

STATE OF MICHIGAN
COURT OF APPEALS

TODD BLAZO, a Minor, by his Next Friend,
EVELYN BLAZO,

Plaintiff-Appellant,

v

McLAREN REGIONAL MEDICAL CENTER,
FRANK W. COOK, M.D., DOUGLAS D.
EITZMAN, M.D., JON A. SANTIAGO, M.D., and
HURLEY MEDICAL CENTER,

Defendants,

and

RICHARD J. McMURRAY, M.D.,

Defendant-Appellee.

TANYA BLAZO, a Minor, by her Next Friend,
EVELYN BLAZO,

Plaintiff-Appellant,

v

McLAREN REGIONAL MEDICAL CENTER,
FRANK W. COOK, M.D., DOUGLAS D.
EITZMAN, M.D., JON A. SANTIAGO, M.D., and
HURLEY MEDICAL CENTER,

UNPUBLISHED
May 28, 2002

No. 227456, 227839
Genesee Circuit Court
LC No. 97-055504-NH

No. 227612, 228102
Genesee Circuit Court
LC No. 97-055503-NH

Defendants,

and

RICHARD J. McMURRAY, M.D.,

Defendant-Appellee.

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

In Docket Nos. 227456 and 227612, plaintiff appeals by leave granted the circuit court's order granting summary disposition in favor of defendant Richard J. McMurray, M.D., in this medical malpractice action. We consolidated these appeals with Docket Nos. 227839 and 228102, in which plaintiff appeals the circuit court's order awarding actual costs to McMurray totaling \$20,297.90, including attorney fees. We reverse.

Plaintiff Evelyn Blazo, who brought suit on behalf of her twins Todd and Tanya Blazo, first argues that the circuit court erred in concluding that there was no genuine issue of material fact whether there was a physician-patient relationship between plaintiff and McMurray. We agree.

Our review of decisions on motions for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and determines whether any documentary evidence establishes a genuine issue of material fact to warrant a trial. *Id.*, citing *Singerman v Municipal Bureau, Inc.*, 455 Mich 135, 138; 565 NW2d 383 (1997). The existence of a legal duty is a question of law. *Oja v Kin*, 229 Mich App 184, 187; 581 NW2d 739 (1998). "A physician-patient relationship is a legal prerequisite to a medical malpractice cause of action." *Id.*

A physician-patient relationship is contractual and requires the consent of both the doctor and the patient. The consent of the patient is generally implied. Relying on *Oja*, *supra*, and *Hill v Kokosky*, 186 Mich App 300; 463 NW2d 265 (1990), defendant argues that plaintiff produced insufficient evidence to create a material issue of fact. We find *Oja* and *Hill* distinguishable.

Hill presented the question "whether a doctor who is contacted by a patient's treating physician to discuss treatment alternatives owes a duty to the patient whose case is discussed." In answering that question, this Court looked to cases in other jurisdictions, stating:

Whether a physician-patient relationship arises from a treating physician's solicitation of a colleague's informal opinion on patient treatment is an issue of first impression in this state. Other jurisdictions have considered the question, however. In the absence of a referral, a formal consultation, or some other contractual relationship, these jurisdictions have concluded that no physician-

patient relationship arises in this context. [186 Mich App at 303.]

Hill did, indeed, involve a treating physician's informal solicitation of the defendants' opinions regarding a patient he was treating. The treating physician related the history, and solicited the opinions over the telephone, there was no referral, no examination, and no other connection between the patient and defendant doctors, other than the informal solicitation of their opinions.

In the instant case, the facts presented, viewed in a light most favorable to plaintiff, are that plaintiff, who was pregnant with twins (Todd and Tanya Blazo), was at defendant McLaren hospital for carpal tunnel surgery when she developed contractions. The hospital had no obstetrician/gynecologist on call, and so the nurse on duty called plaintiff's regular obstetrician's office. That doctor was not available, so the nurse was referred to another doctor in the office, defendant McMurray, who was on call for plaintiff's regular obstetrician. The nurse related plaintiff's condition to Dr. McMurray, and according to the nurse, Dr. McMurray told her that plaintiff had three options: transfer by ambulance to Hurley Hospital, admission at McClaren overnight, or discharge until her pregnancy progressed further. It is claimed that this advice violated the standard of care.

Thus, unlike *Hill*, the instant case does not involve a treating physician's solicitation of an informal opinion from another physician. Rather, viewing the facts in a light most favorable to plaintiff, a nurse called the patient's *treating* physician seeking *directions for care*, and was directed to the doctor who had *assumed the responsibility of covering* for the treating physician.

Defendant asserts that under *Oja*, a physician-patient relationship cannot arise merely from a doctor's being on call. However, *Oja* is also distinguishable. In *Oja*, the doctor on call repeatedly told the emergency room resident who had called him that he was not feeling well and would not go to the hospital, and that the resident should contact another physician to assist her. *Oja, supra* at 186. *Oja* determined that "a physician's on-call status alone is [not] enough to support an implied consent to a physician-patient relationship." *Id.* at 191. The *Oja* Court identified a spectrum of involvement. "Merely listening to another physician's description of a patient's problem and offering a professional opinion regarding the proper course of treatment" is not enough under *Hill*. On the other hand, "a doctor who is on call and who, on the phone or in person, receives a description of a patient's condition and then essentially directs the course of that patient's treatment, has consented to a physician-patient relationship." *Id.* The Court stated that the difficulty arises in determining where, between these two extremes, a physician-client relationship arises. *Id.*

Here, there was evidence that Dr. McMurray responded to the nurse's description of plaintiff's condition and solicitation of medical advice regarding the appropriate course of treatment for plaintiff at that time by identifying three options. Thus, there was evidence that Dr. McMurray did something, such as participate in plaintiff's diagnosis and treatment - - the determination that there were three medically sound options, including that plaintiff could safely go home until her pregnancy proceeded further - - that supports the implication that he consented to the physician-patient relationship. *Id.* This, coupled with evidence that Dr. McMurray gave advice regarding the appropriate options at a time when he had assumed the responsibility of covering for plaintiff's treating obstetrician, created a question of fact regarding the existence of a physician-patient relationship.

Because summary disposition was granted in error, we vacate the award of actual costs under MCR 2.403.

Reversed and remand for further proceedings. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Janet T. Neff

/s/ Helene N. White