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Sean M. Olson and Michelle L. Olson, husband and wife, appellants, v. Lucile Wrenshall, M.D., and University of Nebraska Medical Center Physicians, a Nebraska professional corporation, appellees.

822 N.W.2d 336

Filed October 5, 2012. No. S-11-1030.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
4. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
5. **Summary Judgment: Appeal and Error.** The grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.
6. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
7. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
8. **Negligence: Words and Phrases.** A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.
9. **Negligence.** If there is no duty owed, there can be no negligence.
10. **Malpractice: Physician and Patient: Proof: Proximate Cause.** To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.
11. **Physician and Patient.** Traditionally, a physician's duty to exercise the applicable standard of care arises out of the physician-patient relationship.
12. **Negligence: Public Policy: Legislature.** The determination of a legal duty is fundamentally based in public policy considerations, and it is generally the function of the Legislature to declare what is the law and public policy of Nebraska.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

John M. Lingelbach, Gregory C. Scaglione, and Patrice D. Ott, of Koley Jessen, P.C., L.L.O., for appellants.

Joseph S. Daly and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, and MCCORMACK, JJ., and IRWIN, SIEVERS, and PIRTLE, JUDGES.

MCCORMACK, J.

NATURE OF CASE

This is an appeal after summary judgment in a medical malpractice action. A kidney donor brought suit after his donated kidney was rendered useless by allegedly negligent medical treatment provided to the donee. At issue is whether a duty of care is owed to a kidney donor by the physicians providing posttransplant treatment to the donee.

BACKGROUND

Daniel Olson was in need of a kidney, and his son, Sean M. Olson, volunteered to be the donor. Dr. Lucile Wrenshall performed the surgery to remove Sean's kidney. The surgery was successful, and there were no reported complications. That same day, in a separate surgery, Dr. Michael Morris transplanted Sean's donated kidney into the body of Daniel. In the weeks following the surgery, Daniel experienced complications with the donated kidney and additional surgical procedures were required.

Two weeks later, Wrenshall performed an exploratory surgery on Daniel. During that surgery, it is alleged, Wrenshall mistakenly stitched the renal artery, which supplied blood to the donated kidney.

Shortly thereafter, Morris performed a third surgery. In his operative report, Morris noted that two surgical sutures transgressed the renal artery. At that time, Morris determined the donated kidney could not be saved and ordered it to be removed.

Sean and his wife, Michelle L. Olson, brought suit for medical malpractice against Wrenshall and Morris for negligence in the performance of their professional services for Daniel. The complaint did not allege negligent care was provided to Sean. Rather, it alleged that Wrenshall was negligent in erroneously stitching Daniel's renal artery during the exploratory surgery. It also alleged that both Wrenshall and Morris were negligent in failing to monitor and supervise Daniel and properly detect the decreased blood flow to his transplanted kidney after the exploratory surgery. Further, the plaintiffs sought relief from University of Nebraska Medical Center Physicians (UNMCP), the employer of Wrenshall and Morris, under a theory of respondeat superior.

On July 15, 2011, a hearing was held concerning three relevant motions: Morris' motion for summary judgment, Wrenshall and UNMCP's joint motion for summary judgment, and the plaintiffs' motion for continuance of the summary judgment hearing. At the hearing, the defendants contended that neither Wrenshall nor Morris owed a duty of care to Sean during the care of Daniel. Furthermore, the defendants argued that Sean did not suffer any legally cognizable damages.

The plaintiffs' motion to continue the hearing date for summary judgment was heard first. The motion sought a continuance to conduct further discovery on whether a physician-patient relationship existed between Sean and the defendants. Counsel stated that such evidence would establish a duty of care that the defendants owed Sean. According to counsel, this duty of care to Sean would extend to include Daniel's treatment.

The defendants responded that such discovery was irrelevant to the court's determination of whether there was a cause of action. The defendants contended that regardless of whether Sean had a preexisting physician-patient relationship with the defendants, no duty existed to Sean during the care and treatment of Daniel. The court agreed, and the motion to continue was denied.

In support of summary judgment, the defendants jointly offered into evidence the consent form signed by Sean for his kidney removal surgery. The defendants also requested

that the district court take judicial notice that the complaint was devoid of any claim of personal injury suffered by Sean. Finally, Morris offered his own affidavit into evidence to establish that he did not perform Sean's surgery to remove the donated kidney.

In opposition to the motions, the affidavit of a medical expert was offered. The affidavit proposed the standard of care allegedly breached by Wrenshall. The medical records of Sean were also offered to demonstrate that physician-patient relationships existed between the defendants and Sean.

The district court granted Morris' motion for summary judgment. In its order, the district court stated that Morris had a physician-patient relationship solely with Daniel and thus did not owe a duty to Sean. Further, the order stated that the plaintiffs had failed to demonstrate legally cognizable damages because Sean had donated the kidney prior to any alleged negligence.

The district court soon realized it failed to rule on Wrenshall and UNMCP's motion for summary judgment. On November 7, 2011, the district court entered an order nunc pro tunc, wherein it found that Wrenshall and UNMCP's motion for summary judgment should also be sustained because the plaintiffs had failed to present an issue of fact as to any damages Sean suffered.

Prior to this appeal, the plaintiffs dismissed Morris from this action.

ASSIGNMENTS OF ERROR

The plaintiffs assign that the district court erred in granting summary judgment for four reasons: (1) A duty of care did arise from the physician-patient relationship between Sean and Wrenshall, and such duty was breached by Wrenshall's allegedly negligent treatment of Daniel; (2) Sean suffered damages that are or should be recognized under Nebraska law; (3) opposing expert opinions on the standard of care and breach of that standard of care created fact issues that were inappropriate for disposition on summary judgment; and (4) a continuance of the summary judgment hearing should have been granted to conduct further discovery.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

[3-5] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[3] When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.[4] The grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.[5]

ANALYSIS

Duty of Care

This appeal requires us to decide whether a physician owes a duty of care to a kidney donor during the posttransplant treatment and care of the donee. We hold that in this instance such a duty does not exist.

[6-9] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages

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[1] *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012).

[2] *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 814 N.W.2d 378 (2012).

[3] *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[4] See *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

[5] *Continental Cas. Co. v. Calinger*, 265 Neb. 557, 657 N.W.2d 925 (2003).

proximately caused by the failure to discharge that duty.[6] Thus, the threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.[7] A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.[8] If there is no duty owed, there can be no negligence.[9]

[10,11] To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.[10] Traditionally, a physician's duty to exercise the applicable standard of care arises out of the physician-patient relationship.[11] This relationship is said to arise when the physician undertakes treatment of the patient.[12]

Here, the plaintiffs present two arguments as to why Wrenshall owed a duty of care to Sean. First, Sean and Wrenshall's physician-patient relationship from Sean's kidney removal surgery created a duty of care owed by Wrenshall to Sean during the treatment of Daniel. And second, Wrenshall owed a general duty of care to Sean because Sean was subject to serious risks associated with Daniel's surgery. As a matter of law, we reject both arguments and find that Wrenshall did not owe a duty of care to Sean during her posttransplant treatment of Daniel.

Duty of Care Arising From Physician-Patient Relationship

We hold that Sean and Wrenshall's physician-patient relationship did not create a duty of care to Sean during the

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[6] *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004).

[7] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[8] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 3.

[9] *Turner v. Fehrs Neb. Tractor & Equip.*, 259 Neb. 313, 609 N.W.2d 652 (2000).

[10] *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008).

[11] See *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991).

[12] *Id.*

posttransplant treatment of Daniel. In the only two appellate opinions in the country confronted with similar facts, each court began its analysis with the threshold question of duty.[13] In both instances, the court rejected the donor's medical malpractice claim because the donee's treating physicians did not owe a duty of care to the donor.[14]

In *Malik v Beaumont Hosp*[15] and *Ornelas v. Fry*,[16] medical malpractice suits were brought by the donor for the loss of a donated kidney against the donee's treating physicians for negligent conduct during the donee's treatment. The Michigan Court of Appeals in *Malik* found no duty because the donor's physician-patient relationship with the treating physicians did not arise during the donee's surgery. Likewise, in *Ornelas*, the Arizona Court of Appeals rejected the donor's claim because the donor failed to prove the existence of a physician-patient relationship. The court explained that without the relationship, the anesthesiologist owed no legal duty to the donor and thus the claimed injury was not redressable.[17]

In opposition to *Malik* and *Ornelas*, the plaintiffs erroneously rely on *Siebe v. University of Cincinnati*,[18] an Ohio trial court decision. This is the only opinion cited by the plaintiffs that recognized a donor's medical malpractice cause of action against the donee's negligent physician. However, we find *Siebe* to be unpersuasive because it fails to address the threshold question of duty.

Although there is not a Nebraska case on point, we have held that a physician's duty to exercise the applicable standard of care arises during the physician's treatment of the patient.[19]

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[13] *Malik v Beaumont Hosp*, 168 Mich. App. 159, 423 N.W.2d 920 (1988); *Ornelas v. Fry*, 151 Ariz. 324, 727 P.2d 819 (Ariz. App. 1986).

[14] *Malik v Beaumont Hosp, supra* note 13; *Ornelas v. Fry, supra* note 13.

[15] *Malik v Beaumont Hosp, supra* note 13.

[16] *Ornelas v. Fry, supra* note 13.

[17] *Id.*

[18] *Siebe v. University of Cincinnati*, 117 Ohio Misc. 2d 46, 766 N.E.2d 1070 (2001).

[19] See, *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002); *Flynn v. Bausch, supra* note 11.

To establish that Wrenshall owed him a duty of care, Sean must allege that during the medical treatment he received from Wrenshall, Wrenshall's conduct was negligent.[20]

The complaint clearly alleges that all of Wrenshall's negligent conduct occurred during her treatment of Daniel, not Sean. Specifically, the complaint states that "Wrenshall was negligent in the performance of her professional services for Daniel." Furthermore, each alleged instance of Wrenshall's negligence occurred exclusively during the posttransplant treatment of Daniel. In fact, the complaint is devoid of any allegation that Wrenshall's negligent conduct was part of the treatment received by Sean.

There are no genuine issues of material fact that all of Wrenshall's alleged deviations from the standard of care occurred during the treatment of Daniel, not Sean. Thus, as a matter of law, Wrenshall did not owe a duty of care arising from the physician-patient relationship to Sean during her posttransplant treatment of Daniel.

General Duty of Care to Third Party

Further, we hold that Wrenshall did not owe a general third-party duty of care to Sean during Daniel's allegedly negligent treatment. In their brief, the plaintiffs invite us to create a new legal duty under *Flynn v. Bausch*,[21] where we suggested that in certain cases the physician-patient relationship may engender a duty to third parties who are subject to serious risks associated with a patient's treatment or condition. We decline their invitation.

[12] We are mindful of the fact that the determination of a legal duty is fundamentally based in public policy considerations and that it is generally the function of the legislature to declare what is the law and public policy of this state.[22] Given that no relevant statute establishing this state's public policy

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[20] See *Ornelas v. Fry, supra* note 13.

[21] *Flynn v. Bausch, supra* note 11.

[22] *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006).

has been brought to our attention, we are reluctant to create or define a new legal duty.[23]

In *A.W. v. Lancaster Cty. Sch. Dist. 0001*,[24] we abandoned the risk-utility test to determine whether a duty exists and adopted the duty analysis set forth in the Restatement (Third) of Torts.[25] The Restatement (Third) of Torts § 7 states that an actor owes a duty when the actor's conduct creates a risk of physical harm. The proposed final draft of Section 37 states the obverse of this rule and explains that an actor whose conduct has not created a risk of physical harm to another has no duty of care to the other.[26] Because *Flynn* preceded *A.W.* by almost 20 years, we apply the Restatement (Third) of Torts approach to determine whether a duty existed.

Here, we find that Wrenshall's allegedly negligent treatment of Daniel did not subject Sean to any risk of physical harm. Sean's surgery was on May 19, 2009, and he was discharged 4 days later on May 23. The exploratory surgery in which the renal artery was erroneously stitched occurred 2 weeks later.

At the time of Daniel's exploratory surgery and subsequent treatment, Sean was not at risk of physical harm associated with Daniel's treatment. Whether Wrenshall was negligent or not, Wrenshall's posttransplant treatment of Daniel could not and did not cause Sean to suffer physical injury.[27] Sean's kidney had already been removed, and he was not subject to any further surgeries or treatment because of the alleged negligence.

Therefore, there is no genuine issue of material fact that Sean was not subject to a risk of physical harm during Wrenshall's

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[23] See *id.*

[24] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 3.

[25] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010). See, also, *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

[26] Restatement, *supra* note 25, § 37 (Proposed Final Draft No. 1, 2005). See *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

[27] See *Malik v Beaumont Hosp, supra* note 13.

allegedly negligent treatment of Daniel. Thus, again, as a matter of law, Wrenshall did not owe a duty of care to Sean during her posttransplant treatment of Daniel.

Remaining Assignments of Error

The plaintiffs have three remaining assignments of error, regarding (1) whether Sean suffered legally cognizable damages, (2) whether competing experts on the standard of care make summary judgment inappropriate, and (3) whether the court erred in denying the motion to continue the summary judgment hearing. Because Wrenshall did not owe a duty of care to Sean during her posttransplant treatment of Daniel, we conclude that the remaining assignments of error are without merit.

CONCLUSION

Wrenshall did not owe a duty of care to Sean, the donor, during the posttransplant treatment of Daniel, the donee. Therefore, we hold that the district court did not err in granting summary judgment in favor of Wrenshall and UNMCP.

Affirmed.

Stephan, Miller-Lerman, and Cassel, JJ., not participating.

Bryan S. Behrens, an individual, et al., appellants, v. Christian R. Blunk, an individual, et al., appellees.

822 N.W.2d 344

Filed October 5, 2012. No. S-12-093.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
2. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.
3. **Limitations of Actions: Negligence.** If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within an exception to