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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

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NO. 283810-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LISA UNRUH,

Appellant,

v.

DINO CACCHIOTTI, DDS and JANE DOE CACCHIOTTI, husband and wife
and the marital community composed thereof,

Respondent.

Appeal from Superior Court of Grant County
Honorable Evan Sperline
NO. 07-2-01238-5

OPENING BRIEF OF APPELLANT LISA UNRUH

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I. INTRODUCTION

This case involves a claim of dental malpractice by Lisa Unruh against Dr. Dino Cacchiotti that was dismissed by the trial court on the basis of the statute of limitations. Because there are questions of fact as to when Lisa knew, or should have known, facts sufficient to establish the elements of a cause of action against Dr. Cacchiotti, the trial court erred in granting summary judgment, and this case should be remanded for trial.

Lisa Unruh was nine years old when she began orthodontic treatment with Defendant Dino Cacchiotti, DDS. As a result of improper treatment by Dr. Cacchiotti, Lisa suffered "root resorption" and lost all of her adult teeth because there were no roots to hold the teeth in place. She had to have extensive dental surgery to have implants placed.

Lisa first learned that Dr. Cacchiotti's treatment may have been below the standard of care in March 2006, at an appointment with Dr. Bryant, one of Lisa's dental providers. It was at that time that the statute of limitations started to run on her claim against Dr. Cacchiotti.

Lisa's attorney tolled the statute of limitations for one year pursuant to RCW 7.70.110 by making a written, good faith request for mediation on January 12, 2007. A lawsuit was timely filed in September 2007, during the one-year period during which the statute of limitations was tolled.

This case involves the application of the discovery rule and the factual question of whether Lisa or her parents knew or should have known of the existence of the elements of a cause of action against Defendant Cacchiotti before the March 2006 appointment with Dr. Bryant.

Because there are questions of fact for a jury to decide as to when Lisa discovered or should have discovered the elements of her dental malpractice cause of action against Dr. Cacchiotti, the trial court erred in granting Dr. Cacchiotti's motion for summary judgment.

II. ASSIGNMENT OF ERROR

The trial court erred when it granted summary judgment for Dr. Cacchiotti on the issue of whether Lisa Unruh brought her claim against Dr. Cacchiotti within the time allowed by the statute of limitations.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err in granting summary judgment based on the statute of limitations when there are questions of fact as to when Lisa Unruh discovered the factual basis for the elements of a cause of action against Dr. Cacchiotti, and a lawsuit was timely filed after Lisa discovered the factual basis for the elements of the cause of action?

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IV. STATEMENT OF THE CASE

A. Orthodontic treatment performed by Dino Cacchiotti, DDS caused Lisa Unruh to lose all of her adult teeth.

Lisa Unruh first began orthodontic treatment with Dr. Cacchiotti in March 1995 for a jaw growth discrepancy classified as a skeletal Class III malocclusion (her bottom jaw jutted out past her upper jaw). CP 221; CP 193 at ll. 16-20. Dr. Cacchiotti applied braces to Lisa's teeth in 1995 and 1996. CP 58. He removed the braces in two stages in 1997 and 1999. CP 59.

Lisa's jaw condition should never have been treated with orthodontics. CP 193[1]; CP 228. Defendant's own expert, Peter Shapiro, conceded that Lisa's Class III malocclusion could only be treated surgically:

> Q. At Page 2, Line 20, it says here that it's your opinion that her surgeries, meaning Lisa Unruh's surgeries, were medically necessary; is that right?
>
> A. Yes.
>
> Q. And is that your opinion?
>
> A. Yes.
>
> Q. Was that due to what?

[1] Plaintiff's expert, Dr. Harry Aronowitz, noted that, if orthodontic treatment was attempted to resolve a skeletal deformity like the one Lisa had, it should be on a "very, very short term basis" with frequent monitoring to see if it was having the intended effect – monitoring which Dr. Cacchiotti did not perform. CP 194-95.

A. That her skeletal deformity could not be corrected in any other way.

Q. And you use the words facial skeletal deformity. Did you mean a Class III malocclusion?

A. Yes.

Q. How long was it known that she had a Class III malocclusion?

A. I think the initial records from Dr. Gerla[2] in his notes identified a Class III malocclusion.

CP 228-29.

Dr. Cacchiotti never mentioned the possibility of surgery to the Unruhs, except to say that he was dead set against it:

Q. What else in the deposition [of Dr. Cacchiotti] did you disagree with?

A. He said he kept us posted as to what was going on and that he was advising surgery. He never ever -- in fact, he told me flat out that he was against it.

Q. Against the jaw surgery?

A. Uh-huh.

. . .

A. [H]e said nothing. How it went was he said nothing as to what was going on. Lisa would go in, I would take her in, the girls would work on her, and nothing was said.

---

[2] Dr. Gerla was an orthodontist who treated Lisa before Dr. Cacchiotti. Dr. Cacchiotti took over Dr. Gerla's practice.

CP 239-40 (Deposition of Margaret Unruh).

Despite the clear skeletal deformity that could only be corrected surgically, Defendant Cacchiotti began a course of orthodontic treatment spanning several years. Defendant Cacchiotti's treatment plan for the skeletal deformity was a mixture of orthodontics (braces) and orthopedic therapy (head gear). CP 221. Unbeknownst to Lisa, this treatment plan was improper from the beginning:

> Q. Okay. So you believe that – are you saying that Dr. Cacchiotti should never had put her in orthodontics?
>
> A. No, I think that she should have waited and had orthodontia at the time that the growth was completed and do jaw surgery and ortho the same time.
>
> Q. Okay. So when she was done growing?
>
> A. Yes.
>
> Q. Basically to get her mouth ready just for the surgery?
>
> A. Yes.
>
> Q. And it's your opinion that Dr. Cacchiotti should have never put her in orthodontics as a youth prior to her jaw surgery?
>
> A. I -- I think that it didn't make sense; the treatment plan didn't make sense.
>
> Q. Do you believe that he should have never put her in orthodontics when she was a young girl?

> A. Dr. Gerla put her in orthodontics with a mixed dentition when she was younger. I don't have any problem with that. He took them back off after a year or so. It wasn't in very long, and it was just to allow the teeth to -- the arches to form normally and for the teeth to come in in a normal position.
>
> It was his opinion, at the time when he took them off, that she may be developing into a Class III, and he thought that she was probably going to need surgery. And that's where it was left.
>
> And in looking at the old photographs, it just -- I'm not an orthodontist, but it seems pretty obvious to me that she was definitely a skeletal Class III, and it would be impossible to treat that severity of -- and she wasn't even through growing. And it would be impossible to treat that with orthodontics alone.
>
> And so if you try and treat it with orthodontics alone, with the reverse-pull headgear and Class III elastics, you're actually doing just the opposite of what -- if you do go into surgery later, you're doing the opposite of what you'd need later on and could have to reverse any treatment that's been done. So it didn't make any sense to me.

CP 182-83 (Deposition of Ronald Bryant, DDS, one of Lisa's treating dental providers).

In addition to the skeletal deformity, Lisa also had "a very clear and severe crowding problem in the upper arch." CP 196. Several teeth were erupting, with follicular cysts erupting close to existing teeth. CP 197-98. Defendant Cacchiotti failed to get timely and accurate x-rays as to the current state of Lisa's teeth. CP 198-99. In addition, he braced

teeth that should have been free to move, which prevented them from moving out of the way of erupting teeth. CP 200-01. He also failed to remove the first bicuspids, which are the teeth first removed when significant crowding is present. CP 202-03.

As a result of Dr. Cacchiotti keeping Lisa in braces for too long with heavy forces, her roots "resorped," or dissolved, and she lost all of her teeth. CP 181-82. She had to have surgery for tooth implants, including bone grafting. Bone was harvested from her hip for this procedure. *See* CP 255.

B. Lisa Unruh did not discover facts supporting a potential cause of action until March 2006.

Lisa Unruh did not discover facts supporting the elements of a cause of action against Dr. Cacchiotti until March 2006, during an appointment with Dr. Bryant, a prosthodontist. CP 248. Margaret Unruh, Lisa's step-mother, testified that she and Lisa had no idea that negligent dental treatment by Dr. Cacchiotti caused Lisa to lose her teeth until the March 2006 appointment when Dr. Bryant told them that Lisa's tooth loss was not due to hereditary factors, but was due to her being kept in braces too long:

> Q. . . . As you sit here today, what do you believe is the cause of Lisa losing her teeth? Why do you think she lost her teeth?

. . .

A. I wasn't sure what the cause was. I had no idea until -- I'm trying to think when it was. I think it was -- we went to see a slide show at Dr. Bryant's office, and that's when he was getting her -- her gums were healing up good, and they were getting ready to prepare -- between Dr. Trimble and Dr. Bryant, they were getting ready to prepare her mouth for her implants.

And he gave us a slide show on patients he had done and was giving Lisa an idea of what her teeth would look like. And we were sitting there, and I asked him, I said, "Why are her teeth falling out?" I said, "Was it something hereditary?" And he said, "No, she has root reabsorption."

And I said, "What does that mean? I have no idea." And he said, "It is caused from braces being put on and kept on too long. This is what the cause of root reabsorption is." And I said, "Okay. So this wasn't a birth defect or" -- I said -- he said, "No, that was the cause of her loss of teeth." And I said, "Okay. Thank you."

Q. When were you watching that slide show?

A. I believe it was March of -- I think that's when her appointment was. I have it written down. Can I check that?

Q. Oh, yes.

A. Because I was trying to remember -- like it's hard to remember dates. March 19th, I think, was her appointment, '06.

. . .

Q. So besides Dr. Bryant, has anybody else told you -- any of Lisa's other health care providers told you

that her root resorption was related to her orthodontics?

A. No. I know at one time I think Dr. West -- they kept referring to this root reabsorption thing, but I had no idea what it was. Was it inherited? Was it...

Q. Did you ask?

A. I did Dr. Bryant.

Q. But you didn't ask Dr. West?

A. No, because you listen to stuff that is going on, and he is showing you x-rays for what they want to do for the surgery, so it's kind of second place stuff, you know, because you are concerned with the surgery.

So it wasn't until we got down to the part where the teeth were going to start to be put in, what was the problem? What is this root reabsorption?

. . .

Q. (By Ms. Campbell) We were talking about kind of root resorption in a general sense before, and you were saying that you didn't -- that you learned from Dr. Bryant that it was related to orthodontics. What do you understand root resorption to be?

A. How it was explained to me was that if braces are left on too long, the roots start to reabsorb just like her front tooth did when it -- it will literally fall out of the gum because there's no roots holding the tooth into the jaw. That's how I understand it.

. . .

Q. So Lisa said it was you and she who made the decision to contact an attorney for this case.

A. Yes.

Q. When did you make that decision?

A. That was the day of the slide show.

CP 244-45; CP 249-50; CP 184 at l. 3; CP 251.

Dr. Bryant testified that, though he was aware orthodontics were the cause of Lisa's resorption, he did not share this information with the Unruhs prior to the appointment when he presented the slide show because he did not want to encourage the Unruhs to file a claim against Dr. Cacchiotti – he wanted to "smooth things over":

> Q. When did you come to the conclusion that the orthodontics caused Lisa to lose teeth?
>
> A. From the very first time that I saw her records, I felt that this case was a disaster, and it appeared to me to be obvious that orthodontics was the contributing factor.
>
> Q. Do you believe that you shared that with Lisa and her parents when you first saw her?
>
> A. I do everything I can to smooth things over. I don't ever, ever -- even though I don't recall it, I don't ever try to offer those kinds of opinions to inflame situations.
>
> I feel really good when I can act as a mediator and work things out when things have gone wrong between a patient and a previous doctor or another specialist.
>
> Q. Did you --

A. Yeah. And no, I wouldn't have done that.

CP 185-86. It is of note that, although Dr. Bryant told the Unruhs that orthodontics caused the root resorption, he never told them that Dr. Cacchiotti's application of the orthodontics was negligent. *See* CP 249-50.

Once the Unruhs suspected that Dr. Cacchiotti may have been negligent after the March 2006 appointment with Dr. Bryant, they hired present counsel. CP 251. Dr. Bryant recommended Dr. William F. Ammons, Jr., DDS as someone who could review the case to determine if there was a breach of the standard of care by Dr. Cacchiotti. CP 255. Counsel sent Dr. Ammons Lisa's records for review. CP 257. However, soon after, Dr. Ammons passed away, and Dr. Bryant did not know of anyone else who could provide an analysis of Dr. Cacchiotti's treatment of Lisa. CP 255. Counsel was able to hire Dr. Aronowitz soon after. CP 259. Dr. Aronowitz informed counsel of his opinion that there was in fact a breach of the standard of care and issued a certificate of merit to that effect. CP 261; CP 263.

C. Dr. Anderson's passing comment to Bryan Unruh was insufficient to put the Unruhs on notice of the factual basis for a cause of action against Dr. Cacchiotti.

Sometime in the period 1996-98, Lisa Unruh's father Bryan talked with Dr. Anderson, a now-retired dentist who at the time was treating

Margaret Unruh, Lisa's step-mother, about Lisa's dental problems. Bryan described the conversation as follows:

Q What were you told about Lisa losing her teeth when she was in middle school/high school?

. . .

A Pulling too hard and too fast at a young age.

Q And when you say pulling too hard and too fast, what do you mean by that?

A. There again, I'm not a dentist or an orthodontist, but that's what I was told.

Q When you say pulling too hard and too fast, are you referring to the orthodontic appliances?

A Yes.

Q Now, who told you that?

A If I remember right, I think Dr. Bryant said it, if I remember right.

. . .

A And also -- and also a dentist up in Canada said the same thing.

Q Which dentist in Canada?

A He's retired, but it was Dr. Anderson.

Q Now, did he ever see Lisa?

A No.

Q And when did you speak to Dr. Anderson?

A 10, 12 years ago . . . I can't pinpoint every specific time.

. . .

Q How did you come to find Dr. Anderson? Because he never treated Lisa, did he?

A. No, just general conversation.

CP 152-53.

Dr. Anderson never treated Lisa Unruh. He never reviewed Lisa Unruh's records. Dr. Anderson's passing comment during a brief, general conversation with Bryan Unruh did not put Lisa's father on notice of the factual basis for a negligence claim against Defendant Cacchiotti.

D. Timeline of events.

1/3/86	Lisa Unruh's date of birth.
3/3/95 – 11/14/00	Lisa is treated by Dr. Cacchiotti.
1996(?) – 1998(?)	Bryan Unruh, Lisa's father, had a passing conversation with a retired Canadian dentist, Dr. Anderson, who speculated that Lisa's tooth loss may have been caused by braces pulling too hard and too fast. Dr. Anderson never examined Lisa or reviewed her records, and he did not tell Mr. Unruh that Dr. Cacchiotti had breached the standard of care. CP 152-53.
10/20/00	Margaret Unruh filled out an intake form for Dr. Lord stating that Lisa "had braces on teeth since 6 years of age and because of braces it is destroying roots of permanent teeth." CP 139.
8/5/02	Initial consult with Dr. West. CP 128.
8/7/02	Initial consult with Dr. Bryant. CP 142.

11/19/02	Lisa returned to see Dr. Cacchiotti to discuss jaw surgery. CP 270.
3/03 to 6/03	Dr. Cacchiotti applied additional braces to prepare Lisa's mouth for jaw surgery. *Id.*
7/29/03	First jaw surgery with Dr. West. CP 134-36.
2003 (?)	Sometime in 2003, Dr. Lord mentioned to Lisa that the problem with her roots was due to orthodontic care. CP 277.
10/03 or 3/30/05	Dr. Bryant told Lisa, on her second or third visit with him, that her root resorption was due to braces, but not negligence of Dr. Cacchiotti. CP 279-81.
1/3/04	Lisa turned 18.
5/25/05	Bryan Unruh was told by Dr. Bryant that orthodontics had caused Lisa to lose her teeth, but not that Dr. Cacchiotti did anything wrong. CP 288.
3/19/06	Dr. Bryant told Margaret Unruh and Lisa that the orthodontics caused Lisa to lose her teeth and that her loss of teeth was not due to genetic factors. CP 244-45. However, Dr. Bryant did not say that Dr. Cacchiotti had violated the standard of care. After this visit with Dr. Bryant, Margaret and Lisa decided to contact a lawyer because, in light of Dr. Bryant's statement that her loss of teeth was not due to genetic factors, they felt that Dr. Cacchiotti may have done something wrong. CP 251.
7/18/06	Lisa's attorney sent her records to an expert for review to determine the cause of Lisa's dental problems and whether Dr. Cacchiotti had breached the standard of care. CP 257.
11/7/06	Lisa's attorney sent her records to another expert, Dr. Aronowitz, to review because the first expert passed away. CP 259.

11/16/06	Notice of intent to sue mailed to Dr. Cacchiotti. CP 313.
12/5/06	Dr. Aronowitz signed Certificate of Merit. CP 261.
11/3/07	Lisa turned 21.
1/12/07	Request for mediation sent to Dr. Cacchiotti's insurance representative, tolling the statute of limitations for one year. CP 315.
1/22/07	Insurance representative for Dr. Cacchiotti sent letter to Lisa's attorney agreeing to toll the statute of limitations for one year pursuant to RCW 7.70.110. CP 318.
9/27/07	Lawsuit filed against Dr. Cacchiotti for dental negligence. CP 4-8.

E. Decision in the court below.

The trial court granted summary judgment in favor of Defendant Cacchiotti on July 15, 2009, based on the statute of limitations. CP 346-50. Plaintiff timely filed this appeal. CP 351-54.

V. ARGUMENT

A. Standard of Review.

Review of a trial court's dismissal on summary judgment is de novo. *State v. Heckel*, 143 Wn.2d 824, 831-32, 24 P.3d 404 (2001) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)). On review of summary judgment, this Court engages "in the same inquiry as the trial court and view[s] the facts and all reasonable inferences in the

light most favorable to the nonmoving party." *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007) (citing *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn.2d 96, 101, 929 P.2d 433 (1997)). "[S]ummary judgment is granted only if, from all of the evidence, reasonable persons could reach but one conclusion." *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

The statute of limitations is an affirmative defense. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008). The defendant carries the burden of proof on a statute of limitations defense. *Id.* (citing CR 8(c); *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976)). "While ideally, the statute of limitations is a defense that will be decided pretrial, when the facts are disputed ***the fact finder must resolve them***." *Id.* at 267-68 (citing *Doe v. Finch*, 133 Wn.2d 96, 101-02, 942 P.2d 359 (1997)) (emphasis added); *Duke v. Boyd*, 133 Wn.2d 80, 83, 942 P.2d 351 (1997). Because the Unruhs did not discover Dr. Cacchiotti's negligence until March 2006, and because a lawsuit was timely filed thereafter, it was error for the trial court to dismiss Lisa's lawsuit based on the statute of limitations.

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B. The trial court erred when it granted summary judgment because Lisa Unruh did not discover all of the elements of her cause of action until March 2006.

Because Lisa Unruh first discovered the factual basis for a cause of action against Dr. Cacchiotti in March 2006 at an appointment with Dr. Bryant, the trial court erred in granting summary judgment based on Dr. Cacchiotti's claim that she or her parents should have discovered the existence of the cause of action earlier. RCW 4.16.350 provides in pertinent part: "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 representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission . . ." The one-year discovery period commences when a plaintiff discovered or reasonably should have discovered "all of the essential elements of [his or her] possible cause of action, i.e., duty, breach, causation, damages." *Zaleck v. The Everett Clinic*, 60 Wn. App. 107, 110, 802 P.2d 826 (1991).

"[T]he 1-year discovery period is triggered as to [breach] when the plaintiff knew, or should have known, ***that the defendant violated the applicable standard of care when he or she caused plaintiff's injury***." *Zaleck*, 60 Wn. App. 107 at 112 (emphasis added). While the plaintiff

need not know for certain that a breach has occurred, in order for the one-year discovery rule period to commence, the plaintiff must have "information that the provider was possibly negligent." *Zaleck*, 60 Wn. App. at 113. Whether a plaintiff should have discovered, with due diligence, the existence of all the elements of a cause of action is a question for the finder of fact. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267-68, 189 P.3d 753 (citing *Doe v. Finch*, 133 Wn.2d 96, 101-02, 942 P.2d 359 (1997) (fact finder had to decide whether an exercise of due diligence would have uncovered psychologist's affair with spouse)); *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001) ("The determination of when a plaintiff discovered or through the exercise of due diligence should have discovered the basis for a cause of action is a factual question for the jury."); *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993); *Webb v. Neuroeducation Inc., P.C.*, 121 Wn. App. 336, 343, 88 P.3d 417 (2004) ("The question of when the elements of a cause of action should have been discovered to begin the running of the statute of limitations is a question of fact."). Because the Unruhs only had knowledge of the ***injury*** prior to the March 2006 appointment with Dr. Bryant, but not facts indicating that Dr. Cacchiotti may have breached the standard of care in treating Lisa, summary judgment was improper.

In the court below, Defendant Cacchiotti pointed to the following testimony of Lisa Unruh as allegedly demonstrating her knowledge of the elements of a potential cause of action against Dr. Cacchiotti before March 2006:

A I just knew my roots were missing.

Q Is that something that you learned later or is that something that you learned at the time?

A I learned later.

Q And when did you learn that?

A When I started seeing Dr. Bryant.

. . .

Q And that was in 2002?

A I started understanding more later than that.

Q When?

A Maybe '03.

Q And in 2003, did you understand that the problem with your roots was due to the orthodontic care?

A Yes.

Q And is that something that Dr. Bryant told you?

A We had other people tell me that.

Q Who?

A Dr. Lord mentioned it.

CP 71.

Q . . . What do you recall Dr. West telling you about root resorption?

A He just explained that my roots were smaller than average because of the braces being on so long my teeth couldn't shift, and because of that my bone is not as thick as it was.

Q Now, did you subsequently learn more about root resorption from other doctors?

A Yes.

Q From whom?

A Dr. Bryant.

Q And what did Dr. Bryant tell you about root resorption?

A I don't know the medical term for it. I don't...

CP 72.

Q Okay. So was it until 2005 or 2006 that he -- is that the first time he expressed to you he didn't agree with his care?

A No.

Q When was the first time that he expressed that to you?

A About our second or third visit.

CP 73.

Q Did Dr. Bryant tell you what should have happened or what should have been done by Dr. Cacchiotti?

A He told me what he believed –

Q Okay.

A -- would have been a better way.

Q And was that like on that same second or third visit?

A Around that time.

Q Around that time. Okay. And what did he tell you that he believed should have been done?

A I shouldn't have had braces, and I should have gone through the jaw surgery.

Q Earlier?

A No, I couldn't go through it earlier.

Q So Dr. Bryant did not agree with Dr. Cacchiotti's decision to put you in braces at all?

A Yes.

CP 74.

Q Now you told me, and I just want to clarify here, that it was Dr. Lord, Dr. West and Dr. Bryant that all told you that your root resorption was related to your orthodontics; is that correct?

A Yes.

CP 75.

Lisa's testimony does not indicate that she had knowledge of facts suggesting that Dr. Cacchiotti violated the standard of care until the 2006 appointment with Dr. Bryant. She knew only that her root resorption was related to her orthodontics. But as discussed below, she understood that it

was her unusual physiology that caused the root resorption in response to the orthodontics, not negligence on the part of Dr. Cacchiotti in how the orthodontics was used.

C. Because a facially valid explanation existed for Lisa's tooth loss, the discovery rule was not triggered until March 2006.

Where a facially valid explanation for an injury exists, discovery of a cause of action does not occur until the plaintiff learns of another explanation indicating negligence on the part of the doctor. *See, e.g., Lo v. Honda Motor Co.*, 73 Wn. App. 448, 462-464, 869 P.2d 1114 (1994). For example, in *Winbun v. Moore*, 143 Wn.2d 206, 209, 18 P.3d 576 (2001), Winbun was admitted to the hospital due to severe abdominal pain, nausea, and difficulty breathing. The emergency room physician diagnosed Pelvic Inflammatory Disease (PID) and consulted with the on-call gynecologist by telephone. While hospitalized, Winbun's condition worsened, and it was later discovered that her problems were not gynecological in nature but were due to a perforated gastric ulcer with over two liters of brownish pus in her abdominal cavity. *Id.* Winbun, suspecting that one of the doctors may have made a mistake and misdiagnosed her condition, consulted with an attorney. *Id.* at 211. The attorney had a doctor review the records, and the doctor concluded that Winbun's family physician and the emergency room doctor misdiagnosed

her condition and were negligent, based on the records available at the time. *Id.* After the lawsuit was commenced, additional records were obtained, and it was discovered that the gynecologist who was on call at the hospital, Dr. Epstein, had never made a visit to the hospital to examine Winbun following the PID diagnosis and, in the opinion of Winbun's expert, had deviated grossly from the standard of care. Dr. Epstein was then added to the lawsuit. *Id.*

Dr. Epstein sought dismissal based on the statute of limitations because he was sued more than three years after he treated Winbun. *Id.* at 211-12. The trial court denied the motion, stating that "[the doctor's negligence] would not be apparent to a lay person." The Court of Appeals reversed, but the Supreme Court affirmed the trial court. The Supreme Court noted that, although Winbun knew that Dr. Epstein was one of her treating doctors, "it was the lack of knowledge of any *act or omission* by Epstein which caused the injury that resulted in Epstein not being named as an original defendant." *Id.* at 218 (emphasis in original). The Supreme Court emphasized the fact that there was a facially logical explanation for Winbun's injuries that did not implicate Dr. Epstein (misdiagnosis by other doctors), and therefore, there were questions of fact as to whether Winbun failed to discover Dr. Epstein's negligence in a timely manner:

> Like Lo, Winbun was faced with a "facially logical explanation" for her injuries [--] delay of appropriate treatment due to the initial misdiagnosis of her condition by her family physician and later misdiagnosis by the emergency room physician. . . . From the medical records that Winbun received, it was not readily apparent that Epstein's conduct delayed appropriate treatment.
>
> . . . The reasonableness of Winbun's failure to inquire into Epstein's negligence, given the presence of another facially logical explanation for her injuries, is properly a question for the jury.

Id. at 219-20.

In *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 864 P.2d 921 (1993), an infant suffered severe and permanent brain damage after experiencing cardiac arrest at Children's Hospital. The infant's mother testified that the doctors initially told her the boy suffered a cardiac arrest because of his heart condition. *Adcox*, 123 Wn.2d at 933. She did not learn of the role of the hospital and the nurses in Brandan's cardiac arrest until several years later, when she contacted an attorney who investigated the matter for her. The Supreme Court held that, under these facts, a jury could rationally conclude that the mother acted with due diligence and timely filed the claim, even though the lawsuit was filed four years after the incident. *Adcox*, 123 Wn.2d at 934.

Similar to Winbun and the mother in *Adcox*, the Unruhs had no indication that Dr. Cacchiotti had engaged in an act or omission that fell

below the standard of care until the appointment with Dr. Bryant in March 2006, when he told them that Lisa's problem was not genetic but was due to the braces being kept on too long. While Dr. West (an oral surgeon Lisa was referred to) had told Lisa that the braces had caused resorption, he never said that Dr. Cacchiotti's use of braces fell below the standard of care. CP 278. In fact, Dr. West attributed the root resorption to Lisa's roots being smaller than average. CP 279. When Margaret Unruh, Lisa's stepmother, attempted to inquire as to the cause of Lisa's resorption, she was told by both Dr. Cacchiotti and Dr. Seaberg (a dentist who treated Lisa) that it was just due to Lisa's biology:

> A. . . . I went to see Dr. Seaberg, that was the time when I said, "Will a root canal help or what do we need to do?" And that's when he said, "There's some people meant to have braces on, and some people that aren't, and she's one that shouldn't have had," he said, "because her roots are -- she's getting no roots -- or her roots are dissolving or being destroyed because she had braces on." That's why I marked this down.
>
> Q. Okay. So you knew at this time in 2000 that it was the braces that caused her teeth to fall out?
>
> A. Well, I just believed what Dr. Cacchiotti told me.
>
> . . .
>
> Q. But did Dr. Cacchiotti tell you the roots were destroying the roots of her permanent teeth?

A. He said there are people that should have braces on and people that shouldn't, and Lisa was one that shouldn't because it was affecting the roots of her teeth.

Q. Did you think Dr. Cacchiotti had done something wrong?

A. No.

Q. So you didn't feel Dr. Cacchiotti had done anything wrong at that time?

A. No.

CP 246-48. In fact, Defendant Cacchiotti continues to take the position that Lisa's root resorption was due to an unknown cause. CP 25; CP 81-82.

Patients should be able to trust their dentists and doctors and rely on what they tell them. Lisa and her parents reasonably relied on what her dental providers told them – that her dental problems were due to an adverse reaction to braces because of her unique physiology. They were told that braces brought about the problem, but not that negligent application of orthodontics caused the problem. Nor were they told that braces applied in a non-negligent manner would have averted the problem. The Unruhs had no reason to suspect that Lisa's problems were the result of dental malpractice.

Because three of the doctors involved in Lisa's treatment offered an explanation for the resorption – that Lisa's physiology/genetics had caused an adverse reaction to braces -- that appeared to the Unruhs to be facially valid, the Unruhs had no reason to believe that the root resorption was caused by negligence on the part of Dr. Cacchiotti until Dr. Bryant hinted at that possibility in March 2006 by telling Lisa and her mother that her tooth loss was not due to genetics.[3] Because a facially valid explanation for the resorption existed before March 2006, the Unruhs cannot be charged with discovery of Dr. Cacchiotti's wrongful conduct until they had reason to disbelieve the explanation they had been given. *Webb v. Neuroeducation, Inc., P.C.*, 121 Wn. App. 336, 343, 88 P.3d 417 (2004) ("A plaintiff has no duty to seek out evidence of medical negligence if another 'facially logical explanation' for the injury exists.").

It was not until the appointment with Dr. Bryant in March 2006 that the Unruhs discovered that the facially valid explanation for Lisa's tooth loss no longer held up, at which time the one-year post-discovery period to file a lawsuit or otherwise toll the statute of limitations

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[3] Q When did you think Dr. Cacciotti had done something wrong? Is that when you were watching the slide show with Dr. Bryant?

A Yes.

CP 248.

commenced. The statute of limitations was then tolled on January 12, 2007, when Lisa's attorney made a written request for mediation. CP 315-316; RCW 7.70.110 ("The making of a written, good faith request for mediation . . . shall toll the statute of limitations provided in RCW 4.16.350 for one year.").

D. Speculation prior to March 2006 by the Unruhs did not trigger the discovery rule.

As set forth above, the Unruhs did not have knowledge that the elements of a claim were met prior to March 2006. Any speculation about the possible reasons for Lisa's dental problems on their part before that time did not amount to discovery of the existence of a claim. For example, in *Webb v. Neuroeducation Inc., P.C.*, 121 Wn. App. 336, 340-41, 88 P.3d 417 (2004), the father of a minor child suspected a psychologist of relying on information provided by his ex-wife as the basis for reporting alleged sexual abuse by the father. The father filed declarations in a hearing related to the parenting plan, stating that he "very strongly believed" that his wife had given misinformation to the doctor. *Id.* at 341. Two years later, a GAL report substantiated the father's belief that the psychologist's treatment was negligent. More than three years after filing the declaration, the father brought suit against the psychologist under chapter 7.70 RCW, and the psychologist moved for summary

judgment based on the statute of limitations. *Id.* at 342. The trial court granted summary judgment, finding that the father "knew or should have known the elements of a cause of action" on November 18, 1998, the date of his declaration.[4]

The Court of Appeals reversed. In holding that genuine issues of fact precluded summary judgment, the court refused to use unfounded belief as a basis for triggering the discovery rule period. In addressing mere belief versus the factual knowledge of elements of a cause of action provided by the GAL report, the court stated:

> The parties dispute when Mr. Webb should have known of Dr. Chupurdia's alleged malpractice. Mr. Webb argues he first discovered Dr. Chupurdia's negligent conduct in October 1999 after receiving the GAL report. Before that time, he attributed his difficulties solely to Ms. Ellis [his ex-wife]. Dr. Chupurdia argues Mr. Webb must certainly have discovered the alleged malpractice by November 18, 1998 when he expressed similar beliefs in his show cause affidavit. Given the lack of facts available to Mr. Webb in November 1998 as shown in this record, we consider his belief allegations as necessarily speculative and conclusory. Viewing the facts most favorable to Mr. Webb, only when he acquired the information contained in the GAL report did he have a factual basis for his opinions and grounds for his complaint.
>
> . . . [T]he record shows Mr. Webb used the term "believe" multiple times, to guess at things he clearly could not know. . . .

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[4] The trial court erred in using three years from discovery as its time frame, rather than one year from discovery or three years from the last negligent act in a course of treatment. *See id.* at 343.

> The record shows Mr. Webb was "curious" about many things connected to Dr. Chupurdia's treatment, and proposed his beliefs as mere speculation and supposition ungrounded by facts. Based on this record, we cannot conclude reasonable minds could reach but one conclusion regarding the disputed discovery facts. Therefore, material facts remain in dispute for a jury to decide.

Id. at 344-45.

Similar to Mr. Webb, the Unruhs, prior to Dr. Bryant's comments in March 2006, after which they hired counsel and obtained a review of her records by an expert, had no way of knowing if Lisa's problems were due to her physiology/genetics or due to negligence on the part of Dr. Cacchiotti, which had never been mentioned by any dental professional Lisa had seen. Although Lisa testified that she was told her resorption was due to braces, she testified that she did not know that Dr. Cacchiotti's use of orthodontics was a breach of the standard of care. *See* CP 277; *see also* CP 288 (told only that orthodontics caused the injury, not that the manner in which the orthodontics were done was negligent). Likewise, while Margaret Unruh knew that braces had caused Lisa's resorption, she attributed it to Lisa's fragility based on what Dr. Seaberg and Dr. Cacchiotti had told her and did not suspect that it was due to negligence on the part of Dr. Cacchiotti. CP 244-45, 249-50. A plaintiff cannot file a lawsuit based on mere suspicion. A plaintiff must possess specific facts

supporting the alleged negligence of the defendant to satisfy CR 11 before a lawsuit can be filed. *Webb*, 121 Wn. App. at 345.

Other jurisdictions that have examined the discovery rule in relation to speculation have also required substantiation of the claim to trigger the running of the discovery period. For example, in *Stauffer v. Ebersole*, 385 Pa. Super. 306, 560 A.2d 816, 817 (Penn. 1989), a woman was exposed to excessive radiation following a radical mastectomy. In 1979, she complained of numbness in her fingers, which became acute in 1980. *Id.* In 1982, more than 3 years after the injury was reported, her doctor completed a battery of tests and determined that excess radiation had caused calcium deposits that were pressing against the nerves. *Id.* The appellate court, in affirming the denial of summary judgment, first looked to a Pennsylvania case where a suspected diagnosis of asbestosis was not deemed discovered until confirmed by a physician several years later. *Id.* The court reasoned that "a plaintiff . . . should not be required to have greater knowledge about his medical condition. If those physicians are not reasonably certain as to his diagnosis, then he certainly cannot be bound to have the knowledge necessary to start the statute of limitations running." In applying the same rationale to the case at hand, the court stated:

> Dr. Smith's diagnosis was done without the benefit of exact medical knowledge. Dr. Smith neither performed tests nor examined the appellant. His opinion was based on his knowledge of appellant's medical history and what she described as symptoms. Thus, Dr. Smith's opinion was a mere suspicion absent any testing and did not allude to a proximate cause of appellant's symptoms.

Id.; *see also Roque v. United States*, ___ F. Supp. 2d ___, 2009 WL 4878716, No. 3:09cv533 (JBA) (D. Conn. Dec. 10, 2009) (statute tolled against family member of decedent aware only that decedent died in prison strangulation, but unaware of negligence of prison until responses to FOIA request received); *Spears v. Moore*, 145 N.C. App. 706, 709, 551 S.E. 2d 483, 485 (2001) (where evidence of discovery is not conclusive, whether the cause of action is discovered is ordinarily for the jury).

"The primary reason for extending and applying the [discovery] rule [in professional malpractice cases] is because the consumer of professional services frequently does not have the means or ability to discover professional malpractice." *Peters v. Simmons*, 87 Wn.2d 400, 405, 552 P.2d 1053 (1976). Up until the point Dr. Bryant told Lisa and her step-mother that that her problem was not genetic but was due to the braces being put on and kept on too long, the Unruhs had no substantiated knowledge of the elements of a cause of action. *See* CP 244-45, 249-50. Because Lisa made a written request for mediation within one year of obtaining substantiated knowledge of the breach of the standard of care

(CP 315), thereby tolling the statute of limitations for one year pursuant to RCW 7.70.110, and then filed a lawsuit within that one-year period, the statute of limitations did not lapse, and it was error for the trial court to grant summary judgment in favor of Defendant Cacchiotti on that basis.

E. Imputing Lisa's parents' knowledge to her does not change the fact that Lisa did not possess information indicating that Dr. Cacchiotti's negligence caused her dental problems until the meeting with Dr. Bryant in March of 2006.

Defendant Cacchiotti argued in the court below that the knowledge of Lisa's parents is imputed to her under *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995). RCW 4.16.350 provides that "the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section." *Gilbert* explained what this means, as follows:

> When read in harmony with the tolling statute, the limitations periods of RCW 4.16.350 are tolled until a minor reaches the age of majority, whereupon that minor is "charged" with whatever knowledge regarding a potential malpractice claim his or her parents or guardians possess. The additional language "shall operate to bar the claim . . . to the same extent . . . [as] an adult" then dictates that a minor to whom the knowledge is imputed has only the time which an adult with knowledge would have to file a claim once the minor attains majority. RCW 4.16.350(3). With respect to a competent adult, RCW 4.16.350 requires a medical malpractice action to be commenced within 3 years

> of the act or omission alleged to have caused the injury, or within 1 year of the time that the plaintiff discovers that the injury was caused by said act or omission, whichever expires later.
>
> * * *
>
> We therefore read RCW 4.16.360 in such a way that a minor's rights are preserved until the age of majority but, when knowledge is imputed, for a 3-year period of time only.

Gilbert, 127 Wn.2d at 376, 377.

If Lisa's parents had knowledge of evidence supporting the elements of a potential malpractice claim against Dr. Cacchiotti before she turned 18 (1/3/04), then Lisa would have had three years after she turned 18 to bring a claim (1/3/07). Here, however, there are questions of fact as to when Lisa's parents had knowledge of evidence supporting the elements of a potential malpractice claim against Dr. Cacchiotti. Taking the evidence in the light most favorable to Lisa, as the Court must, the evidence indicates that Lisa's parents did not possess information supporting the existence of a malpractice claim against Dr. Cacchiotti any earlier than Lisa did. They both learned of the possible basis for a malpractice claim against Dr. Cacchiotti at the time of the March 2006 appointment with Dr. Bryant, when Dr. Bryant dispelled their belief that Lisa's loss of teeth was the result of an unusual physiological response to braces. Lisa's attorney tolled the statute of limitations for one year on

January 12, 2007 by making a written request for mediation pursuant to RCW 7.70.110, and then filed a lawsuit against Dr. Cacchiotti in September 2007 -- within the one-year period during which the statute of limitations was tolled.

VI. CONCLUSION

Doctors and dentists are very reluctant to reveal to patients that one of their colleagues committed malpractice. Like Dr. Bryant in this case, they want to "smooth things over" and avoid betraying a colleague's malpractice to a patient, to avoid having a malpractice lawsuit filed against their colleague.

The medical/dental issues in this case are very complicated. Defendant Cacchiotti claims that Lisa Unruh's loss of her teeth was caused by rare, unknown causes. CP 25. Over the years, a couple of dental professionals made vague statements to Lisa's parents about the loss of her teeth being caused by braces, but her parents believed – as they had been told by Dr. Cacchiotti – that her loss of teeth was simply caused by the effects of braces on her unusual physiology, not by any negligence on the part of Dr. Cacchiotti. Knowledge that her tooth loss was caused by orthodontics is not the same thing as knowledge that her tooth loss was caused by the ***negligent*** use of orthodontics by a dental professional. Many adverse events/conditions can occur as the result of medical or

dental treatment in the absence of negligence. The fact that a patient has problems following a medical or dental procedure does not, by itself, put the patient on notice that their medical or dental provider was negligent, particularly when their treating providers tell them that there are plausible explanations for the bad outcome other than negligence.

It was not until they were told by Dr. Bryant in March 2006 that Lisa's problem was not genetic but was due to the braces being kept on too long, that the Unruhs had reason to suspect that negligence on the part of Dr. Cacchiotti caused Lisa's teeth to fall out.[5] At that point, the Unruhs hired an attorney, and the attorney obtained a review of the case by an expert. The expert concluded that Dr. Cacchiotti's negligence caused Lisa's teeth to fall out.

Lisa's attorney tolled the statute of limitations for one year on January 12, 2007 by requesting mediation pursuant to RCW 7.70.110. Lisa's attorney filed a lawsuit against Dr. Cacchiotti on her behalf in September 2007, which was within the one-year period during which the statute of limitations was tolled.

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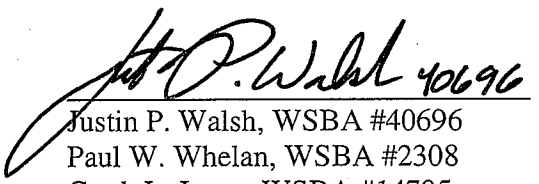
[5] Defendant Cacchiotti acknowledged that, taking the facts in a light most favorable to Lisa Unruh, a jury could reasonably find that the March 2006 appointment with Dr. Bryant is the time that Lisa discovered sufficient facts to put her on notice of the existence of a potential cause of action against Dr. Cacchiotti. CP 42 (Def.'s MSJ at 20) ("Applying the discovery rule, at the very latest, she had until March 20, 2007 to file her

There are questions of fact as to when Lisa Unruh and her parents knew or should have known of facts supporting the elements of a cause of action against Defendant Cacchiotti for dental malpractice. The trial court erred in deciding questions of fact on a motion for summary judgment and granting summary judgment in favor of Defendant Cacchiotti. Summary judgment in favor of Defendant Cacchiotti should be reversed, and this case should be remanded for trial on the issue of when Lisa Unruh and her parents knew or should have known of facts supporting the elements of a cause of action against Defendant Cacchiotti, as well as the underlying issue of Defendant Cacchiotti's malpractice and Lisa's resulting damages.

RESPECTFULLY SUBMITTED this 2d day of February, 2010.



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claim. She waited until September 27, 2007.").

CERTIFICATE OF SERVICE

I certify that I caused to be served, a copy of the foregoing **OPENING BRIEF OF APPELLANT LISA UNRUH** postage prepaid, via Legal Messenger on the 3rd day of February 2010, to the following counsel of record at the following addresses:

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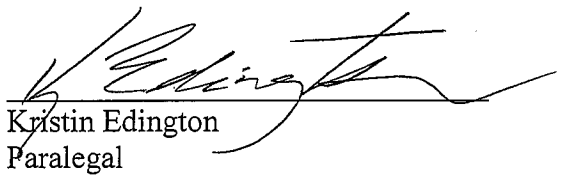

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