71320-5

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No. 71320-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JULIA KAHUBIRE MITCHELL,

Appellant,

vs.

RANDOLPH B. BOURNE, M.D.,

Respondent.

RESPONDENT RANDOLPH BOURNE, M.D.'S RESPONSE BRIEF

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I. INTRODUCTION

When construing all facts in a light most favorable to Appellant Julia Mitchell, the trial court properly dismissed this medical malpractice case on summary judgment because 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.

The alleged malpractice occurred on October 21, 2008; Mitchell filed her complaint *almost five years later*, on September 5, 2013. Mitchell's complaint states that she filed an administrative complaint with the Department of Health, Medical Quality Assurance Commission in August 2011. Mitchell's administrative complaint explains in detail why she believes Respondent Randolph Bourne, M.D. was negligent, and how his alleged negligence caused her injuries. Having exercised due diligence and fully "discovered" the elements of her cause of action no later than August 2011, she nevertheless waited until September 5, 2013 to file her lawsuit—well past the one-year deadline. Under *de novo* review, the trial court's summary judgment dismissal should be affirmed.

II. RESTATEMENT OF THE ISSUES ON APPEAL

1. Medical malpractice lawsuits must be commenced within three years of the alleged negligence. Ms. Mitchell filed suit almost five years following Dr. Bourne's care. Did the trial court properly grant summary judgment dismissal of Ms. Mitchell's claim because it was filed past the three-year statute of limitations?

2. Tolling of the statute of limitations may occur upon proof of intentional concealment; however, once a plaintiff has *actual* knowledge he or she has one year to commence a civil action. Ms. Mitchell knew the facts of this case no later than August 2011, but filed her complaint almost two years later, on September 13, 2013. Did the trial court properly grant summary judgment dismissal of Ms. Mitchell's claim because it was filed well past the one-year tolling period?

III. RESTATEMENT OF THE CASE

A. Restatement of Pertinent Facts

Appellant Julia Kahubire Mitchell, RN, then 41, became pregnant in September 2008. (CP 85) Shortly thereafter she began experiencing vaginal bleeding and sought obstetrical care at Sound Women's Care. (CP 85) Jeffrey Bray, M.D. was concerned that Ms. Mitchell's pregnancy was

unsustainable. (CP 85) She underwent three ultrasounds prior to October 20, all of which failed to show evidence of a yolk sac or fetal pole. (CP 85; CP 51-52 (October 6 ultrasound); CP 53-54 (October 10 ultrasound); CP 56-57 (October 17 ultrasound)) On October 17, the radiologist interpreting Ms. Mitchell's third ultrasound suspected a blighted ovum (early pregnancy failure). (CP 56-57) Each radiology report indicated that Ms. Mitchell had a large complex mass on her right ovary and a simple cyst on the left adnexa. (CP 51-52; CP 53-54; CP 56-57)

On October 21, 2008, Ms. Mitchell consented to undergo a dilation and curettage of the failed pregnancy, laparoscopy, and possible salpingectomy at Stevens Hospital. (CP 6) The Consent Form states, in relevant part, as follows:

> 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 6) Ms. Mitchell signed the Consent Form (subsequently redacted

to protect the patient's privacy during the administrative proceeding before the Commission of Medical Quality Assurance).

Respondent Randolph Bourne, M.D., performed the surgery. Dr. Bourne removed the failed pregnancy and the patient's right ovary, which had a large teratoma (also known as a "dermoid" cyst, which is an encapsulated tumor with organ and tissue components). (CP 7) 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 44) Dr. Bray "discussed this in detail with the patient." (CP 44)

After the surgery, Ms. Mitchell, a nurse at Stevens Hospital, obtained her medical records. (CP 88) Upon reviewing the records, she noted that her fourth ultrasound taken on October 20, 2008 was missing. (CP 88) She inquired at the radiology department and a receptionist gave her a copy of the ultrasound report dated October 20, 2008. (CP 88) The report indicated that Ms. Mitchell had a uterine pregnancy with a visible yolk sac.[1] (CP 60; CP 88)

On August 11, 2011, Ms. Mitchell filed a detailed narrative complaint against Dr. Bourne with the Department of Health Medical Quality Assurance

[1] 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. However, Dr. Bourne believes she obtained the report much earlier than that.

Commission (MQAC).[2] (CP 85-89) Her Superior Court complaint designates "August 2011" as the start of the Department of Health's investigation, triggered by her filing an administrative complaint. (CP 100)

Her August 2011 administrative complaint details the findings of her three ultrasounds, followed by the fourth, October 20 ultrasound; her surgery; and her post-operative treatment. (CP 85-88) Ms. Mitchell's August 2011 administrative complaint explains that she believes Dr. Bourne "was negligent in treating me." (CP 88) Ms. Mitchell explains that Dr. Bourne was negligent because he allegedly did not fully disclose the information and findings contained in the October 20 ultrasound, namely that there was a visible yolk sac. (CP 88) She also complained that she had not consented to terminating a pregnancy and removing her right ovary. (CP 88)

MQAC solicited Dr. Bourne's response to Ms. Mitchell's administrative complaint. (CP 41-42; CP 38-40) On January 12, 2012, Dr. Bourne responded as follows:

> The patient claims that she did not consent to removal of her right ovary, but removal of the right ovary became necessary as Dr. Bourne excised the cystic teratoma. During

[2] Dr. Bourne did not learn of the MQAC investigation until October 2011. However, the administrative complaint that he received indicates that Ms. Mitchell filed the MQAC complaint in August 2011.

what he believed to be a laparoscopy for a probable ectopic pregnancy, Dr. Bourne discovered the almost six-centimeter cystic teratoma. The standard of care requires that a teratoma be removed when found, and this was a particularly large abnormality that could turn malignant and posed an imminent risk of ovarian torsion. Ovarian torsion occurs when an ovary "flips" on its blood supply and gets stuck in this position, causing the blood flow to and from the ovary to become compromised. Torsion of this kind of mass would lead to severe pelvic pain, possible ovarian death and probable emergency surgery in the future. (CP 38)

Dr. Bourne also explained that he:

> attempted to remove the teratoma separately from the ovary. Unfortunately, as is often the case, the way 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 letter, she consented to general anesthesia), and

exposing her to the risk of a second procedure. In addition, the patient had already 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 38; quoting CP 6)

Further, Dr. Bourne responded that:

> The patient claims she did not consent to terminate a uterine pregnancy, but the patient did in fact consent to termination of an abnormal pregnancy. On October 17, 2008, Dr. Bourne's partner, Dr. Rogers, spoke at length with the patient about her elevated hCG levels. They also discussed that, while the pregnancy might or might not be an ectopic pregnancy, it was clearly not a normal intrauterine pregnancy. Even if the yolk sac was present, an eight-week pregnancy with a hCG of almost 60,000 is not a normal pregnancy, and

most likely would have resulted in an "anembryonic gestation." This type of pregnancy is one in which the pregnancy begins, but for whatever reason, usually related to chromosomal abnormality, stops growing prior to the formation of a discernable embryo. This will inevitably lead to a miscarriage. (CP 38-39)

Finally, Dr. Bourne addressed Ms. Mitchell's allegation that he:

> sent the "uterine tissue" to pathology indicating that it was an ectopic pregnancy, when it was actually obtained from the uterus. Ostensibly this was mentioned in an attempt to show that Dr. Bourne tried to "cover up" his decisions and actions during the operation. However, the gross description in the surgical pathology report states, "Received in formalin, labeled "Kahubire, Julia K" and designated "retained products of conception." This description does not describe tissues from an ectopic pregnancy, and Dr. Bourne did not mischaracterize the tissues. (CP 39)

MQAC completed its investigation, and signed its Statement of Allegations and Summary of Evidence on July 20, 2012 (CP 106), then filed

it with the adjudicative clerk on August 27, 2012. (CP 103) In late August 2012, MQAC and Dr. Bourne entered into a Stipulation to Informal Disposition. (CP 109-15)

On August 29, 2012, Ms. Mitchell filed a written Public Disclosure Request for records related to the MQAC investigation. (CP 9) On November 20, 2012, the Department of Health released its complete file to Ms. Mitchell (redacting patient privacy information). (CP 9, attaching the "case file" in PDF format).

B. Procedural History

Ms. Mitchell filed her medical malpractice lawsuit in Snohomish County Superior Court on September 5, 2013. (CP 116-20) She filed her Amended Complaint to correct a date in paragraph 12 of her complaint on September 19, 2013. (CP 97-101) She alleged negligence; lack of informed consent; and fraudulent concealment. (CP 101) Dr. Bourne answered the complaint and asserted the statute of limitations as an affirmative defense. (CP 77-79)

On October 23, 2013, Dr. Bourne filed a motion for summary judgment dismissal based on the expiration of the three-year statute of limitations for medical malpractice, and the expiration of the one-year statute

of limitations for "actual knowledge" of a claim in the case of intentional concealment. (CP 90-95)

On November 26, 2013, Judge Janice Ellis dismissed Ms. Mitchell's lawsuit against Dr. Bourne. (CP 4-5) Ms. Mitchell filed a Notice of Appeal on December 24, 2013. (CP 1-5)

IV. LEGAL ARGUMENT

A. The Standard of Review Is De Novo.

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party (here, Respondent Dr. Bourne) is entitled to summary judgment as a matter of law, and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); *Green v. A.P.C.,* 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 49 Wn. App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988).

Likewise, a nonmoving party (Ms. Mitchell) attempting to resist a summary judgment "may not rely on speculation, argumentative assertions

that unresolved factual matters remain," rather "the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987). Summary judgment is proper where, after considering the evidence and all reasonable inferences therefrom, reasonable persons could reach but one conclusion. *Turngren v. King Cnty.*, 104 Wn.2d 293, 705 P.2d 258 (1985).

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. Ms. Mitchell's Claim Was Properly Dismissed Because She Did Not File Suit Within Three Years of Her Alleged Injury.

The statute of limitations applicable to medical malpractice lawsuits is found at RCW 4.16.350. The statute explicitly states that actions based on medical 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 . . . discovered or reasonably should have discovered that the injury or condition was caused by said act.

RCW 4.16.350(3).[3] This statute allows plaintiffs to file suit three years after the last negligent act or one year after discovery of the negligence "whichever period expires later." *Id.*; *see also Caughell v. Grp. Health Coop. of Puget Sound*, 124 Wn.2d 217, 237 n.6, 876 P.2d 898 (1994).

"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); *Caughell*, 124 Wn.2d 229, 237 n.6. Here, Dr. Bourne's alleged negligence occurred when he performed surgery on Ms. Mitchell on October 21, 2008. The statute of limitations expired on October 21, 2011, and dismissal of any action brought after this date was proper and mandatory under the statute. *See* RCW 4.16.350(3).

The so-called "discovery rule" of RCW 4.16.350(3) does not need to be considered when an action is commenced within the three-year statute of limitations. *See Unruh,* 172 Wn. 2d at 107. However, for cases that are not timely filed a plaintiff may rely on the discovery rule, which requires that an action be brought within one year of the patient discovering that the injury was caused by the action of a medical provider. *See* RCW 4.16.350(3). 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

[3] RCW 4.16.350 has been revised since 2008, however, subparagraph three has remained

206, 217, 18 P.3d 579 (2001). Here, the "discovery rule" does not apply since Ms. Mitchell had knowledge of the allegedly negligent conduct of Dr. Bourne.

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 knew 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 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 88)

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 9; CP 100) However, the "key consideration under the discovery rule is the factual, not the legal, basis for the cause of action.

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unchanged.

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). Here, Ms. Mitchell clearly had factual knowledge of the facts giving rise to this lawsuit when she filed her 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.

Finally, Ms. Mitchell states that she and her partner "did not learn that it was a normal pregnancy until the Department of Health notified them in a three hundred page (redacted) investigative report on November 20, 2012." (*See* Appellant's Opening Brief at 8) First the "report" is five pages—not 300. (CP 103-06) Second, the word "normal" appears *nowhere* in the "report." (CP 103-06) In fact, the word "abnormal" appears three times. Additionally, Ms. Mitchell admits in her August 2011, letter 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 88) Accordingly, she

"discovered" her alleged injury no later than August 2011—not November 20, 2012.

C. 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, Ms. Mitchell she learned of its findings. There is no evidence that Dr. Bourne intentionally tried to "hide" or "conceal" the October 20 ultrasound. 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.

Dr. Bourne did not "deliberately conceal" any information from the

plaintiff.[4] Ms. Mitchell successfully obtained her medical records and radiology reports, reviewed them, then filed an administrative complaint with MQAC in August 2011. (CP 88) Ms. Mitchell's August 2011 letter 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 88) Ms. Mitchell's contention that Dr. Bourne fraudulently concealed information lacks merit.

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." This is not an admission of "fraud" as Ms. Mitchell contends. (*See* Appellant's Opening Brief at 4; CP 77) It is an admission of a statement of fact. Dr. Bourne never tried to "cover up" his decisions and actions during the operation. The gross description in the surgical pathology report states, "Received in formalin, labeled "Kahubire, Julia K" and designated "retained products of conception." This description does not describe tissues from an ectopic pregnancy, and Dr. Bourne did not mischaracterize the tissues.

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[4] 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. *Complaint* ¶11.

By August 2011, when Ms. Mitchell filed her MQAC complaint, she had actual knowledge that prior to her October 21 surgery there was an ultrasound report indicating that she was carrying a uterine pregnancy with a yolk sac. (CP 88) Once she had actual knowledge, Ms. Mitchell had one year to commence civil proceedings. Even in that circumstance, the statute expired in August 2012.

Ms. Mitchell contends 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.")

D. Ms. Mitchell Provided Her Informed Consent.

Ms. Mitchell contends that she did not consent to Dr. Bourne removing her ovary or cyst. (*See* Opening Brief at 8) 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 38; quoting CP 6)

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.

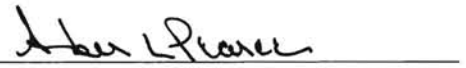
V. CONCLUSION

Based on the foregoing, Respondent Dr. Bourne respectfully requests that

the Court of Appeals affirm the trial court's summary judgment dismissal of Ms. Mitchell's civil complaint based on the expiration of the statute of limitations.

Respectfully submitted this 7th day of April, 2014.

FLOYD, PFLUEGER & RINGER, P.S.



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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 7th day of April, 2014, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

Julia Kahubire Mitchell
P.O. Box 1913
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Linnea Butler
Legal Assistant