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Court of Appeals No. 67949-0-1

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

Young Soo Kim,

Appellant,

v.

Choong-Hyun Lee and Choong-Hyun Lee, DMD, PLLC
dba Lee Family Dental and John Does 1-10

Respondents.

APPELLANT'S REPLY BRIEF

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I. REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF

Respondents offer a number of arguments in response to Mr. Kim's request that this Court reverse the trial court's dismissal of his claims on summary judgment. However, these arguments are not based upon competent evidence and further emphasize the multitude of material issues of fact that preclude dismissal as a matter of law on summary judgment. Given the standard on summary judgment, Mr. Kim presented sufficient reasonable inferences to support his theory that the continuing course of negligent treatment continued through his final appointment with Dr. Lee, and therefore, he should be permitted to present evidence and legal theories as to Dr. Lee's medical malpractice to a jury.

II. RESPONDENTS CANNOT CURE THEIR DEFICIENT SUMMARY JUDGMENT MOTION BY OFFERING THE SPECULATION OF COUNSEL AS TO WHAT IS CONTAINED IN MR. KIM'S MEDICAL RECORDS

As Mr. Kim has repeatedly pointed out, both in response to summary judgment and again on appeal, Dr. Lee did not submit a declaration to refute Mr. Kim's assertion that the examination on March 29, 2007 was part of the follow-up observation and treatment for the installation of crowns. CP 37. Nor did Dr. Lee refute Dr. Kenny's narrative opinion that his medical care and treatment were, in fact,

negligent. Instead, to defeat summary judgment, Dr. Lee relied solely upon the declaration of his counsel, which merely attached Mr. Kim's medical records, the complaint, and the good faith request to mediate. CP 123-24.

Now, in response to Mr. Kim's opening brief, having no support from Dr. Lee directly, Dr. Lee's counsel is left with no other option than to offer his own interpretation and analysis of Mr. Kim's medical records and the course of treatment that Mr. Kim received, in an attempt to refute Mr. Kim's testimony. However, counsel's "argument" is not appropriate on several grounds.

First, counsel is not asserting *arguments* in his response brief, but is attempting to offer new *testimony*. "Testimony" is defined as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." Black's Law Dictionary 1514 (8th ed. 2004). In support of Dr. Lee's motion for summary judgment, only one declaration was submitted, the declaration of Counsel Jake Winfrey, which merely attached Mr. Kim's medical records. CP 123-24. None of the facts now asserted in Dr. Lee's Responsive Brief were ever asserted by Dr. Lee, Mr. Winfrey, or anyone else at the time of summary judgment. Had such facts been set forth in the declaration of Mr. Winfrey, they

would have appropriately been subject to a motion to strike for failing to comply with CR 56.

Second, counsel's personal interpretation of the medical records regarding the course of treatment of Mr. Kim is pure speculation, is not competent evidence, and is hearsay. CR 56(e) provides, in pertinent part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The affiant must "affirmatively show competence to testify to the matters stated" and must be more than just "familiar" with the facts alleged. *Marks v. Benson*, 62 Wn. App. 178, 182, 813 P. 2d 180 (1991). Evidence is not competent if it requires the trier of fact to base its award on mere speculation or conjecture. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn.App. 628, 639, 939 P.2d 1228 (1997).

Mr. Winfrey is not an appropriate witness to testify as to Mr. Kim's course of treatment, as he clearly lacks any personal knowledge of the critical factual information of this case and has no medical or dental training. Statements he now asserts are pure speculation. Notably, Mr. Winfrey's declaration did not set forth the statements he now asserts on appeal. CP 123-24. Even if it did, an attorney's affidavit is entitled to the same consideration as any other affidavit and must be based upon personal

knowledge. *Wilson v. Steinbach*, 98 Wn.2d 434, 438, 656 P.2d 1030 (1982). Legal memoranda and the arguments of counsel are not admissible in evidence. *See, e.g., Strandberg v. Northern Pac. Ry Co.*, 59 Wn.2d 259, 265, 367 P.2d 137 (1961) (argument of counsel is not evidence); *Jones v. Hogan*, 56 Wn.2d 23, 31, 351 P.2d 153 (1960) (same); *Watts v. U.S.*, 703 F.2d 346, 353 (9th Cir. 1983) (“Legal memorandum and argument are not evidence and cannot, by themselves, create a factual dispute sufficient to defeat summary judgment where no dispute otherwise exists.”).

Although counsel may attach business (medical) records without violating the hearsay rule, in accordance with RCW 5.45, the Uniform Business Records as Evidence Act, the Act does not permit the admission of conclusions based upon speculation or conjecture.

It was never intended that, under the guise of a business record, the exception to the hearsay rule would be extended so that the maker of a record could express, through the medium of the record itself, an opinion as to causation that he would not be permitted to express in open court, if he based his opinion solely upon the factual information which is shown in the report.

Young v. Liddington, 50 Wn.2d 78, 84, 309 P.2d 761, 765 (1957). Mr. Winfrey could not take the stand to testify that an entry was made in Mr. Kim’s medical records for any particular reason, or to tell the jury how the medical jargon should be interpreted, or to describe what the medical

treatment consisted of and the reason for it. Because of this, Mr. Winfrey's statements do not fall under the Uniform Business Records as Evidence Act exception, and are also inadmissible hearsay.

Third, counsel's new "argument" violates RAP 9.12, which provides in pertinent part, "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."

As summary judgment rulings are reviewed *de novo*; the appellate court engages in the same inquiry into the evidence and issues called to the attention of the trial court. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993). The purpose of this limitation is to effectuate the rule that the "appellate court engages in the same inquiry as the trial court." *Washington Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). Arguments that are not made to the trial court are not considered. *1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 6 P.3d 74 (2000), *aff'd*, 144 Wn.2d 570, 29 P.3d 1249 (2001); *accord Johnson v. Reehoorn*, 56 Wn.App. 692, 700, 784 P.2d 1301 (1990).

Only a timeline containing undisputed dates of treatment was asserted to the trial court. CP 125-27. None of the new arguments

regarding the basis for certain appointments being scheduled that have been asserted in Dr. Lee's responsive brief were made to the trial court. There was no competent evidence to support those arguments before the trial court and there is no competent evidence now before the appellate court. Dr. Lee had the opportunity to offer his own testimony to support his motion for summary judgment, but he elected not to do so. These arguments are unsupported by competent evidence and are untimely as well.

***III. CONTINUUM OF NEGLIGENT TREATMENT
INCLUDES OMISSIVE CONDUCT, SUCH AS
FAILURE TO HALT THE NEGLIGENT TREATMENT***

A tort claim against a health care provider based upon interrelated violations of the standard of care during a continuing course of treatment is a *single cause of action* that embraces the entire period of treatment, as opposed to a series of related but discrete causes of action. An action for medical negligence must be commenced "within three years of the act or omission alleged to have caused the injury or condition" or one year after discovery, whichever is later. RCW 4.16.350. When negligence over an entire course of treatment is alleged, rather than discrete acts, the filing deadline is three years after either the end of treatment or the date the plaintiff discovered or reasonably should have discovered the negligence,

whichever is earlier. *Webb v. Neuroeducation Inc., P.C.*, 121 Wash. App. 336, 343, 88 P.3d 417, 420 (2004) citing *Caughell v. Group Health Co-op. of Puget Sound*, 124 Wn.2d 217, 236–37, 876 P.2d 898 (1994). This “continuum of negligent treatment” should include any period at the end of the continuum while the patient abides by the health care provider's course of treatment, since the provider designated the course and has negligently omitted to correct or halt the ongoing harmful treatment.

In accordance with the Washington Supreme Court’s holding in *Caughell*, Mr. Kim may assert a claim for medical malpractice based upon Dr. Lee’s “act or omissions” which consist of a continuum of negligent treatment. The three year statute begins to run upon termination of the continuum of negligent treatment. Dr. Lee never identified, much less corrected or halted, the fact that he made an improper abutment selection, installed an improper number of implants, or improperly placed the implant he did install. Such was the case through Mr. Kim’s final appointment with Dr. Lee on March 29, 2007. The continuum includes omissive negligent conduct by the health care provider at the end of the continuum. Consequently, this action was timely filed and summary judgment dismissal of Mr. Kim’s claims was erroneous.

IV. RESPONDENTS CONTINUE TO MISCHARACTERIZE THE HOLDING OF CAUGHELL

Dr. Lee continues to erroneously assert that the holding in *Caughell* requires Mr. Kim to prove that Dr. Lee did something negligent *in of itself* on March 29, 2007 in order to avoid the statute of limitations issue. However, this is precisely the opposite of the *Caughell* holding:

We affirm today that malpractice claimants have the right to allege the entire course of continuing negligent treatment as one claim. Our ruling in *Samuelson* that acknowledged such a right is still the law. The benefits of this rule are as ample as they are apparent. First, our tort law has recognized, and should recognize, that malpractice can occur in a series of interrelated negligent acts. To shoehorn this continuing negligent treatment into a single negligent act, occurring within 3 years of filing suit, deprives claimants of the chance to prove the full extent of negligence *in one claim*. The law should not require plaintiffs to split their claims. Furthermore, as described below, splitting claims has the practical and unfair effect of insulating health care professionals from liability for negligence occurring prior to the 3-year statutory period. We conclude therefore that where the tort is continuing, the claim is continuing.

Caughell at 229-230.

A plaintiff in a continuing negligence claim must show breach of duty by showing a “series” of “interrelated negligent acts” occurring during the course of treatment. *Id.* at 233. A series is defined as two or more negligent acts. *Id.* That element is demonstrated here by Mr. Kim’s testimony that he was subjected to an extensive set of procedures

involving removal of teeth, installation of abutments, implants, and temporary and permanent crowns, all of which resulted in his upper left crown repeatedly falling off. CP 102-04. Mr. Kim was also unable to chew or eat due to pain on both sides of his mouth; he suffered from severe headaches, tingling in his face, hearing loss, and watering eyes. CP 103.

A plaintiff must also show that the acts are interrelated, i.e., that they are part of a substantially uninterrupted course of treatment and must relate to the treatment as a whole. *Id.* Here, Mr. Kim has testified that this course of treatment included removal of his bridge, extractions of his teeth, the installation of implants, temporary, and finally, permanent crowns, and follow up appointments to observe his recovery. CP 102-04. In this instance, then, the acts of Dr. Lee, including the planning and execution of all procedures and surgeries consist as a “substantially uninterrupted course of treatment” relating to the treatment as a whole, which caused damage. *Id.* The acts are, thus, classically “an alleged series of interrelated negligent acts or omissions extending into the statutory period.” *Id. at 234.*

This is consistent with the rationale expressed in *Webb v. Neuroeducation, Inc., supra.* Under RCW 7.70.040, the injury that results must result from “the failure of the health care provider to follow the

accepted standard of care.” *Id.* In continuing failures to follow such a standard, the injury results from the whole. *Webb* does not stand for the proposition that absent some individual injury that occurred as a result of the treatment Mr. Kim obtained on March 29, 2007, his claim is time-barred. Rather, *Webb* stands for the proposition that the statute of limitations begins at the termination of the negligent course of treatment, which is alleged in this case to be March 29, 2007.

Unrah v. Cacchiotti, 172 Wn.2d 98, 257 P.3d 631 (2011) confirms, once again, that the final treatment does not need to *in of itself* create injury, but that if a course of negligent treatment includes application of braces, the removal of braces triggers the statute of limitations.

Not just the law, but the facts in *Caughell* provide further support to Mr. Kim’s argument that the continuum of negligent treatment continued through to his last visit with Dr. Lee.

Defendants contend that, at best, the record supports a finding that the last alleged negligent act occurred on November 18, 1987, when Dr. Sherry wrote his final prescription for Valium. **We do not take so narrow a view.** The physical act of writing a prescription is only part of the alleged negligence. Mrs. Caughell has presented evidence that defendants' failure to *monitor* the effects of Valium and Etrafon may have breached the duty of care owed to her.

Caughell at 235 (emphasis added). As the Defendants did in *Caughell*, Dr. Lee’s counsel similarly asserts that treatment ceased upon installation

of Mr. Kim's last crown. He asks this Court to disregard the fact that Dr. Lee continued to observe and monitor Mr. Kim just weeks afterward, on March 29, 2007. Dr. Lee's contention is even narrower than that of the Defendants in *Caughell*, and should be rejected on the same basis. It is preposterous to assert that during the March 29, 2007 appointment with Dr. Lee, Dr. Lee would not have made any examination of Mr. Kim's crown work and the manner in which he was healing from the prior procedures. The only competent evidence in the record says otherwise.

V. ISSUES OF MATERIAL FACT ARE REplete IN THIS APPEAL

The only issue at summary judgment was whether "the plaintiff failed to comply with RCW 4.16.350, the statute of limitations for medical malpractice claims." The statute of limitations is an affirmative defense on which the defendant bears the burden of proof. *Haslund v. City of Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976).

Mr. Kim's final treatment for the bridge replacement work with Dr. Lee was on March 29, 2007. CP 103. His good faith request for mediation was served prior to March 29, 2010, which tolled the statute of limitations for one year. CP 98-101. The filing of his complaint within that year, on March 14, 2011, was timely. CP 172.

In support of his motion, Dr. Lee merely attached Mr. Kim's medical records to show the dates of Mr. Kim's treatment. CP 123-24. In reply to Mr. Kim's response, he offered no additional competent evidence to support his motion. CP 41-47. Now, on appeal, Dr. Lee openly disputes the following material facts:

- 1) Dr. Lee provided a single course of negligent treatment to Mr. Kim between December 5, 2005 and March 29, 2007.
- 2) Dr. Lee's examination of Mr. Kim on March 29, 2007 was part of the follow-up observation and treatment for the installation of crowns that occurred in February and March 2007.
- 3) Dr. Lee actively examined all four areas of Mr. Kim's mouth on March 29, 2007, including the permanent crowns that he had installed just weeks prior, a continuation of the course of negligent treatment.
- 4) Even after obtaining an x-ray of Mr. Kim's mouth on March 29, 2007, Dr. Lee negligently failed to identify, much less correct, the improper abutment selection, the improper number of implants, or the improperly placed implant that he did install.

VI. CONCLUSION

Dr. Lee improperly recites disputed facts in a light most favorable to him, not to Mr. Kim. This court must consider the facts and all inferences in a light most favorable to Mr. Kim in deciding whether the trial court erred in dismissing his claims on summary judgment. The statement of the case in appellant's opening brief sets out the relevant facts in light of the proper standard. Dr. Lee has not challenged the accuracy of any of the facts recited by Mr. Kim, but instead attempts to improperly insert counsel's unsupported interpretation of the entries of the medical records. This Court should rely on Mr. Kim's statement of the case in deciding this appeal and in determining that the continued course of negligent treatment ended on March 29, 2007. Dr. Lee's dispute of this material fact alone should preclude summary judgment.

Respectfully submitted this 27th day of April, 2012.

SINGLETON & JORGENSEN, INC. PS

By 
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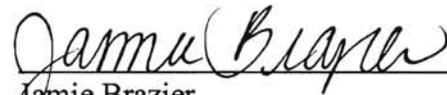
CERTIFICATE OF SERVICE

Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on April 27, 2012, I delivered one copy of the APPELLANT'S REPLY BRIEF, to the address(es) listed below by messenger service:

Jake Winfrey
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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.

Executed at Renton, Washington, on: April 27, 2012.



Jamie Brazier