As a general rule, a patient who is a layman cannot be comparatively negligent for failing to advise a physician of the origin of his or her pain, and cannot be contributorily negligent for having taken lax care of his health over the preceding several years. However, a patient who is a physician may have a higher standard of care under the circumstances of his or her case. *Axelrad v. Jackson*, 142 S.W.3d 418 (Tex. App. – Houston [14th), 2004, reversed and remanded, *Jackson v. Axelrad*, 221 S.W.3d 650 (Tex. 2007)).

Following *Axelrad*, the Supreme Court has further enhanced the likelihood of contributory negligence submissions in health care liability claims. Although finding that on these facts, a contributory negligence submission was improper, the Court lays out an extensive analysis of the circumstances in which such a submission would be appropriate.

"Failure to respond fully and accurately to a doctor's questions could hamper a doctor's diagnosis, could delay appropriate treatment, and in the proper case, might raise a fact issue concerning a patient's possible contributory negligence. See *Elbaor v. Smith*, 845 S.W.2d 240, 245 (Tex. 1992) (recognizing a patient's duty of cooperation); see also, *Jackson v. Axelrad*, 221 S.W.3d 650, 654 (Tex.2007) (discussing the duty of a patient to cooperate in his health care). But here, we need not identify the parameters of such a duty between lay patients and treating physicians. Cf. *Jackson*, 221 S.W.3d at 655-57 (observing that, for purposes of a contributory negligence inquiry in a medical malpractice case, a physician patient's specialized knowledge may be relevant to the ordinary care standard)....Assuming, without deciding, that *Hogue* owed and breached a duty to disclose [emphasis added] his prior heart murmur diagnosis, Columbia Medical must present some evidence that *Hogue's* nondisclosure proximately caused his injury. ...Columbia Medical's proof of causation to support its contributory negligence submission must rise above mere conjecture or possibility. See *Mason*, 143 S.W.3d at 798-99; *Duff v. Yelin*, 751 S.W.2d 175, 176 (Tex.1988). Columbia Medical claims that *Hogue* negligently failed to disclose his heart murmur and that Hogue's omission delayed proper treatment by the physicians.... There is no evidence that the diagnosing doctors at Columbia Medical would have acted differently if *Hogue* had disclosed his heart murmur diagnosis." *Columbia Medical Center of Las Colinas v. Hogue*, 132 S.W.3d 671 (Tex. App. – Dallas, 2004), affirmed in [pertinent] part, reversed in part, *Columbia Medical Center v. Hogue*, 271 S.W.3d 238 (Tex., 2008).

Can a spouse be liable for contributory negligence in not aggressively seeking medical care for her sick husband? So argued the defense in *Hani v. Jimenez*, 264 S.W.3d. 881 (Tex. App. – Dallas, 2008, pet. denied). The trial court and Court of Appeals disagreed, refusing to allow the submission of contributory negligence on behalf of decedent's wife, and the Supreme Court has denied the petition for review.

C. THE CAUSE OF ACTION

1. Establishing the Existence of a Duty: The Patient-Physician Relationship

Before the physician may be held liable for his or her acts, it must be established that a patient-physician relationship existed at the time of the incident in question. See, e.g., *Salas v. Gamboa*, 760 S.W.2d 838 (Tex. App. – San Antonio, 1988, n.p.h.).

a. General Rule

The relation of physician and patient is contractual and wholly voluntary, created by agreement, express or implied. *Childs v. Weiss*, 440 S.W.2d 104, 107 (Tex. App. – Dallas, 1969, writ dismissed, 852 S.W.2d 306). A physician is not liable for arbitrarily refusing to respond to a call of a person,

even urgently in need of medical assistance, if the relation of physician and patient does not exist at the time the call is made. *Id*. at 107. See, e.g., *Salas v. Gamboa*, 760 S.W.2d 838 (Tex. App. – San Antonio, 1988, n.p.h.). This is true even though the physician is "on call" for the hospital in which the patient seeks care. *Fought v. Solce*, 821 S.W.2d 218, 219 (Tex. App. – Houston [1st], 1991, writ denied). The courts strictly construe the requirement of an agreement to treat. A physician who is not on-call and indicates this to a hospital nurse calling him for a consult cannot be held to have established a physician-patient relationship, and therefore to have responsibility for the patient's care or liability for a negative outcome, even if during that phone call he receives information about the patient. For a duty to exist, a physician-patient relationship must be created, and a phone call to a physician who indicates that he is not on-call and refuses the consult does not create that relationship. *Ortiz v. Glusman*, 334 S.W.3d 812 (Tex. App. – El Paso, 2011, n.p.h.). In *Wilson v. Winsett*, 828 S.W.2d 231 (Tex. App. – Amarillo, 1992, writ denied), the Amarillo Court of Appeals held that a doctor owed no duty to inform a patient of test results where the examination was performed at the request of the Texas Rehabilitation Commission. The court reasoned that the patient did not select the doctor, did not submit to examination for the purpose of treatment, and did not request to be informed of the results. Since the doctor had no physician-patient relationship with the plaintiff, he could not be liable for failing to inform the plaintiff of his test results. *Id*.

There is no duty owed to the parent of a child counseled for potential sexual abuse, because there is no physician-patient relationship with the parent. *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994).

In order to establish a physician-patient relationship, and thus, duty and liability, Plaintiff must show more than merely the existence of a previous physician-patient relationship, though that may be a factor in support of such a relationship.

Plaintiffs, twin premature infants, had been seen while hospitalized at birth by Defendant Gross. Thereafter, Dr. Gross wrote a "Dear Parents" letter to Plaintiffs' parents emphasizing the need for follow-up care of their vision impairment. In addition to the letter, appointments were scheduled but canceled for various reasons. The majority holds that these factors alone were insufficient to demonstrate the existence of a physician-patient relationship. "The Dear Parents" letter, along with [Plaintiff's expert's] opinion that they had created a duty on [Defendant's] part to ensure follow-up visits, is less than a scintilla of evidence to uphold the jury's verdict on a vital fact of a continued physician-patient relationship. Without a physician-patient relationship, there can be no duty. "*Gross v. Burt*, 149 S.W.3d 213 (Tex. App. - Ft. Worth, 2004, pet. refused)."

The dissent points out that the Defendant did not negate the existence of a physician-patient relationship as a matter of law. "Termination of an existing physician-patient relationship is an affirmative defense for a matter in avoidance which the physician bears the burden of pleading and proving. *Accord Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 212 (Tex. 1996) (Jury's finding of affirmative defense of justification rendered immaterial finding of actual malice); *Sunsinger v. Perez*, 16 S.W.3d 496, 500 (Tex. App. – Beaumont, 2000, pet. denied) (discussing Defendant doctor's Motion for Summary Judgment on grounds of affirmative defense that patient had terminated physician-patient relationship)."

It is important to remember that termination of the physician-patient relationship is an affirmative defense, and that the burden is

thus on the defense to establish such termination, rather than on the Plaintiff to prove the continuation of the relationship.

b. Problem and Questions

When the physician is retained by a third party, such as an employer, the physician "has a limited duty to the patient." *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705, 710 (Tex. Civ. App. – Dallas, 1963, writ ref'd, n.r.e.). While the retention of the doctor by a third party may affect the doctor's duty, it does not absolve the doctor of all responsibility. In *Armstrong v. Morgan*, 545 S.W.2d 45 (Tex. App. – Texarkana, 1976, n.p.h.), the plaintiff, upon being promoted, was required to take a physical examination. The defendant-doctor's report indicated that the plaintiff was in very bad physical condition which resulted in the plaintiff losing his job and his new position. The plaintiff sued the doctor for damages resulting from this allegedly incorrect diagnosis. The trial court's summary judgment was reversed on appeal on the grounds that the defendant owed a duty to the plaintiff to perform his examination properly and to give an accurate report of the state of the plaintiff's health to the employer. The court held that if the plaintiff was injured as a proximate result of an incorrect report, he could recover. But see *Johnston v. Sibley*, 558 S.W.2d 135 (Tex. App. – Tyler, 1977, writ ref'd, n.r.e.) (holding that a physician's only duty to a person examined, pursuant to the physician's contract with the compensation carrier, is not to cause harm to the person being examined). See also, *Dominguez v. Kelly*, 786 S.W.2d 749 (Tex. App. – El Paso, 1990, writ denied); *Vineyard v. Kraft*, 828 S.W.2d 248 (Tex. App. – Houston [14th], 1992, writ denied).

A First Court of Appeals case examined whether or not a physician's contract with a third party facility to provide health services gave rise to a duty to treat. *Day v. Harkins & Munoz*, 961 S.W.2d 178, (Tex. App. – Houston [1st], 1997, n.p.h.). In this case, the parents of a boy who suffered an asthma attack and died at the Summit Arena after the concert ended and while the premises were clearing brought a legal malpractice claim after their medical malpractice claim was dismissed. In the legal malpractice case, they allege that the attorneys were negligent in not negating the existence of a duty on the part of the physicians who contracted with the Summit to provide emergency first aid. The plaintiffs argued that the duty to treat their son arose out of the physicians' contractual relationship with the Summit. In considering whether, absent their attorney's negligence, they would have prevailed on the merits of the case, the court held that the physician's relationship with the Summit was akin to an "on call" physician, an agreement that, in and of itself, does not establish a doctor-patient relationship. *Fought v. Solce*, 821 S.W.2d 218 (Tex. App. – Houston [1st], 1991, writ denied). Because the Summit contract was not before the court and the plaintiffs failed to provide countervailing evidence of an agreement divesting the physicians of the discretion to choose whether to treat a patient, the court ruled summary judgment was proper.

A health care facility's own literature and the patient's medical records can, in some cases, establish the existence of a physician-patient relationship in the face of the physician's assertion to the contrary.

In *Fenley v. Hospice in the Pines*, 4 S.W.3d 476 (Tex. App. – Beaumont, 1999, writ ref'd.), the plaintiffs filed suit for medical negligence arising from the death of a hospice patient. The patient had sought treatment for headaches, neck pain and ringing in the ears. His attending physician diagnosed him with terminal brain cancer and told him that he only had a few months to live. Based on that diagnosis and prognosis, the attending physician suggested that the patient be admitted to a hospice for pain management and palliative care. Palliative care is medical intervention that

focuses primarily on the reduction of physical symptoms without regard to the side effects of the particular drug therapy. *Id*. at 483. As a condition of admission into the hospice, and to ensure that Medicare and/or Medicaid would pay for the hospice treatment, the patient's attending physician and the medical director of the hospice both signed a document that certified that the patient had a terminal condition with a life expectancy of six months or less. *Id*. at 478. The medical director at the hospice certified the terminal condition even though he had not spoken to the patient's attending physician, reviewed the patient's medical records or examined the patient himself.

Shortly after admission into the hospice, the patient suffered a ruptured colon as a complication of his palliative drug therapy. He underwent surgery, developed peritonitis and died. *Id*. at 478. While investigating the cause of the brain tumor, the patient's family discovered that the patient never had a brain tumor or any other form of terminal illness. *Id*. They brought a wrongful death suit against the hospice.

In moving for summary judgment, the medical director of the hospice alleged that he did not have any duty to the patient because he did not have a physician-patient relationship with him. The court of appeals disagreed, holding that there was sufficient evidence that the physician/medical director of the hospice does indeed have the responsibility of patient care for all of the patients in the hospice program. *Id*. at 484-85. The hospice center's own manual described the role of the medical director as having "overall responsibility for the medical component of hospice patient care, participates in the establishment of the patient's care plan and consults with the patient's attending physician as necessary." *Id*. at 480. In addition, the defendant medical director stated in his affidavit in support of his motion for summary judgment that, as a hospice physician, he is required to review the attending physician's diagnosis and verify the diagnosis of the attending physician that the patient has a terminal condition. *Id*. at 484.

As further evidence that the medical director did indeed have responsibility to ensure that the patient was a proper candidate for hospice care, the hospice physician in this particular case signed the hospice certification form which explicitly stated, "as hospice physician, I certify that this patient has a . . . life expectancy of six months or less." The defendant medical director alleged that his signing this form simply meant that he had certified that the attending physician had determined that the patient had a life expectancy of six months or less. In holding that the certification form was further evidence of the physician-patient relationship, the court of appeals noted that the form does not say, "the hospice physician certifies that the patient's attending physician has diagnosed the patient as having a life expectancy of six months or less." *Id*. at 485. Based on this record, there was sufficient evidence to raise a genuine issue of material fact with regard to the existence of a physician-patient relationship, thus, giving rise to a duty owed to the patient by the hospice physician.

c. Implied Consent

When a patient is in extremis, unable to give express consent, consent is implied. *Gravis v. Physicians & Surgeons Hosp.*, 427 S.W.2d 310, 311 (Tex. 1968).

When physicians are retained on the patient's behalf by the doctors in charge of the case, the patient's actual consent runs by implication to the auxiliary physicians. *Weiser v. Hampton*, 445 S.W.2d 224 (Tex. App. – Houston [1st], 1969, writ ref'd, n.r.e.).

d. Termination

Termination of the relationship by the physician requires notice to the patient sufficient to enable the patient to secure other medical attention. *Lee v. Moore*, 162

S.W. 437, 440 (Tex. App. – Dallas, 1913), rev'd on other grounds, 109 Tex. 391, 211 S.W. 214 (1919).

e. Liability Absent a Patient-Physician Relationship

In certain circumstances, liability may exist without a contractual relationship between the patient and physician. In *Lunsford v. Board of Nurse Examiners*, 648 S.W.2d 391 (Tex. App. – Austin, 1983, n.p.h.), a nurse claimed that she owed no duty to a person who was refused admission to a hospital. The court held that a duty was created when the State of Texas licensed her as a nurse. The court's reasoning could also be applied to physicians.

The First Court of Appeals refused to hold that a physician has a duty to treat a patient merely because he was "on call." *Fought v. Solce*, 821 S.W.2d 218, 220 (Tex. App. – Houston [1st], 1991, writ denied). The doctor was not under a contractual obligation to be on call with the hospital at which the plaintiff presented and was not required to be on call to maintain his staff privileges. The fact that the doctor volunteered to be on call, without more, was insufficient to impose a duty. Therefore, the court held, the plaintiff had no common law claim for medical malpractice. *Id*. The court also refused to recognize a negligence per se cause of action based on the alleged violation of Tex. Rev. Civ. Stat. Ann. section 311.022 (Vernon Supp. 1991) [The Anti-Patient Dumping Statute]; See also *St. John v. Pope*, 901 S.W.2d 420 (Tex. 1995).

f. Other Areas of Liability

(1) Duty to Warn, Disclose or Advise

(a) Generally

An area of the law where the duty of doctors or health care providers has evolved in recent years is the duty to warn. This reflects a growing recognition that health care providers have a duty to provide adequate information to patients. The importance of the duty to communicate is illustrated by a case where a hospital radiologist detected an arm fracture the day after the emergency room doctor failed to diagnose the same fracture. The family was not informed of the fracture. The court pointed out that the communication of a diagnosis may be as important as the diagnosis itself. Therefore, although the radiologist was only an indirect provider of care, without a direct physician-patient relationship, he still had a duty to disclose the patient's condition. *Phillips v. Good Samaritan Hosp*., 416 N.E.2d 646, 6488 (Ohio App. 1979); *Perdue, The Law of Texas Medical Malpractice*, 22 Houston L. Rev. 1, 102 (2d ed. 1985).

In a similar instance, the failure of the hospital radiologist to communicate his findings to the patient resulted in hospital liability for failure to have a proper procedure to ensure that important information was promptly communicated. By virtue of the same omission, the court also found the radiologist negligent for not making sure the report was given to the proper persons in a timely fashion. *Keene v. Methodist Hosp*., 324 F. Supp. 233 (N.D. Ind. 1971). A doctor who is assisting another doctor in carrying out a procedure has a duty to warn the physician if it appears that the procedure is being done incorrectly. *McMillin v. L.D.L.R.*, 645 S.W.2d 836 (Tex. App. - Corpus Christi, 1982, writ ref'd, n.r.e.).

The Texas Supreme Court held that a pregnant woman had a right to know that she previously suffered rubella because the disease could affect her unborn child. *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975)

(b) Duty to Third Parties

The duty to disclose information also extends to possible side effects, including those which might have an impact on third parties. Therefore, a physician has a duty to