682604-4

682604-4

NO. 68264-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVID A. FALSBERG,

Appellant,

v.

GLAXOSMITHKLINE, PLC, or GLAXO SMITH KLINE, INC.,
a foreign corporation, also d/b/a GLAXOSMITHKLINE, L.L.C.,
GLAXOSMITHKLINE CONSUMER HEALTHCARE, L.P.,
GLAXOSMITHKLINE BIOLOGICALS, NORTH AMERICA,
GLAXOSMITHKLINE CONSUMER HEALTHCARE, L.L.C.,
and GLAXOSMITHKLINE SERVICES, INC,.
and JACK S. CONWAY, M.D.,

Respondents.

COURT OF APPEALS STATE OF WASHINGTON
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BRIEF OF RESPONDENT JACK S. CONWAY, M.D.

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I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW AS TO THE DISMISSAL OF MR. FALSBERG'S CLAIMS AGAINST DR. CONWAY

1. Did the trial court properly dismiss Mr. Falsberg's claims against Dr. Conway on statute of limitations grounds?

2. Are RCW 4.16.350(3) and RCW 4.16.190(1) properly harmonized by deeming a medical negligence claim to "accrue" within the meaning of RCW 4.16.190(1) at the time of the defendant's last negligent act or omission, whether or not the plaintiff has yet suffered an injury, and not, as Mr. Falsberg suggests, by interpreting RCW 4.16.190(1) as preserving, solely for purposes of tolling, the common law concept of "accrual" that RCW 4.16.350(3) eliminated for purposes of the three-year limitations period for medical negligence cases?

3. Even if RCW 4.16.350(3) and RCW 4.16.190(1) are to be harmonized as Mr. Falsberg suggests, did his claims against Dr. Conway nonetheless "accrue" on or before the date upon which he became temporarily "incompetent or disabled"?

4. Did Mr. Falsberg fail to state a claim against Dr. Conway for negligent misrepresentation for which relief could be granted that was independent of his RCW 7.70.050 "informed consent" claim?

II. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case.

David Falsberg sued his former psychiatrist, Dr. Jack S. Conway, and several GlaxoSmithKline ("GSK") entities for injuries he allegedly sustained due to an adverse reaction to the drug Lamictal, a GSK pharmaceutical product that Dr. Conway had prescribed for him. CP 25-57.

B. Factual Background.

On February 15, 2007, Dr. Conway prescribed the drug Lamictal to treat Mr. Falsberg for bipolar disorder. CP 27 (¶ 2.3), CP 34 (¶ 4.3(c)), CP 465, CP 519. Mr. Falsberg admits that Dr. Conway told him at the time he prescribed Lamictal that "in very rare instances there can be a rash" from taking it, that "very rarely people get very sick from it," and that he should "stop taking it right away" if he saw a rash. CP 489-91. Mr. Falsberg recalls Dr. Conway telling him "about the incrementalization," meaning that he would take one pill (25 mg) per day in week one, two pills (50 mg) per day in week two, three pills (75 mg) per day in week three, and four pills (100 mg) per day in week four. CP 491. On March 22, 2007, Dr. Conway increased Mr. Falsberg's dosage to 150 mg per day. CP 27 (¶ 2.4), CP 81 (¶ 2.4), CP 232 (¶ 5).

Mr. Falsberg claims that when he got up on April 4, 2007, he "didn't feel great," and that later that morning he lost his balance and fell

in his real estate broker's office after reviewing a 20-page real estate contract with the broker line by line. CP 504-06. He called Dr. Conway's office that afternoon:

> Q. Okay. So let's talk about the April 4th telephone call.
>
> A. All right.
>
> Q. Who called it, him?
>
> A. Me . . . I called his office.
>
> Q. And when you called his office, did you get ahold of him right away or did he call you back?
>
> A. My recollection is that he called me back. He was good at that.
>
> Q. Okay. And then when he called you back, what did you tell him?
>
> A. I told him I had flu-like symptoms, I had blurred vision, I had dizziness. I had actually – I believe I fell down – I fell – I know I fell down in my broker's office.
>
> Q. Okay.
>
> A. And he said hey, you been drinking all night, which I thought was funny but – but that's what I recall.

CP 494-95. In retrospect, Mr. Falsberg believes he already had a rash, but did not see it because it was on his neck and back. CP 495; *see also* CP 1058 (¶ 8). After the April 4 phone conversation with Dr. Conway, Mr. Falsberg, as instructed, halved his dosage of Lamictal. CP 232 (¶ 8), 494.

On April 5, 2007, Mr. Falsberg's wife found him "slumped over the computer with a high fever and a rash on his neck, running down and covering his back" and took him to the Swedish Physicians Clinic in

Ballard, where Mr. Falsberg complained of sore throat, fever, eye redness, and nasal drainage, as well as the rash. CP 227, 232 (¶ 9).[1] Mr. Falsberg was treated at Swedish and evidently discharged home because, according to his declaration testimony, the next morning, which would have been April 6, he was taken back to the Swedish/Ballard emergency room, transferred to the ICU at Swedish First Hill, and diagnosed with Stevens-Johnson Syndrome and Toxic Epidermal Necrolysis ("SJS/TEN"). CP 232 (¶ 10). He was then transferred to the Harborview Medical Center burn unit, where he remained from April 7 until July 10, spending much of that time in a drug-induced coma. CP 232 (¶ ¶ 10-11).

C. Trial Court Proceedings.

Mr. Falsberg, through counsel, filed suit against Dr. Conway in July 2008, CP 109 (¶ B), CP 117 (¶ 3), CP 153-63, but appeared *pro se* to obtain an order voluntarily nonsuiting that complaint without prejudice on October 2, 2008, CP 165.

In April 2010, Mr. Falsberg filed a "Complaint – Medical Negligence" against the GSK entities but not against Dr. Conway or any other licensed health care provider. CP 167-92. On July 12, 2010, he filed an amended complaint, CP 25-57, asserting claims against Dr.

[1] Mrs. Falsberg testified by declaration that those events occurred on April 6, CP 227 (¶ 9), but the amended complaint alleges that they occurred on April 5, CP 28 (¶ 2.8), CP 49 (¶ 14.8), and Dr. Conway's answer admits that the Swedish medical records (which are not of record) indicate they occurred on April 5. CP 82 (¶ 2.8).

Conway, CP 27-36, for medical negligence, CP 33-35, negligent misrepresentation, CP 35, and "lack of informed consent," CP 35-36.

On October 13, 2010, Dr. Conway answered the amended complaint, asserting as an affirmative defense that Mr. Falsberg's claims were barred by the statute of limitations. CP 103. On May 19, 2011, Dr. Conway moved for judgment on the pleadings based on the statute of limitations. CP 107-92.[2] Mr. Falsberg responded on June 3, submitting a brief, CP 212-23, his declaration, CP 231-33, his wife's declaration, CP 226-30, and a copy of voluminous Harborview Medical Center records for Mr. Falsberg's April 7 to July 10, 2007 hospitalization, CP 234-463.

Mr. Falsberg asserted in his declaration that he had been in a drug-induced coma or sedated, and "incapable of appreciating and understanding any legal proceedings or requirements . . ." from April 7 until well after his hospital discharge on July 10, 2007. CP 232-33 (¶ ¶ 11-12). His wife testified by declaration that her husband "[b]y April 3, 2007 . . . was having symptoms of slurred speech, decreased balance, and he said he felt like he was getting the flu," and that "[d]uring a phone conversation the afternoon of April 4, 2007, Dr. Conway did not ask David to come in

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[2] Dr. Conway filed and served his motion on May 19, 2011, noting it for consideration on May 27. CP 105. On motion by Mr. Falsberg, CP 193-96, the trial court gave him until June 3 to respond to Dr. Conway's motion. CP 210-11. Mr. Falsberg filed and served his response on June 3. CP 212-463. He does not assign error to the timetable the trial court followed in considering and ruling on Dr. Conway's motion.

to see him [but rather told him] to decrease the Lamictal to (75 mg.)." CP 227 (¶¶ 7-8). Nancy Falsberg did not otherwise describe or characterize Mr. Falsberg's condition on April 4.

Mr. Falsberg claimed that there were two disputed issues of fact: (1) when Dr. Conway's "last act" occurred for purposes of his *lack-of-informed-consent* claim; and (2) whether he "was an incapacitated person" entitled to disability tolling under RCW 4.16.190(1) as of an unspecified date and time. CP 214. Mr. Falsberg argued that he was hospitalized from April 6 through July 10, 2007, and that, under RCW 4.16.190(1), "the entire time period when Mr. Falsberg had been rendered an incapacitated person . . . must be deducted from the computation of the three-year statute of limitations period." CP 218. He cited *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 189 P.3d 753 (2008), as support for his tolling-due-to-incapacitation argument. CP 217-18.[3]

In arguing that a factual dispute existed "as to when [the] 'last act' occurred for purposes of his lack-of-informed-consent claim," Mr. Falsberg contended that Dr. Conway had an obligation to inform him of the risks of and alternatives to continued use of Lamictal not only when he

[3] Mr. Falsberg also cited decisions concerning CR 12 and CR 56 motions, CP 216-17, and his claims as to the tolling effect of the RCW 7.70.100(1) Notice of Intent to Sue that he mailed to Dr. Conway on March 22, 2010, CP 221 (¶ 24). On appeal, Mr. Falsberg makes no arguments relating to his RCW 7.70.100(1) notice, or to CR 12 versus CR 56 motions.

initially prescribed the drug on February 15, 2007, but also when he increased the dosage on March 22, and when he told Mr. Falsberg to halve the dosage on April 4. CP 220-21. Mr. Falsberg cited no authority for the proposition that a physician has a legal obligation to re-disclose risks and alternatives concerning the use of a drug with every dosage change.

Although not made explicit in his written submissions to the trial court, Mr. Falsberg's amended complaint, testimony and arguments implied that he had "symptoms" before April 4, 2007 of what he claims was the reaction to Lamictal that, by April 7, 2007, had become SJS/TEN. *See* CP 27-28 (¶¶ 2.5-2.6), 48 (¶ 14.5), 220 (¶ 21), 221 (¶ 23), 227 (¶¶ 6, 7), 232 (¶¶ 6, 7). At the hearing on Dr. Conway's motion, Mr. Falsberg's counsel asserted that Mr. Falsberg had begun having symptoms of an adverse reaction to Lamictal as early as March 22. 6/24/11 RP 12-13.

The trial court granted Dr. Conway's motion, CP 510-13, 565-69, treating it as one for summary judgment, 6/24/11 RP 24-25. The summary judgment order was later amended, CP 565-69, to reflect the court's consideration of both of the replies Dr. Conway had filed, *see* CP 538-45, 546-48, 555. Mr. Falsberg's motion for reconsideration, CP 514-29, was denied. CP 570-74. After the court dismissed Mr. Falsberg's claims against GSK, CP 1078-80, Mr. Falsberg timely appealed, CP 1081-1106.

III. ARGUMENT

A. Standard of Review.

> A court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Tracfone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010). An order granting summary judgment can be affirmed on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424 , 426, 878 P.2d 483 (1994).

B. It is Undisputed that Mr. Falsberg's Claims against Dr. Conway Were Not Timely Asserted under RCW 4.16.350's Within-One-Year-of-Discovery Limitations Period.

RCW 4.16.350 provides in pertinent part that:

> Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976, against . . . a physician . . . 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 or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later . . . [Emphasis added.]

Mr. Falsberg does not argue that he filed his amended complaint adding Dr. Conway as a party defendant within one year of the date he "discovered" his causes of action against Dr. Conway. Nor could he. He

first filed suit against Dr. Conway on July 21, 2008 (which he later voluntarily nonsuited) and, based on the allegations made in that July 2008 complaint, showed that he had "discovered" the essential elements of his claims against Dr. Conway by then. CP 153-60. Thus, the claims Mr. Falsberg asserted against Dr. Conway in the amended complaint he filed on July 12, 2010, were not timely under RCW 4.16.350's within-one-year-of-discovery limitations provision. And, Mr. Falsberg has never raised any issue, either in the trial court or on appeal, as to tolling of the one-year limitations period.

C. Mr. Falsberg's Medical Negligence Claim Accrued Before He Became Incapacitated, So RCW 4.16.350's Three-Year Limitations Period Was Not Tolled under RCW 4.16.190(1), and Was Properly Dismissed on Statute of Limitations Grounds.

Mr. Falsberg argues, *App. Br. at 17-23*, that the time during which he was comatose at Harborview does not count against RCW 4.16.350's three-year medical negligence limitations period because, even though RCW 4.16.350(3) does not base the time periods within which suit must be brought on the common law concept of "accrual," RCW 4.16.190(1) bases tolling on that concept by using the word "accrued." RCW 4.16.190(1) provides:

> Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter . . . , be ***at the time the cause of action accrued*** . . . incompetent or disabled to such a degree that he or she cannot understand

> the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, . . . the time of such disability shall not be a part of the time limited for the commencement of action.

Mr. Falsberg asserts that "'accrual' is a legal term of art . . . and does not occur until all the essential elements of liability – duty, breach, causation, and damages – exist and are manifested," *App. Br. at 17*; that an essential element of a negligence claim is "actual loss or damage," *App. Br. at 22*; and that his medical malpractice cause of action accrued only when his injuries were "actualized" days, weeks, and months after April 4, 2007, and could not have accrued "until April 6, 2007, at the earliest, when the hospital determined that he had a life-threatening" condition requiring hospitalization and specialized burn care, *App. Br. at 23*. He cites no authority supporting his assertions that *manifestation* or *actualization* of the elements of a claim – including injury – is necessary for accrual to occur. He asserts, citing *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 189 P.3d 753 (2008), that "whether [a] plaintiff was disabled when her medical malpractice cause of action accrued for purposes of RCW 4.16.190(1) is a question of fact." *App. Br. at 21*.

In effect, Mr. Falsberg spends seven pages to make the argument that his claims against Dr. Conway did not accrue within the meaning of RCW 41.6.190(1) until he was diagnosed with a life-threatening condition

on April 6, 2007. Mr. Falsberg does not dispute, but rather acknowledges, that to be "incompetent or disabled" for purposes of RCW 4.16.190(1), a person must have "a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety." *App. Br. at 18* (quoting RCW 11.88.010(1)(a)).

Dr. Conway does not dispute for purposes of summary judgment that Mr. Falsberg may have become incapacitated at some point on April 6 and may have remained incapacitated for weeks thereafter. Dr. Conway, however, does dispute Mr. Falsberg's contentions (1) that "accrual," in that term's common law sense, continues to control, through RCW 4.16.190(1), tolling analysis for medical negligence claims even though RCW 4.16.350(3) eliminated the common law concept of accrual from statute of limitations analysis with respect to medical negligence claims, and (2) that his medical negligence claims "accrued," even in the common law sense, after April 5, 2007. In other words, Mr. Falsberg's proposed reading of RCW 4.16.190(1) is wrong but, even if it were correct, he still did not sue within RCW 4.16.350(3)'s three-year limitations period.[4] Either way, his claims against Dr. Conway were properly dismissed.

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[4] This is true even considering the fact that, because Mr. Falsberg mailed an RCW 7.70.100(1) notice of intent to sue on Dr. Conway on March 22, 2010, which was within 90 days of the expiration of the statute of limitations, the time within which he had to commence the action was extended 90 days (plus an additional five days thereafter) from the date of mailing (to June 25, 2010). Mr. Falsberg implicitly concedes as much as he

1. <u>The legislature enacted RCW 4.16.350 specifically to de-link limitations periods for medical malpractice actions from the common law concept of "accrual"</u>.

As the Supreme Court explained at some length in *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 953 P.2d 1162 (1998), in rejecting a plaintiff's argument that RCW 4.16.350(3)'s three-year limitations period for medical negligence claims cannot begin to run until a cause of action "accrues" in the common law sense, the purpose of RCW 4.16.350(3) was to take "accrual" *out* of the analysis of when a medical negligence claim is timely asserted except insofar as the elements of accrual are sublimated within the construct of "discovery," which under RCW 4.16.350(3) triggers a special one-year period (not a three-year period) within which a plaintiff must sue:

> An action accrues, generally speaking, when a party has the right to apply to a court for relief. [Citation omitted.] Injury is one of the elements of a negligence cause of action . . . Plaintiff reasons that until she suffered injury, her cause of action did not accrue, and therefore, the three-year period did not begin to run until 1991 when her injury occurred.
>
> The plain language of RCW 4.16.350(3), its history, and judicial construction indicate to the contrary: the three-year period commences to run at the time of the alleged wrongful act or omission causing the injury. RCW 4.16.350(3) provides a statute of limitations with alternative periods in which to file the action, expiration of the later of "3 years

makes no argument on appeal that his mailing of an RCW 7.70.100(1) notice somehow made his filing of the amended complaint adding Dr. Conway as a party defendant on July 12, 2010 timely.

after the last negligent act or 1 year after discovery of the negligence . . . ." [Citation omitted.] The three-year period begins to run from "the act or omission alleged to have caused the injury or condition . . ." RCW 4.16.350(3). This language clearly does not provide that the limitations period commences with accrual of a cause of action.

Further, history indicates that ***the Legislature intended to depart from common-law notions of accrual of a tort cause of action***. Medical malpractice actions which preceded enactment of the medical malpractice statute of limitations were governed by the limitations period in the general tort statute of limitations. RCWA 4.16.080(2) provided that "[a]n action for . . . any . . . injury to the person or rights of another not hereinafter enumerated" had to be commenced within three years. Former RCW 4.16.010 provided that "[a]ctions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute . . . ." Decisions at the time were consistent with the accrual rule plaintiff urges here: negligence which does not produce harm is not actionable, and a cause of action could not be maintained until injury had been sustained. However, once injury was sustained, whether known to plaintiff or not, the limitations period began to run. [Citation omitted.]

* * *

[Upon the enactment of RCW 4.16.350 in 1971], as now, a plaintiff had to commence the action by the expiration of the later of the two periods. ***Medical malpractice actions were no longer subject to the accrual rule expressed in former RCW 4.16.010*** which applied to RCW 4.16.080(2). This court addressed the 1971 statute, stating:

> The 1971 statute was significantly different from the previous statute of limitations and our interpretation of that statute. ***The concept of the accrual of a cause of action contained in the general statute of limitations was eliminated***. In its place is language that any action shall commence within 1 year of the time plaintiff discovers

> the injury or condition was caused by the wrongful act.
>
> *Bixler v. Bowman*, 94 Wn.2d 146, 149, 614 P.2d 1290 (1980) . . . ***Thus, accrual, in the traditional sense, is not the test of when the three-year limitations period begins to run in the case of medical malpractice. Instead, either the wrongful act or omission, or discovery, will commence the running of the alternate limitations periods in RCW 4.16.350(3).***

Gunnier, 134 Wn.2d at 859-61 (emphasis added).

It is implausible, in light of those statements, to conclude that the 1971 legislature, by leaving the word 'accrued" in what is now RCW 4.16.190(1)[5] meant to retain the concept of "accrual" for the limited purpose of tolling the new limitations periods for medical negligence claims due to incapacitation. The statutes are most sensibly harmonized by deeming the word "accrued" in RCW 4.16.190(1), when applied to RCW 4.16.350(3)'s three-year limitations period for medical negligence claims, to refer that three-year limitations period starting date, *i.e.*, the date of the defendant's last negligent act or omission, even if the *traditional* meaning of "accrued" would also carry with it the need for injury to have occurred.

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[5] RCW 4.16.190(2) was added by Laws of 2006, ch. 8, § 303.

2. Even if the word "accrued" in RCW 4.16.190(1) retained its common-law meaning, Mr. Falsberg's claims "accrued" before he became temporarily incapacitated.

Mr. Falsberg notes, *App. Br. at 20 and 23*, that there is a distinction between accrual of a cause of action for tolling purposes and the time when a statute of limitations begins to run. The foregoing excerpt from *Gunnier* confirms that there is such a distinction, but does not establish that the distinction makes a difference for purposes of this appeal. Under Mr. Falsberg's tolling argument, the word "accrued" in RCW 4.16.190(1) means what it meant at common law, before the court adopted the "discovery rule" in the "foreign object" case of *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969). Before *Ruth*, a medical negligence claim accrued as soon as the patient had an injury due to physician malpractice, even if the plaintiff did not know of the injury. As the court noted in *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 143, 960 P.2d 919 (1998), when our state constitution was adopted, it was the law that "a cause of action could accrue and the statute of limitations expire without a patient's knowing of injury." As the Court explained in *Gunnier*, *Ruth* adopted the discovery rule to mitigate perceived unfairness in allowing accrued "foreign object" claims to become time-barred even before patients had reason to know a foreign object had been left in their bodies:

> Under former law, harsh results ensued in some cases because an individual might not know he or she had been injured until after the statute of limitations cut off legal remedies. . . Because the Legislature had not definitively addressed this concern, the court reasoned, it was for the judiciary. *Id.*
>
> [The *Ruth* court] construed former RCW 4.16.010 and RCW 4.16.080(2) to mean that the cause of action might accrue upon discovery of the injury. *Ruth*, 75 Wn.2d at 667-68. This effectively created a three-year discovery rule. The Legislature responded to *Ruth* in 1971 by enacting RCW 4.16.350, setting forth a discovery rule which required commencement of the action within one year of actual discovery that the injury was caused by the wrongful act. Laws of 1971, ch. 80, § 1. The statute reduced the discovery rule period from three years as held in *Ruth* to one year. The new statute also provided for a three-year limitations period, but stated that this period began to run "from the date of the alleged wrongful act . . ." Laws of 1971, ch. 80, § 1.

Gunnier, 134 Wn.2d at 860-61.

The point is that, for purposes of determining when Mr. Falsberg's claim against Dr. Conway *accrued*, what matters is when he first suffered injury caused by Dr. Conway's alleged negligence. When the injury was *diagnosed*, and/or when Mr. Falsberg *discovered* that he had suffered injury due to what he claims was medical negligence, are irrelevant to *accrual* analysis. Diagnosis may or may not have triggered the one-year-from-*discovery* limitations period of RCW 4.16.350(3), but discovery was unnecessary for *accrual* at common law; the discovery rule was adopted to protect plaintiffs from the sometimes-harsh effect of an accrual-based

statute of limitations and because the legislature, as of 1969, had not yet addressed the matter. *Gunnier*, 134 Wn.2d at 860-61. As the court acknowledged in *Gunnier*, the legislature did address the matter by enacting RCW 4.16.350 in response to *Ruth*.

For purposes of determining when Mr. Falsberg suffered injury caused by what he alleges was Dr. Conway's negligence, it has been the law, since long before *Ruth* was decided, that:

> "Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. ***It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.***" [Emphasis added.]

Lindquist v. Mullen, 45 Wn.2d 675, 677, 277 P.2d 724 (1954), *overruled on other grounds by Ruth*, 75 Wn.2d at 636 (quoting 34 Am. Jur. 126, Limitation of Actions, § 160). That remains the law. *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998) ("[t]he statute of limitations is not postponed by the fact that further, more serious harm may flow from the wrongful conduct"). Plaintiff need not know the full amount of damages, only that some actual and appreciable harm occurred.[6]

[6] *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 112 P.2d 826 (1991) (the fact that the plaintiff knew his thumb had gone numb following an injection sufficed to establish discovery more than a year before he filed suit, even if he may not have known at the time that he ultimately would suffer a permanent partial disability); *Steele v. Organon,*

Mr. Falsberg's claim against Dr. Conway *accrued* once Lamictal made him sick. As even he argued below, Lamictal first began making him sick in March, 2007, *see* 6/24/11 RP 12-13, and it was certainly making him sick by April 4, 2007, when he fell at his broker's office and called Dr. Conway complaining of flu-like symptoms, or by April 5, when he first went to Swedish/Ballard with symptoms, CP 227(¶ ¶ 5-9), 232 (¶ ¶ 5-9), 495. He did not first become sick from taking Lamictal on April 6, 2007, when he was diagnosed with a *life-threatening* condition (as he seems to contend, *App. Br. at 23*), or on April 7, 2007, when he was placed in a medically induced coma, *see* CP 227 (¶ 11); 232 (¶ 11). In opposing Dr. Conway's motion, Mr. Falsberg clearly argued and presented evidence that he began having increasingly worrisome side effects from Lamictal starting soon after March 22, when his dosage was increased to 150 mg/day, including those symptoms that he spoke with Dr. Conway about on April 4, and that he had when he presented to Swedish/ Ballard on April 5, 2007. 6/24/11 RP 12-13, CP 227(¶ ¶ 5-9), 232 (¶ ¶ 5-9), 495.[7]

Inc., 43 Wn. App. 230, 716 P.2d 920, *rev. denied*, 106 Wn.2d 1008 (1986) (plaintiff who decided not to sue after experiencing sensory loss and tingling in her appendages after taking medication her physician prescribed for headaches in 1973 knew she had injury possibly due to malpractice years before suffering heart attack in 1981 and stroke in 1982 allegedly due to the medication taken in 1973, such that her claims for damages for the heart attack and stroke injuries was time-barred).

[7] An expert whose testimony Mr. Falsberg offered in opposition to GSK's summary judgment motion declared that Mr. Falsberg had SJS/TEN on April 4, 2007, but that the diagnosis was missed (as the expert testified it almost always is) on April 5. CP 902 (¶ 6) and CP 906 (¶ 38).

Thus, while Mr. Falsberg predictably focuses on the date when SJS/TEN was diagnosed, or the date he was placed in a medically induced coma, in order to make his tolling argument fit the "at the time the cause of action accrued" clause in RCW 4.16.190(1), he has never affirmatively argued, and did not offer competent expert testimony establishing, that his adverse reaction to Lamictal began after April 5, 2007.[8] The evidence of record on Dr. Conway's motion for summary judgment establishes that his adverse reaction to Lamictal began well before, and was ongoing as of April 5, 2007. CP 227(¶ ¶ 5-9), 232 (¶ ¶ 5-9), 495.

Thus, even reading and applying RCW 4.16.190(1) as Mr. Falsberg advocates, his claims against Dr. Conway *accrued* before the earliest date when the admissible evidence of record would support a finding that he became incapacitated, *i.e.*, April 7, 2007. Mr. Falsberg therefore was not yet "incompetent or disabled" within the meaning of RCW 4.16.190(1) at the time his claims against Dr. Conway accrued, and the three-year limitations period was not tolled.

3. *Rivas v. Overlake Hosp. Med. Ctr.* is inapposite.

Mr. Falsberg, *App. Br. at 18-23*, relies heavily on the decision in *Rivas* as support for his RCW 4.16.190(1) "accrual" and tolling

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[8] To the contrary, he offered affirmative expert testimony, albeit in opposition to GSK's dispositive motion, that he had SJS/TEN as of April 4. CP 906 (¶ 38); *see also* CP 885 (¶ 25).

arguments. But his reliance on *Rivas* is misplaced because, as that decision makes clear, the court addressed only what "incapacitation" means, not what the word "accrued" means in RCW 4.16.190(1), and not how that statute is properly harmonized with RCW 4.16.350(3):

> Former RCW 4.16.190 has four factors plaintiffs must satisfy to toll the statute of limitations based upon incompetence or disability. Plaintiffs must show that (1) they are entitled to bring the action, (2) they are incapacitated at the time the cause of action accrues, (3) they are incompetent or disabled to the degree that they cannot understand the nature of the proceedings, and (4) the incompetency or disability exists as "determined according to chapter 11.88 RCW." Former RCW 4.16.190. *Only the last two factors are at issue, and they take us to the guardianship act, chapter 11.88 RCW.*" [Emphasis added].

Rivas, 164 Wn.2d at 268. Because accrual, and harmonizing RCW 4.16.190(1) with RCW 4.16.350(3), were not among the issues *Rivas* addressed, *Rivas* provides no holding to guide a decision in this case.

4. <u>No issue of fact precluded summary judgment dismissal of the medical negligence claim against Dr. Conway.</u>

Mr. Falsberg makes a perfunctory, nine-line argument, *App. Br. at 24*, that "substantial factual disputes" existed as to "whether his legal disability coincided with, or preexisted, the moment his cause of action against Dr. Conway 'accrued'." Mr. Falsberg cites "CP 218-19, 528-529" as support for that assertion. Those pages of the clerk's papers, however, consist of arguments made in briefing to the trial court, not to any testimony or other evidence. Mr. Falsberg's suggestion, *App. Br. at 24*,

that *Rivas*, 164 Wn.2d at 269-70, somehow holds that "disability and accrual are questions of fact" does not bear scrutiny. While *Rivas* involved unresolved material questions of fact precluding summary judgment, this case does not. Even if the word "accrued" in RCW 4.16.190(1) retains its common law meaning when applied to the three-year limitations period of RCW 4.16.350(3), Mr. and Mrs. Falsberg's own testimony establishes that Mr. Falsberg sustained injury from his taking of Lamictal, such that his cause of action accrued, before he became incapacitated.

Although Mr. Falsberg offered evidence that he became incapacitated starting on April 7, he offered no competent evidence that he was incapacitated at the time he spoke with Dr. Conway on April 4, which was several hours after he reviewed a 20-page real estate contract line by line with his broker at the broker's office, CP 504, and during which he described his symptoms and was amused by Dr. Conway's facetious inquiry as to whether he had fallen because he had been drinking, CP 495, and after which he halved his dosage of Lamictal per Dr. Conway's telephone instructions that day, CP 494.[9] The evidence before the trial

[9] Statements in Mrs. Falsberg's declaration that Mr. Falsberg had been "not at all aware of what was happening to him from the time of a couple of days before he was admitted, while he was in the Burn Intensive Care Unit . . ., and for many weeks after he was released to the hospital," and was helpless and incapable of understanding legal proceedings "[f]rom several days prior to his hospitalization until the end of August [2007]," CP

court established that Mr. Falsberg, although ill, was competent, not incapacitated, on April 4, 2007.

D. The Three-Year Limitations Period Applicable to Any "Informed Consent" Claim Under RCW 7.70.050 Began to Run on February 15, 2007. Even If It Did Not Begin to Run Until April 4, 2007, It Still Had Expired by the Time Mr. Falsberg Sued on July 12, 2010.

Mr. Falsberg assigns error to the dismissal of his "lack of informed consent" claim, CP 35, *App. Br. at 2 (Assign. of Error No. 2)*, but offers no arguments specific to that claim as opposed to his medical malpractice claim. The parties did not dispute in the trial court, and *Young v. Savidge*, 155 Wn. App. 806, 815-16, 230 P.3d 222 (2010), confirms, that the limitations period applicable to a RCW 7.70.050 "informed consent" claim is three years pursuant to RCW 4.16.350. What the parties did argue about in the trial court is whether the clock for the three-year limitations period under RCW 4.16.350 began to run on Mr. Falsberg's "informed consent" claim when Dr. Conway first prescribed Lamictal on

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227-28 (¶¶ 11, 13) fall well short of evidence that Mr. Falsberg was unaware of what was happening or helpless during his April 4 phone conversation with Dr. Conway, which was about a full day before Mrs. Falsberg found him slumped over his computer, noticed his rash, and took him to Swedish/Ballard. Moreover, at the hearing on Dr. Conway's motion, Mr. Falsberg's counsel asserted that the Falsbergs' affidavits [sic] "indicat[e] that *beginning* on about April 7th that he was completely incapacitated . . .," 6/24/11 RP 11 (italics added), and that the Falsbergs' declarations show that Mr. Falsberg was incapacitated "*beginning on April 7,*" *id.* at 15 (italics added), not that Mr. Falsberg was incapacitated *before* April 7, let alone on April 4. Mr. Falsberg's counsel later asserted at the same hearing that Mr. Falsberg had been disabled "from April 5th on," not before April 5. 6/24/11 RP 22-23.

February 15, 2007, or was reset each time he prescribed a different dosage, *i.e.*, on March 22 and April 4, 2007. CP 111-12, 220-21, 477-78.

The correct answer is February 15 but, even if it were April 4, Mr. Falsberg's "informed consent" claim against Dr. Conway was asserted too late. "Because the doctrine of informed consent is based on 'the individual's right to ultimately control what happens to his body, . . . common sense dictates that this control is relinquished once the procedure to which the patient could [but claims not to] have consented is complete." *Young*, 155 Wn. App. at 816.

Mr. Falsberg complains that Dr. Conway did not properly inform him "of the true nature of . . . the risks and alternatives [to taking Lamictal]. CP 35 (¶ 6.3). Thus, the "procedure" to which Mr. Falsberg claims he did not give informed consent was the taking of Lamictal, which he admits he knew from the outset would involve increasing the dosage each week for at least four weeks.[10] CP 491. That "procedure" was "complete" once Mr. Falsberg began taking Lamictal, subject to immediate cessation if he developed a rash. CP 491.

Mr. Falsberg cites no authority for the proposition – which would be one of law – that, even after a patient begins taking a prescribed

[10] He also admits that Dr. Conway told him at the time he prescribed Lamictal that "in very rare instances there can be a rash" from taking it, that "very rarely people get very sick from it," and that he should "stop taking it right away" if he saw a rash. CP 489-91.

medication, the prescribing physician has a legal duty to re-inform the patient of all material risks associated with the drug whenever the physician adjusts the initial dosage. Nor did he offer evidence that the risks of taking Lamictal change materially, or that different and materially significant alternatives to taking Lamictal become medically plausible, when a patient's Lamictal dosage is increased from 100 mg to 150 mg, as Mr. Falsberg's dosage was increased on March 22, 2007, or when it is reduced from 150 mg to 75 mg, as his dosage was decreased on April 4.

Even if it were the law that a physician must re-inform the patient when changing a drug dosage, the last adjustment of Mr. Falsberg's Lamictal dosage occurred on April 4, 2007, which was more than three years before he sued Dr. Conway. If Dr. Conway had a duty to re-inform Mr. Falsberg of the risks of and alternatives to Lamictal on April 4, the three-year limitations period had run by the time he sued in July 2010.[11]

E. The Dismissal of Mr. Falsberg's Negligent Misrepresentation Claim Against Dr. Conway May Be Affirmed for the Additional Reasons that a "Claim for Injury Resulting from Health Care" May Not Be Asserted under a Theory of Negligent Misrepresentation and that the Negligent Misrepresentation Claim Is Redundant with Mr. Falsberg's "Lack of Informed Consent" Claim.

It is not clear from his opening brief whether Mr. Falsberg assigns error to the dismissal of his negligent *misrepresentation* claim against Dr.

[11] This is true even considering the fact that Mr. Falsberg mailed an RCW 7.70.100(1) notice of intent to sue on Dr. Conway on March 22, 2010. *See* footnote 4, *supra*.

Conway. If Mr. Falsberg's brief is interpreted as seeking reinstatement of that claim, the claim's dismissal should be affirmed for at least two reasons in addition to those stated above.

First, the claim is redundant with Mr. Falsberg's "lack of informed consent" claim. Both claims allege that Dr. Conway did not tell Mr. Falsberg enough about the risks of and alternatives to taking Lamictal. CP 35-36 (¶¶ 5.2, 6.2-6.3). Neither in the trial court nor in his opening brief on appeal does Mr. Falsberg offer any argument distinguishing the negligent misrepresentation and "lack of informed consent" claims in a way that would allow the former to survive the dismissal of the latter.

Second, no claim other than one of the three listed in RCW 7.70.030 may be asserted for injury resulting from health care.[12] *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335, *rev. denied*, 138 Wn.2d 1023 (1999); *Hall v. Sacred Heart Med. Ctr.*, 100 Wn. App. 53, 61-62,

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[12] RCW 7.70.030 provides that:

> No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:
>
> (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
>
> (2) That a health care provider promised the patient or his or her representative that the injury suffered would not occur;
>
> (3) That injury resulted from health care to which the patient or his or her representative did not consent.
>
> Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

955 P.2d 621, *rev. denied*, 141 Wn.2d 1022 (2000). Mr. Falsberg asserts no claim against Dr. Conway that is based on alleged acts or omissions committed by Dr. Conway other than in his role as a physician providing health care to Mr. Falsberg. Because Mr. Falsberg's action against Dr. Conway is an action for damages for injuries allegedly occurring as a result of health care, RCW 7.70.030 applies. Negligent misrepresentation is not a claim listed in RCW 7.70.030. Mr. Falsberg's amended complaint thus failed to state a claim for negligent misrepresentation on which relief could have been granted.[13]

IV. CONCLUSION

For the foregoing reasons, the trial court correctly dismissed Mr. Falsberg's claims against Dr. Conway based on the statute of limitations, and this Court should affirm.

RESPECTFULLY SUBMITTED this 31st day of August, 2012.

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By ______________________
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[13] Although these arguments are not ones Dr. Conway relied upon in the trial court – although his counsel did refer to them, 6/24/11 RP 20 – this Court may affirm the grant of summary judgment on any ground supported by the record, whether the trial court considered that ground or not. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied,* 493 U.S. 814 (1989); *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011); *Redding*, 75 Wn. App. at 426.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 31st day of August, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondent Jack S. Conway, M.D.," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 31st day of August, 2012, at Seattle, Washington.

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