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No. 324869

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife,

Plaintiffs-Appellants,

vs.

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL; and ALLEN D. NOBLE, PA-C and JANE DOES NOBLE, husband and wife and the marital community composed thereof; and JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community composed thereof; and PROVIDENCE HEALTH SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALTIES, a Washington corporation,

Defendants-Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

On April 25, 2010, Lori Sweeney (Sweeney) and her husband, Jerold, stopped at a service station in Ritzville, Washington, to fill up their car with gas. After getting out of the car, Sweeney tripped over a hose and fell, injuring her shoulder. Her husband took her to the nearest hospital, where she was examined by a certified physician assistant named Allen Noble (Noble). CP 102, 181-82.

Noble determined that Sweeney's shoulder was dislocated and that there was a single fracture of her upper arm bone (humerus), based on x-rays taken at the hospital. CP 102 (chart note), 105 (x-ray report). After consulting with an on-call orthopedic surgeon in Spokane by telephone, Noble attempted to manipulate Sweeney's shoulder back into position, a procedure described as a closed (i.e., non-surgical) reduction. CP 102. The first time he tried to "reduce" the shoulder, he was unsuccessful. *Id.* The second time, he applied greater force and a different movement, but was still unsuccessful. *Id.* The third time, he heard or felt a "pop" as Sweeney's shoulder moved. CP 91-92, 102.

X-rays taken after Noble's third attempt to reduce Sweeney's shoulder revealed that, in addition to the original dislocation and fracture, the top of her humerus (the head) was broken off, the head of the humerus

had a "severely comminuted fracture," and the shoulder joint and humeral head "were completely fractured and destroyed." CP 280-81.[1]

Sweeney was then transported to a hospital in Spokane where she received further treatment from James Dunlap (Dunlap), the on-call orthopedist who had spoken with Noble on the telephone. Dunlap performed a type of shoulder replacement surgery on April 28, 2010, replacing the humeral head with an artificial joint and reconstructing the fractured bone around the joint. He performed a follow up surgery on April 4, 2012, to repair Sweeney's rotator cuff, the group of muscles and tendons that stabilizes the shoulder joint.

On April 23, 2013, Sweeney and her husband filed a medical negligence lawsuit against Noble and his employer, Adams County Public Hospital District No. 2, alleging that it is a violation of the standard of care to attempt a closed reduction of a dislocation-fracture of the severity shown on Sweeney's pre-reduction x-rays, among other things.[2] Sweeney did not file suit against Dunlap because he said he had not seen her pre-reduction x-rays, and Sweeney was not otherwise aware of any problems with the surgeries he performed at that time.

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[1] The definition of "comminute" is "to reduce to minute particles" or "pulverize." *Merriam-Webster Online, s.v.* "comminute" (available at www.m-w.com; viewed Oct. 2, 2014). A comminuted fracture is one "in which a bone is broken, splintered, or crushed into a number of pieces." *MedicineNet.com, s.v.* "comminuted fracture" (available at www.medterms.com; viewed Oct. 2, 2014).

[2] References to Noble in this brief are intended to include the hospital.

After filing suit, on October 23, 2013, Sweeney received an x-ray "audit trail" document from Noble's lawyer, which was not previously available to her, showing that, contrary to his earlier denial, Dunlap had, in fact, seen the pre-reduction x-rays before advising Noble to attempt a closed reduction of her shoulder. In his subsequent deposition, Dunlap confirmed his earlier denial, but he admitted seeing the x-rays after reviewing the audit trail document. CP 266-68.

In the meantime, on June 11, 2013—also after filing suit—Sweeney had to undergo another, more extensive shoulder replacement surgery, which revealed problems with the earlier surgeries performed by Dunlap. Sweeney amended her complaint to name Dunlap and his employer, Providence Health Services, as additional defendants in light of these facts.[3]

Both Noble and Dunlap filed motions for summary judgment, seeking dismissal of the amended complaint. Noble contended that Sweeney lacked evidence of breach of the standard of care causing her injuries, and Dunlap argued that Sweeney's complaint was barred by the medical negligence statute of limitations, RCW 4.16.350. The superior court granted both motions. From these orders, Sweeney now appeals. CP 367-77.

[3] References to Dunlap in this brief are meant to include his employer.

II. ASSIGMENTS OF ERROR

1. The superior court erred in dismissing the claims brought by Sweeney and her husband against Noble and the hospital on summary judgment. CP 370-73.

2. The superior court erred in dismissing the claims brought by Sweeney and her husband against Dunlap and his employer on summary judgment. CP 374-77.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Has Noble met his burden on summary judgment to demonstrate that there are no genuine issues of material fact regarding his violations of the standard of care causing injury to Sweeney? (Assignment of Error #1.)

2. Has Dunlap met his burden on summary judgment to prove, as a matter of law, that Sweeney's claim against him accrued and the applicable limitations periods expired before she amended her complaint to add him as a defendant? (Assignment of Error #2.)

3. If so, is Sweeney's amended complaint against Dunlap timely because it relates back to the date of her original complaint under CR 15(c)? (Assignment of Error #3.)

IV. STATEMENT OF THE CASE

A. Noble makes three unsuccessful attempts to manipulate Sweeney's dislocated and fractured shoulder back into position, and her shoulder joint is "completely fractured and destroyed."

X-rays taken upon Sweeney's arrival at the hospital on April 25, 2010, showed dislocation of her right shoulder and a single fracture of her upper arm bone (humerus). The radiologist report describes the fracture as a broken off fragment of bone representing the greater tuberosity of the

humerus, and states "[n]o additional fractures are identified." CP 105 (brackets added).[4]

Upon reviewing the x-rays and telephoning Dunlap, Noble made three attempts to manipulate Sweeney's shoulder back into position, a procedure described as a closed (i.e., non-surgical) reduction. CP 280-81. On the first attempt: "With her R[ight] arm in full adduction and elbow flexed to 90 degrees, inferior traction was made while externally rotating the shoulder." CP 102 (brackets added). On the second attempt: "When no reduction was achieved, more traction was done axially downward on the humerus and the shoulder abducted fully and then flexed anteriorly." *Id*. On the third attempt: "This was repeated again when no reduction was evident …. We then noted a small pop[.]" *Id.* (ellipses & brackets added).

Following the third attempted reduction, another x-ray was taken, revealing continued dislocation of the shoulder, separation of the humeral head and neck, and a comminuted fracture of the humeral head. CP 106. In sum, Sweeney's shoulder joint and humeral head "were completely fractured and destroyed." CP 281.

In attempting to reduce Sweeney's shoulder, Noble violated the standard of care in a number of ways, including: attempting the reduction

[4] For an illustration of the location of the initial fracture, see the Wikipedia entries and images for "Greater tubercle" and "Upper extremity of humerus" (available at en.wikipedia.org; viewed Oct. 2, 2014).

without adequate training or experience, "failing to call an orthopedic surgeon to come to the emergency department and to treat the condition with conscious sedation or anesthesia," "failing to diagnose a pre-reduction potential anatomic neck fracture" of the humerus, "failing to perform ancillary studies in the presence of greater tuberosity fracture … to delineate the damage and pathology to the shoulder prior to attempting a reduction maneuver[,]" "attempting a reduction by the physician assistant in the emergency room without anesthesia in the presence of a fracture dislocation[,]" and making the second and third attempts to perform a closed reduction after failing to perform the procedure successfully the first time. CP 282-83 & 354 (ellipses & brackets added).

Noble's violations of the standard of care caused the additional fractures of Sweeney's humerus, necessitating total shoulder replacement surgery by Dunlap on April 28, 2010, and rotator cuff repair surgery by Dunlap on April 4, 2012, and resulting in permanent disability. CP 283-84 & 354.

B. Before filing suit, Sweeney's lawyer meets with Dunlap, who denies seeing the pre-reduction x-rays or advising Noble to attempt the procedure after seeing the x-rays.

Although Noble's chart note refers to telephone call with Dunlap to discuss Sweeney's x-rays *before* the attempted reduction of her shoulder, Dunlap's records did not reflect that any such conversation

occurred. CP 265. Moreover, on one occasion in 2012, when Sweeney and her husband showed the pre-reduction x-rays of Sweeney's shoulder to Dunlap, it appeared to be the first time Dunlap had ever seen them. CP 264.

Before filing suit, Sweeney's lawyer endeavored to meet with Dunlap for the purpose of finding out whether he had or had not seen the pre-reduction x-rays. CP 265. After making several attempts to schedule a meeting, he sent a letter to Dunlap stating in part:

> As you know, we represent a patient of yours, Lori A. Sweeney. I have been trying to schedule a meeting with you for some time to discuss Ms. Sween[e]y. As it stands right now, I have a statute of limitations of April 25, 2013, before which I must file a lawsuit on Ms. Sween[e]y's behalf. Before I file that suit, I need to talk to you.

CP 271 (brackets added).

Sweeney's lawyer was finally able to meet with Dunlap on April 19, 2013. CP 266. During the meeting, the lawyer informed Dunlap that he may have some legal culpability based on Noble's records stating that he had seen the pre-reduction x-rays. CP 266, 268-69. In response, Dunlap denied seeing them. CP 266-67. He explained that, if he had seen the pre-reduction x-rays, they would be stored in a computer database that he used. However, when he performed a search of the database, they were not there; he only found the *post*-reduction x-rays. CP 266-67, 269.

Further, Dunlap told Sweeney's lawyer that he did not recall speaking with Noble, and that *he would not have advised Noble to attempt a closed reduction of Sweeney's shoulder if he had seen her pre-reduction x-rays*. CP 267. Instead, he would have instructed Noble to transport Sweeney to Spokane immediately for specialized orthopedic care. CP 267.

After the meeting, Sweeney's lawyer sent a letter to Dunlap stating in part:

> I wanted to write and thank you for taking the time to meet with me on April 19, 2013. I know your time is limited and valuable. The meeting was very informative for me. The fact that it appears you never reviewed any X-rays or spoke with PA-C Noble from East Adams Rural Hospital prior to his attempts to reduce the shoulder is a critical fact in this case.

CP 275.[5] Sweeney and her lawyer had no reason to doubt the truthfulness or accuracy of Dunlap's statements, and, based on the statements, they did not believe that Dunlap had violated the standard of care. CP 267-68.

C. Sweeney files suit against Noble, and, in the course of discovery, learns that Dunlap actually did see the pre-reduction x-rays of her shoulder and that he misinformed her lawyer.

On April 23, 2013, Sweeney filed a complaint against Noble and his employer, Adams County Public Hospital District No. 2. CP 18-27.[6] The complaint alleges that Noble negligently attempted to reduce her

[5] The lawyer also sent a letter to Noble's representative asking whether he intended to apportion fault to Dunlap, which was not answered. CP 268.
[6] The respondeat superior liability of the hospital has not been challenged.

dislocated and fractured shoulder. CP 22-23. On July 15, 2013, Noble answered the complaint, denying negligence and contending that Dunlap reviewed the pre-reduction x-rays before advising him to attempt a reduction of Sweeney's shoulder. CP 31-32.[7]

On October 23, 2013, at the conclusion of Noble's deposition, Noble's lawyer disclosed, for the first time, an "audit trail" for Sweeney's pre-reduction x-rays, revealing that Dunlap had seen them before advising Noble to attempt a reduction of her shoulder. CP 268. The audit trail was not included in Sweeney's medical records, and it was not readily available to Sweeney or her lawyer. CP 268-69. It was maintained by a third party radiology company, and made available to users and entities contracting with the company for radiology services. CP 78, 96.

On October 25, 2013, during Dunlap's deposition, Dunlap reviewed the audit trail and admitted that he had seen the pre-reduction x-rays. CP 100. Dunlap also produced notes of his April 19, 2013, meeting with Sweeney's lawyer, and confirmed that he had previously denied seeing the pre-reduction x-rays. CP 222, 224-30 & 268.

[7] Noble's answer did not identify Dunlap as an at-fault nonparty, as contemplated by CR 12(i). CP 35-36.

D. Sweeney amends her complaint to add Dunlap and his employer as defendants.

On January 2, 2014, Sweeney filed a motion to amend her complaint to add Dunlap and his employer, Providence Health Services, as additional defendants. CP 38-56.[8] The proposed amended complaint alleged that Dunlap violated the standard of care by advising Noble to attempt a closed reduction of Sweeney's shoulder after seeing her pre-reduction x-rays. CP 49.

In the meantime, after the suit was filed against Noble, it also became apparent that there were problems with the surgeries performed by Dunlap. Sweeney was diagnosed with failed shoulder replacement and rotator cuff deficiency, and had to undergo another, more extensive type of shoulder replacement surgery on June 11, 2013. CP 281-82. The need for this surgery was a consequence of both Dunlap's original advice to attempt a closed reduction of Sweeney's shoulder, and his failure to inspect and repair her rotator cuff during the shoulder replacement surgery on April 28, 2010, and the follow up rotator cuff surgery on April 4, 2012. CP 282-84. The amended complaint included allegations that Dunlap failed to comply with the standard of care in performing these surgeries. CP 50-51.

[8] The respondeat superior liability of Dunlap's employer has not been challenged.

The superior court granted Sweeney's motion for leave to amend, and the amended complaint was filed and served on Dunlap and his employer. CP 60-61 (order granting leave to amend); CP 62-73 (amended complaint); CP 259-60 (certificate of service on Dunlap); CP 257 (certificate of service on Providence Health Services).

E. The superior court grants summary judgment in favor of Noble on grounds of causation.

On January 23, 2014, Noble moved for summary judgment, seeking dismissal of Sweeney's complaint against him. CP 74-75 (motion); CP 110-18 (memorandum). Noble primarily argued that Sweeney lacked an expert to testify as to any violations of the standard of care and the causal relationship between such violations and Sweeney's injury. CP 114-17.

With respect to causation, Noble also submitted expert testimony suggesting that the neck of Sweeney's humerus was fractured before Noble attempted to reduce her shoulder dislocation, even though the fracture was not previously detected, or even detectable, on the pre-reduction x-rays.[9] On the basis of this testimony, Noble argued that the

[9] The radiologist retained by Noble stated that the alleged fracture was "very subtle," so much so that it would not be considered a violation of the standard of care for the treating radiologist who originally reviewed Sweeney's x-rays to miss it. CP 125. He explained that he was able to see the fracture because he "scrutinized the films very carefully for this forensic review," with the benefit of hindsight ("retrospective evaluation"), knowing

damage to Sweeney's shoulder was caused by a pre-existing condition rather than Noble's unsuccessful reduction attempts. CP 116.

In response to Noble's motion for summary judgment, Sweeney submitted a sworn declaration from Randall M. Patten, M.D., a board-certified radiologist, who taught radiology at the University of Washington and University of Colorado Schools of Medicine, and who currently practices diagnostic radiology. CP 285-89. After reviewing Sweeney's x-rays, Dr. Patten testified that the pre-reduction x-ray does not show, "even in retrospect," any fracture of the humeral neck before Noble's attempted reduction of her shoulder. CP 287.

Sweeney also submitted a sworn declaration from Steven R. Graboff, M.D., a board-certified orthopedic surgeon who currently practices in Huntington Beach, California. CP 276-84. Dr. Graboff has training and experience in evaluating and treating shoulder dislocations has supervised physician assistants doing the same, and is familiar with the standard of care in the State of Washington. CP 277. Dr. Graboff reviewed all of Sweeney's pertinent x-rays and medical records, along with the declarations of Noble's expert witnesses. CP 278-79. He identified the violations of the standard of care on the part of Noble and

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what happened to Sweeney as a result of Noble's attempts to reduce her shoulder. CP 125-26.

the causal relationship between these violations of the standard of care and Sweeney's injures, as described above. CP 282-84.

Lastly, Sweeney submitted a sworn declaration from Jeffrey Nicholson, PA-C, Ph.D, who is a practicing physician assistant and former Director of the University of Wisconsin-Madison Physician Assistant Program. CP 351-55. Mr. Nicholson reviewed the deposition of Noble and the declarations of the other experts in the case. CP 353. He confirmed the applicable standard of care, and testified that Noble had insufficient experience and training and never should have attempted to reduce Sweeney's shoulder the first time, let alone the second and third times. CP 353-54. He also confirmed that Noble's actions caused Sweeney to suffer permanent injury to her right shoulder. CP 354.[10]

The superior court granted Noble's motion for summary judgment, on grounds that Sweeney failed to prove causation. CP 370-73 (summary judgment order); RP 56:7-25 (oral ruling).

F. The superior court grants summary judgment in favor of Dunlap based on the statute of limitations.

On March 26, 2014, Dunlap filed a motion for summary judgment, arguing that Sweeney's claims are barred by the medical negligence

[10] The superior court accepted Nicholson's declaration after Noble objected to Dr. Graboff's qualifications on grounds that he was not himself a physician assistant (even though he supervised physician assistants). Copies of the declarations of Drs. Patten and Graboff and Mr. Nicholson are reproduced in the Appendix.

statute of limitations, RCW 4.16.350. He further argued that the amended complaint did not satisfy the requirements of CR 15(c) for relation back to the date of Sweeney's original complaint under statute of limitations. CP 152-534 (motion); CP 155-63 (memorandum).

In response to Dunlap's motion for summary judgment, Sweeney contended that the applicable limitations periods had not expired because Dunlap continued to provide negligent treatment until less than a year before the amended complaint was filed. CP 192-205 (response memorandum). The negligence consists of failure to inspect and repair Sweeney's torn rotator cuff during the surgeries he performed on April 28, 2010, and April 4, 2012. CP 283.

Nonetheless, even if the applicable limitations periods had expired, Sweeney argued that the amendment related back to the date of her original complaint, based largely on the circumstances surrounding Dunlap's denial that he had seen the pre-reduction x-rays of her shoulder.

The superior court granted Dunlap's motion for summary judgment based on the statute of limitations, and declined relation back under CR 15(c). *See* CP 374-77 (summary judgment order); RP 57:13-58:5 (oral ruling). The court commented on its ruling by stating:

> I do feel that it's sort of unfair that Dr. Dunlap gets to avoid liability in this case because he either misremembered or prevaricated when asked if he had

> reviewed prereduction x-rays, and it's a little unfair that Mr. Dunlap benefits by Mr. Gilbert's [the Sweeney's lawyer] appropriate attention to his duties under CR 11 …. it doesn't seem fair to me that he could avoid liability based upon an incorrect response he had given to [the lawyer], but the rule is the rule.

RP 57:21-58:2 (brackets & ellipses added).

V. SUMMARY OF ARGUMENT

The superior court erred in granting summary judgment in favor of Noble because there is a genuine issue of material fact regarding his violations of the standard of care and the causation of Sweeney's injuries. The disputed material facts are set forth in the declarations of Drs. Patten and Graboff and Mr. Nicholson submitted in opposition to summary judgment. *See* Appendix.

The superior court also erred in granting Dunlap's motion for summary judgment because he failed to satisfy his burden of proving that both of the alternative limitations periods in RCW 4.16.350, the medical negligence statute of limitations, have accrued and expired. With respect to Dunlap's admittedly negligent advice to Noble to attempt a closed reduction of Sweeney's shoulder, the *one-year limitations period* did not accrue until Sweeney discovered the x-ray audit trail on October 23, 2013, and Dunlap admitted that he had seen the pre-reduction x-ray during his deposition on October 25, 2013. Because Sweeney's amended complaint

was filed on January 17, 2014, within less than one year after accrual (October 23-25, 2013), the one-year limitations period did not expire.

With respect to *all* of Dunlap's negligent treatment—the advice to Noble and the subsequent surgeries on April 28, 2010, and April 4, 2012—the *three-year limitations period* did not accrue until the date of the last surgery under the continuing treatment doctrine. Because Sweeney's complaint was amended within less than three years afterward (April 4, 2012), the three-year limitations period did not expire either.

Even if the applicable limitations periods had accrued and expired, Sweeney's amended complaint would relate back to the date of her original complaint under CR 15(c). In accordance with the requirements of the rule, the amendment arises out of the same transaction or occurrence, Dunlap received notice of the institution of the action, and he should have known that he was mistakenly omitted from the original complaint. To the extent a showing of lack of inexcusable neglect is also required for relation back, this requirement is also satisfied because the omission of Dunlap from the original complaint was the result of the misinformation he provided rather than a strategic choice by Sweeney or her lawyer.

VI. ARGUMENT

A. The superior court erred in granting Noble's motion for summary judgment because there are genuine issues of material fact regarding his violations of the standard of care causing injury to Sweeney.

Summary judgment is subject to review de novo, and no deference is due to the decision of the superior court. *See Unruh v. Cacchiotti*, 172 Wn. 2d 98, 106, 257 P.3d 631 (2011). The burden rests upon the moving party to establish an absence of any genuine issues of material facts. *See Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182 (1989). The facts, and all reasonable inferences from the facts, must be viewed in the light most favorable to the nonmoving party. *See id.* at 226. Viewing the facts in this light, summary judgment must be denied if there is any evidence supporting the elements of the non-moving party's claim. *See id.* In this case, Noble cannot meet his burden to obtain summary judgment because Sweeney has submitted evidence creating genuine issues of material fact regarding his violations of the standard of care causing injury to her.

As it pertains to this case, a claim for medical negligence is based on injury resulting from the failure of a health care provider to follow the accepted standard of care. *See* RCW 7.70.030(1). RCW 7.70.040 sets forth the necessary elements of proof for this type of medical negligence claim:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected or a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

(Formatting in original.) These elements represent particularized expressions of the fundamental concepts in any negligence action, i.e., duty, breach, causation and damage. *See Caughell v. Group Health Coop.*, 124 Wn. 2d 217, 233, 876 P.2d 898 (1994). Here, Sweeney has submitted evidence regarding all of the necessary elements of proof, based on the expert testimony of Dr. Graboff and Mr. Nicholson.

Dr. Graboff is familiar with the standard of care of physician assistants acting in the same or similar circumstances, as he has supervised physician assistants in the course of evaluating and treating shoulder dislocations. CP 277. Mr. Nicholson is himself a physician assistant and he has been an educator of physician assistants for his entire professional life. CP 352. The standard of care in these circumstances is not unique to Washington but is nationwide. CP 277, 354-55.

After reviewing the pertinent records, both Dr. Graboff and Mr. Nicholson described multiple violations of the standard of care by Noble. *See* CP 282-83, 353-54. The superior court appears to have accepted this

testimony, and instead granted summary judgment on the issue of causation of Sweeney's injuries. *See* RP 56:7-25.

However, both Dr. Graboff and Mr. Nicholson also testified as to causation. In particular, Dr. Graboff testified as follows:

> As a direct and proximate cause of the conduct described above, [including the conduct of Noble] which fell below the standard of care, Ms. Sweeney sustained the following injuries on a more probable than not basis and to a reasonable degree of medical certainty:
>
> A. An at least 3-part comminuted fracture dislocation of the right shoulder and proximal humerus and humeral head.
>
> B. The need for total shoulder replacement surgery on 4/28/10.
>
> C. The need for subsequent rotator cuff repair, which more likely than not was associated with the fracture of the greater tuberosity [of the humerus] ….
>
> D. The need for reverse total shoulder replacement in June of 2013 as a result of the development of right shoulder failed arthroplasty and rotator cuff arthropathy ….
>
> E. Chronic pain and dysfunction of the right upper extremity.

CP 283-84 (brackets & ellipses added). Mr. Nicholson added and confirmed: "[a]s a proximate cause of the breach of the standard of care for emergency physician assistants [by Noble], Mrs. Sweeney sustained what is likely a permanent injury to her right upper extremity." CP 354 (brackets added).

The superior court does not appear to have accepted Noble's view of causation, that Sweeney's injuries were caused by an undetected, and apparently undetectable, pre-existing fracture on the neck of Sweeney's humerus rather than Noble's attempts to reduce her shoulder. This causation theory is based upon the testimony of a radiologist retained by Noble, and it is directly contradicted by Dr. Patten, the expert retained on behalf of Sweeney. Noble's theory is also is inconsistent with the fact that the alleged pre-existing fracture was not discovered by him, Dunlap or the radiologist who reviewed Sweeney's pre-reduction x-rays. At a minimum, there are genuine issues of material fact regarding Noble's theory of causation.

The superior court's view of causation appears to be based upon an unduly restricted view of Noble's violations of the standard of care. The court seems to have considered Noble's attempted reduction of Sweeney's shoulder without an attending physician or orthopedist present as the singular violation of the standard of care by Noble. *See* RP 56:7-25. While this should suffice, Dr. Graboff and Mr. Nicholson addressed multiple violations of the standard of care by Noble. These include attempting the reduction without adequate training or experience, performing the reduction without sedation or anesthesia to reduce the contraction of Sweeney's muscles, failing to obtain additional imaging studies, relying

on the telephone consult with Dunlap rather than exercising independent judgment, and making the second and third reduction attempts after the first one proved to be unsuccessful. *See* CP 282-83, 354. All of these violations of the standard of care are causally related to Sweeney's injuries. CP 283-84, 354. When the facts are viewed in the light most favorable to Sweeney, as they must be, summary judgment in favor of Noble should be reversed and Sweeney's claims against him should be remanded for trial.[11]

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[11] The superior court does not appear to have been expressly influenced by Noble's citation of *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 851 P.2d 689, *rev. denied sub nom. Guile v. Crealock*, 122 Wn. 2d 1010 (1993). *See* CP 114 (summary judgment memorandum, citing *Guile*). However, to the extent that *Guile* implicitly influenced the grant of summary judgment, this Court should disapprove of Noble's reading of *Guile* and/or overrule the decision as incorrectly decided and harmful. *See in re Stranger Creek*, 77 Wn. 2d 649, 653, 466 P.2d 508 (1970) (stating incorrect and harmful test for overruling precedent); *International Ass'n of Fire Fighters v. Everett*, 146 Wn. 2d 29, 37 n.9, 42 P.3d 1265 (2002) (stating Court of Appeals can overrule one of its own decisions if incorrect and harmful). In short, Noble's apparent interpretation of *Guile* requires greater specificity for expert affidavits or declarations submitted in opposition to summary judgment, at least in the medical negligence context, than would otherwise be required to be admissible at trial or sufficient to support a verdict. *Guile* is incorrect because it relies on an unduly restrictive reading of the language of CR 56(e) referring to "specific facts" and it marks a departure from normal summary judgment practice. *See, e.g., Young*, 112 Wn. 2d at 242 (discussing CR 56(e), not imposing any specificity requirement). *Guile* is harmful because it infringes on the constitutional right to trial by jury. *See LaMon v. Butler*, 112 Wn. 2d 193, 199 n.5, 770 P.2d 1027 (1989) (indicating summary judgment is consistent with Wash. Const. Art. I, § 21, because it reserves issues of fact for the jury).

B. The superior court erred in granting Dunlap's motion for summary judgment based on the statute of limitations because he cannot prove, as a matter of law, that Sweeney's claims accrued and the applicable limitations periods expired before she amended her complaint.

Summary judgment on the statute of limitations is also reviewed de novo. *See Unruh*, 172 Wn. 2d at 106. However, review of summary judgment regarding the statute of limitations differs because it is an affirmative defense on which Dunlap bears the burden of proof. *See Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn. 2d 261, 267, 189 P.3d 753 (2008) (regarding burden of proof under RCW 4.16.350).[12] In keeping with the burden of proof, Dunlap must produce evidence supporting every element of the defense and demonstrate that he is entitled to judgment as a matter of law. *See Young*, 112 Wn. 2d at 225-26 (discussing relationship between burden of proof and summary judgment). In this case, the Court should reverse the lower court's summary judgment order in favor of Dunlap, because he cannot meet his burden to prove that Sweeney's claims against him accrued and the applicable limitations periods expired before she filed the amended complaint.

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[12] Outside of the medical negligence context, there appears to be a conflict among the Court of Appeals decisions regarding the burden of proof on the issue of accrual based on discovery. Some cases impose the burden of proof on the defendant, in keeping with the overall burden of proof on the statute of limitations. *See Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006) (involving 2-year catch-all statute of limitations, RCW 4.16.130, and citing *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000)); *Mayer*, 102 Wn. App. at 76 (involving same statute and citing *Haslund v. City of Seattle*, 86 Wn. 2d 607, 621-22, 547 P.2d 1221 (1976), which addresses the overall

There is no dispute that Sweeney's claims are governed by the medical negligence statute of limitations. *See, e.g.*, CP 153 (summary judgment motion, citing RCW 4.16.350). The statute provides in pertinent part:

> Any civil action for damages for injury occurring as a result of health care … based 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[.]

RCW 4.16.350 (ellipses & brackets added).[13]

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burden of proof on statute of limitations defense). Other cases impose the burden of proof on the plaintiff. *See Burns v. McClinton*, 135 Wn. App. 285, 300, 153 P.3d 630 (2006) (involving the 3-year statute of limitations for oral contracts, RCW 4.16.080(3); citing *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000)), *rev. denied*, 161 Wn. 2d 1005 (2007); *Douglass*, 101 Wn. App. at 256 (involving 3-year statute of limitations for fraud, RCW 4.16.080(4); citing *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 518, 728 P.2d 597 (1986), *rev. denied*, 107 Wn. 2d 1022 (1987)); *Interlake Porsche*, 45 Wn. App. at 518 (involving RCW 4.16.080(4); citing older authorities involving same statute of limitations); *Clare v. Saberhagen Holdings, Inc*., 129 Wn. App. 599, 603 & n.8, 123 P.3d 465, 467 (2005) (involving 3-year statute of limitations for personal injury, RCW 4.16.080(2); citing *G.W. Constr. Corp. v. Professional Serv. Indus. Inc.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993)); *G.W. Constr.*, 70 Wn. App. at 367 (involving RCW 4.16.080, but not referencing particular subsection; citing *Interlake Porsche, supra*). While the reasoning of these cases is not clearly stated, it appears to be based on a conception of the discovery rule as an exception to the statute of limitations or a form of tolling. To the extent that discovery is the basis for accrual of a claim rather than an exception to the statute of limitations or a form of tolling, the reasoning of these cases is flawed. In any event, none of these cases are controlling under the medical negligence statute of limitations, RCW 4.16.350, which explicitly incorporates a form of discovery as a basis for accrual of a medical negligence claim. *See DeYoung v. Providence Med. Ctr.*, 136 Wn. 2d 136, 145 n.2, 960 P.2d 919 (1998) (indicating discovery is a basis for accrual in the context of medical negligence actions).

[13] The full text of RCW 4.16.350 is reproduced in the Appendix.

This statute contains two alternative limitations periods for medical negligence claims, each of which is based on a different accrual date: either three years from the date of the act or omission causing injury, or one year from the date the plaintiff discovers or should have discovered that the injury was caused by the act or omission in question. *See Gunnier v. Yakima Heart Center, Inc.*, 134 Wn. 2d 854, 859, 953 P.2d 1162 (1998); *Adcox v. Children's Ortho. Hosp. & Med. Ctr.*, 123 Wn. 2d 15, 34, 864 P.2d 921 (1993). Because Sweeney is entitled to the benefit of the longest applicable limitations period (i.e., "whichever expires later"), Dunlap must prove that her claims accrued and both of the applicable limitations periods expired before she amended her complaint.

Accrual of a claim under the statute of limitations is generally a question of fact to be resolved by the jury. *See, e.g., Winbun v. Moore*, 143 Wn. 2d 206, 213, 18 P.3d 576 (2001) (reviewing jury verdict regarding accrual of medical negligence claim for substantial evidence); *Adcox*, 123 Wn. 2d at 34-35 (same). At a minimum, this case presents questions of fact regarding accrual and expiration of the applicable limitations periods.

1. With respect to his admittedly negligent advice to Noble regarding the April 25, 2010, closed reduction of Sweeney's shoulder, Dunlap cannot meet his burden to prove that Sweeney knew or should have known about his violation of the standard of care before she received the x-ray audit trail on October 23, 2013, and Dunlap admitted seeing the pre-reduction x-rays during his deposition on October 25, 2013; because her amended complaint was filed within less than a year after these discoveries, it is timely under the one-year limitations period.

Under the one-year limitations period, a cause of action does not accrue until the plaintiff has actual or constructive knowledge of the allegedly negligent act or omission of an individual health care provider. *See Winbun*, 143 Wn. 2d at 213-23. Discovery of negligence on the part of one health care provider does not necessarily trigger the one-year limitations period as to all other health care providers who also treated the plaintiff. *See id.* at 223. This rule is grounded in the text of the statute of limitations referring to discovery of a particular "act or omission" causing injury to the plaintiff. *See id.* at 217.[14]

The rationales for this rule are compelling. First, it reflects the reality that evidence of negligence on the part of non-party health care providers often

[14] The rule also corresponds to the individual phrasing of the statute of limitations in terms of an action against a singular health care provider. *See* RCW 4.16.350. This mirrors the terms of the medical negligence statute, which is similarly phrased in terms of the liability of a singular health care provider. *See* RCW 7.70.030(1); RCW 7.70.040.

> does not surface until a case progresses through discovery, including the stage at which treating and forensic experts are deposed. This is true even when a plaintiff exercises utmost care to discover all negligent health care providers with due diligence and dispatch. Not infrequently, the particular acts or omissions of other, non-party health care providers fail to surface despite vigorous investigation and discovery.

Winbun, at 220 (quoting amicus curiae brief with approval).

Second, the rule protects plaintiff-patients from unduly harsh application of the statute of limitations:

> failure to individualize the malpractice discovery rule can be unduly harsh where a plaintiff, despite due diligence, could not have discovered the acts or omissions of a particular health care provider within the one-year discovery period. This is especially serious in medical malpractice cases where there is a vast difference between what can be uncovered from "investigation" as opposed to "discovery." No health care provider is required to meet with plaintiff's counsel to explain his or her actions prior to a lawsuit. Only when a suit commences are witnesses subject to subpoena and examination under oath.

Id. at 221 (discussing amicus curiae brief with approval).

Third, the rule protects defendant-health care providers from lawsuits, as explained by the Supreme Court:

> we are concerned that application of the rule as propounded by the Court of Appeals could encourage a "guilt by association" approach to medical malpractice claims. The rule adopted by the appellate court could lead to suing any health care providers identified with the treatment which injured the plaintiff whether or not specific acts or omissions could be attributed to such providers at the time the suit was commenced. Because of

> the possibility that such acts or omissions might later be determined in discovery, the temptation would be to sue first and conduct discovery later. Such a practice would run counter to CR 11, which requires "that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry [every pleading, motion, and legal memorandum] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." CR 11.
>
> Under an individualized application of the discovery rule, those who provided health care where malpractice is alleged, but where no acts or omissions have been identified as to their conduct during investigation, would be spared unnecessary involvement in the litigation.

Id. at 221-22 (formatting in original); *accord Webb v. Neuroeducation Inc.*, 121 Wn. App. 336, 345, 88 P.3d 417 (2004) (noting the Supreme Court has rejected the "shoot first, ask questions later" litigation style in lieu of the rule "that no action should be filed until specific acts or omissions can be attributed to a particular defendant"), *rev. denied*, 153 Wn. 2d 1004 (2005).

Applying the foregoing rule to this case, Sweeney did not have actual knowledge of Dunlap's negligent advice to Noble more than one year before she amended her complaint. She was not privy to the telephone call where Dunlap advised Noble to attempt a closed reduction of her shoulder after reviewing the pre-reduction x-rays. She did not obtain actual knowledge until receiving the x-ray audit trail on October 23,

2014, at the earliest. More likely, she obtained actual knowledge at Dunlap's deposition on October 25, 2014, where he admitted that he reviewed the pre-reduction x-rays and misinformed her lawyer.

With respect to constructive knowledge, there is at least a question of fact whether Sweeney had such knowledge more than one year before she amended her complaint. Dunlap denied reviewing the pre-reduction x-rays and stated that *he would not have advised Noble to attempt a closed reduction of Sweeney's shoulder if he had seen them.* CP 267. This latter statement lends credibility to the denial because it essentially admits culpability if Dunlap had reviewed them.[15] In addition, Dunlap expressed surprise when he was shown copies of the pre-reduction x-rays. He did not have any memory of speaking with Noble before the attempted reduction, he did not have any record of the telephone call or reviewing the pre-reduction x-rays, and the x-rays were not in the computer database where they should have been stored, if he had reviewed them.

Weighing against this evidence is nothing more than the reference to a telephone call between Noble and Dunlap in Noble's chart note, which was obtained by Sweeney's lawyer sometime in late 2012. By relying on this evidence, Dunlap is in the untenable position of urging that

[15] *Cf.* ER 804(b)(3) (regarding hearsay exception for statements against interest); *State v. Hett*, 31 Wn. App. 849, 851-52, 644 P.2d 1187 (noting that statements against interest support an inference of reliability), *rev. denied*, 97 Wn. 2d 1027 (1982).

Sweeney and her lawyer should have disbelieved what he told them in order to sustain summary judgment in his favor. The unfairness inherent in this position is palpable, and is confirmed by the superior court's oral ruling.[16] At any rate, it does no more than create an issue of fact for the jury to resolve.

The facts of this case are comparable to *Winbun* and *Adcox*, where the Supreme Court affirmed jury verdicts in favor of plaintiffs regarding accrual of claims against their health care providers. In *Winbun*, the plaintiff "suspected her injuries were caused by medical malpractice early on," and, while the negligence of one or her physicians "could have easily been discovered by an expert reviewing a complete set of [the plaintiff's] medical records," she did not name the physician as a defendant until more than three years after her injuries because she believed that others were responsible. 143 Wn. 2d at 215 (brackets added). The Court found substantial evidence to support the jury's verdict that the applicable

[16] Dunlap should be estopped from claiming that Sweeney should have discovered his negligence before he admitted seeing the pre-reduction x-rays during his deposition on October 25, 2013. "Equitable estoppel requires proof of '(1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act.'" *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn. 2d 94, 108-09, 297 P.3d 677 (2013) (quotation omitted). Here, Dunlap's statements to Sweeney's lawyer during their April 19, 2013, meeting contradict his claim that Sweeney knew or should have known about his negligence before he admitted that the statements were false. Sweeney and her lawyer reasonably relied on those statements in filing suit, and Sweeney would be injured to the extent her claim is barred by the statute of limitations.

limitations period had not expired because the medical records that the plaintiff received omitted documents that were "significant" to a determination of the physician's liability and "obscured" her ability to determine the nature and extent of care he provided. *Id.* at 216-17.

Similarly, in *Adcox*, the mother of a child injured as a result of medical negligence did not file suit against the child's health care providers (a hospital and two nurses) until more than three years after the child suffered a cardiac arrest. *See* 123 Wn. 2d at 34-35. The child's doctors told her that the cardiac arrest was caused by the child's heart condition rather than the hospital or the nurses, and the mother did not learn about their negligence until after an attorney investigated the matter on her behalf. *See id.* at 35. In this way, the statements by the doctors hindered her discovery of the negligence of the hospital and the nurses, and the Court affirmed the jury's finding that the mother acted with due diligence in bringing her claim.

In this case, as in *Winbun* and *Adcox*, the x-ray audit trail, which was not included in Sweeney's medical records, was significant to a determination of Dunlap's negligence, and Dunlap's denials that he ever saw her pre-reduction x-ray obscured the nature and extent of care he provided and hindered her from discovering his negligence. Because

similar circumstances were sufficient to affirm jury verdicts in *Winbun* and *Adcox*, Sweeney should be entitled to present her case to a jury.[17]

2. With respect to *all* of his negligent treatment—including the advice to Noble and the surgeries on April 28, 2010, and April 4, 2012—Dunlap cannot meet his burden to prove that the treatment is unrelated or non-negligent so as to prevent application of the continuing treatment doctrine; because Sweeney amended her complaint within less than three years after the last negligent treatment, the amendment is timely.

Under the three-year limitations period, a cause of action based on continuing negligent treatment does not accrue until the date of the last negligent treatment. *See Caughell*, 124 Wn. 2d at 229-30. This rule is premised on the idea that a claim arising from a course of negligent treatment comprises a single cause of action. *See id.* at 225, 229-30.

As with the discovery rule described above, the rationales for this rule are similarly compelling. First, treating a course of treatment as a single cause of action accords with the realities regarding the practice of medicine. As explained by the Supreme Court:

> our tort law has recognized, and should recognize, that malpractice can occur in a series of interrelated negligent acts. To shoehorn this continuing negligent treatment into a single negligent act, occurring within 3 years of filing

[17] Although Sweeney's arguments regarding discovery of Dunlap's negligence in the trial court centered around the inexcusable neglect requirement under CR 15(c), which is discussed *infra*, it is also proper for her to make these arguments in connection with issues of accrual under RAP 2.5(a)(2), which allows a party to raise for the first time on appeal the "failure to establish facts upon which relief can be granted[.]" (Brackets added.)

> suit, deprives claimants of the chance to prove the full extent of negligence in one claim. The law should not require plaintiffs to split their claims. Furthermore, as described below, splitting claims has the practical and unfair effect of insulating health care professionals from liability for negligence occurring prior to the 3-year statutory period. We conclude therefore that where the tort is continuing, the claim is continuing.

Id. at 230.

Second, treating a course of treatment as a single cause of action protects the rights of patients. Again, the Supreme Court explains:

> our ruling both presumes and confirms patients' reasonable reliance on their doctors. As members of an invaluable profession, doctors commonly hold the respect and trust of the people they treat. We find particularly apt the trial court's description of this relationship.
>
> > The practice of medicine is a high skilled profession. Doctors are held in high regard, bordering on awe, by most individuals. Patients trust doctors implicitly and rely upon their advice and treatment without question, in most cases.... To hold that such a patient bears the risk of discovering the doctor's negligence seems to be inequitable.
>
> Clerk's Papers, at 323-24. By recognizing continuing negligent treatment as one claim, we affirm that patients can reasonably rely on a doctor's advice without jeopardizing their rights to prove later that the entire course of treatment was negligent.

Id. (formatting in original).

Sweeney's claim against Dunlap satisfies the requirements of the continuing treatment doctrine. The contours of the doctrine were explained by the Supreme Court as follows:

The proof required for a claim of continuing negligent treatment differs slightly on two of these elements: breach and proximate cause. To prove a breach or, in the words of the statute, a failure to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider, a plaintiff must show that a series of interrelated negligent acts occurred during the course of treatment for a medical condition. By "series", we mean two or more negligent acts. By "interrelated", we mean that the negligent acts must be part of a "substantially uninterrupted course of treatment", and must relate to the treatment as a whole. *Samuelson*, 75 Wn.2d at 900, 454 P.2d 406. However, the negligent acts need not relate to each other. If a health care provider performs two procedures negligently as part of a course of treatment, the patient may allege a claim for negligent treatment even though the two procedures have no intrinsic connection to each other. They must only be part of the same treatment. Finally, by "treatment" we mean the protocol, procedures, prescriptions, or other medical actions ordered or performed by the health care provider.

The second modified element is proximate cause. To state a claim for continuing negligent treatment, a plaintiff must show that the series of interrelated negligent acts caused the injury or damages at issue. The plaintiff need not prove which negligent act caused which injury, provided that plaintiff proves that the continuing negligent treatment was the proximate cause of the injury. With this relatively minor difference in proof, a plaintiff's evidentiary burden remains the same.

Certainly, questions of interpretation will arise, and we leave the decision to the trial courts in the first instance as to whether a plaintiff has stated a claim for continuing negligent treatment. However, we note one example of the failure to state a claim. A plaintiff may not simply allege a negligent act followed by non-negligent treatment. The malpractice claimant must prove that the subsequent care was negligent in its own right.

Id. at 233-34 (formatting in original).

All of Dunlap's treatment was provided for the same "medical condition," i.e., Sweeney's dislocated and fractured shoulder. There was a series of negligent acts by Dunlap, consisting of his advice to Noble to attempt a closed reduction of Sweeney's shoulder, and his subsequent surgeries to reconstruct her shoulder on April 28, 2010, and repair her torn rotator cuff on April 4, 2012. Dunlap's advice to attempt a closed reduction of the shoulder was negligent by his own admission, as confirmed by Dr. Graboff. CP 282. The surgeries were negligently performed because Dunlap failed to inspect and repair Sweeney's torn rotator cuff, also attested by Dr. Graboff. CP 283.[18]

All of Dunlap's negligent acts are part of a substantially uninterrupted course of treatment that he provided to Sweeney. The shoulder replacement surgery was performed to repair the damage caused by her original fall and the attempts at closed reduction. CP 281. The rotator cuff repair surgery was performed to address the failure of the shoulder replacement surgery. *See* CP 281 (noting "[i]t is well known that rotator cuff tears are commonly associated with these kinds of injuries and conditions of the shoulder"); CP 283 (describing rotator cuff surgery as

[18] *Contrast Young Soo Kin v. Choong-Hyun Lee*, 174 Wn. App. 319, 325-27, 300 P.3d 431 (2013) (involving failure of proof of negligent act within three years of filing the complaint).

"follow up care"). There is no evidence in the record regarding any discontinuation of Dunlap's treatment of Sweeney until after the April 4, 2012, rotator cuff repair surgery, nor is there any evidence of similar treatment by other providers during the intervening time.

All of Dunlap's negligent acts are causally related to Sweeney's injuries. As stated by Dr. Graboff, the negligence of Dunlap in advising Noble to attempt a closed reduction of Sweeney's shoulder necessitated the subsequent shoulder replacement and rotator cuff repair surgeries, and the failure to inspect and repair Sweeney's rotator cuff during those surgeries necessitated a more extensive shoulder replacement surgery in June of 2013. CP 284.

In light of the foregoing evidence, Sweeney is entitled to rely on the continuing treatment doctrine for the accrual of her claim. Because her complaint was amended within less than three years after the date of the last negligent treatment by Dunlap, the amendment is timely under the statute of limitations.[19]

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[19] The amended complaint is timely as to the April 4, 2012, surgery even without the benefit of the continuing treatment doctrine because it is within three years. While discovery of continuing negligent treatment during the course of such treatment may start the three-year limitations period running before the last negligent act, *see Caughell*, 124 Wn. 2d at 237, there is at least a question of fact regarding discovery of Dunlap's negligent advice to Noble before disclosure of the x-ray audit trail on October 23, 2013, and Dunlap's deposition on October 25, 2013, discussed *supra*. Moreover, there is no evidence in the record that Sweeney knew or should have known that the shoulder replacement and rotator cuff repair surgeries performed by Dunlap were negligent before her more extensive shoulder replacement surgery in June of 2013.

While the facts of *Caughell* are potentially distinguishable to the extent that the case involved the prescription of medication, rather than orthopedic treatment, the distinction is immaterial. *Caughell* relied upon and expressly affirmed the recognition of continuing negligent treatment as a single cause of action in *Samuelson v. Freeman*, 75 Wn. 2d 894, 454 P.2d 406 (1969). *See Caughell*, at 225 & 227-28. While *Samuelson* predated the adoption of RCW 4.16.350, the statute only changed the accrual date from the termination of treatment to the last negligent act, and otherwise left the continuing treatment doctrine intact. *See Caughell*, at 227-28; *see also Bixler v. Bowman*, 94 Wn. 2d 146, 150, 614 P.2d 1290 (1980) (noting limited change to continuing course of treatment doctrine). *Samuelson* involved continuing orthopedic treatment rendered by the defendant after a surgery performed to repair the plaintiff's broken leg. *See* 75 Wn. 2d at 895. To the extent that *Caughell* relied on and affirmed *Samuelson*, the fact that this case involves orthopedic care does not undermine application of the continuing treatment doctrine.

C. Even if Sweeney's claims accrued and the applicable limitations periods had expired, her amended complaint is timely because it relates back to the date of her original complaint for purposes of the statute of limitations.

Once an amendment has been granted, the question of whether the amendment relates back to the date of the original complaint for statute of

limitations purposes is reviewed de novo. *See Perrin v. Stensland*, 158 Wn. App. 185, 193, 240 P.3d 1189 (2010). The requirements for relation back are set forth in CR 15(c), which provides in part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.[20]

Case law has also imposed an additional requirement, based on a lack of "inexcusable neglect." *See id.* at 200.[21] This rule and its requirements are "liberally construed on the side of allowance of relation back of an amendment that adds or substitutes a new party after the statute of limitations has run, particularly where the opposing party will be put to no disadvantage." *Id.* at 194. In this case, under a proper construction of CR 15(c), the requirements for relation back are met, even if the applicable limitations periods are deemed to have accrued and expired.

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[20] The full text of CR 15 is reproduced in the Appendix to this brief.

[21] While this Court is bound by the inexcusable neglect requirement under stare decisis, the requirement is not grounded in the text of the rule and should be abandoned as incorrect and harmful. *See Perrin*, 158 Wn. App. at 200-01 (discussing *Krupski v. Costa Crociere S.P.A.*, 560 U.S. 538 (2010)).

It cannot seriously be disputed, and Sweeney does not understand Dunlap to be disputing, that her amended complaint arose out of the same occurrence as her original complaint. *See* CP 158-61 (summary judgment memorandum). Dunlap also does not appear to dispute that received "notice of the institution of the action" represented by the original complaint. *See id.* The contemplated lawsuit was discussed during the meeting between Sweeney's lawyer and Dunlap on April 19, 2013, and referenced in the letters from the lawyer to Dunlap both before and after the meeting. *Id*. Lastly, Dunlap does not offer any identify any prejudice. *Id*.[22]

The dispute between the parties focuses on the remaining requirements under CR 15(c), relating to mistake and inexcusable neglect. The mistake requirement is satisfied because Dunlap should have known that, but for a mistake concerning the identity of the proper party, he would have been named in the original complaint. Whether or not he had actual knowledge, constructive knowledge satisfies this requirement. *See Tellinghuisen v. King Cnty. Council*, 103 Wn. 2d 221, 223, 691 P.2d 575 (1984). In this case, Dunlap should have known that he advised Noble to

[22] The prejudice no greater than if Sweeney had named Dunlap in the original complaint, but not served him until the complaint was amended. Under these circumstances, there would be no statute of limitations issues. *See Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn. 2d 325, 815 P.2d 781 (1991) (holding service on one defendant tolls statute of limitations as to all defendants).

attempt a closed reduction of Sweeney's shoulder after reviewing her pre-reduction x-rays, as he later admitted. He had constructive knowledge that he would have been named in Sweeney's original complaint if he had provided accurate information to her lawyer, based on the incriminating nature of his statement that he would not have advised Noble to attempt a closed reduction if he had seen the x-rays, along with the centrality of this fact in the case, as communicated by the lawyer.

The inexcusable neglect requirement is satisfied because the failure to name Dunlap in Sweeney's original complaint was the result of the inaccurate information he provided rather than a strategic choice by Sweeney and her lawyer. Inexcusable neglect is limited to situations when the failure to name a defendant is likely the result of "a strategic choice rather than a mistake." *Perrin*, 158 Wn. App. at 201-02 (synthesizing Washington case law regarding inexcusable neglect). As explained by the Washington Supreme Court:

> the purpose of CR 15(c) is to permit amendment, provided the defendant is not prejudiced and has notice. A broad construction of the inexcusable neglect standard undermines this rule and interferes with the resolution of legitimate controversies. *Thus, the inexcusable neglect standard should not be applied to preclude relation back under CR 15(c) where the defendant's actions or misrepresentations mislead the plaintiff*[.]

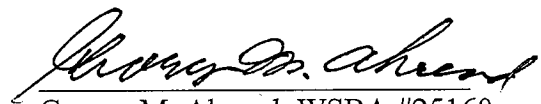
Gildon v. Simon Prop. Grp., Inc., 158 Wn. 2d 483, 492 n.10, 145 P.3d 1196 (2006) (discussing *Beal v. City of Seattle*, 134 Wn.2d 769, 782, 954

P.2d 237 (1998); emphasis & brackets added). The inexcusable neglect requirement is satisfied in this case because Dunlap misled Sweeney's lawyer about the nature of his involvement in her care. As a result, Sweeney's amended complaint should relate back to the date of her original complaint for purposes of the statute of limitations.

VIII. CONCLUSION

Based on the foregoing, Lori and Jerold Sweeney respectfully ask the Court to reverse the superior courts summary judgment orders dismissing her amended complaint, and to remand this case for trial against all defendants.

Respectfully submitted this 6th day of October, 2014.



George M. Ahrend, WSBA #25160
Co-Attorneys for Appellants
Ahrend Albrecht PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On October 6, 2014, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Robert F. Sestero, Jr., Christopher J. Kerley & Mark W. Louvier
Evans, Craven & Lackie, P.S.
818 W. Riverside, Ste. 250
Spokane, WA 99201-0910
rsestero@ecl-law.com
ckerley@wcl-law.com
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Witherspoon Kelley, P.S.
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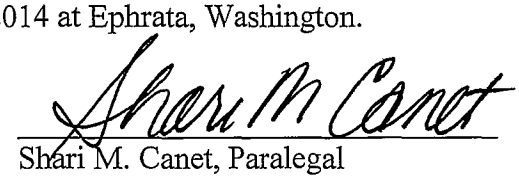
mwd@witherspoonkelley.com
rlh@witherspoonkelley.com

and upon Appellants' co-counsel, Kyle Olive and William A. Gilbert, via email pursuant to prior agreement for electronic service, as follows:

Kyle C. Olive at kyle@olivebearb.com; erin@olivebearb.com
William A. Gilbert at bill@olivebearb.com; suzette@olivebearb.com

Signed on October 6, 2014 at Ephrata, Washington.



Shari M. Canet, Paralegal

APPENDIX

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Prior Version Held Unconstitutional by** DeYoung v. Providence Medical Center, Wash., Aug. 27, 1998

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.16. Limitation of Actions (Refs & Annos)

West's RCWA 4.16.350

4.16.350. Action for injuries resulting from health care or related services--Physicians, dentists, nurses, etc.--Hospitals, clinics, nursing homes, etc.

Effective: July 22, 2011
Currentness

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976, against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his or her employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including, in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative; based 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, except that in no event shall an action be commenced more than eight years after said act or omission: 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.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

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This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

Credits

[2011 c 336 § 88, eff. July 22, 2011; 2006 c 8 § 302, eff. June 7, 2006. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.]

Notes of Decisions (101)

West's RCWA 4.16.350, WA ST 4.16.350
Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and other 2014 Legislation effective through October 1, 2014

End of Document

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West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
3. Pleadings and Motions (Rules 7-16)

Superior Court Civil Rules, CR 15

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

Currentness

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated “proposed” and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

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(e) Interlineations. No amendments shall be made to any pleading by erasing or adding words to the original on file, without first obtaining leave of court.

Credits
[Amended effective September 1, 2005.]

Notes of Decisions (380)

CR 15, WA R SUPER CT CIV CR 15
Current with amendments received through 9/1/14

End of Document

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ADAMS COUNTY
FILED
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SUSAN K. KIRKENDALL, Clerk
BY DM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ADAMS

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife, Plaintiffs, vs. ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL; and ALLEN D. NOBLE, PA-C and JANE DOE NOBLE husband and wife and the marital community thereof; and JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community thereof; and PROVIDENCE HEALTH SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALTIES, A Washington Corporation Defendants.	NO. 13-2-00126-1 DECLARATION OF RANDALL M. PATTEN, M.D.

I, RANDALL M. PATTEN, M.D., declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

GILBERT LAW FIRM
100 EAST BROADWAY*P.O. BOX 2149
MOSES LAKE, WA 98837
(509) 764-8426/FAX (509) 766-7764

1. I am over the age of eighteen; I am competent to testify and all of the opinions expressed in this report are based on a reasonable degree of medical certainty; and I make this declaration of my own personal knowledge.

2. I am a diagnostic radiologist licensed to practice medicine in Washington. I specialize in Radiology and have been certified by the American Board of Radiology in this specialty since 1985. Following completion of a residency in Diagnostic Radiology at the University of California, San Diego in 1985, I completed a fellowship at the University of Washington, School of Medicine in Ultrasound/Computed Tomography/Magnetic Resonance Imaging between 1985 and 1986. I taught Radiology as a Clinical Associate Professor of Radiology at University of Washington School of Medicine and as a Professor of Radiology and Orthopedic Surgery at University of Colorado School of Medicine. I am on the consulting medical staff at Providence St. Peter Hospital and on the active medical staff of Tacoma General Hospital, St. Francis Community Hospital, St. Joseph Medical Center, St. Claire Hospital and St. Anthony's Hospital.

3. I have been retained to provide a summary of my expert opinions as of the date of this report regarding the findings shown on shoulder imaging studies obtained on Lori A. Sweeney dated 4/25/2010.

4. For purposes of my initial review, I evaluated images on CD obtained for the following examinations:

a. Right shoulder radiographs from East Adams Rural Hospital dated 4/25/2010

b. Single post-reduction right shoulder radiograph from East Adams Rural Hospital dated 4/25/2010

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c. Right shoulder radiographs from Sacred Heart Medical Center dated 4/25/2010

d. Right shoulder CT from Sacred Heart Medical Center dated 4/27/2010 Right shoulder radiographs from Sacred Heart Medical Center dated 4/29/2010

e. Declaration of Dr. James Nania

f. Declaration of Dr. Michael Peters

g. Declaration of Dr. John Staeheli

5. Based on the initial right shoulder radiographs obtained on 4/25/2010, there clearly is a fracture-dislocation of the proximal right humerus. The proximal humerus is anteriorly dislocated into a subcoracoid location and there is an obvious separate greater tuberosity fracture fragment that is identified at the level of the inferior glenoid.

6. The quality of the initial radiographic imaging of the shoulder is somewhat compromised by patient positioning and body habitus. I do not identify, even in retrospect, any fracture line of the surgical neck of the humerus. The cortex appears intact and I do not detect any subtle linear lucencies except for a Mach line (artifact) related to the overlapping of the humerus and blade of the scapula.

7. Given the presence of the shoulder fracture-dislocation on initial imaging, and given the clinical importance of completely evaluating and understanding the extent of bony injury, I believe that it would have been reasonable to perform additional imaging with shoulder CT prior to attempts at definitive treatment. It is well known that CT can provide improved detail and definition of the extent of bony shoulder injury. However, I believe that this is a clinical and not a radiological decision.

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8. My opinions in this report are based on the information I have reviewed to date, as well as my education, training, knowledge, and direct experience, in the evaluation and diagnosis of patients with conditions the same as, or similar to those of, Lori Sweeney.

9. I have reviewed these studies independently and am basing my opinions on the imaging studies and information currently available to me. I reserve the right to alter and/or amend opinions if additional information becomes available.

SIGNED at Olympia, Washington this 30th day of April, 2014.

Randall M. Patten, M.D.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the date below, I caused to be served a true and correct copy of the foregoing document to Mr. Robert F. Sestero, Jr., Evans, Craven & Lackie, P.S., 818 W. Riverside Ave., Ste. 250, Spokane, WA 99201; and to Ryan Beaudoin, Witherspoon Kelley, 422 W. Riverside Ave., Ste. 1100, Spokane, WA 99201-0300 via:

- ☒ **HAND DELIVERY**
- ☒ **U.S. FIRST CLASS MAIL**
- ☐ **OVERNIGHT MAIL**
- ☐ **FACSIMILE TRANSMISSION**

DATED this 14th day of April, 2014.

Joel Chavez, Legal Assistant

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ADAMS COUNTY
FILED
(52) APR 24 2014
SUSAN K. KIRKENDALL, Clerk
BY DM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ADAMS

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife, Plaintiffs, vs. ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL; and ALLEN D. NOBLE, PA-C and JANE DOE NOBLE husband and wife and the marital community thereof; and JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community thereof; and PROVIDENCE HEALTH SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALTIES, A Washington Corporation Defendants.	NO. 13-2-00126-1 DECLARATION OF JEFFREY NICHOLSON, PA-C, PhD

I, JEFFREY NICHOLSON, PhD, PA-C, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

OLIVE | BEARB, GRELISH & GILBERT PLLC
1218 Third Ave, Suite 1000
Seattle, WA 98101
T: (206) 629-9909
F: (206) 971-5081

1. I am over the age of eighteen; I am competent to testify and all of the opinions expressed in this report are based on a reasonable degree of medical certainty; and I make this declaration of my own personal knowledge.

2. I am a physician assistant licensed to practice medicine in the state of Wisconsin. I graduated in 1984 from Boston College with a Bachelor of Science, double majoring in biology and philosophy. After my education at Boston College, I attended Harvard University at Cambridge, MA and earned a Master of Education with a concentration in International Development and Education Administration –I graduated from Harvard in 1989. Following my tenure at Harvard, I attended the University of Wisconsin-Madison and graduated in 1992 with a Bachelor of Science in Physician Assistant studies. I have been certified by the National Commission on Accreditation of Certified Physician Assistants since 1993. I later received from the University of Nebraska-Omaha in 2005 a Master of Physician Assistant Studies. Finally, I attended the University of Wisconsin-Madison and in 2008, I graduated with a Doctor of Philosophy in Educational Leadership and Policy Analysis. I have been continuously employed on a part time or full time basis in emergency medicine, urgent care, family practice, and internal medicine for the past twenty-two years. I currently practice clinically full-time in emergency medicine and urgent care and part time in family practice and primary care settings in Milwaukee, WI. I have been a PA educator all my life, and full time PA program faculty for twelve years. I have been the Director of the University of Wisconsin-Madison Physician Assistant Program.

3. I have been retained to provide a summary of my expert opinions as of the date of this report regarding the standard of care provided to Lori A. Sweeney by Allen Noble, PA-C on 4/25/2010.

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4. For purposes of my initial review, I evaluated the following documents:

a. Deposition of Allen Noble, PA-C (with exhibits)

b. Deposition of James Dunlap, M.D. (with exhibits)

c. Deposition of Charles Sackmann, M.D. (with exhibits)

d. Declaration of Steven Graboff, M.D.

e. Declaration of Randall Patten, M.D.

5. The facts of this incident involving Mr. Noble as I understand them are as follows:

a. Mr. Noble failed to consult with his supervising physician prior to attempting to reduce Mrs. Sweeney's shoulder. This injury was potentially an orthopedic emergency, however, and Mr. Noble exercised poor discretion in attempting to treat (reduce) the injury, which caused serious harm to Mrs. Sweeney.

b. Mr. Noble attempted a closed reduction of an orthopedic injury without orthopedic coverage available at the hospital. Mr. Noble consulted with an orthopedic surgeon by telephone who was over 40 miles away and not available to supervise the reduction in the event of a medical emergency arising out of the reduction.

c. Mr. Noble provided treatment for an injury for which Mr. Noble had insufficient experience or training. This is evident through his testimony and through the multiple attempts at reduction of the injury, which caused further harm to Mrs. Sweeney.

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6. It is my opinion, based upon my education, training, and expertise in the treatment of patients as a physician assistant in the emergency and urgent care settings, that Allen Noble PA-C breached the standard of care in his care of Mrs. Sweeney on 4/25/2010. Mr. Noble fell below the applicable standard of care in the following ways:

a. Mr. Noble should not have attempted to reduce this fracture dislocation without the direction and leadership of an orthopedist present or a supervising physician present and taking charge who was comfortable and experienced with reducing such a fracture dislocation.

b. Even if Mr. Noble consulted with an orthopedic specialist who instructed him to attempt a closed reduction, he had a duty to exercise independent judgment before attempting such a procedure. The fact that he ordered a second set of x-rays evidenced his knowledge that he should not have attempted a closed reduction. Given Mr. Nobles' lack of experience in reducing dislocated shoulders and specifically fracture dislocations, attempting to do so autonomously breached the standard of care.

c. After having attempting unsuccessfully to perform a closed reduction, Mr. Noble's second and third attempts fell below the standard of care.

7. As a proximate cause of the breach of the standard of care for emergency physician assistants, Mrs. Sweeney sustained what is likely a permanent injury to her right upper extremity.

8. The standard of care for a physician assistant performing an orthopedic procedure, as was the case here, is a national standard. It does not vary from state to state, nor from region to region. I know this because of my training and experience as an educator of physician

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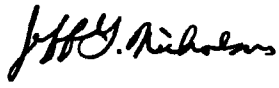
assistants. I have consulted with a physician assistant in the State of Washington to determine that the standard of care is the same in Washington as it is where I currently practice in the State of Wisconsin. The accreditation standards for the training of physician assistants are national standards and physician assistants that receive such training are taught the same standards. Physician assistants take a single national certifying examination based on a single national standard.

9. My opinions in this declaration is based on the information I have reviewed to date, as well as my education, training, knowledge, and direct experience, in the evaluation and diagnosis of patients with conditions the same as, or similar to those of, Mrs. Sweeney.

10. I have reviewed these documents independently and am basing my opinions on information currently available to me. I reserve the right to alter and/or amend opinions if additional information becomes available.

SIGNED at Milwaukee, Wisconsin this 23rd day of April, 2014.



Jeffrey Nicholson, PA-C

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the date below, I caused to be served a true and correct copy of the foregoing document to:

Adams County Superior Court 210 W. Broadway Ave. Ritzville, WA 99169	☒ ☐ ☐ ☐	**HAND DELIVERY** **U.S. FIRST CLASS MAIL** **OVERNIGHT MAIL** **FACSIMILE TRANSMISSION**
Mr. Robert F. Sestero, Jr. Evans, Craven & Lackie, P.S. 818 W. Riverside Ave., Ste. 250 Spokane, WA 99201	☒ ☐ ☐ ☒	**HAND DELIVERY** **U.S. FIRST CLASS MAIL** **OVERNIGHT MAIL** **FACSIMILE TRANSMISSION**
Ryan Beaudoin Witherspoon Kelley 422 W. Riverside Ave., Ste. 1100 Spokane, WA 99201-0300	☒ ☐ ☐ ☒	**HAND DELIVERY** **U.S. FIRST CLASS MAIL** **OVERNIGHT MAIL** **FACSIMILE TRANSMISSION**

DATED this 24th day of April, 2014.

Erin Clune, Legal Assistant

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ADAMS COUNTY
FILED
(39) APR 14 2014
SUSAN K. KIRKENDALL, Clerk
BY DM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ADAMS

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife, Plaintiffs, vs. ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL; and ALLEN D. NOBLE, PA-C and JANE DOE NOBLE husband and wife and the marital community thereof; and JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community thereof; and PROVIDENCE HEALTH SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALTIES, A Washington Corporation Defendants.	NO. 13-2-00126-1 DECLARATION OF STEVEN R. GRABOFF, M.D.

I, STEVEN R. GRABOFF, M.D., declare under penalty of perjury under the laws of the State of Washington and the State of California that the following is true and correct:

1. I am over the age of eighteen. I am competent to testify to the opinions expressed below and all of the opinions expressed in this report, unless otherwise noted, are made on a more probable than not basis and to a reasonable degree of medical certainty. I make this declaration based on my own personal knowledge.

2. I am a medical doctor licensed to practice medicine in the State of California. I specialize in orthopedic surgery and am board certified by the American Board of Orthopaedic Surgery. Following receiving my medical degree from the University of California Irvine School of Medicine in 1980, I did an internship in general surgery at the University of California Irvine Medical Center from 1980-1981 and a residency in Orthopaedic Surgery at Harbor-UCLA Medical Center and Affiliated Hospitals from 1981-1985. I am currently a member of the American Board of Orthopaedic Surgery; the American College of Forensic Examiners; the American Medical Association; the Association of University Professors; the California Faculty Association; the California Orthopaedic Association; the Orange County Medical Association; and the Medical Reserve Corps, Orange County, California. I did orthopaedic surgery in Huntington Beach, Westminster, Fountain Valley, Newport Beach, and Los Alamitos, California between 1985 and 2005. Since 2005, I have had a non-surgical orthopaedic practice in Huntington Beach California.

3. In my clinical practice, I have evaluated and treated shoulder dislocations and have supervised physician assistants doing the same. Based on my training and experience, I am familiar with the standard of care relating to the diagnosis and treatment of fracture dislocations of the humerus. This standard of care is a national standard as applicable in the State of Washington as it is in the State of California, where most of my training and experience has taken place.

4. I have been retained by the plaintiffs in this case to provide a summary of my expert opinions as of the date of this report regarding the treatment received by plaintiff Lori A. Sweeney by defendants East Adams Rural Hospital ("EARH"), Allen D. Noble, PA-C and James N. Dunlap, MD.

5. For purposes of this declaration, I evaluated the following radiological studies:

a. April 25, 2010 pre-reduction x-ray at EARH of right shoulder showing acute anterior-inferior subcoracoid dislocation of the right glenohumeral joint with a fracture of the greater tuberosity that is displaced and widely separated from the humeral head and shaft.

b. April 25, 2010 post reduction x-ray showing that the shaft of humerus has been reduced back to the vicinity of the glenohumeral joint; however, there is now at least a 3-part fracture where the humeral head has been fractured off the distal shaft and neck area of the humerus and is widely displaced left in the subcoracoid anterior-inferior displaced position as well as the greater tuberosity fracture fragment remaining widely displaced

c. April 27, 2010 CT scan of the right shoulder, comminuted in at least a 3-part proximal humeral fracture

d. April 29, 2010 x-ray of the right shoulder, post-operative x-ray with staples in the skin and well-placed cemented hemiarthroplasty

e. July 23, 2010, x-ray of right shoulder, again noted is a well-placed humeral cemented hemiarthroplasty.

f. October 19, 2010, x-ray of right shoulder, the cemented right hemiarthroplasty is again noted. The humeral head component appears to be more high riding that on previously noted films.

g. January 3, 2012, x-ray of right shoulder, again noted is a cemented right hemiarthroplasty. Clearly, there is now evidence of rotator cuff arthropathy with impingement of the superior prosthetic humeral head against the undersurface of the acromion. The prosthetic humeral head is clearly high riding in the glenoid fossa.

h. August 28, 2012, x-ray of right shoulder, again noted is the cemented right humeral hemiarthroplasty. There is rotator cuff arthropathy noted. The humeral head is at least 50% superiorly subluxed abutting underneath the acromion and impinging against the acromion with only 50% contact of the inferior portion of the prosthetic humeral head in the superior portion of the glenoid fossa.

6. For purposes of this declaration, I have reviewed the following medical records:

a. Medical records and bills for treatment of Ms. Lori Sweeney from EARH from April 25, 2010

b. Medical Records and bills from Sacred Heart Medical Center from admission of Ms. Lori Sweeney on 4/25/10 through discharge on May 1, 2010; April 4, 2012;

c. Audit trail of x-rays

7. For purposes of this declaration, I have also reviewed:

a. Declaration of Dr. James Nania

b. Declaration of Dr. John Staeheli

c. Declaration of Dr. Michael Peters

8. I made the factual findings described below based on my review of this information listed above, which allowed me to form the opinions and draw the conclusions I have set forth below. All such opinions and conclusions, unless otherwise noted, are made on a more probable than not basis and to a reasonable degree of medical certainty.

9. On April 25, 2010, Lori Sweeney was a 58-year-old female that fell at a gas station on her extended right upper extremity, resulting in a fracture dislocation of the right shoulder.

10. Following the fall, she presented to the East Adams Rural Hospital, where a physician assistant, Allen Noble, PA-C, evaluated her. Mr. Noble found that Ms. Sweeney had an anterior-inferior subacromial acute fracture dislocated shoulder. At that time, the fracture fragment consisted only of the greater tuberosity. At that time, there was no evidence of any fracture of the humeral neck or head area. Ms. Sweeney was found to be neurologically and vascularly intact with no abnormality at that time.

11. Mr. Noble consulted with orthopedic surgeon, James N. Dunlap, MD, by telephone only. Dr. Dunlap reviewed x-ray film on Stentor, which showed fracture dislocation of the greater tuberosity and the anterior-inferior dislocated humeral head and proximal humerus. On the advice of Dr. Dunlap, an orthopedic surgeon, Mr. Noble attempted in the emergency department to reduce the fracture dislocated right shoulder.

12. Prior to engaging in attempts to at reducing the shoulder, Mr. Noble did not use conscious sedation or anesthesia. He only used narcotic pain medication.

13. Ms. Sweeney underwent three attempts by Mr. Noble to reduce the right shoulder. The culmination of these three attempts caused a severely comminuted fracture in at least 3-parts of the right shoulder. Thus, as a result of the three reduction maneuvers by Mr. Noble at the

instruction of Dr. Dunlap, Ms. Sweeney's right shoulder glenohumeral joint and humeral head were completely fractured and destroyed with loss of the joint surfaces and articulation and persistent anterior-inferior dislocation of the large humeral head fragment.

14. Dr. Dunlap then recommended to Mr. Noble that Ms. Sweeney be transferred to Sacred Heart Hospital in Spokane where she was admitted into the emergency department on April 25, 2010.

15. After admission to Sacred Heart, Dr. Dunlap again advised emergency room personnel to try to reduce the shoulder. Such a recommendation breached the standard of care for a treating orthopedic surgeon given that at least a 3 part fracture dislocation is not a reducible situation and always requires surgical intervention. Such a reduction was attempted again but not successful.

16. Because of the severity of the injury, on April 28, 2010, Dr. Dunlap performed a right cemented shoulder hemiarthroplasty. No inspection appears to have been made during this procedure that the rotator cuff was intact and had not suffered any damage either at the time of the initial fall or in the failed reduction attempts that led to a comminuted fracture. It is well known that rotator cuff tears are commonly associated with these kinds of injuries and conditions of the shoulder.

17. It appears that by April 4, 2012, Ms. Sweeney's right shoulder hemiarthroplasty was failing from a radiological standpoint. She developed a high riding humeral head prosthesis that was impinging in the subacromial space consistent with a rotator cuff arthropathy essentially meaning the rotator cuff was no longer functioning and nonexistent.

18. On April 4, 2012, she was taken to surgery at Sacred Heart by Dr. Dunlap, where he attempted to perform a rotator cuff repair noting that the tissues were rather thin. Based on

this information and from the other materials I have reviewed in this case, Ms. Sweeney underwent a reverse total shoulder replacement on June 11, 2013. Such a procedure was the likely consequence of a failure in 2012 of Dr. Dunlap to take appropriate care during his attempt to perform rotator cuff repair as a consequence of his improper instructions to reduce the shoulder in April of 2010.

19. Based on my review of the materials summarized above and on the factual findings and assumptions made above, it is my opinion that Dr. Dunlap and physician assistant, Allen Noble, departed from the reasonable and accepted standards of medical care as follows:

A. Dr. Dunlap fell below the standard of care by instructing Mr. Noble to reduce a fracture dislocation in the emergency department after Dr. Dunlap had seen the x-rays made available to him via Stentor.

B. Mr. Noble fell below the standard of care by failing to call an orthopedic surgeon to come to the emergency department and to treat the condition with conscious sedation or anesthesia.

C. Dr. Dunlap and Mr. Noble fell below the standard of care by failing to diagnose a pre-reduction potential anatomic neck fracture, though I disagree that such a fracture existed prior to the attempts at reduction.

D. Dr. Dunlap and Mr. Noble fell below the standard of care by failing to perform ancillary studies in the presence of greater tuberosity fracture such as MRI scan or CT scan to delineate the damage and pathology to the shoulder prior to attempting a reduction maneuver.

E. Dr. Dunlap was negligent in instructing and Mr. Noble was negligent in attempting a reduction by the physician assistant in the emergency room without

anesthesia in the presence of a fracture dislocation. This is an orthopedic condition that requires the treatment and expertise of an orthopedic surgeon because there was an associated fracture of the greater tuberosity associated with the anterior dislocation. There was also an associated risk statistically based on literature of a proximal humerus neck fracture that required evaluation, consideration and treatment by a qualified orthopedic surgeon. This condition not only needed to be personally seen and evaluated by an orthopedic surgeon, but needed to be personally treated by the orthopedic surgeon and the treatment rendered by the physician assistant at the request of the orthopedic surgeon was a breach in the standard of care.

F. Negligent request by Dr. Dunlap once the patient was transferred to Sacred Heart Emergency Room to again try and reduce the right shoulder, which already had been attempted to be reduced 3 times resulting in at least a 3-part comminuted fracture dislocation of the proximal humerus and humeral head, and was in need of surgical treatment.

G. Failure by Dr. Dunlap to inspect and repair a torn rotator cuff during the April 28, 2010 surgical procedure for right total shoulder replacement or during follow up care in 2012.

20. As a direct and proximate cause of conduct described above, which fell below the standard of care, Ms. Sweeney sustained the following injuries on a more probable than not basis and to a reasonable degree of medical certainty:

A. An at least 3-part comminuted fracture dislocation of the right shoulder and proximal humerus and humeral head.

B. The need for total shoulder replacement surgery on 4/28/10.

C. The need for subsequent rotator cuff repair, which more likely than not was associated with the fracture of the greater tuberosity and should have been repaired at the time of shoulder replacement or repair of April 4, 2012.

D. The need for reverse total shoulder replacement in June of 2013 as a result of the development of right shoulder failed arthroplasty and rotator cuff arthropathy and failure to repair rotator cuff.

E. Chronic pain and dysfunction of the right upper extremity.

21. I reserve the right to augment, amend or modify any of the statements above upon receipt of additional treatment records or other discovery in this matter.

SIGNED at Huntington Beach, California this 7 day of April, 2014.

Steven R. Graboff, M.D.