STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2266

D. N. N., individually and on behalf
of her minor son, H. A. N.,
Appellant,

vs.

Dr. Steven Joseph Berestka,
Defendant,

Unity Hospital, et al.,
Respondents.

Filed February 5, 2008
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-04-001585

Zenas Baer, Zenas Baer and Associates, 331 6th Street, Box 249, Hawley, MN 56549 (for appellant)

Mark R. Whitmore, Tiffany M. Quick, Bassford Remele, P.A., 33 South 6th Street, Suite 3800, Minneapolis, MN 55402 (for respondents)

Considered and decided by Stoneburner, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant D.N.N., on behalf of her minor son H.A.N., brought a medical-malpractice claim against respondents Unity Hospital and Allina Health System. Appellant's claim is the result of a circumcision procedure performed on H.A.N. by Steven Joseph Berestka, M.D. at Unity Hospital.[1] Before trial, respondents moved for summary judgment, and appellant moved for partial summary judgment and to amend the complaint to add a punitive-damages claim. The district court denied appellant's motions and granted summary judgment to respondents.

Appellant argues that the district court erred in granting summary judgment to respondents. Appellant asserts that the district court erred because (1) under a traditional negligence claim, respondents had a legal duty to protect H.A.N. from the harm caused by Dr. Berestka; (2) respondents' violation of federal Medicare law establishes a prima facie case of negligence per se; and (3) appellant's complaint should be amended to include punitive damages. We affirm.

FACTS

Appellant is the mother of male child H.A.N. Appellant and H.A.N.'s father have another son who was born before H.A.N. Appellant and H.A.N.'s father agreed that it was up to the father to decide if their first son would be circumcised. He chose to have their first son circumcised. During a prenatal visit while appellant was pregnant with

[1] Although originally included in appellant's claims, Dr. Berestka settled the claims against him on a *Pierringer* release and is no longer a party to this case.

H.A.N., appellant completed a form regarding her circumcision preference. The form asked, "If you have a boy, would you like him circumcised?" Appellant circled a "Y" for yes, assuming that H.A.N.'s father would want the baby to be circumcised like their other son.

H.A.N. was born on January 21, 2000, at respondent Unity Hospital. Unity Hospital is part of a group of hospitals run by respondent Allina Health System. Dr. Berestka was the obstetrician on call at Unity Hospital after H.A.N.'s birth. Dr. Berestka approached a nurse employed by Unity Hospital and asked if there were any circumcisions to be performed. The nurse informed Dr. Berestka that there was one child to be circumcised and then prepared H.A.N. for the procedure. Dr. Berestka did not consult with appellant or H.A.N.'s father before performing the circumcision. After the circumcision, appellant and H.A.N.'s father were dissatisfied by the appearance of H.A.N.'s penis. As a result, appellant sought advice from another physician, who subsequently performed a revision for cosmetic purposes.

At the time that H.A.N.'s circumcision was performed, Unity Hospital had a patient-care policy in place that required physicians to obtain informed consent for all surgical procedures that modified a patient's body. The policy also required written verification of informed consent. But in March 1999, prior to H.A.N.'s birth, the hospital amended its patient-care policy to exempt circumcisions from the written verification requirement.

Following H.A.N.'s circumcision, appellant filed a complaint with the Minnesota Department of Health (MDH) regarding the failure to obtain informed consent prior to

the procedure. MDH conducted an investigation and issued a public report on May 24, 2001, concluding that respondents were not in compliance with Medicare conditions of participation concerning informed-consent forms and procedures. The MDH found multiple deficient practices, including a failure "to assure the presence of properly executed informed consent forms for surgical procedures."

Appellant subsequently filed her claim in district court, alleging assault and battery and negligence against Dr. Berestka and improper credentialing and violation of Minn. Stat. §§ 325F.68-.70 (2006), commonly known as the consumer-fraud act, against respondents. Respondents and appellant moved for summary judgment, and appellant moved to amend the complaint to add punitive damages. The district court granted respondents' motions for summary judgment. The district court stated that, although appellant's claim against Unity Hospital and Allina was labeled "improper credentialing," it was a claim of traditional negligence based on Unity Hospital's alleged duty to verify that Dr. Berestka had obtained informed consent. The district court concluded that the hospital had no duty to ensure that Dr. Berestka had obtained informed consent. The district court also granted respondents' summary-judgment motion on appellant's claim based on the consumer-fraud act, on the grounds that appellant failed to (1) plead that count with the specificity required by Minn. R. Civ. P. 9.02; (2) establish that Unity Hospital had been deceptive or misleading in its revision of the policy that eliminated the requirement of written verification of informed consent for circumcisions; and (3) demonstrate that prevailing on her claim would benefit the public. This appeal follows.

D E C I S I O N

On an appeal from summary judgment, this court asks two things: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its conclusions of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

It is the duty of the physician, not the hospital, to ensure that a patient gives informed consent for a surgical procedure. *See Femrite v. Abbott Nw. Hosp.*, 568 N.W.2d 535, 543 (Minn. App. 1997) ("Generally a physician has the duty to ensure that a patient gives informed consent."), *review denied* (Minn. Nov. 18, 1997). The district court also cited a North Dakota Supreme Court decision that discussed the issue of a hospital's duty to obtain informed consent. In *Long v. Jasczak*, 688 N.W.2d 173, 181 (N.D. 2004), the North Dakota Supreme Court concluded that "[t]he duty to obtain informed consent is solely the responsibility of the physician, not the hospital where the procedure is performed." As support for its holding, the North Dakota Supreme Court relied on the majority rule that states that even where a policy exists regarding informed consent, it does not create a legal duty to obtain informed consent. *Long*, 688 N.W.2d at 181 (citing *Mele v. Sherman Hosp.*, 838 F.2d 923, 925 (7th Cir. 1988); *Porter v. Sisters of St. Mary*, 756 F.2d 669, 673 (8th Cir. 1985); *Petriello v. Kalman*, 215 Conn. 377, 386, 576 A.2d 474, 479 (1990); *Wilson v. Lockwood*, 711 S.W.2d 545, 549 (Mo. App. 1986)).

We agree that the majority rule cited by the district court is the appropriate legal standard. The duty to obtain informed consent is a nondelegable duty placed solely on the treating physician as the person in the best position to advise the patient of the risks and benefits of the surgical procedure. *See, e.g.*, *Femrite*, 568 N.W.2d at 543; *Long*, 688

N.W.2d at 181. Appellant suggests that expert testimony in this case creates a duty or a factual question that precludes summary judgment. But without a legal duty, expert statements of a deviation from a professional standard of care cannot give rise to a claim of negligence. *Servicemaster of St. Cloud v. GAB Bus. Servs. Inc.*, 544 N.W.2d 302, 307 (Minn. 1996). Even when a standard of care is breached, if there is no legal duty, there can be no claim for negligence. *Id.* ("A [medical professional] will not be bound to conform its conduct to a standard of care unless a legally recognized duty exists.").

Appellant also suggests that respondents owed a duty to protect H.A.N. from harm caused by third parties and cites *Tomfohr v. Mayo Found.*, 450 N.W.2d 121, 124 (Minn. 1990), and *Sylvester v. Nw. Hosp. of Minneapolis*, 236 Minn. 384, 386-87, 53 N.W.2d 17, 19 (1952), for this proposition. But these cases do not support appellant's contention. Both cases involved hospitals with mentally ill patients and injuries caused by those patients. *See Tomfohr*, 450 N.W.2d at 125 (holding that a medical provider has a duty to prevent self-injurious conduct); *Sylvester*, 236 Minn. at 386-87, 53 N.W.2d at 19 (holding that a hospital that knows or should know of a patient's dangerous tendencies has a duty to protect others from the patient's dangerousness). Here, the injury complained of was one caused by a medical provider, not a third-party patient known to be dangerous.

Appellant also claimed that Unity Hospital and Allina violated the consumer-fraud act, Minn. Stat. §§ 325F.68-.70 (2006). Appellant's claim is based on an allegation that respondents engaged in deceptive practices in the hospital's revision of its policy that eliminated the requirement for verification of written informed consent for a circumcision. Appellant did not brief this claim, which ordinarily results in waiver.

Melina v. Chaplin, 327 N.W.2d 19, 20 (Minn. 1982). Nevertheless, we will address its merits.

As the district court noted, the Minnesota Rules of Civil Procedure require that consumer fraud be pleaded with particularity. Minn. R. Civ. P. 9.02. Here, appellant failed to provide a basis in her complaint for any deceptive or misleading actions on the part of respondents. Appellant suggests that Unity Hospital's revision of its informed-consent policy, exempting circumcisions, is a deceptive practice but fails to identify how it is so. Further, appellant has not established how prevailing on her claims would benefit the public—a requirement for a private citizen using the consumer-fraud act. *See Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000).

Appellant also raises an issue of negligence per se on appeal. Appellant asserts that respondents have violated federal Medicare regulations and that the violation creates a separate duty that has been breached. But appellant did not raise this issue in the district court. Appellant may have properly pleaded a claim of negligence, but negligence per se is a distinct claim. *See Kronzer v. First Nat'l Bank*, 305 Minn. 415, 428, 235 N.W.2d 187, 195 (1975) (actual negligence and negligence per se are treated as separate claims). An appellate court may not consider a "question never litigated below." *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 522 (Minn. 2007) (quoting *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988)). Because appellant did not properly raise this issue in the district court, we decline to consider it at this time.

Finally, appellant challenges the district court's denial of her motion to amend the complaint to add a claim of punitive damages against respondents. But because we

conclude that the district court correctly granted summary judgment to respondents, we do not reach that issue.

Affirmed.