

NO. 44856-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MICHAEL FOSS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

ROBERT W. FERGUSON
Attorney General

PATRICIA C. FETTERLY
Assistant Attorney General
WSBA No. 8425
PO Box 40126
Olympia WA 98504-0126
Telephone No. 360-586-6300
OID No. 91023

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I. COUNTER STATEMENT OF THE CASE

Plaintiff Michael Foss alleges that defendant State of Washington was negligent in providing medical care to him in December 2008 while he was in the custody of the Washington State Department of Corrections. Specifically, Foss claims the State was negligent in failing to diagnose glaucoma and that he sustained damages as a proximate cause of this claimed negligence. CP at 6-7. He appeals the order of the Superior Court which granted the State's motion for summary judgment and dismissed Foss's claims. CP at 126-27.

This appeal raises three issues: (1) Whether the Washington State Department of Corrections was negligent in failing to diagnose glaucoma on December 18, 2008, given the fact that Foss chose not to be transported to a facility where testing of intraocular pressure could be done and failed to meet his burden to establish the standard of medical care by expert medical testimony; (2) Whether the delay in testing between December 18, 2008, when Foss refused transport to a facility where testing could be done, and December 29, 2008, when he agreed to transport and intraocular pressure testing was completed, was a proximate cause of damage to his optic nerve when the only expert medical testimony in the record is that it was not; and (3) Whether Foss's lawsuit was timely when it was commenced more than three years after

December 18, 2008, the date that the alleged act of medical negligence took place.

The Superior Court properly dismissed Foss's complaint. Contrary to established case law, he failed to come forward with expert medical testimony to support his claims that the State of Washington was negligent and that this claimed negligence was a proximate cause of his damages. The only medical testimony concerning causation is that his optic nerve damage was caused by chronic intermittent elevation in intraocular pressure which predated his first request for testing made on December 18, 2008. Because Foss failed to come forward with admissible evidence to support the necessary elements of his claim, the Superior Court properly granted the State's motion for summary judgment, which dismissed Foss's claims. In addition, his complaint was not timely because it was commenced more than three years after the date of the alleged act of negligence and was commenced without compliance with RCW 7.70.100(1) and *McDevitt v. Harborview Medical Center*, _____ Wn.2d _____, 291 P.3d 876 (2012).

II. COUNTERSTATEMENT OF FACTS

In December 2008, plaintiff Michael Foss was incarcerated at Olympic Corrections Center (OCC). OCC is a minimum security work camp operated by the Washington State Department of Corrections. It is

located in a remote area on the Olympic Peninsula. Offenders incarcerated at OCC work in the surrounding forests during the day and, in contrast to offenders in other correctional facilities, are not locked in their cells during the day. CP at 15, 60.

Basic medical care is provided to offenders at a small medical dispensary located at OCC. The dispensary is staffed by a registered nurse. Patients can be seen twice a week by appointment at the OCC medical dispensary by Dr. Clifford Johnson, a general practitioner employed by the Department of Corrections who is primarily assigned to Clallam Bay Corrections Center (Clallam Bay). The OCC dispensary is not sufficiently equipped to provide more than basic medical care. In particular, the OCC dispensary does not have equipment to test intraocular pressure, which is the standard test used to evaluate a patient for glaucoma. Offenders at OCC who need non-routine medical care, including specialty eye care, must be transported to Clallam Bay, a lock up facility more than an hour away, or to the Washington Corrections Center in Shelton (more than three hours away) for specialty care. CP at 15-16.

Foss was received at OCC in September 2008. Prior to being transferred to OCC, he was processed at the Washington Corrections Center in Shelton, where he underwent a medical screening on August 20, 2008, that included an intraocular pressure test for glaucoma. At that

time, Foss's intraocular pressure was normal, indicating that he did not have glaucoma. CP at 14, 27, 49. Glaucoma is a disease of progressive neuropathy of the optic nerve. Increased intraocular pressure is thought to be a risk factor to develop glaucoma, although glaucoma may develop in eyes with normal pressure. CP at 16.

Following transfer to OCC, Foss was seen by Dr. Clifford Johnson on September 26, 2008, for a work screening examination. Dr. Johnson's record of that date notes a history of retinal detachment in the right eye which was surgically repaired in 2005. Because of this history, Dr. Johnson restricted Foss from work on rugged terrain and other vigorous activity. An eye examination was deferred because one had just been performed the prior month at Washington Corrections Center, the results of which were normal. CP at 15, 28.

On December 18, 2008, Foss was seen by Dr. Johnson, complaining of a recent onset of right eye pain. Dr. Johnson noted a cataract in the right eye, a common side effect of retinal surgery, which made it impossible for him to examine Foss's optic nerve. CP at 101, 15-16, 29. Dr. Johnson did not believe that his clinical findings supported a diagnosis of glaucoma. Because of Foss's history of eye problems and retinal surgeries in the right eye, Dr. Johnson recommended that he be transported to Clallam Bay where he could be seen by an eye specialist

and further testing including testing for intraocular pressure could be performed. CP at 16, 29. Foss declined transport to Clallam Bay on December 18 because he did not wish to be transferred even temporarily from a minimum security work camp to a lock up facility. In addition, he told Dr. Johnson that he was scheduled for release from DOC custody within a short period of time. CP at 16, 29, 52, 58-59. Dr. Johnson told Foss to return to the clinic if his eye pain did not improve. CP at 16, 29.

Six days later, on December 24, 2008 (Christmas Eve), Foss returned to the OCC dispensary complaining of worsening right eye pain, and was seen by Dr. Johnson. On that date he agreed to be transferred to Clallam Bay to be seen by a specialist. He was transported to Clallam Bay the next business day, Monday, December 29, 2008, and was seen by an eye specialist that same day. CP at 16, 30. The specialist found high intraocular pressure in the right eye, which supported a diagnosis of glaucoma. Foss was immediately provided with medication to control the pressure. He responded to the medication and his intraocular pressure remained within normal range thereafter. Medication was continued until he left the custody of the Department of Corrections in February 2009. CP at 16-17.

III. SUMMARY OF THE ARGUMENT

Foss's complaints of medical negligence cannot be sustained because he failed to meet his burden of proof and support his claims of breach of the standard of care and causation by expert medical testimony.

IV. ARGUMENT

A. Summary Judgment Standard

This Court reviews an order granting a motion for summary judgment de novo. *E.g., Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 (2001). Summary judgment is appropriate when plaintiff fails to support one of the necessary elements of his claim. Once the defendant points out the absence of evidence to support the plaintiff's claims, the burden shifts to the plaintiff, the party bearing the burden of proof at trial, to demonstrate that an issue of fact exists as to every material element of his claim. If the plaintiff cannot do so, summary judgment is to be granted. *E.g., Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In the present case, the Superior Court was correct in dismissing Foss's complaint because he failed to support his claim of medical negligence with expert testimony concerning the standard of care and proximate cause. Therefore, his complaint was properly dismissed.

B. Expert Testimony Is Required To Establish The Standard Of Care And Causation In A Medical Malpractice Case

It is well established that expert medical testimony is required to establish both the standard of care and to prove causation in a medical negligence action. *E.g., Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993). In a medical negligence action, a medical professional is entitled to summary judgment once the professional establishes that the plaintiff lacks competent expert testimony. *Morinaga v. Vue*, 85 Wn. App. 822, 831-32, 935 P.2d 637 (1997). To defeat summary judgment in a medical negligence case, a plaintiff must produce competent medical expert testimony establishing that the injury complained of was proximately caused by a failure to comply with the applicable standard of care. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). If the plaintiff in a medical negligence case lacks competent expert testimony, the defendant is entitled to a summary judgment of dismissal. *Colwell v. Holy Family Hosp.*, 104 Wn. App. at 611.

Expert testimony must be based upon the facts of the case and not upon speculation or conjecture. *Seybold*, 105 Wn. App. at 677. Such testimony must also be based upon a reasonable degree of medical

certainty. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989).

C. The Reasonable Prudence Standard Does Not Excuse The Requirement That Foss Establish The Standard Of Care By Expert Testimony

It is undisputed that Foss did not present expert testimony to establish the standard of care or proximate cause. He attempts to circumvent this strict requirement by citing the cases of *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974), and *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979). He argues that the “reasonable prudence” standard adopted by those cases does not require that he present expert testimony as part of his case in chief. Brief of Appellant at 5-9, 13. In other words, Foss asserts jurors could find that medical negligence occurred by determining that the defendant did not act reasonably, without reference to the standard exercised in the profession.¹

This is not correct. To the extent that the holdings of *Helling* and *Gates* could be viewed as relieving plaintiffs in certain types of medical

¹ The fallacy in this argument is illustrated in the differing language of WPI 10.01 (6 *Washington Practice: Washington Pattern Jury Instructions: Civil* 10.01 (2012) (WPI)), the Washington Pattern Jury Instruction concerning the standard of care in an ordinary negligence case, and the language of WPI 105.01 (6 *Washington Practice: Washington Pattern Jury Instructions: Civil* 105.01 (2012) (WPI)) which sets forth the standard of care in medical negligence cases. WPI 10.01 defines negligence as the failure to exercise ordinary care or doing something “that a reasonably careful person would not do under the same or similar circumstances.” WPI 105.01 describes the standard of care in a medical negligence case as “the duty to comply with the standard of care for one of the profession or class to which [the defendant medical professional] . . . belongs.”

malpractice cases of the requirement that they present expert testimony as part of their case in chief, this interpretation was overturned by legislation passed in 1975, the year following the *Helling* decision.²

In 1975 the Washington Legislature enacted Substitute House Bill 246 (Laws of 1975, 1st Ex. Sess., ch. 35, § 12), which was codified as RCW 4.24.290. The purpose of this legislation was to reverse the decision in *Helling v. Carey* which held that in certain circumstances a medical professional was held to a general “reasonableness” standard applicable in other negligent cases rather than requiring plaintiff to prove that the medical professional whose conduct is being challenged failed to meet the applicable standard of medical care to which medical professionals are held to. *See Gates v. Jensen*, 92 Wn.2d 246, 256, 595 P.2d 919 (1979) (Dolliver, J., dissenting in part, citing Rep. on House Comm. on Judiciary, Substitute S.B. 246, 44th Leg. Sess. (Wash. 1975)). RCW 4.24.290 states that:

In any civil action for damages based on professional negligence against . . . [a hospital or health care provider] the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise the degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages.

² The *Gates* decision was announced in 1979, but the alleged acts of malpractice at issue in that case took place prior to the effective date of the 1975 legislation. *See Gates*, 92 Wn.2d at 247-48.

SHB 246 (emphasis added). *See* Appendix.

In its report, the House Committee on Judiciary clearly described the purpose of S.S.B. 246 which became codified as RCW 4.24.290:

This bill is occasioned by a recent holding by the Wash. State Supreme Court regarding the standard of care required of physicians. In *Helling v. Carey* the court held that in a malpractice suit it is sufficient for plaintiff to prove that the physician failed to provide reasonable and prudent care in light of all the circumstances. The bill as introduced would re-establish the pre-*Helling* standards of negligence that have been developed through case law in Washington. *See Pederson v. Dumouchel*, 72 Wn.2d 73 (1967), *Hayes v. Hullwit*, 73 Wn.2d 766 (1968). The effect would be that standards of performance for physicians would be established by the acts and testimony of practitioners in the same field throughout the state.

Rep. of House Comm. on Judiciary, Substitute S.B. 246, 44th Leg. Sess. (Wash. 1975).

That same year, the legislature enacted legislation confirming that the standard of care and proximate cause are necessary elements of proof by plaintiff to support claims of medical negligence:

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable prudent health care provider at that time in the profession or class to which he or she belongs in the State of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complaint of.

RCW 7.70.040 (Laws of 1975-76, 2d Ex. Sess. ch. 56, § 9) (emphasis added). *See* Appendix.

In *Harris v. Groth*, 99 Wn.2d 438, 633 P.2d 113 (1983), a case which arose after the effective date of RCW 7.70.040 and RCW 4.24.290, the Washington Supreme Court held that by enacting these statutes in 1975, the Legislature intended that the reasonable prudence rule apply. However, *Harris* does not stand for the principle that expert testimony is not required to establish the standard of care and proximate cause.

The plaintiff in *Harris* brought a medical malpractice lawsuit against her ophthalmologist, Dr. Groth, whom she consulted for treatment of intermittent iritis (irritation) of the right eye in January 1977. Intraocular pressure testing done on that date was normal. Dr. Groth prescribed a continuation of topical corticosteroids previously prescribed for the condition and other medication. Plaintiff was seen again in March 1977 and was provided continuing medications. Dr. Groth did not test plaintiff's intraocular pressure in March despite the presence of symptoms which could be consistent with glaucoma. After her visual problems continued, plaintiff consulted another ophthalmologist who tested her pressure and diagnosed glaucoma. The case proceeded to jury trial. Both

sides presented expert testimony. Plaintiff presented testimony from two expert physicians that plaintiff's intraocular pressure should have been tested when she complained of continuing irritation in March 1977. Dr. Groth presented opposing medical testimony that the "closed angle glaucoma" that was diagnosed can come on in a matter of hours and would not necessarily have been detected by intraocular testing. Therefore, Dr. Groth was not negligent in failing to test for IOP in March of 1977 given the fact that testing done in January 1977 was normal.

In *Harris*, the issue of the "applicable standard of care followed by practicing ophthalmologists in the diagnosis of glaucoma" was presented to the jury. Plaintiff argued that the reasonable prudence standard applied and proposed an instruction which stated that "if reasonable prudence under the circumstances required the administration of additional diagnostic tests" in March 1977, they were to find for the plaintiff. The plaintiff's proposed instruction also stated that in determining whether "reasonable prudence would require giving the tests in question, you should consider, among other facts, the cost, ease or difficulty of administration, risk to the patient and relative reliability of the tests in question." *Harris*, 99 Wn.2d at 441-42. The trial court refused to give plaintiff's proposed instruction and gave the traditional instruction stating

the standard of care to be established medical practice is conformance to the standard of the profession. *Id.* at 442.

Following submission, jurors returned a verdict for Dr. Groth. Plaintiff appealed the refusal to give her proposed instruction. The Supreme Court held that expert medical testimony is still required to sustain a claim of medical negligence. “[M]edical facts in particular must be proven by expert testimony unless they are observable by [a layperson’s] senses and describable without medical training.” *Harris*, 99 Wn.2d at 449 (internal quotes and citation omitted). “[E]xpert testimony will generally be necessary to establish the standard of care and most aspects of causation.” *Id.* (citations and footnote omitted). The Supreme Court explained that the requirement of expert testimony “will remain true even after the reasonable prudence standard of care, since the factual question of whether a particular medical practice is reasonably prudent is generally neither observable by or describable by a layperson.” *Id.* at 449 n.6. (emphasis added). Because of the “significant judgment factors” involved in a medical negligence case, the underlying costs and probabilities of a particular medical practice are facts which must be proven by expert medical testimony.” *Id.*

Harris and subsequent case law reaffirmed the long standing requirement incorporated into the statutes enacted in 1975 that a plaintiff

in a medical malpractice case must support his claim with expert testimony concerning the standard of care:

The standard of care is established by showing “[t]he health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances.” RCW 7.70.040(1). Absent exceptional circumstances, a patient must produce expert testimony to establish if the practice questioned is reasonably prudent.

Morinaga, 85 Wn. App. at 831 (citing *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989)) (emphasis added); *Harris*, 99 Wn.2d at 451). Failure to do so mandates dismissal. *Seybold v. Neu*, 105 Wn. App. at 676.

Foss argues that a different rule should apply in cases involving failure to diagnose glaucoma, again citing the *Helling* and *Gates* cases. Since glaucoma can be detected, he argues, by a “simple test” of intraocular pressure, reasonable prudence requires that the test be administered and the failure to administer the test is proof as a matter of law that the medical professional failed to exercise reasonable prudence.³

This argument is misplaced. First, the treatment at issue in *Helling* and *Gates* arose before 1976, the effective date of RCW 4.24.290 and

³ Plaintiff even argues in his brief that this constitutes negligence as a matter of law, something which is not correct. Br. of Appellant at 1. In any case, plaintiff failed to make a motion for summary judgment presently this agreement to the Superior Court.

RCW 7.70.040. *See Harris*, 99 Wn.2d at 443. By enacting these statutes, the Legislature confirmed that proof of the standard of care by expert testimony is part of plaintiff's burden of proof. Second, in *Harris*, where the treatment arose after RCW 4.24.290 and RCW 7.70.040 took effect, the Supreme Court held that expert testimony is required to establish the standard of care—even after clarifying that the passage of these statutes did not change the requirement that the standard to be met is “reasonable prudence.” *Id.* at 447-49. And the Supreme Court held in *Harris* that the standard of care to determine whether the defendant exercised reasonable prudence must still be established by expert testimony. *Id.* at 449.⁴ Most importantly, in contrast to the plaintiff in the present case, none of the plaintiffs in *Helling*, *Gates*, or *Harris* were offered intraocular testing and refused it as Foss did on December 18, 2008.

Even if *Helling* and *Gates* established a special rule for cases involving the failure to diagnose glaucoma, which they do not, their holdings are limited to situations where the defendants are ophthalmologists, specialists in the diagnosis and treatment of eye diseases, who operate a specialty practice in a clinical setting where

⁴ In *Harris* the appeal arose following a jury trial in which plaintiff presented expert testimony concerning the applicable standard of care and testimony that the defendant's physicians breached that standard of care—something lacking in the present case and in other cases cited herein where the plaintiff's complaint was dismissed on summary judgment for failure to prove a necessary element of the plaintiff's claim.

testing equipment for glaucoma is readily available as was the case in *Helling* and *Gates*. This was not the situation confronting Dr. Johnson, a general practitioner, not an eye specialist, on December 18, 2008. On that date, he saw Foss in a small dispensary in an isolated area which was not equipped with specialty equipment to test intraocular pressure.⁵ CP at 15, 59. Dr. Johnson recommended and offered Foss transport to another correctional facility which had equipment to test intraocular pressure. Foss, on that occasion, refused such transport:

Q: But did he [Dr. Johnson] acknowledge [on December 18, 2008] that it might be a good idea to have the pressure checked?

A: Oh, yes.

Q: Did he indicate [sic] that that could be done if you went to one of the other facilities such as Clallam Bay or Shelton?

A: Yeah. He said that.

CP at 58.

This testimony is consistent with Dr. Johnson's record of the December 18, 2008, visit that "[t]he patient was advised that the only proper way to follow up on this if the pain should return would be for him

⁵ Plaintiff argues in his brief that testing equipment was available at the local hospital in Forks. However, there is no factual support in the record for this statement. Dr. Johnson testified that plaintiff could possibly have been seen at the hospital emergency room for pain that came on during the December 24-25 holiday, when transport to Clallam Bay may not have been available. He did not testify that intraocular pressure could be checked at the hospital. CP at 100-01. In any case, there is no requirement that plaintiff be treated outside of a Department of Corrections facility, where treatment at Clallam Bay was available on December 18, 2008, but rejected by Foss.

to return to Dr. Shields [the eye specialist]. To have this happen he would have to be transferred to a lock-up facility first.” CP at 29. Foss testified in his deposition that he did not wish to return to a lock up facility, where he could see a specialist, on December 18, 2008, as he was scheduled shortly for release from Department of Corrections custody and wanted to complete his sentence at the minimum security OCC. CP at 52, 58-59.

Foss failed to meet his burden to establish the proper standard of care to which Dr. Johnson was held in December 2008 – a necessary element of his claim – by expert testimony. Because Foss failed to prove a necessary element of his claim, the trial court properly dismissed his complaint. *See Young v. Key Pharmaceuticals*, 112 Wn.2d at 225 (entry of summary judgment mandated against party who fails to prove a necessary element of the party’s claim); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

D. Plaintiff Failed To Present Competent Evidence Of Proximate Cause

In addition to proving the standard of care by expert testimony, a plaintiff must prove that the injury-producing situation “probably” or “more likely than not” produced the subsequent injury condition. *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 163, 194 P.3d 274 (2008); *Seybold*, 105 Wn. App. at 676; *Guile*, 851 P.2d at 693.

Specifically, Foss must come forward with expert testimony that the failure to control his intraocular pressure during the eleven days between December 18, 2008, when he first consulted Dr. Johnson for eye pain, and December 29, 2008, when treatment began after intraocular pressure testing was done, caused the severe optic nerve damage he claims to have sustained.

The only expert medical testimony in the record in causation is the testimony of Dr. Johnson. In his deposition testimony, Dr. Johnson testified to the contrary—that he did not believe that the increased intraocular pressure during the visits in December 2008 damaged the optic nerve:

Q: . . . Do you believe that increased intraocular pressure occurring around the time of these visits in December of 2008 is what damaged the optic nerve?

A: No, no. I don't believe that.

CP at 102.

Although Dr. Johnson testified that Foss likely did sustain optic nerve damage, he opined that the damage was likely caused by trauma and “chronic intermittent elevation of his intraocular pressure.” CP at 102. There is no indication from this testimony that the eleven-day delay between Foss’s presentation with right eye complaints on December 18, 2008, and the start of treatment to relieve pressure on December 29, 2008,

caused injury to the optic nerve. It is unclear whether or not the injury to the optic nerve had already occurred prior to December 18 (between the date of his last pressure test in August 2008 and December 18) or occurred after the alleged act of negligence occurred.

Therefore, the sole expert medical testimony concerning causation in the record is the testimony of Dr. Johnson who opined that any increased intraocular pressure occurring in December 2008 was not the cause of damage to the optic nerve. To draw the inference that the injury occurred because of this delay (as opposed to a progressive development over time dating back to August 2008 or even earlier), jurors would have to speculate and draw inferences they are not qualified to make without the assistance of expert testimony.

As the Superior Court noted in its ruling, the only expert medical testimony contained in the record was from Dr. Johnson who “specifically disavows any proximate cause between what he did and the plaintiff’s alleged damages in this case.” VRP at 24. The Superior Court went on to correctly note that expert testimony is required “to establish the standard of care and causation” in a medical negligence case. Further, the Superior Court noted, “it’s not just medical testimony that is required; it’s medical testimony that makes the connection between the alleged act and the damage on a more-probable-than-not basis and not what might have or

could have or possibly did occur.” VRP at 25 (citing *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 194 P.3d 274 (2008)).

This is not a causal connection that lay jurors could draw without the assistance of expert testimony. Foss has failed to carry his burden to prove that acts or omissions of Dr. Johnson on December 18, 2008 were the proximate cause of his claimed injury. This failure also requires dismissal of his complaint.

E. Other Reasons To Exist To Support The Dismissal By The Trial Court

1. Foss’s Complaint Is Not Timely

Foss conceded that he failed to file a tort claim until December 20, 2011, more than three years after the alleged act of negligence occurred on December 18, 2008. Any argument that the negligence of the State was “continuing” after December 18, 2008, lacks merit. Foss alleges that Dr. Johnson was negligent when he failed to see that he obtained intraocular pressure testing on December 18, 2008. Foss did not present himself for further medical care until he saw Dr. Johnson again on December 24, 2008, the date Dr. Johnson again recommended that Foss be transported for specialty care. There was no ongoing medical treatment between December 18 and the next time that plaintiff saw Dr. Johnson on

December 24.⁶ The claimed negligent act, according to Foss's theory, took place on December 18. *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 325, 300 P.3d 431 (2013). Therefore, there was no "continuing" negligence that brought his claims within the claim filing statute and the three year statute of limitations.

The act that forms the basis of Foss's claim of medical negligence occurred on December 18, 2008. Under RCW 4.92.110, he could not commence his lawsuit until 60 days elapsed after the filing of a tort claim during which time the statute of limitations was tolled.⁷ Foss did not file his tort claim until December 20, 2011, more than three years after the alleged act of negligence. He is not entitled to the benefits of the tolling provisions of RCW 4.92.110 because he did not file his tort claim in a timely manner. Strict compliance with the tort claims filing statute is mandatory. *Medina v. Public Util. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 316-17 (2002). Foss did not commence his lawsuit until February 21, 2012, more than three years after the act or omission occurred. His complaint should be dismissed on this separate basis, in

⁶ Foss was transported to Clallam Bay on the next business day after the Christmas holiday which was Monday, December 29. CP at 16, 30.

⁷ Plaintiff correctly points out that RCW 4.92.110 now adds an additional five days of tolling to the 60-day tolling period. This amendment to RCW 4.92.110 did not occur until 2009 and was not in effect when plaintiff's claims arose in 2008. *See* Laws of 2009 Chapter 433 § 3. In any case, plaintiff could not take advantage of the tolling period because his tort claim was not timely filed.

addition to his failure to come forward with expert testimony to support his claims of medical negligence.

2. Plaintiff Failed To Provide Notice Of His Claim As Required By RCW 7.70.100(1)

RCW 7.70.100(1) requires a 90-day pre-suit notice in a medical malpractice case. In *McDevitt v. Harborview Medical Center*, ___ Wn.2d ____, 291 P.3d 876 (2012), the Washington Supreme Court held this 90-day pre-suit notice requirement to be constitutionally valid in claims against the State of Washington, despite the earlier holding in *Waples v. Yi*, 169 Wn.2d 152, 1161, 234 P.3d 187 (2010), that this notice requirement was not constitutionally valid as concerns claims against medical professionals not associated with the State of Washington. As plaintiff concedes in his brief, plaintiff's lawsuit was filed after the 60-day waiting period set forth in RCW 4.92.110, not the 90 day notice requirement set forth in RCW 7.70.100(1). It is subject to dismissal for its failure to comply with the requirements of this statute.⁸

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⁸ The Supreme Court granted partial reconsideration in *McDevitt* on June 13, 2013, limited to the issue of whether the decision should be given only prospective application. The Court stated it would decide that issue without oral argument and without additional briefing. At this time, the *McDevitt* decision has not been limited to prospective effect only.

V. CONCLUSION

This Court should affirm the order of the Superior Court dismissing Foss's complaint.

RESPECTFULLY SUBMITTED this 11 day of October, 2013.

ROBERT W. FERGUSON
Attorney General



PATRICIA C. FETTERLY, WSBA No. 8425
Assistant Attorney General

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

David A. Williams
Attorney at Law
9 Lake Bellevue Dr #104
Bellevue WA 98005

- US Mail Postage Prepaid via Consolidated Mail Service
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of October, 2013, at Tumwater, WA.



APPENDIX

RCW 4.24.290

Action for damages based on professional negligence of hospitals or members of healing arts — Standard of proof — Evidence — Exception.

In any civil action for damages based on professional negligence against a hospital which is licensed by the state of Washington or against the personnel of any such hospital, or against a member of the healing arts including, but not limited to, an East Asian medicine practitioner licensed under chapter 18.06 RCW, a physician licensed under chapter 18.71 RCW, an osteopathic physician licensed under chapter 18.57 RCW, a chiropractor licensed under chapter 18.25 RCW, a dentist licensed under chapter 18.32 RCW, a podiatric physician and surgeon licensed under chapter 18.22 RCW, or a nurse licensed under chapter 18.79 RCW, the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages, but in no event shall the provisions of this section apply to an action based on the failure to obtain the informed consent of a patient.

RCW 7.70.040

Necessary elements of proof that injury resulted from failure to follow accepted standard of care.

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
- (2) Such failure was a proximate cause of the injury complained of.

WASHINGTON STATE ATTORNEY GENERAL

October 18, 2013 - 2:53 PM

Transmittal Letter

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