IN THE COURT OF APPEALS OF IOWA

No. 9-447 / 08-1638
Filed August 19, 2009

**ALBERT MOONSAMMY, Individually,
and as Executor of the Estate of
Lilian C. Moonsammy,**
Plaintiff-Appellant,

vs.

**MERCY HOSPITAL, IOWA CITY,
IOWA, and DR. WILLIAM DULL,**
Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County, Denver Dillard, Judge.

The plaintiff appeals from the district court's order granting summary judgment to the defendants. **AFFIRMED.**

Elizabeth Craig and Martin Diaz, Iowa City, for appellant.

Richard M. Tucker and Anna Moyers Stone of Phelan, Tucker, Mullen, Walker, Tucker, & Gelman, L.L.P., Iowa City, and Constance Alt, Nancy Penner, and Tricia Hoffman-Simanek of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellees.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

Lilian Moonsammy passed away unexpectedly at Mercy Hospital in Iowa City three days after being admitted for severe back pain. Suspecting that she might have received an overdose of morphine in the hospital, the attending physician recommended that her husband request an autopsy. Unfortunately, the autopsy that was performed did not include a toxicology screen, thus making it impossible to determine whether morphine caused Lilian's death.

Lilian's husband, Albert, sued the hospital and the attending physician for negligent infliction of emotional distress, and the district court granted the defendants' motion for summary judgment. For the reasons set forth herein, we conclude Albert has not established a contractual relationship that would support an exception to the general rule that a plaintiff who suffered no physical injury will be denied recovery for emotional distress. *See Overturff v. Raddatz Funeral Servs., Inc*., 757 N.W.2d 241, 245-46 (Iowa 2008). Accordingly, we affirm the judgment below.

I. Background Facts and Proceedings

Since this case comes to us on review from a grant of summary judgment, we recite the facts in the light most favorable to the plaintiff. On December 9, 2004, Lilian, age sixty-five, was admitted to Mercy Hospital due to severe pain, mainly in her lower back. Her treating physician, Dr. William L. Dull, ordered morphine to alleviate her pain. On the afternoon of December 11, Lilian's daughter noticed that her mother seemed "groggy" and "out of it." Dr. Dull subsequently ordered a reduction in the morphine dose. Thereafter, the daughter observed that the nurses appeared to be confused about Dr. Dull's

orders concerning the morphine dose and even about how to operate the pump properly. At approximately 5:10 a.m. on December 12, a nurse found Lilian unresponsive and after unsuccessful efforts to resuscitate her, Lilian was pronounced dead at 5:46 a.m.

Shortly after Lilian's unexpected death, Lillian's husband, Albert Moonsammy, arrived at the hospital and spoke with Dr. Dull. The doctor indicated that he was unsure of the cause of the cause of Lilian's death, but that morphine may have played a role. Albert testified that Dr. Dull told him, "'Albert, I don't know why your wife died. I do not know if it's the morphine. You must request the postmortem or an autopsy,' and I said, 'Yes Doctor.'" A nurse then entered the room and handed Albert an autopsy consent form, which provided:

> Authority for Autopsy[:] I hereby authorize and empower the pathologist of Mercy Hospital, Iowa City Iowa and/or such person(s) as he/she may designate to perform a complete autopsy examination . . . and to retain portions of fluids or tissues for further study to the above named patient.

Albert signed the form, and the nurse witnessed it.

Prior to the autopsy being performed, Dr. Dull completed a discharge report. The report stated that Lilian was admitted with low back pain, but had atherosclerotic vascular disease, hypertension, long-standing anemia, non-insulin dependent diabetes mellitus, and hyperlipidemia. An electrocardiogram had an "incomplete left bundle branch block." The report then stated this "appears to be a sudden death" and discussed possible causes of death:

> The presumption of the underlying diagnosis could be incorrect. The other differential diagnoses include some bone dyscrasia, dysproteinemia, sepsis, or perhaps even a vascular problem (leaking aneurysm specifically), although most of these seem unlikely based on the information at this moment. Other

> considerations for what appears to be sudden death would be a stroke or a conduction abnormality. Finally, it is possible that she had a cerebrovascular insult, although this too seems unlikely but possible. Finally, of course, the issue of her morphine could have played a role in her death. Nonetheless, since it is not entirely clear why or how she died, an autopsy has been requested and granted by the family. Therefore, the final diagnoses are pending these results, which are not yet available.

However, Dr. Dull did not speak with the doctor who was to perform the autopsy.

Later that day, December 12, Dr. Don J. Merryman performed the autopsy. Dr. Merryman testified that he performed a complete autopsy, which is a complete anatomic examination of the body, but does not generally include a toxicology screen. As it was not regularly included, Dr. Merryman did not do a toxicology screen. The final autopsy report stated:

> No anatomic cause of death was identified. The patient did have a history of a left bundle branch block during this hospitalization and also during the previous hospitalization approximately five years ago. This indicates some degree of abnormality in the conduction system of the heart and the cause of death is attributed to a cardia arrhythmia.

Dr. Merryman later testified that he did not believe morphine played a role in Lilian's death. From the clinical findings and nursing notes, there was no evidence of respiratory depression, the only way he was aware that morphine can contribute to death. Lilian's death certificate stated her cause of death was arrhythmia due to conduction defect and atherosclerotic vascular disease.

After the autopsy was completed, Lilian's body was cremated. Subsequently, Albert received the autopsy results and met with Dr. Dull, who explained that Lilian had died of a heart problem. However, Albert learned that toxicology testing had not been completed and believed that morphine had something to do with Lilian's death.

On November 13, 2006, Albert filed a petition seeking recovery for medical malpractice resulting in wrongful death, loss of consortium, and negligent infliction of emotional distress.[1] In the claim for negligent infliction of emotional distress, Albert asserted that the defendants' failure to perform a toxicology screen during the autopsy examination deprived him of a definitive explanation of Lilian's death and thus, caused him emotional distress. Albert introduced expert testimony in the form of a report completed by Dr. Jonathan L. Arden. In his written report, Dr. Arden stated, in part:

> The general purpose of an autopsy is to provide detailed medical information about the decedent, which often can answer questions that cannot be resolved by less invasive methods during life. Hospital and forensic autopsies serve different functions, and thus may use different procedures. The hospital autopsy is used largely to determine the cause of death and to evaluate the extent of natural disease and the effects of treatment. The forensic autopsy is concerned with deaths that are violent (meaning any deaths that result from injuries) and those that are unexplained. . . .
>
> To assess whether morphine caused or contributed to [Lilian's] death would require (in part) toxicology laboratory testing, which would not be [routinely done] in a hospital autopsy. . . .
>
> There was no compelling evidence from the medical history or record to suggest a specific cause of death. The autopsy did not reveal any anatomic cause of death, and in fact showed that the putative cause of death according to Dr. Dull (atherosclerotic heart disease) did not affect Ms. Moonsammy to a degree that it could legitimately be the cause of death. The concerns about morphine were never addressed, because no toxicology testing was done. The ultimate question posed by the autopsy, namely the cause of death, cannot be answered due to the absence of any conclusive positive results from the examinations that were done coupled with the failure to perform toxicology testing. The lack of data on which to base a conclusion is reflected by the incomplete cause of death statement, that death was caused by an arrhythmia related to her left bundle branch block. The stated cause of death lacks an etiologically specific underlying process (which is required of a cause of death), and is not medically credible.

[1] The petition also named Dr. Don Merryman as a defendant. On March 5, 2008, Dr. Merryman was dismissed without prejudice from the suit.

> Given all of the above, and my own assessment of the medical records, the autopsy report and examination of the microscopic slides from the autopsy, it is my opinion that the actual cause of death of Ms. Moonsammy was not determined and, with the absence of required information, cannot be determined with reasonable medical certainty.

On June 3, 2008, the defendants moved for summary judgment. Albert did not resist dismissal of the medical malpractice and loss of consortium claims. However, Albert vigorously opposed dismissal of the negligent infliction of emotional distress claim, asserting that a duty extended from the defendants to him because the parties had a contractual relationship that dealt with a service that carries a deep emotional response upon breach.

On September 12, 2008, the district court found the parties did not have a contractual relationship and, therefore, the defendants did not owe a duty to the plaintiff. Accordingly, it granted the defendants' motion for summary judgment. Albert appeals.

II. Scope and Standard of Review

We review a district court's grant of summary judgment for correction of errors at law. Iowa R. App. P. 6.4; *Moore v. Eckman*, 762 N.W.2d 459, 460 (Iowa 2009). Summary judgment shall be granted when the entire record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Overturff*, 757 N.W.2d at 244. The moving party bears the burden to establish there is no genuine issue of material fact, and the facts must be viewed in the light most favorable to the moving party. *Overturff*, 757 N.W.2d at 244. "Because the existence of a duty under a given set of facts is a question of law

for the court, it is properly resolvable by summary judgment." *Id*. at 245; *J.A.H. v. Wadle & Assocs.*, 589 N.W.2d 256, 258 (Iowa 1999).

III. Analysis

Albert contends the district court erred in granting summary judgment on his negligent infliction of emotional distress claim because the defendants had a duty to avoid causing him emotional harm. It is a well-established principle that a plaintiff must ordinarily suffer some physical injury in order to recover damages for negligent infliction of emotional distress. *Overturff*, 757 N.W.2d at 245.[2] "We have departed from this principle only in a few instances where the circumstances have justified imposition of a duty on the injurer to exercise ordinary care to avoid causing emotional harm." *Millington v. Kuba*, 532 N.W.2d 787, 793 (Iowa 1995); *see e.g.*, *Barnhill v. Davis*, 300 N.W.2d 104, 107-08 (Iowa 1981) (concluding injurer has a duty to exercise ordinary care to avoid causing emotional harm to bystander witnessing serious injury or death of a close relative); *see also* Restatement (Third) of Torts (Tentative Drafts) § 46 (2009). Such claims have been recognized in the delivery of medical services incident to the birth of a child, services incident to a funeral and burial, and transmission and

[2]Some states allow negligent infliction of emotional distress claims more broadly without accompanying physical injury. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser and Keeton on Torts § 54, at 364-65 (5th ed. 1984). Albert cites to two cases where a negligent infliction of emotional distress claim based upon an autopsy survived summary judgment. However, both of these cases are from jurisdictions that do not require accompanying physical injury. *Kelly v. Brigham & Women's Hosp.*, 745 N.E.3d 969, 976-77 (Mass. App. Ct. 2001) (stating "plaintiffs must corroborate their mental distress claims with enough objective evidence of harm to convince a judge that their claims present a sufficient likelihood of genuineness to go to trial" and allowing a wrongful autopsy claim); *Ricottilli v. Summersville Mem'l Hosp.*, 425 S.E.2d 629, 634-35 (W.V. 1992) (discussing that a claim of negligent infliction of emotional distress does not have to be accompanied by physical injury as long as accompanied by facts sufficient to guarantee that the emotional damages claim was not spurious and allowing a claim for failure to determine a cause of death during an autopsy).

delivery of telegrams announcing the death of a close relative. *See Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990); *Meyer v. Nottger*, 241 N.W.2d 911, 920 (Iowa 1976); *Mentzer v. W. Union Tel. Co.*, 93 Iowa 752, 768-71, 62 N.W. 1, 5-6 (1895).

The exception to the physical injury requirement exists "where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm." *Oswald*, 453 N.W.2d at 639. However, a duty does not exist solely based on the existence of a highly emotional relationship or situation. *Millington*, 532 N.W.2d at 793. "[O]ther factors must be present for a duty to avoid causing emotional harm to arise. Such factors include the injured party personally experiencing the injurer's negligent conduct and the injured party having a contract with the injurer." *Id*. (citing *Barnhill*, 300 N.W.2d at 108; *Oswald*, 453 N.W.2d at 639). Thus, our supreme court has recognized a duty to protect against emotional distress where the parties have a relationship that is contractual in nature and concerns acts or services that involve deep emotional responses in the event of a breach. *Id*.; *Oswald*, 453 N.W.2d at 639. It is this exception to the general rule upon which Albert relies.

Albert argues that he contracted with the defendants to perform an "autopsy to determine whether Lilian died from the over-administration of morphine" and this contract carried with it a deep emotional response upon breach. We must thus determine whether the parties had a contractual relationship. Shortly after Lilian's death, Dr. Dull told Albert he did not know the cause of Lilian's death and instructed Albert to request an autopsy. Albert then

signed the hospital's autopsy consent form, which authorized a "complete autopsy" to be performed by the hospital pathologist.

It is difficult to see how this sequence of events can be fashioned into a contract. Dr. Dull and the hospital are two separate parties. Albert had no contract with Dr. Dull regarding the autopsy. Dr. Dull merely told him he should request one. Nor did Albert have a contract with Mercy Hospital. He signed a form authorizing a complete autopsy, but such authorization forms are generally not held to be contracts in and of themselves. *See Powers v. Peoples Cmty. Hosp. Auth.*, 455 N.W.2d 371, 373 (Mich. App. 1990) (stating that the "patient bill of rights . . . merely authorized the hospital and its doctors to render appropriate medical care, and does not constitute a written agreement to perform a specific act"). Further, the defendants were not paid to perform an autopsy as they did not bill the patient's family or insurance.

Albert argues that signing the consent form was consideration because this act gave the hospital legal authority to perform the autopsy. *See* Iowa Code § 144.56 (2005) (providing that an "autopsy . . . may be performed upon the body of a deceased person by a physician whenever the written consent to the examination or autopsy has been obtained . . ."). Albert points out that consideration can be either a legal benefit or a legal detriment. *Meincke v. Northwest Bank & Trust Co.*, 756 N.W.2d 223, 227 (Iowa 2008). However, in order to constitute consideration, a performance or return promise must be bargained for. *Id*. at 228. Albert gave the hospital authorization, but nothing was performed or promised *in return* by the hospital and thus, the authorization was not bargained for. Albert simply testified that he was handed a form by the nurse

and signed it. Further, Albert does not assert the contract was that the hospital would perform an autopsy, but rather that the hospital would "determine whether Lilian died from the over-administration of morphine." There is no evidence, testimony or otherwise, that the hospital agreed to this term. The nurse who obtained the signed consent was not even present when Dr. Dull discussed the morphine issue with Albert. We agree with the district court that consideration was lacking and a contract was not formed.

Next, Albert argues that the consideration requirement may be avoided through the doctrine of promissory estoppel. Under promissory estoppel, a promise may be enforced despite an absence of the consideration typically found in a contract. *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 48 (Iowa 1999)*; see also* Restatement (Second) of Contracts § 90, at 242 (1981).

> [T]he elements of promissory estoppels [are] as follows: (1) a clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise.

Schoff, 604 N.W.2d at 49. As discussed above, Albert claims the hospital promised to "determine whether Lilian died from the over-administration of morphine." Albert essentially asks us to infer that this promise was made from the surrounding circumstances. However, an inference from circumstances is not a "clear and definite promise." We cannot divine from Albert's testimony that either Dr. Dull or a Mercy Hospital employee promised a postmortem examination for morphine would be performed. Nor did Albert testify that he relied on such a promise, or that signing the consent form involved a substantial

detriment to him. We conclude that Albert cannot rely on promissory estoppel to establish a contractual relationship between the parties.

Albert asks us to hold that a duty should be imposed on the defendants in this case because the emotional distress was foreseeable and public policy considerations support recognizing such a duty. Albert argues "[t]he best way to deter professional negligence in the performance of a *contract* to perform an autopsy is to recognize a special duty to avoid causing emotional distress." (Emphasis added.) Yet this argument ultimately begs the question whether the parties had a contract and, as discussed above, they did not.

We believe this case is in some respects similar to *Slaughter v. St. Anthony Community Hospital*, 615 N.Y.S.2d 61, 62 (N.Y. App. Div. 1994), where the court held that claims for intentional and negligent infliction for emotional distress should be dismissed. There, the plaintiff mother gave birth to a stillborn infant. *Id.* Due to "the gross deformities and abnormalities" of the baby, the attending obstetrician recommended that a post mortem examination be conducted. *Id.* The hospital "was allegedly instructed to carry out this examination, but negligently failed to do so." *Id.* The parents contended that the hospital's negligence deprived them of the knowledge they needed to plan future pregnancies, and consequently caused them to suffer emotional distress. *Id.* Despite these allegations, however, the appellate court dismissed the parents' claims. *Id.*

Furthermore, in this case, we believe public policy considerations weigh against recognizing Albert's negligent infliction of emotional distress claim. Due to an unfortunate but unintended set of circumstances, evidence that might or

might not support a medical malpractice claim has been irretrievably lost. Prior to the summary judgment ruling, Albert argued that the failure to perform a toxicology screen had prevented Albert from knowing whether the defendants negligently caused Lilian's death. However, our supreme court has expressly declined to recognize a cause of action for negligent spoliation of evidence. *Meyn v. State*, 594 N.W.2d 31, 34 (Iowa 1999) (declining to adopt the negligent spoliation of evidence theory urged by plaintiff as a separate tort cause of action). Arguably, if we were to find a duty in this case, where there was no contract to perform a toxicology screen, we would be allowing a negligent spoliation of evidence claim in by the backdoor.

IV. Conclusion

For the reasons set forth herein, we affirm the district court's grant of summary judgment.

AFFIRMED.