

**FILED
Court of Appeals
Division III
State of Washington
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**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

BROOKLYN J. FISHER

Appellant,

v.

TRI-CITIES LABORATORY, L.L.C., et.al.,

Respondents.

REPLY BRIEF OF APPELLANT

Benton County Cause No. 19 – 2 - 00022 – 03

Appeal No. 373843

**Richard R. Johnson
Lawyers for Appellant
JOHNSON & JOHNSON LAW FIRM, P.L.L.C.
917 Triple Crown Way #200
Yakima, WA. 98908
(509) 469 - 6900**

FISHER v. TRI – CITIES LABORATORY, L.L.C., et.al.

Appeal No. 373843

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OTHER AUTHORITIES

RCW 4.16.010	2.
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RCW 4.16.350	1., 3.
RCW 7.72.060	2.

REPLY ARGUMENT

This appeal distills down to whether the trial court correctly formulated and applied RCW 4.16.350's one – year discovery rule. The correct formulation of the discovery rule poses a question of law, but the application of the rule presents a question of fact. *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 598 P.2d 1358 (1979).

In *Ohler*, the plaintiff patient suffered blindness from excess oxygen given during her infancy incubation. She brought medical negligence and product liability claims against the hospital and the incubator manufacturer.

The trial court dismissed all of Ms. Ohler's claims on summary judgment motions. The Washington Supreme Court reversed, holding that the plaintiff's claims didn't accrue until she discovered, or reasonably should have discovered, all of the essential elements of her possible causes of action: 1) Duty, 2) Breach, 3) Causation and 4) Damages.

Viewing the evidence in the light most favorable to Ms. Ohler, the Supreme Court held that the trial court had erred as a matter of law when it ruled that her medical negligence cause of action accrued when she discovered the cause of her blindness – “too much oxygen”- even if no fault on the hospital's part was apparent.

The *Ohler* court ruled that there was a factual issue whether or not Ms. Ohler knew, or should have known, that the result - her blindness - was a breach of the hospital's duty of care to her. Ms. Ohler knew she'd been administered oxygen that resulted in her blindness. However, the Supreme Court held that reasonable persons could differ about when Ms. Ohler discovered that her blindness may have been caused by wrongful / tortious acts by the hospital, and left that issue to be resolved by the trier of fact.

The *Ohler* court also reversed dismissal of the product liability claim when RCW 4.16.010 and RCW 4.16.080 (2) were in effect. The Legislature enacted of RCW 7.72.060 (3) in 1981 as the limitation of action state for product liability claims.

Brooklyn Fisher knew that he didn't have tuberculosis by at least early 2016 when he wrote his "special circumstances" letter to the U.W. [CP 43]. He wrote at that time "... the lab contaminated the sample." He didn't know which lab it was, or how his sample became contaminated.

The last letter Brooklyn received from the Benton – Franklin Health District was dated March 23, 2016. [CP 57 & 64] More investigation was done due to "inconsistencies" in clinical and lab findings. Documentation of January 7, 2016 noted that "the lab finding" of TB "... was due to "specimen contamination." However, no details were given on how, when, where, or by whom, the specimen was "contaminated." [CP 64].

There are any number of ways that a patient's collected specimen can become contaminated. Lab contamination doesn't necessarily equate to lab negligence. Brooklyn didn't know lab contamination was the result of wrongful / tortious acts or omissions. In short, he didn't know that a lab had breached a legal duty owed to him.

The one - year discovery provision of RCW 4.16.350 (3) didn't begin to run, by the language of the statute itself, until the time Brooklyn discovered, or reasonably should have discovered, that the injury or condition was caused by "...said act or omission...."

In *Winbun v. Moore*, 143 Wn.2d 206, 18 P.3d 576 (2001), the Supreme Court ruled that the one – year discovery rule is triggered by a plaintiff's discovery of "said act or omission" – that being the act or omission that caused the injury.

Brooklyn Fisher didn't know, nor should he reasonably have known, that he had all of the elements of a healthcare provider negligence claim against a particular lab provider until after he received the state Department of Health Complaint Investigation Report [CP 68 – 71] following his written request of September 9, 2018.

Brooklyn filed his Complaint in Superior Court in early January, 2019 [CP 1]. That's well within one year of his receipt of the Department of Health documents that called out Tri-Cities Laboratory.

Discovery rules such as RCW 4.16.350 require a claimant to use "due diligence" in discovering the basis of a potential claim. *Allen v. State*, 118 Wn.2d 753, 826 P.2d 200 (1992).

Brooklyn Fisher was born in November, 1995 [CP 56, 1. 22]. He was ill, was under medical evaluation and testing, and was being treated with medications. He didn't do well as a student at the U.W., and was not able to continue there. He returned to the Tri – Cities.

What would a person in his late teens / early 20's have gone on to do that Brooklyn didn't do? That's why, we submit, that our appellate courts have consistently ruled that it's normally a question of fact as to when a patient reasonably should have discovered that his injuries / damages were caused by medical negligence. *Adcox v. Children's Hosp. & Med. Ctr.*, 123 Wn.2d 15, 864 P.2d 921 (1993), and *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988).

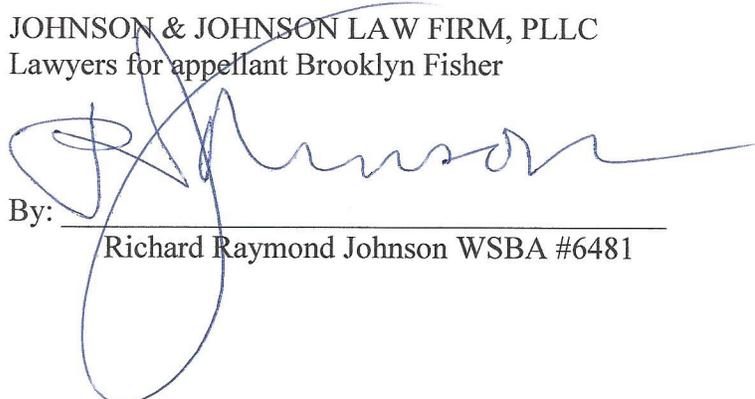
CONCLUSION

This court should reverse the dismissal of Brooklyn's Complaint and remand this matter to the Superior Court for further proceedings.

Dated at Yakima, WA August, 10, 2020.

Respectfully submitted,

JOHNSON & JOHNSON LAW FIRM, PLLC
Lawyers for appellant Brooklyn Fisher

By: 

Richard Raymond Johnson WSBA #6481

COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

BROOKLYN J. FISHER,)
) No. 373843
 Appellant,)
) CERTIFICATE OF SERVICE
) OF REPLY BRIEF OF APPELLANT
)
 TRI-CITIES LABORATORY, LLC,)
 et.al.)
)
 Respondent.)
 _____)

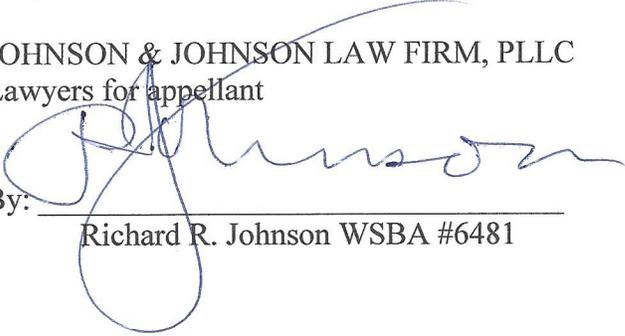
Richard R. Johnson, lawyer for appellant Brooklyn Fisher, states under penalty of perjury of the laws of the state of Washington that on August 10, 2020, I caused the Reply Brief of Appellant to be filed with the Clerk of the Court of Appeals, Division III, and served upon the following, via Court of Appeals E-Filing:

CORR CRONIN LLP
Kelly H. Sheridan WSBA #44746
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
(206) 625 – 8600 Phone
(206) 625 – 0900 Fax
ksheridan@corrchronin.com

LEWIS RICE LLC
Thomas L. Caradonna, *Pro Hac Vice*
Jennifer L. Gustafson, *Pro Hac Vice*
600 Washington Avenue, Suite 2500
St. Louis, MO 63101
(314) 444 – 7600 Phone
(314) 612 – 7693 Fax
tcaradonna@lewisrice.com
jgustafson@lewisrice.com

Dated at Yakima, WA August 10, 2020

JOHNSON & JOHNSON LAW FIRM, PLLC
Lawyers for appellant

By: 
Richard R. Johnson WSBA #6481

JOHNSON & JOHNSON LAW FIRM, PLLC

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- mdawson@corrchronin.com
- tcaradonna@lewisrice.com

Comments:

Sender Name: Richard Johnson - Email: Richard@jandjlaw.com
Address:
917 TRIPLE CROWN WAY STE 200
YAKIMA, WA, 98908-2426
Phone: 509-469-6900

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