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No. 71768-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TANYA I. STOCK,

Appellant,

v.

HARBORVIEW MEDICAL CENTER, UNIVERSITY OF
WASHINGTON/UW PHYSICIANS, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENTS

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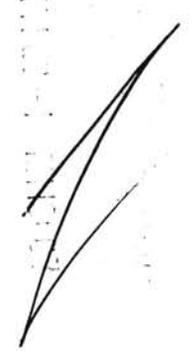


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I. INTRODUCTION

Appellant Tanya Stock lost control of her car and hit a pole in central Seattle while driving intoxicated. Paramedics transported Stock to Harborview Medical Center where she received treatment for three days, including evaluations by neurosurgery, general surgery, psychiatry, social work, physical therapy, and occupational therapy, after which she was discharged with directions to follow up with her personal physician and return to Harborview in two weeks.

She failed to do so, and instead sued respondents Harborview Medical Center, the University of Washington/UW Physicians, and their individual healthcare providers (collectively “Harborview”) for vague and unspecified claims of medical negligence and failure to obtain informed consent. The trial court dismissed her suit because she failed to present any expert evidence to support a claim under RCW ch. 7.70 and because she sued the State of Washington without providing the presuit notice of claim to the State required by RCW ch. 4.92. This Court should affirm the trial court’s summary judgment order on either or both grounds.

II. RESTATEMENT OF ISSUES

1. Was expert testimony required under RCW ch. 7.70 to establish that the defendant health care providers breached the standard of care and caused the plaintiff injuries in discharging her after three days of treatment that she alleged fell below the standard of care?

2. Does a plaintiff who failed to provide the State with notice of the facts and circumstances of her claim prior to filing suit, depriving the State's risk managers of the bare minimum information needed to investigate her claim, substantially comply with RCW 4.92.100?

III. RESTATEMENT OF THE CASE

A. Stock received treatment for three days at Harborview Medical Center after crashing her car while driving intoxicated.

On February 9, 2012, after leaving a bar shortly before midnight, Tanya Stock crashed her car into a pole in central Seattle, causing her airbags to deploy and severely damaging her vehicle. (CP 229, 231) The paramedics who arrived on the scene noted that Stock vomited "alcohol smelling emesis." (CP 229) They intubated Stock, and transported her to Harborview Medical Center for treatment. (CP 229, 231) While at Harborview, Stock explained to

various physicians and nurses that “I was drunk” and “I feel silly being here and stupid for driving drunk-it was a terrible decision.” (CP 239, 242-43, 245) Blood tests revealed that Stock had a BAC of .21. (CP 234)

Physicians at Harborview treated Stock for a small right-sided intraventricular hemorrhage.¹ (CP 236) Over the next three days, Stock was extubated, received multiple x-rays and frequent evaluations, including consultations by neurosurgeons, psychiatry, social work, physical therapy, and occupational therapy. (CP 236-45) After multiple CT scans of her brain, the Harborview physicians determined that her small hemorrhage was stable. (CP 236, 245) They found no other injuries. (CP 236, 245)

On February 11, 2012, Stock’s treating physician approved her for discharge after she was cleared by Harborview’s neurosurgery team. (CP 236-37, 246) Harborview’s discharge instructions directed Stock to follow-up with her primary care provider within a week and with the Harborview neurosurgery clinic within two weeks, and to obtain a CT scan prior to returning to Harborview. (CP 236, 248) The instructions also directed Stock

¹ An intraventricular hemorrhage involves bleeding within a ventricle of the brain. Stedman’s Medical Dictionary at 644 (3d. edition 1972).

to call Harborview neurosurgery should she experience infection, headache, weakness, or a number of other symptoms. (CP 237, 249) When Stock failed to schedule a return appointment, Harborview made multiple unsuccessful attempts to contact Stock by phone for her follow-up care. (CP 251-53)

B. Stock filed a medical malpractice suit against Harborview in February 2013, seven months before she filed a verified tort claim with the State's Office of Risk Management.

On November 13, 2012, Stock sent a letter to the University of Washington and to the Washington state Offices of Risk Management stating that she intended to file a complaint against Harborview. (CP 42) That letter alleged only that she “believe[d] [there] was negligent care by Harborview Medical Center/UW Physicians” without specifying the dates of treatment, by whom she was treated, what she was treated for, what injuries were caused by the alleged negligence, or any other information that would have allowed the State to investigate a claim. *See generally* RCW 4.92.100 (setting forth information to be submitted by a claimant). Stock also failed to verify the letter by signing it. *See* RCW 4.92.100(1)(b)(i)(A).

On February 15, 2013, proceeding pro se, Stock filed a lawsuit against Harborview in King County Superior Court alleging medical malpractice and a lack of informed consent. (CP 1-15) Stock's complaint identified seven individual physicians as additional defendants. (CP 4) She claimed that Harborview released her "prematurely and not according to protocol," and "without appropriate clothing." (CP 10) In its answer, Harborview affirmatively alleged that Stock had failed to comply with the claim filing provisions of RCW ch. 4.92. (CP 201-05)

On September 9, 2013, Stock submitted to the State Office of Risk Management the standard tort claim form prescribed by RCW 4.92.100. (CP 267-69)

C. The trial court granted Harborview summary judgment after Stock failed to provide any expert testimony supporting her claims.

The deadline for primary witness disclosure was set for January 6, 2014. (CP 221) Stock did not disclose any independent expert witnesses, and instead listed the defendant healthcare providers as her only primary witnesses. (CP 271-73) Stock never sought a continuance in order to obtain expert testimony or to depose any of the individual defendants.

On January 14, 2014, Harborview informed Stock that it would be moving for summary judgment based on her failure to comply with the presuit claim filing procedure of RCW ch. 4.92 and her failure to identify any expert to support her claims. (CP 212, 214) Harborview also informed Stock that the hearing date would be March 28, 2014. (CP 212, 214) Harborview filed its summary judgment motion on February 27, 2014. (CP 16-33)

Stock opposed the motion (CP 37-41) relying on her own declaration (CP 44-64) questioning Harborview staff's cooperation with Seattle police in procuring a blood sample for her prosecution and alleging their failure to diagnose a traumatic brain injury before releasing her, while "subjecting her to a revolving door of premature and inappropriate tests." (CP 60)

After hearing oral argument, King County Superior Court Judge Catherine Shaffer ("the trial court") granted Harborview's motion. (CP 199-200) The trial court rejected Stock's argument that the doctrine of *res ipsa loquitur* applied. (RP 35) The trial court likewise rejected Stock's contention that her ability to cross-examine the defendant healthcare providers at trial obviated the need to produce expert testimony in response to Harborview's summary judgment motion:

The Court: I am really having trouble seeing where you have testimony from anybody who works for the defendant that indicates that they deviated from the standard of care.

Ms. Stock: The defendants can testify as an adverse witness as required to be expert testimony.

The Court: I know they can. My question is where have they?

(RP 19; *see also* RP 34-37) The trial court also agreed that Stock had failed to comply with the presuit claim filing requirements of RCW ch. 4.92. (RP 36-37)

Stock appeals. (CP 216)

IV. ARGUMENT

A. On review of summary judgment, this Court engages in the same inquiry as the trial court, which requires dismissal of claims unsupported by affidavits setting forth “specific facts showing that there is a genuine issue for trial.”

Stock failed to meet her burden to raise a disputed issue of material fact that could support a claim under RCW ch. 7.70. CR 56(e). The trial court correctly granted summary judgment.

In reviewing a summary judgment order, this Court engages in the same inquiry as the trial court, “decid[ing] whether the affidavits, facts, and record have created an issue of fact and, if so, whether such issue of fact is material to the cause of action.” *Seven*

Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 12, 721 P.2d 1 (1986). A nonmoving party may not defeat summary judgment by relying on “[a]ffidavits containing conclusory statements without adequate factual support.” *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689, *rev. denied*, 122 Wn.2d 1010, 863 P.2d 72 (1993). Rather, the nonmoving party must submit affidavits or other proof “set[ting] forth specific facts showing there is a genuine issue for trial.” CR 56(e); *Seven Gables*, 106 Wn.2d at 12-13. This is especially true in medical malpractice actions, which almost always require expert testimony. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 (“If the plaintiff in a medical negligence suit lacks competent expert testimony, the defendant is entitled to summary judgment.”), *rev. denied*, 144 Wn.2d 1016, 32 P.3d 283 (2001); § IV.B.2, *infra*.

As a pro se litigant, Stock “is held to the same standard as an attorney.” *Kelsey v. Kelsey*, 179 Wn. App. 360, 368, ¶ 20, 317 P.3d 1096, *rev. denied*, 180 Wn.2d 1017, 327 P.3d 54 (2014), *cert. denied*, No. 14-265, 2014 WL 4373661 (U.S. Nov. 3, 2014). Stock failed to submit any expert testimony to support a medical malpractice claim or an informed consent claim. Undisputed facts

established that she did not comply with the claims filing statute, RCW ch. 4.92. The trial court correctly granted summary judgment.

B. The trial court correctly granted summary judgment because Stock failed to submit any expert testimony supporting her malpractice or informed consent claims.

1. Stock has waived her claim of “abandonment.”

Stock now alleges that her unspecified injuries were the result of premature discharge or, as she puts it, “abandonment.” (App. Br. 10 (“Patient abandonment is a form of medical malpractice”); *see also* App. Br. 4 (Harborview discharged Stock “only 72 hours after admission, less than 48 hours after being removed from mechanical ventilation, and despite showing all the affects of person whom suffered near catastrophic injuries”)) But in the trial court, Stock did not argue that Harborview “abandoned” her and cited none of the cases she now cites to argue that “abandonment” is obvious negligence. (CP 37-41) Stock made only generalized allegations: that “defendants have committed negligence in providing medical aids to the plaintiff and . . . have not provided . . . facilities in accordance with the rules and regulations . . . and [not provided] proper medical aid . . . nor

proper procedure of regarding safe handling of a trauma patient.”
(CP 40-41)

Stock has waived any argument that Harborview “abandoned” her by not raising it below. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, ¶ 43, 322 P.3d 6 (2014) (“It is well settled that we will not review an issue, theory, argument, or claim of error not presented at the trial court level.”) (internal quotation omitted). This Court should affirm for this reason alone.

2. Stock’s claims required expert testimony.

In any event, whether Harborview violated the standard of care by discharging Stock after three days of treatment is a question that can only be addressed by expert testimony. Stock concedes that she failed to produce any expert testimony to support her malpractice or lack of informed consent claims. (App. Br. 10) If this Court reaches her “abandonment” claim, this Court should affirm the trial court’s order of dismissal.

In Washington, the elements of a claim for injury arising from health care are defined by statute. To establish a medical malpractice claim a plaintiff must prove that his or her “injury resulted from the failure of a health care provider to follow the accepted standard of care.” RCW 7.70.030(1). A plaintiff

establishes a standard of care violation by proving that “[t]he health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances.” RCW 7.70.040(1). Establishing a lack of informed consent requires a plaintiff to prove four “necessary elements,” including that the plaintiff was not informed of a “material fact” and that the failure to inform plaintiff proximately caused his or her injuries. RCW 7.70.050(1).

Because of the technical nature of medical malpractice claims, “[w]hat is or is not standard practice and treatment in a particular case, or whether the conduct of the physician measures up to the standard is a question for experts and can be established only by their testimony.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989) (internal quotation omitted); *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 492, ¶ 21, 183 P.3d 283 (2008) (“Expert medical testimony is generally required to establish the standard of care and to prove causation in a medical negligence action.”). Likewise, to support an informed consent claim, a plaintiff must submit expert testimony to establish the

“material” facts, including “[t]he recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.” RCW 7.70.050(3); *Smith v. Shannon*, 100 Wn.2d 26, 33-36, 666 P.2d 351 (1983) (“Only a physician (or other qualified expert) is capable of judging what risks exist and their likelihood of occurrence.”).

This requirement for expert testimony is relaxed only in extreme cases of negligence, such as leaving a foreign object in the body or amputating the wrong limb, “where the want of skill or lack of care is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it.” *Young*, 112 Wn.2d at 228-29 (quotation omitted). *See also Ripley v. Lanzer*, 152 Wn. App. 296, 306-18, ¶¶ 18-56, 215 P.3d 1020 (2009) (applying *res ipsa loquitur* because “courts have long recognized that inadvertently leaving a foreign object in a patient’s body raises the inference of negligence”); *Pacheco v. Ames*, 149 Wn.2d 431, 439, 69 P.3d 324 (2003) (applying *res ipsa loquitur* because “it is within the general experience of mankind that the act of drilling on the wrong side of a patient’s jaw would not ordinarily take place without negligence”).

In rejecting Stock's *res ipsa loquitor* argument, the trial court correctly recognized that this is not a case where negligence was so obvious that no expert testimony was required. (RP 35 ("I agree with you, Ms. Stock, you were discharged from the hospital, but your contention that that is something that would not ordinarily happen in the absence of negligence isn't one I can see in this case."); *see also Swanson v. Brigham*, 18 Wn. App. 647, 650, 571 P.2d 217 (1977) (*res ipsa loquitor* did not apply in medical malpractice suit because "[t]here was no palpably negligent act" nor "expert medical testimony to create an inference that negligence caused the injury"))

The cases cited by Stock involve blatant negligence not present here. For example, Stock cites the 73-year old case *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 393, 34 N.E.2d 367 (1941) (App. Br. 10-11), which involved a hospital's discharge of a patient with "open wounds through which pus was draining." Likewise, *Le Juene Rd. Hosp., Inc. v. Watson*, 171 So. 2d 202, 203 (Fla. Dist. Ct. App. 1965) (App. Br. 11), involved a patient that "was violently ill at the time he was required to leave the appellant's hospital." Stock did not allege, let alone have evidence to support,

such obvious negligence that would excuse the requirement for expert testimony.²

The standard of care for treatment of a closed head injury suffered in a motor vehicle accident, in the presence of elevated alcohol levels, is not within the scope of lay testimony. Stock's failure to present any supporting expert testimony "that needed [unspecified] tests and care that should have been done was not" (CP 63), that her (unspecified) injuries were caused by a breach of the standard of care, or that she was not informed of a (unspecified)

² See also *Thompson v. Patton*, 6 So. 3d 1129, 1141-42 (Ala. 2008) (affirming judgment as a matter of law in favor of defendants because there was no expert testimony establishing that they proximately caused decedent's suicide by prematurely discharging her); *Tavakoli-Nouri v. Gunther*, 745 A.2d 939, 941 (D.C. 2000) (affirming summary judgment dismissal of patient's "abandonment" claim for lack of expert testimony); *Melton v. Medtronic, Inc.*, 389 S.C. 641, 698 S.E.2d 886, 897 (Ct. App. 2010) (same); *Taylor v. Landherr*, 101 Ark. App. 279, 275 S.W.3d 656, 659 (2008) (same); *King v. Zakaria*, 280 Ga. App. 570, 634 S.E.2d 444, 449 (2006) (affirming directed verdict "because [the patient] failed to present any [expert] evidence to show that Dr. Zakaria violated the standard of care by abandoning the decedent"); *Cox v. Jones*, 470 N.W.2d 23, 26-27 (Iowa 1991) ("without expert testimony which plaintiffs cannot introduce, an abandonment cause of action cannot be proven"); *Manno v. McIntosh*, 519 N.W.2d 815, 821 (Iowa Ct. App. 1994) ("Expert evidence is generally required to establish the plaintiff was at a critical stage of medical care when defendants allegedly withdrew medical treatment."); *Tierney v. Univ. of Michigan Regents*, 257 Mich. App. 681, 669 N.W.2d 575, 579 (2003) (noting that an "affidavit of merit" from an expert had been submitted establishing the standard of care and that defendant doctor fell below it by abandoning patient) (App. Br. 10); *Brandt v. Grubin*, 131 N.J. Super. 182, 329 A.2d 82, 89 (1974) (plaintiff's expert alleged that abandonment fell below standard of care) (App. Br. 11).

material risk, mandated dismissal of her claims. *Young*, 112 Wn.2d at 228-29.

Stock could not meet her burden on summary judgment by relying on her right to call defendant healthcare providers as adverse witnesses *at trial*. (App. Br. 12) *See Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, ¶ 13, 292 P.3d 128 (2012) (“Only when [the nonmoving party] can show there was a genuine issue of material fact should the matter proceed to trial and allow her to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.”) (internal quotation omitted). To the contrary, once Harborview moved for summary judgment, Stock was required to respond with affidavits or other evidence creating a genuine issue for trial. CR 56(e); *Young*, 112 Wn.2d at 231 (“Because the plaintiff here has not presented competent evidence regarding the physicians’ standard of care, we affirm the summary judgment in favor of the medical

defendants.”)³ She did not attempt to elicit any testimony from the defendants on any element of her case or ask for a continuance to do so despite receiving more than two months’ notice that Harborview would be moving for summary judgment. (CP 212, 214; RP 19 (“Ms. Stock: The defendants can testify as an adverse witness as required to be expert testimony. The Court: I know they can. My question is where have they?”))

Whether Harborview’s treatment of Stock – involving numerous evaluations and consultations over three days – fell below the standard of care can only be established by expert testimony. This Court should affirm the dismissal of Stock’s claims for lack of expert evidence.

³ The cases cited by Stock stand only for the unremarkable proposition that a malpractice plaintiff may elicit testimony from defendant healthcare providers as adverse witnesses, either at trial or before. *See, e.g., McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469, 472-73 (1964) (“It has long been recognized in this State that a party in a civil suit may be called as a witness by his adversary”) (App. Br. 12); *May’s Estate v. Zorman*, 5 Wn. App. 368, 369, 487 P.2d 270 (1971) (noting that “pretrial discovery” of a defendant physician’s “opinion and exercise of judgment in the course of treating his patient is no different from any case in which an adverse party has knowledge of relevant matters”) (App. Br. 12).

- C. The trial court correctly dismissed Stock’s suit for failure to substantially comply with the presuit notice of claim statute, RCW ch. 4.92.**
- 1. Stock failed to provide *presuit* notice of the basis of her claim to the State, including a description of the alleged malpractice, when it occurred, or who committed it.**

This Court should affirm the alternative basis for the trial court’s dismissal: Stock did not comply with the presuit notice of claim statute RCW ch. 4.92.

The Legislature has exercised its constitutional authority to “direct by law, in what manner, and in what courts, suits may be brought against the state.” Const. Art. II § 26. Under RCW 4.92.100, before a plaintiff may sue the State, including healthcare providers at state facilities such as Harborview and the University of Washington, the plaintiff must file a verified standard tort claim form with the State Office of Risk Management in accordance with the requirements of RCW ch. 4.92. *Kleyer v. Harborview Med. Ctr. of Univ. of Washington*, 76 Wn. App. 542, 543, 887 P.2d 468 (1995); *Hardesty v. Stenchever*, 82 Wn. App. 253, 259-62, 917 P.2d 577 (1996), *rev. denied*, 130 Wn.2d 1005, 925 P.2d 988 (1996).

The tort claim must contain “at a minimum” certain information, including a description of the circumstances that brought about the plaintiff’s injury, a description of the injury or damage, and a list of all persons involved:

(a) The standard tort claim form must, at a minimum, require the following information:

(i) The claimant’s name, date of birth, and contact information;

(ii) A description of the conduct and the circumstances that brought about the injury or damage;

(iii) A description of the injury or damage;

(iv) A statement of the time and place that the injury or damage occurred;

(v) A listing of the names of all persons involved and contact information, if known;

(vi) A statement of the amount of damages claimed; and

(vii) A statement of the actual residence of the claimant at the time of presenting the claim and at the time the claim arose.

RCW 4.92.100(1)(a). A claim must also be signed “[b]y the claimant, verifying the claim.” RCW 4.92.100(1)(b)(i)(A).

Under RCW 4.92.110, a plaintiff may not commence suit against the State “until sixty calendar days have elapsed after the

claim is presented.” Presuit notice “protect[s] government funds by allowing government entities time to investigate, evaluate, and settle claims *before they are sued.*” *Woods v. Bailet*, 116 Wn. App. 658, 663, 67 P.3d 511 (2003) (emphasis added). Presuit notice also allows “the State to make an accurate and timely allocation [of funds] based on pending claims and use unspent funds for budgeting in other areas of state operations.” *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 71, ¶ 14, 316 P.3d 469 (2013); *see also* RCW 4.92.130 (establishing a liability account whose purpose is to “[e]xpeditiously pay legal liabilities” and “establish an actuarially sound system to pay incurred losses”).

Because presuit notice is a “condition precedent” to a plaintiff’s recovery, where a plaintiff fails to comply with RCW ch. 4.92, a court must dismiss the plaintiff’s action. *Hardesty*, 82 Wn. App. at 259; *Kleyer*, 76 Wn. App. at 546; *Levy v. State*, 91 Wn. App. 934, 944, 957 P.2d 1272 (1998). Although the Legislature amended RCW 4.92.100 in 2009 to provide that “substantial compliance will be deemed satisfactory” a plaintiff must still provide sufficient notice to fulfill the purposes of RCW ch. 4.92. *Lee v. Metro Parks Tacoma*, ___ Wn. App. ___, 335 P.3d 1014, 1017 (2014).

In *Lee*, Division Two held that the plaintiff failed to substantially comply with RCW 4.96.020⁴ by filing suit only 14 days after serving her tort claim because the City lacked sufficient time to investigate, evaluate, and decide whether to negotiate a resolution of the claim. 335 P.3d at 1017. Here, Stock filed her claim on September 9, 2013, 206 days *after* she filed suit. (CP 267-69) Stock did not substantially comply with RCW 4.92.110's requirement that a plaintiff wait sixty days after submitting the claim before commencing suit. *See Andrews v. State*, 65 Wn. App. 734, 738, 829 P.2d 250 (1992).

Stock's November 13, 2012 letter to the University's risk managers does not substantially comply with the statute, either. Stock's letter stated that she intended to file a lawsuit but lacked even the "minimum" supporting information required by RCW 4.92.100. (CP 42) Stock gave the University no "description of the conduct and the circumstances that brought about the injury or damage," no "description of the injury or damage," no "statement of the time and place that the injury or damage occurred," no "listing of the names of all persons involved and contact information," and

⁴ RCW 4.96.020 mirrors RCW 4.92.100 and requires identical presuit notice to local governmental entities.

no “statement of the amount of damages claimed.” RCW 4.92.100(1)(a)(ii)-(vi). Stock provided only a bare statement alleging she received “negligent care by Harborview Medical Center/UW Physicians.” (CP 42)

The trial court correctly held that Stock’s generalized letter did not provide sufficient information to allow the State to investigate the facts or evaluate its potential liability. (RP 33 (“The letter that was submitted didn’t include the information required in the statute under subsection (a), any of it.”)) *See Lee*, 335 P.3d at 1017; *Caron v. Grays Harbor County*, 18 Wn.2d 397, 404-05, 139 P.2d 626 (1943) (plaintiff failed to substantially comply with claim filing requirements because she did not include a description of her injury, a description of the defect causing the accident, or the amount of her damages).

Nor did Stock verify her letter as required by RCW 4.92.100(1)(b)(i)(A). Verification serves the important purpose of “assur[ing] the truthfulness of the pleadings and . . . discourag[ing] claims without merit.” *Levy*, 91 Wn. App. at 943 (quotation omitted). The verification requirement is “unambiguous” and Stock’s failure to comply with it mandates dismissal of her claim. *Shannon v. State*, 110 Wn. App. 366, 370, 40 P.3d 1200 (2002)

(affirming summary judgment dismissal for lack of verification); *Levy*, 91 Wn. App. at 943 (same).

Compliance with RCW ch. 4.92 is not an “idle gesture,” as Stock alleges. (App. Br. 10) It is a condition precedent for taking advantage of the State’s waiver of sovereign immunity. The trial court correctly dismissed Stock’s claim based on her undisputed failure to comply with RCW ch. 4.92.

2. Stock was required to give presuit notice of her claim because the 2012 Legislature removed the medical malpractice exception from RCW ch. 4.92.100, eight months before Stock brought suit in 2013.

The trial court correctly applied RCW ch. 4.92 to Stock’s claim, not RCW 7.70.100, as Stock argues. (App. Br. 7-9) The Legislature removed in 2012 – before Stock filed her suit – the exception for medical malpractice claims formerly in RCW 4.92.100. Laws of 2012, ch. 250 § 1. Contrary to Stock’s argument, RCW 4.92.100 is a “direct statutory provision requiring specified presuit notice.” (App. Br. 9)⁵

In 2006, the Legislature amended RCW 7.70.100 to require 90-day presuit notice for *all* medical malpractice claims, whether

⁵ Stock also failed to raise this argument below and thus waived it on appeal. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, ¶ 43, 322 P.3d 6 (2014).

against the state or private defendants. *See* Laws of 2006, ch. 8 § 314. To avoid inconsistent presuit notice requirements, in 2009 the Legislature amended RCW 4.92.020 and RCW 4.92.100 to exempt “claims involving injuries from health care” from the requirements of RCW ch. 4.92. Laws of 2009, ch. 433 § 1. RCW ch. 7.70 thus governed presuit notice requirements for malpractice claims against the State until the Supreme Court, in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), struck down the presuit notice requirement in RCW 7.70.100 as unconstitutional. Thus, as of the 2010 *Waples* decision, no statute expressly required presuit notice of medical malpractice claims against the State.

In response to the statutory gap created by *Waples*, in 2012, the Legislature amended RCW ch. 4.92 to remove the exemption for medical malpractice claims. Laws of 2012, ch. 250 § 1; Final Bill Report SSB 6187 (2012). Thus, effective June 7, 2012, RCW ch. 4.92 again required 60-day presuit notice of *all* claims against the State, including those for medical malpractice. *See McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 76, ¶ 22, 316 P.3d 469 (2013). Stock filed her lawsuit on February 15, 2013, eight months after the 2012 amendment to RCW 4.92.020 and .100.

Stock argues that because the *McDevitt* Court applied its holding – that former RCW 7.70.100(1) set valid conditions to suits against the State – only prospectively, she need not provide *any* presuit notice before filing her suit on February 15, 2013. (App. Br. 7-9) Stock ignores that *McDevitt* itself recognized that “[s]ince the effective date of th[e] statutory change [to RCW 4.92.100] (June 7, 2012), claims must be made under RCW 4.92.100, not under chapter 7.70 RCW.” 179 Wn.2d at 76, ¶ 22. Thus, the Legislature clearly reinstated the claim filing requirement for medical malpractice suits in RCW 4.92.100 eight months *before* Stock filed this action.⁶ Neither the trial court nor Harborview relied “upon RCW 7.70.100(1) to preclude suit in this case.” (*Compare* App. Br. 2 *with* CP 16 (seeking summary judgment under RCW ch. 4.92); RP 4)) This Court should reject Stock’s argument that no statute required her to provide presuit notice.

V. CONCLUSION

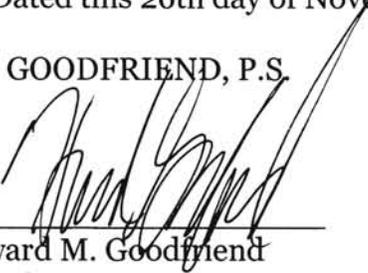
This Court should affirm the trial court’s summary judgment order dismissing Stock’s claims.

⁶ Stock inexplicably asserts that this amendment was “[s]ubsequent to the filing of this suit.” (App. Br. 1, n.1)

Dated this 26th day of November, 2014.

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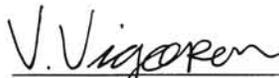
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 26, 2014, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 26th day of November, 2014.



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