STATE OF MICHIGAN

COURT OF APPEALS

GLORIA LABARGE, Individually and as Next Friend of BRADLEY LABARGE, a Minor,

Plaintiff-Appellant,

v

PONTIAC GENERAL HOSPITAL, DR. ANTHONY ATALLA, DR. MARMANILLO, DR. RAO, DR. NARASINGRAO PAMPATI, and CYNTHIA HOGAN, R.N.,

Defendants-Appellees,

and

DR. CHARLES SEMPERE, CHARLES SEMPERE, M.D., P.C., WILSON, PORTNOY & LEADER, P.C., a/k/a PORTNOY, LEADER, PIDGEON & ROTH, P.C., BERNARD PORTNOY, and JAMES PIDGEON,

Defendants.

UNPUBLISHED
October 7, 1997

No. 184143
Oakland Circuit Court
LC No. 92-436713-NH

Before: Wahls, P.J., and Gage and W.J. Nykamp*, JJ.

PER CURIAM.

This is a medical malpractice action arising from allegations that plaintiff gave birth on March 2, 1981, to Bradley LaBarge, who suffered from oxygen deprivation that resulted in brain damage. Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of Pontiac General Hospital and five individual defendants. Plaintiff's sole issue concerns the governmental

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

immunity of the five individual defendants. We reverse the trial court's order with respect to the five individual defendants and remand for further proceedings consistent with this opinion.

This Court reviews the trial court's grant of summary disposition pursuant to MCR 2.116(C)(7) de novo as a matter of law. *Florences v Dep't of Social Services*, 215 Mich App 211, 214; 544 NW2d 723 (1996); *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995). However, our review is limited to the record presented to the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Because defendants' motion was based solely on allegations in plaintiff's second amended complaint, all well-pleaded allegations in the second-amended complaint are construed in a light most favorable to the plaintiff and are accepted as true. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994); *Turner*, *supra* at 348. Defendants had the burden of showing the legal insufficiency of plaintiff's allegations. *Green v Berrien General Hosp Auxiliary, Inc*, 437 Mich 1, 10; 464 NW2d 703 (1990). Summary disposition is inappropriate unless no factual development could provide a basis for recovery. *Florences*, *supra* at 213-214.

Defendants did not meet their burden to show the legal insufficiency of all of plaintiffs' allegations pertaining to the question of governmental immunity.[1] The parties do not dispute that the defendants are lower level governmental employees. Under *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633-634; 363 NW2d 641 (1984), lower level government employees are immune from tort liability when they are (1) acting during the course of employment and acting, or reasonably believe that they are acting, within the scope of their authority, (2) acting in good faith, and (3) performing discretionary, as opposed to ministerial acts.[2]

Defendants in the present case asserted in their motion for summary disposition that the second amended complaint alleged only discretionary acts. Discretionary acts have been defined as those requiring personal deliberation, decision and judgment. *Ross*, *supra* at 634. 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. *Id.* However, even ministerial acts require minor decision making and involve some measure of personal deliberation and judgment. *Green*, *supra* at 14. "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." *Ross*, *supra* at 635. Although the application of this discretionary/ministerial test is technically a legal question, resolution of the question requires a detailed factual analysis of the conduct at issue. *Green*, *supra* at 9-10.

Within the realm of medical decision making, it has been said that medical decision making is inherently discretionary. *Tobias v Phelps*, 144 Mich App 272, 280-281; 375 NW2d 365 (1985). However, our Supreme Court subsequently held that the execution of a medical decision may at times entail a series of medical decisions requiring personal deliberations and judgment, and that *Ross* will require that each decision entail significant decision making for immunity to apply. *Green*, *supra* at 13.

In the case at bar, the second amended complaint purports to set forth claims for negligence and battery against the individual defendants. We note that the second amended complaint contains some

broad allegations such as a failure to properly diagnose which, on their face, would come within the scope of discretionary acts. We note that other allegations describe only the general nature of the alleged activity, and not the specific acts complained of and, thus, provide no basis for ruling upon the discretionary/ministerial distinction. *Canon v Thumudo*, 430 Mich 326, 343; 422 NW2d 688 (1988). However, the record reveals that plaintiff's primary challenge to summary disposition (based on the pleadings), as well as the trial court's decision to grant summary disposition for the five individual defendants, were the allegations in Count I, ¶ 43 (g) to (l). We thus limit our review to these allegations, which set forth the following breaches of duty:

> (g) Failure to respond to fetal monitor which showed persistent late decelerations;
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> (h) Failure to respond to fetal monitor which showed poor beat to beat variability;
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> (i) Failure to timely place internal lead in response to (g) and (j) above;
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> (j) Failure to timely place patient on left side and administer oxygen in response to (g) and (h) above;
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> (k) Failure to perform cesarean section in response to (g), (h), and (j) above;
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> (l) Failure to timely decide on cesarean section as stated above and the delay in performing cesarean section.

Accepting these allegations as true and viewing them most favorably to the plaintiff, we must assume that a medical decision had already been made to order fetal monitoring and that the monitoring produced results, namely, persistent late decelerations and poor beat to beat variability, for which there was a duty to act. Because factual development would be necessary to determine whether the decision-making that occurred during those acts permitted a wide latitude of choices and, thus, would be properly characterized as discretionary, or were ministerial acts, and factual development would be necessary to determine which defendant or defendants were responsible for each act, the trial court incorrectly granted summary disposition in favor of the five individual defendants based solely on the pleadings. *Green, supra; O'Neal v Annapolis Hosp*, 183 Mich App 281; 454 NW2d 148 (1990).

In view of our holding that the pleadings alone did not justify summary disposition, we find it unnecessary to consider plaintiff's argument concerning the effect of incomplete discovery on whether summary disposition was appropriate. However, we note that summary disposition is generally premature if discovery on a disputed issue is incomplete, but that summary disposition is appropriate if there is no fair chance that further discovery will result in factual support for the motion. *Vargo v Sauer*, 215 Mich App 389, 401; 547 NW2d 40 (1996); *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994). Moreover, the trial court must render judgment without delay if the pleadings show that a party is entitled to judgment as a matter of law, or if the proofs show no genuine issue of material fact. *Nationwide Mutual Ins Co v Quality Builders, Inc*, 192 Mich App

643, 648; 482 NW2d 474 (1992); MCR 2.116(I)(1). Because our decision to reverse rests solely on defendants' failure to demonstrate that the pleadings showed that they were entitled to judgment as a matter of law, we express no opinion on whether summary disposition would be proper based on a lack of a genuine issue of material fact before the close of discovery.

Finally, with regard to plaintiff's claim that Count III provides a basis for showing that the "good faith" element for lower level governmental employee immunity was lacking, we note that the trial court did not expressly rule on this argument. However, we will address plaintiff's argument because it was raised below and is likely to arise again on remand. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

We do not agree with plaintiff's assertion that Count III contains allegations of an assault and battery, which would constitute a crime. On its face, Count III purports to set forth a claim for civil battery, but we are not bound by a party's choice of labels for the cause of action. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). A civil battery, in the context of a claim against a physician, is committed when a physician treats or operates on a patient without consent or exceeds the scope of consent. *Banks v Wittenberg*, 82 Mich App 274, 279-280; 266 NW2d 788 (1978). No civil action for battery lies unless there is a contemporaneous refusal of treatment and a fully informed, competent adult patient. *Werth v Taylor*, 190 Mich App 141, 150; 475 NW2d 426 (1991). In the present case, the substance of plaintiff's allegation in Count III is that she was not fully informed concerning her condition and potential risks involved in treatment. This allegation sounds in negligence or medical malpractice, and not civil battery. See *Roberts v Young*, 369 Mich 133, 140; 119 NW2d 627 (1963); *Lincoln v Gupta*, 142 Mich App 615, 625; 370 NW2d 312 (1985). The allegation is insufficient to raise any question on whether the four defendant physicians or nurse Cynthia Hogan acted in bad faith. See *Flones, supra* at 401; *Tobias, supra* at 277-278.

We reverse the trial court's grant of summary disposition in favor of the five individual defendants and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Hilda R. Gage
/s/ Wesley J. Nykamp

[1] In this regard, we note that the law on governmental immunity applicable to the present case was a creation of judicial decision-making because plaintiff's claim arose in 1981 before the immunity statute, MCL 691.1407; MSA 3.996(107), was amended in 1986. *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 585; 525 NW2d 897 (1994); *Flones v Dalman*, 199 Mich App 396, 401; 502 NW2d 725 (1993).

[2] The revised version of the statute eliminates the distinction between discretionary and ministerial acts. MCL 691.1407(2); MSA 3.996(107)(2).