

FILED

OCT 22 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 305376-III

**COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

**KEITH L. DIXON and REBECCA L. DIXON,
husband and wife;**

PLAINTIFF-APPELLANTS

vs.

**YAKIMA HMA, LLC d/b/a YAKIMA REGIONAL
HOSPITAL, a for-profit limited liability company;
EDUARDO MEIRELLES, MD and JANE DOE
MEIRELLES, husband and wife;**

DEFENDANTS-APPELLEES

**PLAINTIFF-APPELLANTS' OPENING BRIEF
(corrected)**

**J. J. Sandlin, WSBA #7392
Attorney for Plaintiff-Appellants**

**SANDLIN LAW FIRM
P. O. Box 1707
Prosser, Washington 99350
(509) 829-3111/fax: (888) 875-7712
Sandlinlaw@msn.com**

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**J. J. Sandlin, WSBA #7392
Attorney for Plaintiff-Appellants**

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P. O. Box 1707
Prosser, Washington 99350
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Sandlinlaw@msn.com**

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Case:

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*Washington Imaging Services, LLC v.
Washington State Dept. of Revenue*, 171 Wn.2d 548,
252 P.3d 885 (2011) 4

Statutes:

R.C.W. 4.16.170 6, 7, 9

R.C.W. 4.16.350 4, 6

R.C.W. 7.70.110 1-2, 4, 6, 8-9

Court Rules:

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1. Introduction

This is a medical malpractice action, where the plaintiff-appellants attempted to trigger the mandatory mediation process, but because of the approaching statute of limitations the plaintiff-appellants sent the mediation demand one day after the action was filed, instead of before the action was filed. The defendant-appellees successfully moved to dismiss on the basis the trial court had no subject matter jurisdiction because the one-year extension of the statute of limitations pursuant to R.C.W. 7.70.110 did not apply, since the action had been filed the day prior to the mediation demand letter being sent to the defendant-appellees. The plaintiff-appellants assert that the legislative purpose of the mediation demand was thwarted by the trial court's requirement that the mediation demand letter must be sent prior to filing at the end of the limitations period, even though the "commenced" action became a nullity and was "not commenced," when no defendant was served within 90 days.

2. Assignment of error

The trial court erred by dismissing the plaintiff-appellants' cause of action on statute of limitations grounds because the plaintiff-appellants had timely requested mandatory mediation of the medical malpractice issues, thus extending the statute of limitations for one year.

3. Issue

If the filing of a complaint is a nullity, because the defendants were not served within ninety (90) days of filing and the statute of limitations has run, but the plaintiff has demanded mandatory mediation before the expiration of the statute of limitations, does R.C.W. 7.70.110 serve to extend the statute of limitations for an additional twelve (12) months, since filing the summons and complaint does not commence the lawsuit under these circumstances?

4. Statement of the case

The following recitation of facts is uncontested (CP 64):

(a) The appellants filed a medical malpractice action against the appellees in the Yakima County Superior Court on May 25, 2011. CP 54.

(b) The appellants claimed plaintiff Keith Dixon was injured due to the appellees' medical malpractice on May 29, 2008. CP 54; Appendix "A" at pp. A-16 through 24.

(c) The appellants sent a demand for mediation to the appellees on May 26, 2011. CP 54; Appendix "B" at p. B-24.

(d) The appellants did not serve the summons and complaint upon the appellees before the expiration of 90 days from the date of filing the action. CP 54.

(e) None of the appellees responded to the appellants' demand for mediation, and instead moved to dismiss the action for lack of jurisdiction of the trial court, because the appellees were not served with the summons and complaint before the expiration of 90 days from the date of filing the action. CP 34; CP 54; Appendix "B" at p. B-31.

(f) The trial court granted the motions to dismiss, on the narrow basis that the trial court lost subject matter jurisdiction because the mediation demand occurred after the action was filed and therefore was ineffective to extend the statute of limitations for an additional year, despite the fact that the action

was not commenced since no defendant was served prior to the expiration of 90 days of filing the action. CP 43-47.

5. Argument

(a) **Standard of review:** This narrow issue is a question of law, and the standard of review is *de novo*. *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011).

(b) **RCW 7.70.110 describes the procedure for demanding mediation, but it should not be a jurisdictional bar when the statute of limitations is to expire in a few days.**

In this case the appellants were going to lose their malpractice claims if they failed to file their action before the three years expired. R.C.W. 4.16.350 (“...*professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition...*”). Thus, the appellants “commenced” their action by timely filing the action, on May 25, 2011. But the appellants desired additional time to negotiate a reasonable settlement of their claims, through mediation. R.C.W. 7.70.110. Thus, on May 26, 2011 (still within the three-

year statute of limitations period) the appellants served their demand for mediation upon the appellees. CP 54.

Ninety days ran from the time of filing the action against the appellees, and the appellants received no response to their mediation demand. CP 34; CP 54; Appendix “B” at p. B-31. The trial court concluded that the mediation demand satisfied the statutory requirements, and this finding is the law of the case in this instance. CP 43-47.

After the expiration of ninety days from filing the malpractice action, the appellants caused the summons and complaint to be served upon the appellees, since no responses had been received and the appellants concluded the appellees would not willingly negotiate a settlement of claims. CP 34; Appendix “B” at p. B-31.

(c) **Was the action commenced and then not commenced?**

Which is it? If it was not commenced, then the trial court should have jurisdiction to proceed because the mediation demand was timely.

The appellees argued before the trial court that the action was commenced by filing the malpractice action with the Clerk

of the Superior Court. In a narrow sense, they are correct. R.C.W. 4.16.170 (“...*an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first...*”). But if the summons and complaint are not served within 90 days of commencing the action, the action shall be deemed to have not been commenced. R.C.W. 4.16.170 (“...*If***following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations...*”). Thus, in view of the intent of the new statute, and examining the entire scenario at the end of the limitation period, the defendant-appellees are incorrect. The filing of the action on May 25, 2011 was a nullity, since no defendant-appellee was served within 90 days.

But given the trial court’s decision the nullity of filing leaves the parties in the Twilight Zone, for purposes of determining the expiration of the statute of limitations.

Consider the statutory language of R.C.W. 7.70.110:

“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.”

How does this comport with the legislative objective of enhancing settlement opportunities for medical negligence claims? In a strict reading of the statute, the court can go one of two ways: (1) “...prior to filing a cause of action...” means just that, and since a cause of action was filed then this statute, extending the statute of limitations, is inapplicable; or (2) “... the action shall be deemed to not have been commenced (R.C.W. 4.16.170)...” means just that, and no cause of action was “filed” or “commenced,” for purposes of requiring the parties to participate in mandatory mediation of this medical malpractice claim, (and extending the statute of limitations for an additional twelve months) in furtherance of the legislative intent to use alternative dispute resolution methods in this specialized area of tort law.

The appellants urge this court to adopt the more reasonable construction of the two competing statutes regarding the statute of limitations for medical malpractice claims; namely, that when a mediation demand is timely filed (May 26, 2011) and the action that was filed becomes a nullity because it was never served within 90 days of filing, then the one-year

automatic extension of the statute of limitations kicks in and the trial court continues to have subject matter jurisdiction.

(d) This fact scenario is distinguishable from *Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 252 P.3d 909 (2011).

Notably, the plaintiff-appellants in this case served their mediation demand by U.S. Mail upon the defendant-appellees on May 26, 2011, prior to the expiration of the three-year statute of limitations period. This was not the case in *Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 252 P.3d 909 (2011). In this case the trial court also found that the plaintiff-appellants did indeed meet the statutory requirements of a mediation demand, whereas Division III found the mediation letter in *Cortez-Kloehn v. Morrison* was merely an “offer” to mediate, which fell far short of the statutory requirement necessary to extend the three-year period of the statute of limitations for an additional year. As a matter of law, this Court should rule that R.C.W. 7.70.110 is a procedural statute that is not a statute of repose, and that the Court should look beyond the mere “filing” of a cause of action when the “filing” does not “commence” the lawsuit, as in this case, and conclude that the timely mediation

demand extends the statute of limitations for an additional twelve months.

6. Conclusion

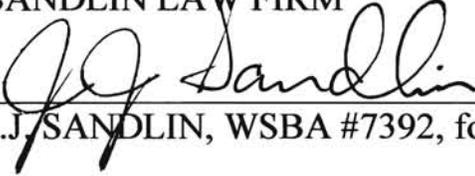
The purpose of mandatory mediation, in a medical malpractice area, is to achieve dispute resolution with the least injury to the medical profession, yet protect the rights and interests of the injured patients. The pre-existing statutes of repose for medical malpractice cases create ambiguity with the new statute that enhances resolution of disputes through mediation. The plaintiff-appellants urge this court to adopt a well-reasoned approach to harmonize the statutes, by examining the transaction in a global approach, which would allow the court to find the filing of the action in this case was a nullity (R.C.W. 4.16.170), which means that the timely, properly demanded mediation protocol has extended the statute of limitations for one year, pursuant to R.C.W. 7.70.110.

The plaintiff-appellants have included, in the Appendix, a true copy of the filed, verified complaint, and a true copy of counsel's declaration under penalty of perjury, which were considered by the trial court during oral arguments upon the

defendant-appellees' motions to dismiss. RAP 10.3(a)(8).
Those documents are respectfully included in the arguments of
this opening brief.

Respectfully submitted this 19th day of October, 2012.

SANDLIN LAW FIRM

A handwritten signature in black ink, appearing to read "J.J. Sandlin", written over a horizontal line.

J.J. SANDLIN, WSBA #7392, for plaintiff-appellants

(Sanctions check of \$300.00 is enclosed.)

APPENDIX

Filed copy of verified complaint.....A-11 through A-22

Plaintiff Counsel's Declaration Opposing
Dismissal.....B-23 through B-32

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CLERK OF SUPERIOR COURT
YAKIMA WASHINGTON

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

KEITH L. DIXON and REBECCA L. DIXON, husband and wife;)	No. 11 2 01820 1
PLAINTIFFS;)	COMPLAINT FOR MEDICAL NEGLIGENCE, PERSONAL INJURIES, LACK OF INFORMED CONSENT, ATTORNEY'S FEES AND COSTS, AND EXEMPLARY DAMAGES AS MAY BE ALLOWED BY LAW
VS.)	
YAKIMA HMA, LLC d/b/a YAKIMA REGIONAL HOSPITAL, a for-profit limited liability company; EDUARDO MEIRELLES, MD and JANE DOE MEIRELLES, husband and wife; and UNKNOWN JOHN and/or JANE DOES Nos. 1 - 20;)	
DEFENDANTS.)	

I. INTRODUCTION

Med. Malpractice Complaint - 1

A-12

SANDLIN LAW FIRM
P.O. Box 1707
Prosser, Washington 99350
(509) 829-3111/fax: (888) 875-7712
Cell: (509) 594-8702
Sandlinlaw@msn.com

1 1. Plaintiffs bring these claims for injuries, general and special damages,
2 attorney's fees and costs, and exemplary damages as may be allowed by law,
3 arising out of injuries sustained by plaintiff Keith L. Dixon while being treated by
4 the named defendants and the unknown hospital staff employees of defendant
5 hospital.
6
7

8 II. VENUE AND JURISDICTION

9
10 2. Jurisdiction and venue are properly with this court, pursuant to RCW
11 4.12.025 and related statutes. The transactions, events and injuries alleged herein
12 occurred in Yakima County, Washington. Venue is proper in this Court because a
13 substantial part of the events or omissions giving rise to the claims herein occurred
14 in Yakima County, and the defendants have at all relevant times conducted
15 business in Yakima County.
16
17

18 III. PARTIES

19
20 3. Plaintiffs Keith L. Dixon and Rebecca L. Dixon are husband and wife; they
21 are bringing this action on their own behalf and on behalf of their marital
22 community. They reside in Yakima County, Washington.
23

24 4. Defendant Yakima HMA, LLC ("defendant hospital") is a limited liability
25 company doing business as Yakima Regional Hospital or any other similar name,
26
27

A-13

1 located at 110 S 9th Ave, Yakima, WA 98902, and is a for-profit limited liability
2 company providing hospital care and health care treatment services for the public,
3
4 in furtherance of the medical care and treatment of its physicians who are granted
5 privileges to practice medicine upon the defendant hospital's premises. The
6 defendant hospital manages and supervises its hospital staff and employees who
7 provide medical care and services for patients of the defendant hospital. These
8 claims are brought against the defendant hospital for its direct and vicarious
9 liability, and against the relevant unknown hospital staff and/or employees of
10 defendant hospital.
11
12

13
14 5. Defendants Eduardo Meirelles, MD and Jane Doe Meirelles, are husband
15 and wife, and these claims are brought against them individually and against their
16 marital community, and against any unknown alter-ego business entity for which
17 defendant Eduardo Meirelles, MD may be employed as a medical doctor providing
18 medical care and treatment to plaintiff Keith L. Dixon. Defendant Eduardo
19 Meirelles, MD is a licensed physician duly authorized to practice medicine in the
20 State of Washington, and was approved by defendant hospital to provide medical
21 services to plaintiff Keith Dixon at the defendant hospital.
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A-14

1 6. Defendants John and/or Jane Does numbered 1 – 20 are unknown persons or
2 entities who/which have acted in contract, combination, conspiracy or
3
4 independently of the named defendants to cause injuries and damages to the
5 plaintiffs. When the identities of said unknown persons or entities have been more
6
7 fully identified then this complaint shall be amended to more fully identify these
8 persons or entities. All of the claims asserted against the named defendants apply
9
10 equally to these unknown persons or entities, and the claims against these unknown
11 persons or entities shall relate back to the commencement of this action.

12 IV. ILLUSTRATIVE FACTS

13
14 *(The following facts, contentions, allegations and assertions are provided by way*
15 *of illustration, and are not intended to be complete or otherwise limiting in nature*
16 *to support the plaintiffs' claims)*

17 7. At all material times herein defendant Eduardo Meirelles, MD held himself
18 out to the general public as qualified to provide medical care.

19
20 8. At all material times herein defendant hospital held itself out to the general
21 public as qualified to provide Level III trauma center coverage, and to provide a
22 full complement of medical services, including advanced neurosurgical
23 procedures. Defendant hospital's stated mission is "To improve the health status
24 of the communities we serve through compassionate, **high quality**, accessible and
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1 cost effective care. We value those who provide our care and those who receive
2 our care. We accomplish this through partnership, **dedication, service, quality and**
3 **stewardship,**" (emphasis added).
4

5 9. During the past three years plaintiff Keith Dixon received medical care and
6 treatment (including surgical care and treatment) from the named defendants.
7

8 10. Enroute to surgery plaintiff Keith L. Dixon was negligently dropped from
9 the gurney upon which he was being transported by defendant hospital's staff or
10 employees, and he sustained injuries.
11

12 11. Upon plaintiff Keith L. Dixon's presentation for surgery after he had
13 sustained injuries from impacting the defendant hospital's floor, it was clear he had
14 been injured.
15

16 12. Notwithstanding defendant Eduardo Meirelles' knowledge that plaintiff
17 Keith Dixon was injured because he had been dropped from the gurney upon
18 which he had been transported to the surgical suite for surgery, Dr. Meirelles
19 elected to proceed with the surgical procedure upon plaintiff Keith Dixon. The
20 surgery was supposed to be for a period of not more than 5-6 hours, but it actually
21 endured for approximately 11 hours. During the surgery, plaintiff Keith Dixon's
22 blood pressure rose to a dangerously high level, triggering at least one and possibly
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1 two strokes, further debilitating plaintiff Keith Dixon following his fall from the
2 hospital gurney.
3

4 13. The plaintiffs contend that Dr. Meirelles should have continued the surgical
5 procedure to a later date, given the injuries plaintiff Keith Dixon had sustained as a
6 result of the fall from the hospital gurney. The surgical results were poor and were
7 a failure, leaving plaintiff Keith Dixon impaired.
8

9 14. Plaintiff Keith Dixon was not properly informed of the risks associated with
10 the health care and treatment offered to him by the defendants, and if he had been
11 fully informed he would not have agreed to the medical care and treatment offered
12 by the defendants.
13

14 15. As a result of the negligence and lack of informed consent by the
15 defendants, plaintiff Keith L. Dixon sustained personal injuries and general and
16 special damages all in an amount to be proved at the time of trial.
17
18

19 V. CLAIMS 20

21 16. Plaintiffs incorporate all preceding paragraphs as though fully set forth
22 herein.
23

24 17. Medical Negligence: The defendants failed to exercise that degree of care,
25 skill, and learning expected of reasonably prudent health care providers at that time
26
27

1 in the profession or class to which the defendants belong, in the state of
2 Washington, acting in the same or similar circumstances. The defendants' failures
3 were proximate causes of the plaintiffs' personal injuries, and general and special
4 damages. The defendants failed to exercise ordinary care under all of the
5 circumstances.
6
7

8 18. Lack of Informed Consent: The defendants failed to properly inform
9 plaintiff Keith Dixon of the risks accompanying the medical care and treatment
10 offered by the defendants; and the elements of the defendants' failures are as
11 follows:
12

13
14 (a) the defendants failed to inform plaintiff Keith Dixon of a material fact or facts
15 relating to his medical care and treatment;
16

17 (b) defendant Keith Dixon consented to the medical care and treatment without
18 being aware of or fully informed of such material fact or facts;
19

20 (c) a reasonably prudent patient under similar circumstances would not have
21 consented to the treatment if informed of such material fact or facts;
22

23 (d) the medical care and treatment in question proximately caused injury to the
24 plaintiffs.
25

26 VI. DAMAGES

A-18

1 19. Plaintiffs incorporate all preceding paragraphs as though fully set forth
2 herein.
3

4 20. As a direct and proximate cause of the defendants' negligence and failure to
5 provide informed consent to the plaintiffs, plaintiff Keith L. Dixon has sustained
6 general and special damages and personal injuries, in an amount to be proved at the
7 time of trial, to include but not be limited to mental anguish and emotional distress,
8 injuries to his head, tongue, dangerously elevated blood pressure during surgery,
9 stroke, excessive medical expenses (past and future), lost wages and/or income,
10 and other general and special damages as shall be proved at the time of trial. The
11 plaintiffs have sustained serious loss of consortium damages.
12
13
14

15 21. Plaintiff Keith L. Dixon is now disabled, as a direct and proximate cause of
16 the medical negligence and failure to provide informed consent by the defendants.
17 He cannot stand, walk or perform any laborious work for more than two hours'
18 duration, his lower back pain is extremely painful, his legs experience a burning
19 sensation, and he feels leg pain as if thousands of needles are poking his legs, from
20 his knees all the way up to his waist. He has lost 40% of his grip strength in his
21 right hand. Both of his hands and arms become numb whether he is sitting, trying
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1 to sleep, or operating a motor vehicle. Despite the prescribed medications he
2 regularly receives, he experiences three to four severe headaches per week.
3

4 22. There may be other facts and personal injuries that may be asserted at the
5 time of trial, based upon further discovery and evidence adduced at trial.
6

7 VII. PRAYER FOR RELIEF

8 WHEREFORE, the plaintiffs pray for the following relief:

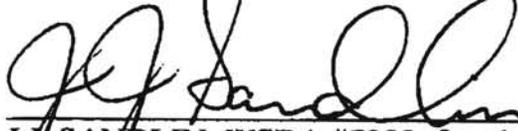
9
10 (a) For judgment against the defendants, and each of them, for personal injuries,
11 general and special damages, and future losses all as shall be proved at the time of
12 trial;
13

14 (b) For an award of attorney's fees and costs, including exemplary damages, as
15 may be allowed by law, by case precedent or by legislative enactment, such as
16 RCW 19.86.090 and related statutes;
17

18 (c) For such other and further relief as the Court deems equitable in the
19 premises.
20

21 Dated this 13th day of May, 2011.

22 SANDLIN LAW FIRM

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25 _____
26 J.J. SANDLIN, WSBA #7392, for plaintiffs

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VERIFICATION

KEITH L. DIXON declares under penalty of perjury of the laws of the State of Washington as follows:

1. I am one of the plaintiffs above-named. I have read the above complaint for medical negligence and failure to provide informed consent, and I certify the facts, allegations, contentions and assertions therein are true and accurate.

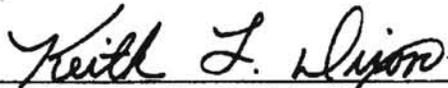
2. I authorize Attorney J.J. Sandlin to prosecute this lawsuit. His reasonable attorney's fees are \$350.00 per hour, but he has agreed to prosecute this action on a contingency fee basis, with credit for any retainers paid against that contingency fee of one-third (33.33%) of the total recovery. This is a fair and reasonable contingency fee, as many law firms charge a 40% contingency fee for medical malpractice claims. I ask this Court to grant me an award of my attorney's fees and costs, together with exemplary damages in this case, as may be allowed by law.

3. To the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the complaint as stated above (a) is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (b) the claims, defenses, and other legal contentions therein are warranted by existing law or by a

A-21

1 non-frivolous argument for the extension, modification, or reversal of existing law
2 or the establishment of new law; (c) the allegations and other factual contentions
3 have evidentiary support or, if specifically so identified, are likely to have
4 evidentiary support after a reasonable opportunity for further investigation or
5 evidentiary support after a reasonable opportunity for further investigation or
6 discovery.
7

8 Respectfully submitted this 13th day of May, 2011.
9

10 

11 _____
12 KEITH L. DIXON, Plaintiff
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A-22

2011 DEC -9 PM 4: 12

KIM M. EATON
EX OFFICIO CLERK
SUPERIOR COURT
YAKIMA WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

KEITH L. DIXON and REBECCA L. DIXON,
husband and wife,

Plaintiffs,

v.

YAKIMA HMA, LLC d/b/a YAKIMA
REGIONAL HOSPITAL, a for-profit limited
liability company; EDUARDO MEIRELLES, M.D.
and JANE DOE MEIRELLES, husband and wife;
and UNKNOWN JOHN and/or JANE DOES Nos.
1 - 20,

Defendants.

11-2-01820-1

No.

DECLARATION OF J.J. SANDLIN
OPPOSING DISMISSAL UNDER CR
12(b) or CR 56 GROUNDS

J.J. SANDLIN declares under penalty of perjury of the laws of the State of

Washington as follows:

Plaintiff Counsel's declaration, opposing
dismissal - 1

SANDLIN LAW FIRM

P.O. Box 1707
Prosser, Washington 99350
(509) 829-3111/fax: (888) 875-7712
Cell: (509) 594-8702
Sandlinlaw@msn.com

B-23

1 1. I am counsel for the plaintiff, Keith Dixon. I object to the defendants'
2 suggestion that this Court has no jurisdiction to hear this action, and that the
3 mediation request was insufficient. The action should not be dismissed.
4

5
6 2. The verified complaint stands on its own. The commencement of the action
7 is controlled by the Civil Rules, and there is nothing in the Civil Rules that calls for
8 dismissal. The rules are silent as to the necessity of serving any defendant within
9
10 90 days from filing the action. *See* CR 3.

11
12 3. The defendants also suggest that mediation was never triggered, but the
13 attached text of the plaintiff's request for mediation was sent to both the hospital
14 and the defendant:

15
16 **"May 26, 2011**

17
18 **Mr. Richard Robinson, CEO**
19 **YAKIMA REGIONAL HOSPITAL**
20 **110 South 9th Avenue**
21 **Yakima, WA 98902**

22 **CT CORPORATION SYSTEM**
23 **1801 West Bay Drive NW**
24 **Olympia, WA 98502**

25 **Eduardo Meirelles, M.D.**
26

27
28 Plaintiff Counsel's declaration, opposing
dismissal - 2

B-24

SANDLIN LAW FIRM

P.O. Box 1707
Prosser, Washington 99350
(509) 829-3111/fax: (888) 875-7712
Cell: (509) 594-8702
Sandlinlaw@msn.com

1 Neurological Surgery
2 3911 Castlevale Road, Suite 301
3 Yakima, WA 98902

4
5 Ref: Claims of *Keith L. Dixon and Rebecca L. Dixon* FOR MEDICAL
6 NEGLIGENCE for medical negligence occurring on or about May 28, 2011

7 Dear Mr. Richard Robinson and Dr. Eduardo Meirelles:

8
9 I represent Mr. and Mrs. Keith Dixon, in medical negligence claims they
10 intend to file against Dr. Meirelles and Yakima Regional Hospital
11 (Yakima HMA, LLC).

12 The following is an unedited, verbatim memorandum provided me by
13 Mr. Dixon, supporting his claims:

14
15 "In regards to my physical status, the disabilities I endure each day from the 3
16 traumatic shocks me and my body endured from Regional Hospital and its staff, has
17 taken its toll on me and my physical capabilities. I cannot stand, walk, or do any
18 laborious work for more than 2 hours at a time. My lower backaches painfully and
19 my legs start to feel like they are burning and someone is poking them constantly
20 with thousands of needles from my knees all the way up to my waist on the outside
21 of my legs, I have lost 40% of my grip strength in my right hand, Both my hands and
22 arms go numb whether sitting, trying to sleep, and while driving. Even with
23 medications, I still have 3 to 4 severe headaches per week since May of 2010. The 3
24 traumatic experiences I endured at Regional Hospital, In Yakima, WA. from its staffs
25 neglect are as follows. #1. Being dropped by the staff before surgery on my back,
26 pictures of my forehead and swollen tongue from biting down on it from the fall and
27 hitting the floor, #2. Blood pressure during surgery went to levels high enough to
28 cause 1 if not 2 strokes. This was verified to me from Dr. Kamath after reviewing my
M.R.I and showing me the blood pools on my brain scan which are there from
strokes. #3. Instead of being in surgery for 5 to 6 hours, I was in surgery for over 11

Plaintiff Counsel's declaration, opposing
dismissal - 3

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1 hours. Why was the surgery not postponed, especially when the surgeon (Dr. Eddie
2 Meirelles) was made aware of me being dropped by the pre-op staff? On 12-15-2010
3 Social Security Disability was approved for me due to my medical conditions, I am
4 also on Labor and Industries Disabilities pay. In regards to lost income? L and I and
5 Social Security disability payments are \$2,400.00 per month, not subtracting \$152.60
6 for attorney's fees every month from L&I and \$200.00 per month for medications for
7 my physical pains. I receive roughly \$2,050.00 per month for a total of \$24,600.00 per
8 year disability, my last wages before the injury was \$3,460.00 per month. A difference
9 of \$1,410.00 per month. If I would not have been dropped, had a stroke while in
10 surgery, I would have been able to go back to full time work status for at least
11 another 18 years minimum. In which that \$1,410.00 per month difference for 18 years
12 would total up to roughly \$286,560.00 in wages that I have lost due to the Trauma, and
13 Neglect from the staff and Dr. Eddie Meirelles at Regional Hospital in Yakima, WA.
14 Respectfully....Keith L Dixon."

15 **In support of my clients' claims, you should review all medical records,
16 charting, incident reports and any private notes that shall support my
17 clients' claims. You have those records in your files.**

18 **Please understand that my clients intend to prosecute this action for
19 medical negligence, by filing an action in the Yakima County Superior
20 Court, after you have had ninety days to consider these claims, and to
21 make proper restitution and compensation to my clients, pursuant to
22 R.C.W. 7.70.100.**

23 **If you fail or refuse to agree to reasonable compensation for my clients, I
24 invite you to engage in meaningful mediation with my clients, to resolve
25 these matters, pursuant to R.C.W. 7.70.100(3). You need not wait until the
26 expiration of ninety days, if you wish to commence any such mediation.
27 My experience, after thirty-five years of trial practice, is that mediation is
28 always a valuable tool to assist the parties in settlement of claims.**

Plaintiff Counsel's declaration, opposing
dismissal - 4

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1 If this matter must be filed as a medical malpractice lawsuit, then the
2 following assertions shall be presented at trial:

3
4 "At all material times herein defendant Eduardo Meirelles, MD held
5 himself out to the general public as qualified to provide medical care.
6

7 1. At all material times herein defendant hospital held itself out to the
8 general public as qualified to provide Level III trauma center coverage, and to
9 provide a full complement of medical services, including advanced
10 neurosurgical procedures. Defendant hospital's stated mission is "To improve
11 the health status of the communities we serve through compassionate, high
12 quality, accessible and cost effective care. We value those who provide our
13 care and those who receive our care. We accomplish this through partnership,
14 dedication, service, quality and stewardship," (emphasis added).
15
16
17

18 2. During the past three years plaintiff Keith Dixon received medical care
19 and treatment (including surgical care and treatment) from the named
20 defendants.
21

22 3. Enroute to surgery plaintiff Keith L. Dixon was negligently dropped
23 from the gurney upon which he was being transported by defendant hospital's
24 staff or employees, and he sustained injuries.
25
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27

28 Plaintiff Counsel's declaration, opposing
dismissal - 5

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1 4. Upon plaintiff Keith L. Dixon's presentation for surgery after he had
2 sustained injuries from impacting the defendant hospital's floor, it was clear
3 he had been injured.
4

5 5. Notwithstanding defendant Eduardo Meirelles' knowledge that plaintiff
6 Keith Dixon was injured because he had been dropped from the gurney upon
7 which he had been transported to the surgical suite for surgery, Dr. Meirelles
8 elected to proceed with the surgical procedure upon plaintiff Keith Dixon. The
9 surgery was supposed to be for a period of not more than 5-6 hours, but it
10 actually endured for approximately 11 hours. During the surgery, plaintiff
11 Keith Dixon's blood pressure rose to a dangerously high level, triggering at
12 least one and possibly two strokes, further debilitating plaintiff Keith Dixon
13 following his fall from the hospital gurney.
14

15 6. The plaintiffs contend that Dr. Meirelles should have continued the
16 surgical procedure to a later date, given the injuries plaintiff Keith Dixon had
17 sustained as a result of the fall from the hospital gurney. The surgical results
18 were poor and were a failure, leaving plaintiff Keith Dixon impaired.
19

20 7. Plaintiff Keith Dixon was not properly informed of the risks associated
21 with the health care and treatment offered to him by the defendants, and if he
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28 Plaintiff Counsel's declaration, opposing
dismissal - 6

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P.O. Box 1707
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1 had been fully informed he would not have agreed to the medical care and
2 treatment offered by the defendants.
3

4 As a result of the negligence and lack of informed consent by the
5 defendants, plaintiff Keith L. Dixon sustained personal injuries and
6 general and special damages all in an amount to be proved at the time of
7 trial."
8
9

10 The Dixons need to be compensated for their losses; the past and
11 future reasonable medical expenses, and reasonable out of pocket costs.
12 The estimated medical costs to date can be computed by reviewing all
13 billings to date, all L&I payments, and other sources of payments made
14 to the hospital, to the physicians and pharmacies, and support health
15 care providers. A reasonable estimate for these services, both past and
16 future, is over \$100,000.00. The wage losses of \$286,560.00 are a very
17 conservative estimate. The attorney's fees, if this is settled prior to
18 litigation, shall be significantly less than at trial, measured by a Lodestar
19 payment of approximately 20% of the total recovery. The Dixons should
20 be compensated for the loss of consortium damages, which in this case
21 shall be at least \$250,000.00. Mr. Dixon should be compensated for his
22 general damages, and these damages are significant. He has lost the
23 quality of life that no person should have to suffer. He shall never be the
24 same, and his injuries lead a reasonable person to conclude a payment of
25 at least \$1,250,000.00 should be offered to resolve these general damages
26 claims. The subrogated claims of L&I and Social Security are additional
27

28 Plaintiff Counsel's declaration, opposing
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P.O. Box 1707
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1 costs that the hospital, its negligent staff, and Dr. Meirelles should pay
2 in order to allow the Dixons to be made whole.

3
4 The above offer of settlement is presented pursuant to the
5 provisions of Evidence Rule 408, and is not to be considered as binding
6 upon the Dixons in the event this matter must proceed to trial. This offer
7 cannot be revealed to the fact finder in any subsequent trial, pursuant to
8 the express provisions of ER 408.

9 Thank you for your attention to these issues. I look forward to your
10 early response.

11 Very truly yours,

12
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14
15
16

J.J. SANDLIN, Attorney at Law
17 For Mr. Keith Dixon and Ms. Rebecca Dixon, husband and wife"

18
19 4. Division III, Washington Court of Appeals has provided an excellent
20 analysis of the mediation requirement and the extension of the statute of limitations
21 for one year when mediation is requested. See *Cortez-Kloehn v. Morrison*, 162
22 Wn. App. 166, 252 P.3d 909 (2011). The above text, provided to each defendant,
23 meets the statutory standards of RCW 7.70.100 and RCW 7.70.110. The Division
24
25

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28 Plaintiff Counsel's declaration, opposing
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1 III Court did not see it that way in *Cortez-Kloehn*, but that was merely an offer to
2 mediate. The instant case is distinguishable, as the plaintiff, Keith Dixon, has
3 requested mediation, and urged the parties to engage in mediation as soon as
4 possible, rather than wait for the statutory time of 90 days to expire (that 90 day
5 timeline apparently has been struck down by our Washington case law, anyway).
6
7

8 5. The defendants make a point that the action was filed and thus mediation is
9 preempted by filing the action. Interestingly, the defendants then suggest that the
10 action was not commenced—so where does that place their argument about the
11 request for mediation? They cannot have it both ways!¹ But the reality is that the
12 plaintiff, out of an abundance of caution, requested immediate mediation and filed
13 the action, to get the ball rolling to see if there could be an early resolution of the
14 claims, and both defendants refused to engage in mediation—the hospital through
15 its silence, and the physician through its attorney, who emphatically denied any
16 liability attaching to the defendant physician, and then refused to engage in
17 mediation, in the follow-up telephone conversation with this counsel.
18
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24 ¹ Notably, the request for mediation occurred prior to the expiration of the statute
25 of limitations, a material distinction from *Cortez-Kloehn v. Morrison*, 162 Wn.
26 App. 166, 252 P.3d 909 (2011).
27

1 For the above reasons this Court should deny the defendants' motions to
2 dismiss and should allow the parties to proceed in discovery.
3

4 Respectfully submitted this 9th day of December, 2011.
5

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7 *J.J. Sandlin*

8 J.J. SANDLIN, WSBA #7392, Attorney for Plaintiff Dixon
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28 Plaintiff Counsel's declaration, opposing
dismissal - 10

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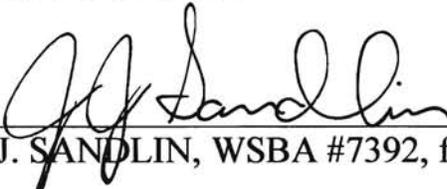
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Prosser, Washington 99350
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Cell: (509) 594-8702
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CERTIFICATE OF SERVICE

J.J. SANDLIN declares under penalty of perjury of the laws of the State of Washington as follows:

On October 19, 2012 I mailed a copy of the APPELLANTS' OPENING BRIEF (corrected, and with one copy; payment of sanctions included) to Clerk of the Court of Appeals, Spokane Division III, at 500 North Cedar Street, Spokane, WA 99201, and I mailed a copy of the APPELLANTS' OPENING BRIEF (corrected) to opposing counsel, Attorney Thomas Howard Fain, of FAIN ANDERSON VANDERHOEF, PLLC, 701 5th Ave., Ste. 4650, Seattle, WA 98104-7030, and Attorney Jerry Aiken, of MEYER, FLUEGGE & TENNEY, P.S., P.O. Box 22680, Yakima, WA 98907-2680.



J.J. SANDLIN, WSBA #7392, for plaintiffs-appellants