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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III

BROOKLYN J. FISHER,

Appellant,

v.

TRI-CITIES LABORATORY, LLC AND
PATHOLOGY ASSOCIATES MEDICAL LABORATORIES, LLC,

Respondents.

Appeal from the Superior Court of Washington for Benton County
Case No. 19-2-0002203

RESPONDENTS' BRIEF

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I. INTRODUCTION

The trial court properly granted summary judgment to Respondents Tri-Cities Laboratory LLC (“TCL”) and Pathology Associates Medical Laboratories LLC (“PAML”) (together, the “labs”). Appellant Brooklyn J. Fisher (“Fisher”) seeks reversal of the trial court’s order dismissing his lawsuit on the grounds that his claim was barred by the statute of limitations set forth in RCW 4.16.350(3). Fisher sued the labs for damages he allegedly sustained as the result of laboratory testing that reported that Fisher had tuberculosis when he did not. It is undisputed that the alleged negligence occurred more than three years prior to the filing of Fisher’s lawsuit, and Fisher concedes that his lawsuit is time barred unless there is a material fact in dispute as to whether the one-year discovery period in RCW 4.16.350 is applicable to Fisher’s claim. The trial court properly ruled that it is not applicable, since it is also undisputed that Fisher was informed in January 2016—almost three years before he filed his lawsuit—that the initial positive result had been the result of specimen contamination, such that the one-year discovery period expired on January 7, 2017. Accordingly, this Court should affirm the trial court’s grant of summary judgment dismissing Fisher’s lawsuit because it is time barred.

II. STATEMENT OF THE CASE

Fisher underwent a bronchoscopy procedure, including bronchial

lavage, at Kadlec Regional Medical Center on August 6, 2015. CP 2. A specimen collected from the bronchial lavage was submitted for laboratory testing and evaluation by TCL, and subsequently by PAML, and was reported to the Washington State Department of Health as showing a positive result for mycobacterium tuberculosis complex. CP 2-3. The Department of Health reported the laboratory results to the Benton – Franklin Health District, which reported the laboratory results to Fisher on September 4, 2015, requiring him to quarantine and not go to his job. CP 3.

A second tuberculosis smear test was performed on September 9, 2015, and a report dated September 14, 2015 indicated that there were no acid fast bacilli seen. CP 27. Therefore, on September 14, 2015, the Benton – Franklin Health District notified Fisher that he did not pose an infectious risk and could return to work. CP 29.

A few weeks later, on October 28, 2015, Fisher visited the University of Washington Medical Center where he was seen by Dr. Kristina Rudd. CP 19, 31. He had been referred for a second opinion concerning his chronic cough, asthma, and recurrent bronchitis. CP 35. Dr. Rudd discussed the results of Fisher’s positive tuberculosis test with him, as reflected in his medical records:

In terms of his mycobacteria culture positivity, we discussed that the *M. gordonae* is a very common non-pathogenic contaminant. Given that he is extremely low-risk for TB,

does not have radiographic evidence of pulmonary TB, and has had multiple negative serum quantiferons, I strongly suspect that his positive BAL culture was a contaminant.

CP 35.

Subsequent laboratory documentation dated January 7, 2016 formally noted, and advised Fisher, that the initial laboratory findings and reporting by the labs were due to specimen contamination, and not active tuberculosis infection and/or exposure to tuberculosis. CP 3.

Fisher did not have satisfactory academic performance during the 2015-2016 school year, and subsequently submitted a statement to his university to explain the special circumstances that prevented him from obtaining satisfactory academic progress. CP 43. Among other things, Fisher stated:

Test results came back from a bronchoscopy that stated I had Tuberculosis. The health department informed me of this and forced me to stay home from work. Fortunately, the lab contaminated the sample, and it was confirmed that I absolutely did not have Tuberculosis. That information was not made available until sometime in winter quarter, which caused a certain amount of stress during fall quarter.

CP 43.

Fisher filed suit against the labs on January 4, 2019. CP 1. He alleges that specimen contamination and/or erroneous reporting caused him to lose his job and suffer emotional distress and loss of enjoyment of life “until he was finally notified of the errors that had been made, and that he

had never had tuberculosis.” CP 3-4.

The labs moved for summary judgment on the grounds that Fisher’s claim was barred by the statute of limitations. CP 11-16. After a hearing on January 17, 2020, the trial court entered summary judgment in favor of the labs, ruling that the one-year discovery period of 4.16.350 had expired on January 7, 2017. CP 81-82; RP 17:14-15.

III. ARGUMENT

An order granting summary judgment is reviewed de novo on appeal. *Young v. Savidge*, 155 Wn. App. 806, 814, 230 P.3d 222 (2010). A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations. *Young*, 155 Wn. App. at 814. A motion for summary judgment based on a statute of limitations should be granted when there is no genuine issue of material fact as to when the statutory period commenced. *Kim v. Lee*, 174 Wn. App. 319, 323, 300 P.3d 431 (2013).

A. **The Trial Court Properly Dismissed Fisher’s Claim on the Grounds That It Was Barred by the Statute of Limitations.**

Fisher’s claim against the labs is subject to the statute of limitations set forth in RCW 4.16.350(3), which provides:

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 . . .**

(emphasis added). RCW 4.16.350(3) contains a discovery rule, tolling the “time for commencement of an action” “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.” In such instances, the plaintiff “has one year from the date of the actual knowledge in which to commence a civil action for damages.” RCW 4.16.350(3).

Fisher made no allegation of fraud, intentional concealment, or the presence of a foreign body in this matter. CP 1-4. Accordingly, RCW 4.16.350(3) required Fisher to bring his claim within three years of the labs’ allegedly negligent acts—the specimen contamination—or one year from when he discovered or reasonably should have discovered Defendants’ allegedly negligent acts, whichever is later.

1. It Is Undisputed and Conceded That the Allegedly Negligent Acts Occurred More than Three Years Before Fisher Filed His Complaint.

As an initial matter, the labs have never asserted that “the three-year part of the statute ran as early as September 4, 2015,” as asserted by Fisher. Appellant Br. 4. The labs asserted, and Fisher concedes, that the labs’ alleged negligence occurred more than three years prior to the filing of the Complaint on January 4, 2019. The Complaint alleges that Fisher learned of the positive tuberculosis test on September 4, 2015 (CP 3), and any contamination that caused an erroneous report occurred prior to that date. Fisher has expressly conceded that “the three-year provision of RCW 4.16.350(3) ran out by early August, 2018.” Appellant Br. 6. Therefore, all that is left for the Court to consider is whether Fisher filed his lawsuit more than one year after he discovered, or reasonably should have discovered, the labs’ allegedly negligent acts.

2. Fisher Discovered the Allegedly Negligent Acts More than One Year Before He Filed His Complaint.

Fisher does not dispute that Dr. Kristina Rudd told him on October 28, 2015 that there was no radiographic evidence of tuberculosis and that she strongly suspected that his positive culture was a contaminant. CP 35. Arguably, this statement from his physician should have reasonably caused Fisher to discover that the labs’ alleged negligence (the specimen

contamination) was the cause of his injury (falsely being diagnosed with tuberculosis).

Nevertheless, it is also undisputed that Fisher learned definitively that his initial positive tuberculosis test result was the result of specimen contamination in January 2016, almost three years before he filed his lawsuit and clearly well outside the one-year discovery period provided by RCW 4.16.350(3). Fisher's Complaint established that "[a]dditional **laboratory documentation of January 7, 2016** formally noted, and **advised plaintiff**, that the initial laboratory findings and reporting by TCL and PAML were due to specimen contamination, and not active tuberculosis infection, and / or exposure to tuberculosis." CP 3 (emphases added). Fisher also represented to his university that he had learned in the winter quarter of the 2015-2016 academic year that the labs had contaminated his specimen. CP 43.

Fisher argues that, despite having actual knowledge that the labs had contaminated his sample in January 2016 (CP 43), he could not have reasonably discovered that his injury was caused by the labs' alleged negligence until he received the records reflecting the Department of Health's investigation into the contamination incident, records which his attorney admits he did not even see until August 2019—seven months after he filed his lawsuit Appellant Br. 5. Fisher asserts that, while he was given

laboratory documentation in January 2016 that “advised [him] that the initial laboratory findings and reporting by TCL and PAML were due to specimen contamination” (CP 3), “[n]o details were given on how, when, where, or by whom, the specimen was ‘contaminated.’” Appellant Br. 2. Importantly, the record contains no testimony from Fisher explaining why, as his attorney argues, Fisher “didn’t know the facts of what actually occurred to his bronchoscopy specimen, where, when and by whom, until he received the records provided in response to his request of September 9, 2018” (Appellant Br. 5), and “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.” Appellant Br. 7.¹

Fisher’s attorney argued at the summary judgment hearing that “the contamination that Brooklyn was told about, he was never told, well, who did the contamination. Was it the doctor who did the procedure? Was it anybody that worked at the hospital? Was it equipment at the hospital?” RP 8:10-15. The record is undisputed, however, that Fisher knew, in the winter quarter of the 2015-2016 academic year, that “the labs contaminated

¹ Fisher’s assertion concerning the records request that he purportedly submitted in September 2018 is not supported by any evidence in the record and should not be considered by this Court.

the sample.” CP 43. Those are Fisher’s own words and he has done nothing to disavow them, despite his attorneys’ argument to the contrary.

Even so, Fisher’s professed need for expert medical review and opinion does not excuse the years-long delay from when he admittedly learned of the specimen contamination in January 2016 to when he finally retained counsel and filed a records request. By the time Fisher retained counsel in October 2018 (CP 56), the one-year discovery period had already expired.

Fisher’s reliance on *Reyes v. Yakima Health District*, 191 Wn.2d 79, 419 P.3d 819 (2018) is inapposite, because the labs were granted summary judgment based on the statute of limitations, not on the issue of liability. The issue in *Reyes* was whether the testimony of the plaintiff’s medical expert created a genuine, material dispute regarding negligent or wrongful conduct by the defendants. *Id.* at 85. The expert testified that the defendants had negligently misdiagnosed the plaintiff’s husband twice but gave no indication what a reasonable physician should have done other than make a correct diagnosis. *Id.* at 89. On appeal, the Washington Supreme Court affirmed summary judgment in defendants’ favor because the plaintiff’s expert had not established the applicable standard of care and how the defendants acted negligently by breaching that standard. *Id.* at 86-87.

The labs here do not dispute that a plaintiff must establish that a

healthcare provider's misdiagnosis breached the standard of care for liability to attach. *See Reyes*, 191 Wn.2d at 83. But the *Reyes* Court's holding that a plaintiff needs expert testimony establishing the standard of care to survive summary judgment on the issue of liability in a medical malpractice case has no bearing on when Brooklyn Fisher discovered or reasonably should have discovered that the lab's alleged negligence caused his purported injury. *Reyes* does not require a plaintiff to have a medical expert lined up before he files his complaint, and it certainly does not excuse a plaintiff for waiting more than two and a half years after he learned of another party's alleged negligence to speak with an attorney. Indeed, it had been established that Fisher did not have a standard of care expert at the time he filed his Complaint in January 2019:

[THE COURT:] My understanding is you filed the case on January 4th, 2019, appreciating that you didn't have an expert yet on standard of care.

Is that fair to say?

MR. JOHNSON: Yes.

RP 15:6-10. Moreover, Fisher's assertion that he needed to determine "the facts of what actually occurred to his bronchoscopy specimen, where, when and by whom" before filing a lawsuit (Appellant Br. 5) is belied by the fact that he included none of these details in his Complaint. CP 1-4. The

Complaint was filed in January 2019, but according to Fisher’s attorney, he did not know that his client had even requested the Department of Health records until August 2019. CP 58, 60. Fisher cannot argue that those records were necessary to bring this lawsuit when the attorney who filed the case did not even know that his client had obtained those records until eight months after the Complaint was filed.

Washington law is clear that a plaintiff need not be certain that all of the elements of a cause of action can be established for the one-year discovery period of RCW 4.16.350 to begin running. *Olson v. Siverling*, 52 Wn. App. 221, 228, 758 P.2d 991 (1988). In other words, “[t]he discovery rule does not require knowledge of the existence of a legal cause of action.” *Caughell v. Group Health Cooperative of Puget Sound*, 124 Wn.2d 217, 237, 876 P.2d 898 (1994) (quoting *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 769, 733 P.2d 530 (1987)). “The key consideration under the discovery rule is the *factual*, as opposed to the *legal*, basis of the cause of action.” *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35, 864 P.2d 921 (1993) (emphases added).

Fisher cites *Adcox* for the proposition that “[i]t’s normally a question of fact as to when a patient reasonably should have discovered that his injuries / damages were caused by medical negligence” (Appellant Br. 7), but the case is of no help to him. *Adcox* holds that “[d]iscovery rules such

as RCW 4.16.350's require a claimant to "use due diligence in discovering the basis for the cause of action." 123 Wn.2d at 34.

The plaintiff in *Adcox* filed suit more than three years after her infant son suffered cardiac arrest during a cardiac catheterization procedure when he was twelve weeks old. 123 Wn.2d at 34. The plaintiff testified that she had initially asked the doctors why her son had suffered cardiac arrest during the procedure and was told that it had been caused by his heart condition. *Id.* at 35. For this reason, she did not learn of the role the hospital and nurses played in her son's cardiac arrest until several years later when she consulted an attorney on the advice of a friend. *Id.* After the attorney investigated the matter, she became aware of the facts that established her cause of action. *Id.* The trial court denied the hospital's motion for partial summary judgment dismissal under RCW 4.16.350. *Id.* at 22. The hospital did not present any evidence to dispute the plaintiff's testimony, and the Washington Supreme Court affirmed, finding that the jury could have rationally concluded from the record before it that the plaintiff acted with due diligence. *Id.* at 35.

Unlike *Adcox*, the record in this case contains no sworn testimony from Fisher, and no evidence that suggests that he exercised due diligence in pursuing his cause of action against the labs. Fisher admits that he learned of the specimen contamination in January 2016 (CP 3), and more

specifically that he knew that the labs had contaminated the specimen in the winter quarter of the 2015-2016 academic year (CP 43), but offers no explanation for why he waited for more than two and half years to speak to an attorney. *See* Appellant Br. 2. Fisher also apparently waited until September 2018 to submit a records request (Appellant Br. at 2), but the record is devoid of any evidence in that regard.² Fisher could have submitted an affidavit explaining his lack of due diligence when he filed his opposition to the labs’ motion for summary judgment, but he elected not to do so. Accordingly, the record is undisputed that Fisher learned of the specimen contamination in January 2016, but waited, without any explanation, until October 2018 to begin to pursue his claim by speaking to an attorney.

The one-year discovery rule “can be invoked only when the plaintiff has exercised due diligence; it will not be invoked when the plaintiff has had ready access to information that a wrong has occurred.” *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 113, 802 P.2d 826 (1991); *see also Reichelt*, 107 Wn.2d at 772 (“Mr. Reichelt would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer's office and is specifically advised that he or she has a legal cause of

² *Supra* note 1.

action; that is not the law. A party must exercise reasonable diligence in pursuing a legal claim. If such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations.”). In this case, Fisher had “ready access to information that a wrong has occurred” in the form of laboratory documentation indicating that his positive tuberculosis test had been the result of specimen contamination (CP 3), contamination which Fisher admittedly knew had been caused by the labs. CP 43.

Citing *Winbun v. Moore*, 143 Wn.2d 206, 18 P.3d 576 (2001) and *Lo v. Honda Motor Company*, 73 Wn. App. 448, 869 P.2d 1114 (1994), Fisher argues that “[i]n 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.” Appellant Br. 6. But this is not a case involving “multiple health care providers and injuries” (*see Winbun*, 143 Wn. 2d at 217), and the record contains no evidence that Fisher believed at any point before filing his lawsuit that his alleged injury had been caused by an act or omission of anyone except the labs. Moreover, unlike *Winbun* and *Lo*, here there was not “another facially logical explanation” for Fisher’s injury that excused his failure to exercise due diligence and speak to an attorney prior to October 2018. *See Winbun*, 143 Wn.2d at 220.

Lo is distinguishable from this case on multiple grounds. First, the plaintiff in *Lo* submitted a sworn affidavit in opposition to the defendants' motion for summary judgment, explaining why she did not add the hospital and physician to her lawsuit until more than four years after her child's premature birth. *See* 73 Wn. App. at 451. The record of this case contains no testimony from Fisher himself, and no explanation for his failure to look into his claim against the labs until late 2018 other than his attorney's argument that he was just "a 19 year-old college student," and that "this young man" apparently could not have discovered that his injury (being falsely diagnosed with tuberculosis) was caused by the labs' negligence (Appellant Br. 7) even though he knew that the labs had contaminated the specimen. CP 43.

Moreover, in *Lo* the plaintiff was faced with the existence of "another facially reasonable explanation [for her son's injuries], the Honda incident," and when she asked questions of her son's physicians, she was told on multiple occasions that "sometimes these things just happen." 73 Wn. App. at 460. By comparison, the record in this case contains no evidence that Fisher previously believed that his alleged injury was caused by an act or omission of anyone other than the labs. There was not "another facially logical explanation" for Fisher's injury that excuses his failure to exercise due diligence and his failure to speak with an attorney until October

2018, after the statute of limitations had already expired.

As a general rule, knowledge that a plaintiff presumably would have discovered, if he had timely made the necessary inquiry, must be imputed to the plaintiff as a matter of law. *Winbun*, 143 Wn.2d at 219. Application of this general rule is appropriate where, as here, an injured plaintiff does little to pursue his potential claims. *Id.* (citing *Zaleck*, 60 Wn. App. at 114 (plaintiff who knew of his injury but failed to inquire of either a doctor or a lawyer was deemed to have failed to exercise due diligence) and *Reichelt*, 107 Wn.2d at 768-73 (plaintiff who knew he had asbestosis and the cause of the disease failed to timely pursue claim)).

Brooklyn Fisher has not presented any evidence that he exercised due diligence in pursuing his claim during the 30 months between January 2016, when he learned that the labs had contaminated his specimen, and October 2018, when he hired his attorney. As the trial court correctly noted, “the interpretation that [Fisher’s attorney] Mr. Johnson is asking the Court to adopt relative to the statute of limitations, RCW 4.16.350, would essentially give a plaintiff whatever time frame they choose to exercise to get records” (RP 16:5-8), and that is not what is contemplated by the statute.

Even when the facts are interpreted in the light most favorable to Fisher, there is no genuine issue of fact as to whether Fisher discovered, or reasonably should have discovered with due diligence, the factual basis of

his claim more than one year before he filed suit in January 2019. Consequently, Fisher's claim is time-barred under RCW 4.16.350(3) and this Court should affirm the trial court's dismissal of Fisher's lawsuit and entry of judgment in favor of the labs.

IV. CONCLUSION

The allegedly negligent acts at issue in this case occurred more than three years before Brooklyn Fisher filed his lawsuit, and by his own admission, Fisher discovered those allegedly negligent acts more than one year before he filed his lawsuit. Accordingly, Fisher's claim is barred by the applicable statute of limitations, and this Court should affirm the entry of summary judgment in favor of the labs.

DATED this 9th day of July, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

1. I am employed at Corr Cronin LLP, attorneys for record for Respondents herein.

2. On this date, I caused the document to which this certificate is attached, Respondents' Brief, to be filed with the Clerk of the Court of Appeals, Division III, of the state of Washington, and served upon the following in the manner indicated below:

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

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