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COURT OF APPEALS
DIVISION ONE
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NO. 67949-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

YOUNG SOO KIM,

Appellant,

v.

CHOONG-HYUN LEE, and his marital community, CHOONG-HYUN
LEE, DMD, PLLC, d/b/a LEE FAMILY DENTAL, a Washington
corporation, and JOHN DOES 1-10,

Respondents.

BRIEF OF RESPONDENTS

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I. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Under RCW 4.16.350(3) does a dental malpractice claim accrue (a) on the date when the plaintiff last visited the defendant dentist, even if the plaintiff neither alleges nor offers evidence that the dentist committed any injury-causing negligent act or omission at that visit, or (b) on the date of the last visit that was part of a “course” of treatment and on which the dentist committed an act or omission that caused injury?

II. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case.

Young Soo Kim alleged that Choong-Hyun Lee, D.D.S., was professionally negligent in locating and placing an implant, abutment, and crown in the upper left part of his mouth in 2006-2007, causing pain and requiring corrective surgery by a specialist. CP 174-76 (¶¶ 2.1-2.12 and 3.1-3.7). The complaint also asserted the elements of a claim for “breach of duty to secure informed consent,” CP 176 (¶ 4.1), for “the procedure,” CP 176 (¶ 4.3). Dr. C-H Lee denied Mr. Kim’s allegations. CP 167-68.

B. Chronology of Dental Care Dr. C-H Lee Provided to Mr. Kim.

This is a case in which dates matter. The history of the dental care Dr. C-H Lee (or a dental hygienist at his office) provided to Mr. Kim is set out chronologically below. As the Periodontal Chart at CP 66 explains, Tooth # 13 is located in the upper left part of the mouth, and is flanked by

Tooth #12 and Tooth #14; Tooth #15 is to the rear of Tooth #14. Tooth #30 is toward the rear on the lower right side of the jaw.

December 5, 2005

Mr. Kim made his first-ever visit to Dr. C-H Lee's office. CP 150. His dental health history was obtained, CP 52-53, and Dr. Lee performed a "NP" (new patient) exam; x-rays ("4 BW" meaning bite-wing x-rays; "5 PA" meaning periapical x-rays) were taken, and Mr. Kim's teeth were cleaned and polished ("prophy & polish") by "Becky." CP 150 (under Treatment Performed and under Notes). Dr. Lee advised Mr. Kim, among other things, that a bridge ("BR") at Teeth #12-#15 was loose and that Tooth #13 needed to be extracted and a new bridge put in. CP 150 (under Notes). There was discussion of placing a bridge at Teeth #3-5 as well. *Id.* The records do not reflect the making of any treatment decisions.

August 28, 2006

Mr. Kim saw Dr. Lee for an emergency appointment. CP 151. The complaint alleged, CP 174 (¶ 2.1), Dr. Lee admitted, CP 166 (¶ 2.1), and the dental records reflect, CP 69, 142, 151, that Dr. Lee extracted Tooth # 13 (upper left) and Tooth #30 (lower right) that day.

September 7, 2006

Mr. Kim kept an appointment for periodic prophylaxis and x-rays (4 bitewing (BW) and 2 periapical (PA)). CP 151. "Becky" cleaned Mr.

Kim's teeth. CP 151. The hygienist note ends with "nv – 6 mo 3-07 bz." CP 143.¹

A separate entry states that Mr. Kim asked to speak with Dr. Lee about replacing missing teeth because he was having a hard time eating and that Dr. Lee told Mr. Kim that Teeth #13, 14 and 30 could be replaced with implants or partial denture, but that Mr. Kim preferred to have implants. CP 143. Mr. Kim was instructed to brush and floss daily and wait a month to six weeks before proceeding with implants. *Id.* That separate entry ends: "NV [next visit] study impressions and ext[ract] #15."

September 12, 2006

Dr. Lee took an impression for implants, reviewed implant procedure with Mr. Kim, and extracted Tooth #15. Placing of implants at Tooth #13 and Tooth # 30 was scheduled for October 16. CP 143, 151.

October 16 or 17, 2006

Dr. Lee surgically placed implants at Teeth #13 and #30 and second stages of the two tooth-restoration procedures were scheduled for two months later. CP 144.

November 13, 2006

Mr. Kim saw Dr. CH Lee for a post-op check and reported having a "funny taste" and "tingling." CP 144. Dr. Lee asked if he had been

¹ "Becky" and "bz" were Becky Zaylor, the dental hygienist. See CP 146, top entry, under "User."

rinsing with peridex. Because Mr. Kim had thrown his prescription away, Dr. Lee wrote a new one and told him rinsing was important. CP 144.

January 24, 2007

Dr. Lee placed healing post and cap abutments on the implants at Tooth #13 and Tooth #30 and scheduled (“nv”) an appointment to take impressions for crowns on the abutments. CP 145.

February 7, 2007

Dr. Lee made impressions for crowns at #13 and #30. CP 145.

February 26, 2007

Dr. Lee placed (seated with cement) and adjusted implant crowns at Tooth #13 and Tooth #30. CP 146.

March 1, 2007

Dr. Lee prepared Tooth #12 (upper left) for a crown and cemented in a temporary crown. CP 146.

March 15, 2007

Dr. Lee removed the temporary crown and seated and cemented in the permanent crown at Tooth #12. CP 146.

No “nv” (next visit) entry was made that day. That marked the last restoration work Dr. Lee would perform on individual teeth in Mr. Kim’s mouth.

/

March 29, 2007

Six months after his last (September 7, 2006) prophylaxis/x-rays visit, Mr. Kim kept an appointment for another, seeing Becky Zaylor, RDH, and having his teeth cleaned and four bitewing x-rays and two periapical x-rays taken. CP 147, 153. A next prophylaxis visit (“nv”) was scheduled for “6 mo 9-07.” CP 147.

C. Events After Mr. Kim’s Final Visit to Dr. Lee’s Office.

The prophylaxis-and-x-rays appointment on March 29, 2007 turned out to be Mr. Kim’s last visit to Dr. Lee’s office. On April 9, 2007, Mr. Kim called to complain about his bill. CP 64. In October 2008, Dr. Lee spoke with Lynnwood periodontist Kenny K. H. Lee, DDS, Ph.D., *see* CP 106, who told Dr. C-H Lee the implant, abutment and crown at Tooth #13 needed to be replaced, but that Mr. Kim had no complaint about Tooth #30. CP 58, 65. Dr. C-H Lee refunded \$1,261 to Mr. Kim. CP 65.

On March 18, 2010, Mr. Kim’s lawyer mailed to Dr. C-H Lee a pre-lawsuit request for mediation pursuant to RCW 7.70.110. CP 49, 162.

D. Proceedings Below.

Mr. Kim filed his complaint on March 11, 2011. CP 172-78. It alleged that, following the February 2007 procedure to place crowns in the upper left and lower right areas of his mouth, the upper left crown repeatedly fell off, CP 174 (¶¶ 2.4-2.5), and that he sought treatment from

Dr. Kenny Lee in June 2008, who made repairs and told him in October 2008 that Dr. C-H Lee's treatment had been deficient. The complaint alleges that:

Specifically, Dr. Kenny Lee determined that the location and size of the upper left implant fixture was incorrect, that the abutment selection was incorrect, the crown size was incorrect, and that Plaintiff Kim's sinus membrane had been adversely affected by Defendants' procedures and treatment.

CP 175 (¶¶ 2.7-2.8). The complaint alleged no deficiencies in Dr. C-H Lee's work in the lower right part of Mr. Kim's mouth (*i.e.*, on Tooth #30), where Dr. Lee had cemented in a permanent crown the same day as the crown on Tooth #13 (upper left) (February 26, 2007, CP 146).

Dr. C-H Lee moved for summary judgment based on the statute of limitations, showing that he had last performed tooth-repair/replacement work on Tooth #13 on February 26, 2007 and had done no repair work in any area of Mr. Kim's mouth after March 15, 2007, the date he had cemented in the permanent crown at Tooth #12. CP 125-34; *see also* CP 123-24 (supporting declaration) and CP 135-64 (supporting exhibits).

In response, Mr. Kim submitted a declaration asserting that his March 29, 2007, appointment had been a "follow-up" one at which Dr. Lee had seen him and "examined all areas of my mouth for swelling and tenderness," and "took x-rays of four areas of my mouth, discussed

periodontal disease, flossing, and use of saline rinses.” CP 103 (¶ 5) (emphases by Mr. Kim). Mr. Kim attached to his declaration a sheet of paper, CP 106, on Dr. Kenny Lee’s stationery, dated June 2, 2009, stating what work had been done to repair implants and crowns in the upper left part of Mr. Kim’s mouth and to replace missing Teeth #4 and #5 (which Dr. C-H Lee and Mr. Kim had discussed replacing with a bridge, CP 55, but as to which Dr. C-H Lee had not been asked to plan or do any work before Mr. Kim ceased visiting his office).² The statements on the page were not sworn, and they made no reference to Tooth #30.

Mr. Kim’s lawyer also provided an unsworn and unsigned document, CP 96, that she represented to be from Dr. Kenny Lee, CP 48-49, in response to an inquiry she had made in December 2009 concerning Mr. Kim’s prior dental care, CP 95.³ That document suggested that its author believes implants had been placed “wrongly” on “#13.30” and in “the upper left”, and that “patient didn’t complain #30 but same mistake on #30 implant (lower right).” CP 96. It also seemed to indicate criticism of what had *not* been done with respect to Teeth #3 and #5. CP 96. None of the statements Mr. Kim or his lawyer attributed to Dr. Kenny Lee criticized in

² As the Periodontal Chart reflects, Teeth #4 and 5 are upper teeth, on the right side, about midway back between the center (incisor) teeth and the molars.

³ The document was an exhibit to Mr. Kim’s counsel’s declaration, which may be confusing because counsel mistakenly identified herself as “an attorney for the Defendants. . .” CP 48.

any respect the care Mr. Kim had received at Dr. C-H Lee's office on March 29, 2007, or attributed injury to care provided by Dr. Lee on that date. No statement of opinion attributed to Dr. Kenny Lee was expressed to a reasonable degree of dental or medical probability.

In his legal memorandum opposing summary judgment, Mr. Kim acknowledged that RCW 4.16.350(3)'s three-year limitations period applied to his malpractice claim. CP 114. He argued that his lawsuit nonetheless had been timely filed because his lawyer had mailed his RCW 7.70.110 mediation request within the three-year limitations period, which, because of the "continuing course of treatment rule," Mr. Kim argued, had begun to run on March 29, 2007, and not on February 26, 2007, as Dr. Lee contended, or even on March 15, 2007. CP 112-19.

In reply, Dr. C-H Lee pointed out that Mr. Kim had neither alleged nor offered evidence that Dr. Lee provided negligent dental care or treatment at the March 29, 2007, prophylaxis/x-rays visit. CP 42. Dr. Lee explained that the "continuing course of treatment" rule is actually a "continuing course of *negligent* treatment" rule, under which a claim accrues at the time the provider last provides *negligent* care, not non-negligent unrelated care or non-negligent follow-up care. CP 41-45. Dr. Lee objected on hearsay grounds to consideration of the unsworn statements (CP 96 and 106) attributed to Dr. Kenny Lee. CP 43.

The trial court granted Dr. Lee's motion and dismissed the complaint. CP 39-40. The court's order reflects no ruling on Dr. C-H Lee's hearsay objections, but it does not list Mr. Kim's or his lawyer's declarations, or exhibits to them, as things it considered. CP 39-40. The summary judgment order dismissed "all claims" with prejudice. CP 40. Mr. Kim's lawyer signed the order under "Agreed as to form." CP 40.

Mr. Kim moved for reconsideration. Without offering any new evidence, he reiterated his "continuing course of treatment rule" arguments, but did not argue that the "informed consent" claim pled in his complaint should not have been dismissed. CP 27-36. The court denied reconsideration. CP 14-15. Mr. Lee appeals. CP 4-13

III. ARGUMENT

A. Mr. Kim's Claims Were Barred by the Three-Year Statute of Limitations Unless His Mediation Request Was Mailed Before the Limitations Period Expired.

Mr. Kim acknowledges, *App. Br. at 8*, that his malpractice claim against Dr. Lee was subject to RCW 4.16.350's three-year limitations period. RCW 4.16.350(3) provides that a medical malpractice claim:

[S]hall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his 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. [Emphasis added.]

Mr. Kim has never argued that he sued within one year after he discovered that he had a claim.⁴

As Mr. Kim's brief notes, *App. Br. at 20*, his lawyer mailed Dr. Lee a RCW 7.70.110 mediation request. Mr. Kim asserts that mailing the mediation notice gave him four years, instead of three, in which to sue. *App. Br. at 20-21*. He seems to argue that, because he filed his complaint on March 11, 2011, his March 15, 2007 visit to Dr. Lee fell within the four-year period.

Any such argument is incorrect. Mailing a RCW 7.70.110 mediation request tolls the limitations period for one year, and *can* make the period four instead of three years. However, for a mediation request to toll the limitations period at all, the mailing must occur before the period expires. That is the holding of *Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 171, 252 P.3d 909, *rev. denied*, 173 Wn.2d 2002 (2011). As the court explained in that decision, mailing a mediation request is like calling timeout in a basketball game; once the game is over, calling a timeout cannot bring the game back to life. *Cortez-Kloehn*, 172 Wn. App. at 171 n. 2. Just because someone mailed a mediation request does not mean the accrual date for his claim is calculated backward four years from the date

⁴ Nor could Mr. Kim have made such an argument, in view of his allegations that Dr. Kenny Lee had told him in 2008 what had been "deficient" in the implant-and-crown work Dr. C-H Lee had done in the upper left part of Mr. Kim's mouth. CP 175 (¶ 2.8).

of complaint filing. The mailing itself must occur before the limitations period expired.

Mr. Kim's last visit to Dr. C-H Lee was a regularly scheduled six-month prophylaxis/x-rays/checkup visit on March 29, 2007. The visit prior to that one, at which Dr. Lee cemented in the permanent crown on Tooth #12 in the upper left area of Mr. Kim's mouth, occurred on March 15, 2007. Dr. Lee had completed the crown-work on Teeth #13 and #30 in February 2007.

Mr. Kim's mediation request was mailed on March 18, 2010. CP 49, 162. The mediation request was mailed in time to toll the limitations period *if* – but *only if* – Mr. Kim's claims against Dr. Lee accrued after March 18, 2007. *Cortez-Kloehn*, 172 Wn. App. at 171.

B. The “Informed Consent” Claim Asserted in the Complaint Has Been Abandoned, But Was Time-Barred if the Malpractice Claim Was.

Mr. Kim's brief does not mention the claim his complaint asserted for breach of the duty to obtain his informed consent, CP 176, but a claim under RCW 7.70.050 is subject to the same statute of limitations as a malpractice claim under RCW 7.70.040, and the three-year limitations period begins to run “once the procedure to which the patient could have consented is complete.” *Young v. Savidge*, 155 Wn. App. 806, 816, 230 P.3d 222 (2010). Neither side's summary judgment briefing specifically

addressed informed consent, but Mr. Kim's complaint alleged failure to obtain his informed consent only for "the procedure," CP 176 (¶ 4.3) and the only procedure the complaint described was the tooth-restoration work done on or before February 26, 2007, CP 174 (¶¶ 2.1-2.4). Furthermore, Mr. Kim did not allege, testify, or argue that any care he received at the March 29, 2007, prophylaxis visit was provided without his informed consent, or that a reasonable patient, if properly informed, would have withheld consent to anything Dr. Lee did on March 29, 2007, or that he suffered injury because of care to which he submitted without giving informed consent on March 29, 2007. *See* RCW 7.70.050(1)(c) and (d) (elements of "informed consent" cause of action).

The summary judgment order dismissed "all claims." CP 40 (line 11). Although Mr. Kim moved for reconsideration of that order, he did not make any special plea with respect to an informed consent claim. Mr. Kim's brief offers no argument at all concerning informed consent. He should be deemed to have abandoned any informed consent claim. *See Besel v. Viking Ins. Co.*, 105 Wn. App. 463, 478 n.1, 21 P.3d 293 (2001) (appellate court may deem an unbriefed claim to be abandoned).

C. The “Continuing Course” Rule Does Not Make March 29, 2007 the Accrual Date for Mr. Kim’s Claims.

1. Mr. Kim’s reliance on *Samuelson v. Freeman* is misplaced because its holding was abrogated by the enactment of RCW 4.16.350(3).

Mr. Kim argues that the care he received from Dr. C-H Lee from December 2, 2005, through March 29, 2007, constituted a “series’ of ‘interrelated acts’” that constituted a “continuing course of treatment” such that the statute of limitations did not begin to run until that last visit. *App. Br. at 12.* Mr. Kim contends that his claim-accrual position is supported by *Samuelson v. Freeman*, 75 Wn.2d 894, 454 P.2d 40 (1969); *Caughell v. Group Health Coop.*, 124 Wn.2d 217, 876 P.2d 898 (1994); *Webb v. Neuroeducation Inc., P.C.*, 121 Wn. App. 336, 88 P.3d 417 (2004), *rev. denied*, 153 Wn.2d 1004 (2005); and *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 361 (2011). *App. Br. at 10-18.*

Mr. Kim’s reliance on *Samuelson* would probably be misplaced even if that decision was still good law. It held 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.” *Samuelson*, 75 Wn.2d at 900. The “particular condition” for which Mr. Kim’s complaint alleged Dr. Lee had provided negligent treatment, causing the injuries for which he sought damages, was damaged

teeth, and the treatment for that condition was indeed provided over the course of several months and visits. It was completed, and “terminated,” however, on March 15, 2007. The *prophylactic care* that Dr. Lee and his staff provided on March 29, 2007, to all of Mr. Kim’s teeth was neither “treatment” nor a step in the tooth-restoration work that had been completed on March 15. It was a regular checkup, subject to an every-six-months schedule established separately from Mr. Kim’s tooth-restoration visits. Thus, even under *Samuelson*, Mr. Kim’s “course” of treatment ended more than three years before his mediation request was mailed.

Even if Mr. Kim’s claim would have been timely asserted under *Samuelson*, however, that decision ceased to be good law in 1971, when the legislature enacted RCW 4.16.350(3). *Laws of 1971, ch. 80 § 1*. The Supreme Court held in *Caughell* that the enactment of RCW 4.16.350(3) did not limit recovery only to injury suffered within the limitations period, and that the right to sue for injury from a “continuing course” of negligent treatment still exists. *Caughell*, 124 Wn.2d at 231-32. But the *Caughell* court went on to explain that, because RCW 4.16.350(3) made the claim-accrual date for medical malpractice claims “the date of the alleged wrongful act,” a claim for injury from a “course” of negligent treatment remains viable *provided* that a negligent act or omission *during* the “course” of treatment occurred less than three years before the plaintiff

sued. *Caughell*, 124 Wn.2d at 232.⁵ The court cited its decision in *Bixler v. Bowman*, 94 Wn.2d 146, 150, 614 P.2d 1290 (1980), where it had explained that:

[T]he 1971 statute substantially modified the continuing course of treatment rule formulated in *Samuelson* . . . Under *Samuelson*, the cause of action would not accrue until, when there was a continuous and substantially uninterrupted course of treatment for a particular illness, the treatment for the particular illness or condition had been terminated. The 1971 statute restricts the commencement of the action to within “three years from the date of the *alleged wrongful act*”. (Italics ours.) The concept of the termination of a “continuing course of treatment” has been succeeded by the designation of a “date of the alleged wrongful act”.

Bixler, 94 Wn.2d at 150. Thus, in *Bixler*, the court held that the plaintiff’s claim had properly been dismissed on summary judgment based on the three-year statute of limitations where the defendant allegedly had failed to diagnose breast cancer in January and April 1975, and the plaintiff sued in June 1978, less than three years after another doctor diagnosed her cancer in August 1975.⁶ The *Caughell* court offered *Bixler* as an example of how the continuing course of treatment rule works:

⁵ Or, since the enactment of RCW 7.70.110, as amended by *Laws of 1996, ch. 270 § 1*, less than three years before the plaintiff mailed a mediation request, and then within a year after doing so. *Cortez-Kloehn*, 172 Wn. App. at 171.

⁶ Moreover, in *Bixler* the Supreme Court reversed a court of appeals decision holding that a “continuing course” of treatment continues even after a last visit and as long as the physician-patient relationship has not been ended by physician or patient. *Bixler v. Bowman*, 24 Wn. App. 815, 818, 604 P.2d 188 (1979) (“when a doctor undertakes to treat a patient, the doctor has a duty to continue to . . . ‘devote his best attention to the case until either medical attention is no longer needed, he is discharged by the patient, or he

We held in *Bixler* that the event which triggers the statute of limitations had changed from the *termination* of a course of treatment, whether or not negligence occurred on that date, to the *last* negligent act committed by the defendant. Under the modified continuing-course-of-treatment rule, claimants must allege that the last negligent act, not simply the end of treatment itself, occurred within 3 years of filing suit.

Caughell, 124 Wn.2d at 229. Thus, negligence must have occurred on the date in question in order for the “termination” of a course of treatment to constitute the claim-accrual date. To the extent *Samuelson* would have enabled Mr. Kim to use the date of his last visit to Dr. Lee as the “termination” *and* claim-accrual date for purposes of “continuing course of treatment” analysis, *Samuelson* is no longer good law.

2. Under the “continuing course” rule as explained and applied in *Caughell*, *Webb*, and *Unruh* in light of RCW 4.16.350(3), the accrual date for Mr. Kim’s claims was not later than March 15, 2007, such that his March 18, 2010 mediation request was mailed too late to toll the limitations period.

a. *Caughell*.

Mr. Kim relies on *Caughell* because the court in that case held the plaintiff’s claim timely under the continuing course rule. But in *Caughell* the reason the claim was held not time-barred was because the plaintiff alleged malpractice in writing prescriptions and failing to monitor for side-effects, and the court decided that the “course” of treatment had continued

has given the patient reasonable notice of his intention to cease to treat the patient . . .”(quoting *Gray v. Davidson*, 15 Wn.2d 257, 266-67, 130 P.2d 341 (1942))).

past the date of her last visit and until the end of the period covered by the last prescription. *Caughell* does not stand for the proposition that a last visit to the defendant health care provider, no matter for what purpose it occurs and no matter what the provider does or does not do at it, makes the last visit date part of a “continuing course” of treatment for statute of limitations purposes. Mr. Kim is mistaken when he relies on *Caughell* for what amounts to that very proposition.

The proposition for which *Caughell* clearly *does* stand, because the court took pains to spell it out, is that

The 1971 statute restricts the commencement for the action to within “three years from the date of the *alleged wrongful act*”. (Italics ours). The concept of the termination of a “continuing course of treatment” has been succeeded by the designation of a “date of the alleged wrongful act”.

Caughell, 124 Wn.2d at 229 (quoting *Bixler*, 94 Wn.2d at 150).⁷ Thus, where allegedly negligent and injury-causing treatment is followed by non-negligent care from the same provider, the claim-accrual date for statute of limitations purposes is *not* the date of the later non-negligent care. As the *Caughell* court put it, under the “continuing course” rule after the enactment of RCW 4.16.350(3):

⁷ In 1976, the Legislature modified the trigger date slightly, adding “or omission” after “act” and linking act or omission to injury. *Laws of 1975-76, 2d ex. Sess., ch. 56 § 1*. RCW 4.16.350(3) now requires suit to be filed “within three years from the act or omission alleged to have caused the injury or condition.” As the *Unruh* decision discussed below reflects, “course of treatment” analysis remains unchanged since *Bixler* and *Caughell*.

A plaintiff may not simply allege a negligent act followed by nonnegligent treatment. The malpractice claimant must prove that the subsequent care was negligent in its own right.

Caughell, 124 Wn.2d at 234. Mr. Kim did not meet that requirement.

Quoting *Caughell*, 124 Wn.2d at 226, Mr. Kim makes a straw man argument at page 14 of his brief when he asserts that he “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 [emphasis Mr. Kim’s].” Dr. Lee has never suggested that Mr. Kim bore any such burden. What Mr. Kim *did* have to prove, according to *Bixler* and *Caughell*, was that he was injured by a course of treatment that was provided negligently *at least partly during the three-year period before March 18, 2010*.

Mr. Kim did not allege in his complaint – nor did he offer any evidence to support a finding of – negligence related to his March 29, 2007, prophylaxis visit. What he alleged was negligent tooth restoration work in the upper left area of his mouth. CP 174-75 (¶¶ 2.3-2.12).⁸ Dr. Lee completed that work on February 26 as to Tooth #13 and on March 15

⁸ The complaint also included allegations that Dr. Lee had placed an implant, abutment, and crown in lower right area of Mr. Kim’s mouth, CP 174 (¶¶ 2.2-2.4), which is true, and that he later had pain on both sides of his mouth (¶ 2.5), but the complaint alleged “deficien[cies]” only with respect to the upper left area work. CP 175 (¶¶ 2.7-2.12). Even if the claims are not limited to the left side, the work Dr. Lee did in the lower right area of Mr. Kim’s mouth consisted of extracting Tooth #30 and placing an implant, abutment, and crown on Tooth #30, all of which work was completed by February 26, 2006. CP 146

as to Tooth #12. CP 146. No injury allegedly resulted from the March 29 prophylaxis visit, and Mr. Kim offered no evidence that injury resulted from a negligent act or omission by Dr. Lee at that visit.

b. Webb.

Mr. Kim's reliance on *Webb*, 121 Wn. App. at 336, *App. Br. at 15*, is likewise misplaced. In *Webb*, the plaintiff alleged that a psychologist had committed malpractice by implanting false memories of sexual abuse in his minor son over the course of several years of counseling, causing injury to the parent-child relationship. The plaintiff alleged that the negligence had occurred through the son's last counseling session, which occurred less than three years before the plaintiff filed suit. Citing *Caughell*, the court of appeals held that if counseling was indeed provided negligently through the son's last session, the plaintiff's claim was not time-barred. *Webb*, 121 Wn. App. at 343. Unlike the plaintiff in *Webb*, Mr. Kim did not allege (nor did he offer competent evidence of) any injury-causing negligence on Dr. Lee's part at his last visit on March 29, 2007. Mr. Kim's brief emphasizes the words "three years after the end of treatment" in quoting *Webb*. *App. Br. at 15*. But those words are in a sentence that begins "[w]hen negligence over an entire course of treatment is alleged, rather than discrete acts." *Webb*, 121 Wn. App. at 343. The key words are "negligence," "entire course," and "treatment"; the word

“end” does not have force independently of them. What Mr. Kim quotes from *Webb* does not change the *Bixler-Caughell* rule under which, if the course of *negligent* treatment – not just a series of visits to the defendant health care – ends more than three years before suit is filed, it does not matter when visits ended; the claim is time-barred.

c. *Unruh.*

Misplaced as well is Mr. Kim’s reliance on *Unruh*, 172 Wn.2d at 98. *App. Br. at 15-17*. In *Unruh*, the plaintiff began receiving orthodontic treatment in 1995, had her braces removed in August 1999, and saw the defendant for a final follow-up appointment in November 2000. The Supreme Court ruled that her claim of negligent orthodontic treatment was timely filed because RCW 4.16.350(3)’s three-year limitations period had been tolled by her minority, not because the November 2000 visit qualified as part of a “continuing course” of negligent treatment.⁹ Indeed, the court observed that, under *Caughell*, “[t]he three year limitations period commences at the time of the last act or omission that allegedly caused the injury,” and that “[a]lthough Unruh continued seeing [the defendant] until November 2000, the alleged negligence appears to have ceased in August 1999 with the removal of the braces.” Accordingly, the

⁹ Mr. Kim, born in 1945, CP 149, was an adult on his first visit to Dr. Lee in 2005.

court treated the limitations period as having been “triggered” in August 1999 and went on to address tolling. *Unruh*, 172 Wn.2d at 107.

Mr. Kim’s brief characterizes the holding in *Unruh* as being “that the removal of 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.” *App. Br. at 15*. But that is not the decision’s holding. The *Unruh* court did not characterize the removal of braces as non-negligent; it characterized *the later follow-up visit* as non-negligent. The court recognized the removal of braces as the end of the course of orthodontic treatment. In this case, Dr. Lee’s teeth-restoration work ended on or before March 15, 2007, when he cemented in the third of three permanent crowns, on Tooth #12. Thus, like the plaintiff in *Unruh*, Mr. Kim underwent a course of dental-repair treatment that allegedly was performed negligently and that allegedly caused injury, and he thereafter saw the defendant for a regular checkup, which he calls a “follow-up” on the repair work, CP 103(¶ 5), but during which he does not even allege that injury was inflicted. Even accepting Mr. Kim’s characterization of the March 29, 2007, visit as a “follow-up” visit related to his crown placements, *Unruh* teaches that even a visit for the purpose of following up on care that had been negligently provided over the course of several earlier visits does not make the “follow-up” visit part of that

“course” of negligent treatment for claim-accrual purposes. A “follow up” visit does not count unless the plaintiff alleges, and in response to a motion for summary judgment offers competent evidence to show, that care provided at the follow-up visit was negligent and caused injury. *Caughell*, 124 Wn.2d at 232 (“[i]n response to Defendants’ motion for summary judgment, Mrs. Caughell had to present some evidence that [a negligent] act or omission took place after January 30, 1988”).

D. It Was Not Dr. Lee’s Responsibility to Prove that Dental Care Provided at the March 29, 2007 Prophylaxis Appointment Was *Not* Part of a “Continuing Course of Negligent Treatment.”

Mr. Kim suggests, *App. Br. at 18-19*, that it was incumbent upon Dr. C-H Lee to present testimony that the care he provided at the March 29, 2007 “follow up” visit was *not* part of a continuing course of treatment. Such an argument should be ignored because it is unsupported by citation to authority. RAP 10.3(a)(6); *Lord v. Pierce County*, ___ Wn. App. ___, 2012 Wn. App LEXIS 382 *22 (Feb. 28, 2012) (“we do not consider arguments unsupported by citation to relevant authority”). The suggestion also is without merit. No case law exists to support it and, as the non-moving party, Mr. Kim was not entitled to base his opposition to summary judgment on mere allegations; he had to, by affidavit or declaration based on personal knowledge, “set forth specific facts showing that there was a genuine issue for trial.” CR 56(e). Dr. Lee’s motion

explained, based on the dental records, why Mr. Kim's claim was time-barred. That obligated Mr. Kim to offer evidence that care provided by Dr. C-H Lee *specifically on March 29, 2007* was negligent and caused injury. CR 56(c); *Caughell*, 124 Wn.2d at 232. Mr. Kim did not qualify himself to address standards of dental care or medical causation, and did not identify any injury-causing negligence. Statements he and his lawyer attributed to Dr. Kenny Lee (CP 96, 106) were hearsay and unsworn, and thus were inadmissible to prove any proposition advanced by Mr. Kim. ER 802; CR 56(e). They also failed to specify identify any negligent, injury-causing care *on March 29, 2007*, as required by CR 56(c).

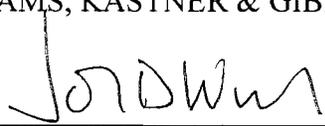
IV. CONCLUSION

For the foregoing reasons, Mr. Kim's complaint was time-barred and was correctly dismissed. This Court should affirm.

RESPECTFULLY SUBMITTED this 28th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 28th day of March, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

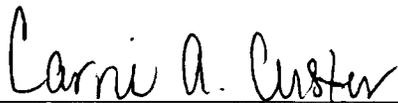
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Carrie A. Custer, Legal Assistant