STATE OF MICHIGAN

COURT OF APPEALS

KATHYANN 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 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UNPUBLISHED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.

WHITE, J. (concurring).

I concur in parts II and III of the majority opinion and agree that the trial court properly dismissed plaintiff's claim under MCR 2.116(C)(10). I dissent from the majority's holding that the trial court properly held that defendants were entitled to governmental immunity because their acts were discretionary. MCR 2.116(C)(7). I would hold that the trial court's dismissal should be affirmed under MCR 2.116(C)(10) only.

When the Supreme Court remanded this case to the trial court,[1] plaintiff's expert had not been named or deposed. After defendants deposed plaintiff's expert, defendants filed a renewed motion for summary disposition, relying in part on the deposition testimony of plaintiff's expert.[2]

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

Plaintiff's expert, Dr. Saie, testified that if a patient has dysplasia, depending on how the patient's colon looks, he would at minimum recommend that the patient come back for repeat colonoscopic evaluations and biopsies and may recommend a colectomy. Dr. Saie further testified that after having a biopsy at Hutzel Hospital, plaintiff had a repeat biopsy at U-M on January 6, 1984, which showed high-grade epithelial dysplasia in the proximal transverse colon. He testified that plaintiff's medical records showed that both continued treatment and surgery were discussed with her as options. Further, as the majority notes, defendants attached to their motion for summary disposition excerpts from plaintiff's trial and deposition testimony directly contradicting plaintiff's affidavit filed in support of her response to defendants' motion. Plaintiff had testified at trial that the physicians told her they were not sure what she had, but were sure that she had dysplasia and of her family history of cancer. At deposition, plaintiff testified that defendants "indicated to me that I had two options; either to have the surgery or to come back every three months for the endoscope to see if cancer was there or not."

Viewing Dr. Saie's testimony and the documentary evidence before the trial court in a light most favorable to plaintiff, plaintiff failed to raise a genuine issue of fact that the standard of care was violated. Dr. Saie did not testify that defendants violated the standard of care as to obtaining plaintiff's informed consent. Nor did Dr. Saie's testimony together with plaintiff's establish a violation. Absent such testimony, no question is presented for jury determination. *Thomas v McPherson Center*, 155 Mich App 700, 704-705; 400 NW2d 629 (1986); *Marchlewicz v Stanton*, 50 Mich App 344, 347; 213 NW2d 317 (1973). Thus, plaintiff's claim was properly dismissed under MCR 2.116(C)(10) and it is unnecessary to address governmental immunity.[3]

I dissent from the majority's conclusion that summary disposition was proper under MCR 2.116(C)(7) because defendants' acts were discretionary. A physician has a duty to warn a patient of the consequences of a medical procedure. *Lincoln v Gupta*, 142 Mich App 615, 624; 370 NW2d 312 (1985), citing *Roberts v Young*, 369 Mich 133; 119 NW2d 627 (1963). In obtaining informed consent, there is no "latitude of choice" with respect to acting or failing to act, thus this decision is most properly characterized as ministerial. *Green v Berrien*, 437 Mich 1, 13; 464 NW2d 703 (1990); *Canon v Thumudo*, 430 Mich 326, 333; 422 NW2d 688 (1988) quoting *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 634-635; 363 NW2d 641 (1984)("'ministerial' acts have been defined as those which constituted. . . the performance of a duty in which the individual has little or no choice. We believe that this definition is not sufficiently broad. An individual who decides whether to engage in a particular activity and how best to carry it out engages in discretionary activity. However, the actual execution of this decision by the same individual is a ministerial act, which must be performed in a nontortious manner.") I would distinguish the discretionary process of determining a patient's appropriate medical care and options from the ministerial tasks of accurately informing the patient of the doctor's conclusions and obtaining the patient's informed consent.

/s/ Helene N. White

[1] The Supreme Court modified this Court's opinion and remanded by order dated May 28, 1993. Defendants filed their first post-remand motion for summary disposition in January 1994 on governmental immunity grounds, MCR 2.116(C)(7). That motion was denied. In October 1994, defendants brought a second post-remand motion for summary disposition, after taking Dr. Saie's deposition on September 6, 1994. The latter motion was brought under MCR 2.116(C)(10) and (C)(7).

[2] At the October 24, 1994, hearing on defendants' motion for summary disposition, plaintiff appeared in pro per. She had not filed a response to defendants' motion, and the court, after hearing defense counsel's argument, gave plaintiff until November 11, 1994, to file a response.

Plaintiff's response to defendants' motion was filed by an attorney, along with an appearance. Plaintiff's response addressed only the (C)(7) aspect of defendants' motion, arguing that Dr. Saie never testified that obtaining a patient's informed consent is a discretionary act. Plaintiff's response attached as exhibits the trial court's earlier opinion denying defendants' motion for summary disposition, plaintiff's affidavit, two documents from her University of Michigan medical records, and her signed request and consent to operation form.

Defendants' reply brief argued that plaintiff failed to raise an issue of genuine fact sufficient to survive defendants' motion

[3] Regarding the circuit court's and this Court's authority to address this issue, the instant case is distinguishable from the cases relied on by Judge Kolenda in his concurrence, *In Re Loose (On Remand)*, 212 Mich App 648; 538 NW2d 92 (1995), and *Wemmer v National Broach & Machine Co*, 199 Mich App 376; 503 NW2d 77 (1993), given that here plaintiff's expert was not even deposed until after the Supreme Court's remand. Further, in the instant case, unlike in *Loose*, neither the trial court nor this Court addressed the issue in the first appeal. And, in *Wemmer*, also unlike the instant case, the issue raised after remand was not addressed by the tribunal to which the case had been remanded.

The Supreme Court's remand order cannot properly be understood as confining the trial court proceedings regarding the informed consent issue to the ministerial/discretionary inquiry, and as barring defendants from challenging whether there was a genuine issue of fact regarding whether defendants even breached the duty, especially where plaintiff's expert was not deposed until after remand.