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Court of Appeals
Division III
State of Washington

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MICHAEL J. YORK,

Appellant,

v.

CSL PLASMA INC., f/k/a ZLB PLASMA,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Michael York (“York”) appeals the summary judgment dismissal order entered on February 7, 2014 by the Spokane County Superior Court, which was based upon York’s failure to file his lawsuit against respondent CSL Plasma Inc. (“CSL Plasma”), within the three-year statute of limitations. CSL Plasma asks the Court of Appeals to affirm the summary judgment dismissal of York’s action, which was brought four years after York had knowledge of the facts giving rise to his alleged personal injury claim.

II. COUNTERSTATEMENT OF THE ISSUES

1. Was CSL Plasma’s Motion for Summary Judgment properly before the trial court where it was served and filed no later than December 9, 2013, and per LCR 56 heard more than 28 days later, on February 7, 2014?

2. Is York’s claim time-barred under the three-year statute of limitations imposed by RCW 4.16.080(2) where York knew of facts giving rise to his claim no later than September 11, 2009, but he did not serve his Complaint until four years later, on September 12, 2013?

3. Alternatively, even if York’s claim could be considered one of medical negligence, is it time-barred under RCW 4.16.350 where York had actual knowledge of his injuries no later than September 11, 2009, and therefore needed to bring a cause of action within the later of one year from the date of actual knowledge or three years from the date of the

claimed injury, but he did not serve his Complaint until four years later, on September 12, 2013?

III. COUNTERSTATEMENT OF THE CASE

A. Facts.

York's lawsuit stems from an injury that he alleges occurred in or about June 2009 and that he attributes to CSL Plasma.¹ See CP 72 (referring to the "June 2009 incident involving Plaintiff").

On or about December 22, 2008, York began donating blood plasma² at one of CSL Plasma's collection facilities in Spokane, Washington.³ CP 3-4, CP 19. In April 2009, York volunteered to take part in a program called Immunization with Immunogen Red Blood Cells ("IRBC") as part of his blood plasma donation. See CP 21, 23. Through the IRBC program, donors agreed to be immunized with human red blood cells that would stimulate donors' bodies to produce certain antibodies. CP 21. Antibodies would then be collected in donated blood plasma. *Id.*

¹ At the time, CSL Plasma was known as "ZLB Plasma". See CP 21, 23.

² The process of donating blood plasma, or plasmapheresis, is a process whereby the cellular portion of the blood is separated from the liquid portion (the plasma). CP 15. The cellular portion of the blood is returned to the donor and the plasma is retained by the plasmapheresis device. *Id.* The blood plasma retained during plasmapheresis is used in the manufacture of high-grade pharmaceuticals. CP 15-16. Plasmapheresis is highly regulated by the government, including under Title 21 of the Code of Federal Regulations. CP 16. All plasmapheresis facilities must undergo periodic inspections by the Food and Drug Administration. *Id.*

³ CSL operates more than 60 blood plasma collection facilities in the United States. CP 15. York donated blood plasma at respondent's East Sprague facility in Spokane, Washington. See CP 3-4.

On April 22, 2009, York signed an Informed Consent form regarding the IRBC program which explained the process of immunization with IRBC, the potential hazards of receiving red blood cells, and which contained a Donor Statement of Consent and Understanding.⁴ See CP 21. York also signed a Disclosure of Origin of Immunizing Red Blood Cells on the same date. CP 23. York alleged that he “began getting lesions after the first inoculation”. CP 4. His last plasma donation occurred no later than June 5, 2009. See CP 43, CP 72.

In September 2009, York sought medical care from infectious disease physician Dr. Chia Wang in relation to his plasma donations and an alleged complaint of “parasitosis”. See CP 43. Dr. Wang’s record reflects that she corresponded with CSL Plasma regarding York’s plasma donations and participation in the IRBC program. *Id.* York alleges that he “became sick and remained sick with increasing severity after [the CSL Plasma] inoculations.” CP 4. York “has since been seen by multiple healthcare providers, hospitals, clinics, centers and universities trying to find a cure for this condition.” *Id.* He “has spent four years of his family life researching and countless hours searching for relief or a cure for this illness.” CP 5. Nevertheless, York claims that he did not appreciate the elements of his claim until August 2013, upon discovery of a lawsuit filed in the U.S. District Court, Eastern District of Washington. See App. Brief at 14, 16-17; CP 38, CP 63-65.

⁴ CSL Plasma understands that York now claims that the “signatures are fakes.” App. Brief at 16.

B. Procedural Background.

York thereafter served his Complaint for Personal Injuries on or about September 12, 2013.⁵ CP 2, CP 7. This was more than four years after his last interaction with CSL Plasma,⁶ and more than four years after seeking medical care in relation to injuries that he alleged could be related to plasma donations and the IRBC program. *See* CP 43.

On December 9, 2013, CSL Plasma filed a Motion for Summary Judgment (“Motion”) based upon York’s failure to conform to the statute of limitations for a personal injury action. CP 9-31. This Motion was sent to York via Federal Express on December 5, 2013. CP 123. The Motion was initially set to be heard on January 10, 2014. CP 32. The Motion was re-noted several times, as was the Mandatory Case Status Conference. *See* CP 144, n. 1; *see also*, CP 80, 82, 107, and 119; RP 4-5. The trial court ultimately had a status conference on February 7, 2014 at 8:30 a.m., *see* CP 82, and then heard oral argument on the Motion on the same date at 11:00 a.m., *see* CP 107.

Between December 5, 2013 and February 7, 2014, York filed a Response to the Motion, CP 34-40, a Declaration, CP 41-66, and a Supplemental Opposition, CP 113-142. Within York’s Supplemental

⁵ York filed his summons and complaint on October 15, 2013, in response to a demand by CSL Plasma to do so. *See* CP 77 at n. 1.

⁶ Mr. York concedes that he has not had contact with CSL Plasma since June 2009, and also concedes that he was asking “questions” of CSL Plasma in June 2009. App. Brief at 15 (“... it says plaintiffs [sic] last contact with defendant was in June of 2009. This is because the defendant refused to answer his questions and locked plaintiffs [sic] phone number from calling their facilities.”).

Opposition, he requested that CSL Plasma's Motion be stricken because he claimed it was not filed in accordance with the time limits set forth at CR 56.⁷ See CP 117.

Judge Annette Plese addressed York's objection regarding timeliness prior to hearing oral argument on the Motion:

THE COURT: . . . Are you ready to proceed at this time for the motion?

MR. YORK: I could proceed, but I'm not really fully prepared because I wasn't – when we were in court two weeks ago, you said we weren't going to have a motion hearing because you didn't have any room on your docket, and, also, the motion – [CSL Plasma's counsel] missed the last three motion settings, and they're stricken from the record.

THE COURT: Let me stop you for a second. There was a status conference that you showed up at that [CSL Plasma's] counsel didn't show up. We had a status conference on the 17th. [CSL Plasma's] motion was noted for the 24th at that time. I told you that it was going to be stricken because it was preassigned to me and had to be set with me.

Shortly after that, it was then reset for today's date on the motion calendar because you asked if it was going to go on the 24th, and I told you it was not going to go. We would continue the status conference to today, and that [CSL Plasma] could set – reset the motion, but it had to be set with me. That was our conversation on that day.

MR. YORK: Yeah. There was, also, two court dates prior to that for this motion.

⁷ The time limits of CR 56 are identical to those set forth at Spokane County Local Court Rule ("LCR") 56.

THE COURT: Correct. There was a motion set with the original presiding judge, Ellen Clark. That was struck. It was reset with Judge Cozza, who is now the current presiding judge for 2014.

When you saw me on the 17th of January for the status conference, I told you that it would have to be reset. They were going to inform [CSL Plasma's counsel] that it would have to be reset with me because it was preassigned.

MR. YORK: [CSL Plasma] knew you were the judge. I turned in the paperwork confirming [counsel] was sent notice, and the Fed Ex tracking shows that [counsel] received it. [Counsel] sent me a letter confirming that she knew you were the presiding judge.

THE COURT: Okay. The issue today is the date and time. [CSL Plasma] properly set it before me, and you got a copy of the Summary Judgment, and you've responded. You've, also, got a reply in opposition. I know you're opposing that it's set today, but it is properly set before the Court.

That's my concern is I want to make sure on the record that you made an objection that it's not properly set before the Court, but I went through the court file. That's where I was going through the court file this morning is to make sure it was properly set, that you got notice of it.

This is basically the same Summary Judgment motion that she had set, and she reset it before the judge, me, that's [sic] it's assigned to for this case.

MR. YORK: Yeah.

THE COURT: So it's ready to be heard today.

RP 3-5.

The trial court thereafter heard argument on CSL Plasma's Motion, and found that York's claims were time barred, RP 12-16⁸, and that "even if I use the last date available, you're way past the Statute of Limitations". RP 12. The trial court signed and entered the Order on CSL Plasma's Motion on February 7, 2014, over York's objection. CP 148-49. York did not file any further motions with the trial court, including motions pursuant to CR 59 or CR 60.⁹ Instead, on March 6, 2014, York filed a Notice of Appeal. CP 151.

IV. STANDARD OF REVIEW

The Court of Appeals reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Keck v. Collins*, 181 Wn. App. 67, 78, 325 P.3d 306 (2014); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 186, 222 P.3d 119 (2009) (citing *Lybbert v. Grant Cnty*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)). A summary judgment dismissal based on a statute of limitations "should be granted only if the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced." *Cox*, 153 Wn. App. at 186, quoting *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

⁸ The trial court held that a three-year limitation applied, regardless of whether York's claim fell under a general personal injury suit or one of medical negligence: "[T]he Statute of Limitations, whether it's under the medical malpractice and/or whether it falls under the time bar the basic statute, it is three years." RP 14.

⁹ Although York states that "CR 60 should rule to vacate the Summary Judgment", App. Brief at 4, 16-23, he never filed a CR 60 motion with the trial court. Accordingly, CR 60 does not apply and CSL Plasma does not address this argument.

(1988)). In reviewing a summary judgment order, the Court must view the facts and reasonable inferences in the light most favorable to the non-moving party.¹⁰ *Cox*, 153 Wn. App. at 186, citing *Lybbert*, 141 Wn.2d at 34. “Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion.” *Cox*, 153 Wn. App. at 186 (quoting *Swinehart v. City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345 (2008) (citing *Alexander v. Cnty. of Walla Walla*, 84 Wn. App. 687, 692, 929 P.2d 1182 (1997))).

V. ARGUMENT

A. CSL Plasma’s Motion Was Properly Before the Court.

1. CSL Plasma’s Motion conformed to the timing requirements of LCR 56.

CSL Plasma filed and served its motion no later than December 9, 2013. *See* CP 9, 123. LCR 56 requires that “[m]otions for summary judgment . . . must be served and filed at least 28 days prior to the hearing[.]” The Motion was not heard until February 7, 2014, nearly 60 days later. There is no dispute that York received the Motion at least 28 days in advance of the February 7 hearing: York filed his opposition to the Motion more than a month before, on January 2, 2014. The Motion was properly before the trial court per the requirements of LCR 56.

2. CSL Plasma’s Motion conformed to the timing requirements of LCR 40 (b)(10), if they apply.

York argues that LCR 40(b)(10) applies, citing to the requirement

¹⁰ The standard is not that “[e]very point of claim needs to be disproved by defendant [] before summary judgment can be granted.” App. Brief at 27.

that “[t]he Note for Hearing/Issue of Law . . . must be served and filed at least seven days before hearing”. See App. Brief at 26. This section of the Rule, however, governs responses to general motion settings and specifically cites to CR 6 and CR 40, not to summary judgment motions.

Even if LCR 40(b)(10) applied and CSL Plasma was required to serve a notice of hearing more than seven days before February 7, CSL Plasma served its notice regarding the hearing on January 22, 2014, well over two weeks before the hearing. CP 107.

3. The trial court has discretion as to whether to grant a request for a continuance.

Longstanding case law recognizes that the trial court has the inherent power to manage proceedings in the courtroom. *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 418, 63 P.2d 397 (1936). “A trial court has the discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases.” *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995). See also, *Winston v. Dep't of Corr.*, 130 Wn. App. 61, 66, 121 P.3d 1201 (2005); *In re Sealed Affidavit(s) to Search Warrants*, 600 F.2d 1256 (9th Cir. 1979); *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981). Whether the trial court has abused that power is reviewed under the abuse of discretion standard. *Winston*, 130 Wn. App. at 65; *Keck*, 181 Wn. App. at 82 (holding motions for continuance of summary judgment motions are reviewed for an abuse of discretion). A court abuses its discretion if it bases its decision on untenable grounds or for untenable

reasons. *Benton City v. Adrian*, 50 Wn. App. 330, 338, 748 P.2d 679 (1988) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) (superseded by statute on other grounds)).

After CSL Plasma filed a Reply to its Motion, CP 74-79, York filed a “Supplemental Opposition” 10 days before oral argument, on January 28, 2014. CP 113-142, *see also* LCR 56 (requiring responses be filed and served 11 days or more before the hearing date). CSL Plasma therefore filed a Supplemental Reply on February 3, 2014. CP 143-146. The Supplemental Reply did not contain additional evidence in support of the Motion, but rather, addressed York’s request to strike the entire Motion and York’s citation to case law. *Id.*

To the extent York argues that he did not receive this Supplemental Reply, *see* App. Brief at 5, he did not raise this issue before the trial court and therefore he may not raise it now for the first time on appeal. RAP 9.12 (“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.”). Additionally, because the Supplemental Reply was “on file” with the trial court prior to the hearing on the Motion, it must be considered by the appellate court in conducting its *de novo* review. *Keck*, 81 Wn. App. at 82.

York did raise the issue of generally being “not really fully prepared”, RP 3, but he did not otherwise make a CR 56(f) motion. The trial court ruled that the Motion was properly set and ready to be heard. RP 5. This was within the trial court’s discretion, and York has made no

showing that it was untenable or unreasonable.

4. Rescheduled status conferences are not germane to the Motion or this appeal.

Even if CSL Plasma was “not timely on their . . . appearances” to trial court status conferences, *see* App. Brief at 25 (which CSL Plasma denies, *see* CP 144 at n. 1), this is not germane to York’s appeal, which focuses on whether York filed his lawsuit within the applicable statute of limitations. York has provided no grounds or case law to demonstrate that the rescheduled status conferences in any way affected the trial court’s determination of the Motion, much less that they demonstrated a genuine issue of material fact that would preclude summary judgment.

5. The trial court did not err regarding a request for discovery.

York claims that the trial court erred in not “demand[ing] Defendant [] participate in the discovery process.” App. Brief at 5, 27-28. He cites to no case law or supporting authority regarding this claim. *See id.* Nor did York ever submit a motion to compel discovery, much less any formal discovery that conformed to the civil rules. CP 68, CP 71-72.

Regardless of any discovery that could have been sought from CSL Plasma, the trial court ruled on the Motion based upon evidence offered by York as to the timing of his injuries. The trial court found this evidence sufficient to demonstrate that York was four years past the latest date of discovery and therefore “way past the Statute of Limitations”. RP 12.

The trial court did not err regarding any request for discovery, because there was no formal request made for either discovery or a motion

to compel. Furthermore, the evidence submitted by York provided all the necessary information regarding timing to assess the statute of limitations.

B. York's Claim Was Untimely Per RCW 4.16.080(2) Where He Did Not Bring His Action Within Three Years of Injury.

1. York's Claim is one of personal injury.

York's brief refers to "reserv[ing] the right to add defenses and claims that become apparent through the course of investigation and litigation", that he "retains the right for a fair speedy trial", that he "can demonstrate equitable title", and he also refers to apportionment. App. Brief at 9-10. This is not a case in which York is a defendant, a criminal, or party to a contract. As referenced in York's Complaint for Personal Injuries, CP 3-7, York's allegations are solely ones of personal injury attributed to the claimed negligence of one entity, CSL Plasma. *See also* CP 5 ("The injuries and damages sustained by plaintiff were the direct and proximate result of the negligent actions of CSL and its affiliates.") York's references to defenses, fair or speedy trials, equitable title and apportionment do not apply.

2. Personal injury claims are subject to a three-year statute of limitations.

Personal injury claims have a three-year statute of limitations in Washington. RCW 4.16.080(2); *Nelson v. Schnautz*, 141 Wn. App. 466, 475, 170 P.3d 69, *rev. denied*, 163 Wn.2d 1054, 187 P.3d 752 (2008). "The general rule in ordinary personal injury actions is that a cause of action accrues at the time the act or omission occurs." *In re Estates of Hibbard*, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992). Even if a

personal injury cause of action does not accrue at the time of the act or omission (for example, in the instance where a plaintiff is injured by the tort of another but the plaintiff does not know that he has been injured), then under the discovery rule the cause of action accrues at time plaintiff knew (or in exercise of diligence should have known) all essential elements of the cause of action. *Samuelson v. Cmty. Coll. Dist. No. 2*, 75 Wn. App. 340, 877 P.2d 734, *rev. denied*, 125 Wn.2d 1023, 890 P.2d 464 (1994); *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997) (citing *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992)). As recognized in *Cox*, 153 Wn. App. at 191 (citing *Allen*, 118 Wn.2d at 758), “the question is if the plaintiff knew the relevant facts, not when the plaintiff knew the facts sufficiently established a legal cause of action.”

In *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 6 P.3d 104 (2000), the court explained,

The general rule in Washington is that when 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 actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered. *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998). Stated more succinctly, the law does not require a smoking gun in order for the statute of limitations to commence. *Beard v. King County*, 76 Wn. App. 863, 868, 889 P.2d 501 (1995). A prospective plaintiff who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken. *Id.*

Giraud, 102 Wn. App. at 450-51.

The record demonstrates that York possessed the relevant facts

sufficient to establish his cause of action “after the first inoculation”, CP 4, that he “became sick and remained sick after these inoculations”, *id.*, that a week before his second inoculation he “told the Doctor of his condition with open sores”, CP 26, and that he had sought medical care no later than September 11, 2009, CP 43, in which his physician summarized her correspondence with CSL Plasma regarding York’s claimed parasitosis.

Taken in the light viewed most favorably to York, York had three years from no later than September 11, 2009, to file his personal injury lawsuit against CSL Plasma, or no later than September 11, 2012. Because York failed to serve his lawsuit until September 12, 2013 (four years later), his claim is time-barred by RCW 4.16.080(2). The trial court should be affirmed.

C. RCW 4.16.350 Does Not Apply to CSL Plasma, Which Is Not a Health Care Provider.

York asserts that this is a claim for injuries resulting from health care services, and that the statute of limitations set forth by RCW 4.16.350 should apply. But CSL Plasma is not a “health care provider” for purposes of RCW 4.16.350. *See* RCW 7.70.020. Instead, CSL Plasma is a plasma collection facility: It did not render health care services to York.¹¹ Although he cites to federal regulations requiring a physician on site at plasma donation facilities, App. Brief at 24, 37, York cites to no legal authority demonstrating that such requirement equates to the

¹¹ York received payment for his blood plasma donations. *E.g.*, CP 4.

provision of health care services. RCW 4.16.350 does not apply here.¹²

D. Even if RCW 4.16.350 Applies, York's Claim Was Untimely.

1. York failed to bring his lawsuit within three years of injury or one year of discovery, per RCW 4.16.350 (3).

Under RCW 4.16.350(3), actions for medical negligence must be commenced within either the standard three-year limitation period or under an alternative one-year discovery rule. *Cox*, 153 Wn. App. at 186-87. That statute provides,

Any civil action for damages for injury occurring as a result of health care . . .

* * *

. . . 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, except that in no event shall an action be commenced more than eight years after said act or omission[.]

RCW 4.16.350(3).¹³

The one-year discovery period “commences when the plaintiff discovered or reasonably should have discovered all of the essential

¹² Contrary to York's claim, App. Brief at 4, the trial court did not find that this was a medical malpractice case. Rather, the trial court found that York's claim was time-barred regardless of the statute that applied. RP 14.

¹³ York states that “it was argued that the repose provision in RCW 4.16.350(3) was unconstitutional”, App. Brief at 6, and that it “violates the privileges and immunities clause of the Washington Constitution”, App. Brief at 7-8, citing to *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998). The Legislature, however, specifically addressed *DeYoung* and re-enacted the statute in 2006. Laws of 2006, Ch. 8, §§ 301-02; see also *Unruh v. Cacchiotti*, 172 Wn.2d 98, 103, 257 P.3d 631 (2011) (en banc).

elements of his or her possible cause of action, *i.e.*, duty, breach, causation, damages.” *Cox*, 153 Wn. App. at 189 (internal quotations and citations omitted). As above, however,

The discovery rule merely tolls the running of the statute of limitations until the plaintiff has knowledge of the ‘facts’ which give rise to the cause of action; it does not require knowledge of the existence of a legal cause of action itself. The key consideration under the discovery rule is the factual, as opposed to the legal, basis of the cause of action. [Internal citations and quotations omitted.]

Id. at 189-90.

In *Nevils v. Aberle*, 46 Wn. App. 344, 349, 730 P.2d 729 (1986), regarding an appeal of a medical negligence case dismissed for failure to file within the statute of limitations, the plaintiff argued that she was unaware her physician may have breached a duty to her until she spoke with an attorney. *Nevils* held that plaintiff “may not have understood she had a legal cause of action [at the time of her treatment], but there is no question that she had discovered the elements of her cause at that time.” 46 Wn. App. at 351, *see also*, *Wood v. Gibbons*, 38 Wn. App. 343, 346-49, 685 P.2d 619, *review denied*, 103 Wn.2d 1009 (1984) (same).

York asserts he was not aware of a legal cause of action until he discovered the federal lawsuit. Similar to *Nevils* and *Wood*, however, there is no question that York knew of the elements of his cause of action by September 2009 when he sought treatment from Dr. Wang: York’s physician corresponded with CSL Plasma regarding claimed injuries.

Even if RCW 4.16.350 applies, the record demonstrates that York

had actual knowledge of his injuries as early as June 2009, and no later than September 11, 2009. He therefore needed to bring a cause of action within the later of “one year from the date of the actual knowledge” or within three years of his claimed injury. RCW 4.16.350(3). York had to file his lawsuit no later than September 11, 2012. Instead, he failed to serve his lawsuit until September 12, 2013; therefore, York failed to conform to the statute of limitations.

2. Even if the tolling provision for intentional concealment or a “foreign body” applied, York failed to bring his lawsuit within the statute of limitations.

RCW 4.16.350(3) contains a provision for tolling the statute of limitations where there has been an intentional effort to conceal negligence from the patient:

[T]he time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient’s representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient’s representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

Id.

The provision regarding intentional concealment “requires more than just the alleged negligent act or omission forming the basis for the cause of action.” *Cox*, 153 Wn. App. at 187 (quoting *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 867, 953 P.2d 1162 (1998)). “Rather, the provision ‘is aimed at conduct or omissions intended to prevent the

discovery of negligence or of the cause of action.’” *Id.*

York appears to assert that this provision should apply to him: “This action is based upon proof of fraud and concealment and foreign bodies”. App. Brief at 13. He offers no evidence in the record (aside from self-serving statements) that CSL Plasma acted affirmatively to conceal any allegedly negligent conduct. Instead, the evidence shows that CSL Plasma corresponded with York’s physician to explain the procedure of the IRBC program, a program in which York voluntarily participated.

As to the “presence of foreign bodies”, cases interpreting this provision involve medical tools inadvertently left in the body. *E.g.*, *Miller v. Jacoby*, 145 Wn.2d 65, 33 P.3d 68 (2001) (en banc) (portion of a Penrose drain inadvertently remained in patient’s body was a foreign object); *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2009) (scalpel blade inadvertently left in patient’s knee was a foreign object); *Bauer v. White*, 95 Wn. App. 663, 976 P.2d 664 (1999) (pin inadvertently left in patient’s tibia was a foreign object); *Van Hook v. Anderson*, 64 Wn. App. 353, 824 P.2d 509 (1992) (sponge inadvertently left in patient’s body after hernia operation was a foreign object). York cites to no case law supporting his assertion that the “foreign bodies” section of RCW 4.16.350 should apply here. Furthermore, York’s participation in the IRBC program and inoculations related thereto were voluntary, and not inadvertent. The tolling provision does not apply.

Even if the tolling provision applied, however, York had “actual knowledge” – as contemplated by the statute – of concerns related to the

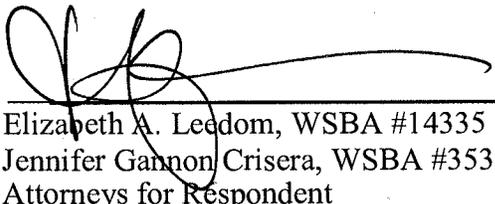
inoculations as early as June 2009, and no later than September 11, 2009. Under the tolling section of RCW 4.16.350(3), York needed to commence his lawsuit within one year of that actual knowledge. Instead, he waited until September 12, 2013. The statute has run.

VI. CONCLUSION

Taken in the light most favorable to York, he was more than a year past the statute of limitations when he brought his claim against CSL Plasma where he had actual knowledge of his claim no later than September 11, 2009. The Court of Appeals should affirm the trial court's summary judgment dismissal of York's action as time-barred.

Respectfully submitted this 20th day of September, 2014.

BENNETT BIGELOW & LEEDOM, P.S.

By: 

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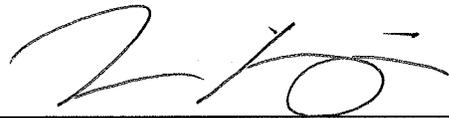
CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing **RESPONDENTS' BRIEF** to be delivered VIA LEGAL MESSENGER and via First Class Mail as follows:

Michael J. York
2714 N. Stone
Spokane, WA 99207

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 22nd day of September, 2014.



Liz Curtis

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