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IN THE COURT OF APPEALS DIVISION I

IN AND FOR THE STATE OF WASHINGTON

NO. 80724-2 - I

GEORGE CANTU, APPELLANT/PETITIONER

v

NIKOLAY A. USOLTSEV, MD., et al , RESPONDENTS

Appellant's Petition for Discretionary Review by Supreme Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

Identity of Petitioner:

Petitioner George Cantu, Pro Se

Citation to Court of Appeals Decision

Cantu v. USOLTSEV, MD., et al, Court of Appeals, Div 1 NO. 80724-2

Decision Filed 3/22/21; Reconsideration Denied 4/23/21.

I. Issues Presented for Review

A. It is an issue of **substantial public interest** that should be determined by the Supreme Court, when courts grant summary judgement or dismissal when discovery has been thwarted (against the Supreme Court's ordered civil rules) by the very party bringing summary judgment or dismissal motions. We need a paradigm-shifting Supreme Court ruling that makes clear to the lower courts what should happen regarding discovery and dismissal of cases, like Fissons did for making clear how discovery is to be made fully in good faith and Burnett did for allowing cases to go forward even when newly discovered things come at the last moment with the direction from this Court that cases should not be dismissed, (wholly or partially), but lesser sanctions ordered. Now it is time to make clear that cases should be heard on the merits to do justice between the parties and not dismissed when the other side will not give reasonable discovery, but instead brings a motion for summary judgment or dismissal. The discretion allowed to judges to dismiss cases in the face of clearly needed discovery will always escape true review because the standards for abuse of this discovery are non-existent. The higher courts just "rubber stamp" the lower court's discretion because it is so fact-oriented and the great presumption in favor of the lower courts' exercise of discretion as trier of fact. The rule should be that if relevant discovery is still outstanding, no summary judgement or motion to

dismiss shall be granted and reasonable discovery shall be ordered.

B. It is a significant question of constitutional law, under the **constitutions** of the State of Washington and The United States, when the guaranteed due process rights for reasonable discovery before Summary Judgment or Motions to Dismiss are trampled upon by too-early dismissals by courts under the excuse that it is in their discretion.

C. RCW 4.16.350 (3), the "discovery rule" "tolling" of statutes of limitations in medical malpractice suits (now 1 year) versus personal injury (now 3 years) suits unconstitutionally. This is a significant question of constitutional law of violations of the equal rights and due process guarantees under the **constitutions** of the State of Washington and The United States.

D. It is a **significant question of constitutional law** when the equal rights and due process guarantees under the constitutions of the State of Washington and The United States are violated by RCW 7.70.110, "tolling" the statute of limitations in medical malpractice claims when a request for mediation is made. RCW 7.70.110 is silent, vague, and undefined as to who and ALL who must be given a notice of request for mediation to toll the statute of limitations for 1 year in a medical malpractice claim and any interpretation of the statute that might require plaintiff to name more than the medical facility puts by the court denying discovery puts an unconstitutional burden on plaintiffs to find the names and addresses of all responsible medical personnel and is an unreasonable burden especially in light of non-employee doctors, PLLCs, and others participating, but not disclosed by medical providers as being independent persons and entities needing separate notice. Plaintiffs cannot be expected to learn this at the outset of claims, even before

discovery is allowed in a future lawsuit. In the subject suit, the non-employee anesthesiologist had his own PLLC and this was not disclosed and should have tolled the statute of limitations until so disclosed by the hospital (here after 6/6/19 dismissal by the court denying discovery regarding the anesthesiologist).

E. A pro se person prevailing should be allowed reasonable attorney's fees and costs under contract, statute, case law, for attorney's fees and costs incurred in assisting in the matter, but without a formal appearance by the attorney, just as a party whose attorney formerly appeared would be entitled to such reasonable attorney's fees and costs. This is an issue of **substantial public interest** and a **significant question of constitutional law**, as it violates equal rights and due process guarantees under the constitutions of Washington and the US.

F. The decision of the Court of Appeals is **in conflict** with the decision of the Supreme Court. Numerous cases cited herein, but many more on allowed briefing.

G. The decision of the Court of Appeals is **in conflict** with another decision of the Court of Appeals. Numerous cases cited herein.

II. STATEMENT OF THE CASE

All CP references are to the 2018 Cantu v. Providence Case NO.18-2-02129-31, unless specifically identified in the 2019 case Cantu v. Usoltsev Case NO. 19-2-05127-31. To understand this 2019 case appeal, you must first understand the earlier 2018 appeal. The 2018 case was a suit against Providence Hospital ("Providence). The 2019 case appeal concerns Dr. Nicolay Usoltsev (hereinafter "Dr. Usotlsev") and his Blue Wave Anesthesia Inc., sued by Appellant George Cantu (hereinafter called "Cantu") for his errors and omissions while working at Providence, but he was only identified right before dismissal of the 2018

case. Most importantly, this Doctor's medical records were only produced after the dismissal.

THE 2018-FILED CASE (COA 80229-1-I) AGAINST PROVIDENCE AND WRONGLY NAMED UNINVOLVED DR. VADERAH (CANTU CONFUSED WITH CASE UNNAMED ANESTHESIOLOGIST DR. USOLTEV) SHOULD NOT HAVE BEEN DISMISSED WITHOUT DISCOVERY

On 3/6/15, appellant underwent anesthesia and surgery by the doctors at Providence Hospital. Medical chart notes much later received showed that there was medication error in dealing with the anesthesia (discovered much later to have been done by Doctor Usoltsev) leading to a "Code Blue" for some 11 minutes of respiratory failure and this injured appellant with significant memory loss.. There was no statute of limitations issue. The case was filed against Providence 3/2/18, within the 3-year statute of limitation. However, the 2018 case was dismissed on 6/6/19 for lack of experts. The Plaintiff had a problem finding experts to support his case precisely because he did not have knowledge or evidence for the basic elements of an allegation of medical malpractice here. The law requires in a medical malpractice case that the plaintiff allege and prove all four elements: duty standard of care of a known named party, breach, causation of the breach to injury, and causation injury to damages. The law is clear that until the plaintiff, as the actual patient involved, has sufficient knowledge of ALL four elements, the discovery statute in RCW 4.16.350(3) tolls the statute of limitations from running indefinitely (hereinafter this statute subsection is named "discovery statute") until the patient learns or reasonably should learn of that knowledge. In the 2018 case, Cantu did not know who the anesthesiologist was until relatively the last minute before the summary judgment 6/6/19, what the anesthesiologist did wrong to cause

the 12 minute Code Blue (Was the wrong medication given? Was the right medication administered incorrectly? What really did the DR do?) and this still is unknown today. Though he knew about an event (Code Blue) he did not know the identity of the anesthesiologists involved and what they did wrong to cause the Code Blue he did believe it was related to mental and cognitive issues. After years of going to various doctors no one casually connected the Code Blue to his mental problems until a suspected theory was proposed by unqualified Dr. Brettel on 11/25/18 (2019 CP 78-95 Ex. I) when she thought the Code Blue might have aggravated Cantu's pre-existing PTSD from his military time instead of causing an organic unknown injury to the brain. This was not determined on a more probable than not basis by a qualified expert until AFTER the 2018 case had been dismissed 6/6/19 when Dr. Areanas in 3/20 prepared and filed his expert report with the court in the 2018 case on the pending Motion for Relief from Judgment /Vacate. 2018 CP 533-568;this also includes the expert Novak reports. The identity of the anesthesiologist and the four elements of medical malpractice were not known to patient Cantu by 2018 case summary judgment on 6/6/19. Factually and legally, the court erred and should not have. The discovery tolling statute and dismissed it. The Civil Rules regarding litigation discovery between the parties (parties are required to fully and completely answer interrogatories and RFPs within 30 days, including producing all medical records requested and providing the names of medical personnel involved) dictate that the case should not have been dismissed and it was error of the court to rule that there would only be one continuance. Providence did not have to provide any of this information needed by Cantu's experts. But the court was obligated to continue the matter to allow discovery so that Cantu's experts

would timely have the information they needed to file expert reports precluding summary judgment the applicability of the discovery statute to tolling is a question for the jury, was genuinely disputed and the court erred in concluding no discovery tolling as a matter of law in the face of the facts read in the light most favorable to Cantu. Furthermore, the court should have granted amendment of the Complaint to identify and add Dr. Usoltsev, just discovered shortly before dismissal.

The Providence attorney EVADED answering discovery time and time again and the trial court never ruled on Cantu's motions to compel discovery. Cantu served interrogatories and RFPs on or about 8/27/18 (2018 CP 113 – 194 at Exhibit 11) and when, contrary to the civil rules, these were never answered by the defendants, he re-served them a second time on 11/7/18 (2018 CP 380 – 382) and a third time on 2/28/19 (2018 CP 113 – 194 at the end of the document)), but instead of answering them defendants brought motions to dismiss and for summary judgment. Most importantly, Providence refused to provide any medical records requested and any information whatsoever regarding the anesthesiologist Dr. Usoltsev, who it turned out, caused the Code Blue.

Each time defendants brought their summary judgment motions early in the case and before any discovery had been provided, Cantu brought a motion to compel the discovery and for continuance (All the following are 2018: filed 12/10/18 2018 CPs: 348 - 350, 12/12/18 CP 334 - 345, 2/4/19 CP 264 - 267, 3/4/19 CP 113 - 194, 5/28/19 CP 90 – 93 and Exhibits CP 75 - 87, 6/5/19 CP 47 - 63, 6/14/19 in Motion for Reconsideration CP 5 - 32), but none of these motions were heard and decided by the court because the defendants purposefully struck the summary judgment hearing where the motions to continue would be heard first. The 3/8/19 sole order of

continuance in the case (2018 CP 70 and 57) granted a 90 day continuance, but the court specifically refused to compel discovery instead and ruled the opposite: that there could be no more motions for continuance to locate an attorney, to get an expert, and most importantly, to ask for any discovery in the case.

The chart summarizes Cantu's repeated motions to compel discovery:

Interrogatories and RFPs Repeated Fillings		Motions to Compel Answers	
1 8/27/18	CP 113-194 Ex 11		
2 11/7/18	CP 380-382	1 12/10/18	CP 348-350
		2 12/12/18	CP 334 – 345
		3 2/4/19	CP 264 – 267
3 2/28/19	CP 113 – 194 at end of document		
		4 3/4/19	CP 113 - 194
		5 5/28/19	CP 90-93 and CP 75-87
		6 6/5/19	CP 47- 63
		7 6/14/19	CP 5 - 32
		8 3/11/20	CP 77-105

FROM CANTU MOTION FOR RELIEF (2019 CP 78-95): In late 2/19 Cantu put in the start of four requests for his Providence medical file – 2/11/19, 4/22/19, 7/2/19 and a second set on 7/2/19.

The significance of missing all of this requested discovery is that Cantu could never get an expert to give an adequate opinion about the case without the full anesthesia medical records never provided and the anesthesiologist's explanation of exactly what medication and delivery dose and timing and Providence refused to ever provide this contrary to the civil rules. Without such an expert opinion and given that the court would only give 90 days without compelling this discovery, the case was dismissed. The other thing of significance is that the court dismissed without considering or ruling upon Cantu's motions regarding getting discovery of medical records, ect. and a deposition of Dr. Usoltsev.

The minutes of the hearing (2018 CP 70) states that the court first denied plaintiffs motion to continue the hearing for discovery, then granted summary judgment dismissing the case, and then third and final stated: "with regard to plaintiff's motions relating to Dr. Nikolay Usoltsev, the court declined to address these issues today."

THE 2019-FILED CASE (COA# 80724-2-I) AGAINST DR. USOLTSEV AND OTHER PROVIDENCE DOCTORS WERE DISCOVERED ONLY IN SPRING 2019 AND SO NOT BARRED BY STATUTE OF LIMITATION.

The 2019 case was dismissed on summary judgment because of the three-year statute of limitations for medical malpractice. There was no issue of experts because Cantu's experts timely filed their reports in the 2019 case. In the 2019 case--just two months after the dismissal of the 2018 case, Plaintiff filed expert opinions, precluding summary judgment. On medical malpractice, Doctor Richard Novak, Stanford Professor of Anesthesiology, provided an expert opinion stating it could not have been "an allergic reaction to one of the standard medications given" for this type of surgery and "rather in all medical probability the respiratory arrest was caused by" 1 "a drug administered by mistake... 2... an overly rapid administration of Vancomycin... 3... an overdose of one of the standard medications given prior to this type of surgery." (2019: CP 723 – 741,CP 317—319, CP 189 –190) On injury arising from the medical malpractice and causation, Dr. Arenas provided an expert opinion stating that the code blue more probably than not made worse pre-existing PTSD and lead to Cantu's mental condition problems (2018 still pending as of this writing motion for relief from order 2018 CP 533-568,487-497 & 498-529), definitely affecting this pro se.

In the 2019 case, the statute of limitations issue was that the court undisputedly erred on the facts and the law and ignored the discovery statute tolling the statute of limitations in a medical malpractice case under RCW 14.16.350. The court simply ruled that the 2019 case (filed on the same day as the 2018 case was dismissed on 6/6/19) was filed 15 months after 3-year statute of limitations that ran on 3/5/18, 3 years after the surgery on 3/6/15. The court denied the application of the discovery statute tolling the statute of limitations until the patient Cantu learned of ALL four elements of the case [Standard of Care duty, breach, injury, damage]. The facts of a known named party clearly show that defendant Dr. Usoltsev's identity was unknown to Cantu until spring 2019 shortly before the 2018 case summary judgment 6/6/19 because Providence and Dr. Usoltsev never provided any Civil Rule - required discovery to Cantu providing him his RFP medical records and separately filed multiple medical records requests filed with Providence and answers to interrogatories and appear at his deposition to explain the "medication error" and explain and provide the anesthesiology records (see citations herein at 9). It was undisputed that none of these records were provided until July of 2019, more than a month AFTER the 6/6/19 dismissal of the 2018 case and same day filing of the 2019 case against Dr. Usoltsev. The court erred in denying the discovery statute tolling and in taking this determination away from the jury. The solution to fairly resolving these two cases is to issue reversals, revive the 2018 case, order amendment of the complaint to involve Dr. Usoltsev and his corporation, compel the requested discovery, and consolidate the 2018 and the 2019 cases into the 2018 case number.

III. ARGUMENT

Respectfully, the Court of Appeals has made numerous factual findings of error and these have led to a flawed decision of the court dated 3/22/21 (and denied reconsideration without any stated reason) and we ask this Court to grant review.

The most important error of fact is that the court at page 2, 8 lines from the top, the court finds that Cantu knew of Dr. Usoltsev's identity at the time of the surgery because right after the surgery Dr. Usoltsev met with Cantu's family (with two other doctors). The court failed to mention that Cantu was not present and that the family received no names in writing (no business cards or medical records) or that none of them remembered the names of the three doctors from the meeting three years later when Cantu went to file his suit still not knowing the Dr Usolsev name. Remember, the medical record the COA relied upon for the meeting with family was only produced 5 years after the loss and years after the suit was filed.

Opinion at 2, middle of page: The COA complains that Cantu did not prepare a notice of deposition, did not serve it on Dr Usoltsev and did not pay the witness fee. This is an improper legal conclusion. The court issued the subpoena to attend the deposition and this *is* a notice of deposition and the court is wrong: he was served through the Providence Anesthesia Department and received the deposition notice (his attorney contacted Cantu late the day before he deposition). Cantu did not have a personal address for Dr. Usoltsev and at that time Cantu did not know that Dr. Usoltsev was not a doctor employee of the hospital, but was actually an independent contractor with his own business (Blue Wave LLC) that neither he nor the hospital ever disclosed to Cantu until after the case was dismissed.

Opinion at 7 Middle, referring to some undated 2018 case filing Cantu declaration, says Dr. Usoltsev admitted error right after surgery. The court concluded from this that Cantu knew of Dr. Usolsev's name in plenty of time to sue him within three years and before the suit that was filed and in time to get records from him to defeat summary judgement. This is just plain factually wrong. This court knows full well from the briefing that the actual fact is that the declaration that the court is referring to was NOT years before or even months before, BUT right before the summary judgment hearing in the 2018 case on 6/6/19 (the very same day that the unlying 2019 case against Dr. Usoltsev was filed) and it was the basis of Cantu's motion to compel discovery from Providence about Dr. Usoltsev, to amend the complaint to add Dr. Usoltsev, just discovered, and too, of course, continue the summary judgment so that with the compelled discovery from Providence, Cantu's medical malpractice expert would hopefully get the information preventing summary judgment, if only Providence would stop failing to comply with the civil rules and actually provide the medical records and, it turned out in the 2019 case against Dr. Usoltsev, that he was an independent contractor who kept his own records and Providence had failed to provide these as well.

Opinion at 7, 8 lines from the bottom: Cantu's Medical records give Dr. Ulsotsev's name. This court knows full well that Cantu requested his medical records many times and Providence refused to comply with court rules and answer the interrogatories and requests for production of documents to provide medical records throughout the entire 2018 case. There were multiple interrogatories and motions to compel to get the medical records that Cantu had a right to and this court

has missed the whole point that the lower court erred in not requiring or compelling Providence to give him medical records.

Opinion at 7 L 4: The S/L only 3 years because plaintiff needs to only know that the provider was "possibly negligent" within three years, **but Cantu did not know who the provider Dr. Usoltsev was within the 3 years and did not discover him until after 4 years and right before the summary judgment motion. Of course, Cantu already sued the hospital timely within the 3 years and that provider was possibly negligent, but he did not know who the anesthesiologist was to name him within the 3 years and there were no records to know adequately what error he had made and causal link between anything he had done and the impact on Cantu were certainly not known within the first 3 years because the several mental experts did not find a connection between the Code Blue and the mental issues until this was finally diagnosed long after the 3 years.** The 2018 COA appeals court claims that Cantu attached an exhibit to his Opposition to Summary Judgment dated 3/4/19 which included a medical record that said the Dr. Usoltsev met with his family about the respiratory event, and therefore Cantu knew Dr. Usoltsev was the anesthesiologist from 3/4/19 until the 6/6/19 hearing. From this record, the court says that Cantu was supposed to have known that Dr. Usoltsev was the anesthesiologist who committed the malpractice, causing the Code Blue, and depriving his brain of oxygen for over 12 minutes. The document does not say that Dr. Usoltsev is the anesthesiologist, and instead clearly says that the author of the document, Dr. Frank Schramm, was the anesthesiologist. In this exhibit (EX B) "Progress Notes—By Schramm, MD at 3/6/2015" it clearly states that the author and editor is identified as of this "Frank Schramm, MD

Anesthesiologist", that the "service" was anesthesiology, and the "author type was anesthesiologist". Dr. Schramm reported that "Drs Brevig, Usoltsev, and I met with the patient's family", this was because Mr. Cantu was still out of it from the event that he was unable to meet with the doctors himself. Dr. Schramm also reported "Dr. Usoltsev will follow up with the family tomorrow when he performs his postoperative anesthesia evaluation". This report was electronically signed by Frank Schramm, MD. By all accounts, Frank Schramm was the author, editor and dictator of this post-operative medical record and appears to be the anesthesiologist of this event. Remember, this medical record about the doctor meeting with his family was not with Cantu and Cantu did not learn that Dr. Usoltsev was the doctor who messed up on this, as explained in all the prior pleadings, and when he found out he noted a deposition of the doctor, who refused to show up and provide any of his anesthesiology records. Cantu explained all of this in his motion of continuance of the summary judgement and to compel the discovery from Dr. Usoltsev.

The COA erroneously ruled at Middle of page 9 that "Cantu never exercised his statutory right to request his medical records." **Of course, Cantu did this and Winbun v. Moore, 143 Wn2d 206 (2001) applies here. A hospital's failure to provide medical records until after the suit is filed supports that the plaintiff did not discover the factual basis of cause of action so as to bring a possible medical malpractice claim against a possible defendant.** This duty was applied in a medical malpractice case, *Butler v. Joy*, 116 Wn.App. 291, 299-300 (Div. 3 2003)[1].

[1] Ms. Butler's attorney, Mr. Umuolo, was retained just the day before the summary judgment hearing. **He appeared without written affidavits in support of a continuance and presented the motion orally. The hearing was not recorded and we have no indication whether Mr. Umuolo argued that he needed more time to obtain further discovery or what further evidence he expected to produce.** Strictly speaking, his motion does not fit within the guidelines of a CR 56(f) continuance. **However, "[t]he primary consideration in the trial court's decision**

The Washington Supreme Court in *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68 (1992), set out the factors in granting a motion to continue a summary judgment motion for additional discovery under CR56(f)[2]. Tellevik dictates that lower courts in Washington MUST grant a motion to continue summary judgment if all of the following three conditions are met (the courts repeatedly state this in the negative that the lower court cannot be in error if it denies a motion for continuance of summary judgment if any one of the three does not happen, but stated positively the court MUST grant a motion for continuance of summary judgment if all the following are met by the moving party for continuance): (1) the moving party offers a good reason for delay in receiving the desired evidence, (2) the moving party states what evidence would come from additional discovery, and (3) the moving party states the desired evidence will raise a genuine issue of material fact[3]. In Tellevik,

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on the motion for a continuance should have been justice." *Coggle v. Snow,* 56 Wash.App. 499, 508, 784 P.2d 554 (1990). ... Mr. Umuolo deserved an opportunity to prepare a response on the issues of law. Dr. Joy has not argued that she would have been prejudiced by a continuance. As noted in *Coggle,* it is hard to see "how justice is served by a draconian application of time limitations" when a party is hobbled by legal representation that has had no time to prepare a response to **a motion that cuts off any decision on the true merits of a case.** *Id.* at 508, 784 P.2d 554. ***Because we cannot find a tenable ground for the trial court's decision, we hold that the denial of the continuance was an abuse of discretion.***

[2] Plaintiffs contend, however, that the trial court erred in denying their CR 56(f) motion for a continuance to allow further discovery. CR 56(f) provides: Should it appear from the affidavits of a party opposing the [summary judgment] motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. .... A court may deny a motion for a continuance when (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; **OR** (3) the desired evidence will not raise a genuine issue of material fact. *Turner v. Kohler,* 54 Wash.App. 688, 693, 775 P.2d 474 (1989). *Tellevik* 120 Wn.2d at 90 (1992).

[3] The Washington State Supreme Court in Tellevik applied the three conditions and ruled that "[t]he trial court should have allowed plaintiffs to complete discovery. The necessary information was not obtained because defendants' counsel did not provide the requested documents when asked informally nor when served with requests for production." *Id* at 91. The court, in finding that the plaintiff demonstrated all three factors necessary to show that a continuance should be granted went on to say that the facts the plaintiff claims would be discovered by a continuance "and the reasonable inferences therefrom viewed in the light most favorable to the plaintiffs

the facts were the same as in Cantu's in this case: there, plaintiff served interrogatories and requests for production of documents. No answers came back before the defendant brought a motion for summary judgment. Plaintiff found out a needed witness, but he would not answer questions, so plaintiff brought a CR 56(f) motion to continue the summary judgment motion to complete the discovery. Cantu found out a needed witness (Dr. Usoltsev the anesthesiologist discovered in the month before the 6/6/19 summary judgment motion), but he would not answer questions in a deposition and there were not 30 days left required answers before the 6/6/19 summary judgment hearing for the doctor to answer interrogatories even if the court made him a party with less than a month to go, so plaintiff brought a CR 56(f) motion to continue the summary judgment motion to complete the discovery. Similar to Tellevik, here, this court should at least find an abuse of discretion.**The Court in** *Turner,* 54 Wn.App. at 692-694 (1989) **states that even beyond the duty to allow for time to continue with discovery under 56(f), trial courts should grant leniency in certain situations.**[4]

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would raise genuine issues of fact regarding Mrs. Pearson's knowledge of and her acquiescence or consent to the illegal conduct. Therefore, the trial court abused its discretion in not granting the continuance." *Id.*

[4] ....There are relatively few Washington cases addressing CR 56(f). However, it is essentially the same as Fed.R.Civ.P. 56(f). [4] **Therefore, we look to decisions and analysis of federal rules for guidance in interpreting the state rule. *Rinke v. Johns-Manville Corp.*, 47 Wash.App. 222, 225, 734 P.2d 533, review denied, 108 Wash.2d 1026 (1987). .... the federal courts have shown leniency to parties who have not formally complied with Fed.R.Civ.P. 56(f).** These include situations in which the party opposing the motion for summary judgment: **(1) appeared pro se**, *Garrett v. City & Cy. of San Francisco,* 818 F.2d 1515, 1518-19 (9th Cir.1987); ... **(4) moved to compel production of certain documents before the motion for summary judgment was heard**, Garrett, 818 F.2d at 1518-19;... In Cantu's case, he fits into Garrett latter grounds (1) and (4). Under (1), as a pro se, he definitely should be given the opportunity to receive the requested discovery months-long delayed by attorneys who have never provided any answers to discovery clearly in non-compliance with court rules. The court knows this: the pecking order is at the top, attorneys who fight hard for their clients within the court rules, below that are attorneys who fight easier and dirty and ignore the court rules, then there is the Pro Se who does his best with the court rules but at the bottom of the pecking order is the mentally challenged Pro Se who will mess up from time to time in trying to follow the court rules, but also the court needs to be more aware of these Pro Ses and assist them when necessary because the

Providence never even came up with any excuses, let alone a self-serving one[5], for its failure to ever answer at any time any of Cantu's many discovery requests. This is all the fault of defendants for not answering discovery required by the CRs AND the 5/19 just-discovered anesthesiologist Dr. Usoltsev refused to go to his deposition 5/31/19 ordered by the court-issued subpoena (CP 99). The court must issue this for a Pro Se. Dr. Usoltsev's attorney notified Cantu by mail received the night before the 5/31/19 deposition that he would not come for undetailed reasons, costing Cantu . CP 90-93 and CP 47-63. The attorney had the gall (in face of discovery court rule and subpoena requiring the deposition and his bald non-compliance and obstruction) to request that the court allow that deposition to be AFTER the summary judgment hearing on 6/6/19. CP 64-66. This is ridiculous and shows major bad faith dealings on the part of Defendants "hiding the ball" in discovery by simply never providing any discovery .He made sure that Cantu never got the anesthesiologist's own medical records he kept himself and never gave Providence.

Opinion at 7 Last Line -- The court rejects discovery rule extension of S/L

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court is also charged with doing justice between the parties. Cantu is mentally challenged from the medical malpractice here and anyone can see that from his pleadings, and it is amazing that he substantially complies with providing the courts with all of the elements of Res Ipsa Loquitur, discovery requests, motions to compel, getting a court issued subpoena for deposition, his many CR 56 and 57 requests, ect. and more reason that the trial court should have granted continuance of summary judgment for him to have the opportunity to get discovery for his experts. And under (4) because Cantu moved to compel discovery several times before and at the summary judgment hearing here and on reconsideration.

[5] In *Modumetal, Inc. v. Xtalic Corp.*, 4 Wn.App.2d 810, 832 (Div. 1 2018), this court ruled: "Justice should be the primary consideration in ruling on a [CR 56(f)] motion for a continuance. *Coggle v. Snow*, **56 Wn.App. 499**, 508, **784 P.2d 554** (1990)." There, this court found that the Defendant had withheld requested discovery, rejecting Defendant's "self-serving assertion that it didn't need to provide a privilege log because everything was privileged, and we conclude that the trial court abused its discretion in denying Modumetal's [Plaintiff's] CR 56(f) continuance request..." *Id* at 833.

from one year from discovery because COA argues Cantu was aware of causation, because he knew about the code blue and he was aware of "some" harm from having difficulty keeping his mind focused, but COA says is charged with knowing what a reasonable inquiry would have discovered. **This is an error of fact and law: the facts show that his doctors were having a very hard time linking any problem to the code blue and then the diagnosis came years later -- that it triggered PTSD.**

Opinion at 8 Middle -- S/L tolled by concealment of Dr. Usoltsev actions and the doctor himself. COA says that it is tolled until he has actual knowledge of the concealment and then has one year from then. **It was concealed because they never gave him his medical records and they definitely concealed the independent contractor company Dr. Usoltsev.**

Opinion at 9 Top and Footnote 4 bottom -- COA totally ignores the lower court error in restricting answers from Dr. Usoltsev for Cantu's expert; the COA in the end of footnote 4[6], *totally missed the entire POINT of this appeal of the decision NOT TO ALLOW the discovery rule to extend the statute of limitation when it erroneously ruled that the lower court was right in cutting off all discovery that would provide information for cantu's argument about the discovery rule.*

Opinion at Page 10 ft 5, the court ruled that the three-year statute of limitations bars Cantu's lawsuit, therefore the court never even got to the most important issue on appeal whether there are genuine issues of material fact about the discovery rule applying to extend the statute of limitations one year AND they did

[6] From page 9 Footnote 4: "Here, because Dr. Usoltsev moved to dismiss on the three-year limitations period, any discovery on that issue prior to the court's ruling on that issue would have been futile." And therefore, the COA ruled that "The court did not abuse its discretion in limiting discovery." This does not make any sense and misses the point of CR569(f)

not reach Cantu's claim that the one year medical malpractice discovery rule is unconstitutional compared to three years for other injuries. **The COA misses the whole point that Dr. Usoltsev was not discovered until long after the three-year statute of Limitations ran and the whole case turned on the issue of applicability of the discovery rule. To say that the court is not going to look at the discovery rule because the court is satisfied that only the three year statute of limitation applies is like saying that it's not going to look at exceptions to a rule because it only wants to look at the rule.**

Concealing Medical Records and Facts Of Code Blue Tolls The S/L; This is a Fact Question For Jury And Not Discretion of Court In this case, Dr. Usoltsev has done everything possible in his power to not answer the 25 or so interrogatories and RFPs asking specifically about who what when where why regarding how he caused the code blue leading to plaintiff's injuries. Cantu spent hours and hours of pleadings and hearings to get simple answers and this evasion is the definition of concealment and clearly supports an intent to deceive, which is how the courts define the fraud element tolling the statute of limitations in medical malpractice..[7]

[7] Footnote 1 Adams v. Allen, 56 Wn.App. 383 (1989) **In Doe v. Finch, 133 Wn.2d 96 (1997),** Dr. Finch admitted his romantic involvement with counseling patient Doe's wife from 1976 until at least 1981. Dr. Finch allegedly lied to Doe when questioned about his relationship with Doe's wife. The court held these allegations must be resolved by a jury and the case was not barred by statute of limitations because the question of concealment of malpractice tolls that statute of limitation".... **Duke v. Boyd, 133 Wn.2d 80 (1997), medical malpractice suit against** ophthalmologist, the suit was filed nearly 10 years after the last eye surgery. Because defendant's post-surgical representations to Plaintiff that her case was simply an unexplainable or unique phenomenon allegedly constituted intentional concealment of Defendant's negligence, the court reversed and remanded for trial of this jury question. **Gunnier v. Yakima Heart Center, Inc., P.S., 134 Wn.2d 854 (1998), the plaintiff in malpractice suit argued** that in light of a physician's fiduciary relationship with a patient, the simple nondisclosure of facts can constitute intentional concealment and the court ruled that "Washington's intentional concealment proviso... is aimed at conduc#t or omissions intended to prevent the discovery of negligence or of the cause of action. Thus, while the question of whether fraud or intentional concealment has occurred within the meaning of RCW 4.16.350 (3) is generally a question of fact for the trier of fact..." **Cox v. Oasis Physical Therapy, PLLC, 153 Wn.App. 176 (2009) ,** The one-year post-discovery period " commences when the plaintiff ' discovered or reasonably should have

1 Year Discovery Rule Unconstitutional The WA Medical Malpractice Discovery Rule is unconstitutional in violation of US and Washington constitutions providing protections against due process and equal protection violations. The US and Washington constitutions guarantee plaintiffs the right to receive justice process rights due to them in our courts and equal protection for all similarly situated persons. The standard "discovery rule" for personal injuries is a tolling of the statute of limitations until all of the elements of their action are discovered and known or should be reasonably known to them and then the plaintiff gets the standard three-year injury statute of limitations. Hamilton v. Arriola Bros. Custom Farming, 931 P.2d 925, 85 Wn.App. 207 (Wash. App., 1997). However, in medical malpractice cases the legislature has not provided a rational basis for relegating medical malpractice victims to only **one year** after discovery. **Medical victims get two years less than auto accident victims.** This, of course, is ridiculous because everyone knows that medical malpractice actions are far more difficult to prove and acquire information for all of the elements because only professional doctors hold this information and they make and keep their own records and a reasonable person will never be on par with a medical provider. This is unequal protection of victims and an inequity in due process rights guaranteed to all victims and this court should find RCW 4.16.350 (3) unconstitutional.

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discovered ALL of the essential elements of [his or] her possible cause of action, i.e., duty, breach, causation, damages.' **Winbun v. Moore, 143 Wn.2d 206 (2001),** Winbun was neither provided all the records of Epstein's treatment nor advised that other records for her treatment on April 19 existed. Under those circumstances, whether Winbun acted reasonably or should have discovered the negligence at an earlier time ***is a fact-specific inquiry properly reserved for the jury.*** 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*. The court stated that there may not be a duty as a matter of law to inquire specifically about the possibility of medical malpractice 'where there is another facially logical explanation' for the injury.

Opinion at page 11 Top -- The COA said Cantu did not specify what evidence he needed so the court properly denied it; **This is false. His Stanford Expert Novak specified exactly what he needed and that is what Cantu was asking for. The COA ignored the evidence of specific interrogatories, RFPs, & admissions Cantu required. The significance of missing all of this requested discovery is that plaintiff appellant could never get an expert to give an adequate opinion about the case without the full anesthesia medical records never provided and the anesthesiologist's explanation of exactly what medication and delivery dose and timing and Providence refused to ever provide this contrary to the civil rules.**

Opinion at Page 11 Sanctions There was no factual misrepresentation ever spelled out by the court in imposing the CR 11 sanction of $50 and that is the whole point of the law requiring the judge make specific written findings of CR 11 violations sanctions. To this day, nobody knows what the judge was talking about in regards to this.

Violation of Due Process Rights: Of course, Cantu explained that the case was dismissed because of the violation of no compelled discovery and no continuance to allow an expert report after discovery and all of these go to violation of due process one is allowed in our courts.

Attorney fees: A Pro Se should not be discriminated against. If they prevail and there are grounds for award of fees, they should get a fee for their attorneys' advice just like other parties, especially as the COA ruled in its decision here that pro se's are on the same footing as other parties with attorneys and held to the same

standard as an attorney. To get attorney advice on the standard they are held to means they should also be awarded fees for such advice to be on the same footing as other parties who hire attorneys.

III. CONCLUSION Please grant review.

DATED this 20th day of May, 2021 at Burlington, WA. _____/S/_George Cantu

George Cantu Pro Se Appellant

DECLARATION OF SERVICE

I certify that on the 21st day of May 2021, I caused a true and correct copy of Appellant's Petition for Discretionary Review by Supreme Court to be served on the following in the manner indicated below:

Court of Appeals, Division 1 Name: Clerk of the Court of Appeals Address: Court of Appeals, Division 1 600 University St Seattle, WA 98101-1176	( ) U.S. Mail (X) Hand Delivery ( ) Email Delivery ( ) e-Filed
Counsel for Respondent Name: Bertha Fitzer Address: Fitzer Veal Law, P.S. 1102 Broadway Ste 401 Tacoma, WA 98402-3526	( ) U.S. Mail ( ) Hand Delivery (X) Email Delivery TO: bertha@f2vm.com
Counsels for Respondent Name: Eric A Norman, Caitlyn Spencer, Ashley Blackburn Jennifer Koh Address: Fain Anderson, Et Al 701 Fifth Ave, Suite 4750 Seattle, WA 98104	( ) U.S. Mail ( ) Hand Delivery (X) Email Delivery TO: eric@favros.com And Email: caitlyn@favros.com And Email: ashley@favros.com And Email: jennifer@favros.com

DATED this 20th day of May 2021 at Burlington,WA__/S/_George Cantu____

George Cantu Pro Se, Appellant

APPENDIX

FILED
3/22/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEORGE CANTU, Appellant, v. NIKOLAY A. USOLTSEV, MD, JANE DOE USOLTSEV, HUSBAND AND WIFE AND THEIR MARITAL COMMUNITY, BLUE WAVE ANESTHESIA INC., A WASHINGTON STATE CORP., FRANK SCHRAMM MD ET UX AND COMMUNITY, JAMES K. BREVIG, MD ET UX AND COMMUNITY, PEYTON G. LANE, RN ET UX AND COMMUNITY, RAE A. HENRY ET UX AND COMMUNITY, Respondents.	No. 80724-2-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — George Cantu, acting pro se, appeals the summary judgment dismissal of his medical malpractice action. We conclude that summary judgment was proper because Cantu's claims were barred by the applicable statute of limitations. We further conclude that the trial court did not err in imposing nominal sanctions on Cantu for filing a frivolous motion. We affirm.

FACTS

On March 6, 2015, George Cantu underwent a coronary artery bypass graft surgery performed by Dr. James Brevig at Providence Regional Medical Center in

Everett. Dr. Nikolay Usoltsev was the primary anesthesiologist for the procedure. After Usoltsev administered preoperative medications, Cantu suffered respiratory arrest in the preoperative holding area. He was initially unresponsive, but recovered. Brevig's notes indicated that the incident "[s]eems likely related to medication administration." Brevig advised Cantu's family of the incident, and a decision was made to proceed with the operation. Brevig, Usoltsev, and Dr. Frank Schramm met with Cantu's family and discussed the potential causes of the event, including the possibility of a medication error.

On March 2, 2018, Cantu filed a pro se medical malpractice claim against Providence and his cardiologist, Dr. Sanjeev Vaderah. The defendants moved for summary judgment dismissal of Cantu's claims, arguing that Cantu failed to identify any expert support for his claims. On May 21, 2019, Cantu obtained the clerk's signature on a subpoena for Usoltsev to attend a deposition on May 31, 2019. This was past the date for Cantu to file his responsive pleadings in opposition to the defendants' motions for summary judgment. Cantu did not prepare a notice of deposition, did not personally serve the subpoena on Usoltsev, and did not tender a witness fee. Counsel for Usoltsev informed Cantu that his client was unavailable on that date and would not be attending the improperly noted deposition. On June 6, 2019, the trial court granted summary judgment. Cantu moved for reconsideration, arguing that the dismissal should be reversed and that he should be allowed to file an amended complaint to include Usoltsev as a defendant. The trial court denied Cantu's motion, and this court affirmed on appeal. Cantu v. Providence Hosp., No. 80229-1-I (Wash. Ct. App. Aug. 10, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/802291orderandopin.pdf.

On June 6, 2019, the same day the trial court dismissed the 2018 action, Cantu filed a new summons and complaint against Usoltsev and his practice group, Blue Wave Anesthesia. The complaint alleged the same conduct set out in the 2018 action and stated that Cantu would request CR 11 sanctions in the event that the defendants denied liability regarding "the clear and undisputed facts in this matter regarding the happening of this occurrence." The defendants filed a CR 12(b) motion to dismiss for failing to file the summons and complaint within the statute of limitations. They also sought a protective order preventing discovery until after the motion to dismiss was resolved.

At a hearing on August 16, 2019, the trial court denied the defendants' CR 12(b) motion to dismiss and ruled that the matter should be renoted as a CR 56(c) motion for summary judgment. The court also granted the defendants' motion for a protective order pending disposition of the summary judgment motion, except for facts relevant to the statute of limitations. On the same date, Cantu filed an amended complaint additionally naming Brevig, Schramm, and members of the nursing staff who provided care to Cantu before and after the procedure (Respondents).

On July 3, 2019, Cantu bypassed counsel and filed interrogatories and requests for production spanning a broad range of topics directly on Usoltsev. Counsel for Usoltsev objected on the ground that discovery was inappropriate until the statute of limitations issue was resolved. On August 5, 2019, Cantu filed multiple discovery motions to be heard on August 13, 2019. The commissioner struck the motion pending the August 16, 2019 hearing on the motion to dismiss. Later that same day, Cantu filed a second motion to compel discovery in which he asserted that all of his interrogatories and requests for production were relevant to the statute of limitations "because they are written towards

getting information about what the doctors did to me specifically regarding anesthesia." Cantu attached the declaration of his expert, Dr. Richard Novak, who opined that the defendants' record keeping fell below the standard of care because it was "very lacking in specifics" as to what caused the respiratory arrest. In opposing the motion, the defendants argued that there had been no CR 26(i) conference regarding which questions related to the statute of limitations and that they had already answered the questions that they believed were relevant to that topic.

On August 23, 2019, the court granted Cantu's motion to compel in part by requiring the defendants to answer two of the 36 interrogatories. The court denied Cantu's request for sanctions and warned him that "sanctions may be considered if motions are filed regarding issues already ruled upon." Cantu then filed a motion for reconsideration in part in which he challenged the trial court's ruling limiting discovery and a motion for revision of the commissioner's ruling striking the hearing on his discovery motions pending the defendants' motion to dismiss. In response, the defendants voluntarily supplemented their response to Cantu's discovery requests.

On September 3, 2019, the defendants filed a motion for summary judgment arguing that the statute of limitations barred Cantu's claim because he had knowledge of all of the elements of his cause of action when he filed his 2018 lawsuit. Cantu sought a continuance of the hearing on the motion for summary judgment and identified specific questions that he needed at a minimum to respond to the motion for summary judgment. On October 4, 2019, after denying Cantu's motion to continue the hearing, the court granted the defendants' motion for summary judgment, ruling that all of the information Cantu needed to file his cause of action was available to him within the statute of

limitations. Cantu immediately stated that he would appeal, and the court warned him that he would need to strictly follow court rules regarding timelines if he wished to appeal the order.

Eleven days after entry of the summary judgment order, Cantu filed a motion for reconsideration. The defendants responded that Cantu's motion was untimely and without merit. Cantu then filed a notice of appeal in this court and a "motion for relief from orders" at the trial court pursuant to CR 60(b)(3), (b)(4) and (b)(11). In the motion, Cantu asserted that counsel for Usoltsev made false statements and misled the court about the dates he filed documents. On December 6, 2019, the court denied Cantu's motion for relief from orders. The court further ruled that the pleading contained factual misrepresentations and that it was frivolous and filed in bad faith. Accordingly, the court imposed nominal sanctions of $10 to be paid to each defendant for a total of $50. Cantu appealed.[1]

ANALYSIS

I. Summary Judgment Dismissal and Statute of Limitations

Cantu contends that the trial court erred in granting summary judgment dismissal of his medical malpractice claim based on the statute of limitations. We disagree.

We review an order on summary judgment de novo, performing the same inquiry as the trial court. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We

[1] As a preliminary matter, Respondents ask this court to summarily dismiss Cantu's appeal as untimely pursuant to RAP 18.8(b). Cantu filed his notice of appeal 41 days after the trial court's summary judgment dismissal of his claim. Cantu argues that his motion for reconsideration tolled the 30 day period for seeking review. He acknowledges that his motion for reconsideration was filed one day late, but argues that this court should overlook the late filing because he did not have internet access on the filing deadline date. Even if Cantu's appeal were timely, he would not prevail on the merits.

consider the facts and reasonable inferences from the facts in the light most favorable to the nonmoving party. Reid v. Pierce County, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Summary judgment is appropriate where "the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000); CR 56(c). "A motion for summary judgment based on a statute of limitations should be granted only if the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced." Zaleck v. Everett Clinic, 60 Wn. App. 107, 110, 802 P.2d 826 (1991). Once the moving party has submitted adequate affidavits to support summary judgment, the burden shifts to the nonmoving party to set forth specific facts that rebut the moving party's contentions and that reveal a material issue of fact. Dombrovsky v. Farmers Ins. Co. of Wash., 84 Wn. App. 245, 253, 928 P.2d 1127 (1996). The nonmoving party may not rely on speculation, argumentative assertions, or unsupported affidavits. Id.

The statute of limitations for medical negligence claims is either three years, or one year after discovery of the negligence, whichever is later. RCW 4.16.350(3).[2] The one-year "post-discovery period" begins to run "when the 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, 60 Wn. App. 107, 110-11, 802 P.2d 826 (1991) (quoting Ohler v. Tacoma Gen. Hosp., 92 Wn.2d 507, 511, 598 P.2d

[2] RCW 4.16.350(3) provides that an action for damages for injury occurring as a result of health care based upon alleged professional negligence,

> [S]hall 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.

1358 (1979). "To discover a 'breach' in a medical malpractice action, the 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." Id. at 112. "The key consideration under the discovery rule is the factual, as opposed to the legal, basis of the cause of action." Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 35, 864 P.2d 921 (1993).

Here, Cantu's medical records clearly document a possible medication error. Moreover, Cantu's declaration filed in the 2018 case demonstrated that he was aware of the basis of the claim when he stated:

> [W]hile waiting at per-op a code Blue was call where I stop breathing and they resuscitate me from a premature death, I'd stop breathing for over 11 minutes, I survive the code blue shortly after a specialist in Anesthesiology came to my room Mr. Nikolay A. Usoltsev M.D. when I ask him what happen he admitted to me he had given me the wrong Medication and crying said he was sorry.

Cantu claims that he did not know the name of the anesthesiologist who treated him and therefore could not bring suit against him. However, Cantu's medical records clearly document the names of the medical professionals involved in his care, including Usoltsev. Cantu, as the patient, had the right to obtain these medical records directly from the provider. RCW 70.02.030. Cantu asserts that his "mental injury affected his [diligence]" regarding failure to obtain these records in a timely manner. No evidence in the record corroborates Cantu's claim.[3]

Cantu also asserts that the statute of limitations should not bar his claim because he was not aware of causation until he was informed in 2018 that the worsening of his

[3] Cantu also appears to argue that the trial court erred in the 2018 case by denying his motion to amend his complaint to add Usoltsev as a defendant. This court rejected the same claim in Cantu's appeal of the 2018 action.

PTSD may have been related to the event. However, the consulting psychiatrist who examined Cantu shortly after the surgery documented that Cantu "remembers distinctly being awake and not being able to breathe" and that Cantu "is oriented but admitted he was having difficulty keeping his mind focused and maintaining a train of thought." Because Cantu was aware of some harm, he was required to file the lawsuit within three years. "'[W]hen a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered.'" 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 581, 146 P.3d 423 (2006) (quoting Green v. A.P.C. (Am. Pharm. Co.), 136 Wn.2d 87, 96, 960 P.2d 912 (1998).

Cantu next asserts that the statute of limitations was tolled based on fraud, misrepresentation, or concealment by Usoltsev. This claim lacks merit. RCW 4.16.350(3) provides that the statute of limitations for medical negligence is tolled by proof of intentional concealment:

> [T]he time for commencement of an action is tolled upon proof of . . . intentional concealment . . . until the date the patient or the patient's representative has actual knowledge of the . . . concealment, . . . 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.

Summary judgment is appropriate where the plaintiff fails to allege facts implicating this statutory provision. Gunnier v. Yakima Heart Ctr., 134 Wn.2d 854, 867, 953 P.2d 1162 (1998). Cantu asserts that the statute of limitations was tolled on this basis because Usoltsev refused to answer all of his discovery requests. But Usoltsev answered all of

the discovery questions that the court deemed relevant to the statute of limitations.[4] Cantu also asserts that Novak's declaration supports Cantu's argument that the medical records "purposefully undocumented" the medication error. But Novak opined only that the medical records were lacking in specifics, not that they constituted fraud or prevented Cantu from understanding that he had a claim.

Cantu's reliance on Winbun v. Moore, 143 Wn.2d 206, 18 P.3d 576 (2001) is misplaced. In Winbun, the hospital failed to provide the plaintiff's complete medical record until after she sued, thus depriving her of information about a possible malpractice defendant. Id. at 211-12. The Washington Supreme Court held that substantial evidence supported the jury's determination that the plaintiff did not discover, nor with due diligence reasonably should have discovered, the factual basis of the cause of action. Id. at 217. But in Winbun, the plaintiff made a written request for the medical records relating to her treatment. Id. at 216. Here, in contrast, Cantu never exercised his statutory right to request his medical records.

Next, Cantu claims that the statute of limitations should be tolled by his disability. RCW 4.16.190(1) provides that the statute of limitations is tolled for an individual who is "incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW." Under RCW 11.88.010(a), "a person may be deemed incapacitated as to

[4] Cantu also argues that the trial court erred in limiting the scope of discovery to the issue of the statute of limitations. A trial court has broad discretion under CR 26 to manage the discovery process and, if necessary, to limit the scope of discovery. CR 26(b), (c); Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 232, 654 P.2d 673 (1982). We review a trial court's decision to limit discovery for an abuse of discretion. Lang v. Dep't of Health, 138 Wn. App. 235, 254, 156 P.3d 919 (2007). Here, because Usoltsev moved to dismiss on the three-year limitations period, any discovery beyond that issue prior to the court's ruling on that issue would have been futile. The court did not abuse its discretion in limiting discovery.

person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety." Under RCW 11.88.010(b), "a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs." Cantu asserts that his diagnosis of PTSD and depression qualify him for this tolling provision. But nothing in the record supports a finding that Cantu met these definitions. Moreover, Cantu's active participation in this litigation as a pro se plaintiff indicates that he had the ability to pursue his claims. The three-year statute of limitations bars Cantu's claim.[5]

Cantu also argues that the trial court abused its discretion by denying his motion for a continuance to allow him to pursue further discovery. "A trial court may continue a summary judgment hearing if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery." Bldg. Indus. Ass'n of Wash. v. McCarthy, 152 Wn. App. 720, 742, 218 P.3d 196 (2009) (citing CR 56(f)). "The trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3) the new evidence would not raise a genuine issue of fact." Butler v. Joy, 116 Wn. App. 291, 299, 65 P.3d 671 (2003). Here, when the court asked Cantu what evidence he believed he would discover if the court granted a continuance, he responded "Unknown factors."

[5] Because the three-year statute of limitations bars Cantu's lawsuit, we need not reach the issue of whether a genuine issue of material fact exists as to when he discovered the basis for the claim for purposes of the one-year discovery rule. Nor do we need to reach Cantu's claim that the medical malpractice discovery rule is unconstitutional.

Because Cantu was unable to specify, or even speculate, what additional evidence he believed he could obtain by a continuance, the court properly denied it.

II. Imposition of Sanctions

Cantu argues that the trial court erred in imposing $50 in sanctions without entry of written findings of specific conduct. Cantu is incorrect. "[I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order." Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). Here, the trial court's written order identified the specific pleading that violated CR 11 and the reason for the violation:

> Plaintiff's Motion for Relief from Orders of 10/4/19 and 10/11/19 is DENIED. The Court has considered the Defendants' request for sanctions based on the number of motions being filed by Mr. Cantu and the nature of the present motion. The Court finds that the Motion for Relief from Orders does contain factual misrepresentations in violation of CR 11. The present motion is frivolous and filed in bad faith. The Court hereby imposes sanctions in the amount of $50.

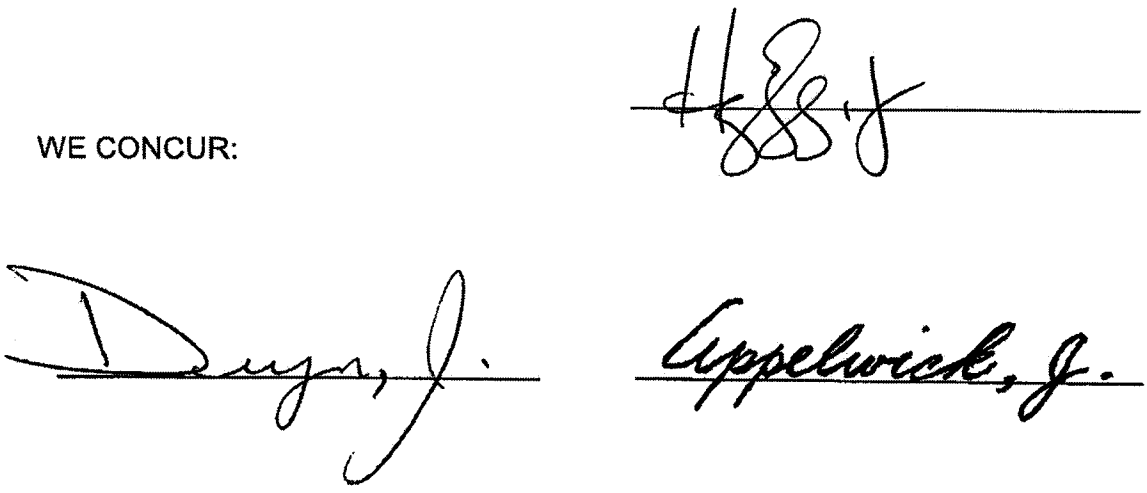
In addition to the written findings, the court stated at the hearing that Cantu's pleadings "made very clear misstatements of fact as to what occurred," "deliberately misinterpret statements made by counsel in pleadings," and "make statements that contradict with other statements" made in other pleadings, and "accuse others of fraud." The court did not err in entering this sanction.

Respondents also ask this court to impose sanctions against Cantu pursuant to RAP 18.9(a) for filing a frivolous appeal. RAP 18.9(a) authorizes us, on our own initiative or on a motion of a party, to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." "Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing

party." Yurtis v. Phipps, 143 Wn. App. 680, 696, 181 P.3d 849 (2008). "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007)). When deciding if an appeal is frivolous, we resolve all doubts in favor of the appellant. Id. at 906. Cantu advanced no plausible argument for reversal of the trial court. His appeal was frivolous, however we find no remedial benefit in the imposition of additional nominal sanctions on appeal. As such, we affirm the sanctions imposed by the trial court and decline respondents' invitation to further sanction Cantu here.

Affirmed.

WE CONCUR:



FILED
4/23/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEORGE CANTU, Appellant, v. NIKOLAY A. USOLTSEV, MD, JANE DOE USOLTSEV, HUSBAND AND WIFE AND THEIR MARITAL COMMUNITY, BLUE WAVE ANESTHESIA INC., A WASHINGTON STATE CORP., FRANK SCHRAMM MD ET UX AND COMMUNITY, JAMES K. BREVIG, MD ET UX AND COMMUNITY, PEYTON G. LANE, RN ET UX AND COMMUNITY, RAE A. HENRY ET UX AND COMMUNITY, Respondents.	No. 80724-2-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, George Cantu, filed a motion for reconsideration of the opinion filed on March 22, 2021. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:

Judge