

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UNPUBLISHED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.

ZAHRA, J. (*Concurring*)

I concur with the majority opinion but write separately because I believe Michigan common law should draw a distinction between a traditional cause of action for battery that results from an unconsented touching during the course of a physician's examination, and a cause of action for sexual battery. When someone consents to a physician's exam, they impliedly consent to the physical contact that is associated with a physician's physical examination. Such contact, even if found to make a patient uncomfortable or if viewed by the patient to be inappropriate, is contact to which the patient impliedly consents. A patient's implied consent continues until the patient expressly revokes that consent. However, touching by a physician that is initiated for sexual gratification is not contact to which a patient consents. A patient need not expressly revoke consent to such conduct. This distinction is necessary to avoid a rule of law that would accord a physician one free sexual assault before liability for such conduct attaches.

Evidence that contact is being initiated for sexual gratification must be viewed from an objective standard. It is not enough that a patient feels uncomfortable or becomes suspicious that the physician's conduct is sexual rather than professional in nature. Rather, the patient must present evidence from which a reasonable person would conclude that, under the circumstances, the physician's conduct is more likely than not for a sexual rather than professional purpose.

In the present case, plaintiff has failed to present sufficient evidence to sustain either a traditional battery claim or a claim of sexual battery. Plaintiff's cause of action is premised upon defendant having

modified plaintiff's bra and pants and defendant having touched plaintiff's breasts and lower abdominal and groin areas. Plaintiff claims defendant touched plaintiff's pubic area but admits defendant did not touch her vagina. Plaintiff also claims defendant brushed his groin area against plaintiff's knee during some of the examinations. Plaintiff acknowledges, however, that defendant had to be in close physical proximity to plaintiff during the exam. All such contacts occurred in the course of the doctor/patient relationship and related to physical examinations for medical care on behalf of plaintiff. Plaintiff never objected to this contact. Accordingly, plaintiff did not expressly revoke her consent, which she impliedly provided to defendant when plaintiff sought medical care from him. Thus, plaintiff cannot prevail on a traditional claim of battery.

Likewise, plaintiff cannot sustain a cause of action for sexual battery. Plaintiff argues that defendant's sexual purpose is evidenced by the fact that defendant, referring to plaintiff's bra during one examination, asked plaintiff "how do we get this off without ruining your dress." A reasonable and objective person cannot construe this comment, made during the course of a medical examination, as having any sort of sexual overtone. Nor can I conclude that defendant's conduct, viewed from an objective standard, can reasonably be construed as evidencing a sexual purpose pursued by defendant. Significantly, plaintiff testified repeatedly that she too could not conclude that any of defendant's actions were for the purpose of sexual gratification.

For these reasons I also find insufficient evidence to sustain a claim of sexual battery.

/s/ /Brian K. Zahra