Supreme Court No. 93951-9
Court of Appeals No. 324869
Adams Co. Superior Court Cause No. 13-2-00126-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs-Petitioners,

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;

Defendants,

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.

PETITION FOR REVIEW

George M. Ahrend, WSBA #25160
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

William A. Gilbert, WSBA #30592
Gilbert Law Firm, P.S.
421 W. Riverside Ave., Ste. 353
Spokane, WA 99210
(509) 321-0750

Co-Attorneys for Petitioners

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I. IDENTITY OF PETITIONERS

Plaintiffs-Petitioners Lori and Jerold Sweeney (collectively "Sweeney") ask this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. CITATION TO COURT OF APPEALS DECISION

Sweeney asks this Court to review that portion of the amended Court of Appeals decision affirming summary judgment of dismissal in favor of Defendants-Respondents James N. Dunlap, M.D., his spouse, "Jane Doe" Dunlap, and his employer, Providence Hospital Services, doing business as Providence Orthopedic Specialties (collectively "Dunlap"). Sweeney does not seek review of that portion of the amended decision reversing summary judgment as to the remaining Defendants.

The Court of Appeals issued an unpublished decision on August 2, 2016. A copy of the decision is reproduced in the Appendix to this Petition at A-1 to -15. The Court of Appeals subsequently withdrew the August 2, 2016, opinion, and filed an amended decision on reconsideration on October 25, 2016. A copy of the order on reconsideration is in the Appendix at A-17 to -33. A copy of an order correcting the amended decision, also filed on October 25, 2016, is reproduced in the Appendix at A-16. The Court

of Appeals denied a motion to publish its October 25, 2016, decision on November 17, 2016. A copy of the order denying publication is in the Appendix at A-34.

III. ISSUES PRESENTED FOR REVIEW

Under circumstances where Dunlap misled Sweeney about his involvement in her health care, and Sweeney amended her complaint to add Dunlap as a defendant within three months after learning that he had misled her and that he was negligent:

1. Has Dunlap met his burden on summary judgment to establish, 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?

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

IV. STATEMENT OF THE CASE

A. Overview.

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. CP 102, 181-82.

A physician assistant 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 Dunlap by telephone—Dunlap was the on-call orthopedic surgeon located in Spokane—the physician assistant 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 the third attempt to reduce Sweeney's shoulder revealed that, in addition to the original dislocation and fracture, the head of her humerus (the top of the upper arm bone) 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 Dunlap. He performed a type of shoulder replacement surgery on April 28, 2010, replacing the humeral head with an artificial joint and reconstructing the

[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).

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 the physician assistant and the hospital, alleging a violation of the standard of care in attempting a closed reduction of a dislocation-fracture of the severity shown on Sweeney's pre-reduction x-rays, among other things.

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

In the meantime, on June 11, 2013, Sweeney also had to undergo another, more extensive shoulder replacement surgery,

which revealed problems with the earlier surgeries performed by Dunlap.

On January 2, 2014—within six months of Dunlap's follow up surgery and three months of learning that he had seen her pre-reduction x-rays—Sweeney amended her complaint to name Dunlap as an additional defendant. Dunlap filed a motion for summary judgment, arguing that Sweeney's complaint was barred by the medical negligence statute of limitations, RCW 4.16.350, and that she was not entitled to relation back under CR 15(c). The superior court granted the motion, and the Court of Appeals affirmed.

B. Dunlap misled Sweeney regarding his involvement in her health care, and, because of the misinformation he provided, she did not originally name him as a defendant.

Before filing suit against anyone, Sweeney's lawyer met with Dunlap because the physician assistant's chart note states that he conferred with Dunlap regarding her x-rays *before* the attempted reduction of her shoulder, although Dunlap's records do not reflect any such conversation occurred. CP 265. Moreover, on one occasion in 2012, when Sweeney and her husband showed the pre-reduction x-rays of her shoulder to Dunlap, it appeared to be the first time he had ever seen them.

After making several unsuccessful attempts to schedule a meeting, Sweeney's lawyer 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. Dunlap 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. 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. During discovery, Sweeney learned that Dunlap had misled her.

On October 23, 2013, the physician assistant's lawyer disclosed an "audit trail" for Sweeney's pre-reduction x-rays. The audit trail revealed, for the first time, that Dunlap had seen Sweeney's pre-reduction x-rays before advising the physician to attempt a closed reduction of her shoulder. 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 contracting with the company for radiology services. CP 78, 96.

On October 25, 2013, during a deposition of Dunlap taken before he was joined as a party, 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 them. CP 222, 224-30 & 268.

D. Within three months of learning that Dunlap had misled her (and that he was therefore negligent), Sweeney amended her complaint to add him as a defendant.

On January 2, 2014, Sweeney filed a motion to amend her complaint to add Dunlap as an additional defendant. CP 38-56.[2] 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. By the time of the amendment, it had also become apparent that there were problems with the surgeries performed by Dunlap. Sweeney was diagnosed with a 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

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

failure to inspect and repair her rotator cuff during the initial shoulder replacement surgery on April 28, 2010, and the follow-up rotator cuff surgery on April 4, 2012. CP 282-84. Accordingly, the amended complaint included allegations that Dunlap failed to comply with the standard of care in performing these surgeries. CP 50-51. The superior court granted the motion to amend. CP 60-61.

E. The superior court granted summary judgment in favor of Dunlap based on the statute of limitations, despite recognizing the unfairness resulting from his conduct.

Dunlap subsequently filed a motion for summary judgment, arguing that Sweeney's claims are barred by the medical negligence statute of limitations, RCW 4.16.350, and 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 the statute of limitations.

In response, Sweeney contended that the applicable limitations periods had not expired because Dunlap continued to provide negligent treatment—consisting of the failure to inspect and repair her torn rotator cuff during the surgeries performed on April 28, 2010, and April 4, 2012—until less than a year before the amended complaint was filed. CP 192-205 & 283. Even if the court

determined that the applicable limitations periods had expired, Sweeney argued that the amendment related back to the date of her original complaint, based 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 denied relation back under CR 15(c). *See* CP 374-77. 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 [i.e., 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).

F. The Court of Appeals affirmed, without addressing the applicable limitations period based on discovery of Dunlap's negligence or acknowledging the fact that Dunlap misled Sweeney.

The Court of Appeals affirmed dismissal of Sweeney's claim against Dunlap based on the statute of limitations. The appellate court recognized that the statute of limitations is an affirmative defense on which Dunlap bears the burden of proof. A-28. The

court held that the medical negligence statute of limitations expired three years after Dunlap's initial negligence, and that there was insufficient evidence of subsequent acts of negligence to extend the limitations period under the continuing treatment doctrine. A-29. The court did not address the alternate one-year limitations period based on Sweeney's discovery of Dunlap's negligence. *See* Sweeney Br., at 25-31; Sweeney Reply to Dunlap, at 12-15.

The Court of Appeals also held that Sweeney was not entitled to relation back under CR 15(c). A-30 to -31. In so doing, the court characterized Sweeney's conduct as "inexcusable neglect," but did not acknowledge the fact that Dunlap misled her lawyer about reviewing the pre-reduction x-rays. *See* A-30 (characterizing Dunlap's misstatements as a lack of recall).

From this decision, Sweeney seeks review.

V. ARGUMENT IN SUPPORT OF REVIEW

A. Review is warranted under RAP 13.4(b)(1) because the Court of Appeals decision below conflicts with this Court's decisions in *Winbun* and *Adcox*.

"A petition for review will be accepted by the Supreme Court ... If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." RAP 13.4(b)(1) (ellipses added). In this case, the Court of Appeals decision below conflicts with this

Court's decisions in *Winbun v. Moore,* 143 Wn. 2d 206, 18 P.3d 576 (2001), and *Adcox v. Children's Ortho. Hosp. & Med. Ctr.*, 123 Wn. 2d 15, 864 P.2d 921 (1993), regarding accrual of a claim for medical negligence based on discovery under the medical negligence statute of limitations. The Court should grant review to resolve this conflict.

1. *Winbun* and *Adcox* hold that a claim for medical negligence does not accrue until the plaintiff discovers the allegedly negligent act or omission of an individual health care provider.

The medical negligence statute of limitations contains alternate limitations periods, i.e., "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 expires later[.]" RCW 4.16.350 (emphasis & brackets added). Under the one-year limitations period based on discovery, the plaintiff's cause of action does not accrue until the plaintiff discovers—i.e., has actual or constructive knowledge of—the allegedly negligent act or omission of an individual health care provider. *See Winbun,* 143 Wn. 2d at

213-22. This normally presents a question of fact for the jury to resolve. *See id.* at 213.

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

> 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:

> 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).

2. The Court of Appeals did not address accrual based on discovery under the applicable one-year limitations period, and its decision is contrary to *Winbun* and *Adcox* because there is a question of fact when Sweeney discovered Dunlap's negligence.

There is, at minimum, a question of fact whether Sweeney's amended complaint against Dunlap is timely under the one-year limitation period, because she filed suit within three months after discovering that Dunlap was negligent. *See* Sweeney Br., at 25-31; Sweeney Reply to Dunlap, at 12-15. Sweeney was not privy to the telephone call between Dunlap and the physician assistant. She did not have actual knowledge that Dunlap had reviewed her x-rays before advising the physician assistant to attempt a closed reduction of her shoulder until receiving the x-ray audit trail on October 23, 2014.

Sweeney did not have constructive knowledge beforehand because: (1) Dunlap denied reviewing the pre-reduction x-rays; (2) he stated that he would not have advised the physician assistant to attempt a closed reduction if he had seen them, thereby incriminating himself and making the denial more credible; (3) he expressed surprise when he was shown copies of the pre-reduction x-rays; (4) did not have any record of reviewing the pre-reduction x-rays; (5) the pre-reduction x-rays were not in the computer

database where they would have been stored, if he had reviewed them; (6) Sweeney did not have access to the x-ray audit trial showing he had, in fact, reviewed them; and (7) Sweeney had no reason to suspect that Dunlap was misleading her lawyer.

Weighing against this evidence is nothing more than a reference to a telephone call between the physician assistant and Dunlap in the physician assistant's chart note.[3] By relying on this evidence, Dunlap places himself in the position of claiming that Sweeney should have disbelieved what he told her lawyer in order to obtain summary judgment on the statute of limitations.

Under these circumstances, holding that the statute of limitations bars Sweeney's claim against Dunlap as a matter of law, as the Court of Appeals did, is contrary to *Winbun* and *Adcox*. In *Winbun,* the plaintiff "suspected her injuries were caused by medical malpractice early on," and, while the negligence of one of 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

[3] The record does not reflect when Sweeney received a copy of the chart note. Although it appears Sweeney's lawyer had it when he met with Dunlap on April 19, 2013, this date is still within the one-year limitations period based on discovery.

responsible. 143 Wn. 2d at 215 (brackets added). The Court found substantial evidence to support the jury's verdict that the applicable 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 true nature and extent of the 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. Any other result would foster the "sue first, ask questions later" approach that this Court has previously rejected.

B. Review is further warranted under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with this Court's decision in *Gildon*, holding that "inexcusable neglect" should not preclude relation back under CR 15(c) "where the defendant's actions or misrepresentations mislead the plaintiff[.]" (Brackets added.)

In addressing relation back under CR 15(c), the Court of Appeals does not mention the fact that Dunlap misled Sweeney's lawyer regarding the nature of his involvement in her care, the fact that Dunlap would have been named as a defendant in the original complaint if he had acknowledged the true nature of his involvement when he met with her lawyer, or the fact that Dunlap was named as a defendant soon after the true nature of his involvement was revealed. The Court's opinion simply sweeps aside these facts by characterizing the summary judgment record

unfairly, in a way that makes it sound like nothing Dunlap said had any effect on his being named in the original complaint. The court merely states: "in a subsequent interview with Dr. Dunlap, the doctor stated that he could not recall looking at the x-rays prior to the recommendation" to attempt a closed reduction of Sweeney's shoulder, and that "this is not enough to justify omitting Dr. Dunlap as a defendant given the other information obtained by the Sweeneys prior to the expiration of the limitations period." A-30. As noted above, Dunlap denied seeing the x-rays, stated that they were not in the computer database where they would be if he had seen them, and incriminated himself by stating that he would not have advised another health care provider to attempt a closed reduction of Sweeney's shoulder if he had seen them. *See* CP 266-67 & 275.[4]

The Court's opinion also does not address the Supreme Court's decision in *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn. 2d 483, 492 n.10, 145 P.3d 1196 (2006), regarding the effect of a defendant's actions upon relation back under CR 15(c). *See* Sweeney Br., at 39-40 (quoting *Gildon*); Sweeney Reply to Dunlap, at 17 (same). Specifically, in *Gildon*, the Court stated that "the

[4] The Court of Appeals' review of the facts conflicts with numerous decisions from this Court holding that the facts and all reasonable inferences must be viewed in the light most favorable to the nonmoving party on summary judgment, independently justifying review under RAP 13.4(b)(1). *See, e.g., Binschus v. State*, 186 Wn. 2d 573, 577, 380 P.3d 468 (2016).

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[.]" *Id.*, 158 Wn. 2d at 492 n.10. The Court of Appeals decision below conflicts with this statement from *Gildon* and independently warrants review under RAP 13.4(b)(1).[5]

VI. CONCLUSION

Sweeney respectfully asks the Court to grant review, reverse summary judgment in favor of Dunlap, and remand this case for trial.

Respectfully submitted this 19th day of December, 2016.

s/George M. Ahrend
George M. Ahrend
WSBA #25160
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
Telephone: (509) 764-9000
Fax: (509) 464-6290
E-mail: gahrend@ahrendlaw.com

s/William A. Gilbert
William A. Gilbert
WSBA #30592
Gilbert Law Firm, P.S.
421 W. Riverside Ave., Ste. 353
Spokane, WA 99210
Telephone: (509) 321-0750
Fax: (509) 464-6290
Email: bill@wagilbert.com

Co-Counsel for Petitioners

[5] The Court of Appeals also stated that Dunlap did not have notice of the action within the limitations period, as required under CR 15(c). A-30. However, the ostensible lack of notice is based on the fact that Sweeney did not join Dunlap as a defendant after he misled her lawyer. *See id.* Dunlap unquestionably had notice of the action, as it was specifically referenced in the letters he received from Sweeney's lawyer. CP 271 & 275.

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 the date set forth below, 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
mlouvier@ecl-law.com

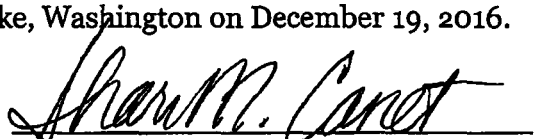
Ryan M. Beaudoin & Matthew W. Daley
Witherspoon Kelley, P.S.
422 W. Riverside Ave., Ste. 1100
Spokane, WA 99201-0300
rmb@witherspoonkelley.com
mwd@witherspoonkelley.com

Robin L. Haynes
McNeice Wheeler
P.O. Box 14758
Spokane Valley, WA 99214-0758
robin@mcneicewheeler.com

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

William A. Gilbert at bill@wagilbert.com; suzette@wagilbert.com

Signed at Moses Lake, Washington on December 19, 2016.



Shari M. Canet, Paralegal

APPENDIX

FILED
August 2, 2016
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife, Appellants, v. 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, Respondents.	)	No. 32486-9-III UNPUBLISHED OPINION

KORSMO, J. — Lori Sweeney and her husband appeal from the dismissal at summary judgment of her medical malpractice action against the physician assistant who initially treated her and the orthopedic surgeon who subsequently performed surgeries on her injured right shoulder. We affirm the dismissal of the action against the surgeon, but conclude that there are unresolved factual questions concerning the claims against the physician assistant and his employer, the Adams County Public Hospital District No. 2.

FACTS

Ms. Sweeney suffered a shoulder injury in a fall at a Ritzville gas station and sought treatment at the emergency room at the East Adams Rural Hospital (EARH). There she was seen by physician's assistant Allen D. Noble. The hospital is not equipped with a magnetic resonance imager, so Mr. Noble had x-rays taken of the shoulder. The x-ray results were uploaded to the Internet and eventually were seen by Dr. James Dunlap.

Mr. Noble diagnosed Ms. Sweeney with a dislocated shoulder and humeral head facture with a 1 cm displacement. Mr. Noble consulted with Dr. Dunlap in Spokane. The two decided the best plan of care was to first manipulate the shoulder back into place. Dr. Dunlap recommended Mr. Noble perform a closed reduction of the shoulder dislocation. A closed reduction is a medical maneuver involving physical manipulation of the shoulder in an effort to pop it back into its socket. It is referred to as a closed reduction because it is done without surgery.

Mr. Noble attempted a closed reduction of the dislocation. The first two attempts were unsuccessful. On the third attempt, Mr. Noble felt a "pop" suggesting the humerus head had moved into the shoulder socket. Clerk's Papers (CP) at 92. However, a post-reduction x-ray showed that while the humerus had moved into better alignment, the humoral head remained inferiorly and anteriorly displaced and a comminuted fracture (a fracture in which the bone is splintered or crushed into numerous pieces) was now

visible. The post-reduction x-ray showed separation of the humeral head from the lower part of the bone.

After viewing the post-reduction x-ray, Mr. Noble again contacted Dr. Dunlap. Ms. Sweeney was transferred to Sacred Heart Medical Center in Spokane. Dr. Dunlap performed surgery on Ms. Sweeney's right shoulder three days later on April 28, 2010. Dr. Dunlap provided follow up care and believed the surgery was successful.

Two years later, Ms. Sweeney returned to Dr. Dunlap because she had suffered a rotator cuff tear. Dr. Dunlap performed a surgical repair of the right shoulder's rotator cuff on April 4, 2012.

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Both Mr. Noble and Dr. Dunlap requested summary judgment dismissal of the Sweeneys' claims. In support of Mr. Noble's summary judgment motion, he submitted a declaration from Dr. James Nania, a board certified emergency medicine physician with 30 years of experience, who has reduced approximately 200 dislocated shoulders. Dr. Nania opined Mr. Noble complied with the applicable standard of care under the circumstances confronting him on April 25, 2010. On the issue of causation, Dr. Nania specifically described the maneuvers used by Mr. Noble during the three attempts to reduce Ms. Sweeney's dislocation and opined the maneuvers did not involve sufficient forces or torque to produce any new fracturing of Ms. Sweeney's shoulder. In response, the Sweeneys provided a declaration from Dr. Steven R. Graboff, an orthopedic surgeon who opined the culmination of Mr. Noble's three attempts to reduce Ms. Sweeney's shoulder dislocation caused a severely comminuted fracture in at least 3 parts of the right shoulder. Ms. Sweeney also submitted a declaration from physician's assistant, Jeffrey

Nicholson, PhD, who opined as a proximate cause of the breach of the standard of care for emergency physician's assistants, Ms. Sweeney sustained what is likely a permanent injury to her right upper extremity.

The trial court found Ms. Sweeney had submitted sufficient expert testimony to raise a material issue of fact on whether Mr. Noble complied with the standard of care. But the court found the Sweeneys had not raised a material issue of fact with respect to causation. In its oral ruling, the court concluded the Sweeneys' "argument fails on the causation element." Report of Proceedings (RP) at 56. The trial court granted summary judgment in favor of Mr. Noble.

Dr. Dunlap argued summary judgment was appropriate because the claim was untimely. The trial court agreed, finding the amended complaint was filed after the three-year statute of limitations for medical malpractice claims had run. *See* RCW 4.16.350. The court further found CR 15's relation-back principles were of no assistance to the Sweeneys because Dr. Dunlap did not have notice that he would be sued; the court reasoned that the "case fails because a new party did not receive notice that he was a target defendant. In fact, he was told just the opposite." RP at 58. The court also rejected the Sweeneys' contention that the "continuing treatment" doctrine prevented the limitations period from beginning to run until after the 2012 rotator cuff surgery; the court observed there was no connection between the 2010 treatment and the 2012 treatment.

The Sweeneys appealed to this court. A panel heard oral argument and, after consulting counsel at argument, stayed the matter pending the decision in *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015). After the decision issued in *Keck*, the parties filed supplemental briefs and a different panel again heard oral argument in the matter.

ANALYSIS

The issues presented are whether the trial court appropriately granted summary judgment as to each defendant. After briefly considering the standard of review, we will consider first the claim against Mr. Noble and the hospital before turning to the claim against Dr. Dunlap.

Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Berger v. Sonneland*, 144 Wn.2d 91, 102, 26 P.3d 257 (2001). The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact. *Id.* at 102. This court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Id.* All facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Id.* at 102-03. All questions of law are reviewed de novo. *Id.* at 103. Summary judgment also is proper if the plaintiff lacks competent medical evidence to establish a prima facie case. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *overruled on other grounds by*, 130 Wn.2d 160 (1996). If a defendant files a motion

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A plaintiff must next show the failure to exercise the necessary degree of care, skill, or learning "was a proximate cause of the injury complained of." RCW 7.70.040(2). "The applicable standard of care and proximate causation generally must be established by expert testimony." *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 144, 341 P.3d 261 (2014) (citing *Berger*, 144 Wn.2d at 111)). This medical testimony must be based on a reasonable degree of medical certainty. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989).

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The trial court dismissed the action against Mr. Noble and the hospital in part on the basis that the plaintiffs' expert's affidavit was too conclusory. This ruling requires us

to consider in some detail the decision in *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 851 P.2d 689 (1993), as well as the decision in *Keck*.

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Keck involved a complicated procedural history that saw the plaintiff's expert filing successive affidavits in opposition to a summary judgment motion. 184 Wn.2d at 364-366. The trial court struck the third affidavit as untimely, but this court determined that the affidavit should have been admitted and found that it sufficed to defeat summary judgment. *Id.* at 367. This court also determined that the second affidavit, timely submitted, was conclusory and did not avert summary judgment. *Id.* The Washington Supreme Court agreed that the trial court had erred in striking the third affidavit, but also concluded that this court had erred in finding the second affidavit insufficient. *Id.* at 368-371.

The court distinguished *Guile*, agreeing that the plaintiff's affidavit there essentially said that a reasonable doctor would not use a faulty technique and failed to state how the defendant had acted negligently. *Id.* at 373. In contrast, the court concluded that the affidavits in *Keck* had stated both a standard of care and breach of that standard when it stated the defendant doctors had "performed multiple operations without really addressing the problem of non-union and infection." *Id.* at 371. The expert also opined that the defendant doctors should have referred the plaintiff to doctors qualified to treat the problems they did not treat. The court concluded that this statement, too, identified another breach of care by the defendant doctors. *Id.* at 372.

As construed in *Keck*, we believe *Guile* stands for the proposition that an expert must identify *facts* that establish the plaintiff's case rather than simply state conclusory opinions. With that understanding, we turn to the affidavit of plaintiffs' expert addressing the issue of causation involving Mr. Noble.[1]

Plaintiffs' experts here stated sufficient facts to avoid summary judgment on causation. Dr. Patten and Dr. Graboff disputed whether the bone was broken before Mr. Noble addressed the shoulder dislocation. Dr. Graboff and Mr. Nicholson both indicated that there was insufficient sedation when Mr. Noble worked on the shoulder. Finally, Mr.

[1] No one disputes that there is a question of fact concerning whether Mr. Noble breached the standard of care.

Nicholson stated that Mr. Noble should not have attempted the reduction on his own and should not have attempted the second and third maneuvers once the first effort failed.

These affidavits all present questions of fact that, if believed by the jury, would support a verdict in favor of the plaintiffs on a theory that Mr. Noble caused the broken shoulder. *Keck*, 184 Wn.2d at 370, 374. Accordingly, we conclude that the trial court erred in granting summary judgment in favor of Mr. Noble and the hospital.

Dr. Dunlap

In contrast, the question presented with respect to Dr. Dunlap is whether the trial court correctly concluded that the statute of limitations barred the claim against him. We agree with the trial court that it did.

There are two statutes of limitation applicable to a medical malpractice action, each having a different accrual date. RCW 4.16.350 provides that a lawsuit alleging medical malpractice must be filed within three years of the "act or omission" giving rise to the claim or one year after the patient "discovered or reasonably should have discovered" that the injury was caused by the act or omission in question. The statute of limitations is an affirmative defense on which the defendant bears the burden of proof. *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-621, 547 P.2d 1221 (1976). Whether a case was filed within the statute of limitations period is normally a question of law to be determined by a judge. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008).

Ms. Sweeney was injured on April 25, 2010 and filed an amended complaint, naming Dr. Dunlap as a new defendant on January 15, 2014, more than three years after the date of injury. The Sweeneys, however, argue their amended complaint relates back to their original complaint under CR 15(c).

"CR 15(c) allows plaintiffs who mistakenly sue incorrect defendants to amend their complaints and add the correct defendants, provided the rule's requirements are satisfied." *Martin v. Dematic*, 182 Wn.2d 281, 292-293, 340 P.3d 834 (2014). The rule has one judicially-created and two textual requirements. The text requires that for a claim to relate back under CR 15(c), the added party must have received notice of the action within the limitations period such that he or she will not be prejudiced in maintaining his or her defense on the merits. CR 15(c)(1). Additionally, the added party must have known or should have known that *but for a mistake concerning his or her identity*, the action would have been brought against him or her. CR 15(c)(2). The judicially-created requirement is that a plaintiff adding a new party can do so only if the plaintiff's delay was not due to inexcusable neglect. *Martin*, 182 Wn.2d at 288. "The party seeking to amend its complaint has the burden to prove those conditions are satisfied." *Id.* at 288-289.

Here, the Sweeneys were aware of Dr. Dunlap's role in Ms. Sweeney's care. They obtained her medical records, which clearly state that on April 25, 2010, Mr. Noble consulted with Dr. Dunlap in Spokane and Dr. Dunlap recommended a closed reduction.

They even interviewed Dr. Dunlap about his involvement prior to the expiration of the statute of limitations period. The Sweeneys indicated to Dr. Dunlap he was not going to be named a defendant. Indeed, the Sweeneys did not name Dr. Dunlap as a defendant when the original complaint was filed.

The Sweeneys claim they only amended their complaint because they learned, after filing their complaint, that Dr. Dunlap reviewed x-rays before the closed reduction was attempted. But, the April 25, 2010 medical records, which the Sweeneys had prior to filing their complaint, state that Mr. Noble "called Dr. Dunlap (ortho) at this point and he reviewed films on stentor. He recommended us attempting closed reduction." CP at 102. While in a subsequent interview with Dr. Dunlap, the doctor stated that he could not recall looking at the x-rays prior to the recommendation, this is not enough to justify omitting Dr. Dunlap as a defendant given the other information obtained by the Sweeneys prior to the expiration of the limitations period.

Accordingly, Dr. Dunlap was not on notice of the action within the limitations period and he did not know the action would be brought given counsel's assurance he was not going to be included as a defendant. Moreover, the delay was based on inexcusable neglect. "Inexcusable neglect exists when the identity of the defendant is readily available and the plaintiff provides no reason for failing to name the defendant." *Martin*, 182 Wn.2d at 290 (citing *S. Hollywood Hills Citizens Ass'n for Pres. of Neigh. Safety & Env't v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984) (finding

inexcusable neglect where "the information necessary to properly implead the parties was readily available" but the plaintiff's attorney "simply did not inquire")). It is not excusable if the delay is due to "'a conscious decision, strategy or tactic.'" *Id.* at 290 (quoting *Stansfield v. Douglas County*, 146 Wn.2d 116, 121, 43 P.3d 498 (2002)). Reasonable minds could conclude the Sweeneys either mistakenly or consciously decided to exclude Dr. Dunlap as a defendant before the three-year limitations period ran. Thus, CR 15's relate-back principles do not apply.

The Sweeneys also argue the treatment was ongoing and continuous, culminating with the rotator cuff repair, and that they amended their complaint within three years of that final treatment. In addressing this argument, *Caughell v. Group Health Cooperative of Puget Sound*, 124 Wn.2d 217, 876 P.2d 898 (1994), is instructive. There, the court clarified the statute of limitations for medical negligence actions where the plaintiff alleges continuing negligent treatment. Under *Caughell*, the three-year statute of limitations under RCW 4.16.350 does not accrue and begin to run until the last date of negligent medical treatment. In *Caughell*, the plaintiff alleged damages resulting from her physician's ongoing and continuing prescription, over more than 20 years, of a specific medication. *Id.* at 220. The court clarified that the acts must be "part of a substantially uninterrupted course of treatment" to extend the statutory period. *Id.* at 233. The Sweeneys cannot make this showing.

The record shows Ms. Sweeney sought treatment from Dr. Dunlap in 2010 and again in 2012. There was no continuing course of care between 2010 and 2012. Furthermore, there is no showing the 2012 surgery was due to negligence in 2010. Finally, the negligence allegations relate to the care provided in 2010. There is no allegation Dr. Dunlap provided substandard care in 2012. Therefore, even if the doctrine were applicable to this case, the limitations period would have begun to run in 2010, the date of the last allegedly negligent treatment, and expired well before the January 15, 2014 amendment that added Dr. Dunlap. "'Under the modified continuing-course-of-treatment rule, claimants must allege that the last negligent act, not simply the end of treatment itself, occurred within 3 years of filing suit.'" *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 325, 300 P.3d 431 (2013) (quoting *Caughell*, 124 Wn.2d at 229). The Sweeneys have not met this burden. The amended complaint against Dr. Dunlap is untimely under RCW 4.16.350's three-year limitations period.

The claim also fails under RCW 4.16.350's alternative one-year limitations period. A medical malpractice lawsuit may be filed within one year after the patient "discovered or reasonably should have discovered" that the *injury* was caused by the act or omission in question. RCW 4.16.350. The Sweeneys argue that once they learned of the x-ray review date they amended their complaint within one year. But, as discussed above, this argument is without merit because the Sweeneys did not just "discover" at that point Dr. Dunlap's involvement; they were already aware. More importantly, the Sweeneys did

not just then discover the shoulder injury. Accordingly, the facts of this case do not trigger RCW 4.16.350's one year limitation.

The trial court correctly dismissed the action against Dr. Dunlap.

The judgment is affirmed in part, reversed in part, and remanded for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Pennell, J.

FILED
OCTOBER 25, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife, Appellants, v. 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, Respondents.	No. 32486-9-III ORDER AMENDING COURT'S OPINION FILED OCTOBER 25, 2016

THE COURT on its own motion has determined that the opinion should be amended on page 14. Therefore,

IT IS HEREBY ORDERED, the Court's opinion filed on October 25, 2016, is hereby amended as follows:

On page 14 fn.2, first line that reads: "Even if the issue had been presented, the affidavits of the defense experts do not satisfy *Keck*."

The sentence shall be corrected to read: Even if the issue had been presented, the affidavits of the plaintiff's experts do not satisfy *Keck*.

The rest of the paragraph shall remain as written.

PANEL: Judges Korsmo, Siddoway, Pennell

FOR THE COURT:

GEORGE FEARING, Chief Judge

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THE COURT has considered appellant's motion for reconsideration and motion to enlarge time to publish opinion and is of the opinion the motions should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration and the motion to enlarge time to publish opinion of this court's decision of August 2, 2016, is hereby denied.

IT IS FURTHER ORDERED the opinion filed August 2, 2016, is hereby withdrawn; a new opinion will be filed this day and has been amended as follows:

The portion of the first full paragraph on page 14 that read:

> The record shows Ms. Sweeney sought treatment from Dr. Dunlap in 2010 and again in 2012. There was no continuing course of care between

2010 and 2012. Furthermore, there is no showing the 2012 surgery was due to negligence in 2010. Finally, the negligence allegations relate to the care provided in 2010. There is no allegation Dr. Dunlap provided substandard care in 2012.

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[2] Even if the issue had been presented, the affidavits of the defense experts do not satisfy *Keck*. There is no showing what a reasonable doctor would or would not have done during the 2012 surgery, or that Dr. Dunlap failed to meet those standards. *Keck*, 184 Wn.2d at 371. Merely alleging a continuing course of conduct does not revive a claim that appellants initially had waived.

PANEL: Judges Korsmo, Siddoway, Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING, Chief Judge

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KORSMO, J. — Lori Sweeney and her husband appeal from the dismissal at summary judgment of her medical malpractice action against the physician assistant who initially treated her and the orthopedic surgeon who subsequently performed surgeries on her injured right shoulder. We affirm the dismissal of the action against the surgeon, but conclude that there are unresolved factual questions concerning the claims against the physician assistant and his employer, the Adams County Public Hospital District No. 2.

FACTS

Ms. Sweeney suffered a shoulder injury in a fall at a Ritzville gas station and sought treatment at the emergency room at the East Adams Rural Hospital (EARH). There she was seen by physician's assistant Allen D. Noble. The hospital is not equipped with a magnetic resonance imager, so Mr. Noble had x-rays taken of the shoulder. The x-ray results were uploaded to the Internet and eventually were seen by Dr. James Dunlap.

Mr. Noble diagnosed Ms. Sweeney with a dislocated shoulder and humeral head facture with a 1 cm displacement. Mr. Noble consulted with Dr. Dunlap in Spokane. The two decided the best plan of care was to first manipulate the shoulder back into place. Dr. Dunlap recommended Mr. Noble perform a closed reduction of the shoulder dislocation. A closed reduction is a medical maneuver involving physical manipulation of the shoulder in an effort to pop it back into its socket. It is referred to as a closed reduction because it is done without surgery.

Mr. Noble attempted a closed reduction of the dislocation. The first two attempts were unsuccessful. On the third attempt, Mr. Noble felt a "pop" suggesting the humerus head had moved into the shoulder socket. Clerk's Papers (CP) at 92. However, a post-reduction x-ray showed that while the humerus had moved into better alignment, the humoral head remained inferiorly and anteriorly displaced and a comminuted fracture (a fracture in which the bone is splintered or crushed into numerous pieces) was now

visible. The post-reduction x-ray showed separation of the humeral head from the lower part of the bone.

After viewing the post-reduction x-ray, Mr. Noble again contacted Dr. Dunlap. Ms. Sweeney was transferred to Sacred Heart Medical Center in Spokane. Dr. Dunlap performed surgery on Ms. Sweeney's right shoulder three days later on April 28, 2010. Dr. Dunlap provided follow up care and believed the surgery was successful.

Two years later, Ms. Sweeney returned to Dr. Dunlap because she had suffered a rotator cuff tear. Dr. Dunlap performed a surgical repair of the right shoulder's rotator cuff on April 4, 2012.

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Both Mr. Noble and Dr. Dunlap requested summary judgment dismissal of the Sweeneys' claims. In support of Mr. Noble's summary judgment motion, he submitted a declaration from Dr. James Nania, a board certified emergency medicine physician with 30 years of experience, who has reduced approximately 200 dislocated shoulders. Dr. Nania opined Mr. Noble complied with the applicable standard of care under the circumstances confronting him on April 25, 2010. On the issue of causation, Dr. Nania specifically described the maneuvers used by Mr. Noble during the three attempts to reduce Ms. Sweeney's dislocation and opined the maneuvers did not involve sufficient forces or torque to produce any new fracturing of Ms. Sweeney's shoulder. In response, the Sweeneys provided a declaration from Dr. Steven R. Graboff, an orthopedic surgeon who opined the culmination of Mr. Noble's three attempts to reduce Ms. Sweeney's shoulder dislocation caused a severely comminuted fracture in at least 3 parts of the right shoulder. Ms. Sweeney also submitted a declaration from physician's assistant, Jeffrey

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The issues presented are whether the trial court appropriately granted summary judgment as to each defendant. After briefly considering the standard of review, we will consider first the claim against Mr. Noble and the hospital before turning to the claim against Dr. Dunlap.

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Keck involved a complicated procedural history that saw the plaintiff's expert filing successive affidavits in opposition to a summary judgment motion. 184 Wn.2d at 364-366. The trial court struck the third affidavit as untimely, but this court determined that the affidavit should have been admitted and found that it sufficed to defeat summary judgment. *Id.* at 367. This court also determined that the second affidavit, timely submitted, was conclusory and did not avert summary judgment. *Id.* The Washington Supreme Court agreed that the trial court had erred in striking the third affidavit, but also concluded that this court had erred in finding the second affidavit insufficient. *Id.* at 368-371.

The court distinguished *Guile*, agreeing that the plaintiff's affidavit there essentially said that a reasonable doctor would not use a faulty technique and failed to state how the defendant had acted negligently. *Id.* at 373. In contrast, the court concluded that the affidavits in *Keck* had stated both a standard of care and breach of that standard when it stated the defendant doctors had "performed multiple operations without really addressing the problem of non-union and infection." *Id.* at 371. The expert also opined that the defendant doctors should have referred the plaintiff to doctors qualified to treat the problems they did not treat. The court concluded that this statement, too, identified another breach of care by the defendant doctors. *Id.* at 372.

As construed in *Keck*, we believe *Guile* stands for the proposition that an expert must identify *facts* that establish the plaintiff's case rather than simply state conclusory opinions. With that understanding, we turn to the affidavit of plaintiffs' expert addressing the issue of causation involving Mr. Noble.[1]

Plaintiffs' experts here stated sufficient facts to avoid summary judgment on causation. Dr. Patten and Dr. Graboff disputed whether the bone was broken before Mr. Noble addressed the shoulder dislocation. Dr. Graboff and Mr. Nicholson both indicated that there was insufficient sedation when Mr. Noble worked on the shoulder. Finally, Mr.

[1] No one disputes that there is a question of fact concerning whether Mr. Noble breached the standard of care.

Nicholson stated that Mr. Noble should not have attempted the reduction on his own and should not have attempted the second and third maneuvers once the first effort failed.

These affidavits all present questions of fact that, if believed by the jury, would support a verdict in favor of the plaintiffs on a theory that Mr. Noble caused the broken shoulder. *Keck*, 184 Wn.2d at 370, 374. Accordingly, we conclude that the trial court erred in granting summary judgment in favor of Mr. Noble and the hospital.

Dr. Dunlap

In contrast, the question presented with respect to Dr. Dunlap is whether the trial court correctly concluded that the statute of limitations barred the claim against him. We agree with the trial court that it did.

There are two statutes of limitation applicable to a medical malpractice action, each having a different accrual date. RCW 4.16.350 provides that a lawsuit alleging medical malpractice must be filed within three years of the "act or omission" giving rise to the claim or one year after the patient "discovered or reasonably should have discovered" that the injury was caused by the act or omission in question. The statute of limitations is an affirmative defense on which the defendant bears the burden of proof. *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-621, 547 P.2d 1221 (1976). Whether a case was filed within the statute of limitations period is normally a question of law to be determined by a judge. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008).

Ms. Sweeney was injured on April 25, 2010 and filed an amended complaint, naming Dr. Dunlap as a new defendant on January 15, 2014, more than three years after the date of injury. The Sweeneys, however, argue their amended complaint relates back to their original complaint under CR 15(c).

"CR 15(c) allows plaintiffs who mistakenly sue incorrect defendants to amend their complaints and add the correct defendants, provided the rule's requirements are satisfied." *Martin v. Dematic*, 182 Wn.2d 281, 292-293, 340 P.3d 834 (2014). The rule has one judicially-created and two textual requirements. The text requires that for a claim to relate back under CR 15(c), the added party must have received notice of the action within the limitations period such that he or she will not be prejudiced in maintaining his or her defense on the merits. CR 15(c)(1). Additionally, the added party must have known or should have known that *but for a mistake concerning his or her identity*, the action would have been brought against him or her. CR 15(c)(2). The judicially-created requirement is that a plaintiff adding a new party can do so only if the plaintiff's delay was not due to inexcusable neglect. *Martin*, 182 Wn.2d at 288. "The party seeking to amend its complaint has the burden to prove those conditions are satisfied." *Id.* at 288-289.

Here, the Sweeneys were aware of Dr. Dunlap's role in Ms. Sweeney's care. They obtained her medical records, which clearly state that on April 25, 2010, Mr. Noble consulted with Dr. Dunlap in Spokane and Dr. Dunlap recommended a closed reduction.

They even interviewed Dr. Dunlap about his involvement prior to the expiration of the statute of limitations period. The Sweeneys indicated to Dr. Dunlap he was not going to be named a defendant. Indeed, the Sweeneys did not name Dr. Dunlap as a defendant when the original complaint was filed.

The Sweeneys claim they only amended their complaint because they learned, after filing their complaint, that Dr. Dunlap reviewed x-rays before the closed reduction was attempted. But, the April 25, 2010 medical records, which the Sweeneys had prior to filing their complaint, state that Mr. Noble "called Dr. Dunlap (ortho) at this point and he reviewed films on stentor. He recommended us attempting closed reduction." CP at 102. While in a subsequent interview with Dr. Dunlap, the doctor stated that he could not recall looking at the x-rays prior to the recommendation, this is not enough to justify omitting Dr. Dunlap as a defendant given the other information obtained by the Sweeneys prior to the expiration of the limitations period.

Accordingly, Dr. Dunlap was not on notice of the action within the limitations period and he did not know the action would be brought given counsel's assurance he was not going to be included as a defendant. Moreover, the delay was based on inexcusable neglect. "Inexcusable neglect exists when the identity of the defendant is readily available and the plaintiff provides no reason for failing to name the defendant." *Martin*, 182 Wn.2d at 290 (citing *S. Hollywood Hills Citizens Ass'n for Pres. of Neigh. Safety & Env't v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984) (finding

inexcusable neglect where "the information necessary to properly implead the parties was readily available" but the plaintiff's attorney "simply did not inquire")). It is not excusable if the delay is due to "'a conscious decision, strategy or tactic.'" *Id.* at 290 (quoting *Stansfield v. Douglas County*, 146 Wn.2d 116, 121, 43 P.3d 498 (2002)). Reasonable minds could conclude the Sweeneys either mistakenly or consciously decided to exclude Dr. Dunlap as a defendant before the three-year limitations period ran. Thus, CR 15's relate-back principles do not apply.

The Sweeneys also argue the treatment was ongoing and continuous, culminating with the rotator cuff repair, and that they amended their complaint within three years of that final treatment. In addressing this argument, *Caughell v. Group Health Cooperative of Puget Sound*, 124 Wn.2d 217, 876 P.2d 898 (1994), is instructive. There, the court clarified the statute of limitations for medical negligence actions where the plaintiff alleges continuing negligent treatment. Under *Caughell*, the three-year statute of limitations under RCW 4.16.350 does not accrue and begin to run until the last date of negligent medical treatment. In *Caughell*, the plaintiff alleged damages resulting from her physician's ongoing and continuing prescription, over more than 20 years, of a specific medication. *Id.* at 220. The court clarified that the acts must be "part of a substantially uninterrupted course of treatment" to extend the statutory period. *Id.* at 233. The Sweeneys cannot make this showing.

The record shows Ms. Sweeney sought treatment from Dr. Dunlap in 2010 and again in 2012. There was no continuing course of care between 2010 and 2012. Furthermore, there is no showing the 2012 surgery was due to negligence in 2010. Finally, the negligence allegations relate to the care provided in 2010. There is no allegation Dr. Dunlap provided substandard care in 2012.[2] Therefore, even if the doctrine were applicable to this case, the limitations period would have begun to run in 2010, the date of the last allegedly negligent treatment, and expired well before the January 15, 2014 amendment that added Dr. Dunlap. "'Under the modified continuing-course-of-treatment rule, claimants must allege that the last negligent act, not simply the end of treatment itself, occurred within 3 years of filing suit.'" *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 325, 300 P.3d 431 (2013) (quoting *Caughell*, 124 Wn.2d at 229). The Sweeneys have not met this burden. The amended complaint against Dr. Dunlap is untimely under RCW 4.16.350's three-year limitations period.

The claim also fails under RCW 4.16.350's alternative one-year limitations period. A medical malpractice lawsuit may be filed within one year after the patient "discovered or reasonably should have discovered" that the *injury* was caused by the act or omission

[2] Even if the issue had been presented, the affidavits of the defense experts do not satisfy *Keck*. There is no showing what a reasonable doctor would or would not have done during the 2012 surgery, or that Dr. Dunlap failed to meet those standards. *Keck*, 184 Wn.2d at 371. Merely alleging a continuing course of conduct does not revive a claim that appellants initially had waived.

in question. RCW 4.16.350. The Sweeneys argue that once they learned of the x-ray review date they amended their complaint within one year. But, as discussed above, this argument is without merit because the Sweeneys did not just "discover" at that point Dr. Dunlap's involvement; they were already aware. More importantly, the Sweeneys did not just then discover the shoulder injury. Accordingly, the facts of this case do not trigger RCW 4.16.350's one year limitation.

The trial court correctly dismissed the action against Dr. Dunlap.

The judgment is affirmed in part, reversed in part, and remanded for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Pennell, J.

FILED
NOVEMBER 17, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife, Appellants, v. 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, Respondent.	)	No. 32486-9-III ORDER DENYING MOTION TO PUBLISH

THE COURT has considered appellant's motion to publish opinion and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to publish opinion of this court's decision of October 25, 2016, is hereby denied.

PANEL: Judges Korsmo, Siddoway, Pennell

FOR THE COURT:

Lawrence-Berrey

ROBERT LAWRENCE-BERREY
Acting Chief Judge

AHREND LAW FIRM PLLC

December 19, 2016 - 4:06 PM

Transmittal Letter

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Case Name: Sweeney v. Dunlap, et al.
Court of Appeals Case Number: 32486-9
Party Respresented: Appellants
Is This a Personal Restraint Petition? ☐ Yes ☑ No

Trial Court County: Adams - Superior Court # 13-2-00126-1

Type of Document being Filed:

☐ Designation of Clerk's Papers / ☐ Statement of Arrangements

☐ Motion for Discretionary Review

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☐ Affidavit of Attorney Fees

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☐ Personal Restraint Petition (PRP)

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Comments:

Filing fee was mailed to Supreme Court on Dec. 16, 2016.

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