

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
PETITION FOR REVIEW FROM

71320-5-F
Mitchell V. Bourne. No. ~~213205-1~~

91542.3

JULIA MITCHELL, STEPHONE MITCHELL

Appellants/Petitioners

vs

RANDOLPH BOURNE

Respondent.

FILED

APR -9 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
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PETITION FOR REVIEW

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Appellants pro se

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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IDENTITY OF PETITIONER

Julia and Stephone Mitchell seek review of the Court of Appeals, Division One decision in this matter.

COURT OF APPEALS DECISION

Mitchell v. Bourne, No. 213205-1. A copy of the opinion and order denying the motion for reconsideration attached.

ISSUES PRESENTED FOR REVIEW

ISSUE ONE: Whether the Supreme Court should take review because the Court of Appeals decision is in conflict with the Washington State constitutional rights.

ISSUE TWO: Did the Court of Appeals restructuring of the facts, creation of an erroneous assumption and failure to draw all reasonable inferences in a light most favorable to the Mitchells conflict with the Washington State Constitutional rights there by creating an issue of substantial public interest ?

CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW

The Court of Appeals decision is in conflict with several decisions of the Washington State Constitutional rights, the United States Constitution and the public interest as set forth in the petitioner's statement of issues. RAP 13.4 (b)(3),(4).

STATEMENT OF THE CASE

Julia and Stephone Mitchell were pregnant with their first child in October 2008. Julia had some twinging pains on and off as well as some spotting for two days. She followed up with her primary care physician who reffered her to sound womens for obstetric care. Julia was assigned under the care of Dr. Bray who followed her for the first two initial visits. Dr. Bray was on vacation at the time of Julia's third and fourth visits which followed ultrasound imaging and blood work. On the fourth visit, Julia and Stephone met Dr, Bourne for the first time. He infomed them that the pregnancy had failed and that Julia had only a fluid collection in her uterus as well as an ectopic pregnancy of unknown site based on the ultrasound she had that day.

Dr. Bourne further informed Julia and stephone that Julia's hcg (pregnancy hormone levels) were not rising. Dr. Bourne informed Julia and Stephone that the only treatment was to perform a d&c (dilation and curretage) to treat the failed uterine pregnancy and then proceed with laparoscopy to treat the ectopic pregnancy. He provided Julia with a consent form for a d&c, salpingectomy and salpingestomy (opening of the fallopian tube and removal of the fallopian tube), (CP 91). Julia signed the consent form for the above procedures based on the information Dr. Bourne had given her.

Dr. Bourne performed surgery on Julia on October 21, 2008 performing a d&c and removing the "failed pregnancy" as well as removing the right ovary (CP 91). He stated

he saw no evidence of a uterine pregnancy which would have been the presence of chorionic villi. He therefore proceeded to perform a laparoscopy to treat the ectopic pregnancy. Dr. Bourne however did not see any ectopic pregnancy. He then turned his attention to Julia's right ovary which he knew prior to surgery had a cyst per the ultrasound report of October 17, 2008 that he reviewed (CP. 56). He started to cut off the corpus luteum which every pregnant woman has as it is the site where the ovulated egg was prior to migration to the uterus. Bearing in mind, Dr. Bourne knew this ovary had a cyst prior to surgery he proceeded to attempt removing the cyst without consent and then cut into the ovary which resulted in to him removing the entire ovary for what he claimed was uncontrolled bleeding of only 150 ml. In removing the ovary, Dr. Bourne performed another surgical procedure a laparotomy which was also not part of the consent.

Dr. Bourne had advised Julia to follow up on a post operative visit with him however, he avoided Julia and Stephone on the day of the visit even though he was in the office that day. Julia and Stephone were informed he was not in the office or building however, they ran into him as they were being taken to a room in the back of the office by the nurses station, Dr. Bourne had also documented in Julia's medical record that he was going to follow up with her on the post operative visit.

Julia decided to obtain her medical records since she could not obtain answers regarding her surgery from Dr. Bourne. First, the October 20, 2008 ultrasound report was missing from

Julia's Medical chart. Julia however obtained a copy from the radiology department. The ultrasound had confirmed a uterine pregnancy with the presence of a yolk sac however no embryo was identified. Based on this information, there was no cause of action as there were no damages or injury incurred by the Mitchells. Second, the report was of the transabdominal ultrasound and the transvaginal report was missing.

Julia filed a complaint with the Washington State Dept of Health (Medical Quality Assurance commission) in August 2011. The Commission carried out an investigation based on Julia's complaint of Dr. Bourne terminating a pregnancy and removing her right ovary. Washington Department of Health as the governing body over health entities in Washington State requested Dr. Bourne to submit unredacted records of Julia's chart. Dr. Bourne was placed on probation for a period of two years and he had to write a paper on diagnosing ectopic pregnancies as well as submit plans for changes he would make when reviewing ultrasounds and obtaining consent among other orders. The unredacted records Department of Health obtained from Dr. Bourne were also missing the transvaginal report (CP. 70,71)

Julia was notified of the findings from the investigation which lasted a year in a 300 page report on November 20, 2012. It was from this report that Julia and Stephone learned that a normal pregnancy existed versus just a pregnancy which had been interpreted as a blighted ovum (a pregnancy that starts out normal but due to chromosome abnormalities fails. A yolk sac

may be present however in time, it disintegrates and the products of conception are evacuated in a miscarriage).

Julia and Stephone Mitchell filed a civil suit against Dr. Bourne on September 5, 2013, ten months from the time they discovered the injury of termination of a normal pregnancy. In their complaint to the Snohomish Superior Court, Julia and Stephone actually indicated that Dr. Bourne had performed an abortion on Julia (CP. 119, # 7). Dr. Bourne denied this allegation and stated that even with the presence of a yolk sac and no embryo visualized, the pregnancy was not normal and it was a matter of time before Julia would have miscarried.

Dr. Bourne per records claimed he did not see any evidence of chorionic villi at the time of surgery so he proceeded with a laparoscopy. He then sent the uterine tissue as ectopic tissues which misled the pathologist as it is inevitable to perform a karyotype analysis on ectopic pregnancy tissue as the ectopic pregnancy has already failed. This karyotype analysis would have determined if the pregnancy had failed or not however the pathologist did not perform the test because the tissues were marked as ectopic pregnancy. On the other hand, the pathologist reviewed the tissues microscopically and indicated that there was chorionic villi which Dr. Bourne stated was not present at the time of the surgery. There is no way the chorionic villi could have grown outside the uterus in tissue samples that were placed in formaldehyde. This is yet another of facts far from the truth which indicate misrepresentation of tissue and tampering with the evidence.

The Snohomish Superior Court dismissed the Mitchell's case without any evidence or opinion of an obstetric expert in a motion for summary judgment by Dr. Bourne in his favor. In early pregnancy, the transvaginal images are relied on more than the transabdominal images according to the new evidence the Mitchells obtained on December 29, 2014 and presented to the Court of Appeals.

Department of Health requested of Dr. Bourne all records of Julia's chart unredacted however, the transvaginal report was missing in those records. Julia and Stephone did and do not have access to the Washington state Dept of Health attorney's work product therefore had/have no knowledge of what other findings there may have been. The Mitchells relied on the information regarding the pregnancy hormones going up and the presence of a yolk sac on the transabdominal ultrasound simultaneously as representing a normal pregnancy.

Julia and Stephone Mitchell submitted new evidence from an expert/proffessor in obstetrics and perinatology (high risk pregnancies) to the Court of Appeals with their motion for reconsideration attached and the Court denied it. The report from the expert, professor Cheng Edith. MD (Maternal fetal medicine) indicated that she together with a radiologist at University of Washington Medical Center identified an embryo on the transabdominal ultrasound. She further stated there were no transvaginal images which would be appreciated because it is from the transvaginal images in early pregnancies that more neccessary information like viability would be determined. The Mitchells had no chance to submit a request for a subpoena of the transvaginal images and report as the Court of Appeals denied their motion for reconsideration. The only

report the Mitchells had/have was the one in Julia's medical record which is similar to the one from the Dept of Health report from Dr. Bourne that indicated there was no embryo identified.

This new evidence in which the experts identified an embryo on the transabdominal ultrasound is evidence that Dr. Bourne performed an illegal abortion on Julia. According to the national center for health statistics, definition of an abortion is expulsion or removal of an embryo or fetus prior to the stage of 20 weeks of gestation.

ARGUMENTS

ISSUE ONE: Whether the Supreme Court should take review because the Court of Appeals decision is in conflict with Washington State Constitutional rights.

1. According to Washington State Constitutional rights (Section 3. Personal rights), no person shall be deprived of life, liberty or property without due process of law. Under this law, the Mitchell's and their child were denied that right. It is a woman's due process right to decide to terminate a pregnancy or not. There was no informed consent for an abortion which renders it unconstitutional because it did not take the perspective of Julia's (womens) due process rights.

Washington State Constitutional rights Section 29. Constitution mandatory states the provisions of this constitution are mandatory, unless by express words they are declared to be otherwise. Ruling in favor of Dr. Bourne was a violation of the women's due process rights and also is of public interest as this would impact many women (expectant mothers and fathers) when it comes to making choices regarding to abort or not with or without their knowledge of what treatment they are undergoing.

2. The Mitchell's had very pertinent information relevant to this case that the Court of Appeals declined to take into consideration. This information was included in the motion for reconsideration as it had just been made available to the Mitchell's on January 7, 2015. This new evidence indicated the presence of an embryo which was not included in the ultrasound report that was given to Julia from the radiology department at Stevens hospital as well as the unredacted records that Department of Health obtained from Dr. Bourne. With the presence of an embryo, the surgical procedure Dr. Bourne performed in 2008 as a d&c of a fluid filled sac was actually an abortion. So many factors play into performing an abortion including obtaining informed consent and counselling among others. This was not the case with the Mitchell's. They were informed the pregnancy had failed by Dr. Bourne and treatment had to be by surgical procedure. If the Mitchell's had been informed there was an embryo, there would never have been any surgery as this was a very highly wanted pregnancy. Instead, the Mitchell's were informed their pregnancy had failed and that there was a life threatening condition which was the diagnosis of an ectopic pregnancy that actually never existed at all. This is an issue of substantial public interest that should be determined by the Supreme court as it would impact many women if Physicians are favored in performing abortions without knowledge of the women of what is actually happening to their bodies and their off springs.

ISSUE TWO

1. The Court of Appeals erred when it only considered part of the consent form in favor of Dr. Bourne. Section 23 bill of attainder, ex post facto law etc, states no bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed. The Court of Appeals erred when judgment was made on the partiality of the contract between the Mitchell's and Dr. Bourne. The Court neglected to take into account the entirety of the contract/consent and therefore excluded the Mitchell's and their right of the said contract. According to Section 29 of the Washington State Constitution mandatory, the provisions of this constitution are mandatory unless by express words they are declared to be otherwise. There are no excuses for breaking contracts or ruling in favor or partial contracts. The contract was not considered in its entirety thereby by personally injuring the Mitchell's by excluding their agreed upon interventions and methods of said interventions.

Section 30 rights reserved, of the Washington state constitution states the enumeration in this constitution of certain rights shall not be construed to deny others retained by the people. The courts ruling in the partial contract phrase protected Dr. Bourne and the Mitchell's rights were not protected.

Section 6 Oaths- mode of administering in the Washington state Constitution states the mode of administering an oath, or affirmation shall be such as may be the most consistent with and binding upon the conscience of the person to whom such oath, or affirmation may be administered. The oath a physician takes is "first do no harm". Without the scans for prudent

practice, it was in this action that Dr. Bourne broke his contract with the Mitchell's and also the oath of his profession for which bound the Mitchell's to "trust" his decision. However, the Court of Appeals erred in protecting Dr. Bourne under the clauses in the contract of "life saving interventions" as without the necessary ultrasound imaging to guide a prudent surgeon knife, his actions of entering the body were not contractual and thus performing a laparotomy, causing damage by cutting into reproductive organs and scraping away at unidentifiable by human eye alone matter in the uterus that was human life. The surgery was not a life saving matter and the clause in the contract between Julia and the doctor allowing him to perform life saving interventions is the only clause the Court of Appeals used to make their decision thus leaving the Mitchell's without protection of law of contract and protecting Dr. Bourne who did not practice with prudence and within the contract agreed upon.

2. The Court of Appeals erred because it viewed evidence in light most unfavorable to the Mitchells'. Dr. Bourne ordered the October 20, 2008 ultrasound as was evidenced by the nurses notes which indicate she personally faxed the order to Stevens radiology (CP. 20). Julia had a transabdominal and transvaginal ultrasound per Dr. Bourne's order. The ultrasound report shows the report was faxed to the ordering physician Dr. Bourne (CP. 71). The report was missing from Julia's medical chart and when obtained from the radiology department, it was incomplete. Julia filed a complaint with Department of Health who requested for unredacted records from Dr. Bourne and the report he submitted was incomplete missing the transvaginal report, Dr. Bourne had lied to Department of Health that Dr. Rogers had ordered the ultrasound.

Department of Health knew this was not true based on the report therefore asked him the same question again, who ordered the ultrasound? Dr. Bourne in his second reponse to the same question responded he did not know who ordered the ultrasound. The original order sheet was missing in the records provided to Department of Health by Dr. Bourne from sound womens and the copy has also gone missing from Stevens radia. Dr. Bourne misrepresented the uterine tissue as ectopic tissue in addition to him claiming he so no evidence at the time of surgery that their was a gestational pregnancy. The pathologist indicated from his observation of the tissue samples sent to him that there was chorionic villi which is evidence of a gestational pregnancy. Dr. Bourne admitted to the Superior court (CP.77, #8) that he had misrepresented the tissues. This was brought up by the Mitchell's in their brief, Dr. Bourne responded it was just a statement of fact. The Mitchell's then provided the Court of Appeals with further proof which was the pathologist's report and the court declined to consider it stating it was not included initially even when it is evident that Dr. Bourne had admitted to this fraud to the superior court then intended to deceive the Court of Appeals by stating it was just a statement of fact. Due to the legal technicality of not submitting the pathologist report which is further proof of Dr. Bourne's fraud even with prior evidence of his admission to this fraud, the Court of Appeals ruled in Dr. Bourne's favor. All this deceit and intent to deceit resulted in delay of discovering what the medical experts observed on the incomplete imaging records provided to Julia. In viewing all this deceit and the Courts decision, the public would have a substantial interest in this matter especially since it

concerns health care which every individual in there life on this earth have to deal with at some point in different apects. Todate, the Mitchell's are still without the transvaginal ultrasound film/images or even the report. The transvaginal images would enable the medical experts to throw more light to this case even though it has been determined that there was an embryo which Stevens radia radiologist and Dr. Bourne claimed there was no visible embryo.

A patient may recover for a doctor's failure to provide informed consent even if the medical diagnosis or treatment was not negligent. **Backlund v. univ. of wash.**, 137 Wn.2d 651, 663, 975 P.2d 950 (1999). The basis for such a claim is that patients have the right to make decisions about their medical treatment. Id; see also **Smith v. Shannon**, 100 Wn.2d, 29, 666 P.2d 351 (1983).

The law governing the period within which a person can file a lawsuit in Washington is RCW 4.16.350 which imposes a three year statute of limitation on medical malpractice actions however, the same law provides and exception to the general rule.

"..... allows the action to be brought no later than one year after the time the patient or his representative discovered or reasonably should have discovered the that injury or condition was caused by such act or omission" RCW 4.16.350 (3)

"..... provides a discovery rule that can allow a medical malpractice action to be brought later than the three year period"
Winbun v. Moore, 143 Wn.2d 206,214,18 P.3d 576 (2000)

CONCLUSION

The decision of the Court of Appeals in the matter of Mitchell v Bourne is unconstitutional as it is in conflict with the Washington State Constitutional rights and it is a decision that is of substantial interest to the public as noted above. This case involves medical malpractice, lack of consent and fraud on the part of Dr. Bourne whom the lower courts have favored to this point. Julia and Stephone Mitchell hearby respectfully request the Washington Supreme Court to review the judgment of the law Courts as they relate to this case and reverse and reinstate this case in the lower court for trial by jury.

Respectfully submitted this 26th day of March, 2015 by

Julia Mitchell and Stephone Mitchell
Appellants/Petitioners (Pro se)



Julia Kahubire Mitchell

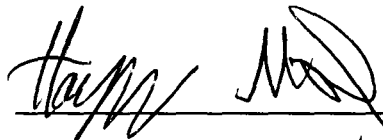
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that on the 26th day of March, 2015, I caused a true and correct copy of the foregoing document, "Petition for Review" to be delivered in the manner indicated below to the following counsel of record:

Counsel for respondent:
Amber Pearce
% Floyd, Pflueger & Ringer, P.S
200 West Thomas st. suite 500
Seattle, WA 98119-4296

SENT VIA:
 fax
 express mail
 regular U.S mail
 priority mail

Dated this 26th day of March, 2015, in Everett, Washington



HAYLEY N

APPENDIX

Laws and Agency Rules

[Legislature Home](#) > [Laws and Agency Rules](#) > Washington State Constitution

Washington State Constitution

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

SECTION 11 RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment,

belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [AMENDMENT 88, 1993 House Joint Resolution No. 4200, p 3062. Approved November 2, 1993.]

Amendment 34 (1957) -- Art. 1 Section 11 RELIGIOUS FREEDOM -- *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.* [AMENDMENT 34, 1957 Senate Joint Resolution No. 14, p 1299. Approved November 4, 1958.]

Amendment 4 (1904) -- Art. 1 Section 11 RELIGIOUS FREEDOM -- *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.* [AMENDMENT 4, 1903 p 283 Section 1. Approved November, 1904.]

Original text -- Art. 1 Section 11 RELIGIOUS FREEDOM -- *Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person, or property, on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.*

SECTION 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

SECTION 13 HABEAS CORPUS. The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it.

SECTION 14 EXCESSIVE BAIL, FINES AND PUNISHMENTS. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

SECTION 15 CONVICTIONS, EFFECT OF. No conviction shall work corruption of blood, nor forfeiture of estate.

SECTION 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [AMENDMENT 9, 1919 p 385 Section 1. Approved November, 1920.]

Original text -- Art. 1 Section 16 EMINENT DOMAIN -- Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

SECTION 17 IMPRISONMENT FOR DEBT. There shall be no imprisonment for debt, except in cases of absconding debtors.

SECTION 18 MILITARY POWER, LIMITATION OF. The military shall be in strict subordination to the civil power.

SECTION 19 FREEDOM OF ELECTIONS. All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

SECTION 20 BAIL, WHEN AUTHORIZED. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature. [AMENDMENT 104, 2010 Engrossed Substitute House Joint Resolution No. 4220, p 3129. Approved November 2, 2010.]

Original text Art. 1 Section 20 BAIL, WHEN AUTHORIZED All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.

SECTION 21 TRIAL BY JURY. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy

public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [**AMENDMENT 10**, 1921 p 79 Section 1. Approved November, 1922.]

Original text -- Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS -- *In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*

SECTION 23 BILL OF ATTAINDER, EX POST FACTO LAW, ETC. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

SECTION 24 RIGHT TO BEAR ARMS. The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

SECTION 25 PROSECUTION BY INFORMATION. Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

SECTION 26 GRAND JURY. No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

SECTION 27 TREASON, DEFINED, ETC. Treason against the state shall consist only in levying war against the state, or adhering to its enemies, or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

SECTION 28 HEREDITARY PRIVILEGES ABOLISHED. No hereditary emoluments, privileges, or powers, shall be granted or conferred in this state.

SECTION 29 CONSTITUTION MANDATORY. The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

SECTION 30 RIGHTS RESERVED. The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

RCW 4.16.350

Action for injuries resulting from health care or related services — Physicians, dentists, nurses, etc. — Hospitals, clinics, nursing homes, etc.

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976, against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his or her employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including, in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative; based upon alleged professional negligence 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 or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

[2011 c 336 § 88; 2006 c 8 § 302. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.]

Notes:

Purpose -- Findings -- Intent -- 2006 c 8 §§ 301 and 302: "The purpose of this section and section 302, chapter 8, Laws of 2006 is to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-year statute of repose in RCW 4.16.350.

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.

In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.

The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.

The legislature intends to reenact RCW 4.16.350 with respect to the eight-year statute of repose and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the eight-year statute of repose reenacted by section 302, chapter 8, Laws of 2006 be applied to actions commenced on or after June 7, 2006." [2006 c 8 § 301.]

Findings -- Intent -- Part headings and subheadings not law -- Severability -- 2006 c 8: See notes following RCW 5.64.010.

Application -- 1998 c 147: "This act applies to any cause of action filed on or after June 11, 1998." [1998 c 147 § 2.]

Application -- 1988 c 144: See note following RCW 4.16.340.

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

Severability -- 1975-'76 2nd ex.s. c 56: "If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 56 § 15.]

Actions for injuries resulting from health care: Chapter 7.70 RCW.

Complaint in personal injury actions not to include statement of damages: RCW 4.28.360.

Evidence of furnishing or offering to pay medical expenses inadmissible to prove liability in personal injury actions for medical negligence: Chapter 5.64 RCW.

Immunity of members of professional review committees, societies, examining, licensing or disciplinary boards from civil suit: RCW 4.24.240.

Proof and evidence required in actions against hospitals, personnel and members of healing arts: RCW 4.24.290.

Verdict or award of future economic damages in personal injury or property damage action may provide for periodic payments: RCW 4.56.260.

MITCHELL, JULIA KAHUBIRE U3012943
Maternal & Infant Record Authenticated
Service Date: May-23-2014
Dictated by Cheng, MD, Edith Y on Jul-29-2014

899099

RETURN PRECONCEPTION CONSULT NOTE

DATE OF SERVICE

May 23, 2014

CLINICAL INFORMATION

PHYSICAL EXAMINATION

Limited to a blood pressure of 114/66 and a pulse of 74.

CONSULTATION/COUNSELING

I disclosed to Julia and her husband that I did review the CD and in fact I reviewed it with radiology as well. Unfortunately our interpretation will not provide Julia with the resolution that she wants which is that this indeed was a nonviable pregnancy and therefore the D&C was indicated. I specifically reviewed that the images that were provided to us were:

1. Of an ultrasound that was done 7 years ago, and therefore the technology was not as robust as it is today.
2. This was a transabdominal ultrasound, there were no transvaginal ultrasounds, and in an early gestation, it is very difficult to find the resolution needed on a transabdominal ultrasound to confirm viability. Therefore the image of what the calipers identify as the embryo is most likely the embryo but there are not enough images to demonstrate the appropriate anatomy at this point. There were no images and no documentation of the presence of a fetal heart rate. We however did see what we believe is a yolk sac in the uterus, but there was only 1 image of this and therefore not confirmatory. Thus the ultrasound images provided on the CD that was provided to me from Julia are inconclusive as to whether there was a viable intrauterine gestation. Lastly, the patient did undergo a unilateral oophorectomy for which she had not been consented prior to the procedure as a possibility. There are no images of

the adnexa suggesting that there was an adnexal mass suspicious for an ectopic pregnancy which would be the rationale for a D&C and potential laparoscopy.

Julia was understandably very disappointed with this finding. As noted previously in my note and I have always been aware and to that extent Julia admits that she needs to have resolution of this as she feels extremely violated by this act. Her husband also agrees in that they cannot or it has been difficult for them to resolve the question of whether there had been an unnecessary termination of a viable pregnancy.

We then embarked on a discussion, predominantly initiated by them, as to the advisability or rationale for pursuing more sanctions or complaints against this physician. Of note is that they have not sought counseling on this matter, but they do have legal representation and legal counseling with regard to this matter. I posed a question to Julia to reflect on; to what end does she want to seek punishment of this physician that would resolve her anger? We are unable to confirm whether this was a viable or nonviable intrauterine embryo and with this ambiguity, would this lead to any further sanctions or punishment of this physician that would give her final resolution?

I told them that the decision to continue pursuing this, which now I realize they have been for quite some time, remains a personal decision and is based on the level of emotional, psychological and financial energy that they want to place on this with an unknown resolution in terms of punishment for the physician, but ultimately an emotional/psychological resolution for them.

Lastly, I have reviewed with Julia and her husband my previous consult of January 13 relating to the risks of a subsequent pregnancy in terms of hypertension, preterm delivery, aneuploidy and abnormal presentation, since her husband was not at that consultation, reminding them that of course the decision for another pregnancy has to be a joint decision, requiring support from both of them to comply or accept the medical management, particularly if significant complications arise.

At the end of our meeting today, there were no additional questions. They are obviously disappointed with the interpretation of the images of the ultrasound provided by the CD.

Total time spent was 45 minutes, 100% of which was in direct face-to-face counseling regarding issues as detailed above.

Signature Line

Electronically Reviewed/Signed On: 08/08/14 at 07:32

Cheng, MD, Edith Y
Attending Physician, Maternal Fetal Medicine and Medical Genetics
Box 356460 (206) 543-3729
Seattle WA

EYC/TUI
DD:07/29/14
TD:07/29/14

899099



SPECIAL CONSENT TO OPERATION, POST OPERATIVE CARE MEDICAL TREATMENT, ANESTHESIA, OR OTHER PROCEDURE

Patient: Patient No.:

Washington State law guarantees that you have both the right and obligation to make decisions concerning your health care.

1 I hereby authorize Dr. Bourne and / or such associates or assistants as may be selected by said physician to treat the following condition(s) which has (have) been explained to me: (Explain nature of condition(s) in professional and lay language.) Ectopic Pregnancy versus Blighted Ovum

2 The procedures planned for treatment of my condition(s) have been explained to me by my physician. I understand them to be: (Describe procedures to be performed in professional and lay language.) RIGHT LEFT BOTH SIDES N/A Suction Dilation and Curettage Laparoscopy, Possible Salpingectomy or Salpingostomy

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 assistants or designees, to perform such surgical or other procedures as are in the exercise of his, her or their professional judgement 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. 4 I have been informed that there are significant risks such as severe loss of blood, infection and cardiac arrest that can lead to death or permanent or partial disability, which may be attendant to the performance of any procedure. I acknowledge that no warranty or guarantee has been made to me as to result or cure.

IMPORTANT: HAVE PATIENT SIGN FULL OR LIMITED DISCLOSURE BOX AND SIGNATURE LINE AT BOTTOM. FULL DISCLOSURE I certify that my physician has informed me of the nature and character of the proposed treatment, of the anticipated results of the proposed treatment, of the possible alternative forms of treatment; and the recognized serious possible risks, complications, and the anticipated benefits involved in the proposed treatment and in the alternative forms of treatment, including non-treatment.

X X 3 - Healthcare Information Readily I. Patient / Other Legally Responsible Sign if Applicable LIMITED DISCLOSURE I certify that my physician has explained to me that I have the right to have clearly described to me the nature and character of the proposed treatment; the anticipated results of the proposed treatment; the alternative forms of treatment; and the recognized serious possible risks, complications, and anticipated benefits involved in the proposed treatment, and in the alternative forms of treatment, including non-treatment. I do not wish to have these facts explained to me.

X Patient / Other Legally Responsible Sign if Applicable Any sections below which do not apply to the proposed treatment may be crossed out. All sections crossed out must be initialed by both physician and patient. 5 I consent to the administration of anesthesia by my attending physician, by an anesthesiologist, or other qualified party under the direction of a physician as may be deemed necessary. I understand that all anesthetics involve risks of complications and serious possible damage to vital organs such as the brain, heart, lung, liver and kidney and that in some cases may result in paralysis, cardiac arrest and / or brain death from both known and unknown causes. 6 I understand that all blood and blood products involve risk of allergic reaction, fever, hives, and in rare circumstances infectious diseases such as hepatitis and HIV/AIDS. I understand that precautions are taken by the blood bank in screening donors and in matching blood for transfusion to minimize those risks. 7 Any tissues or parts surgically removed may be disposed of by the hospital or physician in accordance with accustomed practice.

PHYSICIAN'S STATEMENT

The medical procedure or surgery stated on this form, including the possible risks, complications, alternative treatments (including non-treatment) and anticipated results, was explained by me to the patient or his/her representatives before the patient or his/her representative consented.

Physician's Signature Date Time

PATIENT OR PATIENT REPRESENTATIVE'S ACKNOWLEDGEMENT

I acknowledge that I have read (or have had read to me) and fully understand the above consent, the explanations referred to were made, and that all explained my signature.

Patient / Other Legally Responsible Sign Witness: Witness to Signature

Relationship of Legally Responsible Person to Patient

Date: Time: MD 2011-159469-000028 BOURNE, RANDOLPH, MD 2011-159469, PAGE 163

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington
Seattle*

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January 26, 2015

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Julia Kahubire Mitchell
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CASE #: 71320-5-1

Julia K. and Stephone Mitchell, Appellants v. Randolph Bourne, MD, Respondent
Snohomish County, Cause No. 13-2-07244-9

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of \$200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Janice E. Ellis

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JULIA KAHUBIRE MITCHELL and)	NO. 71320-5-I
STEPHONE MITCHELL,)	
)	DIVISION ONE
Appellants,)	
)	
v.)	
)	
RANDOLPH BOURNE,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: January 26, 2015

LAU, J. — Julia Mitchell appeals the summary judgment dismissal of her medical malpractice claim against Dr. Randolph Bourne. Because Mitchell’s claims are time-barred, we affirm.

FACTS

In October 2008, Mitchell was referred by her primary care provider to Sound Women’s Care for bleeding in early pregnancy. Mitchell underwent ultrasound testing on October 6, October 10, October 17, and October 20 to determine the cause of the bleeding. The October 6, October 10, and October 17 ultrasound reports each described the presence of an intrauterine gestational sac but the absence of a yolk sac, fetal pole, or fetal cardiac activity. The October 20 ultrasound report noted the presence

of a yolk sac but fetal cardiac activity remained absent. The report stated, "With an intrauterine pregnancy present, an ectopic pregnancy is most likely not present." All four ultrasound reports noted that Mitchell had a concerning mass on her right ovary.

Dr. Bourne saw Mitchell for the first time on October 20. Dr. Bourne reviewed what he believed to be Mitchell's complete medical records. He noted:

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 of 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

Dr. Bourne recommended Mitchell undergo a dilation and curettage of the uterine tissue and laparoscopic surgery to rule out an ectopic pregnancy. Mitchell signed a consent form authorizing Dr. Bourne to perform these procedures as well as "such surgical or other procedures as are in the exercise of . . . professional judgment necessary and desirable." During surgery, Dr. Bourne did not see evidence of an intrauterine pregnancy. However, the laparoscopy revealed a large cystic teratoma on Mitchell's right ovary. When Dr. Bourne attempted to remove the teratoma, unexpected bleeding required him to also remove Mitchell's right ovary.

In August 2011, Mitchell sent a letter to the Washington State Department of Health Medical Quality Assurance Commission (MQAC) complaining about Dr. Bourne's care.¹ Mitchell alleged that sometime after the surgery, she requested her medical

¹ The letter is undated, but Mitchell alleges in her complaint and her response to the summary judgment motion that she initiated the complaint against Dr. Bourne in August 2011.

records from Stevens Hospital but the October 20 ultrasound report was missing. Mitchell stated that she later obtained the October 20 report from a hospital receptionist and was surprised to learn that it indicated a uterine pregnancy with a visible yolk sac and rising hCG levels. Mitchell described why she believed Dr. Bourne had been negligent:

First, he did not fully disclose information of my ultrasound report dated October 20, 2008 to me. Looking at his dictation as proof, he does not even seem to have looked at my ultrasound report or even the films because he states he just realized that I had 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 ectopic some where. I would never have accepted to have surgery if he had told me 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.

In response to the MQAC's investigation, Dr. Bourne stated that he inadvertently failed to review the October 20 ultrasound report before performing the surgery. He admitted that he would not have proceeded with the surgery had he known that there was a yolk sac present. He noted, however, that even if a yolk sac were present, the lack of an embryo at nearly eight weeks of gestation indicated that the pregnancy was not sustainable.

On August 27, 2012, the MQAC issued a statement of allegations and summary of evidence. The statement alleged that Dr. Bourne's failure to review the October 20 report prior to surgery was "below the standard of care" and "may have denied [Mitchell]

the choice of continuing the pregnancy, abnormal or not." Dr. Bourne stipulated to an informal disposition in lieu of disciplinary action. On August 29, 2012, Mitchell filed a written public disclosure request for records related to the MQAC investigation. On November 20, 2012, the Department of Health released its complete file to Mitchell. On September 5, 2013, Mitchell sued Dr. Bourne, alleging claims of action for negligence, lack of informed consent to remove her right ovary, and fraudulent concealment. Dr. Bourne moved for summary judgment, arguing that Mitchell did not file her action within the limitations period for medical malpractice actions. The trial court dismissed Mitchell's claims. Mitchell appeals.

DECISION

A motion for summary judgment based on a statute of limitations should be granted only when the pleadings, depositions, interrogatories, admissions, and affidavits in the record demonstrate there is no genuine issue of material fact as to when the statutory period commenced. CR 56(c); Olson v. Siverling, 52 Wn. App. 221, 224, 758 P.2d 991 (1988). The statute of limitations is an affirmative defense on which the defendant bears the burden of proof. Haslund v. City of Seattle, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976). We review an order of summary judgment de novo. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

RCW 4.16.350 sets forth the statute of limitations for medical malpractice actions. The statute requires that such an action must 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, whichever period expires

later" RCW 4.16.350(3). The statute of limitations is tolled, however, in cases of intentional concealment of the negligence:

PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

RCW 4.16.350(3). A party who seeks to invoke the tolling proviso bears the burden of establishing its applicability. Rivas v. Overlake Hosp. Med. Ctr., 164 Wn.2d 261, 267, 189 P.3d 753 (2008).

Here, the alleged negligence occurred on October 21, 2008, when Dr. Bourne performed surgery on Mitchell. Mitchell does not dispute that the three-year limitations period expired on October 21, 2011, well before the date she filed this action. Mitchell contends, however, that there is a genuine issue of material fact as to whether she filed the action within the one-year "discovery period." She argues that she did not realize that she had a cause of action against Dr. Bourne until November 20, 2012, the date she received a copy of the MQAC's investigation, because she was unaware until that time that she had a visible yolk sac with rising hCG levels.

However, the one-year discovery period begins to run "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). It is clear that Mitchell was aware that the October 20 ultrasound showed a visible yolk sac and rising hCG levels at the time she made her complaint to the MQAC in August 2011. Thus, the one-year discovery period began to run no later

(not doubling)

than August 2011. Because Mitchell did not file her action until September 5, 2013, her complaint was not timely filed and the trial court properly granted summary judgment dismissal.

Mitchell argues that, in the alternative, the limitations period was tolled by intentional concealment on the part of Dr. Bourne. She asserts that Dr. Bourne purposely mischaracterized the tissue obtained from her uterus as "ectopic tissue" so that it would be destroyed by pathologists without further analysis to show whether the pregnancy was viable or not. 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). 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). Mitchell has presented no evidence that Dr. Bourne suspected he was negligent at the time of the surgery or that he took steps to cover it up.² Consequently, Mitchell fails to meet her burden to show that Dr. Bourne intentionally concealed his negligence from her. Moreover, even assuming Mitchell had made such a showing, the limitations period is tolled only "until the date the patient . . . has actual knowledge of the act of fraud or concealment," at which point a plaintiff has one year to file suit. RCW 4.16.350(3). The record shows Mitchell was claiming Dr.

He admitted to the fraud

4th ultrasound report is incomplete to this date and false
Embryos present per expert witness

² In her reply brief, Mitchell attaches a copy of a pathology report, claiming it proves Dr. Bourne intentionally mischaracterized the tissue. But Mitchell did not designate this report as part of the record on review and, thus, we do not consider it. See RAP 10.3(a)(8); Tornetta v. Allstate Ins. Co., 94 Wn. App. 803, 808-09, 973 P.2d 8 (1999)

71320-5-1/7

Bourne mislabeled the tissue as early as August 2011 in her complaint to the MQAC.

Consequently, the trial court did not err in declining to toll the limitations period.

Affirmed.

WE CONCUR:

Speerma, C.J.

Jan, J.

Becker, J.

FILED
COURT OF APPEALS IV
STATE OF WASHINGTON
2015 JAN 26 AM 9:00

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JULIA KAHUBIRE MITCHELL and)
STEPHONE MITCHELL,)
)
Appellants,)
)
v.)
)
RANDOLPH BOURNE,)
)
Respondent.)

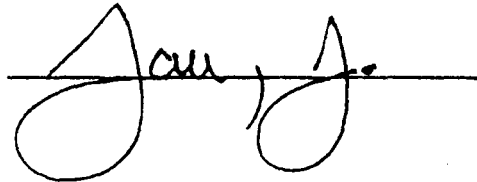
NO. 71320-5-I
DIVISION ONE
ORDER DENYING MOTION
FOR RECONSIDERATION

Appellants Julia and Stephone Mitchell moved for reconsideration of the court's January 26, 2015 opinion, and the court has determined that the motion should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

DATED this 25th day of February 2015.

FOR THE PANEL:



2015 FEB 25 AM 10:38
COURT OF APPEALS
STATE OF WASHINGTON