No. 91542-3

SUPREME COURT
OF THE STATE OF WASHINGTON

JULIA KAHUBIRE MITCHELL, et al.

Petitioners,

vs.

RANDOLPH B. BOURNE, M.D.,

Respondent.

RESPONDENT RANDOLPH B. BOURNE M.D.'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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The Respondent is Randolph B. Bourne, M.D., who was the Respondent in the Court of Appeals and the Defendant in the trial court.

II. Counter Statement of Issues Presented for Review

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2. Tolling of the statute of limitations may occur upon proof of intentional concealment; however, once a plaintiff has *actual* knowledge she has one year to commence a civil action. Ms. Mitchell knew the facts of her case no later than August 2011, but filed suit almost two years later, on September 13, 2013. Should the Supreme Court deny discretionary review because the Court of Appeals correctly affirmed summary judgment dismissal of Ms. Mitchell's claim when: (a) it was filed well past the one-year tolling

period; and (b) her Petition does not involve a constitutional issue or an issue of substantial public interest with respect to tolling the statute of limitations?

III. Restatement of the Case

Pro se Petitioner and registered nurse Julia Mitchell, then 41, became pregnant in September 2008.[1] (CP at 85) Shortly thereafter she began experiencing bleeding and sought obstetrical care at Sound Women's Care. (CP at 85) She underwent ultrasound testing on October 6, 10, 17 and 20, 2008 to determine the cause of the bleeding. (October 6 ultrasound report at CP 85; CP 51-52); (October 10 ultrasound report at CP 53-54); (October 17 ultrasound report at CP 56-57). The first three ultrasounds reports described the presence of an intrauterine gestational sac, but the absence of a yolk sac, fetal pole, or fetal cardiac activity. (*Id.*) The October 20 report noted the presence of a yolk sac, but the absence of fetal cardiac activity. (CP at 60) All four ultrasounds indicated that Ms. Mitchell had a large complex mass on her right ovary and a simple cyst on the left adnexa. (CP at 51-57)

Respondent Dr. Bourne, after reviewing what he believed were Ms. Mitchell's complete records, noted in his October 21, 2008, pre-operative report that:

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[1] RAP 10.3(a)(5) requires that appellate briefs contain "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument. *Reference to the record must be included for each factual statement.* (emphasis added) Ms. Mitchell violates RAP 10.3(a)(5) throughout her Petition.

> Several ultrasounds, including one today, have revealed a small cystic structure in the uterus, yolk sac is not visible, no embryonic pole visualized, and they should be by this point. There is a large anterior fibroid, complex cystic mass noted in the right ovary. Large simple cyst in the left adnexa which appears unchanged. Given all these things, the most likely diagnosis is ectopic pregnancy. It is also possible, however, that she has a blighted ovum, or even molar pregnancy. A normal pregnancy has been ruled out by the fact that she has had multiple ultrasounds and her hCG is no longer rising[.]

(CP at 7). Ms. Mitchell consented to undergo a dilation and curettage of the failed pregnancy, laparoscopy, and possible salpingectomy at Stevens Hospital on **October 21, 2008**. (CP at 6-7)

Ms. Mitchell signed a consent form authorizing Dr. Bourne to perform the procedures, which states, in relevant part:

> 3. I recognize that, during the course of the operation, post-operative care, medical treatment, anesthesia or other procedure, *unforeseen conditions may necessitate additional or different procedures than those above set forth.* ***I therefore authorize my above-named physician and his or her associate or designees, to perform such surgical or other procedures as are in the exercise of his, her or their professional judgment necessary and desirable.*** *The authority granted under this paragraph shall extend to the treatment of all conditions that require treatment and are not known to my physician at the time the medical or surgical procedure is commenced.*

(CP at 6) Dr. Bourne did not see evidence of an intrauterine pregnancy, but the laparoscopy revealed a large teratoma on her right ovary. (CP at 7) When Dr. Bourne tried to remove the teratoma, Ms. Mitchell started bleeding

unexpectedly, requiring him to remove her right ovary. She did not see Dr. Bourne again after the October 21, 2008 surgery.

Ms. Mitchell had a post-surgery visit with Dr. Bray on November 5, 2008, wherein she explained her concerns that an ovary was removed. (CP at 44) Dr. Bray "discussed this in detail with the patient." (CP at 44) After the surgery, Ms. Mitchell, a nurse at Stevens Hospital, obtained her medical records. (CP at 88) Upon reviewing the records, she noted that her fourth ultrasound taken on October 20, 2008 was missing. (CP at 88) She inquired at the radiology department and a receptionist gave her a copy of the October 20, 2008 ultrasound report. (CP at 88) The report indicated that Ms. Mitchell had a uterine pregnancy with a visible yolk sac.[2] (CP at 60; CP at 88)

In **August 2011**, Ms. Mitchell filed a detailed narrative administrative complaint against Dr. Bourne with the Department of Health Medical Quality Assurance Commission (MQAC). (CP at 85-89). Her administrative complaint described why she believed Dr. Bourne "was negligent in treating me":

[2] Although the exact date is unknown, for purposes of the underlying Motion for Summary Judgment and this Appeal only, and construing facts in a light most favorable to the non-moving party, Respondent Dr. Bourne assumes that Ms. Mitchell obtained the October 20, 2008 ultrasound report in or by August 2011, when she filed an administrative complaint with MQAC. However, Dr. Bourne believes she obtained the report much earlier than that.

> First, he did not fully disclose information of my ultrasound report dated October 20, 2008 to me. Looking at the dictation as proof, he does not even seem to have realized that I as a dermoid cyst when he cut the corpus luteum off my right ovary. The radiologist indicated that I had a right dermoid cyst. Secondly, he stated that there was no yolk sac visible on that same ultrasound when indeed there was one. He terminated a pregnancy making me believe I had just a uterine cyst and an etopic some where. I would never have accepted to have surgery if he had told me that I had a uterine pregnancy. Thirdly, when he sent the uterine tissue to pathology he indicated that it was ectopic tissue when he actually obtained it from my uterus. The pathology report clearly showed "red tan tissue fragments" which indicated it was gestational tissue with some chorionic villi. Lastly, I had not given him consent to terminate a uterine pregnancy or even remove my right ovary. He failed to fully disclose information to me which resulted in him terminating a pregnancy and removing my right ovary. Also if he was planning on cutting my right ovary, he should have ordered some labs to at least check my clotting factors.

(CP at 88) In response to the MQAC investigation, Dr. Bourne stated that he inadvertently failed to review the October 20 ultrasound report before performing the surgery, and would not have proceeded with the surgery if he had seen a yolk sac. (CP at 38) However, Dr. Bourne also stated that even if the yolk sac was present, the absence of an embryo at almost eight weeks of gestation revealed that the pregnancy was not sustainable. (CP at 38-39) And at the beginning of the D&C, he did not find evidence of an intrauterine pregnancy. (CP at 39) Finally, the standard of care required excising the cystic teratoma, which could turn malignant, and posed an imminent risk of

ovarian torsion. (CP at 38). Dr. Bourne was unable to remove the teratoma separately from the ovary due to the way it had grown, and unfortunately, as is often the case, excessive bleeding required removal of the right ovary. (CP at 38).

On August 27, 2012, MQAC issued a Statement of Allegations and Summary of Evidence alleging that Dr. Bourne's failure to review the October 20 report before the October 21 surgery was below the standard of care. It alleged that this failure "may have denied [Ms. Mitchell] the choice of continuing the pregnancy, abnormal or not." (CP at 104) Dr. Bourne stipulated to an informal disposition in lieu of disciplinary action. (CP at 109-15)

On November 20, 2012, the Department of Health released its complete file to Ms. Mitchell. On **September 5, 2013**, Ms. Mitchell, *pro se*, filed a lawsuit against Dr. Bourne, alleging negligence, lack of informed consent and fraudulent concealment. (CP at 118-20) In support of her fraudulent concealment claim, Ms. Mitchell alleged that Dr. Bourne purposefully mischaracterized the tissue obtained from her uterus as "ectopic tissue" so that it would be destroyed by the pathologists without further analysis to determine whether the pregnancy was viable. (CP at 119-20)

Dr. Bourne answered the complaint and asserted the statute of limitations as an affirmative defense. (CP at 77-79) He moved for summary judgment dismissal, contending that Ms. Mitchell did not file suit with the three-year statute of limitations or one-year discovery for medical malpractice; and that he did not fraudulently conceal any information from Ms. Mitchell. (CP at 90-95) The trial court dismissed her claims, and the Court of Appeals affirmed. (CP at 11-12) Ms. Mitchell moved for reconsideration, asserting that she had "new evidence" of medical malpractice showing that Dr. Bourne had removed a viable pregnancy.

Ms. Mitchell petitioned this Court for discretionary review, contending that the Court of Appeals' decision: (1) conflicted with the federal and state constitution; and (2) involved substantial public interest. *See* Petition at iii; *see also* RAP 13.4(b)(3)-(4).

IV. Argument Why Review Should Be Denied

A. The Court of Appeals' Statute of Limitations Analysis Does Not Conflict with the Federal or State Constitution.

Ms. Mitchell does <u>not</u> argue that RCW 4.16.350 (the statute of limitation for medical negligence claims), or cases interpreting it, involve a significant question of law under the Constitution of Washington or the

United States.[3] Instead, Ms. Mitchell repeatedly argues the *merits* of her medical malpractice and informed consent claims (which she also did in the trial court and Court of Appeals). However, the statute of limitations defense was the sole basis of the summary judgment dismissal and the Court of Appeals' affirmation. In moving for reconsideration in the Court of Appeals, Ms. Mitchell presented "new evidence" which, again, went to the merits of her claims. Conversely, the new evidence did not change the Court's analysis of Dr. Bourne's statute of limitations defense.

The statute of limitations applicable to medical malpractice lawsuits, RCW 4.16.350(3), states that medical negligence claims "shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient . . . discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, which ever expires later[.]" "The three-year limitations period commences at the time of the last act or omission that allegedly caused the injury." *Unruh v. Cacchiotti,* 172 Wn.2d 98, 107, 257 P.3d 631 (2011). Here, Dr. Bourne's alleged negligence occurred when he performed surgery on Ms. Mitchell on October 21, 2008. The three-year statute of limitations

[3] Ms. Mitchell argues that she was deprived of due process. *See* Petition at 6. This is incorrect. She filed an administrative complaint, triggering an investigation that resulted in an informal disposition leading to probation, among other terms. (CP at 111-15)

expired on October 21, 2011—well before she filed a lawsuit on September 5, 2013—and dismissal of any action brought after October 21, 2011 was proper and mandatory under the statute.

RCW 4.16.350(3) also allows plaintiffs to file suit three years after the last negligent act or one year after discovery of the negligence "whichever period expires later." *Caughell v. Grp. Health Coop. of Puget Sound*, 124 Wn.2d 217, 237 n.6, 876 P.2d 898 (1994). This provision "is triggered by a plaintiff's discovery of 'said act or omission' – the act or omission that caused the injury." *Winburn v. Epstein*, 143 Wn.2d 206, 217, 18 P.3d 579 (2001).

Here, under the "discovery rule" Ms. Mitchell had knowledge of Dr. Bourne's alleged negligence when she filed an administrative complaint with the Department of Health in August 2011. Following her surgery on October 21, 2008, Ms. Mitchell obtained a copy of her medical records and radiology reports. Once she obtained these reports, Mr. Mitchell had the longer of either the three-year statute of limitations or one year under the discovery rule.

Ms. Mitchell believed that she had a uterine pregnancy with a yolk sac no later than August 2011, when she filed her administrative complaint with MQAC. "I was shocked to learn that the missing ultrasound report dated

October 20th 2008 actually indicated a uterine pregnancy with a visible yolk sac[.]" (CP at 88) She states: "I am now forwarding the details of the incident along with the ultrasound reports and films to the Washington State Department of Health to look into the matter because I believe that Dr. Bourne was negligent in treating me." (CP at 88)[4]

Ms. Mitchell's Superior Court complaint alleges that she did not "discover" that she had a legal cause of action until MQAC sent its "300 page copy of the investigation on November 20, 2012," in response to her Public Disclosure Request. (CP at 9; CP at 100) However, the "key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts; whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Allen v. State,* 118 Wn.2d 753, 758, 826 P.2d 200 (1992); *see also Adcox v. Children's Orthopedic Hosp. & Med. Cty.*, 123 Wn.2d 15, 35, 864 P.2d 921 (1993).

[4] Ms. Mitchell's Appendix to her Petition includes a May 23, 2014 consultation/counseling note from Edith Y. Cheng, M.D. Ms. Mitchell contends that this is "new evidence" that Dr. Bourne aborted a viable pregnancy. This unsworn, redacted and inadmissible medical record is not part of the record on appeal and should not be considered in discretionary review. *See* RAP 10.3(a)(8). Additionally, the record applies to the merits of her dismissed claim, and not to the timeliness of her lawsuit. Nevertheless, Dr. Cheng could not confirm whether the pregnancy was viable or not because the ultrasound images were "inconclusive as to whether there was a viable intrauterine gestation."

Here, Ms. Mitchell clearly had factual knowledge giving rise to this lawsuit when she filed an administrative complaint with MQAC in August 2011. Under the discovery rule Ms. Mitchell had (at the latest) until August 2012 to institute a civil action against Dr. Bourne. But she did not file her lawsuit until September 5, 2013.

Ms. Mitchell states that she did not learn "that a normal pregnancy existed versus just a pregnancy which had been interpreted as a blighted ovum" until MQAC issued its November 20, 2012 Statement of Allegations and Summary of Evidence. (*See* Petition at 3) First the "report" is five pages—not 300. (CP at 103-06) Second, the word "normal" appears *nowhere* in the Statement of Allegations and Summary of Evidence. (CP at 103-06) In fact, the word "abnormal" appears three times. Additionally, Ms. Mitchell admits in her August 2011, complaint to MQAC that she was "shocked to learn that the missing ultrasound report dated October 20, 2008 actually indicated a uterine pregnancy with a visible yolk sac and a fibroid as well as the right ovarian dermoid cyst." (CP at 88) Accordingly, she "discovered" her alleged injury no later than August 2011—not November 20, 2012.

B. Dr. Bourne Did Not Fraudulently Conceal Any Information from Ms. Mitchell.

In cases of intentional concealment of negligence, the statute of limitations is tolled "until the date the patient ... has actual knowledge of the act of fraud or concealment . . ." after which the patient has one year to commence a civil action. RCW 4.16.350(3); *see also Giraud v. Quincy Farm and Chem.*, 102 Wn. App. 433, 455, 6 P.3d 104 (2000) ("Fraudulent concealment cannot exist if a plaintiff has knowledge of the evidence of an alleged defect.) The plaintiffs must prove that the "doctor deliberately concealed information that would estop them from asserting the defense of the statute of limitations." *Wood v. Gibbons*, 38 Wn. App. 343, 347, 685 P.2d 619 (1984).

Upon receipt of her October 20, 2008 ultrasound report, Ms. Mitchell learned of its findings. There is no evidence that Dr. Bourne intentionally tried to "hide" or "conceal" the October 20 report. Indeed, the record was readily available on the hospital's computer, and she forwarded all of her records—including the October 20, 2008 ultrasound—to MQAC. (CP at 88)

Dr. Bourne did not "deliberately conceal" any information from the plaintiff.[5] Ms. Mitchell successfully obtained her medical records and

[5] Plaintiff's Complaint suggests that Dr. Bourne "avoided plaintiff in his office" during a follow-up visit; however, Dr. Bourne's unavailability to conduct a post-operative appointment is not fraudulent concealment.

radiology reports, reviewed them, then filed an administrative complaint with MQAC in August 2011. (CP at 88) Ms. Mitchell's August 2011 complaint to MQAC expressly states that she went to the x-ray department to obtain a complete copy of her ultrasound records and films. The receptionist "pulled up my records on the computer and gave me a copy." (CP at 88)

Ms. Mitchell contends that Dr. Bourne "misrepresented the uterine tissue as ectopic tissue in addition to him claiming he so no [sic] evidence at the time of surgery that their [sic] was a gestational pregnancy." *See* Petition at 10. But tolling based on intentional concealment requires a showing of "conduct or omissions intended to prevent the discovery of negligence or of the cause of action." *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 867, 953 P.2d 1162 (1998). Likewise, a party opposing summary judgment must rely on more than mere speculation or argumentative assertions." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Ms. Mitchell presented no evidence that Dr. Bourne suspected that he was negligent at the time of the surgery or that he took steps to cover it up. Accordingly, Ms. Mitchell failed to meet her burden to show that Dr. Bourne intentionally concealed his negligence from her.

She appended an October 23, 2008 pathology report to her reply brief in the Court of Appeals, which the Court did not consider because it was not

designated as part of the record on review. *See* RAP 10.3(a)(8). However, even if the report was considered, it does not change the outcome of the Court's analysis. The report states that the clinical information is "ectopic pregnancy," which is what Dr. Bourne represented that he found. The report's final diagnosis differs from the clinical information, but this is not fraudulent concealment. The Court of Appeals' opinion does not conflict with the U.S. or state Constitution.

Ms. Mitchell contends that Dr. Bourne "admitted to the Superior court that he had misrepresented the tissues." *See* Petition at 10, relying on Dr. Bourne's answer to the complaint at CP 77, ¶ 8. However, the record reveals that Dr. Bourne admitted in his answer to Ms. Mitchell's complaint the allegation in paragraph eight that "On October 21, 2008, defendant sent tissue he obtained from plaintiffs uterus to pathology stating it was an ectopic pregnancy (outside the uterus) and not stating the site of the ectopic pregnancy." (CP at 119) This is not an admission of "fraud" as Ms. Mitchell contends. (*See* Petition at 10; CP at 77) It is an admission of an allegation of fact that Ms. Mitchell asserted. Dr. Bourne never tried to "cover up" his decisions and actions during the surgery.

By August 2011, when Ms. Mitchell filed her MQAC complaint, she had actual knowledge that prior to her October 21, 2008 surgery there was an

ultrasound report indicating that she was carrying a uterine pregnancy with a yolk sac. (CP at 88) The same October 20, 2008 ultrasound report also states "absent fetal heart tones," and "no embryo is identified," and "ectopic pregnancy could not be excluded." (CP at 60) Once she had actual knowledge, Ms. Mitchell had one year to commence civil proceedings. Even in that circumstance, the statute expired in August 2012.

In her Opening Brief filed with the Court of Appeals, Ms. Mitchell stated that she only became *fully aware* of the extent of Dr. Bourne's alleged negligence when she obtained a copy of MQAC's case file through her Public Disclosure Request on November 20, 2012. (See Appellant's Opening Brief at 6) However, for purposes of the statute of limitations, this is immaterial. Ms. Mitchell was aware of the factual basis of this lawsuit by August 2011, when she filed a complaint with MQAC; whether or not she actually knew this information was enough to establish a *legal* cause of action is irrelevant. *See Allen,* 118 Wn.2d at 758 ("The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.")

C. Ms. Mitchell Provided Her Informed Consent.

Ms. Mitchell contends that she did not consent to Dr. Bourne removing her ovary or cyst. *See* Petition at 2, 9. However, she had, in fact, consented to allow Dr. Bourne to "perform such surgical procedures as are in the exercise of his professional judgment necessary and desirable." The consent further states, "The authority granted under this paragraph shall extend the treatment of all conditions that require treatment and are not known to my physician at the time the medical or surgical procedure is commenced." (CP at 38; quoting CP at 6)

During surgery, Dr. Bourne did not see evidence of an intrauterine pregnancy. However, the laparoscopy (a procedure to which she plainly consented; *see* CP at 6) revealed a large cystic teratoma on Ms. Mitchell's right ovary. Dr. Bourne attempted to remove the teratoma (also known generically as a dermoid cyst) separately from the ovary. However, the manner in which the teratoma had grown caused unexpected bleeding; Dr. Bourne was unable to remove the teratoma without the ovary. He did not discuss the removal of the ovary with the patient, as this would have required stopping the surgery, waking her up (as stated in her MQAC letter, she consented to general anesthesia), and exposing her to the risk of a second procedure.

V. Conclusion

The Supreme Court should decline discretionary review because the Petition does not satisfy the criteria in RAP 13.4(b)(3)-(4). The Court of Appeals correctly affirmed the trial court's dismissal of this medical malpractice case on summary judgment as time-barred when Petitioner Mitchell failed to file suit: (1) within the three-year statute of limitations; or (2) within one year of discovering that she incurred an injury caused by the alleged act. Likewise, she failed to present admissible evidence of fraudulent concealment, which would toll the statute of limitations. The Court of Appeals' decision does not involve a significant question of law under the federal or state Constitution, nor does it involve an issue of substantial public interest.

Dated this 23 day of April, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

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DATED this 27 of April, 2015.

Sopheary Sann, Legal Assistant

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If you have any questions, please do not hesitate to contact our office.

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