STATE OF MICHIGAN

COURT OF APPEALS

COLETTE M. TOPOREK,

Plaintiff-Appellant,

v

K. P. ANANDAKRISHNAN, M.D., and K. P. ANANDAKRISHNAN, M.D., PC,

Defendants-Appellees.

UNPUBLISHED
April 11, 2000

No. 210751
Wayne Circuit Court
LC No. 97-710754-NO

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted summary disposition to defendants pursuant to MCR 2.116(C)(10). Plaintiff had filed a claim against defendant, her former physician, for alleged battery and intentional infliction of emotional distress.[1] We affirm.

Plaintiff sought treatment from defendant physician for a thyroid problem. Defendant examined plaintiff several times between June 1996 and January 1997. Plaintiff stated that during various visits defendant pulled up her shirt and bra to listen to her heart with a stethoscope, unfastened her pants to examine her lower abdomen, brushed against her knee with his groin area while examining her, and did not leave the room while she was straightening her clothes. The trial court granted defendant's motion for summary disposition over plaintiff's counsel's arguments that the defendant acted to achieve sexual arousal. In granting summary disposition, the trial court referred to plaintiff's deposition testimony and held that her description of the facts could not be developed to produce a genuine material issue.

This Court reviews motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought pursuant to MCR 2.116(C)(10) tests the "factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

> In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party

> opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Id.* at 119-120.]

In her first two issues on appeal, plaintiff contends that genuine issues of material fact exist regarding whether defendant touched plaintiff for sexual gratification and whether plaintiff impliedly consented to being touched by defendant on the breasts, pubic area and knees. We will address these issues together, because both issues relate to the question of whether a battery occurred. The tort of battery by a treating physician is somewhat unique among other battery claims.

> Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent. Accordingly, if a physician treats or operates on a patient without consent, the physician has committed a battery and may be required to respond in damages. [*In re Rosenbush*, 195 Mich App 675, 680; 491 NW2d 633 (1992).]

Likewise, there has been an assault and battery "if consent has been given but the scope of the consent is exceeded. . . ." *Banks v Wittenberg*, 82 Mich App 274, 279-280; 266 NW2d 788 (1978). A patient's consent to medical treatment may be express or implied. *Werth v Taylor*, 190 Mich App 141, 146; 475 NW2d 426 (1991). The term "implied consent" describes "the consent inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment." *Banks, supra* at 280.

Here, the evidence established that plaintiff sought treatment from defendant and willingly submitted to the examinations. From this conduct, we infer that plaintiff consented to be examined and treated by defendant. Plaintiff has not shown that she revoked her consent or that the allegedly tortious conduct exceeded the scope of her consent. Cf. *In re Martin*, 450 Mich 204, 216; 538 NW2d 399 (1995) ("a necessary corollary of the common-law right to informed consent is the right not to consent"). Furthermore, the evidence presented by plaintiff does not indicate that defendant's actions were performed for any reason other than to facilitate a physical examination. While plaintiff contends on appeal that defendant touched her for sexual arousal or gratification, plaintiff's own deposition testimony fails to support this contention. Because plaintiff consented to undergo the examinations and did not revoke her consent, defendant's actions cannot be considered a battery.

Next, plaintiff contends that a genuine issue of material fact existed with respect to her claim for intentional infliction of emotional distress. The necessary elements of a claim for intentional infliction of emotional distress are "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Teadt v Lutheran Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). Liability under this theory has been found "only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* After reviewing the record, we cannot conclude that

defendant's actions constitute the type of outrageous, extreme or atrocious conduct necessary to support a claim for intentional infliction of emotional distress.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[1] Although plaintiff named both her physician, K. P. Anandakrishnan, M. D., and the professional corporation bearing the physician's name as defendants, for purposes of this opinion we will refer to K. P. Anandakrishnan, M. D., as "defendant."