

No. 63973-1-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

(Whatcom Co. No. 07-2-02163-5)

JENNIFER ROSE ROSS,

Appellant,

v.

**PEACEHEALTH dba ST. JOSEPH HOSPITAL, ROBERT
JOHNSON and JANE DOE JOHNSON, JEFFREY RIES and JANE
DOE RIES,**

Respondents.

**BRIEF OF RESPONDENTS
PEACEHEALTH AND JOHNSON**

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A. INTRODUCTION

In the interest of judicial economy, defendants St. Joseph Hospital and Robert Johnson, R.N. refer to the introduction offered by defendant Ries, as it fairly summarizes the events leading up to this appeal. These defendants add that all claims brought by the plaintiff, Jennifer Ross, against St. Joseph Hospital and Nurse Johnson were also appropriately dismissed at the trial court level.

By agreement of counsel, this brief will follow the format of Dr. Ries' submission to the Court and will refer to his arguments where appropriate to avoid duplication.

B. COUNTERSTATEMENT OF ISSUES

The issues related to Ms. Ross's appeal of summary judgment in favor of St. Joseph and Nurse Johnson are properly identified as:

1. Did the trial court properly grant summary judgment in favor of these defendants because they are immune from liability under RCW 71.05.120? *Yes*
2. Were plaintiff's claims governed by RCW 7.70? *Yes*
3. If plaintiff's claims were governed by RCW 7.70, was summary judgment appropriate where plaintiff failed to offer expert testimony in support of her claims? *Yes*

4. If plaintiff's claims were subject to RCW Chapter 7.70, were plaintiff's claims properly dismissed on summary judgment for failure to comply with the notice of intent statute? *Yes*

4a. Is the 90 day notice statute, RCW 7.70.100(1), constitutional? *Yes*

5. Does the trial court record support dismissal of all claims brought by Ms. Ross against the defendants? *Yes*

C. COUNTERSTATEMENT OF THE CASE

Defendants refer the Court to the background summary provided by Dr. Ries. His summary accurately describes the events leading up to Ms. Ross' attempt to flee the hospital. When she did attempt to leave prior to being evaluated, Ms. Ross was stopped by St. Joseph employee Robert Johnson, R.N. per Dr. Ries' request. CP 239-240. Mr. Johnson, R.N. was wearing scrubs and a stethoscope, and told that Ms. Ross that she could not go. CP 217; CP 239-240; CP 242-243; and CP 245-246. Ms. Ross resisted Nurse Johnson and caused them both to fall to the ground. CP 186; CP 218-219.

After Nurse Johnson identified himself as a nurse, Ms. Ross bit him on the forearm. CP 183; CP 187; and CP 220-221 He identified himself as a nurse again and asked her to stop struggling but she bit him a

second time on the hand and tore into his skin. CP 230-232; CP 240; and CP 243.

Ms. Ross was eventually restrained and was able to undergo additional evaluation. She refused to submit to infectious disease testing that would have allowed for a determination of whether Mr. Johnson's health was at risk as a result of her biting him twice. CP 197-198

Nurse Johnson gave a written statement to police and intended to pursue criminal action against Ms. Ross. CP 223-237; CP 244-247. However, he was never again contacted by Bellingham Police or by the prosecuting attorney's office. CP 225; CP 228-229. The criminal case against Ms. Ross appears to appear have been dismissed without any notification to Mr. Johnson.

D. ARGUMENT

1-2. St. Joseph and Nurse Johnson Were Entitled To Detain Ms. Ross And Are Immune From Civil Liability Under RCW 71.05 *et seq.*

Defendants join in and adopt the arguments made by Dr. Ries in sections 1 and 2 of his brief as the legal arguments apply equally to St. Joseph and Nurse Johnson. These defendants offer the following additional discussion on the issue of immunity:

RCW 71.05.120 provides immunity from liability for hospitals and their staff members who detain and provide care to individuals pending mental health evaluation. The statute states:

No officer of a public or private agency. . . or attending staff of any such agency ... or an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, release, administer antipsychotic medications, or detain a person for evaluation and treatment; Provided, that such duties were performed in good faith and without gross negligence.

RCW 71.05.120(1).

Pursuant to RCW 71.05.020(8), “evaluation and treatment facility” is defined as “any facility which can provide directly, or by direct arrangement with other public or private agencies, emergency evaluation and treatment, outpatient care, and timely and appropriate inpatient care to persons suffering from a mental disorder, and which is certified by the department.” St. Joseph is a “treatment and evaluation facility” licensed by the Washington State Department of Social and Health Services. CP 235-236.

Under RCW 71.05.120, St. Joseph and Nurse Johnson must have been acting in bad faith in their efforts to detain Ms. Ross in order to fall outside the protections provided. Bad faith requires that the providers’ actions be the result of “tainted or fraudulent motives.” *See Spencer v.*

King County, 39 Wn. App. 201, 208, 692 P.2d 874 (1984) (overturned on other grounds). Here, there is absolutely no evidence that such motives were present. As a result, there is no genuine issue of fact with regard to whether St. Joseph and Nurse Johnson acted in accordance with RCW 71.05 and are protected by the immunity provided therein. The plaintiff cannot simply assert bad faith existed when there is no evidence to support this allegation. It has long been the law in Washington that bare allegations are insufficient to defeat a summary judgment motion. *Meissner v. Simpson Timber Co.*, 69 Wash.2d 949, 956, 421 P.2d 674 (1966).

Any contention that “good faith” is always an issue of fact is contrary to the *Spencer* decision, which was decided after both cases cited by the plaintiff. *See Spencer v. King County*, 39 Wn. App. 201. In *Spencer*, the Court held it was proper to dismiss the plaintiff’s claim because the evidence did not raise a “genuine factual issue-either as to gross negligence or bad faith-regarding the applicability of the statutory immunity to the individual defendants.” *Id.* at 208. The same holds true here.

The plaintiff also argues that greater restrictions should be placed on a provider’s ability to utilize RCW 71.05 to evaluate patient risk. She argues that a judicial finding of “probable dangerousness” should be

required as was done in *In re Harris*, 98 Wn.2d 276, 287, 654 P.2d 109 (1982), a case involving involuntary commitment. However the *Harris* case involves a wholly separate provision of RCW 71.05 which does not apply until commitment is sought after a patient has been evaluated and an investigation has been conducted. Further, the standard in *Harris* has been limited and held not to apply in circumstances such as those presented here. *See State v. Lowrimore*, 67 Wash.App. 949, 955-956, 841 P.2d 779 (1992).

In *Lowrimore*, a young woman was detained because she was believed to present a risk of committing suicide. The Court held that given the information gathered from personal observation of Ms. Lowrimore's unstable emotional state, it was "reasonable for [the officer] to conclude that she was suffering from some sort of 'mental disorder.'" The Court further determined that the *Harris* holding "should properly be limited to the context in which it arose, namely, involuntary commitments in nonemergency situations." *Lowrimore* 67 Wash.App. at 955.

In emergency situations, such as the one presented here, all that is required is "reasonable cause to believe an individual presents an imminent likelihood of serious harm." *Id.* at 956. Here, Dr. Ries' testimony that he believed Ms. Ross "was depressed to the point of being

concerned about her health and safety” meets this requirement. CP 203; CP 178-180; and CP 206.

3. Summary Judgment Was Separately Appropriate for Plaintiff’s Failure to Satisfy the Requirements of RCW 7.70.

Defendants join in and adopt the arguments made by Dr. Ries in section 3 of his brief as the law cited applies equally to St. Joseph and Nurse Johnson. These defendants provide the following additional discussion regarding the plaintiff’s failure to satisfy the requirements of RCW 7.70:

- a. Because Ms. Ross’s claims arise out of health care, they are subject to RCW 7.70

The plaintiff argues that she did not have to meet the requirements of RCW 7.70 because she has alleged intentional torts rather than medical negligence. To support this argument she cites an unpublished Texas case involving premises liability. The clear difference between that case and hers is that the allegations remaining in that matter did not involve actions of any health care provider that took place as part of an effort to render care. The law in Washington is that all claims arising out of health care must be brought under RCW 7.70. *See Orwick v. Fox*, 65 Wn. App. 71, 86, 828 P.2d 12 (1992)(emphasis added). *See also Branom v. State*, 974 P.2d 335, 338, 974 P.2d 335 (1999).

Plaintiff's claims in this case flow from allegations which are based on medical professionals' efforts to provide health care.¹ This brings each of Plaintiff's causes of action squarely within the purview of RCW 7.70. RCW 7.70.010 clearly states its intent to modify "certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health." Accordingly, RCW 7.70.010 dictates that the substantive and procedural requirements of this chapter apply. Ms. Ross has failed to meet those requirements.

- i. Dismissal of Ms. Ross's claims against St. Joseph and Nurse Johnson was appropriate because she offered no expert testimony in support of her claims

Here, there is no dispute that Ms. Ross' health care providers detained her in an effort to properly evaluate her mental health and that she is raising the issue of whether their actions were appropriate. As a result, RCW 7.70 requires expert support to address standard of care and causation. *See Harris v. Groth*, 99 Wn.2d 438, 451, 663 P.2d 113 (1983) and *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995).

It is also unquestionable that Ms. Ross did not disclose any expert to support her claims against any defendant in this matter. Both

¹ Arguably, the plaintiff's malicious prosecution claim could be the exception to this statement. However, the plaintiff has not raised the trial court's dismissal of this claim based on substantive grounds as an issue on appeal. The trial court held that Ms. Ross lacked evidence on several required elements of her malicious prosecution claim.

defendants sent the plaintiff discovery requesting the identification of an expert who supported the contention that it was inappropriate for her health care providers to detain her and that the detention caused her harm. CP 38-46. She failed to provide any qualified support for her claims.

- b. Summary judgment was appropriate because Ms. Ross failed to provide a 90-day notice of intent to sue Dr. Ries pursuant to RCW 7.70.100

As noted above, it was necessary for Ms. Ross to meet all requirements of RCW 7.70 in order to properly institute her claims. RCW 7.70.100 required her to provide 90 days notice of intent to sue prior to filing. She did not provide such notice to St. Joseph Hospital or Nurse Johnson. CP 235-236. As a result, her claims against these defendants fail.

- i. RCW 7.70.100 is constitutional

St. Joseph and Nurse Johnson join in the constitutional arguments made on behalf of Dr. Ries. Dr. Ries' brief correctly points out that there is no need to reach the constitutionality issue given the alternative bases for affirming the trial court's opinion. However, if this analysis is necessary, there is clear precedent holding that RCW 7.70.100 is constitutional. *Breuer v. Presta*, 148 Wn. App. 470, 476-77, 200 P.3d 724 *petition for review pending*, 2009 Wash. LEXIS 776 (2009) and *Waples v. Yi*, 146 Wn. App. 54, 59-62, 189 P.3d 813 (2008), *review granted*, 2009 Wash. LEXIS 288 (Wash., Mar. 4, 2009), have held that the notice

provision does not violate equal protection principals or Washington's prohibition of special privileges and immunities laws. Therefore, under current Washington law, the plaintiff's arguments on these bases fail.

Plaintiff's remaining constitutional arguments fail as well. In Washington, a statute is presumed constitutional. *Island County v. State*, 135 Wn.2d 141, 146, 95 P.2d 37 (1998). A plaintiff arguing otherwise has the burden of showing there is no reasonable doubt the statute violates the constitution. *See Id.* at 146. Here, the plaintiff has not met this burden.

As to Plaintiff's separation of powers argument, no clear argument has been made. The separation of powers doctrine does not require different branches of government to be "hermetically sealed off from one another." *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Washington law clearly demonstrates that both the legislature and the judiciary act govern litigation. *See State v. Ryan*, 103 Wash.2d 165, 178, 691 P.2d 197 (1984)("Defendant argues that the enactment of RCW 9A.44.120, a hearsay exception, violates the separation of powers doctrine in that the statute is a legislative invasion of the judicial power. We disagree."). The rules set forth by the judiciary override actions of the legislature only where the two have set forth provisions that conflict. *See Id.* at 178. Otherwise, statutes and rules of court are harmonized, "whenever possible" to bring effect to both. *See Id.* (citing *Emwright v.*

King County, 96 Wash.2d 538, 543, 637 P.2d 656 (1981)). Logically, there can be no conflict here because the pre-suit notice requirement operates prior to filing and prior to a plaintiff availing herself of the Court and the rules governing the court.

Pre-filing notice requirement statutes in health care cases and the rules of court have existed harmoniously for over 40 years. RCW 4.96.020 was initially enacted in 1967 and requires 60 days notice prior to filing suit in all actions against local government entities including public hospitals. *See Hardesty v. Stenchever, et al.*, 82 Wn. App. 253, 257, 917 P.2d 577 (1996)(RCW 4.96.020 applies to public hospital districts). Pre-filing notice requirements are also applicable to other cases including hazardous waste cases and construction defect causes of action. *See* RCW 70.105D.050 (requiring 30 days notice prior to filing civil action relating to hazardous waste cleanup) and RCW 64.50.020 (requiring 45 days notice prior to filing construction defect actions). The plaintiff has not articulated any reason such statutes violate principles of separation of powers. Without, at a minimum, describing how RCW 7.70.100 is in disagreement with the court rules, plaintiff has simply not made a valid separation of powers attack.

Further, requiring advanced notice does not delay justice or deny the plaintiff access. The same statute of limitations and process apply with

or without the notice provision and the plaintiff has the same right to her day in court. In fact, RCW 7.70.100 can operate to toll the statute of limitations in some cases, thus providing a plaintiff with the same or even greater access to the court.

In *Medina v. Public Utility District of Benton County*, 311-314, 147 Wash.2d 303, 53 P.3d 993 (2002), the court examined a similar argument with regard to the notice requirement contained in RCW 4.96.020. The Court stated, “In *Daggs* this court held that governmental tort victims are not substantially burdened by waiting 60 days to file suit since the requirement imposes no ‘real impediment to relief.’” *Id.* at 314 (citing *Daggs v. City of Seattle*, 110 Wash.2d 49, 56, 750 P.2d 626 (1988)).

With regard to Plaintiff’s claim that RCW 7.70.100 is a special law prohibited by Wash. Const. art. II, section 28, this argument fails as well. The notice provision is not a “special law”, it is a general law. “A special law...relates to particular persons or things, while a general law is one which applies to all persons or things of a class.” *Island County v. State*, 135 Wn.2d 141, 149, 95 P.2d 37 (1998). A general law operates on all persons or things constituting a class, even if the class has only one person or thing. *Id.* The prohibition against special laws does not preclude classification since all laws are necessarily based on some kind of classification. *Id.*

RCW 7.70.100 operates on all persons or things constituting a class, namely, all defendant health care providers in suits properly brought pursuant to RCW 7.70. Therefore it is not a special law and the rational basis analysis is not required. However, even if it was, The Washington Appellate Court has determined that RCW 7.70.100 passes rational basis scrutiny. As noted above, in *Waples*, the Court stated RCW 7.70.100 “rationally furthered a legitimate state purpose.” *Waples v. Yi*, 146 Wn. App. 54, 61, 189 P.3d 813 (2008).

In addition, the plaintiff argues that her due process argument should be “evaluated under the same criteria used for equal protection” – i.e., the rational basis test. See Plaintiff’s brief at pg. 10 citing *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220-222, 143 P.3d 571 (2006). Again, RCW 7.70.100 has been held to be rationally related to a legitimate state purpose. See *Waples*, 146 Wash. App. at 54. See also *Breuer*, 148 Wn. App. At 477 (stating “the time period helps achieve the policy’s aim ‘to settle [medical malpractice] cases before resorting to court.’”).

4. All Bases for Dismissal Raised By The Defendants Are Properly Supported In The Record

The plaintiff’s final argument should fail for lack of specificity alone. The plaintiff claims “the moving party may not raise new issues, nor submit new facts in its reply.” However, there is no indication as to

what new issue or fact the plaintiff takes issue with. In examining this broad assertion, it is important to note that the Court of Appeals has discretion to consider even those issues that are not raised at the trial court level. *See In re Marriage of Wendy M.*, 92 Wash.App. 430, 434, 962 P.2d 130 (1998).

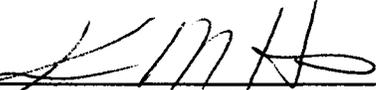
RAP 2.5(a) specifically provides that “a party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” The grounds for affirming which are presented by the defendants here were fully developed at the trial court level and fairly considered by Judge Allendoerfer. Each provides a complete and independent basis for dismissal of the claims against the defendants.

E. CONCLUSION

St. Joseph Hospital and Robert Johnson, RN request that this court affirm the decision made by the trial court dismissing Ms. Ross’ claims in their entirety. Ms. Ross came to St. Joseph Hospital complaining of depression. Her health care providers attempted to help her and to ensure that she did not present a risk of harm to herself. The claims she asserted against them were unsupportable and were not properly brought before the court. Therefore, summary Judgment dismissal was appropriate.

DATED: December 29, 2009, at Seattle, Washington.

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PEACEHEALTH dba ST. JOSEPH)	SERVICE
HOSPITAL, a Washington Public Benefit)	
Corporation; and ROBERT JOHNSON)	
and JANE DOE JOHNSON, husband and)	
wife, and the marital community composed)	
thereof; JEFFREY RIES and JANE DOE)	
RIES, husband and wife, and the marital)	
community composed thereof;)	
)	
Respondents.)	
)	

I, SUSAN EASTLEY, hereby certify that on the 29th day of December, 2009, I served a copy of the following document:

- **Respondent's Brief**

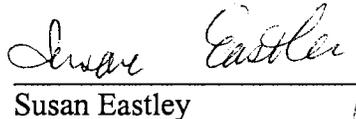
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