

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

KARIN BACON and GARY BACON,

UNPUBLISHED

April 15, 2008

Plaintiffs-Appellants,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

No. 277095

Macomb Circuit Court

LC No. 2005-002125-NH

DAVID MARTIN, M.D., CARDIAC SURGERY  
INSTITUTE, P.C., and MT. CLEMENS  
GENERAL HOSPITAL, INC., d/b/a MT.  
CLEMENS GENERAL HOSPITAL,

Defendants-Appellees.

---

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of her medical malpractice action for failure to establish that a physician-patient relationship existed.<sup>1</sup> We affirm.

On December 6, 2002, plaintiff underwent an emergency cardiac catheterization that was performed by Dr. Brian Litch which indicated that she was suffering from a severe spontaneous spiral dissection with thrombosis formation in her right coronary artery. At 10:00 p.m. that evening, Dr. Litch wrote an order that stated “Dr. David Martin consult/assist.” Dr. Litch also contacted Dr. Martin, a cardiac thoracic surgeon, about his request for a consult and advised him that surgical intervention was not a viable option at that time. Dr. Litch testified that he did not want Dr. Martin to hear about the request for a consult from a ward secretary and then wonder what he had to do. Dr. Litch requested that Dr. Martin evaluate plaintiff the next day in hopes that she would survive and be able to undergo bypass surgery at some time in the future. The

---

<sup>1</sup> Because plaintiff Gary Bacon’s claim is derivative, we refer to Karin Bacon as “plaintiff” in this opinion.

next morning, Dr. Martin saw plaintiff and no surgical intervention was recommended. On December 13, 2002, plaintiff was discharged from the hospital.

On May 27, 2005, plaintiff filed her medical malpractice complaint against Dr. Martin, his professional group, and the hospital apparently claiming that Dr. Martin should have performed a complete examination of plaintiff on December 6, 2002, when her surgical options may have been different. Subsequently, a motion for summary dismissal was filed, asserting that no claim of malpractice could be based on alleged acts or omissions of Dr. Martin on December 6, 2002, because no physician-patient relationship existed between Dr. Martin and plaintiff. Pursuant to MCR 2.116(C)(10) the trial court agreed, holding that no physician-patient relationship was established until Dr. Martin actually examined plaintiff and gave his medical opinion. “A mere telephone conversation between Dr. Litch and Martin did not give rise to a physician-patient relationship between plaintiff and Martin. At that time, Martin did not direct plaintiff’s care in any manner other than to agree to examine her the following day. This agreement alone is insufficient to create a physician-patient relationship.” (citations omitted.) This appeal followed.

Plaintiff argues that the trial court erred in summarily dismissing this matter on the ground that a physician-patient relationship did not exist on December 6, 2002, because there was a written order requesting a formal consult with Dr. Martin and Dr. Martin was actually contacted by Dr. Litch regarding plaintiff’s medical condition on that date. After review de novo of the trial court’s summary dismissal decision, considering the evidence in a light most favorable to plaintiff to determine if there was a genuine issue of material fact on the issue whether a physician-patient relationship existed, we disagree with plaintiff. See *Maiden v Rozwood*, 461 Mich 109, 118, 120-121; 597 NW2d 817 (1999).

“[A] physician-patient relationship is a legal prerequisite to a medical malpractice cause of action.” *Oja v Kin*, 229 Mich App 184, 187; 581 NW2d 739 (1998). This is so because in the absence of a physician-patient relationship, a duty of care—the physician’s legal obligation to act for the benefit of the patient—does not exist. See *Dyer v Trachtman*, 470 Mich 45, 49-50; 679 NW2d 311 (2004); *Buczowski v McKay*, 441 Mich 96, 101 n 5; 490 NW2d 330 (1992), quoting *Rodriguez v Sportsmen’s Congress*, 159 Mich App 265, 270-271; 406 NW2d 207 (1987). Contrary to perhaps a popular misconception, physicians are not legally obligated to render their professional services merely because they are requested.<sup>2</sup> A physician-patient relationship comes into existence in a myriad of ways. Typically, a patient seeks the professional services of medical care and treatment from a physician and the physician accepts the patient and renders those services; thus, by expressed consent, a contractual relationship is established. See *Hill v Kokosky*, 186 Mich App 300, 302-303; 463 NW2d 265 (1990).

Obviously, there are other ways in which the physician-patient relationship can come into existence, including by referral or request from another physician that results in the provision of medical services in an emergent situation. In such instances, the patient’s consent to the relationship is implied. See *Oja, supra* at 190. There are also situations in which a physician’s consent to the relationship will be implied, such as when the physician in some way actively

---

<sup>2</sup> See *Oja, supra* at 190 n 2, quoting *St John v Pope*, 901 SW2d 420, 423 (Tex, 1995).

participates in the patient's medical care and treatment. See *id.* at 190-191. A physician's consent to a relationship with a patient, however, is not implied when the physician merely discusses the patient with another colleague physician. *Hill, supra* at 304; see, also, *NBD Bank, NA v Barry*, 223 Mich App 370, 373; 566 NW2d 47 (1997).

In this case, plaintiff argues that a cognizable physician-patient relationship existed because, on the date at issue, a request for a formal consult by defendant existed and Dr. Litch actually spoke to defendant on the telephone about plaintiff's condition. First, the fact that a request for a consult existed in no way establishes that a physician-patient relationship was created before the consult was actually performed. Until performance, defendant could have failed to see or forgot about the request, or he could have ignored, denied, or refused the request.

Second, that Dr. Litch spoke to defendant on the telephone about plaintiff's condition does not tend to establish the requisite legal relationship between plaintiff and defendant either. Dr. Litch had a physician-patient relationship with plaintiff. He admittedly directed plaintiff's medical management. That Dr. Litch consulted with a colleague—defendant—about plaintiff's condition does not thrust an onus of responsibility for plaintiff's medical care and treatment onto defendant. There is no evidence that defendant accepted plaintiff as a patient during that telephone call or that defendant in any way directed or actively participated in plaintiff's medical care and treatment during that call. In other words, on December 6, 2002, defendant did nothing that would lead to the conclusion that he accepted a contract with plaintiff and there was no evidence to suggest that he was legally obligated to accept a contract with plaintiff.

Plaintiff argues that defendant *should have* accepted plaintiff as a patient and *should have* promptly gone to the hospital and performed his own examination of plaintiff to determine whether surgical intervention was necessary instead of relying on Dr. Litch's conclusions and waiting until the next day to examine plaintiff. If we were to accept plaintiff's contention most physicians not legally obligated to answer their ringing telephone would refuse to do so. Again, physicians are not obligated to render their professional services merely because they are requested. Plaintiff has failed to establish that defendant was under any legal obligation to render his services to her on December 6, 2002. In fact, his services were not even requested. Whether plaintiff should have been immediately and thoroughly examined by a cardiac surgeon was a decision that Dr. Litch made and he decided that such medical care was unnecessary.

In summary, medical malpractice can occur only "within the course of a professional relationship." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999), quoting *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652-653; 438 NW2d 276 (1989). Plaintiff has failed to establish a genuine issue of material fact as to the issue whether she had a physician-patient relationship with defendant. She did not. Accordingly, on December 6, 2002, defendant did not owe plaintiff a duty of due care and he is not subject to liability for alleged negligent conduct with regard to the medical care and treatment she received on that date. Thus, this matter was properly dismissed by the trial court.

Affirmed.

/s/ Christopher M. Murray  
/s/ David H. Sawyer  
/s/ Mark J. Cavanagh