IN THE SUPREME COURT OF IOWA

ROSALINDA VALLES, Individually and on behalf of F.L., her minor child, Plaintiff-Appellant, vs. ANDREW MUETING, D.O., AMY WINGERT, M.D., KELLY RYDER, M.D., JOSEPH LIEWER, M.D., AND NORTHWEST IOWA EMERGENCY PHYSICIANS, P.C., Defendants-Appellees.	No. 19-1066

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HON. JEFFREY L. POULSON

Defendants-Appellees Dr. Wingert and Dr. Ryder's Final Brief

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ROUTING STATEMENT

Defendants/Appellees Dr. Kelly Ryder and Dr. Amy Wingert (collectively "Defendants") submit that this case is appropriate for transfer to the Iowa Court of Appeals as it involves existing legal principles. Iowa R. App. P. 6.1101(3). This case is so deserving of affirmance on all issues that any other ruling would be in conflict with published decisions, warranting further review by the Supreme Court. *Id.*; Iowa R. App. P. 6.1101(2)(b).

INTRODUCTION

Plaintiff-Appellant Rosalinda Valles ("Plaintiff") claims Defendants failed to diagnose and treat bacterial meningitis in her minor son, F.L. Amend. App. v.1 at 1320-21. Neither Dr. Wingert nor Dr. Ryder had any involvement in the care and treatment of F.L. The district court appropriately found that neither owed a duty of care to F.L. and granted their motions for summary judgment. Amend. App. v.1 at 2877-83.

STATEMENT OF THE CASE

Nature of the Case

This medical malpractice case alleges that Defendants failed to diagnose and treat F.L.'s bacterial meningitis. Amend. App. v.1 at 1320-21. Dr. Wingert and Dr. Ryder were dismissed on summary judgment when the district court determined as a matter of law that they owed no duty to F.L. because of the absence of a physician-patient relationship. Amend. App. v.1 at 2877-83.

Course of Proceedings

Plaintiff filed this case individually and as next friend of her minor child, F.L., on January 28, 2016. Amend. App. v.1 at 200. Plaintiff alleged that the healthcare providers named in her Petition failed to diagnose and treat F.L.'s bacterial meningitis. Amend. App. v.1 at 1320-21. Dr. Wingert

and Dr. Ryder moved for summary judgment. Amend. App. v.1 at 1469; 1485. They argued that they had no physician-patient relationship with F.L. and they therefore owed F.L. no duty of care. *Id.* The district court granted their motions. Amend. App. v.1 at 2877-83.

Summary of the Facts

The following facts are uncontroverted:

F.L., an eleven-year-old boy, presented to the emergency room at Mercy Medical Center – Sioux City ("Mercy") on April 3, 2015. Amend. App. v.1 at 1309. His primary complaints were fever and cough. Dr. Andrew Mueting, a family practice resident who was staffing the emergency room that day, was the first to examine F.L. Dr. Mueting suspected influenza. Amend. App. v.2 at 746; 749 (Vol. 2, 45:1-21; 48:10-20, Dr. von Elten). A subsequent blood test confirmed this diagnosis. F.L. was treated and discharged.

F.L. returned to the Mercy emergency room on April 5, 2015. Amend. App. v.2. at 757-57 (Vol.2, 56:17-57:2, Dr. von Elten). An emergency room physician, Dr. Joseph Liewer, examined and treated F.L. Dr. Liewer was concerned enough about F.L.'s condition that he ordered intravenous fluids and admission to the hospital. F.L. was admitted to the pediatric floor at Mercy at approximately 11:15 p.m. on April 5, 2015. Amend. App. v.2 at

2138 (Vol.2, 86:13-25, Dr. Meuting). Dr. Mueting was F.L.'s admitting physician.

On the afternoon of April 7, 2015, Dr. Amy Wingert was the family practice resident assigned to be on call between noon and 6:00 p.m. for Family Medicine Center patients who came into the emergency room at Mercy, and also for patients on the general medical floor, surgical floor, and pediatric floor at Mercy. Amend. App. v.1 at 1498 (Aff. of Dr. Wingert at ¶ 3). This assignment would include F.L.[1]

During on-call shifts, residents were given a pager that would vibrate and alert audibly when the resident received a page. It was well known to the family practice residents, faculty physicians, and nursing staff that there were "dead zones" within the Mercy Hospital building and in other areas around Sioux City where residents were not able to receive pages. Amend. App. v.1 at 1501 (Aff. of Dr. Wingert at ¶ 11). If a resident was paged and did not respond within a few minutes, the nurse who sent the page was to

[1] Although Plaintiff contends that Dr. Wingert "had primary responsibility for F.L.'s care" during the afternoon of April 7, 2015, this statement is contrary to the undisputed evidence. *See* Amend. App. v.1 at 2363 (Pl. Memo. of Auth. 8-31-18, Ex. I at 15 (Mercy Bylaws) ("Each Resident Affiliate acts under the overall supervision of the attending Physician to whom assigned")).

call the resident's cell phone. *Id.* If the resident did not answer his or her cell phone, the nurse was to call the on-call physician faculty member. *Id.*

Nurse Sandra Lang documented that she placed a page to Dr. Wingert regarding F.L. at 2:47 p.m. on April 7, 2015. Amend. App. v.1 at 1540. Dr. Wingert did not receive this page, nor did she receive a call on her cell phone. Amend. App. v.1 at 1501 (Aff. of Dr. Wingert at ¶ 12); 1539 (Depo of Dr. Wingert at 48:4-49:3). Because she was never contacted, Dr. Wingert did not see or treat F.L. at any time during her noon to 6:00 p.m. on-call shift on April 7, 2015. Amend. App. v.1 at 1501 (Aff. of Dr. Wingert at ¶15). Dr. Wingert did not examine F.L., enter any orders for him, or participate in any way in his diagnosis or treatment on April 7, 2015. *Id.*

When Dr. Wingert did not respond to her page, Nurse Lang placed a page to another family practice resident, Dr. Kelly Ryder. Amend. App. v.1 at 1484 (Aff. of Dr. Ryder at Ex. 2). Dr. Ryder was the family practice resident assigned to be on call for "Peds" from noon to 6:00 p.m. on April 7, 2015. Amend. App. v.1 at 1478-79 (Aff. of Dr. Ryder at ¶ 3). The designation "Peds" meant that Dr. Ryder was assigned to be on call for the pediatric inpatients at St. Luke's Hospital in Sioux City, for pediatric patients from the Family Medicine Clinic that came to the emergency room at St. Luke's or Mercy, and for any Family Medicine Clinic pediatric

patients that were being admitted to St. Luke's or Mercy. *Id.* This designation did not include being on call for patients who were already admitted to the pediatric floor at Mercy. *Id.* Dr. Ryder was thus not assigned to be on call for F.L.

Dr. Ryder returned the page and spoke with Nurse Lang. Nurse Lang gave Dr. Ryder an update on F.L.'s condition. Amend. App. v.1 at 1545 (Depo of Nurse Lang at 27:9-24). Dr. Ryder advised Nurse Lang that she was not on call for patients on the pediatric floor at Mercy. Amend. App. v.1 at 1480 (Aff. of Dr. Ryder at ¶ 7). Dr. Ryder declined to see or treat F.L. because she was assigned to be on call for another service at that time. *Id.* She encouraged Nurse Lang to page the resident who was assigned to the Mercy pediatric inpatient service or to page the on-call faculty physician. *Id.* Dr. Ryder had no contact with F.L. on April 7, 2015. *Id.* at ¶ 8. She did not see or examine F.L., enter any orders for him, or in any way participate in his care and treatment. *Id.*

Another resident, Dr. Nieuwenhuis, returned Nurse Lang's page at 4:52 p.m. Amend. App. v.1 at 1484 (Aff. of Dr. Ryder at Ex. 2). Any alleged delay in responding to Nurse Lang's page was therefore de minimus and not causally related to F.L.'s claimed damages.

F.L. suffered a respiratory emergency on April 8, 2015 and was subsequently diagnosed with bacterial meningitis. F.L.'s mother filed suit on January 28, 2016, claiming that F.L. had bacterial meningitis on April 5, 2015 and defendants violated the standard of care by failing to diagnose and treat this condition. Amend. App. v.1 at 200.

Drs. Wingert and Ryder filed motions for summary judgment on August 17, 2018. Amend. App. v.1 at 1469-72; 1485-88. They argued that neither of them had a physician-patient relationship with F.L. and thus owed him no duty. *Id.* The district court agreed, finding that the evidence was such that no reasonable juror could conclude that a physician-patient relationship had formed between F.L. and either Dr. Wingert or Dr. Ryder.[2] Amend. App. v.1 at 2877-83; 2885-91 (Orders 10-12-18). Dr. Wingert and Dr. Ryder were dismissed on October 12, 2018. *Id.*

[2] With respect to Dr. Wingert, the district court found "there is insufficient evidence in the record to lead a reasonable juror to conclude that in simply being the on-call resident at the time, Dr. Wingert impliedly or affirmatively undertook the responsibility for the treatment and care of [F.L.] necessary to create a physician-patient relationship." Amend. App. v.1 at 2882-83. With respect to Dr. Ryder, the district court found "[t]here is no evidence in the record to suggest that Dr. Ryder consented, impliedly or otherwise, to be responsible for [F.L.] . . . . Responding to a page, listening to a condition report, and declining care are insufficient facts to lead a reasonable juror to the conclusion that a physician-patient relationship had formed." Amend. App. v.1 at 2891.

ARGUMENT

I. The Court Lacks Jurisdiction to Consider Plaintiff's Appeal

A. Procedural Background

The district court granted Defendants' motions for summary judgment on October 12, 2018. Amend. App. v.1 at 2877-83; 2885-91 (Orders 10-12-18). Dr. Jesse Nieuwenhuis, Dr. Aruntha Swampillai, Dr. Thomas Morgan, Dr. Leah Johnson, Dr. Said Sana, Siouxland Medical Education Foundation, and Mercy Medical Center (collectively "settling defendants") settled with Plaintiff prior to trial. Amend. App. v.1 at 3521-22.

Trial of the remaining defendants began on October 30, 2018. At trial, the settling defendants were treated as released parties under Iowa Code Ch. 668 and the issue of their negligence was submitted to the jury. Amend. App. v.1 at 3940, 3949, 3957-58. (Instruction Nos. 1, 10, 18-19); Amend. App. v.1 at 3254 (Plaintiff's requested instruction at 5, 10-17-18). The jury returned its verdict in favor of the remaining defendants on November 21, 2018, and judgment was entered the same day. Amend. App. v.1 at 3979 (Order, 11-21-18). Plaintiff's appeal was thus due on December 21, 2018. Iowa R. App. P. 6.101(1)(b).[3]

[3] There were no posttrial proceedings that would delay this appeal date.

Plaintiff filed a notice of appeal on December 20, 2018. (No. 19-0055) ("First Appeal"). Amend. App. v.1 at 186 (Notice 12-20-18). Because the settling defendants had not yet been dismissed, Plaintiff claimed her First Appeal was "protective" and that she did not believe the case was ripe for appeal. *Id.* at 187. In response, the Supreme Court ordered Plaintiff to file a statement as to jurisdiction. Amend. App. v.1 at 4065 (Order 2-5-19). In her statement, Plaintiff said that her appeal should not be treated as an application for interlocutory review and asked that it be dismissed without prejudice. Amend. App. v.1 at 4080 (Statement at 12, 2-19-19). This Court nonetheless treated the First Appeal as an application for interlocutory review and denied the application on March 14, 2019. Amend. App. v.1 at 4109 (Order 3-14-19).

Plaintiff dismissed settling defendant Mercy with prejudice on April 15, 2019. Amend. App. v.1 at 4047 (Dismissal 4-15-19). She dismissed the other settling defendants with prejudice on April 30, 2019. Amend. App. v.1 at 4049 (Dismissals 4-30-19). On May 28, 2019, Plaintiff filed a motion asking the district court to enter a "final judgment" dismissing the settling defendants. Amend. App. v.1 at 4052-54 (Motion 5-28-19). The district court, despite the fact that such an order was superfluous and of no legal effect, filed the order on May 29, 2019. Amend. App. v.1 at 4057 (Order 5-

29-19). This appeal followed on June 24, 2019. Amend. App. v.1 at 4060 (Notice 6-24-19).

B. The November 21, 2018, Judgment Disposed of All Issues and Plaintiff's Appeal is Untimely

A notice of appeal must be filed within 30 days of a final order or judgment. Iowa R. App. P. 6.101(1)(b). In the present case, the November 21, 2018 judgment was a final, appealable order. There were no posttrial motions that would extend the appeal deadline. *See* Iowa R. Civ. P. 1.1007. Plaintiff's June 24, 2019 notice of appeal was not timely.

A final judgment or decision "is one that finally adjudicates the rights of the parties. It must put it beyond the power of the court which made it to place the parties in their original position." *In re M.W.*, 894 N.W.2d 526, 532 (Iowa 2017) (quoting *Johnson v. Iowa State Highway Comm'n*, 134 N.W.2d 916, 918 (Iowa 1965)). Moreover, "[t]wo final orders are possible in a single case, one putting it beyond the power of the court to put the parties in their original positions in relation to a specific issue, and the other adjudicating remaining issues in the case." *Gordon v. Brown*, 2003 WL 118502 (Iowa Ct. App. 2003) (quoting *Lyon v. Willie*, 288 N.W.2d 884, 887 (Iowa 1980)).

When the district court entered summary judgment in favor of Dr. Wingert and Dr. Ryder on October 12, 2018, issues remained for

adjudication with respect to the other defendants. Some of the defendants settled before trial. The remaining defendants proceeded to trial on October 30, 2018. Although the settling defendants had not yet been dismissed from the case, they were treated at trial as though they had and the issue of their comparative fault was submitted to the jury. *See* Iowa Code § 668.3; *see also* Appellant's Proof Brief at 20 ("Thus, by the time of trial, the only remaining claims were those against Dr. Andrew Mueting, Dr. Joseph Liewer and Northwest Iowa Emergency Physicians, P.C."). The jury returned its verdict in favor of the remaining defendants on November 21, 2018, and judgment was entered the same day. Amend. App. v.1 at 3979 (Order 11-21-18). Because the November 21, 2018 judgment fully adjudicated all remaining issues in the case, it was a final order and the Plaintiff had 30 days thereafter to appeal.

With respect to the settling defendants, the Plaintiff dismissed Mercy with prejudice on April 15, 2019. Amend. App. v.1 at 4047 (Dismissal 4-15-19). She dismissed the other settling defendants with prejudice on April 30, 2019. Amend. App. v.1 at 4049 (Dismissal 4-30-19). The completion of these dismissals concerned remaining unrelated issues and did not make the November 21, 2018 interlocutory. *See Gordon* at *2. Even if the Plaintiff's April 30, 2019 final dismissal of the last settling defendant is considered the

final adjudication on the merits of the entire case, Plaintiff's June 24, 2019 notice of appeal was untimely.

The district court's entry of a superfluous order "dismissing" the settling defendants on May 29, 2019 did not extend Plaintiff's deadline to file her notice of appeal. An order dismissing defendants who have already been dismissed has no effect and cannot extend the deadline to appeal.

In *Exec. Commercial Servs., Ltd. v. Al Johnson Cadillac, Inc.*, 412 N.E.2d 706 (Ill. App. 1980), a rental company sued a car dealer for the recovery of rentals of television equipment. The rental company filed for summary judgment against the car dealer. The motion was denied on November 22, 1977. On December 20, 1977, the rental company filed a timely motion to reconsider. After a series of lengthy continuances, the motion to reconsider was denied on December 5, 1979. A second order was entered on December 13, 1979 denying the same motion for reconsideration.[4] The Appellate Court of Illinois held that the December 5, 1979 order was the operative order for calculating the appeal deadline and a January 11, 1980 notice of appeal was not timely. *Exec. Commercial Servs.*,

[4] The rental company contended that the second order was "a more accurate statement" of the court's first order. *Exec. Commercial Servs., Ltd.*, 412 N.E.2d at 707. The Appellate Court of Illinois rejected this interpretation. *Id.*

Ltd., 412 N.E.2d at 707 ("In our opinion, the second order has no legal effect to extend the time for filing the notice of appeal"). The court explained:

> The parties by their counsel cannot in effect abrogate the rules of the supreme court simply by the device of obtaining a second superfluous order denying the already denied motion to reconsider the order appealed from. To permit this practice would effectually nullify the time limitation for filing the notice of appeal expressed in the pertinent rule with most unfortunate consequences.

Id.

Likewise, the Plaintiff cannot abrogate the Iowa Rules of Appellate Procedure by obtaining an order dismissing defendants who have already been dismissed. It makes no difference that the May 29, 2019 order stated it was "the final disposition by this Court of all of the remaining issues and parties in this case." Amend. App. v.1 at 4058 (Order 5-29-19). By May 29, 2019, there were no remaining issues or parties requiring final disposition.[5] Plaintiff requested this language for the transparent purpose of extending her appeal deadline. The May 29, 2019 order had no legal effect. It was not a disposition or adjudication of any issue remaining in the case because none

[5] The claims against Dr. Meuting, Dr. Liewer, and Northwest Iowa Emergency Physicians, P.C. were fully adjudicated by the November 21, 2018 jury verdict and judgment. The claims against Mercy and the other settling defendants were fully adjudicated, at the latest, by their dismissals with prejudice on April 15, 2019 and April 30, 2019, respectively.

remained at that point. The May 29, 2019 order did not extend Plaintiff's appeal deadline. Her June 24, 2019 notice of appeal was untimely.

Plaintiff failed to timely appeal either the summary judgments in favor of Drs. Wingert and Ryder or the judgment in favor of the remaining defendants. Her appeal should be dismissed.

II. The District Court Properly Determined as a Matter of Law That Neither Dr. Wingert Nor Dr. Ryder Owed a Duty to F.L.

A. The Standard of Review

Review of a district court ruling on a motion for summary judgment is for correction of errors at law. *Albaugh v. Reserve*, 930 N.W.2d 676, 682 (Iowa 2019). Summary judgment is proper when the moving party has shown there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* An appellate court reviewing a grant of summary judgment views the evidence in the light most favorable to the nonmoving party. *SEIU, Local 199 v. State*, 928 N.W.2d 69, 74 (Iowa 2019). "The court must consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record." *Id.* (quoting *Thornton v. Am. Interstate Ins.*, 897 N.W.2d 445, 460 (Iowa 2017)).

B. Error Preservation

Defendants agree that Plaintiff has preserved this claimed error.

C. The District Court Correctly Determined that Dr. Wingert and Dr. Ryder Owed F.L. No Duty as a Matter of Law

The district court held as a matter of law that Dr. Wingert and Dr. Ryder had no physician-patient relationship with F.L. and therefore owed him no legal duty. Amend. App. v.1 at 2882-83; 2891 (Rulings 10-12-18). Plaintiff assigns this as error. (Appellant's Proof Brief at 47-64). Because the uncontroverted evidence established the absence of a physician-patient relationship, the district court properly decided this issue as a matter of law.

1. The existence of a physician-patient relationship is a prerequisite to the existence of a duty in a medical malpractice action.

The elements of a medical malpractice claim are "(1) an applicable standard of care, (2) a violation of this standard, and (3) a causal relationship between the violation and injury sustained." *Plowman v. Fort Madison Cmt. Hosp.*, 896 N.W.2d 393, 401 (Iowa 2017). Under Iowa law, "[a] physician owes a duty to his patient to exercise the ordinary knowledge and skill of his or her profession in a reasonable and careful manner when undertaking the care and treatment of a patient." *Id.* at 401.

To be successful in her claims against Dr. Wingert and Dr. Ryder, Plaintiff must first establish that Dr. Wingert and Dr. Ryder owed a duty to

F.L. *J.A.H. by R.M.H. v. Wadle & Assocs.*, 589 N.W.2d 256, 258 (Iowa 1999). Whether a duty exists is a question of law. *Id*. A duty generally requires privity, which exists when a physician-patient relationship is formed. *Id*. at 260; *Plowman* at 401. Absent the existence of a physician-patient relationship, a physician does not owe a patient any duty. *Plowman*, at 412-13. *See also Lyons v. Grether*, 239 S.E.2d 103, 105 (Va. 1977) ("A physician's duty arises only upon the creation of a physician-patient relationship. . ."); *Tomeh v. Bohannon*, 765 S.E.2d 743, 746 (Ga. Ct. App. 2014) ("[D]octor-patient privity is an essential element because it is this relation which is a result of a consensual transaction that establishes the legal duty to conform to a standard of conduct"); *Roberts v. Sankey*, 813 N.E.2d 1195, 1197 (Ind. Ct. App. 2004) ("The duty owed by a physician arises from the physician-patient relationship. Thus, a physician-patient relationship is a legal prerequisite to a medical malpractice action").

The physician-patient relationship "is a consensual one in which the patient, or persons acting on the patient's behalf, knowingly employs the physician and *the physician knowingly consents to treat the patient*." *Corbet v. McKinney*, 980 S.W.2d 166, 169 (Mo. App. 1998) (emphasis added); *see* also 1 Louisell and Williams, MEDICAL MALPRACTICE, Section 8.03 [2] at 8-17 (1998); Pegalis & Wachsman, AMERICAN LAW OF MEDICAL

MALPRACTICE Section 2:3 at 45 (1980) "Because the express or implied consent of the physician is required, the physician must take some affirmative action with regard to treatment of a patient for the relationship to be established." 61 Am Jur 2d Physicians, Surgeons, and Other Healers § 130; *Irvin v. Smith*, 31 P.3d 934, 941 (Kan. 2001).

Plaintiff initially argues that the existence of a physician-patient relationship is a question of fact reserved for the jury. Appellant's Proof Brief at 51-54. This statement is generally true, but beside the point. Where, as here, the operative facts are not in dispute, the court may decide the issue as a matter of law.[6] *Wallace v. Des Moines Ind. Cmty. Sch. Dist. Bd. Of Drs.*, 754 N.W.2d 854, 857 (Iowa 2008) ("A matter may be resolved on summary judgment when the record demonstrates there is only a conflict concerning legal consequences of undisputed facts.")

[6] Plaintiff acknowledges as much when she states "the existence of a physician-patient relationship is usually a question of fact reserved for the jury, *except where the facts are undisputed*." Appellant's Proof Brief at 51 (emphasis added). Plaintiff also states "[t]he majority of jurisdictions have concluded that whether a physician-patient relationship exists is *generally* a question of fact for the jury." *Id.* at 52 n17 (emphasis added). It is noteworthy that, of the eight cases Plaintiff cites in support of this proposition, four of them actually determined that there was no physician-patient relationship as a matter of law. *See Dodd-Anderson v. Stevens*, 905 F. Supp. 937, 944 (D. Kan. 1995); *Gallion v. Woytassek*, 504 N.W.2d 76, 80 (Neb. 1993); *Irvin*, 31 P.3d at 940-41; *Tumblin v. Ball-Incon Glass Packaging*, 478 S.E.2d 81, 85 (S.C. Ct. App. 1996).

In the context of medical malpractice actions in which the underlying facts are not in dispute, courts have frequently determined whether a physician-patient relationship exists as a matter of law. *See Estate of Kundert v. Ill. Valley Cmty. Hosp.*, 964 N.E.2d 670 (Ill. App. 2012) (no hospital-patient relationship as a matter of law where hospital ER was contacted but declined to treat patient); *Irvin*, 31 P.3d at 943 (no physician-patient relationship as a matter of law where neurosurgeon discussed case in general terms over telephone and agreed to see patient the following day); *Corbet*, 980 S.W.2d at 171 (no physician-patient relationship as a matter of law); *Ortiz v. Glusman*, 334 S.W.3d 812, 817 (Tex. App. 2011) (no physician-patient relationship as a matter of law where physician consulted by telephone but took no affirmative action to treat the patient); *Fruiterman v. Granata*, 668 S.E.2d 127 (Va. 2008) (no physician-patient relationship as a matter of law where no evidence physician undertook some affirmative act that would amount to rendering of health care to another); *Jenkins v. Best*, 250 S.W.3d 680 (Ky. Ct. App. 2007) (no physician-patient relationship as a matter of law where physician did not undertake to render medical care to patient).

As will be discussed in more detail below, the material facts in this case are not in dispute. It is uncontroverted that neither Dr. Wingert nor Dr.

Ryder took any affirmative action to treat F.L. The district court properly determined the issue of duty as a matter of law.

2. Dr. Wingert owed F.L. no duty as a matter of law

Although there is evidence in the record that Nurse Lang sent a page to Dr. Wingert, the uncontroverted evidence establishes that Dr. Wingert did not receive either a page or a cell phone call regarding F.L.[7] Amend. App. v.1 at 1501; 1539 (Aff. of Dr. Wingert at ¶ 12; Depo of Dr. Wingert at 48:4-49:3). Plaintiff argues "as the available, paged on-call resident, a reasonable juror could conclude that Dr. Wingert had a physician-patient relationship with F.L. that was breached when she did not return the page." Appellant's Proof Brief at 61. Plaintiff thus argues that Dr. Wingert's status as on-call physician is enough, by itself, to establish a physician-patient relationship. This argument fails as a matter of law.

[7] Plaintiff's assertion "there is no evidence whatsoever that the page Nurse Lang sent to Dr. Wingert did not go through or that Dr. Wingert did not receive this page" is false. Appellant's Proof Brief at 61. Dr. Wingert stated, both by affidavit and direct testimony, that she did not receive a page from Nurse Lang. Amend. App. v.1 at 1501; 1539 (Aff. of Dr. Wingert at ¶ 12; Depo of Dr. Wingert at 48:4-49:3). She also explained the shortcomings of the paging system. *Id.* Plaintiff offered no contrary evidence on either point.

It is well established that a physician's on-call status, by itself, does not create a physician-patient relationship.[8] *Tomeh*, 765 S.E.2d at 747; *Oja v. Kin*, 581 N.W.2d 739, 742-43 (Mich. App. 1998); *Anderson v. Houser*, 523 S.E.2d 342, 347 (Ga. App. 1999); *St. John v. Pope*, 901 S.W.2d 420, 424 (Tex. 1995). Plaintiff cites an Iowa trial court opinion, *Schroeder v. Hinrichs*, No. 07821LACE103154, 2005 WL 5190743 (Iowa Dist. Sep. 29, 2005), in support of her contrary argument. *Schroeder*, however, does not depart in any significant way from the authority cited above.

The plaintiff in *Schroeder* sued an emergency room physician and a cardiologist for medical malpractice in their treatment of the plaintiff's deceased husband. The husband was brought to the emergency room by ambulance complaining of shortness of breath. He was examined by the emergency room physician, who ordered an EKG and other tests. The emergency room physician then contacted the on-call cardiologist via telephone. The results of the EKG were faxed to the cardiologist's home. The cardiologist reviewed the EKG and recommended that the patient could be discharged. The patient died the following day.

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[8] Plaintiff acknowledges this when she argues "whether an on-call physician's *actions* create a physician-patient relationship and the resulting duty of care is a question of fact . . . ." Plaintiff's Proof Brief at 53 (emphasis added). In this case, Dr. Wingert undertook no action whatsoever with respect to F.L.

The cardiologist moved for summary judgment, arguing that he had no physician-patient relationship with the decedent. The trial court, in its order denying the cardiologist's motion for summary judgment, agreed "on-call status does not alone establish a duty." *Id.* at *2 (citing *St. John*). However, because the cardiologist had reviewed the EKG and gave an opinion that the patient could be discharged, the trial court found there was "a genuine issue of material fact as to whether [the cardiologist] directed the actions of [the emergency room physician] and took enough affirmative action toward the treatment of [the decedent] to create the necessary relationship and the resulting duty of care." *Id.*

In the present case, contrary to the facts of *Schroeder*, it is undisputed that Dr. Wingert took no affirmative action toward F.L. She was not involved at all in F.L.'s care and treatment and therefore cannot be said to owe F.L. a duty of care. These facts are closer to those in *Tomeh.*

In *Tomeh*, an infant who was born prematurely died in the hospital shortly after delivery. The infant's mother sued several medical providers, including the pediatrician who was listed as the admitting and attending physician in the infant's medical record. *Id*. at 596. The electronic medical record at the hospital required that the name of an attending physician be entered into the child's chart. *Id*. at 598. The mother had not chosen a

pediatrician prior to the child's birth. *Id*. If the child did not have a previously identified pediatrician, the electronic medical record system would automatically populate with the name of the pediatrician who was on call. *Id*.

The pediatrician filed a motion for summary judgment, arguing that he had no physician-patient relationship with the infant. *Id*. at 598. The pediatrician submitted an affidavit showing that he never consulted or provided treatment to the infant. *Id.* He was never called or asked to treat the infant and was not present at the hospital at the time the infant died. *Id*. The court found that summary judgment was properly granted in favor of the pediatrician, stating:

> Although a doctor who has agreed to be on-call makes himself available to be consulted regarding a patient's condition, that fact alone does not indicate that the doctor has agreed to establish a doctor-patient relationship with any patient who presents to the hospital for diagnosis and treatment. Here, although [the defendant] was the on-call pediatrician at the time of [the infant's] death, he presented affidavit evidence showing that he did not diagnose or treat [the infant], consult on his care, or even meet him. A doctor who is merely on-call, but who renders no treatment or care to a patient does not have a doctor-patient relationship.

Id. at 600.

Plaintiff makes an additional argument in her challenge to the summary judgment granted in favor of Dr. Wingert. She argues that the trial

court did not view "substantial direct and circumstantial evidence" in the light most favorable to her. Appellant's Proof Brief at 55. The direct evidence to which she refers is expert testimony to the effect that Defendants were negligent in their treatment of F.L. *Id.* at 56. Had the district court viewed this evidence in the light most favorable to her, Plaintiff contends, "then a jury would have weighed the evidence and determined whether or not these physicians were negligent in failing to take action to properly care for and treat F.L's bacterial meningitis infection." *Id.* at 58. This argument is easily met.

First, whether there is expert evidence that Defendants were negligent is irrelevant to the threshold question of whether they owed F.L. a duty. *Irvin*, 31 P.3d at 942 ("the fact that a plaintiff produces and expert witness who will testify that a particular act or omission constitutes 'a departure from the standard of care' [does not] establish that a duty exists as a matter of law"); *see, e.g.*, *Seeber v. Ebeling*, 141 P.3d 1180, 1191 (Kan. App. 2006) (finding it unnecessary to address standard of care issue where there was no duty). The affidavits of Plaintiff's experts, offered in opposition to Defendants motions for summary judgment, add nothing to the question of whether a physician-patient relationship, and therefore a duty, existed.

Next, the circumstantial evidence to which Plaintiff refers is not identified. Much of her argument discusses the admissibility of circumstantial evidence. Appellant's Proof Brief at 56-58. Again, the principles she cites are true, but beside the point. Nowhere does Plaintiff identify the circumstantial evidence she believes establishes the existence of a physician-patient relationship between Defendants and F.L.

Finally, Plaintiff's argument confuses the admissibility of circumstantial evidence with its sufficiency. In *Tomeh*, the plaintiff argued that the evidence established a fact issue with respect to whether, and to what extent, Dr. Tomeh was involved in the care of the patient. *Tomeh*, 765 S.E.2d at 746-47. Dr. Tomeh presented his own affidavit in which he stated that he had never seen or treated the patient. *Id.* at 747. He also presented an affidavit from the director of medical records, who explained that the hospital's electronic medical records system required that an attending and admitting physician be listed and, where a minor patient does not have a regular pediatrician, the system automatically populates these fields with the name of the pediatrician who was on call at the time. *Id.* The name of the attending physician is also automatically listed in a coding summary alongside the treatment that was rendered to the patient. *Id.*

The plaintiff, in opposition to summary judgment, did not address Dr. Tomeh's affidavit or that of the director of medical records. Instead, she relied on the facts that Dr. Tomeh was listed in the medical records as the patient's attending physician and his name appeared in a coding summary alongside the treatment that was rendered as circumstantial evidence that Dr. Tomeh was involved in the patient's care. The Court of Appeals of Georgia rejected the argument that this evidence created a genuine issue of material fact on the question of duty. The court first explained the standard to be applied:

> Before circumstantial evidence can have any probative value to rebut or contradict direct and positive testimony of an unimpeached witness of the alleged facts in question, such evidence must point at least more strongly to a conclusion opposite to the direct testimony. It is not sufficient that such circumstantial evidence points equally one way or the other.

Id., quoting *Rosales v. Davis*, 580 S.E.2d 662, 664 (Ga. App. 2003). The court then concluded "the circumstantial evidence, such as the coding summary and the computer-generated medical records, which were shown to sometimes be inaccurate, cannot rebut Dr. Tomeh's direct testimony that he did not treat [the plaintiff's children]." *Id.*

Plaintiff has likewise failed to rebut the direct evidence of Dr. Wingert and Dr. Ryder that they were not involved in F.L.'s care in any way. This

evidence was uncontroverted. Plaintiff has offered no direct or circumstantial evidence sufficient to create an issue of fact on the question of whether there was a physician-patient relationship. Summary judgment was proper and should be affirmed.

3. Dr. Ryder owed F.L. no duty as a matter of law

Dr. Ryder likewise owed no duty to F.L. Plaintiff argues "[w]hen Nurse Lang reached out to Dr. Ryder and relayed her concerns, a physician-patient relationship was formed and Dr. Ryder had a duty to treat F.L. appropriately." Plaintiff's Proof Brief at 63. This argument ignores the uncontroverted evidence and the mutuality of consent required to form a physician-patient relationship.

On April 7, 2015, Dr. Ryder was assigned to be on call for pediatric patients admitted to St. Luke's Hospital in Sioux City, Iowa. Amend. App. v.1 at 1478-79 (Aff. of Dr. Ryder at ¶ 3). She was not assigned to be on call for pediatric patients, such as F.L., who were already admitted to Mercy Medical Center – Sioux City ("Mercy").[9] *Id.* When Nurse Lang "reached

[9] Plaintiff describes Dr. Ryder as "another on-call resident who was responsible for covering patients on the pediatric floor of the hospital." Plaintiff's Proof Brief at 55. This is misleading. While Dr. Ryder is a resident who takes call for the Family Practice Clinic, she was not on call for patients, including F.L., who are already admitted to the pediatric floor at Mercy at the time of Nurse Lang's page. Amend. App. v.1 at 1478-79 (Aff. of Dr. Ryder at ¶ 3). At that time, she was on call for a different service. *Id.*

out" to Dr. Ryder, she contacted the wrong on-call physician. Dr. Ryder advised Nurse Lang of this fact when they spoke. Amend. App. v.1 at 1480 (Aff. of Dr. Ryder at ¶ 7). Dr. Ryder declined to participate in F.L.'s care and advised Nurse Lang that she should page the on-call resident for the Mercy pediatric inpatient service or the on-call faculty physician. *Id.* None of these facts are in dispute. The only issue is whether the law imposes a duty under these undisputed facts. The fact that Dr. Ryder declined to diagnose or treat F.L. disposes of the issue.

Because the physician-patient relationship is one of mutual consent, there can be no physician-patient relationship as a matter of law when a physician declines to treat a patient. *Giles v. Anonymous Physician I*, 13 N.E.3d 504, 511 (Ind. Ct. App. 2014) (no physician-patient relationship as a matter of law where physician declined to see or treat patient); *Jenkins*, 250 S.W.3d at 688 (same); *Seeber*, 141 P.3d at 1190 (same); *Oja*, 581 N.W.2d at 743 (same); *Fought v. Solce*, 821 S.W.2d 218, 220 (Tex. Ct. App. 1991) (same).

In *Seeber*, an emergency room physician paged a neurosurgeon regarding a patient who presented to the emergency room after suffering a spinal cord injury. The neurosurgeon responded to the page and heard a report about the patient's condition. Despite his status as the neurosurgeon

on call, the neurosurgeon said he could not come in and see the patient because he was too fatigued. *Seeber*, 141 P.3d at 1183. The neurosurgeon recommended that the emergency room physician find another doctor to care for the patient and provided the name of another neurosurgeon he could call. *Id*. The court found as a matter of law that no physician-patient relationship had formed between the neurosurgeon and the patient. *Id*. at 1190.

Explaining its decision, the *Seeber* court stated one of the pre-requisites to forming a physician-patient relationship is that the physician agrees to treat the patient. *Id*. at 1190. The court noted that the neurosurgeon told the emergency room physician that he was not able to treat the patient. *Id*. The neurosurgeon did not take any action to participate in diagnosing or treating the patient. *Id*. Even though the neurosurgeon was clearly the physician assigned to be on call during this period of time, the court concluded that this fact alone could not establish a physician-patient relationship:

> We do not believe that a physician's on-call status alone is enough to support an implied consent to a physician-patient relationship. Thus, we conclude that an implied consent to a physician-patient relationship may be found only where a physician does something, such as participate in the patient's diagnosis and treatment, that supports the implication that she consented to a physician-patient relationship. We conclude that such participation is necessary for, but by itself does not establish, an implied physician-patient relationship.

Id.

In *Oja*, the plaintiff's decedent was brought to the hospital emergency room with a gunshot wound to his jaw. The resident physician called the on-call ear, nose, and throat physician ("ENT") and requested that he come to see the patient. 581 N.W.2d at 741. The ENT stated he was not feeling well, could not come to the hospital, and that the resident should find another physician to assist. *Id.* The patient later died from his injuries and his estate sued the ENT for negligence. *Id*.

The *Oja* court observed a "physician-patient relationship is contractual and requires the consent, express or implied, of both the doctor and the patient." *Id.* at 743. Because the ENT declined to treat the patient, the court found that there was no physician-patient relationship between the ENT and the decedent as a matter of law. *Id*. Therefore, the ENT owed no duty. *Id.* The court ruled that summary judgment was properly granted in favor of the ENT. *Id*.

The plaintiff in *Jenkins* sued a perinatologist, Dr. Best, for failing to perform an ultrasound when requested to do so by her treating obstetrician. *Jenkins*, 250 S.W.3d at 684. Plaintiff presented to the emergency room 30 weeks pregnant with complaints of abdominal pain and vaginal bleeding. *Id.* Her treating obstetrician ordered an ultrasound be performed by a

perinatologist. *Id.* Dr. Best was the perinatologist who was on call to provide perinatal care at the hospital. *Id.* When she was contacted by nursing staff, Dr. Best told them she could not perform the ultrasound that evening but might be able to do it the following morning. *Id.* After checking with the plaintiff's treating obstetrician, nursing staff scheduled the plaintiff for an ultrasound the following morning. *Id.* Later that evening, a new nurse became concerned about the plaintiff's condition and called the treating obstetrician, who came to the hospital and examined the patient. *Id.* The plaintiff was transferred to a different hospital where an ultrasound could be performed by a perinatologist that evening. *Id.* The plaintiff delivered by emergency caesarian section early that morning. *Id.* Plaintiff's son was born with hypoxic ischemic encephalopathy.

The Court of Appeals of Kentucky affirmed the summary judgment granted in favor of Dr. Best. *Id.* at 688. The court explained that the evidence did not create an issue of fact regarding the existence of a physician-patient relationship:

> There is no genuine issue regarding the following facts. While [plaintiff] was in Baptist Hospital, Dr. Best was at another location and therefore never available to offer medical assistance. Dr. Best never saw or examined [plaintiff], never spoke to her or consulted or gave her advice. Dr. Best never reviewed [plaintiff's] chart or made any entry in it. Dr. Best never consulted with [the obstetrician] while [plaintiff] was under his care. Dr. Best never issued either medical or

> nonmedical orders. Nor did she render any opinions or recommendations. She did not participate in [plaintiff's] diagnosis or treatment. The extent of her involvement was to inform Baptist Hospital nurses that she was unavailable to perform an ultrasound until the morning . . . . In summary, Dr. Best did nothing that constitutes an undertaking to render medical care to [plaintiff].

Id.

The uncontroverted facts of the present case are indistinguishable from *Seeber*, *Oja*, and *Jenkins*. There is no dispute that Dr. Ryder never saw or treated F.L. Amend. App. v.1 at 1480 (Aff. of Dr. Ryder at ¶ 8). Although a nurse at Mercy mistakenly paged Dr. Ryder regarding F.L., and provided some information about F.L.'s condition, Dr. Ryder told the nurse that she was not familiar with the patient and could not come see him because she was not assigned to that service. *Id.* (Aff. of Dr. Ryder at ¶ 7). Dr. Ryder never reviewed F.L.'s chart or made any entry in it. *Id.* (Aff. of Dr. Ryder at ¶ 8). She never issued either medical or nonmedical orders. *Id.* She did not participate in F.L.'s diagnosis or treatment, nor did she render any opinions or recommendations. *Id.* In short, Dr. Ryder "did nothing that constitutes an undertaking to render medical care to [F.L.]." *Best*, 250 S.W.3d at 688.

The uncontroverted evidence establishes that Dr. Ryder did not have a physician-patient relationship with F.L. As a result, she did not owe F.L. a

duty of care and summary judgment was appropriate. The order of the district court should be affirmed.

4. Principles of ordinary negligence do not support creation of a new duty for on-call physicians.

Finally, Plaintiff argues that Defendants owed F.L. a duty of care "[e]ven in the absence of a physician-patient relationship." Appellant's Proof Brief at 63. Here, she seeks to use principles of ordinary negligence to impose a new duty on physicians that is independent of the physician-patient relationship. She cites the relationship of the parties, reasonable foreseeability of harm to the person who is injured, and public policy considerations as factors the court must weigh in order to determine whether a duty should be imposed. *Id.* (citing *Leonard v. State*, 491 N.W.2d 508, 509-12 (Iowa 1992)). Three points dispose of this argument.

First, Plaintiff makes no real argument on this question. She cites the legal principle but fails to argue how the principle applies to the facts of this case. Appellant's Proof Brief at 63-64. Plaintiff's two-paragraph argument does not engage in the analysis she contends must be undertaken. It does not discuss the relationship of the parties, does not explain why harm to the plaintiff was foreseeable, and does not identify any public policy concern she claims warrants the imposition of a duty under these circumstances (or

the nature of that duty). Most importantly, she does not explain *why* the weighing of these factors should compel this Court to create and impose a new duty independent of the physician-patient relationship.[10] Instead, she mentions these principles in passing and leaves it to the Court to make the argument. The Court should not consider this argument.

Next, Plaintiff does not cite any case where a court found, on similar facts, that a physician owed a duty of care outside the physician-patient relationship based upon traditional negligence principles.[11] The cases she does cite do not help her cause.

Plaintiff cites three cases in support of her argument: *Leonard*; *Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281, 285 (Iowa 1981); and *Diggs v. Arizona Cardiologists, Ltd.*, 8 P.3d 386, 389 (Ariz. App. 2000). None of these cases support the creation of a duty of care outside the physician-patient relationship in a situation such as that presented here.

In *Leonard*, this Court found a mental health facility did not owe a duty of care to the general public for decisions regarding the treatment and release of mentally ill persons from confinement. *Leonard*, 491 N.W.2d at

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[10] This point was likewise raised but not argued in the district court. Amend. App. v.1 at 1529 (Memorandum of Points and Authorities at 12).

[11] Our research has located no such case.

512. To reach this conclusion, this Court first noted that the facility had a duty under Restatement (Second) of Torts § 319[12] to control the patient's conduct, "or at least not negligently release him from custody." *Id.* at 510. This Court then analyzed principles of foreseeability and public policy to determine whether this duty runs "from the custodian to the public at large or only to the reasonably foreseeable victims of the patient's tendencies." *Id.* at 511. This Court concluded "the risks to the general public posed by the negligent release of dangerous mental patients would be far outweighed by the disservice to the general public if treating physicians were subject to civil liability for discharge decisions." *Id.* This Court reversed the district court's denial of summary judgment in favor of the mental health facility and remanded the matter for dismissal of the plaintiff's petition. *Id.* at 512.

Leonard is distinguishable from the present case on several grounds. First, the defendant in *Leonard* owed a special duty of care pursuant to Restatement (Second) of Torts § 319, a provision that does not apply here. Next, the balancing of interests in *Leonard* had to consider the statutory and constitutional framework within which mental health professionals must

[12] "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319.

operate with respect to involuntary commitment of patients. *Id.* Those considerations are not present here. Finally, this Court limited its holding to the facts of that case. *Id. Leonard* does nothing to advance Plaintiff's argument.

Larsen is even less relevant. In *Larsen*, this Court held that a lending institution owed borrowers a duty of care with respect to an appraisal performed by an employee of the institution. *Larsen*, 300 N.W.2d at 288. This Court analyzed the question of duty in the context of Restatement (Second) of Torts § 552 (1977)[13] and *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969), neither of which apply to the present case. Other than as a general

[13] Restatement (Second) of Torts § 522 provides, in pertinent part:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
(2) . . . The liability stated in Subsection (1) is limited to loss suffered
(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

statement that foreseeability is a factor in determining the existence of a duty, *Larsen* adds nothing to Plaintiff's argument.

Finally, *Diggs v. Arizona Cardiologists, Ltd.*, 8 P.3d 386 (Ariz. App. 2000), is also of little utility. The plaintiff in *Diggs* sued a cardiologist who consulted in the care of the plaintiff's deceased wife. The plaintiff's wife went to the emergency with severe chest pain. *Diggs*, 8 P.3d at 387. An emergency room physician suspected the patient had pericarditis. The emergency room physician ordered an EKG and echocardiogram. The computer-generated EKG interpretation indicated that the patient was having a myocardial infarction. Because the EKG machine's interpretation conflicted with his own, and because he was not qualified to interpret an echocardiogram, the emergency room physician spoke with the defendant cardiologist, who was visiting another patient in the ER at the time. *Id.* The cardiologist briefly discussed the case with the emergency room physician, who shared the patient's clinical history and the results of his examination. *Id.* The cardiologist reviewed the EKG and agreed that the patient could be discharged. *Id.* The patient was sent home, where she died a few hours later.

The cardiologist moved for, and was granted, summary judgment based on the absence of a contractual physician-patient relationship with the patient. On appeal, the Court of Appeals of Arizona framed the issue as

"whether a sufficient relationship existed between [the cardiologist] and [the patient] such that, as a matter of policy, [the cardiologist] owed her a duty of care." *Id.* at 389.

The court concluded that, under the circumstances of that case, the cardiologist owed the patient a duty of care as a matter of law. *Id.* at 391. The court did so based upon the undisputed evidence that the cardiologist "voluntarily undertook to provide his expertise to [the ER physician], knowing that it was necessary for the protection of [the patient] and that [the ER physician] would rely on it." *Id.* at 390. The court thus concluded "when [the cardiologist] rendered his opinions, he effectively became a provider of medical treatment to [the patient]. This relationship between [the cardiologist] and [the patient] gave rise to a duty of reasonable care . . . ." *Id.* at 391.

In the present case, it is undisputed that neither Dr. Wingert nor Dr. Ryder provided *any* medical care to F.L. They had no relationship at all with the F.L. The analysis in *Diggs* does not apply to the facts of this case.

Compare the public policy issues analyzed in *Diggs* with those considered in *Anderson*. In *Anderson*, as in the present case, a patient sought to impose a duty of care on an on-call physician who never met or treated

the patient and was in another location when the patient presented to the emergency room:

> The potential ramifications of imposing liability upon an on-call doctor under the circumstances in this case is far-reaching. There would be no logical reason to limit such a holding to situations involving on-call doctors. Suppose a neurologist on staff is required by the terms of his agreement with the hospital to provide consultations when requested by another physician, but is late returning from lunch one day. Another doctor seeking consultation is unable to locate the neurologist and consults a different physician who incorrectly diagnoses the patient's condition. Can the patient sue the neurologist for malpractice, claiming that she had a consensual doctor-patient relationship with him by virtue of his employment agreement with the hospital? Although such a result would appear absurd, there is no principled way to distinguish it from the on-call scenario.

Anderson, 523 S.E.2d at 620-21.

Plaintiff has provided no relevant authority for the creation of a duty of care outside the physician-patient relationship under the facts of this case. Nor has she argued why the application of traditional negligence principles such as foreseeability and public policy would compel the creation of such a duty. Her argument should be rejected.

III. The District Court Correctly Determined That Plaintiff Cannot Recover as Damages Amounts Paid by Texas Medicaid

Defendants agree with and join in the argument of Defendant-Appellees Dr. Mueting, Dr. Liewer, and Northeast Iowa Emergency

Physicians, P.C. with respect to this issue. The Texas Medicaid program is a collateral source under Iowa Code § 147.136. The district court, therefore, properly prohibited Plaintiff from claiming amounts paid by Texas Medicaid as damages.

CONCLUSION

The uncontroverted evidence establishes that neither Dr. Wingert nor Dr. Ryder undertook to provide any care or treatment to F.L. As result, there was no physician-patient relationship between either Dr. Wingert or Dr. Ryder and F.L. Because neither of the Defendants owed F.L. a duty, summary judgment was appropriate. The judgment of the district court should be affirmed.

REQUEST FOR ORAL ARGUMENT

Dr. Wingert and Dr. Ryder hereby request oral argument.

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STATEMENT OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point type and contains 9,837 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

/s/Patrick G. Vipond
Signature

2/27/2020
Date

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I hereby certify the cost of printing the foregoing Defendants-Appellees' Proof Brief was the sum of $0.00.

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