

**FILED**

MAY 26 2020

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**COURT OF APPEALS**  
**DIVISION III**  
**OF THE STATE OF WASHINGTON**

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**BROOKLYN J. FISHER**

**Appellant,**

**v.**

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

**Respondents.**

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**BRIEF OF APPELLANT**

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

**Appeal No. 373843**

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**Richard R. Johnson**  
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**FISHER v. TRI – CITIES LABORATORY, L.L.C., et.al.**

**Appeal No. 373843**

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**OTHER AUTHORITIES**

RCW 4.16.350	4., 6.
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#### A. ASSIGNMENT OF ERROR

The trial court erred when it granted the defendants' motion for summary judgment of dismissal, and dismissed the Complaint.

#### B. INTRODUCTION / STATEMENT OF CASE

Brooklyn Fisher [hereinafter "Brooklyn"], who was born in November, 1995, [CP 56, l. 22] underwent a bronchoscopy, with bronchial lavage, on August 6, 2015, at Kadlec Regional Medical Center, in Richland. A specimen collected from that procedure made its way to the defendant Tri-Cities Laboratory, LLC [hereinafter "TCL"], and, subsequently, to defendant Pathology Associates Medical Laboratories, Inc. [hereinafter "PAML"], for evaluation. [CP 2]

The Washington State Department of Health [hereinafter "DOH"] received a report that Brooklyn's specimen was positive for Mycobacterium Tuberculosis Complex, a potentially communicable disease. [CP 3].

The DOH reported the lab results to the Benton – Franklin Health District [hereinafter "BFHD"], which contacted Brooklyn on September 4, 2015. [CP 3] He was instructed to remain in home quarantine, obviously away from work, while undergoing further communicable disease evaluation. [CP 3]

The BFHD sent Brooklyn a letter dated September 14, 2015. [CP 57 & 62] That letter stated that the quarantine imposed on September 4, 2015 was lifted because “The evaluation determined that you did not pose an infectious risk as of 09/10/2015 and you were cleared to return to work from the public health perspective.” No details were given on why, or how, or by whom, that was all determined. [CP 62].

Brooklyn received another letter from the BFHD dated March 23, 2016. [CP 57 & 64] That letter stated that additional investigations had been done because of “inconsistencies” in clinical and lab findings. Additional lab documentation of January 7, 2016 noted that “the lab finding” of TB “... was due to “specimen contamination.” No details were given on how, when, where, or by whom, the specimen was “contaminated.” [CP 64]

Brooklyn, then age 22, sent a “Freedom of Information Act Request” to TCL on September 9, 2018. [CP 58 & 66]

Brooklyn subsequently received documents, indicating to him for the first time, that the Executive Director of the DOH had made a complaint against TCL in his case. [CP 68-71] Unbeknownst to Brooklyn, the DOH sent a letter to TCL, dated January 4, 2016, along with a Statement of Deficiencies and Plan of Correction investigation. [CP 73-75] The DOH also billed TCL over \$1,250 for the cost of its investigation of Brooklyn’s case. [CP 77-78].

Brooklyn first retained counsel in this matter on October 26, 2018. [CP 56]. Brooklyn filed a Complaint against TCL and PAML, in Benton County Superior Court, on January 4, 2019 [CP 1-4]

The defendants filed a motion for summary judgment of dismissal with the court on December 20, 2019. {CP 11-16}

Superior Court Judge Jacqueline Shea - Brown granted the defendants' motion, and entered an order dismissing the Complaint, on January 17, 2020. [CP 54-55]

Brooklyn filed a Notice of Appeal to this court on February 6, 2020 [CP 79-82].

### C. ARGUMENT

#### 1. The Standard of Review on Appeal

This court reviews trial court orders granting motions for summary judgment of dismissal *de novo*. *Loeffelholz v. Univ of Washington*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

#### 2. Summary Judgment Principles

*Balise v. Underwood*, 62 Wn.3d 195, 381 P.2d 966 (1963) remains a leading case on summary judgment principles. SJ motions can be granted only if the pleadings, affidavits, depositions or admissions show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See, Capitol Hill Methodist Church of Sea. v. Seattle*, 52 Wash.2d 359, 324 P.2d 1113 (1958).

A material fact is one upon which the outcome of the litigation depends. *Zedrick v. Kosenski*, 62 Wn.2d 50, 380 P.2d 870 (1963).

The court determines if there is a genuine issue of material fact. The court can't resolve factual issues. *Thoma v. C. J. Montag & Sons, Inc.*, 54 Wash.2d 20, 337 P.2d 1052 (1959).

The party moving for summary judgment has the burden of proving there are no genuine issues of material fact. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960).

The material evidence, and all reasonable inferences therefrom, is viewed most favorably for the nonmoving party. Summary judgment should be denied when reasonable minds could reach different conclusions. *Wood v. Seattle*, 57 Wash.2d 469, 358 P.2d 140 (1960).

### 3. Health Care Provider Limitation of Action

The defendants asked for dismissal of the Complaint saying that it wasn't filed within the time allowed by RCW 4.16.350. They claimed the three – year part of the statute ran as early as September 4, 2015. That's when the BFHD told Brooklyn he was home quarantined with TB.

Brooklyn first retained undersigned counsel on October 26, 2018, for potential claims for misdiagnosis. A healthcare provider defendant can meet the initial burden for summary judgment of dismissal by showing that the plaintiff lacks competent expert testimony. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989).

The Washington Supreme Court filed its decision in *Reyes v. Yakima Health District*, \_\_\_ Wn.2d \_\_\_, 419 P.3d 819 (2018) on June 21, 2018. The court held that allegations of misdiagnosis, alone, are generally insufficient to create a *prima facie* case of medical negligence. The standard of care, and departure from the standard of care, by the defendant healthcare provider must generally be established by expert medical testimony.

The dismissal of Mrs. Reyes' medical negligence lawsuit, which has facts similar to Brooklyn's case, was affirmed because she hadn't established the applicable standard of care. She hadn't established how the defendants had acted negligently by breaching that standard. Plaintiff's experts must link their conclusions to a factual basis of the case.

Brooklyn needed expert medical review, and opinion, that his misdiagnosis - apparently based upon specimen contamination - was the result of a departure from the standard of care by a healthcare provider to be able to make out a *prima facie* case. Who contaminated his specimen? How did the contamination occur? If there was specimen contamination was that due to a departure from the standard of care? How?

Brooklyn's counsel first learned in August, **2019** that he'd sent a "Freedom of Information Act Request" to TCL on September 9, 2018, and that it was only after then that Brooklyn learned of the DOH investigation and its conclusions. Brooklyn didn't know the facts of what actually occurred to his bronchoscopy specimen, where, when and by whom, until after he received the records provided in response to his request of September 9, 2018.

The DOH Complaint Investigation Report [CP 68 – 71] shows that the acts or omissions of employees / agents of TCL who contaminated Brooklyn’s lavage specimen occurred in early August, 2015. So, the three – year provision of RCW 4.16.350 (3) ran out by early August, 2018.

However, we submit, the one - year discovery provision of RCW 4.16.350 (3) didn’t begin to run, by the language of the statute, 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 Court of Appeals interpreted the medical statute of limitations to mean that the one – year discovery period begins to run when the plaintiff patient knows, or reasonably should know, that his or her injuries were caused by medical malpractice of / by any of the patient’s physicians, regardless of whether the patient knows or reasonably should know the identity of the alleged tortfeasor.

The Supreme Court ruled in its decision in *Winbun* that RCW 4.16.350 (3) didn’t support the Court of Appeals’ interpretation. 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.

In a case of multiple healthcare providers, the plaintiff’s knowledge of an act / omission by one provider, that triggers the discovery rule, doesn’t necessarily trigger the rule as to all providers who treated the plaintiff. *See, also, Lo v. Honda Motor Co.*, 73 Wn. App. 448, 869 P.2d 1114 (1994).

Brooklyn Fisher was a 19 year – old college student when his bronchoscopy lavage specimen was contaminated in his case. The question here then is objectively when this young man should reasonably have known, or discovered, the acts / omissions that caused misdiagnosis were caused by the negligence of a particular healthcare provider out of the multiple providers who'd been involved with Brooklyn's lavage sample.

Objectively, Brooklyn didn't know, nor should he reasonably have known, that he had a claim for healthcare provider negligence against a particular provider / providers until after he reviewed the DOH records in response to his written request of September 9, 2018.

Brooklyn filed his Complaint in Superior Court in early January, 2019. That's well within one year of his receipt of the DOH documents against TCL.

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).

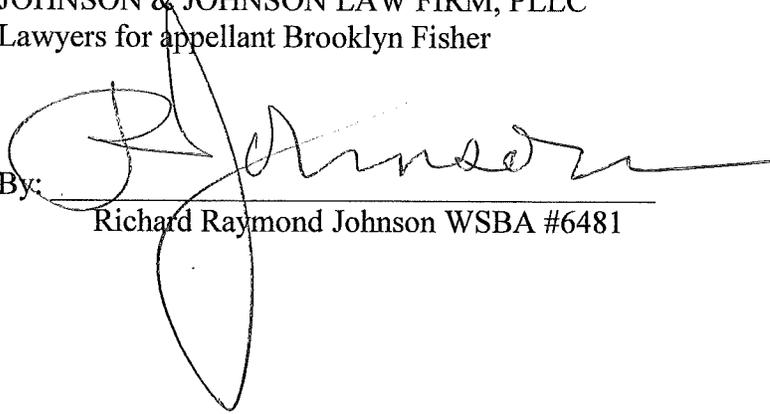
D. CONCLUSION

This court should reverse the trial court and remand this case to Superior Court for further proceedings, we submit.

Dated at Yakima, WA May 22, 2020.

Respectfully submitted,

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

By: 

Richard Raymond Johnson WSBA #6481

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COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

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	) No. 373843
Appellant,	)
	) CERTIFICATE OF SERVICE
	) OF 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 May 22, 2020, I put in the U.S. Mail, 1<sup>st</sup> class, postage paid, a copy of Brief of Appellant, addressed as follows:

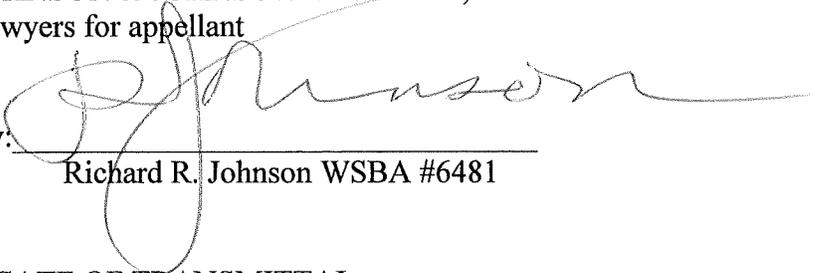
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Certificate of Service

Dated May 22, 2020

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By: 

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CERTIFICATE OF TRANSMITTAL

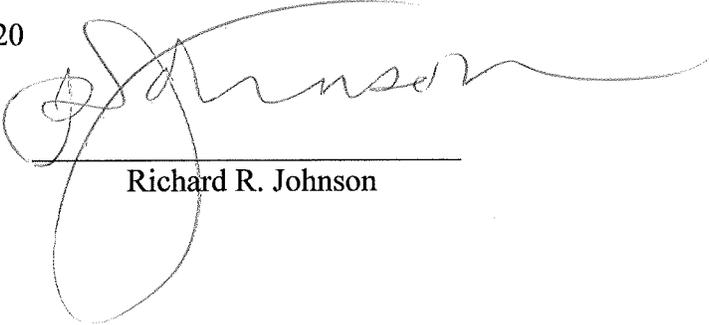
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I hereby certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

Dated at Yakima, WA May 22, 2020

  
Richard R. Johnson

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