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UNPUBLISHED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.

KOLENDA, J. (concurring).

I concur with Judge Griffin's conclusion that the trial court correctly granted summary disposition to doctors Fiddian-Green, Elta, and Falk because their conduct about which plaintiff complains was discretionary in nature such that it qualifies for governmental immunity from tort liability. Subjecting the record in this particular case to the required "rigorous scrutiny," *Green v Berrien General Hospital*, 437 Mich 1, 9; 464 NW2d 703 (1990), the conclusion is inescapable that deciding how to explain to plaintiff the complex diagnosis of her medical condition and her treatment options required "the significant deliberation and judgment characteristic of discretionary acts," *id*., at 7, that deciding what to tell plaintiff "involved decision making [sic] rather than the mere following of a

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

prescribed line of conduct," i.e., involved "a latitude of choice which is the essence of professional discretion." *Canon v Thumudo*, 430 Mich 326, 338; 442 NW2d 688 (1988). That is the conclusion of even plaintiff's expert. For a different plaintiff and a different medical condition, the explanation necessary to obtain informed consent might be so obvious that its transmission is a mere ministerial act not entitled to immunity, but not in this case. Obtaining plaintiff's informed consent "involved 'significant decision-making,'" immunizing movants from tort liability. *Id.*, at 352.

I write separately, rather than join in Judge Griffin's opinion, because his opinion goes beyond the scope of the Supreme Court's remand. That Court sent this case back "for scrutiny of the factual allegations in light of *Green*, 437 Mich at 9-14…; and *Canon, supra*." Because those cases addressed only how to determine whether a lower-level governmental employee's alleged negligent acts and omissions were discretionary or ministerial, so evaluating movants' actions in obtaining plaintiff's consent to surgery may have been the only issue which was properly before the trial court and, if so, is the only issue properly before this Court. As a rule of general application, proceedings on remand are limited to the scope of the remand order. Other matters, however meritorious, cannot be considered. *Wemmer v National Broach & Machine Co.*, 199 Mich App 376, 384; 503 NW2d 77 (1993); and *In re Loose (On Remand)*, 212 Mich App 648, 654; 538 NW2d 92 (1995). Therefore, while I do not necessarily disagree with the remainder of Judge Griffin's opinion, nor with Judge White's (C)(10) analysis, I do not think it appropriate to engage in either analysis in light of the limited scope of the Supreme Court's remand order. Maybe the circumstances of this case justify going beyond the remand order, but it would be unwise to so decide because the sole issue which was the subject of the remand order is dispositive of this case, rendering it unnecessary to decide if the remand order is not binding and, therefore, rendering any such decision nonbinding dictum. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985). Unnecessary decisions are inappropriate because they lack the focus which comes from having effect.

/s/ Dennis C. Kolenda