102062-7

**IN THE COURT OF APPEALS DIVISION I**

**IN AND FOR THE STATE OF WASHINGTON**

**NO. 82349-3-I**

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TERRY FOSTER, APPELLANT/PETITIONER

v

UNITY CARE, et al. , RESPONDENTS

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# PETITION FOR REVIEW TO WASHINGTON SUPREME COURT

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## I Identity of Petitioner*:*

Plaintiff Terry Foster

## II Citation to Court of Appeals Decision

Foster v. Unity Care, et al COA Division I No. 82349-3-I Unpublished Opinion 3-27-23;

Order Denying Motion for Reconsideration (No Discussion or Analysis provided) dated 5-3-23

## III ISSUES PRESENTED FOR REVIEW

**No. 1 The court erred in ruling the doctrine of corporate negligence does not apply to non-hospitals.**

**No. 2 The court erred in ruling that Dr. Carlsen had no duty/liability to supervise the PA here because he was not listed on the DOH form as a supervisor (9-11-21 oral ruling (ROP 9-11-20 at 66 L 2-11) and erred in not reinstating the two other doctors, Drs Pettit and O'Keefe, who were the registered DOH supervisors of PA Taylor, though this was discovered by Drs' counsel AFTER the**

**stipulated dismissal based on his representation that they had nothing to do with PA Taylor's treatment.**

**No. 3 The court erred in dismissing PA Taylor from the case because of the statute of limitations NOT tolling one additional year under RCW 7.70.110 due to her not being specifically named ,but described as " the PA" in the tolling mediation demand, naming only her employer PLLC.**

## IV STATEMENT OF THE CASE

Plaintiff Terry Foster ( hereinafter " Foster") saw his GP for a lump on his penis. He was referred to Bellingham Urology Specialists, PLLC (hereinafter BUS) to determine what the problem was. BUS was formed 11-17-05 and in 2014 its governors were Dr Casey O'Keefe, Dr. John Pettit, Dr. Soren Carlsen and manager Lonni Dodd and they had an employee

physician assistant, PA Denise Taylor, (hereinafter "PA Taylor" or "Taylor").

On 1-14-14, Foster met with Taylor, who diagnosed the lump as Peyronie's disease and assured him it was not cancer and told him that they would see him next in about six months. She failed to set a specific appointment date. BUS is a small practice of three doctor-members of the PLLC and all three trained, supervised, and advised the PA. None of the doctors saw Foster, reviewed any chart notes, or were called by, or gave advice- instruction , to Taylor on 1-14-14 or ever thereafter. None ever reviewed the chart notes until 8-5-14 or later. Taylor left BUS 4-14. Foster was next seen by Dr. Carlsen in 8-5-14. Ultimately, the lump on the penis was discovered to be cancer, but by that time it was too late to save the penis, which was removed after his urethra was rerouted to exit below his scrotum.

**Plaintiff's experts support that Taylor is liable for medical malpractice and her supervising doctors and BUS**

**are liable for failure to supervise**. (CP1334-1338, CP1052-1062).

Doctors are liable for the medical practice of their PA and PAs are individually liable for their negligence. RCW 18.71A.050. Additionally, Drs O'Keefe and Pettit were formally named the supervisors of Taylor on the official Department of Health (DOH) document that allows her to be licensed and practice medicine (CP573-603 Exhibit B Delegation Agreement of Taylor) , **but she was actually, and by agreement of the member-doctors, supervised by all three doctors.**

Foster sued BUS, its doctor-members, its PLLC manager Dodd, PA Taylor, et al. He could not find an attorney prior to the three-year statute of limitations, but before it ran, it was tolled by the one-year extension under RCW 7.70.110 because he made a demand for mediation addressed to BUS.

The parties agreed that the one-year extension applied to BUS, but the trial court heard a motion for summary judgment

to exclude any party other than BUS and the court ruled on 6-1-18 (CP31-34) that everyone else was dismissed because they not specifically named in the mediation demand, except that the court kept in the suit Dr. Carlsen, PLLC member and provider for Foster's care 8-5-14 and later. Plaintiff moved to add these dismissed parties back into the case by motions in 9-2020, denied by the court.

**On 1-8-21, The trial court filed the Order Directing Entry of Final Judgment and Certifying for Interim Appeal of the Court's December 17, 2020 Order on Motion for Reconsideration (CP1453-1456). The court certified the issues to the court of appeals:**

> **1. The doctrine of corporate negligence does not apply, under the facts of this case;**
>
> **2. Bellingham Urology Specialists (BUS), as the entity employing Taylor, had a duty to supervise Ms. Taylor's work. Plaintiff may proceed against BUS on his claim that BUS breached that duty and proximately caused damage to Mr. Foster;**

**3. Plaintiff's claim against Dr. Carlsen as an individual, alleging the breach of duty to supervise Ms. Taylor, is dismissed. The plaintiff's motion for a further reconsideration of this issue [filed 12-11-20,for reconsideration of the court's oral ruling at the hearing on 11-23-20] is denied.**

**4. The Plaintiff's failure to supervise claim, against BUS, is separate and apart from the claim relating to the negligence of Taylor, such that the supervisory claim does not depend on a finding that Ms. Taylor was negligent in her care of Mr. Foster;**

**The court of appeals ruled against 1 and 3 and declined review of 2 and 4. Petitioner herein seeks reversal of Rulings 1 and 3 and seeks the reinstatement into the case**

**of PA Taylor and DOH named supervisors, Drs Pettit and O'Keefe.**

## V ARGUMENT

Per RAP 13.4 (b) Considerations Governing Acceptance of Review. review should be accepted by the Supreme Court here because:

(1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, as here the court of appeals did not follow the reasoning or policy for expanding the corporate negligence doctrine as already adopted by this court,

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved, as here the exclusion DOH registered supervisors under false or unknown pretenses and a PA identified in the tolling statute granting rights for bringing suit when mediation is demanded, and per RAP 2.3 (b) Considerations Governing Acceptance of Review "(1) The superior court has

committed an obvious error which would render further proceedings useless", as here a trial after the pending appeal is decided without the discretionary review for parties and issues included in the trial, undisputedly renders the trial useless because it will certainly be appealed by the Plaintiff at the end of the trial. and

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court, as explained in (3) above and in a case involving medical negligence affecting all citizens.

**A) THIS COURT SHOULD EXTEND THE CORPORATE NEGLIGENCE DOCTRINE IN MEDICAL MALPRACTICE TO ALL CORPORATE ENTITIES MEDICAL PROVIDERS AND NOT JUST HOSPITALS**

WSAJ's Medical Negligence Deskbook 2nd Edition Edited by Elizabeth Calora and Tyler Goldberg-Hoss (2021)

"What sets corporate negligence apart from medical negligence is the entity's independent duty to exercise reasonable care." (p100)

"Washington first expressly recognized the corporate negligence doctrine regarding medical negligence cases in 1984 with Pedroza v. Bryant, 101 Wn.2d 226, 677 P.2d 166 (1984). (p102) ….(p103) By the time Washington addressed corporate negligence, at least thirteen states already permitted such claims for corporate negligence regarding physician competency and review of privileges. But to its credit, the Washington Supreme Court had implicitly adopted some essential principles of corporate negligence in two prior cases from 1967 and 1972, holding that (1) a hospital violated its duty when permitting an operation without the presence of a physician, and (2) a hospital can have a statutory duty to patients independent of a physician's duty.26 Nonetheless, with its explicit adoption in 1984, the Washington Supreme Court set forth its foundational public policy justifications for corporate negligence. The public policy underlying Washington's adoption [of the Corporate Negligence Doctrine] included the rationale that h**ealth care entities are the best-positioned organizations to create workable systems to review, monitor, and evaluate the quality of care being provided within their institutions.** By acknowledging

> institutions' unique position to prevent standard of care deviations, **the Court reasoned that the corporate negligence duties of entities would result in fewer instances of medical negligence by individual providers.**[27] (Pedroza, 100 Wn. 2d at 232)" (p103-104)
>
> " (p105) Cases have set forth **additional** duties:
>
> (p106) • "[D]uty to monitor the treatment of its patients and intervene if there is obvious negligence."44
>
> 44 Schoening v. Grays Harbor Comm. Hosp., 40 Wn. App. 331, 335, 698 P.2d 593 (1985).
>
> (p106) • "[A] continuing duty to review and delineate staff privileges so that incompetent staff physicians are not retained."45 This duty requires periodic monitoring and review of provider competency.46
>
> 45 Pedroza, 101 Wn.2d at 230.
> 46 Taylor v. Intuitive Surgical, Inc., 187 Wn.2d 743, 755-56, 389 P.3d 517 (2017).

All of these duties have been recognized by the court as duties for owing by a medical provider entity and these duties should not just be limited to hospitals, but should be

applicable to clinics, groups, out-patient treatment facilities, any non-hospital settings regardless of whether their corporate organization is Inc.,LLC, PLLC, etc. Medical negligence statutes apply to all of these medical providers and not just hospitals.

The court of appeals in the Opinion at 17 states that in *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991), the Washington Supreme Court "did not address whether the corporate negligence doctrine applies to an entity that is not a hospital" and the court of appeals did not find such a case and indeed distinguished Douglas by arguing that there the Supreme Court found the Corporate Negligence Doctrine to apply to a dental clinic because its parent entity was a hospital.

We ask the court to review and reject this narrow interpretation of Douglas because the focus in that case clearly was on a dental clinic and the Supreme Court did NOT deny the Corporate Negligence Doctrine applying to the clinic and

,indeed, DID specifically apply the corporate negligence doctrine to the dental clinic. .

The court of appeals notes at Opinion at mid-17 that the Supreme Court did find that the Corporate Negligence Doctrine applied against a clinic. The Supreme Court did not say that it was applying against the clinic because it was owned by a hospital. The court of appeals believes that the Supreme Court did not decide Corporate Negligence Doctrine applies to an entity that is not a hospital.

When the Washington Supreme Court has not ruled on an issue and has not given clear guidance about how it would rule, the Courts of Appeals may rule on the issue. Very few cases get to the Washington State Supreme Court and if courts of appeals could not decide cases without guidance from the Supreme Court, untold numbers of cases could not go through the court system and get justice.

Here, the court of appeals believes that the Supreme Court has not ruled upon the issue of whether corporate

entities other than hospitals can fall under the Corporate Negligence Doctrine.

If the court of appeals here does not decide this issue because of the belief that there is no precedent either way from the Washington State Supreme Court, then no case from Division One can make it to the Supreme Court. Respectfully, this court of appeals is shirking its duty to determine legal issues between the parties because of a lack of precedent. That is the circumstance under which the court of appeals is precisely to rule on the issues between the parties. It is not supposed to wait for a Supreme Court ruling on review from another division willing to review the issues between the parties despite a lack of precedent.

Because the court of appeals sees a lack of precedent, it did not want to review the issue at all here and the facts and reasons why the Corporate Negligence Doctrine should obviously apply to medical entities in a non-hospital corporate setting when there is no reason for the distinction and the

majority of doctors now in clinics escaping liability under the Corporate Negligence Doctrine adopted by this state for the reasons that equally apply to non-hospital medical entities providing treatments to patients.

**B) THIS COURT SHOULD HOLD THAT A DOCTOR ACTUALLY SUPERVISING PHYSICIAN ASSISTANTS SHOULD HAVE A DUTY TO PROPERLY SUPERVISE PAS EVEN IF THE DOCTOR IS NOT REGISTERED WITH THE DEPARTMENT OF HEALTH AS ONE OF SEVERAL SUPERVISORS**

The court of appeals ruled in Opinion at 19 that Issue No. 3 certified up to the court of appeals regarding the liability of Dr. Carlsen for supervising PA Taylor was properly dismissed by the trial court and affirmed.

The court of appeals ruled that Defendant Dr. Carlsen was properly dismissed for liability for the PA here because:

1) PA Taylor and Dr. Carlsen never entered into a DOH "delegation agreement" and therefore he could not be liable

for her supervision under the relevant RCWs and WACs in 2014 when the treatment occurred. This is simply incorrect under the law: a doctor supervising a PA is liable for the acts or omissions of a PA under his supervision regardless of whether or not he is registered as the supervisor with DOH. The court of appeals interpretation is simply not what the practice and suits show in reality. Post-2014 changes in the DOH WAC stating that doctors in a group practice (more than the two doctors registered with DOH) do not have to be individually identified with DOH does not mean that that was not the practice and law in 2014 and before. It has always been the law that supervising doctors are responsible for the PA because PAs can never act unless under the supervision of a doctor. This court should reconsider this mistake of law and practice and its later codifications does not exclude the prior law and practice.

2) Foster offers no proof that Dr. Carlsen supervised PA Taylor. This is absolutely untrue.

This was admitted in the deposition of PA Taylor and in Dr. Carlsen's answers to interrogatories where they both clearly stated that PA Taylor was trained, supervised, available for consulting, and assigned to work for all three of the doctors in the practice (and not just the two other doctors registered with DOH years before Dr. Carlsen arrived) and no patients were ever directly assigned any specific provider and all the doctors were doctors for all the patients and she worked multiple supervisors on multiple patients. PA Taylor's treatment of Foster was overseen by Dr. Carlsen and the other doctors and not just by those registered with the DOH. This evidence was provided throughout CPs and briefings.

The court should accept discretionary review at this time when reviewing all of these issues of liable parties and reinstate to the case Doctors O'Keefe and Pettit, whom the trial court in error denied reinstatement due to an earlier stipulation of counsel to dismiss them based on Defendants' counsel's representation that they had absolutely nothing to do with

Foster's appointment with the PA. Defendants' counsel was equally shocked to learn that these two doctors were the DOH supervisors of PA Taylor responsible for overseeing her work for that appointment. These issues are going up on appeal eventually and it would be far better to resolve it now then after the trial, necessitating a separate trial later against them. This is clear error and absolutely should be reversed now.

Respondent argues that even if these two doctors are DOH supervisors they cannot be liable because they never met with Foster on the day of the PA appointment and impliedly argue that they were not his doctor(s).

In ***Paetsch v. Spokane Dermatology Clinic,*** **182 Wash. 2d 842, 847 (2015), the Supreme Court held in a case exactly like ours that it was not error for the trial court to hold Dr. Wheschler, an alternative DOH supervisor of the subject PA, liable for that PAs acts or omission even though he never saw the patient.**

> Spokane Dermatology Clinic is a professional services company owned solely by Dr. William Werschler.
>
> …**While Dr. Werschler owned the clinic** and was listed as the plaintiff's doctor on her patient profile form, he was **not present** at the clinic while Paetsch was a patient of the clinic. **Dr. Werschler never saw Paetsch, never advised Rhoads on her treatment or on her condition, and never spoke with her.**

Like in the instant case case: "[Ft5] … Dr. Werschler was his [DOH] alternate supervisor…who knowingly used PA–C Rhoads to perform patient services.…", just as did Pettit and O'Keefe here.

The WA Supreme Court held that these issues, very much like those for the 3 doctor BUS members here, went to the jury to decide and it found the doctor not liable, but because Plaintiff was allowed the jury instructions that Dr. Werschler, and the PS were liable for PA Rhodes' error, Plaintiff could not claim trial court error. This is now before this court on appeal to decide in Washington law whether an owner of PLLC and the PLLC itself has a duty to intervene in

the care provided by a PA even if one is or is not the supervisor of the PA. Because our case has not gone to trial yet, this court will be deciding these issues.

**C) THIS COURT SHOULD PROCEED IN DECIDING UNDER DISCRETIONARY REVIEW FOSTER'S MOTIONS TO REINSTATE DOH SUPERVISORS DRS PETTIT AND O'KEEFE AND PA-C TAYLOR.**

The court of appeals in Opinion at 14 stated: "Foster also seeks discretionary review, asking us to reverse the trial court's (1) stipulation and order dismissing Dr. Pettit, Dr. O'Keefe (2) order denying his motion to vacate the stipulated order dismissing those defendants, (3) order denying his motion to vacate its order dismissing Taylor, and (4) order denying his motion to amend his complaint to add PNWUS as a party."

Here, a trial after the pending appeal is decided without the discretionary review for parties and issues that should be included in the trial, undisputedly renders the trial useless

because it will certainly be appealed by the Plaintiff, as the liability of the dismissed defendants – PA Taylor, Drs O'Keefe and Pettit, and PLLC Manager Dodd, and successor PLLCs BUG and PNUS – and the issues of liability of a DOH registered supervisor(s) for failure to supervise a PA, tolling of statute of limitations for personnel under the tolling statute for mediation, PA Taylor's individual liability as a health care provider, PLLC manager liability for practice procedures for supervision of PAs and for successor liability of PLLCs, will not have been decided by the trial if these issues and parties remain excluded by the trial court's rulings and the court of appeals denied review. If review is not accepted all of these issues will come before this court of appeals after the useless trial.

This court declined review claiming that the motions were untimely (footnote 13). However the court should reconsider this decision despite the technicalities of other RAP rules because:

1) **The court has the authority to enlarge** the for filing a motion for discretionary review, as Petitioner has sought here, to serve the ends of justice.

RAP 18.8 WAIVER OF RULES AND

EXTENSION AND REDUCTION OF TIME

> (a) Generally. The appellate **court** may, **on its own initiative** or on motion of a party, **waive or alter the provisions of any of these rules** and **enlarge** or shorten the **time within which an act must be done in a particular case** in order **to serve the ends of justice**, subject to the restrictions in sections (b) and (c).

The court has the authority to even waive the RAPs. See also, **RAP 1.2(c):**

> **Waiver. The appellate *court may waive or alter the provisions of <u>any</u> of these rules* in order *to serve the ends of justice*, subject to the restrictions in rule 18.8(b) and (c).**

**D) THIS COURT SHOULD REINSTATE PA TAYLOR WHO WAS DISMISSED FROM THE CASE, RULING THE STATUTE OF LIMITATIONS NOT TOLLING ONE ADDITIONAL YEAR UNDER RCW 7.70.110 DUE TO HER NOT BEING SPECIFICALLY NAMED, BUT DESCRIBED AS "THE PA" in THE TOLLING MEDIATION DEMAND LETTER, NAMING HER EMPLOYER, BUS, PLLC**

Foster sued BUS, its doctor-members, its PLLC manager, PA Taylor, et al. He could not find an attorney during the three-year statute of limitations, but before it ran, he tolled it by the one-year extension under RCW 7.70.110 because he finally made a demand for mediation. (CP542-552 **EX B)** Mediation Request and Proof of Service of Mediation Request.

RCW 7.70.110 provides that "[t]he 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."

The parties agreed that the one-year extension applied to BUS, but the trial court heard a motion for summary judgment

to exclude any party other than BUS. The trial court ruled on 6-1-18 (CP31-34) that everyone else was dismissed because they were not specifically named in the mediation demand, except that the court kept in the suit Dr. Carlsen, PLLC member and provider for Foster's care 8-5-14 and thereafter. Plaintiff moved to add back into the case these dismissed parties by motions in 9-2020 to vacate the 6-1-18 Stipulation and Order dismissing Defendants O'Keefe, Petite, Dodd (CP573-603) and motion to Vacate 9-7-18 Order granting motion for Partial Summary Judgment Dismissing Taylor (CP542-552), arguing:

1.The statute is to be liberally construed to not put penalizing requirements into the notice, but simply to provide notice of possible suit and give the sides additional opportunities to mediate prior to suit. It is not to be a trap to exclude defendants prior to suit.

2. It is ridiculous to have to name everyone involved in a mediation demand. Notice to the clinic is enough.

3. Notice on the PLLC entity is notice on the members.

The court should have granted the motions under CR 60(b)(11) because trial had not happened in this case yet, the discovery cutoff had not happened yet, PA Taylor was represented by an attorney in this matter, she was already deposed, she already participated in Interrogatory and RFP answers, and she had been fully informed regarding developments in this case, as she has been insured through her employer BUS.

The argument is a simple one. Though her name was not on the mediation request, she was unmistakably identified : she was the only PA at BUS on 1-14-14 and the text of the mediation request states, "**The physician assistant who examined me told me it was Peyronie's disease.**" (CP542-552 **EX A).**

Plaintiff named PA Taylor in the 1-10-18 Complaint filed herein. She is also a critical party to this cause of action and should be a defendant in the interest of justice, but the trial court dismissed her because it thought Taylor was just an agent

of doctors and not individually liable for her alone diagnosis and treatment of Foster.

In the 9-7-18 Hearing, this court dismissed PA Taylor :

> MR. REICHERT [**Defendants' Attorney**]:.... In terms of Denise Taylor in particular, what I heard from counsel particularly was the argument's even weaker **because she is an employee or some sort of agent and not, doesn't have any affiliation and hasn't for years with Bellingham Urology Specialists,** she hasn't been there for three or four years.
> THE COURT: **I think Ms. Taylor is pretty clearly out in her individual capacity.**
> 9/7/18 RoPat20L7-20.

This error is clear: PAs are individually liable for their own negligence (**RCW 18.71A.050**:..The supervising physician and physician assistant shall *each* retain professional and personal responsibility for any act which constitutes the practice of medicine) and she should be part of this suit and to exclude her on statute of limitations for not giving her name but only her position is not what the legislature intended.

In *Unruh v. Cacchiotti, 172 Wn. 2d 98, 172 Wash. 2d 98,*

*(Wash. 2011)*, the Washington Supreme Court reviewed the "procedural informality" of RCW 7.70.110 and stated:

> Unlike its companion provision, former RCW 7.70.100, which outlined specific procedures for serving the 90–day notice of intent to sue, **RCW 7.70.110 does NOT contain detailed service procedures. It requires only that the request for mediation be "written" and be made in "good faith." RCW 7.70.110.** (emphasis added).

In finding that Plaintiff's service to Defendant's insurance representative was effective service under RCW 7.70.110, the *Unruh* court based its decision, in part, on the reasoning that "the defendant will receive notice that the plaintiff has requested mediation under RCW 7.70.110." *Unruh,* at 114-115.

**RCW 7.70.110 is NOT a statute of original service of a lawsuit, which generally is to be strictly construed and is very specific about service. RCW 7.70.110 is only about giving notice of a potential suit that might be filled because the doctor's lobby put in place this law for a**

**"cooling-period" and the opportunity of the hospitals and clinics and all their various employees involved to have mediation of a grievance before any lawsuits are filed impacting careers, need for lawyers, etc. This is not a service of process statute, and should not be strictly construed – consistent with the "procedural informality" (*Unruh* at 114) with which it was enacted by the legislature.**

A party bringing a mediation request under RCW 7.70.110 is in the very earliest stages of a medical claim and should not be responsible for identifying and notifying the many parties who gave them medical care. Often this is an extensive list which can include multiple persons and entities. At the stage of a mediation demand, there is no discovery for the prospective plaintiff to rely upon to find all possible parties. **The burden should fall on the medical companies and medical providers to pass along mediation requests under RCW 7.70.110 to their employees, private contractors, and anyone else involved.** They are in possession of the complete

medical records at this stage, and the potential plaintiff is not. It is absolutely unreasonable to expect a patient to track down all of the names and addresses of potential notifies of a mediation request, when the patient does not have access to any of that information but the employer does.

In this particular case when the lawsuit was filed it was extremely difficult to locate Taylor because nothing indicated she was in Bellingham after 2014 and the only likely Taylor was in Eastern Washington and was not responsive. Here, the patient Foster, did not know she had left BUS only three months after treating him and went to parts unknown.

Under RCW 23.95.455 registered agents have a duty "[t]o forward to the represented entity at the address most recently supplied to the agent by the entity any process, notice, or demand pertaining to the entity which is served on or received by the agent." There is no question that BUS received notice through its registered agent and *Unruh* stands for notice on an agent is good notice on the entity. In this capacity, the

registered agent is actually acting as an agent for the particular medical providers involved in treating the patient. They cannot shirk their duty to be open to mediation by a good-faith requester, requiring them to notify the involved parties within its organization to deal with this issue in good faith, as well.

This reading of the statute is consistent with the law that provides that plaintiffs who do not know the identity of all parties involved can name John Doe and Jane Doe in a complaint because parties are typically uncovered during the discovery process to add them later when they are sufficiently identified (CR10(a)(2) and CR15(c)). The Washington Supreme Court in *Powers v. W.B. Mobile Servs.*, *Inc.*, 182 Wn.2d 159, (2014), took this concept one step further, stating that **if you provide enough identity of the party without specifically naming them**, you do not have to prove a basis for "relating back":

> If a plaintiff is able to show that the plaintiff identified an unnamed defendant with reasonable particularity and tolled the statute of limitations by

> timely serving **at least one named defendant**, the statute of limitations will be tolled as to claims against such unnamed defendant. In that case, the plaintiff may amend its pleading under CR 10(a)(2) to substitute the actual name of the defendant in place of the placeholder for such defendant, such as " John Doe" or " ABC Corporation," **even after the expiration of the statute of limitations,** without needing to show that such amendment relates back to the date of the plaintiff's original pleading under CR 15(c).

**PA Taylor's dismissal because she was not specifically named in the mediation demand should be vacated.**

## IV CONCLUSION

**The court should grant review of all issues.**

I declare that this document contains 4,851 words per RAP 18.17.

Dated this 2nd day of June, 2023 at Seattle,WA .

Respectfully submitted,
/S/William C. Budigan

William C. Budigan, WSBA #13443
Attorney for Petitioner Terry Foster

**BUDIGAN LAW FIRM**

**June 02, 2023 - 4:59 PM**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 82349-3 |
| **Appellate Court Case Title:** | Unity Care Northwest, Respondent/Cr-Appellant v. Terry Foster, Appellant/Cr-Respondent |
| **Superior Court Case Number:** | 18-2-00072-2 |

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| TERRY FOSTER,<br><br>Appellant/Cross Respondent,<br><br>v.<br><br>BELLINGHAM UROLOGY SPECIALISTS, PLLC, a WA Professional Limited Liability Company, and SOREN CARLSEN,<br><br>Respondents/Cross Appellants,<br><br>UNITY CARE NORTHWEST, a WA Nonprofit Corporation, and DAN WHITE, LARRY THOMPSON, JENNIFER BRANCH, JON MARTIN, SUE RITTMUELLER, MICHAEL BATES, and REBECCA HALE, PAC; INTERFAITH COMMUNITY HEALTH CENTER, a WA Nonprofit Corporation, and JON MARTIN, DANIEL WHITTLE, SUSAN RITTMUELLER, and ELYA MOORE; MT. BAKER IMAGING, LLC, a WA Limited Liability Company, and its Members, NORTHWEST RADIOLOGISTS, INC., HEALTH VENTURES, and MATTHEW STUDLEY, MD; S. CASEY O' KEEFE, JOHN M. PETTIT, LONNI DODD, and DENISE M. TAYLOR, PAC; BELLINGHAM UROLOGY GROUP PLLC, a WA Professional Limited Liability Company, and JOHN PETTIT; JOHN and JANE DOES I-100; and all the above named parties' Husbands | No. 82349-3-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |

and Wives and their marital communities,

Defendants.

BOWMAN, J. — In this interlocutory appeal, Terry Foster assigns error to the trial court's orders dismissing his corporate negligence claim against Bellingham Urology Specialists PLLC (BUS) and his negligent supervision claim against BUS provider, Dr. Soren Carlsen. Because BUS is not a hospital and the doctrine of corporate negligence applies to only hospitals, we affirm the trial court's order dismissing that claim. And because Foster identifies no legal duty for Dr. Carlsen to supervise, we also affirm the trial court's order dismissing the negligent supervision claim. We remand for further proceedings.

FACTS

In 2005, doctors John Pettit and S. Casey O'Keefe formed BUS, providing professional urological and related health care services. In 2008, BUS hired certified physician assistant (PA-C) Denise Taylor. Taylor worked under a practice plan approved by the Department of Health (DOH) that designated Dr. Pettit as her supervising physician and Dr. O'Keefe as an alternate supervising physician. Dr. Pettit and Dr. O'Keefe trained Taylor in "all areas of their practice."

In 2009, BUS hired Dr. Carlsen, who became a member of the PLLC in 2011. In 2012, BUS also hired Dr. Kelly Casperson. All the BUS doctors made themselves available to consult with Taylor if she had questions. And the doctors often discussed Taylor's cases with her and "frequently" provided her with "hands-on, on-the-job training."

On September 27, 2013, Foster visited his primary care provider after discovering a lump in his penis. An ultrasound showed that Foster's lump was likely Peyronie's disease.[1] Foster's primary care provider referred him to BUS.

On January 14, 2014, Taylor evaluated Foster, which included a physical examination, reviewing his medical history and the ultrasound images, and questioning him on his urologic and sexual health. After Foster reported no concerns and Taylor found none, she concurred with the Peyronie's disease diagnosis and reassured Foster that his lump was benign. Taylor did not consult the other BUS doctors about Foster's case.

Taylor left BUS in April 2014. Four months later on August 5, Foster returned to BUS for a follow-up visit and saw Dr. Carlsen. Foster told Dr. Carlsen that the lump had become slightly larger and sometimes restricted his ability to urinate. Dr. Carlsen ordered a cystoscopy, which showed there was a "dense nodular stricture" narrowing Foster's urethra. Dr. Carlsen recommended a biopsy of the lump, telling Foster to follow up in one to three weeks to discuss his options, including surgery.

Foster returned to BUS on September 18, 2014 and told Dr. Carlsen that he was "unsure if the lump on his penis is still present." Foster said he had been treating the lump with cannabis oil and was experiencing no pain. But he explained that urination issues persisted, along with a "downward curvature [of his] erection." Dr. Carlsen "again explained [his] concern for the possibility of

[1] Foster's urologic expert Dr. J. Bruce Robertson described Peyronie's disease as the "development of scar tissue involving the erectile tissue of the penis, which is termed the co[r]pora cavernosa."

malignancy" and "strongly encouraged" a biopsy. At Foster's request, Dr. O'Keefe offered a second opinion. Dr. O'Keefe "concurred" with Dr. Carlsen's findings and recommendations but suggested that Foster also obtain an MRI.[2] Dr. Carlsen then referred Foster to University of Washington Medicine at Harborview Medical Center (UW Harborview) for "a [second] opinion outside [the BUS] clinic."

Dr. Bryan Voelzke evaluated Foster at UW Harborview on October 9, 2014. Dr. Voelzke explained there was a "small chance" the lump was cancerous and scheduled Foster for an MRI. The MRI of Foster's pelvis showed "no evidence" of abnormally enlarged lymph nodes "or concern for urethral carcinoma." But "given the aggressive nature of the scar tissue on his penis," Dr. Voelzke scheduled Foster for a perineal urethrostomy.[3] Dr. Voelzke would also perform a urethral biopsy during the surgery.

UW Harborview surgeons performed the perineal urethrostomy and transurethral biopsy on November 14, 2014. The biopsy showed "invasive carcinoma." A radiologist reinterpreted Foster's MRI and determined that the cancerous lump within Foster's urethra had "invaded" the surrounding tissue. As a result, Foster returned to UW Harborview on November 21, 2014 for a total penectomy—the surgical removal of his penis.

[2] Magnetic resonance imaging.

[3] Foster's expert urologist Dr. Dudley Danoff explained that a perineal urethrostomy relieves narrowing of the urethra by "re-routing . . . urine from [the] penis to a new exit under [the] scrotum."

Procedural History

In November 2014, Dr. Pettit left BUS and formed Bellingham Urology Group PLLC (BUG). Then, in February 2015, Dr. Carlsen, Dr. O'Keefe, and Dr. Casperson founded Pacific Northwest Urology Specialists LLC (PNWUS). The doctors had fully dissolved BUS by April 2015. PNWUS maintained BUS' patient files after the dissolution.

On January 14, 2017, Foster served only BUS with a request for mediation.[4] The request stated, in relevant part:

> I believe the care and treatment I received at your clinic was negligence, and that had I had proper treatment I would have had a better outcome.
>
> Pursuant to RCW 7.70.110 [tolling the statute of limitations for one year], I request mediation.

Almost a year later, on January 10, 2018, Foster sued more than 20 health care providers, including BUG, BUS, and former BUS employees Dr. Pettit, Dr. O'Keefe, Dr. Carlsen, PA-C Taylor, and administrator Lonni Dodd. Foster alleged medical malpractice under chapter 7.70 RCW, unprofessional conduct under "multiple violations" of RCW 18.130.180, and negligent treatment under RCW 18.130.180(4).

A. Stipulated Dismissals

In May 2018, the BUG and BUS defendants moved for summary judgment dismissal of Foster's claims as time barred. BUS acknowledged that Foster's mediation request tolled the statute of limitations as to his claims against the

[4] Foster mailed the request to a Seattle law firm.

PLLC, but it argued that the claims against the individual defendants were time barred because he did not serve them with the mediation request. BUS also argued the court should dismiss Dodd because she was an administrator, not a health care provider. BUG argued the court should dismiss the claims against it because it did not exist until November 25, 2014 and never treated Foster.

At a hearing on June 1, 2018, the parties agreed to dismiss BUG, Dr. Pettit, Dr. O'Keefe, and Dodd with prejudice, leaving only BUS, Dr. Carlsen, and Taylor as named defendants.[5] In exchange, BUS acknowledged vicarious liability for any negligence by Dr. Carlsen or Taylor. And they agreed that Foster's claim against BUS was not time barred. The trial court requested the parties provide supplemental briefing on whether Foster's mediation request tolled the statute of limitations as to Dr. Carlsen and Taylor.

Soon after, Dr. Carlsen and Taylor renewed their motion to dismiss, arguing again that Foster did not serve them with a mediation request under RCW 7.70.110, so his claims against them were time barred. On September 7, 2018, the trial court dismissed Foster's claims against Taylor with prejudice but deferred its ruling as to Dr. Carlsen.[6] The parties proceeded to discovery.

[5] The parties also agreed to dismiss with prejudice Dr. Matthew Studley; Mt. Baker Imaging LLC; Northwest Radiologists Inc.; Unity Care NW; Unity Care employees Dan White, Larry Thompson, Jennifer Branch, Jon Martin, Sue Rittmueller, Michael Bates, and Rebecca Hale; Unity Care subsidiary Interfaith Community Health Center; Interfaith employees Daniel Whittle and Elya Moore; and Health Ventures. These dismissed defendants are not parties to this appeal.

[6] It does not appear from the record that the court has issued a ruling on whether Foster's claims against Dr. Carlsen are time barred.

B. Motions to Vacate and Amend Complaint

Almost two years later in August and September 2020, Foster moved (1) for permission to amend his complaint to add PNWUS as a defendant, (2) to vacate the stipulated orders dismissing Dr. Pettit, Dr. O'Keefe, Dodd, and BUG, and (3) to vacate the court's order dismissing Taylor.[7] Foster argued that PNWUS and BUG were a "mere continuation" of BUS and that BUS fraudulently transferred assets to the corporations to avoid liability. He also claimed that he only recently learned through discovery that Dr. Pettit and Dr. O'Keefe had a duty to supervise Taylor under either RCW 18.100.070[8] or former RCW 18.71A.050 (1994).[9] And Foster renewed his argument that his mediation request tolled the statute of limitations on his claim against Taylor.

Following a hearing on September 1, 2020, the trial court denied Foster's motions. In a memorandum decision issued September 9, 2020, the court noted that Foster's theories about PNWUS and BUG were "speculative and [not] supported by the evidence." And it determined there was no evidence that the doctors formed either company with fraudulent intent. As to Dr. Pettit and Dr.

[7] Foster also moved to compel discovery.

[8] The relevant part of RCW 18.100.070 provides:

> Any director, officer, shareholder, agent, or employee of a corporation organized under this chapter shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or her or by any person under his or her direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered.

[9] Under former RCW 18.71A.050, "[t]he supervising physician and physician assistant shall retain professional and personal responsibility for any act which constitutes the practice of medicine as defined in RCW 18.71.011 when performed by the physician assistant."

O'Keefe, the court noted that vacating their stipulated dismissals would "prejudice both these former defendants . . . [and] vitiate the vicarious liability provision which was a material term of the stipulation." Finally, as to the claim against Taylor, the court noted that Foster's motion provided "the same information and argument" as his earlier motion "and is essentially a second Motion for reconsideration."

C. Summary Judgment

Around the same time, in August 2020, the parties cross moved for summary judgment on Foster's medical negligence claim against Dr. Carlsen. BUS and Dr. Carlsen argued that Foster lacked qualified medical expert testimony establishing the standard of care, breach, and causation for his claim. Foster asserted that Dr. Carlsen was liable for Taylor's actions as her supervisor.

The trial court heard argument on both summary judgment motions on September 11, 2020. In its oral ruling, the court denied Foster's motion. It then granted defendants' motion to dismiss Foster's "duty to supervise" claim because no evidence showed BUS or Dr. Carlsen had a duty to supervise Taylor. But the court refused to dismiss Foster's medical negligence claim against Dr. Carlsen, finding disputed issues of material fact remained "as to whether the delay in treatment between August 5[, 2014] and . . . when the penectomy was done . . . [was] below the standard of care."[10]

[10] The medical negligence claim against Dr. Carlsen is still pending in the trial court and is not the subject of this appeal.

Foster moved for reconsideration, arguing that registration of Dr. Pettit and Dr. O'Keefe as Taylor's supervisors on her DOH practice plan was only "pro forma," and, in practice, Dr. Carlsen also supervised Taylor. In response, BUS and Dr. Carlsen argued there was no evidence that Dr. Carlsen "had direct or indirect supervisory control" over Taylor. And, as to BUS, they argued that even if Foster's references to a "supervision" claim implied a corporate negligence action, he did not properly plead such a claim.[11] On October 12, 2020, the trial court granted Foster's motion for reconsideration, finding that there were "disputed issues of fact" as to Foster's claims that BUS and Dr. Carlsen breached a duty to supervise Taylor.

The next week, BUS and Dr. Carlsen moved for reconsideration and clarification of the October 12, 2020 order, arguing that a negligent supervision claim against them both is "redundant" because BUS already conceded vicarious liability for Dr. Carlsen's actions. At a hearing on November 23, 2020, the trial court granted BUS' motion in part, dismissing the negligent supervision claim against Dr. Carlsen. Foster then filed another motion for reconsideration.

On December 17, 2020, the trial court issued an "Order Granting in Part and Denying in Part Defendants' Motion for Clarification and Reconsideration of Order on Plaintiff's Motion for Reconsideration Re: Supervision," ruling:

> 1. The doctrine of corporate negligence does not apply, under the facts of this case;

[11] BUS and Dr. Carlsen noted, "Up until this most recent motion, Plaintiff made no indication to Defendants that he may be hinting at a claim for corporate negligence, and even here Plaintiff makes no specific reference to the doctrine."

2. Bellingham Urology Specialists (BUS), as the entity employing Denise Taylor, PA-C, had a duty to supervise Ms. Taylor's work. Plaintiff may proceed against BUS on his claim that BUS breached that duty and proximately caused damage to Mr. Foster.
3. Plaintiff's claim against Dr. Carlsen as an individual, alleging breach of a duty to supervise Ms. Taylor, is dismissed. The plaintiff's motion for a further reconsideration of this issue is denied.
4. The Plaintiff's failure to supervise claim, against BUS, is separate and apart from the claim relating to the negligence of Denise Taylor, PA-C such that the supervisory claim does not depend on a finding that Ms. Taylor was negligent in her care of Mr. Foster.

Foster then filed a "Motion for Court Findings, Express Direction, and Express Determination for Appeal to Court of Appeals" under RAP 2.2(d). Foster asked for review of the trial court's December 17, 2020 order dismissing his "claim against Defendant Dr. Carlsen for failure to properly supervise PA-C Denise Taylor." Foster argued the possibility that a direct appeal may result in a second trial warranted interlocutory review. BUS and Dr. Carlsen objected, arguing that CR 54(b) certification for interlocutory review was not appropriate. But they asked that "if the Court for whatever reason is inclined to grant Plaintiff's motion," it should "finalize the entire December 17th order for appeal." Foster agreed, stating, "I guess I wouldn't mind all four of those [rulings] going forward."

Following a hearing on January 6, 2021, the trial court granted Foster's motion, ruling:

> The issues addressed in the Court's order of December 17th are closely related to the issue of Dr. Carlsen's individual liability, if any, and I think that it is fair for both parties for all of those issues to be certified rather than for the Court to simply select the issue of Dr. Carlsen's personal alleged failure to supervise.

On January 8, 2021, the court entered an order "pursuant to CR 54(b) and RAP

2.2(d)," directing the entry of final judgment and certifying for appeal its December 17, 2020 order on reconsideration and clarification. And the court made written findings supporting its certification under CR 54(b).

Foster then filed a notice of appeal, designating the court's December 17, 2020 order on reconsideration and its January 8, 2021 order on certification. He also sought discretionary review of the trial court's following rulings:

> 6/1/18 Stipulation and Order Dismissing Defendants S. Casey O'Keefe, MD, John M. Pettit, MD, Lonni Dodd, Bellingham Urology Group, PLLC, with Prejudice and Without Costs and Fees
>
> 9/9/20 Order Denying Motion to Vacate to 6/1/18 Stipulation and Order Dismissing Defendants S. [C]asey O'Keefe, MD, John M. Pettit, MD, Lonni Dodd, Bellingham Urology Group, PLLC
>
> 9/9/20 Decision Regarding Motions to Amend Complaint, Compel Discovery, and Vacate Prior Orders
>
> 12/17/20 Order on Motion for Reconsideration (Regarding vacating dismissal of Dr. Pettit and [Dr.] O'Keefe).

BUS cross appeals, seeking review of only rulings 2 and 4 of the trial court's December 17, 2020 order.

## ANALYSIS

### Appealability

Both parties seek interlocutory review of several trial court rulings. They contend that the trial court's December 17, 2020 order on reconsideration amounts to a final judgment reviewable under RAP 2.2(d). And Foster asks for discretionary review of several additional rulings under RAP 2.3.

A. Final Judgments under RAP 2.2(d)

A court generally must resolve all claims for and against all parties before it enters a final judgment on any part of a case. Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now, 119 Wn. App. 665, 693, 82 P.3d 1199 (2004). But RAP 2.2(d) and its companion rule, CR 54(b), create an exception to allow interlocutory appeal in multiclaim and multiparty actions.

Under RAP 2.2(d), in a case with multiple parties or multiple claims for relief,

> an appeal may be taken from a final judgment that does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay.

Still, a party may appeal under RAP 2.2(d) only if the trial court issues a final order under CR 54(b) that expressly "direct[s] the entry of a final judgment as to one or more but fewer than all of the claims or parties" and contains an express determination supported by written findings that there is no just reason for delay. See Fluor Enters., Inc. v. Walter Constr., Ltd., 141 Wn. App. 761, 766-67, 172 P.3d 368 (2007).

While "[s]ome deference is given to the trial judge's opinion that the rule 54(b) requirements have been met, . . . a trial court's certification that a decision meets the requirements of CR 54(b) is not conclusive." Nelbro Packing Co. v. Baypack Fisheries, LLC, 101 Wn. App. 517, 523, 6 P.3d 22 (2000). Before accepting review under RAP 2.2(d), we must be satisfied that the trial court

properly reached a final judgment as to any of the claims or parties. Id.[12] A final judgment is "the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies." CR 54(a)(1); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 79 Wn. App. 221, 225, 901 P.2d 1060 (1995) ("A final judgment is a judgment that ends the litigation, leaving nothing for the court to do but execute the judgment."), aff'd, 130 Wn.2d 862, 929 P.2d 379 (1996).

Here, rulings 1 and 3 of the trial court's December 17, 2020 order stating that (1) "[t]he doctrine of corporate negligence does not apply, under the facts of this case," and (3) "Plaintiff's claim against Dr. Carlsen as an individual, alleging breach of a duty to supervise Ms. Taylor, is dismissed," amount to final judgments reviewable under RAP 2.2(b). These rulings are final determinations ending litigation over two of Foster's claims.

But rulings 2 and 4 of the trial court's order providing that (2) BUS "had a duty to supervise Ms. Taylor's work, [and] Plaintiff may proceed against BUS on his claim that BUS breached that duty and proximately caused damage to Mr. Foster," and (4) "Plaintiff's failure to supervise claim, against BUS, is separate and apart from the claim relating to the negligence of Denise Taylor," do not amount to final judgments reviewable under RAP 2.2(b). Orders leaving issues for trial are subject to only discretionary review. See Glass v. Stahl Specialty

[12] We also consider whether the trial court abused its discretion by determining that there was no just reason for delay. Nelbro Packing, 101 Wn. App. at 524-25. A court abuses its discretion if the decision was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Id. at 525. We give substantial deference to the trial court's judgment, and here, we cannot say the trial court's determination about unjust delay was manifestly unreasonable. Id.

Co., 97 Wn.2d 880, 883, 652 P.2d 948 (1982). As a result, we decline to address rulings 2 and 4.

B. Discretionary Review

Foster also seeks discretionary review, asking us to reverse the trial court's (1) stipulation and order dismissing Dr. Pettit, Dr. O'Keefe, Dodd, and BUG, (2) order denying his motion to vacate the stipulated order dismissing those defendants, (3) order denying his motion to vacate its order dismissing Taylor, and (4) order denying his motion to amend his complaint to add PNWUS as a party.

Under RAP 5.1(a), "[a] party seeking review of a trial court decision subject to discretionary review must file a notice of discretionary review . . . within the time provided by rule 5.2." RAP 5.2(b) says that a notice of discretionary review "must be filed in the trial court within . . . 30 days after the act of the trial court that the party filing the notice wants reviewed." And a party seeking discretionary review must "file in the appellate court a motion for discretionary review within 15 days after filing the notice for discretionary review." RAP 6.2(b).

Here, the trial court entered the stipulated dismissal on June 1, 2018 and its orders denying Foster's motions to vacate on September 9, 2020. Foster filed his notice of discretionary review in superior court on February 5, 2021, well beyond the 30 days allowed under RAP 5.2(b). And Foster filed no motion for

discretionary review in this court.[13] We decline to review Foster's additional assignments of error.

Review of Final Judgments

We review summary judgment decisions[14] de novo. Bavand v. OneWest Bank, FSB, 196 Wn. App. 813, 825, 385 P.3d 233 (2016). Summary judgment is appropriate if there are no genuine issues of material fact, entitling the moving party to judgment as a matter of law. CR 56(c); Cotton v. Kronenberg, 111 Wn. App. 258, 264, 44 P.3d 878 (2002). A moving party is entitled to judgment as a matter of law when the nonmoving party " 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " Miller v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001)[15] (quoting Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). When reviewing a summary judgment order, we engage in the same inquiry as the trial court and construe the facts in a light most favorable to the nonmoving party. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001).

[13] Foster moved for discretionary review of the four orders on March 10, 2023, two months after oral argument. And he added the trial court's September 7, 2018 order dismissing Taylor to the decisions on review. We reject the motion as untimely. RAP 5.2(b), 6.2(b).

[14] The trial court's December 17, 2020 order ultimately clarifies its September 11, 2020 oral ruling denying Foster's motion for partial summary judgment on the individual liability of Dr. Carlsen and granting in part BUS and Dr. Carlsen's motion for partial summary judgment to dismiss Foster's negligent supervision claims.

[15] Internal quotation marks omitted.

To establish negligence, a plaintiff must show (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). In every negligence action, "the threshold question is whether the defendant owes a duty of care to the injured plaintiff." Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). The existence of a legal duty is a question of law, while the scope of that duty is a question of fact. McKown v. Simon Prop. Grp., Inc., 182 Wn.2d 752, 762, 344 P.3d 661 (2015).

A. Corporate Negligence Claim

Foster argues the corporate negligence doctrine applies to BUS and imposes a duty on the PLLC to train its physician assistants and their supervisors "to prevent negligence," to oversee a physician assistant's practice of medicine, and to "adopt and enforce rules and policies for proper doctor supervision of PA[-C]s to prevent negligence." We disagree.

The corporate negligence doctrine imposes on a hospital "a nondelegable duty owed directly to [its] patient, regardless of the details of the doctor-hospital relationship." Pedroza v. Bryant, 101 Wn.2d 226, 229, 677 P.2d 166 (1984). Among other things, the doctrine imposes a duty on a hospital to maintain its premises, select its employees with reasonable care, and supervise its medical providers. Douglas v. Freeman, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991). Courts hold a hospital to the standard of care of an average, competent health care facility acting in the same circumstances. Ripley v. Lanzer, 152 Wn. App. 296, 324, 215 P.3d 1020 (2009). The Joint Commission on the accreditation of

hospitals generally defines the standard of care based on its own standards and the hospital's own bylaws. Id.; see also RCW 70.41.010 (requiring hospitals to set minimum standards for the maintenance and operation of their facilities).

Foster acknowledges that BUS is not a hospital. Still, citing Douglas, Foster argues that Washington courts have expanded the doctrine of corporate negligence to apply to professional health entities other than hospitals. In Douglas, the plaintiff sued both a dental resident of Providence Dental Clinic and the clinic's parent entity, "Sisters of Providence in Washington, d/b/a Providence Medical Center." 117 Wn.2d at 242, 245. Our Supreme Court found that sufficient evidence supported a corporate negligence verdict against the clinic—an entity of Providence Medical Center, a hospital. Id. at 252. The court did not address whether the corporate negligence doctrine applies to an entity that is not a hospital. Indeed, Foster cites no Washington case that applies the doctrine of corporate negligence to an entity other than a hospital. We presume that he could not find such authority. See Helmbreck v. McPhee, 15 Wn. App. 2d 41, 57, 476 P.3d 589 (2020).

The trial court did not err in dismissing Foster's corporate negligence claim at summary judgment.

B. Duty to Supervise Claim

Foster argues that the trial court erred by concluding Dr. Carlsen had no duty to supervise PA-C Taylor under the physician assistants act, chapter 18.71A

RCW.[16] We disagree.

Chapter 18.71A RCW governs the licensing of physician assistants. A physician assistant must apply to the medical quality assurance commission[17] for permission to be "employed or supervised by a physician or physician group." Former RCW 18.71A.040(2) (2013), repealed by LAWS OF 2020, ch. 80, § 60; former RCW 18.71A.010(2) (1994). The commission will license a physician assistant to practice medicine only under the supervision of a physician. Former RCW 18.71A.010(1). A physician assistant and her supervising physician must jointly submit a "delegation agreement," or practice plan, that "delineate[s] the manner and extent to which the physician assistant would practice and be supervised." Former RCW 18.71A.040(2). A physician assistant can practice only if the commission approves the delegation agreement "and only to the extent permitted by the commission." Former RCW 18.71A.030 (2013). And "[t]he supervising physician and physician assistant shall retain professional and personal responsibility for any act which constitutes the practice of medicine as defined in RCW 18.71.011 when performed by the physician assistant." Former RCW 18.71A.050.

[16] Foster did not plead negligent supervision but raised the theory during litigation. Throughout the record, the parties refer to Foster's claim as "negligent supervision." A common law cause of action for negligent supervision recognizes that "an employer may be held liable for acts beyond the scope of employment if it had prior knowledge of the dangerous tendencies of its employee." Thompson v. Everett Clinic, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). Foster does not allege that Taylor acted beyond the scope of employment, so we do not address common law negligent supervision. Foster argued below that both chapter 18.71A RCW and RCW 18.100.070 of the Professional Service Corporation Act gave rise to a duty to supervise. But at oral argument, Foster clarified that his claim relies on only the duty to supervise under chapter 18.71A RCW.

[17] Now known as the Washington Medical Commission.

Taylor executed a practice plan for employment at BUS on December 15, 2008. DOH approved the plan on December 17, 2008. Taylor's practice plan identifies "John Pettit, M.D." as her supervising physician and "S. Casey O'Keefe, M.D." as her alternate supervising physician. Still, Foster argues that Dr. Carlsen "is liable as undisputed supervisor of Taylor whether he is on the DOH form or not." According to Foster, the evidence shows that Dr. Carlsen supervised Taylor in practice, and former WAC 246-918-055(2)(a) (2015) "allows BUS to appoint alternate supervising doctors without having to identify them on the DOH form."

Former WAC 246-918-055(2)(a) requires that a practice plan identify "[t]he names and Washington state license numbers of the sponsoring physician and alternate physician, if any. In the case of a group practice, the alternate physicians do not need to be individually identified." But DOH did not codify former WAC 246-918-055(2)(a) until 2015, long after Foster first saw Taylor in January 2014. Wash. St. Reg. (WSR) 15-04-122 (effective March 6, 2015). The WAC in effect then, former WAC 246-918-080 (2001), said nothing about designating a supervising physician within a group practice. But it required that if a physician assistant "desires to become associated with another physician, he or she must submit a new practice plan." Former WAC 246-918-080(3). No evidence shows that Taylor submitted a new practice plan designating Dr. Carlsen as her supervisor.

And even if chapter 18.71A RCW and the WACs allowed for Dr. Carlsen to assume supervision of Taylor, the facts do not support that he did. Foster

argues that Dr. Carlsen supervised Taylor by making himself available to consult with her and periodically training her. But Foster offers no authority that consulting and training amount to supervising. And nothing in the record suggests that Dr. Carlsen assumed responsibility for Taylor's day-to-day activities.

We affirm the trial court's dismissal of Foster's corporate negligence claim against BUS and his duty to supervise claim against Dr. Carlsen and remand for further proceedings.

Brennan, J.

WE CONCUR:

Díaz, J.

Coburn, J.