

No. 36211-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NANCY NGYUEN WAPLES

Appellant,

v.

PETER H. YI DDS and JANE DOE YI, husband and wife and their
marital community thereof, dba LAKEWOOD DENTAL CLINIC,
and PETER H. YI DDS, PS, a Washington Corporation

Respondents

BRIEF OF RESPONDENTS

John C. Versnel III, WSBA No. 17755
Vanessa M. Vanderbrug WSBA No. 31668
Lawrence & Versnel PLLC
601 Union St., #3030, Seattle, WA 98101
(206) 624-0200
Attorneys for Respondents

FILED
COURT OF APPEALS DIV. II
STATE OF WASHINGTON
2007 AUG 30 PM 3:02

TABLE OF CONTENTS

I. IDENTIFICATION OF PARTIES1

II. DECISION.....1

III. SUMMARY OF ARGUMENT1

IV. STATEMENT OF CASE4

A. Factual Background.....4

B. Procedural Background.....4

V. ARGUMENT.....6

A. The standard of review for summary judgment is *de novo*...6

B. RCW 7.70.100 requires notice to the defendant before
a suit may be commenced.....7

C. RCW 7.70.100(1) facially requires filing “notice of claim”
as a condition precedent to maintaining suit.....11

D. The pre-filing ninety day notice is a condition precedent
to mediation.....12

E. Civil Rule 53.4, governing mediation of health care claims,
became effective on March 11, 1997.....12

F. Ms. Waples failed to raise the constitutionality of RCW 7.70
at the summary judgment hearing.....13

G. Ms. Waples fails to show, beyond a reasonable doubt,
that RCW 7.70 is unconstitutional.....14

1.	RCW 7.70.100 is rationally related to a legitimate state interest and is in accordance with the constitutional guarantees of equal protection.....	15
2.	RCW 7.70.150 is rationally related to a legitimate State interest and is in accordance with the constitutional guarantees of equal protection.....	22
3.	RCW 7.70.150 does not violate the separation of powers doctrine.....	24
4.	RCW 7.70.150 does not violate the right to trial by jury.....	26
V.	CONCLUSION.....	28

TABLE OF AUTHORITIES

CASES

<i>1519-1525 Lakewood Blvd. Condominium Ass'n v. Apartment Sales Corp.</i> , 144 Wn.2d 570, 29 P.3d 1249 (2001).....	19
<i>Alcantra v. Boeing Co.</i> , 41 Wn.App. 675, 705 P.2d 1222 (1985).....	11
<i>Allen v. State of Washington</i> , 118 Wn.2d 753, 826 P.2d 200 (1992).....	6
<i>Amunrud v. Board of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	17,19
<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	27,28
<i>Berger v. Sonneland</i> , 101 Wn. App. 141, 1 P.2d 1, 187. (2000).....	8,12
<i>Branom v. State</i> , 94 Wn.App. 964 P.2d 335 (1999).....	8
<i>Buchanan v. Simplot Feeders Ltd. Partnership</i> , 134 Wn.2d 673, 952 P.2d 610 (1988).....	22
<i>Burnett v. Tacoma City Light</i> , 124 Wn.App. 550, 104 P.3d 677 (2005).....	10
<i>City of Fircrest v. Jensen</i> , 158 Wn.2d 384, 143 P.2d 776 (2006).....	25
<i>Cockle v. Dept. of Labor Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	11
<i>Cotton v. Kronenberg</i> , 111 Wn.App. 258, 44 P.3d 878 (2002).....	13
<i>Clements v. Travelers Indemnity Co.</i> , 121 Wn.2d 243, 850 P.2d 1298.....	7
<i>Cummings v. X-ray Associates of New Mexico</i> , 121 N.M. 821, 918 P.2d 1321 (N.M., 1996).....	18
<i>Duffy v. King Chiropractic Clinic</i> , 17 Wn.App. 693, 565 P.2d 435 (1977).....	19
<i>Edgar v. City of Tacoma</i> , 129 Wn.2d 621, 919 P.2d 1236 (1996).....	26,27
<i>Ellwein v. Hartford</i> , 95 Wn.App. 419, 976 P.2d 138 (1999).....	13
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	16
<i>Heller v. Doe</i> , 509 U.S. 312 (1993).....	19
<i>Hintz v. Kitsap County</i> , 92 Wn.App. 10, 960 P.2d 946 (1998).....	9
<i>Hoffman v. United States</i> , 767 F.2d 1431 (9th Cir., 1985).....	18
<i>Houk v. Furman</i> , 613 F.Supp. 1022 (Maine, 1985).....	18,20,21
<i>Hunter v. North Mason High School</i> , 85 Wn.2d 810, 539 P.2d 435 (1975).....	19,20,23
<i>James v. Robeck</i> , 79 Wn.2d 864, 490 P.2d 878 (1971).....	27

<i>Kaegle v. Aetna Life and Cas. Co.</i> , 40 Wn.App. 194, 698 P.2d 90 (1985).....	11
<i>Lewis v. Bell</i> , 45 Wn.App. 192, 724 P.2d 425 (1986).....	6,7
<i>Lynn v. Miller</i> , 498 So.2d 1011 (Fla., 1986).....	20
<i>Mahoney v. Doerhoff Surgical Services</i> , 807 S.W.2d 503 (Mo., 1991).....	24,26
<i>McAlister v. Schick</i> , 147 Ill.2d 84, 588 N.E.2d 1151 (1992).....	24,25,26
<i>Miller v. United States</i> , 73 F.3d 878 (9th Cir., 1995).....	18
<i>Morinaga v. Vue</i> , 85 Wn.App. 822, 935 P.2d 637 (1997).....	23
<i>Nebbia v. People of New York</i> , 291 U.S. 502 (1934).....	15
<i>Peninsula Neighborhood Association v. Washington State Dept. of Transportation</i> , 142 Wn.2d 328, 12 P.3d 134 (2000).....	14,15
<i>Phillippe v. Bernard</i> , 151 Wn.2d 376, 88 P.3d 939 (2004).....	17
<i>Piortle v. Spokane Pub. Sch. Dist. No. 81</i> , 83 Wn.App. 304 921 P.2d 1084 (1996).....	9,10
<i>Rozner v. City of Bellevue</i> , 116 Wn.2d 342, 804 P.2d 24 (1991).....	11
<i>Reyes v. City of Renton</i> , 121 Wn.App. 498, 86 P.3d 155 (2004).....	10
<i>Troxell v. Rainier Pub. Sch. Dist. No. 307</i> , 154 Wn.2d 345, 111 P.3d 1173 (2005).....	10
<i>Schmidt v. Cornerstone Investments</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	15
<i>Sievers v. City of Mountlake Terrace</i> , 97 Wn.App. 181 983 P.2d 1127 (1999).....	8,10
<i>Sisario v. Amsterdam Memorial Hospital</i> , 159 A.D. 843 (N.Y., 1990)...	24
<i>Snyder v. Department of Labor and Industries</i> , 40 Wn.App. 566, 699 P.2d 256 (1985).....	11
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	26,27
<i>State v. Eaton</i> , 30 Wn.App. 288, 633 P.2d 921 (1981).....	14
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999).....	13
<i>State v. Walton</i> , 76 Wn.App. 288, 633 P.2d 921 (1981).....	14
<i>Washoe v. Second Judicial District Court of the State of Nevada</i> , 148 P.3d 790 (Nev., 2000).....	25
<i>Woods v. Bailet</i> , 116 Wn.App. 658, 67 P.3d 511 (2003).....	10
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	7

STATUTES/RULES

CR 3.....8
CR 53.4.....12, 13
RAP 2.2.....6
RAP 2.5.....13
RAP 9.12.....6
RAP 10.3.....14
RCW 4.16.350.....19
RCW 4.96.020.....8,9
RCW 7.70.....1,5,7,8,14
RCW 7.70.040.....23
RCW
7.70.100.....2,5,7,8,10,11,12,15,16,19,20,21
RCW 7.70.040.....23
RCW 7.70.150.....2,3,7,22,24,26,27,28
RCW 7.70.160.....22
S.S.H.B. 2292.....17,20,21,22
Wa. Const. Art. 1 §12.....16

SECONDARY AUTHORITY

Tegland, 4 Wash.Prac. CR 53.4(2007).....13

I. IDENTIFICATION OF PARTIES

Peter H. Yi DDS¹ was the defendant² in a Pierce County Superior Court case, bearing Cause No. 06-2-11015-9. Nancy and Mark Waples were the plaintiffs in the action.³

II. DECISION

Dr. Yi requests this Court AFFIRM the trial court's Order Granting his Motion for Summary Judgment Dismissal, entered March 16, 2007. (CP 34-35)

III. SUMMARY OF ARGUMENT

Ms. Waples filed the instant medical negligence case on September 6, 2006, alleging damages arising out of treatment rendered by Dr. Yi on or about September 13, 2003. The trial court appropriately dismissed Ms. Waples' suit for her failure to comply with the requirements of the statutes governing suits against health care providers.

All suits arising out of health care are strictly governed by the statutory requirements of RCW 7.70. In response to heightened medical malpractice insurance rates and public concern regarding access to medical

¹ Appellant erroneously spelled Dr. Yi's name as "Yee".

² The defendants in the Pierce County matter were Peter Yi DDS, Lakewood Dental Clinic and Peter H. Yi DDS PS. For ease of reference, they will be referred to collectively as "Dr. Yi".

³ For ease of reference, the Appellants will be referred to collectively as "Ms. Waples".

practitioners, the Legislature enacted, in relevant part here, two changes to the law regarding medical negligence suits. First, to facilitate settlement of medical negligence claims and thus limit claims to malpractice insurance carriers, the Legislature added a pre-litigation notice requirement to the laws governing health care. RCW 7.70.100. In addition, to minimize frivolous claims and streamline the litigation process, the Legislature codified existing law by requiring medical negligence plaintiffs to support their complaint with a “merit” certification of a qualified expert. RCW 7.70.150. Both portions of the statute became effective on June 7, 2006, prior to Ms. Waples’ initiation of suit against Dr. Yi.

Ms. Waples contends the pre-filing notice requirement should not be strictly construed. Ms. Waples’ argument fails where the statute is plain on its face and requires pre-litigation notice regardless of any showing of prejudice to the noticed party.

Next, Ms. Waples contends she is excused from compliance with the pre-filing notice requirement because the Supreme Court had not yet promulgated rules governing mediation. First, Ms. Waples never provided the required notice, thus mooting her argument pertaining to mediation

rules. Second, rules applicable to mediation of health care claims have been in effect since March 1997, rendering, Ms. Waples' argument without force.

For the first time, Ms. Waples challenges the pre-filing notice requirement and the "merit" requirement on Constitutional grounds. The Court should decline to consider the Constitutional arguments here where Ms. Waples' failed to raise these challenges during the trial court summary judgment proceedings. Even if the Court does consider the Constitutional challenges, these challenges are without force.

Fourth, Ms. Waples argues the pre-filing notice requirement violates the Equal Protection guarantees of the Washington Constitution. Ms. Waples' contention fails because the pre-filing notice serves the rational governmental interest of limiting claims to malpractice insurers and promoting settlement of claims.

Next, Ms. Waples argues the "merit" requirement set forth at RCW 7.70.150 violates the Equal Protection guarantees of the Washington Constitution. Ms. Waples' contention fails because the certification requirement serves the rational governmental interest of minimizing the filing of frivolous claims.

Sixth, Ms. Waples argues the “merit” requirement violates the “separation of powers” doctrine. The “merit” requirement does not invade the province of the judiciary where it provides a substantive requirement to maintenance of a suit.

Finally, Ms. Waples argues the “merit” requirement impermissibly removes the consideration of cases from the jury and, as such, violates the right to trial by jury. The “merit” requirement does not violate the right to trial by jury as it merely codifies existing substantive law and removes from the jury the consideration of irrelevant facts.

IV. STATEMENT OF THE CASE

A. Factual Background⁴

On September 16, 2003 Appellant Nancy Waples received dental treatment from Respondent Dr. Yi. (CP 1-3) Ms. Waples alleged that, during that treatment, an employee of Dr. Yi “injected a shot of novocaine in a negligent manner” causing damage to Ms. Waples. (*Id.*)

B. Procedural Background

On September 5, 2006, Ms. Waples commenced an action against Dr. Yi alleging professional negligence. (CP 1-3) On December 7, 2006,

⁴ Contrary to Ms. Waples’ contention, claimed negligence by Dr. Yi is disputed. The procedural facts of this matter, relevant here, are not disputed.

Dr. Yi answered the complaint, denied all claims of negligence, and, in relevant part, raised the failure to comply with RCW 7.70.100 as an affirmative defense. (CP 4-7)

On February 8, 2007, Dr. Yi filed a Motion for Summary Judgment dismissal on grounds Ms. Waples failed to comply with the notice requirements of RCW 7.70.100. (CP 8-14) On March 5, 2007, Ms. Waples filed her Opposition to the Motion arguing: (1) strict compliance with RCW 7.70.100 is not required; and (2) the failure to file a certificate of merit constitutes only discretionary grounds for dismissal. (CP 17-19)

On March 7, 2007, Dr. Yi filed his Reply in Support of his Motion for Summary Judgment. (CP 20-25) On that same date, Dr. Yi filed a Motion to Strike Ms. Waples' Opposition because Ms. Waples filed her Opposition briefing late. (CP 20-25) Specifically, Ms. Waples' Opposition was due on February 26, 2007, and Ms. Waples failed to file her Opposition until March 5, 2007. (*Id.*)

On March 16, 2007, the trial court heard argument on Dr. Yi's Motion for Summary Judgment. (RP 3) At argument, counsel for Ms. Waples acknowledged the failure to comply with RCW 7.70 and conceded that Dr. Yi raised the failure to comply in the Answer. (RP 6-7) The trial court granted summary judgment, noting:

Even though we abhor a forfeiture, we have to follow certain procedures. That's what they're in place for.

(RP 11); (CP 36-37)

On April 16, 2007, Ms. Waples' filed her Notice of Appeal. Counsel for Dr. Yi received the Notice of Appeal on April 23, 2007.

IV. ARGUMENT

A. The standard of review for summary judgment is *de novo*.

Ms. Waples brings this appeal pursuant to the authority granted in RAP 2.2(a)(1) permitting for appellate review of the final judgment of any action or proceeding. As Ms. Waples appeals from the trial court's grant of summary judgment, the appellate court may consider only evidence and documents called to the attention of the trial court prior to entry of the dismissal order. RAP 9.12; *see also, Lewis v. Bell*, 45 Wn. App. 192, 95, 724 P.2d 425 (1986).

The appellate court reviews the trial court's ruling on summary judgment *de novo*. *Allen v. State of Washington*, 118 Wn.2d 753, 757, 826 P.2d 200 (1992). The appellate court, like the trial court before it, analyzes whether any genuine issues of material fact exist and whether one party is entitled to judgment as a matter of law. *Id.* The mere existence of factual questions is insufficient to warrant denial of summary judgment. *Id.*

Instead, denial of summary judgment on the basis that factual issues remain is only appropriate where the factual questions are material to resolving the legal issue at stake. *Id.*; *see also, Lewis*, 45 Wn. App. at 195; *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) (material fact is one upon which the outcome of the litigation depends); *see also, Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (the plaintiff's failure to produce evidence essential to its case requires entry of summary judgment).

Here, upon the facts presented by Ms. Waples, the trial court correctly held Ms. Waples failed to commence her action against Dr. Yi in compliance with RCW 7.70, the statute governing disposition of all health care claims. First, Ms. Waples failed to provide ninety days pre-filing notice to Dr. Yi in accordance with RCW 7.70.100(1). Second, Ms. Waples failed to file a certification of merit within forty-five days of commencement of the action as required by RCW 7.70.150. Accordingly, the trial court appropriately dismissed Ms. Waples' claims.

B. RCW 7.70.100 requires notice to the defendant before a suit may be commenced.

Ms. Waples' claim against Dr. Yi arises out of dental treatment she received on September 16, 2003. Whenever an injury is alleged as a result of health care, the action for damages for that injury is governed

exclusively by the statute dealing with substantive and procedural aspects of such actions. *Berger v. Sonneland*, 101 Wn. App. 141, 1 P.2d 1, 187. (2000). Any suit seeking damages for an injury occurring as a result of health care is controlled exclusively by RCW 7.70, *et seq.*, regardless of how the action is characterized. *Branom v. State*, 94 Wn. App. 964, 947 P.2d 335 (1999), *rev. denied*. 138 Wn.2d 1023, 989 P.2d 1136.

RCW 7.70.100(1) provides:

No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action.

(Emphasis added.) A suit is “commenced” by service of a summons and complaint, or by filing the complaint with the court. CR 3(a); *Sievers v. City of Mountlake Terrace*, 97 Wn.App. 181, 184, 983 P.2d 1127 (1999).

The notice requirement in RCW 7.70.100(1) went into effect in June, 2006, and cases citing the amended statute have yet to reach appellate courts. However, there is significant case law examining RCW 4.96.020(4), which, using language substantially similar to that found in RCW 7.70.100(1), requires that plaintiffs provide notice to municipal governments and their subdivisions before filing suit against such entities.

RCW 4.96.020(4) states that, “*No action shall be commenced against any local governmental entity for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof.*” (Emphasis added.)

In *Hintz v. Kitsap County*, 92 Wn. App. 10, 960 P.2d 946 (1998), the plaintiff was a former county employee who alleged he had been wrongfully terminated. The plaintiff properly filed his notice of claim, but proceeded to serve a summons and complaint on the County only 57 days later. The County moved for summary judgment based on the plaintiff’s failure to wait the full 60 days before commencing the suit. The trial court dismissed the action, and the plaintiff appealed

The Court observed that, “the filing of a complaint or service of a summons, or both, within the 60-day waiting period violates RCW 4.96.020(4).” *Id.*, at 16. The Court held that “the proper remedy for failure to comply with a notice of claim statute is dismissal of the suit.” *Id.*, at 14. *citing Pirtle v. Spokane Pub. Sch. Dist. No. 81*, 83 Wn.App. 304, 309, 921 P.2d 1084 (1996). The plaintiff argued that the Court should overlook his failure to wait the full 60-day period, asserting that the defendant had not been prejudiced. The appellate court rejected the

plaintiff's argument, noting that other cases had already determined that "any issue of prejudice [is]...immaterial." *Id.* at 14 *citing Pirtle*, 83 Wn.App. at 310.

Numerous other cases have reached the identical result. *See, Woods v. Bailet*, 116 Wn. App. 658, 67 P.3d 511 (2003) (Claim filing statutes that impose reasonable burdens on plaintiffs will be upheld.); *Burnett v. Tacoma City Light*, 124 Wn.App. 550, 104 P.3d 677 (2005) (Failure to provide notice to the defendant results in dismissal even where defendant has actual knowledge of suit); *Reyes v. City of Renton*, 121 Wn.App. 498, 86 P.3d 155 (2004); and *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 111 P.3d 1173 (2005).

In the present case, Ms. Waples commenced her action on September 5, 2006, when she filed her Summons and Complaint with the Superior Court. She did not simply fail to wait the full ninety days required by RCW 7.70.100, she neglected to provide Dr. Yi with any notice whatsoever. The trial court appropriately gave, "full effect to the plain meaning of the statute," and dismissed Ms. Waples' claims. *See, Sievers v. Mountlake Terrace*, 97 Wn.App. 181, 183, 983 P.2d 1127 (1999).

C. RCW 7.70.100(1) facially requires filing “notice of claim” as a condition precedent to maintaining suit.

Ms. Waples contends the mediation procedures of RCW 7.70.100(4) should preclude the plain application of the “notice” requirement of RCW 7.70.100(1). Ms. Waples provides no legal authority in support of her argument and, moreover, the plain language of the statute renders her argument without force.

The Court should not consider arguments not supported by legal authority. *Alcantara v. Boeing Co.*, 41 Wn.App. 675, 705 P.2d 1222 (1985); *Snyder v. Dept. Labor Indus.*, 40 Wn.App. 566, 699 P.2d 256 (1985); *Kagele v. Aetna Life and Cas. Co.*, 40 Wn.App. 194, 698 P.2d 90 (1985). For this reason alone, the Court should decline to consider Ms. Waples’ argument pertaining to interpretation of RCW 7.70.100(1).

Next, RCW 7.70.100(1) plainly requires the ninety-day notice to the health care provider separate from any mediation requirement in subsection four of the statute. The primary goal of statutory construction is to carry out legislative intent. *Cockle v. Dept. of Labor Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). If the statute is clear on its face, its meaning must be ascertained from that language. *Id.* at 807. The only permissible interpretation is that which gives effect to the statute's plain language.

Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). Said another way, the court is required to assume the legislature means exactly what it says. *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). Here, the statute facially requires the ninety-day pre-filing notice and Ms. Waples provides no basis for excusing that statutory requirement.

D. The pre-filing ninety day notice is a condition precedent to mediation.

RCW 7.70.100(3) provides, in pertinent part:

After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial....

The statutory provision is plain on its face and expressly requires filing of the ninety-day presuit notice prior to initiation of mediation proceedings. Ms. Waples' failure to comply with the ninety-day presuit notice renders her argument pertaining to mediation moot.

E. Civil Rule 53.4, governing mediation of health care claims, became effective on March 11, 1997.

Ms. Waples argues the mediation requirements of RCW 7.70.100(4) were "impossible" to fulfill because the "rules to govern that mediation had not been created." Ms. Waples' contention is incorrect.

The Washington State Bar Association drafted Civil Rule 53.4 at the request of the Washington Supreme Court. 4 Wash.Prac. CR 53.4 (2007). CR 53.4 “was adopted in 1997 and has never been amended.” *Id.* Accordingly, contrary to Ms. Waples’ contention, no impediments to mediation existed.

F. Ms. Waples failed to raise the constitutionality of RCW 7.70 at the summary judgment hearing.

The appellate court need not consider arguments not briefed in the trial court summary judgment proceedings. *Ellwein v. Hartford*, 95 Wn.App. 419, 430, 976 P.2d 138 (1999) *rev. on other grounds at* 142 Wn.2d 766, 15 P.3d 640 (2001). Similarly, an objection made to the trial court will typically only preserve that particular argument for appeal; other bases for the objection will ordinarily be deemed waived. *Cotton v. Kronenberg*, 111 Wn.App. 258, 44 P.3d 878 (2002).

RAP 2.5(a) provides, in pertinent part, as follows:

Errors Raised for the First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.

RAP 2.5(a)(3) is “an exception to the general rule that parties cannot raise new arguments on appeal” and, accordingly, the exception is construed

narrowly. *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)(holding interpretation of RAP 2.5(a) is the same whether applied to civil or criminal appeals). The claimed error must both be “manifest” and “truly of constitutional magnitude.” *Id.* Moreover, an error known at the time of trial cannot be raised for the first time on appeal where the decision is the result of a strategic decision. *State v. Walton*, 76 Wn.App. 364, 370, 884 P.2d 1348 (1994). Finally, the constitutionality of a statute should not be considered “unless absolutely necessary to the determination of the case.” *State v. Eaton*, 30 Wn.App. 288, 297, 633 P.2d 921 (1981).

Here, Ms. Waples has failed to provide any factual or legal authority establishing that her Constitutional claims could not have been brought at the time of the trial court proceedings. *See*, RAP 10.3(a)(5) Moreover, Ms. Waples fails to cite any authority for the proposition that the Constitutionality of the statute is a “manifest” error. *Id.*

G. Ms. Waples fails to show, beyond a reasonable doubt, that RCW 7.70 is unconstitutional.

Statutes are presumed constitutional and, as such, a party challenging the constitutionality of a statute must prove, “beyond a reasonable doubt, that it is unconstitutional.” *Peninsula Neighborhood Association v. Washington State Dept. of Transportation*, 142 Wn.2d 328 335, 12 P.3d 134 (2000). In rendering a determination, the judiciary will

provide deference to the legislature who is presumed to have considered the constitutionality of its enactment. *Id.* Ultimately, the party challenging the constitutionality of a statute must “by argument and research, convince that court that there is no reasonable doubt that the statute violates the constitution.” *Id.* As stated by the United States Supreme Court:

Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

Nebbia v. People of New York 291 U.S. 502, 537-538 (1934).

Ms. Waples fails to meet this burden and, accordingly, her contentions should not be sustained.

1. RCW 7.70.100 is rationally related to a legitimate state interest and is in accordance with the constitutional guarantees of equal protection.

Ms. Waples contends the notice requirement of RCW 7.70.100 violates the guarantees of equal protection by treating medical practitioners differently than other classes of tortfeasors.⁵ This argument is without force, where the Legislature enunciated a rational basis for

⁵ Ms. Waples briefing fails to cite legal authority specific to this legal challenge, and accordingly, the Court should not consider the argument. RAP 10.3(a)(5); *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005).

differentiating medical malpractice cases from other types of personal injury actions.

The Washington Constitution guarantees the equal protection of the laws to all citizens of Washington and specifically states:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

WA. Const. Art. 1, § 12. As stated by the Washington Supreme Court:

The right to equal protection guarantees that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. In order to determine whether the equal protection clause has been violated, one of three tests is employed. First, strict scrutiny is applied when a classification affects a fundamental right or a suspect class. Second, intermediate scrutiny is applied when a classification affects both a liberty right and a semi-suspect class not accountable for its status. The third test is rational basis. Under this inquiry, the legislative classification is upheld unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives.

Habitat Watch v. Skagit County, 155 Wn.2d 397, 414, 120 P.3d 56 (2005).

At issue here, is a statute requiring notice to health care practitioners prior to the filing of a civil malpractice lawsuit. RCW

7.70.100. The notice requirement is uniformly applicable to all classes of health care providers and all types of malpractice cases. RCW 7.70.010.

The legislature enacted the pre-filing notice statute in response to two competing initiatives, I-330 and I-336, both of which addressed the rising costs of medical care in Washington. 2006 Wash. Legis. Serv. Ch. 8 (S.S.H.B. 2292). The Legislature set forth the following findings:

- Access to safe, affordable health care is one of the most important issues facing the citizens of Washington state.
- The rising cost of medical malpractice insurance has caused some physicians....to be unavailable when and where the citizens need them most.

S.S.H.B. 2292 thus specifically enunciated the legislative intent to, in pertinent part, address the rising cost of malpractice insurance and, in relevant part, “provide incentives to settle cases before resorting to court”.

Id.

The standard of review in a case that does not employ suspect classification or fundamental right is rational basis, also called minimal scrutiny. *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004). Here, the right to pursue suit against a health care provider is neither a fundamental right nor are private plaintiffs a special class

triggering either a strict scrutiny or an intermediate scrutiny analysis of the statute. *See, Amunrud v. Board of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006)(economic regulation subject to rational basis review); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir., 1985)(right to recovery of tort damages in excess of statutorily mandated cap is not a fundamental right nor are medical malpractice plaintiffs with damages in excess of statutorily mandated cap a suspect class); *Miller v. United States*, 73 F.3d 878, 881 (9th Cir., 1995)(“Constitution does not create a fundamental right to pursue specific tort actions.”); *Cummings v. X-ray Associates of New Mexico*, 121 N.M. 821, 829, 918 P.2d 1321 (N.M., 1996)(“The class of patients suffering from latent injuries inflicted by qualified health care providers is not of the same constitutional order as classifications based upon race, national origin, religion or status as a resident alien.”) Moreover, a majority of state and federal courts considering equal protection challenges to malpractice reform statutes apply the rational basis test. *Houk v. Furman*, 613 F.Supp. 1022, 1028 (Maine, 1985)(citations omitted).

Under a minimum scrutiny analysis, the court will uphold a statute as constitutional if:

- (1) all members of the class created within the statute are treated alike;

- (2) reasonable grounds exist to justify the exclusion of parties who are not within the class; and
- (3) the classification created by the statute bears a rational relationship to a legitimate purpose of the statute.

1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp., 144 Wn.2d 570, 577, 29 P.3d 1249 (2001). In short, the “challenged law must be rationally related to a legitimate state interest.” *Amunrud*, 158 Wn.2d 208 at 222. The *Amunrud* court held:

In determining whether a rational relationship exists, a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and the legitimate state interest.

Id. citing Heller v. Doe, 509 U.S. 312, 320 (1993).

The Legislative intent to limit medical malpractice actions bears a rational relationship to differentiating between health care practitioners and other types of private tortfeasors. *Duffy v. King Chiropractic Clinic*, 17 Wn.App. 693, 696, 565 P.2d 435 (1977)(construing RCW 4.16.350, medical malpractice statute of limitations).

Ms. Waples relies heavily on *Hunter v. North Mason High School*, 85 Wn.2d 810, 539 P.2d 845 (1975) to support her equal protection challenge to the pre-filing notice requirement of RCW 7.70.100. *Hunter* construed a non-claim statute, not a “notice” requirement and, for that

reason alone, is distinguishable from the current case. *Hunter*, 85 Wn.2d 810 at 811. The statute at issue in *Hunter* essentially rendered causes of action against municipalities void unless a claim was made within 120 days of the occurrence of the claimed injury. *Id.* The *Hunter* court reasoned that the non-claim statute was not rationally related to a legitimate state interest where there was no showing that the notice requirement corresponded to any “special need” of municipalities. *Id.*

RCW 7.70.100 is distinguishable from *Hunter supra* where it is not a non-claim statute, but instead, contains a pre-filing notice requirement to facilitate the settlement of medical malpractice claims. S.S.H.B. 2292. The pre-filing notice requirement serves the rational government interests of: (1) minimizing claims to malpractice carriers, thus limiting increases in insurance rates; and (2) promoting settlement of malpractice claims. *Id.*

Courts in other jurisdictions have considered, and rejected, equal protection constitutional challenges to pre-filing notice requirements in medical malpractice actions analogous to the pre-filing notice at issue here. *Lynn v. Miller*, 498 So.2d 1011 (Fla., 1986); *Houk v. Furman*, 613 F.Supp. 1022 (Maine, 1985).

In *Houk supra* the court determined pre-litigation notice was enacted for a “legitimate purpose” as the notice was designed to promote

settlement and to minimize the incidence of claims to malpractice carriers. *Houk*, 613 F.Supp. 1022 at 1030. Akin to *Houk*, the notice requirement, as per RCW 7.70.100, is based in the Legislative intent to promote settlement and minimize malpractice claims. S.S.H.B. 2292.

Next, *Houk* reasoned that the differentiation between medical malpractice plaintiffs and other personal injury plaintiffs through the added requirement of pre-litigation notice was reasonably tailored to achieve the intended purpose of promotion of settlements. *Id.* at 1031. The mere availability of other, non-statutory, solutions to pursuit of claims did not negate the importance of the pre-litigation notice requirement as a tool to encourage pre-litigation settlement of claims and, moreover, did not undermine the Legislature's rational basis supporting the enactment of the pre-litigation notice requirement. *Id.* at 1032-1033.

Here, the Legislature has identified a rational basis for the pre-litigation notice requirement and Ms. Waples has failed to submit any evidence establishing the identified basis is not rational. Accordingly, Ms. Waples' fails to show, beyond a reasonable doubt, that the pre-litigation notice requirement is unconstitutional.

2. RCW 7.70.150 is rationally related to a legitimate state interest and is in accordance with the constitutional guarantees of equal protection.

RCW 7.70.150 codifies the long-standing requirement that plaintiffs support their claims for medical negligence with qualified expert testimony. Specifically, RCW 7.70.150 provides, in pertinent part:

In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. If the action is commenced within forty-five days prior to the expiration of the applicable statute of limitations, the plaintiff must file the certificate of merit no later than forty-five days after commencing the action.

The Legislature enacted the certification of merit requirement in the same vein as the pre-litigation notice requirement, for the purpose of limiting frivolous malpractice claims. S.S.H.B. 2292. Notably, in accordance with the policy of limiting frivolous lawsuits, the Legislature also enacted RCW 7.70.160, which expressly permits recovery of reasonable costs incurred resulting from the filing of a frivolous claim. *See e.g., Buchanan v. Simplot Feeders, Ltd. Partnership*, 134 Wn.2d 673, 682, 952 P.2d 610

(1998)(when determining Legislative intent the Court must look to the whole statute).

It has long been established that a suit based on medical negligence must be dismissed in the absence of expert testimony to the effect that the defendant's actions fell below the standard of care. "In an action for medical negligence, a doctor is entitled to summary judgment once he establishes that plaintiff lacks competent expert testimony." *Morinaga v. Vue*, 85 Wn. App. 822, 832, 935 P.2d 637, 642, (1997). See RCW 7.70.040 (establishing the necessary elements of proof, to include evidence that the health care provider failed to follow the applicable standard of care and that such failure caused the injury alleged).

Ms. Waples' reliance upon *Hunter supra* is misplaced. As discussed above, *Hunter* addressed a "non-claim" statute. The "non-claim" statute at issue in *Hunter* bore no rational relationship to any government interest and, as such, failed the rational basis test. *Hunter*, 85 Wn.2d 810 at 813. In stark contrast, the certification of merit requirement merely codifies existing law and serves the rational government interest of limiting frivolous malpractice actions.

Equal protection challenges to "certification of merit" requirements have been considered and rejected by courts in other jurisdictions. *Sisario*

v. Amsterdam Memorial Hospital, 159 A.D. 843, 844 (N.Y., 1990)(“Clearly, the requirement of a certificate of merit is rationally related to the goal of reducing malpractice insurance premiums by attempting to decrease the number of frivolous malpractice suits.”); *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d 503, 513 (Mo., 1991)(“It is enough to satisfy equal protection that the legislature could have reasonably decided that the early disposition of frivolous medical malpractice suits, those that ultimately must be dismissed for want of expert testimony, would ameliorate the cost and availability of health care services.”)

Here, the Legislature has identified a rational basis for the pre-litigation notice requirement and Ms. Waples has failed to submit any evidence establishing the identified basis is not rational. Accordingly, Ms. Waples’ fails to show, beyond a reasonable doubt, that the pre-litigation notice requirement is unconstitutional.

3. RCW 7.70.150 does not violate the separation of powers doctrine.

The certification of merit requirement serves to inform the judiciary of facts necessary to adjudication of the claim; it does not, contrary to Ms. Waples’ contention, encroach upon the authority of the judiciary. *See, McAlister v. Schick*, 147 Ill.2d 84, 97, 588 N.E.2d 1151

(1992)(construing Illinois' merit certification requirement); *see also*, *Washoe v. Second Judicial District Court of the State of Nevada*, 148 P.3d 790, 795 (Nev., 2006)(construing Nevada's certification of merit requirement)

The separation of powers doctrine exists to ensure only that one branch of government does not "invade" the province of another. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Critically, the "branches are not hermetically sealed and some overlap must exist." *Id.* In considering whether a statute "invades" the province of the judiciary, the Court will consider whether the statute is procedural, the province of the judiciary, or substantive, the province of the legislature. *Id.* The *Fircrest* Court defined the concepts thusly:

Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Id.

In *McAlister supra*, the Illinois Supreme Court considered, and rejected, a separation of powers challenge to the Illinois "certificate of merit" requirement. *McAlister*, 147 Ill.2d 84 at 97-98. The Court

reasoned that the statute simply requires that a health care professional, based on his background and experience, certify that the plaintiff's complaint is meritorious. *Id.* The court went on to state:

Thus, the health professional certifies the underlying claim rather than the cause of action. It is the court's responsibility, then, to judge the legal sufficiency of the complaint. Consequently, we find that the health care professional does not exercise judicial power.

Id. at 97 (emphasis added).

Here, the "merit" requirement codifies existing substantive law and leaves to the Court to authority to adjudicate the facts presented under existing law. Accordingly, Ms. Waples fails to show, beyond a reasonable doubt, that the "merit" requirement is unconstitutional.

4. RCW 7.70.150 does not violate the right to trial by jury.

The right to a trial by jury is not violated by removing from the jury "facts which are not relevant under applicable law." *Edgar v. City of Tacoma*, 129 Wn.2d 621, 631, 919 P.2d 1236 (1996) construing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989). The certification of merit requirement merely codifies existing substantive law governing medical negligence claims and, as such, does not infringe upon the role of the jury. *See, Mahoney*, 807 S.W.2d 503 at 508.

In *Sofie*, the court set forth the parameters of legislative authority:

It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration when determining liability. This is fundamentally different from directing predetermining the limits of a jury's fact-finding powers in relevant issues, which offends the constitution.

Sofie, 129 Wn.2d 621 at 666. There, the court held unconstitutional a statute predetermining the amount of damages a jury could find in tort cases. *Id.* Contrary to *Sofie*, the certification of merit requirement merely establishes a procedural prerequisite to maintaining suit and, moreover, precludes the jury from consideration of irrelevant matters. RCW 7.70.150; *see also*, *Edgar supra*.

Ms. Waples' reliance on *James v. Robeck*, 79 Wn.2d 864, 490 P.2d 878 (1971) is misplaced. *James* reiterated the well established rule that a jury's determination on damages will not be disturbed absent a strong showing that the verdict is based upon "passion" or "prejudice". *James*, 79 Wn.2d 864 at 869. Here, the certification of merit requirement does not remove the ultimate determination from the jury. Instead, the requirement permissibly removes the consideration of irrelevant facts from the jury. RCW 7.70.150; *see also*, *Edgar supra*.

It is well established that the dismissal of cases on summary judgment does not violate the right to trial by jury. *See e.g.*, *Babcock v.*

State, 116 Wn.2d 596, 598, 809 P.2d 143 (1991). As discussed *supra* RCW 7.70.150 codifies existing law requiring plaintiffs to submit expert testimony in support of their medical negligence claims. Prior to enactment of RCW 7.70.150, the defense would be entitled to summary dismissal of any claims submitted by a plaintiff that were unsupported by expert testimony. Ms. Waples fails to meet her burden to show, beyond a reasonable doubt, that RCW 7.70.150 violates the right to trial by jury.

V. CONCLUSION

The statutes governing medical negligence suits provide reasonable conditions precedent to bringing suit which are rationally related to the Legislature's interests of minimizing malpractice claims, limiting frivolous claims, and facilitating settlement. Ms. Waples failed to comply with the reasonable statutory requirements. Specifically, Ms. Waples failed to comply with the pre-litigation notice requirement and, in addition, failed to make a showing that the facts of her case had merit. As such, the trial court appropriately dismissed Ms. Waples' claims based upon her failure to comply with the statutory requirements.

For these and all the foregoing reasons, Dr. Yi respectfully requests
the Court affirm the trial court's dismissal.

Respectfully submitted this 29th day of August, 2007.

LAWRENCE & VERSNEL PLLC.

By: Vanessa M. Vanderbrug
John C. Versnel, III, WSBA No. 17955
Vanessa Vanderbrug, WSBA No. 31668
Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I sent by facsimile, followed by delivery or mailing of a true copy of this document as follows:

George A. Steele
P O Box 2370
Shelton, WA 98584-5061

DATED this th29 day of August, 2007 at Seattle, Washington.


Bobbi Cowley

FILED
COURT OF APPEALS DIV. #3
STATE OF WASHINGTON
2007 AUG 30 PM 3:02

FILED
COURT OF APPEALS DIV. #3
STATE OF WASHINGTON
2007 AUG 30 PM 3:02