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No. 67840-0-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

REGIS J. COSTELLO, Individually and as  
Personal Representative for the Estate of Maurice J. Costello,

Appellant,

vs.

UNIVERSITY OF WASHINGTON MEDICAL CENTER;  
TERESA BRETNALL, M.D.; MELISSA HAGMAN M.D.;  
CHRISTINE SCHLENKER, M.D.; AND JANE DOE,

Respondents.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE BRUCE W. HILYER

BRIEF OF RESPONDENTS

SMITH GOODFRIEND, P.S.

FAIN ANDERSON  
VANDERHOEF, PLLC

By: Howard M. Goodfriend  
WSBA No. 14355  
Ian C. Cairns  
WSBA No. 43210

By: Thomas H. Fain  
WSBA No. 07117  
Susan E. Wassell  
WSBA No. 42783

1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974

701 5th Ave Ste 4650  
Seattle WA 98104-7030  
(206) 749-2373

Attorneys for Respondents

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	RESTATEMENT OF THE ISSUES.....	1
III.	RESTATEMENT OF THE CASE .....	3
	A. Chronology Of Relevant Events.....	4
	B. On June 12, 2007, Physicians At UWMC Replaced Maurice's Feeding Tube. Two Months Later, Doctors At Overlake Hospital Informed Regis That The Feeding Tube Had Punctured Maurice's Colon.....	6
	C. Regis Accused Numerous Institutions Of Wrongdoing Contributing To His Father's Death, Including UWMC.....	7
	D. Regis Brought This Action Against UWMC On April 27, 2011. The Trial Court Granted Summary Judgment, Dismissing The Suit As Time Barred. ....	13
IV.	ARGUMENT .....	14
	A. Regis' Medical Malpractice Claim Is Barred Under RCW 4.16.350 Because It Was Filed More Than Three Years After The Alleged Negligence And More Than One Year After Regis Discovered The Alleged Negligence.....	14
	1. Regis Filed Suit More Than Three Years After The June 12, 2007 Procedure. ....	15
	2. Regis Filed Suit More Than One Year After Hearing Of All Facts Underlying His Claim.....	15

B.	The Statute Of Limitations Is Not Tolled Under RCW 4.16.350(3) Because Regis Does Not Allege Any Facts That Establish Intentional Concealment, Fraud, Or The Presence Of A Non-Therapeutic Foreign Body.....	19
1.	UWMC Did Not Conceal Evidence Of Negligence And Therefore Did Not Engage In Fraud Or Intentional Concealment Under RCW 4.16.350(3).....	20
2.	A Medical Device Placed In The Patient For A Therapeutic Purpose Is Not A “Foreign Body” That Tolls The Statute of Limitations.....	26
C.	The Statute Of Limitations Is Not Tolled By A Request For Mediation Made After The Limitations Period Had Already Expired.....	27
D.	Regis’ Wrongful Death Claim Is Barred By The Statute Of Limitations Because It Was Filed More Than Three Years After Maurice’s Death.....	29
V.	CONCLUSION.....	30

TABLE OF AUTHORITIES

FEDERAL CASES

*Paige v. Police Dept. of City of Schenectady*, 264 F.3d 197 (2d Cir. 2001)..... 22

*Statistical Phone Philly v. NYNEX Corp.*, 116 F. Supp. 2d 468 (S.D.N.Y. 2000), *aff'd sub nom. Black Radio Network, Inc. v. Nynex Corp.*, 14 F. App'x 111 (2d Cir. 2001)..... 24

STATE CASES

*Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007) ..... 29

*Breuer v. Douglas D. Presta, D.P.M.*, 148 Wn. App. 470, 200 P.3d 724 (2009), *rev. denied*, 169 Wn.2d 1029 (2010)..... 20

*Charter Peachford Behavioral Health Sys. v. Kohout*, 233 Ga.App. 452, 504 S.E.2d 514 (1998)..... 21-22

*Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 252 P.3d 909 (2011), *rev. denied*, 173 Wn.2d 1002 (2011) ..... 20, 28

*Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 222 P.3d 119 (2009)..... 16, 17, 25

*Dove v. Ty Cobb Healthcare Sys., Inc.*, 305 Ga.App. 13, 699 S.E.2d 355 (2010)..... 22

*Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986)..... 25

*Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998) ..... 3

<b><i>Giraud v. Quincy Farm and Chemical</i></b> , 102 Wn. App. 443, 6 P.3d 104 (2000), <i>rev.</i> <i>denied</i> 143 Wn.2d 1005 (2001).....	22-23
<b><i>Gunnier v. Yakima Heart Ctr., Inc., P.S.</i></b> , 134 Wn.2d 854, 953 P.2d 1162 (1998).....	15, 18, 20-21
<b><i>In re Martin</i></b> , 154 Wn. App. 252, 223 P.3d 1221 (2009), <i>rev. denied</i> 169 Wn.2d 1002 (2010).....	3
<b><i>Lutheran Hosp. of Maryland v. Levy</i></b> , 482 A.2d 23 (Md. App. 1984).....	23
<b><i>Matter of Estates of Hibbard</i></b> , 118 Wn.2d 737, 826 P.2d 690 (1992).....	18
<b><i>Nguyen v. Sacred Heart Med. Ctr.</i></b> , 97 Wn. App. 728, 987 P.2d 634 (1999).....	27
<b><i>Pogue v. Goodman</i></b> , 282 Ga.App. 385, 638 S.E.2d 824 (2006).....	27
<b><i>Rubalcaba v. Kaestner</i></b> , 981 S.W.2d 369 (Tex. App. 1998).....	21
<b><i>Shah v. Lehman</i></b> , 953 S.W.2d 955 (Mo. Ct. App. 1997).....	27
<b><i>Sherry v. Financial Indem. Co.</i></b> , 160 Wn.2d 611, 160 P.3d 31 (2007).....	3
<b><i>Stuard v. Jorgenson</i></b> , 150 Idaho 701, 249 P.3d 1156 (2011).....	27
<b><i>Wood v. Gibbons</i></b> , 38 Wn. App. 343, 685 P.2d 619, <i>rev. denied</i> 103 Wn.2d 1009 (1984).....	18
<b><i>Zaleck v. Everett Clinic</i></b> , 60 Wn. App. 107, 802 P.2d 826 (1991).....	16-17

**STATUTES**

RCW 4.16.080..... 29  
RCW 4.16.350..... 2, 14-15, 17-21, 26, 28  
RCW 4.20.010..... 29  
RCW 7.70.110..... 2, 27, 28  
RCW 70.56.020..... 18

**RULES AND REGULATIONS**

RAP 2.5..... 27  
RAP 9.12..... 3, 4  
RAP 10.3..... 3

## **I. INTRODUCTION**

The trial court dismissed as time barred this medical malpractice action, filed by the patient's son alleging medical negligence from the placement of a feeding tube in the patient by the University of Washington Medical Center ("UWMC"). Plaintiff filed this lawsuit almost four years after the procedure was performed, more than three years after obtaining all the facts upon which he based his claim of medical malpractice, and more than one year after accusing the UWMC and its physicians of professional negligence that allegedly caused his father's death. This court should affirm the trial court's summary judgment on statute of limitations grounds.

## **II. RESTATEMENT OF THE ISSUES**

The issues presented to the trial court and preserved for review are properly restated as follows:

1. Did the trial court properly dismiss as time barred a personal representative's action alleging medical malpractice from misplacing a feeding tube, which was filed more than three years after the patient's discharge from treatment and more than three years after obtaining facts from the patient's subsequent treating

physicians leading plaintiff to conclude that negligent placement of the feeding tube had injured the patient?

2. The plaintiff obtained all written records concerning treatment promptly upon request with the exception of a single radiology imaging film that does not support his claim that defendant misplaced the patient's feeding tube. Does the defendant's delay in providing plaintiff a copy of the film until he specifically requested radiology images constitute "fraud" or "intentional concealment" that tolls the statute of limitations under RCW 4.16.350?

3. Is a feeding tube a "foreign body not intended to have a therapeutic or diagnostic purpose," the presence of which tolls the medical malpractice statute of limitations under RCW 4.16.350(3)?

While this issue was not raised by the appellant in the trial court, appellant's brief raises the following additional issue:

4. Does a plaintiff's request for mediation first made after the statute of limitations had expired toll the medical malpractice statute of limitations under RCW 7.70.110?

### III. RESTATEMENT OF THE CASE

Appellant's statement of the case ignores much of the evidence presented to the trial court on summary judgment. Although this court views conflicting evidence in the light most favorable to the non-prevailing party, it is not free to disregard undisputed evidence presented to the court below. See **Folsom v. Burger King**, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court . . .") (emphasis in original). That appellant is without appellate counsel does not modify the standard to which he is held. "A pro se litigant is held to the same rules of procedural and substantive law as an attorney." **In re Martin**, 154 Wn. App. 252, 265, 223 P.3d 1221 (2009), *rev. denied* 169 Wn.2d 1002 (2010).

Because many of the factual statements in appellant's brief are unsupported by the record, this court should not consider them. **Sherry v. Financial Indem. Co.**, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007) (A court "decline[s] to consider facts recited in the briefs but not supported by the record") (*citing* RAP 10.3(a)(5), 13.4(c)). Further, many of his citations are to materials that are not part of the summary judgment record. 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.”); e.g., App. Br. at 9-11, 27, and 45 (*citing* CP 272-75); App. Br. at 17, 27, and 35 (*citing* CP 280-82); App. Br. at 18 and 23 (*citing* CP 255-60).<sup>1</sup>

The following restatement of facts properly considers the undisputed evidence before the trial court on summary judgment:

**A. Chronology Of Relevant Events.**

On January 24, 2008, Maurice Costello died from metastatic cancer, *C. difficile* diarrhea, malnutrition, and decubitus ulcer. (CP 35) Regis Costello is the son of Maurice Costello and the personal representative of Maurice Costello’s estate.<sup>2</sup> (CP 3) The following timeline summarizes the relevant events leading up to Regis’ current lawsuit:

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<sup>1</sup> Costello submitted a declaration with attachments on October 24, 2011, more than a month after the trial court entered its summary judgment order dismissing Costello’s claims. (CP 179-282) Much of this declaration is duplicative of Costello’s earlier declaration (CP 9-160), but it also contains new materials not submitted with Costello’s first declaration. (CP 253-282) The trial court did not consider Costello’s declaration save for two separately filed documents: the declaration of Sally Beahan (CP 277-78, 386-87) and Costello’s surreply (CP 262-69, 403-10). These two documents are referred to in the summary judgment order, (CP 411), but the remainder of Costello’s declaration is not part of the summary judgment record. RAP 9.12.

<sup>2</sup> For purposes of clarity only, Regis Costello and Maurice Costello are referred to by their first names in the remainder of this brief.

June 12, 2007	UWMC physicians insert a feeding tube into Maurice's stomach. (CP 5, 107)
June 14, 2007	UWMC discharges Maurice. (CP 83-84, 88, 329)
August 11, 2007	Overlake physicians tell Regis that the feeding tube punctured Maurice's colon. (CP 5, 72, 75, 79, 84, 89, 332)
January 24, 2008	Maurice dies. (CP 35)
March 12, 2008	Regis submits records request to UWMC. (CP 87, 338, 387)
March 25, 2008	UWMC provides Regis all written records for Maurice's care at UWMC. (CP 339, 387)
March 23, 2010	Regis writes to UWMC alleging that its negligence in placing the feeding tube caused a punctured colon and led to Maurice's death. (CP 329-30)
April 19, 2010	Regis writes to the Attorney General claiming that Regis "discovered on August 11, 2007 that Maurice died "from an infection caused by a punctured colon and displaced feeding device at [UWMC] . . . on June 12, 2007. (CP 72)
August 11, 2010	Regis files his first suit against UWMC and other defendants. (CP 309-321)
February 18, 2011	Regis voluntarily dismisses his lawsuit. (CP 289, 323-27)
April 27, 2011	Regis files the current lawsuit. (CP 1-8)

**B. On June 12, 2007, Physicians At UWMC Replaced Maurice's Feeding Tube. Two Months Later, Doctors At Overlake Hospital Informed Regis That The Feeding Tube Had Punctured Maurice's Colon.**

In June 2007, Maurice Costello was 77 years old, suffering from squamous cell carcinoma and recovering from hip surgery. (CP 4, 19, 35, 83, 104) He was admitted to the University of Washington Medical Center on June 4, 2007, experiencing shortness of breath with a diagnosis of possible pneumonia, among other problems. (CP 106-07) It was Maurice's second admission within the month. (CP 106-07) He arrived with a nasal feeding tube that had been placed in Maurice by another institution. (CP 106-07) Regis encouraged UWMC to replace Maurice's nasal feeding tube with a "PEG" feeding tube<sup>3</sup> because Maurice complained that his nasal feeding tube left him hungry. (CP 107) On June 12, 2007, UWMC physicians<sup>4</sup> replaced Maurice's feeding tube. (CP 107)

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<sup>3</sup> This feeding tube is referred to in the record alternatively as a percutaneous endoscopic gastrostomy or "PEG" tube. It is undisputed that the tube's purpose was to feed Maurice Costello. (CP 4, 72, 75; see also App. Br. at 1)

<sup>4</sup> UWMC and its physicians are collectively referred to as "UWMC."

Maurice was discharged from UWMC to the Kline Gallard Home on June 14, 2007. (CP 83-84, 88, 329) On July 17, 2007, Maurice was transferred from the Kline Gallard Home to the Ansara Family Home ("Ansara"). (CP 5, 83-84)

Six weeks after his treatment at UWMC, Maurice was admitted to Overlake Hospital Medical Center ("Overlake") with diarrhea symptoms. (CP 20, 84, 89) On August 11, 2007, Overlake physicians informed Regis that the feeding tube inserted by UWMC was located in Maurice's colon, rather than his stomach. (CP 5, 72, 75, 79, 84, 89, 332) Doctors at Overlake, in consultation with UWMC, performed corrective surgery and placed a new feeding tube in Maurice's stomach. (CP 5-6, 73, 89)

Maurice died on January 24, 2008. (CP 35) His death certificate lists as the causes of death metastatic cancer, *C. difficile* diarrhea, malnutrition, and decubitus ulcer. (CP 35)

**C. Regis Accused Numerous Institutions Of Wrongdoing Contributing To His Father's Death, Including UWMC.**

Between 2007 and 2011, Regis accused various institutions responsible for his father's care of negligence that contributed to his father's death. The accusations are reflected in Regis' correspondence with the UWMC (CP 153-56, 329-32), the

Washington State Attorney General (CP 75-81, 158-60, 333-34), the Washington State Department of Social and Health Services ("DSHS") (CP 48-50, 83-84), the Washington State Department of Health (CP 86-89, 102), the Bellevue Police Department (CP 42-43), Regence Blueshield (CP 124), and a medical malpractice lawyer. (CP 130-34).<sup>5</sup>

On March 12, 2008, approximately seven weeks after his father's death, Regis requested records from UWMC concerning his father's treatment. (CP 87, 338, 387) On March 25, 2008, UWMC provided Regis with Maurice's entire written medical chart

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<sup>5</sup> In December of 2007, while Maurice was still alive, Regis filed a complaint with the Bellevue Police Department accusing Ansara of having musty carpets and damaged gutters. (CP 43) The Bellevue Police Department concluded that Regis' complaints did not warrant opening a case. (CP 43) On December 24, 2007, one month before his father died, Regis filed a complaint with the Washington Department of Social and Health Service ("DSHS") accusing Ansara of improperly discharging Maurice, withholding records, and failing to properly feed Maurice. (CP 47-50) DSHS concluded that Ansara had improperly discharged Maurice and withheld records, but that it had properly administered his feedings. (CP 47-50)

and reports. (CP 339, 387) Regis did not specifically request radiology imaging film and UWMC did not provide any. (CP 387)<sup>6</sup>

In a March 22, 2010, letter to a Regional Administrator of DSHS, Regis accused UWMC of discharging Maurice “with a punctured colon.” (CP 83)<sup>7</sup> Regis told DSHS that he would be filing formal complaints regarding the treatment Maurice received at UWMC, as well as from Ansara, Visiting Nurse Services, and Overlake. (CP 84 (“We need these trusted medical facilities to be held accountable.”))

Regis wrote UWMC on March 23, 2010, accusing UWMC and its physicians of puncturing Maurice’s colon when it inserted the feeding tube during Maurice’s hospital stay on June 12, 2007. (CP 328-30) Regis claimed that Maurice was “discharged on June 14, 2007, with a punctured colon and feeding tube inserted whereby he was left without adequate nutritional absorption to

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<sup>6</sup> UWMC’s Health Information Management Department maintains radiology reports as part of the patient’s medical records, but radiology imaging films are maintained separately by UWMC’s Radiology Department. (CP 387) The Health Information Management Department, therefore, does not obtain radiology imaging films from the Radiology Department in response to a request for written records unless imaging film is specifically requested. (CP 387)

<sup>7</sup> Regis also accused Ansara of withholding records, of failing to administer medications prescribed to Maurice, and of failing to properly examine Maurice. (CP 82-84)

sustain his life.” (CP 329) Regis alleged that other physicians were required to correct UWMC’s error by removing “the faulty medical device from the punctured colon.” (CP 329) Regis alleged that UWMC’s “failure to inform the State of Washington of the adverse events has ultimately caused my father’s death.” (CP 329) Regis repeated his accusation that “the University of Washington’s adverse event . . . caused our father’s death” in an April 4, 2010, letter to UWMC. (CP 332)

On April 19, 2010, Regis wrote to the Attorney General stating, “Maurice Costello passed away on January 24, 2008 from an infection caused by a punctured colon and displaced feeding device at [UWMC].” (CP 72) Regis stated that “[t]his adverse event occurred on June 12, 2007 and was discovered on August 11, 2007.” (CP 72)<sup>8</sup>

UWMC Risk Manager Julie Tin responded to Regis’ letters and accusations of negligence in a May 5, 2010, letter. (CP 105-109) Tin told Regis that “migration of a PEG tube into the colon is, although unusual, a known complication of the procedure.” (CP

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<sup>8</sup> In addition to accusing UWMC of negligence, Regis accused Ansara of withholding records and failing to administer medications to Maurice. (CP 72) Regis also accused DSHS of failing to provide records he requested. (CP 72)

108) Tin stated further, "This migration can occur gradually and go unrecognized for a while, as the tube may still function appropriately. In your father's case, the tube's migration was discovered approximately two months after his discharge from UWMC." (CP 108) Tin denied that Maurice's care fell below the standard of care or that UWMC had failed to comply with adverse event reporting requirements. (CP 108) Regis continued to accuse UWMC of negligence in letters to the Attorney General dated May 27, 2010; June 9, 2010; July 7, 2010; and August 2, 2010. (CP 75-81)<sup>9</sup>

On July 23, 2010, Regis wrote to Dr. Frantz Pierre-Jerome, the Overlake physician who performed the corrective surgery. (CP 150-51) Regis alleges that Dr. Pierre-Jerome told him that UWMC was negligent in inserting the feeding tube, but no declaration or statement from Pierre-Jerome supports that hearsay or Regis'

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<sup>9</sup> Regis had previously submitted a complaint to the Washington State Department of Health regarding UWMC. This complaint is not in the record. On April 19, 2010, the Department of Health informed Regis that it found no violations of law by UWMC. (CP 102)

Regis also accused Regence Blue Shield of interfering with an investigation by the Washington State Department of Health and of pressuring the Overlake physicians to discharge Maurice prematurely. (CP 75, 79) Regis also accused DSHS of "neglect[ing] to act in a timely manner to recover the medical records that were requested." (CP 77)

allegation that Dr. Pierre-Jerome provided “sketches” of the procedure to Regis. (CP 37-40, 133; App. Br. at 5, 15-16)

On August 2, 2010, Regis requested from UWMC the radiology imaging film from the June 12, 2007 feeding tube procedure. (CP 127, 387) UWMC immediately provided the single image from the operation. (CP 62-63, 87, 133, 387) According to Regis, the image shows the feeding tube properly placed in Maurice's stomach and not in his colon. (App. Br. at 26) No expert evidence, nor for that matter lay testimony, explains what this image shows, and no evidence allows a jury to infer from this image that UWMC pierced Maurice's colon when inserting the feeding tube.

On February 18, 2011, Regis filed a complaint with the Washington State Department of Health accusing UWMC of negligence in inserting the feeding tube, failing to obtain informed consent for the feeding tube procedure, withholding records from him, and failing to report an “adverse event.” (CP 86-89) Regis stated in his DOH complaint that he learned on August 11, 2007,

from Doctor Sang U. Kim at Overlake that UWMC punctured Maurice's colon. (CP 89)<sup>10</sup>

**D. Regis Brought This Action Against UWMC On April 27, 2011. The Trial Court Granted Summary Judgment, Dismissing The Suit As Time Barred.**

On August 11, 2010, Regis filed suit against UWMC and its physicians as well as well as other defendants, including Overlake, Ansara, Regence Blueshield, and DSHS. (CP 309-321) Regis moved to voluntarily dismiss his suit after all defendants moved for summary judgment. The court granted Regis' motion and dismissed the case without prejudice on February 18, 2011. (CP 287, 322-27)

On April 27, 2011, Regis filed the current suit in King County Superior Court alleging UWMC "punctured [Maurice]'s colon during insertion of the Tube on June 12, 2007 and left it connected within his colon so that it would not provide adequate nutrition." (CP 4) On September 23, 2011, the Honorable Bruce Hilyer ("the trial court") granted summary judgment on the ground that Regis' malpractice lawsuit was barred by the statute of limitations. (CP 411-12)

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<sup>10</sup> Regis also accused Regence Blueshield of forcing UWMC to prematurely discharge Maurice, and Ansara of withholding records from him and failing to administer medications to Maurice. (CP 88-89)

#### IV. ARGUMENT

Regis filed this suit more than three years after the alleged negligence occurred, more than three years after learning of all facts underlying his malpractice claim, more than three years after Maurice died, and more than one year after Regis accused UWMC of negligence. The statute of limitations has run on each of Regis' claims.

**A. Regis' Medical Malpractice Claim Is Barred Under RCW 4.16.350 Because It Was Filed More Than Three Years After The Alleged Negligence And More Than One Year After Regis Discovered The Alleged Negligence.**

An action alleging injury or death occurring as a result of health care and "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 . . . ." RCW 4.16.350(3). Regis knew by August of 2007 the factual basis for his claim of medical malpractice but waited almost four years to file this action. The trial court properly dismissed this action for medical negligence under RCW 4.16.350(3).

**1. Regis Filed Suit More Than Three Years After The June 12, 2007 Procedure.**

RCW 4.16.350(3)'s three-year period begins to run from "the act or omission alleged to have caused the injury or condition. . . ." *Gunnier v. Yakima Heart Ctr., Inc., P.S.*, 134 Wn.2d 854, 859, 953 P.2d 1162 (1998) (quoting RCW 4.16.350(3)). Here, Regis' complaint alleged that "Defendants punctured Costello's colon during insertion of the Tube on June 12, 2007." (CP 4; see also App. Br. at 3, 9, 24) Regis filed this suit on April 27, 2011, over 46 months after the alleged act or omission—10 months after the three year period under RCW 4.16.350 expired. (CP 3) It is undisputed that Regis' suit was not filed "within three years of the act or omission."

**2. Regis Filed Suit More Than One Year After Hearing Of All Facts Underlying His Claim.**

Regis also failed to file suit within one year of his discovery of UWMC's alleged negligence. Regis knew all the facts giving rise to his claim more than three years before filing suit. His suit was time barred under the one-year discovery provision of RCW 4.16.350(3).

"[T]he 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.” **Cox v. Oasis Physical Therapy, PLLC**, 153 Wn. App. 176, 189, 222 P.3d 119 (2009) (quotation omitted) (rejecting patient’s argument that her suit was timely under discovery rule where patient “knew the critical facts underlying her cause of action” more than one year before filing suit). “[T]he plaintiff need not have known with certainty that the health care provider was negligent. Instead, the plaintiff need only have had, or should have had, information that the provider was possibly negligent.” **Zaleck v. Everett Clinic**, 60 Wn. App. 107, 112, 802 P.2d 826 (1991) (rejecting patient’s argument that his suit was timely under 1-year discovery rule because patient was aware, or should have been aware, of facts underlying his malpractice claim more than one year before filing suit).

Regis knew all the “critical facts” underlying his claim of malpractice when he learned on August 11, 2007 that the feeding tube placed in Maurice by UWMC had punctured his father’s colon. In his correspondence with the Attorney General, the Department of Health, and Dr. Pierce Jerome, Regis admitted that he discovered that Maurice’s colon was punctured by the feeding tube inserted by UWMC on August 11, 2007. (CP 72; *see also* CP 5-6, 75, 79, 84,

89, 151, 329, 332, 334; App. Br. at 14, 16, 45) Regis waited another 44 months before filing this lawsuit. His claim is not timely under the discovery provision of RCW 4.16.350.

Regis argues that he did not discover the factual basis for his claim until August 5, 2010, when he met with Dr. Pierre-Jerome because that is the first time the feeding tube puncture was “explained in complete detail.” (App. Br. at 2) But Regis accused UWMC of “puncturing” his father’s colon in March of 2010, more than a year before he filed suit against UWMC. (CP 83, 329-30) He also referred to the June 12, 2007 feeding tube procedure as an “adverse event” that caused his father’s death in his April 4, 2010 correspondence to UWMC. (CP 332)

In any event, the statute of limitations is not tolled until a plaintiff “completely” understands the factual basis for his claim or until he knows “without any doubt” (App. Br. at 13) that he has a cause of action, as Regis maintains. See **Cox**, 153 Wn. App. at 189; **Zaleck**, 60 Wn. App. at 112. Regis did not learn any new facts between August 11, 2007 and August 5, 2010. Regis had “information that the provider was possibly negligent” and had discovered the factual basis for his claim by August 2007. **Zaleck**, 60 Wn. App. at 112. Regis filed suit 44 months later. His suit is not

timely under the one year discovery rule provision of RCW 4.16.350.

There is no injustice in dismissing an untimely lawsuit. RCW 4.16.350, like other “[s]tatutes of limitation seek[s] to avoid the difficulty of a trial long after witnesses have disappeared and memories have dimmed.” *Wood v. Gibbons*, 38 Wn. App. 343, 346, 685 P.2d 619, *rev. denied*, 103 Wn.2d 1009 (1984) (quotations omitted). “An adult with a justifiable grievance usually knows it, and the law affords him ample opportunity to assert it in the courts.” *Gunnier*, 134 Wn.2d at 860 (quotations omitted). Accordingly, “compelling one to answer a stale claim is in itself a substantial wrong.” *Matter of Estates of Hibbard*, 118 Wn.2d 737, 745, 826 P.2d 690 (1992). This court should affirm the dismissal of Regis’ malpractice lawsuit.<sup>11</sup>

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<sup>11</sup> Regis also complains that UWMC failed to report the feeding tube procedure as an “adverse event” to the Washington State Department of Health under RCW 70.56.020. (*E.g.*, App. Br. at 7-9, 30, 33) Regis cites no authority for the proposition that this regulatory statute creates a private cause of action, and ignores the DOH’s finding that UWMC did not violate the applicable reporting regulations. (CP 102; see CP 108)

**B. The Statute Of Limitations Is Not Tolloed Under RCW 4.16.350(3) Because Regis Does Not Allege Any Facts That Establish Intentional Concealment, Fraud, Or The Presence Of A Non-Therapeutic Foreign Body.**

Regis alleges that UWMC covered up its medical negligence, but cannot support that allegation with any evidence that UWMC engaged in “fraud” or “intentional concealment” as required by statute. RCW 4.16.350(3). Regis’ argument that the “foreign body” provision of RCW 4.16.350(3) applies is also refuted by the plain language of the statute.

RCW 4.16.350(3) provides a limited exception to the three year/one year medical malpractice statute of limitations, upon plaintiff’s proof that the defendant fraudulently or intentionally concealed their malpractice, or if the defendant’s treatment resulted in the presence of a non-therapeutic foreign body:

PROVIDED, That the 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.

RCW 4.16.350(3). Regis failed to meet his burden of supporting his bare allegations with any evidence that would allow a trier of fact to conclude that this tolling provision applies. See **Cortez-Kloehn v. Morrison**, 162 Wn. App. 166, 172, 252 P.3d 909 (2011) (“A plaintiff asserting an exception to the statute of limitations . . . bears the burden of proving that a tolling provision applies.”), *rev. denied*, 173 Wn.2d 1002 (2011).

**1. UWMC Did Not Conceal Evidence Of Negligence And Therefore Did Not Engage In Fraud Or Intentional Concealment Under RCW 4.16.350(3).**

“The intentional concealment proviso of RCW 4.16.350 ‘requires more than just the alleged negligent act or omission forming the basis for the cause of action. The proviso is aimed at conduct or omissions intended to prevent the discovery of negligence or of the cause of action.’” **Breuer v. Douglas D. Presta, D.P.M.**, 148 Wn. App. 470, 478, 200 P.3d 724 (2009), *rev. denied*, 169 Wn.2d 1029 (2010) (quoting **Gunnier v. Yakima Heart Ctr., Inc.**, 134 Wn.2d 854, 867, 953 P.2d 1162 (1998)).

Regis fails to allege any facts that establish intentional concealment of negligence under RCW 4.16.350(3). Regis alleges that UWMC concealed its radiology film until August 2010, but the film itself provides no evidence of any negligence on the part of

UWMC, and in fact supports UWMC's position that it properly placed the tube in Maurice's stomach. Regis concedes that the image taken before Maurice's discharge from UWMC "shows the PEG in the stomach" not the colon. (App. Br. at 26; see *also* CP 107) UWMC could not "conceal" evidence of negligence if it possessed no such evidence. Its alleged delay in providing evidence that affirmatively rebuts Regis' allegations of negligence is not conduct "intended to prevent the discovery of wrongdoing" and cannot as a matter of law toll the statute of limitations. **Gunnier**, 134 Wn.2d at 867.<sup>12</sup>

Even if there were any competent evidence that the film supported Regis' malpractice claim – and there is not – RCW 4.16.350(3)'s tolling provision does not apply for the additional reason that Regis already had knowledge of the allegedly

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<sup>12</sup> See **Charter Peachford Behavioral Health Sys. v. Kohout**, 233 Ga.App. 452, 504 S.E.2d 514, 523 (1998) (citations omitted) ("In a medical malpractice action for misdiagnosis, the fraud that plaintiff must show to toll the statute of limitation is an intentional failure *to reveal negligence.*") (emphasis added); **Rubalcaba v. Kaestner**, 981 S.W.2d 369, 375 (Tex. App. 1998) ("For a party to invoke fraudulent concealment as a defense to limitations, he must show that the cause of action has been concealed, not that the records have been concealed. The inability to obtain medical records does not, in and of itself, establish fraudulent concealment."); see *also* **Rubalcaba**, 981 S.W.2d at 378 (Cohen, J., concurring) ("If the concealed evidence did not support appellant's claim, its concealment was not fraudulent. If the concealed evidence did not differ from the existing evidence, its concealment was harmless.").

concealed facts. See *Giraud v. Quincy Farm and Chemical*, 102 Wn. App. 443, 455, 6 P.3d 104 (2000) (“In order to toll the statute of limitations, the [plaintiffs] must do more than merely establish that [defendant] concealed this information. They must also show that they were personally unaware of this information.”), *rev. denied* 143 Wn.2d 1005 (2001).<sup>13</sup> Regis knew by August 2007 that the feeding tube inserted by UWMC had punctured his father’s colon and alleged that he believed at that time that UWMC was responsible for this adverse event. The radiology imaging film – even it did show the tube in Maurice’s colon – did not inform Regis of any facts he did not already know.

Finally, the tolling proviso is inapplicable for the additional reason that no evidence supports Regis’ bare assertion that UWMC “concealed” the film from Regis. UWMC provided Regis with all his father’s written medical records two weeks after he requested them

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<sup>13</sup> See also *Dove v. Ty Cobb Healthcare Sys., Inc.*, 305 Ga.App. 13, 699 S.E.2d 355, 357 (2010) (“But, even if evidence of fraud exists, the statute of limitation is not tolled when the plaintiff knew all facts necessary to show malpractice before the running of the period of limitation.”) (quotations omitted); *Paige v. Police Dept. of City of Schenectady*, 264 F.3d 197, 200 (2d Cir. 2001) (holding no equitable tolling of statute of limitations where plaintiff knew of a civil rights claim, even if police had concealed the investigation file); *Charter Peachford Behavioral Health Sys. v. Kohout*, 504 S.E.2d 514, 523 (Ga. App. 1998) (“if the alleged fraud did not prevent the plaintiff from learning of defendant’s alleged negligence, then the statute is not tolled”).

on March 12, 2008. (CP 87, 338-39, 387) UWMC did not provide Regis with the radiology imaging film because Regis did not ask for film in his March 2008 request for medical records. (CP 62-63, 87, 387) UWMC gave Regis the radiology imaging film as soon as he requested it on August 2, 2010, more than two years after his initial records request and almost two months after the limitations period expired. (CP 87, 387-89).

Regis, not UWMC, is responsible for the two-year delay in following up on his initial records request. Regis' lack of diligence cannot toll the statute of limitations. ***Giraud***, 102 Wn. App. at 455 (plaintiffs "are required to demonstrate that they were reasonably diligent in their efforts to discover the information that they allege" was withheld); *see also Lutheran Hosp. of Maryland v. Levy*, 482 A.2d 23, 30 (Md. App. 1984) ("An unfulfilled request for x-rays in 1975, with no further request . . . until January 1977 is simply not evidence of ordinary diligence"), *cert. denied*, 302 Md. 288 (1985).

Regis argues that UWMC's May 5, 2010 letter denying negligence was an attempt to hide the "true facts" that "the PEG was punctured through the colon." (App. Br. at 32-33) But Regis knew the tube had punctured his father's colon on August 11, 2007, a fact that UWMC has never denied. Indeed, UWMC consulted

with Overlake in August 2007 to remedy the feeding tube migration. (CP 5-6, 73, 89) Denial of negligence is not the concealment of facts. See **Statistical Phone Philly v. NYNEX Corp.**, 116 F. Supp. 2d 468, 483 (S.D.N.Y. 2000) (“Taking plaintiffs’ theory to its logical extreme, so long as a defendant denies wrongdoing or characterizes the available evidence in its favor, the statute of limitations cannot begin to run. This argument is plainly without merit.”), *aff’d sub nom. Black Radio Network, Inc. v. Nynex Corp.*, 14 F. App’x 111 (2d Cir. 2001).

Regis also accuses numerous parties of concealing facts or aiding a cover-up regarding his father’s treatment, including Ansara Family Home (App. Br. at 3, 9, 12, 21, 25, 30, 38), the Bellevue Police Department (App. Br. at 10-11, 17, 25-26), Visiting Nurse Services (App. Br. at 3, 9, 30), the Washington State Department of Social and Health Services (App. Br. at 11-12, 17, 31), Kline Gallard (App. Br. at 14, 45), ABC Legal Services (App. Br. at 18-19), the Washington State Attorney General ((App. Br. at 17, 19, 21, 48), the Washington State Department of Health (App. Br. at 17), Regence Blueshield (App. Br. at 20-21, 38, 47-48), attorneys Regis consulted with (App. Br. at 22-23), and Overlake Hospital (App. Br. at 14-16, 28, 38, 45-47). The conduct of parties other

than UWMC cannot toll the statute of limitations against UWMC. **Cox**, 153 Wn. App. at 189 (rejecting plaintiff's argument that "the conduct of a person other than the practitioner is relevant to the issue of whether intentional concealment tolls the statute of limitations for an action against the practitioner").

Regis' assertion that a "whistleblower" revealed wrongdoing is likewise immaterial to his claims against UWMC. (See App. Br. at 29 (*citing* CP 55-58)) Regis relies on hearsay from a visiting nurse who does not even mention UWMC, let alone accuse it of "concealing" records from Regis. **Dunlap v. Wayne**, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) ("A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.").

Regis' broad ranging allegations of negligence and a cover-up by those charged with the care of his father during his last days may be sincerely held, but they are not supported by any specific facts that would allow the trier of fact to find that UWMC intentionally concealed Maurice's injury or the professional negligence of its physicians or staff. This court should affirm the trial court's order dismissing Regis' complaint.

**2. A Medical Device Placed In The Patient For A Therapeutic Purpose Is Not A “Foreign Body” That Tolls The Statute of Limitations.**

This court should also reject Regis’ contention that the statute of limitations was tolled under the “foreign body” provision of RCW 4.16.350(3). This provision applies by its terms to “the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect.” RCW 4.16.350(3). As Regis concedes, the feeding tube was intended “to improve the nutritional benefits for Maurice Costello” who was already gravely ill and complaining of hunger when he was treated at UWMC in June 2007. (App. Br. at 1; see also CP 4, 72 (injury was caused by a “displaced feeding device”), 75, 107) The “foreign body” provision of RCW 4.16.350(3) was intended to apply to non-therapeutic objects unintentionally left in the body, e.g., a surgical sponge. The statute does not apply to medical devices, such as Maurice’s

feeding tube, that are intentionally placed in the body for therapeutic purposes.<sup>14</sup>

**C. The Statute Of Limitations Is Not Tolloed By A Request For Mediation Made After The Limitations Period Had Already Expired.**

Regis seeks to invoke the separate tolling of the statute of limitations granted under RCW 7.70.110, when a plaintiff makes a request for mediation, but Regis failed to raise this issue in the trial court, thus depriving UWMC of the opportunity to make a record on a potentially dispositive issue. This court should refuse to consider this new tolling argument on appeal for this reason alone. **Nguyen v. Sacred Heart Med. Ctr.**, 97 Wn. App. 728, 733, 987 P.2d 634 (1999) (“Generally, appellate courts will limit review to claims argued before the trial court. RAP 2.5(a). This is especially true for summary judgment proceedings.”).

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<sup>14</sup> Accord **Stuard v. Jorgenson**, 150 Idaho 701, 249 P.3d 1156, 1163 (2011) (under Idaho’s similar statute, “a medical device which is placed in the body intentionally for the purpose of medical treatment is not a ‘foreign object’”) (listing cases); **Shah v. Lehman**, 953 S.W.2d 955, 958 (Mo. Ct. App. 1997) (foreign object provision of tolling statute inapplicable; plaintiff did “not contest that the [object] was intended to be left in as a medical implant”); **Pogue v. Goodman**, 282 Ga.App. 385, 638 S.E.2d 824, 826 (2006) (“We have interpreted the term ‘foreign object’ to include only those objects that are inadvertently left within a patient’s body” and not those “purposely placed in a body”) (quotations omitted).

Regis' argument fails on the merits in any event. Under RCW 7.70.110, "The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year." In his July 7, 2010 letter to the Attorney General, Regis wrote, "We ask that you please agree to use Honorable Robert Olsdorf [sic] and Honorable Faith Ireland to assist by mediation / arbitrate of this matter." (CP 79) Even if this could be considered a proper request for mediation under the statute,<sup>15</sup> Regis' July 7, 2010 letter came too late.

A request for mediation may not "toll" the statute of limitations if the limitations period had already expired and there was no limitations period to extend. "The three year period can be extended by this provision, but it will not revive a period that has already expired because there would be nothing to toll." **Cortez-Kloehn**, 162 Wn. App. at 171. Regis sent his letter to the Attorney

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<sup>15</sup> UWMC does not concede that the Attorney General was an appropriate representative of UWMC under RCW 7.70.110, or that the letter constitutes a statutory request for mediation, particularly when UWMC's claims manager had previously asked Regis to communicate exclusively with her. (CP 154) In any event, Regis' failure to raise this issue below prevented the UWMC from presenting evidence on this issue in the trial court.

General on July 7, 2010 (CP 79), almost a month *after* the three-year statute of limitations expired, at the latest on June 12, 2010. There was no limitations period to toll by the time Regis submitted his letter to the Attorney General. The statute of limitations bars Regis' claim.

**D. Regis' Wrongful Death Claim Is Barred By The Statute Of Limitations Because It Was Filed More Than Three Years After Maurice's Death.**

Maurice Costello died on January 24, 2008. (CP 35) Regis asserted his wrongful death claim under RCW 4.20.010 on April 27, 2011, more than three years later. (CP 1-8) His claim is barred under RCW 4.16.080(2).

"The statute of limitations for a wrongful death action in Washington is three years." ***Atchison v. Great W. Malting Co.***, 161 Wn.2d 372, 377, 166 P.3d 662 (2007) (*citing* RCW 4.16.080(2)). "[W]rongful death actions accrue at the time of death" and the limitations period begins to run from the date of death. ***Atchison***, 161 Wn.2d at 379. Maurice Costello died on January 24, 2008. Because this April 27, 2011 action was commenced more than three years after his death, it is untimely.

**V. CONCLUSION**

Regis filed his lawsuit more than three years after UWMC engaged in all "acts or omissions" that formed the basis for his claim of professional negligence and more than three years after he discovered all facts upon which he based his claim. No reasonable juror could find that UWMC engaged in fraud or attempted to conceal any of the facts surrounding his father's treatment, let alone covered up evidence of professional negligence, as Regis claims. This court should affirm the trial court's order granting summary judgment to UWMC based on the statute of limitations.

Dated this 29<sup>th</sup> day of February, 2012.

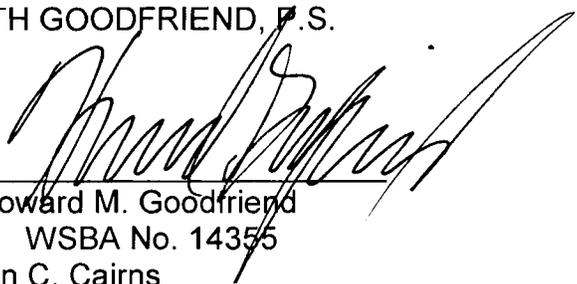
FAIN ANDERSON  
VANDERHOEF, PLLC

By: \_\_\_\_\_

  
Thomas H. Fain  
WSBA No. 07117  
Susan E. Wassell  
WSBA No. 42783

SMITH GOODFRIEND, P.S.

By: \_\_\_\_\_

  
Howard M. Goodfriend  
WSBA No. 14355  
Ian C. Cairns  
WSBA No. 43210

Attorneys for Respondents

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 29, 2012, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Regis Costello Pro Se 14462 58th Ave. So. Tukwila, WA 98168	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Thomas H. Fain Susan E. Wassell Fain Anderson VanDerhoef PLLC 701 5th Ave Ste 4650 Seattle WA 98104-7030	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 29th day of February, 2012.

  
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Victoria K. Isaksen