No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 58093-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ANTHONY J. BOZUNG, JR., individually and as personal representative of the ESTATE OF JO EVELYN BOZUNG,

Appellant,

v.

MULTICARE HEALTH SYSTEM,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Anthony Bozung, Jr., individually and as personal representative of the Estate of Jo Evelyn Bozung (Petitioner) petitions for review of the Court of Appeals decision.

II. COURT OF APPEALS DECISION

Division I Court of Appeals ("the Court") upheld the superior court's order on summary judgment dismissing petitioner's action, finding the lawsuit was filed beyond the statute of limitations and the discovery rule did not apply. *Anthony Bozung, Jr. v. MultiCare Health System*, No. 86171-9-I (May 20, 2024) (Slip op.), attached as Appendix A. The decision conflicts with previous Supreme Court decisions.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court err in determining the discovery rule did not apply as a matter of law, where Petitioner presented evidence of continuous due diligence efforts to obtain records necessary to ascertain whether a claim existed? (Yes)

2. Did the Court err in holding Petitioner provided no evidence of any proximate causation of damages within three years of filing the complaint, where it ignored the lost chance of a better outcome as one of the damages asserted? (Yes)

3. Did the Court err in finding there was no "continuing negligent treatment" where Petitioner provided evidence that MultiCare continually failed to follow up on a lung nodule finding and that omission of care led to reduced chance of survival? (Yes)

IV. STATEMENT OF THE CASE

This case arises from Defendant's failure to inform Jo Evelyn Bozung about a lung nodule discovered by her healthcare providers on October 7, 2013, as well as their failure to properly monitor or treat the nodule throughout their treatment of her, until she was finally diagnosed with cancer on June 1, 2019.

A. St. Joseph MC informs MultiCare in October 2013 it discovered a lung nodule; MultiCare does nothing.

From October 7-9, 2013, Ms. Bozung was hospitalized at St. Joseph Medical Center ("St. Joseph") in Tacoma after she suffered a stroke. CP 804-16. A 73-year-old female with a history of dementia and heart disease, Ms. Bozung exhibited symptoms of numbness and difficulty ambulating, and had a recent fall in the bathtub. CP 807.

St. Joseph doctors administered several tests and scans to determine her health condition. CP 808-10. A computerized tomography ("CT") scan discovered a 1.3 cm nodule in Ms. Bozung's right upper lung. CP 810. The CT scan also showed "mild biapical scarring" on lung tissue. CP 814. A lung nodule is a solid area, like a marble, embedded in the lung tissue. CP 783. Nodules greater than 1 cm in diameter are biopsied or removed due to the 80% probability they are malignant cancer. CP 783-84.

The October 9, 2013 physician's discharge report included the radiologist's recommendation for a follow-up chest

CT in three months and, if stable, follow-up CT scans for at least three years. CP 810. The St. Joseph treating doctor also noted, "CT of the head and neck revealed a pulmonary nodule which needs follow up, referral to pulmonary nodule clinic is recommended." CP 641. St. Joseph medical records listed the patient's primary care physician as Diane Reineman at MultiCare. CP 808.

Ms. Bozung and her husband promptly met with her MultiCare primary care physician and cardiologist on October 14, 2013, and several times shortly thereafter. CP 818-21 (Dr. Hamburg Decl., Ex. 3); CP 520. St. Joseph had transmitted its medical records to MultiCare, as Dr. Reineman's notes specifically mentioned the recent CT scan picked "up a small 1.3 cm nodule in the right upper lobe of the lung that may need some follow-up in another 3 months." CP 820. However, she never discussed the lung nodule with the Bozungs, nor did she arrange for a follow-up CT scan, referral to a pulmonary nodule clinic, or any other monitoring of the lung nodule. CP 520-21;

CP 817-21.

After Dr. Reineman retired sometime before 2017, Ms. Bozung switched to other MultiCare primary care physicians, transferring to Dr. Erin Kallock in about 2017, and Dr. Jaime Payne in early 2018. CP 744; CP 762. None of the MultiCare physicians discussed the lung nodule or scheduled a follow-up CT scan. CP 520-21.

MultiCare was aware that Ms. Bozung was a former smoker of 50 years who used to smoke 1-2 packs of cigarettes per day, and had a career as an X-ray technician. CP 735, 784. She was at high risk of cancer, and regardless of the nodule should have had annual CT scans, but none were performed or recommended by MultiCare. CP 788.

Ms. Bozung's last treatment date with Dr. Payne before the discovery of the Stage 4 cancer was April 22, 2019. CP 823-25 (Dr. Hamburg Decl., Ex. 4). At that visit, Dr. Payne reviewed Ms. Bozung's past medical history and noted that Ms. Bozung was due for a colon cancer screening. CP 823-24.

B. In May 2019, St. Joseph discovers Ms. Bozung has Stage 4 lung cancer.

On May 31, 2019, Ms. Bozung was again hospitalized at St. Joseph for treatment related to a recent fall. CP 654. They performed a CT chest scan, which showed a 3.2 cm x 2 cm cavitary lesion in her upper right lung lobe. CP 672. After a biopsy, Ms. Bozung was diagnosed with adenocarcinoma: a lung cancer that occurs mainly in people who smoke or formerly smoked. CP 662. This was the first time her upper lungs had been scanned since the 1.3 cm nodule was discovered on October 7, 2013. CP 717.

By September, 2019, the lung cancer had metastasized to her brain. CP 521. She died from respiratory failure and adenocarcinoma on December 17, 2019, at age 79. CP 731.

C. Records Request.

In 2020, several months after Ms. Bozung's death, her husband Mr. Bozung wanted to look into her medical records. CP 539. Mr. Bozung was perplexed as to what had happened with his wife, because she had been to the doctors many times

and they had mentioned no sign of cancer before 2019. CP 521.

In June 2020, Mr. Bozung's attorney spoke with Dr. Solomon Hamburg about the case. CP 540; CP 783. Dr. Hamburg reviewed the few records Mr. Bozung possessed and, while he noted the records showed a lung nodule, he advised he needed the complete medical file before making any assertion of medical malpractice. CP 540, 783.

Getting Ms. Bozung's complete medical records was compounded by delays from the record storage company CIOX, along with general slowdowns due to COVID-19. CP 522, 541. Over the next several months, Mr. Bozung attempted to get complete records on his own by visiting the medical facilities to request the records. CP 522. However, these efforts proved fruitless as the medical providers were slow in replying to him, and ultimately never fulfilled promises to fax him records. *Id*.

In early 2021, Mr. Bozung asked for assistance from his attorney in getting the records. *Id*. Mr. Bozung's counsel worked with T-Scan, a records retrieval company. CP 541. The effort

was to help Mr. Bozung obtain the records at the lower patient rate to which he was entitled, but for some reason was not completed by the medical providers.

In June and July, 2021 several emails were exchanged with T-Scan, clarifying that the spouse has a statutory right to the information, and T-Scan stating they would move forward with the records requests. CP 540, 546-51. Authorizations and powers of attorney were signed to facilitate the records retrieval. CP 541, 552-60.

T-Scan advised that MultiCare/CIOX would charge a higher third-party rate, which would cost up to $3,429.70. CP 540, 550, 553. This cost posed a serious obstacle for Mr. Bozung because he is retired and lives on a fixed income. CP 522, 546-47. Different attempts were made throughout 2021 to enable Mr. Bozung to retrieve the records at the lower rate. CP 541. Compounding the struggle to get records were weeks-long delays from CIOX in responding to the requests. CP 554-55.

Eventually, Mr. Bozung succeeded in his efforts to get the

records at the lower patient rate, getting approval from CIOX in about December 2021, and an invoice for $54.78. CP 562. By late December 2021 or early January 2022, the rest of the records were obtained and forwarded to Dr. Hamburg. He reviewed the medical records and imaging, and provided an opinion that Ms. Bozung's healthcare providers committed malpractice from October 2013 until her stage 4 cancer diagnosis. CP 783; CP 542. Plaintiff filed the complaint shortly thereafter, on March 1, 2022. CP 1-20.

D. Procedural history.

Plaintiff filed an amended complaint on June 20, 2022. CP 57-77. On January 27, 2023, the trial court heard oral argument on the Defendant's motion for summary judgment, which sought dismissal on statute of limitations grounds. On February 1, the Court granted the Defendant's motion. CP 878-79. Plaintiff subsequently moved for Reconsideration pertaining to the summary judgment order for MultiCare. CP 880. The Court denied the Motion for Reconsideration. CP 917-19. Petitioner

then appealed, and on May 20, 2024, Division I Court of Appeals issued its ruling affirming the trial court.

V. ARGUMENT FOR REVIEW

A. Standard of Review for Summary Judgment.

Appellate courts review an order granting summary judgment *de novo*. *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011). Summary judgment may be granted only if no genuine issue of material fact remains and the moving party is entitled to a judgment as a matter of law. CR 56(c). All facts are viewed in the light most favorable to the nonmoving party. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, 850 (2007). Summary judgment is only appropriate if reasonable persons could reach but one conclusion from all the evidence. *Id*. "Summary judgment is a mechanism for dismissing claims that are unsupported by law or fact. It is not a tool for assessing the weight or credibility of a party's evidence." *Haley v. Amazon.com Servs., LLC*, 25 Wn. App. 2d 207, 209, 522 P.3d 80 (2022) (emphasis added).

B. The Court of Appeals erred by applying the wrong legal standard to the discovery rule.

The Court disregarded evidence and legal precedent about due diligence and the discovery rule as they pertain to medical negligence actions. The Court's decision raises a barrier to access to justice for low income litigants.

1. This Court holds that the question of due diligence is an issue of fact.

Under the discovery rule, civil actions for damages resulting from medical negligence may commence one year from the time the plaintiff discovered or reasonably should have discovered the injury. RCW 4.16.350(3). "The question of when a patient or representative reasonably should have discovered the injury was caused by medical negligence is normally an issue of fact." *Adcox v. Children's Ortho. Hosp. & Med. Ctr.*, 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993). "Knowledge of the injury alone is insufficient. Specific negligent acts or omissions by the health care provider must be known, requiring access to the relevant medical records." *Webb v. Neuroeduc. Inc., P.C.*, 121 Wn. App. 336, 343, 88 P.3d 417 (2004) (citing *Winbun v. Moore*, 143

Wn.2d 206, 214, 18 P.3d 576 (2001)).

The Court noted that reasonable minds could reach only one conclusion on the question of whether Petitioner exercised due diligence in discovering his claim, and held that as a matter of law the discovery rule did not apply. Slip op. at 15, 18. In cases addressing the discovery rule, courts have routinely denied summary judgment where the plaintiff did not file suit until after they had all relevant evidence and an expert opinion opining as to liability.

In *Winbun v. Moore*, several doctors were sued related to injuries plaintiff suffered during a hospitalization. *Winbun v. Moore*, 143 at 209-10. During discovery, one defendant asked plaintiff's counsel why another doctor present during treatment had not been named a defendant. *Id*. at 211. Plaintiff then had their expert review all of the medical records again, and the expert opined that the doctor had acted negligently. *Id*. Plaintiff amended the complaint shortly after and added the doctor to the lawsuit, over three years after the injury. Similarly to this case,

the plaintiff in *Winbun* had requested her medical records, but was not originally provided full records that revealed information about that doctor. *Id*. at 216-17.

In *Lo v. Honda*, the court rejected the premise that the fact of a traumatic medical event and knowledge of its immediate cause equates with notice that the injury was caused by a medical error or omission. *Lo v. Honda Motor Co*., 73 Wn. App. 448, 460, 869 P.2d 1114 (1994) In *Lo*, plaintiff's child was born prematurely and with disabilities after her Honda suddenly accelerated and thrashed about. *Id*. at 450. The doctors told her that sometimes "these things just happen," and Lo believed in her own mind it was due to the Honda incident. *Id*. at 451. She eventually retained a law firm, who found an expert who opined that the healthcare provider's acts or omissions more probably than not caused the birth defects during delivery. *Id*. at 453. She added the hospital to the complaint, over four years after the birth. *Id*. at 453-54. The *Lo* court determined that reasonable minds could differ on the question of whether plaintiff or her

law firm exercised due diligence in discovering whether medical malpractice was the proximate cause of the injury. *Id*. at 464. The court stated there may not be a duty to inquire specifically about the possibility of medical malpractice "where there is another facially logical explanation" for the injury. *Id*. at 456.

In *Webb v. Neuroeduc. Inc.*, two parents were part of a messy divorce proceeding involving child custody. *Id*. at 340. The father filed a lawsuit against the wife's hired psychologist under Ch. 7.70 RCW, after a guardian ad litem determined the psychologist planted false memories in the son about his father sexually abusing him. *Id*. at 340-41. Even though the father had filed a declaration several years prior that he thought the psychologist was coaching his son to fear him, the court held he did not discover his claim at that time, as it was speculative and conclusory, and he had no facts to support it until he saw the GAL report. *Id*. at 344.

According to the Court, this case is unlike *Winbun*, *Lo*, and *Webb*. Slip op. at 17. The Court opined that "no reasonable

juror" could find the complaint was timely filed because Dr. Hamburg opined in June 2020 that the records he had showed a risk of cancer from the October 2013 medical records, but the complaint was not filed until March 1, 2022. Slip op. at 18. The Court claimed that the October 2013 medical records showing a lung cancer nodule were sufficient grounds for a complaint. *Id*. This is false.

The Court said Mr. Bozung had information as of June 2020 that the providers were "possibly" negligent, and his action accrued then. Slip op. at 18 (citing *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 112, 802 P.2d 826 (1991); *Allen v. State*, 118 Wn.2d 753, 759, 826 P.2d 200 (1992)). This misstates the law and ignores the facts provided by Petitioner. "Knowledge of the injury alone is insufficient. Specific negligent acts or omissions by the health care provider must be known, requiring access to the relevant medical records." *Webb*, 121 Wn. App. at 343 (citing *Winbun v. Moore*, 143 Wn.2d at 214).

In *Zaleck*, the plaintiff already had the necessary damage

and causation information immediately, as he knew the injection in his thumb caused the immediate numbness that did not go away. *Zaleck*, 60 Wn. App. at 113. In *Allen*, the plaintiff "made *no* attempt to discover what happened" regarding her husband's 1979 murder. *Allen*, 118 Wn.2d at 758. She wanted to put her husband's death behind her and not hear about it, only filing suit several years after the local papers widely covered the 1982 trial and conviction of his murderers. *Id*. at 759.

This case is qualitatively different than those cases. First, unlike in *Zaleck*, it was unknown whether Petitioner had a claim because it was unknown if she was damaged by MultiCare and its employees. The issue was whether Ms. Bozung's doctors followed up on that 2013 lung nodule finding. Dr. Hamburg noted that the full medical file was "*essential*" to formulating his opinion, and to determine if the 2013 nodule was more likely than not the start of the lung cancer that killed Ms. Bozung. CP 783. If the records showed that her doctors had followed the recommended follow-up protocol, then there would be no claim.

Those records were *necessary* to establish the factual basis of this legal claim. A "possible" negligence claim is not the standard by which a cause of action accrues.

> This is the so-called 'shoot first, ask questions later' litigation style, rejected by Washington courts. The rule now is that no action should be filed until specific acts or omissions can be attributed to a particular defendant. Filing on questionable grounds in the hope of using the discovery rules to supply the missing facts is contrary to CR 11.

Webb, 121 Wn. App. at 345 (citation omitted).

Second, this case is unlike *Allen*, as the record reflects numerous efforts to obtain the medical records. In *Allen*, the plaintiff actively avoided seeking information about her husband's murder. Here, Mr. Bozung tried numerous times to get records directly from the primary care physician's office, where he was often promised records, but then received nothing. CP 522. Notably, this was during the height of the Covid-19 pandemic, when many employees worked remotely, and hospitals were slammed with dealing with the pandemic. Eventually he sought help with counsel to get the records, a

process that took several more months. *Id.* The Court gave no consideration to Mr. Bozung's testimony, stating that while he declared he tried to get records, "none of the exhibits submitted are dated earlier than November 2021." Slip op. at 18 n.6. This puzzling viewpoint seems to give no regard to Mr. Bozung's sworn testimony. An affidavit based on personal knowledge is valid evidence in summary judgment proceedings. CR 56(e). The Court erred in disregarding his testimony.

2. The Court's decision impacts access to justice for low-income litigants.

Under the HITECH Act, Mr. Bozung had the right to request and obtain the necessary medical records himself. *See* 45 CFR §164.524. He could then use those records as he wished, including handing them to a consultant to determine if any medical negligence transpired. Washington courts have long held that access to the justice system for low-income residents is an important right. *See, e.g., Iverson v. Marine Bancorporation*, 83 Wn.2d 163, 167, 517 P.2d 197 (1973) ("[F]inancial inability to pay the costs of pursuing a legal

remedy will not operate to bar one from this state's system of justice."); *Miranda v. Sims*, 98 Wn. App. 898, 909, 991 P.2d 681 (2000) (Ellington, J., concurring) ("[A]ccess to the courts is fundamental to our system of justice. Indeed, it is the right 'conservative of all other rights.'") (citation omitted).

The Court's ruling on this issue raises an access to justice issue for low income litigants. In 2020, this matter was still in a pre-litigation investigation stage. It was unknown if there was a viable claim, and the Petitioner was ultimately liable for any expenses incurred in the investigation. RPC 1.8(e). Contrary to the Court's reasoning, it was unknown if there was medical negligence, as it was unknown if anyone followed up on the lung nodule finding, and the consulting expert needed those records to form an opinion on negligence.

Under the Court's logic, however, once an attorney becomes involved in any capacity, then the attorney presumably must request the records at the far higher cost, leaving the low-income client on the hook to pay thousands of dollars more

before knowing whether or not he has a viable negligence claim. *See* Slip op. at 18 ("counsel did not seek more … records"). The Court precluded a low-income party from maintaining the action as a *matter of law* because the medical provider didn't provide records and he didn't pursue more costly avenues of obtaining records. This undermines the ability of low-income residents from pursuing civil claims. The evidence showed continuous efforts to obtain necessary medical records for almost 18 months, until right before the complaint was filed. It should be up to the jury to determine whether Mr. Bozung exercised due diligence in trying to obtain his late wife's medical records.

C. The Court of Appeals applied the wrong standard of review by viewing the disputed facts in the light most favorable to the moving party.

The Court noted that Ms. Bozung's April 22, 2019 was the only appointment with MultiCare within the 3-year limitations period. Slip op. at 9. The Court then stated that "no reasonable juror could find proximate cause between any act or omission at Jo Evelyn's April 22, 2019 appointment with Dr. Payne and her

death that December." The Court next stated that even if Dr. Payne had referred Ms. Bozung for a CT scan, there was no evidence that the CT scan would have occurred earlier than the May 31, 2019 scan that found lung cancer, or that her diagnosis or treatment options would have been materially different. Slip op. at 10. The Court claimed that Dr. Hamburg's testimony was merely speculation and conclusory, and no expert testimony causally connected the breach on April 22 with Ms. Bozung's death. *Id*. The Court made several mistakes.

First, the Court ignored much of Dr. Hamburg's declaration. It stated, "Dr. Hamburg's testimony was as follows," and then quoting just one paragraph from his affidavit. *Compare* Slip op. at 9 *with* CP 781-89. Elsewhere, his testimony established that had her doctors (including Dr. Payne) properly monitored the nodule, Ms. Bozung could have received treatment earlier, which "would have significantly improved her chances of living a longer life and/or surviving the cancer diagnosis." CP 787-88. This was straightforward expert

testimony showing that the delay in addressing the nodule (which necessarily includes the April 22, 2019 visit) decreased her chances of living a longer life or surviving the diagnosis.

Second, the Court's reasoning does not apply where Petitioner claimed that the negligence caused Ms. Bozung to lose a chance of having a better medical outcome. CP 68 (First Amended Complaint). Where a loss of a chance of a better outcome is part of a medical negligence claim, a plaintiff must prove duty, breach, and that such breach of duty proximately caused a loss of chance of a better outcome. *Mohr v. Grantham*, 172 Wn.2d 844, 857, 262 P.3d 490 (2011). The lost chance is the compensable injury. *Id*. Loss of an opportunity for a better outcome is an interest this Court has agreed should be compensable. *Id*. at 858.

As this Court has noted:

> "Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a certainty that the patient would have lived had she

been hospitalized and operated on promptly."

Herskovitz, 99 Wn.2d at 626 (plurality opinion) (quoting *Hicks v. U.S.*, 368 F.2d 626, 632 (4th Cir. 1966)). It is unnecessary for a plaintiff to provide evidence establishing the negligence resulted in the injury or death, but simply that the negligence increased the risk of injury or death. *Id*. at 617. This Court noted that more speculation is involved in requiring the medical expert to testify as to what would have happened had the defendant not been negligent. *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 618, 664 P.2d 474 (1983). In *Herskovits*, similarly to this case, the expert opined that the defendant failed to take necessary steps to diagnose the patient's condition, the defendant could have diagnosed the cancer months earlier, that tumors increase in size over time, and there was no way of knowing how far the tumor had developed when the defendant failed to examine the patient at the earlier date. *Herksovits*, 99 Wn.2d at 621. The expert further stated that the failure probably caused the patient's chance for survival to be substantially reduced. *Id*. This Court

found that plaintiff provided testimony showing the defendant probably caused a substantial reduction in the patient's chance of survival, and therefore established prima facie issue of proximate cause. *Id*. at 634. Dr. Hamburg in this case provided very similar testimony.

The Court also erred by viewing the evidence in favor of the *moving* party. It cited Dr. Payne as stating that Jo Evelyn had aged out of the recommended schedule for lung screening. Slip op. at 10. Petitioner's expert stated that she *should* have had annual CT scans. CP 785. (Moreover, Dr. Payne did not apparently take into consideration Ms. Bozung's lung nodule or Xray technician background in considering whether to run a CT scan. *See* CP 785.) For summary judgment purposes, the Court was wrong to ignore Dr. Hamburg's expert opinion as to the propriety of annual CT scans.

D. The Court of Appeals erred by treating different providers within the same health network as separate providers starting entirely new care, for purposes of the negligent treatment doctrine.

The Court rejected Petitioner's continuing negligent

treatment claim, stating "Bozung cites no authority from Washington State for the proposition that the continuing negligent treatment doctrine can be applied to separate providers, operating at separate facilities, and treating a patient for multiple ailments." Slip op. at 11-12. This misstates Petitioner's argument.

Petitioner provided expert testimony that each of Ms. Bozung's primary care doctors within the MultiCare healthcare system had a responsibility to know about the lung nodule finding from 2013 and follow up on it. However, the Court determined that with each new doctor, the "transitions of care" were interruptions in the "continuing care" at that point. Slip op. at 13-14. This is counter to this Court's precedent acknowledging negligent treatment may continue from one physician to the next that is treating the patient. *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 146-47, 341 P.3d 261 (2014). In any event, the provider at issue is MultiCare. A "health care provider" for purposes of the medical negligence statutes

includes a medical network such as MultiCare that employs numerous physicians. RCW 7.70.020(3); *cf.* RCW 4.16.350(3). Each of Ms. Bozung's primary care physicians worked for MultiCare. As this Court has noted, "the hospital has a nondelegable duty of care directly to its patients, including the duty to employ competent personnel and to adequately supervise them." *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991).

Even if it were true that "continuing care" could only apply to one of MultiCare's primary care physicians, Ms. Bozung transitioned to her final primary care physician , Dr. Jaime Payne, in early 2018. CP 785. Dr. Hamburg stated that she had a duty to review Ms. Bozung's medical file and follow up on unresolved issues, including the lung nodule. CP 786. This omission in Dr. Payne's care continued through her April 2019 visit with Ms. Bozung.

The Court's notation of treatments for other ailments and in different MultiCare facilities is irrelevant. Nowhere does the

"continuing negligent treatment" doctrine require the medical treatment to be in the same physical facility during the course of treatment. Moreover, the fact that Ms. Bozung saw her primary care physician for a variety of other ailments over the years is completely irrelevant to the condition at issue here.

VI. CONCLUSION

This Court should accept review, reverse the Court of Appeals' decision, and remand for a trial on the merits.

SUBMITTED: this Thursday, June 20, 2024

The undersigned certifies this petition contains 4,648 words in compliance with RAP 18.17.

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APPENDIX A

FILED
5/20/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANTHONY J. BOZUNG, JR., individually and as personal representative of the ESTATE OF JO EVELYN BOZUNG,

Appellant,

v.

MULTICARE HEALTH SYSTEM, a Washington nonprofit corporation,

Respondent,

VIRGINIA MASON FRANCISCAN HEALTH, a Washington nonprofit corporation; FRANCISCAN HEALTH SYSTEM, a Washington nonprofit corporation, dba CHI FRANCISCAN HEALTH and ST. JOSEPH MEDICAL CENTER; SETH G. HOLT, M.D., a Washington healthcare provider, JOHN DOE and JANE DOE 1-10, unknown healthcare providers; DIANE REINEMAN, M.D., a Washington healthcare provider; and PETER Y. CHEN, M.D., a Washington healthcare provider,

Defendants.

No. 86171-9-I

DIVISION ONE

UNPUBLISHED OPINION

MANN, J. — Anthony Bozung Jr., individually and as personal representative of the estate of Jo Evelyn Bozung, appeals the trial court's order on summary judgment that dismissed claims of failure to follow the accepted standard of care, informed consent, wrongful death, and corporate negligence against MultiCare Health System (MultiCare). Because the complaint was not filed within the three-year statute of limitations provided in RCW 4.16.350, and no tolling provision applied, we affirm.

I

Jo Evelyn Bozung[1] was 79 years old when she died of lung cancer in December 2019.[2]

Dr. Diane Reineman was Jo Evelyn's primary care physician from 2004 through 2016. Dr. Reineman was located at the Allenmore Primary Care Facility, operated by MultiCare.

As she aged, Jo Evelyn experienced many ailments. By 2012, Jo Evelyn had been diagnosed with chronic airway obstruction, idiopathic urticaria, insomnia, depression, anxiety, dementia, gastritis, hypercholesterolemia, and coronary atherosclerosis. And she had several hospitalizations and emergency room (ER) visits, including treatment for a heart attack. From October 7 to 9, 2013, Jo Evelyn was hospitalized at St. Joseph Medical Center, operated by Franciscan Health Services, for a transient ischemic attack (TIA). Jo Evelyn presented with symptoms of numbness and difficulty ambulating, and she had

[1] To avoid confusion, because Jo Evelyn and Anthony Bozung share a last name, we refer to Jo Evelyn by her first name and the appellant by his last name. We intend no disrespect.

[2] Because Bozung was the nonmoving party on summary judgment, the facts are taken in the light most favorable to him. Keck v. Collins, 184 Wn.2d 358, 357 P.3d 1080 (2015).

recently fallen in the bathtub. Providers at St. Joseph performed several diagnostic tests. A computerized tomography (CT) scan showed a 1.3 cm nodule in Jo Evelyn's right upper lung. The Bozungs were not told about the nodule or told to follow up. But, Jo Evelyn's discharge paperwork included the following notation:

> There is a 1.3 cm ovoid, and groundglass opacity within the right upper lobe (for example series 6, image 53).
>
> 1.3 cm groundglass nodule within the right upper lobe. Solitary, purely ground glass nodules measuring greater than 5mm are nonspecific and may represent a benign or malignant process. Referral to the lung nodule clinic may be considered. Follow up chest CT in 3 months is recommended. Should the nodule persist in stable form, annual follow-up chest CT is recommended for a minimum of 3 years. Per Physician.

Jo Evelyn had a follow-up visit with Dr. Reineman after she was released from the hospital. They discussed the TIA and went over "her medications at length." In her progress notes Dr. Reineman noted: "CT did pick up a small 1.3 cm nodule in the right upper lobe of the lung that may need some followup in another 3 months." The Bozungs also consulted cardiologist Dr. Peter Chen. Neither provider mentioned the lung nodule to the Bozungs.

Dr. Reineman retired in May 2017 and Jo Evelyn began seeing Dr. Erin Kallock at a different clinic: MultiCare's James Center Family Practice. During their first visit, Dr. Kallock conducted a detailed interview of Jo Evelyn and went over current symptoms and ailments. Jo Evelyn brought a form from the Department of Licensing (DOL) to the visit needed for Jo Evelyn to get a new driver's license. Jo Evelyn told Dr. Kallock, however, that she didn't really want to drive, was afraid she would get lost, and was scared to drive the new Jeep they owned. A few weeks later, Jo Evelyn underwent

an annual wellness exam with Dr. Kallock. In January 2018, Bozung notified the clinic that they would be changing Jo Evelyn's primary care physician because "they felt that patient's care wasn't met to their satisfaction."

Jo Evelyn began seeing Dr. Jamie Payne on February 7, 2018, at a different clinic: MultiCare Family Medical Center. During the first appointment to establish care, Dr. Payne reviewed Jo Evelyn's past medical history, which included dementia, depression, heart vessel disease, COPD or chronic airway obstruction, history of TIAs, hypercholesterolemia, and tobacco use disorder. Along with regular lab work, Dr. Payne recommended pulmonary function testing and bone density testing. Dr. Payne recommended Jo Evelyn return for a wellness visit in four weeks. When Jo Evelyn returned in March, Dr. Payne again noted Jo Evelyn's former smoking history, but also noted, "[p]atient age is outside of recommended schedule for lung screening."

In April 2018, Jo Evelyn suffered a fall. This was not the first time in recent years that Jo Evelyn had fallen. But on this occasion, Jo Evelyn fractured her left hip and underwent surgery. She was discharged to a long-term recovery center for several months. During her stay, she experienced a urinary tract infection and was re-hospitalized for several days.

Jo Evelyn's last visit with Dr. Payne was on April 22, 2019. That visit was a follow up appointment on Jo Evelyn's hip fracture and included a medication review. Dr. Payne referred Jo Evelyn to physical therapy to work on her gait instability and to gastroenterology for colon cancer screening.

Jo Evelyn was admitted to St. Joseph again on May 31, 2019, after Bozung contacted Dr. Payne explaining the Jo Evelyn had suffered another fall, could not

remember the fall, was sleeping a lot, and had a loss of appetite. Dr. Payne recommended that Bozung take Jo Evelyn to the ER to get evaluated for her lethargy and to rule out a stroke. Jo Evelyn was treated by Dr. Seth Holt. A CT scan of Jo Evelyn's chest found a 3.2 x 2 cm cavitary lesion in the right upper lobe of her lung. Further testing revealed that Jo Evelyn had adenocarcinoma of the lung: a lung cancer that occurs mainly in people who smoke or formerly smoked. Jo Evelyn passed away on December 17, 2019.

On March 1, 2022, Bozung sued MultiCare, Virginia Mason Franciscan Health, Franciscan Health System, Dr. Reineman, and Dr. Chen. He asserted four causes of action including: failure to follow accepted standard of care, failure to comply with statutory informed consent duties, wrongful death and survival claims, and corporate negligence.

MultiCare moved to dismiss Bozung's complaint under CR 12(b)(6) based on the statute of limitations. The trial court granted the motion in part, dismissing Bozung's claims against Dr. Reineman and Dr. Chen, but denied the motion as to defendant MultiCare.

On May 24, 2022, Bozung requested leave to file an amended complaint to add Dr. Payne. The trial court denied his motion. Bozung then moved to amend his complaint to add Dr. Holt of Franciscan Health System, which the trial court granted.

MultiCare moved for summary judgment, renewing its argument that Bozung's claims were barred by the statute of limitations. The trial court granted MultiCare summary judgment dismissal of Bozung's claims. Bozung unsuccessfully moved for reconsideration of the trial court's dismissal order.

Bozung appeals.[3]

II

Summary judgment based on a statute of limitations should be granted only when the pleadings, depositions, interrogatories, admissions, and affidavits in the record demonstrate there is no genuine issue of material fact as to when the statutory period began. CR 56(c); Olson v. Siverling, 52 Wn. App. 221, 224, 758 P.2d 991 (1988). The statute of limitations is an affirmative defense; the defendant bears the burden of proof. Haslund v. City of Seattle, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976). The plaintiff, however, carries the burden of proof if they allege that the statute was tolled and does not bar the claim. Rivas v. Overlake Hosp. Med. Ctr., 164 Wn.2d 261, 267, 189 P.3d 753 (2008). Whether a case was filed within the statute of limitations period is normally a question of law to be determined by a judge. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 263, 840 P.2d 860 (1992). Although the evidence is viewed in the light most favorable to the nonmoving party, if that party is the plaintiff and the plaintiff fails to make a factual showing sufficient to establish an element essential to his case, summary judgment is warranted. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). We review an order of summary judgment de novo. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

A

RCW 4.16.350(3) contains two provisions for timely commencement of medical malpractice actions—a three-year statute of limitations and a one-year discovery rule:

[3] The remaining defendants were separately granted summary judgment, but Bozung has only appealed the order granting MultiCare's motion for summary judgment.

> Any civil action for damages for injury occurring as a result of health care . . . based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission.[4]

The three-year limitations period in RCW 4.16.350(3) "begins to run from the date of the act or omission alleged to have caused injury." Gunnier v. Yakima Heart Ctr., Inc., P.S., 134 Wn.2d 854, 864, 953 P.2d 1162 (1998). This means that the three-year period may lapse before injury occurs. This conclusion is "neither absurd nor harsh, as [a] plaintiff still has the alternative limitations period of the one-year discovery rule in which to file suit." Gunnier, 134 Wn.2d at 864.

Bozung's claims were based on the 2013 discovery of the nodule in Jo Evelyn's right lung and the failure of her MultiCare primary care physicians to notify her or follow up on the finding. Bozung's complaint was filed on March 1, 2020.

Bozung argues he presented a genuine issue of material fact that (1) MultiCare breached the standard of care within the statute of limitations, (2) the continuing negligent treatment doctrine applied to toll the commencement of the statute of limitations to the last negligent act, and (3) he filed his claim within the one-year discovery period. We take each argument in turn.

1

Bozung asserts that he raised a genuine issue of material fact that a breach of the standard of care occurred within the limitations period. We disagree.

[4] RCW 4.16.350(3) also contains an eight-year statute of repose which was recently held to violate the privileges and immunities clause of the Washington State Constitution, article I, section 12. Bennett v. United States, 2 Wn.3d 430, 435, 539 P.3d 361 (2023). But this portion of the statute is not at issue here.

A claim premised on medical negligence must prove the following:

(a) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
(b) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040(1).

In a medical negligence case, an expert must establish the applicable standard of care and prove causation. Behr v. Anderson, 18 Wn. App. 2d 341, 363, 491 P.3d 189 (2021). "'The testimony must be sufficient to establish that the injury-producing situation 'probably' or 'more likely than not' caused the subsequent condition, rather than the accident or injury 'might have,' 'could have,' or 'possibly did' cause the subsequent condition.'" Rounds v. Nellcor Puritan Bennett, Inc., 147 Wn. App. 155, 163, 194 P.3d 274 (2008) (quoting Merriman v. Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973)). Moreover, the testimony must be based on a reasonable degree of medical certainty. Rounds, 147 Wn. App. at 163. "The expert's opinion must be based on fact and cannot simply be a conclusion or based on an assumption if it is to survive summary judgment." Volk v. DeMeerleer, 187 Wn.2d 241, 277, 386 P.3d 254 (2016). "[S]peculation and conclusory statements will not preclude summary judgment." Volk, 187 Wn.2d at 277.

Further, a "physician with a medical degree is qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist, so long as the physician has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue in the medical malpractice action." Hill v. Sacred Heart Med. Ctr., 143 Wn. App. 438, 447, 177 P.3d 1152 (2008).

Because Jo Evelyn's April 22, 2019 appointment with Dr. Payne is the only appointment within the limitations period, Bozung had to present a genuine issue of material fact that Dr. Payne failed to exercise the proper standard of care at this appointment and that failure was a proximate cause of Jo Evelyn's death in December 2019. RCW 7.70.040(1).

Dr. Hamburg's testimony was as follows:

> It does not appear that any of her primary care physicians reviewed her medical records related to the 2013 lung nodule finding, or otherwise relayed that information to Ms. Bozung. Each of her primary care physicians should have reviewed her medical history and followed up on unresolved issues. Ms. Bozung visited with Dr. Payne on April 22, 2019. That visit included a review of her medical history, a physical exam, and, among other health conditions addressed, a referral to screen for colon cancer. During that visit Dr. Payne did not discuss the lung nodule or provide any followup care or monitoring of the lung nodule. In my opinion her failure to do so fell below the standard of care of a reasonably prudent physician. Each of Ms. Bozung's primary care physicians at MultiCare had a responsibility to follow up on the lung nodule that was discovered in 2013 and that the radiologist had advised to monitor. Failure to do so at each visit—including the April 22, 2019 visit—allowed the cancerous nodule to grow unchecked and Ms. Bozung's treatment options and outlook to diminish. The providers also did not inform Ms. Bozung of the 2013 test results, or that there were treatment and monitoring options (i.e. annual CT scans) that could determine whether the nodule found in 2013 was cancerous. A reasonable and prudent physician would inform a patient about these facts so she could make an informed decision about treatments she could undergo. This is especially true for a patient such as Ms. Bozung who has a high risk of lung cancer due to her personal history. It is my opinion that had the nodule been monitored as the radiologist had recommended, the cancer would have been discovered before it had progressed to stage 4.

Assuming without deciding that Dr. Hamburg's testimony established the requisite standard of care, no reasonable juror could find proximate cause between any act or omission at Jo Evelyn's April 22, 2019 appointment with Dr. Payne and her death that December.

First, when Jo Evelyn established care with Dr. Payne in 2018, Dr. Payne noted that Jo Evelyn had aged out of the "recommended schedule for lung screening." And second, even if Dr. Payne had referred Jo Evelyn for a CT scan on April 22, 2019, there is no testimony that the CT scan would have occurred earlier than the May 31, 2019 CT scan which found lung cancer or that the diagnosis and treatment options would have been materially different. Thus, Dr. Hamburg's testimony merely consisted of speculation and conclusory statements that could not preclude summary judgment. Volk, 187 Wn.2d at 277.

Because Bozung failed to present expert testimony that causally connected any alleged breach on April 22, 2019 to Jo Evelyn's death, the trial court correctly granted summary judgment.

2

Bozung asserts that the continuing negligent treatment doctrine applied and tolled the statute of limitations. We disagree.

A claim of continuing negligent treatment may allow the plaintiff to recover for alleged negligent acts or omissions that occurred more than three years before filing. Caughell v. Grp. Health Co-op. of Puget Sound, 124 Wn.2d 217, 233, 876 P.2d 898 (1994). But "[u]nder the modified continuing-course-of-treatment rule, claimants must allege that the last negligent act, not simply the end of treatment itself, occurred within [three] years of filing suit." Caughell, 124 Wn.2d at 229. To state a claim of continuing negligent treatment, a plaintiff must show "that a series of interrelated negligent acts caused the injury or damages at issue." Caughell, 124 Wn.2d at 233.

A claim of continuing negligent treatment differs slightly on breach and proximate cause. Caughell, 124 Wn.2d at 233. The court in Caughell explained:

> To prove a breach or, in the words of the statute, a failure to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider, a plaintiff must show that a series of interrelated negligent acts occurred during the course of treatment for a medical condition. By "series", we mean two or more negligent acts. By "interrelated", we mean that the negligent acts must be part of a "substantially uninterrupted course of treatment", and must relate to the treatment as a whole . . . Finally, by "treatment" we mean the protocol, procedures, prescriptions, or other medical actions ordered or performed by the health care provider.

124 Wn.2d at 233 (internal citation omitted).

As to proximate cause, "a plaintiff must show that the series of interrelated negligent acts caused the injury or damages at issue." Caughell, 124 Wn.2d at 233. A plaintiff who simply alleges a negligent act followed by nonnegligent treatment will fail to state a claim of continuing negligent treatment; "[t]he malpractice claimant must prove that the subsequent care was negligent in its own right." Caughell, 124 Wn.2d at 234.

In Caughell, the plaintiff alleged damages resulting from her physician's ongoing and continuing prescription of a specific medication over more than 20 years. 124 Wn.2d at 220. The court held that when a physician prescribes a drug to a patient, the physician's duty of care extends throughout the length of the prescription. Caughell, 124 Wn.2d at 235. Because the plaintiff provided sufficient evidence of continuing negligent treatment within the statutory period, summary judgment was improper. Caughell, 124 Wn.2d at 236.

Bozung asserts that each of Jo Evelyn's primary care physicians should have reviewed her medical records, seen the 2013 lung nodule finding, and followed up on it. Bozung cites no authority from Washington State for the proposition that the continuing

negligent treatment doctrine can be applied to separate providers, operating at separate facilities, and treating a patient for multiple ailments.[5] Instead, he cites several readily distinguishable out-of-state cases.

For instance, Bozung cites an unpublished Illinois court order, Myles v. Mercy Hospital & Med. Ctr., No. 15 C 8804, 2016 WL 3752983 (N.D. Ill. July 14, 2016), and asserts that the Myles court found a continuous course of treatment. In Myles, the plaintiff alleged that doctors discovered the patient's stomach cancer in 2010 but failed to disclose the results until 2014 even though the defendants provided a continuous and unbroken course of negligent treatment for the patient's persistent stomach pain. 2016 WL 3752983, at *3-4. Under Illinois law, the doctrine requires plaintiffs to demonstrate a continuous and unbroken course of negligent treatment and that the treatment was so related as to constitute one continuing wrong. Myles, 2016 WL 3752983, at *4. Prior Illinois case law also held that the doctrine did not apply if a provider failed to notify a patient of abnormal tests results, without subsequent affirmative medical treatment. Myles, 2016 WL 3752983, at *4-5.

The court in Myles was considering a CR 12(b)(6) motion to dismiss. 2016 WL 3752983, at *2. The court denied the motion because under CR 12(b)(6), the allegations in the complaint must be accepted as true and all reasonable inferences drawn in favor of the plaintiff. Myles, 2016 WL 3752983, at *5, *7. However, the court also explained that evidence obtained through discovery may reveal that although the patient received subsequent treatment, "his condition or symptoms did not reasonably

[5] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

require [the provider] to request, review, and report [the patient's] comprehensive medical records." Myles, 2016 WL 3752983, at *5.

The remaining out-of-state cases Bozung cites applied continuing negligent treatment to a single provider. Baker v. Farrand, 2011 ME 91, 26 A.3d 806, 809, 816, (2011) (holding that a patient "may bring a single action alleging continuing negligent treatment that arises from two or more related acts or omissions by a single health care provider or practitioner" where at least one act occurred within three years of the claim) (emphasis added); Farley v. Goode, 219 Va. 969, 976, 252 S.E.2d 594 (1979) (applying the doctrine to a dentist who treated patient for four years but failed to diagnose periodontal disease); Forbes v. Stoeckl, 2007 WI App 151, 303 Wis. 2d 425, 427-28, 735 N.W.2d 536 (2007) (applying the doctrine to a dentist who diagnosed the patient and performed multiple treatments over several years, holding "a series of negligent treatments of the same condition gives rise to a single action") (emphasis added).

Bozung failed to establish continuing negligent treatment under Washington law. First, Bozung cannot establish that the alleged negligent acts were part of a "substantially uninterrupted course of treatment." Caughell, 124 Wn.2d at 233. The discovery of the nodule occurred at St. Joseph Medical Center, operated by Franciscan Health Services, not MultiCare. At the time, Jo Evelyn was experiencing a TIA and received care for that diagnosis at St. Joseph.

Between the discovery of the nodule in 2013 to Jo Evelyn's diagnosis of lung cancer in 2019, Jo Evelyn had three different primary care physicians operating at three different primary care clinics. Each time Jo Evelyn changed providers, a new patient assessment occurred where the providers discussed with Jo Evelyn her past medical

history and her current symptoms and concerns. These transitions of care were interruptions.

Second, the allegedly negligent acts must relate to the treatment as a whole. Caughell, 124 Wn.2d at 233. But Jo Evelyn was not being treated by MultiCare for a single medical condition. Again, at the time of the 2013 CT scan, Jo Evelyn was experiencing stroke-like symptoms and was diagnosed with a TIA. And Dr. Reineman saw Jo Evelyn for a follow-up appointment based on the TIA that she experienced.

By 2012, Jo Evelyn had been diagnosed with several conditions including chronic airway obstruction, idiopathic urticaria, insomnia, depression, anxiety, dementia, gastritis, hypercholesterolemia, coronary atherosclerosis. And as the years went by, Jo Evelyn's medical conditions continued to evolve and increase, and she had several hospital visits. This included: a progression and worsening of dementia, symptoms of headaches and slurred speech, ongoing depression and insomnia, pain associated with gallstones and a gallbladder surgery, and a collapsed lung. In addition, Jo Evelyn experienced several falls and hip fractures, including a 2018 hip fracture which required surgery and discharge to a long-term recovery center.

Not all of this care was provided by MultiCare. Jo Evelyn's primary care physicians saw her for many of the above conditions, and, because of the multiple issues Jo Evelyn experienced as she aged, Jo Evelyn's treatment needs changed.

Finally, Bozung failed to establish that the alleged last negligent act—the April 22, 2019 visit with Dr. Payne—was causally connected to Jo Evelyn's death that December.

We conclude that Bozung failed to raise an issue of material fact that the continuing negligent treatment doctrine applied and thus the statute of limitations was not tolled.

3

Bozung next argues that because genuine issues of material fact exist as to when he discovered the claims against MultiCare, the trial court erred by dismissing the claims as time-barred. We disagree.

The one-year "post-discovery period" begins to run "when the plaintiff 'discovered or reasonably should have discovered all of the essential elements of [his or] her possible cause of action, i.e., duty, breach, causation, damages.'" Zaleck v. Everett Clinic, 60 Wn. App. 107, 110-11, 802 P.2d 826 (1991) (quoting Ohler v. Tacoma Gen. Hosp., 92 Wn.2d 507, 511, 598 P.2d 1358 (1979)). A cause of action will accrue when a plaintiff should have discovered the basis for the cause of action "even if actual discovery did not occur until later." Allen v. State, 118 Wn.2d 753, 759, 826 P.2d 200 (1992) (emphasis added). "To discover a 'breach' in a medical malpractice action, the plaintiff need not have known with certainty that the health care provider was negligent. Instead, the plaintiff need only have had, or should have had, information that the provider was possibly negligent." Zaleck, 60 Wn. App. at 112. "The key consideration under the discovery rule is the factual, as opposed to the legal, basis of the cause of action." Adcox v. Child.'s Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 35, 864 P.2d 921 (1993). Nevertheless, "a question of fact may be determined as a matter of law where reasonable minds can reach only one conclusion." Cho v. City of Seattle, 185 Wn. App. 10, 15, 341 P.3d 309 (2014).

Bozung relies on Winbun v. Moore, 143 Wn.2d 206, 18 P.3d 576 (2001), Lo v. Honda Motor Co., Ltd., 73 Wn. App. 448, 450-51, 869 P.2d 1114 (1994), and Webb v. Neuroeducation, Inc., P.C., 121 Wn. App. 336, 340-41, 88 P.3d 417 (2004).

In Winbun, a patient sued a family physician, an ER physician, and a hospital. 143 Wn.2d at 211. More than three years after her injury, she amended her complaint and added the hospital attending physician. Winbun, 143 Wn.2d at 211. While the patient had requested her medical records, the full records were not provided until after the patient sued, thus depriving the patient of information about the attending physician. Winbun, 143 Wn.2d at 216-17. Our Supreme Court held that substantial evidence supported the jury's determination that the plaintiff did not discover, nor with due diligence reasonably should have discovered, the factual basis of the cause of action against the attending physician. Winbun, 143 Wn.2d at 217.

In Lo, a mother sued Honda Motor Company for injuries to her child after he was born prematurely and with afflictions one month after Lo's Honda suddenly accelerated uncontrollably, thrashing Lo violently. 73 Wn. App. at 450-51, 462. Lo repeatedly asked pediatricians about her son's afflictions and was told "in a small percentage of cases these things just happen." Lo, 73 Wn. App. at 451. When the child was 3-1/2 years old, a doctor concluded that medical negligence more probably than not caused or contributed to his maladies. Lo, 73 Wn. App. at 453. Lo then added the hospital as a defendant in her lawsuit. Lo, 73 Wn. App. at 453-54. In affirming the trial court's decision that Lo's claims against the hospital were not time barred, this court recognized that Lo did not have a duty to inquire specifically about the possibility of medical

malpractice when there was "another facially logical explanation" for the injury. Lo, 73 Wn. App. at 456, 460.

And in Webb, a mother tried to terminate a father's visitation with his son by filing a claim of sexual abuse. 121 Wn. App. at 340. The father filed a declaration stating that he believed the mother had coached the son and the son's counselor contributed to the son's fear. Webb, 121 Wn. App. at 340. A guardian ad litem (GAL) later exonerated the father and implicated the counselor. Webb, 121 Wn. App. at 341. The father then sued the counselor who argued the statute of limitations ran from the time the father expressed mistrust in the counselor. Webb, 121 Wn. App. at 341-42. On appeal, the court held that the father did not "have a factual basis for his opinions and grounds for his complaint" until he received the GAL report in 1999, and that any allegations in a prior declaration were "necessarily speculative" as they were "guess[es] at things he clearly could not know." Webb, 121 Wn. App. at 344.

This case is unlike Winbun, Lo, and Webb. In June 2020, Bozung's counsel requested an analysis from Dr. Hamburg based on the records Bozung "had on hand." While Dr. Hamburg noted that he would need the complete medical files before making any assertion of medical malpractice, within the records he saw the 2013 finding of the nodule in Jo's upper right lung and noted "that there was a risk of cancer." And counsel conceded at oral argument that the 2013 records pertaining to the lung nodule were within the records sent to Dr. Hamburg in June 2020. Wash. Ct. of Appeals oral arg., Bozung v. MultiCare Health Sys., No. 86171-9-I (Feb. 29, 2024) at 21 min., 38 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024021468/?eventID=2024021468.

Despite this knowledge, counsel did not seek more of Jo Evelyn's medical records until July 2021.[6] Bozung's complaint was not filed until March 1, 2022, almost two years after Dr. Hamburg noted the 2013 lung nodule finding indicated a risk of cancer.

The evidence establishes that as of June 2020, Bozung, his attorney, and his medical expert, knew that St. Joseph discovered a nodule in Jo Evelyn's upper right lung in October 2013. At that time, Bozung had a "factual basis for his opinions and grounds for his complaint." Webb, 121 Wn. App. at 344. Bozung had information that the providers were possibly negligent and his cause of action accrued on that date even though actual discovery did not occur until later. Zaleck, 60 Wn. App. at 112; Allen, 118 Wn.2d at 759.

Because Bozung did not file his complaint until March 1, 2022, almost two years later, we conclude that no reasonable juror could find that Bozung's complaint was timely filed and the trial court properly granted summary judgment dismissal.

B

Finally, Bozung asserts that the trial court erred by dismissing claims that were not addressed in MultiCare's motion for summary judgment. MultiCare asserts that it sought dismissal of all claims under ch. 7.70 RCW as outside the statute of limitations

[6] While Bozung declared that he tried to obtain Jo Evelyn's medical records in person at her primary care physician's office in 2020, none of the exhibits submitted are dated earlier than November 2021. Similarly, Bozung's counsel declared that his office contacted T-Scan, a medical records retrieval company, on May 26, 2020, however, the attached and referenced exhibit show the communications occurred in July 2021. Counsel conceded at oral argument that this was a typo and the communications were in July 2021. Wash. Ct. of Appeals oral arg., supra, at 22 min., 40 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024021468/?eventID=2024021468.

and that, regardless of Bozung's theory of recovery, RCW 4.16.350 applies with equal force to any claim arising from health care. We agree with MultiCare.

Chapter 7.70 RCW governs "all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care." RCW 7.70.010. RCW 7.70.010 "sweeps broadly" and "modifies procedural and substantive aspects of all civil actions for damages or injury occurring as a result of health care, regardless of how the action is characterized." Branom v. State, 94 Wn. App. 964, 969, 974 P.2d 335 (1999). The statutes of limitations set out in RCW 4.16.350 apply in "[a]ny civil action for damages for injury occurring as a result of health care."

Bozung's complaint asserted: failure to follow the standard of care, RCW 7.70.040; informed consent, RCW 7.70.050;[7] wrongful death and survival, RCW 4.20; and corporate negligence.[8] All of his claims were based on wrongful death resulting from negligent health care. Thus, the statute of limitations set forth in RCW 4.16.350 applied to all four of his claims. See Fast v. Kennewick Pub. Hosp. Dist., 187 Wn.2d 27, 29, 384 P.3d 232 (2016).

[7] Informed consent claims under RCW 7.70.050 are limited to "treatment," physicians are not expected to inform patients about conditions of which the physician is not aware. Davies v. MultiCare Health Sys., 199 Wn.2d 608, 625, 510 P.3d 346 (2022). Under a misdiagnosis or failure to diagnose case, the patient may bring a negligence claim if the physician breached the standard of care. See Backlund v. Univ. of Wash., 137 Wn.2d 651, 661 n.2, 975 P.2d 950 (1999).

[8] Corporate negligence claims are based on a hospital's breach of care that proximately causes plaintiff's injury. Douglas v. Freeman, 117 Wn.2d 242, 248, 814, P.2d 1160 (1991). The doctrine imposes on a hospital "a nondelegable duty owed directly to [its] patient, regardless of the details of the doctor-hospital relationship." Pedroza v. Bryant, 101 Wn.2d 226, 229, 677 P.2d 166 (1984). Jo Evelyn received care from MultiCare's outpatient clinics, not a hospital.

We conclude that because the complaint was not filed within the three-year statute of limitations provided in RCW 4.16.350 and no applicable tolling provision applied, dismissal of all claims was proper.

We affirm.

Mann, J.

WE CONCUR:

Díaz, J.

Bowman, J.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

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Division II Court of Appeals 909 A Street, Ste 200 Tacoma, WA 98402 Phone: 253.593.2970	Electronic File ☒ First Class U.S. Mail ☐ Electronic Mail ☐ Facsimile ☐
Brennen Johnson, WSBA No. 51665 2115 N. 30th St., Ste. 101 Tacoma, WA 98403 Email: brennenj@jgkmw.com	Messenger Service ☐ First Class U.S. Mail ☐ E-Service ☒ Electronic Mail ☒

DATED: June 20, 2024, at Seattle, Washington.

s/ Gregory A. McBroom
Gregory A. McBroom

SMITH MCBROOM, PLLC

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