

FILED
OCT 15 2010
COURT OF APPEALS
DIVISION III
SEASIDE, WASHINGTON
BY _____

Court of Appeals Number: 289125
(consolidated with 290441)

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

Esther Kloehn and
Jay Kloehn,
Appellants,
vs.

Dr. David Morrison and
Dr. Leandro Cabanilla,
Respondents

BRIEF OF APPELLANTS: ESTHER AND JAY KLOEHN

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I. INTRODUCTION

Washington courts have yet to determine that an RCW 7.70.110 notice creates, by the plain words of the statute, a four-year statute of limitations, or if there is an implicit requirement that the RCW 7.70.110 notice must be given prior to the running of the three-year statute of limitation period for medical negligence that obtains without an RCW 7.70.110 notice.

In this case, the RCW 7.70.100/.110 notices were given by Ms. Kloehn's prior law firm (Ochoa Law Group) to the defendants in 2007, but the prior law firm of Ms. Kloehn (Ochoa) could not locate the final drafts of those notices, creating an issue of fact about their service, which creates the other issue on appeal, to wit: whether there is a question of fact as to whether those notices were given, and whether the affidavit of service was rebutted so forcefully that there remains no question of fact as to service in 2007.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred in holding that RCW 7.70.110 notices do not create a four-year statute of limitations, as provided on the face of the statute. (This is also the issue in

the trial court's decision in the consolidated appeal (#290441).

No. 2: The trial court erred in finding no question of fact as to whether RCW 7.70.100/.110 notices had been served on the defendant physicians, given the affidavits of service and related filings which created genuine issues of material fact.

Issues Pertaining to Assignments of Error

No. 1: Does RCW 7.70.110 create a four year statute of limitations upon delivery of a good faith request to mediate the dispute, as stated by the plain words of the statute?

(Answer: Yes.) *Assignment of Error No. 1*

No. 2: Does RCW 7.70.110 embody an implicit requirement, not in any statute, that the good faith request for mediation must be given before the three year statute of limitations runs? (Answer: No.) *Assignment of Error No. 1*

No. 3: Did the Plaintiff create a question of fact as to the 2007 service of the RCW 7.70.100/.110 notices on the defendants? (Answer: Yes.) *Assignment of Error No. 2*

No. 4: Were the facts properly construed against the non-moving party when the Plaintiffs' case was dismissed by the trial court? (Answer: No.) *Assignment of Error No. 1 & No. 2*

The implications of *Waples v. Yi*, 169 Wash.2d 152, 234

P.3d 187 (2010) will be discussed at the end of the brief.

III. STATEMENT OF THE CASE

(Citations to clerk's papers are from the first case [#289135], unless otherwise noted.)

Esther Kloehn received a diagnostic laparoscopy from Dr. Morrison on 10/11/05. *Clerk's Papers: 1-2* Subsequently, Ms. Kloehn suffered two months of untreated and insufficiently treated infections, often with her surgery wound draining. *CP: 2*

A full hysterectomy and salpingo-oophorectomy (bso) was performed by Dr. Morrison on 12/5/05. *CP: 2* More infection drainage forced Ms. Kloehn back into the emergency room on 12/11/05, but despite the medical records indicating post-operative defects, on 12/13/05, Dr. Morrison removed Ms. Kloehn's staples and sent her home without any additional treatments or precautions. *CP: 2*

Ms. Kloehn was in spectacular pain and suffered abdominal bleeding, and again went to the emergency room on 12/23/05, and a bowel obstruction from the prior surgery was finally detected on 1/13/06. *CP: 2-3* After the next surgery of 1/27/06, with Dr. Cabanilla assisting, Ms. Kloehn suffered paralysis of her small intestine, and more infection, and pain

increased even more. *CP: 3* A new CT scan showed fluid gathering in her abdomen, and both defendants undertook exploratory surgery on 2/1/06, and located perforations in Ms. Kloehn's small intestine. *CP:3* The defendants then removed Ms. Kloehn's ileocecal valve (the sphincter that holds food in the small intestine while it digests) and part of the cecum (where water from food is reabsorbed at the beginning of the colon, creating solid waste to excrete, and which prevents dehydration). *CP: 3* This left Ms. Kloehn with uncontrollable diarrhea of undigested food, which requires constant ingestion of vitamin supplements and places her under constant threat of dehydration – everything she eats or drinks quickly runs into her colon for uncontrollable expulsion. *CP: 3*

Ms. Kloehn found representation by the Ochoa Law Group in 2007, and current counsel, Mr. Mason, was employed by Ochoa at that time. *CP: 8, 9 & 13* Mr. Mason and his paralegal sent RCW 7.70.100/.110 notices to Dr. Morrison and Dr. Cabanilla in 2007. *Id.* Mr. Mason left Ochoa Law group in the fall of 2007, and the firm subsequently became defunct. Ms. Kloehn located Mr. Mason in Spokane, approximately in early 2009, having been discharged by Ms. Ochoa apparently in the

late fall of 2008. Mr. Mason filed suit on behalf of Ms. Kloehn, and her husband, Jay Kloehn, on 10/14/09.

Upon notice from opposing counsel that they were filing summary judgment due to a lack of RCW 7.70.100/.110 notices, Mr. Mason, with difficulty, eventually contacted Ms. Ochoa in her new firm and received a response from her partner, Brian Anderson, that all he could locate were the nearly final drafts of the RCW 7.70.100/.110 notices sent in 2007. *CP: 29-36.*

Mr. Mason clearly recalled the notices being sent, and recalled that the defendants had refused to produce medical records (the defendants records were received indirectly via the hospital records), and that the defendants had otherwise stonewalled pursuit of the claim and/or mediation in 2007. *CP 37-38 & 13.* Having not known of the lacunae in Ms. Ochoa's records, and having been unable to contact Ms. Ochoa, Mr. Mason did not know that there was a problem additionally verifying the service of RCW 7.70.100/.110 notices until the defendants filed their summary judgment motion, at which time the notices were again served on the defendants. *CP 16-23.*

The service requirements of RCW 7.70.100 were meticulously followed, and Ms. Kloehn's suit was re-filed on

3/4/10, more than 90 days, but fewer than 95 days, after the 12/1/09 service of the RCW 7.70.100/.110 notice on Dr. Cabanilla and the 12/2/09 service on Dr. Morrison. *CP 16-23 & 69-70.*

That matter, filed on 3/4/10, is also consolidated in this appeal (#290441), as Ms. Kloehn's suit was dismissed by the trial court solely on the issue of whether RCW 7.70.110 provides a four year statute of limitations on its face, or whether there is an implicit requirement that the RCW 7.70.110 notice be served before the three year statute of limitation, that exists without an RCW 7.70.110 notice, runs. *CP 75-81 & 84-85.*

IV. Summary of Argument

The argument is that: (a) RCW 7.70.110 means what it says, and a good faith request for mediation creates a four-year statute of limitations by the plain language of the statute, and (b) that a genuine issue of material fact exists as to whether the defendants have rebutted the affidavit of service of the RCW 7.70.100/.110 notices upon them in 2007.

V. ARGUMENT

A. Standard of Review

1. De Novo Standard of Review

On appeal, the appellate court stands in the same position

as the trial court, and determines for itself whether there are genuine issues of material fact. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

2. Dismissal on Summary Judgment Improper If There are Genuine Issues of Material Fact

If there are genuine issues of material fact, then the case should be allowed to proceed, and dismissal on summary judgment is erroneous. "If reasonable minds can reach different conclusions, summary judgment is improper." *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104 (1998) (citing *Kalmas v. Wagner*, 133 Wn.2d 210, 215, 943 P.2d 1369 (1997)).

The court should have construed the facts in favor of Ms. Kloehn, and against the defendants. "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party...." *Ranger Insurance v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (emphasis added) (upholding reversal of summary judgment).

"A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation," *Id.*, citing, *Wilson v. Steinbach*, 98 Wn.2d 434, 437,

656 P.2d 1030 (1982); *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980), *cited in Bort v. Parker*, 110 Wn. App. 561, 569, 42 P.3d 980 (2002).

B. Plain Meaning of RCW 7.70.110: The Language of the Statute: “Plain Words Do Not Require Construction”

Both parties agreed that the basic statute of limitations was three years under RCW 4.16.350, and the issue was one of interpreting RCW 7.70.110, which reads (emphasis added):

The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

The language is clear and plain. Namely: Filing the RCW 7.70.110 notice creates a four year statute of limitations.

Bennett v. Seattle Mental Health supports this plain language view of RCW 7.70.110 (emphasis added):

The interpretation and meaning of a statute is a question of law subject to de novo review. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wash.2d 221, 224, 86 P.3d 1166 (2004). The primary objective of statutory interpretation is to discern and implement legislative intent. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). To determine legislative intent, we first look to the *460 language of the statute. We must give meaning to every word in a statute and presume the legislature did not use any superfluous words. *In re Recall of Pearsall-Stipek*, 141

Wash.2d 756, 767, 10 P.3d 1034 (2000). Absent ambiguity, a statute's meaning is derived from the language of the statute and we must give effect to that plain meaning as an expression of legislative intent. *Campbell & Gwinn*, 146 Wash.2d at 9-10, 43 P.3d 4. “me [sic] that the legislature means exactly what it says. Plain words do not require construction.” *City of Kent v. Jenkins*, 99 Wash.App. 287, 290, 992 P.2d 1045 (2000).

Bennett v. Seattle Mental Health, 150 Wn.App. 455, 459-60, 208 P.3d 578 (2009) (construing RCW 7.70.100 to require filing of suit after the 90 days notice have passed, and filing on the 90th day was outside the plain language of the statute). *See also*, "In interpreting a statute, this court looks first to its plain language. If the plain language of the statute is unambiguous, then this court's inquiry is at an end. The statute is to be enforced in accordance with its plain meaning." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citations omitted).

The clear language of RCW 7.70.110 means that a four year statute of limitations is created by filing an RCW 7.70.110 notice of a good faith request to mediate, at any point prior to the four years running. The grant of summary judgment should be reversed, and the Defendants' motions should be dismissed.

C. Burden Upon the Defendant is “Clear and Convincing” to Challenge an Affidavit of Service: The *Miebach* Standard Applies, and Was Not Met

A plaintiff may assert proper service by producing an affidavit of service that, on its face at least, shows that service was properly carried out. *State ex rel. Coughlin v. Jenkins*, 102 Wash.App. 60, 65, 7 P.3d 818 (2000). An affidavit of service that is regular in form is presumptively correct. *Lee v. W. Processing Co.*, 35 Wash.App. 466, 469, 667 P.2d 638 (1983). The burden is then on the person attacking service to show by clear and convincing evidence that service was improper. *Miebach v. Colasurdo*, 35 Wn. Add. 803, 808, 35 Wash.App. 803, 670 P.2d 276 (1983), *reversed in part on other grounds*, 102 Wash.2d 170, 685 P.2d 1074(1984).

RCW 7.70.100 reads, in relevant part:

Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail.

Lori Mason had filed an affidavit of service of the RCW 7.70.100/.110 notices in 2007. *CP: 8-9* The defendants did not show by clear and convincing evidence that the service was improper. (*See also Declaration of Counsel at CP 13.*)

The same burden that applied in *Miebach*, supra, should have applied in this case, as well. Without a finding by clear and convincing evidence that the service did not occur, summary judgment was improper. See, e.g., *Woodruff v. Spence*, 76 Wash.App. 207, 210, 883 P.2d 936 (1994) (“The affidavits in this case present an issue of fact which can only be resolved by determining the credibility of the witnesses. The matter must be remanded for an evidentiary hearing to resolve this fact issue.”). See also 14 KARL TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 4.40, at 108 (1st ed.2003).

Questions of fact remain on the issue of service of the RCW 7.70.100/.110 notices. Proper findings were not made, and could not have been made, as the defendants lacked substantial evidence to rebut the presumption, and such a factual conflict is for the jury, and is not for dismissal on summary judgment.

Summary judgment based upon the lack of service should be reversed, and the case remanded for trial.

D. Implications of *Waples v. Yi*, 169 Wash.2d 152, 234 P.3d 187 (2010) for this Consolidated Appeal

In the *Waples* decision, delivered 7/1/10, the Washington State Supreme Court struck down the 90 day notice requirement

of RCW 7.70.100. *Waples v. Yi*, 169 Wash.2d 152, 234 P.3d 187 (2010). Ms. Kloehn has exercised her due diligence, relied upon the statutes' plain language, and should be entitled to equitable tolling. *Mellish v. Frog Mountain Pet Care*, 154 Wn.App. 395, 225 P.3d 439 (2010), and cases cited therein. Additionally, the Washington State Supreme has shown that the access of plaintiffs to the courts is an important due process value, for example in striking down the "certificate of merit" requirement of RCW 7.70.150 in *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009).

As long as this court upholds the plain language of RCW 7.70.110, and grants Ms. Kloehn her four-year statute of limitations, then Ms. Kloehn would ask to be allowed to proceed on her first-filed claim (filed 10/14/09), since if she must rely upon her second-filed claim (filed 3/4/10), her October, 2005, surgery will be omitted from the claim, and the defendants might receive an unfair advantage in suddenly deciding to blame all of the perforations of her intestines upon the first surgery, outside of the statute of limitations of her suit filed on 3/4/10, based upon RCW 7.70.100 notices filed in early December, 2009, which, in reliance upon the 90 notice provision

for these purposes, do capture the December, 2005, through February, 2006, surgeries and medical treatments.

VI. CONCLUSION

Given that the court must construe facts against the defendants, as the moving party in a summary judgment, and given the presumption in favor of the plaintiff's affidavit of service, genuine issues of material fact remain as to the service of the 2007 RCW 7.70.100/.110 notices.

Those notices were given, then the law suit should proceed as filed on 10/14/10.

Given the plain statutory language of RCW 7.70.110, and given that statute of limitation defenses are not favored, the "plain words" of the statute should govern, and either suit should proceed on the basis of the four year statute of limitations. Ms. Kloehn's reliance upon the plain language of RCW 7.70.100/.110 was reasonable and well-placed.

The defendant's CR 56(c) motions should be dismissed.

Respectfully submitted,


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VII. APPENDIX

RCW 7.70.110

Mandatory mediation of health care claims — Tolling statute of limitations.

The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

RCW 7.70.100

Mandatory mediation of health care claims — Procedures.

(1) 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. The notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW 7.70.020(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW 4.96.020(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) 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 except as provided in subsection (6) of this section.

(4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The implementation contemplates the adoption of rules by the supreme court which will require mandatory mediation without exception unless subsection (6) of this section applies. The rules on mandatory mediation shall address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

(b) Appropriate limits on the amount or manner of compensation of mediators;

(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

(e) The number of days following the selection of a mediator within which a mediation conference must be held;

(f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and

(g) Any other matters deemed necessary by the court.

(5) Mediators shall not impose discovery schedules upon the parties.

(6) The mandatory mediation requirement of subsection (4) of this section does not apply to an action subject to mandatory arbitration under chapter 7.06 RCW or to an action in which the parties have agreed, subsequent to the arising of the claim, to submit the claim to arbitration under chapter 7.04A or 7.70A RCW.

(7) The implementation also contemplates the adoption of a rule by the supreme court for procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

[2007 c 119 § 1; 2006 c 8 § 314; 1993 c 492 § 419.]

RCW 4.16.350

Action for injuries resulting from health care or related services — Physicians, dentists, nurses, etc. — Hospitals, clinics, nursing homes, etc.

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

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 representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

[2006 c 8 § 302. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.]