

63973-1

63973-1

NO. 63973-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

(Whatcom County Cause No. 07-2-02163-5)

---

**JENNIFER ROSE ROSS, an individual,**

**Plaintiff/Appellant,**

vs.

**PEACEHEALTH, dba ST. JOSEPH HOSPITAL, ROBERT  
JOHNSON and JANE DOE JOHNSON, JEFFREY RIES and  
JANE DOES RIES**

**Respondents/Defendants.**

---

**BRIEF OF APPELLANT**

---

ORIGINAL

Douglas R. Shepherd  
Edward S. Alexander  
SHEPHERD ABBOTT ALEXANDER  
1616 Cornwall Ave., Suite 100  
Bellingham, WA 98225  
(360) 733-3773 or 647-4567

2009 DEC - 1 PM 10:43  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

---

November 30, 2009

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ASSIGNMENTS OF ERROR..... 2

III. ISSUES PERTAINING TO ASSIGNMENTS OF  
ERROR ..... 2

IV. STATEMENT OF THE CASE..... 5

V. ARGUMENT..... 6

    A. Standard of Review..... 6

    B. The additional 90-day Notice requirement only  
applies to claims based on professional negligence..... 8

    C. Even assuming RCW 7.70.150 and RCW  
7.70.100 were intended to apply to Ross’s claims as  
drafted, they are unconstitutional..... 12

        1. RCW 7.70.150 has been stricken down as  
unconstitutional..... 12

        2. Under the doctrine of separation of powers,  
the civil rules control procedural requirements for the  
resolution of legal claims by the Superior Courts..... 13

        3. CR 3 governs the procedural requirements for  
commencing an action against a health care provider..... 15

        4. RCW 7.70.100 is an unnecessary delay, and an  
undue burden on access to the courts..... 18

        5. RCW 7.70.100 deprives Ross of due process  
and constitution equal protection of the laws..... 21

        6. In addition to due process and equal protection,  
RCW 7.70.100 violates the Washington Constitution’s  
Privileges and immunities clause and special laws  
provision..... 24

D. Assuming the statute is constitutional, the 90-day notice requirement applies only to claims made when the Case is “commenced”, not in a subsequent defense.....	35
E. Due process and Chapter 71.05 do not allow the deprivation of liberty where there is no emergency or judicial finding of probable dangerousness.....	36
F. PeaceHealth, et al., were not immune as a matter of law under Chapter 71.05.....	37
G. The moving party may not raise new issues, or submit new facts in its reply.....	42
VI. CONCLUSION.....	44

## **APPENDICES**

- Appendix 1 (Supplemental Designation of Clerk's Papers)  
11-14-2007 Answer and Affirmative Defenses of  
Defendant Jeffrey Ries, M.D.
  
- Appendix 2 (Supplemental Designation of Clerk's Papers)  
10-29-2007 Defendant PeaceHealth and Robert  
Johnson's Answer to Plaintiff's Complaint for Damages  
and Counterclaim
  
- Appendix 3 2006 Wash. Legis. Serv. Ch. 8 (S.S.H.B. 2292, Sec.  
314)
  
- Appendix 4 RCW 7.70.100 Mandatory Mediation of Health Care  
Claims – Procedures
  
- Appendix 5 Laws of 2006, Ch. 8, Sec. 1
  
- Appendix 6 Civil Rule 53.4 Procedures for Mandatory Mediation of  
Health Care Claims
  
- Appendix 7 RCW 7.70.100 Mandatory Mediation of Health Care  
Claims – Tolling Statute of Limitations

## TABLE OF AUTHORITIES

### Washington Supreme Court

<i>Amend v. Bell</i> , 89 Wn.2d 124, 570 P.2d 138 (1977).....	42
<i>Amunrud v. Bd. Of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	22
<i>Andersen v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006).....	29
<i>Brower v. State</i> , 137 Wn.2d 44, 969 P.2d 42 (1998).....	34
<i>Collier v. City of Tacoma</i> , 121 Wn.2d 737, 854 P.2d 1046 (1993).....	28
<i>Coppernoll v. Reed</i> , 155 Wn.2d 290, 119 P.3d 318 (2005).....	6
<i>Curtis Lumber Co. v. Sortor</i> , 83 Wn.2d 764, 522 P.2d 822 (1974).....	15, 16, 17
<i>DeYoung v. Providence Med. Ctr.</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	19, 33
<i>Garratt v. Dailey</i> , 46 Wn.2d 197, 279 P.2d 1091 (1955).....	9
<i>Grant County Fire Protection Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	28, 29, 30
<i>Graves v. P.J. Taggares Co.</i> , 94 Wn.2d 298, 616 P.2d 1223 (1980).....	42
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	7

<i>Hunter v. North Mason High School</i> , 85 Wn.2d 810, 539 P.2d 845 (1975).....	23, 24
<i>In Re the Detention of Stout</i> , 159 Wn.2d 384, 150 P.3d 86 (2007).....	22, 37
<i>In Re Harris</i> , 98 Wn.2d 276, 654 P.2d 109 (1982).....	36, 37
<i>In Re LaBelle</i> , 107 Wn.2d 196, 728 P.2d 138 (1986)...	36, 37, 39
<i>In Re the Marriage of King</i> , 162 Wn.2d 378, 174 P.3d 659 (2007).....	18
<i>In Re the Personal Restraint of Dyer</i> , 143 Wn.2d 384, 20 P.3d 907 (2001).....	22
<i>Island County v. State</i> , 135 Wn.2d 141, 955 P.2d 377 (1998).....	34
<i>John Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	19, 20
<i>Marine Power &amp; Equipment Co., Inc., v. Industrial Indem. Co.</i> , 102 Wn.2d 457, 687 P.2d 202 (1984).....	13
<i>Petersen v. State</i> , 100 Wn.2d 424, 671 P.2d 230 (1983).....	41
<i>Puget Sound Tug &amp; Barge Co.</i> , 13 Wn.2d 485, 125 P.2d 681 (1942).....	10
<i>Putman v. Wenatchee Valley Medical Center, P.S.</i> , 166 Wn.2d 194, 216 P.3d 374 (2009)...	7, 13, 14, 15, 17, 19, 20, 23, 26
<i>Rufer v. Abbott Laboratories</i> , 154 Wn.2d 530, 114 P.3d 1182 (2005).....	19, 23

<i>Safeco Insurance Co. v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992).....	6
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	28
<i>Tufte v. City of Tacoma</i> , 71 Wn.2d 866, 431 P.2d 183 (1967).....	10
<i>Tunstall ex rel. Tunstall v. Bergeson</i> , 141 Wn.2d 201 5 P.3d 691 (2000).....	27
<i>Waples v. Yi</i> , 165 Wn.2d 1031, 203 P.3d 382 (2009)...	23, 26, 33

### **Washington State Court of Appeals**

<i>Cochran Elec. Co. v. Mahoney</i> , 129 Wn.App. 687, 121 P.3d 747 (2005).....	7
<i>Dang v. Ehredt</i> , 95 Wn.App. 670, 977 P.2d 29 (1999).....	10
<i>Duckworth v. Langeland</i> , 95 Wn.App. 1, 988 P.2d 967 (Div. 1, 1998).....	43
<i>Hanson v. Estell</i> , 100 Wn.App. 281, 997 P.2d 426 (2000).....	11
<i>Happy Bunch, LLC v. Grandview North, LLC</i> , 142 Wn.App. 81, 173 P.3d 959 (2007).....	7
<i>Moore v. Pay'N Save Corp.</i> , 20 Wn.App. 482, 581, P.2d 159 (1978).....	10
<i>Morinaga v. Vue</i> , 85 Wn.App. 822, 935 P.2d 637 (1997)...	9
<i>Percival v. Bruun</i> , 28 Wn.App. 291, 622 P.2d 413 (1981).....	39, 40, 41

<i>Spencer v. King County</i> , 39 Wn.App. 201, 692 P.2d 874 (1984).....	40
<i>Waples v. Yi</i> , 146 Wn.App. 54, 189 P.3d 813 (2008).....	23, 26, 33
<i>White v. Kent Medical Center, Inc., P.S.</i> , 61 Wn.App. 163, 810 P.2d 4 (Div. 1, 1991).....	43

### **US Supreme Court**

<i>Marbury v. Madison</i> , 5 U.S. 137, 2 L.Ed. 60 (1803).....	18
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	37

### **Courts of Other Jurisdiction**

<i>Best v. Taylor Mech. Works</i> , 1789 Ill.2d 367, 689 NE.2d 1057 (1997).....	25
<i>Jones v. Integris Baptist Medical Center</i> , 178 P.3d 191 (Okla.App. 2008).....	26, 34
<i>Phillips v. ABC Builders</i> , 611 P.2d 821 (Wyo. 1980).....	25
<i>Reynolds v. Porter</i> , 1988 Olka. 88, 760 P.2d 816 (1988)...	25
<i>Zeier v. Zimmer, Inc.</i> , 152 P.3d 861 (Ok. 2006).....	25, 30, 31, 34

### **Unpublished Opinions**

<i>McAllen Work Rehab Center v. Gomez</i> , 2008 WL 2930306, No. 13-07-00466 unpublished (Tex.App., 2008).....	11
---	----

## **Statutes**

RCW 7.70.100.....	3, 4, 8, 9, 12, 15, 16, 17, 18, 21, 24, 29, 30, 31, 33, 35,
RCW 7.70.110.....	3, 21
RCW 7.70.150.....	3, 12, 17
RCW 60.04.100.....	16
RCW 71.05.....	2, 36, 37, 38, 41
RCW 71.05.012.....	37
RCW 71.05.020.....	38
RCW 71.05.050.....	3, 38
RCW 71.05.120.....	41
West’s RCW A 70.70.100 Historical and Statutory Note.....	8

## **Constitutions**

Okla. Const. Art. 2, Sec. 6.....	25
Okla. Const. Art. 5, Sec. 46.....	25
U.S. Const. Amend 14.....	21
U.S. Const. Amend XIV, Sec. 1. ....	22
Wash. Const. Art. 1 § 3.....	22

Wash. Const. Art. 1 § 12.....	19, 22, 25, 29
Wash. Const. Art. 2 § 28.....	25
Wash. Const. Art. 1 § 10.....	18, 19, 26
Wash. Const. Art. 4 § 1.....	13

**Rules**

CR 12(a)(1).....	15, 18, 31, 33
CR 3.....	15, 16, 18
CR 3(a).....	15, 17, 33, 35
CR 53.4(e).....	21
CR 56.....	43
CR 56(c).....	43
CR 81.....	15

**Other Relevant Authorities**

Bamberger, James: <i>Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State</i> , 4 Seattle J. for Soc. Just. 383 (Fall/Winter 2005).....	20, 21, 26
Gordon, Randolph I, and Assefa, Brook: <i>A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Healthcare</i> , 4 Seattle J. for Soc. Just. 693 (Spring/Summer 2006).....	31, 32

Laws 2006, Ch. 8, Sec. 314.....	8, 33
<i>Real Bite for "Equal Protection" Review of Regulatory Legislation, 69 Temp. L. Rev. 1247 (1996).....</i>	<i>30</i>
Snure, Brian: <i>A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution</i> , 67 Wash. L. Rev. 669, (1992).....	30
Thompson, Jonathan: <i>The Washington Constitutions Prohibition on Special <u>Privileges</u> and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?</i> 69 Temp. L. Rev. 1247, (1996).....	30
WA Legis. 492 (1993).....	8

## **I – INTRODUCTION**

This appeal involves a woman's claims of assault, battery, false imprisonment, and malicious prosecution. The woman went to the PeaceHealth emergency room in Whatcom County for a respiratory infection and depression. She was told she could leave. She received no treatment. On the way out she was assaulted and physically restrained, leaving her with a permanent physical injury. The woman, Jennifer Ross, is the plaintiff below, and appellant herein. Although Ms. Ross's causes of action are intentional torts, Peacehealth, Dr. Ries, and Nurse Johnson raised the defense of professional negligence, and argued the special statutory procedural hurdles protecting health care providers required dismissal of Ross's claims.

Since the hearing below, one of those hurdles raised by PeaceHealth, Dr. Ries, and Nurse Johnson (certificate of merit) has been stricken down by the Washington supreme court. The other hurdle, 90 additional days of notice, is inapplicable but should nonetheless be stricken as unconstitutional.

Peacehealth, Dr. Ries, and Nurse Johnson also argued below, that they are immune because they were performing duties pursuant to Chapter 71.05. Ross argues here and below, that there is a question of fact as to whether they are immune, and in any case, the interpretation requested PeaceHealth, Dr. Ries, and Nurse Johnson, is unconstitutional.

The trial court found that Ms. Ross was “well aware” that she was told not to leave, and dismissed Ross’s claims against all defendants.

## **II – ASSIGNMENTS OF ERROR**

Ross assigns error to certain decisions of the trial court:

- A. The trial court’s decision to summarily dismiss Ross’s claims against PeaceHealth, Robert Johnson, and Jane Doe Johnson. CP 9-11.
- B. The trial court’s decision to summarily dismiss Ross’s claims against, Jeffrey Ries, MD and Jane Doe Ries. CP 13 – 15.
- C. The trial court’s decision denying Ross’s motion to strike untimely submissions. CP 15.

## **III - ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. Was the Ross Complaint an action based upon "professional negligence"? No.

B. If not, do the unconstitutional professional negligence statutes apply, as drafted to Ross's intentional tort claims? No.

C. Even assuming the complaint was based on professional negligence, are the statutes unconstitutional? Yes.

1. Does the certificate of merit statute (RCW 7.70.150) violate the right of access to courts and separation of powers? Yes.

2. Does the additional 90 day notice statute (RCW 7.70.100) violate separation of powers and invade the prerogative of the judicial branch to dictate its own court rules? Yes.

3. Is RCW 7.70.100 an unnecessary delay, and a violation of the open courts clause of the Washington constitution? Yes.

4. Does RCW 7.70.100 violate her rights to due process and equal protection under the 14<sup>th</sup> Amendment? Yes.

5. Does RCW 7.70.100 violate the Washington Constitution's privileges and immunities, and special laws provisions? Yes.

6. Is there a compelling reason or rational basis for the additional 90 day notice requirement for professional negligence actions against health care providers?

7. Is there a compelling reason or rational basis for the additional 90 day notice requirement for intentional tort actions? No.

D. Even assuming the statutes were constitutional, do they require additional notice after "commencement" of an action? No.

E. Is there a question of fact as to whether the immunity statutes immunize PeaceHealth et al? Yes.

F. Do state and federal due process permit interpretation of the immunity statutes to allow dismissal of Ross's claims as a matter of law? No.

G. May the trial court consider a second round of factual submissions from the moving party in a motion for summary judgment? No.

#### **IV – STATEMENT OF THE CASE**

On September 18, 2005, Ross went to the St. Joseph/PeaceHealth emergency room for a respiratory infection and depression. CP 149. Ross believed that her Lummi Nation (Native American) healthcare plan provided for and allowed her to use the PeaceHealth ER during off clinic hours. CP 149. After two to three hours passed in the lobby, she was taken to an exam room and briefly talked to a doctor. CP 149. She waited unattended and received no treatment for thirty minutes to an hour. CP 150. After she was told she could leave, she left. CP 150 – 151. She told no one that she was going to hurt or kill herself herself. CP 150. She was never asked to stay or told to stop. CP 151.

At the outside doors to the ER, Ross was assaulted, restrained, and injured. CP 151. She was then told, "We all heard you say you were going to kill yourself." CP 151. She was asked to sign a waiver of liability, but not allowed to talk to her mother, who was waiting in the lobby. CP 152. She informed the police she wanted to press charges, and that she may sue. CP 153. She

later found herself charged with assault. CP 153. The charges were quickly dismissed. CP 153.

Ross filed suit nearly two years later for the intentional torts of assault, battery, false imprisonment, and malicious prosecution. CP 427. In the answer, the defense of professional negligence and associated statutes were raised. See answers in Appendices.

Disregarding Ms. Ross's testimony, the trial court found that she was asked, and then told, "No, don't leave Ms. Ross," and she was "well aware of that, and she ignored that advice." VR 42, Line 16, and 43, Line 8. The trial court then dismissed Ms. Ross's case, based on the professional negligence 90 day notice, of good faith and, and emergency. VR 46 – 47, CP 9 – 15.

## **V - ARGUMENT**

### **A. Standard of Review.**

On appeal, a trial court's summary judgment is reviewed *de novo*. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Where the moving parties have failed to meet their burden of showing the absence of disputed material facts summary judgment must be denied. *Safeco Insurance Co. v. Butler*, 118

Wn.2d 383, 823 P.2d 499 (1992).

This court conducts de novo review to determine if the record before the superior court, with all facts and inferences considered in the light most favorable to [Ross] . . . the non-moving party, demonstrates that there is no genuine issue of material fact, and that . . . [PeaceHealth et al/Respondents Peacehealth, Johnson, and Ries et al (collectively, "PeaceHealth et al") were] entitled to judgment as a matter of law. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

*Cochran Elec. Co. v. Mahoney*, 129 Wn.App. 687, 692, 121 P.3d 747 (2005). "A court must consider all facts and any reasonable inferences in the light most favorable to the nonmoving party."  
*Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002).

Appeals courts "review questions of statutory interpretation and claimed errors of law de novo." *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn.App. 81, 88, 173 P.3d 959 (2007). The constitutionality of a statute is reviewed de novo. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 978, 216 P.3d 374 (2009).

**B. The additional 90 day notice requirement only applies to claims based on professional negligence.**

**7.70.100. Mandatory mediation of health care claims—Procedures**

(1) No action **based upon** a health care provider's **professional negligence** may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. . .

RCW 7.70.100(1) (emphasis added). None of Ross's claims are based upon professional negligence. CP 429. The statute therefore does not require Ross to provide 90 days notice.

The language in the current RCW 7.70.100(1) was carefully drafted to narrow the previous language put in place in 1993 in former subsection (1):

(1) All causes of action, whether based in tort, contract, or otherwise, for damages **arising from** injury occurring **as a result of health care** provided after July 1, 1993, shall be subject to mandatory mediation prior to trial.

West's RCWA 7.70.100 Historical and Statutory Note, regarding Laws 2006, ch. 8, Sec. 314, *citing* WA Legis 492 (1993). Clearly, the new statutory requirement of 90 days notice is not intended to apply to Ross's claims.

The standard of care is an element of medical malpractice. Ross pled intentional torts, not negligence, and did not plead medical malpractice. Assuming PeaceHealth et al wish to make the reasonable practice of medicine as a defense, RCW 7.70.100 is raised by PeaceHealth et al's answer and motion, not by plaintiff's claims. Ross's claims are based on the intentional torts of battery, assault, false imprisonment, and malicious prosecution.

"A battery is the intentional infliction of harmful bodily contact with a plaintiff." *Morinaga v. Vue*, 85 Wn.App. 822, 834, 935 P.2d 637 (1997), *citing*, *Garratt v. Dailey*, 46 Wn.2d 197, 200, 279 P.2d 1091 (1955). It is not necessary that the defendant intended the specific harm that befell the plaintiff. *Garratt v. Dailey*, *supra*. "The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge." *Id.*, at 202. Thus, it is the conduct that must be intended, not the result.

"An assault is an attempt, with unlawful force, to inflict bodily injuries on another, accompanied with the apparent present

ability to give effect to the attempt if not prevented." *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 505, 125 P.2d 681 (1942).

Whether there has been an assault in a particular case depends more upon the apprehension created in the mind of the person assaulted than upon the undisclosed intention of the person committing the assault. *Howell v. Winters, supra; Allen v. Hannaford*, 138 Wash. 423, 244 P. 700. Hence, the fact that the pistol or gun used is not loaded at the time is immaterial if the person at whom the weapon is pointed does not know that it is not loaded.

*Id.*, at 505.

"Our law makes actionable the intentional confinement of another's person, unjustified under the circumstances." *Tufte v. City of Tacoma*, 71 Wn.2d 866, 870, 431 P.2d 183 (1967). For example, "Intentionally to hold another in confinement for being drunk when one knows or should know that he is not drunk, is to confine him unjustifiably." *Id.* Restraint without legal authority is all that is necessary for false imprisonment. *Dang v. Ehredt*, 95 Wn.App. 670, 685, 977 P.2d 29 (1999); *Moore v. Pay'N Save Corp.*, 20 Wn.App 482, 487, 581 P.2d 159 (1978).

An action for malicious prosecution must be resolved by the fact finder where there is an issue of fact as to whether:

1. The defendant instituted the criminal prosecution;
2. The prosecution lacked probable cause;
3. There was malice;
4. The charges were abandoned; and
5. Ms. Ross was damaged.

*Hanson v. Estell*, 100 Wn.App. 281, 286, 997 P.2d 426 (2000).

A cause of action does not involve a violation of a standard of care simply because it involves a healthcare provider or occurred on the hospital premises. *McAllen Work Rehab. Center v. Gomez*, 2008 WL 2930306, No. 13-07-00466 unpublished, (Tex. App. — Corpus Christi, July 31, 2008). In *McAllen*, the plaintiff attended “therapy” and “treatment” at the McAllen Work Rehabilitation Center. *Id.*, at 1. The plaintiff, however, dropped all allegations that his injuries were caused by errors during therapy and treatment. *Id.* The appeals court ruled that the Texas statutory certificate of merit requirement did not preclude the plaintiff from

bringing his premises liability claim against the provider for the same injury.

PeaceHealth et al appear to assert that because their defense is that the injuries are a result their carelessness (negligence), and not their intentional wrongdoing, the professional negligence statutes apply. This argument is made even though none of Ross's claims are based on negligence. Taking defendant's argument to the logical conclusion, the professional negligence statutes would apply to Ross even if her claim was that she was falsely imprisoned and raped at the hospital, as long as the health care providers assert a defense of carelessness, rather than intentional wrongdoing.

**C. Even assuming RCW 7.70.150 and RCW 7.70.100 were intended to apply to Ross's claims as drafted, they are unconstitutional.**

**1. RCW 7.70.150 has been stricken down as unconstitutional.**

The RCW 7.70.150 certificate of merit requirement unduly burdened the right of access to courts and violated the separation

of powers. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d at 980. The statute was therefore stricken down on September 17, 2009. *Id.*

**2. Under the doctrine of separation of powers, the civil rules control procedural requirements for the resolution of legal claims by the superior courts.**

The statutory notice requirement violates separation of powers by allowing the Washington Legislature to create procedural rules for lawsuits when only the Washington Supreme Court has the constitutional power to create those procedural rules. Wash. const. art. 4, § 1.<sup>1</sup> "It is within the power of this court to dictate, under the constitutional separation of powers, its own court rules, even if they contradict rules established by the Legislature. Wash. const. art. 4, § 1." *Marine Power & Equipment Co., Inc. v. Industrial Indem. Co.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984).

The Washington State Constitution does not contain a formal separation of powers clause, but "the very division of our government into different branches has

---

<sup>1</sup> "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."

been presumed throughout our state's history to give rise to a vital separation of powers doctrine.' " Brown v. Owen, 165 Wash.2d 706, 718, 206 P.3d 310 (2009) (quoting Carrick v. Locke, 125 Wash.2d 129, 135, 882 P.2d 173 (1994)). The doctrine of separation of powers divides power into three co-equal branches of government: executive, legislative, and judicial. City of Fircrest v. Jensen, 158 Wash.2d 384, 393-94, 143 P.3d 776 (2006), *cert. denied*, 549 U.S. 1254, 127 S.Ct. 1382, 167 L.Ed.2d 162 (2007).

*Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 984 – 985, 216 P.3d 374 (2009).

Where a statutory procedure and a court rule cannot be harmonized, the statute violates the doctrine of the separation of powers. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d at 984 – 985. That is to say, "if 'the activity of one branch threatens the independence or integrity or invades the prerogatives of another,' it violates the separation of powers." *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d at 980, *citing*, *Fircrest*, 158 Wn.2d at 394, 143 P.3d 776 (internal quotation marks omitted). A statute encroaches into the procedural realm when it sets up requirements for how to effectuate a substantive right. *Putman v. Wenatchee Valley Medical Center*, 166 Wn2d at 985.

**3. CR 3 governs the procedural requirements for commencing an action against a healthcare provider.**

The statutory 90 day notice requirement violates the separation of powers doctrine because it imposes an additional notice requirement for commencement of actions against healthcare providers. Statutes that invade the prerogatives of the judicial branch and change the procedures regarding “how to file a claim to enforce a right provided by law” violate the doctrine of separation of powers. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 779, 216 P.3d 374 (2009). Thus, additional statutory requirements, including additional notice, for commencement of actions are “displaced and rendered inoperative” by the rules of civil procedure, including CR 3, CR 12(a)(1), and CR 81. *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822 (1974).

CR 3(a) provides that an action may be commenced by filing a complaint or by serving the summons. RCW 7.70.100 purports to impose an additional procedural requirement (emphasis added):

7.70.100. Mandatory mediation of health care claims--  
**Procedures**

(1) No action based upon a health care provider's professional negligence may be **commenced unless** the defendant has been given at least ninety days' notice of the intention to commence the action. . .

The goal and effect of the adoption of the rules of civil procedure, however, was to eliminate extra "procedural snares" in the court system, including statutory notice requirements in the commencement of actions. *Curtis Lumber Co. v. Sortor*, 83 Wn.2d at 766.

For example, in *Curtis Lumber*, Curtis Lumber filed a complaint to foreclose on a lien. *Curtis Lumber Co. v. Sortor*, 83 Wn.2d at 822. The Court of Appeals affirmed dismissal of the complaint at the trial court because RCW 60.04.100 dictated that actions to foreclose on that type of lien were not commenced until all necessary parties were served. *Id.*, at 766 - 766. The supreme court reversed, holding that CR 3 controlled, which provides that an action is commenced either by filing, or by service. *Id.*

**RULE 3. COMMENCEMENT OF ACTION**

**(a) Methods.** Except as provided in rule 4.1, a civil action is **commenced by** service of a copy of a summons together with a copy of a complaint, as

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

CR 3(a) (emphasis added). The supreme court explained:

In 1967, this court completely revised the Washington rules of civil procedure. The goal, as stated at the time, was '(t)o eliminate many procedural traps now existing in Washington practice;' Foreword to Civil Rules for Superior Court, 71 Wash.2d xxiii, xxiv (1967). The instant case provides a prime example of an anomalous, purely accidental, unnecessary but fatal procedural snare for the unwary or less fleet of foot. The new rules should serve as a manual or Bible of civil procedure.

*Curtis Lumber Co. v. Sortor*, 83 Wn.2d at 766.

In holding that additional the filing requirement in RCW 7.70.150 invades prerogatives within the "inherent power of the judicial branch," the supreme court agreed that the requirements "conflict with court rules regarding the procedures for filing lawsuits." *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d at 980, 984 – 985. RCW 7.70.100 likewise imposes an additional requirement for filing malpractice lawsuits against

healthcare providers. This unconstitutional violation of the separation of powers must likewise be stricken down.

**4. RCW 7.70.100 is an unnecessary delay, and an undue burden on access to the courts.**

RCW 7.70.100 delays medical malpractice suits 90 days, in addition to the 20 days provided for in CR 3, and 12(a)(1).

“Justice in all cases shall be administered openly and without unnecessary delay.” Wash. Const. Art. I, Sec. 10.

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803).

Justice delayed is justice denied.

We have generally applied the open courts clause in one of two contexts: “the right of the public and press to be present and gather information at trial and the right to a remedy for a wrong suffered.” Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 24 (2002).

*In re Marriage of King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007).

In safeguarding the first fundamental right protected by Art. I, Sec. 10 (the right of the public and press), the supreme court

has required a compelling state interest to uphold an abridgement of the right. *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540 – 541, 114 P.3d 1182 (2005). The second right protected by Art. I, Sec. 10, has been described as more than fundamental: “The people have a right of access to courts; indeed, it is **‘the bedrock foundation** upon which rest all the people’s rights and obligations.” *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d at 979 (emphasis added), *citing, John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).<sup>2</sup> Accordingly, the right to access to courts should not be burdened unless there is a compelling state interest that cannot be achieved by alternate means.

For example, in *Putman*, the supreme court held that the certificate of merit requirement constituted an unconstitutional burden on the right of access to the courts because it “may not be possible” for some injured people to obtain an opinion from an

---

<sup>2</sup> In *DeYoung v. Providence Med. Ctr.*, 136 Wash.2d 136, 150, 960 P.2d 919 (1998), the Supreme Court held the medical malpractice statute of repose violated article I, section 12 (equal protection), and so declined to consider whether it also violated “access to the courts provisions of the state constitution.”

expert before they are granted the right of conducting discovery under the civil rules. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d at 979.

Filing fees and court imposed costs have also been found to unduly burden access to the courts:

In *O'Connor v. Matzdorff*, 76 Wash.2d 589, 458 P.2d 154 (1969), the court waived the filing fee to insure access for the poor. In *Iverson v. Marine Bancorporation*, 83 Wash.2d 163, 517 P.2d 197 (1973), the court was concerned with fees and costs for an appeal. The court said: "The administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief", and "[c]onsistent with **our affirmative duty to keep the doors of justice open to all** with what appears to be a meritorious claim for judicial relief, we hold that the plaintiff is entitled to the relief requested [waiver of fees and costs]." (Italics ours.) *Iverson*, at 167-68, 517 P.2d 197.

*John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 781, 819 P.2d 370 (1991).

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

[D]espite the Washington Supreme Court's less than distinguished analysis over the years, the origins and purpose of the right of access to the courts along with its express embodiment in Washington's constitution confirms its fundamental significance to the relationship between the citizens of the state and their government. As a right conserving all other substantive rights, it is essential to the ordered operation of society and the preservation of individual liberty.

*Id.* at 398.

The state interest in requiring extra notice is not compelling, or even rational if its purpose is to increase the number of cases settled rather than litigated. RCW 7.70.100 does not compel settlement negotiations before filing suit. RCW 7.70.100 does not compel that mediation happen at any time as long as it occurs 30 days prior to trial. CR 53.4(e). Unlike RCW 7.70.110, RCW 7.70.100 does not provide any incentive to negotiate before filing suit.

#### **5. RCW 7.70.100 deprives Ross of Due Process and Constitution Equal Protection of the Laws.**

The special burdens the statute allegedly imposes on Ross and on victims of medical negligence deprive Ross of Due Process and Equal Protection of the Laws. U.S. const. amend. 14; Wash.

const. art. 1 § 3<sup>3</sup> and § 12. No state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend XIV, Sec. 1. Amendment.

Both the Washington and U.S. Constitutions guarantee due process, Const. Art. I, § 3; U.S. Const. amend. XIV, § 1, and confer equivalent protections. *In re Personal Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). Due process “[a]t its core is a right to be meaningfully heard.” *In re Detention of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). And consequently courts, utilize a test that balances: “(1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures.” *Id.* Substantive due process claims are evaluated under the same criteria used for equal protection. *See Amunrud v. Bd. of Appeals*, 158 Wn.2d 208,

---

<sup>3</sup> “No person shall be deprived of life, liberty, or property, without due process of law.”

220-22, 143 P.3d 571 (2006).

The right of access to courts is fundamental, or “bedrock.”

*Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d at 979.

The right to be compensated for personal injuries has been held to be a substantial and fundamental right under the constitution.

*Hunter v. North Mason High School*, 85 Wn.2d 810, 814 - 815, 539

P.2d 845 (1975). The right to access to courts should not be

burdened unless there is a compelling state interest that cannot be

achieved by alternate means. *Rufer v. Abbott Labs*, 154 Wn.2d at

540 – 541.<sup>4</sup>

At a minimum, a statute may not discriminate between

potential negligence claimants without a statutory policy that

rationality relates to a legitimate state purpose. *Id.*, at 818 – 819.

There is no rational basis to impose additional burdens on victims

of assault and battery, or medical negligence not imposed on other

personal injury victims.

---

<sup>4</sup> *But see Waples v. Yi*, 146 Wn.App. 54, 189 P.3d 813 (2008) (holding former RCW 7.70.100 did not violate equal protection), review granted by, *Waples v. Yi*, 165 Wn.n2d 1031, 203 P.3d 382 (Supreme Court review pending as of March 04, 2009).

The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life. Statutory classifications which substantially burden such rights as to some individuals but not others are permissible under the equal protection clause of the Fourteenth Amendment only if they are 'reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Kahn v. Shevin*, 416 U.S. 351, 355, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Dandridge v. Williams*, 397 U.S. 471, 520-22, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) (Marshall, J., dissenting); *Washington Statewide Organization of Stepparents v. Smith*, 85 Wash.2d 564, 572, 536 P.2d 1202 (1975) (Utter, J., concurring).

*Hunter v. North Mason High School*, 85 Wn.2d at 814 – 815.

**6. In addition to Due Process and Equal Protection, RCW 7.70.100 violates the Washington Constitution's Privileges and Immunities Clause and Special Laws provision.**

The Washington Constitution provides, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same

terms shall not equally belong to all citizens, or corporations.”  
Article 1, Sec. 12 of the Washington Constitution. “The legislature  
is prohibited from enacting any private or special laws in the  
following cases:-- . . . 17. For limitation of civil or criminal actions.”  
Wash. Const. art. 2, Sec. 28.

The Oklahoma Supreme Court held that the affidavit of merit  
requirement violated the Oklahoma Constitution’s prohibitions  
against the passing of special laws regulating evidence or inquiry in  
the courts, Okla. const. art. 5, § 46, and limitations on open access  
to courts, Okla. const. art. 2, § 6. *Zeier v. Zimmer, Inc.*, 152 P.3d  
861, 863 (Ok. 2006).<sup>5</sup> Shortly thereafter, applying the reasoning in  
*Zeier*, the appeals court held that a statute requiring medical  
negligence plaintiffs to issue summons on defendant within 180  
days of filing of lawsuit was impermissible special law and violated

---

<sup>5</sup> *cf Reynolds v. Porter*, 1988 Okla. 88, 760 P.2d 816, 824 (1988) (three-year medical malpractice statute of limitation that failed to allow tolling for discovery of injury discriminated against medical malpractice claimants and thus was unconstitutional special legislation); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 831 (Wyo. 1980) (10-year statute of repose relating to improvements to real property constitutes impermissible special legislation because it arbitrarily and irrationally immunized “only ... a narrow spectrum of [possible] PeaceHealth et al.”); *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 689 N.E.2d 1057, 1076 (1997) (invalidating, *inter alia*, a cap on noneconomic damages on special-legislation grounds).

due process. *Jones v. Integris Baptist Medical Center*, 178 P.3d 191 (Okla. App. 2008). The Washington Supreme Court may do likewise.<sup>6</sup>

James A. Bamberger, in *Confirming The Constitutional Right Of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 Seattle J. for Soc. Just. 383, 414-15 (Fall/Winter 2005), also concludes that the right of access to the courts is a "privilege" within the meaning of the privileges and immunities clause, in addition to the most obvious and logical provision for the individual right of access to the courts in article 1, section 10.<sup>7</sup>

---

<sup>6</sup> The Washington Supreme Court, in *Putman* also held the certificate unconstitutional, but declined to reach whether or not the requirement "(1) violates the privileges and immunities clause of the Washington State Constitution and the equal protection clause of the United States Constitution, (2) violates the prohibition on special laws in the Washington State Constitution, and (3) violates the due process clause of the United States Constitution." *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 977, 216 P.3d 374 (2009). As of March 4, 2009, *Waples v. Yi* (holding former RCW 7.70.100 did not violate equal protection) is now pending review by the supreme court. *Waples v. Yi*, 146 Wn.App. 54, 189 P.3d 813 (2008), review granted by, *Waples v. Yi*, 165 Wn2d 1031, 203 P.3d 382 (March 04, 2009).

<sup>7</sup> See also, Wash. Const. art. 1, sec. 10: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."

Ross has the burden of showing the statute is unconstitutional. "It is a well-established general rule that where the constitutionality of a statute is challenged, that statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000). The "court's focus when addressing constitutional facial challenges is on whether the statute's language violates the constitution, not whether the statute would be unconstitutional 'as applied' to the facts of a particular case." *Id.*, at 221. A facial rational basis challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied. *Id.*, at 221. Under an "as applied" challenge, in contrast, the challenging party contends that the statute, as actually applied, violates the Constitution. *Id.*, at 223-24. Ross contends the statute is unconstitutional both on its face and as applied.

This court has a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law.

*State v. Coe*, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984). Besides our responsibility to interpret Washington's Constitution, we must furnish a rational basis "for counsel to predict the future course of state decisional law." *State v. Gunwall*, 106 Wn.2d 54, 60, 720 P.2d 808 (1986).

*Collier v. City of Tacoma*, 121 Wn.2d 737, 745, 854 P.2d 1046 (1993).

To resolve constitutional questions under the state constitution, the court employs a 6-factor analysis articulated in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986):

In determining that our state constitutional provision requires a separate and independent constitutional analysis from the United States Constitution, we consider six nonexclusive neutral criteria: (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

*Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806, 83 P.3d 419 (2004).

In *Grant County*, the court held that the privileges and immunities clause of the Washington State Constitution, article I, § 12, requires an independent constitutional analysis from the federal equal protection analysis where, as here, “the challenged law grants a privilege or immunity to a minority class, *i.e.*, in the event of positive favoritism.” *Andersen v. King County*, 158 Wn.2d 1, 18, 138 P.3d 963 (2006) (holding that the Defense of Marriage Act did not involve the grant of a privilege or immunity to a favored minority class and was constitutional). *Grant County*, 150 Wn.2d at 805. Because medical malpractice claims brought in Washington against Washington defendants (generally by Washington residents) are a matter of state and local concern, they are most appropriately addressed under the Washington State Constitution.

As in *Grant County*, the law at issue—the additional notice requirement in RCW 7.70.100—grants a privilege to the minority of tortfeasors whose negligence (or in this case, intentional torts) was allegedly committed in while providing healthcare. It also favors the wealthy, politically powerful minority of medical malpractice defendants and insurers that have vast resources to defend against

these claims. The law runs directly against “our state’s framers’ concern with undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority.” *Grant County*, 150 Wn.2d at 808 (citing Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 671-72 (1992)); Jonathan Thompson, *The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation* 69 Temp. L. Rev. 1247, 1253 (1996) (“alteration of Oregon model ‘reflected the contemporary populist suspicion of the political influence accompanying large concentrations of wealth’”).

Contrary to our state’s privileges and immunities protection and the intent behind it, the RCW 7.70.100 clearly and heavily favors wealthy insurance companies and those healthcare providers they insure. *Zeier*, 152 P.3d at 869 (medical malpractice statutes like Oklahoma’s have resulted in “a windfall for insurance companies who benefit from the decreased number of causes they

must defend but which are not required to implement post-tort reform rates decreasing the cost of medical malpractice insurance to physicians. These companies happily pay out less in tort-reform states while continuing to collect higher premiums from doctors and encouraging the public to blame the victim or attorney for bringing frivolous lawsuits"; footnotes and citations omitted). The law greatly assists this well-funded minority by granting them additional time (90 days after the notice of intent to sue under RCW 7.70.100, in addition to 20 days to answer provided by CR 12(a)(1), followed by the Certificate of Merit).

In *Zeier*, the court considered whether medical malpractice statutes such as Oklahoma's and Washington's fail to satisfy their purposes and how those purposes are flawed or even fictitious. Analyses by Washington practitioners also exist. See, Randolph I. Gordon<sup>8</sup> and Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care*,

---

<sup>8</sup> Mr. Gordon is a trial lawyer practicing in Bellevue, Washington. He is also an Adjunct Professor at Seattle University School of Law, Gordon, note 1, and a former member of Board of Governors of the Washington State Bar Association.

4 Seattle J. for Soc. Just. 693 (Spring/Summer 2006). As to whether health care litigation is excessive, Gordon concludes:

At the outset, it should be noted that lawyers representing plaintiffs injured as a consequence of medical malpractice are generally compensated on a contingent fee basis, with legal fees being paid as a percentage of the recovery, if any. Defense lawyers, representing the malpractice defendant, are generally compensated on an hourly basis by the insurance company for the defendant health care provider. **One would not expect plaintiffs' attorneys, who only receive a fee if there is a settlement or verdict in favor of their injured client, to pursue cases lacking merit. Plaintiffs' attorneys, as a rule, must incur substantial expenses obtaining copies of a patient's medical records, paying for record review by medically trained individuals, and retaining expert witnesses (customarily out-of-state) to render opinions respecting the standard of care. In addition, such cases involve the expense of compensating the defense experts for their time during deposition. Finally, there is the lost opportunity cost associated with the pursuit of a frivolous case, when other meritorious cases are not pursued. There is nothing in the economics of attorney compensation through a contingent fee that militates in favor of the commencement of non-meritorious claims or the prolongation of litigation.**

Gordon, at 710-711 (footnotes omitted; emphasis added).

Even under an equal protection analysis, RCW 7.70.100 would fail. Applying the most lenient “rational relationship” scrutiny, the law’s classifications bear no rational relationship to the statute’s purpose. RCW 7.70.100’s additional notice requirement purports to reduce the cost of healthcare by reducing the cost of lawsuits, but it is both ineffective in that purpose, and redundant in light of CR 3, and 12(a)(1).<sup>9</sup> *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998) (holding that “the relationship between the goal of alleviating any medical insurance

---

<sup>9</sup> In considering the existence of a legitimate state purpose for enacting RCW 7.70.100, Division 2 noted that the legislature intended to provide affordable healthcare by reducing the cost of medical malpractice lawsuits:

When enacting Second Substitute House Bill No. 2292, the medical malpractice act, the legislature found: [A]ccess to safe, affordable health care is. one of the most important issues facing the citizens of Washington state.... The rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

*Waples v. Yi*, 146 Wn.App. 54, 189 P.3d 813 (2008), *citing*, LAWS OF 2006, ch. 8, § 1, and 314, *review granted by*, *Waples v. Yi*, 165 Wn2d 1031, 203 P.3d 382 (March 04, 2009).

crisis and the class of persons affected by the eight-year statute of repose is too attenuated to survive rational basis scrutiny"); *Jones v. Integris Baptist Medical Center*, 178 P.3d at 196; *Zier*, 152 P.3d at 873-74. Any relationship to an unnecessary, redundant, or improper purpose cannot be rational, much less compelling.

In *Zeier* and *Jones*, the Oklahoma courts had no difficulty concluding that the affidavit of merit and 180 day summons requirements were unconstitutional special laws. Similarly, in Washington, special legislation is legislation which operates upon a single person or entity, while general legislation operates on all things or people within a class. A class may consist of one person, provided the law applies to all members of the class. It is not what the law includes, but rather what it excludes, that is the test of special legislation. To survive a challenge as special legislation, any exclusions from a statute's applicability, as well as the statute itself, must, at a minimum, be rationally related to the statute's purpose. *Brower v. State*, 137 Wn.2d 44, 52, 969 P.2d 42 (1998); *Island County v. State*, 135 Wn.2d 141, 150, 955 P.2d 377 (1998) (court overturned legislation as an unconstitutional special law).

The statute at issue here excludes all plaintiffs other than medical malpractice plaintiffs from the additional notice requirement. There is no compelling reason, or rational relationship to the statute's purposes.

**D. Assuming the statute is constitutional, the 90 day notice requirement applies only to claims made when the case is "commenced" not in a subsequent defense.**

RCW 7.70.100(1) provides,

**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. . .

Emphasis added. An action is commenced when the complaint is filed. CR 3(a). The complaint therefore provides the basis of the action. Defenses, by definition can not. Even if, however, a subsequent defense or counterclaim was based on medical malpractice, the statute could only apply to the defense or counterclaim, not retroactively to the complaint.

**E. Due Process and Chapter 71.05 do not allow the deprivation of liberty where there is no emergency or judicial finding of probable dangerousness.**

There is no question that due process guaranties must accompany involuntary commitment for mental disorders. *In re Levias*, 83 Wash.2d 253, 517 P.2d 588 (1973); *In re Quesnell*, 83 Wash.2d 224, 517 P.2d 568 (1973); *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). The United States Supreme Court has described involuntary commitment as "a massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972).

*In re Harris*, 98 Wn.2d 276, 279, 654 P.2d 109 (1982). "[A] State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *In re LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986).

In determining whether due process is violated, the following factors are balanced: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and

administrative burdens of additional procedures. *In re Detention of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007), citing *Mathews, v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Where there is no emergency, a person may not be detained for a mental disorder against her will without first going to the court and obtaining a “judicial finding of ‘probable dangerousness.’” *In re LaBelle*, 107 Wn.2d at 287. In addition to a state and federal right to due process, access to the courts is a fundamental right in Washington. See discussion access to courts discussion above.

The Court’s “primary objective in interpreting a statute is to ascertain and give effect to the intent of the Legislature.” *In re LaBelle*, 107 Wn.2d at 205. The statute is intended to apply only to “persons with serious mental disorders.” RCW 71.05.012.

“[W]here as here a significant deprivation of liberty is involved, statutes must be construed strictly.” *In re Harris*, 98 Wn.2d., at 205. PeaceHealth et al have not alleged a serious mental disorder.

**F. PeaceHealth et al were not immune, as a matter of law, under Chapter 71.05.**

PeaceHealth et al contend they are immune because they were "performing duties pursuant to this chapter" (Chapter 71.05). Ries' Motion for Summary Judgment, CP 19. Chapter 71.05 provides that a hospital or agency may detain a person against her will if the agency or hospital "regard such person as presenting as a result of a mental disorder an imminent likelihood of serious harm, or as presenting an imminent danger because of grave disability." RCW 71.05.050.

"'Imminent' means the state or condition of being likely to occur at any moment or near at hand, rather than distant or remote." RCW 71.05.020(20).

[I]t is particularly important that the evidence provide a factual basis for concluding that an individual "manifests severe [mental] deterioration in routine functioning". Such evidence must include recent proof of significant loss of cognitive or volitional control. In addition, the evidence must reveal a factual basis for concluding that the individual is not receiving or would not receive, if released, such care as is essential for his or her health or safety. It is not enough to show that care and treatment of an individual's mental illness would be preferred or beneficial or even in his best interests. To justify commitment, such care must be shown to be *essential* to an individual's health or safety and the

evidence should indicate the harmful consequences likely to follow if involuntary treatment is not ordered.

*In re LaBelle*, 107 Wn.2d at 208.

Moreover, PeaceHealth et al were not, as a matter of law, acting in good faith. Whether a person acted in good faith is usually a question of fact. *Percival v. Bruun*, 28 Wn.App. 291, 622 P.2d 413 (1981).

A determination as to good faith involves a determination of a state of mind. "Inasmuch as a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ a function traditionally left to the jury summary judgment often will be an inappropriate means of resolving an issue of this character." Similar considerations mitigate against the Court's deciding this issue on the basis of an affidavit and a deposition: "Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue." In short, good faith in general and as a defense in actions for deprivations of civil rights, is almost always a question for determination by the fact-finder rather than the court on a motion for summary judgment.

*Id.*, at 294.

In *Percival*, as in this case, a person was deprived of her liberty by a health care provider asserting immunity based on statutory grounds that it acted in good faith. The court held that Harborview Medical Center was not entitled to summary judgment that it acted in good faith even though the officer who brought the plaintiff to the medical center stated that she had alcohol on her breath and was unable to stand. *Percival v. Bruun*, 28 Wn.App. at 293. The plaintiff testified that she was having “difficulty awakening because of a serious heart and circulatory problem.” *Id.*

PeaceHealth et al relied upon the test for good faith in *Spencer v. King County*, which asks whether there was a “tainted” motive, a “motive of interest” or “ill will.” 39 Wn.App. 201, 207 – 208, 692 P.2d 874 (1984). This Court has reasoned that a defendant is not acting in good faith if –

he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the (person) affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights

...

*Percival v. Bruun*, 28 Wn.App. at 293. Division One was applying the good faith defense that was undefined in the Uniform Alcoholism and Intoxication Treatment Act.

The Washington Supreme Court has also refrained from determining good faith as a matter of law under RCW 71.05. In *Petersen v. State*, hospital personnel observed a schizophrenic patient "driving his car on the hospital grounds in a reckless fashion that involved spinning his car in circles." *Petersen v. State*, 100 Wn.2d 424, 441, 671 P.2d 230 (1983). The Supreme Court held there was a question of fact as to whether or not the personnel acted in good faith under RCW 71.05.120 in releasing the patient.

Ross, in this matter, also raises a question of fact. There was no emergency. It appears that the attitude was that Ross was inappropriately using the emergency room for a non-emergency. She was not monitored and was allowed to move freely about the hospital. She was never told she could not leave. To the contrary, she was told she could leave. Then she was assaulted, physically battered, and falsely imprisoned. PeaceHealth et al knew there was no emergency.

**G. The moving party may not raise new issues, or submit new facts in its reply.**

Evidence not timely submitted can not be considered in support of a motion for summary judgment. The moving party must meet its "burden of offering factual evidence showing that it is entitled to judgment as a matter of law" in its initial moving papers. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980). "[I]f the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials." *Id.* The additional submission is an admission that defendants' moving papers are insufficient to sustain their burden.

Defendants' additional submissions may be intended to attack the credibility of plaintiff. If there is an issue of credibility, the motion for summary judgment should be denied. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977). The trial court, at summary judgment, cannot resolve issues of credibility. Even a declaration which is arguably inconsistent with other pleadings or early statements must be accepted as verities. "[W]e do not weigh

the parties' credibility but resolve all reasonable inferences in favor of the nonmoving party." *Duckworth v. Langland*, 95 Wn.App. 1, 8, 988 P.2d 967 (Div. 1, 1998).

It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. **Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond.**

*White v. Kent Medical Center, Inc., P.S.*, 61 Wn.App. 163, 168, 810 P.2d 4 (Div. 1, 1991) (emphasis added).

CR 56 is not a mechanism for resolving factual disputes. Consequently, there is no provision in the rules for plaintiff to dispute or explain the "facts" contained in defendants' new declaration.

The adverse party may file and serve opposing affidavits, memoranda of law or other documentation no later than 11 calendar days before the hearing.

CR 56(c).

## VI – CONCLUSION

The trial court's dismissal of Ross's claims must be reversed.

Respectfully submitted this 30<sup>th</sup> day of November 2009.

SHEPHERD ABBOTT ALEXANDER

By   
Douglas R. Shepherd, WSBA # 9514,  
Edward S. Alexander, WSBA # 33818,  
Of Attorneys for Appellant Ross

## Appendix 1

### Brief of Appellant Ross

SCANNED

RECEIVED

OCT 31 2007

SHEPHERD ABBOTT CARTER

**FYI**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**SUPERIOR COURT OF WASHINGTON IN AND FOR WHATCOM COUNTY**

**JENNIFER ROSE ROSS, an individual,** )  
 )  
 ) **Plaintiff,** )  
 )  
 ) **v.** )  
 )  
 ) **PEACEHEALTH dba ST. JOSEPH** )  
 ) **HOSPITAL, a Washington Public Benefit** )  
 ) **Corporation; and ROBERT JOHNSON and** )  
 ) **JANE DOE JOHNSON, husband and wife,** )  
 ) **and the marital community composed thereof;** )  
 ) **JEFFREY RIES and JANE DOE RIES,** )  
 ) **husband and wife, and the marital community** )  
 ) **composed thereof; JOHN DOE I - IV, and** )  
 ) **JANE DOE I - IV,** )  
 )  
 ) **Defendants.** )

**No. 07-2-02163-5**

**DEFENDANTS PEACEHEALTH  
AND ROBERT JOHNSON'S  
ANSWER TO PLAINTIFF'S  
COMPLAINT FOR DAMAGES AND  
COUNTERCLAIM**

COME NOW defendants PEACEHEALTH dba ST. JOSEPH HOSPITAL and ROBERT JOHNSON and JANE DOE JOHNSON, husband and wife, by and through their attorneys of record, Rando B. Wick and Kim M. Holmes, of Johnson, Graffe, Keay, Moniz & Wick, LLP, and admit, deny, and deny on currently available information and belief plaintiff's Complaint for Damages as follows:

**ANSWER TO COMPLAINT FOR DAMAGES AND  
COUNTERCLAIM - 1**

**JOHNSON, GRAFFE,  
KEY, MONIZ & WICK, LLP**  
ATTORNEYS AND COUNSELORS AT LAW  
925 FOURTH AVENUE, SUITE 2300  
SEATTLE, WA 98104  
PHONE (206) 223-4770  
FACSIMILE (206) 386-7344

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**I - VENUE/JURISDICTION**

01. Defendants admit jurisdiction and venue are proper in Whatcom County Washington.

**II - PARTIES**

02. See corresponding answer.

03. Admitted.

04. Admitted.

05. Defendants admit that Robert Johnson was employed by Peace Health on September 18, 2005.

06. Defendants admit that Robert Johnson is a married individual. Defendants deny there was any improper act or omission by Mr. Johnson as alleged in Plaintiff's Complaint.

07. Admitted.

08. Defendants lack sufficient information or knowledge upon which to admit or deny the allegations in ¶8 and therefore deny the same.

09. Defendants lack sufficient information or knowledge upon which to admit or deny the allegations in ¶9 and therefore deny the same.

**III - FACTS**

10. See corresponding answers.

11. Defendants admit that Jennifer Ross was seen in St. Joseph's emergency

1 room on September 18, 2005, for various physical and mental health issues including  
2 reported depression, suicidal ideation and a head cold. Defendants lack sufficient  
3 information or knowledge upon which to admit or deny the remaining allegations in ¶11  
4 and therefore deny the same.  
5

6 12. Defendants admit that after a wait plaintiff was undergoing evaluation when  
7 she informed St. Joseph's staff that she was leaving.

8 13. Denied.

9 14. Denied.

10 15. Defendants admit that the plaintiff was restrained on a gurney and placed  
11 under supervision following her attack on Robert Johnson. Defendants lack sufficient  
12 information or knowledge upon which to admit or deny the remaining allegations in ¶15  
13 and therefore deny the same.  
14

15 16. Defendants lack sufficient information or knowledge upon which to admit  
16 or deny the allegations in ¶16 and therefore deny the same.

17 17. Denied.

18 18. Defendants lack sufficient information or knowledge upon which to admit  
19 or deny the allegations in ¶18 and therefore deny the same.  
20

21 19. Defendants lack sufficient information or knowledge upon which to admit  
22 or deny the allegations in ¶19 and therefore deny the same.

23 20. Defendants admit that charges were instituted against the plaintiff by Robert  
24

25  
26 **ANSWER TO COMPLAINT FOR DAMAGES AND  
COUNTERCLAIM - 3**

JOHNSON, GRAFFE,  
KEY, MONIZ & WICK, LLP  
ATTORNEYS AND COUNSELORS AT LAW  
925 FOURTH AVENUE, SUITE 2300  
SEATTLE, WA 98104  
PHONE (206) 223-4770  
FACSIMILE (206) 386-7344

1 Johnson. Defendants lack sufficient information or knowledge upon which to admit or  
2 deny the allegations in ¶20 and therefore deny the same.

3 21. Defendants lack sufficient information or knowledge upon which to admit  
4 or deny the allegations in ¶21 and therefore deny the same.

5 22. Defendants lack sufficient information or knowledge upon which to admit  
6 or deny the allegations in ¶22 and therefore deny the same.

7 23. Defendants lack sufficient information or knowledge upon which to admit  
8 or deny the allegations in ¶23 and therefore deny the same.

9  
10 **IV - ASSAULT AND BATTERY**

11 24. See corresponding answers.

12 25. Denied.

13  
14 **V - FALSE IMPRISONMENT**

15 26. See corresponding answers.

16 27. Denied.

17  
18 **VI - MALICIOUS PROSECUTION**

19 28. See corresponding answers.

20 29. Denied.

21  
22 **VIII - RESPONDEAT SUPERIOR**

23 30. See corresponding answers.

24 31. Defendants deny that Jeffrey Ries was an agent or employee of PeaceHealth

1 on September 18, 2005. Defendants admit that Robert Johnson was an employee of  
2 PeaceHealth on September 18, 2005. Defendants lack sufficient information or knowledge  
3 upon which to admit or deny the remaining allegations in ¶31 and therefore deny the same.  
4

5 **VIII - DAMAGES**

6 32. See corresponding answers.

7 33. Denied.

8 34. Denied.

9 35. Denied.  
10

11 **VIII - PHYSICIAN-PATIENT PRIVILEGE**

12 36. See corresponding answers.

13 37. Defendants agree to follow relevant Washington law with regard to waiver  
14 of physician-patient privilege and the recovery of Plaintiff's medical records. Defendant  
15 does not agree to abide by any additional obligations asserted in Plaintiff's Complaint.  
16

17 **IX - PRAYER FOR RELIEF**

18 No response required.

19 **AFFIRMATIVE DEFENSES**

20 1. Plaintiff's claims are barred because they are not properly pursued under  
21 RCW 7.70.

22 2. Plaintiff's claims are barred by RCW 7.70.150.

23 3. Plaintiff's claims are barred by RCW 7.70.100.  
24

25 **ANSWER TO COMPLAINT FOR DAMAGES AND**  
26 **COUNTERCLAIM - 5**

JOHNSON, GRAFFE,  
KEY, MONIZ & WICK, LLP  
ATTORNEYS AND COUNSELORS AT LAW  
925 FOURTH AVENUE, SUITE 2300  
SEATTLE, WA 98104  
PHONE (206) 223-4770  
FACSIMILE (206) 386-7344

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

4. Plaintiff's damages, if any, are attributable to her comparative fault.

5. If the plaintiff has sustained any damages or injuries, this defendant is not liable because they arose solely as a result of the failure of the plaintiff to mitigate her damages and injuries and protect herself from avoidable consequences.

6. Defendant is not responsible for any alleged injuries or damages alleged to be caused by or contributed to by the plaintiff, other defendants, or any third party that is not a party to this lawsuit, to whom liability or damages, if any, must be allocated by the Court or trier-of-fact.

**COUNTERCLAIM**

Further, defendant, Robert Johnson, alleges the following counter claims:

1. **Assault.** On September 18, 2005, the plaintiff caused defendant, Robert Johnson, to suffer apprehension of imminent harmful and offensive contact for which he is entitled to recover.

2. **Battery.** On September 18, 2005, the plaintiff battered defendant, Robert Johnson, when she intentionally had unpermitted contact with his person. Plaintiff's battery of Mr. Johnson includes, but is not limited to, repeatedly biting him. Defendant is entitled to recover for injury resulting from the plaintiff's battery.

3. **Intentional infliction of emotional distress.** On September 18, 2005, the plaintiff refused to submit to infectious disease testing after repeatedly biting defendant

1 Robert Johnson. This conduct was extreme and outrageous and caused severe emotional  
2 distress to Mr. Johnson for which he is entitled to recover.

3  
4 4. **Negligent infliction of emotional distress.** Plaintiff acted negligently in  
5 failing to submit to infectious disease testing after repeatedly biting defendant Robert  
6 Johnson on September 18, 2005. This conduct caused severe emotional distress to Mr.  
7 Johnson for which he is entitled to recover.

8 Defendants PeaceHealth and Robert Johnson reserve the right to amend this answer  
9 to include additional affirmative defenses, counterclaims, cross-claims and/or third party  
10 claims as they become known in discovery.  
11

12  
13 **WHEREFORE**, having fully answered plaintiff's Complaint for Damages on file  
14 herein, defendants PeaceHealth and Robert Johnson pray that Plaintiff's claims be  
15 dismissed, with prejudice, and that it be awarded costs, attorney's fees, and such further  
16 relief as is equitable.  
17

18 **DATED: October 29, 2007, at Seattle, Washington.**

19 I certify under penalty of perjury  
20 under the laws of the State of  
21 Washington that I faxed, mailed  
22 and/or delivered via messenger to  
23 all counsel of record a copy of  
24 the document on which this  
25 certificate is affixed.

26 Signed on 10-30-07  
Susan Costley

**JOHNSON, GRAFFE,  
KEY, MONIZ & WICK, LLP**

By   
Rando B. Wick, WSBA #20101  
Kim M. Holmes, WSBA #36136  
Attorneys for Defendant PeaceHealth  
dba St. Joseph Hospital

JOHNSON, GRAFFE,  
KEY, MONIZ & WICK, LLP  
ATTORNEYS AND COUNSELORS AT LAW  
925 FOURTH AVENUE, SUITE 2300  
SEATTLE, WA 98104  
PHONE (206) 223-4770  
FACSIMILE (206) 386-7344

**ANSWER TO COMPLAINT FOR DAMAGES AND  
COUNTERCLAIM - 7**

## Appendix 2

### Brief of Appellant Ross

RECEIVED

NOV 19 2007

SHEPHERD ABBOTT CARTER

SCANNED

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

SUPERIOR COURT OF WASHINGTON IN AND FOR WHATCOM COUNTY

JENNIFER ROSE ROSS, an individual,,

Plaintiff,

v.

PEACEHEALTH d.b.a. ST. JOSEPH HOSPITAL, a Washington Public Benefit Corporation; and ROBERT JOHNSON and JANE DOE JOHNSON, husband and wife, and the marital community composed thereof; JEFFREY RIES and JANE DOE RIES, husband and wife, and the marital community composed thereof; JOHN DOE I-IV. and JANE DOE I-IV,

Defendants.

No. 07-2-02163-5

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT JFFERY RIES, M.D.

Defendants Jeffery Ries, M.D. and Jane Doe Ries hereby submit the following Answer and Affirmative Defenses to Plaintiff's Complaint for Damages.

I. ANSWER

Defendants Jeffrey Ries, M.D. and Jane Doe Ries hereby admit and deny the allegations contained in Plaintiffs' Complaint for damages as follows:

1. Pursuant to Paragraph 01, defendants admit jurisdiction and venue is proper in Whatcom County, Washington.
2. Pursuant to Paragraph 02, defendants incorporate by reference the answer to Paragraph 01.

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT JFFERY RIES, M.D. - 1

Fain Sheldon Anderson & VanDerhoef, PLLC  
701 Fifth Avenue, Suite 4650  
Seattle, WA 98104  
(206) 749-0094  
Fax: (206) 749-0194

COPY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

SUPERIOR COURT OF WASHINGTON IN AND FOR WHATCOM COUNTY

JENNIFER ROSE ROSS, an individual,, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 PEACEHEALTH d.b.a. ST. JOSEPH )  
 HOSPITAL, a Washington Public Benefit )  
 Corporation; and ROBERT JOHNSON and )  
 JANE DOE JOHNSON, husband and wife, and )  
 the marital community composed thereof; )  
 JEFFREY RIES and JANE DOE RIES, )  
 husband and wife, and the marital community )  
 composed thereof; JOHN DOE I-IV. and JANE )  
 DOE I-IV, )  
 )  
 Defendants. )

No. 07-2-02163-5

ANSWER AND AFFIRMATIVE  
DEFENSES OF DEFENDANT  
JEFFERY RIES, M.D.

Defendants Jeffery Ries, M.D. and Jane Doe Ries hereby submit the following Answer  
and Affirmative Defenses to Plaintiff's Complaint for Damages.

I. ANSWER

Defendants Jeffrey Ries, M.D. and Jane Doe Ries hereby admit and deny the allegations  
contained in Plaintiffs' Complaint for damages as follows:

1. Pursuant to Paragraph 01, defendants admit jurisdiction and venue is proper in  
Whatcom County, Washington.
2. Pursuant to Paragraph 02, defendants incorporate by reference the answer to  
Paragraph 01.

ANSWER AND AFFIRMATIVE DEFENSES  
OF DEFENDANT JEFFERY RIES, M.D. - 1

Fain Sheldon Anderson & VanDerhoef, PLLC  
701 Fifth Avenue, Suite 4650  
Seattle, WA 98104  
(206) 749-0094  
Fax: (206) 749-0194

1           3.       Pursuant to Paragraph 03, defendants lack sufficient information on which to form  
2 a belief as to the truth of the allegations, and therefore deny the same.

3           4.       Defendants admit Paragraph 04.

4           5.       Defendants lack sufficient information on which to form a belief as to the truth of  
5 the allegations contained in Paragraphs 05 and 06, and therefore deny the same.

6           6.       Defendants admit Paragraph 07.

7           7.       Pursuant to Paragraph 08, defendants admit that Dr. Ries is married and resides in  
8 Whatcom County, Washington. The remaining allegation contained in Paragraph 08 calls for a  
9 legal conclusion, which does not require an answer.

10          8.       Defendants lack sufficient information on which to form a belief as to the truth of  
11 the allegations contained in Paragraph 09, and therefore deny the same.

12          9.       Pursuant to Paragraph 10, defendants admit and deny the allegations contained in  
13 Paragraphs 01 through 09 as set forth above.

14          10.      Pursuant to Paragraph 11, defendants admit that Jennifer Ross was seen in the St.  
15 Joseph Hospital Emergency Department on September 18, 2005 for various physical and mental  
16 health issues including reported depression, suicidal ideation, and a head cold. Defendants lack  
17 sufficient information on which to form a belief as to the truth of the remaining allegations  
18 contained in Paragraph 11, and therefore deny the same.

19          11.      Defendants lack sufficient information on which to form a belief as to the truth of  
20 the allegations contained in Paragraph 12, and therefore deny the same.

21          12.      Defendants deny Paragraphs 13 and 14.

22          13.      Pursuant to Paragraph 15, defendants admit that the plaintiff was restrained on a  
23 gurney. Defendants lack sufficient information on which to form a belief as to the truth of the  
24 remaining allegations contained in Paragraph 15, and therefore deny the same.

25          14.      Defendants lack sufficient information on which to form a belief as to the truth of  
26 the allegations contained in Paragraph 16, and therefore deny the same.

ANSWER AND AFFIRMATIVE DEFENSES  
OF DEFENDANT JFFERY RIES, M.D. - 2

F:\CHA OPENROSS\PLEADINGS\ANSWER.DOC

Fain Sheldon Anderson & VanDerhoef, PLLC  
701 Fifth Avenue, Suite 4650  
Seattle, WA 98104  
(206) 749-0094  
Fax: (206) 749-0194

- 1           15.    Defendants deny all allegations contained in Paragraph 17.
- 2           16.    Defendants deny all allegations contained in Paragraph 18.
- 3           17.    Defendants lack sufficient information on which to form a belief as to the truth of  
4 the allegations contained in Paragraph 19, and therefore deny the same.
- 5           18.    Pursuant to Paragraph 20, defendants deny that plaintiff was assaulted by these  
6 answering defendants or that these answering defendants "instituted" any legal charges.  
7 Defendants lack sufficient information on which to form a belief as to the truth of the remaining  
8 allegations contained in Paragraph 20, and therefore deny the same.
- 9           19.    Defendants lack sufficient information on which to form a belief as to the truth of  
10 the allegations contained in Paragraphs 21 and 22, and therefore deny the same.
- 11          20.    Defendants deny Paragraph 23.
- 12          21.    Pursuant to Paragraph 24, defendants admit and deny the allegations contained in  
13 Paragraphs 01 through 23 as stated above.
- 14          22.    Defendants deny all allegations contained in Paragraph 25.
- 15          23.    Pursuant to Paragraph 26, defendants admit and deny the allegations contained in  
16 Paragraphs 01 through 25 as stated above.
- 17          24.    Defendants deny Paragraph 27.
- 18          25.    Pursuant to Paragraph 28, defendants admit and deny the allegations contained in  
19 Paragraph 01 through 27 as stated above.
- 20          26.    Defendants deny Paragraph 29.
- 21          27.    Pursuant to Paragraph 30, defendants admit and deny the allegations contained in  
22 Paragraphs 01 through 29 as stated above.
- 23          28.    Defendants deny Paragraph 31.
- 24          29.    Pursuant to Paragraph 32, defendants admit and deny the allegations contained in  
25 Paragraphs 01 through 31 as stated above.
- 26          30.    Defendants deny Paragraphs 33, 34, and 35.

**ANSWER AND AFFIRMATIVE DEFENSES  
OF DEFENDANT JFFERY RIES, M.D. - 3**

F:\CHA OPEN\ROSS\PLEADINGS\ANSWER.DOC

**Fain Sheldon Anderson & VanDerhoef, PLLC**  
701 Fifth Avenue, Suite 4650  
Seattle, WA 98104  
(206) 749-0094  
Fax: (206) 749-0194



1 damages must be apportioned among the parties and non-parties in conformance with  
2 Washington Law.

3 11. As discovery has just commenced, defendants reserve the right to add additional  
4 affirmative defenses as they are supported by the facts as they are developed.

5 Having answered plaintiff's complaint for damages by denying all allegations not  
6 expressly admitted herein, these defendants pray for dismissal of plaintiff's complaint with  
7 prejudice, for an award of all costs and attorneys fees, and for all the relief as may be just and  
8 equitable.

9 DATED this 14 day of November, 2007.

10 Fain Sheldon Anderson & VanDerhoef, PLLC

11  
12 By 

13 Christopher H. Anderson, WSBA # 19811  
14 James C. Parks, Jr. WSBA # 39149

15 Attorneys for Defendant  
16 Jeffery Ries, M.D.

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
ANSWER AND AFFIRMATIVE DEFENSES  
OF DEFENDANT JFFERY RIES, M.D. - 5

Fain Sheldon Anderson & VanDerhoef, PLLC  
701 Fifth Avenue, Suite 4650  
Seattle, WA 98104  
(206) 749-0094  
Fax: (206) 749-0194

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

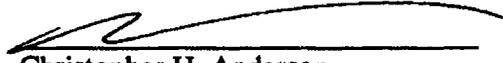
**DECLARATION**

I, Christopher H. Anderson, declare as follows:

- (1) I represent defendant Jeffrey Ries, M.D., in this action;
- (2) I have shown and provided Dr. Ries a copy of the provisions of the law relating to voluntary arbitration and;
- (3) Dr. Ries has elected not to submit this dispute to arbitration under this law.

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 14 day of November, 2007.

  
Christopher H. Anderson  
WSBA #19811

## Appendix 3

### Brief of Appellant Ross



- the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;
- (b) Appropriate limits on the amount or manner of compensation of mediators;
  - (c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;
  - (d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;
  - (e) The number of days following the selection of a mediator within which a mediation conference must be held;
  - (f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and
  - (g) Any other matters deemed necessary by the court.

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

(4) The mandatory mediation requirement of subsection (1) of this section does not apply to an action subject to mandatory arbitration under chapter 7.06 RCW or to an action in which the parties have agreed, subsequent to the filing of the claim, to submit the claim to arbitration under chapter 7.04A or 7.05 (sections 302 through 313 of this act) RCW.

(5) The implementation also contemplates the adoption of a rule by the superior court for procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

## Appendix 4

### Brief of Appellant Ross

## APPENDIX

### RCW 7.70.100. Mandatory mediation of health care claims--Procedures

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. The notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW 7.70.020(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW 4.96.020(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial except as provided in subsection (6) of this section.

(4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The implementation contemplates the adoption of rules by the supreme court which will require mandatory mediation without exception unless subsection (6) of this section applies. The rules on mandatory mediation shall address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

- (b) Appropriate limits on the amount or manner of compensation of mediators;
  - (c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;
  - (d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;
  - (e) The number of days following the selection of a mediator within which a mediation conference must be held;
  - (f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and
  - (g) Any other matters deemed necessary by the court.
- (5) Mediators shall not impose discovery schedules upon the parties.
- (6) The mandatory mediation requirement of subsection (4) of this section does not apply to an action subject to mandatory arbitration under chapter 7.06 RCW or to an action in which the parties have agreed, subsequent to the arising of the claim, to submit the claim to arbitration under chapter 7.04A or 7.70A RCW.
- (7) The implementation also contemplates the adoption of a rule by the supreme court for procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

CREDIT(S)

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

## Appendix 5

### Brief of Appellant Ross

## **APPENDIX**

### **LAWS OF 2006, CH. 8, SEC. 1**

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants. It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums. Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes. It is also the legislature's intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. Finally, it is the intent of the legislature to provide the insurance commissioner with the tools and information necessary to regulate medical malpractice insurance rates and policies so that they are fair to both the insurers and the insured.

## Appendix 6

### Brief of Appellant Ross

## APPENDIX

### CIVIL RULE 53.4 PROCEDURES FOR MANDATORY MEDIATION OF HEALTH CARE CLAIMS

**(a) Scope of Rule.** This rule governs the procedure in the superior court in all claims subject to mandatory mediation under RCW 7.70.100 and .110.

**(b) Voluntary Mediation.** The parties may establish a procedure for mediation that differs from this rule provided the procedure and the selection of the mediator are agreed to in writing and signed by all parties.

**(c) Deadlines.** Except as otherwise ordered by the court for good cause shown, mediation under RCW 7.70.100 shall be commenced no later than 30 days before the trial date. Mediation under RCW 7.70.110 shall be commenced no later than 90 days after the selection of the mediator.

**(d) Waiver of Mediation.** Upon petition of any party that mediation is not appropriate, the court shall order or the mediator may determine that the claim is not appropriate for mediation.

**(e) Appointment of Mediator.** Subject to the conditions in this section, the court shall designate a mediator from the register described in section (g) upon the request of any party. Except upon stipulation in writing signed by all parties, the court shall not make this designation if the parties have agreed in writing to the selection of a mediator as contemplated by section (b) or have obtained a waiver of mediation under section (d). Except upon stipulation in writing signed by all parties, the court shall designate a mediator no sooner than 180 days before trial, or for mediation requested under RCW 7.70.100, no sooner than 180 days after the good faith request for mediation.

**(f) Mediation Procedure.** Promptly upon the designation of a mediator, the plaintiff shall arrange a conference call among the mediator and counsel for each party to discuss the procedural aspects of the mediation. Except to the extent the mediator directs otherwise, the following procedures shall apply:

(1) *Copy of Pleadings.* Upon selection of a mediator, the parties shall provide the mediator with copies of the relevant pleadings.

(2) *Notice of Time and Place.* The mediator shall fix a time and place for the mediation conference, and all subsequent sessions, that is reasonably convenient for the parties and shall give them at least 14 days' written notice of the initial conference. In giving notice the mediator may use a form provided by the court.

(3) *Memoranda.* Each party shall provide the mediator with a confidential memorandum presenting in concise form its contentions relative to both liability and damages. This memorandum shall not exceed 10 pages in length. A copy of the memorandum shall be delivered to the mediator at least seven days before the mediation conference. Any party may deliver a copy of his or her memorandum to any other party. In addition, each party shall deliver to the mediator a confidential statement of its current offer or demand. Any party may deliver a copy of his or her statement to any other party.

(4) *Attendance and Preparation Required.* The attorney who is primarily responsible for each party's case shall personally attend the mediation conference and any subsequent sessions of that conference. The attorney for each party shall come prepared to discuss the following matters in detail and in good faith:

(A) All liability issues.

(B) All damage issues.

(C) The position of his or her client relative to settlement.

(5) *Attendance of Parties and Insurers.* For purposes of this section, "insurer" shall include "self insurer." In addition to counsel, all parties and insurers shall attend the mediation in person. In the event a party defendant has provided his or her insurer with full authority to settle, such party's attendance is optional. The mediator may also, at his or her discretion, but only in exceptional cases, excuse a party or insurer from personally attending the mediation conference. Those excused from personal attendance by the mediator shall be on call by telephone during the conference.

(6) *Failure to Attend.* Willful or negligent failure to attend the mediation conference, or to comply with this rule or with the directions of the mediator, shall be reported to the court by the mediator in writing and may result in the imposition of such sanctions as the court may find appropriate.

(7) *Proceedings Privileged.* All proceedings of the mediation conference, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and not reported, recorded, placed in evidence, used for impeachment, made known to the trial court or jury, or construed for any purpose as an admission. No party shall be bound by anything done or said at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement.

(8) *Mediator's Suggestions.* The mediator shall have no obligation to make any written comments or recommendations, but may in his or her discretion provide the parties or their counsel with a confidential written settlement recommendation memorandum, but only if all parties agree. No copy of any such memorandum shall be filed with the clerk

or made available, in whole or in part, directly or indirectly, either to the court or to the jury.

(9) *Certification of Mediation.* Not more than 10 days after the mediation concludes or the mediator determines that the claim is not appropriate for mediation, the parties shall certify in writing to the court the manner of mediation, if any, and compliance with the provisions of this rule.

**(g) Register of Volunteer Mediators.**

(1) *Court to Maintain Register.* The court shall establish and maintain a register of qualified attorneys who have volunteered to serve as mediators. The attorneys so registered shall be selected by the court from lists of qualified attorneys at law who are current members in good standing of the Washington State Bar Association.

(2) *Qualifications.* In order to qualify as a mediator, an attorney shall:

(A) Have been a member of the Washington State Bar Association for at least five years; and

(B) Have experience or expertise related to litigating actions arising from injury occurring as a result of health care; and

(C) Have 6 hours of CLE mediator training and acted as a mediator in at least 10 cases, three of which were medical malpractice; or

(D) Be a retired judge having experience or expertise related to actions arising from injury occurring as a result of health care and satisfy the requirements of (2)(C) herein.

CREDIT(S)

[Adopted effective March 11, 1997; amended effective September 1, 2007.]

## Appendix 7

### Brief of Appellant Ross

## **APPENDIX**

### **RCW 7.70.110. Mandatory mediation of health care claims--Tolling statute of limitations**

The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

CREDIT(S)

[1996 c 270 § 1; 1993 c 492 § 420.]

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

JENNIFER ROSE ROSS,  
an individual,

Plaintiff/Appellant,

vs.

PEACEHEALTH d.b.a. ST. JOSEPH  
HOSPITAL, a Washington Public  
Benefit Corporation; and ROBERT  
JOHNSON and JANE DOE  
JOHNSON, husband and wife, and  
the marital community composed  
thereof; JEFFREY RIES and JANE  
DOE RIES, husband and wife, and  
the marital community composed  
thereof; JOHN DOE I – IV, and  
JANE DOE I - IV,

Defendants/Respondent.

**Case No. 63973-1-I**

**Whatcom County  
Superior Court  
Case No. 07-2-02163-5**

**Certificate of Service**

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 DEC - 1 AM 10:44

ORIGINAL

CERTIFICATE OF SERVICE  
Page 1 of 2.

**SHEPHERD ♦ ABBOTT ♦ ALEXANDER**

ATTORNEYS AT LAW  
1616 CORNWALL AVENUE, SUITE 100  
BELLINGHAM, WASHINGTON 98225  
TELEPHONE: (360) 733-3773 ♦ FAX: (360) 647-9060  
www.saalawoffice.com

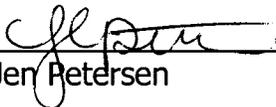
I, Jen Petersen, certify that on November 30, 2009, I caused to be served a copy of the following document:

**Appellant's Brief;** and a copy of this **Certificate of Service** in the above matter, on the following persons, at the following address, in the manner described:

Kim Holmes, Esq.	<input checked="" type="checkbox"/> U.S. Mail
Rando B. Wick, Esq.	<input type="checkbox"/> FedEx Mail
Johnson, Graffe, Keay, Moniz & Wick, LLP	<input type="checkbox"/> Fax
Attorneys and Counselors at Law	<input type="checkbox"/> Messenger
925 Fourth Avenue, Suite 2300	<input type="checkbox"/> E-Mail
Seattle, WA 98104	

Christopher H. Anderson, Esq.	<input checked="" type="checkbox"/> U.S. Mail
Fain Sheldon Anderson & VanDerhoef, PLLC	<input type="checkbox"/> FedEx Mail
701 Fifth Avenue, Suite 4650	<input type="checkbox"/> Fax
Seattle, WA 98104	<input type="checkbox"/> Messenger
	<input type="checkbox"/> E-Mail

DATED this 30 day of November 2009.

  
\_\_\_\_\_  
Jen Petersen