STATE OF MICHIGAN

COURT OF APPEALS

KATHY ANN MORSE

Plaintiff-Appellant,

v

RICHARD FIDDIAN-GREEN, M.D., GRACE ELTA, M.D., and GARY FALK, M.D.,

Defendants-Appellees,

and

JOHN SHELLITO, M.D., ROBERT CILLEY, M.D., C. L. COOKINGHAM, M.D., H. D. APPELMAN, M.D., J. D. SCHALDENBRAND, M.D., UNIVERSITY OF MICHIGAN, UNIVERSITY OF MICHIGAN REGENTS, and UNIVERSITY MEDICAL AFFILIATES, P.C.,

Defendants.

UNPUBLISHED
November 22, 1996

No. 182661
LC No. 86-003333-NM

Before: White, P.J., and Griffin and D. C. Kolenda,* JJ.

PER CURIAM.

This medical malpractice case is before us for a second time following remand from our Supreme Court to the trial court for reconsideration whether the three remaining defendants, Drs. Fiddian-Green, Elta, and Falk, were entitled to governmental immunity. Plaintiff's malpractice claims arose from a January 24, 1984, surgery to remove her colon, rectum, and ileum.

Plaintiff appeals by right a circuit court order after remand that granted defendant doctors' motion for summary disposition under MCR 2.116(C)(7) on the ground that the doctors' actions involved discretionary decision-making acts that entitled them to governmental immunity from tort

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* Circuit judge, sitting on the Court of Appeals by assignment.

liability. That same order also granted the doctors summary disposition under MCR 2.116(C)(10) on the ground that the uncontradicted evidence revealed that the doctors had satisfied the relevant standard of care for obtaining plaintiff's informed consent, which entitled them to judgment as a matter of law. We affirm.

I

Plaintiff's complaint alleged that defendants incorrectly diagnosed her with ulcerative colitis, advised her that she had "terminal ileitis," which she believed to be a life-threatening condition requiring immediate surgical intervention, violated the established standard of care, and breached the duty of obtaining informed consent before performing surgery on her. In their respective answers, the doctors denied plaintiff's allegations, but pleaded no contest to the allegation that they owed plaintiff a duty, and raised governmental immunity as an affirmative defense.

The circuit court granted the doctors summary disposition on the ground that they were entitled to governmental immunity from tort liability and dismissed, with prejudice, plaintiff's claims against the doctors.

Plaintiff appealed, and this Court affirmed in part and reversed in part in an unpublished per curiam opinion that was issued on July 16, 1992 (Docket No. 119932). The doctors appealed, and our Supreme Court modified this Court's judgment in lieu of granting leave, remanding the case to the trial court for factual reconsideration in light of *Green v Berrien General Hosp Auxiliary, Inc*, 437 Mich 1, 9-14; 464 NW2d 703 (1990), and *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988); *Morse v Univ of Michigan Bd of Regents*, 442 Mich 914; 503 NW2d 450 (1993).

Drs. Fiddian-Green, Elta, and Falk moved for summary disposition claiming that they were protected by governmental immunity on the ground that they performed discretionary decision-making acts rather than ministerial acts to obtain plaintiff's informed consent, and each submitted an individual affidavit to support their position. The court denied the doctors' motion on the ground that a factual dispute existed as to whether the doctors had obtained plaintiff's informed consent in accord with the relevant standard of care.

Five months later, the doctors again moved for summary disposition under subrules (C)(7) and (10), claiming that governmental immunity protected them from tort liability when they performed discretionary decision-making acts and that they were entitled to judgment as a matter of law because they satisfied the relevant standard of care when they obtained plaintiff's informed consent to the surgery. The doctors supported their motion with selected pages from the deposition of plaintiff's expert witness, S. H. Saie, M.D., with exhibits consisting of plaintiff's medical records, the consent form that she signed before the surgery, and selected pages from plaintiff's deposition testimony.

Plaintiff opposed the doctors' motion, arguing that the doctors' acts were ministerial ones and that Dr. Saie's deposition did not state that physicians had any discretion about obtaining informed

consent. Plaintiff also submitted an affidavit in which she challenged the facts stated in the doctors' affidavits.

The circuit court granted summary disposition, concluding that the doctors were protected by governmental immunity under *Green*, *supra*, 17-19, and under *Canon*, *supra*, on the ground that their acts were discretionary ones, employing advanced medical knowledge based on long experience, considerable training, and detailed analysis before reviewing the options with plaintiff. The court also determined that the uncontradicted evidence showed that the doctors had met the standard of care for obtaining plaintiff's informed consent and that she knew the details of her medical condition at the time she consented to surgery.

II

Plaintiff first argues that the circuit court erred as a matter of law when it granted Drs. Fiddian-Green, Elta, and Falk summary disposition because the doctors' actions were ministerial ones that do not qualify for governmental immunity from tort liability. We disagree.

Plaintiff's argument is premised on the belief that any discretionary acts occur before the doctors speak with the patient and actually obtain consent. Plaintiff distinguishes the diagnosis and treatment selection process from obtaining the patient's informed consent because obtaining consent is a ministerial act taken in response to a clear legal duty. Plaintiff reasons that the doctors simply explain their previously made decisions to a patient and ask the patient's permission to execute the previously developed plan. Plaintiff argues that obtaining informed consent does not involve exercising professional judgment or involve making any discretionary decisions, but merely requires the doctors to perform their duty. Plaintiff concludes that the circuit court failed to recognize that this case was more similar to the facts and outcome in *Green*, *supra*, than to *Canon*, *supra*, which caused the court to apply the wrong law.

A

We review summary disposition motions under subrule (C)(7) de novo on appeal to verify that the prevailing party was entitled to judgment as a matter of law. *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995). The circuit court must accept the plaintiff's complaint as true and construe all inferences in the plaintiff's favor. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If documentary evidence is submitted, then the court must consider that evidence. *Higgins v Lauritzen*, 209 Mich App 266, 268-269; 530 NW2d 171 (1995). The court may grant the motion if no material facts are in dispute and if the prevailing party is entitled to judgment as a matter of law. *Shawl v Dhital*, 209 Mich App 321, 324; 529 NW2d 661 (1995); *Huron Tool*, *supra*, 375.

Furthermore, whether the doctors' actions were discretionary or ministerial presents a question of law, *Green*, *supra*, 9-10, which is reviewed de novo on appeal, *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

B

In *Ross v Consumers Power Co*, 420 Mich 567, 633-634; 363 NW2d 641 (1984), our Supreme Court held that lower level officials were entitled to governmental immunity if they acted during the course of their employment, within the scope of their authority, with good faith, and performed discretionary rather than ministerial acts. Our Supreme Court noted that, historically, common law granted immunity only to the extent necessary to guarantee "unfettered decision-making," and distinguished between discretionary acts and ministerial acts as follows:

> "Discretionary" acts have been defined as those which require personal deliberation, decision, and judgment. . . . For clarity, we would add the word "decisional" so the operative term would be "discretionary-decisional" acts.
>
> "Ministerial" acts have been defined as those which constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice. . . . In a nutshell, the distinction between "discretionary" and "ministerial" acts is that the former involves significant decision-making, while the latter involves the execution of a decision and might entail some minor decision-making. Here too, for clarity, we would add the word "operational" so the operative term would be "ministerial-operational" acts. [*Id*., 634-635.]

Our Supreme Court explained that individuals are often given some measure of discretionary authority to perform their duties, making it necessary to review the specific acts that the plaintiff complained were committed by the defendant. *Ross*, *supra*, 635. According to our Supreme Court, the goal is to provide the governmental agent or employee with the freedom necessary to achieve the duty, while recognizing that the duty must have been performed in a conscientious manner. *Id*.

Applying *Ross* to a medical malpractice claim, our Supreme Court in *Green*, *supra*, 10-13, examined each of the plaintiff's allegations of negligence against the defendant nurses to determine whether the defendant nurses' actions were discretionary or ministerial. For example, the plaintiff complained that the nurses failed to maintain a clear airway by regularly suctioning the decedent's endotracheal tube. *Id*., 10. Our Supreme Court determined that, once the decision had been made to intubate the decedent, then maintaining a clear airway by regularly suctioning the endotracheal tube was a ministerial act that required only minor decision making. *Id*. Consequently, our Supreme Court determined that the nurses engaged in ministerial acts for which they could be held liable if they had negligently performed those acts. *Id.*, 13.

In contrast to *Green*, the plaintiff in *Canon*, *supra*, 339, claimed that the defendant nurses had failed to professionally evaluate the patient's continued participation in an outpatient mental health program. Our Supreme Court determined that the defendant nurses' decision to treat the patient on an outpatient basis involved considerable discretionary, decision-making skill, which qualified the defendant nurses for governmental immunity from tort liability for negligence. *Id*., 340.

C

In addition to the nature of the doctors' actions, the doctrine of informed consent is also at issue in this appeal. Informed consent is a duty imposed on a physician by law to warn the patient of a medical procedure's consequences. *Roberts v Young*, 369 Mich 133, 140; 119 NW2d 627 (1963). The duty arises because a competent adult patient has the right to refuse any and all forms of medical treatment. *Werth v Taylor*, 190 Mich App 141, 145; 475 NW2d 426 (1991). Expert testimony is required to determine whether a physician has satisfied the duty in conformity with the customary practices of medical professional in the locality. *Roberts, supra*, 140; *Marchlewicz v Stanton*, 50 Mich App 344, 347; 213 NW2d 317 (1973).

D

Plaintiff's complaint alleges that the doctors told her that she had terminal ileitis, that she believed that the condition was life threatening and required immediate surgical intervention, that the doctors coerced her into submitting to the surgery, and that the doctors failed to obtain her informed consent to the surgery.

The circuit court determined that the documentary evidence revealed that the doctors evaluated plaintiff's medical condition, analyzed potential diagnoses, identified possible treatment options, consulted with others concerning possible diagnoses and treatment options, evaluated the appropriateness of these options for plaintiff in light of her personal and family medical history, and weighed the various risks and benefits associated with each treatment option. The court contrasted these facts with the facts in *Green* and found this case factually more similar to the facts in *Canon*.

The documentary evidence in the present case included plaintiff's medical records, which showed that plaintiff was referred to Drs. Elta and Falk for a second opinion to determine whether plaintiff had Crohn's disease or ulcerative colitis. Drs. Elta and Falk ordered additional tests, reviewed the test results, and consulted with other specialists concerning the test results and treatment options. Then Drs. Elta and Falk offered plaintiff two options: first, continued medical monitoring and testing, which carried with it the risk that plaintiff could develop cancer between tests; or second, surgical intervention. Drs. Elta and Falk further explained to plaintiff that there were three surgical options: a standard ileostomy, a continent ileostomy, or a J-pouch procedure, and the doctors explained each option.

According to Drs. Elta's and Falk's clinical notes, plaintiff returned a week later and told them that she decided to have her colon removed, given her family history of colon cancer, but that she wanted a further consultation with Dr. Fiddian-Green. Two days later plaintiff consulted with Dr. Fiddian-Green, who explained the available surgical options and that the J-pouch technique might not be feasible. Four days after her consultation with Dr. Fiddian-Green and one day before surgery, plaintiff signed a consent form that stated that she had discussed the procedure and its associated risks with Dr.

Fiddian-Green. Plaintiff underwent surgery on January 24, 1984, to have her colon removed, and she required a permanent ileostomy when it was determined that the J-pouch technique could not be used.

Plaintiff's expert witness, Dr. S. H. Saie, explained in his deposition the degree of difficulty associated with diagnosing plaintiff's condition and outlined the complex process involved to identify, evaluate, and select appropriate treatment options for a patient like plaintiff whose inflammatory disease may follow a pattern of exacerbation then quiescence or may be a precursor of cancer. Dr. Saie also testified that, in his opinion, Drs. Fiddian-Green, Elta, and Falk satisfied the 1984 standard of care for obtaining informed consent.

We find no error in the circuit court's decision. The court correctly focused on the process of obtaining plaintiff's informed consent and properly recognized that the complex process makes this case more similar to the facts in *Canon*, *supra*, 339-340. The court also correctly determined that Dr. Saie's uncontradicted evidence showed that the 1984 standard of care for obtaining informed consent had been met. *Roberts*, *supra*, 140; *Marchlewicz*, *supra*, 347. Plaintiff's argument focuses too narrowly on the doctors' actual conversations with her and places too little emphasis on the events preceding those conversations. To determine the discretionary or ministerial nature of the doctors' actions in obtaining plaintiff's informed consent, we believe that the more encompassing review utilized by the circuit court is most appropriate. *Green*, *supra*, 10-13; *Canon*, *supra*, 339-340; *Ross*, *supra*, 634-635.

III

Finally, plaintiff contends that the doctors acted with deliberate indifference toward her, and she reasons that the circuit court erred when it failed to recognize that the doctors are not entitled to governmental immunity from tort liability as a result of their deliberate indifference.

We do not address this issue because whether the doctors acted with deliberate indifference toward plaintiff is an issue that is beyond the scope of our Supreme Court's remand order. The general rule is that further appeal is limited to the issues addressed in the remand order. *Wemmer v National Broach & Machine Co*, 199 Mich App 376, 384; 503 NW2d 77 (1993). Our Supreme Court remanded this case to the circuit court for reconsideration on the sole issue whether the doctors' actions were discretionary or ministerial, and this Court does not consider issues outside the scope of remand. *In re Loose (On Remand)*, 212 Mich App 648, 654; 538 NW2d 92 (1995); *Wemmer*, *supra*, 384.

Affirmed.

/s/ Richard Allen Griffin