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71320-5

NO. 7132051
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT NO. 13-2-072449

Julia Kahubire Mitchell , Stephone Mitchell

Appellants / Plaintiffs

v

Randolph Bourne

Respondent / Defendant

APPELLANT'S OPENING BRIEF

Julia Mitchell , Stephone Mitchell

P o box 1913

Lynnwood , WA 98046

Pro se Appellants

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STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

Assignments of error

1. The lower court erred in granting defendants motion for summary judgment dismissing Plaintiff's claims of fraud , medical malpractice and lack of consent as barred by the statute of limitations.
2. The lower court erred in dismissing plaintiff's claims based on Department of Health findings as lacking genuine dispute as to any material fact.
3. It was not constitutional for the lower court to dismiss plaintiff's claims thereby enabling defendant who committed a series of fraud / intentional concealment avoid facing justice.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the lower court err in granting defendants motion for summary judgment given the defendant fraudulently concealed information in this case that involves medical malpractice and lack of consent to which plaintiff's did not immediately learn of their injury?
2. Did the lower court err in dismissing plaintiff's claims as lacking genuine dispute as to any material fact without medical experts opinion when plaintiffs presented their case based on findings from Department of Health while defendant who acknowledged to the court of having committed fraud requested the court to dismiss plaintiff's suit based on the insufficient knowledge plaintiffs had when they filed a complaint with Department of Health ?
3. Was it constitutional for the lower court to dismiss Plaintiff's claims when defendant carried out a series of fraud to cover up the injury, delay discovery and then use the statute of limitations to escape facing justice ?

B. STATEMENT OF THE CASE

In October, 2008, Julia and Stephone learned they were pregnant with their first child. Dr. Hibbert, Julia's primary care physician referred her to sound women's care for obstetrical care and she ordered the first ultrasound on October, 6, 2008 [CP-51, 52]. Dr. Bray Jeffrey was assigned to Julia as her primary obstetrician and he ordered ultrasounds dated October, 10, 2008 and October, 17, 2008 [CP-53, 54/55, 56, 57]. These series of ultrasounds were being done as an ectopic pregnancy had not been confirmed.

On October, 20, 2008, defendant Dr. Bourne ordered the fourth pelvic ultrasound [CP-60, 61] and he requested for a phone report. Cathy Bentley a registered nurse at sound women's care faxed the order to radia imaging [CP-20]. Julia had the ultrasound at 12:30 pm on October, 20, 2008. On the same day the ultrasound was ordered and done, Julia and stephone were seen by Dr. Bourne at 2:30 pm. Dr. Bourne informed them "the ultrasound you had today shows nothing in your uterus except for a fluid filled sac and your hcg (human chorionic gonadotropin-pregnancy hormone) is not rising (doubling)" [CP-22, 23].

Dr. Bourne further informed Julia and stephone that a normal pregnancy had been ruled out and that needed to be treated surgically [CP- 22]. Dr. Bourne obtained consent from julia for a suction, dilation and curettage (d & c) to remove the fluid sac / cyst and a consent for a laparoscopy possible salpingectomy or salpingestomy (opening or removal of the fallopian tubes" to treat an ectopic pregnancy vs blighted ovum (failed pregnancy) [CP-24]. He then ordered some lab work on the same day October, 20, 2008, in preparation for the scheduled October, 21, 2008 surgery [CP-72, 73] however, he reviewed these results "two days after performing surgery

and “not” prior to surgery.

On October, 21, 2008, Dr. Bourne took Julia to surgery and performed a d & c of what was believed to be a fluid filled sac / cyst. He also performed a right Oophrectomy (removal of the right ovary) [CP-42]

Dr. Bourne had called Julia seven days after the surgery and left her a message for her to call his office and schedule a post-operative appointment for November, 5, 2008 [CP-32]. Julia was however seen nine days after the surgery briefly by Dr. Bourne in his office because she had a pleural effusion (fluid in lung). Dr. Bourne acknowledge having seen Julia and wrote “Julia came by having difficulty breathing. Has a pleural effusion. Being managed by pcp. I will follow up one week” [CP-42].

On the scheduled appointment day, November, 5, 2008, one week from the brief visit with Dr. Bourne, Julia and Stephone arrived at sound women’s care and were told that they would be seeing Dr. Bray instead of Dr. Bourne. Dr. Bourne was reported as not being in the office or building but was actually seen by Julia and Stephone as he stood by a desk at the back of the office dressed in his white coat.

Dr. Bray could not answer all Julia and Stephone’s questions and since they could not see Dr. Bourne, Julia decided to obtain her medical records. Interestingly the October, 20, 2008, ultrasound that Dr. Bourne ordered and that he was referring to at the pre-operative visit was missing from Julia’s medical file. Julia was able to obtain a copy of the ultrasound from the radiology department [CP-70] which indicated the presence of a yolk sac and no ectopic pregnancy. It was in this very ultrasound that the right ovary complex mass seen on all three

prior ultrasounds [CP-51,52,53,54/55,56,57] was confirmed to be a dermoid cyst [CP-60,61,70] which tend to run in Julia's family. Dr. Bourne did not obtain a consent for a cystectomy (resection of the ovary) or Oophrectomy (removal of the entire ovary) even when all ultrasounds showed the ovary had a mass / cyst.

Dr. Bourne however informed Department of Health that he reviewed the October, 17, 2008 ultrasound prior to taking Julia to surgery [CP-26,42]. He further stated that he always reviews the images of the ultrasounds himself and not just looking at a report however, he did not know why he did not review the images from the ultrasound that he ordered on October, 20, 2008 [CP-27]

Dr. Bourne also mischaracterized the uterine tissues as ectopic tissue. This fraud misled the pathologist when he carried out an analysis on the tissue. Since the pathologist believed Dr. Bourne that the tissue was ectopic, it was inevitable to carry out a karyotype analysis which is performed to determine the cause of pregnancy failure if a pregnancy indeed has failed and if not it would show nothing was wrong with the pregnancy. Dr. Bourne admitted to this fraud to the Snohomish superior court in his answer to plaintiff's complaint eight [CP-119 complaint # 8, 77 answer #8]

Department of Health asked Dr. Bourne who ordered the October,20, 2008 ultrasound twice during their investigation and he initially stated his colleague Dr. Rogers ordered it [CP-42]. He then changed his answer the second time he was asked and stated he did not know who ordered it and he did not know one had been ordered [CP-26]. On the other hand, he stated that he read Dr. Rogers note [CP-26] which however reads that plaintiff was to have another ultrasound followed by an appointment on October, 20, 2008 [CP- 20] "re eval 10/20.

Precautions re rupture given, advised may miss chance of mtx (methotrexate) treatment & need to proceed with surgery LSC or laparoscopy. Sono (ultrasound) am 10/20. Then appointment" wrote Dr. Rogers.

Evidence on the report itself shows distribution to the ordering physician : Dr. Bourne [CP-61]. The nurses notes obtained by Department of Health as indicated earlier also indicate that he ordered the ultrasound. It is however reported that the actual order itself is missing to this date and cannot be located anywhere in the plaintiffs medical file. This includes radia imaging where the ultrasound was done, Stevens hospital now Swedish Edmonds were the surgery took place and iron mountain where medical records are kept for a duration of ten years.

C. ARGUMENT FOR ASSIGNED ERRORS

1. THE LOWER COURT ERRORED IN GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT, DISMISSING PLAINTIFF'S CLAIMS OF FRAUD, MEDICAL MALPRACTICE AND LACK OF CONSENT AS BARRED BY THE STATUTE OF LIMITATIONS.

A review of Julia and Stephone's complaint reveals that Dr. Bourne fraudulently informed them he had looked at the ultrasound that showed the pregnancy had failed and there was an ectopic pregnancy which put her life in danger. This fraud did not end there. It continued with intentional concealment / mischaracterization of tissue that would have shown what constituted the contents of the tissue sample from a karyotype analysis standpoint and further failing to report the adverse event to the Department of Health according to the law. (WAC 246-320-145 (10) & RCW 70.56 requires the reporting of the confirmed occurrence of specified events to the Department of Health.

Dr. Bourne informed Department of Health that he discovered the occurrence of the adverse event sometime after he had performed surgery on Julia [CP-38] and instead he chose to avoid Julia and Stephone on the scheduled post-operative visit in addition to failing to report this adverse event to Department of Health. The gravamen of the action is that discovery of the injury was not until November, 20, 2012. The fraud exercised by Dr. Bourne delayed discovery of the injury. It is further noted in Stevens hospital now Swedish Edmonds' policy, where Dr. Bourne performed the surgery regarding disclosure of unanticipated outcomes that:

"The law requires that when a hospital finds it appropriate, information about unanticipated outcomes of delivered healthcare will be shared with patients, their families, or surrogate decision-maker. This policy set forth how to meet the requirements of the Revised Code of Washington (RCW 70.41.380)" which states, "Hospitals shall have in place policies to assure that, when appropriate, information about unanticipated outcomes is provided to patients or their families or any surrogate decision-makers identified pursuant to RCW 7.70 065." [CP-35]

In its decision, the lower court applied RCW 4.16.350 below which states that any action:

"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 representative 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 or damages." (emphasis added)

Review of **RCW 4.16.350** indicates that "the statute of limitations is tolled upon proof of fraud / intentional concealment." Dr. Bourne mischaracterized the uterine tissue and this resulted in the tissue (evidence) being discarded. There was no way of finding out what the pregnancy represented in terms of abnormality or being normal. This is only best known to Dr. Bourne why he obtained tissue from the uterus then sent it to pathology stating it was outside the uterus. Is it possible he may have seen the heart beating or some other indication that the pregnancy was viable and he had to ensure that he misled the pathologist so tissue would be discarded without a karyotype analysis being performed ?

"A surgical operation is a technical battery, regardless of its results, and is excusable only when there is express or implied consent."

Bonner v. Moran , 126 F.2d 121, 122 (D.C Cir. 1941). **Chapter 7. 70**

RCW preserves actions for failure to obtain consent (common law medical battery) where a health care provider fails to obtain any consent, or where the patient refuses care by a particular provider." Id p.17.

In **Bundrick v. Stewart** , 128 Wn. App. 11 (2005). There the plaintiff brought action based on lack of consent where a resident/trainee was used in an operation without the consent of a minor, patient's parents. The distinction discussed in Bundrick is particularly material here. Dr.

Bourne, was aware that the right ovary had a mass/cyst based on the ultrasound he states he looked at prior to taking Julia to surgery [CP-56]. He however failed to inform and obtain consent to remove the cyst or ovary (Cystectomy or Oophrectomy) from Julia prior to surgery [CP-24].

2. THE LOWER COURT ERRORED IN DISMISSING PLAINTIFF'S CLAIMS BASED ON DEPARTMENT OF HEALTH FINDINGS AS LACKING GENUINE DISPUTE AS TO ANY MATERIAL FACTS.

At the time of filing a complaint with Department of Health in 2011, Julia and Stephone did not know of the injuries and even when Julia was being followed by a fertility specialist and perinatologist in 2011 [CP-63, 64, 66,67]. The injuries appellants are talking about are termination of a normal uterine pregnancy and unnecessary removal of the right ovary, not just termination of a failed uterine pregnancy / blighted ovum. On acquiring the missing ultrasound report, plaintiff's learned there was a uterine pregnancy however, they did not learn that it was a normal pregnancy until Department of Health notified them in a three hundred page (redacted) investigative report on November, 20, 2012. Julia and Stephone filed a civil suit with the snohomish superior court on September, 5, 2013, ten months from the time they discovered the injuries. Department of Health noted "the hcg levels were within the normal range for a seven to eight week pregnancy" as an addition to the development of the yolk sac seen on the ultrasound [CP-76]. It is further noted that Department of Health believed Dr. Bourne denied Julia the chance of continuing the pregnancy normal or not [CP-76] however, they found nothing abnormal about the pregnancy as noted above "at the time" Dr. Bourne terminated it and thereby unnecessarily removing the right ovary. (Emphasis added on normal vs abnormal)

Julia and Stephone can see how the lower court judge may have mistakenly misunderstood their complaint based on Dr. Bourne's motion for summary judgment [CP-. Lets assume that Julia and Stephone had filed a civil suit in July 2011 based on the ultrasound report referenced in the motion for summary judgment as knowledge of malpractice. That suit would not have been viable because all that the ultrasound indicated and Dr. Bourne's surgical intervention would have done to Julia was preventing her from having a miscarriage naturally of the supposed failed pregnancy. The lower court judge was not aware that with that ultrasound alone, there was no injury suffered. Department of Health (Medical Quality Assurance Commission) protects the public from harm by ensuring delivery of safe health care and after carrying out an investigation for a duration of a year, took disciplinary action against Dr. Bourne [Appendix A]. If there was no harm done, they would not have taken any action. For Department of Health to conclude that there was harm done, they required Dr. Bourne's responses and unredacted medical records in addition to Julia's complaint.

Courts interpreting the general statute of limitations have consistently found that the time limit begins to run when the plaintiff discovers his or her injury, **Reichelt v. Johns-Manville corporation**, 107 Wn.2d 761, 733 P.2d 530 (1987). In Reichelt an asbestos worker and his wife brought action for personal injuries and for loss of consortium. The lower court had granted the asbestos manufacturer's motion for summary judgment based on the statute of limitations . The court of appeals affirmed. In its review the Supreme Court upheld the lower court's dismissal of the husband's injury claim based on his knowledge of his injuries more than three years prior to the filing of the action. The court reversed the lower court judgment dismissing the wife's claim for consortium.

“Since Lois Reichelt’s claim for loss of consortium is a separate cause of action in Washington, it logically follows the statute of limitations governing her claim should begin to run when she experienced her injury, not when her husband knew of his injury. Based on the foregoing, we, conclude that a deprived spouse’s loss of consortium claim is not necessarily determined by the timeliness of the impaired spouse’s claim.” Id. p. 776

The court went on to remand the case to the lower court to make factual findings to determine when Mrs. Reichelt first “discovered” her “injuries.” Also in reference to **Estates of Hibbard**, 118 Wash.2d 737, 826 P.2d 690 (1992):

“Application of the rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant. Application of the rule is extended to claims in which plaintiffs could not immediately know of the cause of their injuries.” Id. p. 749,750.

This brings us to the the two incidents in this obstetric malpractice case involving Julia and Stephone v. Dr. Bourne. First, lets take a look at the consent and missing ultrasound. Based on these, if Dr. Bourne had not performed a surgical operation on Julia the day he did, it was just a matter of time before Julia would have had a natural miscarriage. So there are not any injuries suffered from Dr. Bourne’s surgical intervention because the end result would still be loss of the abnormal pregnancy.

On the other hand, let's take a look at the findings of Department of Health. The ultrasound showed a yolk sac which meant that the pregnancy was in the uterus and not an ectopic (outside uterus). This is the same information as above regarding the ultrasound. They further noted that the hcg levels (pregnancy hormone) were rising and were within the normal range. This is the key to the issue presented here regarding discovery of the injury. If the hcg levels were dropping or did not rise, then one would conclude the pregnancy had failed and it was a matter of time before miscarriage took place.

**3. IT WAS NOT CONSTITUTIONAL FOR THE LOWER COURT TO DISMISS
PLAINTIFF'S CLAIMS THEREBY ENABLING DEFENDANT WHO COMMITTED A
SERIES OF FRAUD/ INTENTIONAL CONCEALMENT AVOID FACING JUSTICE**

Given all the above facts of the case, it was unconstitutional for Julia and Stephone's claims to be dismissed on grounds of untimely filing their claims when they did not actually know of their injury. It would have been pointless to bring a civil suit against Dr. Bourne based on the ultrasound alone when there was no knowledge of the injury until November, 2012. If the law required citizens to file civil suits without having knowledge of injury or having suffered injury, it would be a big burden on the courts and this is what the motion for summary judgment was implying.

D. CONCLUSION

In this appeal, the lower court erred in granting Dr. Bourne's motion for summary judgment thereby dismissing Julia and Stephone's claims. From the evidence presented, a rational jury could reject Dr. Bourne's defense of the statute of limitations running and find favor of Julia and Stephone's factual contention that there was not sufficient evidence for a cause of

action since the injury was unknown to them until 2012 and there was no consent for removal of the ovary.

On the other hand as a matter of law, the lower court erred in dismissing Julia and Stephone's claims because of the fraud that prevailed in this case. Again here a rational jury could find defendants fraudulent concealment violated Julia and Stephone's right to know of the injury resulting in them having insufficient evidence for a cause of action.

In their action, the lower court incorrectly applied RCW 4.16.350 to this case where injury was unknown till later and failed to apply the "malpractice discovery rule." The lower court further incorrectly applied the above statute of limitations to to this case involving intentional fraudulent conduct. This allowed Dr. Bourne to improperly benefit from the special rule afforded under the statute. As a part of this error the court ignored statutes of limitations applicable to fraud.

Finally, the lower court should have granted Julia and Stephone's oppositon to motion for summary judgment on the issues of intentional concealment (fraud) and insufficient evidence (unknown injury). The exhibits presented to the lower court showed there were genuine issues of fact with regard to discovery of the injury in this case. Respondent finally acknowledged to the lower court only one incident of fraud relating to mischaracterizing tissue even though evidence pertaining to other incidents of fraud were presented to the court as seen in the exhibits.

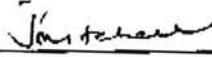
Under Washington Law "summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. **Taggart**, 118 Wn.2d at 199. Questions of law are reviewed de novo. **Sherman v. State**, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Existence of a duty is a question of law. **Schooley v. Pinch's Deli Market, inc.**, 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

For the foregoing reasons, this court should reverse the lower court's decision that granted defendant's motion for summary judgment.

Respectfully submitted this 5 day of March, 2014.

Julia Kahubire Mitchell , Stephone Mitchell.

Appellants

By 
Julia Kahubire Mitchell, Appellant

APPENDIX A

Department of Health notice of investigative report disclosure..... 14

From: Haenke, Sarah K (DOH) (DOH) <Sarah.Haenke@DOH.WA.GOV>

To: juliamitchell7 <juliamitchell7@aol.com>

Subject: Public Disclosure Request Re: Randolph Bourne

Date: Tue, Nov 20, 2012 8:02 am

Attachments: Case_File_36628_pdf-r.pdf (11908K)

Julia Kahbuire

juliamitchell7@aol.com

Dear Julie Kahbuire:

Thank you for your public disclosure request received on 08/29/2012 regarding case file 2011-159469MD.

Attached are the records identified as responsive to your public disclosure request. Since all identified records have been provided to you, this request is considered closed.

Some records related to your request have been redacted or withheld in their entirety; please see the enclosed Redaction Summary and/or Exemption Log. Under RCW 42.56.520 you may appeal a decision to withhold information contained in the records via a request for review by the Department of Health's Public Records Officer. The request must be submitted in writing.

Mailing Address:

Email Address:

Public Records Officer

OSPDRC@DOH.WA.GOV

Washington State Department of Health

P.O. Box 47890

Olympia, WA 98504-7890

If you have any questions or need additional information, please contact me via email at Sarah.Haenke@doh.wa.gov or phone at (360) 236-4829.

Sincerely,

Sarah Haenke, Forms & Records Analyst

Health Systems Quality Assurance (HSQA)

HSQA/Public Disclosure Unit

111 Israel Road SE, PO Box 47865

Olympia, WA 98504-7865

Phone: (360) 236-4829 Fax: (360) 586-2171

Email: Sarah.Haenke@doh.wa.gov

Attachment

<<Case File_36628_pdf-r.pdf>>

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I hereby certify under penalty of perjury under the laws of the state of Washington that on the 5th day of March, 2014, I caused a true and correct copy of the foregoing document, "Appellants opening brief," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Defendant/Respondent:

Amber L Pearce
Floyd, Pflueger & Ringer
200 W. Thomas Street, Suite 500
Seattle, WA 98119

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Dated this 5th day of March, 2014, at Everett, Washington.

J. Ly
Signature
Jennifer Ly

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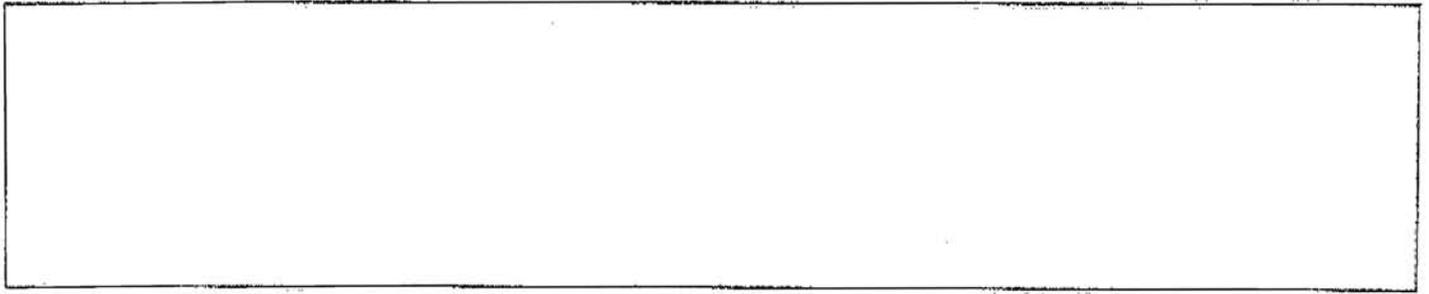
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