No. 97058-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

FRANTZ JEROME-PIERRE, MD 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.

ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDING PARTY

This answer is submitted on behalf of Frantz Pierre-Jerome, M.D., defendant in the superior court action and respondent in the Court of Appeals action. Dr. Pierre-Jerome requests denial of this petition for discretionary review.

II. DECISION BELOW

In violation of RAP 13.4(c)(4), Petitioners have failed to identify what decisions they wish this Court to accept for review. Petitioners apparently intend to seek discretionary review of the March 11, 2019, unpublished opinion of the Court of Appeals affirming the trial court's decision denying a motion to vacate pursuant to CR 60. Petitioners did not file a motion for reconsideration. No party filed a motion to publish.

III. RESTATEMENT OF THE ISSUES

1. Is Supreme Court review warranted where Petitioners fail to demonstrate any of the criteria outlined in RAP 13.4(b) for acceptance of review?

IV. STATEMENT OF THE CASE

A. Facts.

This medical malpractice claim arose out of care and treatment provided to Helen Yankee on October 31, 2010, at Overlake Hospital. Clerk's Papers (CP) 127:20. At approximately 10:30 a.m., Helen Yankee suffered stroke-like symptoms at home after a fall in her kitchen. CP

127:21. At 11:51 a.m., Tri-Med Ambulance received an emergency call and arrived at the scene at 12:02 p.m. CP 127:22-128:1. Mrs. Yankee was then transported via ambulance to Overlake Hospital. CP 128:1. Once she arrived at Overlake Hospital, Mrs. Yankee was taken to the emergency department, where she was seen by David Bronstein, M.D. CP 128: 2-3.

Dr. Bronstein conducted an initial evaluation, then neurologist Timothy Scearce, M.D. was called in to evaluate Mrs. Yankee—he arrived at 2:14 p.m. CP 128:3-5. Dr. Scearce had a detailed discussion with the Yankee family and learned that Mrs. Yankee's fall occurred at 10:30 a.m. that morning. CP 128:5-6. Dr. Scearce's understanding of the timing of the fall was central to the type and timing of therapy ordered. CP 128:6-8.

Mrs. Yankee, her husband, and her daughter were involved in a 50-minute discussion with Dr. Scearce regarding potential treatment options, including intravenous tPA and intra-arterial therapy. CP 199:7-10. Mrs. Yankee was not an ideal candidate for intravenous tPA due to the extended period of time since the onset of her symptoms. CP 199:10-11. After discussion, Mrs. Yankee elected to undergo intra-arterial thrombolytic therapy, which was performed by Dr. Pierre-Jerome. CP 12-13.

Dr. Pierre-Jerome is an interventional radiologist at Overlake Hospital. CP 112:22-113:1. He is board certified in radiology, with specialty training in advanced stroke intervention. CP 113:1-3. Dr. Pierre-

Jerome is privileged at Overlake Hospital to perform neuroangiography, percutaneous transluminal angioplasty, and embolus therapy. CP 113:23-25. Stroke interventions performed by interventional radiologists, like the procedure performed for Mrs. Yankee, fall into these categories of techniques. CP 113:26.

B. Procedural History.

1. Allegations and Discovery.

The Yankees filed their Complaint on October 31, 2014. CP 192. They alleged that Dr. Pierre-Jerome caused dissection of Mrs. Yankee's right internal carotid artery during the intra-arterial thrombolytic treatment. CP 195:12-16. The Yankees did not allege, and never alleged prior to trial, that Dr. Pierre-Jerome was unqualified to perform the intra-arterial procedure. CP 98:18-20.

Dr. Pierre-Jerome submitted discovery to the Yankees on November 12, 2015, requesting information regarding any experts the Yankees intended to rely on to support their claims against him. CP 199:18-20. The Yankees did not respond. CP 199:24. The Yankees never conducted any discovery from Dr. Pierre-Jerome, and never took his deposition in the underlying case. CP 98:12-13. They did, however, produce Dr. Pierre-Jerome's physician biography from the Overlake Hospital website in response to discovery requests by another defendant. CP 98:25-99:1.

2. Summary Judgment Motion.

On July 20, 2015, Dr. Pierre-Jerome filed a Motion for Summary Judgment on the basis that the Yankees did not have expert testimony to support their claims against him. CP 198. The Yankees opposed the motion on August 6, 2015. CP 234. In response to the Motion for Summary Judgment, the Yankees submitted declarations from two expert witnesses, Dr. William Likosky and Dr. Richard Pergolizzi. CP 97:25-26. Neither declaration provided any testimony that Dr. Pierre-Jerome fell below the standard of care or failed to secure Mrs. Yankee's informed consent. CP 98:1-3. Notably, the declarations submitted in opposition to the summary judgment did not address Dr. Pierre-Jerome's qualifications. CP 238-242; 337-341. No declaration was submitted by a neurosurgeon. *Id*. The Yankees' own expert, Dr. Pergolizzi, who offered opinions against Dr. Pierre-Jerome in the underlying action was a radiologist. CP 99:12-14.

Summary judgment was granted and all claims against Dr. Pierre-Jerome were dismissed on August 17, 2015. CP 1-7; CP 128:11-12. The same day, the Yankees moved to amend the complaint to add a claim for failure to secure informed consent. The trial court denied the motion. The case proceeded to trial against Group Health only with respect to vicarious liability for Dr. Scearce. CP 17; CP 128:14-15.

Following a defense verdict, the Yankees filed a Notice of Appeal. CP 129:18-19. Several months later, the Yankees elected not to proceed with the appeal and it was dismissed. CP 129:19-130:1; CP 151.

3. Motion to Vacate.

On September 1, 2017, more than two years after judgment was entered in favor of Dr. Pierre-Jerome, the Yankees moved the trial court pursuant to CR 60(b)(4) and (11) for an order vacating the judgment in favor of all defendants. CP 28-34. As to Dr. Pierre-Jerome, they argued that he "performed an intra-arterial procedure on Helen Yankee without being a board certified neuro-inventional [sic] radiologist, as required for treatments going to the brain, and without informing Mrs. Yankee and her husband of this fact." CP 29. As such, the Yankees claimed that Dr. Pierre-Jerome committed fraud. *Id*. In support of their motion, the Yankees submitted a declaration from Dr. Philip Parsons, an emergency medicine physician. CP 39-45.

The trial court denied the motion and awarded sanctions to each defendant, finding that the Yankees' motion was "not well grounded in fact or warranted by law." CP 157-58. Specifically, the trial court stated, that what the Yankees argued regarding the Motion to Vacate "was really a recitation of the underlying facts in this case." Verbatim Report of Proceedings (VRP) 24:15-16. The trial court found that the arguments

raised by the Yankees had "nothing to do with any fraud that was perpetrated during the discovery process or during the course of trial." VRP 25:5-7.

Each sanction award was reduced to a judgment, however, the Yankees never paid the judgment nor posted a supersedeas bond before pursuing their second appeal. CP 173-74.

4. Court of Appeal Proceedings.

The Yankees filed a Notice of Appeal on October 23, 2017, seeking review of the trial court's denial of their motion to vacate pursuant to CR 60. After full briefing, and without oral argument, the Court of Appeals issued a ruling on March 11, 2019. The Court of Appeals found that the Yankees' allegations of fraud were not of the type that justify vacating a trial court decision pursuant to CR 60(b)(4) because the Yankees failed to demonstrate any fraud related to procurement of the summary judgment dismissal. The Court of Appeals also found that the Yankees had not demonstrated extraordinary circumstances under CR 60(b)(11) requiring vacation of the trial court's summary judgment order. The Yankees now seek discretionary review of that decision.

V. ARGUMENT

The Yankees have not made a showing that review is appropriate under any of the criteria set forth in RAP 13.4(b), and review of the record

shows that they cannot; the decision below does not conflict with any decision of this Court or any other Court of Appeals decision, nor does it involve any constitutional or other issue of substantial public interest.

A. The Court of Appeals did not err in affirming the denial of the Yankees' motion to vacate.

The Yankees' petition for discretionary review is nothing more than a recitation of the arguments raised in the Court of Appeal and earlier at the trial court level on the motion to vacate. The Yankees do not even attempt to explain how the Court of Appeals decision conflicts with a decision of this Court or with a decision of the Court of Appeals. The Yankees do not identify a single case that contradicts any of the findings by the Court of Appeals.

In reality, the Court of Appeals decision is consistent with statutory principles governing fraud on the court, as well as precedent regarding CR 60(b). "Fraud" as contemplated by CR 60(b)(4) is specific to fraud perpetrated by a party in obtaining the judgment. See RCW 4.72.010. 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 v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). It does not permit a party to relitigate the underlying merits of her claim. *Biurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

Similarly, CR 60(b)(11) is not an invitation to reconsider the merits of an underlying action. It applies 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). In this case, the Yankees filed an initial appeal related to the underlying judgments. They later voluntarily abandoned that appeal. CP at 129:18-130:1; CP 151. The time for challenging the underlying judgment was in the original appeal, not by way of a CR 60 motion years after Dr. Pierre-Jerome was dismissed from the case. Dr. Pierre-Jerome has a right to finality in the judgement rendered in his favor and must be able to have confidence that there is an end to this legal process.

Since the Yankees fail to identify any actual conflict with existing law, their petition does not meet the considerations of RAP 13.4(b)(1) or (2).

B. <u>The Court of Appeals' unpublished decision does not create binding precedent.</u>

GR 14.1(a) provides:

> Washington Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. . .

The Court of Appeals March 11, 2019 decision was not published nor did Dr. Pierre-Jerome seek to have it published. As such, even if a conflict with prior case law was presumed to exist, the Court of Appeals' decision cannot create a binding conflict with any prior published opinion.

C. The dismissal of the Yankees' informed consent claim does not involve a Constitutional issue.

The Yankees argue that their attorney's alleged stipulation to enter dismissal of their informed consent claim violates their constitutional right to a jury trial on that claim. First, as the Court of Appeals pointed out, no stipulation was involved in the dismissal of the Yankees' informed consent claim. Slip Op. at 5. Second, the Yankees cite no supporting authority for their argument that dismissal of a claim on summary judgment deprives a party of a constitutional right to a jury trial. The Yankees had a full and fair opportunity to litigate their informed consent claim in the underlying action, and produced no evidence that the dismissal was procured by fraud. The trial court appropriately dismissed the informed consent claim, appropriately denied the motion to vacate, and the Court of Appeals appropriately affirmed.

The proper venue for the Yankees' argument that their lawyer mishandled the case is in an action against their lawyer, not by way of a motion to vacate or appellate review. *Haller v. Wallis*, 89 Wn.2d 539, 547,

573 P.2d 1302 (1978). Nothing in the record suggests that the Yankees' attorney acted in a particular manner or made strategic decisions due to fraud or misrepresentation of the opposing party. As such, the Yankees are bound by the decisions of their lawyer as if those decisions were their own. *Id*. Dr. Pierre-Jerome "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).

V. CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 8th day of May, 2019

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that I am now, and at all times material hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

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DATED this 8th day of May, 2019.

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