

NOT DESIGNATED FOR PUBLICATION

No. 124,946

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JEANNINE WILLIAMS-DAVIDSON and JEFFREY DAVIDSON,
Appellants,

v.

DR. NASON LUI, STORMONT-VAIL HEALTHCARE, INC., STORMONT-VAIL, INC.,
d/b/a COTTON-O'NEIL, and OTHER DOE CORPORATIONS,
Appellees.

MEMORANDUM OPINION

Appeal from Douglas District Court; JAMES R. MCCABRIA, judge. Opinion filed July 28, 2023.
Reversed and remanded with directions.

Jason W. Belveal, of Holton, for appellants.

Cynthia J. Sheppard and *Cameron S. Bernard*, of Goodell Stratton Edmonds & Palmer, LLP, of
Topeka, for appellees.

Before BRUNS, P.J., CLINE and HURST, JJ.

CLINE, J.: Jeannine Williams-Davidson underwent surgery to remove her left adrenal gland at Stormont-Vail Hospital. Unfortunately, the surgeon who performed the operation misidentified her pancreas as her adrenal gland and removed a portion of the pancreas instead. Jeannine required further surgery and ongoing medical treatment, both to remove the remaining diseased adrenal gland and to repair the damage to her pancreas. Jeannine and her husband Jeffrey Davidson brought medical malpractice, contract, and KCPA claims against Dr. Nason Lui, Stormont-Vail Healthcare, Inc., Stormont-Vail,

Inc., d/b/a Cotton-O'Neil, and other Doe Corporations (Defendants) based on this mistake, as well as other alleged conduct.

The district court granted summary judgment to Defendants on the Davidsons' medical malpractice claims because the Davidsons did not designate a medical expert to testify about the standard of care for performing Jeannine's first surgery or whether the surgeon failed to meet that standard. It dismissed their remaining claims as moot after finding they all turned on the Davidsons' allegations that the surgeon committed medical malpractice in Jeannine's first surgery. The Davidsons appeal, arguing the common-knowledge exception and the doctrine of *res ipsa loquitur* apply so expert testimony is not required to establish the standard of care or a breach of that standard in this situation. They also argue their contract and KCPA claims stand on their own and thus should not have been dismissed as moot.

We agree the district court improperly granted summary judgment. When the surgeon misidentifies and removes all or part of a healthy organ, leaving the organ the surgeon intended to operate on untouched, the common-knowledge exception alleviates the need for expert testimony to establish the standard of care or a breach of that standard. And since the district court's determination that the Davidsons' remaining claims were moot was based on its decision regarding the need for expert testimony to establish the standard of care, we reverse that decision as well and remand for further proceedings.

FACTS

In February 2018, Jeannine underwent laparoscopic surgery at Stormont-Vail Hospital to remove her left adrenal gland, as treatment for an adrenal adenoma. Dr. Nason Lui performed the surgery but was joined by Dr. Brian Boyd partway through the operation.

The first part of the surgery involved cutting through adhesions from Jeannine's previous abdominal operations so the operational area could be visualized. Dr. Lui, assisted by Dr. Boyd, then removed what he believed to be Jeannine's left adrenal gland. In his operative report, Dr. Lui noted that Jeannine's adrenal gland appeared larger than expected and was surrounded by an abnormal amount of fat.

A subsequent pathology examination revealed that Dr. Lui had not removed Jeannine's left adrenal gland but had instead removed a portion of her pancreas. This finding explained why Jeannine experienced significant pain after the surgery from the buildup of fluid leaking from her injured pancreas.

Even though Dr. Lui later admitted that Dr. Boyd was not present during the entire operation, Dr. Lui wrote in his operative report—which he filed after receiving the results of the pathology examination—that Dr. Boyd "was present and assisted throughout all aspects of this operation."

Dr. Lui informed Jeannine of the pathology results and recommended that she undergo a second operation. Jeannine agreed and, the next day, Dr. Lui once again performed laparoscopic surgery. This time, he removed Jeannine's left adrenal gland and inserted a drain to address the leaking pancreatic fluid.

Based on alleged discussions with hospital representatives, Jeannine did not expect to be charged for the extra care caused by the mistakes made during her first surgery. Yet the hospital did not reduce Jeannine's bill, and she was charged for both surgeries, her extra hospital stay, and all follow-up care.

Roughly two years later, Jeannine and Jeffrey filed suit against Defendants. Their claims, as stated in their second amended petition, included medical malpractice, unjust

enrichment, breach of the duty of good faith and fair dealing, and violations of the Kansas Consumer Protection Act (KCPA).

The Davidsons alleged that due to the negligent removal of a part of Jeannine's pancreas instead of her left adrenal gland, Jeannine had to receive much more treatment than was initially anticipated. They alleged that the injuries to her pancreas not only extended the length of her initial hospital stay, but also required her to later be admitted for a second hospital stay after she became septic, requiring additional treatment. The Davidsons further alleged that, following her surgeries, Jeannine could not work for three months and developed diabetes. She apparently also suffered some injury to her spleen during one of the surgeries.

Along with the medical injuries, the Davidsons alleged that after the first surgery, Dr. Lui and other hospital staff tried to conceal and control evidence of their malpractice. The Davidsons alleged that after learning the results of the pathology examination, Jeannine contacted her attorney and, through counsel, informed the hospital that she wanted to be moved to University of Kansas Medical Center (KU Med) for any further treatment. They alleged that Defendants responded by confronting Jeannine without her counsel present and attempted to keep evidence of their malpractice under their control by coercing her into remaining at Stormont-Vail. This included, for instance, allegedly falsely telling Jeannine that her insurance would not pay for treatment if she left their facilities and that she did not need an attorney because they would "take care of the situation and make things right." The Davidsons also alleged that when Jeannine finally decided to transfer to KU Med and needed a referral to do so, Dr. Lui twice refused to give his signature, only providing it on the third request.

The Davidsons' malpractice claims were based mainly on Dr. Lui's misidentification and removal of part of Jeannine's pancreas during the first adrenalectomy. Besides identifying several ways in which Dr. Lui violated his duty of

care during the first surgery, the Davidsons claimed that removal of the wrong organ was negligent as a matter of common knowledge and also justified application of the doctrine of *res ipsa loquitur*. Their claims were partially based on allegations that Dr. Lui attempted to speak with Jeannine when she was readmitted for treatment, even though she had fired him as her doctor and made clear that she wanted him to leave her alone.

The Davidsons based their unjust enrichment claim on the Defendants' representations that they would take care of Jeannine without the need for her to obtain an attorney, alleging that Defendants unjustly derived pecuniary enrichment from mistakes which demanded restitution.

Similarly, the Davidsons alleged that Defendants breached their duty of good faith when they promised to make things right but then refused to reduce or waive any charges exceeding the cost of the initial surgery, even though the charges would not have been incurred but for Defendants' mistakes. The Davidsons also alleged that Defendants breached contractual duties under Stormont-Vail's Patient Bill of Rights by interfering with Jeannine's right to a second opinion, right to be transferred to another facility, and right to have a patient advocate of her choice.

As for the KCPA claims, the Davidsons alleged that Defendants engaged in deceptive acts or practices in violation of K.S.A. 2022 Supp. 50-626 by: charging Jeannine for extra treatment caused by their mistakes, setting prices higher for individuals with insurance, engaging in deceptive price fixing, using billing practices that were meant to confuse, failing to post prices for goods and services in advertisements, using scare tactics to try to prevent Jeannine from transferring, stating they would fix the issue when they actually intended to charge for all additional services, and providing an illusory patient bill of rights that did not guarantee patients any redress.

The Davidsons also alleged that Defendants violated the KCPA by engaging in unconscionable acts and practices under K.S.A. 50-627 by: interfering with the attorney-client relationship by speaking with Jeannine without counsel present to try to overcome Jeannine's stated desire to be transferred, not providing sufficient pain relief in contravention of the patient bill of rights, engaging in captive audience price gouging for prescription drugs from the hospital pharmacy, charging for services that would not have been necessary but for Defendants' mistakes, and attempting to frustrate Jeannine's efforts to transfer to KU Med. And the Davidsons alleged that Dr. Lui violated K.S.A. 50-627 by not using the on-call backup and instead interacting with her when she was readmitted to the hospital even though he had been fired as Jeannine's doctor and been made aware that she did not want to see him.

In preparation for trial, Dr. Lui was deposed by the Davidsons and responded to their requests for admissions. He admitted to unintentionally removing a portion of Jeannine's pancreas but denied that this mistake constituted medical negligence. When asked why he mistook the pancreas for the adrenal gland, Dr. Lui stated that it had a similar shape to the adrenal gland and was in "the same general location where the adrenal [gland] could be." He added that the tail of the pancreas can sit close to the tip of the kidney in the same location as the adrenal gland.

Dr. Lui testified that he did not review literature before performing the operation because he had done it before. He also stated that he preferred to have another surgeon present during a laparoscopic adrenalectomy, so that they can consult and direct each other during the procedure. And he admitted the removal of a portion of Jeannine's pancreas is what warranted her later readmission to the hospital as septic.

Pretrial motions

After the deadline for designating expert witnesses passed with no expert witness designation from the Davidsons, Defendants moved for summary judgment on some claims and to dismiss others. They filed two motions—one addressing the Davidsons' medical malpractice claims and the other addressing the Davidsons' various contract and KCPA claims.

In seeking summary judgment on the medical malpractice claims, Defendants pointed out that normally an expert medical opinion is necessary to establish breach of the relevant standard of care for such claims. They argued that neither of the exceptions to this general rule—the doctrine of *res ipsa loquitur* and the common-knowledge exception—applied because they claimed the standard of care for a laparoscopic adrenalectomy was not susceptible to common knowledge and removal of part of the pancreas was an unintended outcome that occurred despite reasonable medical and surgical care.

In seeking dismissal and summary judgment on the Davidsons' remaining claims, Defendants argued these claims should be dismissed because they were derivative of, and thus preempted by, the medical malpractice claims. Alternatively, Defendants contended the KCPA claims failed because they were not pled with sufficient particularity or supported by expert testimony.

For their part, the Davidsons argued that they did not need to provide an expert opinion to support their medical malpractice claims, as their claims fell within the exceptions to this requirement. They contended Dr. Lui's negligence was obvious and could be understood by a layperson, given that he began the surgery without Dr. Boyd present and removed part of the wrong organ.

They also denied that their unjust enrichment, billing, and KCPA claims were preempted by their medical malpractice claims. The Davidsons asserted that these claims dealt purely with deceptive billing practices and violations of the Patient Bill of Rights and were distinct from the allegation that Dr. Lui violated the standard of care during the first surgery, citing *Via Christi Regional Med. Center, Inc. v. Reed*, 298 Kan. 503, 314 P.3d 852 (2013). Additionally, the Davidsons argued that their KCPA claims were not fraud claims and thus were not subject to a heightened pleading standard.

Separately, the Davidsons moved for partial summary judgment on their KCPA claims related to amounts billed for services caused by Defendants' mistakes.

The district court's decision

The district court granted summary judgment to Defendants on all the medical malpractice claims because the Davidsons had no expert testimony to address the standard of care. The court concluded that neither the common-knowledge exception nor the doctrine of *res ipsa loquitur* applied.

In explaining this ruling, the district court first identified the Davidsons' malpractice claims, noting that they alleged Dr. Lui was negligent in: (1) initiating and performing much of the surgery on his own in the face of a written protocol that calls for two doctors to participate in the surgery; and (2) incorrectly identifying a portion of the pancreas as the adrenal gland and removing it as a result. As for *res ipsa loquitur*, the court noted the doctrine applied in a situation where the injury could be explained only by allowing an inference that negligence must have occurred. Because there was "nothing about [the Davidsons' claims] that [could not] be explored by examining the evidence to see whether such actions depart[ed] from the proper standard of care," the district court concluded the doctrine did not apply. The district court also found that whether two people were needed to perform laparoscopic surgery was not an issue of common

knowledge. And while acknowledging that removal of the wrong organ would seem to qualify as common-knowledge medical negligence, the district court nonetheless concluded that the exception should be limited to cases like the amputation of a wrong limb, rather than removal of a part of anatomy in the immediate area of the surgery.

The district court did not address Defendants' arguments about the viability of the Davidsons' remaining claims. Instead, it found Defendants' second motion—which addressed the remaining claims—was moot since it found all the Davidsons' claims "are predicated on proving that the first surgery was the result of medical malpractice." It also found the Davidsons' motion for partial summary judgment was moot for the same reason.

The Davidsons filed a motion to alter or amend judgment, which was denied. In elaborating on its decision to find the motions as to the non-malpractice claims moot, the court noted:

"[Jeannine's] argument was never that these claims were being asserted separate and apart from whether any medical malpractice occurred. That is, the arguments in this case were always cast in light of the harm arising from the second 'unnecessary' surgery that [Jeannine] underwent. Had the first surgery resolved all of [Jeannine's] medical issues, this lawsuit would not exist on bare KCPA allegations of price gouging or failure to provide comparison pricing or that some duty of good faith/fair dealing existed in connection with the decision to have the first surgery."

ANALYSIS

On appeal, the Davidsons challenge the district court's finding that expert medical testimony was required to establish the standard of care or a breach of that standard to support their malpractice claims. They also contend the court erred in concluding their

remaining claims all derived from their malpractice claims, thus finding their partial summary judgment motion moot.

Did the district court err in granting Defendants' motion for summary judgment as to the medical malpractice claims?

The Davidsons argue that the district court erred in granting summary judgment as to their medical malpractice claims because the *res ipsa loquitur* doctrine and the common-knowledge exception apply, so they were not required to provide expert opinion to establish the standard of care or breach of that standard. And since neither the district court nor the parties address whether expert testimony would be necessary to establish causation for any of the Davidsons' injuries, this court does not have a record or arguments available to address that issue.

Standard of review

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling [is] sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is *de novo*. [Citation omitted.]" *Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc.*, 62 Kan. App. 2d 204, 214, 510 P.3d 1172 (2022), *rev. denied* 316 Kan. 756 (2022).

Medical malpractice claims generally require expert testimony.

Medical malpractice is negligence of a healthcare professional in the diagnosis, care, and treatment of a patient. *Webb v. Lungstrum*, 223 Kan. 487, 490, 575 P.2d 22 (1978). To establish a medical malpractice claim, a plaintiff must prove the following: (1) The defendant owed the plaintiff a duty of care, requiring the defendant to exercise a certain standard of care to protect the plaintiff from injury; (2) the defendant breached that duty by deviating from the standard of care; (3) the plaintiff was injured; and (4) the injury proximately resulted from the defendant's breach. *Castleberry v. DeBrot*, 308 Kan. 791, 802, 424 P.3d 495 (2018).

The general rule presumes a physician or surgeon carefully and skillfully treated or operated on their patient, and no presumption of negligence is created by an injury or adverse result. *Tatro v. Lueken*, 212 Kan. 606, 611, 512 P.2d 529 (1973).

Because the diagnosis, care, and treatment of a patient are typically issues outside the knowledge of an average person, expert testimony generally is required to establish the relevant standard of care in medical malpractice cases. There are, however, exceptions to this requirement. Experts are not needed to establish the relevant standard of care where either the common-knowledge exception or the doctrine of *res ipsa loquitur* apply. *Hubbard v. Mellion*, 48 Kan. App. 2d 1005, 1013-14, 302 P.3d 1084 (2013).

The common-knowledge exception can alleviate the need for expert testimony to establish the standard of care when a breach of reasonable care is apparent to and within the common knowledge and experience of the average layperson. *Webb*, 223 Kan. at 490. Similarly, the doctrine of *res ipsa loquitur* applies to allow negligence to be inferred when a layperson could find that the patient's condition is such that it would ordinarily not have occurred had due care been exercised. *Tatro*, 212 Kan. at 611.

Although related, the common-knowledge exception and *res ipsa loquitur* are distinct doctrines. The court in *Hubbard* described the difference between the two:

"In a common knowledge case, a plaintiff presents evidence of the specific act or omission that allegedly deviated from the applicable standard of care and evidence of the injury sustained. The jury then utilizes common knowledge and experience to assess the wrongfulness of the specific act or omission and attribute the plaintiff's injury to that wrongful act or omission. In a *res ipsa loquitur* case, however, a plaintiff need only present evidence of the injury and is not required to prove a standard of care or a specific act or omission. Under the doctrine of *res ipsa loquitur*, the mere fact that the injury occurred raises an inference of negligence. [Citations omitted.]" 48 Kan. App. 2d at 1014.

The common-knowledge exception

The common-knowledge exception can apply to avoid use of an expert to establish the standard of care when what is alleged to have occurred in the diagnosis, treatment, and care of a patient is so obviously lacking in reasonable care and the results are so bad that the lack of reasonable care would be apparent to and within the common knowledge and experience of humankind generally. When the exception applies, lack of reasonable care may be established by lay testimony. *Webb*, 223 Kan. at 490.

Thus, there are three essential elements to the common-knowledge exception: (1) the plaintiff has alleged medical malpractice; (2) the care or result of the care is patently bad; and (3) a person without the pertinent medical knowledge can assess the wrongfulness of the diagnosis, treatment, or care and attribute the plaintiff's injury to the wrongful conduct without the help of expert testimony. Whether or not the common-knowledge exception applies to a given set of facts is a question of law. It is a narrow exception and is rarely applied. *Hubbard*, 48 Kan. App. 2d at 1015.

The common-knowledge exception has most often been applied to cases in which a physician leaves a sponge or surgical instrument in the patient after surgery. *Webb*, 223 Kan. at 490. But Kansas courts have applied the doctrine in various situations. See *Hiatt v. Groce*, 215 Kan. 14, 22-23, 523 P.2d 320 (1974) (no expert testimony needed to establish breach of the standard of care where nurse failed to call doctor when woman began labor and suffered severe vaginal lacerations); see also *Bernsden v. Johnson*, 174 Kan. 230, 238, 255 P.2d 1033 (1953) (no expert testimony needed to establish negligent medical treatment where physician left a plastic tube in patient's throat for 36 hours after surgery, resulting in severe pain, hypoxia, and hoarseness); *McMillen v. Foncannon*, 127 Kan. 573, 274 P. 237 (1929) (no expert testimony needed to establish whether failure to set or treat a badly dislocated elbow was negligent medical treatment).

Res ipsa loquitur

While the common-knowledge exception can be applied to allow a plaintiff to show breach of the standard of care without expert testimony, the doctrine of *res ipsa loquitur* allows a plaintiff to establish negligence without direct proof of either the standard or the breach. Where common knowledge and experience show that a patient would not have been injured had due care been exercised, negligence can be inferred without the medical evidence which is ordinarily required to show not only what occurred but how and why it occurred. *Voss v. Bridwell*, 188 Kan. 643, 662, 364 P.2d 955 (1961) (negligence could be inferred where intubation tube was accidentally placed down esophagus, depriving patient of oxygen during surgery and rendering him brain dead); see also *Emrie v. Tice*, 174 Kan. 739, 747, 258 P.2d 332 (1953) (*res ipsa loquitur* applied when patient suffered severe burns to portions of his head, face, and neck during x-ray treatment to remove growth on ear).

The doctrine applies in a negligence action where there is no direct proof of negligence, but where circumstances are such as to leave no conclusion other than that

the defendant is at fault. Because of the favorable presumption of skill and care and the nature of medical practice and treatment, which usually requires expert testimony to establish fault, the doctrine's application is limited. *Hubbard*, 48 Kan. App. 2d at 1016.

Discussion

In arguing that the common-knowledge exception should apply here to allow them to establish a breach of the standard of care with lay testimony, the Davidsons point to their allegations that Dr. Lui performed a portion of the surgery by himself in violation of hospital policy and was overworked. The Davidsons also assert that breach of the standard of care is obvious from Dr. Lui's removal of the wrong organ, noting that Dr. Lui admitted removing a portion of the pancreas was a mistake.

Similarly, in arguing the *res ipsa loquitur* doctrine applies here, the Davidsons assert that no technical knowledge should be needed to show that negligence has occurred when a surgeon operates a machine requiring two surgeons on his own and mistakenly removes the wrong organ.

Finally, in apparent support for the application of both doctrines, the Davidsons also point to their allegation that, at the time of the first surgery, Dr. Lui had not performed an adrenalectomy in more than a year. The Davidsons further argue that public policy supports the application of both doctrines, as an overly restrictive application of these doctrines can deny worthy plaintiffs who cannot afford expert witnesses an avenue to relief. And they argue that allowing their claims to proceed to trial would not prejudice Dr. Lui since he could still present his defense.

Neither exception applies to the Davidsons' specific allegations of negligence.

To begin, the Davidsons' arguments about Dr. Lui performing a portion of the surgery by himself, being overworked, or not having performed an adrenalectomy in over a year are misplaced and do not support the application of either exception.

A person without medical training cannot assess whether the standard of care for a laparoscopic adrenalectomy involving the lysis of adhesions from previous surgeries requires two surgeons to be present for the entire procedure. Similarly, what an appropriate and safe workload is for a surgeon or how often a surgeon must perform a certain procedure to remain competent at it are not topics within the common knowledge of a layperson. Thus, the common-knowledge exception does not apply to any of these specific claimed acts of negligence.

And as Defendants note, while Dr. Lui admitted in deposition that he preferred having a second surgeon present during an adrenalectomy, he did not state that the standard of care requires two surgeons or admit that he breached the standard of care by performing a portion of the surgery without Dr. Boyd present. As such, separate expert testimony would still be needed to establish that Dr. Lui acted negligently in performing a portion of the surgery by himself.

Nor do these allegations support applying the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* allows a plaintiff to establish negligence in the absence of a definite explanation for how an injury occurred. In making arguments as to Dr. Lui's preparation and methods, purporting to identify specific acts of negligence that led to the injury, the Davidsons misapprehend the purpose of the doctrine.

Removal of the wrong organ

That said, we find merit in the Davidsons' argument that the common-knowledge exception applies to allow them to argue Dr. Lui breached the standard of care by misidentifying and removing the wrong organ without providing expert testimony on this issue. Because the Davidsons only need to use one of these exceptions to allow them to establish breach of the standard of care without use of expert testimony, we need not decide whether the doctrine of *res ipsa loquitur* also applies.

In arguing that the common-knowledge exception allows them to establish a violation of the standard of care based on Dr. Lui's removal of the wrong organ, the Davidsons analogize their case to the situation where a doctor leaves a foreign object behind in a patient's body. They assert that negligence is just as obvious in both situations. In support, they point to *Schwartz v. Abay*, 26 Kan. App. 2d 707, 711, 995 P.2d 878 (1999) (common-knowledge exception applied when surgeon operated on wrong disc in patient's spine and admitted violation of the standard of care).

Defendants seek to distinguish *Abay*, arguing that the dispositive fact there was not that Dr. Eustaquio Abay operated on the wrong disc, but that he admitted by doing so he breached the relevant standard of care. Here, as Defendants note, neither Dr. Lui nor Dr. Boyd stated that by removing the pancreatic tissue they breached the relevant standard of care.

While Defendants are correct that this court relied on Dr. Abay's admission that he had violated the relevant standard of care in finding that the common-knowledge exception applied, this admission was not vital to the *Abay* decision. After noting Dr. Abay admitted that he committed malpractice, we explained why the other facts of the case supported application of the exception:

"Schwartz does not need a medical expert to say that Dr. Abay deviated from the standard of care. Dr. Abay operated on the wrong disc and took out 60% of a healthy disc, but left the disc he had diagnosed as the problem in Schwartz' back. If Dr. Abay removed the problem disc, he made the wrong diagnosis. No matter how it is viewed, it does not take a medical expert to determine that Dr. Abay deviated from the standard of care. The common knowledge exception applies to this case." *Abay*, 26 Kan. App. 2d at 711.

While Dr. Abay's admission was important, such an admission is not required for the exception to apply to establish a breach of the standard of care. Dr. Lui admitted that he did not intend to remove a portion of Jeannine's pancreas and only did so because he misidentified it as her left adrenal gland. We are persuaded by the Davidsons' argument that when a surgeon misidentifies and removes a healthy organ, leaving the organ intended to be operated on untouched, the outcome is so patently bad that the lack of reasonable care can be apparent and within the common knowledge of a layperson to establish a breach of the standard of care.

In arguing that the common-knowledge exception does not apply here, Defendants first assert that the exception is limited to obvious negligence that does not involve professional judgment for patient care, pointing to several examples in support. See e.g., *McKnight v. St. Francis Hosp. & School of Nursing*, 224 Kan. 632, 634-35, 585 P.2d 984 (1978) (applying exception when weakened patient fell to the floor when x-ray table was tilted vertically); *Webb*, 223 Kan. at 490 (listing cases in which physician left a sponge, gauze, or instrument in the patient after using it in a surgical procedure).

While Defendants are correct that this exception is limited, it is not as restrictive as they suggest.

First, the common-knowledge exception is not limited to situations that do not involve professional judgment for patient care. Rather, it applies to situations where a

person without special training can assess the wrongfulness of the diagnosis, treatment, or care and attribute the plaintiff's injury to the wrongful conduct without the help of expert testimony. *Hubbard*, 48 Kan. App. 2d at 1015. If the act was obviously wrong, the exception can apply even though professional judgment for patient care was part of the procedure.

Turning to the facts here, Defendants argue that the circumstances of this surgery do not support the application of the common-knowledge exception. They claim the standard of care for this procedure, or any breach, would be outside the common knowledge of the average person. In support, they argue that the adrenal gland and pancreatic tissue were not clearly delineated and were very close to each other, Dr. Lui was viewing them through a laparoscopic scope, the area was clouded with adhesions, and the adrenal gland resembles pancreatic tissue. Defendants assert that these circumstances leave too much to speculation as to what the standard of care would be to apply the common-knowledge exception here.

Beyond these arguments, Defendants contend that the Davidsons oversimplify the issue by giving dispositive effect to Dr. Lui's removal of the wrong organ. They cite *Collins v. Meeker*, 198 Kan. 390, 400, 424 P.2d 488 (1967), and *Tatro*, 212 Kan. at 613-14, in arguing that the common-knowledge exception should not be automatically applied to allow plaintiffs to avoid expert testimony to establish the standard of care in all cases in which a surgeon removes the wrong organ. They claim these cases establish that this is especially true when the injured organ was close to the intended site of operation, and there was no misplacement between two obviously different systems or locations.

In *Collins*, the court faced a medical malpractice claim based on, among other things, the incision of a patient's spermatic cord during a hernia repair. The district court granted summary judgment in the physician's favor, and the patient appealed, arguing that the common-knowledge exception and the doctrine of *res ipsa loquitur* applied to

permit the claim to proceed to trial. The court held that the incision of a spermatic cord during hernia repair, while a basis for an action in negligence, was not one of those cases in which common knowledge showed that the injury would not have resulted to a patient if reasonable medical or surgical care had been used. 198 Kan. at 400. Yet because expert testimony existed in the record that cutting the spermatic cord violated the standard of care, the court held that there was sufficient evidence to allow the claim to proceed to trial and reversed the granting of summary judgment. 198 Kan. at 400-01.

Tatro, meanwhile, involved a medical malpractice claim based on a hysterectomy that resulted in a vesicovaginal fistula. The case was tried to a jury, which returned a verdict for the physician. The patient appealed, arguing that the trial court erred in not allowing her to submit the case to the jury under the doctrine of *res ipsa loquitur*. On appeal, the Kansas Supreme Court affirmed the trial court's decision, holding that the doctrine of *res ipsa loquitur* did not apply since the expert testimony in the case suggested the fistula could have resulted from several causes, some of which did not involve negligence on the part of the surgeon. 212 Kan. at 614-15. In reaching this conclusion, the court reviewed *Collins*, and noted the doctrine should only apply when common knowledge suggests the injury would not have occurred but for negligence. *Tatro*, 212 Kan. at 612-13. The court then compared the facts at issue to *Collins*, pointing out that both cases involved complex surgical operations where an injury occurred to an organ that was not the object of the surgery but was in the immediate area of the surgery, and suggested that in such a context, the common-knowledge exception would not apply. *Tatro*, 212 Kan. at 613-14.

Defendants argue that *Collins* and *Tatro* are on point, as they involved situations where there was no reason to cut the organ that was injured, but the organ was in the immediate area of the surgery. Despite this similarity, however, there are also important differences between *Collins*, *Tatro*, and this case.

First, in both *Collins* and *Tatro*, the surgery at issue required some amount of interaction with the mistakenly injured organ. In *Collins*, the spermatic cord passed through the inguinal ring being repaired. In *Tatro*, the bladder had to be pushed to the side and isolated from the site of the operation. Because of the proximity of the organs to the object of the operation and the nature of the alleged injury, it could not be said as a matter of common knowledge that the injuries would not occur during a properly performed surgery. And in *Tatro*, it was unclear as a matter of common knowledge that the surgeon even caused the injury. The evidence suggested the injury to the patient's bladder could have resulted from a natural complication of surgery—an abscess—rather than an injury inflicted by the surgeon. 202 Kan. at 609. Finally, neither surgeon in *Collins* or *Tatro* was alleged to have misidentified the object of the operation, leaving the targeted diseased organ intact. Rather, they were alleged to have injured a healthy organ as an incident of operating on the targeted or diseased organ in that area of the anatomy.

Here, there is no argument that Dr. Lui intended to operate on or otherwise manipulate the pancreas as part of the planned adrenal gland procedure. And Dr. Lui did not injure Jeannine's pancreas while working on a correctly identified nearby portion of the anatomy. Rather, he misidentified the site of the operation, performing the procedure on the wrong organ while leaving the true object of the surgery untouched.

Based on the facts here, we cannot say that a violation of the standard of care was beyond the understanding of a layperson. Dr. Lui intentionally removed a portion of Jeannine's pancreas under the mistaken impression that it was her left adrenal gland. A person without the pertinent medical knowledge can assess whether Dr. Lui's conduct was within the standard of care when he mistakenly removed a portion of a patient's pancreas instead of the adrenal gland during an operation to remove the adrenal gland.

We therefore find that the common-knowledge exception applies to alleviate the need for expert testimony regarding the standard of care. We reverse the district court's

grant of summary judgment as to the Davidsons' medical malpractice claim based on the Davidsons' failure to identify an expert witness to establish whether removal of the wrong organ was a breach of the standard of care.

Disposition of the Davidsons' remaining claims

Along with challenging the district court's disposition of their medical malpractice claims, the Davidsons appeal from the court's decision finding all their remaining claims required proof that the surgeon committed medical malpractice in the first surgery. Defendants contend the court correctly characterized the Davidsons' claims as derivative. In the alternative, Defendants ask us to dismiss all the KCPA claims as improperly pled and dismiss the KCPA claims about billing for lack of expert testimony on specialized medical billing practices.

To recap, the Davidsons' contract and KCPA claims were based on allegations that Defendants: improperly overcharged Jeannine for services that would not have been necessary but for Dr. Lui's mistakes; set prices higher for individuals with insurance; engaged in deceptive price fixing; used billing practices that were meant to confuse; failed to post prices for goods and services in advertisements; used scare tactics to try to prevent Jeannine from transferring, stating that they would fix the issue when they actually intended to charge for all additional services; engaged in captive audience price gouging; failed to provide adequate pain relief; delayed production of Jeannine's records to prevent her from transferring hospitals; and provided an illusory patient bill of rights that did not guarantee patients any redress. They also alleged violations of the KCPA based on Dr. Lui's continued interaction with Jeannine after she fired him. The pretrial order reflects that the Davidsons claimed Defendants further violated the KCPA when Dr. Lui made false representations in his operative report for the first surgery that Dr. Boyd was present for the entire surgery.

Many of these allegations, such as deceptive price fixing, the use of confusing billing practices, deceptive advertising, and captive audience price gouging, appear unrelated to the Davidsons' specific allegations of medical malpractice, and instead appear to be based on the hospital's general business practices. The problem we face here is that the district court did not independently review the Davidsons' remaining claims. Instead, it summarily characterized them as derivative and did not consider any arguments on the viability of these claims because it granted summary judgment on the malpractice claims. Although Defendants urge us to independently dispose of these claims by finding the district court was right to dismiss them (although for a different reason), we decline to do so. We are a court of review and should hesitate to consider arguments that have not been ruled on first by a district court. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 898, 179 P.3d 366 (2008) (Kansas courts do not render advisory opinions.).

Since we find that the district court erred in finding the Davidsons could not establish a breach of the standard of care without expert testimony, we remand the matter to the district court for further proceedings. The court can address the merits of the Davidsons' remaining claims on remand.

Reversed and remanded with directions.

* * *

BRUNS, J., dissenting: Although I agree with the majority's conclusion that neither the common knowledge exception nor *res ipsa loquitur* apply to certain specific allegations of medical malpractice asserted by the Davidsons, I respectfully dissent from the conclusion that the common knowledge exception applies to the inadvertent removal of a part of the patient's pancreas by Dr. Lui when attempting to remove his patient's left adrenal gland.

As the majority correctly notes, the common knowledge exception applies when a breach of the appropriate standard of care and/or causation falls within the common knowledge and experience of the average layperson. Here, even though there is no question that Dr. Lui mistakenly removed a portion of the pancreas, the average lay person would not have the knowledge necessary to determine whether this mistake rose to the level of a breach of the appropriate standard of care by a surgeon. In other words, I do not believe it is patently obvious that the bad result occurred due to a breach of reasonable care.

Unlike cases in which a physician operates on the wrong limb or leaves a foreign substance in a surgical site, the record establishes that Dr. Lui was performing a laparoscopic adrenalectomy on the patient that was made more difficult than normal by adhesions. The record also establishes that the adrenal gland and pancreas are located in close proximity to one another. Consequently, whether the unintentional removal of a part of the patient's pancreas by a surgeon under these circumstances constitutes medical malpractice is not a subject that falls within the common knowledge of a layperson.

As a result of the nature of the surgical procedure, the patient's anatomy and the adhesions discovered during the surgery, I would find that an expert witness is needed to establish the appropriate standard of care, whether the standard of care was breached, and causation. As the district court found, "[t]he circumstances here leave too much to speculation . . . and to permit the jury to wrestle with such questions on their own would be in contravention of Kansas law." Thus, I would affirm the district court.