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SUPERIOR COURT
STATE OF WASHINGTON
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No. 853673

King County Superior Court Cause No., 10-2-24679-7

GLEN A. McDEVITT

Respondent

v.

HARBORVIEW MEDICAL CENTER, UNIVERSITY OF
WASHINGTON, and THE STATE OF WASHINGTON

Petitioners

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT

Glen McDevitt, plaintiff and respondent (hereinafter “McDevitt”), respectfully requests this court to deny Harborview Medical Center, the University of Washington, and the State of Washington’s (hereinafter “Harborview”) motion for discretionary review of the interlocutory Order Denying Harborview’s Motion for Summary Judgment identified below.

B. DECISION

King County Superior Court Judge Ramsdell entered an Order Denying Defendants’ Motion for Summary Judgment on October 29, 2010. Appendix at A-1 to A-2.

C. NO ISSUE RIPE FOR REVIEW

McDevitt does not believe that any issue arising out of the Trial Court’s denial of an interlocutory Order Denying Summary Judgment is ripe for discretionary review by the Supreme Court. However, in the unlikely event that discretionary review is accepted, McDevitt frames the issue as follows: Whether Harborview’s motion for discretionary review should be denied when this Court already determined in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010) that the RCW 7.70.100(1) pre-suit notice requirement for all claims

involving injuries from health care providers violated the separation of powers doctrine and, thus, was unconstitutional?

D. STATEMENT OF THE CASE

1. Background

Until this Court's ruling in *Waples v. Yi*, RCW 7.70.100(1) required that "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." RCW 7.70.100(1). In *Waples*, the Supreme Court ruled that the ninety (90) day pre-suit requirement found in RCW 7.70.100(1) violated the state's separation of powers doctrine by conflicting with CR 3(a) and was unconstitutional. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010). The majority decision renders RCW 7.70.100(1) entirely inoperable and does not distinguish between public and private health care providers.

Relying upon the decision in *Waples v. Yi*, McDevitt commenced his action on July 7, 2010 and did not provide pre-suit notice to Harborview. Shortly thereafter, Harborview moved for summary judgment. In *Waples*, the Supreme Court held that the notice of claim provision contained in the statute conflicted with CR 3(a),

could not be harmonized and given effect and, thus, was unconstitutional. *Waples v. Yi*, 169 Wn.2d 152 at 160-61. In his response, McDevitt argued that Harborview's logic failed because: (1) RCW 7.70.100(1) did "not address the primary rights of either party" but dealt only with procedural matters and because the statute conflicted with the judiciary's power to set court rules it violated the separation of powers doctrine; (2) that the absence of the invalidated statute does not allow RCW 4.92.110 to supplement RCW 7.70.100(1) because RCW 4.92.100(1) specifically exempts claims involving injuries from health care; and, (3) that Harborview's argument failed because the Court invalidated RCW 7.70.100(1) as a whole, rendering the statute inoperable. Thus, the holding in *Waples* applied to all health care providers as defined in RCW 7.70.020. RCW 7.70.100(1); RCW 7.70.020; CR 3(a); *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

On October 29, 2010, the parties argued the motion for summary judgment before the Honorable Jeffrey Ramsdell, who denied Harborview's motion for summary judgment. A-1 to A-2. Harborview filed a motion to certify the issue, and McDevitt filed a Response. A-3 to A-6. On December 10, 2010, Judge Ramsdell

entered an Order Denying Defendants' Motion for Certification. A-14
to A-15.

2. Relevant Statutory and Constitutional Provisions

RCW 7.70.100(1) formerly provided 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. 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).

RCW 7.70.020 defines a "health care provider" as:

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

person is deceased, his or her estate or personal representative;

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

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, 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 or her employment, including in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative.

CR 3(a) provides in pertinent part:

(a) Methods. Except as provided in rule 4.1, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint. Upon written demand by any other party, the plaintiff instituting the action shall pay the filing fee and file the summons and complaint within 14 days after service of the demand or the service shall be void. An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170.

RCW 4.92.100(1) provides in pertinent part:

(1) All claims against the state, or against the state's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct, except for claims involving injuries from health care,

shall be presented to the risk management division. Claims involving injuries from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are exempt from this chapter. A claim is deemed presented when the claim form is delivered in person or by regular mail, registered mail, or certified mail, with return receipt requested, to the risk management division. For claims for damages presented after July 26, 2009, all claims for damages must be presented on the standard tort claim form that is maintained by the risk management division. The standard tort claim form must be posted on the office of financial management's web site.

3. Facts

On July 9, 2007, while paragliding in the Tiger Mountain area, McDevitt crashed into tree branches which threw him onto a roof, against a chimney, and onto the ground. A-10 to A-13. McDevitt was taken to a Bellevue facility and ultimately transferred to Harborview Medical Center for treatment. *Id.* On July 10, 2007, McDevitt underwent major surgery to repair his fractured left leg. *Id.* During his stay at Harborview, McDevitt received Lovenox, an anticoagulant drug that prevents blood clots. *Id.* McDevitt was taken off Lovenox without his knowledge and without receiving education about the risk of blood clots and the measures necessary to guard against deep vein thrombosis. *Id.* On July 20, 2007, McDevitt went to Northwest

Hospital's emergency room where he was diagnosed with bilateral calf level deep venous thrombosis in his right leg.

4. Proceedings Below

On July 7, 2010, McDevitt filed a lawsuit against Harborview for negligence. On July 20, 2010, McDevitt filed an amended complaint naming all Defendants (Harborview Medical Center, University of Washington and the State of Washington). Harborview brought a motion for summary judgment. In response, McDevitt reasoned that in *Waples* the Supreme Court declared RCW 7.70.100(1) unconstitutional and invalidated the pre-suit notice requirement as a whole for all claims involving health care injuries and as to all health care providers.

On October 29, 2010, the parties argued the motion for summary judgment before the Honorable Jeffrey Ramsdell, who entered an Order Denying Harborview's Motion for Summary Judgment. A-1 to A-2.

Harborview then filed a Motion for Certification noted for December 8, 2010. McDevitt's response reasoned that the Order Denying Defendants' Motion for Summary Judgment is merely an interlocutory order consistent with the Supreme Court's holding in

Waples and does not warrant certification. A-3 to A-6. Judge Ramsdell denied Harborview's Motion for Certification on December 10, 2010. A-14 to A-15.

E. DISCRETIONARY REVIEW SHOULD BE DENIED

1. Summary

The Trial Court did not commit obvious or probable error by denying Defendants' Motion for Summary Judgment. The Supreme Court in *Waples* clearly established that the pre-suit notice requirement in RCW 7.70.100(1) violated the separation of powers doctrine by conflicting with CR 3(a) and is unconstitutional. *Waples v. Yi*, at 159-60. The Trial Court merely followed this Court's ruling in *Waples*. Additionally, the Trial Court denied Harborview Medical's Motion for Certification under RAP 2.3(b)(4). The Supreme court invalidated the statute completely and it stands to reason that this invalidation applies to both private and public health care providers.

2. The Trial Court Properly Denied Harborview's Motion for Summary Judgment

i. *Waples* Applies to All Health Care Providers and to Actions Against Public Health Care Providers

Neither Chapter 7.70 nor the Supreme Court distinguishes between a public or private health care provider.¹ Nowhere in the definition does the statute differentiate between private and public health care providers. In *Waples*, the Supreme Court did not limit its ruling to private health care providers and clearly took into account the effect the invalidation of RCW 7.70100(1) might have on public health care providers. *Waples v. Yi* at 165-66. Additionally, no situation exists in which the statute can be applied constitutionally regardless of the nature of the health care provider.

ii. The Trial Court Did Not Commit Obvious or Probable Error.

On October 29, 2010, the Trial Court entered an Order Denying Harborview's Motion for Summary Judgment. The Trial Court did not commit obvious or probable error but properly denied the motion based upon the holding in *Waples*. *Waples* completely invalidated RCW 7.70.100(1) as to all health care providers. Harborview argues that the Trial Court did not conduct a searching legal analysis before denying its motion for summary judgment. This

¹ RCW 7.70.020 defines "health care provider". See, Relevant Constitutional and Statutory Provisions *supra*.

is false. Judge Ramsdell noted at the oral argument that he thoroughly analyzed both parties' arguments. The Trial Court engaged in a searching legal analysis, listened to the parties' arguments, and asked many questions during the proceeding. For example, the Trial Court carefully noted that the dissent in *Waples* (at page 166) recognized "that existing statutory notice requirements may be vulnerable to invalidation." A-7 to A-9. Harborview's claim that the Trial Court failed to engage in legal analysis before denying their motion is untrue. Therefore, the Trial Court acted properly.

iii. RCW 7.70.100(1) Conflicts With the Judiciary's Power to Set Procedural Court Rules And Is Unconstitutional As To All Health Care Providers.

In *Waples*, the Supreme Court of Washington accepted review of two cases involving a plaintiff's failure to provide pre-suit notice before filing a health care claim pursuant to RCW 7.70.100(1). The Supreme Court held that the pre-suit notice requirement was unconstitutional because it violated the separation of powers doctrine by conflicting with CR 3(a). *Waples v. Yi*, 169 Wn.2d 152 at 159-60. CR 3(a) provides the method by which a lawsuit may be commenced. CR 3(a). In *Waples*, the court noted that when:

A statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot..., the court rule will prevail in procedural matters and the statute will prevail in substantive matters.

Waples v. Yi 169 Wn.2d 152 at 158. The Court could not harmonize the notice of claim provision in the statute with the provisions of CR 3(a) and, thus, they could not be given effect. Because RCW 7.70.100(1) addressed only procedural matters and not “the primary rights of either party” and because it conflicted with the judiciary’s powers to set court proceedings, the Court declared the statute unconstitutional. *Waples* at 160-61.

Petitioners attempt to distinguish *Waples* by arguing that the case involved only private health care providers. Harborview attempted to argue that *Waples* cannot apply to government entities because the legislature’s power comes directly from the state Constitution which grants the legislature the authority to determine the manner in which the state is sued. Harborview again cites *Lacey Nursing Center, Inc. v. Department of Revenue* to support its argument that *Waples* cannot apply to state agencies. In *Lacey*, the plaintiffs brought an excise tax refund action against the state and sought to

make it a class action pursuant to CR 23 and the Supreme Court upheld a statute requiring pre-suit notices for tax refund suits regarding class actions. *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40 at 55-56. However, the *Lacey* case involved a primary right as opposed to a procedural right – the right to bring a class action against a state agency is a primary right. The *Lacey* court analyzed whether the Legislature “intended to permit class action lawsuits for...excise tax refunds”. The statute did not conflict with a court rule or procedure, but rather dealt with the substantive issue of whether taxpayers could bring a class action against the state. Harborview’s reliance on *Lacey* is inherently flawed because in *Lacey* the court recognized the ability to file a class action is a substantive issue which is governed by the Legislature; whereas, in *Waples* the court determined that the extra step required to file a lawsuit violated the separation of powers doctrine and was unconstitutional.

Though the Washington State Constitution provides the Legislature with the authority to decide the manner in which suits may be brought against government entities, the separation of powers doctrine exists in order to safeguard the court’s power to set court procedures. In *Putnam v. Wenatchee Valley Med. Ctr.*, this Court held

that RCW 7.70.150 violated the separation of powers doctrine and struck down the pre-suit certificate of merit requirement. *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 979-85, 216 P.3d 374 (2009). A formal separation of powers clause cannot be found in the Washington State constitution, but “the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.” *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974 at 980 (citing, *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994))). Based on this analysis, the Supreme Court held that RCW 7.70.150 addressed how to file a claim to enforce a right provided by law and as such was procedural. *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d at 985.² Contrary to *Lacey* where a primary right of the parties was involved, this Court recognized that the statute regarding the certificate of merit addressed only the procedural manner to effectuate a party's primary right. *Id.* Therefore, RCW 7.70.150 impermissibly conflicted

² See, e.g., *Hiatt v. S. Health Facilities, Inc.*, 68 Ohio St.3d 236 at 238, 626 N.E.2d 71 (1994) (“Since the conflict involves the form and content of the complaint to initiate a medical malpractice case, it is a procedural matter.”).

with court rules governing procedures for initiating lawsuits, jeopardized the judiciary's power to set procedural rules, and could not prevail over the conflicting court rules. *Id.* This Court properly followed its own, earlier analysis in *Putnam* regarding the separation of powers doctrine when it decided *Waples*. Because the invalidation effects all claims related to health care injuries, Harborview's argument that the separation of powers is limited to private health care providers fails.³

iv. No Unresolved Issues of Law Remain for This Court's Review

McDevitt submits that Harborview's motion for discretionary review should be denied because no new or unresolved issues of law remain for this Court's review. Approximately six months ago, this Court, in a 6-3 majority decision, held that RCW 7.70.100(1), which required notice of intent to file suit, was unconstitutional because it violated the separation of powers doctrine and conflicted with CR 3(a).

³ The Supreme Court did not differentiate between public or private health care providers in this case. With ample opportunity to do so in either the *Putnam* or *Waples* case, and mention of it by the dissent in *Waples*, it is apparent that the Supreme Court knew of the potential conflict and it is implied that the respective statutes are unconstitutional and applicable to *all* health care providers.

Waples v. Yi, 169 Wn.2d 152 at 159-60. It appears that Harborview did not like the decision in the *Waples* case or the decision in this case.

Review is discretionary and ‘may be accepted only’ when the criteria are present. RAP 2.3(b) (emphasis added). Discretionary review of a denial of a motion for summary judgment will not be ordinarily granted, but can be granted in the relatively rare situations posited by this rule (RAP 2.3). *Rye v. Seattle Times Co.*, 37 Wn. App. 45, 678 P.2d 1282, cert. denied, 469 U.S. 1087, 105 S.Ct. 593, 83 L.Ed.2d 703 (1984). Discretionary review is disfavored because it lends itself to piecemeal, multiple appeals. *Right-Price Recreation, L.L.C v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). Consequently, discretionary review should be limited to extraordinary cases to avoid protracted and expensive litigation and not as a vehicle to obtain expedited review of a difficult case. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 333 F.Supp.2d 215, 221 (S.D.N.Y. 2004 (quoting, *German v. Fed. Home Loan Mortgage Corp.*, 896 F.Supp. 1385, 1398 (S.D.N.Y. 1995)).

Under RAP 2.3(b)(1) or (2), Petitioners’ case is also not ripe for discretionary review. Based on the holding in *Waples*, the Trial Court entered the October 29, 2010 Order Denying Defendants’

Motion for Summary Judgment. A-1 to A-2. *Waples* is on point and there can be no difference of opinion on that issue. The fact the majority opinion was silent on whether the invalidation of RCW 7.70.100(1) applies to private and/or public health care providers is of no consequence. The pre-suit notice requirement invades the court's domain in the same way that the certificate of merit did in *Putnam*. Therefore, RCW 7.70.100(1) is unconstitutional on its face and inoperable as to all claims involving injuries from health care, regardless of who provided the care.

Furthermore, RAP 2.3(b)(4) does not apply to this case. The Trial Court denied Harborview's motion for certification.⁴ A-14 to A-15. Nevertheless, Harborview attempts to argue that Washington Courts may still grant discretionary review if an issue of substantial public interest is involved in the case. Harborview cites *Hartley v. State* as support for its argument. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). *Hartley* involved the denial of a summary judgment and the appellate court granted discretionary review. *Id.* As the court noted, "Judicial policy generally disfavors interlocutory

⁴ See Order Denying Defendants Motion for Certification dated December 10, 2010.

appeals. *Maybury v. Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). In this instance, however, we are interpreting a new statute with wide implications for governmental liability.” *Hartley v. State*, 103 Wn.2d 768, 773, 698 P.2d 77. The new statute in question (Habitual Traffic Offenders Act) required interpretation in order to avoid the wide implications of the case if liability in a tort action involving a drunk driver could fall upon the State or the County as a third party for failure to revoke the driver’s license. *Hartley v. State*, 103 Wn.2d 768 at 784.

In *Waples*, the Supreme Court already thoroughly analyzed the statute in question, determined that it was unconstitutional to require pre-suit notice, and did not distinguish between private and public health care providers. *Waples* at 159-60. Harborview argues that the holding in *Waples* is as-applied and a facial application of the invalidation cannot be upheld. This is untrue. A facial challenge must show that each and every application of the challenged statute is inoperable and cannot be constitutional. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004) (citing, *In Re Detention of Turay*, 139 Wn.2d 379, 417 Fn 27, 986 P.2d 790 (1999)). Though the majority in *Waples* did not specifically note whether the invalidation

of RCW 7.70.100(1) applied facially or as-applied, it is inconsequential because the decision effectively renders RCW 7.70.100(1) completely inoperable and no set of circumstances exists in “which the statute can constitutionally be applied.” *In re Detention of Turay*, 139 Wn.2d 379, 417 Fn 27, 379 Wn.2d 790 (1999); (citing, *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting) (first emphasis added)). In *Waples*, a common sense interpretation of the decision can only lead to the understanding that the Supreme Court found the statute unconstitutional as a whole and completely inoperable because the pre-suit notice requirement invaded the Court’s domain and was unconstitutional on its face.⁵ *Waples v. Yi*, 169 Wn.2d 152 at 165.⁶ Thus, RCW 7.70.100(1) is completely invalidated as to *all health care providers*. The fact the parties themselves

⁵ In *Waples*, in the dissent, the Supreme Court recognized and knew of the potential conflict between private and public health care providers. Notwithstanding this, this Court held RCW 7.70.100(1) unconstitutional. *Waples v. Yi*, 169 Wn.2d 152, 165, 234 P.3d 187 (2010).

⁶ See also, *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 979-85, 216 P.3d 374 (2009). The Supreme Court did not differentiate between public or private health care providers in its opinion. However, it is reasonable to believe that the certificate of merit is no longer required before filing a lawsuit against all health care providers.

disagree as to the interpretation of persuasive authority does not constitute an issue of substantial public interest sufficient enough to warrant discretionary review.

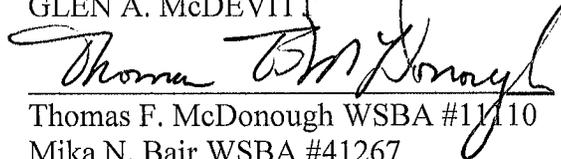
The Supreme Court's ruling in *Waples* is definitive and further interpretation of the statute is not required. In this case, McDevitt relied on the Supreme Court's ruling and the Trial court agreed and entered the October 29, 2010 Order Denying Defendants' Motion for Summary judgment. A-1 to A-2.

F. CONCLUSION

For these reasons, the Court should deny Harborview's motion for discretionary review and affirm the trial court's decision denying summary judgment. Harborview has not established sufficient grounds for discretionary review by the Supreme Court of the interlocutory Order Denying Defendants' Motion for Summary Judgment.

Respectfully submitted this 11th day of January, 2011.

ATTORNEYS FOR RESPONDENT
GLEN A. McDEVITT



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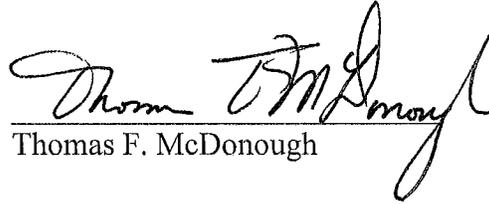
DECLARATION OF SERVICE

I, Thomas F. McDonough, declare as follows:

I am a resident of the State of Washington, residing or employed in Edmonds, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 510 Bell Street, Edmonds, Washington, 98020.

On January 12, 2011, I certify under penalty of perjury under the laws of the State of Washington that I effected service of the foregoing **ANSWER TO MOTION FOR DISCRETIONARY REVIEW** by causing a true and correct copy to be delivered via legal messenger as follows:

HAND DELIVERED TO:
Michael Madden
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Tel: (206) 622-5511
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Thomas F. McDonough

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OCT 29 2010
SUPERIOR COURT CLERK
KIRSTIN GRANT
DEPUTY

SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GLEN A. McDEVITT, an unmarried man,

Plaintiff,

v.

HARBORVIEW MEDICAL CENTER, a King
County Public Hospital, and JOHN DOE and
JANE DOE; UNIVERSITY OF WASHINGTON
dba UW MEDICINE/PHYSICIANS, and THE
STATE OF WASHINGTON, a governmental
entity,

Defendants.

NO. 10-2-24679-7 SEA

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

This matter came on regularly for hearing before this Court on October 29, 2010, upon the Defendant's Motion for Summary Judgment, seeking dismissal of Plaintiff's Complaint for failure to comply with RCW 7.70.100(1) as applied to state government entities under RCW 4.92.100 and the applicable statute of limitations. Defendants are represented by Michael Madden of Bennett Bigelow & Leedom, P.S. and Plaintiff is represented by Thomas F. McDonough and Mika Bair.

1 Based on the records and files herein, the comments of counsel and other good cause
2 including the following pleadings:

- 3 1. First Amended Complaint for Medical Negligence.
- 4 2. Answer.
- 5 3. Defendant's Motion for Summary Judgment.
- 6 4. Plaintiff McDevitt's Response to Defendant's Motion for Summary Judgment.
- 7 5. Declaration of Glen A. McDevitt.
- 8 6. Defendant's Reply, if any. *gm gm2*

9 NOW THEREFORE, it is hereby:

10 ORDERED, ADJUDGED AND DECREED

11 Defendant's Motion for Summary Judgment is denied.

12
13
14
15 DONE IN OPEN COURT this 29th day of October, 2010.

16 *Jeffrey Ramsdell*
17 HONORABLE JEFFREY RAMSDELL
18 Superior Court Judge

19 Presented by:

Copy Received, Approved as to Form,
Notice of Presentation Waived:

20
21 *Thomas F. McDonough*
22 Thomas F. McDonough, WSBA #11110
Attorney for Plaintiff

23 *Michael Madden*
24 Michael Madden, WSBA #8747
25 Bennett Bigelow & Leedom, P.S.
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ORDER DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

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

GLEN A. McDEVITT, an unmarried man,

Plaintiff,

No. 10-2-24679-7 SEA

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
CERTIFICATION

v.

HARBORVIEW MEDICAL CENTER, a King
County Public Hospital, and JOHN DOE and
JANE DOE; UNIVERSITY OF
WASHINGTON d/b/a UW
MEDICINE/PHYSICIANS; and THE STATE
OF WASHINGTON, a governmental entity,

Defendants.

Defendants seek certification of the October 29, 2010 Order Denying Defendant's Motion For Summary Judgment. Plaintiff submits that certification should be denied because the subject Order does not involve a controlling question of law as to which there is substantial ground for a difference of opinion. The Supreme Court's 6-3 decision in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), as the Trial Court found, is controlling.

Less than six months ago our Supreme Court in a 6-3 decision held that RCW 7.70.100(1), which required notice of intent to file suit, was unconstitutional because it violated

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1 the separation of powers doctrine and conflicts with CR 3(a). *Waples* at 159-160. Defense
2 counsel in this case participated in the *Waples* case. It appears that defense counsel does not like
3 the decision in the *Waples* case or the decision in this case. However, the Supreme Court has
4 ruled and issued its mandate. The October 29, 2010 Order Denying Defendants' Motion for
5 Summary Judgment is merely an interlocutory order, consistent with the holding in *Waples*.
6 Therefore, the Order does not involve a controlling question of law as to which there is
7 substantial ground for a difference of opinion.

8 Generally, denial of a motion for summary judgment is not a proper subject of a notice
9 for discretionary review. *Roth v. Bell*, 24 Wn.App. 92, 600 P.2d 602 (1979). Discretionary
10 review of a denial of a motion for summary judgment will not ordinarily be granted, but can be
11 granted in the relatively rare situations posited by this rule (RAP 2.3). *Rye v. Seattle Times Co.*,
12 37 Wn.App. 45, 678 P.2d 1282, cert. denied 469 U.S. 1087, 105 S.Ct. 593, 83 L.Ed.2d 703
13 (1984).

14
15 RAP 2.3(b)(4) is derived from Federal Statute 28 U.S.C. 1292(b). The statute is entitled
16 "Interlocutory decisions" and states in part:

17 (b) When a district judge, in making in a civil action an order not
18 otherwise appealable under this section, shall be of the opinion
19 that such order involves a controlling question of law as to which
20 there is substantial ground for difference of opinion and that an
21 immediate appeal from the order may materially advance the
22 ultimate termination of the litigation, he shall so state in writing in
23 such order . . .

24 Whether to certify an interlocutory appeal pursuant to Section 1292(b) lies within the discretion
25 of the court. *See, Primavera Familienstiftung v. Askin*, 139 F.Supp.2d 567, 574 (S.D.N.Y. 2001).
Although courts have discretion to certify an issue for interlocutory appeal, the movant bears the
burden of showing that exceptional circumstances justify a departure from the basic policy of

1 postponing appellate review until after the entry of final judgment. *Judicial Watch, Inc. v.*
2 *National Energy Policy Development Group*, 233 F.Supp.2d 16 (D.D.C. 2002).

3 Review is discretionary and ‘may be accepted only’ when the criteria are present. RAP
4 2.3(b) (emphasis added). Discretionary review is disfavored because it lends itself to piecemeal,
5 multiple appeals. *Right-Price Recreation, L.L.C. v. Connells Prairie Cmty. Council*, 146 Wn.2d
6 370, 380, 46 P.3d 789 (2002). Discretionary review of an interlocutory order denying summary
7 judgment in particular is rarely granted. *DGHI Enters. v. Pac. Cities, Inc.*, 137 Wn.2d 933, 949,
8 977 P.2d 1231 (1999); *Walden v. City of Seattle*, 77 Wn.App. 784, 790, 892 P.2d 745 (1995).
9 Consequently, discretionary review under this rule should be limited to extraordinary cases to
10 avoid protracted and expensive litigation and not as a vehicle to obtain expedited review of a
11 difficult case (underlining added). *United States v. Am. Soc’y of Composers, Authors &*
12 *Publishers*, 333 F.Supp.2d 215, 221 (S.D.N.Y. 2004) (quoting *German v. Fed. Home Loan*
13 *Mortgage Corp.*, 896 F.Supp. 1385, 1398 (S.D.N.Y. 1995).

14
15 The fact that the parties themselves disagree as to the interpretation of persuasive
16 authority does not constitute “a difference of opinion” sufficient to warrant certification of an
17 interlocutory order for immediate appeal. *Williston v. Eggleston*, 410 F.Supp.2d 274 (S.D.N.Y.
18 2006). The aforementioned New York District Court case involved seeking certification for
19 immediate appeal of questions of law as to which there was alleged substantial grounds for
20 difference of opinion. The court denied the request for certification and a copy of that New York
21 case is attached to the working papers for the court’s consideration.

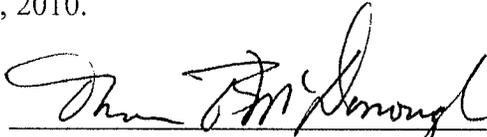
22 In reviewing my notes from the Hearing, my recollection of the Trial Court’s comments
23 differs from defense counsel Megard’s recollection in several respects. Moreover, the
24 Defendants’ Motion is significant for what it fails to say about the Summary Judgment Hearing.
25

1 The Trial Court carefully noted that the *Waples* dissent at page 166 recognized “that existing
2 statutory notice requirements may be vulnerable to invalidation . . .” Also, in the dissent at page
3 165 the pre-suit notice for certain tort actions against the state was specifically referenced.
4 Therefore, the Supreme Court knew of the potential conflict between actions against private
5 health care providers and state health care providers. Notwithstanding, the trial court found
6 *Waples* is on point and *Waples* held the pre-suit notice in RCW 7.70.100(1) is unconstitutional.
7 In this case the Plaintiff relied on the recent Supreme Court ruling and the Trial Court agreed
8 with Plaintiff and entered the October 29, 2010 Order Denying Defendants’ Motion for
9 Summary Judgment.

10 In conclusion, while defense counsel has certainly raised some interesting legal issues,
11 those issues are not ripe for certification in this case. Based on the holding in *Waples*, the Trial
12 Court entered the October 29, 2010 Order Denying Defendants’ Motion for Summary Judgment.
13 *Waples* is on point and there can be no difference of opinion on that issue. While the majority
14 opinion was silent on whether the invalidation of RCW 7.70.100(1) applies to private and/or
15 state health care providers, is of no consequence. The statute is unconstitutional and said ruling
16 applies to all claims involving injuries from health care.
17

18 Accordingly, Plaintiff respectfully requests this Court to deny Defendant’s Motion for
19 Certification.

20 DATED this 3rd day of December, 2010.

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23 _____
24 THOMAS F. McDONOUGH, WSBA #11110
25 Attorney for Plaintiff Glen A. McDevitt

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SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GLEN A. McDEVITT, an unmarried man,

Plaintiff,

v.

HARBORVIEW MEDICAL CENTER, a King
County Public Hospital, and JOHN DOE and
JANE DOE; UNIVERSITY OF WASHINGTON
dba UW MEDICINE/PHYSICIANS, and THE
STATE OF WASHINGTON, a governmental
entity,

Defendants.

NO. 10-2-24679-7 SEA

DECLARATION OF COUNSEL
REGARDING OCTOBER 29, 2010
SUMMARY JUDGMENT HEARING

Declaration states:

1. Status of Declarant: At all times material hereto, Declarant is the attorney for the Plaintiff and was present at the Summary Judgment Hearing on October 29, 2010. Except as indicated otherwise, Declarant has personal knowledge of the matters stated herein, such facts are admissible as evidence, and Declarant is competent to be a witness. Further, Declarant submits this declaration in opposition to the Defendant's Motion for Certification.

2. Notes from Summary Judgment Hearing: On October 29, 2010, I accompanied my associate, Mika Bair, who argued the Summary Judgment Motion before Judge Ramsdell.

DECLARATION OF COUNSEL REGARDING
OCTOBER 29, 2010 SUMMARY JUDGMENT HEARING-1

ORIGINAL

Thomas F. McDonough
Attorney at Law
510 Bell Street
Edmonds, WA 98020
Telephone (425) 778-8555
Fax (425) 778-8550

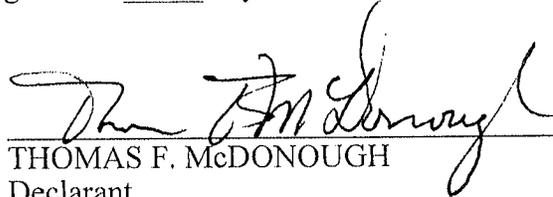
1 During the Hearing I remained seated at counsel table and took copious notes. I specifically
2 recall that the Court noted in the *Waples* dissent at page 166 that the Supreme Court recognized
3 the potential problem with other statutes that require pre-suit notice. I also specifically recall
4 that the Trial Court found that *Waples* was on point and *Waples* held the statute was
5 unconstitutional. Therefore, the Trial Court denied the Motion to Dismiss.

6 3. Comments Re Declaration of Bruce Megard: Counsel's declaration is
7 significant for not referencing the dissent, which the undersigned believes was key to the Trial
8 Court's ruling. Declarant takes issue with Mr. Megard's belief that the Court affirmatively
9 stated "there was a legitimate issue for appeal". It is my recollection this comment was
10 expanded on page 3 of the Defendant's Motion at line 17 and Declarant's recollection is that
11 the Trial Court stated words to the effect that Plaintiff "may have problems down the road".
12 That statement is a far cry from affirmatively stating "Defendants had a legitimate issue on
13 appeal and the Plaintiff has significant problems if the case was appealed". Declarant believes
14 and therefore states that if the Trial Court was so adamant about the issue there would have
15 been language in the Order entered on October 29, 2010.
16

17 4. Copy of Order: Attached hereto and marked Exhibit A and incorporated by this
18 reference is the October 29, 2010 Order Denying Defendants' Motion for Summary Judgment.
19 The attached Order certifies the result of the proceedings. Said interlocutory Order may be
20 subject to discretionary review by our Supreme Court but fails to meet all the requirements of
21 RAP 2.3(b)(4), because there is no ground for difference of opinion as to the result of the
22 Supreme Court's 6-3 decision in *Waples*, declaring the statutory pre-suit notice violated the
23 separation of powers doctrine and therefore unconstitutional.
24
25

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 DATED at Edmonds, Washington this 3rd day of December, 2010.

4 
5 _____
6 THOMAS F. McDONOUGH
7 Declarant

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SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GLEN A. McDEVITT, an unmarried man,

Plaintiff,

v.

HARBORVIEW MEDICAL CENTER, a King
County Public Hospital, and JOHN DOE and
JANE DOE; UNIVERSITY OF WASHINGTON
dba UW MEDICINE/PHYSICIANS, and THE
STATE OF WASHINGTON, a governmental
entity,

Defendants.

NO. 10-2-24679-7 SEA

FIRST AMENDED COMPLAINT FOR
MEDICAL NEGLIGENCE

Pursuant to CR 15(a), Plaintiff amends its Complaint, which relates back to the original filing of July 7, 2010. Plaintiff alleges:

1. Status of Plaintiff: At all times material hereto, Plaintiff is an unmarried man residing in Seattle, King County, Washington. Plaintiff asserts the physician/patient privilege for 89 days following the filing of this Complaint. On the 90th day following the filing of this Complaint, Plaintiff hereby waives the physician/patient privilege. Said waiver is conditioned and limited as follows:

(a) The Plaintiff does not waive the Plaintiff's constitutional right of privacy;

1 (b) Plaintiff does not authorize contact with the Plaintiff's health care providers of
2 any kind except by judicial proceedings authorized by the Rules of Civil
3 Procedure; and

4 (c) Representatives of the Defendants are specifically instructed not to attempt ex
5 parte contacts with the health care providers of the Plaintiff.

6 2. Status of Defendants: At all times material hereto, Defendant Harborview
7 Medical Center is a public hospital owned by King County and managed by the University of
8 Washington. The services identified herein occurred at the main hospital located at 325 Ninth
9 Avenue in Seattle, King County, Washington, where Defendant maintains its principal place of
10 business.

11 John Doe and Jane Doe are other Defendants who may bear responsibility for
12 the actions alleged in this Complaint, but whose identity is unknown.

13 At all times material hereto, Defendant University of Washington is a state
14 institution and operates University of Washington Medicine/Physicians, which is a group of
15 health care providers, employed by the University of Washington and/or the State of
16 Washington, who operate and manage medical services provided at Harborview Medical
17 Center. Defendant State of Washington is a governmental entity.

18 3. Jurisdiction: This Court has jurisdiction over the parties and the subject matter
19 of this action. This Court is the proper forum for this litigation.

20 4. Statement of Facts: Plaintiff is a middle school teacher who enjoys active
21 outdoor pursuits. On July 9, 2007, Plaintiff was paragliding in the Tiger Mountain area. While
22 paragliding, Plaintiff crashed into tree branches that threw him into a roof, chimney and onto
23 the ground. Plaintiff was taken to a Bellevue facility and transferred to Harborview Medical
24 Center for treatment. Plaintiff suffered a fracture of his left femur, specifically a left
25 comminuted subtrochanteric/petrochanteric femur fracture with segmental comminution
involving lesser trochanter and posterolateral diaphyseal cortex, completely displaced and
unstable. On July 10, 2007, Plaintiff underwent major surgery to repair his leg. After surgery

1 Plaintiff remained in the hospital until discharged on July 13, 2007. Upon discharge, Plaintiff
2 was taken off Lovenox without his knowledge and without being educated about the risks of
3 blood clots and the measures necessary to guard against deep venous thrombosis. Plaintiff was
4 discharged to his home and experienced pain and swelling in his lower extremities. On July
5 20, 2007, Plaintiff went to the Emergency Room at Northwest Hospital, and the health care
6 providers found significant swelling of his left leg from hip to ankle. Plaintiff was diagnosed
7 with bilateral calf level deep venous thrombosis, isolated to peroneal veins on the left leg and
8 notable in a valve cusp in localized posterior tibial vein on the right leg. Said condition is
9 chronic, causing Plaintiff pain and loss of enjoyment of life.

10 5. Vicarious Liability: Defendants employ doctors, nurses and health care
11 providers who treated Plaintiff herein. All acts and omissions of Harborview Medical Center
12 staff and employees alleged herein occurred within the scope of their employment/agency
13 relationship with Harborview Medical Center for which it, the University of Washington and
14 the State of Washington are vicariously liable.

15 6. Standard of Care: Defendants, acting through its agents and employees, is
16 required to exercise that degree of care, skill and learning expected of a reasonably prudent
17 health care provider in the State of Washington, acting under the same or similar circumstances
18 at the time care was provided to Plaintiff. Said duties are owed to Plaintiff herein.

19 8. Negligence/Damages: Defendants breached the duty of care owed to Plaintiff as
20 a result of the treatment and/or lack of treatment. In particular, the failure to prescribe Lovenox
21 upon discharge and to educate and advise Plaintiff of the risks of deep venous thrombosis and
22 of precautions necessary to prevent blood clots and deep venous thrombosis, constitute
23 negligence which actually and proximately caused injury and damage to Plaintiff in an amount
24 to be proven at trial.

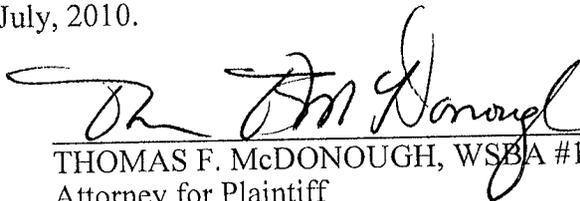
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WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally,

as follows:

1. Damages in an amount to be determined by the Court or a jury;
2. Medical and related expenses incurred by Plaintiff;
3. Compensation for future expenses for medical care and treatment;
4. Past, present and future pain and suffering, both emotional and physical;
5. Costs, disbursements and reasonable attorney fees;
6. Interest on all the above amounts as they become due, both prior to and after judgment; and
7. For such other further relief the Court deems just and equitable.

DATED this 20th day of July, 2010.



THOMAS F. McDONOUGH, WSBA #11110
Attorney for Plaintiff

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SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GLEN A. McDEVITT, an unmarried man,

Plaintiff,

v.

HARBORVIEW MEDICAL CENTER, a King
County Public Hospital, and JOHN DOE and
JANE DOE; UNIVERSITY OF WASHINGTON
dba UW MEDICINE/PHYSICIANS, and THE
STATE OF WASHINGTON, a governmental
entity,

Defendants.

NO. 10-2-24679-7 SEA

ORDER DENYING DEFENDANT'S
MOTION FOR CERTIFICATION

This matter came on regularly for hearing before this Court on December 8, 2010, upon the Defendant's Motion for Certification of the Court's October 29, 2010 Order, seeking certification under RAP 2.3(b)(4). Plaintiff is represented by Thomas F. McDonough, Attorney at Law, and Defendants are represented by Michael Madden of Bennett Bigelow & Leedom, P.S.

Based on the records and files herein and other good cause, it is hereby:

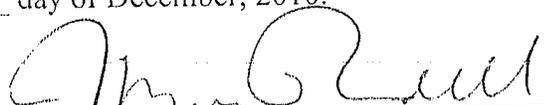
ORDERED, ADJUDGED AND DECREED

Defendant's Motion for Certification of the Court's October 29, 2010 Order is denied.

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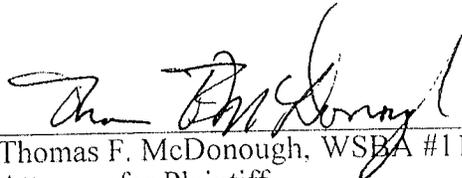
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DONE IN OPEN COURT this 10th day of December, 2010.


HONORABLE JEFFREY RAMSDELL
Superior Court Judge

Presented by:

Copy Received, Approved as to Form,
Notice of Presentation Waived:


Thomas F. McDonough, WSBA #11110
Attorney for Plaintiff

Michael Madden, WSBA #8747
Bennett Bigelow & Leedom, P.S.
Attorney for Defendants