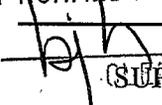


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NO. 82142-9

  
SUPREME COURT OF THE STATE OF WASHINGTON

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NANCY NGYUEN WAPLES,

Appellant,

v.

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

Respondents.

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**BRIEF OF AMICUS CURIAE  
WASHINGTON DEFENSE TRIAL LAWYERS**

---

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Defense Trial Lawyers (“WDTL”) is a nonprofit organization of attorneys who devote a substantial portion of their practice to representing defendants, companies, or entities in civil litigation. WDTL appears in this and other courts as *amicus curiae* on a *pro bono* basis to advance the interests of its members and their clients and to pursue its mission of fostering balance in the civil justice system.

## II. STATEMENT OF THE CASE

In 2006, Nancy Waples filed a dental practice lawsuit against Peter Yi, DDS, claiming that an injection had been negligently provided to her in 2003. *Waples v. Yi*, 146 Wn. App. 54, 57, 189 P.3d 813 (2008). Ms. Waples concedes that she failed to file the notice of intent to file suit that is required by RCW 7.70.100. *Id.*

In his answer, Dr. Yi denied any negligence and pleaded the affirmative defense of failure to file the notice of intent. *Id.* He subsequently was granted summary judgment on that basis. *Id.*

On appeal, Ms. Waples asserted several new arguments, including claims of unconstitutionality. *Id.*; *Respondent’s Ct. of Appeals Br. at 3*. These were arguments the trial court neither considered, nor ruled upon.

*Id.*<sup>1</sup> The Court of Appeals affirmed the trial court, based upon Plaintiff's failure to comply with RCW 7.70.100's mandatory notice of intent. *Id.* In doing so, it analyzed the notice of intent requirement, and found it constitutional. The Court of Appeals was correct. WDTL believes the Supreme Court should affirm the Court of Appeals.

### III. ARGUMENT

#### A. RCW 7.70 Exists Because of the Fundamental Need for Quality, Affordable, and Available Health Care in Washington, and Washington's Ongoing Health Care Crisis.

In 1975, it was widely understood that the entire nation's health care delivery system was under serious threat due to a medical malpractice insurance crisis. *DeYoung v. Providence Medical Ctr.*, 136 Wn.2d 136, 148, 960 P.2d 919 (1998). Washington was not exempt from the crisis. In preparing to confront Washington's difficulties as best it could at the time, the Legislature took evidence from many sources. *Id.*

The information received included advice that, in recent years, medical malpractice loss payments for at least one insurer had skyrocketed, and medical malpractice insurance premiums for specified

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<sup>1</sup> Plaintiff's constitutional arguments also address RCW 7.70.150's certificate of merit requirement. However, not only did the trial court not have an opportunity to consider these arguments, the trial court did not even reach the certificate of merit. The dismissal was based upon the failure to comply with the notice of intent requirement. *Waples*, 146 Wn. App. at 61. The Court of Appeals did not address the certificate of merit arguments either; and it is presumed that these arguments will not be addressed here. However, should that presumption be error, WDTL would be pleased and honored to participate as *amicus curiae* on those issues as well should the Court be so inclined.

classes of physicians had doubled and tripled. *Id.* Based upon this and other evidence before the Legislature at the time, this Court has acknowledged that it was rational to surmise that a medical malpractice insurance crisis either was upon Washington or was likely. *Id.*

In response to the urgent situation, the Legislature adopted the laws that became RCW 7.70. *Sherman v. Kissinger*, 146 Wn. App. 855, 866, 195 P.3d 539 (2008) (citing 1975-1976 Final Legislative Report, 44<sup>th</sup> Wash. Leg., 2d Ex. Sess., at 22). The primary goal of RCW 7.70 was to stem the crisis and the corresponding increase in consumer health care costs. *Id.*

Unfortunately, the crisis was not stemmed. For example, in 2001, because of heavy medical malpractice losses and concerns about the future of these claims, the St. Paul Companies announced that they would leave the medical malpractice insurance business. Milt Freudenheim, *St. Paul Cos. Exit Medical Malpractice Insurance*, N.Y. Times, December 13, 2001. This ended coverage for 750 hospitals, 42,000 physicians, and 73,000 other health care workers nationwide, including a fair number in Washington. *Id.* In 2003, the Office of the Insurance Commissioner placed an insolvent Washington Casualty Co. into receivership, at a time when it reportedly insured 46 Washington hospitals, 20 Washington community health clinics, and other Washington entities and physicians.

See Thurston County Superior Court Cause No. 03-2-00401-1. These are only two of many examples of the continuing crisis.

In the Fall of 2005, competing Initiatives 336 and 330 were introduced by those interested in the important issues related to the delivery of health care. That Fall, the initiatives were at the forefront of the news, and on the minds of every engaged voter. The battle over the initiatives was lengthy. It was expensive. And it was ugly. In the end, Washington's voters rejected both initiatives.

**B. In 2006, the Legislature, With Thoughtful Input and Assistance of Governor Gregoire, WSTLA, the WSBA, Physicians' Groups and Others, Adopted Comprehensive Amendments to RCW 7.70, Including RCW 7.70.100's Notice of Intent Requirement.**

The furor associated with Initiatives 336 and 330 passed with the November 2005 general election, but Washington was left with the *status quo* for its health care system. Reform was needed; the *status quo* was not acceptable. The Legislature stepped in, and worked on making important changes to health care through House Bill 2292. The bill's prime sponsor, Representative Pat Lanz explained in a February 20, 2006 hearing before the Senate Committee on Health and Long Term Care (the "Senate Committee"):

We laid a very good foundation when we started this process four years ago in the House, and then last year actually had the bill that kept that foundation of the three

legged stool. We knew it was important to have all three parts [patient safety, civil liability reform, and insurance reform] of this bill balanced.

\* \* \*

After the initiative election this fall, it was so very clear that what the people were saying was that there are some issues that are just *way* too complex for us to deal with at the ballot box. And we elected you to take on these hard issues.

\* \* \*

So that is why, that first week of session, if you will recall, we made some minor corrections in the bill that we had brought back from Rules, and sent it off the floor. We were hoping that what happened, would happen, that it took a detour to the Governor's office. And in there, with the very capable hands of the Governor, we had all of those competing interests come together around the table and deal with, I guess we could say the rough edges of the foundation and the walls of the structure. Or, I have a stool, of the legs of the stool that we had constructed.<sup>2</sup>

In also speaking before the Senate Committee that day, Governor Gregoire thanked those who had assisted with the negotiations Representative Lanz referenced; they included: three members of the Washington State Trial Lawyers Association, two members of the Washington State Hospital Association, three members of the Washington State Medical Association, general counsel for Physicians Insurance, two

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<sup>2</sup> The audio of this hearing can be found at <http://www.tvw.org/search/siteSearch.cfm?EvtType=C&keywords=Senate%20Health%20&date=2006&bhcp=1>. An unofficial transcription of key portions of the hearing is also included in the appendix to this brief; Senate Committee Hearing transcription at 3.

members of the Washington State Bar Association, members of the Governor's office, and those from the Department of Health and the Office of the Insurance Commissioner. Governor Gregoire continued:

They came to the table with much trepidation, as you might well imagine, but the negotiations were always very professional and always in good faith. And I will tell you what I think you will hear later, that what you have now is a bill that is better. It is complete. It is not everything that anyone at the table wanted.

\* \* \*

So I think the fact that these people were able to come to the table, and negotiate with the paramount responsibility in mind that they had to be true to their patients and to the public at large is an example of why we were able to reach agreement today. I come on their behalf. We stand arm in arm. We are united in support of the striker to 2292.<sup>3</sup>

The Washington State Association for Justice (then named the Washington State Trial Lawyers Association) added:

John Budlong on behalf of the Washington State Trial Lawyers.<sup>4</sup> We also would *encourage* this body to enact bill 2292 as written with the striker amendments. We also would like to thank our colleagues in the health care professions who have spent five sessions of three hours each discussing all aspects of 2292, particularly the liability provisions in *great* detail. These were candid, open, I think

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<sup>3</sup> Senate Committee Hearing transcription at 1-2. The "striker" Governor Gregoire referenced was the final "striker amendment" to (by then) 2SHB 2292. Among other revisions to the bill, this amendment added the notice of intent provision that is at issue in this case. See Senate Bill Report 2SHB 2292 at 7 (under heading "Amended Bill Compared to Second Substitute Bill"), a copy of which is included in the appendix to this brief.

<sup>4</sup> Mr. Budlong was then a member of its Board of Governors, and is now a past President.

very friendly discussions, and I think the voters perhaps would want to know that after this last campaign. I think that we made a lot of progress in here in enacting *comprehensive* reform in patient safety, insurance reform, civil justice reform issues. We also would like to thank Representative Pat Lanz who has put this bill out as the vehicle, for the last, I believe it started four years ago, and finally, of course, for Governor Gregoire, I fully agree with Dr. Dunbar. I think without her gift for bringing opposing parties together that we would not be here today unanimously in favor of this bill as written. Thank you.

Senate Committee Hearing transcription at 5.

S. Brooke Taylor explained:

I have practiced law in Port Angeles, Washington for 37 years, and I have to tell you I never thought I'd see this day. I am here today in my capacity as President of the Washington State Bar Association.

\* \* \*

After the bitter initiative campaigns, I was searching for answers. And it seemed to me that the voters were telling all of us, among other things, that they wanted significant balanced reforms in how we resolved these disputes.

\* \* \*

Then Governor Gregoire, with her superb leadership, made it all happen. Doctors and lawyers sitting at the same table face to face, discussing these issues, which have for decades divided our professions, which have so much in common in every other respect.

I can tell you that the Washington State Bar Association endorses this bill as it is currently written, and we would urge this body to enact it. I can also tell you that Dr. Dunbar as president of his association and I as president of mine, have agreed to continue this dialogue, this

engagement into the future, recognizing that there is still work to be done and this is *only* a start. But it is a *very, very* good start. Thank you.

*Id.* at 6-7. As others at the hearing and the speakers quoted above made clear, the notice of intent provision at issue in this case came about as part of a truly historic and progressive compromise. It was a part of reform that was wanted and needed by Washington's citizens, by Washington's government, by Washington's physicians and patients, and by Washington's lawyers.

This understanding of the thorough, thoughtful, and collaborative discussion and intent that led to the 2006 reforms of RCW 7.70 is imperative as this Court considers this case, because the provisions and their adoption must be considered in context. However, they remain at their core, the Legislature's provisions, and therefore perhaps most important to understanding their rationale and placing the notice provisions in context are the Legislature's official findings adopted in connection with the 2006 reforms to RCW 7.70:

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage

patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

Laws of 2006, ch. 8, § 1 (*cited in Waples*, 146 Wn. App. at 61 n. 3).

It is also the legislature's intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work.

Laws of 2006, ch. 8, § 1.

In other words, RCW's 7.70.100 notice of intent provision was part of the comprehensive, compromise package of laws that served the broad goals of the Legislature and the people of Washington as outlined above. And as part and parcel of that, it also served the more specific purpose of promoting quick and early settlement, which conserves resources for all involved (the parties, insurers, and the courts). *Bennett v. Seattle Mental Health*, 150 Wn. App. 455, 462, 208 P.3d 578 (2009) ("Reading the plain language of RCW 7.70.100(1) as a whole, it is clear that the legislative intent is to require a mandatory 90 day waiting period to allow the parties the opportunity resolve medical malpractice claims against the health care provider."); *Breuer v. Presta*, 148 Wn. App. 470, 477, 200 P.3d 724 (2009) (purpose of notice of intent is to help achieve the Legislature's policy goal of settling cases pre-filing); *Waples*, 146 Wn.

App. at 61 (same); *see also Medina v. Pub. Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 53 P. 3d 993 (2002) (it is generally accepted that a purpose of the governmental claim-filing provisions of RCW 4.96.020 is to allow government entities time to investigate, evaluate, and settle claims).<sup>5</sup> These are rational -- and even substantial -- state interests if ever there were any, particularly given the historical context and the important services provided by health care workers.

**C. The Law Neither Mandates Nor Permits Unraveling of the Historic Progress Made in 2006.**

**1. Ms. Waples' claims must be analyzed under the Fourteenth Amendment to the United States Constitution.**

Ms. Waples argues that if RCW 7.70.100's notice provisions are mandatory (and they are)<sup>6</sup>, they represent a violation of equal protection guarantees. She does not specify under which constitutional provision she

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<sup>5</sup> For many years, RCW 4.96.020 pre-suit notice requirements applied to public hospitals to facilitate settlement. *See id.; Hardesty v. Stenchever*, 83 Wn. App. 253, 257, 917 P.2d 577 (1997) (RCW 4.96.020 applies to public hospital districts). However, the Legislature recently amended RCW 4.96.020 to make clear that RCW 7.70's notice (and other) provisions exclusively govern claims against the public hospitals now.

<sup>6</sup> Where statutory language is clear, its meaning is derived from the language of the statute alone. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). RCW 7.70.100 provides in pertinent part, "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."

"May" is a permissive term. *See, e.g., Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999). This statute's plain language discusses when there is (and is not) permission to proceed. By the statute's plain language, there is no permission to proceed with (i.e., to commence) a lawsuit unless the 90 day notice has been given. Reading the entire sentence in a reasonable manner designed to avoid an absurd or strained result, it is clear that the notice of intent is mandatory. *See Bennett*, 150 Wn. App. at 462.

makes this argument. The candidates are the United States Constitution's Fourteenth Amendment and the Washington Constitution's Article I, § 12 privileges and immunities clause. *Waples* 146 Wn. App. at 59.

If Ms. Waples intended to establish that Article I, § 12 provides broader protections than the Fourteenth Amendment, she was required to so prove by offering a *Gunwall* analysis showing that separate analysis of the Washington Constitution was warranted, and that greater protections flow from the Washington Constitution than from the federal. *E.g.*, *Madison v. State*, 161 Wn.2d 85, 93, 163 P.3d 757 (2007); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Ms. Waples did neither. As such, the equal protection claim must be analyzed as a Fourteenth Amendment claim. *Forbes v. City of Seattle*, 113 Wn.2d 929, 934, 785 P.2d 431 (1990) (plaintiff failed to provide a *Gunwall* analysis, therefore no separate analysis of the Washington Constitution undertaken).<sup>7</sup>

**2. Rational basis scrutiny applies to Ms. Waples' claim.**

In analyzing a Fourteenth Amendment equal protection challenge, the Court must first determine the level of scrutiny to be applied. *Forbes*, 113 Wn.2d at 940. Rational basis scrutiny, also known as minimal scrutiny, is applied to statutes that do not affect fundamental rights or

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<sup>7</sup> Moreover, this Court has rejected claims that Article I, §12 provides different or greater protection than the Fourteenth Amendment. *E.g.*, *DeYoung v. Providence Medical Ctr.*, 136 Wn.2d 136, 142-144, 960 P.2d 919 (1998).

create suspect classifications. *Medina v. Pub. Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 313, 53 P.3d 993 (2002). No fundamental rights or suspect classifications are at issue here.<sup>8</sup>

Indeed, rational basis scrutiny was applied both by Dr. Yi in his argument at the Court of Appeals, and by the Court of Appeals in the decision from which Ms. Waples appeals. Ms. Waples did not controvert the applicability of rational basis scrutiny in briefing at the Court of Appeals or in her petition to the Supreme Court.

Instead, in support of her equal protection argument, Ms. Waples has chosen to rely almost entirely on *Hunter v. North Mason High Sch.*, 85 Wn.2d 810, 539 P.2d 845 (1975). But the *Hunter* Court never identified the standard of review it applied. *See generally id.*; *Daggs v. City of Seattle*, 110 Wn.2d 49, 56, 750 P.2d 626 (1988). *Hunter* discussed whether (alleged) statutory classifications “substantially burdened”

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<sup>8</sup> Fundamental rights are those guaranteed by the Constitution. *Forbes*, 113 Wn.2d at 940 n.11 (citing *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 93 S. Ct. 1278 (1973)). Ms. Waples did not argue court access as a fundamental right in connection with her notice of intent argument. Nor should she have. Access to the courts is not a fundamental right. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 562, 800 P.2d 367 (1990) (citing *Housing Auth. v. Saylor*, 87 Wn.2d 732, 739-40, 557 P.2d 321 (1976)); *Miranda v. Sims*, 98 Wn. App. 898, 907, 991 P.2d 681, *rev. denied*, 141 Wn.2d 1003 (2000). Similarly, right to redress for personal injury claims is not a fundamental right. *1519-1525 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001).

Examples of suspect classifications include those based on race, nationality or alienage. *Forbes*, 113 Wn.2d at 940 n.11 (citing *State v. Schaaf*, 109 Wn.2d 1, 18, 743 P.2d 240 (1987)). No party has argued that fundamental rights or suspect classifications are at issue this case with respect to the notice of intent.

individuals' rights. *Hunter*, 85 Wn.2d at 814. Consideration of substantial burden no longer is part of this Court's equal protection analysis. *Medina*, 147 Wn.2d at 314 n.5. On that basis alone, *Hunter* should be rejected as inapplicable and unpersuasive.

The appropriate level of scrutiny in the context of RCW 7.70, medical practice litigation was decided over 10 years ago in *DeYoung v. Providence Medical Ctr.* *DeYoung* involved an allegation of negligently administered radiation therapy that resulted in eye injury. *DeYoung*, 136 Wn.2d at 139-140. Ms. DeYoung filed her lawsuit, but she did so sixteen years after her treatment had taken place. *DeYoung*, 136 Wn.2d at 139-140. It was dismissed based upon Washington's (former) eight-year medical malpractice statute of repose. *Id.* at 140.<sup>9</sup>

On appeal, Ms. DeYoung claimed that the statute of repose was unconstitutional because it arbitrarily denied the benefit of the discovery toll to a small class of adult plaintiffs who could not be expected to discover their injuries within the eight year window. *Id.* at 140. She argued that heightened (also called intermediate) scrutiny applied. *Id.* at 141-142. The Supreme Court explained that intermediate scrutiny applied

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<sup>9</sup> Washington distinguishes between a statute of limitations and a statute of repose as follows: "A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specific time, even if the injury has not yet occurred." *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 875 P.2d 1213 (1994) (internal citations omitted).

only in limited circumstances, when a statute implicated both an important right and a semi-suspect class not accountable for its status. *Id.* at 141 (citations omitted). It then held that there was no semi-suspect class at issue in the medical malpractice litigation. Therefore, intermediate scrutiny did not apply. *Id.* at 141-142.

Specifically, the Court explained that many, though not all, of those whose claims would be barred by the statute of limitations are those who chose not to bring an action, those who slept on their rights, and those who have elected not to diligently investigate their situation. *Id.* The same is true of those whose claims are barred for failure to comply with the notice of intent requirement of RCW 7.70.100.

If a plaintiff erroneously failed to file a notice of intent prior to suing, the plaintiff (or her lawyer) must live with the consequences of the failure. It is a “universal maxim” that ignorance of the law is no excuse for failure to comply with the law. *Kingery v. Department of Labor & Indus.*, 132 Wn.2d 162, 174, 937 P.2d 565 (1997) (internal quotations and citations omitted). However, under the medical malpractice statute of limitations, RCW 4.16.350, plaintiffs have at least three years from the time of the alleged erroneous act or omission to file suit. Various tolls of the statute of limitations are provided as well. If a plaintiff has been even

a little bit responsible and diligent in pursuing her claim, failure to comply with the notice of intent should not prevent her from pursuing it.

A lawsuit filed out of compliance with RCW 7.70.100 will be dismissed without prejudice. The plaintiff then has an opportunity to serve the notice of intent. If settlement talks do not result in resolution during the following 90 days, the even minimally responsible and diligent plaintiff will still have her opportunity to file a lawsuit.<sup>10</sup>

In contrast to the minimally responsible and diligent plaintiff, most plaintiffs who may lose their opportunity to pursue a claim by their failure to file the notice of intent are the same type of most plaintiffs at issue in *DeYoung*: those who chose not to bring an action, those who slept on their rights, and those who have elected not to diligently investigate their situation. *DeYoung*, 136 Wn.2d at 141-142. Those plaintiffs were not a semi-suspect class in *DeYoung*. It follows that they are not a semi-suspect class here. As such, under Washington precedent, intermediate scrutiny does not apply in this case. Just as in *DeYoung*, the claim of unconstitutionality must be analyzed utilizing rational basis review.

**3. The notice of intent requirement passes constitutional muster.**

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<sup>10</sup> This is true even if the notice of intent is served on the eve of the statute of limitations. Since it was passed, RCW 7.70.100(1) has provided a toll for the entire 90 day pendency of the notice of intent. Since 2007, the toll was increased by an additional five days.

Statutes are presumed constitutional. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 414, 120 P.3d 56 (2005). The party challenging a statute bears the burden of overcoming this presumption beyond a reasonable doubt. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 643, 112 Wn.2d 636 (1989) (quoting *Brewer v. Copeland*, 86 Wn.2d 58, 542 P.2d 455 (1975)). Under rational basis scrutiny, it is a “heavy burden” indeed. *Forbes*, 133 Wn.2d at 941 n.12. Put another way:

And, when the constitutionality an act of the legislature is drawn in question, the court will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt on the subject. . . .

*Sofie*, 112 Wn.2d at 642 (quoting *State v. Ide*, 35 Wash. 576, 77 P. 961 (1904) (elipses in the original)).

The Court must undertake its review of Ms. Waples’ arguments with great care. *Id.* The Court’s role is not to second guess or critique the Legislature. *See id.* Nor is it to pass judgment on the wisdom of the statute. *Id.* The Court’s only role is to determine whether the legislation at issue passes constitutional muster. *Id.*

Rational basis scrutiny requires that a challenged statute be determined to be constitutional when it is rationally related to a legitimate state interest. *Medina*, 147 Wn.2d at 313; *1519-1525 Lakeview Boulevard Condominium Ass’n*, 144 Wn.2d at 577. If there exists any conceivable

set of facts that could provide a rational basis for a statutory classification that is being scrutinized on an equal protection claim, the classification must be upheld. *Medina*, 147 Wn.2d at 313 (citing *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997) (citing *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637 (1993))).

Here, Ms. Waples or others may argue that there is no rational basis for creating what they will call two classes of plaintiffs: one class that involves regular tort plaintiffs in simple cases who are free to race to the courthouse and sue whomever they wish on a moments notice and a second class of medical malpractice plaintiffs who must be more thoughtful in their actions and take time to attempt to resolve their claim before suing.<sup>11</sup> In 2002, in *Medina*, this Court addressed an equal protection challenge to similar classes in the context of the governmental

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<sup>11</sup> In her briefing, Ms. Waples characterizes the classes created as health care defendants and non-health care defendants. This is contrary to the Supreme Court's interpretation of a similar governmental notice statute in *Medina*. *Medina*, 147 Wn.2d 303 ("Claim filing law create two classes of tort victims – governmental and private."). Viewing the classes as the Supreme Court does makes sense given that the statute imposes obligations on the plaintiffs. However, it should also be noted that neither RCW 4.96.020 nor RCW 7.70.100 exist in a vacuum. Notice statutes exist in other areas of both the state and federal law. For example, RCW 64.50.020 requires 45 days pre-suit notice in construction defect litigation – another industry well-known to be in crisis in Washington. RCW 70.105D.050 requires 30 days notice prior to filing a civil action relating to hazardous waste cleanup. The Age Discrimination in Employment Act requires 60 days pre-suit notice (through the EEOC). 29 U.S.C. § 626(d). This list is for illustrative purposes only, and is not intended to be exhaustive.

pre-filing notice statute found at RCW 4.96.020 (which applied at the time to health care delivered at public hospitals).

Applying the principles set forth above, and rational basis scrutiny, this Court reaffirmed the “constitutionally sound” holdings of *Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982) and *Daggs v. City of Seattle*, 110 Wn.2d 49, 56, 750 P.2d 626 (1988), in their determinations that a legitimate state interest exists in encouraging negotiation and settlement, and there is a rational relationship between encouraging negotiation and settlement and enforcing a uniform waiting period for the claims. RCW 7.70.100 involves those very same, very legitimate state interests of negotiation and settlement. The Legislature expressly intended to facilitate these legitimate state interests with RCW 7.70.100’s notice of intent requirement.

It is rational and laudable for these interests to receive particular emphasis in the medical malpractice litigation context given the approximately 40 year crisis in Washington’s health care system and the determination by the Legislature that these reforms were necessary as a result of the crisis. Just as the *Medina* Court determined that there was a rational relationship between these goals and the pre-suit notice provision of RCW 4.96.020, the same logical, rational relationship, applies here.

RCW 7.70.100's notice of intent requirement passes constitutional muster, survives rational basis scrutiny, and must be enforced.

The *Medina* Court made an additional point important to the Court's consideration of Ms. Waples' arguments in her brief. As mentioned above, the Court explained that historically it had considered whether there was a substantial burden on class members when it undertook an equal protection analysis (as it did in *Hunter*), but that this substantial burden consideration is not included in modern jurisprudence. *Id.* at 313-314. Nevertheless, it explained that a short waiting period before filing suit was not a substantial burden; in fact, it was "no real impediment to relief" at all, especially where the statute of limitations was tolled during the pendency of the notice period. *Id.* at 314.

The same is true in this case. It cannot be credibly argued that a waiting period of only 30 days longer than RCW 4.96.020's period takes the waiting period from "no real impediment" at all to a substantial burden. Also, RCW 7.70.100 tolls the statute of limitations during the notice period (and for five days afterward). Not only does RCW 7.70.100 not shorten the statute of limitations (like the provision found unconstitutional in *Hunter*), it lengthens it. *Breuer*, 148 Wn. App. at 477. Therefore, if *Hunter* were still valid precedent (though it is not), it does not support Ms. Waples' position.

As outlined above, a finding of constitutionality is compelled based upon the majority's analysis in *Medina*. Though not binding on this Court, one of the *Medina* dissents is also noteworthy for its recognition of these principles. Justice Chambers wrote:

In *Daggs*, we concluded that where the statute of limitations was not affected, the short 60-day buffer period between filing a claim and suit is reasonably related to achieving negotiated settlement. In other words, a short 60-day waiting period is a fair and reasonable means to accomplish the limited and rational purpose of giving the government an opportunity to negotiate and settle claims.

*Medina*, 147 Wn.2d at 327 (internal citations omitted). Just as the short waiting period was fair and reasonable in the governmental claims context, it is fair and reasonable in the medical practice litigation context.

RCW 7.70.100's notice of intent should be upheld on rational basis scrutiny. Ms. Waples has not shown – and indeed cannot show – that RCW 7.70.100's notice of intent provision is not rationally related to a legitimate state interest. Accordingly, the statute is constitutional, and WDTL requests that this Court affirm the Court of Appeals.

Respectfully submitted this 29th day of July, 2009.

Fain Sheldon Anderson & VanDerhoef, PLLC



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Erin H. Hammond, WSBA #28777  
On Behalf of Washington Defense Trial Lawyers

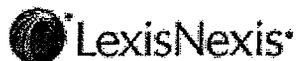
# **APPENDIX**

# **RCW 5.64.010**

INCLUDES LEGISLATIVE FINDINGS:

LAWS OF 2006, CH. 8, § 1

ANNOTATED (LEXIS)



LEXSTAT REV. CODE WASH. (ARCW) § 5.64.010

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\*\* Statutes current through the 2009 legislation effective through 7/1/2009 \*\*  
\*\*\* Annotations current through May 5, 2009 \*\*\*

TITLE 5. EVIDENCE  
CHAPTER 5.64. ADMISSIBILITY OF CERTAIN GESTURES OF APOLOGY, SYMPATHY, FAULT, ETC. IN  
CIVIL ACTIONS AGAINST HEALTH CARE PROVIDERS  
(FORMERLY: ADMISSIBILITY -- FURNISHING, OFFERING, OR PROMISING TO PAY MEDICAL EX-  
PENSES)

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

*Rev. Code Wash. (ARCW) § 5.64.010 (2009)*

§ 5.64.010. Civil actions against health care providers -- Admissibility of evidence of furnishing or offering to pay medical expenses -- Admissibility of expressions of apology, sympathy, fault, etc

(1) In any civil action against a health care provider for personal injuries which is based upon alleged professional negligence, or in any arbitration or mediation proceeding related to such civil action, evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible.

(2) (a) In a civil action against a health care provider for personal injuries that is based upon alleged professional negligence, or in any arbitration or mediation proceeding related to such civil action, a statement, affirmation, gesture, or conduct identified in (b) of this subsection is not admissible as evidence if:

(i) It was conveyed by a health care provider to the injured person, or to a person specified in *RCW 7.70.065 (1)(a)* or *(2)(a)* within thirty days of the act or omission that is the basis for the allegation of professional negligence or within thirty days of the time the health care provider discovered the act or omission that is the basis for the allegation of professional negligence, whichever period expires later; and

(ii) It relates to the discomfort, pain, suffering, injury, or death of the injured person as the result of the alleged professional negligence.

(b) (a) of this subsection applies to:

(i) Any statement, affirmation, gesture, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence; or

(ii) Any statement or affirmation regarding remedial actions that may be taken to address the act or omission that is the basis for the allegation of negligence.

**HISTORY:** 2006 c 8 § 101; 1975-76 2nd ex.s. c 56 § 3.

**NOTES: FINDINGS -- INTENT --** 2006 C 8: "The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase

oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums. Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes. It is also the legislature's intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. Finally, it is the intent of the legislature to provide the insurance commissioner with the tools and information necessary to regulate medical malpractice insurance rates and policies so that they are fair to both the insurers and the insured." [2006 c 8 § 1.]

PART HEADINGS AND SUBHEADINGS NOT LAW -- 2006 C 8: "Part headings and subheadings used in this act are not any part of the law." [2006 c 8 § 401.]

SEVERABILITY -- 2006 C 8: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2006 c 8 § 407.]

SEVERABILITY -- 1975-76 2ND EX.S. C 56: See note following *RCW 4.16.350*.

#### CROSS REFERENCES.

Rules of court: Cf. *ER 409*.

#### EFFECT OF AMENDMENTS.

2006 c 8 § 101, effective June 7, 2006, rewrote the section to the extent that a detailed comparison is impracticable.

### LexisNexis 50 State Surveys, Legislation & Regulations

Medical Malpractice Actions

#### NOTES APPLICABLE TO ENTIRE TITLE

##### CROSS REFERENCES.

City codes as evidence: *RCW 35.21.550*.

Corporate seals, effect of absence from instrument: *RCW 64.04.105*.

Deposition, definitions: *RCW 9A.72.010*.

District courts, witnesses and depositions: Chapter 12.16 RCW.

Domestic relations, spouse or domestic partner as witness: *RCW 26.20.071*.

Method for recording of instruments: *RCW 65.04.030, 65.04.040*.

Microfilming of records to provide continuity of civil government: Chapter 40.10 RCW.

Order for examination of judgment debtor: *RCW 6.32.010*.

Records of medical, dental, pharmaceutical, or hospital review boards, immunity from process: *RCW 4.24.250*.

Rules of court: See Rules of Evidence (ER).

Superior court records, destruction, reproduction: *RCW 36.23.065 through 36.23.070*.

##### TEXTBOOKS AND TREATISES.

The Law of Evidence in Washington; Robert H. Aronson (Michie).

Washington Civil Practice Deskbook; Eleanor Hoague and Members of the Washington State Bar (Michie).

Washington Criminal Practice in Courts of Limited Jurisdiction; Linda S. Portnoy, Eileen P. Farley (Michie).

Washington Evidence Trial Book; Stephen A. Salzborg, John B. Mitchell, Fred Tausend (Michie).

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The Law of Evidence in Washington; Robert H. Aronson (Michie).

Washington Civil Practice in Courts of Limited Jurisdiction; Linda S. Portnoy, Eileen P. Farley (Michie).

Rev. Code Wash. (ARCW) § 5.64.010

Washington Criminal Practice in Courts of Limited Jurisdiction; Linda S. Portnoy, Eileen P. Farley (Michie).  
Washington Evidence Trial Book; Stephen A. Salzburg, John B. Mitchell, Fred Tausend (Michie).

**RCW 7.70.100**  
ANNOTATED (LEXIS)



LEXSTAT RCW 7.70.100

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\*\*\* Annotations current through May 5, 2009 \*\*\*

TITLE 7. SPECIAL PROCEEDINGS AND ACTIONS  
CHAPTER 7.70. ACTIONS FOR INJURIES RESULTING FROM HEALTH CARE

**GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

*Rev. Code Wash. (ARCW) § 7.70.100 (2009)*

§ 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.

**HISTORY:** 2007 c 119 § 1; 2006 c 8 § 314; 1993 c 492 § 419.

**NOTES: FINDINGS -- INTENT -- PART HEADINGS AND SUBHEADINGS NOT LAW -- SEVERABILITY --**  
2006 C 8: See notes following RCW 5.64.010.

**MEDICAL MALPRACTICE REVIEW -- 1993 C 492:** "(1) The administrator for the courts shall coordinate a collaborative effort to develop a voluntary system for review of medical malpractice claims by health services experts prior to the filing of a cause of action under chapter 7.70 RCW.

(2) THE SYSTEM SHALL HAVE AT LEAST THE FOLLOWING COMPONENTS:

(a) Review would be initiated, by agreement of the injured claimant and the health care provider, at the point at which a medical malpractice claim is submitted to a malpractice insurer or a self-insured health care provider.

(b) By agreement of the parties, an expert would be chosen from a pool of health services experts who have agreed to review claims on a voluntary basis.

(c) The mutually agreed upon expert would conduct an impartial review of the claim and provide his or her opinion to the parties.

(d) A pool of available experts would be established and maintained for each category of health care practitioner by the corresponding practitioner association, such as the Washington state medical association and the Washington state nurses association.

(3) The administrator for the courts shall seek to involve at least the following organizations in a collaborative effort to develop the informal review system described in subsection (2) of this section:

(a) The Washington defense trial lawyers association;

(b) The Washington state trial lawyers association;

(c) The Washington state medical association;

(d) The Washington state nurses association and other employee organizations representing nurses;

(e) The Washington state hospital association;

(f) The Washington state physicians insurance exchange and association;

(g) The Washington casualty company;

(h) The doctor's agency;

(i) Group health cooperative of Puget Sound;

(j) The University of Washington;

(k) Washington osteopathic medical association;

(l) Washington state chiropractic association;

(m) Washington association of naturopathic physicians; and

(n) The department of health.

(4) On or before January 1, 1994, the administrator for the courts shall provide a report on the status of the development of the system described in this section to the governor and the appropriate committees of the senate and the house of representatives." [1993 c 492 § 418.]

FINDINGS -- INTENT -- 1993 C 492: See notes following *RCW 43.72.005*.

SHORT TITLE -- SEVERABILITY -- SAVINGS -- CAPTIONS NOT LAW -- RESERVATION OF LEGISLATIVE POWER -- EFFECTIVE DATES -- 1993 C 492: See *RCW 43.72.910* through *43.72.915*.

#### EFFECT OF AMENDMENTS.

2007 c 119 § 1, effective July 22, 2007, in (1), added the second through fourth sentences, and substituted "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" for "service of the notice" in the last sentence.

2006 c 8 § 314, effective June 7, 2006, added (1), (2), (6), and (7), and redesignated subsections accordingly; in (3), added "After the filing of the ninety-day presuit notice, and before a superior court trial" at the beginning and added the proviso at the end; and in the introductory paragraph of (4), added the second sentence, and added "on mandatory mediation" after "rules" in the last sentence.

#### LexisNexis 50 State Surveys, Legislation & Regulations

1. Healthcare - Informed Consent
2. Medical Malpractice Actions

#### JUDICIAL DECISIONS

##### ANALYSIS

Constitutionality  
Complaint untimely  
Evidence

#### CONSTITUTIONALITY.

Former *RCW 7.70.100(1)* extended the time available to file a claim; even if it did not, it created no arbitrary or irrational classification because the time period helped achieve the policy's aim to settle medical malpractice cases before resorting to court; the requirement was not unconstitutional. *Breuer v. Presta*, 148 Wn. App. 470, 200 P.3d 724 (2009).

#### COMPLAINT UNTIMELY.

Even if a letter to the doctor started the 90-day waiting period under former *RCW 7.70.100(1)* (2006), the filing of the patient's complaint was still too late. *Breuer v. Presta*, 148 Wn. App. 470, 200 P.3d 724 (2009).

#### EVIDENCE.

In an insurance dispute, the trial court did not abuse its discretion or violate *RCW 5.60.070* in introducing evidence concerning a mediation in an underlying personal injury case because (1) the insurer failed to provide any evidence establishing that the mediation was a result of a court order, a written agreement between the parties, or a mandate under *RCW 7.70.100*; (2) the insureds did not violate *RAP 2.5(a)* making an argument relating to the mediation for the first time on appeal because they had no reason to raise the argument until the insurer argued that *RCW 5.60.070(1)* compelled the exclusion of the mediation evidence; and (3) introduction of the evidence did not violate *ER 408* because the testimony was admitted as evidence of the insureds' state of mind during the time they attempted to obtain underwriting files from the insurer and not for the purpose of showing liability. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 161 P.3d 406 (2007).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

**WASHINGTON STATE SENATE  
HEALTH & LONG TERM CARE  
COMMITTEE HEARING  
FEBRUARY 20, 2006**

**WASHINGTON STATE SENATE HEALTH &  
LONG TERM CARE COMMITTEE HEARING**

**February 20, 2006**

Unofficial Transcription of the Audio Recording of Select Testimony<sup>1</sup>

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<sup>1</sup> This unofficial transcription is provided for the Court's ease of reference, and is believed to be a true and accurate transcription. The emphasis in the transcription reflects an effort to capture the emphasis in the speakers' voices. A complete audio recording of the hearing is available at no charge at: <http://www.tvw.org/search/siteSearch.cfm?EvtntType=C&keywords=Senate%20Health%20&date=2006&bhcp=1>

Senate Bill Report 2SHB 2292 dated February 22, 2006 is also included in this Appendix. On page 7, it lists all witnesses who testified at the hearing and the nature of the testimony.

**Washington Governor Christine Gregoire:**

Thank you Senator and members of the committee. I thought I would first do justice to those who come together over the last several weeks and describe briefly who they were for you, some of whom are here to testify before you today. From the Washington State Trial Lawyers Association, we had Larry Shannon, John Budlong, and Reed Schifferman. From the Washington State Hospital Association, Randy Revelle and Barbara Schickish. From the Washington State Medical Association, Dr. Peter Dunbar who is the current president, Len Eninger, and Dr. Ken Issacks who is the immediate past president. From Physicians Insurance Gary Morse. From the Washington State Bar Association Brooke Taylor and Gail Stone. And then from my office, Lucy Asaki and Marty Brown.

We divided the negotiations up, with regard to the three aspects of the bill. Patient safety and civil justice reform, I worked on with these folks as well as Secretary of Health Mary Selecki. And then, with respect to the insurance reform, that was separate. Those negotiations were separate with the insurance commissioner, Mike Kreidler. These folks that I just described to you, with me alone, put in at least five sessions of three hours. And then with me, five sessions of two hours each. And that doesn't include some pre-meetings.

They came to the table with much trepidation, as you might well imagine, but the negotiations were always very professional and always in good faith. And I will tell you what I think you will hear later, that what you have now is a bill that is better. It is complete. It is not everything that anyone at the table wanted. So there is more work to be done. And I will say for myself, I did not get everything I wanted, let alone did everyone else at the table get everything what they wanted.

But to put this all in perspective, we have looked around the country, at what is going on around the country, and most states are grappling with this issue. And to be perfectly honest with you, failing. So I think the fact that these people were able to come to the table, and negotiate with the paramount responsibility in mind that they had to be true to their patients and to the public at large is an example of why we were able to reach agreement today. I come on their behalf. We stand arm in arm. We are united in support of the striker to 2292.

We think that it is collectively a good bill in all three fronts that we had to deal with, but we do also believe there's more work to be done in the future. But with that, to be brief, I would urge your immediate consideration and passage of the striker of 2292. Thank you madam Chair.

**Chair:**

Thank you Governor very much, and I really do want to complement you on the effort you put forward to resolve this longstanding dispute and to put everyone at the same table and make everyone work on the level playing field there, so. Senator Deccio has a comment?

**Senator Deccio:** Governor I was going to say somewhat the same thing. I think the fact that you got everyone together makes you eligible for the medal of valor next year.

Laughter.

[Additional questions and comments omitted.]

**Washington Representative Pat Lanz** (prime sponsor of HB 2292):

Thank you Chair Kaiser, and to all the members of the committee. You know in your lifetime there aren't very many moments like this one. And I think I have kind of a silly grin on my face that won't erase. It started this morning.

2292 is a number that is etched in my brain. I have been here for ten years, and I *don't* remember bill numbers, but I will *always* remember this bill number. We laid a very good foundation when we started this process four years ago in the House, and then last year actually had the bill that kept that foundation of the three legged stool. We knew it was so important to have all three parts of this bill balanced. We need patient safety being front and center, but that leg of civil liability reform as well as insurance reform was equally important in order to keep the stool level.

After the initiative election this fall, it was so very clear that what the people were saying was that there are some issues that are just *way* too complex for us to deal with at the ballot box. And we elected you to take on these hard issues. So, that two or three days after the election, that was many telephone calls about how we should proceed. I never hesitated for a moment. I knew I had a responsibility to move forward. So that is why, that first week of session, if you will recall, we made some minor corrections in the bill that we had brought back from Rules, and sent it off the floor. We were hoping that what happened, would happen, that it took a detour to the Governor's office. And in there, with the very very capable hands of the Governor, we had *all* of those competing interests come together around the table and deal with, what I guess we could say the rough edges of the foundation and the walls of the structure. Or, I have a stool, of the legs of the stool that we had constructed.

So you will hear from them about how they were able to negotiate, how they were able to come to a compromise on some issues and in some instances just decide that they had to agree to disagree. But in any event, what we have here, is a product that meets standards of a legislative product in the *very* finest sense of the word. We *do* the work of compromise. That's what is our skill. That's our talent. And we *hope* that on occasion it reaches an art form. It is the art of compromise that we have seen here, and I am so very very pleased to bring you this striker amendment so that we can do what the people of the state of Washington asked us to do, which is legislate deliberately and thoughtfully in order to improve the lot of all of the citizens of Washington state.

**Chair:**

Thank you Representative Lanz. Appreciate your passion on this issue.

[Additional questions and comments omitted.]

**John Budlong, Washington State Trial Lawyers Association Board Member:**

Thank you madam chair. John Budlong on behalf of the Washington State Trial Lawyers. We also would *encourage* this body to enact Bill 2292 as written with the striker amendments. We also would like to thank our colleagues in the health care professions who have spent five sessions of three hours each discussing all aspects of 2292, particularly the liability provisions in *great* detail. These were candid, open, I think very friendly discussions, and I think the voters perhaps would want to know that after this last campaign. I think that we made a lot of progress in here in enacting *comprehensive* reform in patient safety, insurance reform, civil justice reform issues. We also would like to thank Representative Pat Lanz who has put this bill out as the vehicle, for the last, I believe it started four years ago, and finally, of course, for Governor Gregoire, I fully agree with Dr. Dunbar. I think without her gift for bringing opposing parties together that we would not be here today unanimously in favor of this bill as written. Thank you.

**S. Brooke Taylor, Washington State Bar Association President:**

Thank you madam chairman, members of the committee. My name is Brooke Taylor. I have practiced law in Port Angeles, Washington for 37 years, and I have to tell you I never thought I'd see this day.

I am here today in my capacity as President of the Washington State Bar Association. And I think it's important to distinguish that group from the other professional associations that are here at the table. The Washington State Bar Association is a mandatory organization. All 29,800 lawyers licensed to practice in this state belong to this association.

I have not been here to testify before and it is unlikely that I will be here again. The reason for that is because we have very severe constraints on taking positions on issues that have any significant political content at all. And this one certainly has over the years. However, it's also important to understand that very few of our members have anything to do with medical malpractice litigation. That having been said, all of our members -- all of the lawyers involved in this litigation do belong to our association, whether they represent physicians or patients. So, our positions have to be rather circumspect.

After the bitter initiative campaigns, I was searching for answers. And it seemed to me that the voters were telling all of us, among other things, that they wanted significant balanced reforms in how we resolved these disputes. And they were not at all interested in extremes or special interest legislation.

So, I wrote an article. It was called, "An Open Letter to Physicians: We Need to Talk." It was really a shot in the dark. The *very first* response I got was from the executive director of the Washington State Medical Association, within 24 hours, who said, "Yes. We need to talk. We're ready to talk."

Then Governor Gregoire, with her superb leadership, made it all happen. Doctors and lawyers sitting at the same table face to face, discussing these issues, which have for decades divided our professions, which have so much in common in every other respect.

I can tell you that the Washington State Bar Association endorses this bill as it is currently written, and we would urge this body to enact it. I can also tell you that Dr. Dunbar as president of his association and I as president of mine, have agreed to continue this dialogue, this engagement into the future, recognizing that there is still work to be done and this is *only* a start. But it is a *very, very* good start. Thank you.

**Chair:**

Thank you Mr. Taylor. And I am really pleased to hear that you are going to continue your conversations and your relationships that have been built.

**SENATE BILL REPORT**

**2SHB 2292**

**FEBRUARY 22, 2006**

# SENATE BILL REPORT

## 2SHB 2292

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As Reported By Senate Committee On:  
Health & Long-Term Care, February 22, 2006

**Title:** An act relating to improving health care by increasing patient safety, reducing medical errors, reforming medical malpractice insurance, and resolving medical malpractice claims fairly without imposing mandatory limits on damage awards or fees.

**Brief Description:** Addressing health care liability reform.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Lantz, Cody, Campbell, Kirby, Flannigan, Williams, Linville, Springer, Clibborn, Wood, Fromhold, Morrell, Hunt, Moeller, Green, Kilmer, Conway, O'Brien, Sells, Kenney, Kessler, Chase, Upthegrove, Ormsby, Lovick, McCoy and Santos).

**Brief History:** Passed House: 1/23/06, 54-43.

**Committee Activity:** Health & Long-Term Care: 2/20/06, 2/22/06 [DPA].

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### SENATE COMMITTEE ON HEALTH & LONG-TERM CARE

**Majority Report:** Do pass as amended.

Signed by Senators Keiser, Chair; Thibaudeau, Vice Chair; Deccio, Ranking Minority Member; Benson, Brandland, Johnson, Kastama, Kline, Parlette and Poulsen.

**Staff:** Edith Rice (786-7444)

**Background:** Patient Safety

*Statements of Apology:* Under both a statute and a court rule, evidence of furnishing or offering to pay medical expenses needed as the result of an injury is not admissible in a civil action to prove liability for the injury. In addition, a court rule provides that evidence of offers of compromise are not admissible to prove liability for a claim. Evidence of conduct or statements made in compromise negotiations are likewise not admissible.

In 2002, the Legislature passed legislation that makes expressions of sympathy relating to the pain, suffering, or death of an injured person inadmissible in a civil trial. A statement of fault, however, is not made inadmissible under this provision.

*Reports of Unprofessional Conduct:* A provision of law gives immunity specifically to physicians, dentists, and pharmacists who in good faith file charges or present evidence of incompetency or gross misconduct against another member of their profession before the Medical Quality Assurance Commission, the Dental Quality Assurance Commission, or the Board of Pharmacy.

*Medical Quality Assurance Commission Membership (MQAC):* The MQAC is responsible for the regulation of physicians and physician assistants. This constitutes approximately 23,000

credentialed health care professionals. The MQAC currently has 19 members consisting of 13 licensed physicians, two physician assistants, and four members of the public.

*Health Care Provider Discipline:* The Uniform Disciplinary Act (UDA) governs disciplinary actions for all 57 categories of credentialed health care providers. The UDA defines acts of unprofessional conduct, establishes sanctions for such acts, and provides general procedures for addressing complaints and taking disciplinary actions against a credentialed health care provider. Responsibilities in the disciplinary process are divided between the Secretary of Health (Secretary) and the 16 health profession boards and commissions according to the profession that the health care provider is a member of and the relevant step in the disciplinary process.

Upon a finding of an act of unprofessional conduct, the Secretary or the board or commission decides which sanctions should be ordered. These sanctions include: revocation of a license, suspension of a license, restriction of the practice, mandatory remedial education or treatment, monitoring of the practice, censure or reprimand, conditions of probation, payment of a fine, and surrender of the license. In the selection of a sanction the first consideration is what is necessary to protect or compensate the public, and the second consideration is what may rehabilitate the license holder or applicant.

*Disclosure of Adverse Events:* A hospital is required to inform the Department of Health when certain events occur in its facility. These events include: unanticipated deaths or major permanent losses of function; patient suicides; infant abductions or discharges to the wrong family; sexual assault or rape; transfusions with major blood incompatibilities; surgery performed on the wrong patient or site; major facility system malfunctions; or fires affecting patient care or treatment. Hospitals must report this information within two business days of the hospital leaders learning of the event.

*Coordinated Quality Improvement Programs:* Hospitals maintain quality improvement committees to improve the quality of health care services and prevent medical malpractice. Quality improvement proceedings review medical staff privileges and employee competency, collect information related to negative health care outcomes, and conduct safety improvement activities. Provider groups and medical facilities other than hospitals are encouraged to conduct similar activities.

#### Insurance Industry Reform

*Medical Malpractice Closed Claim Reporting:* The Insurance Commissioner (Commissioner) is responsible for the licensing and regulation of insurance companies doing business in this state. This includes insurers offering coverage for medical malpractice. There is no statutory requirement for insurers to report to the Commissioner information about medical malpractice claims, judgments, or settlements.

*Cancellation or Non-Renewal of Liability Insurance Policies:* With certain exceptions, state insurance law requires insurance policies to be renewable. An insurer is exempt from this requirement if the insurer provides the insured with a cancellation notice that is delivered or mailed to the insured no fewer than 45 days before the effective date of the cancellation. Shorter notice periods apply for cancellation based on nonpayment of premiums (10 days) and for cancellation of fire insurance policies under certain circumstances (five days). The written notice must state the actual reason for cancellation of the insurance policy.

*Prior Approval of Medical Malpractice Insurance Rates:* The forms and rates of medical malpractice policies are "use and file." After issuing any policy, an insurer must file the forms and rates with the Commissioner within 30 days. Rates and forms are subject to public disclosure when the filing becomes effective. Actuarial formulas, statistics, and assumptions submitted in support of the filing are not subject to public disclosure.

#### Health Care Liability Reform

*Statutes of Limitations and Repose:* A medical malpractice action must be brought within time limits specified in statute, called the statute of limitations. Generally, a medical malpractice action must be brought within three years of the act or omission or within one year of when the claimant discovered or reasonably should have discovered that the injury was caused by the act or omission, whichever period is longer.

The statute of limitations is tolled during minority. This means that the three-year period does not begin to run until the minor reaches the age of 18. An injured minor will therefore always have until at least the age of 21 to bring a medical malpractice action.

The statute also provides that a medical malpractice action may never be commenced more than eight years after the act or omission. This eight-year outside time limit for bringing an action is called a "statute of repose." In the 1998 Washington Supreme Court decision *DeYoung v. Providence Medical Center*, the eight-year statute of repose was held unconstitutional on equal protection grounds.

*Certificate of Merit:* A lawsuit is commenced either by filing a complaint or service of summons and a copy of the complaint on the defendant. The complaint is the plaintiff's statement of his or her claim against the defendant. The plaintiff is generally not required to plead detailed facts in the complaint; rather, the complaint may contain a short and plain statement that sets forth the basic nature of the claim and shows that the plaintiff is entitled to relief.

There is no requirement that a plaintiff instituting a civil action file an affidavit or other document stating that the action has merit. However, a court rule requires that the pleadings in a case be made in good faith (Civil Rule 11). An attorney or party signing the pleading certifies that he or she has objectively reasonable grounds for asserting the facts and law. The court may assess attorneys' fees and costs against a party if the court finds that the pleading was made in bad faith, or to harass or cause unnecessary delay or needless expense.

*Voluntary Arbitration:* Parties to a dispute may voluntarily agree in writing to enter into binding arbitration to resolve the dispute. A procedural framework for conducting the arbitration proceeding is provided in statute, including provisions relating to appointment of an arbitrator, attorney representation, witnesses, depositions, and awards. The arbitrator's decision is final and binding on the parties and there is no right of appeal. A court's review of an arbitration decision is limited to correction of an award or vacation of an award under limited circumstances.

*Collateral Sources:* In the context of tort actions, "collateral sources" are sources of payments or benefits available to the injured person that are totally independent of the tortfeasor. Examples of collateral sources are health insurance coverage, disability insurance, or sick

leave. Under the common law "collateral source rule," a defendant is barred from introducing evidence that the plaintiff has received collateral source compensation for the injury.

The traditional collateral source rule has been modified in medical malpractice actions. In a medical malpractice action, any party may introduce evidence that the plaintiff has received compensation for the injury from collateral sources, except those purchased with the plaintiff's assets (e.g., insurance plan payments). The plaintiff may present evidence of an obligation to repay the collateral source compensation.

**Summary of Amended Bill:** The Legislature finds that addressing the issues of consumer access to health care and the increasing costs of medical malpractice insurance requires comprehensive solutions that encourage patient safety, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient. The Legislature intends to prioritize patient safety and the prevention of medical errors, to provide incentives to settle cases prior to going to court, and to provide the insurance commissioner with tools and information necessary to regulate medical malpractice insurance rates and policies so they are fair to insurers and the insured.

#### Part I

#### PATIENT SAFETY

**Statements of Apology:** In a medical negligence action, a statement of fault, apology, or sympathy, or a statement of remedial actions that may be taken, is not admissible as evidence if the statement was conveyed by a health care provider to the injured person or certain family members within 30 days of the act or within 30 days of the time the health care provider discovered the act, whichever is longer.

**Reports of Unprofessional Conduct:** A health care professional who makes a good faith report, files charges, or presents evidence to a disciplining authority against another member of a health profession relating to unprofessional conduct or inability to practice safely due to a physical or mental condition is immune in a civil action for damages resulting from such good faith activities. A health care professional who prevails in a civil action on the good faith defense is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense.

**Medical Quality Assurance Commission (MQAC):** The public membership component of the MQAC is increased from four to six members, and at least two of the public members must not be from the health care industry.

**Health Care Provider Discipline:** When imposing a sanction, a health profession disciplining authority may consider prior findings of unprofessional conduct, stipulations to informal disposition, and the actions of other Washington or out-of-state disciplining authorities.

**Adverse health event :** "Adverse event" is defined as the list of serious reportable events adopted by the national quality forum in 2002. "Incident" is defined as a situation involving patient care which results in an unanticipated injury not part of the patient's illness, or a situation which could result in injury or require additional health care services but did not. Other definitions are provided.

Adverse Event Notification: Medical facilities must notify the Department of Health (DOH) within 48 hours of confirmation that an adverse event has occurred. A report must be submitted to the DOH within 45 days after confirmation that an adverse event has occurred. If DOH determines that an adverse event has not been reported or investigated, DOH will direct the facility to report or investigate it.

Independent entity to receive notification of adverse events and incidents: DOH will contract with an independent entity to develop an internet based system for reporting adverse events by facilities immediately available to DOH. The system will protect confidentiality, and the independent entity will develop recommendations for changes in health care practices for the purpose of reducing the number and severity of adverse events.

Whistleblower protection: An adverse event or incidents are specifically mentioned as information for which whistleblowers are protected if reported to DOH in good faith.

Confidentiality: Notification or reports of adverse events or are subject to the confidentiality provisions in current law and are exempt from public disclosure.

Prescription Legibility: Prescriptions for legend drugs must either be hand-printed, typewritten, or generated electronically.

## Part II

### INSURANCE INDUSTRY REFORM

Medical Malpractice Closed Claim Reporting: Self-insurers and insuring entities that write medical malpractice insurance are required to report any closed claim to the Office of the Insurance Commissioner (OIC). OIC may fine those who violate this requirement, up to \$250 per day. The reports must contain specified data that is (to the extent possible) consistent with the format for data reported to the national practitioner data bank.

The Office of the Commissioner is required to prepare aggregate statistical summaries of closed claims based on the data submitted, while protecting the confidentiality of the underlying data.

OIC must prepare an annual report starting in 2010 which should include an analysis of closed claim information and any information the Commissioner finds is relevant to trends in medical malpractice. OIC will monitor losses and claim development patterns in the Washington state medical malpractice insurance market.

If the National Association of Insurance Commissioners adopts revised model statistical reporting standards for medical malpractice insurance, the OIC must analyze them and report any changes and recommendations to the Legislature by December 1, the year after they are adopted.

Written notice of a medical malpractice policy non-renewal must be delivered or mailed to the named insured at least 90 days before policy expiration and must include the actual reason for refusing to renew.

Medical malpractice policy forms or application forms are subject to the requirements under current law which must be filed with and approved by the OIC unless exempted from doing so by rule.

## Part III

## HEALTH CARE LIABILITY REFORM

### Statutes of Limitations and Repose:

The eight-year statute of repose is re-established. Legislative intent and findings regarding the justification for a statute of repose are provided in response to the Washington Supreme Court's decision overturning the statute of repose in *DeYoung v. Providence Medical Center*. This means that a civil action for injury from health care must be commenced within three years of the act causing injury or within one year of the time that the patient discovered the injury or should have discovered the injury, whichever is later. However, this cannot be more than eight years after the original act causing the injury.

There are exceptions for fraud or intentional concealment until the date the patient has actual knowledge of the act of fraud or concealment, then they have one year from knowledge of the fraud or concealment. Knowledge of a custodial parent or guardian is imputed to a minor (person under 18 years of age). This means that tolling of the statute of limitations during minority is eliminated. Any actions not meeting these requirements are barred.

**Certificate of Merit:** In medical negligence actions involving a claim of a breach of the standard of care, the plaintiff must file a certificate of merit at the time of commencing the action (or no later than 45 days after filing the action if the action is filed 45 days prior to the running of the statute of limitations). If there is more than one defendant, a certificate of merit must be filed for each defendant. The person executing the certificate of merit must state that there is reasonable probability that the defendant's conduct did not follow the accepted standard of care required.

Failure to file a certificate of merit that complies with these requirements results in dismissal of the case. If a case is dismissed for failure to comply with the certificate of merit requirements, the filing of the claim may not be used against the health care provider in liability insurance rate settings, personal credit history, or professional licensing or credentialing.

**Voluntary Arbitration:** A voluntary arbitration system is established for disputes involving alleged professional negligence in the provision of health care. The voluntary arbitration system may be used only where all parties have agreed to submit the dispute to voluntary arbitration once the suit is filed, either through the initial complaint and answer, or after the commencement of the suit upon stipulation by all parties.

**Arbitration award:** The maximum award an arbitrator can make is limited to \$1 million for both economic and non-economic damages. In addition, the arbitrator may not make an award of damages based on the "ostensible agency" theory of vicarious liability (an agency created by operation of law - a principle's actions would reasonably lead a third party to conclude that an agency relationship existed). Fees and expenses shall be paid by the non-prevailing party.

**Appeal:** There is no right to a trial de novo on an appeal of the arbitrator's decision. An appeal is limited to the bases for appeal provided under the current arbitration statute for vacation of an award under circumstances where there was corruption or misconduct, or for modification or correction of an award to correct evident mistakes.

Notice: Ninety days notice of intent to file a lawsuit is required if the lawsuit is based on a health care provider's professional negligence. Mandatory mediation does not apply to parties who have agreed to arbitration.

Collateral Sources: The collateral source payment statute is amended to remove the restriction on presenting evidence of collateral source payments that come from insurance purchased by the plaintiff. The plaintiff, however, may introduce evidence of amounts paid to secure the right to the collateral source payments (e.g., premiums).

Frivolous Lawsuits: When signing and filing a claim, counterclaim, cross claim, or defense, an attorney must certify that the claim or defense is not frivolous. An attorney who signs a filing in violation of this section is subject to sanctions, including an order to pay reasonable expenses and reasonable attorneys' fees incurred by the other party.

**Amended Bill Compared to Second Substitute Bill:** The amended bill provides that statements of fault or apology are not admissible if conveyed within 30 days of the act, no longer contains a reference to mandatory revocation of a health care professional license. Adverse events are defined and reporting requirements for adverse events are described. The amended bill removes the reference to burden of proof for license suspension or revocation, and deletes the reference to business and occupation tax credits for physicians treating the uninsured. Reference to filing underwriting standards is removed, the limitation on number of expert witnesses is deleted, as is the reference to offers of settlement. A 90 day notice of intent to file a medical malpractice lawsuit is required.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** This bill is an improvement, but not necessarily everything everyone wanted. There is more work to be done in the future, but this is a good start. This bill has appropriate trade-offs. This bill will allow us to be better prepared for future changes. Real data will allow us to make meaningful changes in the future. This is an important first step. We fully support the striking amendment. This is an important step towards comprehensive reform. We have agreed to continue the dialogue started with this striking amendment. We have concerns about the additional data required. This will add cost, and we have concerns about the penalties in this bill.

**Testimony Against:** None.

**Who Testified:** PRO: Governor Christine Gregoire; Insurance Commissioner Mike Kreidler; Representative Pat Lantz, Prime sponsor; Randy Revelle, Washington State Hospital Association; Peter Dunbar, MD, Washington State Medical Association; John Budlong, Washington State Trail Lawyers Association; Mary Selecky, Secretary, Department of Health; Gary Morse, Physicians Insurance; S. Brooke Taylor, Washington State Bar Association; Tom Parker, Surplus Lines; Mike Kapplohn, Farmers Insurance.