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COURT OF APPEALS, DIV I  
STATE OF WASHINGTON  
2011 OCT 26 PM 4:30

Court of Appeals No. 66944-3-1

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION I

SHARON SUMERA, RESPONDENT

v.

GREGORY BEASLEY and JANE DOE BEASELY, APPELLANTS

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BRIEF OF RESPONDENT

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**ORIGINAL**

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## I. INTRODUCTION

Sharon Sumera, Respondent herein, offers this Response Brief in opposition to Appellant's Opening Brief.

## II. STATEMENT OF FACTS

For the purposes of this Appeal, Appellants have adequately laid out the facts before this Court. The facts are effectively not in dispute with respect to what procedurally has occurred. It is undisputed that Respondent's Complaint was timely filed if RCW 7.70.100 extended the time period within which she was allowed to bring the claim.

Accordingly, the only issue before this Court is the impact of the Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010) decision on RCW 7.70.100.

## III. ARGUMENT

### A. The Court in Waples did not hold RCW 7.70.100 in its entirety to be unconstitutional.

Appellants' assert that the Court in Waples expressly or impliedly rendered RCW 7.70.100 in its entirety unconstitutional. However, the Supreme Court's decision in Waples doesn't hold RCW 7.70.100 to be unconstitutional. Rather, the Supreme Court in Waples held that:

“The Notice requirement of RCW 7.70.100(1) conflicts with the commencement requirements of CR 3(a) and is unconstitutional because it conflicts with the judiciary’s power to set Court procedures.” Waples, at p. 161

As clearly can be seen, the Supreme Court does not hold that RCW 7.70.100(1) is unconstitutional – the decision holds that the “requirement” of the pre-filing notice under this statute is unconstitutional. RCW 7.70.100(1) expressly states in part the following:

.....If the notice is served within ninety days of the expiration of the applicable statute of limitations, the commencement of the action must be extended ninety days from the date that the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.  
RCW 7.70.100(1)

**B. Appellants’ reliance on the Lunsford, Moody and Moen decisions is misplaced.**

Appellants’ have cited a number of decisions in their motion that relate to a Court’s interpretation of a statute and its retroactive application. Essentially, Appellants’ argue that when the Supreme Court interprets a statute, the interpretation relates back to the statute’s enactment. Lunsford v. Saberhagen Holding, Inc., 166 Wn.2d 264, 208 P.3d 1092 (2009); State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) The Moen decision did not involve a constitutionality issue. Rather, the case involved construction of a statute and the retroactive application of the Court’s construction. In the

Moen case a criminal statute that addressed the timeliness of entry of a restitution order was at issue. A prior decision interpreted the statute at issue as requiring entry of the order within the sixty days enumerated in the Statute – and the Defendant in Moen argued that the rule should apply to him. The State argued that the Court’s prior decision should only apply prospectively – the Moen Court disagreed and applied the rule retroactively.

In Lunsford v. Saberhagen Holding, Inc., 166 Wn.2d 264, 208 P.3d 1092 (2009) the Court considered whether strict liability on an asbestos claim would apply retroactively. The trial court dismissed the claim and the Court of Appeals reversed. The Lunsford Court upheld the reversal and applied the strict liability rule retroactively. Lunsford at p. 285-286.

The Supreme Court in Waples v. Yi, 169 Wn2d 152, 234 P.3d 187 (2010) was not interpreting a statute – the Waples Court held the pre-filing Notice requirement of the statute was unconstitutional. Waples at p.161. The “rule” of Waples is that a litigant is not “required” to file a Notice of Claim prior to filing suit. Waples doesn’t mention and/or discuss the extension portion of the statute.

Appellants also cite Moody v. United States, 112 Wn.2d 690, 773 P.2d 67 (1989) for the proposition that when a statute is held unconstitutional, the court should consider the issues in light of the law as

it existed prior to the statute which was held to be unconstitutional taking effect. In Moody, the Court was confronted with a prior ruling that RCW 4.56.250(2) had been held unconstitutional. However, as indicated above, the Waples Court didn't hold that all of RCW 7.70.100 was unconstitutional only the portion of the statute that required a pre-filing notice.

**C. Appellants' Argument that the Waples v. Yi decision impliedly invalidates the extension language is not supported.**

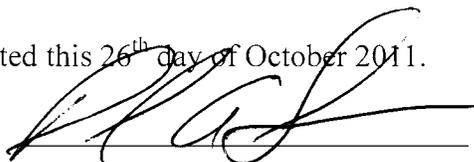
Finally, Appellants' argue in their motion that it would be absurd to suggest that the extension language in the statute survives the Court's holding in Waples. Appellants' argument is essentially that you cannot have a statute that gratuitously extends a period of limitations. However, we need only to look to the same statutory scheme that is at issue to find such an extension. Under RCW 7.70.110 (See Appendix B) a good faith request for Mediation extends a period of limitations for one year on a claim. A party is not "required" to file such a request for mediation but if a party does so, the period of limitations is extended.

Similarly, after Waples, a party is not required to file a pre-filing Notice of Claim, but if a party does so, they extend the period of limitations.

#### IV CONCLUSION

For the foregoing reasons, the trial Court's decision should be affirmed.

Respectfully submitted this 26<sup>th</sup> day of October 2011.

A handwritten signature in black ink, appearing to read 'Paul A. Spencer', written over a horizontal line.

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Oseran, Hahn, Spring, Straight & Watts, P.S.  
Attorneys for Respondents

## APPENDIX

1. RCW 7.70.100
2. RCW 7.70.110



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[7.70.090](#) << [7.70.100](#) >> [7.70.110](#)

## 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;

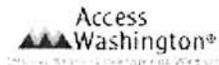
(b) Appropriate limits on the amount or manner of compensation of mediators;

(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.

[2007 c 119 § 1; 2006 c 8 § 314; 1993 c 492 § 419.]

### Notes:

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

**Medical malpractice review -- 1993 c 492:** "(1) The administrator for the courts shall coordinate a collaborative effort to develop a voluntary system for review of medical malpractice claims by health services experts prior to the filing of a cause of action under chapter 7.70 RCW.

(2) The system shall have at least the following components:

(a) Review would be initiated, by agreement of the injured claimant and the health care provider, at the point at which a medical malpractice claim is submitted to a malpractice insurer or a self-insured health care provider.

(b) By agreement of the parties, an expert would be chosen from a pool of health services experts who have agreed to review claims on a voluntary basis.

(c) The mutually agreed upon expert would conduct an impartial review of the claim and provide his or her opinion to the parties.

(d) A pool of available experts would be established and maintained for each category of health care practitioner by the corresponding practitioner association, such as the Washington state medical association and the Washington state nurses association.

(3) The administrator for the courts shall seek to involve at least the following organizations in a collaborative effort to develop the informal review system described in subsection (2) of this section:

(a) The Washington defense trial lawyers association;

(b) The Washington state trial lawyers association;

(c) The Washington state medical association;

(d) The Washington state nurses association and other employee organizations representing nurses;

(e) The Washington state hospital association;

(f) The Washington state physicians insurance exchange and association;

(g) The Washington casualty company;

- (h) The doctor's agency;
- (i) Group health cooperative of Puget Sound;
- (j) The University of Washington;
- (k) Washington osteopathic medical association;
- (l) Washington state chiropractic association;
- (m) Washington association of naturopathic physicians; and
- (n) The department of health.

(4) On or before January 1, 1994, the administrator for the courts shall provide a report on the status of the development of the system described in this section to the governor and the appropriate committees of the senate and the house of representatives." [1993 c 492 § 418.]

**Findings -- Intent -- 1993 c 492:** See notes following RCW [43.72.005](#).

**Short title -- Severability -- Savings -- Captions not law -- Reservation of legislative power -- Effective dates -- 1993 c 492:** See RCW [43.72.910](#) through [43.72.915](#).



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[7.70.100](#) << [7.70.110](#) >> [7.70.120](#)

## 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.

[1996 c 270 § 1; 1993 c 492 § 420.]

#### Notes:

**Findings -- Intent -- 1993 c 492:** See notes following RCW [43.72.005](#).

**Short title -- Severability -- Savings -- Captions not law -- Reservation of legislative power -- Effective dates -- 1993 c 492:** See RCW [43.72.910](#) through [43.72.915](#).



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**COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION I**

SHARON SUMERA,  
  
Respondent,  
  
vs.  
  
GREGORY BEASELY and JANE  
DOE BEASELY, et al.,  
  
Petitioners.

NO. 66944-3-I  
  
CERTIFICATE OF SERVICE  
BRIEF OF RESPONDENT'S

CHERYL COOK, states and declares under the laws of the State of Washington that the following is true:

1. I am over the age of eighteen years and an employee of Oseran, Hahn, Spring, Straight & Watts, P.S..
2. On this 26<sup>th</sup> day of October 2011 I caused the original of the Brief of Respondent's and this Certificate of Service to be filed with the Washington State Court of Appeals, Division I in Seattle, and a copy of these pleadings to be forwarded to Gary Eliassen and Peter Klipstein at:

Gary Eliassen and Peter Klipstein  
Merrick, Hofstedt & Lindsey, P.S.  
3101 Western Avenue, Suite 200  
Seattle, Washington 98121

Dated at Bellevue Washington this 26<sup>th</sup> day of October 2011.

  
Cheryl Cook