

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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|---------------------------------------|----------------------------------|
| REGIS J. COSTELLO, individually and) | No. 67840-0-1 |
| as personal representative for the) |) |
| Estate of Maurice J. Costello,) | DIVISION ONE |
|) |) |
| Appellant,) |) |
|) |) |
| v.) |) |
|) | UNPUBLISHED OPINION |
| UNIVERSITY OF WASHINGTON) |) |
| MEDICAL CENTER; TERESA) |) |
| BRETNALL, M.D.; MELISSA) |) |
| HAGMAN, M.D.; CHRISTINE) |) |
| SCHLENKER, M.D.; and JANE DOE,) |) |
|) |) |
| <u>Respondents.</u>) | FILED: <u>September 24, 2012</u> |

Spearman, A.C.J. — In this medical negligence action, Regis Costello argues the statute of limitation was tolled by the University of Washington’s alleged fraudulent concealment of an injury to his father during surgery, and that the trial court therefore erroneously granted summary judgment. Because the record shows Costello knew of the alleged concealment more than three years before he filed suit, we reject his argument. We likewise reject Costello’s arguments that the limitation period was tolled under the “foreign body” exception to RCW 4.16.350(3) and under RCW 7.70.110 by

his request for mediation. Affirmed.

FACTS

In June 2007, Maurice Costello was diagnosed with squamous cell carcinoma and recovering from hip surgery. On June 4, 2007, he experienced shortness of breath and was admitted to the University of Washington Medical Center (UWMC), possibly with pneumonia. While there, Regis Costello informed UWMC doctors that his father's nasal feeding tube often left him feeling hungry, and asked them to implant a feeding tube in his stomach. On June 12, 2007, UWMC doctors (hereinafter, UWMC and UWMC doctors are collectively referred to as UWMC) replaced Maurice's feeding tube.

Maurice was discharged from UWMC to the Kline Gallard Home on June 14, 2007. On July 17, 2007, Maurice was transferred from the Kline Gallard Home to the Ansara Family Home.

Six weeks after his treatment at UWMC, Maurice was admitted to Overlake Hospital Medical Center (Overlake) with diarrhea symptoms. On August 11, 2007, Overlake physicians informed Regis that the feeding tube inserted by UWMC had punctured and was located in his father's colon, rather than his stomach. Doctors at Overlake performed corrective surgery and placed a new feeding tube in Maurice's stomach. Maurice died on January 24, 2008. His death certificate lists as the causes of death metastatic cancer, C. difficile diarrhea, malnutrition, and decubitus ulcer.

On August 11, 2010, Regis filed suit against UWMC as well as other defendants,

including Overlake, Ansara, Regence BlueShield, and Department of Social and Health Services (DSHS). Regis moved to voluntarily dismiss his suit, however, after all defendants moved for summary judgment. The court granted Regis's motion and dismissed the case without prejudice on February 18, 2011.

On April 27, 2011, Regis filed this lawsuit, alleging two causes of action against UWMC: (1) medical negligence, and (2) wrongful death. UWMC moved for summary judgment, arguing that the statute of limitations had expired. Regis sought a continuance to do additional discovery. On September 23, 2011, the trial court denied the motion for a continuance, and granted summary judgment. Regis appeals.

DISCUSSION

Regis Costello first argues the statute of limitation for his medical negligence claim was tolled by intentional concealment on the part of UWMC. The statute of limitations for medical negligence claims is either three years, or one year after discovery of the negligence, whichever is later. RCW 4.16.350(3).¹ This statute of limitation is tolled, however, in cases of intentional concealment of the negligence:

¹ RCW 4.16.350 provides:

An action for damages for injury occurring as a result of health care

. . . .

(3) [B]ased upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later . . .

PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

RCW 4.16.350(3).² Here, Regis alleges UWMC intentionally concealed that UWMC surgeons punctured his father's colon while implanting the feeding tube by falsely claiming the tube naturally "migrated" from the stomach to the colon. . . . ("the term 'migration' was constructed by UWMC with careless use to purposely create confusion into the actual 'true facts' that the feeding [tube] was punctured through the colon . . .").
See Appellant's Opening Brief at 33

But even assuming this is true, we reject Regis's argument. The statute of limitation is tolled by fraudulent concealment only "until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment[.]" RCW 4.16.350(3); see also, Giraud v. Quincy Farm and Chemical, 102 Wn. App. 443, 455, 6 P.3d 104 (2000) ("Fraudulent concealment cannot exist if a plaintiff has knowledge of the evidence of an alleged defect") (citing Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 918-19 (Minn.1990)). Here, the record shows Regis knew of

² Regis does not appear to argue the statute of limitation for the wrongful death claim was tolled by concealment. To the extent he does, we reject the argument because the limitation period begins to run in a wrongful death claim simply at the time of death. Atchison v. Great Western Malting Co., 161 Wn.2d 372, 378, 166 P.3d 662 (2007). The statute of limitations for a wrongful death action in Washington is three years, RCW 4.16.080(2); Atchison, 161 Wn.2d at 377, and here, Regis filed suit on April 27, 2011, more than three years after his father died on January 24, 2008.

the alleged concealment four and a half years before he filed suit. Specifically, in a letter to the Department of Social and Health Services, Regis described how a doctor at Overlake Hospital told him about the punctured colon on August 11, 2007:

Within a week of my father arriving at Ansara Family Home, my father was rushed to Overlake Hospital (July 25, 2007) with severe illness and C-diff infection. On August 11, 2007, Dr. Sang Kim revealed that the feeding tube had not been inserted into my father's stomach but in error had instead punctured and displaced into his colon. Dr. Kim commented he had never seen something so severe.

(Emphasis added).

Thus, even assuming UWMC intentionally concealed the punctured colon, Regis discovered the concealment by August 11, 2007 at the latest, and the limitation period for his claim thus expired either one year from that date, or three years from the alleged wrongful act, whichever was later. Here, the later date was June 12, 2010, three years after the surgery to implant the feeding tube. Given Regis did not file suit until April 27, 2011, the statute of limitation expired and the trial court did not err in dismissing the case.

Additionally, Regis argues throughout his briefing that UWMC concealed medical records. But even assuming the truth of this claim, as is described above, the record here shows Regis knew about the alleged concealment of the punctured colon four and a half years before he filed suit. As such, any undisclosed or untimely disclosed medical records shed no light upon when Regis knew about the punctured colon, and we reject this argument.

Regis also argues the statute of limitation was tolled under the “foreign body” provision of RCW 4.16.350(3), which reads:

PROVIDED, That the time for commencement of an action is tolled upon ... the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge ... of the presence of the foreign body

Regis contends the presence of the feeding tube in his father’s colon triggered this tolling clause. We disagree.

Regis cites only one case on this issue, Ruth v. Dight, 75 Wn.2d 660, 453 P.2d 631 (1969) (superseded by statute, RCW 4.16.350). But in Ruth, the triggering event was a sponge inadvertently left in the plaintiff’s abdomen during surgery, and the plaintiff did not discover the cause of her recurring pain until she underwent exploratory surgery 22 years later. Ruth, 75 Wn.2d at 662-63. Here, by contrast, the foreign object was a feeding tube that, as Regis concedes, was intended to have therapeutic use.³ Under RCW 4.16.350(3), the statute of limitation is tolled only by the presence of foreign objects “not intended to have a therapeutic or diagnostic purpose or effect[.]” (Emphasis added). Additionally, the statute is tolled only “until the date the patient or the patient's representative has actual knowledge ... of the presence of the foreign body[.]” Id. Again, as is described above, Regis knew the feeding tube had punctured his father’s colon as of August 11, 2007, more than three years before he filed this lawsuit.

³ Regis acknowledges the feeding tube was “intended to improve the nutritional benefits” for his father.

Regis also argues the statute of limitation was tolled under RCW 7.70.110 by his attempt to request mediation. In general, a request for mediation tolls the statute of limitations in a medical malpractice action for one year:

The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

RCW 7.70.110. This argument, however, was not raised below. We do not consider for the first time on appeal an issue not argued to the trial court. RAP 9.12; Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008). Under RAP 9.12, we will consider “only evidence and issues called to the attention of the trial court” in an appeal of an order on summary judgment. UWMC notes that had this issue been raised in response to summary judgment, it would have challenged the request for mediation as improper, because Regis sent the letter to Attorney General Rob McKenna, rather than to the attorneys representing the defendants. Because this issue was not raised below, we decline to consider it.

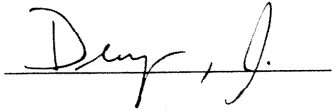
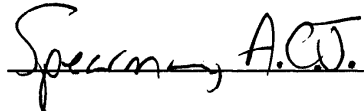
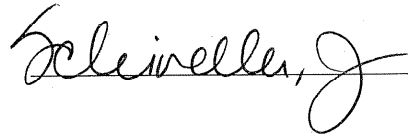
Moreover, even if we were to consider the issue, we would reject it. Under Cortez-Kloehn v. Morrison, 162 Wn. App. 166, 252 P.3d 909, review denied, 173 Wn.2d 1002, 268 P.3d 941 (2011), a request for mediation made after the limitations period has already expired cannot toll the statute. “The three year period can be extended by this provision, but it will not revive a period that has already expired because there would be nothing to toll.” Cortez-Kloehn, 162 Wn. App. at 171. Here,

No. 67840-0-1/8

Regis requested mediation in a July 7, 2010 letter. The limitation period had expired, however, on June 12, 2010, three years after the alleged wrongful act.

In sum, the trial court did not err in granting summary judgment dismissal of the claims asserted herein. Affirmed.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dery, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Sperry, A.W.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Schweitzer, J.", written over a horizontal line.