This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0109

Kevin Kopka, et al., individually and as parents and
natural guardians of minor children B. Kopka and I. Kopka,
Appellants,

vs.

Sand Hospitality, LLC,
Respondent.

Filed November 1, 2021
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge

Stearns County District Court
File No. 73-CV-19-6839

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellants)

Emily B. Uhl, The Cincinnati Insurance Company, Coon Rapids, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Segal, Chief Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant-parents challenge the district court's grant of summary judgment in favor of respondent-hotel-owner, dismissing appellants' personal-injury suit. Appellants brought suit on behalf of their two young daughters and themselves based on their claim that respondent negligently allowed the daughters to come into contact with a used condom

in their hotel room that did not belong to appellants. Appellants asserted negligence claims both for physical injury to the daughters and for the negligent infliction of emotional distress to the daughters and themselves. The district court granted summary judgment to respondent on the claim for physical injury to the daughters, concluding that the alleged negligence was not the proximate cause of the injuries. The district court also granted summary judgment on the claims for negligent infliction of emotional distress because the daughters were unaware of any danger of contracting disease from the used condom and neither parent was in the zone of danger and their fear was for the safety of their daughters, not themselves. We reverse the grant of summary judgment on the claim for physical injury to the daughters but affirm summary judgment on the claims for negligent infliction of emotional distress.

FACTS

Appellants Julee and Kevin Kopka,[1] their two young daughters (daughter 1 and daughter 2), an older daughter, two cats, and a dog stayed for several days in a Holiday Inn and Suites owned by respondent Sand Hospitality, LLC, following a fire in the family's home. The Kopkas had two hotel rooms.

On the date of the incident, Julee requested that the hotel provide more linens and towels to be brought to the daughters' room. When a hotel staff member arrived with the towels and linens, Julee took daughters 1 and 2 out of the room, and left the staff member alone in the room for ten to fifteen minutes. When Julee and the girls returned to the room

[1] To avoid confusion, we will refer to the parents by their first names.

after the staff member left, Julee went into the bedroom to check on the linens he had brought. When Julee came back into the kitchen area of the room, she saw daughters 1 and 2 holding a used condom. Julee told the girls to stop playing with the condom and called down to the front desk of the hotel to have the condom removed and the room cleaned. Julee told hotel management that the condom had not been in the room prior to the arrival of the hotel staff member.

Julee asked the girls whether they had put the condom in their mouths and the children did not answer directly, but when Kevin asked both daughters the same question later, daughter 2 said, "No," she had not put it in her mouth. Daughter 1, who was nonverbal, did not respond. The following day, the hotel manager told Julee that the daughters should be tested for sexually transmitted diseases. The Kopkas' pediatrician said that it's rare to transmit human immunodeficiency virus (HIV) from a used condom, but it was possible, so they should test the daughters for HIV at two months and six months out from the possible exposure.

The two young daughters each have preexisting medical issues. Daughter 1, the older of the two girls, has been diagnosed with autism and was nonverbal at the time of the incident. Daughter 2, the youngest child, has Von Willebrand disease, which causes excessive bleeding, bruising, and poor clotting, and Ehlers-Danlos, a connective-tissue disorder.

The Kopkas took daughters 1 and 2 to the family's usual clinic to have their blood drawn to test for HIV and hepatitis B. It was very difficult to draw either daughter's blood, and the blood draws caused distress to both girls. Whenever the daughters get shots or

have blood tests they need to be held down by their mother and nurses to keep them still, and the daughters both scream during the process. Daughter 2 was particularly upset while medical staff tried to draw her blood because it was hard to find a vein that they could draw blood from without the vein "blowing"—at one point they tried to use a vein in daughter 2's head to draw blood but failed. Daughter 2 bled a lot during this process.

Julee was in the doctor's office with both girls when attempts were made to draw their blood while Kevin waited in the sitting room, but Kevin was still able to hear both daughters screaming.

The Kopkas had to return multiple times to the doctor's office because the first attempts to draw a blood sample failed. The doctor's office staff were able to draw daughter 2's blood on the second visit, but the blood draw inflamed her Von Willebrand disease. It took two or three visits to successfully draw daughter 1's blood. Because of unrelated medical conditions, the children also had blood drawn at other times over the same six-month period.

The clinic had a person from the hospital who was very good at drawing blood from difficult veins come to draw daughter 2's blood and daughter 2's blood sample returned a presumptive positive or "reactive" result for HIV. The clinic sent that sample to the Centers for Disease Control and Prevention (CDC) for conclusive results. The family waited about three days to hear the results from the CDC, and ultimately learned that daughter 2's results were negative for HIV.

Neither daughter understands that they were playing with a condom at the hotel, or any of the potential health risks. In fact, to the extent either child remembers the incident,

it is a memory about playing with a glove. At no point did the Kopkas explain to the children what had happened, or their fears that the children would contract HIV.

The two daughters have exhibited symptoms of emotional distress since the blood tests. Daughter 1 now has a fear of doctors and needles, which is being treated by her regular psychiatric provider. Daughter 2 has anxiety, refuses to stay away from home for more than a few days, and also refuses to sleep alone. Daughter 2 is being treated for depression and anxiety.[2]

The Kopkas sued Sand Hospitality claiming that their negligence in allegedly allowing a used condom to be brought into the daughters' room caused the daughters physical injury and emotional distress from the ordeal of the blood draws. They also alleged that, as parents, they suffered emotional distress resulting from their fear that the girls may have been exposed to HIV and other pathogens and from witnessing the trauma experienced by the girls from the blood draws.

After the close of discovery, Sand Hospitality moved for summary judgment, which the district court granted. The district court determined that the claim for injuries to the girls from the blood draws failed because there was a break in causation between the claimed breach of duty and the girls' alleged physical injuries. The court noted that, when the blood draws were conducted with the assistance "of a specialist, the blood draws occurred without incident" and that the Kopkas conceded "that the children's emotional

---

[2] Since the stay in the hotel, daughter 2 has undergone other medical treatment and procedures unrelated to this case, including having her tonsils removed to treat recurring intermittent fevers and treatment for two concussions that requires her to attend occupational and physical therapy.

distress, e.g., new fear of needles and general increased anxiety, resulted from the blood draws and not from the hotel incident itself." The district court concluded that the injuries were thus too attenuated to satisfy the proximate-cause requirement because "the children's injuries were caused by the method in which the doctor chose to draw the children's blood and not as a result of the Defendant's negligence."

The district court also granted summary judgment against the Kopkas on their claims of negligent infliction of emotional distress that they had asserted on behalf of their daughters and themselves. The court noted that, while the two children were within the zone of danger posed by the used condom, the children "believed they were playing with a glove and had no knowledge of the infectious threat it posed." The court thus granted summary judgment on the daughters' claims of negligent infliction of emotional distress because the negligent act—the presence of the used condom in the hotel room—was not the cause of their emotional distress.

The district court granted summary judgment on the parents' negligent-infliction claim because neither parent could demonstrate that they were in the "zone of danger" posed by the condom and because they alleged that their emotional distress was caused by fear for their daughter's safety, not their own.

The Kopkas now appeal.

DECISION

The Kopkas raise two arguments on this appeal. First, they challenge the district court's conclusion that there was a break in the chain of causation between the breach of duty and the failed blood draws. And, second, they ask this court to abandon the "zone of

danger" test for the tort of negligent infliction of emotional distress. We address each argument in turn below.

Standard of Review

On appeal from a grant of summary judgment, we apply a de novo standard of review "to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). Summary judgment is appropriate if the party who bears the burden of proof fails to bring forward evidence sufficient to create a genuine issue of material fact in support of one or more essential elements of his or her claim. *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013). And summary judgment is "inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Montemayor*, 898 N.W.2d at 628 (quotation omitted). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

I. There is a genuine issue of material fact on the question of causation as to the daughters' claims for damages arising out of the blood draws.

The first claim asserted by the Kopkas is that the hotel's negligence in allowing their two younger daughters to be exposed to the used condom caused physical injury to the girls because the girls had to endure needle sticks and blood draws as a result of the exposure. To establish a negligence claim, a plaintiff must prove four elements: "(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being

the proximate cause of the injury." *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005).

The district court concluded that the Kopkas had put forward sufficient evidence to create a genuine issue of material fact and survive summary judgment with regard to the first three elements of a negligence claim—that the hotel owed a duty, that the duty was breached, and that the blood draws could constitute a physical injury. The district court concluded, however, that there was a break in causation between the negligent act—allowing exposure to a used condom in the hotel room—and the blood tests administered to the girls. The district court reasoned that the girls' injuries were from the failed attempts to draw blood, including the needle stick that inflamed daughter 2's Von Willebrand disease. The district court noted that "[w]hen the doctors sought the expertise of a specialist, the blood draws occurred without incident." The district court thus determined that the doctors' actions were an intervening cause that broke the chain of causation between the hotel's breach of duty and the injury. The Kopkas claim that the district court erred in its conclusion that the doctors' failed efforts to draw blood broke the chain of causation, and we agree.

Under established law, intervening negligence by a medical provider does not necessarily relieve the original tortfeasor of liability if the medical treatment was made necessary by the negligent act of the tortfeasor. *See Couillard v. Charles T. Miller Hosp., Inc.*, 92 N.W.2d 96, 99 (Minn. 1958); *Fields v. Mankato Elec. Traction Co.*, 133 N.W. 577, 578 (Minn. 1911) (stating "risks incident to submitting to treatments and operations" following from a negligent action were incurred because of the fault of the wrongdoer and

were therefore proximately caused by the wrongdoer, and the wrongdoer was liable). Thus, even if the doctors were negligent in connection with the blood draws, it is the alleged negligence of Sand Hospitality that caused the girls to get the blood tests. We therefore reject the district court's conclusion that the doctors' choice of technicians to draw blood was an intervening cause sufficient to relieve Sand Hospitality of potential liability as a matter of law.

Sand Hospitality also argues that proximate cause does not exist because the Kopkas never alleged any actual exposure to HIV; they just alleged that they feared the girls had been so exposed. Sand Hospitality cites the case of *K.A.C. v. Benson* in support of its argument. 527 N.W.2d 553 (Minn. 1995). In *K.A.C.*, a former patient sued her gynecologist because he was HIV positive and had performed an invasive exam without informing her of his HIV status. The physician had HIV-related lesions on his hands at the time but was wearing gloves and followed all the protocols the medical board had provided to him. *Id.* at 556-57. The supreme court held that "[i]n an action for damages based solely upon plaintiff's fear of acquiring AIDS, without allegation of actual exposure to HIV, no legally cognizable claim exists under Minnesota law." *Id.* at 560. In this case, however, the daughters' claims are based not on the fear of contracting HIV, but on the physical injury caused by the blood draws for the testing. *K.A.C.* is thus distinguishable.

The question then is whether Sand Hospitality "ought . . . to have anticipated [its negligence] was likely to result in injury to others, though [it] could not have anticipated the particular injury which did happen." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (quotation omitted). Here, there is at least a fact question whether Sand

Hospitality should have anticipated that their alleged negligent act of allowing exposure to a used condom would lead to the need for testing. Indeed, Sand Hospitality's own manager recommended that the girls should be tested.

Thus, we conclude that there is a genuine issue of material fact on the question of causation that cannot properly be dispensed with on a motion for summary judgment. As recently emphasized by the Minnesota Supreme Court, summary judgment is proper only when "the record reflects a complete lack of proof on proximate cause." *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, ___, No. A20-0267, slip op. at 10 (Minn. 2021) (quotation omitted); *see also Bondy v. Allen*, 635 N.W.2d 244, 248 (Minn. App. 2001) (stating issues of causation "seldom can be disposed of on a motion for summary judgment" (quotation omitted)). We thus reverse the summary judgment with regard to the claim brought on behalf of the daughters for the alleged injuries caused by the blood draws.[3]

II. The district court did not err in granting summary judgment against the Kopkas on their claims for the negligent infliction of emotional distress.

The remaining issue concerns the Kopkas' challenge to the grant of summary judgment on their claims for negligent infliction of emotional distress. The Kopkas urge this court to abandon the "zone of danger" test, arguing it is unfair to tort victims.

To establish a claim for negligent infliction of emotional distress, a plaintiff "must prove the four elements of a negligence claim, as well as three additional elements specific

---

[3] In reaching this conclusion, however, we decide only that there is a fact question on this issue and express no opinion on the ultimate merits of the daughters' claim.

to [negligent infliction of emotional distress] claims." *Engler*, 706 N.W.2d at 767; *see also Stead-Bowers v. Langley*, 636 N.W.2d 334, 343 (Minn. App. 2001), *rev. denied* (Minn. Feb. 19, 2002). The additional three elements require that the plaintiff "(1) was within the zone of danger of physical impact created by the defendant's negligence; (2) reasonably feared for her own safety; and (3) consequently suffered severe emotional distress with attendant physical manifestations." *Engler*, 706 N.W.2d at 767 (quotation omitted).

Turning first to the negligent-infliction claim brought on behalf of the daughters, the district court dismissed the claim on the grounds that they suffered no emotional distress from the physical contact with the condom. The court pointed out that the girls were unaware of any potential risks. To the extent either recalled the incident, they remembered only playing with a glove and never feared for their own safety from the contact with the condom. And, as noted by the district court, the Kopkas conceded that the girls' emotional distress was caused by the blood draws, not the contact with the condom. The Kopkas thus failed to bring forward evidence to support two of the three added elements required to establish a claim for negligent infliction of emotional distress—that the girls feared for their safety because of the contact with the condom and consequently experienced severe emotional distress.

The parents' claim for negligent infliction is also deficient. Julee had no contact with the condom and thus was never in the "zone of danger" and Kevin was not even in the hotel during the actual incident. Moreover, the parents never feared for their own safety; their emotional distress arose out of fear for the safety of their daughters. The district court thus committed no error in dismissing the parents' negligent-infliction claim.

Finally, insofar as the Kopkas seek a change in the law related to the required elements for negligent-infliction claims, the law surrounding such claims is well-established and their request is beyond the authority of this court. *Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) ("This court, as an error correcting court, is without authority to change the law."), *rev. denied* (Minn. June 17, 1998).

Affirmed in part, reversed in part, and remanded.