

70491-5

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NO. 70491-5-I

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

SARAH A. EVISON,

Appellant,

v.

DAVID VOSSLER, M.D., VALLEY MEDICAL CENTER – KING
COUNTY HOSPITAL DISTRICT NO. 1,

Respondents.


 STATE OF WASHINGTON
 COURT OF APPEALS
 DIVISION I
 2011 SEP 23 11:10:54

BRIEF OF RESPONDENTS

Bruce W. Megard, Jr., WSBA #27560
 Carol Sue Janes, WSBA #16557
 Michael F. Madden, WSBA #8747
 Bennett Bigelow & Leedom, P.S.
 601 Union Street, Suite 1500
 Seattle, WA 98101
 (206) 622-5511

Attorneys for Defendants David
 Vossler, MD and Valley Medical
 Center – King County Hospital
 District No. 1

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This medical negligence lawsuit was commenced on March 9, 2012. At that time, RCW 7.70.100(1) required plaintiffs to give at least 90 days notice of their intent to sue health care providers for negligence. In *McDevitt v. Harborview Med. Ctr.*, __ Wn.2d __, 291 P.3d 876 (2012), decided on December 27, 2012, the Supreme Court held that notwithstanding its decision in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), RCW 7.70.100(1) remained valid and effective as applied to claims against governmental entities such as the defendant/respondents in this case. Plaintiff/Appellant failed to comply with this statute. Accordingly, the superior court correctly dismissed the case based on the law in effect at the time of decision.

After the superior court ruled, the Supreme Court granted partial reconsideration in *McDevitt*, “limited to the issue of whether the decision should be given only prospective application.” Appendix, Attachment A (*McDevitt v. Harborview Med. Ctr.*, No. 85367-3, Order Granting Motion for Reconsideration, dated June 13, 2013). If the Supreme Court on reconsideration adheres to its original decision, then the superior court’s order of dismissal in this case must be affirmed. If the Supreme Court limits application of *McDevitt* in some fashion, the outcome may be different. It is reasonable to think that the issue will be decided before

this case is ready for argument, although the Court may elect to call for additional briefing depending on the precise nature of the Supreme Court's ruling.

Regardless of the Supreme Court's ruling, the record provides a clear alternative ground for affirming, which was fully briefed and presented to the trial court: specifically, Ms. Evison's failure to produce the necessary expert testimony necessary in support of her claims. Accordingly, respondents Valley Medical Center - King County Public Hospital District No. 1¹ and David Vossler, M.D. (collectively, "Valley Medical Center") ask the Court to affirm the summary judgment dismissal with prejudice of appellant Sarah Evison's action.

II. ISSUES PRESENTED

Ms. Evison failed to provide pre-suit notice of her action against Valley Medical Center, as required by former RCW 7.70.100(1), and specifically applicable to public entities such as Valley Medical Center under former RCW 4.96.020. The state Supreme Court's 2012 *McDevitt* decision, which presented the same circumstances under the same effective laws, concluded that the failure to provide the mandatory pre-suit notice was fatal to the plaintiff's claim. The superior court, relying on *McDevitt*, granted summary judgment dismissal of Ms. Evison's claims.

¹ The Hospital District does business as Valley Medical Center.

In light of the pending partial reconsideration in *McDevitt* regarding whether it should be given only prospective application:

1. Should this Court affirm the summary judgment dismissal of Valley Medical Center on the independent basis, also briefed on summary judgment, that Ms. Evison plainly failed to produce necessary expert testimony to support her claims?

2. Alternatively, should this Court affirm on the basis that the superior court appropriately relied on *McDevitt*?

3. Alternatively, should this Court stay this action pending resolution of the partial reconsideration in *McDevitt*?

III. STATEMENT OF THE CASE

A. Factual History.

Ms. Evison began this medical malpractice action against Valley Medical Center based on the alleged negligence of Dr. David Vossler, a physician employed by King County Public Hospital District No. 1 (the Hospital District). Ms. Evison claimed that Dr. Vossler failed to meet the standard of care regarding the management of Ms. Evison's prescription of the drug Lamictal, resulting in injury to her. *See* CP 3-7, 33-35. Ms. Evison also named as defendants GlaxoSmithKline, LLC, and DSM Pharmaceuticals, Inc., which manufacture Lamictal. *See* CP 2, 4, 30, 35.

The care in question terminated on March 20, 2009. On March 9, 2012, Ms. Evison submitted by personal delivery to Valley Medical Center a “Standard Tort Claim Form.” CP 251-55. On the *same day*, March 9, 2012, Ms. Evison filed the action in King County Superior Court. CP 1, 237. Ms. Evison then served her Summons and Complaint on the Hospital on May 11, 2012. CP 237, 241-49; CP 485-88. Ms. Evison at no time served a Notice of Intent to Sue or similar document, nor did she wait 60 days (as prescribed by RCW 4.96.020) or 90 days (as prescribed by former RCW 7.70.100(1)) after submitting her claim/notice before commencing suit. CP 238.

B. Procedural History.

The superior court dismissed Valley Medical Center on summary judgment. Over the course of the proceedings below, Valley Medical Center filed three separate summary judgment motions; the superior court granted the last one. In the first, filed prior to the Supreme Court’s decision in *McDevitt*, Valley Medical Center sought relief because of Ms. Evison’s failure to comply with RCW 7.70.100(1) before filing her action. CP 457-62. Valley Medical Center relied on the same authorities later relied upon in the *McDevitt* decision, including Art. 2, § 26 of the State Constitution. *Id.*; *McDevitt*, 291 P.3d at 877. The superior court denied

the motion (CP 79-81), but indicated at the hearing a willingness to revisit the issue if appropriate following the *McDevitt* decision. See CP 227-28.

Valley Medical Center's second summary judgment motion was based on a lack of necessary expert testimony. CP 84-116. Valley Medical Center filed the motion more than three months after serving discovery requests on Ms. Evison seeking identification of her experts, which had produced no substantive response. CP 85, 97, 111.

After *McDevitt* was decided, Valley Medical Center brought a third summary judgment motion, renewing the issue of failure to comply with RCW 7.70.100(1) and relying on *McDevitt*. CP 227-66. Valley Medical Center set this third motion for hearing on the same date—February 1, 2013—as the pending motion regarding lack of experts. CP 225. GlaxoSmithKline and DSM Pharmaceuticals also filed a summary judgment motion seeking dismissal based on the lack of experts, accompanied by the declaration of their expert, Alfred Arrigo Sadun, M.D., who had reviewed the evidence and concluded that “Lamictal did not cause Ms. Evison’s condition.” CP 159; CP 117-24. This motion was also set for February 1, 2013, resulting in three summary judgment motions set for hearing at the same day and time. CP 115.

Ms. Evison moved to continue the summary judgment motions under CR 56(f) (CP 267-82), ignoring the fact that CR 56(f) would have

no bearing on the issue of law raised by the motion relying on *McDevitt*² and, while noting some hoped-for future review of the case by some physicians, tacitly acknowledged the absence—ten months after filing her action and 3-1/2 years after the events at issue—of any existing expert support necessary to support the allegations. *See* CP 267-82. Ms. Evison filed no response or opposition to the motion regarding *McDevitt*. Both Valley Medical Center and GlaxoSmithKline/DSM Pharmaceuticals opposed the motion to continue, noting several reasons why expert support for Ms. Evison as to liability and causation were unlikely: first, Dr. Vossler had not prescribed the Lamictal, second, Dr. Vossler had testified in his deposition that he was “convinced” that the Lamictal had not caused Ms. Evison’s injuries and, third, in addition to Dr. Sadun, Ms. Evison’s own non-defendant treating physicians (Eugene May, MD, and C.J. Boes, MD) had also documented their opinions that the Lamictal was not the cause of the injuries. CP 312-13, 345-46, 352-55, 358-61; *see generally* CP 297-302; 305-18. The superior court, however, on January 29, 2013, without oral argument or written explanation,³ granted the motion to

² In the briefing on the first summary judgment motion regarding RCW 7.70.100(1), Ms. Evison had conceded that the motion “presents a legal question only.” CP 49.

³ The court’s sole explanation was its handwritten note on the order: “It is not sufficient to request that discovery be completed before the motions [re: lack of experts] be heard, however, as a practical matter, the Court has concluded that a continuance may be inevitable for the motion on expert evidence.” CP 429.

continue the hearings on the summary judgment motions regarding expert testimony until April 2013, while preserving the February 1, 2013, hearing date for Valley Medical Center's summary judgment motion that relied on *McDevitt*. CP 428-29.

Counsel for Ms. Evison did not appear at the summary judgment hearing on February 1, 2013. CP 489-93. The superior court rescheduled the hearing for February 11, 2013, and agreed to entertain a motion for costs. *Id.* Valley Medical Center's motion for costs addressed not only the failure to appear but also the failure to submit a response to the *McDevitt* summary judgment motion or even to respond to a communication from counsel for Valley Medical Center inquiring whether the issue might be resolved by stipulation. *Id.*

In Ms. Evison's opposition to the motion for costs, Ms. Evison then asserted without analysis that the pre-suit notice requirement was unconstitutional, an issue already resolved by *McDevitt*. *See* CP 436. Valley Medical Center moved to strike the non-responsive opposition. CP 494-99.

At the February 11, 2013 hearing, the superior court, relying on *McDevitt*, granted summary judgment dismissal of Valley Medical Center (CP 439-41), granted Valley Medical Center's motion to strike Ms.

Evison's improper response to the motion for costs (445-47), and granted Valley Medical Center's motion for costs, awarding \$250.00 (CP 442-44).

Prior to the February 11, 2013, hearing, the superior court had dismissed defendants DSM Pharmaceuticals following stipulation. CP 430-33. After the February 11, 2013, hearing, the superior court dismissed GlaxoSmithKline, also following stipulation. CP 448-49. Neither of these two parties are parties to this appeal. Ms. Evison filed her notice of appeal on June 11, 2013. CP 450-54.

Ms. Evison's brief on appeal, filed August 23, 2013, made no reference to the Supreme Court's June 13, 2013 partial reconsideration order in *McDevitt*.

IV. ARGUMENT

The 2012 *McDevitt* decision resolved, in favor of Valley Medical Center, the issue Ms. Evison raises here. However, in light of the Supreme Court's recent grant of partial reconsideration of its *McDevitt* decision, "limited to the issue of whether the decision should be given only prospective application" (Appendix, Attachment A), Valley Medical Center asks this Court to affirm—in reliance on its authority to affirm on any basis supported by the record—due to Ms. Evison's documented failure to produce the necessary expert testimony in support of her claims. Alternatively, the Court can affirm in reliance on controlling law and the

existing *McDevitt* decision, which remains in effect. As another alternative, if the *McDevitt* decision on partial reconsideration has not been published at the time of argument in this appeal, the Court can choose to stay resolution of this matter pending publication of the amended *McDevitt* decision. Each of these options is addressed below.

A. The standard of review is de novo.

Valley Medical Center agrees that the standard of review on a summary judgment motion is de novo, and “the appellate court performs the same inquiry as the trial court.” *McDevitt*, 291 P.2d at 878.

B. This Court can and should affirm the dismissal of Valley Medical Center based on the lack of experts.

This Court can and should affirm the superior court’s dismissal of Valley Medical Center on the basis of Valley Medical Center’s other summary judgment motion, which relied on the lack of expert testimony. The prevailing party may argue any grounds in support of the court’s order that are supported by the record. *E.g.*, *McGowan v. State*, 148 Wn.2d 278, 288, 60 P.3d 67 (2002). The superior court’s ruling, granting a brief continuance of this motion, does not preclude this Court from using any evidence in the record in support of the superior court’s dismissal. *Id.* (cross-appeal as to superior court ruling on alternative grounds not necessary where the prevailing party seeks no further affirmative relief);

see also, e.g., *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134-35, 847 P.2d 428 (1993) (affirming grant of summary judgment on grounds not relied upon by trial court).

The undisputed evidence here established that Ms. Evison had no expert testimony in support of her allegations, and that her own physicians rejected the claim that the Lamictal caused her injury. In order to establish negligence, a medical malpractice plaintiff must prove that a health care provider violated the applicable standard of care, which RCW 7.70 defines as: “That degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances.” Proof of the violation requires the plaintiff to produce expert medical testimony to establish: (1) what the standard of care is and (2) that defendants breached the standard. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 227-30, 770 P.2d 182 (1989); *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (“[m]edical facts in particular must be proven by expert testimony unless they are ‘observable by [a layperson]’s senses and describable without medical training”); *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637 (1997); *Swanson v. Brigham*, 18 Wn. App. 647, 651, 571 P.2d 217 (1977). Summary judgment is appropriate in a medical negligence action where a plaintiff fails to

produce “an affidavit from a qualified⁴ expert witness” in response to the motion:

Thus, a defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lack competent expert testimony. *Young v. Key Pharmaceuticals Inc.*, 112 Wn.2d [at 226-27]. The burden then shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action. *Young* at 226-27. Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. CR 56(e); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288, *rev. denied*, 114 Wn.2d 1023, 792 P.2d 535 (1990); *Vant Leven v. Kretzler*, 56 Wn. App. 349, 356, 783 P.2d 611 (1989).

Guile v. Ballard Community Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993).

In addition to establishing a violation of the standard of care, a medical malpractice plaintiff must also establish proximate cause. RCW 7.70.040(2). Failing this, summary judgment for defendants is required. *See Pelton v. Tri-State Mem. Hosp.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992). This requirement aligns with the requirement in all personal injury actions that a plaintiff must prove the causal relationship between the acts

⁴ To be qualified to testify regarding standard of care and breach of the standard of care in a medical negligence action, the expert must be a professional equal to the defendant. *McKee v. American Home Products Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). “The duty of physicians must be set forth by a physician, the duty of structural engineers by a structural engineer and that of any expert must be proven by one practicing in the same field by one’s peer.” *Id.* at 706-07. Absent special exceptions, a medical negligence plaintiff must establish the standard of professional practice at the time of the alleged injury, and a violation of that standard, through the testimony of the professional equals of the defendant physician. *Swanson v. Brigham*, 18 Wn. App. 647, 571 P.2d 217 (1977).

of the defendant and the injuries for which relief is sought. *Moyer v. Clark*, 75 Wn.2d 800, 804, 454 P.2d 374 (1969); *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); see generally Dobbs' *Law of Torts*, § 198 (2013) (the proximate causal link is the limitation that courts have placed upon an actor's responsibility for the consequences of his conduct).

To establish this link in a medical malpractice action, a plaintiff must present expert medical testimony to show that the plaintiff's injuries were proximately caused by a defendant's alleged negligence. RCW 7.70.040(2); *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995) (citations omitted); *Harris*, 99 Wn.2d at 449. When faced with a technical causation issue, it is unreasonable to rely on lay opinion. *Id.* Rather, the plaintiff must prove the element of proximate cause by the testimony of a medical expert. *Pelton*, 66 Wn. App. at 355; see also *Guile*, 70 Wn. App. at 25. As the Court found in *O'Donoghue v. Riggs*:

In a case such as this, medical testimony must be relied upon to establish the causal relationship between the liability-producing situation and the claimed physical disability resulting therefrom. The evidence will be deemed insufficient to support the jury's verdict, if it can be said that considering the whole of the medical testimony the jury must resort to speculation or conjecture in determining such causal relationship. In many recent decisions of this court we have held that such determination is deemed based on speculation and conjecture if the medical testimony does not go beyond the expression of an opinion that the physical disability "might have" or "possibly did" result from the hypothesized cause. To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act

complained of “probably” or “more likely than not” caused the subsequent disability.

73 Wn.2d 814, 824, 440 P.2d 823 (1968).

At the time of the summary judgment ruling, Ms. Evison, more than 3-1/2 years after her final treatment by Dr. Evison, more than 10 months after commencing her action, and more than 4 months after discovery requesting the identity of her experts, failed to identify any expert support for her claims of liability and causation. CP 84-95, 96-114, 115-16. The evidence further demonstrated that four physicians—Dr. Vossler, Dr. Sadun, Dr. May, and Dr. Boes—had all given undisputed opinions contrary to Ms. Evison’s allegations of liability and causation. CP 290-361. Ms. Evison’s counsel at no time disagreed with the proposition that he had had ample time to seek and obtain expert testimony.

CR 56(f) does not permit a plaintiff to delay dismissal of claims, and impose the burden of further legal fees and costs, solely due to a failure to diligently pursue any of the expert testimony needed to pursue her action. As the court stated in *Turner v. Kohler, M.D.*, 54 Wn. App. 688, 693-94, 775 P.2d 474 (1989): “Under Washington law, a CR 56(f) continuance is not a ‘free pass’ for a litigant that has sat back and done nothing until it is too late.” Ms. Evison’s request for continuance was based on nothing other than her counsel’s observation that the deadline for

primary witness disclosure had not yet passed. Ms. Evison cited no authority that precluded summary judgment resolution of an action solely on the basis that it preceded the case schedule's stated *last possible* date for disclosure of primary witnesses. To the contrary, the court in *Briggs v. Nova Services*, 135 Wn. App. 955, 962, 147 P.3d 616 (2006), rejected a very similar argument. The nonmoving party in *Briggs* asserted that the court should grant the continuance to give them the "opportunity at least to determine what's out there" and further argued that "The discovery cutoff date isn't even until mid September and we have ample opportunity to flush out the information that we believe we may find, will find, if we have the opportunity to make that effort." *Id.* at 961. The court rejected these arguments as insufficient to support a continuance. *Id.* at 962.

Below, Ms. Evison cited the decision in *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990), ostensibly in support of a continuance until the case schedule deadline. The *Briggs* plaintiffs had also cited *Coggle* to support the argument that the discovery cutoff had not passed and that the plaintiffs hoped to find in the future evidence that would provide a basis to oppose the motion. The *Briggs* court upheld the dismissal, and specifically distinguished *Coggle*, as well as another similar decision, *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003), noting as follows:

The record does not show what specific evidence the [plaintiffs] would be able to locate or how the evidence would raise a material issue of fact. *Joy*, 116 Wn. App. at 299. The [plaintiffs] acknowledge the motion did not strictly fit in the CR 56(f) continuance requirements, but contend the court's primary consideration should have been justice considering the time remaining for discovery. *Joy*, 116 Wn. App. at 299; *Coggle*, 56 Wn. App. at 508. In both *Joy* and *Coggle* the plaintiffs obtained new counsel shortly before the summary judgment hearing. *Joy*, 116 Wn. App. at 299; *Coggle*, 56 Wn. App. at 508. Neither counsel had adequate time to respond to the summary judgment motion. *Joy*, 116 Wn. App. at 299-300; *Coggle*, 56 Wn. App. at 508.

Joy and *Coggle* are distinguishable. Here, the issue is not whether the [plaintiffs] had adequate time to respond to the motion.

Briggs, 135 Wn. App. at 962.

Numerous decisions since *Briggs* have similarly found a lack of support for a CR 56(f) continuance. *E.g.*, *Mossman v. Rowley*, 154 Wn. App. 735, 743-44, 229 P.3d 812 (2009) (“there is no reason that [plaintiff] could not have attempted to ascertain [the witness’s] identity in the four years between the time of the [the event at issue] and the summary judgment hearing”); *Durand v. HIMC Corp.*, 151 Wn. App. 818, 828-29, 214 P.3d 189 (2009) (“the trial court properly denied the [motion for continuance] because [the moving parties] presented no proof to the trial court that [the additional witness] would provide useful testimony [and] offered no valid reasons for their failure to diligently pursue discovery”); *Gross v. Sunding*, 139 Wn.2d 54, 67-68, 161 P.3d 380 (2007) (plaintiff “does not demonstrate a good reason for delay in obtaining evidence”);

see also *Winston v. Department of Corrections*, 130 Wn. App. 61, 66, 121 P.3d 1201 (2005) (plaintiff “did not satisfy the trial court’s inquiry as to why he had not completed his discovery”).

A court properly denies a CR 56(f) continuance that does not identify the specific evidence that has not yet been obtained or how that evidence would raise a genuine issue of material fact. *E.g.*, *Mossman*, 154 Wn. App. at 742. Here, the mere fact that Ms. Evison’s counsel “believe[d]” that he would be able to retain experts who would provide expert testimony was not a sufficient basis to support a continuance.⁵

In light of the undisputed evidence contrary to Ms. Evison’s claims, and Ms. Evison’s failure to provide a substantive response or basis for a CR 56(f) continuance, the absence of necessary expert testimony was an appropriate basis for summary judgment dismissal of Valley Medical Center.

C. Alternatively, the Court can affirm in reliance on *McDevitt*, because no decision has ever invalidated the continuing pre-suit notice requirement for actions against public entities.

Because Ms. Evison has failed to provide a basis for deviating from *McDevitt*, which remains controlling law,⁶ and which upheld and

⁵ See, e.g., *Addison v. Allstate Ins. Co.*, 97 F. Supp. 2d 771, 774 (S.D. Miss. 2000) (the party opposing summary judgment “must show that the additional discovery will be more than a mere ‘fishing expedition’”).

⁶ The state supreme court’s order did not stay or withdraw the existing *McDevitt* decision.

enforced compliance with existing pre-suit notice requirements in actions against public entities, this Court can and should also affirm the superior court decision on this basis. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998) (“a deliberate expression of the court upon the meaning of the statute’ should not be disregarded”) (quoting *State v. Nikolich*, 137 Wash. 62, 66, 241 P. 664 (1925); accord *Lee v. Sauvage*, 38 Wn. App. 699, 703, 689 P.2d 404 (1984); see generally, e.g., *Smith v. Ayres*, 845 F.2d 1360, 1365 n.18 (5th Cir. 1988) (court of appeals is “bound” by prior decision pending reconsideration of issue by en banc panel or Supreme Court).

Ms. Evison asserts that, as of the time of the filing of her action, RCW 7.70.100(1)’s pre-suit notice requirement had been “struck down by the Washington Supreme Court as unconstitutional,” and that therefore she had no obligation to comply with its requirements in her action against Valley Medical Center. *See* Br. App. at 8. This argument was specifically rejected in the *McDevitt* decision, which upheld the imposition of RCW 7/70.100(1)’s pre-suit notice requirements as valid when applied to actions against public entities under Wash. Const. Art. II. § 26. Relying on *McDevitt*, the superior court properly concluded that Ms. Evison’s failure to comply with the requirement was fatal to her action here against Valley Medical Center.

McDevitt interpreted the continuing history of pre-suit notice requirements for actions against public entities, and strongly reaffirmed their validity. Since 1961, when the state first waived the state's immunity from suit for tort damages, the legislature has consistently required pre-suit notice of a claim as a condition precedent. Laws of 1961, ch. 136, § 1; Laws of 1963, ch. 159, § 3, and *McDevitt*, 291 P.3d 878. This requirement remains codified in RCW 4.92.100 (for state entities) and RCW 4.96.020 (for local entities), which require 60-day pre-suit notice requirement for tort actions against public entities.⁷ Long before *McDevitt*, the requirement was repeatedly upheld against a variety of constitutional challenges.⁸ See *McDevitt*, 291 P.3d at 877 (“we have often upheld similar procedural requirements for suit against the State”).

In 2006, the Medical Malpractice Act imposed a 90-day pre-suit notice requirement for medical malpractice actions. Laws of 2006, ch. 8, § 314, codified at former RCW 7.70.100(1). In 2009, “in order to avoid

⁷ Public hospital districts are municipal corporations. RCW 70.44.010; *Skagit County Pub. Hosp. Dist. No. 1 v. State Dep't of Revenue*, 158 Wn. App. 426, 446, 242 P.3d 909 (2010).

⁸ See, e.g., *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002) (upholding the 60 day waiting requirement of RCW 4.96.020, and noting “the right to bring suit was created by statute and is not a fundamental right”); *Eugster v. City of Spokane*, 115 Wn. App. 740, 750, 63 P.3d 841 (2003) (“[t]he right to sue the state is not a fundamental right; it is statutory [;] [i]t follows then that the state can place limitations upon that right”); *O'Donoghue v. State*, 66 Wn.2d 787, 405 P.2d 258 (1965) (“[s]ince the state, as sovereign, must give the right to sue, it follows that it can prescribe the limitations upon that right”) (cited in *Medina*, 147 Wn.2d at 312).

inconsistent pre-suit notice requirements,” the legislature amended RCW 4.96.020 and RCW 4.92.100 to exempt from their 60-day pre-suit notice requirement all “claims involving injuries from health care,” making the 90-day requirement applicable to those actions. *See McDevitt*, 291 P.3d 879 at nn.4-5.

The decision in *Waples v. Yi*, 169, Wn.2d 152, 234 P.3d 187 (2010), invalidated the RCW 7.70.100(1) 90-day pre-suit notice requirement in an action against “private individuals and private corporations.” *McDevitt*, 291 P.3d at 883.

In light of *Waples*, the 2012 legislature, removed (effective June 7, 2012) the 2009 amendments to RCW 4.96.020 and RCW 4.92.100 that had referenced the separate rule in RCW 7.70.100(1) for medical malpractice actions, thus re-instating the 60-day pre-suit notice requirements as to all claims against public entities. *See Laws of 2012*, ch. 250. In 2013, also in light of *Waples*, the legislature removed the language in RCW 7.70.100(1) that had imposed the separate 90-day pre-suit notice requirement for medical malpractice actions. *Laws of 2013*, ch. 82.

During the entire course of this legislative history, there has never been a time when pre-suit notice was not required for medical malpractice actions against public entities. The only aspect of the legislation that

changed in recent years was which particular statute imposed the requirement, and whether there was a 90-day or 60-day requirement as to certain actions. In 2012, at the time Ms. Evison filed her action, former RCW 7.70.100(1) provided, “[n]o 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,” and former RCW 4.96.020 provided that, as to local government entities and their employees, “claims involving injuries from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are exempt from this chapter.” Applying these exact same laws, the *McDevitt* court held that the application of RCW 7.70.100(1) 90-day pre-suit notice requirement was “constitutional as applied to lawsuits against the State.” *McDevitt*, 291 P.3d at 880. Relying on Article 2, § 26 of the Washington Constitution, which provides that “[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state,” the *McDevitt* court concluded that “the pre-suit notice requirement of RCW 7.70.100(1) as applied to the State is a constitutionally valid statutory precondition for suit against the State.” *McDevitt*, 291 P.3d at 877; *see also id.* (“the legislature may establish conditions precedent, including pre-suit notice requirements, to inform the State of future costs and delay associated with court resolution of an

issue”). Because Ms. Evison did not give the required pre-suit notice, as required at that time under former RCW 7.70.100(1), the superior court properly granted summary judgment dismissal of her claim against Valley Medical Center.⁹

Ms. Evison apparently asserts that *McDevitt* was wrongly decided and, citing the *McDevitt* dissent, contends without analysis or factual distinction, that *McDevitt* reaches an “absurd result” and “is not controlling.” *See* Br. App. at 14-15. The superior court, however, was obliged to adhere to the controlling Supreme Court precedent, as is this Court. Ms. Evison cites no authority, and Valley Medical Center is aware of none, that would allow this Court to ignore the controlling *McDevitt* decision.

⁹ Ms. Evison has made no argument that any different analysis applies to the claim against defendant/respondent Dr. Vossler. Ms. Evison expressly alleged that Dr. Vossler’s conduct was within the scope of his practice at the Hospital District’s Valley Medical Center. *See* CP 35. Continuation of any action against Dr. Vossler is a continuation of the action against the Hospital District. The *McDevitt* plaintiff brought his action against Harborview, the State, “UW Medicine/Physicians,” and “John Doe and Jane Doe.” The *McDevitt* defendants moved for summary judgment dismissal of the entire lawsuit. *McDevitt*, 291 P.3d at 878. The state supreme court’s reversal of the superior court’s denial dismissed the lawsuit as to all defendants. *See id.* at 883.

The Hospital District has a statutory relationship with its physicians that imposes liability on the Hospital District for its physicians acting within the scope of their employment. RCW 4.96.041; *Hardesty v. Stenchever*, 82 Wn. App. 253, 260, 917 P.2d 577 (1996). The same procedures *Hardesty* describes for state employees are codified for employees of local governmental entities at RCW 4.96.041. The *Hardesty* plaintiff filed a medical malpractice action against the University of Washington Medical Center and an individual physician, alleging that the physician, while an employee of the UW, negligently provided medical care. Because plaintiffs had failed to comply with RCW 4.92, the trial court dismissed the suit against the UW and State, but allowed the case against the individual to go forward. The court of appeals reversed, dismissing the case against the individual physician as well. 82 Wn. App. at 261.

Ms. Evison apparently also asserts that because she filed her action after *Waples* and before *McDevitt*, the superior court erred in applying *McDevitt* to her action. Her argument that this Court should not adhere to *McDevitt* is without merit. First, and most importantly, the Supreme Court imposed the pre-suit notice requirements on the *McDevitt* plaintiff, reversing the denial of summary judgment, and this Court, and the superior court below, must similarly apply those requirements to Ms. Evison, who filed her action under the same statutory scheme.

Washington attorneys can hardly claim surprise by the *McDevitt* court's holding. Since at least 2010, when the State filed its answer and moved for summary judgment in *McDevitt*, the State's position that pre-suit notice requirements remained valid after *Waples* has been publically available, given the proliferation of listservs and blogs, and the argument rose to even greater prominence when the Supreme Court granted direct review of the *McDevitt* decision in April 2011. Since that date, certainly, it has been public knowledge that there was at least a possibility that RCW 7.70.100(1) would continue to apply to public defendants.¹⁰ Valley Medical Center's answer in this case, raising the affirmative defense of failing to give notice, was filed and served on June 20, 2012 (CP 23-24),

¹⁰ The February 11, 2012 Senate Bill Report noted that the issue of "[w]hether [*Waples*] can be *extended* to those cases involving governmental entities is a question currently before the state Supreme Court" in *McDevitt*. CP 74 (emphasis added).

and summary judgment was sought promptly thereafter, all before *McDevitt*. CP 457-63.

Further, Washington law strongly disfavors prospective-only application of decisions in circumstances such as those here. Under the standard maxim regarding retroactive application of court decisions, “[r]etroactive application, by which a decision is applied to both the litigants before the court in all cases arising prior to and subsequent to announcing of the new rule, is ‘overwhelmingly the norm.’” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009) (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)). The *Lunsford* court determined that a new rule of law—strict product liability—applied retroactively. 166 Wn.2d at 267.

The *McDevitt* decision addressed the interpretation of a statute, not a new common law rule or a constitutional ruling. Once the Court determined that former RCW 7.70.100(1) was a valid exercise of the Legislature’s authority under Wash. Const. Art. II, § 26, the statute was presumed to have always been valid as against governmental defendants and should have retroactive application. *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696 (2011) (“once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have

always meant that interpretation”). Although Ms. Evison’s counsel may have assumed that the statute was invalid as a result of *Waples*, the *McDevitt* court’s contrary decision can hardly be seen as announcing a new rule of law. As the *McDevitt* court noted, *Waples* had not addressed the issue that *McDevitt* presented. *McDevitt*, 291 P.3d at 882.

Finally, although the statute of limitations was set to expire on or about March 2009,¹¹ Ms. Evison could have tolled it under RCW 7.70.100(1) by giving notice, then waiting 90 days to commence her action.¹² She could also have tolled the statute of limitation for one year by making a good faith request for mediation under RCW 7.70.110, but elected not to do so.¹³

¹¹ According to her complaint, Ms. Evison communicated to Dr. Vossler in January 2009 that she was allegedly suffering side effects of the Lamictal. CP 32. Ms. Evison’s last appointment with Dr. Vossler was on March 20, 2009. CP 34.

¹² Ms. Evison appears to assert that her delay in service of her complaint until May 11, 2012, may have complied with her pre-suit notice requirements, even though she filed the complaint on the same day as her notice. See Br. App. 15-16. Any such argument is precluded by *Schmitz v. State*, 68 Wn. App. 486, 489-90, 843 P.2d 1109 (1993), which held that the action was “commenced” for the purposes of RCW 4.92.110 by the filing of the complaint; the fact that service occurred later does not satisfy the pre-suit notice requirement. *Id.* (“we conclude that the filing of the complaint did commence the action”).

¹³ Given the absence of meaningful limits on its use, plaintiffs’ counsel who are concerned about an impending limitations deadline routinely take advantage of the one-year tolling period provided under RCW 7.70.130 by requesting mediation of their claims. See *Morris v. Swedish Health Svcs.*, 148 Wn. App. 771, 200 P.3d 261 (2009).

D. Alternatively, this Court may stay this matter pending resolution of the *McDevitt* partial reconsideration.

In light of the pending *McDevitt* decision on partial reconsideration, this Court may consider whether to stay proceedings in this matter pending that ruling. Although not required to do so, the Court has authority to make a non-final decision to stay proceedings. *See generally* RAP 12.2 (“The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of case and the interests of justice may require”); RAP 12.3(b) (authorizing interlocutory decisions not terminating review); RAP 8.1(b)(3) (authorizing the appellate court to stay trial court decisions).

V. CONCLUSION

Valley Medical Center respectfully requests that this Court affirm the summary judgment dismissal of Ms. Evison’s claims against Valley Medical Center. First, independent of the *McDevitt* decision, summary judgment was appropriate because of the absence of the required expert testimony. Second, because *McDevitt* remains controlling law pending resolution of the partial reconsideration, summary judgment was appropriate because Ms. Evison failed to comply with the pre-suit notice requirements of former RCW 7.70.100(1), applicable to Valley Medical Center through former RCW 4.96.020. Alternatively, this Court may stay

the proceedings pending resolution of the *McDevitt* partial reconsideration.

Respectfully submitted this 23rd day of September, 2013.

BENNETT BIGELOW & LEEDOM, P.S.

By: 

Bruce W. Megard, Jr., WSBA #27560
Carol Sue Janes, WSBA #16557
Michael Madden, WSBA #8747
Attorneys for Defendants David
Vossler, MD and Valley Medical
Center – King County Hospital District
No. 1

CERTIFICATE OF SERVICE

I certify under penalty under the laws of the State of Washington that on September 23, 2013, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENTS to be delivered as follows:

John G. Bergmann
Helsell Fetterman, LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154

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

Attorneys for Appellant



Caroline J. Coleman

VI. APPENDIX

- A *McDevitt v. Harborview Med. Ctr.*, No. 85367-3, Order Granting Motion for Reconsideration, dated June 13, 2013

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FILED
COURT

2013 JUN 13 A 8:49

BY RONALD E. CARPENTER

THE SUPREME COURT OF WASHINGTON

GLEN A. McDEVITT, an unmarried man,
Respondent,

v.

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

ORDER GRANTING MOTION FOR RECONSIDERATION

No. 85367-3

King County Superior Court
No. 10-2-24679-7 SEA

The Court having considered the Respondent's "MOTION FOR RECONSIDERATION";

Now, therefore, it is hereby

ORDERED:

That the motion for reconsideration is granted in part, limited to the issue of whether the decision should be given only prospective application. The matter will be reconferenced without oral argument and without additional briefing by the parties.

DATED at Olympia, Washington this 13th day of June, 2013.

For the Court

Madsen, C.J.
CHIEF JUSTICE

665/126