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NO 70491-5

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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SARAH A. EVISON,

APPELLANT

v.

DAVID VOSSLER, M.D., VALLEY MEDICAL CENTER – KING  
COUNTY HOSPITAL DISTRICT NO. 1,

RESPONDENTS

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BRIEF OF APPELLANT

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## I. INTRODUCTION

This is a lawsuit involving medical negligence. In May 2008, when Appellant/Plaintiff Sarah Evison<sup>1</sup> was approaching the end of her senior year of high school, she suffered a generalized tonic-clonic seizure. She was hospitalized and put on the drug Dilantin but experienced an allergic reaction to it and switched to the anti-seizure medication Keppra.

In July 2008, Sarah was referred to Respondent/Defendant David Vossler, M.D. at Respondent/Defendant Valley Medical Center – King County Public Hospital District No. 1 (“Valley Medical Center”). By December 2008, Sarah had experienced weight gain, anxiety, aggression, right-sided headaches, and imbalance. She was prescribed the drug Lamictal in an effort to wean her off Keppra and introduce her to Lamictal.

Within two and a half months, Sarah had suffered significant nausea, fatigue, and sensitivity to light. Though she had never experienced these conditions on Keppra, in January 2009, Dr. Vossler told her to continue the transition from Keppra to Lamictal. By February 2009, she was so sick from the Lamictal that she had

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<sup>1</sup> For clarity, this brief will refer to Sarah Evison as “Sarah,” and her mother Patricia Evison as “Patricia.”

taped a garbage bag to her dorm room bed. Dr. Vossler was kept advised of her deteriorating physical condition.

Sarah's symptoms continued to worsen, and she ultimately took a medical withdrawal from college. When she saw Dr. Vossler on March 16, her visual acuity was 20/400 in all directions. Dr. Vossler initially queried whether her problems were related to Lamictal and referred her to an ophthalmologist. On March 20, Dr. Vossler finally instructed her to stop Lamictal. By then, she was legally blind.

On March 9, 2012, Sarah served a Standard Tort Claim Form on Dr. Vossler and Valley Medical Center pursuant to RCW 4.92.100. (She also sued entities that allegedly manufactured and/or distributed Lamictal, who were dismissed and are not part of this appeal.) After some discovery, Dr. Vossler and Valley Medical Center successfully moved for summary judgment, arguing that Sarah had failed to comply with RCW 7.70.100(1) as applied to local government entities under RCW 4.96.020. She now appeals that order granting summary judgment of dismissal for Dr. Vossler and Valley Medical Center.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Dr. Vossler's and Valley Medical Center's Motion for Summary Judgment of Dismissal. Clerk's Papers ("CP") at 439-41.

2. The trial court erred in its ruling that RCW 7.70.100(1) was not unconstitutional when Ms. Evison filed and served her complaint.

3. The trial court erred in its ruling that RCW 7.70.100(1) was applicable to the claim of Ms. Evison against Dr. Vossler and Valley Medical Center.

## III. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in granting summary judgment of dismissal of Sarah's lawsuit, where she had served her complaint under RCW 4.92.100 in reliance on the Washington Supreme Court's decision in *Waples v. Yi*, 169 Wn.2d 152, 161, 234 P.3d 187 (2010), that RCW 7.70.010 was unconstitutional? (Assignments of Error Nos. 1-3.)

## IV. STATEMENT OF THE CASE

**Facts:** Sarah Evison is a single woman, born on February 17, 1989. CP at 1. In May 2008, she was approaching the end of her senior year of high school at Bellevue Christian High School. CP at

365. With her parents' approval, she began making plans to attend Oregon State University in the fall of 2008. *Id.*

In May 2008, Sarah suffered a generalized tonic-clonic seizure. She was hospitalized at Overlake Hospital. CP at 366. She was put on Dilantin but experienced an allergic reaction to it. *Id.* She was seen for this by Dr. Fosmire, who in June 2008 started her on Keppra. *Id.*

In July 2008, Dr. Fosmire referred Sarah to Dr. David Vossler at the Washington Neuroscience Institute at Valley Medical Center. CP at 366-68. He initially told her to continue on the Keppra 500 mg twice a day.

In August 2008, Sarah's mother Patricia called Dr. Vossler to report that Sarah had gained a significant amount of weight over two and half months and was depressed. CP at 390. In December 2008, Sarah was reporting symptoms of weight gain, anxiety, aggression, right-sided headaches and imbalance. Dr. Vossler's office set an appointment for December 30, 2008. CP at 366. Sarah was then a student at Oregon State University. *Id.*

Because of Sarah's symptoms and her desire to stop the Keppra and its side effects, Nurse Practitioner Kim Veilleux at the Neuroscience Institute at Valley General prescribed the drug

Lamictal on December 30, 2008. *Id.* Sarah was on an anti-epileptic drug schedule with the drugs she had previously been taking, Keppra, and her new drug Lamictal. *Id.* The goal was to wean her off Keppra and gradually introduce her to Lamictal. *Id.*

Within two and a half months after Sarah began taking the drug Lamictal, she had significant signs of nausea, fatigue, and sensitivity to light. She was in residence at Oregon State University when the onset of these conditions occurred. She went to see Dr. Vossler in January 2009. He told her to continue the transition from Keppra to Lamictal. CP at 4, 366, 391.

She had never experienced these conditions on the anti-seizure medication Keppra. By February of 2009, she was so sick from the Lamictal that she had taped a garbage bag to her dorm room bed and had made several trips to the Oregon State University Health Clinic. CP at 366-67. She kept her mother informed of these symptoms. CP at 367. In turn, Patricia advised Dr. Vossler of those symptoms; his office continued to advise her that Sarah was experiencing normal side effects of Lamictal. *Id.*

Sarah's symptoms continued to worsen in February and March 2009. On March 4, 2009, Patricia called Dr. Vossler's office to report that Sarah was having a lot of nausea, vomiting, fatigue,

dizzy, and sensitivity to light. Dr. Vossler told her get a Lamotrigine Level. CP at 392.

On March 10, Sarah woke with blurry vision and was walking into walls. CP at 367. She took a medical withdrawal from Oregon State. CP at 368. She left school in mid-March and returned home to see Dr. Vossler. *Id.* She saw him on March 16, 2009. Her vision was blurry in all directions. Her visual acuity was 20/400 in all directions. CP at 369. Dr. Vossler queried whether “this really is related to Lamictal.” CP at 394. Dr. Vossler told her he did not think it was due to Lamictal. *Id.* He referred her to an ophthalmologist, Dr. Solomon. CP at 368. Dr. Solomon told her he had never seen anything like this. *Id.*

Dr. Vossler finally instructed her to stop Lamictal on March 20, 2009. By then, her vision was 20/400—she was, and remains, legally blind. CP at 367-69. Thereafter, Dr. Vossler told her parents that her visual problems may be due to multiple sclerosis, thrombosis, or Lamictal. CP at 6, 368.

According to Dr. Vossler’s medical record dated November 23, 2010:

Optic Neuritis developed approximately 3/10/09 after titrating up dose of [lamotrigene]. Started on [lamotrigene] 25 milligrams .... per day, on

12/30/08 and reaching 150 twice a day nine weeks later on 2/25/09. Used standard dose escalation.

CP at 388. For Sarah, her life is essentially now a big stop sign.

**Procedural History:** Sarah served a Standard Tort Claim Form pursuant to RCW 4.92.100 on March 9, 2012. CP at 466, 480. On July 12, 2013, Valley Medical Center and Dr. Vossler moved for summary judgment of dismissal, arguing that Sarah had failed to comply with RCW 7.70.100(1) as applied to local government entities under RCW 4.96.020. CP at 457.

She now appeals that order dismissing her case.

## V. ARGUMENT

### A. **The Standard of Review Here is De Novo.**

Washington appellate courts review orders granting or denying summary judgment de novo and engage in the same inquiry as the trial court. *E.g., Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Summary judgment may be ordered only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

**B. When Sarah Filed Her Complaint, the Washington Supreme Court Had Invalidated the Entirety of RCW 7.70.100(1).**

The provisions of RCW 7.70.100 were enacted in 2006 as part of a series of statutory amendments governing medical malpractice, insurance, and litigation, among other things. In recent years, two of the most oppressive and burdensome aspects of that “reform” legislation have properly been struck down by the Washington Supreme Court as unconstitutional. In *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 985, 216 P.3d 374 (2009), the Supreme Court held that the “certificate of merit” requirement stated in RCW 7.70.150 is unconstitutional on separation of powers principles. As noted above, the *Waples* Court invalidated RCW 7.70.100(1) for similar reasons. 169 Wn.2d at 160–61.

Before the Supreme Court ruled in *Waples*, RCW 7.70.100(1) required a plaintiff in a medical malpractice action to provide 90 days’ advance notice to a health care provider of that plaintiff’s intent to file suit. The *Waples* Court invalidated the requirement that plaintiffs provide this notice. There, two plaintiffs appealed the dismissal of their respective medical malpractice suits for failure to provide the RCW 7.70.100(1) notice of intent to sue.

*Waples* consolidated both cases to address whether “the notice requirement of RCW 7.70.100(1) violate[s] the separation of powers doctrine.” *Waples*, 169 Wn.2d at 158. In its analysis, the Court adhered to its reasoning stated in *Putnam* a year earlier:

There, we held that the addition of legislative requirements to the court rules for filing suit was unconstitutional. We based our conclusion on the fact that the statutory certificate of merit requirement involved procedures and not substantive rights “because it addresses how to file a claim to enforce a right provided by law .... The statute does not address the primary rights of either party; it deals only with the procedures to effectuate those rights. Therefore, it is a procedural law and will not prevail over the conflicting court rules.” **We make the same holding here.**

*Waples*, 169 Wn.2d at 160–61 (emphasis added) (quoting *Putman*, 166 Wn.2d at 984–85).<sup>2</sup>

Therefore, the *Waples* Court clearly held that RCW 7.70.100(1), like RCW 7.70.150, “does not address the primary rights” of medical malpractice litigants, but is only a procedural rule. *Id.* That analysis and ruling led the Court to hold the statute unconstitutional in its entirety: “[t]he notice requirement of RCW 7.70.100(1) irreconcilably conflicts with the commencement

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<sup>2</sup> More specifically, the *Putman* Court ruled that RCW 7.70.150’s certificate of merit requirement violated the separation of powers doctrine because it conflicted with Civil Rules 8 and 11 regarding pleading requirements and thereby encroached on the judiciary’s power to set court rules. 166 Wn.2d at 979–80.

**requirements of CR 3(a) and is unconstitutional because it conflicts with the judiciary’s power to set court procedures.”**

*Waples*, 169 Wn.2d at 161 (emphasis added).

No distinction was made between governmental and private tortfeasors, as Valley Medical Center and Dr. Vossler contend, nor would any such distinction be warranted. The Supreme Court’s decision in *Waples* was controlling law when Sarah filed her lawsuit in this matter. RCW 7.70.100(1) was no longer the law and did not govern the procedural commencement of this lawsuit.

The *Waples* Court phrased the issue as: “Does the notice requirement of RCW 7.70.100(1) violate the separation of powers doctrine?” 169 Wn.2d at 158. As stated in its holding quoted above, it answered the question in the affirmative.

Since *Waples*, several courts have been faced with issues similar to that before this Court on Valley Medical Center and Dr. Vossler’s motion. Uniformly, courts have treated the *Waples* opinion as having completely invalidated the pre-filing notice requirements in RCW 7.70.100(1). In *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011), for instance, the Supreme Court implicitly recognized that it had invalidated the entirety of the pre-filing notice provision: “[t]he provision of former RCW 7.70.100

requiring a 90-day notice of intent to sue *was recently invalidated by this court* based on separation of powers.” *Id.* at 108 n.7 (emphasis added) (citing *Waples*, 169 Wn.2d at 158–61).

Recently, this Court has recognized a similar scope of the *Waples* opinion: “In *Waples v. Yi*, the Washington Supreme Court held that the filing requirements in RCW 7.70.100(1) were unconstitutional.” *Bennett v. Seattle Mental Health*, 166 Wn. App. 477, 483, 269 P.3d 1079, *rev. denied*, 174 Wn.2d 1009, 281 P.3d 686 (2012) (citation omitted).

**C. In 2012, the Legislature Passed Substitute Senate Bill 6187 Amending RCW 4.92.100 and RCW 4.96.020 and Acknowledging the Unconstitutionality of RCW 7.70.010.**

On February 11, 2012, the State Senate unanimously passed Substitute Senate Bill 6187. CP at 66. The House passed it, also unanimously, on February 28, 2012. *Id.* The Governor signed it on March 30, 2012. *Id.* It had an effective date of June 7, 2012. *Id.* The Law amended RCW 4.92.100 and RCW 4.96.020 to make them apply to all claims against the state. SSB 6187 (CP at 67-71). It removed the prior exception “for claims involving injuries from health care” and deleted the former provision that “[c]laims involving injuries from health care are governed solely by the

procedures set forth in chapter 7.70 RCW....” CP at 67, 69. It specifically provided at section (4) that:

No action subject to the claim filing requirements of this section shall be commenced against any local governmental entity, or against any local governmental entity’s officers, [or] employees ... for damages arising out of tortious conduct until *sixty calendar days* have elapsed after the claim has first been presented....

CP at 70 (emphasis added).

The Senate Bill Report specifically noted that the Washington Supreme Court’s conclusion that the 90-days’ notice requirement is “unconstitutional”:

The current statute reads that a person may commence an action based upon a health care provider’s professional negligence by giving the defendant 90 days’ notice of intent to commence the action.... However, in recent case law the Washington State Supreme Court concluded that the notice requirement in the statute is unconstitutional because it violates the separation of powers doctrine as it conflicts with the judiciary’s power to set court procedures.

Senate Bill Report SSB 6178 (CP at 73-74).

The House Bill Report specifically acknowledged that:

In 2010 the Washington Supreme Court (Court) invalidated the 90-day notice requirement for health care actions in the case *Waples v. Yi*. The Court found that the statute violated separation of powers principles because it irreconcilably conflicts with the court rules governing the commencement of actions

and it is a procedural rule that falls within the powers of the judicial branch....

House Bill Report SSB 6187 (CP at 77). It noted that *Waples* involved a suit against a private health care provider. *Id.* It also noted that *McDevitt v. Harborview Medical Center*, \_\_\_Wn.2d \_\_\_, 291 P.3d 876 (2012), was currently on direct review at the Court on the issue of whether the 90-day notice requirement for health care actions remains valid with respect to health care actions against governmental entities. *Id.* The Summary of the Bill stated: “Provisions of the state and local government claim filing statutes that exempt claims involving injuries from health care are eliminated.” *Id.*

The net effect of this 2012 Senate bill restored the 60-day claim filing period to actions against the state involving health care. The Legislature clearly acknowledged the unconstitutionality of RCW 7.70.100 requiring a 90-day period for health related claims. It changed the law before the Supreme Court decision in the *McDevitt* case.

This action of the Legislature took place before Sarah filed her standard form tort claim.

**D. *McDevitt v Harborview Medical Center* Is Not Controlling.**

Dr. Vossler and Valley Medical Center relied upon *McDevitt v. Harborview Medical Center*, \_\_\_ Wn.2d \_\_\_, 291 P.3d 876 (2012), in support of their Motion for Summary Judgment of Dismissal. In a 5-to-4 decision, this case held that the presuit notice requirement of RCW 7.70.100(1) as applied to the State is a constitutionally-valid statutory pre-condition for suit against the State because it was adopted by the Legislature as provided in article II, section 26 of the Washington Constitution. This section provides: “The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.”

The majority in *McDevitt* distinguished *Waples* as involving a dispute between private parties, not a state defendant. It held that, as applied to the State, RCW 7.70.100(1) is a constitutional application under article II, section 26 of the Washington Constitution. It is important to note that the four-judge dissent characterized the majority opinion as:

wrong in its statutory analysis, ignores the clear direction of the legislature to avoid inconsistent presuit notice requirements, fails to treat similar government and private entities the same, and reaches an absurd result.... Under the majority’s opinion, government health care providers are given

the benefit of a presuit notice requirement that other health care providers are not.

*Id.* at 883 (Chambers, J., dissenting). Justice Chambers again emphasized that this was an “absurd result”. *Id.*

As applied to Sarah the result is equally absurd. As pointed out above, she was faced with the following facts when she filed her lawsuit: She filed her complaint on March 9, 2012. CP at 1. Her Standard Tort Claim with her Complaint was served on Valley Medical Center on March 9, 2012. CP at 466, 480.

1. In 2010, *Waples* held RCW 7.70.100(1) unconstitutional.
2. The Notice of Claim pursuant to RCW4.92.100 and RCW 4.96.020 was filed March 9, 2012.
3. The Complaint was served on Dr. Vossler on May 11, 2012.
4. Substitute Senate Bill 6187 was signed by Governor Gregoire on March 30, 2012 with an effective date of June 7, 2012.

When Sarah filed her claim, RCW 7.70.100(1) did not apply to her because *Waples* had held that statute unconstitutional. The new law of Substitute Senate Bill 6187 was not yet effective, but

the intent of the Legislature was clear. The only constitutionally-valid statute applying to Sarah's claim was RCW 4.92.100 and RCW 4.96.020. Sarah gave notice with a standard tort claim authorized and require by these statutes, which gave her a 60-day notice requirement.

In enacting Substitute Senate Bill 6187, both the house and senate of the Legislature acknowledged that a new law was required with regard to filing claims involving health care against any state entity. The law that was ultimately enacted contained a 60-day notice requirement.

**E. The Current RCW 7.70.100 No Longer Contains the 90-Day Notice of Intent to File Provision.**

Effective July 2013, RCW 7.70 has been amended again to eliminate any reference to either a 60-day or 90-day notice of intent to file.

Over the years the legislative intent has been clear. The holding in *Waples* must be followed. The house and senate have consistently read this decision to hold that to have any presuit notice of intent apply only to health care claims is unconstitutional. When it passed Substitute Senate Bill 6187, it thought it had dealt with problem. Then, along came the *McDevitt* ruling and it was

back to square one. The Supreme Court was distinguishing its way around its 2010 holding in *Waples*. The Legislature has now spoken conclusively. It has finally amended RCW 7.70.100 to remove *any* requirement of presuit notice of intent to file in claims involving health care.

## VI. CONCLUSION

The trial court erred by relying upon the *McDevitt* decision from December, 12, 2012, in entering its Order dated February 11, 2013, dismissing Sarah's complaint against Dr. Vossler and Valley Medical Center. When Sarah filed her tort claim and her complaint, RCW 7.70.010(1) had already been held to be unconstitutional in the *Waples* decision. The 90-day notice requirement of 7.70.010(1) had been held to be in irreconcilable conflict with the commencement requirements of CR 3(a). It conflicted with the judiciary's power to set court procedures. At the time Sarah filed her complaint, the Legislature, in response to *Waples*, had passed Senate Bill 6187, which removed the exemption for health care claims from the tort claim filing statutes. The current RCW 7.70 no longer contains any reference to a 90-day notice of intent requirement.

Since *Waples*, the Legislature's intent has been clear. It clearly recognized that there was in fact no applicable statute relating to filing of health care tort claims against local government entities. It recognized that RCW 7.70.010(1) had been held to be unconstitutional. It therefore removed the restriction limiting the claim filing statutes RCW 4.92.100 and RCW 4.96.020 to non-healthcare claims. It acted before *McDevitt* had been decided. It clearly intended that these two statutes, with the 60-day notice requirement, should apply to claims against the state and local government entities.

However, this statute was not effective until June 2012. RCW 7.70.010(1) was unconstitutional. There was no applicable claim filing statute that applied to Sarah when she filed her complaint in March 2012.

Respectfully submitted this 23rd day of August, 2013.

HELSELL FETTERMAN LLP

By   
John G. Bergmann, WSBA No. 00386  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 Fourth Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Evison v. Vossler, et al., I did on the date listed below, (1) cause to be filed with this Court a Brief of Appellant; and (2) to be delivered via messenger to Bruce Megard, Bennett Bigelow, & Leedom, 601 Union Street, Ste. 1500, Seattle, WA 98101, who are counsel of record of Respondent.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: August 23, 2013

  
KYNA GONZALEZ