

67949-0

67949-0

Court of Appeals No. 67949-0-1

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Young Soo Kim,

Appellant,

v.

Choong-Hyun Lee and Choong-Hyun Lee, DMD, PLLC
dba Lee Family Dental and John Does 1-10

Respondents.

APPELLANT'S OPENING BRIEF

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 30 PM 2:43

Jean Jorgensen, WSBA #34964
Singleton & Jorgensen, Inc., P.S.
337 Park Avenue
Renton, WA 98055
Telephone: (425) 235-4800
Facsimile: (425) 235-4838
Attorney for Appellant Kim

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

 A. Mr. Kim assigns error to the trial court’s entry of the Order Granting Defendants’ Motion for Summary Judgment, dismissing Mr. Kim’s claims.....2

 B. Mr. Kim assigns error to the trial court’s entry of the Order Denying Plaintiff’s Motion for Reconsideration of Order Granting Defendants’ Motion for Summary Judgment RE: Statute of Limitations.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

 1. Did the trial court err by concluding as a matter of law, that the evidence presented to the trial court in support of the Motion for Summary Judgment demonstrated no genuine issue of material fact such that the moving party was entitled to judgment as a matter of law, dismissing Mr. Kim’s claims?2

 2. Did the trial court err by concluding that Mr. Kim’s final examination by Dr. Lee on March 29, 2007 was not part of the asserted continuing course of negligent treatment, as a matter of law, where, as here: a) Mr. Kim testified that this final examination was a follow-up observation and part of the continued treatment for his installation of crowns; b) no evidence was presented to refute that assertion?3

 3. Did the trial court err when it failed to view all facts and inferences in the light most favorable to Mr. Kim, the non-moving party, when it granted the Motion for Summary Judgment and held that reasonable persons could reach only one conclusion, specifically that Mr. Kim’s final examination did not include any observation of, nor continued treatment of, the installation of crowns?3

IV.	APPELLANT’S STATEMENT OF THE CASE.....	3
	A. History of Mr. Kim’s Treatment by Dr. Lee.....	3
	B. Mr. Kim Suffers from Negligent Treatment	5
	C. Tolling of Statute of Limitations and Timely Commencement of Litigation.....	6
V.	ARGUMENT.....	7
	1. Standard of Review.....	7
	2. Statute of Limitations for Medical Malpractice Claim.....	8
	3. Tolling of Statute of Limitations for One Year	9
	4. The Continuing Course of Treatment Rule	10
	5. Continuing Course of Treatment Rule Applies to Support Timely Filing of Complaint	13
	6. Mr. Kim’s Lawsuit was Timely Pursuant to the Holding in <i>Caughell</i>	17
VI.	CONCLUSION.....	19
VII.	REQUEST FOR ATTORNEYS’ FEES.....	21

TABLE OF AUTHORITIES

Cases

<i>Atherton Condominium Apartment Owners Ass'n Bd. Of Dirs. v. Blume Dev.Co.</i> , 115 Wn.2d 505, 799 P.2d 250 (1990).....	19
<i>Caughell v. Group Health Cooperative of Puget Sound</i> , 124 Wn.2d 217, 876 P.2d 898 (1994).....	8, 11, 12, 14, 15, 16, 17
<i>DePhillips v. Zolt Constr. Co.</i> , 136 Wn.2d 26, 959 P.2d 1104 (1998).....	19
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002).....	7
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	7
<i>Samuelson v. Freeman</i> , 75 Wn.2d 894, 454 P.2d 40 (1969)..	10, 11, 13, 16
<i>Unrah v. Cacchiotti</i> , 172 Wn.2d 98, 257 P.3d 631 (2011).....	15, 17
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005)	7
<i>Webb v. Neuroeducation Inc., P.C.</i> , 121 Wn. App. 336, 88 P.3d 417 (2004).....	15

Statutes

RCW 4.16.350	8, 9, 13, 17
RCW 7.70.040.....	8, 14
RCW 7.70.070.....	21, 22
RCW 7.70.100.....	7
RCW 7.70.110	9, 18

Court Rules

CR 56	19
-------------	----

I. INTRODUCTION

Young Soo Kim filed suit on March 14, 2011 against his dental medical provider, Dr. Choong-Hyun Lee and his company, for medical malpractice.

Dr. Lee provided continuous medical care and treatment to Mr. Kim between December 2005 and March 2007. The medical care and treatment consisted of removal of a bridge, extraction of several teeth, surgical placement of implants, abutments, and installation of temporary crowns and finally, permanent crowns.

The basis for the medical malpractice claim is the improper size and location of the implants and abutments that were used to provide a base for the crowns. Mr. Kim also asserted a claim for lack of informed consent.

As a result of the negligent care of Dr. Lee, Mr. Kim's crowns fell out, he suffered infections and substantial pain on both sides of his mouth, severe headaches, tingling in his face, hearing loss and watering eyes. Mr. Kim then had to undergo additional implant surgery, crown lengthening surgery, a sinus lift, and another surgery to reinstall dental implants. Mr. Kim continues to suffer pain to this day as a result of Dr. Lee's negligence.

Dr. Lee brought a motion for summary judgment solely relating to the statute of limitations, which the trial court granted, dismissing Mr. Kim's case in its entirety.

The sole issue on appeal is whether Mr. Kim's last appointment with Dr. Lee, on March 29, 2007, just two weeks after removal of a temporary crown and installation of a permanent crown, (an appointment in which Dr. Lee examined Mr. Kim for swelling and tenderness and took x-rays) was part of a "continuing course of negligent treatment" so as to fall within the applicable statute of limitations.

II. ASSIGNMENTS OF ERROR

- A. Mr. Kim assigns error to the trial court's entry of the Order Granting Defendants' Motion for Summary Judgment, dismissing Mr. Kim's claims. (CP 39-40).
- B. Mr. Kim assigns error to the trial court's entry of the Order Denying Plaintiff's Motion for Reconsideration of Order Granting Defendants' Motion for Summary Judgment RE: Statute of Limitations. (CP 14-15).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Did the trial court err by concluding as a matter of law, that the evidence presented to the trial court in support of the Motion for

Summary Judgment demonstrated no genuine issue of material fact such that the moving party was entitled to judgment as a matter of law, dismissing all of Mr. Kim's claims? (Assignment of Error 1.)

2. Did the trial court err by concluding that Mr. Kim's final examination by Dr. Lee on March 29, 2007 was not part of the asserted continuing course of negligent treatment, as a matter of law, where, as here: a) Mr. Kim testified that this final examination was a follow-up observation and part of the continued treatment for his installation of crowns; b) no competent evidence was presented to refute this assertion? (Assignments of Error 1 and 2.)

3. Did the trial court err when it failed to view all facts and inferences in the light most favorable to Mr. Kim, the non-moving party, when it granted the Motion for Summary Judgment and held that reasonable persons could reach only one conclusion, specifically that Mr. Kim's final examination did not include any observation of, nor continued treatment of, the installation of crowns? (Assignments of Error 1 and 2.)

IV. APPELLANT'S STATEMENT OF THE CASE

A. History of Mr. Kim's Treatment by Dr. Lee

On or about December 2, 2005, Mr. Kim sought medical treatment from Dr. Lee, specifically dental treatment. CP 102. On the patient

information form, Mr. Kim reported that he sought complete dental care and preferred to save his teeth. CP 52.

During the initial examination, according to Mr. Kim's medical records, Dr. Lee advised Mr. Kim that the bridge for teeth #12-15 was failing and loose. CP 55. Dr. Lee determined that tooth #13 needed to be extracted and that a four-unit bridge needed to be installed for teeth #12-15. CP 55.

At that time, Mr. Kim did not elect to proceed with extraction of his #13 tooth and replacement of his bridge. CP 64 – CP 65. Mr. Kim did not return for additional medical treatment for approximately nine months, until August 28, 2006. CP 56; CP 59.

On August 28, 2006, Mr. Kim sought emergency medical treatment from Dr. Lee; the exam was deemed to be an emergency exam. CP 56; CP 59. At that time, Dr. Lee extracted two of Mr. Kim's teeth, #13 and #30. CP 56; CP 59. On September 12, 2006, Dr. Lee extracted Mr. Kim's tooth #15. CP 56; CP 60.

On October 16, 2006, Dr. Lee surgically placed two implants on the upper left and lower right areas of Mr. Kim's mouth. CP 56; CP 61.

Several months later, on January 24, 2007, Dr. Lee placed an abutment on the upper left and lower right areas of Mr. Kim's mouth. CP 57; CP 62. The next month, on February 26, 2007, Dr. Lee placed crowns

on two of Kim's teeth, #13 and #30. CP 57; CP 63. A few days later, on March 1, 2007, Dr. Lee prepared Mr. Kim's tooth #12 for installation of a crown. CP 57; CP 63. Two weeks later, on March 15, 2007, Dr. Lee removed the temporary crown from Mr. Kim's tooth #12 and cemented a permanent crown on tooth #12. CP 57; CP 63. Two weeks later, on March 29, 2007, Dr. Lee performed a final examination of Mr. Kim for continued swelling and tenderness, took x-rays of all four areas of Mr. Kim's mouth, discussed periodontal disease, flossing, and use of saline rinses. CP 64; CP 75; CP 91; CP 103. This was the last time Mr. Kim sought medical treatment from Dr. Lee. CP 64.

B. Mr. Kim Suffers from Negligent Treatment

Thereafter, Mr. Kim's upper left crown repeatedly fell off. CP 103. Mr. Kim was unable to chew or eat due to pain on both sides of his mouth. CP 103. Mr. Kim also began to suffer from severe headaches, tingling in his face, hearing loss, and watering eyes. CP 103.

On June 18, 2008, Mr. Kim sought medical treatment from Dr. Kenny Lee, a periodontist.¹ CP 103. Dr. Kenny diagnosed Mr. Kim with an abscess, an infection near the root of the upper left tooth that had been treated by Dr. Lee. CP 103.

On July 16, 2008, Dr. Kenny diagnosed Mr. Kim with a sinus

¹ To avoid confusion between the two Dr. Lees, Dr. Kenny Lee is referred to in this brief simply as Dr. Kenny.

problem and referred Mr. Kim to an ENT for further treatment, including a possible sinus lift. CP 103. Dr. Kenny recommended that an implant be placed in Mr. Kim's tooth #14 and #15 after the sinus lift. CP 103.

On October 10, 2008, Dr. Kenny noted that Mr. Kim's crown came off and that the location and size of the fixture was wrong and that the abutment selection was not correct, among other things. CP 103 - CP 104. Dr. Kenny contacted Dr. Lee to inquire as to the size of the implants placed on Mr. Kim's tooth #13 and tooth #30. CP 104.

Dr. Kenny provided a letter to Mr. Kim dated June 2, 2009, which described the issue. CP 106. Dr. Kenny stated, "Patient later complained that his crown on implant #13 came off – it was due to the misplacement of single implant. The implant was too distalized, had improper abutment selection and inadequate number of implants on Upper Left quad." CP 106.

Mr. Kim's counsel requested additional information from Dr. Kenny. CP 94 - CP 95. Dr. Kenny provided an opinion to Mr. Kim's counsel that "Dr. Lee placed the two implants was placed [sic] on both sides but not comfortable because of loose crown on #13 and missing teeth on both side. [sic]" CP 96.

C. Tolling of Statute of Limitations and Timely Commencement of Litigation

On March 18, 2010, counsel for Mr. Kim mailed a notice of intent and request for mediation, pursuant to RCW 7.70.100, to Dr. Lee. CP 98 – CP 101. The notice was received and signed for by Dr. Lee’s agent on March 19, 2010. CP 101.

When Dr. Lee refused to participate in mediation, Mr. Kim filed and served the lawsuit. CP 172 – CP 178. Consequently, given the claims of Mr. Kim against Dr. Lee for a continuing course of negligent treatment, Mr. Kim had to file his complaint within four years of the termination of treatment by Dr. Lee, prior to March 29, 2011, which he achieved on March 14, 2011. CP 172 – CP 178.

V. ARGUMENT

Mr. Kim Sets Forth Facts of a Continuing Course of Negligent Treatment to Survive Summary Judgment

1. Standard of Review

The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The motion should solely be granted if, from all the evidence, reasonable persons could

reach but one conclusion.” *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

2. Statute of Limitations for Medical Malpractice Claim

A claim for medical malpractice must be commenced within three years, in accordance with RCW 4.16.350, which provides, in pertinent part, an action:

...shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: ...

Mr. Kim asserts a claim for medical malpractice pursuant to RCW 7.70.040, in which:

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

Such a claim is a single claim in which Mr. Kim has “the right to allege the entire course of continuing negligent treatment as one claim.” *Caughell v. Group Health Cooperative of Puget Sound*, 124 Wn.2d 217, 229-30, 876 P.2d 898 (1994). Mr. Kim asserts that the malpractice

occurred “during a continuous and substantially uninterrupted course of treatment for a particular illness or condition.” *Id.* at 225.

3. Tolling of Statute of Limitations for One Year

Instead of abruptly commencing litigation against Dr. Lee, Mr. Kim elected to attempt to mediate the dispute with Dr. Lee in an effort to resolve the claim amicably, pursuant to RCW 7.70.110, “Mandatory mediation of health care claims — Tolling statute of limitations.”:

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.

On March 18, 2010, counsel for Mr. Kim sent a Notice of Intent and Request for Mediation to Dr. Lee. Dr. Lee’ agent received the request on March 19, 2010.

Although the mediation of the matter is deemed to be “mandatory” by the Washington State Legislature, neither Dr. Lee nor its insurer participated in mediation, despite Mr. Kim’s repeated requests. Mr. Kim filed this litigation on March 14, 2011, within a year of having sent his request for mediation that tolled the statute of limitations for one year.

4. *The Continuing Course of Treatment Rule*

The “continuing course of treatment rule” that applies in this case was first established by the Washington Supreme Court in *Samuelson v. Freeman*, 75 Wn.2d 894, 900, 454 P.2d 40 (1969):

In construing the statute of limitations concerning medical malpractice, we think it a sound rule that, if malpractice is claimed during a continuous and substantially uninterrupted course of treatment for a particular illness or condition, the statute does not begin to run until the treatment for that particular illness or condition **has been terminated**.

(emphasis added). The pertinent facts in *Samuelson* are similar to the facts in our case. In *Samuelson*, the plaintiff underwent surgery on September 18, 1960, but filed her litigation three years and seven months after the operation. The defense asserted that the statute of limitations barred her claim.

The record shows beyond doubt that Dr. Freeman performed surgery on or about September 18, 1960, to reduce and treat plaintiff's fracture of the femur, and that he **continued to observe and treat** that particular condition until some time in April, 1963. Plaintiff charged the defendant with continuing negligence from the time of the surgery, but because of the existing interpretation of the 3-year statute of limitations governing malpractice cases, damages were limited to acts and omissions occurring within the 3 years preceding the commencement of the action [which occurred on April 1, 1964].

Samuelson at 895 (emphasis added). Notably, the Washington Supreme Court overruled the dismissal of the plaintiff's claim due to the statute of limitations and held, "The continuing-course-of-treatment rule makes a sensible corollary to the rule that the statute of limitations ordinarily begins to run either from the occurrence of the negligent act or omission, if the injuries therefrom are manifest..." *Id.* at 900.

Caughell confirmed that the claim for continuing negligent treatment, as set out in *Samuelson*, has not been extinguished. *Caughell* at 903-04. (*Caughell* also confirmed in footnote 5 that it similarly uses the phrase "negligent act" to include the corresponding "negligent omission".)

The Washington Supreme Court held:

The proof required for a claim of continuing negligent treatment differs slightly on two of these elements: breach and proximate cause. To prove a breach or, in the words of the statute, a failure to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider, a plaintiff must show that a series of interrelated negligent acts occurred during the course of treatment for a medical condition. By "series", we mean two or more negligent acts. By "interrelated", we mean that the negligent acts must be part of a **"substantially uninterrupted course of treatment", and must relate to the treatment as a whole.** However, the negligent acts need not relate to each other. If a health care provider performs two procedures negligently as part of a course of treatment, the patient may allege a claim for negligent treatment even though the two procedures have no intrinsic connection to each

other. They **must only be part of the same treatment**. Finally, by “treatment” we mean the **protocol, procedures, prescriptions, or other medical actions ordered or performed** by the health care provider.

Id. at 233 (internal citation omitted) (emphasis added).

Mr. Kim sought medical treatment from Dr. Lee continuously between December 2, 2005 and March 29, 2007. From the very first treatment through the last treatment, Dr. Lee diagnosed, observed, and treated Mr. Kim for a failing bridge on teeth #12 - #15. Dr. Lee extracted several of those teeth, surgically placed implants in those areas, and installed temporary and then permanent crowns on those teeth. The permanent crowns on teeth #12 and #13 were installed in February 2007 and March 2007. This constitutes a “series” of “interrelated acts” as defined, *supra*, by the Washington Supreme Court in *Caughell*.

As part of his medical protocol, Dr. Lee performed a final examination of Mr. Kim on March 29, 2007, two weeks after having installed the last permanent crown. Specifically, Dr. Lee took x-rays of Kim’s mouth and examined his mouth for swelling and tenderness, and discussed periodontal disease and use of saline rinses. These constitute actions that “relate to the treatment as a whole,” and that are “part of the same treatment” as defined, *supra*, by the Washington Supreme Court in *Caughell*.

During the course of treatment, Dr. Lee continued “to **observe and treat** that particular condition until some time” which, in our case, was March 29, 2007, the date of the final medical examination. *Samuelson* at 900 (emphasis added).

Mr. Kim was required, pursuant to RCW 4.16.350, to commence a lawsuit against Dr. Lee no later March 29, 2010² in order to satisfy the statute of limitations for medical malpractice claims.

5. Continuing Course of Treatment Rule Applies to Support Timely Filing of Complaint

Fifteen months after Dr. Lee’s final examination and treatment, Mr. Kim sought further medical treatment, from a different dentist, Dr. Kenny, a periodontist. Mr. Kim complained that his crown on tooth #13 was falling off. Several months later, Dr. Kenny determined that Dr. Lee’s work was deficient because there was an improper abutment selection and an inadequate number of implants on the upper left of Mr. Kim’s mouth, namely, the area of teeth #12 - #15. Dr. Kenny determined that Dr. Lee should have placed two or three implants on the upper left of Mr. Kim’s mouth, but that Dr. Lee only placed one implant there, and it was placed in the wrong position.

Dr. Lee’s attempt to dismiss Mr. Kim’s claim by encouraging this

² Without having tolled the statute of limitations with a request for mediation, which Mr. Kim did.

Court to focus too narrowly on the work performed only on tooth #13, when, in fact, it was the medical treatment on the entire upper left area of Mr. Kim's mouth, at a minimum, that is in question. As Dr. Kenny described, "It was the wrong diagnosis, treatment planning and execution. [Dr. Lee] had better refer to [a] Specialist." Under RCW 7.70.040, injury results from a failure of the health care provider to exercise the degree of care, skill, and learning expected..." In failing to exercise the degree of care, skill, and learning, the injury results from the whole course of treatment, not merely from one individual event.

Significantly, Mr. Kim is not required to allege and prove that treatment between December 2, 2005 and March 29, 2007 were "separate and distinct acts", which provide "separate and distinct causes of action". *Caughell*. at 226. The law does "not require plaintiffs to split their claims" in such a way that it "has the practical and unfair effect of insulating health care professionals from liability for negligence occurring prior to the 3-year statutory period." *Id.* at 230. Washington Courts consistently uphold the *Caughell* ruling that permits plaintiffs, like Mr. Kim, to assert a timely claim for medical malpractice based upon the last date of the course of treatment that is asserted as negligent.

When negligence over an entire course of treatment is alleged, rather than discrete acts, the filing deadline is **three years after either the end of treatment** or the date the plaintiff discovered or reasonably should have discovered the negligence, whichever is earlier.

Webb v. Neuroeducation Inc., P.C., 121 Wn. App. 336, 88 P.3d 417 (2004) (emphasis added) (suit filed in November 2001 was timely to satisfy medical malpractice statute of limitations pertaining to continuing course of treatment that commenced in April 1997 and ended in November 1999).

In *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011), the Washington Supreme Court analyzed a dental malpractice case in which the plaintiff asserted that an orthodontist's recommended entire treatment plan involving braces was negligent. The Washington Supreme Court held that the removal of the braces commenced the statute of limitations period, even though there was no particular separate or distinct claim that the *removal* of braces was itself negligent:

In this case, the alleged negligence began in 1995 when Cacchiotti applied braces to Unruh's teeth, and it continued until at least August 1999 when the braces were removed. Although Unruh continued seeing Cacchiotti until November 2000, the **alleged negligence appears to have ceased in August 1999 with the removal of the braces**. We will assume for purposes of analysis that the limitations period was triggered in August 1999.

Id. at 107 (emphasis added).

In *Caughell*, the Washington Supreme Court explained the rationale behind the continuing-course-of-treatment rule:

We affirm today that malpractice claimants have the right to allege the entire course of continuing negligent treatment as one claim. Our ruling in *Samuelson* that acknowledged such a right is still the law. The benefits of this rule are as ample as they are apparent. First, our tort law has recognized, and should recognize, that malpractice can occur in a series of interrelated negligent acts. To shoehorn this continuing negligent treatment into a single negligent act, occurring within 3 years of filing suit, deprives claimants of the chance to prove the full extent of negligence *in one claim*. The law should not require plaintiffs to split their claims. Furthermore, as described below, splitting claims has the practical and unfair effect of insulating health care professionals from liability for negligence occurring prior to the 3-year statutory period. We conclude therefore that where the tort is continuing, the claim is continuing.

Second, our ruling both presumes and confirms patients' reasonable reliance on their doctors. As members of an invaluable profession, doctors commonly hold the respect and trust of the people they treat. We find particularly apt the trial court's description of this relationship.

The practice of medicine is a high skilled profession. Doctors are held in high regard, bordering on awe, by most individuals. Patients trust doctors implicitly and rely upon their advice and treatment without question, in most cases.... To hold that such a patient bears the risk of discovering the doctor's negligence seems to be inequitable.

... By recognizing continuing negligent treatment as one claim, we affirm that patients can reasonably rely on a doctor's advice without jeopardizing their rights to prove later that the entire course of treatment was negligent.

Caughell at 229-30.

Just as in *Caughell*, in which the Washington Supreme Court refused to commence the three-year statute of limitations from the time of the last prescription written by the health care provider, this Court should also hold that the time of the last crown installation by Dr. Lee is not relevant to the statute of limitations. The termination of the course of treatment is instead determinative. Just as in *Unrah, supra*, in which the Washington Supreme Court held that the final observation and treatment to remove orthodontic braces, although not in of itself an independently negligent act, commenced the statute of limitations, this Court should hold that Dr. Lee's observation and treatment of Mr. Kim extended through the date of his final examination by Dr. Lee on March 29, 2007, as a "series of interrelated negligent acts or omissions extending into the statutory period." *Caughell*. at 235.

6. *Mr. Kim's Lawsuit was Timely Pursuant to the Holding in Caughell*

Dr. Lee's Motion for Summary Judgment was limited to a single issue – whether "the plaintiff failed to comply with RCW 4.16.350, the

statute of limitations for medical malpractice claims”. In response, Mr. Kim demonstrated that he asserted a continuing course of treatment by Dr. Lee that was negligent, which commences a three-year statute of limitations after the treatment had been terminated, and that the statute was tolled for an additional year pursuant to RCW 7.7.110.

All reasonable inferences must be found in favor of the non-moving party, Mr. Kim, because this is a summary judgment motion. All Mr. Kim needs to show is that he asserts that an entire course of treatment by Dr. Lee is negligent, as a single claim, and that the filing of his complaint on March 14, 2011, prior to the statute of limitations period running, brings that entire course of treatment within the statutory period. In addition to Mr. Kim’s declaration regarding that final appointment for continuing treatment with Dr. Lee, Mr. Kim also submitted his medical records and x-rays taken during that final examination, in support of this contention. Mr. Kim’s counsel obtained an independent, expert opinion from Dr. Kenny to support the continuing course of treatment that “It was [the] wrong diagnosis, treatment[,], planning and execution. [Dr. Lee] had better refer to [a] Specialist.” CP 96.

Notably, Dr. Lee did not submit a declaration to refute Mr. Kim’s assertion that the examination on March 29, 2007 was part of the follow-up observation and treatment for the installation of crowns, which

occurred just weeks prior and was thus, part of the continued course of treatment. Nor did Dr. Lee refute Dr. Kenny's narrative opinion that his medical care and treatment were, in fact, negligent. Dr. Lee relies solely upon the declaration of his counsel, which merely attaches Mr. Kim's medical records.

Consequently, Mr. Kim's presentation of evidence that Dr. Lee's acts or omissions occurred after March 14, 2007, as part of the continuing course of treatment, defeat Dr. Lee's unsupported allegation that the claims are time-barred.

VI. CONCLUSION

Summary judgment is appropriate only when the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court may not weigh the evidence, find facts, or decide credibility; it must view all facts and inferences in the light most favorable to the non-moving party. *Atherton Condominium Apartment Owners Ass'n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 505, 515-516, 799 P.2d 250 (1990). Any doubts are resolved against the moving party. If reasonable minds could differ, summary judgment is not proper. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104 (1998).

Mr. Kim asserts that Dr. Lee's entire course of his care, including the diagnosis, treatment, planning, execution, and monitoring of his teeth, from the removal of the bridge on teeth #12 - #15, to the extraction of teeth, the surgical installation of implants, and the placement of temporary and permanent crowns, fell below the accepted standard of care. Mr. Kim's claims are not restricted to work done only "on tooth #13". Dr. Lee's work on the area that originally had a bridge, teeth #12 - #15, was entirely deficient and caused numerous subsequent medical problems for Mr. Kim. This assertion is explicitly supported by Dr. Kenny's narrative opinion.

Mr. Kim's complaint was timely given the fact that he has asserted a continuing course of treatment that was negligent, he invoked mediation which extended the statute one year, and which complaint was timely filed within four years of the termination of Dr. Lee's treatment. The *Caughell* opinion provides that Mr. Kim has the right to make such a single claim and does not require Mr. Kim to articulate a separate and distinct act of negligence that occurred during his final examination.

Mr. Kim's commencement of this litigation is timely given the following events:

December 2, 2005	First treatment for condition
March 29, 2007	Last treatment for condition

March 19, 2010 Request for mediation

March 14, 2011 Complaint filed and served

Mr. Kim presented the factual basis and legal theories to support his claims for medical malpractice by Dr. Lee. In sharp contrast, Dr. Lee failed to submit any admissible evidence or declaration to refute Mr. Kim's assertion that the examination on March 29, 2007 was a follow-up observation and part of the continued treatment.

In viewing all facts and inferences in the light most favorable to Mr. Kim, his claims should not have been dismissed on summary judgment, as a matter of law. The trial court further erred by denying Mr. Kim's motion for reconsideration, in which Mr. Kim raised these very issues. Mr. Kim satisfied his burden to show that dismissal of his claims was not proper and that the trial court's decision should be reversed.

VII. REQUEST FOR ATTORNEYS' FEES

Pursuant to RAP 18.1, RCW 7.70.070, and upon equitable principles, Mr. Kim requests attorneys' fees on appeal. RAP 18.1 provides: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule..."

RCW 7.70.070 provides, in pertinent part, “The court shall, in any action under this chapter, determine the reasonableness of each party's attorneys fees.” Should Mr. Kim prevail on appeal, he will timely file his motion for attorneys’ fees.

Respectfully submitted this 30th day of January, 2012.

SINGLETON & JORGENSEN, INC. PS

By  _____
Jean Jorgensen
WSBA No. 34964
Attorneys for Appellant Kim

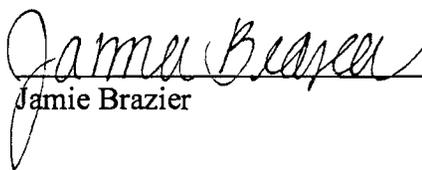
CERTIFICATE OF SERVICE

Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on January 30, 2012, I delivered one copy of the APPELLANT'S OPENING BRIEF, to the address(es) listed below by messenger service:

Jake Winfrey
Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380

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

Executed at Renton, Washington, on: January 30, 2012.



Jamie Brazier