IN THE SUPREME COURT OF IOWA

No. 22-0576

CHARLENE JORGENSEN and MICHAEL JORGENSEN
Plaintiffs-Appellees

vs.

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

APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT CASE NO. LACV192198

THE HONORABLE JEFFREY L. POULSON
PRESIDING JUDGE

DEFNEDANTS-APPELLANTS' FINAL BRIEF

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I. Whether the District Court erred in determining that Iowa Code section 147.140 does not apply to the Jorgensens' negligent hiring, retention, and supervision claim against Tri-State Specialists, LLP.

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 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 this claim 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).

Plaintiffs' Petition, filed May 28, 2020, asserts medical negligence and failure to provide informed consent claims against Defendant, Adam B. Smith, M.D. ("Dr. Smith"). App. 10-13 at Counts I, II. These claims arose from a breast reconstruction performed by Dr. Smith on June 7, 2018. *See id.* Plaintiffs claim 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 App. 13-17 at Counts III, IV. Plaintiffs also allege that Tri-State was directly liable for negligently retaining Dr. Smith. *Id.* at App. 15-17 at Count IV. This appeal centers around Plaintiffs' negligent retention claims.

On June 2, 2020, Plaintiffs filed a certificate of merit affidavit from Dr. Mark Jewell ("Dr. Jewell"). App. 20-21. Dr. Jewell alleged that Dr. Smith breached the standard of care with respect to the surgical procedure. *Id.* at App. 21 at ¶ 7. On September 28, 2021, Plaintiffs designated Dr. Michael Edwards ("Dr. Edwards") as their sole expert witness. Just like Dr. Jewell, Dr. Edwards only provides opinions on the care by Dr. Smith. App. 715-718; App. 719-725. Neither the certificate of merit affidavit nor the reports of Dr. Edwards opine that Tri-State negligently retained Dr. Smith. *Id.*; App. 20-21.

On December 15, 2021, Defendants moved for partial summary judgment on Plaintiffs' negligent retention claim. Defendants contended that expert testimony is required to prove a prima facie case of negligent retention of professional staff against a health care provider such as 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 this claim. *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 2, 2022, the Honorable Judge Jeffrey L. Poulson denied Defendants' Motion for Partial Summary Judgment. App. 222. The district court cited this Court's 2012 decision in *Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681 for the proposition that "the ordinary negligence standard applie[s] [] [to] credentialing decision[s]." *Id.* at App. 221; *but see Hall*, 812 N.W.2d at 686 ("[b]ecause we have concluded the district court's judgment in favor of the defendants should be affirmed, *we find it unnecessary to address the defendants' argument that the district court should have applied a higher 'professional' standard of care*") (emphasis added); *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). The district court then concluded, relying on *Hall*, that Tri-State retaining Dr. Smith was "within the ambit of nonmedical, administrative, or ministerial acts" such that expert testimony is not required. *Id.* at App. 222. Alternatively, the district court found that the common knowledge exception for breaches where the lack of care is so obvious as to be within the comprehension of lay persons applied. *Id.*

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 Tri-State was 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 contrary to the four 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); *Pratt v. Smith, et al.*, Woodbury County Case No. LACV18774 (District Court Ruling, Feb. 4, 2022)[2]; *Hanner, et al. v. Smith, et al.*, Woodbury County Case No. LACV191581 (District Court Ruling, Feb. 18, 2022). Those district courts found that expert testimony was required on negligent retention claims, requiring a certificate of merit and the dismissal with prejudice of those plaintiffs' negligent retention claims. *See* Iowa Code § 147.140.

Despite standing alone on these facts, and against the weight of appellate authority regarding the necessity of expert testimony for claims against health care providers, the district court also denied Defendants' Motion to Reconsider its February 2 Ruling on March 9, 2022. App. 256. Defendants filed an Application for Interlocutory Review on March 29, 2022. On June 22, 2022, this Court entered an Order granting Defendants' Application for Interlocutory Review and staying the district court proceedings below.

[2] This Court granted interlocutory appeal in *Pratt* on June 22, 2022.

STATEMENT OF THE FACTS

Dr. Smith was hired by Tri-State in 2014. App. 217. Dr. Matthew Steele ("Dr. Steele") was subsequently hired by Tri-State in 2016. *Id.* at App. 218. Dr. Steele was eventually terminated from Tri-State, effective July 31, 2017. *See* Letter from Dr. Steele to Tri-State (July 31, 2017) at App. 711-712.

In March and April 2017, Dr. Steele had made allegations to Tri-State that Dr. Smith was engaged in "rampant malpractice and widespread insurance fraud". *Id.* at App. 712. Dr. Steele reiterated and expounded upon these allegations in a July 31, 2017 letter. *See id.* at App. 712-714.

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). The allegations contained in the letter of Dr. Steele, a disgruntled former employee, was the totality of known allegations of misconduct against Dr. Smith which occurred prior to his treatment of Ms. Jorgensen.[3]

[3] Before the district court, Plaintiffs routinely relied upon information about Dr. Smith which came to light after Dr. Smith treated Ms. Jorgensen on June 7, 2018. *See e.g.*, App. 92-96 (addressing facts which came to light in 2019, 2020, and 2021). For reasons set forth in further detail below, these facts are irrelevant to Plaintiffs' negligent supervision claim. *See Godar v. Edwards*, 588 N.W.2d 701, 708–09 (Iowa 1999) (to recover on a negligent supervision claim, the plaintiff must show the

Ms. Jorgensen underwent a breast reconstruction performed by Dr. Smith on June 7, 2018. App. 8 at ¶ 10. Ms. Jorgensen alleges that Dr. Smith negligently performed this procedure, specifically with respect to the placement of her right breast nipple. *See id.* at App. 8, 9 at ¶¶ 10, 17, 21.

On May 28, 2020, Plaintiffs brought this action against Defendants. *See generally id.* In addition to the direct and vicarious liability claims made in connection with the care provided by Dr. Smith, Plaintiffs assert a further claim of direct negligence against Tri-State, alleging negligence in retaining Dr. Smith. *Id.* at App. 16 at ¶ 53.

In Plaintiffs' certificate of merit, provided on May 29, 2020, Dr. Mark Jewell opines that Dr. Smith "breached the standard of care with respect to . . . [the] surgery and the follow-up care provided to Charlene Jorgensen." App. 21 at ¶ 7. Dr. Jewell provides no opinion regarding whether Tri-State was negligent in retaining Dr. Smith. *See generally* App. 20-21. The expert report of Dr. Michael Edwards, dated June 23, 2020, similarly opines that "Dr. Smith fell below the accepted standard of care in the treatment of Ms. Jorgensen," while offering no opinion as to the retention of Dr. Smith. App. 717. Dr. Edwards' supplemental report, dated February 2, 2022, is also silent on the issue of Tri-State's alleged negligent retention. App. 724-725.

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employer knew or should have known of the employee's unfitness at the time of the alleged wrong).

In light of Plaintiffs' failure to comply with the certificate of merit affidavit requirements as to the negligent retention claim, Defendants moved for partial summary judgment on December 15, 2021. *See* App. 31-34. 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 date, June 7, 2018. *See* App. 90-91.

Plaintiffs further argued that expert testimony is not needed generally to support a negligent retention of professional staff claim against a health care provider. *Id.* at App. 106-110. Alternatively, Plaintiffs claimed that the allegations of Dr. Steele make Tri-State's retention of Dr. Smith such an obvious breach of the standard of care that expert testimony, even if ordinarily required for a plaintiff to establish a prima facie case, is not required in this particular case. *Id.* at App. 110-112.

ARGUMENT

I. The District Court Erred in Finding That Expert Testimony is Not Needed to Establish a Prima Facie Case of Negligent Retention of Professional Staff Against a Health Care Provider.

A. Negligent retention claims are beyond the common knowledge of laypersons.

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)).

"It is well settled that expert testimony is required to prove professional negligence claims against healthcare providers." *Struck*, 973 N.W.2d at 539. "To establish a prima facie case of medical malpractice, a plaintiff must produce evidence that (1) establishes the applicable standard of care, (2) demonstrates a violation of this standard, and (3) develops a causal relationship between the violation and the injury sustained." *Id.* (quoting *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990)); *see also Susie v. Fam. Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 337 (Iowa 2020).

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. *See Rieder*, 959 N.W.2d at 431 (Iowa 2021) (quoting *Brookins*, 292 P.3d at 364 ("[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")). 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.[4]

In reaching a result contrary to *Struck*, the district court concluded that Tri-State's decision to retain Dr. Smith was "within the ambit of nonmedical, administrative, or ministerial acts." App. 222. The district court relied on *Hall*, claiming it provides that an ordinary negligence standard applies to credentialing medical professionals. *Id.* at App. 221-222 (citing *Hall*, 812 N.W.2d at 684). However, *Hall* never addressed the proper standard of care in negligent credentialing cases. *Hall*, 812 N.W.2d at 686 ("[b]ecause we have concluded the district court's judgment in favor of the defendants should be affirmed, we find it unnecessary to

[4] *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).

address the defendants' argument that the district court should have applied a higher "professional" standard of care.").

When this Court did address the issue as recently as 2021 in *Rieder*, it suggested that expert testimony is necessary to support a negligent credentialing claim. *Rieder*, 959 N.W.2d at 431 (quoting *Brookins*, 292 P.3d at 364) ("*[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). The analogous negligent credentialing claim having been found to require expert testimony is harmonious with this Court's position in *Struck* that such testimony is required for a negligent retention of professional staff claim against a health care provider. *Compare id. with Struck*, 973 N.W.2d at 539, 544.

The determination of whether Tri-State should have terminated Dr. Smith, based on what it knew as of June 7, 2018 is "beyond the common knowledge of laypersons and requires expert evidence." *Kennis*, 491 N.W.2d at 166. The only allegations which support Plaintiffs' argument that it was so obvious that Tri-State should have terminated Dr. Smith prior to June 7, 2018 were contained in the letter of Dr. Steele. Plaintiffs attempted reliance on events which came to light long after June 7, 2018 is misplaced—information not known to Tri-State at the time Dr. Smith provided care to Ms. Jorgensen is irrelevant. *See Godar*, 588 N.W.2d at 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).

The allegations against Dr. Smith included accusations of medical malpractice and improper billings practices. Whether these allegations of malpractice and improper billing practices are 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. 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 Wolfe*, 2022 WL 2160449, at *2.

Expert testimony is required to demonstrate the merits of any prior malpractice suits sought to prove Tri-State negligently retained Dr. Smith. *See Kennis*, 491 N.W.2d at 166. Equally important, expert testimony is necessary to show how these prior claims related to Dr. Smith's ability to competently treat Plaintiff, such that evidence of the prior claims would even be relevant to Tri-State's decision to retain Dr. Smith. *See Rieder*, 959 N.W.2d at 430.

Tri-State was engaged in a professional activity when assessing Dr. Smith's competency and skills. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *2–3; *Burns*, 83 So. 3d at 788–89. A lay jury cannot reach the conclusion that Tri-State was under a duty to terminate Dr. Smith based on the prior allegations of malpractice, without the assistance of expert testimony. Hence, *Struck* and *Wolfe* correctly held that expert testimony is needed to support this type of claim.

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. As a result, expert testimony is needed to establish the relevant standard of care and whether Tri-State failing to terminate Dr. Smith as a result of allegations related to billing practices amounts to a breach thereof. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *2–3.

B. Negligent retention is not a nonmedical, routine, administrative, or ministerial act.

The district court's ruling is also inconsistent with Iowa precedent defining nonmedical or routine care. The cases relied on by the district court 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 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 decision to retain Dr. Smith involved far greater professional judgment than a decision related to repositioning a patient in bed. *Compare id. 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 finding to the contrary is an outlier which should be reversed.

C. Failing to terminate Dr. Smith is not such an obvious breach of the standard of care such that expert testimony is not necessary.

The district court alternatively concluded that even if expert testimony would ordinarily be required, such testimony was unnecessary in this case. App. 222. The

district court recognized that "[w]here lack of care is so obvious as to be within the comprehension of a lay person and requires only common knowledge to understand, no expert testimony is required." *Id.* (citing *Oswald*, 453 N.W.2d at 636). The district court then concluded that the alleged facts in this case "are so obvious as to be within this exception." *Id.*

A closer review of Iowa cases examining this exception show its inapplicability to Plaintiffs' negligent retention claim. *See, e.g.*, *Welte v. Bello*, 482 N.W.2d 437, 440–41 (Iowa 1992). As recently observed by this Court, "expert testimony would not be required in a malpractice action alleging the surgeon removed the wrong kidney or inadvertently left a clamp inside the patient's body." *Struck*, 973 N.W.2d at 539 n.4.

Tri-State retaining Dr. Smith through the June 7, 2018 surgery is not comparable to operating on the wrong body part or leaving an instrument in a patient. *See, e.g.*, *Mass*, 28 So. 3d at 522 (finding obvious negligence exception to medical expert testimony not applicable to a negligent supervision of professional staff claim); *Wright*, 563 N.E.2d at 366–67 (citing *Bruni v. Tatsumi*, 346 N.E.2d 673, 676–77 (Ohio 1976)) (expert testimony needed for negligent supervision of professional staff claim pursuant to proper standard, which includes exception for obvious negligence). The district court's finding that the obvious breach exception to expert testimony was applicable was in err.

"Ordinarily, evidence of the applicable standard of care—and its breach—must be furnished by an expert." *Struck*, 973 N.W.2d at 539. The exception to this general rule applies "where the physician's lack of care is so obvious as to be within the comprehension of a layperson" such as "when the physician injures a part of the body not being treated." *Oswald*, 453 N.W.2d at 636 (internal alterations omitted). "If a doctor operates on the wrong patient or amputates the wrong limb, a plaintiff would not have to introduce expert testimony to establish that the doctor was negligent." *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989).

The obvious breach exception appears to have been first expressly recognized by this Court 70 years ago. *See Stickleman v. Synhorst*, 52 N.W.2d 504, 508 (Iowa 1952). Since then, many cases have expounded upon what is and what is not an obvious breach. *See, e.g.*, *Welte*, 482 N.W.2d at 440–41; *Zaw v. Birusingh*, 974 N.W.2d 140, 165 (Iowa Ct. App. 2021). Based upon the standard established by this Court, the exception does not apply in this matter.

As noted in *Kennis*, most cases holding that expert testimony was not required "involved injuries out of the field of treatment and to healthy parts of the body." *Kennis*, 491 N.W.2d at 167. Such was the case in *Welte*, where the physician's treatment resulted in chemical burns to the plaintiff's arm. *Welte*, 482 N.W.2d at 441–42. Expert testimony has also been found to be unnecessary for a claim arising from EMTs dropping a patient being transported off an ambulance cot. *Pollock v.*

Ottumwa Reg'l Mobile Intensive Care Servs., 2000 WL 1825444, at *3–4 (Iowa Ct. App. 2000).

Just last year, the Court of Appeals held that a doctor's duty to inform a patient about the type of planned procedure is so obvious as to fall under the exception. *Zaw*, 974 N.W.2d at 164–65. The court noted that the simple question of what operation the physician will be performing does not necessarily bring specialized medical knowledge or skills into play, such that the specialized standard of care need not apply. *Id.* (quoting *Canterbury v. Spence*, 464 F.2d 772, 785 (D.C. Cir. 1972)). Such a decision instead involves "non-medical judgment." *Id.* at 164.

However, in the overwhelming majority of cases, this exception does not apply. *See Struck*, 973 N.W.2d at 539. Where the matter before the jury involves a "highly technical" question which is "not so obvious as to be within the comprehension of a layperson" the exception fails to apply and the court properly rejects any claim by plaintiff that expert testimony is not required. *Kennis*, 491 N.W.2d at 166–67.

The question of whether a health care provider should terminate professional staff is the type of "highly technical" question which does not lend itself to jurors being as capable of drawing the correct conclusions as an expert witness. *See id.*; *Wolfe*, 2022 WL 2160449, at *2. This determination involves "medical judgment." *See Zaw*, 974 N.W.2d at 164.

What is acceptable supervision on the part of Tri-State as to its physicians, such as Dr. Smith? Did Tri-State adhere to this standard? These are the types of questions relevant to Plaintiffs' negligent retention claim which a lay juror cannot adequately answer without the assistance of expert testimony. *Wolfe*, 2022 WL 2160449, at *2. As a result, the obvious breach exception does not apply. Expert testimony is required to prove negligent retention of professional staff by a health care provider. *Struck*, 973 N.W.2d at 539, 544; *Wolfe*, 2022 WL 2160449, at *2–3.

Consistent with the decisions reached in *Struck* and *Wolfe*, other courts have held that expert testimony is needed for negligent retention of professional staff claims against health care providers and that the obvious breach exception does not apply. *See, e.g.*, *Mass*, 28 So. 3d at 522; *MacPete*, 185 S.W.3d at 586; *Wright*, 563 N.E.2d at 366–67. As recognized in *Mass*, the failure to adequately train and supervise a physician is "not as evident" of negligence as "an obviously careless act, such as fracturing a leg during examination, amputating the wrong arm, dropping a knife, scalpel, or acid on a patient, or leaving a sponge in a patient's body, from which a lay person can infer negligence." *Mass*, 28 So. 3d at 522 n.3. This is because a claim related to the employment of professional staff "necessarily implicates" the professional standard of care. *MacPete*, 185 S.W.3d at 586.[5]

[5] Texas law requires an expert report within 120 days of each defendant's answer in cases where the plaintiff asserts a "health care liability claim." Tex. Code § 74.351(a). This requirement is very similar to Iowa's applicable expert requirements

Plaintiffs cited a negligent retention and negligent credentialing case to the district court. All are inapposite. The only case which expressly held that expert testimony was not necessary involved a physician whose license was on probationary status at the time of hiring. *See Andrews v. Reynolds Mem'l Hosp., Inc*., 499 S.E.2d 846, 857 n.12 (W. Va. 1997). The other case relied upon by Plaintiffs involved a physician who had not been able to secure malpractice insurance for more than six years preceding the care at issue. *See Fletcher v. S. Peninsula Hosp.*, 71 P.3d 833, 843 (Alaska 2003). *Fletcher* further expressly provided it was not addressing the issue of the necessity of expert testimony. *Id.* at 844 n.55. The breadth and nature of the allegations against the physicians at issue in these cases are not analogous to the unsubstantiated allegations against Dr. Smith in this case, contained within the letter of Dr. Steele, a disgruntled physician on his way out of Tri-State. *Compare id.* at 843, *and Andrews*, 499 S.E.2d at 857 n.12 *with* Letter from Dr. Steele to Tri-State (July 31, 2017). App. 711-714.

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for claims against health care providers. *Compare id. with* Iowa Code § § 147.140; 668.11. Pursuant to its analogous requirement, Texas courts have recognized that the requirement still applies, even if expert testimony is ultimately determined to be unnecessary at the time of trial. *MacPete*, 185 S.W.3d at 586. "[E]ven if expert testimony on the proper standard is not required at trial on all aspects of the claim, [Tex. Code § 74.351] requires the threshold expert report in this case, not as a necessity for proof, but as a threshold showing to substantiate the claim." *Id.* (citing *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005)).

Those allegations do not make Tri-State's breach so obvious that expert testimony is not required. 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). The allegations known at the time Dr. Smith treated Ms. Jorgensen do not make Tri-State retaining Dr. Smith such an obvious breach that the exception to the expert testimony requirement applies. *See Struck*, 973 N.W.2d at 539, 544 (expert testimony required for negligent retention of professional staff claim against health care provider); *Wolfe*, 2022 WL 2160449, at *2–3 (same).

II. Even if breach of the standard of care can be established without expert testimony, expert testimony is still necessary on the issues of factual cause and scope of liability.

Similarly, even if the allegations predating June 7, 2018 are sufficient to negate the need for expert testimony on standard of care and breach,[6] Plaintiffs 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 v. Kaczinski*, 774 N.W.2d

[6] 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.

829, 836–40 (Iowa 2009). Plaintiffs cannot show a causal connection between Dr. Steele's allegations and her injuries, without expert testimony. *See Kennis*, 491 N.W.2d at 166. Furthermore, Plaintiffs' claimed damages fall outside the scope of 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' claim fails, even if the standard of care and breach could be established in the absence of expert testimony.

Even in medical malpractice 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, at *2. The factual correlation between the prior allegations of malpractice and Plaintiffs' claim against Tri-State cannot be established without expert testimony, even if the decision not to terminate Dr. Smith based on the allegations was such an obvious breach that expert testimony is not needed to establish the standard of care and/or breach thereof.

On the scope of liability issue, 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 Godar*, 588 N.W.2d at 708–10. 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.

The damages alleged by Plaintiffs 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 id.* at 538.[7] Plaintiffs do not assert damages for improper billing. Damages related solely to medical treatment are not foreseeable or within the scope of liability based on the billing allegations. *See id.* Plaintiffs cannot prove causation as to her negligent retention claim, certainty not without requisite expert testimony, and the district court's contrary ruling on Defendants' Motion for Partial Summary Judgment should be reversed.

[7] 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 alleged 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).

III. The Requirement of Expert Testimony Triggers Iowa Code Section 147.140 and Results in the Mandatory Dismissal with Prejudice of Plaintiff's Negligent Retention Claim Against Tri-State.

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 Tri-State and no exception to this requirement applies. *See supra* at § § 1–2. Because Plaintiffs' negligent retention claim is 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).

Plaintiffs seek to recover damages for physical injuries associated with the June 7, 2018 procedure performed by Dr. Smith, in connection with their negligent retention claim against Tri-State. *See* App. 16 at ¶ 54. This satisfies the first element

of Iowa Code section 147.140(1)(a), as Plaintiffs' claim is "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 Ms. Jorgensen. As a result, Plaintiffs negligent retention claim against Tri-State is against a "health care provider." *See* Iowa Code § 147.140(1)(a).

Plaintiffs' negligent retention claim is further "based upon the alleged negligence in the practice of [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).

Tri-State's alleged negligent retention of Dr. Smith, as described in Plaintiffs' Petition, plainly falls within the definition set forth above. Plaintiffs allege that Tri-State "failed to exercise reasonable care in hiring, supervising, employing, and/or retaining its agents, servants, or employees." App. 16 at ¶ 53. By Plaintiffs' own admission, the supervising of physicians such as Dr. Smith is part of what Tri-State does—part of its "principal work or business" such that it is part of Tri-State's "occupation." *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, Plaintiffs have not at all complied with the certificate of merit affidavit requirements, much less substantially so. *See* Iowa Code § § 147.140(1)(a), (6). Plaintiffs' negligent retention claim against Tri-State required such compliance. *See* Iowa Code § 147.140(1)(a).

Plaintiffs failed to move the Court for an extension of the deadline to comply with the certificate of merit affidavit requirements within the time frame provided. *See* Iowa Code § 147.140(4). If an extension was needed so that Plaintiffs could conduct additional discovery to determine whether a certificate of merit was necessary, subsection 4 provided Plaintiffs with an opportunity to request such an extension, ahead of the deadline. *See id.* Plaintiffs failed to avail themselves of this relief.

As a result of Plaintiffs' 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 Plaintiffs' negligent retention claim, 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

erred in failing to apply the clear dictates of Iowa Code section 147.140 and not dismissing Plaintiffs' negligent retention claim with prejudice.[8]

CONCLUSION

Expert testimony is required on these facts to show that 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 know at the time he treated Ms. Jorgensen—and the foreseeability that such incompetence would result in Plaintiffs' damages. *See Godar*, 588 N.W.2d at 708–10; *Thompson*, 774 N.W.2d at 837–40.

Plaintiffs' negligent retention claim is also one for personal injury, against a health care provider, alleging negligence in Tri-State's practice of its occupation. *See* Iowa Code § 147.140(1)(a). Satisfying these criteria triggered the certificate of merit affidavit requirements. *See id.* Plaintiffs have not substantially complied with these requirements. *See* Iowa Code § 147.140(6). As a result, Plaintiffs' negligent retention claim is subject to mandatory dismissal, with prejudice. *See id.* The district court's determination that that the certificate of merit affidavit requirements do not apply to Plaintiffs' negligent retention claim was incorrect and must be reversed, so

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

as to align with established Iowa law. *See Struck*, 973 N.W.2d at 544; *Wolfe*, 2022 WL 2160449, at *3.

REQUEST FOR ORAL ARGUMENT

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

DATED this 28th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

Defendants-Appellants, Adam B. Smith, M.D.; Adam Smith, M.D., P.C.; and Tri-State Specialists, LLP, pursuant to Iowa Rules of Appellate Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 7,334 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.

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CERTIFICATE OF FILING

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

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PROOF OF SERVICE

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

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ATTORNEY'S COST CERTIFICATE

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

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