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SUPREME COURT  
STATE OF WASHINGTON

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BY RONALD F. NICOL, M.D. ENTER

82142-9

THE STATE OF WASHINGTON SUPREME COURT

CLERK

LINDA CUNNINGHAM AND DOWNEY C. CUNNINGHAM, A MARITAL  
COMMUNITY

Appellants,

vs.

RONALD F. NICOL, M.D.; VALLEY RADIOLOGISTS, INC., P.S. and  
MULTICARE HEALTH SYSTEM, INC. dba COVINGTON MULTICARE CLINIC

Respondents.

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STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. NATURE OF CASE AND DECISION

This appeal presents fundamental constitutional issues of first impression and issues of great public importance regarding medical malpractice actions and the special legislative limitations applicable only to health care claims.

Appellants seek direct review of the trial court decision dismissing their personal injury complaint (arising from allegations of medical negligence) entered by the King County Superior Court on March 13,

2009. The issues presented in this appeal include the application and validity of RCW 7.70.100 and RCW 4.16.350, and the material conflicts between the “mandatory” 90-day pre-filing waiting period under RCW 7.70.100 and the applicable eight year statute of abrogation/repose. The Supreme Court’s decision and opinion in Putman v. Wenatchee Valley Medical Center, (No. 80888-1, oral arguments completed on 2/24/09) is potentially relevant to this appeal, as is the fact that the Supreme Court has granted review in Waples v. Yi, 146 Wn. App. 54 (2008), (No. 82142-9) which also raises issues pertaining to RCW 7.70.100.

Regarding the statute at issue, on March 6, 2006, Governor Gregoire signed into law Second Substitute House Bill 2292, the so-called “Comprehensive Patient Protection Act” (effective June 7, 2006). The Act includes provisions, that re-enact the statute of response and create the pre-filing requirements of Notice of Intent to Sue, Certificate of Merit, and 90-day pre-filing waiting period. The appellants contend that the 90-day waiting period is unconstitutional and appellants seek direct review in this Court on these important public issues that materially affect the rights of Washington state citizens.

Regarding the underlying facts that are the basis for the Cunningham Complaint, (**Appendix A**), Linda Cunnigham is a 54-year-old woman who in August 24, 2000, was referred for imaging of her brain to rule out serious pathology. The radiology specialists in their report, dated August 24, 2000, reported the study as normal when, in fact, the

study showed tumors. The tumors grew over the next eight years to eventually require invasive surgeries. Linda Cunningham has survived the negligence of the radiologist, and now asserts a legal claim that must survive the inattention of the legislature, which created direct conflicts between RCW 7.70.100 and RCW 4.16.350. (**Appendix B**)

On March 13, 2009 the defendants jointly moved to dismiss the claims against them, contending that state laws now require Cunningham to file within the statute of repose and comply with the RCW 7.70.100 90-day pre-filing waiting period, which Cunningham did not do. The Superior Court dismissed the case at Summary Judgment on March 13, 2009, and entered its Order Granting Defendants Nicol and Valley Radiologist's Motion to Dismiss. This appeal timely followed. (**Appendix C**).

Cunningham appeals from the Superior Court's decision that the 90-day waiting period is mandatory under RCW 7.70.100 and RCW 4.16.350. Appellants assert that Washington's pre-filing requirement is unconstitutional under the following principles:

- The pre-filing requirement is an unconstitutional violation of the ban on special laws, Washington Constitution, art. 2, § 28(6);<sup>1</sup> *cf.* CR 8, because the requirement is not rationally related to the goal of reducing malpractice insurance premiums by attempting to decrease the number of frivolous malpractice suits and does nothing to promote "mandatory" mediation;

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<sup>1</sup> "The legislature is prohibited from enacting any private or special laws in the following cases:-- . . . 6. For granting corporate powers or privileges."

- The pre-filing requirement creates an unconstitutional barrier and delay of justice, contrary to the open access to courts mandated by Washington Constitution, Art. 1, § 10;<sup>2</sup> Article 1, § 32.<sup>3</sup>
- The pre-filing requirement offends due process or equal protection, U.S. Const. Amend. 14 (due process, equal protection); Washington Constitution, Art. 1 § 3<sup>4</sup> and § 12.<sup>5</sup>
- The pre-filing requirement violates separation of powers between the judiciary and the legislature, Washington Constitution, Art. 4, § 1.

The 90-day waiting period requirement applies only to health care claims. No other negligence claim carries similar pre-filing requirements that conflict with any statute of repose, with such unjust results.

## 2. ISSUE PRESENTED FOR REVIEW

By requiring a 90-day waiting period does RCW 7.70.100 violate the Washington State Constitution's separation of powers clause; prohibitions against special laws; rights of open access to the courts; and the privileges and immunities clause; as well as the U.S. Constitution's equal protection and due process clauses?

## 3. GROUNDS FOR DIRECT REVIEW

**a. This appeal presents important public issues that should be reviewed directly by this Court.** RAP 4.2(a)(4) allows direct review in cases involving a "fundamental and urgent issue of broad public import which requires prompt and ultimate determination." *See, e.g., Nast v.*

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<sup>2</sup> "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."

<sup>3</sup> "Justice in all cases shall be administered openly, and without unnecessary delay."

<sup>4</sup> "No person shall be deprived of life, liberty, or property, without due process of law."

<sup>5</sup> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

*Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). The Supreme Court may accept review based on public importance and judicial economy even when a petitioner fails to file a statement of grounds for direct review. *In re Petersen*, 138 Wn.2d 70, 77 n.3, 980 P.2d 1204 (1999). The Court may consider information outside the record to determine whether to grant direct review. *D/O Center v. Department of Ecology*, 119 Wn.2d 761, 769, 837 P.2d 1007 (1992).

The importance of legislative limitations applicable only to health care claims is apparent.<sup>6</sup> The Legislature declared the high priority of health care issues, including justice, safety, and insurance, in its Statement of Intent:

**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**

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<sup>6</sup> [http://kff.org/kaiserpolls/h08\\_pomr122007pkg.cfm](http://kff.org/kaiserpolls/h08_pomr122007pkg.cfm);

[http://www.allhealth.org/publications/Uninsured/toolkit\\_uninsured.asp#keyfacts](http://www.allhealth.org/publications/Uninsured/toolkit_uninsured.asp#keyfacts).

**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.

Laws of 2006, chapter 8 § 1 (emphasis added; following RCW 5.64.010).<sup>7</sup>

As reflected in this statement, a clear purpose of the law's pre-filing requirements is to prevent frivolous lawsuits from being filed.

The problems created by such unconstitutional laws are urgent, and public importance and judicial economy call for this Court's direct review, especially in light of the pending decision in *Putman and Waples*.

**b. This appeal involves constitutional issues of first impression.**

Cunningham may seek direct review in the Supreme Court from a Superior Court final decision because this appeal involves a statute's constitutionality. RAP 4.2(a)(2); see *State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee*, 135 Wn.2d 618, 623, 957 P.2d 691 (1998).

**(1) The 90-day pre-filing requirement adds nothing to assure the merits of a given case or support mandatory mediation.** Relevant to this issue, the 90-day requirement is redundant, because litigants must already certify that the lawsuit is not presented for an improper or frivolous purpose and is based on reasonable inquiry. CR 11.

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<sup>7</sup> The bill was passed overwhelmingly in the Washington State Senate by a vote of 48-0 (1 excused), and in the House of Representatives by 82-15 (1 excused). See also amendment to RCW 7.70.100. **Debate on medical malpractice reform is ongoing; we can expect further amendments and proposed changes.** See SB 5093 and SB 5390, "Healthy Washington Initiative," adopting recommendations from the Blue Ribbon Commission on Health Care Costs and Access. <http://www.kff.org/uninsured/statehealthreform/wa.cfm>; <http://wstla.org/legislativenews>.

(2) **Separation of powers clause.** The 90-day pre-filing requirement violates separation of powers by allowing the Washington Legislature to create procedural rules for lawsuits when only the Washington Supreme Court has the constitutional power to create those procedural rules. Washington Constitutional, Art. 4, § 1.<sup>8</sup> “It is within the power of this court to dictate, under the constitutional separation of powers, its own court rules, even if they contradict rules established by the Legislature. Const. Art. 4, § 1.” *Marine Power & Equipment Co., Inc. v. Industrial Indem. Co.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984); CR 8.

When other jurisdictions have faced analogous issues particularly “in the face of a statutory scheme which failed to contemplate the scenario presented[,] . . . a review of decisions of other jurisdictions is instructive.” *In re Parentage of L.B.*, 155 Wn.2d 679, 702, 122 P.3d 161 (2005). In *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992) a statute requiring sixty days’ notice to medical-malpractice defendants before filing an action was superseded by Civil Rule 3. See also, *Summerville v. Thrower*, 369 Ark. 231 (2007), where the court concluded the same reasoning made an affidavit of reasonable cause unconstitutional, quoting *Weidrick*: “We can think of few rules more basic to the civil process than a rule defining the means by which complaints are filed and actions commenced for a common law tort such as medical malpractice.”

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<sup>8</sup> “The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.”

Only the Supreme Court has the power to change the civil rules. RCW 7.70.100's pre-filing requirement violates separation of powers by permitting the Washington Legislature to usurp the Supreme Court's role.

**(3) Privileges and immunities, equal protection, and due process clauses.** The 90-day pre-filing requirement creates an impermissible obstacle that favors medical malpractice defendants and insurers that have vast resources to delay, diminish, and defend against these claims. Such laws conflict with "our state's framers' concern with undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority." *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 808, 83 P.3d 419 (2004).

Under lenient "rational relationship" scrutiny, the subject law's classifications bear no rational relationship to the statute's stated purpose. The 90-day pre-filing requirement is ineffective in meeting the Act's goals. Any relationship to an unnecessary, redundant, or improper purpose cannot be rational. The pre-filing requirement cannot be reconciled with the Washington State Constitution's privileges and immunities clause, and it denies equal protection and due process under both the state and federal constitutions.

**(4) Ban on special legislation.** Special legislation, prohibited by the State Constitution, operates upon a single person or entity instead of a class. Any exclusions from a statute's applicability, as well as the statute

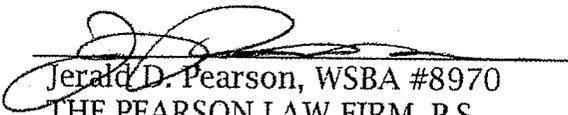
itself, must be rationally related to the statute's purpose. *Brower v. State*, 137 Wn.2d 44, 52, 969 P.2d 42 (1998). The 90-day pre-filing requirement has no rational relationship to the statute's purpose.

(5) **Open court access.** Access to justice is a fundamental right and a "privilege" within the privileges and immunities clause.<sup>9</sup> Justice delayed is justice denied: here, the 90-day pre-suit requirement can prevent the filing of a suit within the last months of the Statute of Repose, and a plaintiff like Cunningham is left with no remedy. *See, e.g., Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780-81, 819 P.2d 370, 375 (1991).

DATED this 28<sup>th</sup> day of April, 2009.

Respectfully Submitted,

The Pearson Law Firm



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<sup>9</sup> James A. Bamberger, *Confirming The Constitutional Right Of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 Seattle J. for Soc. Just. 383, 397-98, 414-15 (Fall/Winter 2005).

# Appendix A

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
9 IN AND FOR THE COUNTY OF KING

10 LINDA CUNNINGHAM AND DOWNEY  
11 C. CUNNINGHAM, A MARITAL  
COMMUNITY,

12 Plaintiffs,

13  
14 vs.

No.

15 RONALD F. NICOL, M.D.; VALLEY  
16 RADIOLOGISTS, INC., P.S. and  
17 MULTICARE HEALTH SYSTEM, INC. dba  
COVINGTON MULTICARE CLINIC,

18 Defendants.  
19

20  
21 **COMPLAINT FOR PERSONAL INJURIES IN TORT**  
22 **(MEDICAL NEGLIGENCE)**

23 COME NOW the Plaintiffs, and for claims against these Defendants, allege  
24 as follows:

25 1. PARTIES:

26 1.1 Plaintiffs CUNNINGHAM: Linda Cunningham and Downey  
27 Cunningham, are husband and wife and at all material times were residents of  
28  
29

1 King County, Washington; and Linda Cunningham was a patient receiving health  
2 care services through the named defendants.

3  
4 1.2 Defendant NICOL: Ronald F. Nicol, M.D. is a health care  
5 professional duly licensed to practice as a specialist physician/radiologist in  
6 the State of Washington, and at all material times defendant Nicol was  
7 practicing in King County and a resident of the State of Washington; and on  
8 information and belief defendant Nicol was an employee or agent of the other  
9 defendants, through which Nicol provided radiology services to  
10 plaintiff/patient Linda Cunningham, acting within the scope of his employment.

11  
12 1.3 Defendant Multicare: Multicare Health Systems, Inc, dba  
13 Covington Multicare Clinic, is a corporation which provides medical services to  
14 the public, acting through its agents and employees, including defendant Valley  
15 Radiologists and defendant Nicol.

16  
17 1.4 Defendant Valley: Valley Radiologists, Inc., P.S., is a  
18 corporation which provides medical services to the public, acting through its  
19 agents and employees, including defendant Nicol.

20  
21 2. JURISDICTION AND VENUE: The subject matter hereof and the  
22 parties hereto are subject to the jurisdiction of the above-entitled Court; and  
23 venue is proper.

24  
25 3. NEGLIGENCE, LIABILITY FACTS AND LIABILITY THEORIES

26  
27 3.1 On or about August 24, 2000, plaintiff Linda Cunningham  
28 was seen by her primary care physician Pamela Yung MD, and referred for  
29 imaging studies through the Covington Multicare Clinic to rule out any serious

1 and life threatening causes of Linda Cunningham's reported symptoms.  
2 Plaintiff Linda Cunningham requested, and was legally entitled to receive,  
3 reasonably prudent health care services.  
4

5 3.2 The imaging studies at issue (brain MRI) were taken on  
6 August 24, 2000 and reported by and through the defendants as normal; and in  
7 fact, the imaging studies were markedly abnormal, and showed abnormalities  
8 of extra-axial tumor mass, evident on all pulse sequences and more than eight  
9 images; and Linda Cunningham did not learn of any issues pertaining to the old  
10 films managed by these defendants until February 2008.  
11

12 3.3 The health care services defendants provided to plaintiff  
13 Linda Cunningham were below the standard of care, as defendants negligently  
14 failed to accurately review and accurately report the abnormalities on the  
15 subject imaging studies, and failed to alert the plaintiffs to the inaccurate  
16 reporting.  
17

18 3.4 At all material times defendant Nicol acted independently  
19 and/or as apparent or actual agent or employee of Covington Multicare, and/or  
20 Valley Radiologists.  
21

22 3.5 Standard of Care: The health care provided by the  
23 defendants was below the standard of care, and the defendants failed in their  
24 duty to provide reasonable and prudent care, and failed to exercise the degree  
25 of skill, care, and learning expected of reasonably prudent providers under  
26 such circumstances.  
27  
28  
29

1           4.     CAUSATION AND DAMAGES: As a direct, immediate and proximate  
2 result of the defendants' negligent and wrongful conduct Plaintiffs sustained  
3 severe personal injuries, and permanent disabilities, including loss of  
4 consortium, all to their actual and continuing damage in an amount to be  
5 proven at trial.  
6

7           5.     **DECLARATORY RELIEF IS REQUESTED DUE TO THE PRESENCE**  
8 **OF A JUSTICIABLE CONTROVERSY: CONTRADICTIONS BETWEEN**  
9 **STATUTORY PREREQUISITES TO SUIT AND THE APPLICABLE STATUTE OF**  
10 **REPOSE**: RCWA 7.70.100 requires a mandatory Notice of Intent To Sue; the  
11 statute dictates that no claim can be commenced until a Notice is provided and  
12 a 90 day waiting period has passed; the statute also confirms that upon  
13 compliance with this requirement all applicable statutes of limitation will be  
14 extended for 90 days. RCWA 7.70.100, however, does not address the  
15 implications of the 90 day notice on the applicable statute of repose under  
16 RCWA 4.16.350 which provides that regardless of any late discovery of  
17 negligence, no claim can be commenced after eight years.  
18  
19  
20

21           Under the legislative history of the applicable statute our Legislature  
22 specifically declared its intentions in its effort to address judicial concerns:  
23

24           "The purpose of this section and section 302, chapter 8, Laws of 2006 is to  
25 respond to the court's decision in DeYoung v. Providence Medical Center, 136  
26 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-  
27 year statute of repose in RCW 4.16.350.  
28

29           Plaintiffs note the potential contradictions between these principles of  
limitation, repose and extension, and the judicially recognized difference

1 between statutes of limitation and statutes of repose; and plaintiffs note that  
2 the Notice of Intent To Sue required by RCWA 7.70.100, if valid, effectively  
3 shortens the applicable statute of repose to less than eight years, unlawfully  
4 denying certain citizens like Linda and Downey Cunningham access to the  
5 courts and denying essential rights guaranteed by the Constitution of the State  
6 of Washington.  
7

8  
9 Plaintiffs also note that if our courts treat the statute of repose as a  
10 statute of limitation, and the Notice and 90 day waiting period extends this  
11 applicable limitation period, then compliance with RCWA 7.70.100 will extend  
12 the period of repose beyond eight years.  
13

14 Plaintiffs seek Declaratory Relief to resolve all ambiguity under these  
15 facts, and provide judicial confirmation that the case has been properly  
16 commenced.  
17

18 WHEREFORE, Plaintiffs pray for Declaratory Relief and judgment  
19 against Defendants jointly and severally as follows:

- 20 a. For an amount commensurate Plaintiffs' injuries to be determined  
21 at the time of trial;  
22  
23 b. For Plaintiffs' costs, disbursements, pre-judgment interest on  
24 liquidated damages and attorney's fees incurred herein;  
25  
26 c. For declaratory relief as referenced above; and  
27  
28 d. For such other and further relief as the court deems just and  
29 equitable.

1 DATED this 20th day of August, 2008.

2 THE PEARSON LAW FIRM, P.S.

3  
4  
5 By: J.P.  
6 JERALD D. PEARSON, WSBA #8970  
7 Attorney for Plaintiffs  
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# Appendix B

**C**West's Revised Code of Washington Annotated CurrentnessTitle 7. Special Proceedings and Actions (Refs & Annos)▣ Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)

→ 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.

## CREDIT(S)

[2007 c 119 § 1, eff. July 22, 2007; 2006 c 8 § 314, eff. June 7, 2006; 1993 c 492 § 419.]

## HISTORICAL AND STATUTORY 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.

Laws 2006, ch. 8, § 314 rewrote the section, which formerly read:

"(1) 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.

"(2) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The rules 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.

“(3) Mediators shall not impose discovery schedules upon the parties.”

#### 2007 Legislation

Laws 2007, ch. 119, § 1 rewrote subsec. (1), which formerly read:

“(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. 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 service of the notice.”

#### CROSS REFERENCES

Health carriers, standards and quality of care, rejected complaints submitted to nonbinding mediation, see § [48.43.055](#).

#### ADMINISTRATIVE CODE REFERENCES

Environmental claims, see [WAC 284-30-900 et seq.](#)

#### LAW REVIEW AND JOURNAL COMMENTARIES

A tale of two initiatives: Where propaganda meets fact in the debate over America's health care. Randolph I. Gordon and Brook Assefa, 4 *Seattle J.Soc.Jus.* 693 (2006).

#### LIBRARY REFERENCES

2007 Main Volume

[Alternative Dispute Resolution](#)  [444](#).  
Westlaw Topic No. [25T](#).

## Statute of Repose for Health Care Claims

West's RCWA 4.16.350

West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.16. Limitation of Actions (Refs & Annos)

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

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

- (1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;
- (2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or
- (3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

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

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a

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

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

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

#### CREDIT(S)

[2006 c 8 § 302, eff. June 7, 2006. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.]

#### HISTORICAL AND STATUTORY NOTES

**Purpose--Findings--Intent--2006 c 8 §§ 301 and 302:** "The purpose of this section and section 302, chapter 8, Laws of 2006 is to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-year statute of repose in RCW 4.16.350.

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.

In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.

The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.

The legislature intends to reenact RCW 4.16.350 with respect to the eight-year statute of repose and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the eight-year statute of repose reenacted by section 302, chapter 8, Laws of 2006 be applied to actions commenced on or after June 7, 2006." [2006 c 8 § 301.]

**Findings--Intent--Part headings and subheadings not law--Severability--2006 c 8:** See notes following RCW 5.64.010.

**Application--1998 c 147:** "This act applies to any cause of action filed on or after June 11, 1998." [1998 c 147 § 2.]

**Application--1988 c 144:** See note following RCW 4.16.340.

**Preamble--Report to legislature--Applicability--Severability--1986 c 305:** See notes following RCW 4.16.160.

**Severability--1975-'76 2nd ex.s. c 56:** "If any provision of this 1976 amendatory 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." [1975-'76 2nd ex.s. c 56 § 15.]

Laws 1975-76, 2nd Ex.Sess., ch. 56, § 1, rewrote this section, which had read:

"Any civil action for damages against a hospital which is licensed by the state of Washington or against the personnel of any hospital, or against a member of the healing arts including, but not limited to, a physician licensed under chapter 18.71 RCW or chapter 18.57 RCW, chiropractor licensed under RCW 18.25, a dentist licensed under chapter 18.32 RCW, or a nurse licensed under chapter 18.88 or 18.78 RCW, based upon alleged professional negligence shall be commenced within (1) three years from the date of the alleged wrongful act, or (2) one year from the time that plaintiff discovers the injury or condition was caused by the wrongful act, whichever period of time expires last."

Laws 1986, ch. 305, § 502, rewrote the proviso at the end of the first paragraph, and added the second paragraph. Prior to revision, the proviso read: "*Provided*, That the limitations in this section shall not apply to persons under a legal disability as defined in RCW 4.16.190."

Laws 1987, ch. 212, § 1401, in the second paragraph, inserted "and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section," and added the third paragraph, relating to the effective date for imputing the knowledge of a custodial parent or guardian.

Laws 1988, ch. 144, § 2, added the last paragraph.

Laws 1998, ch. 147, § 1, in subsec. (1), substituted "podiatric physician and surgeon" for "podiatrist"; and, at the end of subsec. (3), added ", until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages".

2006 Legislation

Laws 2006, ch. 8, § 302 reenacted the section without change.

# Appendix C

RECEIVED

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3/16/09

SW

THE HONORABLE CHERYL CAREY

HEARING DATE: MARCH 13, 2009  
WITH ORAL ARGUMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

LINDA CUNNINGHAM AND DOWNEY C.  
CUNNINGHAM, A MARITAL  
COMMUNITY,

Plaintiffs,

vs.

RONALD F. NICOL, M.D.; VALLEY  
RADIOLOGISTS, INC., P.S. and  
MULTICARE HEALTH SYSTEM, INC. dba  
COVINGTON MULTICARE CLINIC,

Defendants.

NO. 08-2-28582-1KNT

ORDER GRANTING DEFENDANTS  
NICOL AND VALLEY  
RADIOLOGIST'S MOTION TO  
DISMISS

This matter having come before the Court upon Defendants Ronald Nicol M.D. and Valley Radiologist's Motion to Dismiss For Failure to Comply with RCW 7.70.100, the Court having heard oral argument on the matter and the Court having considered the records and pleadings on file in this matter, and the following:

1. Defendant Dr. Nicol's and Valley Radiologist's Motion to Dismiss and the Declaration of Jennifer L. Moore and exhibit attached thereto;
2. Defendant Multicare's Joinder in Motion to Dismiss;

ORDER GRANTING DEFENDANTS NICOL AND VALLEY  
RADIOLOGISTS MOTION TO DISMISS - 1

LAW OFFICES  
BENNETT BIGELOW & LEEDOM, P.S.  
1700 Seventh Avenue, Suite 1900  
Seattle, Washington 98101  
T. (206) 622-5511 / F. (206) 622-8986

1 3. Plaintiff's Opposition, the Declaration of Jerald Pearson and the exhibits  
2 attached thereto; and

3 4. Defendant Dr. Nicol's and Valley Radiologist's Reply; and

4 5. Defendant Multicare's Joinder in Reply Brief.

5 And the Court therefore being fully informed, NOW, THEREFORE, IT IS HEREBY  
6 ORDERED THAT Defendants' Motion to Dismiss is Hereby GRANTED because plaintiffs  
7 failed to state a claim for failure to comply with RCW 7.70.100. It is further hereby  
8 ORDERED that all claims against all Defendants in this matter shall be, and are hereby,  
9 DISMISSED with prejudice.  
10

11  
12 DATED this 13 day of March, 2009.

13  
14   
15 \_\_\_\_\_  
16 Judge Cheryl Carey

17 Presented by:

18  
19 BENNETT BIGELOW & LEEDOM, P.S.

20 By: Jennifer L. Moore  
21 Elizabeth A. Leedom, WSBA #14335  
22 Jennifer L. Moore, WSBA #30422  
23 Attorney for Defendants Nicol and Valley  
24 Radiologists, Inc., P.S.  
25  
26

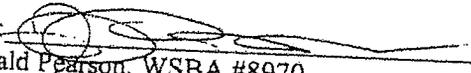
ORDER GRANTING DEFENDANTS NICOL AND VALLEY  
RADIOLOGISTS MOTION TO DISMISS - 2

LAW OFFICES  
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1700 Seventh Avenue, Suite 1900  
Seattle, Washington 98101  
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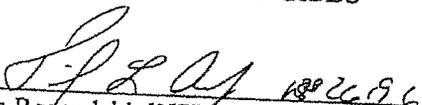
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Approved as to form, notice of presentation waived:

THE PEARSON LAW FIRM

By:   
Jerald Pearson, WSBA #8970  
Attorney for Plaintiffs

WILLIAMS KASTNER & GIBBS

By:   
John Rosendahl, WSBA #9394  
Attorney for Defendant Multicare Healthy  
System d/b/a Covington Multicare Clinic

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ORDER GRANTING DEFENDANTS NICOL AND VALLEY  
RADIOLOGISTS MOTION TO DISMISS - 3

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Seattle, Washington 98101  
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## OFFICE RECEPTIONIST, CLERK

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**To:** Angie Martinez  
**Cc:** eleedom@bblaw.com; Jennifer L. Moore; Rosendahl, John; Ashcraft, Tim; Carol J. Hagler; Steffensen, Karen; Jerald D. Pearson  
**Subject:** RE: Supreme Court No. 82973-0; Linda Cunningham, et al v. Ronald Nicol, et al.; King County No. 08-2-28582-1 KNT

Rec. 4-28-09

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**From:** Angie Martinez [mailto:angie@pearsonlawfirm.com]

**Sent:** Tuesday, April 28, 2009 4:16 PM

**To:** OFFICE RECEPTIONIST, CLERK

**Cc:** eleedom@bblaw.com; Jennifer L. Moore; Rosendahl, John; Ashcraft, Tim; Carol J. Hagler; Steffensen, Karen; Jerald D. Pearson; Angie Martinez

**Subject:** Supreme Court No. 82973-0; Linda Cunningham, et al v. Ronald Nicol, et al.; King County No. 08-2-28582-1 KNT

Dear Clerk:

Enclosed please find for filing the following documents regarding Supreme Court No. 82973-0; Linda Cunningham, et al v. Ronald Nicol, et al.; King County No. 08-2-28582-1 KNT:

1. Declaration of Service of Statement of Grounds for Direct Review;
2. Statement of Grounds for Direct Review; and
3. Appendixes A-C.

Please confirm receipt of documents for filing and a copy has been forwarded to all counsel with agreement from attorney Rosendahl and Ashcraft to accept service for documents via e-mail transmission. A hard copy will follow via regular mail.

Documents filed by Attorney for Appellants, Jerald D. Pearson, (425) 831-3100, WSBA#8970.

Angie Martinez  
Paralegal  
The Pearson Law Firm, P.S.  
35131 S.E. Douglas St., Ste. 103  
Snoqualmie, WA 98065  
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(425) 831-3105 fax

[angie@pearsonlawfirm.com](mailto:angie@pearsonlawfirm.com)

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Documents filed by Attorney for Appellants, Jerald D. Pearson, (425) 831-3100, WSBA#8970.

Angie Martinez  
Paralegal  
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SUPREME COURT  
STATE OF WASHINGTON

Appellate Case No. 08-2-28582-1  
2009 APR 28 P 4: 20

BY RONALD R. CARPENTER

THE STATE OF WASHINGTON SUPREME COURT  
CLERK

LINDA CUNNINGHAM AND DOWNEY C. CUNNINGHAM, A MARITAL  
COMMUNITY

Appellants

vs.

RONALD F. NICOL, M.D.; VALLEY RADIOLOGISTS, INC., P.S. and MULTICARE  
HEALTH SYSTEM, INC. dba COVINGTON MULTICARE CLINIC

Respondents.

---

**DECLARATION OF SERVICE OF  
STATEMENT OF GROUNDS FOR DIRECT REVIEW**

---

I, Angie Martinez, declare as follows:

1. On April 28, 2009, a copy of Statement of Grounds for Direct Review, together with a copy of this document, were hand-delivered via ABC Legal Messenger, via regular mail, via e-mail transmission and/or facsimile to defense counsel as follows:

Elizabeth Leedom  
Jennifer Moore  
Bennett, Bigelow & Leedom, P.S.  
1700 Seventh Ave., Ste. 1900  
Seattle, WA 98101  
Attorney for Defendants Nicol and Valley Radiologists

John Rosendahl  
Timothy Ashcraft  
Williams, Kastner & Gibbs, PLLC  
1301 A Street, Suite 900  
Tacoma, WA 98402  
Attorney for Defendant Multicare Health System

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 28<sup>th</sup> day of April, 2009.



---

ANGIE MARTINEZ, Paralegal

THE PEARSON LAW FIRM, P.S.  
35131 SE Douglas Street, Suite 103  
Snoqualmie, WA 98065  
(425) 831-3100