

**IN THE SUPREME COURT OF IOWA**

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**IOWA SUPREME COURT No. 22-0403**

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**ALYSSA PRATT  
Plaintiff-Appellant**

**vs.**

**ADAM SMITH, M.D., ADAM SMITH, M.D., P.C., TRI-STATE  
SPECIALISTS, L.L.P.,  
Defendants-Appellees**

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**APPEAL FROM FEBRUARY 4, 2022 ORDER OF THE IOWA DISTRICT  
COURT FOR WOODBURY COUNTY,  
THE HONORABLE ROGER L. SAILER  
No. LACV187747**

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**PLAINTIFF-APPELLANT'S FINAL BRIEF**

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Jon Specht            AT0012576  
TRIAL LAWYERS FOR JUSTICE  
421 W. Water St., Third Floor  
Decorah, IA 52101  
Phone: (563) 382-5071  
Fax: (888) 801-3616  
Email: [jon@tl4j.com](mailto:jon@tl4j.com)

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**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

I. Whether the District Court erred in determining that Iowa Code section 147.140 applied to Ms. Pratt's negligent hiring, retention, and supervision claim against Tri-State Specialists, LLP.

## **ROUTING STATEMENT**

This appeal involves the application of well-established legal principals. Transfer to The Court of Appeals would seem appropriate. *See*, Iowa R. App. P. 6.1101(3)(a).

## **STATEMENT OF THE CASE**

This case is an appeal from an Order granting Defendants' Motion for Partial Summary judgment on the issue of negligent retention by the Iowa District Court for Woodbury County in the matter of case number LACV187747, *Pratt v. Adam Smith, M.D., et al.* The case involves claims for injuries by Plaintiff Alyssa Pratt arising out of a breast reduction surgery performed on September 20, 2017 and related care by Defendant Adam Smith, M.D. The Petition in this matter was filed on August 7, 2019. In addition to claims for medical negligence by Defendant Adam Smith, M.D., Plaintiff's Petition also alleged claims for negligent retention of Dr. Smith by corporate defendants Adam Smith, M.D., P.C. and Tri-State Specialists, L.L.P.

On February 24, 2020, Plaintiff filed the Certificate of Merit Affidavit of Dr. Richard Marfuggi, certifying that Dr. Smith's medical care and treatment of Ms. Pratt did not meet the standard of care for a plastic surgeon. This Certificate of Merit did not address Plaintiff's negligent retention claims, and Plaintiff did not file a separate Certificate of Merit specifically addressing the negligent retention

claim.

On December 16, 2021, Defendants filed a Motion for Partial Summary Judgment and Alternative Motion to Bifurcate, asking that the Court dismiss Plaintiff's claims against Defendants Adam Smith, M.D., P.C. ("Smith P.C.") and Tri-State Specialists, LLP ("Tri-State") for failing to exercise reasonable care in the hiring, retention, and supervision of Dr. Smith ("negligent retention claim"). After being granted an enlargement of time to file a Resistance, on January 7, 2022, Plaintiff filed a Resistance and supporting documentation to Defendants' Motion for Partial Summary Judgment.

On February 4, 2022, a Hearing was held on Defendants' Motion for Partial Summary Judgment before the Honorable Roger L. Sailer. On February 4, 2022, the Court issued a ruling granting Defendants' Motion for Partial Summary Judgment.

### **STATEMENT OF THE FACTS**

Alyssa Pratt underwent a breast reconstruction surgery performed by Defendant Adam B. Smith, M.D. on September 20, 2017. Ms. Pratt received follow-up treatment, including a second surgery, from Defendant Dr. Smith until June, 2019.

Prior to moving his plastic surgery practice to Sioux City, Iowa, Defendant Dr. Smith practiced plastic surgery in Traverse City, Michigan from 2011.

Complaint of the United States, United States of America v. Adam B. Smith, M.D., and Borealis Plastic Surgery, PLLC, Defendants (18-cv1445), App. 100. While practicing in Michigan, Dr. Smith “knowingly defrauded Medicare and Medicaid by submitting false claims for reimbursements for plastic surgery procedures that were cosmetic and not medically necessary” and “knowingly made false statements regarding the nature of the services [he] provided and [his] patients’ conditions in order to obtain reimbursement from these programs.” Final Order for Default Judgment, *United States of America v. Adam B. Smith, M.D. and Borealis Plastic Surgery, PLLC* (18-cv1445), App 121.

On July 31, 2017, Matthew H. Steele, M.D., formerly a physician with Tri-State Specialists, L.L.P., sent a letter to Tri-State Specialists that stated, “But what disgusts me . . . is your decision to exercise the 90-day option after I brought forth evidence of Dr. Smith’s rampant malpractice and widespread insurance fraud.” Dr. Steele Letter, App 141. Dr. Steele further stated in this letter that he informed Tri-State Specialists between 3/1/17 and 4/7/17, among many other things, that “Dr. Smith was under investigation by the Department of Justice for alleged Medicare fraud committed during his tenure in Traverse City, MI.” Dr. Steele Letter, App 143.

In its Sentencing Memorandum in the matter of United States of America v. Adam B. Smith, M.D., the United States stated as follows: “But this investigation

is not about Smith being unjustly reimbursed for one procedure. It is about ending the pervasive harm caused by a person who, from the outset of his surgical career, has exhibited a multi-state pattern of incompetence, opportunistic decision-making, and fraud. As a result of those actions, he has left a wake of professional misconduct complaints, lawsuits, and a debt to government programs that fund medically necessary treatments for the elderly and impoverished.” Government’s Sentencing Memorandum, *United States of America v. Adam B. Smith, M.D.* (19-cr-259), App 123.

On November 19, 2020, the Iowa Board of Medicine filed an Amended Statement of Charges against Dr. Smith. These charges included the following: (1) Professional Incompetency; (2) Practice Harmful or Detrimental to the Public; (3) Unethical or Unprofessional Conduct; (4) Inappropriate Prescribing; (5) Improper Management of Medical Records; (6) Knowingly Making Misleading, Deceptive, Untrue, or Fraudulent Representations in the Practice of Medicine and Surgery; and (7) Having a License to Practice Medicine and Surgery Suspended in the Licensing Authority of Another State. Amended Statement of Charges, In The Matter of the Statement of Charges Against Adam B. Smith, M.D., Respondent, Before the Iowa Board of Medicine, App 133.

On February 18, 2021, as part of a Settlement Agreement with the Iowa Board of Medicine, Dr. Smith voluntarily surrendered his Iowa medical license.



Settlement Agreement in the Matter of the Statement of Charges Against Adam B. Smith, M.D., Respondent, Before the Iowa Board of Medicine, App 129. On September 10, 2021, Defendant Adam B. Smith, M.D. plead guilty to False Statements Relating to a Health Care Matter. Judgment, *United States of America v. Adam B. Smith, M.D.* (19-cr-259). On November 29, 2021, a Default Judgment was entered against Defendant Dr. Smith in the matter of United States of America v. Adam B. Smith, M.D., and Borealis Plastic Surgery, PLLC, Defendants. Final Order of Default Judgment, *United States of America v. Adam B. Smith, M.D., and Borealis Plastic Surgery, PLLC, Defendants* (18-cv-1445)), App 121.

Plaintiff's claims in this matter included claims against Defendant Tri-State Specialists for the negligent retention of Dr. Smith. Specifically, Plaintiff claimed that Tri-State Specialists negligently retained Dr. Smith after receiving the letter of Dr. Matthew Steele.

On December 16, 2021, Defendants Adam Smith, MD, Adam Smith, MD, PC, and Tri-State Specialists, LLP filed a Motion for Partial Summary Judgment and Alternative Motion to Bifurcate with regards to Plaintiff's negligent retention claims. One of the central contentions of this Motion for Partial Summary Judgment was that Plaintiff was required to file a Certificate of Merit Affidavit with regards to her negligent retention claim against Dr. Smith.

In the same time period, Defendants Adam Smith, MD, Adam Smith, MD,

PC, and Tri-State Specialists, LLP filed virtually identical motions for Partial Summary Judgment and Alternative Motions to Bifurcate in several other matters in which these parties are also defendants.

On February 2, 2022, the Honorable Jeffrey Poulson in the matter of *Charlene Jorgensen and Michael Jorgensen v. Adam B. Smith, MD, Adam Smith, MD, PC, and Tri-State Specialists, LLP*, Case No. LACV192198, in the Iowa District Court for Woodbury County, a case brought by separate plaintiffs represented by separate counsel against the same defendants as those in this matter, when faced with a virtually identical Motion for Partial Summary Judgment brought by Defendants Adam B. Smith, MD, Adam Smith, MD, PC, and Tri-State Specialists, LLP, issued a ruling denying the motion. *See*, Ruling on Defendants' Motion for Partial Summary Judgment, *Jorgensen v. Adam B. Smith, MD, et al.*, (hereinafter "Jorgensen Ruling"), App 271.

### **ANALYSIS**

#### **I. The District Court Erred in Granting Defendants' Motion for Partial Summary Judgment on Plaintiff's Negligent Retention Claim**

Plaintiff does not dispute that no Certificate of Merit or expert report was filed in this matter on the specific issue of the Negligent Retention of Dr. Smith – because Plaintiff was not required to do so. Plaintiff's claim of Negligent Retention fell under the rubric of being within the realm of common knowledge and therefore the

District Court was incorrect in granting Defendants' Motion for Partial Summary Judgment with respect to this claim.

**A. Plaintiff Fulfilled the Elements of a Claim for Negligent Retention**

Iowa Civil Jury Instruction 730.5 (2020 Update) states as follows with regards to a claim for Negligent Hiring:

Plaintiff must prove all of the following propositions:

1. An [employment][agency] relationship exists between (employee) and the defendant employer.
2. The employer knew, or in the exercise of ordinary care should have known, of (employee's) [incompetence][unfitness][dangerous characteristics] at the time of hiring.
3. The (employee's) [incompetence][unfitness][dangerous characteristics] was a cause of damage to the Plaintiff.
4. The nature and extent of the damage.

*See*, Iowa Civil Jury Instruction 730.5. Furthermore, "In Godar, the Iowa Supreme Court held that a claim for negligent hiring likewise included an action for negligent retention and negligent supervision." *See*, Iowa Civil Jury Instruction 730.5 (Comment), citing *Godar v. Edwards*, 588 N.W.2d 701 (Iowa 1999).

By July 31, 2017 Defendant Tri-State Specialists, L.L.P. had been made aware by Dr. Matthew Steele of Dr. Smith's incompetence, unfitness, and dangerous characteristics – including, but not limited to, that he was under investigation by the Department of Justice for Medicare fraud. *See*, Dr. Steele

Letter, App 141. The care which plaintiff's expert witness Richard Marfuggi, M.D. testified fell below the standard of care took place in and after September of 2017. (With regard to Adam Smith, M.D., P.C., Defendant Adam Smith was the agent, corporate officer, and sole shareholder of Adam Smith, M.D., P.C. It can be presumed that Dr. Smith was aware of his own incompetence, unfitness, and dangerous characteristics and that this actual knowledge can be imputed to Adam Smith, M.D., P.C.).

By choosing to continue to maintain an employment and/or agency relationship with Dr. Smith after becoming aware, through Dr. Steele's letter in July, 2017, that Dr. Smith was incompetent, unfit and dangerous, Tri-State Specialists allowed Plaintiff Alyssa Pratt to come under Dr. Smith's medical care in September, 2017 and the period that followed.

**B. Dr. Smith Knowingly Defrauded Medicare Prior to his Relationship With Tri-State Specialists**

Prior to his relationship with Tri-States Specialists, Dr. Smith committed fraud at his prior practice in Michigan. This fact which was judicially established in the 11/29/2021 Final Order of Default by Hon. Janet T. Neff, District Judge for the United States District Court for the Western District of Michigan. *See*, Final Order of Default Judgment, *United States of America v. Adam B. Smith, M.D., and Borealis Plastic Surgery, PLLC, Defendants* (18-cv-1445). In the Default

Judgment, the Court found in relevant part (emphasis added): “Adam Smith and Borealis Plastic Surgery failed to appear and to file an answer or responsive pleading in this action as required by the Court’s September 20, 2021 Order.”

The United States obtained a default judgment against Dr. Smith. The well-pleaded facts alleged in the Complaint are deemed admitted based upon the Entry of Default. 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 that were 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. This conduct violated the False Claims Act, 31 U.S.C. § 3729(a)(1)(A) and (B), and the United States’ damages must be trebled and statutory penalties awarded, 31 U.S.C. § 3729(a).” *See* Default Judgment pp. 1-2 (internal citations omitted) (emphasis added), App 121.

Therefore, there is no disputing that: (a) Dr. Smith committed fraud prior to starting his relationship with Tri-State Specialists; (b) by the summer 2017, Tri-State Specialists was aware that Dr. Smith was under investigation for fraud; and (c) Plaintiff’s care and treatment in the fall of 2017 and after by Dr. Smith took place after Tri-State Specialists was aware that Dr. Smith was under

investigation for fraud.

### **C. Plaintiff-Appellant's Negligent Retention Claim is Within the Realm of Lay Knowledge**

Under Iowa law, when a particular matter is a technical issue that goes beyond common knowledge and experience, then expert testimony is necessary to generate a jury issue. *See, Diemer v. Hansen* 545 N.W.2d 573 (1996). However, if a matter is within the common knowledge and experience of a layperson, no expert testimony is required. Iowa courts have found a number of topics within the realm of common experience for which no expert testimony is required. In *Welte v. Bello*, the Iowa Supreme Court held that it was within the common experience of a juror to know that properly inserted needles should not cause chemical burns. *See, Welte v. Bello*, 482 N.W.2d 437 (Iowa 1992). As the Court stated, “The chemical burn to Welte’s arm was caused by sodium pentothal that Dr. Bello injected into her vein which then infiltrated or escaped from the vein into the surrounding tissues. We believe it is within the common experience of laypersons that such an occurrence in the ordinary course of things would not have happened if reasonable care had been used. The insertion of a needle into a vein is a common medical procedure that laypersons understand. It is a procedure that has become so common that laypersons know certain occurrence would not take place if ordinary care is used.” *Id.* at 441. The issue here – should an employee known to be under federal criminal investigation for a Class C Felony continue to be employed in a patient-

facing role – is well within the realm of the ordinary knowledge of a lay person.

This is not an issue that requires medical expert knowledge or testimony. Any Iowa juror is qualified to evaluate this matter without hearing from an expert witness. This is a far less technical question than that which was faced by the jury in *Welte v. Bello*. As the Iowa Supreme Court stated in *Thompson v. Embassy Rehabilitation & Care Center*, 604 N.W.2d 643 (Iowa 2000), “[I]f 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.” This is just such a situation which can be evaluated by a person of common understanding.

Plaintiff-Appellant respectfully submits that the reasoning of Judge Poulson in denying a virtually identical Motion for Partial Summary Judgment from these Defendants in the matter of *Jorgensen v. Adam Smith, M.D., et al.*, in the Iowa District Court for Woodbury County, LACV192198 was correct.

As Judge Poulson noted in his ruling on the Jorgensen matter, “Not every cause of action against a health care provider is subject to the certificate of merit affidavit requirement. 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.” Jorgensen Ruling, App 274. As Judge Poulson further noted, “Iowa cases have recognized a distinction between cases involving routine care and professional care. If routine care is involved, no expert witness is required, whereas professional care does inherently require expert testimony.” Jorgensen Ruling, App 275, citing *Landes v. Women’s Christian Ass’n*, 504 N.W.2d 139 (Iowa Ct. App. 1993), *Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 101-102 (Iowa 1971), and *Hall v. Jennie Edmundson Memorial Hospital*, 812 N.W.2d 681(Iowa 2012).

In *Landes*, the Iowa Court of Appeals held that the Plaintiff was not required to introduce expert testimony regarding a claim for injuries Plaintiff sustained at a hospital while being taken to the bathroom, finding that the hospital’s activity with regards to this patient at the time of the injury involved “nonmedical, administrative, ministerial, or routine care.” *Landes* at 140. As the Iowa Supreme Court held in *Kastler*, “The proper standard of care for nonmedical, administrative, ministerial, or routine care by hospitals is such reasonable care as the patient’s known mental or physical condition may require.” *Kastler* at 102. In such situations, “Expert testimony is not required to prove this standard of care.” *Id.*

Alternatively, as Judge Poulson also noted in the *Jorgensen* ruling, Iowa law also recognizes a “common knowledge” exception to the requirement for expert



testimony to establish the standard of care and breach in a medical malpractice case. In cases where the “lack of care is so obvious to be within the comprehension of a lay[person] and requires only common knowledge and experience to understand,” no expert testimony is required.” *Oswald v. LeGrand*, 453 N.W.2d 634 (Iowa 1990). As Judge Poulson held in the alternative in the *Jorgensen* ruling, the potential negligence of Defendants in retaining Dr. Smith was a matter where the lack of care was so obvious as to be within the comprehension of a lay juror. Therefore, no expert testimony or Certificate of Merit was required to establish a prima facie claim for the negligent retention of Dr. Smith. The Plaintiff-Appellant in this matter respectfully submits that the reasoning of Judge Poulson in the *Jorgensen* matter was correct and should have been adopted by the District Court with regards to this matter. As such, the Court erred in granting Partial Summary Judgment for defendants.

### **CONCLUSION**

For the above reasons, Plaintiff prays that the Court determine that the district court erred in granting Defendants’ Motion for Partial Summary Judgment, that the Court order that Plaintiff’s claims for negligent retention be re-instated, and that the Court remand the Plaintiff’s negligent retention claim to the district court so that litigation of this claim may resume.

## REQUEST FOR ORAL ARGUMENT

We request to be allowed 10 minutes for oral argument.

/s/Jon Specht  
Jon Specht AT0012576  
TRIAL LAWYERS FOR JUSTICE  
421 W. Water St., Third Floor  
Decorah, IA 52101  
Phone: (563) 382-5071  
Fax: (888) 801-3616  
Email: [jon@tl4j.com](mailto:jon@tl4j.com)

## PROOF OF FILING AND SERVICE

The undersigned hereby certifies that he, or a person acting on his behalf, electronically filed the Plaintiff-Appellant's Final Brief on the 7<sup>th</sup> day of November, 2022, and further certifies that he, or a person acting on his behalf, served the Appellant's Final Brief on all other parties to this appeal via EDMS.

By: /s/ Jon Specht  
Jon Specht AT0012576

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