

No. 853673

King County Superior Court Cause No. 10-2-24679 SEA

SUPREME COURT OF
THE STATE OF WASHINGTON

GLEN A. McDEVITT,

Respondent

v.

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

Petitioners

RECORDED
STATE OF WASHINGTON
2010 DEC 14 AM 8:09
DONALD N. CARPENTER
CER
b/c

MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

A. IDENTITY OF PETITIONERS

Harborview Medical Center,¹ the University of Washington, and the State of Washington, defendants below (hereinafter “Harborview”), ask this Court to accept review of the decision set forth in Part B of this motion.

B. DECISION

Harborview requests review of the Order Denying Defendants’ Motion for Summary Judgment. This Order, which was entered by the King County Superior Court (Honorable Jeffrey Ramsdell) on October 29, 2010, is contained in the Appendix at A 25-26.²

C. ISSUE PRESENTED FOR REVIEW

Can the separation of powers rationale utilized in *Waples v. Yi*, 169 Wash. 2d 152, 234 P.3d 187 (2010), to invalidate the pre-suit notice requirement for medical malpractice actions against private defendants be extended to suits against governmental entities, when Article II, § 26 of the Washington constitution authorizes the Legislature to enact laws governing procedures for suits against the government?

¹ Harborview is a county-owned facility that is managed and staffed by the University of Washington. As such, medical negligence claims against it are treated as claims against the University. *Hontz v. State*, 105 Wash. 2d 302, 310, 714 P.2d 1176 (1986).

² The documents germane to the issues raised by this petition are contained in the Appendix submitted in accordance with RAP 17.3(8). The Appendix is numbered sequentially and will be cited as A [____].

D. STATEMENT OF THE CASE

1. Background

Since the 1960's, the Legislature has required persons bringing tort actions against state or local government to give notice to the government before commencing suit. L. 1963, ch. 159, § 3; L. 1967, ch. 64, § 4. When the Legislature enacted RCW 7.70.100(1) in 2006, requiring all medical malpractice plaintiffs to give pre-suit notice, it created a situation where persons making claims against governmental health care providers had to comply with two different sets of notice requirements. In 2009, the Legislature eliminated the duplication by amending RCW 4.92.100 and RCW 4.92.020 to require that plaintiffs suing state or local agencies for medical malpractice need only comply with RCW 7.70.100(1). L. 2009, ch. 433, §§ 1-2.

In this case, which was commenced after *Waples* was decided, plaintiff did not give any pre-suit notice. Harborview answered and immediately moved for summary judgment. In response to plaintiff's claim that *Waples* invalidated RCW 7.70.100(1), Harborview argued that *Waples* did not involve any governmental defendants, and that the Court could not have invalidated the statute under a separation of powers rationale as applied to governmental entities because the state constitution expressly authorizes the Legislature to enact procedural laws governing such matters. Although it viewed the issue was a close one, the trial court denied Harborview's motion. A 35-36.

2. Relevant Constitutional and Statutory Provisions

Art. II, § 26 of the Washington Constitution states: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state."

RCW 4.92.100(1) provides in relevant part:

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. [emphasis added]

RCW 4.92.110 provides:

No action subject to the claim filing requirements of RCW 4.92.100 shall be commenced against the state, or against any state officer, employee, or volunteer, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim is presented to the risk management division.

RCW 7.70.100(1) states in relevant 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).

3. Facts

On July 9, 2007, plaintiff crashed into a tree while paragliding. He was thrown onto a roof and chimney and then fell to the ground, fracturing his left femur. A 1-4. He was taken to a Bellevue facility and ultimately transferred to Harborview. *Id.* On July 10, 2007, he underwent major surgery to repair his leg. *Id.* On July 13, 2007, he was discharged from Harborview. *Id.* In this lawsuit, he alleges that subsequently he developed deep venous thrombosis because he was not maintained on anti-coagulant medications. *Id.*

4. Proceedings Below

Plaintiff commenced suit on July 20, 2010. A 2-3. Harborview sought dismissal because Plaintiff did not provide any form of pre-suit notice. A 5. In response, Plaintiff argued that this Court's recent decision in *Waples* invalidated *all* pre-suit notice requirements, even for health care suits against government entities. A 11. In reply, Defendants argued that *Waples* is inapplicable because it involved actions against private health care providers; therefore, the *Waples* Court had no occasion to consider whether the notice requirement for health care liability claims was valid as applied to governmental entities under Art. II, § 26. A 19.

The trial court denied Defendants' Motion. In its oral ruling, the trial court explained that it understood Defendants' position that *Waples* was decided in the context of a medical malpractice suit against a private litigant. A 35-36. It further explained that its decision on the issue was made difficult because the majority in *Waples* did not explain whether its decision also invalidated pre-suit notice requirements against state entities. *Id.* The court then concluded that the more restrained approach was to deny the motion, even though there was a significant risk of reversal on appeal from a final judgment. *Id.*

Harborview timely filed a notice for discretionary review and also asked the trial court to certify the issue for immediate appeal pursuant to RAP 2.3(b)(4). A 68; 27. The motion for certification is pending before the trial court at this time. Harborview will update the Court when a ruling is issued.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Summary

This case is appropriate for interlocutory review under RAP 2.3(b)(1) and (2).³ Statutes requiring that notice be given before suing the government have been upheld repeatedly against constitutional challenges.⁴ Even though such statutes impose certain "procedural" pre-conditions on the ability to commence suit, this Court has said that these

³ If the trial court certifies the issue for interlocutory appeal, review should also be granted under RAP 2.3(b)(4).

⁴ See cases cited in Petitioners' Statement of Grounds for Direct Review, n. 1.

measures are a legitimate exercise of the Legislature's authority under art. II, § 26 to direct, "in what manner ... suits may be brought against the state." Under this Court's precedents, there is no doubt that RCW 7.70.100(1) would be valid if it only applied to governmental health care providers. More specifically, there is no basis to invalidate a notice of claim statute based on separation of powers when the constitution expressly authorizes the Legislature to regulate procedures for bringing suit against the state. See *Northwestern & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 75, 50 P. 586 (1897) ("By this provision . . . it was left to the legislature to determine in what court such suits should be brought, and to prescribe the method of procedure.").

Notwithstanding this basic principle, the trial court erroneously concluded that *Waples* invalidated the statute as applied to governmental defendants. This ruling constitutes obvious or probable error because it ignores a fundamental principle of this Court's jurisprudence; courts should presume that legislation is constitutional and require the opponent to demonstrate unconstitutionality beyond reasonable doubt.⁵ Here, the statute has been held invalid solely based on application of *Waples*, even though the facts and arguments supporting the constitutionality of the

⁵ *Island County v. State*, 135 Wash. 2d 141, 146, 955 P.2d 377 (1998); *Citizens for More Important Things v. King County*, 131 Wash. 2d 411, 415, 932 P.2d 135 (1997); *Erickson & Assocs., Inc. v. McLerran*, 123 Wash. 2d 864, 869, 872 P.2d 1090 (1994). This rule means that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. *Island County*, 135 Wash. 2d at 147. The court must be "fully convinced, after a searching legal analysis, that the statute violates the constitution." *Id.*

statute in this case were never presented in that case and its logic is inapplicable to government claims. In this regard, the trial court's ruling treats *Waples* as if it was a facial, rather than an "as-applied" challenge to the statute.⁶ By not considering whether the statute would be constitutional as applied to suits against governmental entities, the trial court failed to give any weight to the Legislature's authority under Const. Art. II, § 26.

2. The Trial Court Committed Obvious or Probable Error

The trial court's conclusion that *Waples* invalidated RCW 7.70.100(1) as applied to governmental health care providers ignored the circumstances of that case (suits against private defendants) and failed to consider whether the separation of powers rationale in that case extends to statutes enacted pursuant to Art. II, § 26. The *Waples* court had no occasion to consider this issue. By applying *Waples* to governmental claims without any analysis of whether its rationale extends to governmental claims, the trial court failed to engage in the searching legal analysis that is required before holding a duly enacted statute invalid.

⁶ A "facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *Carlisle v. Columbia Irrigation Dist.*, 168 Wash. 2d 555, 567 n.2, 229 P.3d 761 (2010) (citing *City of Redmond v. Moore*, 151 Wash. 2d 664, 669, 91 P.3d 875 (2004)). "An as-applied challenge ... is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional. Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *City of Redmond*, 151 Wash. 2d at 669 (internal citations omitted).

a. ***Waples* did not invalidate RCW 7.70.100(1) as applied to actions against government**

Waples involved two consolidated matters raising claims against private health care providers. It held that RCW 7.70.100(1) violated the separation of powers doctrine because the notice of intent requirement added a step not found in CR 3(a), which provides that 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.” *Waples* 169 Wash. 2d at 160. The Court held that both CR 3(a) and RCW 7.70.100 “cannot be harmonized and both cannot be given effect. If a statute and a court rule cannot be harmonized, the court rule will generally prevail in procedural matters and the statute in substantive matters.” *Id.* at 161.

This rationale is inapplicable to statutes governing procedures for suing the government because Art. II, § 26 gives the Legislature authority “to prescribe the method of procedure” in actions against the State. *Northwestern & Pac. Hypotheek Bank*, 18 Wash. at 75. On this basis, the Court in *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wash. 2d 40, 51-52, 905 P.2d 338 (1995), rejected the claim that a statute dictating pre-suit and judicial procedures for tax refund suits violated the separation of powers doctrine, holding Art. II, § 26 authorized the Legislature to regulate such matters and that the ability to sue the State

must be “exercised in the manner provided by the statute.” Under this provision, the Legislature’s “power to control and regulate the right of suit against [the state] is plenary.” *State v. Superior Court for Thurston County*, 86 Wash. 685, 688, 151 P. 108 (1915); *see also Eugster v. City of Spokane*, 115 Wash. App. 740, 750, 63 P.3d 841 (2003) (“The Washington State Constitution ... expressly reserves to the legislature the right to regulate lawsuits against governmental entities”). The separation of powers doctrine, which is a court-developed doctrine not expressly recognized in the constitution, cannot be applied to invalidate a procedural requirement that the constitution expressly authorizes the Legislature to impose.

b. The trial court erred by assuming that *Waples* controls

As previously noted, the trial court treated *Waples* as if it was a facial challenge to the statute and, therefore, assumed that there is no set of circumstances where it could be constitutionally applied. This assumption was a fundamental error because the logic of *Waples* cannot be extended to circumstances where the Legislature has acted pursuant to express constitutional authority. Consequently, the trial court failed to conduct the searching legal analysis that is required before a statute may be invalidated. Had the Court conducted the required analysis, it could and should have concluded that the statute is valid as applied to claims against government. *See e.g., City of Redmond*, 151 Wash. 2d at 669

(holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated).

In order for the *Waples* Court to have found the statute invalid on its face, the plaintiffs in that case would have been required to prove beyond a reasonable doubt that the statute is invalid under all circumstances—even where statutory authority comes directly from the Constitution. Moreover, the Court would have had to make such a finding while exercising “judicial restraint,” and it would still have had to be “fully convinced” that the statute is unconstitutional in all circumstances. No such analysis is contained in the *Waples* opinion.

c. RCW 7.70.100(1) represents a valid exercise of the Legislature’s constitutional authority as applied to actions against government,

The 2009 amendments to RCW 4.92.100 and 4.96.020 stating that malpractice claims against governmental entities are governed by RCW 7.70.100(1) were part of an act “[r]elating to claims for damages against the state and local governmental entities,” a larger act that simplified and clarified procedures for tort suits against government. L. 2009, ch. 333. The relevant amendments indicate very clearly that the Legislature was exercising its authority in Art. II, § 26 to require that pre-suit notice in medical liability cases be given pursuant to RCW 7.70.100(1). The trial court committed obvious or probable error by ignoring these circumstances.

4. Further Proceedings Will Be Useless. The Status Quo Has Been Significantly Altered.

Decisions applying RAP 2.3(b) indicate that the appellate courts are especially likely to accept interlocutory review of cases presenting new or unresolved issues of law regarding compliance with statutory conditions precedent to suit, including pre-suit notice requirement statutes.⁷ These types of cases are particularly suited for interlocutory review because later appellate reversal of a summary judgment denial inevitably results in unnecessary and expensive litigation at the trial court, which a later reversal would render “useless” and which, in any event, places substantial burdens on the parties in terms of continuing litigation costs and uncertainty.

Washington appellate courts also grant discretionary review, even in the absence of a stipulation or certificate under RAP 2.3(b)(4), if a case presents an issue of substantial public interest. For example, in *Hartley v. State*, 103 Wash. 2d 768, 698 P.2d 77 (1985); the Court accepted review of a denial of summary judgment where dismissal was sought on grounds

⁷ See, e.g., *Lacey Nursing Center v. Dept. of Revenue*, 128 Wash. 2d 40, 905 P.2d 338 (1995) (discretionary review failure to comply with requirements for tax refund suit); *Oda v. State*, 111 Wash. App. 79, 44 P.3d 8 (2002); *Andrews v. State*, 65 Wash. App. 734, 829 P.2d 250 (1992) (discretionary review of alleged failure to comply with RCW 4.92.100); *Rivas v. Eastside Radiology Associates*, 134 Wash. App. 921, 143 P.3d 330 (2006); *Bennett v. Dalton*, 120 Wash. App. 74, 84 P.3d 265 (2004) (discretionary review of tolling questions).

of immunity and the public duty doctrine. The Court found that review was appropriate in part because resolution of the issue had “wide implications for governmental liability” and where a decision in favor of the defendants would warrant their dismissal and prevent a useless trial. *Id.* at 773-774.

Similar considerations favor discretionary review in this case: a recent Supreme Court decision presents the potential for conflicting interpretations by the trial courts. An erroneous interpretation can either unfairly bar a lawsuit or prolong one that will ultimately be dismissed. As matters currently sit, prudent plaintiffs are continuing to give pre-suit notice in actions against governmental health care providers, including the University of Washington, Department of Social & Health Services, Department of Corrections and public hospital districts. Others are less cautiously presuming that *Waples* controls, which leads to further litigation such as this, including the potential for conflicting lower court rulings. An early and definitive ruling from this Court on the issue will eliminate uncertainty and risk for all concerned.

There is no dispute that if RCW 7.70.100(1) validly applies, this case must be dismissed with prejudice because the limitations period has run. Likewise, there should be no dispute that litigating cases of this nature necessarily requires that the parties will incur significant costs for

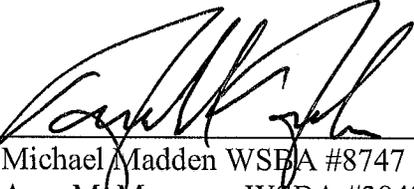
lawyers and experts. In this case, those costs will be entirely unnecessary if the statute is valid. In the circumstances, discretionary review is fully warranted in order to avoid a useless lawsuit. *Hartley v. State*, 103 Wash. 2d at 774.

F. CONCLUSION

For these reasons, the Court should grant discretionary review and reverse the trial court, directing that summary judgment be entered in favor of petitioners.

Respectfully submitted this 13 day of December 2010.

BENNETT BIGELOW & LEEDOM, P.S.

By 
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Attorneys for Petitioners Harborview Medical
Center, University of Washington and the State
of Washington

DECLARATION OF SERVICE

I, Gerri Downs, declare as follows:

I am a resident of the State of Washington, residing or employed in Seattle, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1700 7th Avenue, Suite 1900, Seattle, Washington 98101.

On December 14, 2010, I certify under penalty of perjury under the laws of the State of Washington that I caused service of the foregoing **MOTION FOR DISCRETIONARY REVIEW** by causing a true and correct copy to be delivered via legal messenger as follows:

Thomas F. McDonough
Attorney at Law
510 Bell Street
Edmonds, WA 98020
Fax: 425-778-8550
Email: thomas.mcdonough@frontier.com

- Hand Delivered
- Facsimile
- Email
- 1st Class Mail
- Priority Mail
- Federal Express, Next Day


Gerri Downs

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Washington State
Office of the Attorney General
Acknowledged Receipt, this 22d day
of JULY, 20 10, Time: 11:30a
In SEATTLE, Washington.
Signature: *William Clark*
Print Name: WILLIAM CLARK
Assistant Attorney General

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;

FIRST AMENDED COMPLAINT FOR
MEDICAL NEGLIGENCE -1

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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.

25

FIRST AMENDED COMPLAINT FOR
MEDICAL NEGLIGENCE

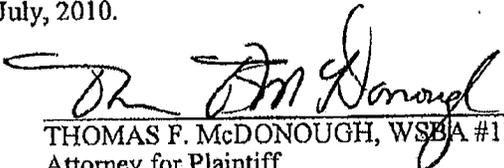
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1 WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally,
2 as follows:

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

11 DATED this 20th day of July, 2010.

12 
13 THOMAS F. McDONOUGH, WSB/A #11110
14 Attorney for Plaintiff

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The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GLEN A. McDEVITT, an unmarried man,,
Plaintiff,

NO. 10-2-24679 SEA

vs.

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

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.

I. RELIEF REQUESTED

COMES NOW defendants Harborview Medical Center, University of Washington,
and the State of Washington ("defendants"), by and through their counsel of record, and
respectfully move the Court for Summary Judgment of dismissal pursuant to CR 56. This
matter should be dismissed with prejudice because plaintiff has failed to comply with RCW
7.70.100(1) as applied to state government entities under RCW 4.92.100, and because the
applicable limitations period has now expired.

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II. STATEMENT OF FACTS

This is a medical malpractice case brought against the State of Washington based on the alleged negligence of physicians employed by the University of Washington. The plaintiff, who suffered severe injuries when he crashed his hang-glider into the roof of a house, claims that the failure to prescribe anti-coagulants when he was discharged from Harborview Medical Center¹ caused deep vein thrombosis (formation of a clot) in his leg. See Complaint, ¶ 4. Plaintiff was discharged from Harborview on July 13, 2007. *Id.* He commenced this action by filing a complaint on July 20, 2010. He did not serve a tort claim or notice of intent to sue prior to doing so.

III. STATEMENT OF ISSUES

1. Whether all claims against defendants should be dismissed where plaintiff failed to comply with RCW 7.70.100(1), as made applicable to state entities under RCW 4.92.100.

IV. EVIDENCE RELIED UPON

CR 56, RCW 4.92.100, RCW 7.70.100(1), the pleadings and papers on file with the Court.

V. AUTHORITY

A. Plaintiff Failed to Provide Pre-Suit Notice.

RCW 4.92.100 provides that “[a]ll 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.” (emphasis added). RCW 7.70.100 provides “[n]o action based upon a health care provider’s professional

¹ Although owned by King County, Harborview is operated by the University of Washington and is treated as a state facility for purposes of tort liability. *Hontz v. State*, 105 Wn.2d 302, 310 (1986).

1 negligence may be commenced unless the defendant has been given at least ninety days'
2 notice of the intention to commence the action." Plaintiff did not comply with the
3 requirements of RCW 7.70.100, and gave no pre-suit notice. This is not in dispute and, thus,
4 there is no issue of material fact.

5 **B. The Legislature Has Constitutional Authority to Require Pre-Suit Notice.**

6 Article 2, § 26 of the Washington Constitution ("Suits against the State") provides
7 "[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought
8 against the state." Under this authority, the Legislature's "power to control and regulate the
9 right of suit against [the state] is plenary; it may grant the right or refuse it as it chooses."
10 *State v. Superior Court for Thurston County*, 86 Wn. 685, 688 (1915). In 1963, when it first
11 waived the state's immunity from suit for tort damages, the legislature required pre-suit notice
12 of claim as a condition precedent to commencement of such an action. L. 1963, ch. 159, § 3.
13 This requirement, which is currently codified in RCW 4.92.100 (for state entities) and RCW
14 4.96.020 (local entities) has been upheld repeatedly against a variety of constitutional
15 challenges. *See, e.g., Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303,
16 312 (2002) (Upholding the 60 day waiting requirement of RCW 4.96.020, and noting "the
17 right to bring suit was created by statute and is not a fundamental right."); *Eugster v. City of*
18 *Spokane*, 115 Wn. App. 740, 750 (2003) ("The right to bring suit against political
19 subdivisions of the state and its municipalities was created by statute in 1967 when the
20 legislature waived sovereign immunity. The right to sue the state is not a fundamental right; it
21 is statutory. It follows then that the state can place limitations upon that right. The
22 Washington State Constitution, moreover, expressly reserves to the legislature the right to
23 regulate lawsuits against governmental entities.") (internal citations omitted). *See Medina*,
24 147 Wn.2d at 312, citing *O'Donoghue v. State*, 66 Wn.2d 787, 789 (1965) ("Since the state,
25 as sovereign, must give the right to sue, it follows that it can prescribe the limitations upon
26 that right.")

1 Because it is clear that the legislature acted pursuant to its constitutional authority
2 under Art. 2, § 26 when it directed that malpractice plaintiffs must comply with RCW
3 7.70.100 before commencing suit against governmental health care providers, and because it
4 is undisputed that plaintiffs did not comply, this matter must be dismissed.

5 **C. *Waples v. Yi* does not apply to this Case.**

6 Plaintiff will undoubtedly assert that RCW 7.70.100 is unconstitutional based on
7 *Waples v. Yi*, 169 Wn.2d 152, 161 (2010), where the Supreme Court held that the notice of
8 intent requirement violated the separation of powers doctrine because it conflicts with CR
9 3(a). The court reasoned that RCW 7.70.100, in requiring notice, added a step not found in
10 the requirements of CR 3(a), which provides that a “civil action is commenced by service of a
11 copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a
12 complaint.” *Id.* at 160. Thus, the Court held that both CR 3(a) and RCW 7.70.100 “cannot be
13 harmonized and both cannot be given effect. If a statute and a court rule cannot be
14 harmonized, the court rule will generally prevail in procedural matters and the statute in
15 substantive matters.” *Id.* at 161. The Court, therefore, held that RCW 7.70.100 “is
16 unconstitutional because it conflicts with the judiciary’s power to set court proceedings.”
17 *Waples*, 169 Wn.2d at 161.

18 In *Waples*, the case involved suits against private health care providers. But in this
19 case a private party is suing the State of Washington. Thus, there is no conflict between the
20 legislature and the judiciary, because the Legislature’s power to determine the manner in
21 which the state is sued comes directly from the constitution. *See Eugster* 115 Wn. App. at
22 750 (“The Washington State Constitution, moreover, expressly reserves to the legislature the
23 right to regulate lawsuits against governmental entities”). Separation of powers (a court-
24 developed doctrine not expressly recognized in the constitution), cannot be applied to
25 invalidate a procedural requirement that the constitution expressly authorizes the Legislature
26 to impose. *See Nw. & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 75, (1897) (“By this

1 provision . . . it was left to the legislature to determine in what court such suits should be
2 brought, and to prescribe the method of procedure.”). On this basis, the court in *Lacey*
3 *Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40, 51-52 (1995) rejected the
4 claim that a statute dictating both pre-suit and judicial procedures for tax refund suits violated
5 the separation of powers doctrine. There, the Court held that the right to bring excise tax
6 refund suits against the state was a conditional, partial waiver of sovereign immunity afforded
7 by Art. 2, § 26 of the Constitution, and must be “exercised in the manner provided by the
8 statute.” *Id.* at 52.

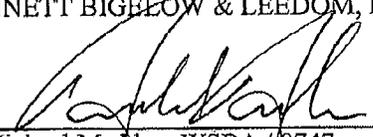
9 Therefore, in medical malpractice cases against state and local government entities,
10 the pre-suit notice requirements of RCW 7.70.100 are valid because they are imposed
11 pursuant to the Legislature’s express authority under Art. 2, §26 to determine “in what
12 manner, and in what courts, suits may be brought against the state.” Because plaintiff failed
13 to follow these validly imposed requirements, his claims should be dismissed with prejudice.

14 **VI. CONCLUSION**

15 Defendants respectfully request that this Court grant the motion for summary
16 judgment and dismiss plaintiff’s claims with prejudice. Summary judgment is appropriate
17 because plaintiff failed to comply with the notice requirements of RCW 4.92.100,
18 incorporating 7.70.100(1), which is still valid as related to claims against government entities.

19
20 DATED this 15th day of October, 2010.

21
22 BENNETT BIGELOW & LEEDOM, P.S.

23
24 By 
25 Michael Madden, WSBA #8747
26 Special Assistant Attorney General
Attorneys for Defendants

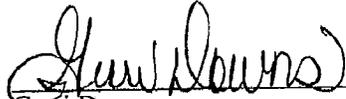
CERTIFICATE OF SERVICE

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I certify under penalty under the laws of the State of Washington that on October 1,
2010, I caused a true and correct copy of the foregoing Defendant's Motion for Summary
Judgment to be delivered as follows:

Thomas F. McDonough
Attorney at Law
510 Bell Street
Edmonds, WA 98020
Fax: 425-778-8550
Email: thomas.mcdonough@verizon.net

- Hand Delivered
- Facsimile
- Email
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- Federal Express, Next Day


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BENNETT BIGELOW
& LEEDOM

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

GLEN A. McDEVITT, an unmarried man,

No. 10-2-24679 SEA

Plaintiff,

PLAINTIFF GLEN A. McDEVITT'S
RESPONSE TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

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.

I. RELIEF REQUESTED

COMES NOW Plaintiff, Glen McDevitt, by and through his counsel of record, and respectfully requests the court deny Defendants Harborview Medical Center, University of Washington, and the State of Washington's motion for summary judgment of dismissal. The Defendants' Motion for Summary Judgment should be denied because the Washington Supreme

PLAINTIFF GLEN A. McDEVITT'S RESPONSE
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT -

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1 Court declared RCW 7.70.100(1) unconstitutional and no longer requires pre-suit notice for
2 claims against the state involving health care.¹

3 II. STATEMENT OF FACTS

4 The following facts were gleaned from Plaintiff's Amended Complaint. For purposes of
5 this summary judgment motion, it appears that the moving party does not contest the following
6 facts.

7 Plaintiff, Glen McDevitt, is a middle school teacher who enjoys active outdoor pursuits.
8 Plaintiff was paragliding in the Tiger Mountain area. While paragliding, Plaintiff crashed into
9 tree branches that threw him onto a roof, against a chimney, and onto the ground. Plaintiff was
10 taken to a Bellevue hospital facility and transferred to Harborview Medical Center for treatment.
11 Plaintiff suffered a fracture of his left femur, specifically a left comminuted
12 subtrochanteric/petrochanteric femur fracture with segmental comminution involving lesser
13 trochanter and posterolateral diaphyseal cortex, completely displaced and unstable. On July 10,
14 2007, Plaintiff underwent major surgery to repair his leg. After surgery, Plaintiff remained in the
15 hospital until discharged on July 13, 2007. During his stay at Harborview Medical Center,
16 Plaintiff received Lovenox, an anticoagulant drug that prevents blood clots called deep vein
17 thrombosis. Upon discharge, Plaintiff was taken off Lovenox without his knowledge and
18 without being educated about the risks of blood clots and the measures necessary to guard
19 against deep vein thrombosis. Plaintiff was discharged to his home and experienced pain and
20 swelling in his lower extremities. On July 20, 2007, Plaintiff went to the emergency room at
21 Northwest Hospital, and the health care providers found significant swelling of his left leg from
22 hip to ankle. Plaintiff was diagnosed with bilateral calf level deep venous thrombosis, isolated to
23

24
25 ¹ See *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

1 peroneal veins on the left leg and notable in a valve cusp in the localized posterior tibial vein on
2 the right leg. Said condition is chronic, causing Plaintiff pain and loss of enjoyment of life. On
3 July 7, 2010, Plaintiff filed a lawsuit against Harborview Medical Center for negligence due to
4 defendants' breach of the duty of care owed to him as a result of the treatment and/or lack of
5 treatment. On July 20, 2010, Plaintiff filed an amended complaint naming all Defendants. On
6 July 22, 2010, Plaintiff served the summons and amended complaint on all Defendants.

7 III. STATEMENT OF ISSUES

8 Whether the defendants' motion for summary judgment should be denied because
9 Plaintiff's claim does not require pre-suit notice pursuant to the Supreme Court of Washington's
10 declaration that RCW 7.70.100(1) requirement of notice of a claim is unconstitutional?
11

12 IV. EVIDENCE RELIED UPON

13 RCW 7.70.100(1), CR 56, CR 15(a), and the records and files herein including the
14 Declaration of Glen A. McDevitt.

15 V. AUTHORITY/ANALYSIS

16 A. Summary Judgment Standard.

17 Summary judgment is only appropriate in favor of the moving party, if the moving party
18 shows that there is no genuine issue of material fact and the moving party is entitled to judgment
19 as a matter of law. CR 56(c); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068
20 (2002). The defendants have the burden of proof and the Court must construe the facts and
21 reasonable inferences to be drawn in the light most favorable to the non-moving party. *Id.* "A
22 material fact is one upon which the outcome of the litigation depends in whole or in part."
23 *Atherton Condo. Apt.-Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799
24 P.2d 250 (1990) (citing, *Morris v. McNicol*, 83 Wn.2d 491, 494, 519, 519 P.2d 7 (1974)).
25

PLAINTIFF GLEN A. McDEVITT'S RESPONSE
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1 Material facts of this case are in dispute and the Defendant is not entitled to summary judgment
2 as a matter of law.

3 The only material issue is whether the Supreme Court's decision in *Waples* is controlling
4 law. The Supreme Court of Washington's decision in *Waples* declared the 90 day pre-suit notice
5 of intent to file a claim as unconstitutional. Plaintiff is not required to file a notice of intent.
6 Defendants are, quite simply, wrong regarding the law.

7 **B. *Waples v. Yi* Applies Therefore Plaintiff's Failure to Provide Pre-Suit Notice Does**
8 **Not Preclude This Action.**

9 Defendants correctly state that RCW 4.92.100 requires that "claims involving injuries
10 from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are
11 exempt from this chapter." RCW 4.92.100. Defendants also correctly cite Article 2, § 26 of the
12 Washington Constitution which provides the legislature with the authority to decide the manner
13 in which suits may be brought against the state. The legislature requires pre-suit notice of a
14 claim as a condition precedent to an action. L. 1963, ch. 159, § 3; RCW 4.92.100. However, as
15 noted above, RCW 4.92.100 specifically states that injuries resulting from health care are
16 "governed solely by ...chapter 7.70 RCW." RCW 4.92.100. RCW 7.70.100(1) provides that
17 "action[s] based upon a health care provider's professional negligence may not be commenced
18 unless the defendant has given at least ninety days' notice" of intent to file an action. However,
19 on July 1, 2010, that feature of the medical malpractice legislation was found to be
20 unconstitutional because of its failure to honor the separation of powers required by the state
21 constitution. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010). Plaintiff concedes that he did
22 not file a pre-suit notice under RCW 7.70.100(1) pursuant to the Washington Supreme Court's
23 recent decision in *Waples v. Yi* which permits him to file an action without pre-suit notice. *Id.*
24
25

PLAINTIFF GLEN A. McDEVITT'S RESPONSE
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1 In *Waples*, the Supreme Court of Washington accepted review of two cases involving a
2 plaintiff's failure to provide pre-suit notice before filing a health care claim pursuant to RCW
3 7.70.100(1). The Court consolidated the two actions. The Supreme Court held that RCW
4 7.70.100's requirement to give notice of intent to file was unconstitutional because it violated the
5 separation of powers doctrine by conflicting with CR 3(a). *Waples v. Yi*, 169 Wn.2d 152 at 159-
6 160. The Supreme Court began its analysis of the case with a discussion of the separation of
7 powers doctrine and noted:

8 Some fundamental functions are within the inherent power of the judicial branch
9 including the power to promulgate rules for its practice. If a statute appears to
10 conflict with a court rule, this court will first attempt to harmonize them and give
11 effect to both, but if they cannot be harmonized, the court rule will prevail in
12 procedural matters and the statute will prevail in substantive matters.

13 *Waples v. Yi* 169 Wn.2d 152 at 158. The Supreme Court held that the notice of claim provision
14 contained in the statute and CR 3(a) could not be harmonized and given effect. Since RCW
15 7.70.100(1) did "not address the primary rights of either party" but dealt only with procedural
16 matters, and because RCW 7.70.100(1) conflicted with judiciary's power to set court
17 proceedings, the Court declared the statute unconstitutional. *Waples v. Yi*, 169 Wn.2d 152 at
18 160-161.

19 Defendants attempt to distinguish *Waples* by arguing that the case involved only suits
20 against private health care providers. Defendants argue that there is no conflict between the two
21 government branches because the legislature's power comes directly from the constitution and
22 that the legislature still retains the authority to determine the manner in which the state is sued.
23 Specifically, Defendants cite *Lacey Nursing Center, Inc. v. Department of Revenue* (a pre-
24 *Waples* decision from over 15 years ago) to support their argument that *Waples* does not apply to
25 state agencies. The cited case contains a different statute and different rules of construction

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1 regarding tax refunds. Additionally, Defendants erroneously rely upon mere dicta contained in
2 the case. In *Lacey*, plaintiffs brought an excise tax refund action against the state and sought to
3 make it a class action pursuant to CR 23. *Lacey Nursing Center, Inc. v. Department of Revenue*,
4 128 Wn.2d 40 at 54. In its decision, the court stated:

5 As a general principle, this court has held that tax statutes conferring credits,
6 refunds or deductions must be construed narrowly. RCW 82.32.180 is a
7 conditional, partial waiver of the sovereign immunity afforded by Article II, § 26
8 of the Washington Constitution. The statute permits certain excise tax refund
9 suits to be brought in the superior court of Thurston County. The right to bring
10 excise tax refund suits against the state must "be exercised in the manner provided
11 by the statute." If the Legislature intended to permit class action lawsuits for
12 taxpayers seeking excise tax refunds, it would have made express provision for it.
13 This it did not do. The trial court was in error in interpreting RCW 82.32.180 to
14 allow class actions

15 *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40 at 55-56. The right of a
16 party to bring a class action against a state agency is a primary right not a procedural right.
17 *Lacey* does not apply to RCW 7.70.100(1) because it addresses the legislature's power to
18 determine the primary rights of the parties, as opposed to the procedural rights discussed in
19 *Waples*. The statute in *Lacey* does not conflict with a court rule but, rather, limits a party's
20 ability to bring a class action, and does not raise an issue regarding the separation of powers but,
21 rather, illustrates the correct application of the separation of powers when applied to the
22 legislature's ability to determine the primary right of a party as opposed to the judiciary's power
23 to set court procedures. The Defendants' argument fails.

24 Neither the statute nor the Supreme Court distinguishes between a state or private health
25 care provider. RCW 7.70.020 defines "health care provider" to mean:

(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,

PLAINTIFF GLEN A. McDEVITT'S RESPONSE
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1 physician assistant, midwife, osteopathic physician's assistant, nurse practitioner,
2 or physician's trained mobile intensive care paramedic, including, in the event
such person is deceased, his or her estate or personal representative;

3 (2) An employee or agent of a person described in part (1) above, acting in
4 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

5 (3) An entity, whether or not incorporated, facility, or institution
6 employing one or more persons described in part (1) above, including, but not
7 limited to, a hospital, clinic, health maintenance organization, or nursing home; or
8 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.

9 RCW 7.70.020. Nowhere in the definition does the statute differentiate between private and
10 state health care providers. Additionally, the Supreme Court did not limit its ruling to private
11 health care providers and, thus, the court decision in *Waples* governs actions against both private
12 and state health care providers. Therefore, Plaintiff's failure to provide pre-suit notice does not
13 result in the dismissal of his case against Defendants.

14 **C. CR 15(c)'s Relation-Back Applies to Plaintiff's Amended Complaint.**

15 In their introduction, Defendants allege that the applicable limitations period covering
16 Plaintiff's medical malpractice claims has expired. This is untrue. On July 7, 2010, and within
17 applicable statute of limitations, Plaintiff filed his complaint against Harborview Medical Center
18 and Jane and John Doe. McDevitt Dec. On July 20, 2010, Plaintiff filed an amended complaint
19 joining additional defendants UW Medicine/Physicians and the State of Washington. CR 15(c)
20 allows relation back:
21

22 Whenever, the claim or defense asserted in the amended pleading arose out of the
23 conduct, transaction, or occurrence set forth or attempted to be set forth in the
24 original pleading, the amendment relates back to the date of the original pleading.
25 An amendment changing the party against whom a claim is asserted relates back
if the foregoing provision is satisfied and, within the period provided by law for
commencing the action against him, the party to be brought in by amendment (1)
has received such notice of the institution of the action that he will not be

1 prejudiced in maintaining his defense on the merits, and (2) knew or should have
2 known that, but for a mistake concerning the identity of the proper party, the
3 action would have been brought against him.

4 CR 15(c). Plaintiff's amended complaint meets all the above requirements of CR 15(c).

5 The claims against the Defendants arise from the same treatment and/or lack of treatment alleged
6 in Plaintiff's original complaint. The added parties manage and operate Harborview Medical
7 Center. When Plaintiff filed its complaint against Harborview Medical Center, UW
8 Medicine/Physicians and the State of Washington received constructive notice that parties would
9 be added due to the addition of Jane and John Does whose true identity was not known at the
10 time. Additionally, Defendants are not prejudiced from maintaining a defense. The amended
11 complaint relates back to the July 7, 2010 filing of the original complaint.

12 **VI. CONCLUSION**

13 Defendants Harborview Medical Center, University of Washington, and the State of
14 Washington have failed to meet their burden of proof in connection with their motion for
15 summary judgment. Therefore, Plaintiff respectfully requests the court to deny Defendants'
16 motion for summary judgment and grant his order denying the Defendant's motion. A proposed
17 order is attached.

18 DATED this 13th day of October, 2010.

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21 THOMAS F. McDONOUGH, WSBA #11110
22 Attorney for Plaintiff Glen A. McDevitt

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The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GLEN A. McDEVITT, an unmarried man,,
Plaintiff,

NO. 10-2-24679 SEA

vs.

**DEFENDANT'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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.

I. INTRODUCTION

There is no doubt that the legislature has the authority to promulgate rules and regulations for lawsuits against the State. Indeed, plaintiff concedes that Article II, § 26 of the Washington Constitution "provides the legislature with the authority to decide the manner in which suits may be brought against the state. The legislature requires pre-suit notice of a claim as a condition precedent to an action." See Opposition at 4. This should end the inquiry because the legislature has unequivocally required pre-suit notice for health care liability claims against the State and plaintiff concedes such notice was not provided.

DEFENDANT'S REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT Page - 1

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1 Plaintiff's argument that *Waples v. Yi*, 169 Wn.2d 152 (2010) invalidated RCW
2 7.70.100(1) for all time and in all cases ignores the fact that courts decide cases based upon
3 the facts and the arguments presented. *Waples* involved non-governmental defendants.
4 Therefore, the court had no occasion to consider whether the notice requirement was valid
5 under Art. II, § 26 of the Washington Constitution. One cannot simply assume, as plaintiff
6 would have it, that a decision based on a particular set of facts and arguments controls a case
7 involving materially different facts and arguments, particularly where validity of statutory
8 pre-suit notice requirements, as applied to governmental defendants, is well-settled under 50
9 years of Washington case law.

10 II. AUTHORITY

11 Plaintiff's reading of *Waples* ignores the critical distinction between facial and as-
12 applied constitutional challenges to legislation. A "facial challenge is one where no set of
13 circumstances exists in which the statute, as currently written, can be constitutionally
14 applied." *Carlisle v. Columbia Irrigation Dist.*, 168 Wn.2d 555, 567 n.2 (2010) (citing *City of*
15 *Redmond v. Moore*, 151 Wn.2d 664, 669 (2004)). "An as-applied challenge ... is
16 characterized by a party's allegation that application of the statute in the specific context of
17 the party's actions or intended actions is unconstitutional. Holding a statute unconstitutional
18 as-applied prohibits future application of the statute in a similar context, **but the statute is**
19 **not totally invalidated.**" *City of Redmond*, 151 Wn.2d at 669 (internal citations omitted)
20 (emphasis added). Having only recently declared the distinction between facial and as-applied
21 challenges, if the *Waples* court intended to declare RCW 7.70.100(1) facially unconstitutional,
22 it would surely have said so expressly, particularly because the import of such a decision
23 would be to also invalidate RCW 4.92.100 and thereby overturn fifty years worth of
24 Washington cases.

25 Furthermore, as a recent Court of Appeals case makes clear, this Court cannot assume
26 that the *Waples* court decided anything more than the particular case before it. In a challenge

1 to the state's statutory special education funding process, the Court of Appeals analyzed the
2 appropriate use of facial, versus as-applied challenges. *School Dist. Alliance For Adequate*
3 *Funding of Special Educ. v. State*, 149 Wn. App. 241 (2009). In that case, the constitutional
4 authority was derived from Article IX, § 1 of the constitution, which provides that "[i]t is the
5 paramount duty of the [S]tate to make ample provision for the education of all children
6 residing within its borders, without distinction or preference on account of race, color, caste,
7 or sex." *Id.* at 245-46. The legislature determined that special education was a part of the
8 State's constitutional obligation, and instructed the Office of the Superintendent of Public
9 Instruction to establish a regulatory framework governing special education. *Id.* at 246. The
10 court held that "[u]nless a court is fully convinced that a statute violates the constitution, it
11 lacks the authority to override a legislative enactment. . . . A facial challenge must be rejected
12 unless . . . *no set of circumstances* [exist] in which the statute can be constitutionally applied."
13 *Id.* at 246-47 (emphasis in original). The court noted that it must "presume that a statute is
14 constitutional and the party challenging the statute as applied bears the burden of proving its
15 unconstitutionality beyond a reasonable doubt." *Id.* at 265. It further noted that it is not the
16 court's role to "micromanage education in Washington." *Id.* at 264.

17 In analyzing the challenged statute, the court provided that it "must determine first
18 what article IX, section 1 requires and then decide whether the [plaintiffs] ha[ve] provided
19 sufficient evidence to prove beyond a reasonable doubt that there is no set of circumstances
20 under which the legislature's statutory special education funding process could satisfy the
21 minimum due under article IX, section 1." *Id.* at 248. The court held that based upon the
22 constitutional authority provided under article IX, section 1, "the legislature has the authority
23 to select the means to discharge this duty and **the judiciary, including the trial court and**
24 **this court, should restrain its role to providing only broad constitutional guidelines**
25 **within which the legislature may work."** *Id.* at 263 (emphasis added). In striking down the
26 facial challenge, the court noted that it exercised "judicial restraint" and that under article IX's

1 "broad constitutional guidelines, the [funding scheme] is constitutional on its face." *Id.* at
2 264.

3 In *Waples*, the court did not hold RCW 7.70.100(1) to be unconstitutional in every
4 conceivable circumstance. In fact, the court concluded the opposite—holding RCW
5 7.70.100(1) invalid only "because it conflicts with the judiciary's power to set court
6 procedures." *Waples*, 169 Wn.2d at 161. Plaintiff's reading of *Waples* would extend the
7 decision beyond the circumstances where RCW 7.70.100(1) conflicts with a judicial rule to
8 all circumstances. In order for the *Waples* court to have found the statute invalid on its face,
9 however, the plaintiffs in that case would have been required to prove beyond a reasonable
10 doubt that the statute is invalid under all circumstances—even where statutory authority
11 comes directly from the Constitution. Moreover, the Court would have had to make such a
12 finding while exercising "judicial restraint," and it would still have had to be "fully
13 convinced" that the statute is unconstitutional. No such analysis is contained in the *Waples*
14 opinion, and there is no mention of any of the canons of interpretation.

15 Clearly, RCW 7.70.100(1) is constitutional when applied to cases where the State is
16 the defendant. As the plaintiff concedes, Article II, § 26 directs the legislature to determine
17 the manner in which the State can be sued. RCW 4.92.100 provides unequivocally that
18 "[c]laims involving health care are governed solely by the procedures set forth in chapter 7.70
19 RCW" Thus, the "set of circumstances" under which RCW 7.70.100(1) is constitutional
20 are the exact set of circumstances of this case—the State is a defendant in a suit "based upon a
21 health care provider's professional negligence." It is simply not the case that *Waples*
22 invalidated RCW 7.70.100(1) in cases like this. It is elementary that the separation of powers
23 doctrine does not allow a court rule to trump the constitution, which is precisely what plaintiff
24 would have this court decide.

25
26

DEFENDANT'S REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT Page - 4

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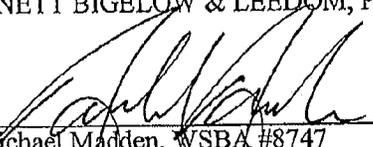
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III. CONCLUSION

Defendants respectfully request that the Court grant their motion for summary judgment.

DATED this 25th day of October 2010.

BENNETT BIGELOW & LEEDOM, P.S.

By 
Michael Madden, WSBA #8747
Special Assistant Attorney General
Attorneys for Defendants

CERTIFICATE OF SERVICE

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I certify under penalty under the laws of the State of Washington that on October 25, 2010, I caused a true and correct copy of the foregoing Defendant's Reply in Support of Motion for Summary Judgment to be delivered as follows:

Thomas F. McDonough
Attorney at Law
510 Bell Street
Edmonds, WA 98020
Fax: 425-778-8550
Email: thomas.mcdonough@verizon.net

- Hand Delivered
- Facsimile
- Email
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Gerri Downs

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FILED
~~PROCLAMATION~~
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.

ORDER DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Thomas F. McDonough
Attorney at Law
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Based on the records and files herein, the comments of counsel and other good cause including the following pleadings:

- 1. First Amended Complaint for Medical Negligence.
- 2. Answer.
- 3. Defendant's Motion for Summary Judgment.
- 4. Plaintiff McDevitt's Response to Defendant's Motion for Summary Judgment.
- 5. Declaration of Glen A. McDevitt.
- 6. Defendant's Reply, if any. *(Handwritten initials: BML, GMA)*

NOW THEREFORE, it is hereby:

ORDERED, ADJUDGED AND DECREED

Defendant's Motion for Summary Judgment is denied.

DONE IN OPEN COURT this 29th day of October, 2010.

(Handwritten Signature: Jeffrey Ramsdell)
 HONORABLE JEFFREY RAMSDELL
 Superior Court Judge

Presented by:

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

(Handwritten Signature: Thomas F. McDonough)
 Thomas F. McDonough, WSBA #11110
 Attorney for Plaintiff

(Handwritten Signature: Michael Madden)
 Michael Madden, WSBA #8747
 Bennett Bigelow & Leedom, P.S.
 Attorney for Defendants

ORDER DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

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The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GLEN A. McDEVITT, an unmarried man,,
Plaintiff,

NO. 10-2-24679 SEA

vs.

**DEFENDANT'S MOTION FOR
CERTIFICATION OF THE
COURT'S OCTOBER 29, 2010
ORDER**

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.

I. RELIEF REQUESTED

With respect to this Court's October 29, 2010 Order denying Defendants' motion for summary judgment, Defendants intend to seek discretionary review by the Supreme Court on the question of whether *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), invalidated RCW 7.70.100(1) as applied to suits against governmental entities. Defendants ask the Court to certify pursuant to RAP 2.3(b)(4) that the Order involves a controlling question of law as to

1 which there is substantial ground for difference of opinion and that immediate review of the
2 Order may materially advance the ultimate termination of the litigation.

3 At oral argument on Defendants' Motion, the Court acknowledged that there was an
4 open question of whether the Washington State Supreme Court's decision in *Waples v. Yi*,
5 169 Wn.2d 152, 234 P.3d 187 (2010), invalidated all pre-suit notice requirements, including
6 tort suits against local and state agencies. Ultimately, because of the lack of direction on the
7 issue from the *Waples* majority, the Court concluded that the more restrained approach was
8 for the Court to deny the motion, which the Court did—all the while expressing its concerns
9 about the viability of Plaintiff's case should it go up on appeal. Based on this ruling and the
10 Court's reasoning in support thereof, the issue presented by the Court's October 29, 2010
11 Order is squarely suited for certification, and Defendants request that the Court certify
12 whether *Waples* invalidates Plaintiff's requirement to give pre-suit notice in *this case*, where
13 Plaintiff has brought a medical negligence suit against the State.
14

15
16 **I. FACTS**

17 Plaintiff filed his medical negligence suit against Harborview Medical Center, the
18 University of Washington, and the State of Washington on July 20, 2010. Declaration of
19 Bruce W. Megard, Exhibit 1. Plaintiff did not give the statutorily required pre-suit notice to
20 Defendants before he filed his lawsuit. Accordingly, several months later, Defendants
21 brought a motion for summary judgment dismissal, because of Plaintiff's failure to comply
22 with RCW 4.92.100. Megard Decl. Ex. 2. In response, Plaintiff argued that the Washington
23 State Supreme Court's recent decision, *Waples v. Yi*, invalidated *all* pre-suit notice
24 requirements, even for health care suits against the State. Megard Decl. Ex. 3.
25
26

1 In reply, Defendants argued that *Waples* was inapplicable to the facts of *this case*,
2 because the *Waples* case was decided in the context of a civil litigant suing private health care
3 providers; therefore, the Court in *Waples* had no occasion to consider whether the notice
4 requirement for health care liability claims against the State was valid under Art. II, § 26 of
5 the Washington Constitution. Megard Decl. Ex. 4. As such, Defendant argued, *Waples* was
6 inapplicable, Plaintiff failed to comply with the pre-notice requirements, and the case should
7 be dismissed. *Id.*

8
9 At oral argument on the motion, the Court explained that it understood Defendant's
10 position that *Waples* was decided in the context of a medical malpractice suit against a private
11 litigant. Declaration of Bruce W. Megard at ¶ 4. The Court further explained that its decision
12 on the issue was compounded because the majority in *Waples* did not explain whether its
13 decision also invalidated pre-suit notice requirements against state entities. *Id.* at ¶ 5. The
14 Court then concluded that the more restrained approach was to deny the motion, even though
15 there would be significant issues down the road. *Id.* at ¶ 8. The Court also acknowledged that
16 Defendants had a legitimate issue on appeal and that Plaintiff has significant problems if the
17 case was appealed. *Id.*

18 19 **II. ISSUES PRESENTED**

20 Whether the Court should certify this matter for discretionary review under
21 RAP 2.3(b)(4) when the Court's October 29, 2010 Order: (a) involves a controlling question
22 of law; (b) as to which there is substantial ground for difference of opinion; and (c) an
23 immediate appeal from the Order may materially advance the ultimate termination of the
24 litigation?
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III. EVIDENCE RELIED UPON

This Motion is based upon the summary judgment record and the Declaration of Bruce W. Megard.

IV. ARGUMENT AND AUTHORITY

The Court may certify discretionary review of an order not otherwise appealable when that order: (1) involves a controlling question of law; (2) for which there is a substantial ground for difference of opinion; and (3) when an immediate appeal from the order may materially advance the ultimate termination of the litigation. RAP 2.3(b)(4). The language from RAP 2.3(b)(4) on certification was adapted from a federal statute, 28 U.S.C. §1292(b), which sets forth the standard for federal interlocutory appeals.¹ Tegland, 2A Washington Practice, Rules Practice § 2.3 (6th Ed.) A large body of federal case law has developed under 28 U.S.C. §1292(b), and is instructive by analogy. *Id.*

In reviewing the standard set forth in §1292(b), and the cases interpreting the statute, set forth below, it is clear that the present case is appropriate for certification.

A. The October 29, 2010 Order Presented a Controlling Question of Law

First and foremost, the Court's October 29, 2010 Order presents a controlling question of law, as a reversal of the Order by the Court of Appeals would require immediate dismissal of Plaintiff's lawsuit. Numerous courts have ruled that a question of law is controlling if reversal of the Court's Order would terminate the action. *In re Cement Antitrust Litigation* (MDL No. 296), 673 F.2d 1020 (9th Cir. 1982) (courts have refused to define controlling

¹ 28 U.S.C.A. §1292(b) provides in pertinent part, "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

1 question as narrowly as termination of an action, but if an action were terminated the issue is
2 undoubtedly controlling); *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir.
3 1990); *Skylon Corp. v. Guilford Mills, Inc.*, 901 F. Supp. 711, 718 (S.D.N.Y. 1995) (granting
4 interlocutory appeal because, “if the Court of Appeals were to rule in defendants’ favor, the
5 litigation would come to an end”). Here, if pre-suit notice requirements in tort suits against
6 the government survive *Waples*, the litigation must terminate. Accordingly, under the
7 standard above, the Order presents a per se controlling question of law.

8
9 **B. The October 29, 2010 Order Concerns Issues as to Which There Are**
10 **Substantial Grounds for Difference of Opinion.**

11 Courts have found that substantial grounds for difference of opinion exist where the
12 controlling legal issues are “difficult and of first impression.” *Klinghoffer*, 921 F.2d at 25; *see*
13 *also New York Racing Ass’n*, 959 F. Supp. at 584 (finding substantial ground for difference of
14 opinion where “the legal principles involved are somewhat difficult, and the factual
15 circumstances of the case . . . add a level of complexity to the legal analysis”). In
16 Washington, the Court of Appeals has entered certification pursuant to RAP 2.3(b)(4) where
17 an issue of first impression is involved and interlocutory review would prevent “the need for
18 potentially unnecessary development” of the case. *Ensley v. Pitcher*, 152 Wn. App. 891, 897-
19 98, 222 P.3d 99 (2009).

20
21 Here, as demonstrated by the briefing submitted by the parties on Defendant’s Motion,
22 and the Court’s comments when it issued its ruling, there is a substantial ground for difference
23 of opinion on the issue presented by the Order. The Court acknowledged that this was an
24 issue of first impression in the wake of the *Waples* decision. The Court further acknowledged
25 that the majority opinion in *Waples* was not instructive on the issue presented by this case,
26 because the facts in *Waples* were distinguishable from the facts presented by this case where a

1 litigant has filed a medical negligence suit against the State. And, subsequent to the *Waples*
2 decision, no appellate court has examined whether pre-suit notice requirements in government
3 tort suits still apply. As a result, this case presents an issue of first impression that would be
4 properly addressed by the Court of Appeals under RAP 2.3(b)(4).

5 **C. An Immediate Appeal from the October 29, 2010 Order**
6 **May Materially Advance the Litigation.**

7 The Washington State Supreme Court adopted RAP 2.3(b)(4) for the same reason
8 that Congress enacted § 1292(b) -- to foster efficiency and judicial economy by saving "the
9 time of the district court and considerable expenses on the part of the litigants." S. Rep. 2434,
10 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5256-58; *see* Drafters'
11 Comment, 1998 Amendment to RAP 2.3, *reprinted in* Tegland, 2A Wa Prac. § 2.3.
12 Consistent with this goal, certification of an order is appropriate in "those cases where an
13 intermediate appeal may avoid protracted litigation." *Koehler v. Bank of Bermuda, Ltd.*, 101
14 F.3d 863, 865-66 (2d Cir. 1996). The amount of unnecessary pre-trial discovery that may be
15 avoided is another factor bearing on whether an interlocutory appeal may materially advance
16 the litigation. *See In re: Healthcare Compare Corp. Sec. Litig.*, 75F.3d 276, 279 (7th Cir.
17 1996) (interlocutory appeal granted where the district judge certified the order, in part
18 "because a 'massive amount of discovery [is] lurking in this case' and there would be
19 'meaningful discovery that would just be down the drain if I'm wrong.'")
20
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22 Here, delaying a ruling on the *Waples* issue until after entry of final judgment would
23 be of no benefit; the plaintiff would have to incur the substantial cost of preparing and trying
24 his case, which defendants may not be willing to compromise on without a ruling on the pre-
25 suit notice issue. An immediate decision on a short record is the most efficient and fair way
26 to proceed.

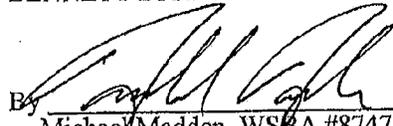
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V. CONCLUSION

The October 29, 2010 Order meets all three criteria for discretionary review under RAP 2.3(b)(4). This Court should exercise its discretion and certify that Order for discretionary review pursuant to RAP 2.3(b)(4). Defendants, therefore, respectfully request that this matter be certified.

DATED this 29 day of November, 2010.

BENNETT BIGELOW & LEEDOM, P.S.

By 
Michael Madden, WSBA #8747
Special Assistant Attorney General
Attorneys for Defendants

CERTIFICATE OF SERVICE

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I certify under penalty under the laws of the State of Washington that on November 29, 2010, I caused a true and correct copy of the foregoing to be delivered as follows:

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Attorney at Law
510 Bell Street
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Fax: 425-778-8550
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The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GLEN A. McDEVITT, an unmarried man,,

Plaintiff,

vs.

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 SEA

**DECLARATON OF BRUCE W.
MEGARD IN SUPPORT OF
DEFENDANT'S MOTION FOR
CERTIFICATION OF THE
COURT'S OCTOBER 29, 2010
ORDER**

1. I am an attorney at Bennett, Bigelow & Leedom, attorneys for Defendants in this matter, and I have personal knowledge of the matters stated herein.

2. On behalf of Defendants, I attended and argued Defendants' Motion for Summary Judgment dismissal, which took place on October 29, 2010.

3. After the parties argued their respective positions, the Court made several comments and then gave its oral ruling, which was memorialized in the Court's October 29, 2010 Order.

DECLARATION OF BRUCE W. MEGARD IN
SUPPORT OF DEFENDANT'S MOTION FOR
CERTIFICATION OF THE COURT'S OCTOBER 29,
2010 ORDER - Page 1

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
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1 4. I understood the Court to state that it understood Defendants' position with
2 regard to the issue addressed in Defendants' Motion and that it believed Defendants'
3 argument was logical. The Court also stated that it agreed with 90% of what Defendants were
4 arguing.

5 5. The Court stated several times that it believed the Legislature was free to place
6 conditions or restrictions on claims or lawsuits against the state and its political subdivisions.
7 The Court further stated it was conflicted because of the Supreme Court's holding in *Waples*.
8 Specifically, the *Waples* majority did not address or analyze the constitutionality of the notice
9 statute in the context of a claim against the State and did not limit its decision to claims or
10 lawsuits that do not involve governmental agencies.

11 6. The Court also stated that the *Waples* decision appeared to conflict with the
12 Legislature's authority to prescribe the manner in which lawsuits may be brought against the
13 State. However, the Court also explained that the majority in *Waples* did not specifically
14 address whether its invalidation of the pre-suit notice requirement in RCW 7.70.100 applied
15 to other pre-notice statutes, particularly RCW 4.92.100.

16 7. The Court continued that if it was a matter of first impression, it would rule in
17 Defendants' favor; but the *Waples* majority did not expressly state whether its holding applied
18 to both private and state health care providers.

19 8. Therefore, the Court concluded that the more restrained approach was to deny
20 Defendants' Motion. It further stated there was a legitimate issue for appeal and that Plaintiff
21 would likely have a significant problem if the case were to be appealed.

22 Attached hereto as Exhibits are true and correct copies of the following:

- 23 1. Plaintiff's First Amended Complaint for Medical Negligence, dated July 20,
24 2010.
- 25 2. Defendant's Motion for Summary Judgment, dated October 1, 2010.

26

DECLARATION OF BRUCE W. MEGARD IN
SUPPORT OF DEFENDANT'S MOTION FOR
CERTIFICATION OF THE COURT'S OCTOBER 29,
2010 ORDER - Page 2

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3. Plaintiff Glen A. McDevitt's Response to Defendant's Motion for Summary Judgment, dated October 13, 2010.

4. Defendant's Reply in Support of Motion for Summary Judgment, dated October 25, 2010.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Executed at SEATTLE, Washington, this 29 day of November, 2010.



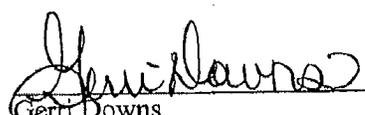
BRUCE W. MEGARD

CERTIFICATE OF SERVICE

I certify under penalty under the laws of the State of Washington that on ~~October 1,~~ ^{Nov, 30} 2010, I caused a true and correct copy of the foregoing Defendant's Motion for Summary Judgment to be delivered as follows:

Thomas F. McDonough
Attorney at Law
510 Bell Street
Edmonds, WA 98020
Fax: 425-778-8550
Email: thomas.mcdonough@verizon.net

- Hand Delivered
- Facsimile
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- 1st Class Mail
- Priority Mail
- Federal Express, Next Day



Geni Downs

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DECLARATION OF BRUCE W. MEGARD IN SUPPORT OF DEFENDANT'S MOTION FOR CERTIFICATION OF THE COURT'S OCTOBER 29, 2010 ORDER - Page 3

LAW OFFICES
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EXHIBIT 1

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Washington State
Office of the Attorney General
Acknowledged Receipt, this 22d day
of JULY, 20 16, Time: 11:30a
in SEATTLE, Washington.
Signature: *William Clark*
Print Name: WILLIAM CLARK
Assistant Attorney General

SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GLEN A. McDEVITT, an unmarried man,

NO. 10-2-24679-7 SEA

Plaintiff,

FIRST AMENDED COMPLAINT FOR
MEDICAL NEGLIGENCE

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.

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;

FIRST AMENDED COMPLAINT FOR
MEDICAL NEGLIGENCE

-1

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Fax (425) 778-8550

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

FIRST AMENDED COMPLAINT FOR
MEDICAL NEGLIGENCE

-2

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Attorney at Law
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Fax (425) 778-8550

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, WSPA #11110
Attorney for Plaintiff

FIRST AMENDED COMPLAINT FOR
MEDICAL NEGLIGENCE

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EXHIBIT 2

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The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GLEN A. McDEVITT, an unmarried man,,
Plaintiff,

NO. 10-2-24679 SEA

vs.

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

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.

I. RELIEF REQUESTED

COMES NOW defendants Harborview Medical Center, University of Washington,
and the State of Washington ("defendants"), by and through their counsel of record, and
respectfully move the Court for Summary Judgment of dismissal pursuant to CR 56. This
matter should be dismissed with prejudice because plaintiff has failed to comply with RCW
7.70.100(1) as applied to state government entities under RCW 4.92.100, and because the
applicable limitations period has now expired.

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II. STATEMENT OF FACTS

This is a medical malpractice case brought against the State of Washington based on the alleged negligence of physicians employed by the University of Washington. The plaintiff, who suffered severe injuries when he crashed his hang-glider into the roof of a house, claims that the failure to prescribe anti-coagulants when he was discharged from Harborview Medical Center¹ caused deep vein thrombosis (formation of a clot) in his leg. See Complaint, ¶ 4. Plaintiff was discharged from Harborview on July 13, 2007. *Id.* He commenced this action by filing a complaint on July 20, 2010. He did not serve a tort claim or notice of intent to sue prior to doing so.

III. STATEMENT OF ISSUES

1. Whether all claims against defendants should be dismissed where plaintiff failed to comply with RCW 7.70.100(1), as made applicable to state entities under RCW 4.92.100.

IV. EVIDENCE RELIED UPON

CR 56, RCW 4.92.100, RCW 7.70.100(1), the pleadings and papers on file with the Court.

V. AUTHORITY

A. Plaintiff Failed to Provide Pre-Suit Notice.

RCW 4.92.100 provides that “[a]ll claims against the state, or against the state’s officers, employees, or volunteers, acting in such capacity, for damages arising out of tortuous 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.” (emphasis added). RCW 7.70.100 provides “[n]o action based upon a health care provider’s professional

¹ Although owned by King County, Harborview is operated by the University of Washington and is treated as a state facility for purposes of tort liability. *Hontz v. State*, 105 Wn.2d 302, 310 (1986).

1 negligence may be commenced unless the defendant has been given at least ninety days'
2 notice of the intention to commence the action." Plaintiff did not comply with the
3 requirements of RCW 7.70.100, and gave no pre-suit notice. This is not in dispute and, thus,
4 there is no issue of material fact.

5 **B. The Legislature Has Constitutional Authority to Require Pre-Suit Notice.**

6 Article 2, § 26 of the Washington Constitution ("Suits against the State") provides
7 "[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought
8 against the state." Under this authority, the Legislature's "power to control and regulate the
9 right of suit against [the state] is plenary; it may grant the right or refuse it as it chooses."
10 *State v. Superior Court for Thurston County*, 86 Wn. 685, 688 (1915). In 1963, when it first
11 waived the state's immunity from suit for tort damages, the legislature required pre-suit notice
12 of claim as a condition precedent to commencement of such an action. L. 1963, ch. 159, § 3.
13 This requirement, which is currently codified in RCW 4.92.100 (for state entities) and RCW
14 4.96.020 (local entities) has been upheld repeatedly against a variety of constitutional
15 challenges. *See, e.g., Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303,
16 312 (2002) (Upholding the 60 day waiting requirement of RCW 4.96.020, and noting "the
17 right to bring suit was created by statute and is not a fundamental right."); *Eugster v. City of*
18 *Spokane*, 115 Wn. App. 740, 750 (2003) ("The right to bring suit against political
19 subdivisions of the state and its municipalities was created by statute in 1967 when the
20 legislature waived sovereign immunity. The right to sue the state is not a fundamental right; it
21 is statutory. It follows then that the state can place limitations upon that right. The
22 Washington State Constitution, moreover, expressly reserves to the legislature the right to
23 regulate lawsuits against governmental entities.") (internal citations omitted). *See Medina*,
24 147 Wn.2d at 312, citing *O'Donoghue v. State*, 66 Wn.2d 787, 789 (1965) ("Since the state,
25 as sovereign, must give the right to sue, it follows that it can prescribe the limitations upon
26 that right.")

1 Because it is clear that the legislature acted pursuant to its constitutional authority
2 under Art. 2, § 26 when it directed that malpractice plaintiffs must comply with RCW
3 7.70.100 before commencing suit against governmental health care providers, and because it
4 is undisputed that plaintiffs did not comply, this matter must be dismissed.

5 **C. *Waples v. Yi* does not apply to this Case.**

6 Plaintiff will undoubtedly assert that RCW 7.70.100 is unconstitutional based on
7 *Waples v. Yi*, 169 Wn.2d 152, 161 (2010), where the Supreme Court held that the notice of
8 intent requirement violated the separation of powers doctrine because it conflicts with CR
9 3(a). The court reasoned that RCW 7.70.100, in requiring notice, added a step not found in
10 the requirements of CR 3(a), which provides that a “civil action is commenced by service of a
11 copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a
12 complaint.” *Id.* at 160. Thus, the Court held that both CR 3(a) and RCW 7.70.100 “cannot be
13 harmonized and both cannot be given effect. If a statute and a court rule cannot be
14 harmonized, the court rule will generally prevail in procedural matters and the statute in
15 substantive matters.” *Id.* at 161. The Court, therefore, held that RCW 7.70.100 “is
16 unconstitutional because it conflicts with the judiciary’s power to set court proceedings.”
17 *Waples*, 169 Wn.2d at 161.

18 In *Waples*, the case involved suits against private health care providers. But in this
19 case a private party is suing the State of Washington. Thus, there is no conflict between the
20 legislature and the judiciary, because the Legislature’s power to determine the manner in
21 which the state is sued comes directly from the constitution. *See Eugster* 115 Wn. App. at
22 750 (“The Washington State Constitution, moreover, expressly reserves to the legislature the
23 right to regulate lawsuits against governmental entities”). Separation of powers (a court-
24 developed doctrine not expressly recognized in the constitution), cannot be applied to
25 invalidate a procedural requirement that the constitution expressly authorizes the Legislature
26 to impose. *See Nw. & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 75, (1897) (“By this

1 provision . . . it was left to the legislature to determine in what court such suits should be
2 brought, and to prescribe the method of procedure.”). On this basis, the court in *Lacey*
3 *Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40, 51-52 (1995) rejected the
4 claim that a statute dictating both pre-suit and judicial procedures for tax refund suits violated
5 the separation of powers doctrine. There, the Court held that the right to bring excise tax
6 refund suits against the state was a conditional, partial waiver of sovereign immunity afforded
7 by Art. 2, § 26 of the Constitution, and must be “exercised in the manner provided by the
8 statute.” *Id.* at 52.

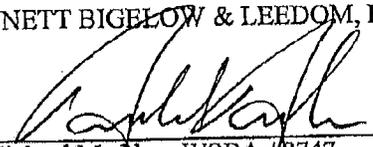
9 Therefore, in medical malpractice cases against state and local government entities,
10 the pre-suit notice requirements of RCW 7.70.100 are valid because they are imposed
11 pursuant to the Legislature’s express authority under Art. 2, §26 to determine “in what
12 manner, and in what courts, suits may be brought against the state.” Because plaintiff failed
13 to follow these validly imposed requirements, his claims should be dismissed with prejudice.

14 **VI. CONCLUSION**

15 Defendants respectfully request that this Court grant the motion for summary
16 judgment and dismiss plaintiff’s claims with prejudice. Summary judgment is appropriate
17 because plaintiff failed to comply with the notice requirements of RCW 4.92.100,
18 incorporating 7.70.100(1), which is still valid as related to claims against government entities.

19
20 DATED this 19th day of October, 2010.

21 BENNETT BIGELOW & LEEDOM, P.S.

22
23 By 
24 Michael Madden, WSBA #8747
25 Special Assistant Attorney General
26 Attorneys for Defendants

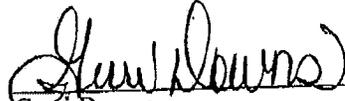
CERTIFICATE OF SERVICE

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I certify under penalty under the laws of the State of Washington that on October 1,
2010, I caused a true and correct copy of the foregoing Defendant's Motion for Summary
Judgment to be delivered as follows:

Thomas F. McDonough
Attorney at Law
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Fax: 425-778-8550
Email: thomas.mcdonough@verizon.net

- Hand Delivered
- Facsimile
- Email
- 1st Class Mail
- Priority Mail
- Federal Express, Next Day


Gerri Downs

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EXHIBIT 3

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OCT 18 2010

BENNETT BIGELOW
& LEEDOM

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

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 d/b/a UW
MEDICINE/PHYSICIANS; and THE STATE
OF WASHINGTON, a governmental entity,

Defendants.

No. 10-2-24679 SEA

PLAINTIFF GLEN A. McDEVITT'S
RESPONSE TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

COMES NOW Plaintiff, Glen McDevitt, by and through his counsel of record, and respectfully requests the court deny Defendants Harborview Medical Center, University of Washington, and the State of Washington's motion for summary judgment of dismissal. The Defendants' Motion for Summary Judgment should be denied because the Washington Supreme

PLAINTIFF GLEN A. McDEVITT'S RESPONSE
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT -

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1 Court declared RCW 7.70.100(1) unconstitutional and no longer requires pre-suit notice for
2 claims against the state involving health care.¹

3 II. STATEMENT OF FACTS

4 The following facts were gleaned from Plaintiff's Amended Complaint. For purposes of
5 this summary judgment motion, it appears that the moving party does not contest the following
6 facts.

7 Plaintiff, Glen McDevitt, is a middle school teacher who enjoys active outdoor pursuits.
8 Plaintiff was paragliding in the Tiger Mountain area. While paragliding, Plaintiff crashed into
9 tree branches that threw him onto a roof, against a chimney, and onto the ground. Plaintiff was
10 taken to a Bellevue hospital facility and transferred to Harborview Medical Center for treatment.
11 Plaintiff suffered a fracture of his left femur, specifically a left comminuted
12 subtrochanteric/petrochanteric femur fracture with segmental comminution involving lesser
13 trochanter and posterolateral diaphyseal cortex, completely displaced and unstable. On July 10,
14 2007, Plaintiff underwent major surgery to repair his leg. After surgery, Plaintiff remained in the
15 hospital until discharged on July 13, 2007. During his stay at Harborview Medical Center,
16 Plaintiff received Lovenox, an anticoagulant drug that prevents blood clots called deep vein
17 thrombosis. Upon discharge, Plaintiff was taken off Lovenox without his knowledge and
18 without being educated about the risks of blood clots and the measures necessary to guard
19 against deep vein thrombosis. Plaintiff was discharged to his home and experienced pain and
20 swelling in his lower extremities. On July 20, 2007, Plaintiff went to the emergency room at
21 Northwest Hospital, and the health care providers found significant swelling of his left leg from
22 hip to ankle. Plaintiff was diagnosed with bilateral calf level deep venous thrombosis, isolated to
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24

25 ¹ See *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

1 peroneal veins on the left leg and notable in a valve cusp in the localized posterior tibial vein on
2 the right leg. Said condition is chronic, causing Plaintiff pain and loss of enjoyment of life. On
3 July 7, 2010, Plaintiff filed a lawsuit against Harborview Medical Center for negligence due to
4 defendants' breach of the duty of care owed to him as a result of the treatment and/or lack of
5 treatment. On July 20, 2010, Plaintiff filed an amended complaint naming all Defendants. On
6 July 22, 2010, Plaintiff served the summons and amended complaint on all Defendants.

7 III. STATEMENT OF ISSUES

8 Whether the defendants' motion for summary judgment should be denied because
9 Plaintiff's claim does not require pre-suit notice pursuant to the Supreme Court of Washington's
10 declaration that RCW 7.70.100(1) requirement of notice of a claim is unconstitutional?

11 IV. EVIDENCE RELIED UPON

12 RCW 7.70.100(1), CR 56, CR 15(a), and the records and files herein including the
13 Declaration of Glen A. McDevitt.

14 V. AUTHORITY/ANALYSIS

15 A. Summary Judgment Standard.

16 Summary judgment is only appropriate in favor of the moving party, if the moving party
17 shows that there is no genuine issue of material fact and the moving party is entitled to judgment
18 as a matter of law. CR 56(c); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068
19 (2002). The defendants have the burden of proof and the Court must construe the facts and
20 reasonable inferences to be drawn in the light most favorable to the non-moving party. *Id.* "A
21 material fact is one upon which the outcome of the litigation depends in whole or in part."
22 *Atherton Condo. Apt.-Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799
23 P.2d 250 (1990) (citing, *Morris v. McNicol*, 83 Wn.2d 491, 494, 519, 519 P.2d 7 (1974)).
24
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PLAINTIFF GLEN A. McDEVITT'S RESPONSE
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT -

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1 Material facts of this case are in dispute and the Defendant is not entitled to summary judgment
2 as a matter of law.

3 The only material issue is whether the Supreme Court's decision in *Waples* is controlling
4 law. The Supreme Court of Washington's decision in *Waples* declared the 90 day pre-suit notice
5 of intent to file a claim as unconstitutional. Plaintiff is not required to file a notice of intent.
6 Defendants are, quite simply, wrong regarding the law.

7 **B. *Waples v. Yi* Applies Therefore Plaintiff's Failure to Provide Pre-Suit Notice Does**
8 **Not Preclude This Action.**

9 Defendants correctly state that RCW 4.92.100 requires that "claims involving injuries
10 from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are
11 exempt from this chapter." RCW 4.92.100. Defendants also correctly cite Article 2, § 26 of the
12 Washington Constitution which provides the legislature with the authority to decide the manner
13 in which suits may be brought against the state. The legislature requires pre-suit notice of a
14 claim as a condition precedent to an action. L. 1963, ch. 159, § 3; RCW 4.92.100. However, as
15 noted above, RCW 4.92.100 specifically states that injuries resulting from health care are
16 "governed solely by ...chapter 7.70 RCW." RCW 4.92.100. RCW 7.70.100(1) provides that
17 "action[s] based upon a health care provider's professional negligence may not be commenced
18 unless the defendant has given at least ninety days' notice" of intent to file an action. However,
19 on July 1, 2010, that feature of the medical malpractice legislation was found to be
20 unconstitutional because of its failure to honor the separation of powers required by the state
21 constitution. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010). Plaintiff concedes that he did
22 not file a pre-suit notice under RCW 7.70.100(1) pursuant to the Washington Supreme Court's
23 recent decision in *Waples v. Yi* which permits him to file an action without pre-suit notice. *Id.*
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PLAINTIFF GLEN A. McDEVITT'S RESPONSE
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT -

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1 In *Waples*, the Supreme Court of Washington accepted review of two cases involving a
2 plaintiff's failure to provide pre-suit notice before filing a health care claim pursuant to RCW
3 7.70.100(1). The Court consolidated the two actions. The Supreme Court held that RCW
4 7.70.100's requirement to give notice of intent to file was unconstitutional because it violated the
5 separation of powers doctrine by conflicting with CR 3(a). *Waples v. Yi*, 169 Wn.2d 152 at 159-
6 160. The Supreme Court began its analysis of the case with a discussion of the separation of
7 powers doctrine and noted:

8 Some fundamental functions are within the inherent power of the judicial branch
9 including the power to promulgate rules for its practice. If a statute appears to
10 conflict with a court rule, this court will first attempt to harmonize them and give
11 effect to both, but if they cannot be harmonized, the court rule will prevail in
12 procedural matters and the statute will prevail in substantive matters.

13 *Waples v. Yi* 169 Wn.2d 152 at 158. The Supreme Court held that the notice of claim provision
14 contained in the statute and CR 3(a) could not be harmonized and given effect. Since RCW
15 7.70.100(1) did "not address the primary rights of either party" but dealt only with procedural
16 matters, and because RCW 7.70.100(1) conflicted with judiciary's power to set court
17 proceedings, the Court declared the statute unconstitutional. *Waples v. Yi*, 169 Wn.2d 152 at
18 160-161.

19 Defendants attempt to distinguish *Waples* by arguing that the case involved only suits
20 against private health care providers. Defendants argue that there is no conflict between the two
21 government branches because the legislature's power comes directly from the constitution and
22 that the legislature still retains the authority to determine the manner in which the state is sued.
23 Specifically, Defendants cite *Lacey Nursing Center, Inc. v. Department of Revenue* (a pre-
24 *Waples* decision from over 15 years ago) to support their argument that *Waples* does not apply to
25 state agencies. The cited case contains a different statute and different rules of construction

PLAINTIFF GLEN A. McDEVITT'S RESPONSE
TO DEFENDANTS' MOTION FOR
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1 regarding tax refunds. Additionally, Defendants erroneously rely upon mere dicta contained in
2 the case. In *Lacey*, plaintiffs brought an excise tax refund action against the state and sought to
3 make it a class action pursuant to CR 23. *Lacey Nursing Center, Inc. v. Department of Revenue*,
4 128 Wn.2d 40 at 54. In its decision, the court stated:

5 As a general principle, this court has held that tax statutes conferring credits,
6 refunds or deductions must be construed narrowly. RCW 82.32.180 is a
7 conditional, partial waiver of the sovereign immunity afforded by Article II, § 26
8 of the Washington Constitution. The statute permits certain excise tax refund
9 suits to be brought in the superior court of Thurston County. The right to bring
10 excise tax refund suits against the state must "be exercised in the manner provided
11 by the statute." If the Legislature intended to permit class action lawsuits for
12 taxpayers seeking excise tax refunds, it would have made express provision for it.
13 This it did not do. The trial court was in error in interpreting RCW 82.32.180 to
14 allow class actions

15 *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40 at 55-56. The right of a
16 party to bring a class action against a state agency is a primary right not a procedural right.
17 *Lacey* does not apply to RCW 7.70.100(1) because it addresses the legislature's power to
18 determine the primary rights of the parties, as opposed to the procedural rights discussed in
19 *Waples*. The statute in *Lacey* does not conflict with a court rule but, rather, limits a party's
20 ability to bring a class action, and does not raise an issue regarding the separation of powers but,
21 rather, illustrates the correct application of the separation of powers when applied to the
22 legislature's ability to determine the primary right of a party as opposed to the judiciary's power
23 to set court procedures. The Defendants' argument fails.

24 Neither the statute nor the Supreme Court distinguishes between a state or private health
25 care provider. RCW 7.70.020 defines "health care provider" to mean:

(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,

PLAINTIFF GLEN A. McDEVITT'S RESPONSE
TO DEFENDANTS' MOTION FOR
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1 physician assistant, midwife, osteopathic physician's assistant, nurse practitioner,
2 or physician's trained mobile intensive care paramedic, including, in the event
such person is deceased, his or her estate or personal representative;

3 (2) An employee or agent of a person described in part (1) above, acting in
4 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

5 (3) An entity, whether or not incorporated, facility, or institution
6 employing one or more persons described in part (1) above, including, but not
7 limited to, a hospital, clinic, health maintenance organization, or nursing home; or
8 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.

9 RCW 7.70.020. Nowhere in the definition does the statute differentiate between private and
10 state health care providers. Additionally, the Supreme Court did not limit its ruling to private
11 health care providers and, thus, the court decision in *Waples* governs actions against both private
12 and state health care providers. Therefore, Plaintiff's failure to provide pre-suit notice does not
13 result in the dismissal of his case against Defendants.

14 **C. CR 15(c)'s Relation-Back Applies to Plaintiff's Amended Complaint.**

15 In their introduction, Defendants allege that the applicable limitations period covering
16 Plaintiff's medical malpractice claims has expired. This is untrue. On July 7, 2010, and within
17 applicable statute of limitations, Plaintiff filed his complaint against Harborview Medical Center
18 and Jane and John Doe. McDevitt Dec. On July 20, 2010, Plaintiff filed an amended complaint
19 joining additional defendants UW Medicine/Physicians and the State of Washington. CR 15(c)
20 allows relation back:

21
22 Whenever, the claim or defense asserted in the amended pleading arose out of the
23 conduct, transaction, or occurrence set forth or attempted to be set forth in the
24 original pleading, the amendment relates back to the date of the original pleading.
25 An amendment changing the party against whom a claim is asserted relates back
if the foregoing provision is satisfied and, within the period provided by law for
commencing the action against him, the party to be brought in by amendment (1)
has received such notice of the institution of the action that he will not be

PLAINTIFF GLEN A. McDEVITT'S RESPONSE
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT -

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1 prejudiced in maintaining his defense on the merits, and (2) knew or should have
2 known that, but for a mistake concerning the identity of the proper party, the
action would have been brought against him.

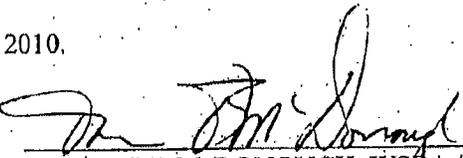
3 CR 15(c). Plaintiff's amended complaint meets all the above requirements of CR 15(c).

4 The claims against the Defendants arise from the same treatment and/or lack of treatment alleged
5 in Plaintiff's original complaint. The added parties manage and operate Harborview Medical
6 Center. When Plaintiff filed its complaint against Harborview Medical Center, UW
7 Medicine/Physicians and the State of Washington received constructive notice that parties would
8 be added due to the addition of Jane and John Does whose true identity was not known at the
9 time. Additionally, Defendants are not prejudiced from maintaining a defense. The amended
10 complaint relates back to the July 7, 2010 filing of the original complaint.

11 VI. CONCLUSION

12 Defendants Harborview Medical Center, University of Washington, and the State of
13 Washington have failed to meet their burden of proof in connection with their motion for
14 summary judgment. Therefore, Plaintiff respectfully requests the court to deny Defendants'
15 motion for summary judgment and grant his order denying the Defendant's motion. A proposed
16 order is attached.
17

18 DATED this 13th day of October, 2010.

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21 THOMAS F. McDONOUGH, WSPA #11110
Attorney for Plaintiff Glen A. McDevitt

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PLAINTIFF GLEN A. McDEVITT'S RESPONSE
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT -

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EXHIBIT 4

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The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GLEN A. McDEVITT, an unmarried man,,
Plaintiff,

NO. 10-2-24679 SEA

vs.

**DEFENDANT'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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.

I. INTRODUCTION

There is no doubt that the legislature has the authority to promulgate rules and regulations for lawsuits against the State. Indeed, plaintiff concedes that Article II, § 26 of the Washington Constitution "provides the legislature with the authority to decide the manner in which suits may be brought against the state. The legislature requires pre-suit notice of a claim as a condition precedent to an action." See Opposition at 4. This should end the inquiry because the legislature has unequivocally required pre-suit notice for health care liability claims against the State and plaintiff concedes such notice was not provided.

DEFENDANT'S REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT Page - 1

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1 Plaintiff's argument that *Waples v. Yi*, 169 Wn.2d 152 (2010) invalidated RCW
2 7.70.100(1) for all time and in all cases ignores the fact that courts decide cases based upon
3 the facts and the arguments presented. *Waples* involved non-governmental defendants.
4 Therefore, the court had no occasion to consider whether the notice requirement was valid
5 under Art. II, § 26 of the Washington Constitution. One cannot simply assume, as plaintiff
6 would have it, that a decision based on a particular set of facts and arguments controls a case
7 involving materially different facts and arguments, particularly where validity of statutory
8 pre-suit notice requirements, as applied to governmental defendants, is well-settled under 50
9 years of Washington case law.

10 **II. AUTHORITY**

11 Plaintiff's reading of *Waples* ignores the critical distinction between facial and as-
12 applied constitutional challenges to legislation. A "facial challenge is one where no set of
13 circumstances exists in which the statute, as currently written, can be constitutionally
14 applied." *Carlisle v. Columbia Irrigation Dist.*, 168 Wn.2d 555, 567 n.2 (2010) (*citing City of*
15 *Redmond v. Moore*, 151 Wn.2d 664, 669 (2004)). "An as-applied challenge ... is
16 characterized by a party's allegation that application of the statute in the specific context of
17 the party's actions or intended actions is unconstitutional. Holding a statute unconstitutional
18 as-applied prohibits future application of the statute in a similar context, **but the statute is**
19 **not totally invalidated.**" *City of Redmond*, 151 Wn.2d at 669 (internal citations omitted)
20 (emphasis added). Having only recently declared the distinction between facial and as-applied
21 challenges, if the *Waples* court intended to declare RCW 7.70.100(1) facially unconstitutional,
22 it would surely have said so expressly, particularly because the import of such a decision
23 would be to also invalidate RCW 4.92.100 and thereby overturn fifty years worth of
24 Washington cases.

25 Furthermore, as a recent Court of Appeals case makes clear, this Court cannot assume
26 that the *Waples* court decided anything more than the particular case before it. In a challenge

1 to the state's statutory special education funding process, the Court of Appeals analyzed the
2 appropriate use of facial, versus as-applied challenges. *School Dist. Alliance For Adequate*
3 *Funding of Special Educ. v. State*, 149 Wn. App. 241 (2009). In that case, the constitutional
4 authority was derived from Article IX, § 1 of the constitution, which provides that "[i]t is the
5 paramount duty of the [S]tate to make ample provision for the education of all children
6 residing within its borders, without distinction or preference on account of race, color, caste,
7 or sex." *Id.* at 245-46. The legislature determined that special education was a part of the
8 State's constitutional obligation, and instructed the Office of the Superintendent of Public
9 Instruction to establish a regulatory framework governing special education. *Id.* at 246. The
10 court held that "[u]nless a court is fully convinced that a statute violates the constitution, it
11 lacks the authority to override a legislative enactment. . . . A facial challenge must be rejected
12 unless . . . *no set of circumstances* [exist] in which the statute can be constitutionally applied."
13 *Id.* at 246-47 (emphasis in original). The court noted that it must "presume that a statute is
14 constitutional and the party challenging the statute as applied bears the burden of proving its
15 unconstitutionality beyond a reasonable doubt." *Id.* at 265. It further noted that it is not the
16 court's role to "micromanage education in Washington." *Id.* at 264.

17 In analyzing the challenged statute, the court provided that it "must determine first
18 what article IX, section 1 requires and then decide whether the [plaintiffs] ha[ve] provided
19 sufficient evidence to prove beyond a reasonable doubt that there is no set of circumstances
20 under which the legislature's statutory special education funding process could satisfy the
21 minimum due under article IX, section 1." *Id.* at 248. The court held that based upon the
22 constitutional authority provided under article IX, section 1, "the legislature has the authority
23 to select the means to discharge this duty and **the judiciary, including the trial court and**
24 **this court, should restrain its role to providing only broad constitutional guidelines**
25 **within which the legislature may work."** *Id.* at 263 (emphasis added). In striking down the
26 facial challenge, the court noted that it exercised "judicial restraint" and that under article IX's

1 "broad constitutional guidelines, the [funding scheme] is constitutional on its face." *Id.* at
2 264.

3 In *Waples*, the court did not hold RCW 7.70.100(1) to be unconstitutional in every
4 conceivable circumstance. In fact, the court concluded the opposite—holding RCW
5 7.70.100(1) invalid only "because it conflicts with the judiciary's power to set court
6 procedures." *Waples*, 169 Wn.2d at 161. Plaintiff's reading of *Waples* would extend the
7 decision beyond the circumstances where RCW 7.70.100(1) conflicts with a judicial rule to
8 all circumstances. In order for the *Waples* court to have found the statute invalid on its face,
9 however, the plaintiffs in that case would have been required to prove beyond a reasonable
10 doubt that the statute is invalid under all circumstances—even where statutory authority
11 comes directly from the Constitution. Moreover, the Court would have had to make such a
12 finding while exercising "judicial restraint," and it would still have had to be "fully
13 convinced" that the statute is unconstitutional. No such analysis is contained in the *Waples*
14 opinion, and there is no mention of any of the canons of interpretation.

15 Clearly, RCW 7.70.100(1) is constitutional when applied to cases where the State is
16 the defendant. As the plaintiff concedes, Article II, § 26 directs the legislature to determine
17 the manner in which the State can be sued. RCW 4.92.100 provides unequivocally that
18 "[c]laims involving health care are governed solely by the procedures set forth in chapter 7.70
19 RCW" Thus, the "set of circumstances" under which RCW 7.70.100(1) is constitutional
20 are the exact set of circumstances of this case—the State is a defendant in a suit "based upon a
21 health care provider's professional negligence." It is simply not the case that *Waples*
22 invalidated RCW 7.70.100(1) in cases like this. It is elementary that the separation of powers
23 doctrine does not allow a court rule to trump the constitution, which is precisely what plaintiff
24 would have this court decide.

25
26

DEFENDANT'S REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT Page - 4

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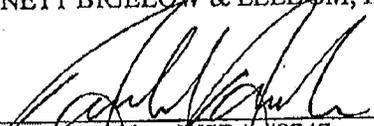
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III. CONCLUSION

Defendants respectfully request that the Court grant their motion for summary judgment.

DATED this 25th day of October 2010.

BENNETT BIGELOW & LEEDOM, P.S.

By 
Michael Madden, WSBA #8747
Special Assistant Attorney General
Attorneys for Defendants

CERTIFICATE OF SERVICE

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I certify under penalty under the laws of the State of Washington that on October 25, 2010, I caused a true and correct copy of the foregoing Defendant's Reply in Support of Motion for Summary Judgment to be delivered as follows:

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- Federal Express, Next Day


Gerri Downs

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The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GLEN A. McDEVITT, an unmarried man,,

Plaintiff,

vs.

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 SEA

**PROPOSED ORDER ON
DEFENDANT'S MOTION FOR
CERTIFICATION OF THE
COURT'S OCTOBER 29, 2010
ORDER**

THIS MATTER came before this Court for hearing on December 7, 2010, on Defendants Harborview Medical Center, University of Washington and the State of Washington's Motion for Certification of the Court's October 29, 2010 Order pursuant to RAP 2.3(b)(4). The Court having considered the pleadings filed herein hereby ORDERS that Defendant's Motion for Certification is granted. Pursuant to RAP 2.3(b)(4), the Court finds:

1. The October 29, 2010 order involves a controlling question of law; *i.e.*, whether *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), invalidated RCW 7.70.100(1) as applied to suits against governmental entities? If defendants' position is correct, this litigation would terminate.

PROPOSED ORDER ON DEFENDANT'S MOTION
FOR CERTIFICATION - Page 1

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- 2. There is substantial ground for a difference of opinion on that question in that Art. II, Sec. 20 of the Washington Constitution authorizes the Legislature to establish procedural requirements for actions against governmental entities and the Supreme Court has upheld such measures in a number of cases without suggesting that those measures violate the Separation of Powers doctrine, but *Waples* seemingly held RCW 7.70.100(1) unconstitutional without regard to whether the suit in question was against the government.
- 3. Immediate review of the October 29, 2010 order may materially advance the ultimate termination of the litigation because it would be inefficient and unfair to require plaintiff to bear the cost of preparing and trying a medical malpractice case while facing the risk of dismissal following appeal because of failure to give pre-suit notice.

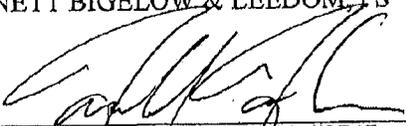
DATED this _____ day of _____, 2010.

JEFFREY RAMSDELL
Superior Court Judge

Presented by:

BENNETT BIGELOW & LEEDOM, P.S.

By:


 Michael Madden, WSBA #8747
 Special Assistant Attorney General
 Attorneys for Defendants

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2010 NOV 29 PM 2:19 The Honorable Jeffrey Ramsdell

KING COUNTY
SUPERIOR COURT

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GLEN A. McDEVITT, an unmarried man,,

Plaintiff,

vs.

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

DEFENDANTS' NOTICE FOR
DISCRETIONARY REVIEW TO
THE SUPREME COURT

Defendants Harborview Medical Center, the University of Washington, and the State of Washington seek discretionary review by the Washington State Supreme Court of the Court's October 29, 2010 Order Denying Defendant's Motion for Summary Judgment, pursuant to RAP 4.2(a). A copy of the decision is attached to this Notice.

DEFENDANTS' NOTICE FOR DISCRETIONARY
REVIEW TO THE SUPREME COURT - Page 1
10-2-24679-7 SEA

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DATED this 29 day of November 2010.

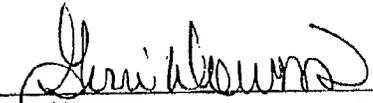
BENNETT BIGELOW & LEEDOM, P.S.

By 
Michael Madden, WSBA #8747
Attorney for Defendants

CERTIFICATE OF SERVICE

I certify under penalty under the laws of the State of Washington that on November 29, 2010, I caused a true and correct copy of the foregoing to be delivered as follows:

Thomas F. McDonough	<input checked="" type="checkbox"/>	Hand Delivered
Attorney at Law	<input type="checkbox"/>	Facsimile
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Fax: 425-778-8550	<input type="checkbox"/>	Priority Mail
Email: <u>thomas.mcdonough@verizon.net</u>	<input type="checkbox"/>	Federal Express, Next Day


Gerri Downs

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DEFENDANTS' NOTICE FOR DISCRETIONARY
REVIEW TO THE SUPREME COURT - Page 2
10-2-24679-7 SEA

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