NO. 97058-1

SUPREME COURT OF THE STATE OF WASHINGTON

HELEN YANKEE and DAVID EARL YANKEE, as individuals and as a part of the martial community comprised thereof,

Petitioners,

v.

FRANTZ JEROME-PIERRE, M.D., and "JANE DOE" JEROME-PIERRE, husband and wife an individual and as part of the martial community comprised thereof; TIM SCEARCE, M.D. and "JANE DOE" SCEARCE, husband and wife and the martial community comprised thereof; and GROUP HEALTH COOPERATIVE; a Washington Corporation; and OVERLAKE HOSPITAL MEDICAL CENTER; a Washington Corporation;

Respondents.

RESPONDENT OVERLAKE HOSPITAL MEDICAL CENTER'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Respondent Overlake Hospital Medical Center submits this Answer to Petition for Review. Overlake also adopts by reference all arguments made by Co-Respondents in their separate Answers.

II. COURT OF APPEALS DECISION

In its March 11, 2019 unpublished decision, Division I affirmed the trial court's denial of Helen and David Yankee's CR 60(b) motion to vacate orders of judgment in a medical malpractice action. In concluding that the trial court did not abuse its discretion, Division I recognized, among other things, that (1) the Yankees' allegations of fraud regarding Dr. Pierre-Jerome's qualifications for performing an intra-arterial procedure "are not of the type that serve as a basis for vacation" of the challenged dismissal orders pursuant to CR 60(b)(4), *Slip Op. at* 4; (2) "[t]here is no question that the Yankees were aware of Dr. Pierre-Jerome's qualifications during the proceedings in the trial court" and did not claim during the underlying action that he was unqualified to perform the procedure, such that any question as to his qualifications "had no bearing on the judgments in favor of the defendants," *id. at 5*; (3) because they "chose not to litigate a claim regarding Dr. Pierre-Jerome's qualifications, despite being aware of them at the time of trial," the Yankees "fail[ed] to establish any extraordinary circumstances requiring vacation of the judgments" under CR 60(b)(11), *id.*

at 5-6; and (4) even if their claim of error in dismissing the informed consent claim "on stipulated summary judgment" were considered for the first time on appeal, the record revealed that there was no stipulation involved when trial court denied their motion to amend the complaint to include an informed consent claim, *id. at 6*.

III. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Should this Court deny the petition for review because the Court of Appeals correctly determined that the trial court did not abuse its discretion in denying the Yankees' CR 60(b) motion and review is not justified under RAP 13.4(b)?

IV. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case and the Appeal

Represented by counsel, Helen and David Yankee filed complaints alleging medical negligence against two doctors, Group Health, and Overlake in October 2014. CP 19, 51. Prior to trial, the trial court entered orders dismissing certain claims. CP 6-18. At an eight-day trial in August 2016, the Yankees presented evidence and testimony to support their remaining claims against Group Health and Overlake; the jury found the defendants were not negligent and the trial court entered judgments in favor of Group Health and Overlake on the jury's verdict. CP 19-24.

In September 2017, acting pro se, the Yankees filed a CR 60(b) motion to vacate the pre-trial dismissal orders as well as the judgments based on the jury's verdict. CP 28-29, 34. The trial court denied the motion to vacate. CP 155-162. The Court of Appeals affirmed because the Yankees' decision to litigate certain claims and not others could not be revisited in a CR 60(b) proceeding. *Slip Op. at* 4-6.

Although the Yankees frame their arguments before this Court in terms of trial court error and fraud or misrepresentation that they attribute to Dr. Pierre-Jerome at the time he performed the intra-arterial procedure, the essence of their petition is that their "entire case would have been handled differently" had they known and understood certain factual matters and legal principles about which their *attorney* "kept [them] in the dark." *See, e.g.,* Petition at 10, 17. But, their dissatisfaction with their attorney's choices and performance at trial does not provide grounds for review of the Court of Appeals' proper decision affirming the trial court's exercise of discretion in denying their CR 60(b) motion.

B. Relevant Factual and Procedural Background

On October 31, 2010, Dr. Timothy Scearce, a neurologist employed by Group Health, and Dr. Frantz Pierre-Jerome, an interventional radiologist employed by Overlake Imaging Associates, provided medical care to Helen Yankee at Overlake Hospital. *Slip Op. at* 2; CP 50-51. Dr.

Scearce diagnosed a stroke and discussed possible treatment options with Mrs. Yankee, her husband, David Yankee, and her daughter, Robyn Brodigan. CP 51. After both Dr. Scearce and Dr. Pierre-Jerome discussed the procedure with them, the Yankees elected to proceed with an intra-arterial thrombectomy. *Id.* Dr. Pierre-Jerome performed the procedure, that was, unfortunately, not successful. *Id.*

From the initiation of their lawsuit in October 2014 through the entry of judgment on the jury's verdict in favor of Group Health and Overlake in September 2016, the Yankees were represented by their attorney, Karl Malling. *See, e.g.*, CP 7, 12, 15, 18, 19, 23, 76. Mr. Malling responded to Overlake's discovery request with documentation indicating that Dr. Pierre-Jerome's specialty is interventional radiology; identified both a neurologist and an interventional radiologist as experts (indicating that he knew the difference); elected not to depose Dr. Pierre-Jerome prior to trial; agreed to motions to exclude evidence relevant only to dismissed claims; and presented expert testimony at trial that did not suggest that a neurosurgeon was required to perform or oversee any intra-arterial procedure. CP 52, 71-72, 78. Nothing in the record suggests that Mr. Malling was not authorized to act on behalf of the Yankees at any time before entry of the jury's verdict. *Id.*; *see also* CP 51-53.

In their CR 60(b) motion, the Yankees did not claim or provide any

evidence to suggest that Overlake, or any other defendant, made any misrepresentation or committed any fraud during discovery, prior to trial, or during trial that prevented their attorney from obtaining any relevant factual information, asserting any legal claim, or presenting any evidence at trial. Similarly, the Yankees did not argue before the Court of Appeals that any action by any defendant induced their attorney to make any strategic decision.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Under RAP 13.4(b), a petition for review will be accepted *only*:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, the Yankees do not identify grounds for seeking review under RAP 13.4(b). And, nothing in their petition suggests that review would be appropriate under any of those four limited grounds.

A. The Yankees' dissatisfaction with their attorney's performance prior to and during trial does not justify review of the Court of Appeals decision affirming denial of their CR 60(b) motion.

Generally, if a party has designated an attorney to appear on his or her behalf, that attorney's acts are binding on the client. *Haller v. Wallis*,

89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002). "The attorney's knowledge is deemed to be the client's knowledge," and the parties and the court are entitled to rely on the attorney's authority until they receive notice that the client has discharged the attorney. *Haller*, 89 Wn.2d at 547.

Where an attorney is authorized to appear and his subsequent actions are "not induced by the fraud of the adverse party," a client who "did not really give his consent" is bound "at law and in equity" and his only "remedy is against his counsel." *Haller*, 89 Wn.2d at 547 (quoting 3E. Tuttle, *A Treatise of the Law of Judgments* § 1252, at 2608 (5th ed. rev. 1925)). Where there is no evidence that an attorney's negligence was brought about by fraud on the part of any opposing party, the opposing parties "should not be penalized for the quality of representation provided by an attorney" who was "voluntarily selected" and authorized to appear as the legal representative of his client. *Lane v. Brown & Haley*, 81 Wn. App. 102, 108, 912 P.2d 1040 (1996). An attorney's "mistake or negligence does not provide an equitable basis for relief for the client." *Id*. at 109.

Here, the Yankees never disputed that they authorized Mr. Malling to appear on their behalf, investigate their claims, draft a complaint, engage in discovery, hire experts, present briefing and argument to the court, and

present their case to the jury at trial. The trial court and the defendants were therefore entitled to rely on Mr. Malling's authority to litigate the case for the Yankees. *Haller*, 89 Wn.2d at 547. In their CR 60(b) motion, the Yankees did not claim or present any evidence to suggest that any defendant in any way contributed to or induced any negligent act or omission on Mr. Malling's part by fraud. Thus, to the extent the Yankees are dissatisfied with their attorney's provision of professional legal services, their only remedy is a cause of action against their attorney for legal malpractice. *Haller*, 89 Wn.2d at 547.

B. Overlake joins in their Co-Respondent's arguments.

Overlake adopts by reference all arguments made by Co-Respondents in their separate Answers to the Yankees' Petition for Review. The Yankees' Petition does not state any proper ground for review under RAP 13.4(b). And, the Court of Appeals applied the correct standard of review and properly affirmed the trial court's denial of their CR 60(b) motion.

VI. CONCLUSION

For all these reasons, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 6th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 6th day of May, 2019, I caused a true and correct copy of the foregoing document, "Respondents' Overlake Hospital Medical Center's Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 6th day of May, 2019, at Seattle, Washington.

s/Carrie A. Custer
Carrie A. Custer, Legal Assistant

FAVROS LAW

May 06, 2019 - 12:07 PM

Transmittal Information

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