97058-1

Washington State Supreme Court

David Earl Yankee and Helen Yankee, as individuals and as a part of the marital community comprised thereof,

Appellants,

v.

Frantz Pierre Jerome, M.D., and "Jane Doe" Jerome-Pierre, husband and wife, as individuals and as part of the marital community comprised thereof; Group Health Cooperative, a Washington corporation; and Overlake Hospital Medical Center, a Washington corporation,

Respondents.

Petition For Discretionary Review

of

Washington State Appellate Court, Division One
Case No. 77544-8-1

of

King County Superior Court
Case No. 14-2-29568-5SEA

David and Helen Yankee
5109 S. 163rd Pl.
Tukwila, WA 98188

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Review of Court of Appeals, Division One, Case no. 77544-8-1
of
King County Superior Court No. 14-2-29568-5SEA

David Yankee, hereby petitions the Washington State Supreme Court for discretionary review of the decision of the Appellate Court, entered March 11, 2019, affirming the decision of the King County Superior Court, denying our motion to vacate entered on September 28, 2017.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The court erred by not finding fraud as grounds to vacate under CR 60(b)(4).

Issues pertaining to assignment of error no. 1

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1. Did Dr. Pierre-Jerome's nondisclosure that he is not a neurosurgeon constitute fraud, having a material effect on the motions and orders for summary judgment and the trial court proceedings?

Assignment of Error No. 2

The court erred by not finding an extraordinary circumstance to vacate under CR 60(b)(11), specifically "And, having reviewed everything, the Court finds very clearly that the information given to this court by the plaintiffs do [does] not give rise to a motion to vacate under CR 60(b)11, extraordinary circumstances. Which is what would have to be proven in this case." VRP at 24, lines 6 -11.

Issues pertaining to assignment of error no. 2

1. Is medical treatment by an unqualified physician resulting in paralysis an extraordinary circumstance, constituting grounds for relief under CR 60(b)(11)?

Assignment of Error No. 3

The court erred by not finding the medical providers liable for the conduct of the physicians in this case.

Issues pertaining to assignment of error no. 3

1. Should Overlake Hospital and Group Health be liable for the tortuous conduct of Dr. Jerome-Pierre, Dr. Bronstein, and Dr. Timothy Scearce as well as the doctors individually, knowing Dr. Jerome-Pierre was

not qualified to perform the intra-arterial procedure, but allowed him to do so?

Assignment of Error No. 4

The court erred by dismissing the issue of informed consent at the motion to vacate presentation, just as the court did prior to trial on summary judgment, and motion to amend the complaint, resulting in taking the issue of informed consent from the jury. VRP at pp.10 – 11

Issues pertaining to assignment of error no. 4

1. Was dismissing the issue of informed consent a manifest error, affecting a constitutional right of the plaintiffs?

2. Was the issue of informed consent relevant to the determination of the case?

STATEMENT OF THE CASE

On September 28, 2017, I, David Earl Yankee, and my wife, Helen Yankee, motioned for an order to vacate the orders, entered on June 5, 2015, dismissing Dr. Timothy Scearce; August 17, 2015, dismissing Dr. Jerome Pierre; August 18, 2015, granting partial summary judgment to Group Health; August 28, 2015, granting partial summary judgment against Dr. Timothy Scearce; June 17, 2016, granting summary judgment to dismiss corporate negligence claims against Group Health, and the judgments entered September 6, 2016, for Overlake Hospital and Group Health in the

above entitled action. CP 28-38 Our motion was based on fraud of the defendants, who misrepresented material facts to my wife, Helen Yankee, and to me, her husband, David Yankee. My wife is still paralyzed due to the negligent medical conduct while in the care of these physicians, performing services for my wife without informed consent, as required by law. Accordingly, we requested to vacate all judgments entered on the above dates, dismissing the physicians who provided care to my dear wife, including Dr. Bronstein, of Overlake Hospital; Dr. Timothy Scearce, of Group Health; and Dr. Jerome-Pierre, of Overlake Hospital. We sought vacation of all the judgments of record entered on the above dates, dismissing Overlake Hospital and Group Health from liability, since a health care provider may be liable for the torts of its doctors committed within the scope of their employment or agency. CR 60(b)(4) provides an order or final judgment may be vacated due to fraud, misrepresentation, or other misconduct of an adverse party. Our motion was also based on CR 60(b)(11), allowing the court to relieve a party from the operation of a judgment for any reason justifying relief. In addition, the basis for our motion included CR 60(c), under which the court may entertain an independent action to relieve a party from a judgment, order, or proceeding.

Therefore, we requested the judgments entered on the above dates be vacated and that an independent action of fraud and negligent misconduct against the defendants be entertained by the court.

On October 31, 2010, my wife, Helen Yankee was admitted to Overlake Hospital Medical Center for stroke symptoms. Mrs. Yankee was seen by Dr. Bronstein and Dr. Scearce. While in the care of the doctors at Overlake for an hour and a half, Dr. Bronstein and Dr. Scearce did not perform an IV tPA, which is the FDA recommended procedure for stroke patients during the first three-hours of having a stroke, so the possibility of a better outcome elapsed. Finally, Dr. Frantz Jerome-Pierre, M.D., of Overlake Hospital Medical Center performed an intra-arterial procedure on Helen Yankee without being a board certified neuro-interventional radiologist, as required for treatments going to the brain, and without informing Mrs Yankee and her husband he was not qualified to do so. A dissection of her carotid artery occurred during the procedure. No informed consent was signed by Helen Yankee or her husband David Yankee.

ARGUMENT

Assignment of Error No. 1

The court erred by not finding fraud as grounds to vacate under CR 60(b)(4).

Issues pertaining to assignment of error no. 1

1. Did Dr. Pierre-Jerome's nondisclosure that he is not a neurosurgeon constitute fraud, having a material effect on the motions and orders for summary judgment and the trial court proceedings?

A material fact is one that affects the outcome of the litigation. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2nd 853, 861, 93 P.3d 108 (2004). The appellate court found the allegation that Dr. Pierre-Jerome did not discuss his qualifications prior to obtaining consent for the procedure had no bearing on the judgments in favor of the defendants. This finding is shocking and erroneous. Had we known Dr. Pierre-Jerome was not a neurosurgeon our entire case would have been handled differently, including our complaint, summary judgments, dismissals, and timely appeals, since if he was not a neurosurgeon, it would have been a genuine material fact, precluding summary judgment, so it was fraud in the proceedings.

Therefore, it is error to find the nondisclosure of this material fact did not have a bearing on the summary judgments in favor of the defendants.

CR 60(b)(4) provides an order or final judgment may be vacated due to fraud, misrepresentation, or other misconduct of an adverse party. The appellate court found we were aware of Dr. Pierre-Jerome's qualifications. Despite the finding, this is not true. We were not aware that Dr. Pierre-Jerome was not a neurosurgeon. I contended in my motion to vacate that

Dr. Pierre-Jerome was not qualified to perform IV tPA merci procedure, since it requires going to the brain, and he is not a neurosurgeon. However, Dr. Pierre-Jerome finally admitted in his response to our motion to vacate his credentials and privileges at Overlake Hospital, so he brought his credentials into material evidence, which were material omissions at the trial court. CP 112-113 Overlake admits Dr. Pierre-Jerome was not a neurosurgeon and not part of the stroke team. Dr. Pierre-Jerome attempts to qualify himself by stating numerous procedures he has been allowed to perform at Overlake but none of them allow him to go the brain, as he did for my wife in performing the merci procedure. CP 113 Dr. Pierre-Jerome states he has practiced at Overlake since 1999, thereby holding himself out as an employee for eighteen years at the time of his declaration. CP 113:1 Dr. Pierre-Jerome further claims he is privileged at Overlake to perform radiology as an interventional radiologist, including neuroangiography, percutaneous transluminal angioplasty, and embolus therapy. CP 113:22-26 However, these privileges do not allow going to the brain, since that would require neurosurgeon credentials. He also claims to be on staff at Overlake as a radiologist. CP 116-117 Dr. Pierre-Jerome further claims he started the stroke program at Overlake with three of his radiology partners. CP 113:1-3 He further claimed that Board certification in radiology is sufficient to obtain hospital privileges to perform cerebral angiography at Overlake. Dr.

Pierre-Jerome claims a physician need not be a board certified neurointerventional radiologist to perform cerebral angiography at Overlake. Essentially, Dr. Pierre-Jerome claims Overlake allows him to perform procedures going to the brain that ordinarily would require a neurosurgeon. CP 113:6-9 Dr. Pierre-Jerome claims in all these privileges, he is authorized by Overlake, thus, making him the agent of Overlake. Overlake contends Dr. Pierre-Jerome has never been an employee at Overlake. Consequently, his misrepresentation of his credentials and his employment was misleading during litigation and is manifest on appeal, and constitutes grounds for vacation under CR 60(b)(4).

Therefore, the misrepresentation of his credentials were relevant to his liability and all the proceedings in our case, thereby constituting misrepresentation and fraud under CR 60(b)(4), and grounds to vacate.

2. Was the fact that Dr. Pierre-Jerome was not a neurosurgeon relevant to the care of Helen Yankee?

Evidence is relevant if it has any tendency in law or in fact to prove or disprove a fact that is of consequence to the determination of the action. If a neurosurgeon was required for my wife's procedure, then the fact that Dr. Pierre-Jerome was not a neurosurgeon is relevant to the determination of our case. The appellate court held the credentials of Dr. Pierre-Jerome had no bearing on the outcome of the case. This ruling just confirms the

credentials were unknown to us. For had they been discovered they would have been litigated in all proceedings. Usually the statute of limitations on fraud does not begin to run until the plaintiff has discovered the fraud. At trial, even Elizabeth Leedom, the attorney for Dr. Pierre-Jerome, stated in her motion for summary judgment, Dr.Pierre-Jerome was an interventional radiologist, perhaps unaware a board certified neuro-interventional radiologist was required to perform an intra-arterial procedure. Traditionally, the fraud discovery rule has been applied in cases where the defendant fraudulently conceals a material fact from the plaintiff and thereby deprives the plaintiff of the knowledge of accrual of the cause of action. Application of the discovery rule tolls the limitation period until such time as the plaintiff knew or, through the exercise of due diligence, should have known of the fraud. *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 163 (1997).

The appellate court found that we knew Dr. Pierre-Jerome's credentials because they are published on Overlake's website. However, when a person goes to the hospital for emergency stroke services, researching websites for physician credentials is not possible by the patient. I was concerned for my wife. The hospital has a duty to qualify the physicians they allow to perform services, and the physicians have a duty to perform services they know they are qualified to perform. The emergency

patient is not the gatekeeper of physician credentials. It's not clear to a lay person exactly what kind of doctor is necessary for a particular service, nor is the meaning clear of any particular doctor's credentials. Specifically, in the case of Dr. Pierre-Jerome, who has many credentials but is not a neurosurgeon. It's confusing for a lay person to know the scope of the credentials, even if they are published.. That's why a person relies on the hospital. It's not as easy as a few clicks on a hospital website to know the credentials of any particular doctor are sufficient for your care in an emergency. When my wife had her stroke I was focused only on her. I did not have the leisure to conduct medical research of physician credentials under those circumstances. It was unimaginable to me that Overlake would allow a doctor, like Dr. Pierre-Jerome, to perform neurosurgery if he was not a neurosurgeon. We did not discover that Dr. Pierre-Jerome was not a neurosurgeon before my wife was treated for her stroke or at any time during trial. We did not discover that he was not a neurosurgeon until nearly a year after our case was dismissed. Dr. Pierre- Jerome was merely an interventional radiologist or diagnostic radiologist. CP at 45 Overlake Hospital Medical Clinic Roster shows Dr. Pierre-Jerome was an interventional radiologist. Consequently, the qualifications of Dr. Pierre-Jerome were relevant to the just determination of our case in all respects, but were concealed from us for obvious reasons.

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To quote Mr. Larson for Group Health when contesting Dr. Pergolizzi's credentials "...he's not an Interventional Neurologist. And, that matters when you're trying to establish the Standard of Care of a Neurologist in Washington State. He's an Interventional, or he's an Interventional Radiologist. It doesn't say he's a Board Certified Neurologist. That distinction matters". VRP dated August 18, 2015, at 19, lines 1-8. The same standard applies to Dr. Pierre-Jerome. It's not an issue of a qualified physician's lack of experience as in *Whiteside v. Ludson*, it's whether the physician is qualified to perform the procedure in the first place. 89 Wn. App. 109, 112, 947 P.2d 1263 (1997) Dr. Pierre-Jerome was not qualified. This makes the credentials of Dr. Pierre-Jerome relevant in all respects of our case, so they should have been admitted and argued before the jury. Dr. Pierre-Jerome was dismissed from the case on summary judgment prior to the trial.

Dr. Parsons states that Dr. Pierre-Jerome was "posing" as a Neurosurgeon because he was not a board certified neuro interventional radiologist CP at 43 These facts were withheld from us and never discovered during the trial or raised before the court. The hospital administrator has the physician records showing which physicians are qualified to perform certain procedures, so it is not an issue of requiring expert testimony to prove it.

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Nevertheless, Dr. Pierre-Jerome remains welded to his misrepresentation, still contending he was qualified, even though not a neurosurgeon. Dr. Frantz Jerome-Pierre's credentials were attached to our motion to vacate, evidencing he is not a board neuro-interventional radiologist. The court on September 28, 2017, disregarded this evidence. CP at 45. We contended Dr. Pierre-Jerome failed to disclose he was not a neuro-interventional radiologist, as is required for intra-arterial I.A./merci procedure to the brain.

The elements of fraud were discussed in our motion to vacate and appellate brief and are incorporated herein by this reference as grounds to vacate the order entered by the court on September 6, 2016, under CR 60(b)(4).

Assignment of Error No. 2

The court erred by not finding an extraordinary circumstance to vacate under CR 60(b)(11), specifically "And, having reviewed everything, the Court finds very clearly that the information given to this court by the plaintiffs do [does] not give rise to a motion to vacate under CR 60(b)11, extraordinary circumstances. Which is what would have to be proven in this case." VRP at 24, lines 6 -11.

Issues pertaining to assignment of error no. 2

1. Is medical treatment by an unqualified physician resulting in paralysis an extraordinary circumstance, constituting grounds for relief under CR 60(b)(11)?

The nature of the conduct involving an unqualified physician (Dr. Jerome-Pierre) performing an intra-arterial procedure to the brain, within Overlake Hospital is conscience shocking, thereby constituting a reason justifying relief under CR 60(b)(11) as an extraordinary circumstance. It is an abuse of discretion to hold otherwise. Perhaps more shocking is that the court would not consider this as satisfying the element of an extraordinary circumstance under CR 60(b)(11). In essence, the denial of the motion to vacate says, it is not an extraordinary circumstance for patients to be ignorantly treated by unqualified physicians who misrepresent their credentials and suffer paralysis from their malpractice as a result. On the contrary. It is not ordinary according to a reasonably prudent person standard for a doctor to perform neurosurgical procedures if he or she is not a neurosurgeon. In this regard, the trial court and appellate court ruling should shock the people of the state of the Washington and throughout the United States.

Therefore, it was an abuse of discretion for the court to deny the motion to vacate under CR 60(b)(11), since it is an extraordinary circumstance.

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Assignment of Error No. 3

The court erred by not finding the medical providers liable for the conduct of the physicians in this case.

Issues pertaining to assignment of error no. 3

1. Should Overlake Hospital and Group Health be liable for the tortuous conduct of Dr. Jerome-Pierre, Dr. Bronstein, and Dr. Timothy Scearce as well as the doctors individually, knowing Dr. Jerome-Pierre was not qualified to perform the intra-arterial procedure, but allowed him to do so?

The numerous judgments specified in relief must be vacated because the physicians and their employers are liable as a matter of law for tortuous conduct committed within the scope of their employment, resulting in injuries to their patients. A health care provider is liable for the tortuous conduct committed by its employees within the scope of their employment.

Dr. Jerome-Pierre and Dr. Bronstein were practicing medicine within the scope of their employment at Overlake Hospital when they treated Helen Yankee, therefore, Overlake Hospital may be held liable for the resulting injuries to Mrs. Yankee while in their care. Likewise, Group Health may be held liable for tortuous conduct of Dr. Scearce, since he was practicing medicine within the scope of his employment at Group Health when he treated Helen Yankee. All three doctors knew or should have

known a IV tPA should be ordered within the three hour window of stroke symptoms, but did did not order the procedure. Dr. Jerome-Pierre's conduct was particularly shocking in posing as a neurosurgeon and performing an intra-arterial procedure himself personally without having a neuro-interventional radiology board certification, as required for going to the brain. Mrs. Yankee now spends her life in a wheel chair.

Therefore, all three doctors are implicated together with their employers for the injuries caused to Mrs. Yankee on October 31, 2010, while in their care.

Assignment of Error No. 4

The court erred by dismissing the issue of informed consent at the motion to vacate presentation, just as the court did prior to trial on summary judgment, and motion to amend the complaint, resulting in taking the issue of informed consent from the jury. VRP at pp.10 – 11

Issues pertaining to assignment of error no. 4

1. Was dismissing the issue of informed consent a manifest error, affecting a constitutional right of the plaintiffs?

2. Was the issue of informed consent relevant to the determination of the case?

Written informed consent is the law of the state, which cannot be stipulated away by an attorney. At the motion to vacate, the court stated the

issue of informed consent was dismissed on summary judgment. VRP at 10-11 However, it was a stipulated summary judgment, for my wife was and is still suffering from her stroke, so she did not have the capacity to consent to dismissing the informed consent claim, which I contend was a violation of her fundamental constitutional right to trial by jury of her primary claim for relief. *see Quesnell, infra*

In re *Quesnell*, 83 Wn.2d 224, 240-43, 517 P.2d 568 (1973) the court held that "the right to trial by jury in civil proceedings is fundamental and may not be waived by a guardian ad litem of a person charged with being mentally ill. The person charged must give his own knowing consent to a waiver of jury trial." *In Graves v. P. J. Taggares Co.*, 25 Wn. App. 118, 605 P.2d 348 (1980), the court cited *Quesnell*, stating "We recognize that, *in re Quesnell*, supra, although a civil case, nonetheless involved the deprivation of liberty." At the time of the dismissal, my wife was and is still suffering from her stroke, she did not have the capacity to consent to a dismissal, neither was a dismissal of our informed consent claim explained to us by our attorney.

In *Morgan v. Burks*, 17 Wn.App. 193, 563 P.2d 1260 (1977) vacation under CR 60 was proper where a dismissal order of their claim resulted from serious misunderstandings between attorney and client, as the result of which the Morgans did not in fact, authorize their attorneys to

bind them to the settlement and dismissal; nor did they give their informed consent thereto. This is reason enough to vacate the dismissal order under CR 60. *Kelly v. Belcher*, 155 W. Va. 757,187 S.E.2d 617, 626 (1972); *Robinson v. Hiles*, 119 Cal. App.2d 666, 260 P.2d 194, 196 (1953)

Here, in a nutshell, our case is very similar to *Morgan*, our attorney stipulated to the dismissal of our informed consent claim without us understanding the legal ramifications of our decision, much less, obtaining our consent. I contend, our trial was a pretense because our primary claim for relief was stipulated away by our attorney. My wife was not mentally competent to understand a stipulation to dismiss our claim of informed consent. Essentially, our attorney stipulated away our case before the jury. As the court said in *Graves* and *Morgan*, there are certain rights that an attorney cannot stipulate on behalf of his clients without depriving them of their due process rights to a fair trial and/or settlement. We were kept in the dark by our attorney Karl Malling. It was a manifest abuse of discretion for the court not to grant our motion to vacate since our informed consent claim was the strongest aspect of our case and was like *Morgan* and *Graves,* in dismissing our claims on summary judgment by stipulation. Our attorney stipulating to the dismissal of our informed consent claim was deprived us of our strongest claim, for there was no written informed consent on record.

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Therefore, the court should reverse the decision of the trial court, denying our motion to vacate as a manifest error, affecting our constitutional right to have the issue of informed consent decided by the jury.

In re *Backlund v. University of Washington*, the court ruled a patient may recover for a doctor's failure to provide informed consent even if the medical diagnosis of treatment was not negligent. 137 Wn.2d 651, 663, 975 P.2d 950 (1999) The *Backlund* court also held that a jury's exoneration of a physician under a negligence theory did not forestall a claim of failure to obtain informed consent. The trial court held we had to choose to pursue our claim under the standard of care or informed consent. Since our attorney, Carl Malling, chose the standard of care, the informed consent claim was tolled until the standard of care claim was decided.

Nevertheless, I contend the elements of informed consent are an element of the standard of care, since the physician cannot proceed in its absence, so it is an inherent element. The only way that the issue of informed consent would be appropriate for summary judgment would be if there was no genuine issue of material fact. CR 56(c) A material fact is one that affects the outcome of the litigation. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2nd 853, 861, 93 P.3d 108 (2004).

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However, here, there is no written informed consent in the record. However, Dr. Jerome Pierre claims he obtained written informed consent. At the motion to vacate, Judge Parisien stated at the motion to vacate on September 28, 2017, stating "Right. But you understand, Ms. Brodigan, and I know you probably do, that the informed consent claim was dismissed...on Summary Judgment." VRP at 10 – 11. However, its dismissal was due to our attorney choosing the standard of care option which the court ruled precluded pursuing the written informed consent claim contemporaneously.

My wife and I did not sign an informed consent document, yet Dr. Pierre-Jerome claims he obtained informed consent from us, which is not true. CP 114:19 As the court stated in *Backlund,* a patient may recover for a doctor's failure to provide informed consent even if the medical diagnosis of treatment was not negligent. *Supra*

We had the right to a factual determination by the jury regarding informed consent for a fair trial, which is our constitutional right, so our claim for relief was not decided by the jury, so the purpose of having a jury trial was frustrated, thereby affecting our constitutional right, and qualifying as an issue raised for the first time on appeal under RAP 2.5(a)(3).

Therefore, the stipulated dismissal of the issue of informed consent by a summary judgment deprived us of a factual determination of informed consent by the jury as required by Wash. St. Const. Art. IV § 16,

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and our liberty interest in due process of law in civil proceedings under the U.S. Const. XIV Amend., which also constitutes an extraordinary circumstance justifying relief to vacate under CR 60(b)(11).

CONCLUSION

Based on the aforementioned, the appellant requests the court to reverse the appellate court's order, entered March 11, 2019, affirming the trial court order denying the motion to vacate, entered on September 28, 2017, and order that the court enter orders consistent with ruling of the Supreme Court.

April 8, 2019.

Respectfully submitted,
Signature

David E. Yankee

Declaration of Service to Parties is filed together with this Brief.

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Washington State Supreme Court

Helen Yankee and David Earl Yankee; as individuals and as a part of the marital community thereof: Appellants, and Frantz Jerome-Pierre, M.D., and "Jane Doe" Jerome-Pierre, husband and wife, an individual and as part of the marital community comprised thereof; Tim Scearce, M.D. and "Jane Doe" Scearce, husband and wife, and the marital community comprised thereof; and Group Health Cooperative; a Washington Corporation; and Overlake Hospital Medical Center; a Washington Corporation; Respondents.	Supreme Court Case No. Declaration of Service of Petition for Discretionary Review Appellate Case No. 77544-8-1

I, David E. Yankee, declare that I sent the Petition for Discretionary Review via U.S. First Class Mail on April 8, 2019, in the above entitled action, to the following persons at their respective addresses:

Amber L. Pearce, for Group Health
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Johnson, Graffe, Keay, Moniz, Wick
For:Overlake Hospital Medical Center
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) Kent, (state) Wash. on (date) 4-8-19.

Dave Yankee
Signature

David E. Yankee
Print or Type Name

FILED
3/11/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellants,

v.

FRANTZ JEROME-PIERRE, M.D.,† and "JANE DOE" JEROME-PIERRE, husband and wife and the marital community comprised thereof; GROUP HEALTH COOPERATIVE, a Washington Corporation; and OVERLAKE HOSPITAL MEDICAL CENTER, a Washington Corporation,

Respondents,

TIM SCEARCE, M.D. and "JANE DOE" SCEARCE, husband and wife and the marital community comprised thereof,

Defendants.

No. 77544-8-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: March 11, 2019

MANN, A.C.J. — Helen and David Yankee appeal the denial of their CR 60(b) motion to vacate orders of judgment in a medical malpractice action. Because the

Yankees do not demonstrate that the trial court abused its discretion in denying the motion, we affirm.[1]

I.

On October 31, 2010, Helen Yankee was transported to Overlake Hospital by ambulance after suffering stroke-like symptoms and a fall at her home.[2] Neurologist Dr. Timothy Scearce, an employee of Group Health Cooperative, determined that the window of opportunity to perform intravenous thrombolytic treatment had passed and recommended that Helen undergo intra-arterial thrombolytic treatment. Interventional radiologist Dr. Frantz Pierre-Jerome performed the intra-arterial procedure.

On October 31, 2014, the Yankees sued Dr. Scearce, Dr. Pierre-Jerome, Overlake Hospital, and Group Health Cooperative for negligence. The Yankees claimed that a complication arose during the intra-arterial procedure that resulted in the dissection of Helen's carotid artery, and that the doctors breached the standard of care by failing to administer thrombolytic treatment intravenously.

All defendants moved for summary judgment. On June 5, 2015, the parties stipulated to the dismissal of Dr. Scearce as a defendant. On August 17, 2015, the trial court granted summary judgment dismissal of Dr. Pierre-Jerome as a defendant. On the same day, the Yankees moved to amend the complaint to add a claim for failure to

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† The original complaint lists Frantz Jerome-Pierre's name incorrectly. His name is Frantz Pierre-Jerome.

[1] Although we recognize that the Yankees are pro se on appeal, we hold self-represented litigants to the same standards as attorneys. See In re Pers. Restraint of Rhem, 188 Wn.2d 321, 328, 394 P.3d 367 (2017).

[2] The facts are taken from the Yankees' complaint and the declarations filed in support of their response to summary judgment.

obtain informed consent, contending that they were inadequately advised of the risks of the intra-arterial procedure.[3] The trial court denied the motion.

The case proceeded to trial against Overlake Hospital and Group Health Cooperative. The Yankees stipulated to a motion in limine to exclude any evidence involving the informed consent claim. A jury found in favor of the defendants. On September 6, 2016, the trial court entered a judgment and final order of dismissal. The Yankees did not appeal.

On September 1, 2017, acting pro se, the Yankees filed a CR 60(b) motion to vacate all of the dismissal orders. The Yankees asserted that only a "board-certified neuro-interventional radiologist" would be qualified to perform the intra-arterial procedure. The Yankees contended that Dr. Pierre-Jerome obtained their consent to the procedure without informing them that he was not a neurologist. They argued that, in performing the procedure, Dr. Pierre-Jerome "represented by conduct" that he possessed the necessary qualifications, which constituted fraud or misconduct entitling them to vacation of the judgment pursuant to CR 60(b)(4) and CR 60(b)(11).[4]

The trial court denied the Yankees' motion to vacate. The Yankees appeal.

II.

We review a trial court's denial of a motion to vacate for abuse of discretion. Haley v. Highland, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). The trial court's decision will only be disturbed "if there is a clear showing that the exercise of discretion was

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[3] Although the motion is discussed by parties, the Yankees did not designate the motion as part of the record on appeal.

[4] The Yankees also cited CR 60(c), which permits a court "to entertain an independent action to relieve a party from a judgment, order, or proceeding." But, by its very terms, CR 60(c) contemplates a party's commencement of a separate action to vacate the judgment.

manifestly unreasonable, based on untenable grounds, or based on untenable reasons." Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). Review of a decision on a motion to vacate is limited to the decision on the motion, not the underlying judgment. Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion. Bjurstrom, 27 Wn. App. at 450-51; RAP 2.2(a)(10); RAP 2.4(c).

CR 60(b)(4) provides for the vacation of a judgment for fraud, misrepresentation, or other conduct of an adverse party. Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). "The rule does not, however, permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment." Lindgren, 58 Wn. App. at 596. The "fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense." Lindgren, 58 Wn. App. at 596. Our review is limited to determining whether the evidence shows that fraud, misrepresentation, or misconduct was "highly probable." Dalton v. State, 130 Wn. App. 653, 666, 124 P.3d 305 (2005).

Here, the Yankees' allegations are not of the type that serve as a basis for vacation of the orders pursuant to CR 60(b)(4).[5] The rule contemplates fraud perpetrated by a party in obtaining the judgment. See RCW 4.72.010. Typical examples include perjured testimony or the withholding of documents during discovery. See KARL

[5] The Yankees argue that the trial court addressed only CR 60(b)(11) and failed to consider their motion under CR 60(b)(4). While the trial court may not have referred explicitly to CR 60(b)(4) it is clear that the trial court considered the Yankees' allegations of fraud regarding Dr. Pierre-Jerome's qualifications. For example, in its oral ruling, the trial court stated:

> What's been brought here is—has nothing to do with any fraud that was perpetrated during the discovery process or during the course of trial.

B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE (6th ed. 2013). But the Yankees fail to establish any fraud relating to the procurement of the judgment.[6] There is no question that the Yankees were aware of Dr. Pierre-Jerome's qualifications during the proceedings in the trial court; the record shows that a copy of his physician biography on the Overlake Hospital website was available in discovery. Furthermore, at no time during the underlying action did the Yankees claim that Dr. Pierre-Jerome was unqualified to perform the intra-arterial procedure. Therefore, even if, as the Yankees allege, Dr. Pierre-Jerome did not discuss his qualifications prior to obtaining consent for the procedure, it had no bearing on the judgments in favor of the defendants.

Nor did the Yankees establish they were entitled to relief under CR 60(b)(11). CR 60(b)(11) provides that the court may vacate an order for "[a]ny other reason justifying relief from the operation of the judgment." Despite its broad language, CR 60(b)(11) is "not a blanket provision authorizing reconsideration for all conceivable reasons." State v. Keller, 32 Wn. App. 135, 141, 647 P.2d 35 (1982). Rather, [r]elief pursuant to CR 60(b)(11) should be confined to "situations involving extraordinary circumstances not covered by any other section of the rule." In re Marriage of Thurston, 92 Wn. App. 494, 499, 963 P.2d 947 (1998). We apply CR 60(b)(11) only "to serve the ends of justice in extreme, unexpected situations." In re Detention of Ward, 125 Wn. App. 374, 379, 104 P.3d 751 (2005). As discussed above, the Yankees chose not to litigate a claim regarding Dr. Pierre-Jerome's qualifications, despite being aware of them at the time of trial. They fail to establish any extraordinary circumstances requiring vacation of the

[6] The Yankees' brief focuses on the elements of a cause of action for fraud. This is distinct from fraud as contemplated by CR 60(b)(4).

judgments, and the trial court did not abuse its discretion in denying the CR 60(b) motion.[7]

Finally, the Yankees contend, for the first time on appeal, that the trial court erred in dismissing the informed consent claim "on stipulated summary judgment" because Helen "did not have the capacity to consent to dismissing the informed consent claim." But even if this court were to exercise its discretion and consider this claim under RAP 2.5(a), the trial court denied the Yankees' motion to amend the complaint to plead an informed consent claim. No stipulation was involved.

We affirm the trial court's denial of the Yankees' CR 60(b) motion.

Mann, ACJ

WE CONCUR:

Andrus, J.

[7] Because we conclude that the Yankees did not establish a basis for relief, we do not address the respondents' claims that the Yankees' CR 60 motion was procedurally defective.