COA No. 324869

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LORI A. SWEENEY and JEROLD L. SWEENEY, husband and wife,
Plaintiffs - Appellants
v.

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL, et al.,
Defendants-Respondents

BRIEF OF RESPONDENTS JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community composed thereof; and PROVIDENCE HOSPITAL SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALITIES

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I. INTRODUCTION & RELIEF REQUESTED

This appeal arises out of a summary judgment order entered in a medical negligence action. The Plaintiffs, Lori and Jerold Sweeney (collectively "Ms. Sweeney"), initially brought suit against the Adams County Public Health District No. 2 and PA-C Allen D. Noble (collectively "PA-C Noble"). Ms. Sweeney then successfully moved to amend her complaint to include claims against Dr. James Dunlap, and his employer Providence Health Services (collectively "Dr. Dunlap").

After being included as a defendant in this suit, Dr. Dunlap successfully moved for summary dismissal of all claims.[1] That motion was based upon Ms. Sweeney's failure to bring her claims within the applicable three-year limitations period. Dr. Dunlap argued, and the trial court held, that Ms. Sweeney's claim accrued more than three years prior to its filing and that CR 15's relation-back principles were inapplicable given the undisputed facts of this case. Ms. Sweeney seeks review of the trial court's order dismissing Dr. Dunlap from this litigation.

Medical negligence claims carry a three-year limitations period, which runs from the act or omission that is alleged to have caused the plaintiff's

[1] The trial court, by a separate order, dismissed Ms. Sweeney's claims against the Adams County Public Health District No. 2 and PA-C Noble. CP 357. Those defendants are separately represented, and Ms. Sweeney's appeal of the order dismissing her claims against those defendants will be addressed separately.

purported injury, loss, or damage. RCW 4.16.350. The statute also contains an alternative limitations period – one year from the date on which the plaintiff "discovered or reasonably should have discovered" that the claimed injury was caused by said act or omission. *Id.* A medical negligence plaintiff must initiate her action within the longer of those two options.

The material facts are undisputed. Those facts show that Ms. Sweeney's cause of action against Dr. Dunlap accrued more than three years before she commenced it brought her claim. Ms. Sweeney was instantly aware that her claimed injuries were the result of treatment that she received on April 25, 2010, and she was immediately aware of Dr. Dunlap's role in that treatment. The undisputed facts also show that Ms. Sweeney's failure to include Dr. Dunlap in the initial complaint owed itself to her conscious strategic decisions, rather than to any mistake as to the proper defendant's identity.

The trial court was entirely correct in summarily dismissing Ms. Sweeney's claims. Dr. Dunlap, therefore, respectfully asks the Court to affirm the trial court's decision in every respect.

II. RESTATEMENT OF THE ISSUES PRESENTED

A. A cause of action for medical negligence must be commenced within three years of the treatment at issue, or within one year of the plaintiff's discovery that her injuries were proximately caused by said treatment.

Ms. Sweeney was immediately aware that her injury resulted from the April 25, 2010 treatment, and she was immediately aware of Dr. Dunlap's role in that treatment. Was the trial court, therefore, correct in holding that Ms. Sweeney's January 15, 2014 claim against Dr. Dunlap was time-barred?

B. In order to avail herself of CR 15's relation back principles a plaintiff must demonstrate that the defendant to be added "knew or should have known that, but for a mistake concerning the identity of the property party, the action would have been brought against him." Ms. Sweeney's failure to name Dr. Dunlap in the initial action was not due to any mistake regarding the proper defendant's identity. Instead, it was a considered strategic decision, and there was nothing excusable in that decision. On those facts, was the trial court correct to deny Ms. Sweeney's efforts to have her claim against Dr. Dunlap relate back to the initial filing date?

III. STATEMENT OF FACTS

A. ON APRIL 25, 2010, MS. SWEENEY SUFFERED A SHOULDER INJURY AND WAS TREATED AT THE EAST ADAMS RURAL HOSPITAL.

On April 25, 2010, Ms. Sweeney fell and injured her shoulder. CP 102, 181-182. She reported to the Emergency Department at East Adams Rural Hospital[2] where she was treated by PA-C Noble. CP 85, 102. PA-C Noble was

[2] The Adams County Public Hospital District No. 2 operates the East Adams Rural Hospital.

able to determine, by a clinical examination, that Ms. Sweeney's shoulder had been dislocated. CP 83, 86. Nonetheless, PA-C Noble ordered x-rays to determine whether there were any additional injuries. CP 86.

At the time of Ms. Sweeney's visit, the hospital did not have an orthopedic surgeon on duty. CP 318. Instead, it had a system in place whereby physicians in other facilities – mostly in Spokane – could be contacted via telephone for consultation. CP 185-186. After examining Ms. Sweeney and reviewing her x-rays, PA-C Noble contacted Dr. Dunlap for a telephone consultation. CP 185. Dr. Dunlap was the on-call orthopedist at Sacred Heart Medical Center in Spokane, Washington. CP 86.

In consultation, Dr. Noble and PA-C Noble reached the medical judgment that an attempt at closed reduction should be made.[3] CP 185-186.

Thereafter, PA-C Noble made three attempts to perform the closed reduction. CP 86, 185. On the third attempt, PA-C Noble heard or felt a "pop" and ordered an additional x-ray performed. CP 92, 185. That post-reduction x-

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[3] A closed reduction is a medical maneuver involving physical manipulation of the shoulder in an effort to "pop" it back into is socket. CP 88. It is called a "closed" reduction because it is done without surgery; when a shoulder is put back in its socket surgically it is known as an "open" reduction. *Id.*

ray revealed that the reduction was unsuccessful and that it had resulted in the separation of the humeral head from the lower part of the bone. CP 185.

B. Ms. Sweeney's Care was Transferred to Sacred Heart Medical Center, Dr. Dunlap Performed a Successful Surgical Shoulder Replacement, and Ms. Sweeney Made a Full Recovery.

After viewing the post-reduction x-ray, PA-C Noble again contacted Dr. Dunlap. CP 92, 106. Dr. Dunlap directed PA-C Noble to have Ms. Sweeney's care transferred to the Sacred Heart Medical Center. CP 93. The on-call physician for East Adams Rural Hospital, Dr. Sackmann, agreed with the transfer and Ms. Sweeney's care was transferred to Sacred Heart. CP 185-86.

On April 28, 2010, Dr. Dunlap performed a surgical repair of Ms. Sweeney's shoulder. CP 67. That surgery was successful in every respect and Ms. Sweeney recovered. CP 336; RP 41.

C. Dr. Dunlap Performed an Unrelated Surgery for Ms. Sweeney in 2012.

Ms. Sweeney returned to Dr. Dunlap's care in the spring of 2012. CP 23. She had suffered a separate and distinct shoulder injury – a rotator cuff tear. CP 336. Dr. Dunlap performed a surgical repair of that rotator cuff tear during April 2012. *Id.* That procedure was accomplished successfully and without complication. *Id.*; RP 41. Dr. Dunlap provided no treatment to Ms. Sweeney between April 2010 and the April 2012 rotator cuff surgery. CP 333.

D. MS. SWEENEY BEGAN INVESTIGATING A MEDICAL NEGLIGENCE LAWSUIT.

Sometime in 2012, Ms. Sweeney met with Dr. Dunlap regarding her belief that she had received negligent medical care on April 25, 2010. CP 264. During that meeting, there was no dispute or doubt regarding Dr. Dunlap's role in said care. CP 264, ¶ 13. It is undisputed that Ms. Sweeney had retained counsel and that said counsel began investigating a medical negligence claim by late 2012. CP 262. In the following year, on or about April 19, 2013, 6 days before the lapse of the three-year limitations period, Ms. Sweeney again met with Dr. Dunlap – this time by and through Ms. Sweeney's counsel. CP 266, ¶18. In fact, in scheduling the meeting, Ms. Sweeney's counsel stressed the importance of promptly scheduling the meeting due to the imminent lapse of the limitations period. CP 271.

During the meeting with Ms. Sweeney's counsel, Dr. Dunlap answered questions regarding his role in Ms. Sweeney's April 2010 treatment. CP 157. Ms. Sweeney's counsel had obtained Ms. Sweeney's medical records prior to the meeting, and counsel brought those records with him to the meeting. CP 265. Those medical records demonstrate that Dr. Dunlap had access to some of Ms. Sweeney's pre-reduction x-rays (the ones taken prior to PA-C Noble's attempted shoulder reduction). CP 265. During the meeting, Ms. Sweeney inquired as to

which x-rays Dr. Dunlap had reviewed and when he had reviewed them. CP 266-267. Dr. Dunlap reported that he had no recollection of seeing the pre-reduction x-ray at the time of his consultation with PA-C Noble. *Id.* Ms. Sweeney indicated, through counsel, that she had elected not to sue Dr. Dunlap, a statement about which Dr. Dunlap testified during his October 2013 deposition. CP 225, 265-268.

This entire appeal is premised on the contention that Ms. Sweeney did not name Dr. Dunlap in the action as initially filed because of his assertion that he did not recall seeing the pre-reduction x-rays prior to consulting with PA-C Noble. CP 265. It is undisputed that Dr. Dunlap told Ms. Sweeney's counsel, during the April 19, 2013 meeting, that he would not have recommended a closed reduction had he seen the x-ray. CP 227.[4]

On April 23, 2010 (four days after the meeting with Dr. Dunlap), Ms. Sweeney filed this action. CP 268. She named the hospital and PA-C Noble as defendants. *Id.* While that complaint did not allege any claims against Dr. Dunlap, it detailed his role in Ms. Sweeney's care. *Id.* Despite an explicit description of Dr. Dunlap's role in Ms. Sweeney's care, the initial complaint does not contain any allegation that any aspect of his care, including his April 28, 2010

[4] During his October 2013 deposition, Dr. Dunlap noted that even if he had recommended a closed reduction, if the PA was not comfortable with the procedure or was not experienced or if the reduction was difficult, the PA should stop and transfer the patient. CP 227.

surgery or his April 2012 surgery (rotator cuff), was performed in a negligent manner. CP 20.

IV. STATEMENT OF CASE

This appeal focuses on whether the trial court should have excused Ms. Sweeney's failure to assert her claim against Dr. Dunlap within the three-year limitations period. The trial court correctly held that the limitations period with respect to claims against Dr. Dunlap began to run on April 25, 2010 – the date of the care at issue – and that CR 15's relation-back principles provided Ms. Sweeney no sanctuary.

A. DISCOVERY LED MS. SWEENEY TO DOUBT DR. DUNLAP'S RECOLLECTION REGARDING WHETHER HE HAD SEEN THE PRE-REDUCTION X-RAYS, AND SHE AMENDED HER COMPLAINT TO INCLUDE A CLAIM AGAINST DR. DUNLAP.

During discovery, conducted after the initial complaint's filing, Ms. Sweeney obtained a document known as an "Audit Trail." CP 269. The Audit Trail identified which x-rays Dr. Dunlap had access to and when Dr. Dunlap had access to each such x-ray. *Id.* Specifically, the Audit Trail demonstrated that Dr. Dunlap had access to the pre-reduction x-ray during his April 25, 2010 consultation with PA-C Noble. *Id.*

Based upon that Audit Trail, Ms. Sweeney sought and obtained permission to amend her complaint to include a claim against Dr. Dunlap. CP 61, 157.

Ms. Sweeney's amended complaint was filed on January 15, 2014, and it asserted a claim against Dr. Dunlap based upon his role in Ms. Sweeney's April 25, 2010 treatment. CP 65-66, 158. The amended complaint alleged no claims related to the 2012 rotator cuff surgery. CP 333-334.

B. DR. DUNLAP SUCCESSFULLY MOVED FOR SUMMARY JUDGMENT.

Following the amended complaint, Dr. Dunlap moved for summary judgment, based upon the timeliness of Ms. Sweeney's claim. CP 152. In granting Dr. Dunlap's motion, the trial court rejected Ms. Sweeney's argument that she could not have asserted a claim against Dr. Dunlap prior to receiving and reviewing the Audit Trial. CP 265, 269, 333. The trial court also rejected Ms. Sweeney's contention that the "continuing treatment" doctrine prevented the limitations period from beginning to run until after Ms. Sweeney's 2012 rotator cuff surgery; the trial court correctly observed that there was no connection between Ms. Sweeney's 2010 treatment and her 2012 treatment. CP 364-365. Finally, the trial court held that CR 15's relation-back principles were of no assistance to Ms. Sweeney because her decision to omit Dr. Dunlap from her initial complaint was the result of a strategic decision, rather than due to any mistake regarding the proper defendant's identity. *Id.*

C. MS. SWEENEY TOOK A TIMELY APPEAL.

Ms. Sweeney filed a notice of appeal on May 12, 2014. CP 367. That notice was timely. *See* RAP 5.2.

V. ARGUMENT

A. REVIEWING THIS MATTER DE NOVO, THE COURT SHOULD AFFIRM THE TRIAL COURT'S SUMMARY DISMISSAL OF ALL CLAIMS AGAINST DR. DUNLAP.

Summary judgment rulings are reviewed *de novo*. *See Tanner Elect. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996). The appellate court must engage in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *accord, Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987).

Summary judgment is proper if the records on file with the trial court show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A material fact is one "upon which the outcome of the litigation depends, in whole or in part." *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

The material facts are undisputed. The timelines at issue are undisputed, and the facts surrounding how and when Ms. Sweeney's cause of action accrued are also undisputed. It is undisputed that Ms. Sweeney knew both: (i) that

Dr. Dunlap was involved in the facts, circumstances, and care giving rise to her claim and (ii) what role Dr. Dunlap played in that care. On at least two occasions, Ms. Sweeney spoke with Dr. Dunlap (once directly and once through counsel) prior to initiating this lawsuit. CP 264. During the second of those meetings, Ms. Sweeney readily acknowledged that the statute of limitations was about to run on her potential claim against Dr. Dunlap. CP 271. Just days after that meeting, Ms. Sweeney made the knowing and strategic decision not to include a claim against Dr. Dunlap in her complaint. CP 268.

No matter how those facts are construed, Ms. Sweeney's claim against Dr. Dunlap had accrued immediately – that is, it accrued on April 25, 2010. The trial court was correct, therefore, to summarily dismiss Ms. Sweeney's claim against Dr. Dunlap. The Court of Appeals should affirm the trial court's decision in every respect.

B. Ms. Sweeney's Claim Against Dr. Dunlap Accrued on April 25, 2010, and the Limitations Period Expired on April 25, 2013.

Ms. Sweeney's claims are governed by the medical negligence statute of limitations, RCW 4.16.350. The statute requires medical negligence cases must be commenced within the later of (i) three years of the act or omission alleged to have caused the injury or (ii) within one year of the time the patient should have discovered that the injury was caused by the act or omission. *Id.*

Ms. Sweeney's claim is, and has always been, based upon the care that she received on April 25, 2010. Ms. Sweeney knew (on April 25, 2010) that PA-C Noble had consulted with Dr. Dunlap regarding Ms. Sweeney's treatment; she also knew that she was transported to Sacred Heart for further treatment by Dr. Dunlap that same day. CP 185-186. When Ms. Sweeney filed her original complaint, she had complete copies of the medical records related to her April 25, 2010 treatment. *Id.* Those records detail PA-C Noble's consultation with Dr. Dunlap. *Id.* There was, therefore, never any question, doubt, or lack of clarity regarding Dr. Dunlap's role in the facts giving rise to this suit. CP 264-265.

Furthermore, when Ms. Sweeney met with Dr. Dunlap (through counsel)[5] she had the relevant medical records with her. CP 264-265. She showed those records to Dr. Dunlap. CP 266-267. Specifically, she showed Dr. Dunlap a copy of the pre-reduction x-rays. *Id.* As noted above, it is undisputed that the x-ray depicted a dislocation, and it is undisputed that Dr. Dunlap indicated that he did not believe that he would have suggested any attempt at a closed reduction, had he seen the x-ray. CP 267. Despite all of that, Ms. Sweeney made an affirmative decision not to sue Dr. Dunlap. CP 268.

[5] April 19, 2013. CP 266.

Ms. Sweeney asserts that her decision was based solely upon her meeting with Dr. Dunlap. CP 265-268. It is, therefore, undisputed that Ms. Sweeney considered whether to include Dr. Dunlap in her suit prior to her April 19, 2013 meeting with Dr. Dunlap. *Id.* Ms. Sweeney knew, from **April 2010** forward, that her claimed injury was caused (at least in part) by Dr. Dunlap's consultation with PA-C Noble and from the decision, resulting from that consultation, to attempt a closed reduction. CP 185-186, 265-266.

Ms. Sweeney's claim against Dr. Dunlap accrued immediately regardless of whether or when Dr. Dunlap reviewed the pre-reduction x-rays. There were only two possibilities either (i) Dr. Dunlap recommended a closed reduction despite his review of the pre-reduction x-ray; or (ii) Dr. Dunlap recommended a closed reduction without having first reviewed the pre-reduction x-ray. Either possibility could have given rise to a claim. At a minimum, Ms. Sweeney had an immediately accrued claim asserting that Dr. Dunlap acted unreasonably in recommending a closed reduction without having first reviewed the pertinent x-rays. The accrual of that claim began the statute's running, regardless of any other issue. The limitations period, therefore, began running immediately and it ran regardless of which of the two possibilities proved to be historically accurate.

C. NO FACTS WERE DELIBERATELY CONCEALED FROM MS. SWEENEY; THERE IS, THEREFORE, NO BASIS UPON WHICH TO EXTEND THE THREE-YEAR LIMITATIONS PERIOD.

Ms. Sweeney attempts to excuse herself from the obligation to bring claims in a timely fashion, arguing that facts were fraudulently concealed during her April 19, 2013 meeting with Dr. Dunlap. However, no facts were concealed from Ms. Sweeney. She had all the facts and information necessary to initiate a timely claim against Dr. Dunlap – she simply chose not to name him.

Fraudulent concealment applies only in cases where a defendant has concealed facts or otherwise induced a plaintiff not to bring suit. *Wood v. Gibbons*, 38 Wn.App. 343, 346, 685 P.2d 619 (Div. III, 1984). In *Wood*, Division III held that without affirmative proof that the defendant "deliberately concealed" information that would estop him from later asserting the statute of limitations as a defense, the fraudulent concealment doctrine does not apply. *Id.* The Court specifically rejected the plaintiff's argument that "a doctor has a duty to disclose any information that may be the basis of a lawsuit." *Id.* In rejecting the plaintiff's argument, the Court of Appeals observed that the plaintiff was aware of all "[t]he basic information that is the basis of this cause of action" years prior to filing his lawsuit. *Id.* at 349. The Court of Appeals dismissed the plaintiff's action on statute of limitations grounds, holding that "[t]he fact the attorney was of the

opinion no cause of action existed did not stop the statutes from running." *Id.* at 348-349.

The facts of this case are functionally identical to those in *Wood.* Ms. Sweeney was always aware of Dr. Dunlap's involvement in her care, particularly the treatment that she received on April 25, 2010. In fact, there was no point in time during which Ms. Sweeney was not aware of Dr. Dunlap's role in her care. The Audit Trail did not provide any new information, and the Audit Trail did not impact the nature or accrual of Ms. Sweeney's claim.[6] Ms. Sweeney's strategic decision not to name Dr. Dunlap – even if based upon a genuinely held belief that no viable cause of action existed – does not extend or toll the limitations period.

Likewise, Dr. Dunlap did not say anything that would estop the limitations period from running, nor did he take any steps to induce Ms. Sweeney from asserting a claim against him. As noted above, Ms. Sweeney could have asserted a claim against Dr. Dunlap regardless of whether he had reviewed the pre-reduction x-rays prior to suggesting a close reduction be attempted. There is, therefore, no basis in the record to toll or extend the three-year limitations period.

[6] It did show new information in that it showed which providers accesses which films.

D. THERE WAS NO DELAY IN MS. SWEENEY'S DISCOVERY OF THE FACTS AND CIRCUMSTANCES SURROUNDING DR. DUNLAP'S INVOLVEMENT IN HER APRIL 25, 2010 CARE.

Ms. Sweeney also argues that the limitations period should be extended under the continuing course of treatment exception. That exception prevents a medical negligence cause of action from accruing until the plaintiff has actual or constructive knowledge of the allegedly negligent act or omission, and only in cases involving a continuing course of negligent medical treatment. *Winbun v. Moore*, 143 Wn.2d 206, 213, 18P.3d 576 (2001). For the exception to apply, the Plaintiff has the burden to show that she exercised due diligence in discovering the basis for her cause of action. *Id.*

1. Unlike the Plaintiff in Winbun v. Moore, Ms. Sweeney was Always Fully Cognizant and Aware of the Circumstances Giving Rise to Her Claim for Medical Negligence.

Ms. Sweeney relies upon *Winbun v. Moore* to argue that the limitations period should have been tolled. *Id.* at 214. However, *Winbun* provides Ms. Sweeney no refuge.

Unlike Ms. Sweeney, the Plaintiff in *Winbun* did not have access to the information that was necessary for her to determine who was involved in the events giving rise to her claim. *Id.* at 214-215. The *Winbun* plaintiff did not have access to her own medical records, she was alone and heavily sedated during the treatment at issue – she, therefore, did not know who the potential defendants

were, and she had no other information available to her. *Id.* at 219-220. Under those circumstances, the Court cautioned against "guilt by association" pleadings or a "sue first and conduct discovery later" approach to medical malpractice litigation. *Id.* at 221.

Ms. Sweeney, on the other hand, had more than enough information to determine who was involved in her care and treatment, what the facts and circumstances giving rise to her claim were, and who the potential defendants were. Ms. Sweeney knew that PA-C Noble relied upon his consultation with Dr. Dunlap in making the decision to attempt a closed reduction.

Ms. Sweeney attempts to diminish her pre-meeting-with-Dunlap-knowledge by characterizing the medical records as containing "nothing more than a reference" to PA-C Noble's conference with Dr. Dunlap. The record is undisputed that Ms. Sweeney knew, from the beginning, that PA-C Noble and Dr. Dunlap both played a role in the decision to attempt a closed reduction. CP 22-23, 264. That knowledge is absolutely fatal to Ms. Sweeney's attempt to expand the medical negligence limitations period beyond its three-year baseline.

2. Unlike the Plaintiff in Adcox v. Children's Orthopedic Hospital and Medical Center, Ms. Sweeney Was Always Fully Competent, and She Timely Investigated Her Potential Claim.

Ms. Sweeney also argues that the State Supreme Court's decision in *Adcox v. Children's Orthopedic Hosp. and Medical Ctr.* justified her prayer for an

extension of the limitations period. 123 Wn.2d 15, 864 P.2d 921 (1993). Again, Ms. Sweeney's argument misses the mark.

The *Adcox* case involved a child who suffered from a cardiac arrest during the course of pediatric medical treatment. *Adcox*, 123 Wn.2d at 35. The plaintiff/patient in *Adcox* was a minor at the time of the care at issue, and the child's mother did not investigate any potential claims in the years immediately following. *Id.* Years later, the child's mother discussed the potential claim with an attorney friend, and, at that point, an investigation began. *Id.* Moreover, at the time of the minor's treatment for a cardiac arrest, the doctors had advised the mother that the child's injuries were caused by the child's heart condition, not by any specific treatment. *Id.* On those facts, the Court held that the limitations period posed no bar to the claim. *Id.*

Ms. Sweeney's case bears no resemblance to *Adcox*. First, Ms. Sweeney was neither a minor nor incapacitated – she was always fully competent and capable of acting for herself. She consulted with a lawyer well within the limitations period. CP 262. Working with that lawyer, Ms. Sweeney undertook an investigation of her potential claims. *Id.* After that investigation, Ms. Sweeney made strategic decisions regarding who to sue, when to sue, and what claims to bring. CP 268. The reasons that justified the Court's accommodation to

a minor plaintiff in *Adcox* simply do not apply to Ms. Sweeney, a plaintiff who made a strategic error and has come to rue her decision.

E. THERE WAS NO CONTINUING COURSE OF NEGLIGENT TREATMENT IN THIS CASE; THEREFORE, THE CONTINUING NEGLIGENCE DOCTRINE CANNOT EXTEND THE LIMITATIONS PERIOD.

Ms. Sweeney's final effort to extend the applicable limitations period is as ill-fated as her prior attempts. Ms. Sweeney argues that Dr. Dunlap's April 2012 rotator cuff procedure prevented the limitations period from beginning to run on treatment that occurred two years earlier. However, there is no allegation that Dr. Dunlap's 2012 treatment fell below the standard of care expected of a reasonably prudent surgeon. Moreover, it is undisputed that there was no continuation of care between 2010 and 2012 –the two surgeries were unrelated independent medical encounters.

In *Caughell v. Group Health Coop. of Puget Sound*, the State Supreme Court addressed a unique type of medical negligence case: those rare cases involving multiple discrete encounters, occurring over a period of years, but that all relate to the same underlying medical condition or issue, and all of which are alleged to be part of the same course of negligent treatment. 124 Wn.2d 217, 233, 876 P.2d 217 (1994). In *Caughell*, the plaintiff alleged damages resulting from her physician's ongoing and continuing prescription, over the course of over 20 years, of a specific medication. *Id.* at 220. The Court observed that it was

impossible for a plaintiff to segregate which damages were proximately caused by which specific encounter, and the Court went on to hold that preventing plaintiffs in those cases from recovering damages caused throughout the period of care would be inequitable and inconsistent with the fundamental purposes of medical negligence law. *Id.* at 234-235.

In rejecting Ms. Sweeney's effort to make the same argument in this case, the trial court correctly observed that a plaintiff asserting this exception to the statute of limitations must show a series of interrelated negligent acts that occurred during the course of treatment for the medical condition at issue. CP 364-365. Acts are only deemed to be interrelated if they are "part of a 'substantially uninterrupted course of treatment.'" *Caughell*, 124 Wn.2d at 233. The plaintiff must also demonstrate that the series of interrelated negligent acts caused the injury at issue. *Id.* at 233-234.

Furthermore, the continued negligent treatment exception to the three-year medical negligence limitations period has recently been clarified, in such a way as to make it undeniable that it has no applicability to this case. In 2013, the Court of Appeals confirmed that the mere fact of continuing treatment does not extend the limitations period. *Young Soo Kim v. Choony-Hyun Lee*, 174 Wn.App. 319, 325-326, 300 P.3d 432 (Div. I, 2013). Instead, only continuing **negligent**

treatment can extend the limitations period, and the limitations period begins to run upon **last date of negligent treatment**. *Id.* (emphasis added).

This case bears no resemblance to *Caughell*. This case involves exactly two encounters, one in 2010 and one in 2012. CP 333. Furthermore, it is undisputed that there was no continuing course of care between 2010 and 2012. *Id.* It is undisputed that the 2012 care was not, in any manner, related to the 2010 care.[7] *Id.* Finally, all of the negligence allegations relate to the care rendered in 2010. There is no allegation that Dr. Dunlap provided sub-standard care in 2012. CP 67. Therefore, even if the doctrine were to apply to this case, the limitations period would have begun to run in 2010 – the date of the last allegedly negligent treatment. *See Young Soo Kim*, 174 Wn.App. at 325-26.

F. MS. SWEENEY CAN FIND NO SHELTER IN RELATION-BACK PRINCIPLES; SHE FAILED TO MEET HER CR 15 BURDEN.

CR 15(c) permits an amended complaint adding a new defendant to relate back to the original filing date only when certain criteria are met. An amended complaint relates back to the original filing date only if:

> (1) the amended pleading arouse of the transaction set forth in the original pleading; (2) the new party received notice of the action

[7] In fact, Ms. Sweeney did not even mention the 2012 surgery until her response memorandum to Dr. Dunlap's motion for summary judgment. CP 333. The trial court recognized this argument for the "proverbial Hail Mary to avoid" an adverse ruling that it was. CP 333. Ms. Sweeney admits to having explored all potential claims (in consultation with four experts) prior to filing suit, and nothing in either her initial complaint or her 2014 amended complaint is critical of Dr. Dunlap's 2012 care. CP 67.

> within the statute of limitations; (3) the new party has received such notice that he will not be prejudiced in maintaining a defense on the merits; and (4) the new party 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.

Lind v. Frick, 15 Wn.App. 614, 616-617, 550 P.2d 709 (Div. III, 1976). Each of the criteria must be satisfied for an amendment to relate back to the original filing date. CR 15(c); *Kiehn v. Nelsen's Tire Co.*, 45 Wn.App. 291, 296, 724 P.2d 434 (Div. II, 1986) (holding that the absence of any one of the CR. 15(c) elements is fatal). The party seeking relation-back bears the burden of establishing each of the necessary criteria. *Lind*, 15 Wn.App. at 616-617. In addition, the amending party must show that her delay in adding a defendant is not due to her own inexcusable neglect. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 172-173, 744 P.2d 1032 (1987).

Ms. Sweeney cannot and has not met her burden of establishing the necessary relation-back criteria. As a result, the relevant commencement date, for evaluating the timeliness of her claim against Dr. Dunlap, is January 15, 2014.

1. Ms. Sweeney's Failure to Include Dr. Dunlap in the Initial Complaint was Not the Result of Any Mistaken Identity.

One of the required elements, under CR 15(c), is that the party to be added "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." This element

requires an affirmative showing that the plaintiff named the wrong person in her complaint and that the proper party was aware of the plaintiff's error. *LaRue v. Harris,* 128 Wn.App. 460, 466, 115 P.3d 1077 (Div. II, 2005). Phrased differently, the rule protects a plaintiff from adverse results in situations of logistical errors; it does not allow the plaintiff a do-over in cases where her strategic decisions prove ill-considered.

There is simply no credible argument to be made in support of Ms. Sweeney's position; there is no colorable argument that Ms. Sweeney was mistaken regarding the defendants' identities. Ms. Sweeney was well aware of Dr. Dunlap's role in her care. Ms. Sweeney spoke with Dr. Dunlap twice prior to initiating suit. Ms. Sweeney knew what Dr. Dunlap's role was, she knew the potential bases for his liability, and she made an affirmative and strategic decision not to assert a claim against him.

This issue, standing alone defeats Ms. Sweeney's prayer for relation-back relief. The trial court was, therefore, correct to summarily dismiss Ms. Sweeney's claim, and the Court of Appeals should affirm the trial court in every respect.

2. Ms. Sweeney's Neglect in Failing to Sue Dr. Dunlap, in the First Instance, was Inexcusable.

A "conscious decision, strategy or tactic" prevents relation-back of an amendment adding a party after a statute has run, precisely because a conscious

and intentional decision can never be said to result from "excusable neglect." *See Sagline v. State Dept. of Labor and Indus.*, 169 Wn.2d 467, 477, 238 P.3d 1107 (2010). As noted above, CR 15 does not provide a do-over for strategic and judgment errors.

Ms. Sweeney specifically chose to not sue Dr. Dunlap when she filed her April 23, 2013 complaint. Ms. Sweeney had consulted with four experts, had reviewed her own medical records, and had met with Dr. Dunlap twice. There was nothing excusable in the negligent decision not to assert a timely claim against Dr. Dunlap.

Ms. Sweeney's entire appeal hinges upon her assertion that the statute of limitations should be disregarded because Dr. Dunlap had told her, in a pre-filing discussion, that he did not recall reviewing the pre-reduction x-ray. In that manner, this entire appeal hinges upon a misunderstanding of the facts and the law.

First, a plaintiff need not have mastery of every relevant fact for her action to accrue; instead, an action accrues the moment that a plaintiff becomes aware of the purported causal connection between her claimed injury and the care at issue. In this case, there is no reasonable dispute but that the causal relationship was instantaneously known. PA-C Noble attempted a closed

reduction based, at least in part, on his consultation with Dr. Dunlap, and that attempt resulted in Ms. Sweeney's claimed injury.

Second, a potential defendant's lack of recollection or misunderstanding regarding his role in the events giving rise to a claim cannot prevent the statute of limitations from beginning to run. The law requires either: (i) a statement that would estop a defendant from later asserting the statute of limitations as a defense; or (ii) an affirmative act by the defendant that aims to induce a plaintiff not to include him as a defendant. Ms. Sweeney has not, and cannot, point to any such behavior by Dr. Dunlap.

Finally, CR 15 provides a lifeline only to those plaintiffs who allow the limitations period to lapse by virtue of an excusable mistake. Noting that Dr. Dunlap said or could have said during the two pre-filing discussions could have excused Ms. Sweeney from the consequences of her decision. Ms. Sweeney could have asserted a claim against Dr. Dunlap regardless of his recollection – Ms. Sweeney could have asserted that Dr. Dunlap was negligent in recommending a closed reduction without first reviewing all of the pertinent x-rays or she could have asserted that Dr. Dunlap was negligent in recommending a closed reduction in light of his possession of an x-ray that would contraindicate a closed reduction. Ms. Sweeney, however, chose a third option – not to make a

claim against him at all. CR 15 does not allow a do-over under those circumstances.

VII. CONCLUSION

Ms. Sweeney's claim against Dr. Dunlap relates solely and exclusively to care rendered on April 25, 2010 – specifically, Dr. Dunlap's recommendation to PA-C Noble to attempt a closed reduction of Ms. Sweeney's dislocated shoulder. That claim accrued immediately. There was no question, no doubt, and no lack of clarity regarding Dr. Dunlap's role in Ms. Sweeney's care. Nor was there any opacity with respect to that care's causal relationship to Ms. Sweeney's alleged damages.

Ms. Sweeney's contention that Dr. Dunlap's subjective recollection controls the accrual of her action is without support in the law, in the facts, or in reason. Ms. Sweeney was in possession of medical records that identified a potential and legally valid claim against Dr. Dunlap, regardless of whether he acknowledged or recalled reviewing the x-rays prior to recommending a closed reduction.

This entire appeal is, therefore, based upon a false and faulty premise. As the Plaintiff, Ms. Sweeney's knowledge (not Dr. Dunlap's) controlled when her action accrued, and Ms. Sweeney had all the requisite knowledge immediately.

Ms. Sweeney chose who to sue, when to sue them, and what to sue them for. She must live with those choices. Statutes of limitations exist to protect defendants from the threat of litigation years after an event, when recollections are stale or non-existent. There is no justice or reason in subjecting Dr. Dunlap to an untimely and stale claim simply because Ms. Sweeney reconsidered her prior strategy.

RESPECTFULLY SUBMITTED this 14th day of December, 2014.

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DECLARATION OF SERVICE

I declare that I sent a true and correct copy of the Brief of Respondents James N. Dunlap, MD and Jane Doe Dunlap, husband and wife and the marital community composed thereof; and Providence Hospital Services, d/b/a Providence Orthopedic Specialties by the method indicated below and addressed to the following:

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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.

Dated this 10th day of December, 2014.

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