IN THE SUPREME COURT OF IOWA

Supreme Court 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
NO. LACV192198

HONORABLE JEFFERY L. POULSON

PLAINTIFFS-APPELLEES' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUE

I. The District Court properly determined that Iowa Code § 147.140 does not apply to Jorgensen's employment claims of negligent hiring, retention, and supervision against Tri-State Specialists, LLP.

Iowa Code § 147.140
Kastler v. Iowa Methodist Hosp., 193 N.W.2d 98 (Iowa 1971)
Osward v. LeGrand, 453 N.W.2d 634 (Iowa 1990)

ROUTING STATEMENT

This case presents a substantial issue of first impression, specifically with respect to the applicability of certificate of merit requirements, allegedly under Iowa Code § 147.140, to negligent hiring, retention, and supervision of professional staff members when: (1) a plaintiff pled claims of negligent hiring, supervision, and retention in their Petition; (2) a plaintiff has already timely filed a certificate of merit affidavit as to the underlying medical malpractice claim; and, (3) when the underlying medical malpractice case has not been dismissed. *Cf. Struck v. Mercy Health Servs.-Iowa Corp*., 973 N.W.2d 533, 539 (Iowa 2022) ("As the court of appeals recognized, Struck concedes that the district court correctly ruled that section 147.140 applies to her claims alleging the professional negligence of her healthcare providers."); *Wolfe v. Shenandoah Med. Ctr*., 2022 WL 2160449, at *2 (Iowa Ct. App. June 15, 2022) ("The court determined Plaintiffs neither pleaded negligent supervision as a cause of action nor amended their petition to include the claim—even after Plaintiffs' expert amended his opinion and criticized the supervision of SMC and after the motion to dismiss was filed."). Therefore, this Court should retain this case. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Iowa Code § 147.140 requires plaintiffs to present a certificate of merit affidavit of an expert witness who meets the qualifying standards of § 147.139, which requires that the expert "is licensed to practice in the same or substantially similar field as the defendant[.]" The legislative goal of this statute was to enable healthcare providers to dismiss frivolous *malpractice* claims that are not supported by expert testimony. There is nothing to suggest this step was also meant to require a second certificate of merit as to the standard of care for employment claims related to an underlying medical malpractice claim to which a certificate of merit had been filed in support. Reviewing the recorded legislative history here, the Legislature intended §147.140 to apply only to traditional medical malpractice actions.[1] There was no discussion of certificates of merit applying to business decisions apart from the actual application of medical care to a human being.

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[1] *See* Senate Video on S.F. 465, G.A. 87, 1st Sess. (March 20, 2017) https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20170320125545820&dt=2017-03-20&offset=9715&bill=SF%20465&status=i; (at 4:50:23, Sen. Nate Boulton describing certificates of merit as showing proof in cases of preventable medical errors by individual practitioners.). *See also,* Senate Video on S.F. 465, G.A. 87, 1st Sess. (April 17, 2017) https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20170417155344150&dt=2017-04-17&offset=3805&bill=SF%20465&status=r (at 3:42:20, Sen. Charles Schneider discussing the purpose of certificates of merit as weeding out frivolous cases in the context of individual medical providers.).

Moreover, the Legislature believed this to be a minor change to the law resulting only in a small burden to plaintiffs.[2] The discussion shows legislators stating the statute merely codifies the existing practice of attorneys to have medical provider opinions in hand about actual medical care at the time a lawsuit is started in medical malpractice cases. The Legislature did not intend the statute to require certificates of merit for non-medical business decisions of organizations such as those involved in this case.

Plaintiffs filed their petition on May 28, 2020. App. p.7. The Petition pled claims of medical negligence and lack of informed consent against Defendant Smith. App. pp.10-13. In addition, the Petition pled a claim of Respondeat Superior and Negligent Hiring, Supervising, and Retention against Defendant Tri-State. App. pp.15-17. Consistent with Iowa Code § 147.140, Plaintiffs filed a certificate of merit affidavit from Dr. Mark Jewell

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[2] *See,* House Video on S.F. 465, G.A. 87, 1st Sess. (April 12, 2017) https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170412162909125&dt=2017-04-12&offset=3031&bill=SF%20465&status=r (at 5:16:10, Rep. Ashley Hinson stating the certificate of merit is not new and is "the usual practice of good lawyers" and that it is only "codifying what is already being done in Iowa".); *See* Senate Video on S.F. 465, G.A. 87, 1st Sess. (March 20,2017) https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20170320125545820&dt=2017-03-20&offset=9715&bill=SF%20465&status=i; (at 4:53:57, Sen. Charles Schneider describing certificates of merit as "not that big of a burden" and that it is "not difficult" to find a physician to testify in the context of individual medical practitioners.).

on June 2, 2020, and later designated Dr. Michael Edwards on September 28, 2021. App. pp.20-21; pp. 29-30; pp. 715-725. Both are board-certified plastic surgeons who opined that Defendant Smith's treatment breached the applicable standard of care.

On December 15, 2021, Defendants moved for partial summary judgment on Plaintiffs' negligent retention claim alleging that Iowa Code § 147.140 similarly applied to employment claims against a health provider. App. pp.35-38. The Honorable Judge Jeffrey L. Poulson properly denied Defendants' Motion for Partial Summary Judgment. App. pp.217-224. Judge Poulson noted in his ruling that "[n]ot every cause of action against a health care provider is subject to the certificate of merit affidavit requirement." App. p.220. "By its terms, the statute applies only to '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.'" *Id*. "Iowa cases have recognized a distinction between cases involving routine care and professional care." App. p.221. "If routine care is involved, no expert witness is required, whereas professional care does inherently require expert testimony." *Id*. Judge Poulson found that "while Tri-State Specialists is a health facility and within the type of cases included in 147.140, the negligent hiring and retention claim involves matters that

jurors are as capable of comprehending as are expert witnesses." App. p.222. "This cause of action is not a question of professional medical care, but is within the ambit of 'nonmedical, administrative, or ministerial acts.'" *Id*. (quoting *Hall v. Jennie Edmundson Mem'l Hosp*., 812 N.W.2d 681, 684 (Iowa 2012)).

Judge Poulson also ruled, in the alterative, that "there is a long-recognized exception to the rule in a medical malpractice case that expert testimony is required to establish the standard of care and a breach of the standard of care." *Id*. "Where 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 *Osward v. LeGrand*, 453 N.W.2d 634 (Iowa 1990)). "Under the facts of this case, the alleged facts are so obvious as to be within this exception, and the 'common knowledge' exception applies." *Id*. "No expert testimony is required to establish a prima facie case and no certificate of merit affidavit is required." *Id*.

On February 7, 2022, Defendants filed a Motion to Reconsider. (App. pp.225-232. The district court denied this motion on March 9, 2022. (App. pp.254-257. Judge Poulson provided additional analysis on the issue of causation. In contrasting the need of expert opinion on causation in medical claims versus negligent employment claims, Judge Poulson noted that "[t]he

facts of this case involving the claimed negligent hiring and retention of an alleged incompetent doctor are significantly different from whether or not the damages are related to the use of a particular drug." App. p.256. "The Court relied only upon the history of medical malpractice as well as the claims raised in the Steele letter." *Id*. "As to these issues, and under the facts of this case, on the issue of negligent hiring, retention, or ministerial acts, the issue of causation to damages claimed by Ms. Jorgensen are equally obvious to the jury as to an expert, and on the issue of causation, based upon the facts of this case, expert testimony was therefore not required." *Id*. Defendants filed an Application for Interlocutory Review on March 29, 2022. App. pp.258-274. On June 22, 2022, this Court entered an Order granting Defendants' Application for Interlocutory Review. App. pp.347-349.

STATEMENT OF THE FACTS

Defendant Tri-State woefully understates the relevant facts in this case. It fails to capture the blatant and obvious medical malpractice and violation of informed consent that Defendant Smith engaged in and of which Charlene Jorgensen suffered. Defendant Tri-State fails to acknowledge admissions that it knew about Smith's prior misconduct when it hired him. Defendant Tri-State contorts the facts that put it on notice of Smith's malfeasance during his tenure there. Defendant Tri-State is dismissive of the facts that would lead a

reasonable person to believe that Tri-State knew or should have known about all the medical malpractice and fraud that Smith performed under Tri-State's roof.

I. Defendant Smith's history of malpractice before working at Defendant Tri-State.

Adam Smith ("Smith") became a plastic surgeon in 2011. App. p.88. Smith opened his own practice, Borealis Plastic Surgery, in the Traverse City, Michigan area. *Id*. (citing App. p.518). Smith performed many of his surgeries at Munson Hospital in Traverse City. *Id*. Smith was sued multiple times for malpractice while he was performing surgery in Michigan. *Id*. (citing App. p.375).

Other plastic surgeons at Munson Hospital became concerned with Smith's surgeries. *Id*. In 2013, Munson Hospital sought an external review of Smith's surgeries. *Id*. (citing App. p.418). The external review confirmed internal findings that Smith's surgical practices demonstrated "patterns of both fraud and questionable surgical decision-making." *Id*. (citing App. pp. 418, 518-519, 526). The "patterns of fraud" and "questionable surgical decision-making" included "treatment of fractures that did not appear on films and diagnosis of 'open wounds' where there were none." App. pp.88-89 (citing App. p.418). Based on the external and internal reviews, Munson Hospital intended to terminate Smith's privileges. App. p.89. Instead of

terminating Smith's privileges, however, Munson Hospital allowed Smith to voluntarily resign his privileges in 2014. *Id*. (citing App. p.418).

II. Defendant Tri-State knew when they hired Defendant Smith that he was sued multiple times for malpractice.

Smith then moved to Sioux City, Iowa to practice plastic surgery. *Id*. Smith testified that he left Michigan because the Michigan medical community did not "appreciate" his medical practices because they were "taking away from their businesses." *Id*. Smith became an employee or agent of Defendant Tri-State in 2014. *Id*. Defendant Tri-State is "a business entity and not a medical doctor" and "does not provide medical care treatment or diagnosis." *Id*. (citing App. pp. 359, 380-81). When Smith moved to Iowa in 2014, Smith was aware of the findings of the internal and external reviews of Munson Hospital. *Id*. (citing App. p.419). By 2016, and certainly by 2017, Smith knew the federal government was investigating his conduct in Michigan for criminal healthcare fraud. App. pp.89-90 (citing App. pp. 419, 558). At the time Smith was hired by Tri-State, Tri-State knew Smith had been sued multiple times while Smith was working in Traverse City, Michigan. App. p.89.

REQUEST FOR ADMISSION NO. 4: Admit that Tri-State was aware when Adam Smith was hired that he was sued multiple times while he was working in Traverse City, Michigan. ___X___ Admit _____ Deny

App. p.376.[3]

III. Dr. Steele observed Defendant Smith's malpractice and put Defendant Tri-State on notice of Defendant Smith's conduct.

In April 2016, Matthew Steele, M.D., was hired by Tri-State. App. p.90. Dr. Steele was able to observe Smith, and began to have concerns about Smith's surgical practices. *Id*. Beginning in March 2017, Dr. Steele, met with Lee Hilka, the business manager of Tri-State, four times to discuss Dr. Steele's concerns about Smith. *Id*. (citing App. pp. 521, 711-714). During these meetings, Dr. Steele told Hilka about the investigation of Defendant Smith in Michigan for healthcare fraud and Smith's previous malpractice cases. *Id*. Dr. Steele also told Hilka that Smith was engaging in rampant malpractice concerning patients in Iowa. *Id*. (citing App. 711-714).

In these meetings, Dr. Steele talked with Hilka about specific examples of Smith's malpractice that endangered patients. *Id*. Those concerns included poor hand hygiene in the clinic setting, failure to maintain accurate medical records, failure to mark the operative plan on the patient in the preoperative holding area, poor choice of operative candidates resulting in preventable

[3] Before this Court, Defendants-Appellants claim that the allegations of a disgruntled employee were the totality of what Tri-State knew about Smith before his treatment of Ms. Jorgensen. (*Defendants-Appellants' Proof Brief*, at 13). Tri-State's own admissions contradict this claim and prove their misstatements of fact before this Court.

complications and unnecessary revisionary surgery, and very poor aesthetic outcomes.[4] *Id*. (citing App. 711-714).

At some point in the spring of 2017, Smith became aware that Dr. Steele was making complaints against Smith. *Id*. Smith talked Dr. Steele, and Dr. Steele told Smith he was writing a letter concerning issues that Dr. Steele had with Defendant Smith's practice of plastic surgery. *Id*. (citing App. pp.537-38).

Tri-State's response to Dr. Steele's concerns was to terminate his employment. App. p.91. On July 31, 2017, Dr. Steele did send a letter to Tri-State and its partners, Doctors Nelson, Liudahl, Samuelson, and Doarn. *Id*. Steele's letter stated that he had been fired by Tri-State "after I brought forth evidence of Dr. Smith's rampant malpractice[.] . . . There are very significant problems that you are choosing to ignore." App. p.712.

IV. Defendant Tri-State knew Dr. Steele's allegations were true and failed to investigate.

Dr. Steele's letter also goes beyond allegations pertaining to his personal observations. Dr. Steele alleged that Defendant Smith was sued for malpractice three times in his first three years in Traverse City. *Id*. Defendant

[4] Dr. Steele's allegations were first brought to Tri-State's attention before Tri-State fired him. Defendants-Appellants' characterization of Dr. Steele making allegations as a "disgruntled former employee" is false.

Tri-State knew this when they hired him. App. p.376. Dr. Steele also described how one of the women in those lawsuits went on national television three times to discuss her ordeal with Defendant Smith. App. p.713. A google search confirms this allegation as well.

A local Traverse City newspaper titled, "Reaching for Recovery: Lake Ann woman to appear on 'The Doctors' show" on May 15, 2016, confirms Dr. Steele's statement. App. pp.604-607. The article discussed how Defendant Smith "sent [her] home with holes in [her] arms, gaping wounds. They're horrendous." App. p.605. The article discussed how the TV show "The Doctors" aired the plaintiff's struggle in November 2015, May 2016, and hopefully a third episode. App. p.606. The article also stated that Defendant Smith "works at Tri-State Specialists Plastic Surgery in Sioux City, Iowa." *Id*.

This is not all the information that was actually known or should have been known to Tri-State by the date of Ms. Jorgensen's surgery. It is likely that Tri-State either possessed or was aware of facts that instigated the United States Department of Justice decision to investigate Defendant Tri-State. Tri-State paid "$612,501.44 to the United States, the State of Iowa, and the State of South Dakota to resolve allegations that it violated the False Claims Act by billing Medicare, Medicaid, TRICARE, and the Federal Employees Health

Benefits Program for ***medically unnecessary procedures*** and for procedures in excess of those actually performed." App. p.242 (citing App. p.608) (emphasis added).[5] The allegations were "that, from August 2014 until August 2019, Tri-State submitted false claims for payment to government healthcare programs for surgical procedures and office visits performed by a plastic surgeon who previously was a partner with Tri-State." *Id*. (citing App. p.608). "Tri-State was liable for the surgeon's acts both because the surgeon was an agent of Tri-State and ***because Tri-State knew of the surgeon's acts***." *Id*. (citing App. p.608) (emphasis added). The plastic surgeon in the allegations is believed to be Defendant Smith as the dates of the governments' allegations coincided with when he was affiliated with Defendant Tri-State. *Id*. (citing App. p.611). Ironically, this was the exact outcome that Dr. Steele predicted and warned about when he expressed his concerns to Defendant Tri-State about Defendant Smith. App. p.714.

[5] Defendant Tri-State has argued that it was unaware of these facts that materialized after Charlene Jorgensen's surgery. However, as Smith's conduct occurred during his tenure at Tri-State, these are facts that Tri-State either knew of or should have known of after investigation prior to Charlene Jorgensen's surgery.

V. Defendant Smith disfigured Plaintiff Charlene Jorgensen's right breast.

Smith performed a breast reduction on Plaintiff Charlene Jorgensen in 2016. App. p.91. Sometime after that, Charlene had a fall that caused her right breast to drop significantly. *Id*. Charlene saw Smith for that incident. *Id*. Smith advised Charlene that she had popped a stitch and that he would reattach what popped during a "quick and simple" procedure. *Id*. (citing App. pp.479, 544). Smith performed that "simple" surgery on June 7, 2018. *Id*.

When Charlene woke up after surgery, Charlene discovered the surgery Smith had done was anything but "simple." *Id*. Charlene was shocked and horrified when she saw the location of her right nipple on her breast. *Id*. (citing App. p.544). Charlene's right nipple had been essentially moved to the inside of her right breast. *Id*. Smith admitted at his deposition that the location of the nipple was "asymmetrical" and that no patient would want a nipple in the location he had placed it. *Id*. (citing App. pp.535-36). Smith's surgery left Charlene disfigured. *Id*. (citing App. pp.548-49).

The Informed Consent that Charlene signed said nothing about Smith cutting off her nipple and moving it. *Id*. Smith never verbally told Charlene he was going to move her nipple as part of the surgery. App. pp.91-92 (citing App. pp.545-46). When Charlene questioned Smith about why he had moved her nipple, Smith told her he had decided to perform additional surgery. App.

p.92 (citing App. p.546). Defendant Smith told Michael Jorgensen, Charlene's husband, after the surgery that he "did a little more work" than he had planned to do on Charlene. *Id*. (citing App. pp.534, 546, 555-56). Charlene was devastated by the result of the surgery. *Id*. Smith told Charlene that he could do another surgery to "fix it." *Id*. (citing App. pp.549-550).

Charlene's disfigurement led her to consult with another plastic surgeon. *Id*. Charlene obtained Smith's records. *Id*. What she saw shocked her. *Id*. Charlene saw multiple factual inaccuracies in her records. *Id*. Those included:

- Records saying she smoked cigarettes and had been counseled by Smith multiple times about stopping smoking, when in reality, she had never smoked.
- Records saying her breasts were different sizes after her fall when they were not.
- Records stating she weighed 176 pounds at every visit for over two years, when she actually weighed more, including 210 pounds at the time of the 2018 surgery.
- Records saying she was pleased with the outcome of the 2018 surgery when she was horrified by the result.

Id. (citing App. pp. 447-515; 540; 543, 545-47).

Charlene Jorgensen's medical records with Smith were not Smith's only patient records that had numerous inaccuracies and factual misstatements. *Id*. Through discovery in other malpractice lawsuits against Smith and Tri-State Smith's patient records from 2016-2019 show a continuous pattern of errors, identical record notations, and information not related to the patient at issue. *Id*. (citing App. pp.560; 562; 564; 566-67; 569). The problems with Smith's patient records are consistent with what Dr. Steele discussed with Tri-State and Lee Hilka in March and April of 2017 and what Dr. Steele stated in his July 31, 2017, letter to Tri-State. App. p.93.

VI. Defendant Smith loses his privileges as the Iowa and South Dakota Boards of Medicine investigate his conduct while at Tri-State.

Dr. Steele's warnings to Tri-State were soon borne out. It is not clear when the Iowa Board of Medicine began to receive complaints about Defendant Smith. *Id*. In a letter to Charlene Jorgensen dated March 11, 2021, however, the Board informed Charlene that Smith had been under investigation for numerous issues with his medical practice, concerning 17 patients Smith treated between December 2014 and September 2017. *Id*. (citing App. p.412). The letter stated that Defendant Smith had been charged on July 18, 2019, with failing to provide appropriate surgical care, including, but not limited to, patient selection, surgical choice, informed consent, surgical execution, surgical judgment and decision-making, postoperative

care, excessive narcotics, anxiolytics and or hypnotics, medical record keeping, and coding and billing practices. *Id.* (citing App. p.412).

Smith's hospital privileges were soon being questioned. Smith admitted that he began to lose his hospital privileges through suspension beginning at the end of 2018 and into 2019. App. pp.93-94 (citing App. pp.571-73). Over the next six months, Smith lost his privileges at five hospitals. App. p.94. This was before the Iowa Medical Board formally filed charges against Smith on July 18, 2019. *Id*. (citing App. pp.571-73).

The South Dakota Board of Medical and Osteopathic Examiners (hereinafter "South Dakota Board") was notified from a third-party source that Smith's hospital privileges were suspended at five hospitals and Smith's license was under investigation by the Iowa Medical Board. *Id*. On June 5, 2019, Defendant Smith was notified by the South Dakota Board that his South Dakota Medical License was under investigation. *Id*. Smith was asked to provide an explanation for why he had lost his clinical privileges. *Id*. Smith did not respond to two letters sent by the South Dakota Board. *Id*. (citing App. pp.386-88).

On September 12, 2019, the South Dakota Board entered an Order for Summary Suspension of Defendant Smith's license to practice medicine in the State of South Dakota. *Id*. (citing App. pp.386-88). In entering the Order

for Summary Suspension, the South Dakota Board made important findings that included the following:

- Smith had not disclosed to the Board or Board staff any of the losses of his clinical privileges or the Iowa Board of Medicine complaint;
- Smith's clinical privileges had been suspended by five medical facilities in the preceding 9 months; and
- Several of these suspensions had been based upon concerns over Smith's alleged failure to maintain adequate medical records, failure to provide appropriate patient care, failure to provide medically reasonable and/or necessary items or services, and patient abandonment.

App. pp.94-95. The South Dakota Board found that Smith's was a danger to the public and required emergency action to insure the protection of public health, safety, or welfare. App. p.95 (citing App. pp.386-88).

The South Dakota Board held an administrative hearing on December 5, 2019. *Id*. Defendant Smith attended the hearing and requested that he be permitted to voluntarily surrender his South Dakota Medical license. *Id*. (citing App. p.389). On December 12, 2019, Smith entered into a settlement agreement with the South Dakota Board giving up his South Dakota Medical license. *Id*. (citing App. p.390). On March 12, 2020, the South Dakota Board

formally accepted the voluntary surrender of Smith's license to practice medicine in the state of South Dakota as of December 20, 2019. *Id*. (citing pp391-92).

Defendant Smith was sued for medical malpractice 16 times for his medical care since 2014. *Id*. (citing App. p.523). The Iowa Board of Medicine allowed Smith to voluntarily surrender his Iowa medical license on February 18, 2021, through a Settlement Agreement with the Iowa Board of Medicine. *Id*. (citing App. p.390).

VII. Defendant Smith pled guilty to the Medicare and Medicaid fraud that Dr. Steele warned Defendant Tri-State about before Ms. Jorgensen's surgery.

Smith's actions in Michigan before he came to Sioux City in 2014 finally caught up with him and on April 12, 2021, Defendant Smith pled guilty to making false statements relating to a healthcare matter in the state of Michigan in the United States District Court. App. pp.95-96 (citing App. pp.423-444). The United States also sued Smith civilly for health care fraud for his actions in Michigan from 2013 to 2014. App. p.96. On November 29, 2021, Defendant Smith was found in default of the United States' fraud claim against Smith for his activities in the state of Michigan in 2013-2014. *Id*. (citing App. pp.445-46).

The United States District Court stated, "as detailed in the complaint, Defendants Adam B. Smith and Borealis Plastic Surgery, PLLC knowingly defrauded Medicare and Medicaid by submitting false claims for reimbursements for plastic surgery procedures cosmetic and not medically necessary, and the Defendants knowingly made false statements regarding the nature of the services they provided and their patients' conditions in order to obtain reimbursement from these programs." *Id*. (citing App. 445).

Tri-State knew, no later than March or April of 2017, that one of their own doctors had documented the same dangerous "rampant malpractice" that led to the cascade of lawsuits, suspensions, criminal charges, and conviction. App. p.712. But even as the malpractice allegations, administrative actions, and news stories of Smith's danger to patients became widely known, Tri-State continued to support Smith. Smith testified that neither Hilka, nor any of the other principals of Tri-State, ever talked to him about Dr. Steele's letter! App. pp.96-97 (citing App. p.537). And Smith testified he only resigned from Tri-State in 2019 because of the personal toll all these allegations had taken on him, stating "I felt that for them who continued to support me [Tri-State] in their mind 100 percent, that it was the best thing for me to step away from medicine for a time . . .." App. p.97 (citing App. 571).

Charlene Jorgensen would never have let Smith perform surgery on her in June 2018 had either Defendants Smith or Tri-State disclosed to her all the problems Smith had with his professional competence, documentation and surgical practices and the criminal investigation. *Id*.

STANDARD OF REVIEW

This case stems from an appeal from pretrial summary judgment motion. This Court's "review under such circumstances is well established[.]" *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990)

> The burden is upon the party moving for summary judgment to show absence of any genuine issue of a material fact. All material properly before the court must be viewed in the light most favorable to the opposing party.

Id. (quoting *Daboll v. Hoden*, 222 N.W.2d 727, 731 (Iowa 1974)). "Because resolution of issues of negligence and proximate cause turns on the reasonableness of the acts and conduct of the parties under all the facts and circumstances, actions for malpractice 'are ordinarily not susceptible of summary adjudication.'" *Id.* (quoting *Daboll*, 222 N.W.2d at 734)). Defendants allege that Plaintiffs need expert opinion as to their negligent employment claims. "In a case like this . . ., the issue becomes 'not whether there was negligence in the actions of the defendant but whether there was evidence upon which liability could be found.'" *Id*. (quoting *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989)). "To the extent [this Court is] asked

to engage in statutory interpretation, our review is for correction of errors at law." *DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 289 (Iowa 2017) (citing *State v. Howse*, 875 N.W.2d 684, 688 (Iowa 2016)).

ARGUMENT

I. The District Court properly determined that Iowa Code § 147.140 does not apply to employment claims, *e.g.* negligent hiring, supervision, and retention.

A. Iowa Code § 147.140 applies only to professional, medical malpractice claims, and not to routine or administrative, employment claims.

By its own terms, Iowa Code § 147.140(1) applies only to "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[.]" Emphasis added.[6] Issues regarding medical malpractice and informed consent are "issue[s] beyond the common

[6] Iowa Code § 148.1 provides additional clarification that the practice of medicine relates to the treat patients, as opposed to administrative decisions:

> [T]he following classes of persons shall be deemed to be engaged in the practice of medicine and surgery or osteopathic medicine and surgery:
>
> 1. Persons who publicly profess to be physicians and surgeons or osteopathic physicians and surgeons, or who publicly profess to assume the duties incident to the practice of medicine and surgery or osteopathic medicine and surgery.
> 2. Persons who prescribe, or prescribe and furnish, medicine for human ailments or treat the same by surgery.
> 3. Persons who act as representatives of any person in doing any of the things mentioned in this section.

knowledge of laypersons and requires expert evidence." *See Schmitt v. Floyd Valley Healthcare*, 2021 WL 3077022, at *1 (Iowa Ct. App. 2021) (medical malpractice); *Kennis v. Mercy Hosp. Med. Ctr.,* 491 N.W.2d 161, 166 (Iowa 1992) (informed consent). Iowa Code §147.140 is clear that it applies to actions in the practice of medical professions or patient care—that is, actually applying medical treatment that involves medical judgment to a patient's body.

Iowa has recognized a distinction between cases involving routine care and professional care. "Under that law, the standard of conduct which ordinarily applies is the care 'of a reasonable man under like circumstances.'" *Kastler v. Iowa Methodist Hosp*., 193 N.W.2d 98, 101 (Iowa 1971) (quoting Restatement, Torts 2d § 283). "But in the practice of a profession or trade, the standard is 'the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.'" *Id*. "[W]ith respect to nonmedical, *administrative*, ministerial, or routine care, [this Court] adopt[ed] the rule that the standard is such reasonable care for patients as their known mental and physical condition may require." *Id*. at 101-02 (emphasis added). "The character of a particular activity of a hospital—whether professional, on the one hand, or nonmedical,

administrative, ministerial, or routine care, on the other—is *determined by the nature of the activity itself*, not by its purpose." *Id*. at 102 (emphasis added).

Because claims of medical malpractice and informed consent are issues that require expert testimony, Plaintiffs filed a certificate of merit affidavit from Dr. Mark Jewell on June 2, 2020, and designated Dr. Michael Edwards on September 28, 2021. App. pp.20-21; 29-30. The Jorgensens' employment claims of negligent hiring, supervision, and retention don't involve medical judgments that typically require expert testimony. Employment decisions can be understood by a common person. Hospital administrators and CEOs who make employment decisions are typically non-doctors would apply business judgment, not medical judgment, in hiring, supervising, and retaining professional staff. As a result, Plaintiffs did not, nor did they need to, provide a certificate of merit on their employment claims.

The Jorgensens' employment claims of negligent hiring, supervision, and retention claims are based upon Tri-State's nonmedical, administrative, ministerial actions, or routine care. In *Hall v. Jennie Edmundson Memorial Hosp*., this Court held there was no error in a district court's ruling that a lay standard of care applied to a hospital's credentialing decision. 812 N.W.2d 681, 685-86 (Iowa 2012). The basis for the district court's decision was that the credentialing decision as involved "nonmedical, administrative, or

ministerial acts by a hospital." *Id*. at 684. *Hall* found no fault in the district court's application of a lay standard of care, or the district court's determination that the credentialing decision involved non-medical, administrative, or ministerial acts. This is analogous to the Jorgensens' claims here.

The decision in *Hall* was a result of the application of years of Iowa Supreme Court and Court of Appeals case law. In *Kastler*, a patient fell while in the shower after reporting to hospital staff that she was not feeling well. *Id*. at 99-100. This Court determined that that the adoption of the reasonable care rule meant that the plaintiff "was not required to adduce proof of the practice of hospitals generally respecting showers or to introduce expert testimony. The jury could use its own knowledge and good sense with respect to the hospital's conduct in question." *Id*. at 102.

In *Cockerton v. Mercy Hospital Medical Center*, a plaintiff alleged injuries due to a fall when she was left unattended by hospital personnel while having x-rays. 490 N.W.2d 856, 858 (Iowa Ct. App. 1992). This Court found the action involved routine, nonmedical care by the hospital, and not professional conduct. *Id*. at 859. This Court concluded that "this was not the kind of case requiring expert testimony to establish a deviation from an accepted standard of care of hospitals." *Id*.

In *Landes v. Women's Christian Ass'n*, the plaintiff brought a claim after he fell while the hospital left him unattended as the anesthetic he was under had worn off. 504 N.W.2d 139, 140 (Iowa Ct. App. 1993). This Court determined that the plaintiff's claim "[did] not allege medical malpractice or professional activity by the hospital . . .[and] was nonmedical or routine." *Id*. at 141. Accordingly, the plaintiff "[was] not required to introduce expert testimony to prove his case." *Id*. at 141-42.

In the present case, the Jorgensens' employment claims are based on the fact that Tri-State knew and/or should have known about Smith's rampant history of malpractice, as well as the substandard care he provided and unnecessary procedures he performed while at Tri-State. Tri-State hiring Smith with knowledge of his prior conduct was an administrative or business decision, not involving particular medical knowledge. Likewise, Tri-State's knowledge of or failure to investigate Smith's conduct, of which it was put on notice, while retaining Smith is another administrative choice, not involving medical knowledge.

B. Case law from other states with certificate of merit statutes confirm employment claims are neither medical in nature nor require a certificate of merit.

Iowa is not the only state that has some form of a certificate of merit requirement. In many of those states, the courts have ruled that negligent

hiring, supervision, and retention claims are not "medical" claims that would require a certificate of merit. For example, North Carolina has a statute that requires certification of a review by a medical expert on the merits of a malpractice claim. N.C. Gen. Stat. § 1A-1, Rule 9(j). In the context of that statute, the North Carolina courts have distinguished claims that require expert testimony, and hence certification by a medical expert, from those that do not. *Estate of Waters v. Jarman*, 547 S.E.2d 142 (N.C. App. 2001).

In *Jarman*, the court noted that analysis of whether expert testimony was required hinged on whether the misconduct alleged was in the performance of medical, dental, or other health care. The court stated:

> It is undisputed that the claims asserted in this action involve the furnishing of professional services; however, the pertinent question here appears to be whether the claim arose "***in the performance of medical***, dental, or other health ***care*** by a health care provider." N.C. Gen.Stat § 90-21.11 (emphasis added). A review of the case law involving corporate negligence claims asserted against a hospital reveals that there are fundamentally two kinds of claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital. The case law has treated the two types of claims differently.
>
> Our courts have applied the medical malpractice statutory standard of care and required expert testimony where the corporate negligence claims arose out of clinical care provided by the hospital to the patient.
>
> However, where the ***corporate negligence claims*** allege negligence on the part of the hospital for administrative or

> ***management deficiencies***, the courts have instead ***applied the reasonably prudent person standard of care***.

Id. at 144-45 (emphasis added). The court explained that:

> Collectively, we believe these cases stand for the proposition that corporate negligence actions brought against a hospital which pertain to clinical patient care constitute medical malpractice actions; however, where the ***corporate negligence claim arises out of policy, management or administrative decisions***, such as ***granting or continuing hospital privileges, failing to monitor or oversee performance of the physicians, credentialing,*** and failing to follow hospital policies, the claim is instead derived from ***ordinary negligence principles***. This distinction is consistent with the statutory definition of medical malpractice actions, which requires that the claim arise out of services "in the performance of medical, dental, or other health care." Accordingly, only those claims which assert negligence on the part of the hospital which arise out of the provision of clinical patient care constitute medical malpractice actions and require Rule 9(j) certification.

Id. at 145 (emphasis added).

Georgia also has an expert affidavit requirement for medical malpractice cases similar to Iowa Code § 147.140. *See* OCGA § 9-11-9.1. In *Upson County Hosp., Inc., v. Head*, 540 S.E.2d 626 (Ga. Ct. App. 2000), the Georgia Court of Appeals faced an issue similar to this case. The plaintiff filed a complaint against a hospital for medical negligence and for simple negligence. *Id*. at 629-30. The hospital filed a motion to dismiss alleging that the plaintiff did not comply with the expert affidavit requirement. *Id*. The

trial court denied the hospital's motion to dismiss and the hospital appealed. *Id*.

The *Head* court affirmed the trial court on the expert affidavit issue on what it termed "simple negligence," noting the distinction between claims that "required the exercise of professional judgment and skill" and those that do not. *Id.* at 630. "A professional negligence or professional malpractice claim calls into question the conduct of the professional in his area of expertise. Administrative, clerical, or routine acts demanding no special expertise fall into the realm of simple negligence." *Id*.

Expert testimony may be required when the claim involves the performance of health care by a health care provider, subject to the common knowledge exception. But if the claim concerns administrative, clerical, or routine acts, expert testimony is not required. If expert testimony is not required, it should be obvious that § 147.140 is not applicable in this case.

C. Expanding Iowa Code § 147.140 to employment claims would, in effect, bar employment claims related to underlying medical malpractice.

The construction of the statute as advanced by Defendants creates an impossible procedural barrier. The statute requires a certificate of merit before discovery. *See* Iowa Code § 147.140(1) (". . . the plaintiff shall, *prior to the commencement of discovery* in the case and within sixty days of the

defendant's answer. . . ." (emphasis added)). Plaintiffs can obtain their own medical records prior to the commencement of a lawsuit and discovery. This allows an expert to evaluate a claim of medical malpractice in order to issue a certificate of merit as to the medical care the plaintiff received. There is no substantial burden in obtaining a certificate of merit on just a medical malpractice claim.

The same is not true for employment claims of negligent hiring, supervision, and retention claims. Such claims are based on an entity's actions relating to the employment of individuals. The employers' actions almost always—by necessity—involve a multitude of other facts and incidents outside a plaintiff's own medical records.[7] Unless a concerned citizen, like Dr. Steele, discloses such information voluntarily, these employment-related facts are usually unknown to a plaintiff until discovery begins. Even after

[7] The Jorgensen's limited knowledge of Smith's medical malfeasance in this case was brought about by a proverbial, perfect storm of Dr. Steele acting as a whistleblower and discovery from other lawsuits. Not only would a typical plaintiff have to engage in discovery to obtain facts germane to negligent employment claims, but also that plaintiff would have to deal with the medical provider's discovery obstruction regarding those employment facts. Tri-State's refusal to engage in discovery exemplifies the logistical impossibility of having an employment certificate of merit affidavit prior to discovery. *See generally* App. pp.608–671. Defendants like Tri-State will claim that discovery as to employment "matters not be had unless and until there is a finding of negligence in the underlying medical malpractice case against [the doctor]." App. p.662.

discovery begins, however, there are hurdles that plaintiffs usually face in compelling hospitals to disclose employment-related facts and documents. Plaintiffs are not required to be clairvoyant, and the Legislature did not intend to require such soothsaying by passing the certificate of merit statute. The result Defendants are seeking would be absurd, and essentially eviscerates negligent hiring, supervision, and retention claims. Had the Legislature intended such a radical result, it could have plainly done so in the text of the statute. It did not.

D. The "same or substantially similar field or specialty" requirement is understandable in a medical malpractice context, but not in the context of employment claims.

Expert witnesses under Iowa Code § 147.140(1) must meet the qualifying standards of § 147.139. Pursuant to the qualifying standards statute, the expert must be licensed to practice and actively practiced five years before the malpractice occurred "in the same or a substantially similar field as the defendant[.]" Iowa Code § 147.139(1)-(2). Similarly, if the defendant is board-certified in a specialty, the expert must also be "certified in the same or a substantially similar specialty by a board recognized by the American board of medical specialties, the American osteopathic association, or the council on podiatric medical education." Iowa Code § 147.139(3).

This standard is simple and understandable when evaluating the medical judgment that a health care provider used. In evaluating the medical judgment of an orthopedic surgeon, for example, a physician in an unrelated field, such as a cardiology, would not be able to testify as the standard of care to which an orthopedic surgeon should be held. In that hypothetical, Iowa Code § 147.140 and § 147.139 would require another orthopedic surgeon to provide expert testimony as to the standard of care the original orthopedic surgeon should have applied.

There is no similar comparison, however, for the employment claims of negligent hiring, supervision, and retention. An orthopedic surgeon, although knowledgeable in the field of orthopedic surgery, may not have knowledge of the standard of care to be applied for hiring, supervising, or retaining medical professions. The surgeon would be able to apply medical judgment, but not business administration judgment or risk management. Under Iowa's current statutory construction, should Defendants' position be adopted for employment claims, there is no contemplation of what field, specialty, or qualifications would be required for a certificate of merit affidavit expert witness. A hospital administrator, medical staff director, risk management officer, or even an employment lawyer could all provide expert

testimony as to employment claims in a health care sitting,[8] but it is unknown which, if any, would be the same or substantially similar to a defendant's decisionmaker on hiring, supervising, or retaining staff. Hospitals or clinics defending employment claims related to an underlying malpractice claim could easily play shell games with plaintiffs and courts as to the needed qualifications of a certificate of merit expert.

II. The District Court properly found that expert testimony was not needed to establish a prima facie case for employment claims, regarding staff in a health care facility.

A. *Struck* does not stand for Defendants' proposition that an additional, separate certificate of merit affidavit be filed for employment claims on top of the one for the medical malpractice claim.

The Jorgensens' medical malpractice and informed consent claims related to the medical judgment, or lack thereof, that Smith exercised. Accordingly, a certificate of merit affidavit was filed and an expert was disclosed to show that Smith's conduct fell below that his particular standard of care. However, the Jorgensens' employment claims of negligent hiring, supervision, and retention do not relate to Smith's medical judgment during his course of treatment of Charlene Jorgensen. Rather, the employment claims relate to the "nonmedical business, administrative, ministerial, or

[8] This Court should take note that Dr. Steele echoed his concerns about Smith to a non-doctor and business manager for Tri-State, Lee Hilka.

routine care" a hospital must show its patients. Under this Court's holding in *Kastler*, the standard of care for these employment claims is the reasonable person under like circumstances. *Kastler*, 193 N.W.2d at 101-02. Although the purpose of the employment claims is related to health care, the standard of care is "determined by the nature of the activity itself. *Id*. at 102. Thus, the standard of care for employment claims in a health care setting should be no different than similar claims in any other business setting as the natures of the activities are the same.

Tri-State relies on this Court's opinion in *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 536 (Iowa 2022). There are critical distinctions between the *Struck* case and this one that this Court cannot overlook. The underlying facts in *Struck* related to a patient who brought a professional negligence claim because the medications the medical facility gave her "were contraindicated with the medications she was already taking." *Id*. at 537. However, ***the* Struck *plaintiff never filed any certificate of merit*** nor sought leave to amend her petition to allege any ordinary negligence claim. *Id.* For the first time, on appeal, the *Struck* plaintiff asserted her petition was for that of ordinary negligence. *Id*. at 538.

This Court concluded that the purpose of Iowa Code § 147.140 was to provide a mechanism for dismissing "professional liability" claims when

supporting expert testimony is lacking. *Id*. at 539. In this case, as Tri-State must admit, the Jorgensens filed a certificate of merit and disclosed another expert to support their professional liability claims against Defendants. This is the fundamental distinction between this case and *Struck*. This Court must neither ignore this distinction nor allow Defendants to make a false equivalence between the two cases.

This Court's analysis in *Struck* highlights why blindly applying that case to the present one is improper. This Court determined that the district court was correct in dismissing both "Struck's professional negligence ***and*** negligent hiring, retention, or supervision of professional staff claims . . . upon her ***failure to file*** a certificate of merit." *Id*. at 540. In the present case, Tri-State did not seek to dismiss the malpractice claim as a result of Jorgensens' failure to file a certificate of merit pursuant to Iowa Code § 147.140. Even if Tri-State did, the district court could not have dismissed the Jorgensens' professional negligence/medical malpractice claim because they did, in fact, file a certificate of merit. Furthermore, this Court noted that "[b]y alleging only 'professional negligence' claims and not filing a certificate of merit, she effectively pleaded herself out of court." Again, the Jorgensens' employment claims of negligent hiring, supervision, and retention should not be summarily dismissed as they did file a certificate of merit on the

professional negligence claim. Unlike in *Struck*, the Jorgensens did not effectively plead themselves out of court.

This Court disagreed with the court of appeals' decision to allow Struck's "surviving" negligence claims to stand as to determine whether expert testimony was required. *Id*., at 542. This Court expanded on its reasoning that negligent hiring and retention claims require an initial finding of malpractice. *Id*. at 544. "***Because*** Struck's ***underlying professional negligence claims*** against the individual healthcare professionals ***were*** properly ***dismissed*** under section 147.140(6), ***she cannot prove*** her case within a case to establish Mercy's liability for ***wrongfully hiring or retaining them***." *Id*. (emphasis added).

In direct contrast to *Struck*, the Jorgensen's employment claims are not surviving independently outside of a failed professional negligence claim. Furthermore, the Jorgensens are also not evading the certificate of merit requirement nor relabeling a failed medical malpractice claim as one of ordinary negligence. *See id*. at 542. This is all because there is no dispute that the Jorgensens' are allowed to proceed on their medical malpractice and informed consent claims. Because of this critical distinction, this Court should not dismiss the Jorgensen's employment claims as their underlying professional negligence claim has not been dismissed.

Importantly, allowing the Jorgensen's employment claims to proceed does not "undermine the legislative goal to enable healthcare providers to quickly dismiss professional negligence claims that are not supported by the requisite expert testimony." *See id*., at 541. By filing a certificate of merit in support of the medical malpractice claim, the Jorgensens provided their "proof prepared at an early stage in the litigation in order that the professional [*i.e.* Tri-State and Smith] does not have to spend time, effort and expense in defending a frivolous action." *See id.* (quoting *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993)). This is not a case were there would be an "[e]arly disposition of [a] potential nuisance case" or one that "lacks expert testimony" that "would presumably have a positive impact on the cost and availability of medical services." *See id*. (quoting *Hantsbarger*, 501 N.W.2d at 504). The Jorgensens "perform[ed] the due diligence necessary to determine the[ir] claim [was] meritorious before instituting litigation." *See id*. (quoting John D. North, Tort reform-Certificate of Merit, 9 Bus. & Com. Litig. Fed. Cts. § 103:31 (5th ed. 2021)). The Jorgensens' certificate of merit on the medical malpractice claim shows their lawsuit is not frivolous in nature.

Ultimately, this Court in *Struck* determined that the plaintiff's allegations were that "the defendants were professionally negligent by providing her with 'contraindicated' medication and breached duties of

professional care when they negligently 'failed to properly supervise her considering the medications she was on and the risks they posed for dizziness.'" *Id*. at 543. "Whether Struck was improperly medicated and supervised in light of her condition without measures to better monitor or restrain her is beyond the understanding of ordinary jurors." *Id*. By contrast, while the Jorgensens also made allegations of professional negligence, they did file a certificate of merit affidavit of one expert as well as disclosed a second expert because the medical malpractice claims are beyond the understanding of ordinary jurors. Although this Court agreed with the dismissal of the negligent hiring, supervising, and retention claims in *Struck*, that case does not stand for the proposition that all employment claims like negligent hiring, supervising, and retention claims require a second, independent certificate of merit.

B. Defendants' other citations are also misplaced for similar reasons noted-above related to *Struck*.

Following its flawed analysis of *Struck*, Tri-State provides superficial analysis of two cases this Court cited in *Struck: Palms W. Hosp. Ltd. P'ship v. Burns*, 83 So.3d 785, 788 (Fla. Dist. Ct. App. 2011) and *Ray v. Scot. Rite Children's Med. Ctr., Inc*., 555 S.E.2d 166, 168–69 (Ga. Ct. App. 2001)). Like with *Struck*, *Burns* and *Ray* are distinguishable.

In *Burns*, the patient was refused treatment in an emergency situation because every off-site doctor refused to come to the hospital because the patient lacked insurance. *Burns*, 83 So.3d at 787. The estate of the patient alleged the hospital knew these doctors might refuse treatment out of concern for sufficient compensation. *Id*. The hospital's failure to terminate those doctors was the basis of the negligent retention claim. *Id*. However, the Florida court ruled that malpractice pre-suit requirements, similar to Iowa's certificate of merit, must be followed because the claim was "a medical negligence claim where the respondent is claim that the [patient]'s death *resulted from the lack of treatment*." *Id*. at 788 (emphasis added). Not only is the negligent retention claim factually different than the present case, but also the Jorgensens' properly complied with Iowa's medical malpractice procedure by filing a certificate of merit as to cause of their injury.

In *Ray*, the plaintiffs' initial lawsuit for medical malpractice was dismissed with prejudice. 555 S.E.2d at 168. Like in *Struck*, the plaintiffs attempted to relabel a failed medical malpractice claim as one negligent retention to avoid the statute of limitation and repose. *Id*. The Georgia court clarified that the action for injuries "arose out of the care rendered by [the doctor], acting within the scope of her employment, constitutes an action for medical malpractice. . . . [T]heir claim nevertheless calls into question [the

doctor's] professional skills, or lack thereof, and their damages are predicated upon proof that [the doctor's] substandard medical care caused . . . injuries." *Id*. at 168-69. Again, the Jorgensens' employment claims are not relabeled failed malpractice claims as they may proceed with those as a result of the fact that they filed the certificate of merit affidavit.

Tri-State's reliance on *Wolfe v. Shenandoah Med. Ctr*., is also misplaced and is inapposite of this case. No. 21-1269, 2022 WL 2160449 (Iowa Ct. App. June 15, 2022). *Wolfe* involved the plaintiffs' claim that all the defendants, including a hospital, were negligent in their diagnosis, treatment, and discharge of the decedent. The *Wolfe* plaintiffs never included a negligent supervision claim against a hospital in their Petition. *See id*. at *1.

During discovery, the *Wolfe* plaintiffs apparently obtained some evidence of negligent supervision. However, they "neither pleaded negligent supervision as a cause of action nor amended their petition to include the claim—even after Plaintiffs' expert amended his opinion and criticized the supervision of SMC." *Id*. at *2. The *Wolfe* defendants then brought a motion to essentially dismiss a claim that was never made, and the district court granted the motion based on the plaintiff's failure to comply with § 147.140.

This case is different, beginning with the fact that the Jorgensens included negligent hiring, supervision, and retention claims in their Petition.

App. p.15. This case is also different in that *Wolfe* never involved the plethora of issues discussed above, or included allegations of such serious serial wrongdoing as present in this case.

Tri-State claims that these cases are consistent with this Court's decision in *Rieder v. Segal*, 959 N.W.2d 423 (Iowa 2021). However, this is an incorrect reading of *Rieder*, as it never addressed the issue before the Court here. Negligent credentialing is not the same claim as negligent hiring, supervision, or retention claims. Importantly, *Rieder*'s main holding was that an expert's opinion, based in part on numerous malpractice claims made against a physician, was admissible on the issue of whether the hospital breached the standard of care for credentialing a physician. This Court did not consider whether the issue involved ministerial, clerical, or administrative issues, or whether the common knowledge exception applied. And *Rieder* did not involve wrongdoing as egregious as in this case.

C. What Defendant Tri-State knew or should have known as of June 7, 2018, is sufficient for a layperson to evaluate without expert opinion.

For obvious reasons, Tri-State downplays what it knew about Smith when they hired him and what it reasonably should have discovered during his tenure prior to Charlene Jorgensen's botched surgery. At the time Smith was hired by Tri-State, Tri-State knew Smith had been sued multiple times

while Smith was working in Traverse City, Michigan. App. p.376. Dr. Steele's in-person warnings to Tri-State were while he was employed by Tri-State. Tri-State's characterization for Dr. Steele as a "disgruntled former employee" is misleading and obfuscates the seriousness of the allegations reported to Tri-State, which were then ignored by Tri-State.[9]

Moreover, Tri-State's cherry-picking of facts by isolating Dr. Steele's allegations of billing errors, at the cost of other severe allegations, similarly obfuscates the breadth of the allegations Dr. Steele made. Dr. Steele warned Tri-State during his tenure of various concerns of Smith's medical practice falling below the standard of care for a prudent, ethical, board-certified plastic surgeon. *Id*. The deviations included: (1) poor hand hygiene in the clinic setting; (2) failure to maintain accurate documentation, including avoiding recording complications; (3) failure to mark the operative plan on the patient in the preoperative holding area; (4) poor choice of operative candidates resulting in preventable complications and unnecessary revision surgery; and, (5) poor outcomes. *Id*.

Furthermore, while Tri-State attempts to make Smith's improper coding on a bill as innocent mistakes, the facts that "came to light later" put

[9] This Court should remember that Tri-State has resisted to provide meaningful discovery to the Jorgensens' that would allow her verify or rebut Tri-State's characterization of evidence. *See supra* fn. 7.

Dr. Steele's warnings into context of what Tri-State knew, should have investigated, or should have discovered. As a result of Smith's conduct, Tri-State paid over $612,000 to resolve claims that Smith performed "medically unnecessary procedures" and because "Tri-State knew of the surgeons' acts." Although couched in the context of billing fraud, the allegations that Smith billed for unnecessary procedures means that Tri-State knowingly was compensated for Smith's medical malpractice that occurred under their proverbial noses. Tri-State's decisions to hire and retain Smith—based on the nature of the allegations, the magnitude of the outcomes, and Tri-State's compliance or willful ignorance of Smith's conduct— does not require an understanding and application of concepts not within the knowledge of laypersons at what Tri-State did was wrong. It is within the knowledge of lawpersons that Tri-State allowed Smith to perform malpractice for profit. It is within the knowledge of laypersons that if Tri-State disclosed this information to Charlene Jorgensen, she would not have let Smith operate on her. It is within the knowledge of laypersons that if Tri-State was not negligent in hiring, supervising, and/or retaining Smith based on what they knew or should have known before Charlene Jorgensen's surgery, she would not have been disfigured by the hands of Smith at Tri-State.

D. Negligent employment claims are nonmedical, administrative, or ministerial in nature.

Judge Poulson correctly determined that employment claims, such as negligent hiring, supervision, and retention, are nonmedical, routine, administrative, or ministerial in nature. This decision is supported by this Court's holding in *Kastler* that the "character of a particular activity of a hospital—whether professional, on the one hand, or nonmedical, administrative, ministerial, or routine care, on the other—is *determined by the nature of the activity itself*, not by its purpose." 193 N.W.2d at 102 (emphasis added).

Tri-State attempts to compare this case with *Thompson v. Embassy Rehabilitation & Care Center,* 604 N.W.2d 643 (Iowa 2000). Their comparison is misplaced. Like in so many other cases that Tri-State wants this Court to apply, the *Thompson* plaintiff "failed to designate an expert witness to as to the standard of care" regarding the "fail[ure] to position [the patient] in a way that would lessen the pressure on the affected [bedsore] area" "that developed into a severe coccyx ulcer." *Id*. at 644. Again, unlike in *Thompson*, the Jorgensens did designate an expert witness as to the standard of care for a board-certified plastic surgeon. Because of the "special circumstances" in *Thompson*, this Court determined that the issue in dispute was the "forced repositioning of the care facility resident contrary to his

wishes" and that would be a medical question not within the common understanding of the jury. *Id*. at 646. In doing so, this Court applied the test that:

> If all the primary facts can be accurately and intelligibly described to the jury, and if they, as persons of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation, expert testimony is not required.

Id. Judge Poulson cited this test in his decision. App. pp.221-222. In *Thompson*, the special circumstances required medical judgment as to the standard of care for reposition a patient. This is wholly dissimilar to the application of common or business judgment in hiring and retaining a doctor who has a history of malpractice, performing unnecessary procedures, and with specific allegations of substandard care of patients under the facility's care.

E. Tri-State's hiring, failure to properly supervise, and failure to terminate Smith were obvious breaches such that expert testimony is not needed.

This Court has recognized that even in situations involving "pure" medical malpractice claims against physicians or hospitals expert testimony is not necessary in every case. *Oswald v. LeGrand*, 453 N.W.2d 634 (Iowa 1990). *Oswald* held that while certain negligent conduct of physicians and

hospitals requires expert testimony for "evidence not within common knowledge" there is an exception for "evidence within the common knowledge." *Id*. at 638; *see also Cockerton*, 490 N.W.2d at 859 ("[W]here a physician's lack of care is so obvious as to be within the comprehension of laymen, and to require only common knowledge and experience to understand, expert testimony is unnecessary." (quoting *Buckroyd v. Bunten*, 237 N.W.2d 808, 811 (Iowa 1976))). The "common knowledge" exception has long been accepted in the State of Iowa and throughout the United States.

This Court noted that "the question is whether these . . . incidents, if proven at trial would demonstrate a breach of professional conduct so obvious as to be within the common knowledge of laypersons without the aid of expert testimony; or in the alternative, whether plaintiffs could prove the standard of care and its breach through defendants' own testimony." *Oswald*, 453 N.W.2d at 638. This Court went on to hold that the conduct of the physician in being rude and leaving the hospital with his patient unattended did not require an expert witness because "a lay jury is . . . capable of evaluating the professional propriety" of the physician's conduct. *Id*. at 640. Thus, even if this Court considers some element of the Jorgensens' negligent employment claims to encompass "medical" standards, what happened in this particular case is so egregious that it is within the common knowledge of a lay jury.

The litany of Smith's unprofessional misconduct was well-known to Tri-State *before* Charlene Jorgensen's June 7, 2018 surgery. Dr. Steele's conversations with Tri-State's business manager and his July 31, 2017 letter are devastating. The fact that Dr. Steele was fired after raising these concerns further cements Tri-State's awareness of Smith's malfeasance. What Tri-State chose to ignore was the obvious danger to patients such as Charlene Jorgensen. It doesn't take a medical expert to know that the totality of Smith's malfeasance violates the standard of care. Smith was dangerous and known to be harming patients, and a clear and present danger to the public. The malfeasance in this case is just as egregious as what the Supreme Court found in *Oswald* to be well within the capability of a lay jury to evaluate.

Almost every state in the Union recognizes some version of the "common knowledge" exception to expert testimony. *See generally Jackson v. Burrell*, 603 S.W.2d 340, 346-348 (Tenn. 2020) (collecting and summarizing cases). The *Jackson* case involved a statute similar to Iowa Code § 147.140, and required a "good faith certificate" in health care liability cases that a plaintiff had consulted with one or more experts who provided a signed written statement on the merits of the case. *Id.* at 342-43. *Jackson* also applied the "common knowledge" exception to the certificate requirement.

The *Jackson* Court noted that "in health care liability cases, this exception comes into play when the subject matter of the alleged misconduct is 'within the understanding of lay members of the public.' The practical effect of applying the common knowledge exception is that the plaintiff need not produce expert testimony to prove . . . a deviation of the standard of care applicable to the defendant." *Id.* at 346. The *Jackson* court succinctly noted why expert testimony was needed in some claims, but not in others:

> What all of these cases have in common is the fundamental consideration of whether the conduct at issue involved the exercise of medical judgment or skill. In other words, whether the alleged negligent conduct involved technical or specialized knowledge of a medical procedure or a patient's medical condition or whether the alleged negligent conduct involved medical decision-making – such as determining the type of treatment or procedure to perform or the type of equipment or medicine to use. If so, the expert proof would be necessary. As Professor King has suggested, this inquiry might be phrased as whether "[t]he specific decision making by the health care provider … involve[d] the exercise of uniquely professional medical skills, a deliberate balancing of medical risks and benefits, or the exercise of therapeutic judgment."

Id. at 350 (citations omitted.)

In *Andrews v. Reynolds Memorial Hosp., Inc.*, 499 S.E.2d 846 (W.V. 1997), the West Virginia Supreme Court of Appeals dealt with a similar issue. A hospital argued that a West Virginia statute required the trial court to dismiss the plaintiff's claim because the plaintiff produced no expert testimony on a plaintiff's negligent hiring and retention claim. The court held

no expert testimony was required under the circumstances of that case. *Id.* at 857 n. 12. The court noted that:

> Here, the lack of expert testimony notwithstanding, a significant portion of the appellants' claim of negligent hiring and retention consisted of evidence submitted at trial of (1) an *agreed order* between Dr. Spore and the Tennessee Board of Medical Examiners placing Dr. Spore's license to practice medicine in that State upon probationary status and (2) ***testimony to the effect that Reynolds Memorial Hospital knew about the agreed order prior to hiring Dr. Spore but failed to investigate the circumstances thereof***. *See*, T.J. Hurney, Jr., *Hospital Liability in West Virginia*, 95 W.Va.L.Rev. 943 (1993) (collecting cases). ("Hospitals have been held liable when the failure to properly scrutinize a physician's application results in unreasonable risk of harm to its patients.") Upon review, this Court concludes that, under the circumstances of this action, the evidence of the appellants upon the negligent hiring and retention issue was sufficient for the jury's consideration. Thus, the appellees' assertion concerning a directed verdict is without merit. *See also Roberts*, 176 W.Va. at 498, 346 S.E.2d at 797.

Id. (emphasis added).

The Alaska Supreme Court dealt with a similar issue in *Fletcher v. South Peninsula Hosp.*, 71 P.3d 833 (Alaska 2003). *Fletcher* involved a medical malpractice claim and a corporate negligence claim for negligent credentialing against a hospital. The hospital moved for partial summary judgment on several of the claims, including the negligent credentialing claim. The trial court granted partial summary judgment on the negligent credentialing claim. *Id.* at 837. The Alaska Supreme Court reversed the trial court on the plaintiff's negligent credentialing claim. *Id.* at 842-43.

While the court did not directly address the expert testimony issue, it did note that the trial court did not require expert testimony on the negligent credentialing issue. *Id.* at 844 n. 55. The court stated that even without "expert" testimony, evidence precluding summary judgment on the negligent credentialing claim included "six prior malpractice cases" and the fact "his privileges had been suspended for medical record delinquency." *Id.* at 843-44.

The touchstone of these cases is that when the evidence consists of serial wrongdoing, malpractice lawsuits, board complaints, administrative actions, and criminal charges it does not take an expert to help the jury to figure out if the standard of care has been violated. Such is the case here.

III. Causation between Defendant Tri-State's negligent hiring, supervision, and retention of Defendant Smith and the Jorgensens' injuries does not need expert testimony.

Tri-State fails to cite any authority that expert testimony is needed for causation of injuries with employment claims, such as negligent hiring, supervision, and retention, when there is already expert testimony as to the failure to act consistent with the standard of care on the malpractice aspect of the case. While Tri-State accurately cites *Godar v. Edwards*, for the proposition that the Jorgensens must show how Smith's "incompetence, unfitness, or dangerous characteristics proximately caused the resulting

injuries[,]" 588 N.W.2d 701, 708 (Iowa 1999), *Godar* does not stand for the proposition that this must be done through expert testimony.

The Jorgensens agree that causation for medical malpractice cases should typically be established by expert testimony. That is why their medical malpractice claim and lack of informed consent claim is supported by two disclosed experts. However, Tri-State's citations on this issue fail to show that expert opinion is required to establish factual causation between employment claims and the injury.

Defendant first cites *Bazel v. Mabee*, 576 N.W.2d 385 (Iowa Ct. App. 1998). The *Bazel* plaintiff "filed a *medical malpractice* claim against defendants[.]" *Id*., at 386 (emphasis added). The plaintiff had an artery bypass graft. *Id*. The plaintiff told one or more persons at the hospital that she was allergic to Betadine, which was eventually used during the surgery. *Id*., at 387. The defendants moved for summary judgment. The district court dismissed the claim because the plaintiff failed to show causation by expert testimony. *Id.* "The question [was] whether expert testimony was necessary to establish a prima facie claim of *medical malpractice*." *Id*. (emphasis added). The Iowa Court of Appeals determined that "[w]hether the result of applying Betadine to plaintiff's skin caused the damage she claims to have suffered [was] not within the common knowledge of a non-medically trained

person." *Id*., at 388. Clearly, the issue of causation was not related to a negligent hiring, retention, and supervision claim, which are the claims that are presently at issue.

The second case that Defendants cite is *Schmitt v. Floyd Valley Healthcare*, 965 N.W.2d 642 (Iowa Ct. App. 2021) (unpublished). The *Schmitt* plaintiffs "appealed the dismissal of their medical malpractice lawsuit against Floyd Valley Healthcare, in which they allege[d] two of its practitioners breached *the standard of medical care in diagnosing and treating* [the plaintiff]." *Id*., at 1 (emphasis added). "The district court determined that all but one of the [plaintiffs'] claims require expert witness testimony on the question of standard of care." *Id*. at 2. The Iowa Court of Appeals determined that "[d]espite the [plaintiffs'] claims that the breach of the standard of care is so clear as to be obvious to a layperson, [they found] no error in the legal conclusion that expert witness testimony is necessary to establish a prima face case on each of the [plaintiffs'] *medical malpractice* claims." *Id*. (emphasis added). Again, the issue of causation was not related to a negligent hiring, retention, and supervision claim. The need to establish causation by expert testimony was related to medical malpractice claims.

IV. Because expert testimony is not required, Plaintiffs' employment claims are not subject to dismissal.

As established in the preceding sections, expert testimony is not required in this case for the Jorgensen's employment claims. By the language in the statutory scheme, Iowa Code § 147.140 applies to professional, medical malpractice claims, not administrative, employment claims. *See supra* §§ I.A-B. The requirement that the certificate of merit affidavit be filed prior to discovery can be achieved for medical malpractice claims as patients/potential plaintiffs can request their medical records to provide to an expert for their review. *See supra* § I.C. However, the evidence needed to be obtained for a separate, additional, employment-focused certificate of merit would require gathering different facts pertaining to the facility and that would not be included in a patient's medical records. *See id*. Furthermore, "same or substantially similar field or specialty" requirement of Iowa Code § 147.139 would allow hospitals to create a moving target as to what type of expert a plaintiff would need to consult in order to file a certificate of merit affidavit. *See supra* § I.D. A medical provider that can opine as to the standard of care of medical judgment for a provider in the same field, but the same provider is no more or less qualified as to business or administrative decisions related to employment. This is why it is puzzling that Tri-State argues that the business decisions underlying the Jorgensens' employment claims require medical

judgement. *See* Defendants-Appellees' Brief, at 27. Tri-State's position opens the door to non-doctors to provide expert testimony as to the allegedly highly-technical, medical questions as to whether a health care provider should terminate a provider. As a result, it becomes obvious that the employment claims involve business decisions that can be understood by laypersons, and don't require specialized, medical knowledge.

Furthermore, the egregious facts of what Tri-State knew about Smith or should have investigated into would not require expert testimony to determine that Tri-State's conduct fell below the standard of care to which a reasonable hospital should be held. *See supra* §§ II.C, E.[10] Tri-State cites no case law that isn't factually distinguishable from this case. *See supra* §§ II.A-B. All of these reasons go toward why Iowa Code § 147.140 and a

[10] As this is an appeal from a summary judgment, all facts "properly before the court must be viewed in the light most favorable to the opposing party[,]" *i.e.* the Plaintiffs. *See Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990). Judge Poulson, in viewing the alleged facts of this case, determined that they "are so obvious as to be within th[e common knowledge] exception[.]" App. p.216. Furthermore, in relying on Smith's history of malpractice and the claims in the Steele Letter, Judge Poulson determined that "on the issue of negligent hiring, retention, or ministerial acts, the issue of causation to damages claimed by Ms. Jorgensen are equally obvious to the jury as to an expert, and on the issue of causation, based upon the facts of this case, expert testimony was therefore not required." App. p.250. Under the proper standard of review, this Court should affirm the district court's decision on this basis alone.

requirement of expert testimony is inapplicable to the Jorgensens' employment claims.

The Jorgensens filed a certificate of merit affidavit as to Smith's medical malpractice that resulted in their injuries. While employment claims require an underlying finding of medical malpractice, that does not been an additional and separate certificate of merit must be filed specifically for those employment claims. Because the Jorgensens filed a certificate of merit affidavit in support of their malpractice claims, which have not been dismissed, Iowa Code § 147.140 does not mandate dismissal of the employment claims.

CONCLUSION

Under Iowa Code § 147.140, the Jorgensens were required to file a certificate of merit affidavit to support their medical malpractice claim. In doing so, they provide that their claim was not frivolous, which was the legislative intention of § 147.140. Defendants' basis for this appeal stems from a distorted interpretation of § 147.140 and application to employment claims related to the underlying malpractice. Defendants, however, fail to cite a single case in which a plaintiff's employment claims were dismissed despite both pleading negligent hiring, supervision, and retention in their Petition and filing a certificate of merit affidavit as to the malpractice claim.

Because employment decisions can be made by non-doctors, such as hospital administration or business managers, expert testimony regarding medical judgment is not required to establish a hospital's breach of the standard of care. It is long-standing Iowa law that in these nonmedical, business decisions, the reasonable person standard is applied. While Defendants underplay the facts as to what Tri-State knew, how they knew, what they knew, and should have known after a reasonable investigation into Smith, the factual allegations in this case are egregious. It is well-within a layperson's understanding to find Tri-State negligent in hiring, supervising, and/or retaining Smith.

Accordingly, the Jorgensens' employment claims are not subject to the mandatory dismissal of Iowa Code § 147.140(6). The district court's determinations regarding the certificate of merit affidavit requirements not applying to the Jorgensens' employment claims was correct and must be affirmed.

REQUEST FOR NONORAL SUBMISSION

Plaintiffs-Appellees respectfully request to submit this brief without oral argument.

Dated this 8th day of November, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 13,243 words, excluding the parts of the brief exempted by Iowa R.App.P. 6.903(1)(g)(1).

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CERTIFICATE OF SERVICE AND FILING

I, Michael D. Bornitz, do hereby certify this Final Brief for Appellee was served on this 8th day of November, 2022, upon the following persons and upon the Clerk of the Supreme Court using the EDMS system which will send notification of such filing to the following:

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