

No. 72708-7

In the Court of Appeals
for the State of Washington

Division One

MARSHA K. MCFADDEN, as Personal Representative of
the Estate of DAVID R. MCFADDEN, deceased; on behalf
of the Estate of DAVID R. MCFADDEN, and on behalf of
MARSHA K. MCFADDEN, surviving spouse, and on
behalf of KATHRYN GREEN, CHRISTINA CARLSON
and JACLYN FLEMING, surviving adult children,

Appellants/Plaintiffs,

v.

SOUTH SOUND INPATIENT PHYSICIANS, PLLC; and
MONICA MARTON-POPOVICI, M.D.,

Respondents/Defendants.

RESPONDENTS' BRIEF

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I. INTRODUCTION

CR 11(b) requires an attorney to certify that, to the best of the attorney's knowledge, a pleading has been filed after "a reasonable inquiry under the circumstances" and that it is "well grounded in fact." CR 11(b)(1). The history of this appeal and underlying litigation illustrates the need for this rule. Here, plaintiffs' counsel has made diametrically opposed statements of fact in multiple pleadings filed in two related medical malpractice lawsuits arising from the March 5, 2009 death of David McFadden. The first action, filed on February 14, 2012, identified the same actors and essentially the same claims of negligence as those contained in a second action filed individually against Respondents Dr. Marton-Popovici and her employer South Sound Inpatient Physicians. Compare CP 1-8 with CP 28-36. Plaintiffs settled the 2012 action and dismissed the case on July 24, 2013. CP 251. They then filed the present action against Dr. Marton-Popovici on September 17, 2013. CP 1.

The tort claim in the original action, the Complaint in the first lawsuit, and defensive motions plaintiffs filed as the case proceeded all demonstrate counsel's knowledge of Dr. Marton-Popovici's role in Mr. McFadden's care as early as September 2011. There is thus no credible argument that the discovery rule applies to excuse the tardy filing of this action. Faced with the multiple examples of the plaintiffs'

knowledge of the facts relating to their claim against Dr. Marton-Popovici, the trial court properly concluded there were no genuine issues of material fact and that the statute of limitations had run. Because no debatable issues exist upon which reasonable minds can differ, the Respondents request that this Court dismiss the appeal, find the appeal frivolous, and award compensatory fees as the appropriate sanction.

II. COUNTER STATEMENT OF ISSUES RELATING TO APPELLANTS' ASSIGNMENTS OF ERROR

1. Where plaintiffs and their counsel possess all facts necessary to bring a claim against a physician within the statutory three-year period, did the trial court properly dismiss an action brought four years and six months after the death of the patient?

2. Is the current appeal frivolous?

III. COUNTER-STATEMENT OF THE CASE

A. Underlying Medical Negligence Claim.

David McFadden, presented to the Emergency Room at Valley Medical Center (hereafter "VMC") on March 3, 2009 with a headache, weak appetite, vomiting, chills, and confusion. CP 3. At 8:30 a.m., emergency room physician, Dr. Anne Lapine, notified the hospital that Mr. McFadden needed to be admitted and requested that a hospitalist call

her back for admission orders. Dr. Marton-Popovici¹ was the hospitalist on duty. Dr. Marton-Popovici provided care to Mr. McFadden in the ICU. Mr. McFadden died on March 5, 2009. All allegations of negligence thus involve the two-day period between March 3, 2009 and March 5, 2009.

B. Plaintiffs' 2011 Tort Claim and 2012 Complaint Establish Facts Sufficient to Bring Suit against Dr. Marton-Popovici's for Her Role in Providing Care to David McFadden.

In September 2011, plaintiffs filed a tort claim pursuant to RCW 4.96.020 against VMC (hereafter the "Tort Claim"). CP 126. The tort claim cited the medical treatment that Mr. McFadden received at VMC from the time of his arrival in its emergency room at 2:37 a.m. on March 3, 2009 to the time of his death on March 5, 2009. CP 126. Plaintiffs identified Dr. Monica Marton-Popovici in paragraph 13 of the tort claim as a witness, employee and ostensible agent of the state agency and as the hospitalist who accepted the patient from the ER. CP 126; CP 130.

On February 14, 2012, filed the first Complaint in King County (Case No. 12-2-05645-S KNT) against Public Hospital District No. 1 of King County d/b/a Valley Medical Center, Associated Emergency

¹ During the course of these proceedings, Dr. Marton changed her name to Dr. Marton-Popovici. For the sake of consistency, unless a specific pleading is being quoted, this brief refers to the doctor by her current name, Dr. Marton-Popovici.

Physicians, Inc., P.S., and Anne L. Lapine M.D. (hereafter the “February 2012 Complaint”). CP 116.

The February 2012 Complaint alleges that the claim “arises out of medical care and treatment provided to David R. McFadden by the defendants between March 3, 2009 at 2:37 a.m. and March 5, 2009.

CP 119-21. As with the tort claim, this complaint identified Dr. Marton-Popovici by name and referred to her as a “defendant” in Paragraph 2.1.

CP 118.

Paragraph 1.1 identified Dr. Marton-Popovici as providing health care to Mr. McFadden:

1.1 . . . At all times material hereto, and in particular, 2009, David R. McFadden received health care services from Public Hospital District No. 1 of King County d/b/a Valley Medical Center through its partners, employees, agents, and/or ostensible agents, including Associated Emergency Physicians, Inc., P.S., Anne L. Lapine, M.D., and **Monica Marton, M.D., and there existed a fiduciary health care provider-patient relationship between David R. McFadden and these defendants.**

CP 116-17 (emphasis added.)

Paragraph 4.26 identified Dr. Marton-Popovici as a person who caused Mr. McFadden’s death:

4.26 As a direct and proximate result of VMC, AEP, Anne L. Lapine, M.D., **Monica Marton, M.D.**, and their partners, employees, agents and/or ostensible agents’ failure to provide reasonably prudent care to David R. McFadden, he suffered and needlessly died, and the Estate of David R.

McFadden and its beneficiaries, including Marsh K. McFadden, Kathryn McFadden, Christina Carlson, and Jaclyn Fleming have been permanently and severely injured.

CP 116-17; CP 121-22 (emphasis added).

Finally, paragraph 4.22 quoted the same portion of the medical records cited in the tort claim, which again referred to Dr. Marton-Popovici as the hospitalist who accepted Mr. McFadden for treatment. CP 121.

C. Plaintiffs Used Information Regarding Dr. Marton-Popovici's Alleged Negligence Defensively throughout the First Litigation.

Throughout the litigation of the 2012 Complaint, the parties routinely discussed plaintiffs' allegations of negligence on the part of Dr. Marton-Popovici, including whether VMC would be vicariously liable for Dr. Marton-Popovici's conduct, as an ostensible agent of VMC. CP 142; *see also*, CP 193; 195; 197; 199.

On April 19, 2013, VMC moved to change the trial date, asserting that it had not realized that it would be required to defend against claims of negligence against the hospitalist (Dr. Marton-Popovici) and VMC's nurses. CP 211; 213.

In combatting a move of the trial date, counsel submitted a detailed declaration accusing the defense of lying. He argued: "VMC's Response is replete with inaccurate and false statements" and that "These claims have been provided in various forms in the filed tort claim, the complaint,

discussions with VMC counsel Donna Moniz and provided in declaration form in February and early March. There **are no new “recently alleged claims.”** CP 136-37 (emphasis added.)

Counsel asserted constructive notice of the allegation of negligence against Dr. Marton-Popovici dated back to at least December 2012, stating: “VMC has known about plaintiff’s claims about the care of the hospitalist, Dr. Marton-Popovici, for **at least five months** since Defendant Lapine’s deposition was taken on December 12, 2012.” CP 138, lines 1-3 (emphasis in original). Counsel had “multiple specific conversations both individually with VMC counsel...regarding the fact that plaintiff had claims of negligence and causation regarding Dr. Marton-Popovici.” CP 138, lines 3-5. Counsel refused requests to dismiss claims against Dr. Marton-Popovici and concluded “I have always told her we hold the hospital responsible for the actions of Dr. Marton-Popovici.” CP 138, lines 5-9.

These statements mirror those set out in counsel’s brief resisting VMC’s Motion to File an Amended Answer to add a request for allocation against Dr. Marton-Popovici. CP 232-243. That pleading contained the following claim: “VMC was placed on notice of alleged fault of non-party Dr. Marton in both the Tort Claim filed on 9/9/11 and the Complaint filed

on 2/14/12, which referenced Dr. Marton as an employee, agent and/or ostensible agent of VMC.” CP 233.

Following these motions, the parties to the 2012 complaint settled their claims and entered a Stipulation and Order of Dismissal on July 24, 2013. CP 251-52.

D. Present Lawsuit and Dismissal on Summary Judgment.

On September 17, 2013, four years and six months after Mr. McFadden’s death, plaintiffs filed a second lawsuit based on the same facts but naming Dr. Marton-Popovici and SSIP as defendants in the caption. CP 1-8.

The 2013 Complaint listed the exact same plaintiffs as the 2012 Complaint and the same cause of action for the alleged wrongful death of David McFadden. Specifically, plaintiffs asserted that this current action is:

[A]n action for professional negligence and malpractice and wrongful death against the defendants brought pursuant to the laws of the State of Washington, to include RCW 7.70 et seq., and 4.20 et seq., and ordinary negligence. Plaintiff hereby notify defendants that she is pleading all theories of recovery and bases for liability available pursuant to law to include negligence; wrongful death; vicarious liability; lack of informed consent; and otherwise failure to render the necessary medical care and treatment their patient David R. McFadden required.

CP 5. This allegation is identical to the 2012 Complaint. *Compare* CP 5 to CP 122. Indeed, the majority of the allegations in this Complaint are identical to the 2012 Complaint. Both complaints identified Dr. Marton-Popovici and both asserted that as a direct and proximate result of her negligence David R. McFadden died...” *Compare* CP 121 (2012 Complaint) to CP 6 (2013 Complaint).

Defendants brought a prompt Motion to Dismiss based on the failure to bring the claim against Dr. Marton-Popovici within the three-year statute of limitations. CP 9-22. The court denied this motion without prejudice. CP 73-75.

On September 19, 2014, defendants moved for an order dismissing the case on summary judgment. CP 78-98. Defendants supported that motion with the declaration of Jennifer Simitrovich which attached the various pleadings referred to above. CP 102-253. Plaintiffs responded by claiming that it was a question of fact as to when “the negligence of Dr. Marton-Popovici was first known to the plaintiffs...” CP 255. To support this claim, the plaintiffs cited to deposition testimony that they claimed established that Dr. Marton-Popovici “abandoned” the patient, CP 257, and Mr. Otorowski’s conclusory statement that “Plaintiff at all times exercised due diligence in discovery and once the facts were known

at the time of Dr. Marton-Popovici's deposition, an appropriate lawsuit was filed well within a one year date of discovery." CP 272.

The trial court rejected plaintiffs' arguments and granted the motion to dismiss on October 17, 2014. Plaintiffs filed a timely notice of appeal.

IV. ARGUMENT SUMMARY

Plaintiffs argue that the court erred in dismissing their case because questions of fact exist as to when they discovered the claim against Dr. Marton-Popovici and because the *defendants* in the first lawsuit disputed the arguments *plaintiffs* made in the various pleadings cited above. Appellants' Brief at pp. 12- 20. These arguments are without merit. No questions of fact exist. As Mr. Otorowski argued to the first court, "we hold the hospital responsible for the actions of Dr. Marton-Popovici." CP 138, lines 5-9.

Having clearly and unequivocally asserted that these facts were true, counsel cannot now take them back and rely on the prior defendants' opposition to his statement as an excuse for his failure to bring a timely action against Dr. Marton-Popovici and her employer. Counsel's pleadings clearly establish knowledge of a claim against Dr. Marton-Popovici as early as September 9, 2011 (Date of the Tort Claim) and no later than the date of his expert's declaration alleging negligence on the

part of Dr. Marton-Popovici. (October 24, 2012, CP 275-284). Plaintiffs' opening brief offers nothing new to what the trial court considered. Because reasonable minds cannot differ on the conclusion that the present appeal is frivolous, Respondents respectfully requests that this Court summarily affirm the trial court and award terms pursuant to RAP 18.9.

V. LEGAL ARGUMENT

A. Standards for Review and for Summary Judgment

Summary judgment decisions are reviewed de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). "A motion for summary judgment based on a statute of limitations should be granted where the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced." *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 110, 802 P.2d 826 (1991) (citing *Olson v. Siverling*, 52 Wn. App. 221, 224, 758 P.2d 991 (1988), *rev. denied*, 111 Wn.2d 1033 (1989)). "All facts and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, based on all of the evidence, reasonable persons could reach but one conclusion." *Zaleck*, 60 Wn. App. at 110.

A nonmoving party may not attempt to resist a summary judgment by relying on speculative and argumentative assertions that unresolved factual matters remain; instead, “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), *rev. denied*, 108 Wn.2d 1008 (1987); CR 56(e). Moreover, unsupported, conclusory statements are insufficient to prove the existence or nonexistence of issues of fact. *Hash v. Children’s Orthopedic Hosp. & Medical Ctr.*, 49 Wn. App. 130, 741 P.2d 584 (1987), *aff’d*, 110 Wn.2d 912, 757 P.2d 507 (1988).

An appellate court may affirm a trial court’s disposition of a summary judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. The Plaintiffs Cannot Avoid Summary Judgment By Invoking the Discovery Rule.

In Washington, the general rule is that “[a] cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief.” *O’Neill v. Estate of Murtha*, 89 Wn. App. 67, 69-70, 947 P.2d 1252 (1997) (citing *Golden Eagle Mining Co. v. Emperor-Quilip Co.*, 93 Wash. 692, 696, 161 P. 848 (1916)). A three-

year statute of limitations applies to claims of alleged medical malpractice.

The applicable statute of limitations is RCW 4.16.350(3):

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

(emphasis added).

The discovery rule is an exception to the general rule of accrual, applied where “injured parties do not, or cannot, know they have been injured.” *In re Estates of Hibbard*, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992) (quoting *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985)).

The discovery rule “postpones the running of a statute of limitations only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action, and a cause of action will accrue on that date even if *actual* discovery did not occur until later.” *Allen v. State*, 118 Wn.2d 753, 758, 826, P.2d 200 (1992); *see also Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998) (“a cause of action may accrue for the purposes of the statute of

limitations if a party should have discovered salient facts regarding a claim”).

When a plaintiff is placed on notice by some appreciable harm allegedly caused by another's wrongful conduct, that plaintiff must make further diligent inquiry to ascertain the scope of the actual harm and is charged with what a reasonable inquiry would have discovered. *Green*, 136 Wn.2d at 95. Thus, "one who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose." *Id.* (quoting *Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909)). *Accord American Sur. Co. of N.Y. v. Sundberg*, 58 Wn.2d 337, 344, 363 P.2d 99 (1961), *cert. denied*, 368 U.S. 989, 82 S. Ct. 598 (1962) ("notice sufficient to excite attention and put a person on guard, or to call for an inquiry is notice of everything to which such inquiry might lead.").

Absent fraudulent concealment depriving the plaintiff of the knowledge of the accrual of the cause the cause of action, Washington courts apply the doctrine when the “nature of the plaintiff’s injury makes it extremely difficult, if not impossible, for the plaintiff to learn the factual elements of the cause of action within the specified limitation period.” *Crisman v. Crisman*, 85 Wn. App. 15, 20-21, 931 P.2d 163 (1997).

"[T]o invoke the discovery rule, the plaintiff must show that he or she could not have discovered the relevant facts earlier." *Giraud v. Quincy Farm & Chemical*, 102 Wn.App. 443, 449, 6 P.3d 104 (2000). Not all facts must be known to the plaintiff, the cause of action begins accruing when the plaintiff knew or should have known there was a possibility the defendant was negligent. *Zaleck*, 60 Wn. App. at 112. Further, the discovery rule requires the plaintiff to use due diligence in discovering the basis for a cause of action. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 34, 864 P.2d 921 (1993); *see also Gunnier v. Yakima Heart Center, Inc., P.S.*, 134 Wn.2d 854, 953 P.2d 1162 (1998) (no equitable tolling of medical malpractice statute of limitations when plaintiff failed to show due diligence in pursuing cause of action, where plaintiff brought suit more than one year after discovering cause of action).

C. Plaintiffs' Own Pleadings Establish They Had Sufficient Knowledge of their Claims against Dr. Marton-Popovici to require that They Bring Suit against Her No Later than Three Years after Mr. McFadden's Death.

As established by the plaintiffs' tort claim, the 2012 Complaint and the pleadings filed in opposition to various motions, they had knowledge of all elements of a cause of action against Dr. Marton-Popovici no later than September 2011 and certainly no later than the date of the first complaint filed on February 14, 2012. Both documents identified Dr. Marton-

Popovici's role in Mr. McFadden's care, claimed she was negligent and cited to the same medical record. CP 127, 130; 118.

“[W]hen a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose.” *Green v. A.P.C.*, 136 Wn. 2d 87, 96, 960 P.2d 912 (1998), quoting *Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909), also citing *American Sur.*, 58 Wn.2d at 344 (“notice sufficient to excite attention and put a person on guard, or to call for an inquiry is notice of everything to which such inquiry might lead”).

Here, the plaintiffs repeatedly demonstrated their knowledge of Dr. Marton-Popovici's role in the treatment of Mr. McFadden. *See, e.g.* CP 136-144; CP 232-42. They cannot now disclaim that knowledge in a vain attempt to avoid its consequences.

Finally, plaintiffs cannot avoid dismissal by claiming that there was new information learned in Dr. Marton-Popovici's deposition. The fact that Dr. Marton-Popovici did not physically see Mr. McFadden prior to going to the ICU floor is not newly discovered information to plaintiffs. The medical records show that Dr. Marton-Popovici did not see the patient or make any

orders with respect to the patient from the time he was admitted at 8:30 a.m. until he was physically transferred to the ICU after 1:00 p.m. on March 3, 2009. *See* CP 187-190. If plaintiffs truly believed they had additional facts supporting a cause of action of negligence Dr. Marton-Popovici, they could (and should) have amended their 2012 Complaint to name this cause of action after her deposition in the 2012 lawsuit. Plaintiffs also could have refused to settle with VMC and tried the issue of whether VMC was vicariously liable, as plaintiffs previously alleged, for Dr. Marton-Popovici's conduct. Instead, they chose to dismiss VMC and file this second action. Because the discovery rule precludes this claim, the trial court's ruling should be summarily affirmed.

D. Plaintiffs Had Sufficient Facts to Bring an Action Against Dr. Marton-Popovici. Consequently, Their Reliance on *Winbun v. Moore* and Related Cases Is Misplaced.

Plaintiffs rely on *Winbun v. Moore*, 143 Wn.2d 206, 18 P.3d 576 (2001) and related cases for the proposition that a question of fact exists as to whether or not plaintiffs "discovered" the elements of their cause of action prior to Dr. Marton-Popovici's deposition. This argument is unsound.

Winbun, supra, involved a case where the trial court originally denied a motion for summary judgment. In opposing the motion for summary judgment, plaintiffs offered a declaration by their expert. The

expert's declaration established that the defendant's negligence would not be apparent to a layperson. *Winbun*, 143 Wn. 2d at 212. *Winbun* also involved a dispute were complete. *Winbun*, 143 Wn. 2d at 216.

Here, there were no missing records. Plaintiffs cited the medical records detailing Dr. Marton-Popovici's involvement in their original tort claim filed in September 2011. CP 129-130. They identified, but did not name her, as a defendant in the 2012 Complaint. CP 118. They cited the same medical record that they cited in their tort claim as the basis for this claim. CP 120. Moreover, **prior** to Dr. Marton-Popovici's deposition, plaintiffs had obtained **two** declarations from their expert, identifying Dr. Marton-Popovici's negligence. CP 275-284; CP 285-290. The second of these declarations specifically set out the course of events, citing the pertinent medical records and repeatedly faulting Dr. Marton-Popovici, among others, for treatment that failed to meet the applicable standard of care. In his March 11, 2013² declaration, this expert concluded:

Based on the foregoing and my review of the medical records I (sic) in this case, I herewith hold the following specific opinions with regard to Dr. Lapine, Dr. Marton-Popovici, resident Rachel Olson, MD, and the VMC nursing staff and the role of their failed actions leading to the death of Mr. McFadden.

² Dr. Marton-Popovici's deposition was taken on April 18, 2013, five weeks after plaintiffs filed the above declaration. CP 291.

It is my opinion to a reasonable degree of medical probability that VMC providers, specifically including Dr. Lapine, **Dr. Marton-Popovici**, resident Rachel Olson, MD, and the VMC nursing staff failed to exercise the degree of care, skill and learning expected of reasonably prudent physicians and nurses caring for Mr. McFadden, a patient with bacterial meningitis and/or in which bacterial meningitis was in the differential diagnosis, when they failed to monitor, manage, consult, refer, treat, diagnose and intervene in at least the following ways, which more likely than not led to cerebellar tonsillar herniation and irreversible brainstem injury.

CP 287 (Emphasis added). The declaration then named Dr. Marton-Popovici in paragraphs b, c, d, e, f, and g, as specifically failing to take actions that could have saved the patient. CP 288-89. This declaration was filed on March 11, 2013 and incorporated the expert's October 24, 2012 declaration that outlined much the same information. CP 290; CP 275-284.

Unlike *Winbun*, the facts before the trial court here established unequivocally that the parties had "full access to David McFadden's medical records." CP 236. To claim that there were "new allegations" or that they did not have the opportunity to discover the facts necessary to file suit against Dr. Marton-Popovici is "simply not true." CP 236.³

³ Plaintiffs' Response to Defendant's Motion for Leave to File Amended Answer, CP 236 at lines 6; 14.

E. Appellants' Brief Raises No Issues Upon Which Reasonable Minds May Differ and Is Devoid of Merit. Sanctions Are Therefore Appropriate Under RAP 18.9.

RAP 18.9 allows an appellate court to award attorneys' fees and costs when an appeal is frivolous. In determining whether an appeal is frivolous, the courts are guided by the following considerations:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Millers' Casualty Ins. Co. v. Briggs, 100 Wn. 2d 9, 14, 665 P. 2d 887 (1983) (quoting *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P. 2d 187 (1990)).

Here, reasonable minds cannot differ that there is no possibility that the appeal would be successful. The simple fact is that the appellants' current position and arguments are the exact opposite of arguments and factual assertions made to the trial court in litigating the 2012 Complaint. This Court should not tolerate such conduct. An award of sanctions is thus appropriate.

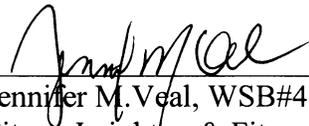
VI. CONCLUSION

Plaintiffs filed pleadings that clearly identified Dr. Marton-Popovici's role in the care of David McFadden years before they brought suit against her. The court and the parties are entitled to rely on CR 11(b) for the position that counsel signed the tort claim, the 2012 Complaint, and the pleadings filed in opposition to various motions only after plaintiffs' counsel had made reasonable inquiry that the claims contained therein were "well grounded in fact." CR 11(b). Plaintiffs' current attempt to avoid the impact of those prior factual assertions should be rejected. Based on his own admission and pleadings, counsel for plaintiffs knew the facts necessary to bring suit against Dr. Marton-Popovici no later than September 2011. Because suit was filed two years after this date, and well beyond the three year statute of limitations, the trial court properly dismissed the action. Defendants request that this Court affirm that ruling and find further that the current appeal is frivolous pursuant to RAP 18.9.

Respectfully submitted this 30th day of April, 2015.



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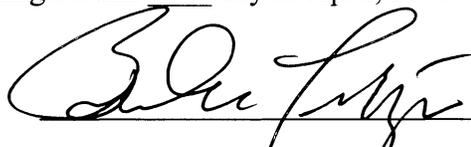
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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the date set forth below, I caused a true and correct copy of the foregoing document be served on the following in the manner indicated below:

Counsel for Plaintiff/Appellant:	[]	Via First Class Mail
Christopher Otorowski	[]	Via Hand Delivery
298 Winslow Way West	[X]	Via Electronic Mail
Bainbridge Island WA 98110		
clo@medilaw.com		

SIGNED at Tacoma, Washington this ^{30th} day of April, 2015.



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FITZER, LEIGHTON & FITZER, P.S.

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