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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 36211-2- II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NANCY NGYUEN WAPLES

Appellant,

vs.

PETER H. YEE, et. al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
The Honorable FREDERICK W. FLEMING, Judge
Cause No. 06-2-11015-9

BRIEF OF APPELLANT
NANCY NGYUEN WAPLES

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A. STATEMENT OF THE CASE

The facts of this case are not in any serious dispute. The Appellant filed a compliant for damages against her former dentist for negligence regarding a dental procedure, on September 5, 2007. (CP Pages 1 through 3). The Plaintiff's counsel failed to request mediation before filing the complaint or obtain a certificate of merit. (CP Pages 8 through 14, 15 through 16, and 20 through 25). The mediation procedures were not in effect, when the case was filed. (CP Pages 20 through 25).

The trial court granted summary judgment and dismissed the case. (CP Pages 36 and 37). This appeal follows.

B. ASSIGNMENT OF ERROR

I.

The trial court erred in dismissing this case when the statute in question did not require strict compliance, the procedures for the mediation were not in effect at the time the case was filed, and RCW 7.70.100 treats one class of tortfeaser differently from other classes of tortfeasors.

II.

The trial court erred in dismissing this case for failure to obtain a certificate of merit when that requirement, imposed by the legislature violates the separation of powers doctrine and equal protection.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

I(1). Whether strict compliance standard should not required, when RCW 7.70.100 does not apply to a governmental agency and is not worded the same as RCW 4.96.010.

I(2). Whether the court should decline to enforce RCW 7.70.100 in this case, when it was filed prior to there even being any mediation procedures in effect, under the statute.

I(3). Whether RCW 7.70.100 is unconstitutional when it treats one class of private tortfeasers differently than other classes of private tortfeasers for no justifiable reason.

II(1). Whether RCW 7.70.150 is unconstitutional when it treats one class of private tortfeasers differently than other classes of private tortfeasers for no justifiable reason.

II(2). Whether RCW 7.70.150 is unconstitutional when it removes the discretion of the court to rule on whether a case has merit and removing the right to trial by jury, by requiring an expert to determine merit, as a condition precedent to the case going forward.

D. SUMMARY OF ARGUMENT

RCW 7.70.100 deals with private tortfeasers, not the State of Washington or some other governmental entity. It is not worded the same as RCW 4.96.010. Consequently, strict compliance is not required. This is especially true, when the mediation procedures were not even in place until

several months after this case was filed.

This court should also use this opportunity to declare RCW 7.70.100 unconstitutional, due to the fact it treats one class of private tortfeasers differently than other private tortfeasers. The State of Washington, when it provided a blanket authorization to bring claims against the State and other governmental entities, set rules for itself. In this case, the State of Washington has decided to treat medical providers differently than other private parties. There is no legitimate reasons to do so, and as a result, this violates equal protection.

For the same reason, perhaps even more so, requiring a certificate of merit from an expert in medical tort cases, but not requiring it in other cases, treats medical providers differently. There is no legitimate need to do so and, as a result, RCW 7.70.150 also violates equal protection.

RCW 7.70.150 has an additional constitutional problem as well. The statutory scheme allows for a person to be shut out of the court system when they seek compensation for injuries. If the certificate of merit cannot be obtained, the doors of the courthouse are shut. While, as a practical matter, it would be difficult to proceed without witnesses who can establish the negligence, this statute precludes the attempt, no matter how meritorious the claim. Jurors can disregard the opinions of expert witnesses. Often, professionals are unwilling to accuse fellow professionals of malpractice. If

a person with a claim cannot find an expert willing to provide the certificate, judicial review is denied. Because of this, the statute is an example of the legislative and executive branches' attempt to divest the judicial branch its role in determining the merit of claims brought forth. As a result, this violates the separation of powers doctrine and equal protection.

E. ARGUMENT

I.

THE TRIAL COURT ERRED IN DISMISSING THIS CASE WHEN THE STATUTE IN QUESTION DID NOT REQUIRE STRICT COMPLIANCE, THE PROCEDURES FOR THE MEDIATION WERE NOT IN EFFECT AT THE TIME THE CASE WAS FILED, AND RCW 7.70.100 TREATS ONE CLASS OF TORTFEASER DIFFERENTLY FROM OTHER CLASSES OF TORTFEASERS.

1. Strict compliance standard should not required, when RCW 7.70.100 does not apply to a governmental agency and is not worded the same as RCW 4.96.010. If this were a claim against the State of Washington or a local government, the rule requiring advance notice would be one of strict compliance. See RCW 4.96.010 which uses the phrase ". . . *shall* be a condition precedent. . . ." (Emphasis added) in requiring that a demand be made against the governmental unit before a suit can be commenced. See also Burnett v. Tacoma City Light, 124 Wn. App. 550, 104 P.3d 677 (2004),

where the court imposed a strict compliance standard. The court recognized that while this could lead to harsh results, the statute would still strictly apply, even if the act of filing the notice would be futile or if the governmental entity was aware of the claim. It is important to the analysis of the case that the statute in question dealt with governmental claims under RCW 4.96.010.

Unlike RCW 4.96.010, RCW 7.70.100 does not apply to governmental agencies and is worded differently. RCW 7.70.100 says no action may be filed with out the requisite notice. The statute also requires mediation, under rules to be promulgated by the Supreme Court. Those rules were created but did not take effect until March 11, 2007, after this case was dismissed.

In applying this to the case at bar, the statutes are worded differently. Further, RCW 4.96.010 deals with governmental units, that the legislature was not required to give up sovereign immunity in the first place. Given that statute uses language of ". . . shall be condition precedent . . ." to the filing of a lawsuit against a governmental entity, it is crystal clear that the terms are mandatory. Clearly, strict compliance was required, and the courts have so held. In this case, because the statutes are worded differently and the statute deals with private tortfeasers, the trial court should have allowed the parties to engage in mediation, rather than dismiss the case.

2. <u>The court should decline to enforce RCW 7.70.100 in this case, when</u>

it was filed prior to there even being any mediation procedures in effect, under the statute. Additionally, as stated above, the mediation requirements of RCW 7.70.100 were impossible to fulfill, because the rules to govern that mediation had not been created, at the time this lawsuit was filed. Given the recent enactment of the statute, and the fact that it was impossible for litigants to comply with the statute when this case was filed, the trial court should have allowed the parties to submit to mediation once it became available.

3. RCW 7.70.100 is unconstitutional when it treats one class of private tortfeasers differently than other classes of private tortfeasers for no justifiable reason. The courts may only find a statute unconstitutional when it is shown beyond a reasonable doubt. State v. Pietrzak 100 Wn. App. 291, 997 P.3d 947 (2000). Additionally a statute is unconstitutional on its face, when there are no circumstances where it can be applied constitutionally. See City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

The courts have dealt with equal protection as it applies to tort cases. In Hunter v. North Mason High School, 85 Wn.2d 810, 539 P.2d 845 (1975), a minor was injured playing rugby during a school P.E. class. His father did notify the school principal of the injury. He did not make a claim, within 120 days of the injury, as was required by then RCW 4.96.020. The trial court dismissed the case, for failure to file such a claim. The Court of Appeals reversed, due to his minor status. The Washington State Supreme Court,

instead, chose to look at the issue from equal protection grounds. The Supreme Court held that ". . . Statutory classifications which substantially burden such rights as to some individuals but not others are permissible under the equal protection clause of the Fourteenth Amendment only if they are 'reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920)." Hunter v. North Mason Highschool, supra. The court was concerned that the effect of this statute was to deny people the ability to pursue a claim against governmental entities, such as school districts, where no such requirement existed for private tortfeasers. Generally, most people would not be aware of the time limit, until after it expired. The court found that the statute was unconstitutional because it violated equal protection, because there was no legitimate reason to treat governmental entities differently than private entities. See also Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989). While the Court, in that case, did not decide the issue of previous attempts of tort "reform" on equal protection grounds, it did discuss the issue and expressed concern.

In applying this to the case at bar, it should be noted that, like in Hunter, supra, the State has chosen to treat different classes of tortfeasers

differently. There is no compelling governmental interest in doing so. One could argue that theses types of cases are more complex and time consuming. However, many non-medical cases are also complex and time consuming. Many slip and fall cases are going to be complicated. Civil cases involving embezzlement are going to be complicated, sorting though the records and presenting it in a coherent manner to a jury. Product liability can be extremely complicated. While the practice of medicine is important, so is the practice of law, accounting, not to mention operating theme parks, transportation, etc. There is no legitimate justification to treat medical providers any differently than these other classes of potential tortfeasers. Unlike Hunter, supra, we are not distinguishing governmental tortfeasers from private tortfeasers. This law differentiates different classes of *private* tortfeasers. The actions of the Legislature, in this case, were unreasonable and arbitrary. There simply is no justification. Accordingly, the court should find the statute unconstitutional. There is no set of circumstances whereby this statute could be constitutionally applied.

II.

THE TRIAL COURT ERRED IN DISMISSING THIS CASE FOR FAILURE TO OBTAIN A CERTIFICATE OF MERIT WHEN THAT REQUIREMENT, IMPOSED BY THE LEGISLATURE VIOLATES THE SEPARATION OF POWERS DOCTRINE AND EQUAL PROTECTION.

1 RCW 7.70.150 is unconstitutional when it treats one class of private tortfeasers differently than other classes of private tortfeasers for no justifiable reason. As stated above, the legislature cannot treat one class of tortfeasers differently than another. See Hunter v. North Mason High School, 85 Wn.2d 810, 539 P.2d 845 (1975). For the same reasons RCW 7.70.100 treats medical practitioners differently, so does RCW 7.70.150. RCW 7.70.150 requires a certificate of merit, to even get into or stay in the courtroom. There would be no judicial review, by judge or jury, if such a certificate could not be had, because a case could not be filed or maintained. Any other type of private tortfeaser would be subject to the filing of a lawsuit, without a certificate of merit being obtained. As argued above, there simply are no justifications to treat medical malpractice any different. The actions of the Legislature, were unreasonable and arbitrary, when it passed RCW 7.70.150, just as it was when it passed RCW 7.70.100.

Prior to the enactment of these statutes, there were remedies to the filing of frivolous suits. Litigation is not pleasant and can be expensive, regardless of the type of tort claim that is being litigated. This author would suggest that the only justification was an attempt on the part of the Legislature to placate the medical profession and insurance industry. That does not justify the discrimination RCW 7.70.150 codifies into our legal system. Equal protection is not the only constitutional problem of RCW

7.70.150.

2. RCW 7.70.150 is unconstitutional when it removes the discretion of the court to rule on whether a case has merit and by removing the right to trial by jury, by requiring an expert to determine merit, as a condition precedent to the case going forward. The Appellant submits that this statute is unconstitutional on its face. ". . . Our Washington state constitution does not contain a formal separation-of-powers clause. Nonetheless, separation of powers is a vital doctrine, presumed throughout our state history from the division of our state government into three separate branches." State v. David, 134 Wn. App. 470, 141 P.3d 646 (2006). Additionally, the right to a jury trial in tort cases is guaranteed by the Washington State Constitution.

Washington State Constitution
Article 1 section 21

> The right of a trial by jury shall remain inviolate, but the legislature may provide for a jury for any number less than twelve in courts not of record, and for a verdict of nine of more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The courts have made clear that this applies to tort claims. In Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989), the Washington Supreme Court dealt with another legislative attempt to limit the discretion of juries, in tort claims. There, the legislature placed a cap on non-economic

damages, at $300,000.00. The jury was not to be told about the cap; the judge would reduce the judgment downward. The Court did an analysis of the cases that dealt with the extent of the right to a civil jury trial. The starting point was the extent of the right at the time the Constitution was adopted. State ex. rel. Goodner v. Speed, 96 Wn.2d 838, 640 P.2d 13 (1982). The court cited Baker v. Prewitt, 3 Wash. Terr. 595, 19 P. 149 (1888) to make clear that the scope of the right to trial by jury included determining damages. The court made clear that determining the actual damages was the province of the jury and that the statutory scheme was therefore unconstitutional because it removed that from the jury. The court rejected comparisons to the judge's authority under the doctrine of remittitur.

The judge's authority under that doctrine was discussed in James v. Roebeck, 79 Wn.2d 864, 490 P.2d 878 (1971) where the court reviewed the trial judge's reduction of a damage award. While a trial judge has the right to change a jury's determination of damages, great deference has to be shown to the jury and there must be a finding that the jury's award was not supported by the evidence in the trial. Again, the Supreme Court established very clearly the important role of the jury in determining the damages. The court in Sofie, supra, pointed out that the tort reform legislation took the doctrine of remittitur a step further and referred to it as legislative remittitur. Unlike the trial court's discretion, the Legislature required the reduction, regardless of the evidence. The key difference was that the legislature's scheme had no bearing to the facts of the case at all, where as the traditional authority of the judge required that the evidence be taken into account.

In applying this to the case at bar, it RCW 7.70.150 actually goes further than the laws that was the subject of the Sofie, case. At least under the previous law, the case could be brought and be subject to judicial review of the verdict, where as in this case, without the certificate of merit one does not get to go into court at all. While it would, admittedly, be a rare case that is able to go forward without expert evidence, RCW 7.70.150 mandates it, for the case to even go forward. In essence, the Legislature granted private citizens a veto power over a claim being pursued, with no judicial review. If there is a reluctance by qualified individuals to give such a certificate, regardless of the reason for that reluctance, there will be no judicial review of the merits, not to mention a jury, because RCW 7.70.150 requires dismissal. Such a statutory scheme violates the separation of powers doctrine, because the statute takes away the legitimate authority of the courts, to make the final ruling in legal disputes. It is the Appellant's position that requiring a non-judicial entity to essentially take over the role of deciding whether a claim has merit is nothing more than a legislative encroachment of the judicial branch of government. This is also true when there are already judicial remedies to quickly dispose of non-meritorious cases from the court system. As argued above, there is no set of circumstances whereby this statute could be constitutionally applied. See City of Redmond v. Moore, supra.

RCW 7.70.150 also violates Article I, section 21 of the Washington State Constitution because it takes the role of determining the facts of a case from the jury and gives it to the expert who prepares or does not prepare the certificate. This statute goes far beyond what was found to be

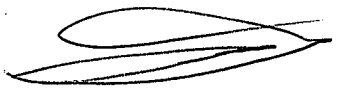
unconstitutional in Sofie v. Fibreboard Corp., supra. For that reason, the trial court erred in dismissing the case.

F. CONCLUSION

Therefore, for the reasons given in this brief, the trial court erred in dismissing this case, when RCW 7.70.100 should not be strictly enforced and violates equal protection. Additionally, because RCW 7.70.150 also violates equal protection and violates the separation of powers doctrine, the trial court erred in dismissing the case. Accordingly, the order of the trial court, dismissing this case should be reversed, and the matter remanded back for trial.

DATED This 24th Day of July, 2007.

RESPECTFULLY SUBMITTED,



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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

NANCY N. WAPLES and MARK WAPLES, husband and wife and their marital community thereof, Appellants, v. PETER H. YI, DDS, and JANE DOE YI, husband and wife and their marital community thereof, dba LAKEWOOD DENTAL CLINIC, and Dr. Peter H. YI, DDS, P.S. a Washington Corporation, Respondent.	No. 36211-2-II **AFFIDAVIT OF MAILING**

I, Olene Cheryl Steele, being first duly sworn, on oath, certify that at all times mentioned herein I was of legal age, and on July 24, 2007, I mailed a copy of the documents listed below by mailing copies thereof, First Class Mail, with the proper postage affixed thereto to the following: Washington State Court Of Appeals Division Two 950 Broadway Suite 300 Tacoma, WA 98402.

Copies of Documents Mailed: **Brief of Appellant Nancy Ngyuen Waples**

I certify under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 24th day of July 2007, at Shelton, Washington.

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