that the defendant deviated from the applicable standard of care to raise a genuine issue of material fact") (emphasis added). This result is also consistent with that of numerous other courts which have found expert testimony necessary to establish the standard of care and breach thereof

as to the employment of medical professionals.[3]

The result reached by the district court, concluding that Plaintiff's claims are not within the realm of lay knowledge, is consistent with the aforementioned precedent. The determination of whether Smith P.C. and Tri-State should have terminated Dr. Smith, based on what it knew as of September 20, 2017 or June 20, 2019, is "beyond the common knowledge of laypersons and requires expert evidence." *Kennis*, 491 N.W.2d at 166. Whether the allegations of malpractice and improper billing practices which were known or should have been known at the time of treatment were of the quantity and quality that Dr. Smith should have been terminated requires professional judgment. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *2–3; *Burns*, 83 So. 3d at 788–89.

An exception to the requirement for expert testimony for claims against health

[3] *See Mass v. Bartholomew*, 28 So. 3d 520, 522 (La. Ct. App. 2009) (holding plaintiff's claim that a hospital was negligent in training or supervising its employees in dealing with back surgery patients required expert testimony to establish the hospital's standard of care and breach); *MacPete v. Bolomey*, 185 S.W.3d 580, 586 (Tex. App. 2006) (holding claim against psychiatric practice group for negligent training and supervision of psychiatrist required expert testimony to establish the appropriate standard of care); *Dine v. Williams*, 830 S.W.2d 453, 456 (Mo. Ct. App. 1992) (noting the duty of an attending physician to supervise a resident is "a technical subject outside the common knowledge and experience of a jury" which requires expert testimony because the "amount of attention needed depends on the custom or practice of ordinarily diligent and careful physicians acting under the same or similar circumstances."); *Wright v. Univ. Hosp. of Cleveland*, 563 N.E.2d 361, 366 (Ohio Ct. App. 1989) (holding negligent supervision claim against attending physician required expert testimony to establish the standard of care and breach of that standard).

care providers applies where the "lack of care is so obvious as to be within the comprehension of a layperson." *Oswald v. LeGrand*, 453 N.W.2d 634, 636 (Iowa 1990). Such cases involve "non-medical judgment." *See Zaw v. Birusingh*, 974 N.W.2d 140, 164 (Iowa Ct. App. 2021). In contrast, the concepts of which a factfinder would have to be knowledgeable of for a negligent supervision claim is extensive. *Wolfe*, 2022 WL 2160449, at *2.

Medical professionals are often accused of improper coding on a bill or negligence in treating a patient. Is one allegation of improper billing or malpractice enough to warrant termination? Five? Ten? Twenty? Making this determination requires the understanding and application of concepts not within the knowledge of laypersons, such that expert testimony is required. *See id.*

Expert testimony is also required to demonstrate the merits of the prior malpractice claims and any connection between those claims and Dr. Smith's ability to competently treat Plaintiff. *See Kennis*, 491 N.W.2d at 166; *Rieder*, 959 N.W.2d at 430. Allegations related to billing practices would similarly require expert testimony to support a connection between those allegations and the claim that Tri-State breached the standard of care by failing to terminate Dr. Smith. The correlation, if any, between the allegations related to billing and Dr. Smith's competence to provide Ms. Jorgensen treatment is beyond the common knowledge of laypersons and would require expert testimony. *See Kennis*, 491 N.W.2d at 166. Hence, *Struck*

and *Wolfe* correctly held that expert testimony is needed to support this type of claim. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *2–3.

ii. Plaintiff's negligent retention of professional staff claims do not arise out of a nonmedical, administrative, or ministerial act.

Plaintiff's alternative position that her negligent retention claims arise out of a nonmedical, administrative, or ministerial act is inconsistent with Iowa precedent defining nonmedical or routine care. *See Thompson*, 604 N.W.2d at 645–46; *Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 102 (Iowa 1971); *Landes v. Women's Christian Ass'n*, 504 N.W.2d 139, 141–42 (Iowa Ct. App. 1993).

The nonmedical or routine exception to the requirement for expert testimony is narrowly construed. *See Thompson* , 604 N.W.2d at 645–46. *Thompson* held that expert testimony was required for a plaintiff's claim that a care facility was negligent for failing to reposition his body so as to relieve pressure from bedsores. *Id.* at 646. Despite "[s]uch acts on the surface appear[ing] to have been ministerial," the Court nevertheless held that the issue of whether forced repositioning was proper required expert testimony. *Id.* The cases recognizing the exception were slip and fall cases where expert testimony was not needed because the defendant health care provider was not engaged in professional activities. *See Kastler*, 193 N.W.2d at 102; *Landes*, 504 N.W.2d at 141–42.

The decision to retain Dr. Smith involved far greater professional judgment than a decision related to repositioning a patient in bed. *Compare Thompson* , 604 N.W.2d at 645–46 *with Wolfe*, 2022 WL 2160449, at *2. Consistent with the specialized fact finding necessary to support claims of negligent retention of professional staff against health care providers, *Struck* and *Wolfe* found that expert testimony was required. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *2–3. The district court's Ruling is consistent with this finding and Plaintiff's contrary interpretation of this exception should be rejected.

iii. Expert witness testimony is needed on the issues of standard of care and causation/scope of liability.

As set forth above, expert witness testimony is required for Plaintiff to show Smith P.C. and Tri-State breached the standard of care by retaining Dr. Smith. The decisions of health care providers regarding the retention medical professionals is not within the realm of lay knowledge. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *3. Retaining such professionals is similarly not within the standard of nonmedical, routine, administrative, or ministerial acts set forth by this Court. *Compare id. with Kastler*, 193 N.W.2d at 102, *and Landes*, 504 N.W.2d at 141–42.

However, even if the allegations predating the care of September 20, 2017 and June 20, 2019 were sufficient to negate the need for expert testimony on the standard

of care and breach,[4] Plaintiff must still show that Dr. Smith's "incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries." *Godar*, 588 N.W.2d at 708. This includes both factual cause and scope of liability. *See Thompson*, 774 N.W.2d at 836–40; *Shearer*, 2022 WL 2317443, at *20.

Plaintiff cannot show a causal connection between Dr. Steele's allegations of negligence against Dr. Smith and Plaintiff's own alleged injuries, without expert testimony. *See Kennis*, 491 N.W.2d at 166. Furthermore, Plaintiff's claimed damages fall outside the scope of Smith P.C.'s and Tri-State's liability related to Dr. Steele's allegations with respect to billing practices. *See Godar*, 588 N.W.2d at 708–10; *Thompson*, 774 N.W.2d at 837–40. Therefore, Plaintiffs' claims fail, even if the standard of care and breach could be established in the absence of expert testimony.

Those cases where the standard of care and breach need not be established by expert testimony because the breach was so obvious, expert testimony may still be necessary on the issue of factual causation. *See Bazel v. Mabee*, 576 N.W.2d 385, 387–88 (Iowa Ct. App. 1998); *Schmitt*, 2021 WL 3077022, at *2. Lay jurors are not as capable as experts of determining "if and how the alleged negligent supervision did or did not cause or contributorily cause the injury." *Wolfe*, 2022 WL 2160449,

[4] This presumption is obviously incorrect. Dr. Steele's allegations would not be admissible at trial to prove Tri-State negligently retained Dr. Smith because the letter meets the definition of "peer review records." *See* Iowa Code § 147.135(2). Moreover, Dr. Steele's letter and the allegations contained therein are hearsay for which no exception applies. *See* Iowa R. Evid. 5.801–5.804.

at *2. Though the certificate of merit need not opine on the issue of causation, a certificate of merit is required when expert testimony will ultimately be needed on the issue of causation, as causation is a required element of a plaintiff's prima facie case against a health care provider. *Schmitt*, 2021 WL 3077022, at *2; *Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.*, 2022 WL 3440703, at *2–3 (Iowa Ct. App. 2022).

When a plaintiff asserting negligent retention presents insufficient evidence regarding the employee's alleged foreseeable incompetence being a proximate cause of their resulting injuries, the claim fails as a matter of law. *See, e.g.*, *Godar*, 588 N.W.2d at 708–10; *Harris*, 679 N.W.2d at 680; *Bandstra*, 913 N.W.2d at 40–41; *Shearer*, 2022 WL 2317443, at *20. To succeed on such a claim, a plaintiff must prove not only that the employer knew or should have known of the employee's unfitness at the time of retention, but also that the employee's incompetent characteristic "proximately caused the resulting injuries." *Id.* at 708. A finding of proximate cause requires a finding that the injuries suffered by plaintiff fall within the scope of the risk of the defendants' acts or omissions. *Thompson*, 774 N.W.2d at 840; *see also DeBower v. Spencer*, 2021 WL 4887976, at *4 (N.D. Iowa 2021) (quoting *Bandstra*, 913 N.W.2d at 40) (discussing "post-*Thompson*" foreseeability standard with respect to negligent hiring and supervision claims).

The factual correlation between the prior allegations of malpractice and Plaintiff's claims against Smith P.C. and Tri-State cannot be established without expert testimony. Thus, a certificate of merit affidavit was required for the negligent retention claims. *Schmitt*, 2021 WL 3077022, at *2; *Butterfield*, 2022 WL 3440703, at *2–3. The damages alleged by Plaintiff also fall outside the scope of the risk of any negligent act or omission of Tri-State in failing to terminate Dr. Smith based on the billing allegations. *See Thompson*, 774 N.W.2d at 538.[5]

The district court properly recognized the significance of causation in its certificate of merit affidavit analysis. Tr. Mot. Partial Summ. J. at 9. Judge Sailer's analysis of the causation issue was affirmed in *Schmitt* and was again cited as being the proper analysis in *Butterfield*. *Schmitt*, 2021 WL 3077022, at *2; *Butterfield*, 2022 WL 3440703, at *2–3 (citing *Schmitt*, 2021 WL 3077022, at *2). Plaintiff cannot prove causation as to her negligent retention claims, certainly not without requisite expert testimony, and the district court's Ruling consistent with Iowa precedent should be affirmed.

[5] The example provided in *Thompson* and lifted from the Restatement (Third) is illustrative here. Just like damages related to a child dropping a loaded gun on their foot, damages related to medical treatment alleged by Plaintiffs do not fall within the risk that allegedly made Tri-State's actions negligent—i.e., retaining a physician accused of improper billing practices. *See id.* (citing Restatement (Third) of Torts: Phys. & Emot. Harm § 29, cmt. d, illus. 3).

II. The Requirement of Expert Testimony Triggers Iowa Code Section 147.140 and Results in the Mandatory Dismissal with Prejudice of Plaintiff's Negligent Retention of Professional Staff Claims.

The certificate of merit affidavit requirements of Iowa Code section 147.140 apply to:

- any action for personal injury or wrongful death;
- against a health care provider;
- based upon the alleged negligence in the practice of that profession or occupation or in patient care;
- which includes a cause of action for which expert testimony is necessary to establish a prima facie case.

Iowa Code § 147.140(1)(a). As addressed above, expert testimony is required to establish a prima facie case of negligent retention against Smith P.C. and Tri-State, and no exception to this requirement applies. *See supra* at § I. Because Plaintiff's negligent retention claims are an action for personal injury, against a health care provider, and is based on alleged negligence in Tri-State's "practice of that profession or occupation or in patient care," all triggering requirements of Iowa Code section 147.140 are satisfied. *See* Iowa Code § 147.140(1)(a).

Plaintiff seeks to recover damages for physical injuries associated with the September 20, 2017 procedure and June 20, 2019 follow-up procedure performed by Dr. Smith, in connection with her negligent retention claims against Smith P.C. and Tri-State. App. 158, 161. This satisfies the first element of Iowa Code section

147.140(1)(a), as Plaintiffs' claims are "an action for personal injury." Iowa Code § 147.140(1)(a).

"For purposes of [Iowa Code § 147.140], 'health care provider' means the same as defined in section 147.136A." Iowa Code § 147.140(7). Iowa Code section 147.136A defines "health care provider" to include health facilities, professional corporations owned by persons licensed to practice medicine, and any other entity licensed to administer health care in its ordinary course of business. Iowa Code § 147.136A(1)(a). A "health facility" is further defined under Iowa Code to include "a clinic." Iowa Code § 135P.1(3). Tri-State was a professional corporate entity, owned by its physician partners, which operated a clinic and was licensed to administer health care at the time Dr. Smith provided care to Plaintiff. As a result, Plaintiff's negligent retention claims against Smith P.C. and Tri-State are against "health care provider[s]." *See* Iowa Code § 147.140(1)(a).

Plaintiff's negligent retention claims are further "based upon the alleged negligence in the practice of [Smith P.C.'s and Tri-State's] profession or occupation or in patient care." *See id.* While "occupation" is nowhere specifically defined in Iowa Code, in common usage, it means "[a]n activity or pursuit in which a person engages; esp., a person's usual or principal work or business." *Occupation*, BLACK'S LAW DICTIONARY (11th ed. 2019). When the words of a statute are not defined by

the legislature, courts properly rely on dictionary definitions and common usage. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 519 (Iowa 2012).

Smith P.C.'s and Tri-State's alleged negligent retention of Dr. Smith, as described in Plaintiff's Petition, plainly falls within the definition set forth above. Plaintiff alleges that Smith P.C. and Tri-State "fail[ed] to exercise reasonable care in hiring, supervising, employing, and/or continuing to employ [Dr. Smith]." App. 157–158, 160–161. By Plaintiffs' own admission, the supervising of physicians such as Dr. Smith is part of what entities such as Smith P.C. and Tri-State do—part of their "principal work or business" such that it is part of the "occupation" of these entities. *See* Iowa Code § 147.140(1)(a). Accordingly, this final element triggering the certificate of merit affidavit requirements is satisfied.

When the certificate of merit affidavit requirements apply, a plaintiff must "substantially comply" with those requirements. Iowa Code § 147.140(6). A plaintiff's failure to substantially comply "shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case." *Id.* The sixty (60) days after the defendant's answer plaintiff is afforded to substantially comply with these requirements may be extended "for good cause shown *and* in response to a motion filed *prior to* the expiration of the time limits." Iowa Code § 147.140(4) (emphasis added); *see also McHugh v. Smith*, 966 N.W.2d 285, 288 (Iowa Ct. App. 2021) (court

may only extend deadline, in absence of party agreement "for good cause shown and in response to a motion filed prior to the expiration of the time limits").

"Substantial compliance means compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *McHugh*, 966 N.W. at 288–89 (internal quotations omitted) (quoting *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993)). Gauging substantial compliance requires a court to "identify the legislature's purpose in enacting section 147.140." *Id.* at 289. Said purpose is "to enable healthcare providers to quickly dismiss professional negligence claims that are not supported by the requisite expert testimony." *Struck*, 973 N.W.2d at 541.

Failure to file a certificate of merit affidavit or move for an extension within the sixty days is itself a failure to substantially comply with Iowa Code section 147.140(1). *Schneider v. Jennie Edmundson Mem'l Hosp.*, 2021 WL 1016599, at *2 (Iowa Ct. App. 2021). A plaintiff fails to substantially comply by simply attaching to their petition medical records from other physicians which they claim provide that those physicians are familiar with the applicable standard of care and allege that the standard was breached by the health care provider named as a defendant. *Schmitt*, 2021 WL 3077022, at *2–3. A plaintiff's claim having colorable merit similarly does not amount to substantial compliance. *Morrow v. United States*, 2021 WL 4347682, at *4–5 (N.D. Iowa 2021).

In this case, Plaintiff has not at all complied with the certificate of merit affidavit requirements, much less substantially so. *See* Iowa Code § § 147.140(1)(a), (6). Plaintiff's negligent retention claims against Smith P.C. and Tri-State required such compliance. *See* Iowa Code § 147.140(1)(a). Plaintiffs failed to avail themselves of the relief provided by the statute by not moving for an extension of the deadline to comply with the certificate of merit affidavit requirements within the time frame required. *See* Iowa Code § 147.140(4).

As a result of Plaintiff's failure to substantially comply with the requirements and failure to make a timely request for an extension, the district court was without discretion and was required to dismiss Plaintiff's negligent retention claims, with prejudice. *See* Iowa Code § 147.140(6). The use of the mandatory "shall" in section 147.140(6) is dispositive. *See* Iowa Code § 4.1(30)(a) ("[u]nless otherwise specifically provided by the general assembly . . . [t]he word 'shall' imposes a duty"). "A plaintiff's failure to comply with the requirements of Section 147.140(1) *compels the court, upon defendant's motion, to dismiss the plaintiff's complaint with prejudice.*" *Morrow*, 2021 WL 4347682, at *5 (emphasis added). The district court properly applied the clear dictates of Iowa Code section 147.140 and dismissed Plaintiff's negligent retention claims with prejudice.[6]

[6] In addition, Plaintiffs failed to certify an expert witness in support of the negligent retention claims within 180 days of Defendants' Answer, as required by Iowa Code section 668.11. *See* Iowa Code § 668.11(1)(a).

CONCLUSION

Expert testimony is required on these facts to show that Smith P.C. and Tri-State breached the standard of care and negligently retained Dr. Smith. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *3. Expert testimony is also needed to establish what, if any, causal connection exists between Dr. Smith's alleged incompetence—according to the allegations known or which should have been known at the times he treated Plaintiff—and the foreseeability that such incompetence would result in Plaintiff's alleged damages. *See Godar*, 588 N.W.2d at 708–10; *Thompson*, 774 N.W.2d at 837–40; *Bandstra*, 913 N.W.2d at 40–41.

Plaintiff's negligent retention claims are for personal injury, against health care providers, and allege negligence in Smith P.C.'s and Tri-State's practice of their occupation. *See* Iowa Code § 147.140(1)(a). Satisfying these criteria triggered the certificate of merit affidavit requirements. *See id.* Plaintiff did not substantially comply with these requirements. *See* Iowa Code § 147.140(6). As a result, Plaintiff's negligent retention claims are subject to mandatory dismissal, with prejudice. *See id.* The district court's determination that that the certificate of merit affidavit requirements apply to Plaintiff's negligent retention claims was the correct outcome and aligns with established Iowa law. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *3.

REQUEST FOR ORAL ARGUMENT

The Defendants-Appellees requests that this case be submitted with oral argument.

DATED this 28th day of November, 2022.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright

JEFF W. WRIGHT, AT0008716
ZACK A. MARTIN, AT0014476
1128 Historic 4th Street
P.O. Box 3086
Sioux City, Iowa 51102
Phone: (712) 255-8838
Fax: (712) 258-6714
Jeff.Wright@heidmanlaw.com
Zack.Martin@heidmanlaw.com
ATTORNEYS FOR DEFENDANTS ADAM B. SMITH, M.D.; ADAM SMITH, P.C.; AND TRI-STATE SPECIALISTS, LLP

CERTIFICATE OF COMPLIANCE

Defendants-Appellees, Adam B. Smith, M.D.; Adam Smith, M.D., P.C.; and Tri-State Specialists, LLP, pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 5,804 words of a 14-point proportionally spaced Times New Roman font and it complies with the 14,000-word maximum permitted length of the brief.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright

JEFF W. WRIGHT, AT0008716
ZACK A. MARTIN, AT0014476
1128 Historic 4th Street
P.O. Box 3086
Sioux City, Iowa 51102
Phone: (712) 255-8838
Fax: (712) 258-6714
Jeff.Wright@heidmanlaw.com
Zack.Martin@heidmanlaw.com
ATTORNEYS FOR DEFENDANTS ADAM B. SMITH, M.D.; ADAM SMITH, P.C.; AND TRI-STATE SPECIALISTS, LLP

CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file the attached Defendants-Appellees' Proof Brief with the Clerk of the Supreme Court by using the EDMS filing system.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright

JEFF W. WRIGHT, AT0008716
ZACK A. MARTIN, AT0014476
1128 Historic 4th Street
P.O. Box 3086
Sioux City, Iowa 51102
Phone: (712) 255-8838
Fax: (712) 258-6714
Jeff.Wright@heidmanlaw.com
Zack.Martin@heidmanlaw.com
ATTORNEYS FOR DEFENDANTS ADAM B. SMITH, M.D.; ADAM SMITH, P.C.; AND TRI-STATE SPECIALISTS, LLP

PROOF OF SERVICE

I, the undersigned, hereby certify that I did serve the attached Defendants-Appellees' Proof Brief on all other parties electronically utilizing the EDMS filing system, which will provide notice to:

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright
JEFF W. WRIGHT, AT0008716
ZACK A. MARTIN, AT0014476
1128 Historic 4th Street
P.O. Box 3086
Sioux City, Iowa 51102
Phone: (712) 255-8838
Fax: (712) 258-6714
Jeff.Wright@heidmanlaw.com
Zack.Martin@heidmanlaw.com
ATTORNEYS FOR DEFENDANTS
ADAM B. SMITH, M.D.; ADAM SMITH, P.C.; AND TRI-STATE SPECIALISTS, LLP

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of preparing the foregoing Defendants-Appellees' Proof Brief was the sum of $0.00 exclusive of service tax, postage, and delivery charges.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jeff W. Wright

JEFF W. WRIGHT, AT0008716
ZACK A. MARTIN, AT0014476
1128 Historic 4th Street
P.O. Box 3086
Sioux City, Iowa 51102
Phone: (712) 255-8838
Fax: (712) 258-6714
Jeff.Wright@heidmanlaw.com
Zack.Martin@heidmanlaw.com
ATTORNEYS FOR DEFENDANTS ADAM B. SMITH, M.D.; ADAM SMITH, P.C.; AND TRI-STATE SPECIALISTS, LLP