STATE OF MICHIGAN

COURT OF APPEALS

CAROL JODIS and JAN JODIS,[1] as Next Friend of MIKAYLA GRANGER, a Minor,

Plaintiffs-Appellants,

v

MICHELLE BRUBAKER, SUE FOWLE, MARY STUART, DAVE BABCOCK, NURSE A. VAN CAMP, DR. DEBRA LUSTY, DR. ALFRED BEDIAKO, DR. VERONICA DULA, and HILLSDALE COUNTY COMMUNITY HEALTH CENTER,

Defendants-Appellees,

and

ELIZABETH WARNER and PHILLIP BERKEMEIER,

Appellants.[2]

UNPUBLISHED
January 31, 2008

No. 271649
Hillsdale Circuit Court
LC No. 05-000677-NO

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right orders granting summary disposition to defendants, denying plaintiffs' motions for voluntary dismissal, imposing sanctions on plaintiffs and plaintiffs' trial counsel, and denying motions to disqualify the trial judge. Plaintiffs' trial counsel also appeal as

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[1] Jan Jodis is Mikayla's maternal grandfather. Mikayla's biological father relinquished his parental rights and is not a party to the instant action.

[2] Warner and Berkemeier are the attorneys who represented plaintiffs in the trial court. They are appellants in this case only from the portion of the trial court's order imposing sanctions on them. We use the term "plaintiffs" to refer only to Carol and to Mikayla through Jan.

of right the order imposing sanctions. We reverse the imposition of sanctions, and in all other respects we affirm.

Plaintiffs commenced this case on the basis of defendants' actions after Carol went to the Hillsdale County Community Health Center ("the hospital") on October 3, 2003, to give birth to Mikayla. Carol admitted to having used drugs the previous week. Drug tests performed on Carol and Mikayla revealed marijuana and methamphetamine in both of their systems. Defendants then refused to discharge Mikayla the next day, and they shared drug-test results with Hillsdale County Child Protective Services ("CPS"). Mikayla was formally removed from Carol's custody and placed with the Family Independence Agency by an order entered October 7, 2003. Carol was ordered by the family court to comply with the Family Independence Agency's requests for further drug testing. On May 13, 2004, an order was entered terminating Mikayla's father's parental rights. By September 9, 2004, the Family Independence Agency had filed a petition to terminate Carol's parental rights, but she could not be located. That same month, Carol apparently went to a hospital in Jackson County under an assumed name and gave birth to another child, who was born with cocaine in its system. Plaintiffs' complaint indicates that Mikayla was returned to Carol in June 2005.

Plaintiffs filed a ten-count complaint alleging assault and battery for involuntary drug testing,[3] false imprisonment for refusing to discharge Mikayla, breach of fiduciary duty for disclosing the results of the drug testing, and gross negligence and civil rights violations under 42 USC § 1983 for the drug testing and for the removal of Mikayla from her parents' custody.[4] Defendants moved for summary disposition, contending in the aggregate that all of their alleged acts were immune as exercises of medical judgment or under the Child Protection Law, MCL 722.621 *et seq*. Plaintiffs moved to disqualify the trial judge on the ground that he was a witness. The trial court denied the motion, and subsequently so did an assigned judge on de novo review. Plaintiffs then moved for voluntary dismissal of most of their claims. The trial court granted defendants' motions for summary disposition, finding that there was "no basis whatsoever under the law for any of the claims that have been raised in this particular matter." The trial court then additionally imposed sanctions on plaintiffs and on plaintiffs' counsel, describing the action as "horrendously frivolous." Plaintiffs now appeal.

Plaintiffs first argue that the trial court abused its discretion in refusing to grant plaintiffs' motion for voluntary dismissal. We disagree.

"Under MCR 2.504(A)(2), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper," and we review the

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[3] One battery count was based on testing Carol without her consent for drugs on the day of, but just prior to, Mikayla's birth. The other was based on subsequent court-ordered drug testing of Carol that was allegedly performed in a manner not authorized by the court order.

[4] We have grouped plaintiffs' allegations together and refer to defendants collectively for ease of reference. However, we note that not all counts in the complaint were alleged against all defendants.

trial court's denial of a motion for voluntary dismissal "to see whether the decision was without justification." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 570; 525 NW2d 489 (1994). The trial court should consider the interests of the parties, the inconvenience to the court that would result from further delays, and the goal of protecting defendants from abuse. *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972) (discussing prior GCR 1963, 504.1(2)). As was the case in *African Methodist Episcopal Church*, we find the trial court justified in refusing to grant plaintiffs' motion for voluntary dismissal where defendants were entitled to summary disposition in their favor. The denial was particularly justified here, given our further agreement, discussed *infra*, with the trial court's finding that much of the instant action was meritless, and given that plaintiffs' stated goal was to recommence the same suit in another court, after their motions to disqualify the trial judge were denied. Plaintiffs' assertion that the trial court's motivation in denying their motion to dismiss was an "agenda" to destroy the lawsuit is unsupported by the record.

Plaintiffs also contend that it was clearly erroneous not to disqualify the trial judge. We disagree. "We review for an abuse of discretion the trial court's factual findings on a motion for disqualification, but the application of the facts to the law is reviewed de novo." *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003).

Plaintiffs explicitly disclaimed below any assertion that the trial judge was actually biased. Rather, plaintiffs contended that the trial judge had personal knowledge of the circumstances surrounding the October 7, 2003 order removing Mikayla, pursuant to MCR 2.003(B)(2) ("the judge has personal knowledge of disputed evidentiary facts concerning the proceeding"). The trial judge in the instant case signed the order, although a different judge was listed as "present." A significant portion of plaintiffs' case turns on challenging the regularity, propriety, and timing of the order. However, the trial judge explained that he had merely signed the order administratively in the absence of the probate judge assigned to the prior action, and he had no other contact or involvement with the order or the matter whatsoever. Presuming the order was indeed improper as plaintiffs assert, plaintiffs nevertheless have not suggested anything that would cast doubt on the trial judge's statement that he had no knowledge of the genesis of the order or of what happened to it after he signed it. Therefore, the trial judge did not have "personal knowledge of disputed evidentiary facts concerning the proceeding." The trial judge only had personal knowledge of the undisputed facts that he signed the order and that he was not involved in the proceedings that generated the order, so the motion to disqualify on the basis of MCR 2.003(B)(2) was properly denied.

Plaintiffs next argue that summary disposition in defendants' favor was unwarranted. We disagree.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We likewise review de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003).

Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence

submitted by the moving party. *Maiden*, *supra* at 119. A motion under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id*., 119. Generally, the court may only consider the pleadings when considering a motion under MCR 2.116(C)(8), but if the motion is *also* based on MCR 2.116(C)(7), the court may consider all admissible documentary evidence submitted by the parties when considering the motion. *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006).

"In reviewing a grant of summary disposition pursuant to MCR 2.116(C)(4) [lack of subject matter jurisdiction] or (C)(10) [no genuine issue of material fact], we consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted to determine whether the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show that there was no genuine issue of material fact to warrant a trial." *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). Although summary disposition under MCR 2.116(C)(10) is generally premature if discovery is incomplete, it may also be appropriate if further discovery stands no reasonable chance of resulting in factual support for the nonmoving party. *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000). The party opposing summary disposition on the ground that discovery is incomplete must provide some independent evidence showing the existence of a genuine dispute. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

Plaintiffs' first count alleges that defendant Brubaker committed assault and battery by threatening to pull out Carol's hair or by actually doing so.[5] A battery is the actualization of an assault, which in turn is a realistically believable offer to visit some immediate, undesired, and unlawful use of force on another person. *Tinkler v Richter*, 295 Mich 396, 401-402; 295 NW 201 (1940). It is not disputed that a sample of Carol's hair was actually removed for the purpose of a drug test, contrary to her will at the time.

However, this claim of battery rests on the assertion that the removal of Carol's hair was not authorized by any court order. In fact, a court order in place at the time required Carol to "submit to random drug test [sic] which can include blood, urine or breathalyzer as requested by the FIA." Although hair samples are not explicitly listed in the body of the order itself, the order additionally requires "all parties" to comply with the treatment plan prepared by Brubaker, which in turn specifies that Carol must submit to drug testing that may include hair samples. The phrase "can include" is arguably ambiguous: it could indicate an exhaustive delineation of allowed testing methodologies, *or* it could indicate a nonexhaustive list of some example testing methodologies without forbidding others. But given the order's inclusion of the treatment plan, a reading of the order as a whole shows that the latter, nonexhaustive interpretation of "can include" was intended. Obtaining a drug test from Carol by the means of a hair sample was

[5] In an affidavit, Carol later clarified that a hospital employee "pulled and cut" her hair at the direction of Brubaker and in the presence of police officers, for the purpose of drug testing.

lawfully authorized by court order. Summary disposition was appropriate pursuant to MCR 2.116(C)(8).[6]

Plaintiffs' second count alleges that Carol sustained a different battery when her blood or urine was taken on the day of Mikayla's birth for the purposes of drug testing.[7] In Michigan, patients have a right to refuse "any and all forms of medical intervention, including lifesaving or life-prolonging treatment," and performance of medical treatment without the patient's consent generally constitutes a tortious battery. *In re Rosebush*, 195 Mich App 675, 680-681; 491 NW2d 633 (1992). In the case of minor children patients, parents are empowered and obligated to make those decisions on behalf of their children. *Id*., 683.

MCL 722.625 provides immunity to any person "who makes a report, cooperates in an investigation, or assists in any other requirement of" the Child Protection Law, excepting acts not "done according to" the Child Protection Law or constituting negligence or malpractice that causes "personal injury or death." Plaintiffs do not allege that the drug testing constituted negligence or malpractice that caused Carol or Mikayla personal injury or death. "When a child suspected of being an abused or neglected child is seen by a physician, the physician shall make the necessary examinations, which may include physical examinations, x-rays, photographs, laboratory studies, and other pertinent studies." MCL 722.626(2). The testing of Mikayla was protected by the statute.

However, plaintiffs correctly observe that the Child Protection Law only addresses actions *after* an individual becomes aware of some suspected harm to a child. A "child" is defined as "a person under 18 years of age." MCL 722.622(e). The Child Protection Law therefore does not address harm to fetuses, which are not considered "persons" even where they are entitled to legal protection. *Matter of Baby X*, 97 Mich App 111, 115; 293 NW2d 736 (1980). The drug testing of Carol allegedly took place *before* Mikayla was born. Therefore, it could not have been "done according to" anything in the Child Protection Law, and it cannot be protected by the grant of immunity therein.

However, unconsented-to medical treatment is only *generally* a battery. Consent to a particular procedure may be "inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment." *Banks v Wittenberg*, 82 Mich App 274, 280; 266 NW2d 788 (1978). Here, Carol came to the hospital for the purpose of medical treatment: the birth of Mikayla. The complaint itself admits that Carol had used marijuana and methamphetamines the week before giving birth to Mikayla. Attached to the complaint was a copy of the "progress notes," apparently taken just prior to Mikayla's birth; although difficult to read and composed largely of medical abbreviations, notations in what

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[6] Because the motions for summary disposition pursuant to MCR 2.116(C)(8) included motions pursuant to MCR 2.116(C)(7), we have considered documents like the court order itself.

[7] For clarity, we note that the acts comprising this second allegation of battery on Carol actually took place chronologically *before* the acts comprising the first allegation of battery. Plaintiffs' third count alleges battery on Mikayla based on testing Mikayla for drugs.

appears to be a "social history" description clearly refer to drugs and to ethanol. An uncontested order entered by the trial court in the prior neglect case recited factual findings that included Carol having affirmatively admitted to using marijuana and methamphetamine prior to Mikayla's birth. Insofar as we can determine from the pleadings and the record,[8] Carol did not at any time communicate to any personnel at the hospital that she wished not to be tested for drugs. Testing Carol for drugs without first obtaining her consent did not constitute a battery here, where Carol unambiguously consented to the course of treatment – the birth of Mikayla – pursuant to which the drug test was conducted, and where Carol in no way communicated a desire not to be tested.

Further, to the extent plaintiffs challenge the specific decision to give a drug test as part of the delivery procedure, the trial court correctly found that the decision was an exercise of medical judgment that occurred during the course of a professional relationship. Therefore, an action against the medical defendants on the basis of their decision to conduct the initial drug test of Carol, during the course of treatment to which Carol consented, "is subject to the procedural and substantive requirements that govern medical malpractice actions." *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 422; 684 NW2d 864 (2004). Summary disposition was proper pursuant to MCR 2.116(C)(7) because those requirements have not been complied with and the applicable limitations period has expired.

Plaintiffs' third count alleges that Mikayla was battered when she was tested for drugs, and plaintiffs' fourth count alleges that Mikayla was falsely imprisoned when she was kept at the hospital for an additional day after her birth. However, examination of, and detention for a day of, a child suspected of being abused are both explicitly permitted or required by MCL 722.626, and merely assisting in a requirement of the Child Protection Law gives rise to immunity under MCL 722.625. Summary disposition was appropriate pursuant to MCR 2.116(C)(7).

Plaintiffs' fifth count alleges that Mikayla was falsely imprisoned when she was removed from plaintiffs' care on October 7, 2003. As discussed, an order was signed on October 7, 2003, finding probable cause to believe that removal of Mikayla was necessary and placing her with the Family Independence Agency; the record also contains affidavits and copies of hearing records indicating that Carol was present at the October 7, 2003 hearing where it was determined that Mikayla would be removed. Also as discussed, the trial judge in the instant matter signed the order administratively in the absence of the assigned probate judge. Plaintiffs assert a variety of challenges to the order, all of which essentially constitute bare assertions that it is not a real order or it was not signed until after Mikayla was removed. However, the only actual evidence plaintiffs have to contradict the affidavits and other documentary evidence is the time stamp on a copy of the order, which is October 13, 2003. However, "the date of signing an order or judgment is the date of entry." MCR 2.602(A)(2). Mikayla's removal was pursuant to a valid court order, and the social services workers are immune from suit for complying therewith. *Martin v Children's Aid Society*, 215 Mich App 88, 96-98; 544 NW2d 651 (1996). Summary disposition was appropriate pursuant to MCR 2.116(C)(7).

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[8] We note that we have, as part of our review, considered affidavits that Carol herself submitted.

Plaintiffs' sixth count alleges that defendants violated their fiduciary duty of confidentiality and the requirements of 42 USC § 290dd-2 by disclosing drug test results beyond an initial report, even though they were in good faith and pursuant to the CPS investigation of Carol's drug use. However, 42 USC § 290dd-2(e) explicitly makes that section inapplicable to state child abuse reporting laws, and again, MCL 722.625 grants immunity for assisting in any requirement of the Child Protection Law, including cooperating in an investigation. These allegations are immune by statute, so summary disposition was appropriate pursuant to MCR 2.116(C)(7).

Plaintiffs' ninth count alleges gross negligence, incorrectly asserting that defendants had no valid court order to remove Mikayla from Carol's custody and otherwise stating that defendants "engaged in no reasonable efforts to prevent removal" and "conducted almost no investigation of the child's safety beyond knowing that her mother had used drugs shortly before she gave birth to her." "Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 411-412; 716 NW2d 236 (2006). Plaintiffs have only provided conclusory assertions that defendants acted with the requisite level of disregard. Moreover, the record evidence shows that Carol was present at a hearing held prior to removal, where it was determined that Mikayla was actually under the influence of drugs at birth, reasonable efforts were made to prevent removal, and that as a consequence of Mikayla being under the influence of drugs at birth it would be contrary to her welfare for her to remain in the home. Plaintiffs have not shown any evidence to the contrary, and plaintiffs' conclusory allegations are insufficient to state a claim. Summary disposition was appropriate pursuant to either MCR 2.116(C)(8) or (C)(10).

Plaintiffs' seventh, eighth, and tenth counts allege civil rights violations under 42 USC § 1983. Plaintiffs' seventh count is premised on a violation of the Fourth Amendment arising out of Mikayla's removal without a court order; as discussed *supra*, this is simply incorrect. Plaintiffs' eighth count is premised on a violation of the Fourteenth Amendment arising out of defendants' alleged failure to follow their own procedures, apparently duplicating the conclusory allegations of count nine, which we found meritless as discussed *supra*. Plaintiffs' tenth count is premised on an alleged violation of 42 USC § 290dd-2, which, as discussed *supra*, is inapplicable to state child abuse reporting laws. Plaintiffs assert that state law immunity is unavailable in a claim based on a violation of 42 USC § 1983. We need not determine whether this is true. See *Martin*, *supra*, 215 Mich App at 95 n 4. There has simply been no evidence presented to us, and little more[9] than conclusions alleged, to show that any person acting under color of law deprived plaintiffs of a right secured by the United States Constitution or the laws of the United States. See *Morden v Grand Traverse Co*, 275 Mich App 325, 332; 738 NW2d 278

[9] We briefly note plaintiffs' argument that the United States Supreme Court has held that testing pregnant women for drugs without their consent is inherently unlawful. *Ferguson v City of Charleston*, 532 US 67; 121 S Ct 1281; 149 L Ed 2d 205 (2001). However, *Ferguson* actually held that doing so "to generate evidence *for law enforcement purposes*," *id*., 83 (emphasis in original) was unconstitutional. We have found nothing in the record to suggest that the drug testing here was for the purpose of prosecution or any other law enforcement.

(2007). Plaintiffs fail to state a claim, so summary disposition was appropriate pursuant to MCR 2.116(C)(8).

Plaintiffs' final argument on appeal concerns the trial court's award of sanctions under MCR 2.114. We review a trial court's determination that a claim is frivolous for clear error, meaning "although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Attorney Gen v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003). Sanctions are mandatory if an attorney fails to make an objectively reasonable inquiry into the legal and factual bases for a pleading before it is signed. *Id*., 576. However, sanctions are not appropriate merely because alleged facts are determined to be untrue and assertions of law are rejected. *Id*., 576-577. An action is frivolous if it was initiated for an improper purpose, if there was no reasonable basis for believing that it was based on true facts, or if it lacked arguable legal merit. MCL 600.2591(3)(a). The determination of frivolity must be based on the circumstances at the time the claim was asserted. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

We find that sanctions were inappropriate here for several reasons. There is nothing in the record to suggest that plaintiffs initiated this action "to harass, embarrass, or injure" any of the defendants. MCL 600.2591(3)(a)(i). Although we disagree with plaintiffs' argument that the first drug test performed on Carol, without her consent and prior to Mikayla's birth, constituted a battery, we do not find it devoid of all arguable legal or factual merit, given plaintiffs' counsel's reliance on, and extensive research regarding, *Ferguson*, *supra*. Although we find *Ferguson* distinguishable, we cannot conclude that plaintiffs' claims and arguments are frivolous. Further, although plaintiffs and their counsel were aware of the removal and drug testing orders, we do not find plaintiffs' concerns about their proper entry and interpretation to have been wholly unreasonable at the time the complaint was filed. When these determinations are viewed in light of the trial court's finding of frivolity without the benefit of more than token briefing by the parties or a meaningful opportunity for plaintiffs to respond,[10] we are convinced that, although there is some support in the record for the finding of frivolity, the trial court made a mistake. We therefore reverse the trial court's finding that this action was frivolous.

The award of sanctions is reversed; in all other respects we affirm.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Helene N. White

[10] Although defendants requested sanctions in briefs to the trial court, defendants did not expand on that request, and they explained to the trial court that they had intended to wait and see how the trial court ruled on their summary disposition motions. The trial court then replied that it would "save you the trouble" and immediately imposed sanctions on plaintiffs and their counsel, stating that the case was "one of the most frivolous causes I have ever seen."