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No. 67840-0

King County Superior Court No. 11-2-15367-3 SEA

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

**REGIS J. COSTELLO, Individually and as Personal Representative for the
Estate of Maurice Costello, Pro Se
Plaintiff/Appellant,**

v.

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

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APPELLANT'S OPENING BRIEF

**Regis J. Costello, Individually
Estate of Maurice Costello
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INTRODUCTION

On June 12, 2007, family of Maurice Costello witnessed the start of the “percutaneous endoscopic gastrostomy” (PEG) to improve the nutritional benefits for Maurice Costello. Regis Costello, now Personal Representative for the Estate of Maurice Costello (CP 36) was with Maurice as he was recovering from hip surgery that was performed at Valley Medical Center. Maurice was asking for medical leadership from University of Washington Medical Center (UWMC) for treating a recently diagnosed squamous cell carcinoma in the neck and the placement of the PEG tube. Valley Medical Center Radiation Oncology and Robert Douglas, M.D. gave a good chance of total reduction of the mass in the neck and proposed treatment right away. A second opinion was requested at UWMC. Whether the mass would return was unknown. The PEG procedure was performed at UWMC by the team of physicians, Teresa Brentnall, M.D., Christine Schlenker, M.D., Melisa Hagman, M.D., and Jane Doe. The team first allowed Regis to watch the procedure within the same room and then asked Regis to wait outside in the hallway. They

1. “Percutaneous Endoscopic Gastrostomy” is a tube (PEG tube) that is passed through the abdominal wall and into the stomach, most commonly to provide a means of feeding when oral intake is not adequate.

again asked Regis to relocate to a waiting room which was completely removed from their work environment. The team made certain that Regis would not see their attempt at cover up and repair of the malpractice adverse event. It was initially said to be a quick and easy procedure, approximately fifteen minutes and no more than thirty minutes, but ended up taking one hour and twenty minutes to complete. The team of physicians were trying to pull the PEG out of the stomach and through the colon walls after piercing the introducer needle and PEG completely through the colon and into the stomach. This malpractice adverse event was first explained in complete detail to Regis Costello on August 5, 2010 by Frantz Pierre Jerome, M.D. (CP 37-40, 150-152) and confirmed again by Allen J. Telmos, M.D. on July 12, 2011. Dr. Telmos has performed successful corrective PEG procedures on patients through the past thirty years of specialized medical practice including but not limited to pulling the PEG from the stomach and through the colon and abdomen walls. (CP 23-33).

The Discovery Rule must apply to this case and therefore tolls the statute of limitations because the complications were intentionally omitted and concealed. In addition, there remains conflicting legal advice as to criminal activity regarding the careless conduct and attempt to conceal the medical records and confuse the facts surrounding the malpractice adverse

event by using the term “migration” of the PEG feeding tube as described in the UWMC May 5, 2010 letter (CP 105 -109).

There also remains criminal activity yet to be prosecuted in full regarding the false statement made by UWMC or Ansara Family Home, LLC or Visiting Nurse Services (CP 55-58) during its repeated attempts to avoid relinquishing the medical records for Maurice and by making a false statement that Maurice was being hidden from his family and negligently misrepresenting the term “migration”¹ of PEG tube, which ultimately diverted attention away from the urgency in getting the medical records. See DOH Report and DSHS Report (CP 47-52, 203-206). See Bellevue Police Report (CP 41-43).

Regis Costello and Maurice Costello could not have known that the team of physicians at UWMC was attempting to conceal the malpractice adverse event on June 12, 2007. See “timeline”²

1. “Migration” is a term defined by medical dictionaries: an apparently spontaneous change of place, as of symptoms. In this case, UWMC proposed its theory that the PEG migrated on its own spontaneously from the stomach to the colon.

2. “Timeline”

Due to negligent misrepresentation by UWMC, Maurice was forced to move from the following places: UWMC to Kline Galland (June 13, 2007) to Ansara Family Home (July 17, 2007) to Overlake Hospital (July 25, 2007) to Lake Vue (August 17, 2007) to Ansara Family Home (August 28, 2007) to Overlake Hospital (October 15, 2007) to Providence Marianwood (October 18, 2007) and to Valley Medical Center (November 14, 2007). Maurice died January 24, 2008 at home.

It was not only the act of committing the adverse event itself, but the fraudulent act of concealment and negligent misrepresentation that tolls the statute. The “true facts” of the struggle that was evident during the initial PEG placement at UWMC was first described to Regis on August 5, 2010 by Frantz Pierre Jerome, M.D., (CP 37-40) the Overlake Hospital doctor who did the corrective surgery. Allen J. Telmos, M.D. also studied the medical records to determine that the PEG did not “migrate” but was pierced through the colon and then pulled from the stomach. (CP 23-33).

TIMELINE

August 1, 2008 *Medical records from Ansara Family Home show no evidence of metronidazole or clotrimazole being administered and no evidence of testing for C-Difficile.*

March 7, 2009 *Regis attended Rajiv Nagaich Aging Options care management and asset preservation seminar at Embassy Suites in Tukwila to request help with arbitration and mediation. Rajiv Nagaich phones Regis and recommends attorney Greg McBroom.*

July 21, 2009 *Regis met in the office of Greg McBroom, Esq. and he refuses the case due to incomplete medical records by UWMC.*

October 10, 2009 *Kearns Investigations interview of the whistleblower nurse and advised Estate and Regis to contact Attorney Charles Hamilton III. The nurse is not available to meet right away but requesting all records first.*

October 21, 2009 *Estate and Regis write letter to Charles Hamilton III requesting to meet.*

March 8, 2010 *email sent from Charles Hamilton III refuses to represent Estate and Regis but says he should be considered the attorney for the whistleblower nurse.*

May 5, 2010 letter sent from UWMC declaring the PEG migrating spontaneously from stomach to colon.

June 21, 2010 Carol Johnston reviews medical records. Refuses case for lack of records by UWMC.

July 7, 2010 Estate and Regis request for mediation and follow the recommendation made by Carol Johnston to use Honorable Robert Alsdorf and Honorable Faith Ireland.

August 1, 2010 phone call with Dr. Danielle Schramm and advises going to UWMC and getting all images for June 12, 2007.

August 2, 2010 visit to UWMC for records and images. No record of PEG done on June 12, 2007 but later one scope image of PEG in stomach appears by Teresa Brentnall, M.D.

August 5, 2010 meeting with Frantz Pierre Jerome, M.D. describing that the PEG was pulled from stomach and through the colon.

August 10, 2010 attorney George Kargianis does not believe that PEG can be pulled from stomach and through colon. Refuses to represent Estate and Regis since no letter was sent by Frantz Pierre Jerome, M.D.

August 11, 2010 suit filed by Estate and Regis.

May 12, 2011 attorney George Kargianis agrees to meet and present a fee agreement to be signed after Allen J. Telmos, M.D. had sent his letters and agreed to prepare a Certificate of Merit. Mr. Kargianis phones Thomas Fain and discuss mediation and settlement options.

July 12, 2011 Allen J. Telmos, M.D. sends Certificate of Merit.

February 18, 2011 the suit dismissed without prejudice.

April 27, 2011 suit filed again naming only UWMC and its doctors.

September 19, 2011 declaration of Sally Beahan, Director of Health Information Management. Found to be erroneous after findings and Affidavit of Roderick McPhee.

September 23, 2011 suit dismissed.

The King County Superior Court erred in granting summary judgment dismissing Regis Costello's and the Estate of Maurice Costello's complaint for medical malpractice and wrongful death. The Order Granting Defendants' Motion For Summary Judgment On Statute Of Limitations is attached with this Brief (CP 177-178).

ASSIGNMENT OF ERROR

1. The court erred by failing to recognize the Discovery Rule on intentional concealment and omission of records and negligent misrepresentation. Regis Costello and Maurice Costello were diligent in seeking the proper authorities and agencies and asking for help to get the records and true facts.
2. The court erred by dismissing the case on statute of limitations when the PEG object was forcefully pulled into the colon and not acknowledged by the UWMC when it was aware of the complication. The statute of limitations is tolled until UWMC formally acknowledges that it placed the PEG through the colon and into the stomach and then forcefully pulled the PEG object back to the colon where it stayed for two months.
3. The court erred by failing to grant partial summary judgment for The Estate of Maurice Costello and for Regis Costello, individually. The request for mediation on July 7, 2010 was ignored which should have tolled the statute of limitations and

the May 12, 2011 meeting attempt with Special Assistant Attorney General Thomas Fain shall be reviewed de novo.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Regis Costello and Dr. Frantz Pierre Jerome met on one occasion for the first and only meeting August 5, 2010. The facts were disclosed that a PEG tube can be forcefully pulled from the stomach and completely through the colon. Dr. Frantz Pierre Jerome drew sketches to illustrate it. (CP 37-40). Did the court err in dismissing Costello's suit when UWMC omitted and concealed the facts pertaining to the punctured colon and by using the term "migration" to create the illusion that the PEG moved spontaneously from the stomach to the colon? Did the court err by accepting the interpretation of "migration" rather than assign a careful investigation into how the PEG was punctured through the colon and into the stomach, pulled back out of the stomach and into the colon where it stayed and ultimately starved Maurice Costello for 226 days and ultimately causing his death?

2. Did the Court err by granting the dismissal of the Costello's suit and not allowing the Discovery Rule to toll the statute of limitations? The UWMC refused to acknowledge the reportable malpractice adverse event until it was advantageous for it to do so. See letter dated May 5, 2010 (CP 105-109). To this date, the malpractice adverse event has not been reported to the State of Washington adverse event officer Linda

Furkay. Maurice Costello, a vulnerable senior citizen, was caught in a complicated family schism which UWMC had defined in its medical records on May 29, 2007. Instead of devoting the needed care and effort to protect Maurice from harm, it covered up its medical errors which ultimately aggravated the alleged family schism by negligently suggesting that Maurice was being hidden from his family. This ultimately diverted the investigation away from getting the records and placed a focus instead on a malicious false statement that proved to be without merit, wasting valuable time which should have been spent on getting the records.

3. Did the court err by not granting Costello partial summary judgment and not acknowledging the requests for mediation on July 7, 2010 and July 19, 2011 which should have tolled the statute of limitations?

STATEMENT OF THE CASE

A. Nature of the Case.

This case was brought under the State of Washington Resident Record – Required for WAC 388-76-10315(1)(h). Maurice was discharged without proper notice WAC 388-76-10615(1)(2). The case was necessary because The State of Washington Department of Social Health Services has little or no method for enforcement of the malpractice Adverse Event Mandatory Reporting RCW 70.56.020. (CP 139-149). The Estate of Maurice Costello, and Regis Costello, individually, agree that the

RESTATEMENT (SECOND) OF TORTS, § 552 has been adopted in Washington concerning what constitutes “negligent misrepresentation” by use of the term “migration” of PEG tube. Additionally, when the Ansara Family Home, LLC records were released over one year from the first request for records on July 17, 2007, the medications that were needed to reverse the trend of starvation and infection were not evident in the medical records mailed on July 24, 2008. (CP 47-54, 210-215).

The decision made by UWMC and its physicians to negligently fail to report the pierced colon on June 12, 2007 caused confusion among all other care providers, which was unreasonable, lethal, and criminal.

NEGLIGENT MISREPRESENTATION AND CONCEALMENT

B. Affidavit of Michael Reid

Mr. Reid was present during both investigation interviews by Bellevue Police Department and Department of Social Health Services. The negligent misrepresentation and false statement by UWMC and Ansara Family Home and Visiting Nurse Services led the investigation away from the focus on getting the records which harmed Maurice by neglecting him and his need for medications to reverse the presence of starvation and infection. (CP 44-46)

C. Affidavit of Roderick McPhee

Mr. McPhee was present during the July 25, 2011 interview with ABC Legal and the October 5, 2011 visit to UWMC Radiology and

records department requesting records pertaining to the June 12, 2007 PEG procedure. According to Jerry Smith from the radiology department, they do not have record of any procedure being performed on Maurice Costello on June 12, 2007. The records department did not have any record of the June 12, 2007 PEG procedure when Regis Costello visited on August 2, 2010 which was confirmed again by Julie Reed in Health Services. Mr. Smith and Ms. Reed could not give a definitive reason for the missing records (CP 261- 269, 272- 275).

D. Bellevue Police Report and Investigation

In another instance of concealment of records and negligent misrepresentation, the Bellevue Police Department was called to investigate why the records were not being released and the police did not get them from the offending facility. Instead, they advised Regis and Maurice to get an attorney because it was in the detective's point of view, a civil matter and not criminal. See police investigation report. (CP 41-43, 203-206) Citations were issued to Ansara Family Home LLC after the death of Maurice on January 24, 2008 and the records were not released until July 24, 2008. (CP 47- 54). The records show that Ansara Family Home, LLC did not administer clotrimazole and metronidazole to reverse the battle with starvation. The Bellevue Police Detective Robert Thompson predetermined that there was no crime and hung up on Regis during a phone call while Regis was still talking. In fact, the actions of the

Bellevue police detective contributed to the death of Maurice and constitute negligent misrepresentation and his report has multiple erroneous entries.

E. Declaration of Sally Beahan

The Declaration of Sally Beahan UWMC Director of Health Information is another attempt to confuse the issue into why no records could be located on August 2, 2010, which is another example of negligent misrepresentation and concealment (CP 276-279). Sally Beahan stated that the earlier requests for records and images were not performed correctly, that “all records” would not include images. According to Ms. Beahan, in order to get images from Radiology it is essential that the request specifically ask for all images and all records. Yet the same results were evident when a new and correct request for all records and images was submitted to Radiology by the Estate of Maurice Costello and Regis on October 1, 2011. Radiology insisted they had no record of a PEG tube procedure for Maurice Costello on June 12, 2007 but UWMC billed Regence Blue Shield. See Affidavit of Roderick McPhee (CP 272-275) and Plaintiffs’ reply dated September 21, 2011 (CP 261-269).

F. Department of Social Health Services Report.

Regis asked Bellevue Police Detective Thompson to accompany him to Ansara Family Home to get Maurice Costello’s records and the request was denied. DSHS Field Investigator Denise Roth told Regis that

she would get the records and instructed Regis to stop his effort to get the records. The records were not sent within a reasonable time and Denise Roth was negligent in representing her ability to get the records. It was over one year from the first request for records that the records were received and it was clear that Ansara Family Home LLC had not administered the medications to help cure the infections that were prolonging malnutrition of Maurice. See investigation report from DSHS, Marcy Kelly. (CP 47-52, 82-84, 86-104).

G. *Kearns Investigation Report.*

A whistleblower came to Maurice's residence on December 29, 2007 with information and potential knowledge into why records were not being released. Kearns Investigations interviewed the whistleblower, a nurse, with information and concerns into why records on Maurice were being concealed. A follow-up interview with the nurse into why the records were being concealed has not yet occurred because the nurse specifically requested for all the records to examine prior to meeting again and requested to remain anonymous. See Kearns Investigation interview report. (CP 55-58). The fact that the records have been concealed by UWMC and the fact that Department of Social Health Services has not released the name of the parties who falsely claimed Maurice was hidden from his family is another example of negligent misrepresentation.

H. University of Washington Letter Dated May 5, 2010.

The UWMC concealed the facts surrounding the PEG tube being located in the colon. The May 5, 2010 letter from UWMC describes a “migrating” feeding tube (CP 105-109). This letter gives the wrong impression and negligent misrepresentation that no malpractice adverse event occurred and that the feeding tube migrated from the stomach to the colon on its own. The May 5, 2010 letter from UWMC is clear indication of concealment of the malpractice adverse event which did occur on June 12, 2007.

OBJECT LEFT IN COLON TOLLS STATUTE *RCW 4.16.080(2)*

I. Certificate of Merit and Affidavit of Allen J. Telmos, M.D.

This malpractice adverse event was first explained in complete detail to Regis Costello on August 5, 2010 by Frantz Pierre Jerome, M.D. (CP 37-40, 150-152) and confirmed by Allen J. Telmos, M.D. on July 12, 2011 in his Letter of Merit and Affidavit whereby it was determined without any doubt that the UWMC and Melissa Hagman, M.D.; Christine Schlenker, M.D., Teresa Brentnall, M.D.; and Jane Doe performed the PEG placement in error and failed to exercise reasonable care by placing the PEG through the colon. (CP 23-33). Dr. Telmos also explained to Regis during a telephone conference that he has also performed corrective PEG procedures on patients during his 30 years of specialized practice and teaches physicians how to properly correct a PEG that has been placed

through the colon in error. Indicators that a PEG is placed through the colon in error would be severe weight loss, pressure ulcers, stomach pain, and the formula from the elemental diet not being absorbed in the digestive tract but passing quickly and excreting out the bowel. All of these indicators were evident with Maurice immediately after the PEG placement and by June 13, 2007. The nursing staff at Kline Galland commented on the abnormal feeding pattern of the formula being the same color and texture at both ends. Kline Galland also took no action to correct what it perceived to be abnormal.

J. Sang U. Kim M.D. Scope and Exhibit D.

Dr. Sang U. Kim of Overlake Hospital insinuates there was a previous PEG tube site within the stomach in his notes of August 11, 2007. (CP 18-20). This series of doctor notes again gives false information that confuse all true facts that would have clearly indicated the PEG was punctured through the colon and into the stomach. Maurice never had an earlier PEG placement than the June 12, 2007 PEG and Dr. Sang U. Kim's negligent misrepresentation suggested he did have an earlier PEG placement. (CP 110- 117). Dr. Kim asked for permission to collaborate with the UWMC on August 11, 2007 at which time he should have known the PEG was placed through the colon and into the stomach, and by law this malpractice adverse event should have been reported to the state adverse event officer Linda Furkay. There is evidence that show both Dr.

Sang U. Kim and Dr. Franz Pierre Jerome were not disclosing the true facts of their findings from the endoscopic results from August 2, 2007.

K. Sketches From Frantz Pierre Jerome, M.D.

Dr. Frantz Pierre Jerome of Overlake Hospital met with Regis on August 15, 2007 to discuss repairing Maurice's incorrectly placed PEG tube. He said the PEG was pushed through the colon by UWMC, and in order to avoid the same error, he would inflate the stomach with air and anchor the stomach. This method would work to keep the colon from overlapping the stomach and getting in-between the abdomen and the targeted stomach during the introducer needle piercing. Dr. Frantz Pierre Jerome met with Regis on August 5, 2010 for the first time to discuss what caused the death of Maurice. The true facts were not quickly delivered from the Overlake Hospital staff and yet the PEG was visible in the first series of CT scan images showing the feeding tube in the colon. The negligent misrepresentation by not sharing the results on August 2, 2007 to Maurice and Regis was a contributory act that diminished the chances for Maurice's recovery. There is evidence that show both Dr. Sang U. Kim and Dr. Franz Pierre Jerome were not disclosing the true facts of their findings from the endoscopic results from August 2, 2007. In addition, Dr. Frantz Pierre Jerome stated that he had once personally witnessed a forced pulling of a PEG through the colon in another patient. Dr. Frantz Pierre Jerome also stated that he must first get permission from the

Overlake Hospital and his insurance company to compose a letter describing the details of the UWMC error. No letter was drafted or submitted as Dr. Frantz Pierre Jerome had committed to do during the August 5, 2010 meeting. It is important to note that Overlake Hospital had a direct link with Kline Galland by way of Dr. Daniel Raskind who signed the POLST “full code” for Maurice when discharged from Kline Galland. (CP 47-52). Dr. Daniel Raskind is also a physician at Overlake Hospital and as the attending physician at Kline Galland he should have known that the PEG was in Maurice’s colon since the nursing staff was aware of and had commented on abnormal feeding indicators. Regis was invited by Dr. Frantz Pierre Jerome to sit in on both corrective surgeries for Maurice on August 15, 2007 and January 23, 2008, but the initial error by UWMC was never reported to the State of Washington Adverse Event Officer, Linda Furkay.

L. Teresa Brentnall, M.D. Scope Image of PEG.

On August 2, 2010, another attempt to withhold records and conceal the malpractice adverse event was evident when Regis visited the records department at UWMC. Regis spoke with at least five different people in four different departments and all were completely confused to why the records were not available pertaining to the June 12, 2007 PEG placement. The following individuals were not sure why there was no record of a PEG placement being performed on June 12, 2007 yet other

procedures like the NG placement and X-rays were on record from June 9, 2007: Dianne Schoonover, RN 206-598-9524; Patricia Marstall, RN 206-598-9524; Julie Reed (records) 206-598-4345; Jerry Smith (Radiology) kungfu@u.washington.edu; Bobbie (Sand Point Records) 206-598-4375.

All of the personnel that Regis spoke with were not able to explain why there were no records of the June 12, 2007 PEG placement and Regis went home without any records or images of the PEG placement. At 3:30pm on August 2, 2010 Regis was contacted by the UWMC records department claiming there was a single image from Teresa Brentnall, M.D. showing the PEG in the stomach and nothing else was available. This image was taken prior to the UWMC physician team led by Teresa Brentnall, M.D. pulling the PEG out of the stomach and into the colon where it stayed. The team of physicians negligently misrepresented the condition that Maurice was being fed when they knew or should have known he was not being fed. The act of discharging Maurice from the hospital care with his PEG in the colon and threatening that the insurance would not cover costs beyond the June 13, 2007 date was unreasonable and criminal (CP 62-63, 280-282). Also, negligently misrepresenting Maurice's condition to Kline Galland and then again to Ansara Family Home was a criminal act that should not have been overlooked by the Bellevue Police and all state agencies that were contacted by Costello.

REQUEST FOR MEDIATION TOLLS STATUTE RCW 7.70.110

M. Attorney General Letters April – August 2010 and Reportable Adverse Event Definition.

In a letter dated July 7, 2010 to Attorney General Rob McKenna, formal request was made for mediation and the request went unanswered. The request was specific and the Honorable Robert Alsdorf and Honorable Faith Ireland were referred to Regis by attorney Carol Johnston on June 25, 2010. (CP 71-104, 244-252). Request for mediation was also made to George Kargianis as follow-up to the mediation attempt he made with Assistant Attorney General Thomas Fain during a May 12, 2011 meeting. See attorney client fee arrangement prepared by George Kargianis and letters from August, 2010 – September, 2011. (CP 255-260). Mr. Kargianis also recommended that Regis use ABC Legal to deliver process service on Teresa Brentnall, M.D. after Regis explained to Mr. Kargianis that Seattle Legal Messenger Service had attempted delivering process service and in fact delivered service on a minor who claimed to be the son of Teresa Brentnall. Mr. Kargianis stated that delivering process service on a minor was considered bad service and advised using ABC Legal because there were two residence locations identified with Teresa Brentnall, M.D. Due to the recommendation made by Mr. Kargianis, Regis went to the ABC Legal located next door to the Law office of Mr. Kargianis. The manager of ABC Legal, Maria Arcorace, stated they would

not normally team with the police department or sheriff to deliver process. Regis asked why ABC Legal teamed with the police department to deliver service upon him at his residence under the direction of Thomas Fain and Erin Hammond. Ms. Arcorace would not answer the inquiry unless Regis had a court order and charged the Estate of Maurice Costello the \$90.00 fee for attempting process service on Teresa Brentnall, M.D. Furthermore, why did ABC Legal continue having its assigned process server, Jason Hammond, attempt service upon Teresa Brentnall, M.D. when it was contracted to attempt only four times? (CP 59-61) Jason Hammond had attempted fourteen times until Regis had to stop ABC Legal when he learned that Jason Hammond was continuing to attempt service and may have continued had he not been informed that the King County Sheriff had already delivered process service upon Teresa Brentnall, M.D. at her personal residence.

N. Attorney Carol Johnston.

Regis introduced the case to Attorney Carol Johnston and she agreed to examine the medical records that were provided thus far. Carol Johnston did a review of the records and declined to lead the case in a letter dated June 21, 2010 for unknown reasons but encouraged Regis in the following message: "The hospitalist 'system' had generated significant problems in rendering consistent good quality patient care. In my role as President of the Trial Lawyers Association, the Washington State

Association for Justice, we continue to battle for improvements in the quality of patient and patient safety. It is a never-ending battle as the primary interest always seems to be immunity for wrong doers and preservation of huge insurance company profits.” (CP 125-134).

O. Regence Blue Shield

On August 15, 2007 immediately following the corrective surgery at Overlake Hospital. The order was made for Maurice to immediately be discharged from the hospital. There was much confusion about the nature of the injuries and no physician devoted time to explain the proper methods for a full recovery. Regis was concerned about moving Maurice to another location without giving adequate time to test the wounds during normal feeding schedules. The injuries were apparently being negligently misrepresented to Regence Blue Shield and definitely to Maurice and Regis. All of the hospitalist physicians were on rotation but did not devote time to completely learn the nature of the errors made at UWMC. The true facts of Maurice’s wounds became altered by introducing the term “migration” therefore negligently misrepresenting the level of urgent care toward recovery. Regis made a formal appeal to Regence Blue Shield which was ultimately denied and Maurice was again forced to move while under duress with the threat that he would be responsible for all hospital costs incurred after August 16, 2007. Ansara Family Home would not take Maurice immediately and Maurice waited two week at Lake Vue in

Kirkland. On August 28, 2007 Maurice moved back to Ansara Family Home again under the negligent misrepresentation that the PEG had “migrated” from the stomach to the colon. Maurice did not get to plead his case before Regence Blue Shield and therefore the negligence contributed to his death because the wounds were not given adequate time to be studied. (CP 118-124) Attorney General Rob McKenna ignored Regis’ request for mediation based on faulty information passed down from UWMC and its physicians that made the first error on June 12, 2007 by covering up the wounds, concealing the records, leaving the PEG in the colon for 60 days and starved Maurice for 226 days due to malnutrition.

P. Suit and Plaintiff Sur- Reply

The Costello’s did not agree with UWMC position that the PEG tube had “migrated” from the stomach to the colon and that the UWMC had no record of the malpractice adverse event for June 12, 2007 and no record of the PEG placement for that day. In addition, Ansara Family Home had refused to relinquish its medical records for over a full year from the first request for records. When the records were released they showed no metronidazole or clotrimazole being administered for Maurice. The Estate of Maurice Costello and Regis Costello, Individually, then sued. (CP 1-8, 261-269). Nevertheless, the University and its hospital and employed staff continue to deny that a negligent act occurred on June 12, 2007 (CP 105-109) and afterward by not exercising reasonable care

concerning how to correct its error that caused Maurice 226 days of starvation and suffering. There was a chain of negligent misrepresentation among the long list of care providers after being repeatedly discharged from care with a PEG tube and foreign object in Maurice's colon on June 13, 2007. (CP 153- 156).

PROCEEDINGS BELOW

Costello and UWMC and its defendants filed motions for summary judgment on whether the statute of limitations was tolled. The Honorable Bruce Hilyer granted UWMC motion and denied Costello's motion for summary judgment. (CP 177-178)

De Novo Standard of Review

The court is reviewing an order granting summary judgment on statute of limitations for UWMC; Melissa Hagman M.D.; Teresa Brentnall M.D.; Christine Schlenker M.D.; and Jane Doe. The Court must conduct a de novo review of the interpretation and application of the law to determine whether George Kargianis and Thomas Fain were conducting an attempt at arbitration / mediation during the meeting on May 12, 2011. In addition, the July 7, 2010 letter to Attorney General Rob McKenna (CP 78-79) requesting the Honorable Robert Alsdorf and Honorable Faith Ireland to mediate / arbitrate the case went unanswered as did the request made to George Kargianis to mediate in the July 19, 2011 letter. Each attempt in good faith should have resulted in settlement of this dispute or

toll the statute of limitations for one year RCW 7.70.110. Attorney Carol Johnston referred Honorable Robert Alsdorf and Honorable Faith Ireland as prospective mediation choices during her message sent on June 25, 2010 with her letter dated June 21, 2010. (CP 125-134).

Regis met with attorney George Kargianis on May 12, 2011 and shared the Letter of Merit and Affidavit of Allen J. Telmos, M.D. George Kargianis asked Regis if he could phone Special Assistant Attorney General Thomas Fain during the meeting as he presented Regis and the Estate of Maurice Costello with an Attorney-Client Fee Agreement to be signed. Regis did sign it after sharing the content of the contract with another family member. Mr. Fain and Mr. Kargianis discussed the case and options of settling. Mr. Fain was not interested in settling the case for any amount over \$30,000.00. Was Mr. Kargianis assuming the role of counsel or mediator and was Assistant Attorney General Thomas Fain acting in response to the July 7, 2010 request for mediation? Mr. Kargianis drafted his contract and after Regis provided his signature upon the contract, Mr. Kargianis returned it unsigned (CP 255-260). Mr. Kargianis refused to add his signature to his contract he drafted.

ARGUMENT

- I. UNIVERSITY OF WASHINGTON MEDICAL CENTER; TERESA BRETNALL, M.D.; MELISSA HAGMAN, M.D.; CHRISTINE SCHLENKER, M.D.; AND JANE DOE INTENTIONALLY CONCEALED AND OMITTED TRUE FACTS AND LEFT A FEEDING TUBE IN THE COLON

DURING THE PERCUTANEOUS ENDOSCOPIC GASTROSTOMY (PEG) INSERTION. THE COURT ERRED BY DISMISSING THE SUIT.

A. The statute of limitations is tolled by proof of intentional concealment RCW 4.16.350 and negligent misrepresentation RESTATEMENT (SECOND) OF TORTS, § 552. University of Washington Medical Center's Theory- that the feeding tube "migrated" from the stomach to the colon and there was no malpractice event that occurred on June 12, 2007. Letter dated May 5, 2010.

University of Washington Medical Center's Theory- that there was a family schism. This theory came to surface one week after Regis Costello called The Department of Social Health Services for help in releasing the medical records from Ansara Family Home, LLC. The theory was dismissed by Investigator Denise Roth and Ansara Family Home was issued citations one day after Maurice died for failure to provide records on request and improper discharge of Maurice by dropping him off at Overlake Hospital.

The UWMC May 5, 2010 letter is a blatant attempt to confuse all care providers and government agencies and authorities that could have provided assistance and give Maurice a chance to recover from the foreign object left in his colon. Why did the UWMC choose not to tell Regis or Maurice on June 12, 2007 and why did UWMC continue with the fraud while choosing instead to compose and send the May 5, 2010 letter which consists of erroneous information? See UWMC letter dated May 5, 2010 describing the PEG tube "migration" (CP 105-109).

Due to the concealment of records, Maurice and the Estate of Maurice Costello were deprived the chance to recover from 226 days of

continued starvation and also deprived the opportunity to secure legal counsel. Every prospective attorney interviewed by Regis and the Estate of Maurice Costello were requiring all records to help in conducting a thorough understanding of the malpractice adverse event. In addition, Department of Social Health Services (CP 47-52) (CP 82-84, 86-104), Bellevue Police Department (CP 41-43, 203-206), Attorney General Rob McKenna (CP 71-81, 157-160), Regence Blue Shield (CP 118-124) and Washington State Adverse Event Officer Linda Furkay were not able to do a thorough investigation into the malpractice adverse event.

In another instance of concealment of records, the Bellevue Police Department was called to investigate why the records were not being released and the police did not get them from the offending facility. Instead they advised Regis and Maurice to get an attorney because it was in the detective's point of view, a civil matter and not criminal. See police investigation report. (CP 41-43, 203-206) Citations were issued to Ansara Family Home LLC after the death of Maurice. It was over one year from the first request for records that the records were received and it was clear that Ansara Family Home LLC had not administered the medications to help cure the infections that were prolonging malnutrition of Maurice. See investigation report from DSHS, Marcy Kelly. (CP 47-52).

In fact, Regis was actually pleading with the Bellevue Police Department to help and Detective Robert Thompson misunderstood hyper-

vigilance as he termed it “rude” and he hung up the phone on Regis while Regis was still talking (CP 41-43, 203-206). Bellevue Police Detective Robert Thompson acted on UWMC negligent misrepresentation of facts and had already predetermined that there was no violation or crime and therefore prematurely closed the investigation.

During the September 23, 2011 hearing, The Honorable Judge Hilyer stated that he had no doubt that the adverse event occurred on June 12, 2007. Judge Hilyer stated that the Appellate court is available for Costello. Special Assistant Attorney General Thomas Fain asked that the sur-reply from Regis Costello entered on the court docket September 21, 2011 be struck from the record. Judge Hilyer stated that he would not strike it from the record. See Plaintiff Reply (CP 261-269).

There was no record of images or any procedure being performed during Regis Costello’s visit to UWMC on August 2, 2010. Many personnel were concerned with the reason why there was nothing on record of a procedure for June 12, 2007 and could not give a definite reason for the missing records. One scope image came forward from Teresa Brentnall, M.D. that shows the PEG in the stomach but does not accurately show piercing through the colon. It is reasonable to conclude the image was taken prior to Teresa Brentnall, M.D. leading her team to attempt pulling the PEG from the stomach. (CP 62-63)

The Declaration of Sally Beahan is another attempt to confuse the issue into why no records could be located on August 2, 2010 (CP 276-279). Yet the same results were evident when a new request for all records and images in Radiology was made by the Estate of Maurice Costello and Regis on October 1, 2011. Radiology insisted they have no record of a PEG tube procedure on June 12, 2007 although UWMC billed Regence Blue Shield. See Affidavit of Roderick McPhee (CP 272-275) and Plaintiffs' reply dated September 21, 2011 (CP 261-269).

Maurice was discharged from UWMC to Kline Galland the day following the PEG procedure with instruction to Do Not Attempt Resuscitation on the physicians order, a foreign object in his colon and starving. Regis and Maurice had not signed such a document nor agreed to such an instruction. See UWMC POLST (CP 270-271, 280-282). See Kline Galland POLST (CP 47-52). See UW Medical Records June 5, 2007 – June 13, 2007.

The statute of limitations is tolled indefinitely when records are concealed or omitted. Special Assistant Attorney General Thomas Fain argues that the statute of limitations started at the time of the incident on June 12, 2007 or at the time that the physicians at Overlake Hospital disclosing to Regis and Maurice that the PEG was in the colon on August 11, 2007 or on March 23, 2010 or on April 4, 2010. Each date that was introduced by Special Assistant Attorney General Thomas Fain as a

possible statute of limitations date cannot and must not be used, because Regis and Maurice did not know for sure and could not start any litigation until a physician confirmed the adverse event of June 12, 2007. None of the physicians would agree to meet with Regis or make admissions to the PEG being placed through the colon and into the stomach. Instead, they all waited until they presupposed the three year statute of limitations had nearly run its course when they figured it would be safe to meet. Dr. Sang U. Kim kept silent and avoided admission to the PEG being placed completely through the colon and into the stomach, but rather made the statement and negligent misrepresentation to a mucosal indentation in the stomach consistent with a possible old PEG tube site (CP 18-20). Nothing was ever submitted to Maurice to correct Dr. Kim's theory of Maurice having an earlier PEG tube site in his stomach. Likewise, the UWMC never corrected its negligent misrepresentation of the PEG tube "migrating" on its own from the stomach to the colon. Regis and the Estate of Maurice Costello did all necessary due diligence by including multiple State of Washington agencies that could help find the facts in this case. In each instance no agency or person of authority came to assist in this matter because of the fraud and concealment of records at UWMC.

Duke v. Boyd, 133 Wn.2d 80, 83, 942 P.2d 351 (1997) (reversing summary judgment dismissal of malpractice claim where ophthalmologist misrepresented to plaintiff that she was the only one who did not respond

positively to the procedure). The common law fraud or concealment exception requires plaintiffs to use due diligence to discover relevant information, and Costello did use due diligence.

In addition, a whistleblower came forth with information on December 29, 2007 with potential knowledge into why records were not being released. Kearns Investigations interviewed a nurse with information and concerns into why records on Maurice were being concealed. The follow-up interview with the nurse who arrived on December 29, 2007 with information into why the records were being concealed is not yet available to interview again because the nurse specifically required all the records to examine prior to meeting again and requested to remain anonymous. See Kearns Investigation interview report. (CP 55-58).

Regis Costello and the Estate of Maurice Costello have submitted requests for records on three separate occasions in addition to the two requests for production and interrogatory submittals in January 2011 and September 2011, both submittals were ignored by Defendants. Multiple subpoena attempts were submitted to King County Court but denied. The Estate of Maurice Costello needs the six-page FAX as described in the *November 9, 2011 letter from Bellevue Police Department records supervisor, Deborah Martin*. The Estate of Maurice Costello needs to know if there is a direct tie or relation to the UWMC with the person or

persons who made the unfounded and careless false statement that Maurice was being hidden from his family. (CP 44-46). This false statement of hiding Maurice came after Regis called upon the Department of Social Health Services requesting help in getting the medical records from Ansara Family Home, LLC. This false statement of hiding Maurice ultimately interfered with the focus on getting the medical records and was a disturbing effort of mal intent by the UWMC, Ansara Family Home, LLC or Visiting Nurse Services or someone tied to it to prolong the investigation (CP 55-58). Or, mal intent by the UWMC to create confusion with the term “migration” of the feeding tube, and hide the fact that Ansara Family Home, LLC had not administered metronidazole or clotrimizole nor do periodic tests to monitor the C-Difficile infection. No physician reported the malpractice adverse events to the State of Washington adverse event investigator Linda Furkay, which further confused the level of urgency.

The UWMC argues that the Statute of Limitations apparently has run and therefore the false communications between its physicians and all authorities investigating the missing medical records and the false statement of hiding Maurice cannot be considered for guidance in a business transaction. The court should not employ such a restrictive definition of what constitutes a “business transaction.” Instead, the court should have concluded that the Estate of Maurice Costello and Regis

Costello must seek to find out who made the false statements that redirected the investigation and prevented the medical records from being released in a timely manner so they could hold them legally responsible for their injuries constitutes the requisite “business transaction.”

Furthermore, Department of Social Health Services was informed at the point of the records finally arriving in August of 2008 that the medications necessary for reversing the starvation were never administered while Maurice was at Ansara Family Home, LLC. Field investigators Marcy Kelly and Ms. Carver stated they would reopen the investigation. Regis and The Estate of Maurice Costello requested all records pertaining to the investigation and await those records to this date. Costello has proven “that the defendants engaged in conduct of an affirmative nature designed to prevent the Costello’s from becoming aware of the defect.” *Giraud v. Quincy Farm & Chemical*, 102 Wn. App 443, 452, 6 P.3d 104 (2000). The affirmative act of concealment requires “actual subjective knowledge by the defendants of the wrong done, *i.e.*, scienter, and some affirmative action on his part in concealing the wrong.” *Id.* (citations omitted). The requirement that the Costello’s have “actual subjective knowledge” may still impose some responsibilities on the Costello’s to exercise due diligence responsibilities. *See, e.g., Estates of Hibbard v Gordon, Thomas*, 118 Wn.2d 737, 750-51, 826 P.2d 690 (1992) (discovery rule “should have known” standard applies to claims in

which the Costello's "could not have immediately known of their injuries due to concealment of information by the defendant").

The Estate of Maurice Costello and its personal representative, Regis Costello, lacked knowledge of the true facts or could not acquire them. And they lacked knowledge of the true facts concerning the statements made to them by UWMC in its May 5, 2007 letter describing a "migrating" feeding tube. The UWMC concealed the facts surrounding the PEG tube being located in the colon. The May 5, 2010 letter from UWMC describes a "migrating" feeding tube (CP 105-109). This gives the wrong impression that no malpractice adverse event occurred and that the feeding tube migrated from the stomach to the colon on its own. The May 5, 2010 letter from UWMC is clear indication of concealment of the malpractice adverse event which did occur on June 12, 2007. The Costello's need not make a showing that they could not acquire the "true facts," because the statement of law makes clear that one either has to have a lack of knowledge of the true facts or could not acquire the true facts. In any event, even if the Estate of Maurice Costello or Regis Costello is required to prove both things, one could reasonably question how Regis or the Estate was to have acquired the "true facts" other than what they did: they asked for medical records that were omitted and concealed from Maurice. Instead, the false records were passed along with mal intent, and misrepresented information from *University of Washington Medical*

Center to Kline Galland (June 13, 2007) to Ansara Family Home (July 17, 2007) to Overlake Hospital (July 25, 2007) to Lake Vue (August 17, 2007) to Ansara Family Home (August 28, 2007) to Overlake Hospital (October 15, 2007) to Providence Marianwood (October 18, 2007) and to Valley Medical Center (November 14, 2007). The records were never shared with the State of Washington adverse event officer Linda Furkay. And there was never any mention that the feeding tube was punctured through the colon and into the stomach, which would have been the indicator that it was a state regulatory requirement to report such a medical malpractice adverse event. Instead, the term “migration” was constructed by UWMC with careless use to purposely create confusion into the actual “true facts” that the PEG was punctured through the colon and into the stomach and purposefully pulled from the stomach and left in the colon to cause 226 days of starvation and death.

The statutory discovery rule for a medical malpractice action provides that where the defendant has engaged in intentional concealment, the limitations period is one year from actual knowledge of the fraud or concealment. RCW 4.16.350(3); see *Webb v. Neuroeducation, Inc.*, 100 Wn. App. 336, 345, 88 P.3d 417 (2004). The operation of the statute is tolled indefinitely where there is intentional concealment. *Webb v. Neuroeducation, Inc.*, 100 Wn. App. 336, 345, 88 P.3d 417 (2004). This

exception “is aimed at conduct or omissions intended to prevent the discovery of negligence or of the cause of action.”

The Estate of Maurice Costello and Regis Costello, individually agree that the RESTATEMENT (SECOND) OF TORTS, § 552 has been adopted in Washington concerning what constitutes “negligent misrepresentation.” The Restatement defines someone who has committed a negligent misrepresentation as:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. ESCA Corp. v. KPMG Peat Marwich, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) (citing RESTATEMENT (SECOND) OF TORTS § 552(1) (1977)). What happened in this case fits within this definition, and Maurice Costello and Regis Costello, individually while fulfilling his role then as Durable Power of Attorney and now as Personal Representative for the Estate of Maurice Costello and individually claiming negligent misrepresentation, concealment and omission of records to activate the Discovery Rule which tolls to Statute of Limitations in Washington State.

- 1. Teresa Brentnall, M.D., and Christine Schlenker, M.D., and Melissa Hagman, M.D., and Jane Doe were in the course of their employment.**

At the time they supplied the false information to (Maurice Costello and Regis Costello), Teresa Brentnall, M.D., and Christine Schlenker, M.D., and Melissa Hagman, M.D., and Jane Doe were acting within the course of their employment for UWMC.

- 2. Teresa Brentnall, M.D., and Christine Schlenker, M.D., and Melissa Hagman, M.D., and Jane Doe supplied false information to Maurice Costello and Regis Costello and Attorney General Rob McKenna and Department of Social Health Services and Bellevue Police Department Detective Robert Thompson, and Kline Galland, Et al.**

Teresa Brentnall, M.D., and Christine Schlenker, M.D., and Melissa Hagman, M.D., and Jane Doe told Maurice Costello and Regis Costello that the PEG was placed without difficulty and that Maurice was being fed when they knew or should have known he was not or could not be fed while the PEG was in his colon (CP 280-282). In addition, the UWMC made reference to a family “schism” as described by Angelina Zappia, M.D. and Karla Mitchell, M.D. on May 29, 2007 medical charts. Due to the fact that UWMC suspected an alleged “schism” among the Costello Family, the Medical Center also had a fiduciary obligation to make sure that extra care was given to Maurice to ensure his safety and well being. Costello’s planned to litigate when the “true facts” were shown, but the concealment of records created more conflict among the

entire family. The UWMC team of physicians actually caused a breach in the Costello family by hiding the true facts and stating that Maurice was being hidden.

3. The Estate of Maurice Costello and Maurice's planned litigation should be considered a "business transaction."

To toll the limitations period based upon fraud, the plaintiff has the burden to prove each of the nine elements of fraud, or to prove that "the defendant breached an affirmative duty to disclose a material fact." *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997). In addition, a party alleging fraud or intentional concealment must prove it by clear, cogent and convincing evidence. *See Duke v. Boyd*, 133 Wn.2d 80, 83, 942 P.2d 351 (1997). The common law fraud or concealment exception requires plaintiffs to use due diligence to discover relevant information. Did Regis Costello and Maurice Costello use due diligence in this case to discover relevant information? YES

In *Rosenthal v. Blum*, 529 S.W.2d 102 (Tex. Civ. App. 1975) the court considered a similar situation. There, the plaintiff patient brought an action against the defendant physician, alleging that the defendant had negligently diagnosed the plaintiff's physical condition, and misrepresented the extent of his injuries to him following an automobile accident. The plaintiff claimed that he relied on the doctor's representations when he settled his claim against the automobile insurance

company and was, therefore, entitled to damages for the difference between the amount he received and the amount he would have settled for had he known the full extent of his injuries. The lower court dismissed the complaint, and the plaintiff appealed. The appellate court held that since the defendant knew that the plaintiff was relying on his diagnosis for settlement purposes, the plaintiff had stated a cause of action for negligent misrepresentation, and the case was remanded for trial. Rosenthal, 529 S.W.2d at 104.

The fact that the patient was looking to the defendant physician for advice related to his personal injury lawsuit was sufficient for the court to conclude that his claim was related to information the physician had provided to him for guidance in a business transaction. The court should have similarly concluded here that there is a need to finding true fact in how Maurice was starved to death and the identity of who made the false statement that Maurice was allegedly being hidden from his family. The entire family had access at all times to Maurice Costello by direct face to face contact and by phone. Maurice did not have control over the move from UWMC as it made clear that Maurice would have to move on June 13, 2007 one day following the PEG surgery done in error. Moreover, UWMC was imposing fears of having to pay out of pocket if Maurice were to stay beyond the discharge date of June 13, 2007. Likewise, the move from Kline Galland was unexpected and the admission department

stated that Maurice did not fit the definition of “comfort care” and Kline Galland stated UWMC negligently misrepresented the condition of Maurice in the model of “comfort care”. Maurice was receiving daily physical therapy and was apparently getting “stronger” and the physician for Kline Galland, Daniel Raskind, M.D. made certain the POLST was Full Code when Maurice transferred to Ansara Family Home, LLC. Regis did not get copies of the POLST until the records arrived in August 2008. Dr. Raskind also works for Overlake Hospital. The move from Ansara Family Home, LLC was also unexpected which eventually resulted in Ansara Family Home, LLC getting a citation from Department of Social Health Services for improper discharge of Maurice (CP 47-52). The move from Overlake Hospital on August 16, 2007 was improper because Regence Blue Shield would not allow for adequate testing of the wounds as the insurer was told the PEG “migrated” and there was no need for testing (CP 118-124).

Given all the evidence showing fraud, The Personal Representative for the Estate of Maurice Costello has a responsibility to all six beneficiaries to ensure that the monies are recovered due to the injuries caused by UWMC negligent misrepresentation and malpractice.

In addition to common law tort liability, numerous jurisdictions have adopted the RESTATEMENT (SECOND) OF TORTS § 324A (1965). That section states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Although Washington courts have not expressly adopted § 324A, it has not been rejected either. *Meneely*, 101 Wn. App. At 862 n.4. In an illustrative case, an insurer undertook to inspect a grain elevator for hazards. *Brown v. Mich. Millers Mut. Ins. Co.*, 665 S.W.2d 630, 632 (Mo. Ct. App. 1983). The plaintiffs alleged that the insurer knew or should have known that a plastic pipe used in a grain elevator was hazardous. *Id.* At 635. The court found that there was a common law cause of action under the voluntary rescue doctrine. *Id.* At 634 (“Missouri case law supports the proposition that one who acts gratuitously or otherwise is liable for the negligence performance of the act, even though there was no duty to act”). The court also found that a cause of action could be maintained under § 324A, noting that “the risk of harm to these plaintiffs was enhanced by the failure of defendants to advise the Desert Gold Mill to discontinue use of

the plastic pipe.” *Id.* At 636. Thus, even though the plastic pipe was plainly visible, the insurer’s superior knowledge that the plastic pipe was a hazardous condition created a duty for the insurer to warn the plaintiffs of that hazardous condition. Its failure to do so created a cause of action under both common law principles and § 324A.

In Costello’s case, the court should have applied common-law negligence principle and the Restatement (second) of Torts § 324A and the discovery rule to toll the statute of limitations because UWMC was aware of a complication during the PEG procedure and thereafter, which was a duty owed to the Costello Family and breached it by denying that a malpractice adverse event was required to be reported to the State of Washington Adverse Event Officer Linda Furkay. This failure to disclose and purposely try to redefine the malpractice adverse event with the use of the term “migration” to create the false impression that the PEG moved from the stomach to the colon on its own should be criminal (CP 105-109). In fact, the PEG was pierced completely through the colon and into the stomach which was secretively attempted to be corrected on June 12, 2007 while Regis Costello was observing the complications. However, the complications were immediately silenced by UWMC team of physicians in effort to hide the “true facts”. The level of confusion rippled across a continuum of care providers which ultimately denied Maurice the care that

he truly needed to overcome the 226 days of starvation which lead to his death on January 24, 2008.

Did Costello exercise due diligence in getting the records and did UWMC conceal the true facts and omit records that are pertinent to understanding that the feeding tube did not spontaneously “migrate” from the stomach to the colon? YES

**B. OBJECT LEFT IN COLON TOLLS STATUTE
RCW 4.16.080(2)**

The statute of limitations is tolled by leaving a foreign object inside the body “the statute of limitations (RCW 4.16.080(2)), commences to run when Costello discovers or, in the exercise of reasonable care for Costello’s own health and welfare, should have discovered the presence of the foreign object PEG displaced in Costello’s stomach and colon” Ruth v. Dight.

The discovery rule must apply in this case thus tolling the statute of limitations. The court first adopted the discovery rule in **Ruth v. Dight**. That was a medical malpractice case in which a plaintiff, alleging that her doctor had negligently left a surgical sponge in her abdomen, brought an action against the doctor 23 years after he had performed surgery on her. During those 23 years, plaintiff had sought the help of various physicians who treated her for recurrent pain. However, the sponge was not discovered until she underwent exploratory surgery just a year before she

filed suit. The court recognized the practical and policy considerations underlying statutes of limitations, observing that stale claims may be spurious and generally rely on untrustworthy evidence. The court further observed that society benefits when it can be assured that a time comes when one is freed from the threat of litigation. The court also recognized the remedial goal of the justice system, stating that “when an adult person has a justiciable grievance, that person usually knows it and the law affords the person ample opportunity to assert it in the courts,” but that goal is balanced by recognition that compelling one to answer a stale claim is in itself a substantial wrong. The court resolved these competing interests where neither party is responsible for the delay in discovery of the asserted action by tolling the statute of limitations and by preserving the remedy. Thus, the court has held that in medical malpractice cases asserting negligence in leaving foreign substances or articles in a surgical wound and which remains in the body after the wound has been closed, “the statute of limitations (RCW 4.16.080(2)), commences to run when the patient discovers or, in the exercise of reasonable care for the patient’s own health and welfare, should have discovered the presence of the foreign substance or article in the patient’s body.”

When Regis was interviewing prospective attorneys to represent this case, attorney George Kargianis agreed to study the case in August of 2010. He told Regis that he knew Maurice Costello from past work with

Burlington Northern and Amtrak. Mr. Kargianis phoned Regis and declined to take the case after reviewing some medical records. Mr. Kargianis further refused to believe that the physicians at University of Washington Medical Center would be able to pull the PEG through the stomach wall and back through the walls of the colon. Had the malpractice adverse event been timely reported by UWMC, all prospective legal counsel would also have been informed of the facts and better prepared to take the case. Allen J. Telmos, M.D is sure the PEG was pulled from the stomach and into the colon on June 12, 2007. (CP 23-33, 62, 63)

The Estate of Maurice Costello and Regis Costello agree that the forced pulling of the PEG from the stomach and into the colon is most relevant. That there was a fiduciary relationship between Costello and UWMC and its physicians together represent a duty owed to Maurice which was neglected and caused his death. This fact was illustrated on August 5, 2010 during the meeting with Regis Costello and Dr. Frantz Pierre Jerome, and was not only the question of whether a malpractice adverse event occurred on June 12, 2007, but also why the team of UWMC physicians had required Regis to leave the operating room when they first allowed Regis to sit in and observe the procedure. While Regis was waiting outside the door wondering why the physicians had asked him to leave the room, the physicians again asked Regis to leave the hallway and go to the waiting area. There was no explanation following the

procedure or while Maurice was in the recovery room. Most important, there was no informed consent because there was no explanation regarding any risks associated with the PEG or explanation into why Regis was asked to relocate and deprive him the opportunity to observe the procedure. One of the personnel who participated in the procedure was shadowing Regis in the recovery room as if wanting to describe the complication. Instead, they chose to avoid the reason why they asked Regis to leave and hence terminated the original plan to allow Regis to sit in and observe the PEG procedure. Regis explained the experience to Dr. Frantz Pierre Jerome on August 5, 2010 during the meeting at Overlake Hospital. Dr. Frantz Pierre Jerome said that was the first he had heard of Regis' experience of being asked to leave the operation and said he would write a letter describing his understanding of what went wrong on June 12, 2007. Dr. Frantz Pierre Jerome stated that he had once personally witnessed a forced pulling of a PEG through the colon in another patient. Dr. Frantz Pierre Jerome also stated that he must first get permission from the Overlake Hospital and his insurance company to compose a letter. No letter was drafted or submitted as Dr. Frantz Pierre Jerome had committed to do during the August 5, 2010 meeting. Regis was invited by Dr. Frantz Pierre Jerome to sit in on both corrective surgeries for Maurice on August 15, 2007 and January 23, 2008.

In addition, The Estate of Maurice Costello argues that the surgeons at Overlake Hospital, Dr. Kim and Dr. Frantz Pierre Jerome, were made aware of the adverse event on August 1, 2007 during the CT scans of the abdomen and pelvis. The adverse event should have been reported to the state adverse event officer Linda Furkay on August 1, 2007 and at the earliest June 12, 2007 by staff at UWMC, or by Kline Galland. Instead, the punctured colon and foreign object in the colon was concealed and omitted from medical records. See October 1, 2011 request for records and Affidavit of Roderick McPhee (CP 272-275) and Declaration of Sally Beahan. (CP 276- 279).

Why did Dr. Sang U. Kim wait to disclose the fact of the PEG being displaced in the colon which was identified in the August 1, 2007 CT scans of the abdomen? Dr. Kim waited until Regis and Maurice made a request to be transferred to Evergreen Hospital on August 11, 2007. Dr. Kim phoned Regis at 9 pm on Saturday, August 11, 2007 and asked who did the original PEG placement. Regis explained that UWMC did the original PEG insertion. Dr. Kim stated it was inserted into Maurice's colon and it was a miracle that he had survived for two months without being fed. Dr. Kim acknowledged the starvation of Maurice was caused at UWMC and the PEG being placed in the colon (CP 110-117). Still no mention of an adverse event occurring had been reported to the State of Washington Adverse Event Officer Linda Furkay.

In addition to Dr. Kim acknowledging the PEG tube in the colon, Dr. Frantz Pierre Jerome also acknowledged the foreign object being left within Maurice's colon during the first meeting to discuss this malpractice adverse event on August 5, 2010. Not only were sketches drawn by Dr. Frantz Pierre Jerome, but he also admitted that the first CT images clearly show the PEG through the colon. The first Overlake Hospital images of the abdomen were taken on August 1, 2007 and mentioning of a "possible malposition of the enterostomy tube". Regis asked Dr. Frantz Pierre Jerome why nobody from Overlake Hospital disclosed the fact of the PEG being in the colon immediately if it was evident that Maurice was suffering from starvation. Dr. Frantz Pierre Jerome did not answer Regis' inquiry. Dr. Kim and Dr. Frantz Pierre Jerome waited until August 5, 2010 to disclose the true facts of the PEG being pulled from the stomach to the colon which constitutes negligent misrepresentation. Dr. Sang U. Kim insinuates there was a previous PEG tube site within the stomach in his notes of August 11, 2007. (CP 18-20). This series of doctor notes again gives false information that confuses true facts that would have clearly indicated the PEG was punctured through the colon and into the stomach. Maurice never had an earlier PEG placement as Dr. Sang U. Kim had negligently suggested.

Maurice Costello and Regis Costello could not know of a malpractice adverse event having occurred unless it is reported to the

family or Maurice or to the State of Washington Adverse Event Officer Linda Furkay. There was nothing in writing from any physician that cared for Maurice accurately describing the fact that a foreign object was placed through his colon and left within his colon during the PEG tube procedure of June 12, 2007 or leading up to his death on January 24, 2008. Regis and Maurice could not know anything other than what is described in the physician's notes. See UWMC. Dr. Brentnall, Dr. Schlenker, Dr. Hagman operation chart notes and discharge notes. June 12 and 13, 2007. And Dr. Frantz Pierre Jerome's sketches and statement, "forcefully pulling from stomach to colon" *emphasis added*. (CP 37-40). The entire above mentioned are examples of negligent misrepresentation.

C. THE COURT ERRED BY NOT ALLOWING FOR MEDIATION AFTER THE REQUEST WAS MADE TO ATTORNEY GENERAL ROB MCKENNA JULY 7, 2010.

Costello's formal request for mediation with the letter to Attorney General Rob McKenna dated July 7, 2010 tolls the statute of limitations for one year. De Novo review to examine meeting with George Kargianis and Assistant AG Thomas Fain on May 12, 2011 and requests for mediation.

Regence Blue Shield would not allow enough time to test the wounds immediately after the corrective surgery on August 15, 2007. The request for more time to test the wounds made by Regis Costello and Maurice Costello was denied by Regence Blue Shield because it was then that the care providers were being manipulated by the UWMC having

constructed the term “migration” to intentionally create confusion. (CP 118-124).

Regis and The Estate of Maurice Costello requested that Attorney General Rob McKenna consider Honorable Robert Aldsdorf or Honorable Faith Ireland for mediation or arbitration in a letter dated July 7, 2010 (CP 78-79, 125-134). Regis and The Estate of Maurice Costello requested that the Attorney General Rob McKenna send all true and correct images and records pertaining to the adverse event on June 12, 2007. Regis and the Estate of Maurice Costello still have not received the requested discovery. Why would the UWMC not have images available after such an ordeal in placing the PEG? See letter from Assistant Attorney General Kristin Miles. See letter from Assistant Attorney General Noella Rawlings. See letter from Assistant Attorney General William Nicholson. See letter from Stephen Groff of Attorney General Office recommending Small Claims Court (CP 157-160).

CONCLUSION

For the foregoing reasons, the court erred by failing to grant partial summary judgment for the plaintiff, The Estate of Maurice Costello and for the plaintiff, Regis Costello, individually. The court erred by granting defendants motion for dismissal based on statute of limitations. The court erred by failing to recognize the Discovery Rule on intentional concealment and omission of records. The court erred by not striking the Declaration of Sally Beahan, which came before the court on September 19, 2011 and during the hearing on September 23, 2011. Plaintiff was not given notice of the Sally Beahan declaration in a timely manner in order to respond prior to the hearing date. The court's orders should therefore be reversed and the case remanded with instructions.

Dated this th 29 day of December, 2011. Regis J. Costello

A handwritten signature in black ink, appearing to read "Regis J. Costello", written over a horizontal line.

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