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SUPREME COURT
STATE OF WASHINGTON

82142-9

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No. 82973-0

BY RONALD R. CARPENTER

SUPREME COURT OF _____
THE STATE OF WASHINGTON CLERK *RJC*

LINDA CUNNINGHAM and DOWNEY C. CUNNINGHAM,
a Marital Community,

Appellants,

v.

RONALD F. NICOL, M.D.; VALLEY RADIOLOGISTS, INC., P.S.;
and MULTICARE HEALTH SYSTEM, INC.
dba COVINGTON MULTICARE CLINIC,

Respondents.

**ANSWER TO STATEMENT OF GROUNDS
FOR DIRECT REVIEW**

MICHAEL MADDEN
WSBA No. 8747
ELIZABETH A. LEEDOM
WSBA No. 14335
Bennett Bigelow & Leedom, P.S.
1700 7th Avenue, Suite 1900
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Attorneys for Respondent Nicol and Valley Radiologists, Inc., P.S.

1. NATURE OF CASE AND DECISION

Plaintiff/appellants commenced this action for medical negligence by filing a complaint on August 20, 2008. The complaint alleged that defendant/respondents negligently failed to detect a tumor, which appellants claim should have been detected on August 24, 2000 by Dr. Nicol when he read a magnetic resonance imaging (MRI) study. Complaint ¶ 3.2.¹ The complaint also alleges that appellants “did not learn of any issues pertaining to the old films ... until February 2008.” *Id.*² This allegation apparently was included to allow appellants to take advantage of the statutory discovery rule under RCW 4.16.350, which allows an action for professional negligence to be brought within one year after the patient discovers or should have discovered that the injury in question was caused by a negligent act or omission of a healthcare provider.

RCW 4.16.350, as re-enacted by Laws 2006, ch. 8, § 302, includes a repose provision, which provides, with respect to actions for damages resulting from health care, “that in no event shall an action be commenced more than eight years after ... [the] act or omission” alleged to have

¹ Documents from the trial court record cited in this answer are reproduced in the appendix filed herewith.

² This date coincides with the time when plaintiffs obtained a complete set of Linda Cunningham’s medical records. Ashcraft Decl., Ex. 1.

caused injury. Accordingly, in this case, the statute of repose prevented appellants from commencing an action after August 24, 2008. Appellants and their counsel were admittedly aware of this provision, as well as the requirement under RCW 7.70.100 to give 90 days written notice of intent to commence an action for damages arising from the provision of health care.³ Nonetheless, despite admitted knowledge of a potential claim in February 2008, appellants did not serve a notice of intent until July 29, 2008, 21 days before their lawsuit was commenced.

When defendants/respondents moved to dismiss based on failure to comply with the 90-day notice requirement, appellants responded by seeking a continuance until after a decision in *Putman v. Wenatchee Valley Med. Ctr., P.S.*, No. 80888-1.⁴ They asserted that this Court's decision in *Putman*, which deals with the constitutionality of the certificate of merit required by RCW 7.70.150, would determine the validity of the 90-day notice requirement under RCW 7.70.100. Appellants made no other arguments in their opposition⁵ and specifically conceded the validity of the re-enacted statute of repose, stating, "[u]nder

³ Plaintiffs' Joint Response in Opp. to Defendants' Motion to Dismiss, p. 2:5-13.

⁴ *Id.*

⁵ *Id.* at pp. 3-4.

these references and authorities the validity of the subject statute of repose is beyond challenge.”⁶

By separate motion, appellants requested a continuance of all dispositive motions pending the *Putman* decision or, alternatively, a “declaratory ruling” or “summary judgment” on an issue that they described as “conflicts between the relevant statute of abrogation/repose and other 2006 amendments.”⁷ Although never fully articulated, appellants’ contention seemingly was that, if the 90-day notice requirement is not facially unconstitutional, it is unconstitutional as applied to them because, in order to give the required notice, they would have to postpone commencement of their action until after the statute of repose took effect.

Respondents opposed both of these motions because *Putman* does not address the validity of RCW 7.70.100, and because appellants did not demonstrate why they were unable to comply with the notice of intent requirement and commence their action before the repose period took effect.⁸ After hearing oral argument, the trial court entered separate orders granting defendants’ motion to dismiss and denying plaintiffs’ motions for

⁶ *Id.* at p. 3.

⁷ Plaintiffs’ Consol. Motions for Continuance and for Summary Judgment, pp. 6-7.

⁸ Defendants Nicol, *et al.* Opp. to Plaintiffs’ Consol. Motions.

continuance or for summary judgment.⁹ On April 13, 2009, plaintiffs filed a notice of appeal with respect to the Order granting the motion to dismiss only.¹⁰

2. ISSUE PRESENTED FOR REVIEW

Consistent with their notice of appeal, the sole issue identified in connection with their appeal from the dismissal order is the alleged facial unconstitutionality of the notice of intent requirement.¹¹

3. GROUNDS FOR DENYING DIRECT REVIEW

Appellants seek direct review only under RAP 4.2(a)(4), which provides for Supreme Court review in cases “involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” As shown herein however, the issue presented does not warrant direct review in this case.

A. The issue presented is already pending before this Court.

Appellants’ only arguments are identical to those raised in *Waples v. Yi*, 146 Wn. App. 54, 189 P.2d 813 (2008), *rev. granted* 165 Wn.2d 1031, 203 P.3d 382 (2009). Therefore, the result in *Waples* will control in

⁹ Order Granting Defendants’ Motion to Dismiss (entered March 13, 2009); Order Denying Plaintiffs’ Consol. Motions (also entered March 13, 2009).

¹⁰ Plaintiffs’ Notice of Appeal to Supreme Court.

¹¹ Statement of Grounds for Direct Review, p. 4.

this case. There is no need to complicate or delay resolution of that matter by granting review here.

B. Additional issues are not properly before this Court.

Additional issues concerning application of the statute of repose are not properly or adequately presented in this case. First, in their pleadings below, appellants conceded the validity of the statute of the repose. Second, in opposition to defendants' motion to dismiss, appellants' only argument was that the notice of intent requirement is facially invalid. While appellants' summary judgment motion briefly mentioned an alleged unconstitutional conflict between the notice requirement and the repose statute, they did not appeal the order denying that motion. And, although their Statement of Grounds for Direct Review alludes to additional issues concerning this alleged conflict,¹² appellants' statement of the issue presented omits any mention of these claims.

Accordingly, the Court should not consider any additional issues, not only because they were not adequately presented below or properly appealed, but because they are entirely hypothetical in the context of this case; *i.e.*, it is undisputed that, at any time up to May 24, 2008, appellants could have served a notice of intent and been able to commence their

¹² Statement of Grounds for Direct Review, p. 2.

action before it was barred by the statute of repose. When respondents argued that appellants could have complied with the notice requirement and still commenced their action in a timely manner, appellants submitted nothing to rebut that contention.¹³ Indeed, the allegation in their complaint that they became aware of problems with the MRI in February 2008 precludes any credible argument that they were unable to comply with the notice requirement. Unlike the requirements under CR 11 and RCW 7.70.150 to commence a malpractice lawsuit, no particular level of factual investigation, legal research or expert support is required before serving a notice of intent to sue. Therefore, the requirement to give 90 days notice imposed no significant burden on the appellants and any conflict with the statute of repose was entirely avoidable, which is no doubt why appellants' arguments are focused on a facial challenge to the notice requirement. Because that issue is already before this Court in *Waples*, there is no need to grant direct review in this matter.

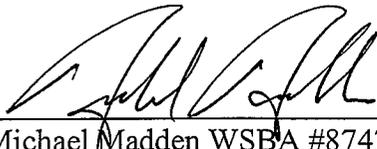
4. CONCLUSION

For these reasons, direct review should be denied and the matter transferred to the Court of Appeals.

¹³ Plaintiffs' Resp. to Motion to Dismiss; Defendants' Reply Brief in Supp. of Motion to Dismiss, p.3.

Respectfully submitted this 11 day of May, 2009

BENNETT BIGELOW & LEEDOM, P.S.

By 
Michael Madden WSBA #8747
Elizabeth A. Leedom, WSBA #14335
BENNETT BIGELOW & LEEDOM, P.S.
1700 7th Avenue, Suite 1900
Seattle, WA 98101
(206) 622-5511

Attorneys for Respondents Nicol and Valley
Radiologists

DECLARATION OF SERVICE

I, Deanna Schow, declare as follows:

I am a resident of the State of Washington, residing or employed in Seattle, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1700 7th Avenue, Suite 1900, Seattle, Washington 98101.

On May 12, 2009, I certify under penalty of perjury under the laws of the State of Washington that I caused service of the foregoing **ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW** by causing a true and correct copy to be delivered via legal messenger as follows:

Jerald D. Pearson
The Pearson Law Firm, P.S.
351312 SE Douglas Street, Suite 103
Snoqualmie, WA 98065
Attorneys for Appellants

John Rosendahl
Tim Ashcraft
Williams Kastner & Gibbs, PLLC
1301 A Street, Suite 900
Tacoma, WA 98402
Attorneys for Multicare Health System, Inc.



Deanna Schow

APPENDIX

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

LINDA CUNNINGHAM AND DOWNEY
C. CUNNINGHAM, A MARITAL
COMMUNITY,

Plaintiffs,

vs.

No.

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC,

Defendants.

COMPLAINT FOR PERSONAL INJURIES IN TORT
(MEDICAL NEGLIGENCE)

COME NOW the Plaintiffs, and for claims against these Defendants, allege
as follows:

1. PARTIES:

1.1 Plaintiffs CUNNINGHAM: Linda Cunningham and Downey
Cunningham, are husband and wife and at all material times were residents of

COMPLAINT FOR PERSONAL INJURIES IN TORT
(MEDICAL NEGLIGENCE) -1

THE PEARSON LAW FIRM, P.S.
3511 SE HODDLAG STREET, SUITE 101
SINGOALAH, WA 98065
425 831-3100
FAX 425 831-3105

1 King County, Washington; and Linda Cunningham was a patient receiving health
2 care services through the named defendants.

3
4 1.2 Defendant NICOL: Ronald F. Nicol, M.D. is a health care
5 professional duly licensed to practice as a specialist physician/radiologist in
6 the State of Washington, and at all material times defendant Nicol was
7 practicing in King County and a resident of the State of Washington; and on
8 information and belief defendant Nicol was an employee or agent of the other
9 defendants, through which Nicol provided radiology services to
10 plaintiff/patient Linda Cunningham, acting within the scope of his employment.

11
12 1.3 Defendant Multicare: Multicare Health Systems, Inc. dba
13 Covington Multicare Clinic, is a corporation which provides medical services to
14 the public, acting through its agents and employees, including defendant Valley
15 Radiologists and defendant Nicol.

16
17 1.4 Defendant Valley: Valley Radiologists, Inc., P.S., is a
18 corporation which provides medical services to the public, acting through its
19 agents and employees, including defendant Nicol.

20
21 2. JURISDICTION AND VENUE: The subject matter hereof and the
22 parties hereto are subject to the jurisdiction of the above-entitled Court; and
23 venue is proper.

24
25 3. NEGLIGENCE, LIABILITY FACTS AND LIABILITY THEORIES

26
27 3.1 On or about August 24, 2000, plaintiff Linda Cunningham
28 was seen by her primary care physician Pamela Yung MD, and referred for
29 imaging studies through the Covington Multicare Clinic to rule out any serious

COMPLAINT FOR PERSONAL INJURIES IN TORT
(MEDICAL NEGLIGENCE) -2

THE PEARSON LAW FIRM, P.S.
33731 SO DOUGLAS STREET, SUITE 103
BNOCKWALSH, WA 98003
425 831-3100
FAX 425 831-3105

1 and life threatening causes of Linda Cunningham's reported symptoms.
 2 Plaintiff Linda Cunningham requested, and was legally entitled to receive,
 3 reasonably prudent health care services.
 4

5 3.2 The imaging studies at issue (brain MRI) were taken on
 6 August 24, 2000 and reported by and through the defendants as normal; and in
 7 fact, the imaging studies were markedly abnormal, and showed abnormalities
 8 of extra-axial tumor mass, evident on all pulse sequences and more than eight
 9 images; and Linda Cunningham did not learn of any issues pertaining to the old
 10 films managed by these defendants until February 2008.
 11

12 3.3 The health care services defendants provided to plaintiff
 13 Linda Cunningham were below the standard of care, as defendants negligently
 14 failed to accurately review and accurately report the abnormalities on the
 15 subject imaging studies, and failed to alert the plaintiffs to the inaccurate
 16 reporting.
 17

18 3.4 At all material times defendant Nicol acted independently
 19 and/or as apparent or actual agent or employee of Covington Multicare, and/or
 20 Valley Radiologists.
 21

22 3.5 Standard of Care: The health care provided by the
 23 defendants was below the standard of care, and the defendants failed in their
 24 duty to provide reasonable and prudent care, and failed to exercise the degree
 25 of skill, care, and learning expected of reasonably prudent providers under
 26 such circumstances.
 27
 28
 29

COMPLAINT FOR PERSONAL INJURIES IN TORT
 (MEDICAL NEGLIGENCE) - 3

THE PEARSON LAW FIRM, P.S.
 2131 N. DOUGLAS STREET, SUITE 103
 ANACAPLES, WA 98005
 253 831-3100
 FAX 253 831-3105

1 4. CAUSATION AND DAMAGES: As a direct, immediate and proximate
 2 result of the defendants' negligent and wrongful conduct Plaintiffs sustained
 3 severe personal injuries, and permanent disabilities, including loss of
 4 consortium, all to their actual and continuing damage in an amount to be
 5 proven at trial.

7 5. **DECLARATORY RELIEF IS REQUESTED DUE TO THE PRESENCE**
 8 **OF A JUSTICIABLE CONTROVERSY: CONTRADICTIONS BETWEEN**
 9 **STATUTORY PREREQUISITES TO SUIT AND THE APPLICABLE STATUTE OF**
 10 **REPOSE:** RCWA 7.70.100 requires a mandatory Notice of Intent To Sue; the
 11 statute dictates that no claim can be commenced until a Notice is provided and
 12 a 90 day waiting period has passed; the statute also confirms that upon
 13 compliance with this requirement all applicable statutes of limitation will be
 14 extended for 90 days. RCWA 7.70.100, however, does not address the
 15 implications of the 90 day notice on the applicable statute of repose under
 16 RCWA 4.16.350 which provides that regardless of any late discovery of
 17 negligence, no claim can be commenced after eight years.

21 Under the legislative history of the applicable statute our Legislature
 22 specifically declared its intentions in its effort to address judicial concerns:

24 "The purpose of this section and section 302, chapter 8, Laws of 2006 is to
 25 respond to the court's decision in DeYoung v. Providence Medical Center, 136
 26 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-
 year statute of repose in RCW 4.16.350.

27 Plaintiffs note the potential contradictions between these principles of
 28 limitation, repose and extension, and the judicially recognized difference

29 COMPLAINT FOR PERSONAL INJURIES IN TORT
 (MEDICAL NEGLIGENCE) -4

THE PEARSON LAW FIRM, P.S.
 35131 SE DOUGLAS STREET, SUITE 103
 SNOQUALMIE, WA 98065
 425 831-3100
 FAX 425 831-3105

1 between statutes of limitation and statutes of repose; and plaintiffs note that
2 the Notice of Intent To Sue required by RCWA 7.70.100, if valid, effectively
3 shortens the applicable statute of repose to less than eight years, unlawfully
4 denying certain citizens like Linda and Downey Cunningham access to the
5 courts and denying essential rights guaranteed by the Constitution of the State
6 of Washington.

8
9 Plaintiffs also note that if our courts treat the statute of repose as a
10 statute of limitation, and the Notice and 90 day waiting period extends this
11 applicable limitation period, then compliance with RCWA 7.70.100 will extend
12 the period of repose beyond eight years.

13
14 Plaintiffs seek Declaratory Relief to resolve all ambiguity under these
15 facts, and provide judicial confirmation that the case has been properly
16 commenced.

17
18 WHEREFORE, Plaintiffs pray for Declaratory Relief and judgment
19 against Defendants jointly and severally as follows:

20 a. For an amount commensurate Plaintiffs' injuries to be determined
21 at the time of trial;

22 b. For Plaintiffs' costs, disbursements, pre-judgment interest on
23 liquidated damages and attorney's fees incurred herein;

24 c. For declaratory relief as referenced above; and

25 d. For such other and further relief as the court deems just and
26 equitable.
27
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29

COMPLAINT FOR PERSONAL INJURIES IN TORT
(MEDICAL NEGLIGENCE) -5

THE PEARSON LAW FIRM, P.S.
33131 96 DORRILLAS STREET, SUITE 105
SNOQUALMIE, WA 98068
425.831.3100
FAX 425.831.1102

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DATED this 21st day of August, 2008.

THE PEARSON LAW FIRM, P.S.

By: [Signature]
JERALD D. PEARSON, WSBA #8970
Attorney for Plaintiffs

COMPLAINT FOR PERSONAL INJURIES IN TORT
(MEDICAL NEGLIGENCE) -6

THE PEARSON LAW FIRM, P.S.
35131 SE DOUGLAS STREET, SUITE 102
SNOQUALMIE, WA 98045
425 831-3100
FAX 425 831-3105

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The Honorable Cheryl Carey
Hearing Date: March 13, 2009, 11:00 a.m.

FEB 13 2009

BENNETT BIGELOW
& LEEDOM

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

LINDA CUNNINGHAM and DOWNEY C.
CUNNINGHAM, a marital community,

Plaintiffs,

v.

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S., and
MULTICARE HEALTH SYSTEM, INC., d/b/a
COVINGTON MULTICARE CLINIC,

Defendant.

NO. 08 2 28582 1 KNT

DECLARATION OF TIMOTHY L.
ASHCRAFT IN SUPPORT OF
DEFENDANT MULTICARE HEALTH
SYSTEM, INC. d/b/a COVINGTON
MULTICARE CLINIC'S JOINDER IN
DEFENDANTS NICOL AND VALLEY
RADIOLOGISTS' MOTION TO
DISMISS FOR FAILURE TO COMPLY
WITH RCW 7.70.100

TIMOTHY L. ASHCRAFT, declares as follows:

1. My name is Timothy L. Ashcraft. I am over 18 years of age and competent to make this declaration.

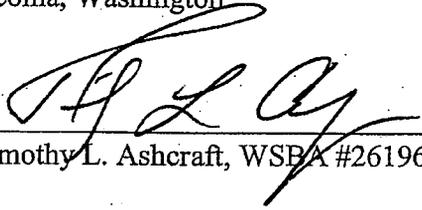
2. Attached to the declaration as Exhibit 1 is a true and correct copy of requests made by Linda Cunningham for her medical records in December 2007 and February 2008.

I DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DECLARATION OF TIMOTHY L. ASHCRAFT IN SUPPORT OF
DEFENDANT MULTICARE HEALTH SYSTEM, INC. d/b/a
COVINGTON MULTICARE CLINIC'S JOINDER IN
DEFENDANTS NICOL AND VALLEY RADIOLOGISTS' MOTION
TO DISMISS FOR FAILURE TO COMPLY WITH RCW 7.70.100 - 1

Williams, Kastner & Gibbs PLLC
1301 A Street, Suite 900
Tacoma, Washington 98402-4200
(253) 593-5620 Tacoma
(206) 628-2420 Seattle

1 DATED this 12 day of January, 2009 at Tacoma, Washington

2
3 By 
4 Timothy L. Ashcraft, WSPA #26196

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DECLARATION OF TIMOTHY L. ASHCRAFT IN SUPPORT OF
DEFENDANT MULTICARE HEALTH SYSTEM, INC. d/b/a
COVINGTON MULTICARE CLINIC'S JOINDER IN
DEFENDANTS NICOL AND VALLEY RADIOLOGISTS' MOTION
TO DISMISS FOR FAILURE TO COMPLY WITH RCW 7.70.100 - 2

Williams, Kastner & Gibbs PLLC
1301 A Street, Suite 900
Tacoma, Washington 98402-4200
(253) 593-5620 Tacoma
(206) 628-2420 Seattle

EXHIBIT 1

View Scanned Document

Covington MultiCare Clinic
Release of Information - SKC Office
17700 SE 272nd Street, Room 270
Covington, WA 98042-4951
Phone # 253-372-7239, Fax # 253-372-7238



Authorization to Use or Disclose My Health Care Information

Patient's full name (print): Linda Lee Cunningham Date of Birth: 11-3-55
Previous name (print): _____ Phone Number: 253 852 8141
Reason for this Authorization: _____

You may use or disclose the following health care information (check all that apply):
 All records Last 2 years of records Last 3 years of records
 Immunization records Bills/Payment Information
 Permanently release all mammography images
 Other (specify specific days of service): _____

Place a check mark next to each item below that you wish to INCLUDE in this disclosure:
 HIV (AIDS virus) *see reverse Sexually transmitted diseases
 Psychiatric disorders/mental health Drug and/or alcohol abuse

I authorize disclosure of my health care information noted above to: (if more than one see reverse):
Name of person or organization: Linda Cunningham
Address: 10224 SE 224
City: Kent State: Wa Zip: 98031 Phone: 253 852 8141 Fax: _____

You may obtain my health care information noted above from:
Name of person or organization: Covington MultiCare Clinic
Address: Release of Information - SKC Office
City: _____ State: _____ Zip: _____
17700 SE 272nd Street, Room 270
Covington, WA 98042-4951
Phone # 253-372-7239, Fax # 253-372-7238

This Authorization Expires:
 Please include a date or event that you want this authorization to expire. (if none indicated, it will expire in 90 days from date signed.) Date/Event: _____
 Financial institutions and employers:
When an authorization permits the disclosure of health care information to a financial institution or an employer of the patient for purposes other than payment, the authorization as it pertains to those disclosures shall expire ninety (90) days after the signing of the authorization, unless the authorization is renewed by the patient. Initials: _____

MY RIGHTS
I understand I do not have to sign this authorization in order to get health care benefits (treatment, payment or enrollment). However, I do have to sign an authorization form:
• To take part in a research study. OR
• To receive health care when the purpose is to create health care information for a third party.

I may revoke this authorization in writing. However, it would not affect any actions/disclosures already taken by MultiCare Health System based upon this authorization. I may not be able to revoke this authorization if its purpose is to obtain insurance. Two ways to revoke this authorization are:
• Fill out a revocation form. The form is available from MultiCare Health System. OR
• Write a letter to MultiCare Health System.

Once MultiCare Health System discloses your health care information, the recipient may re-disclose your information and privacy laws may no longer protect your information.

CHARGES FOR INFORMATION
I understand that I may be charged a reasonable fee for the copies I have requested. A fee schedule is available from the Health Information Management Department.

Linda Cunningham 12/31/07
Patient or legally authorized individual signature Date

Authorized individual's printed name if signed on behalf of the patient Relationship (parent, legal guardian, personal representative)

MULTICARE USE ONLY
 Call patient when complete Fax to physician Mail Request completed at clinic

Provide Copy to Patient

View Scanned Document

02/26/2008 01:11 FAX 253 859 1821
FEB-26-2008 13:08 FROM-MULTICARE NEUROSURGERY

KELLY MOORE PAINT KENT

002

+2534037288

T-215 P.002/002 F-858

MULTICARE
Health System

AMH
FEB 26 2008
10:35

Authorization to Use or Disclose My Health Care Information

X Patient's full name (print): LINDA CUNNINGHAM X Date of Birth: 11-3-55
X Previous name (print): Linda Ring X Phone Number: 253 852 8141
X Reason for this Authorization: FOR MY OWN RECORDS

You may use or disclose the following health care information (check all that apply):
 All records Last 2 yrs of records Last 5 years of records
 Immunization records Bills/Payment Information
 Other:

Place a check mark next to each item below that you wish to INCLUDE in this disclosure:

- HIV (AIDS virus) *see reverse
- Sexually transmitted diseases
- Psychiatric disorders/mental health
- Drug and/or alcohol abuse

To (if more than one see reverse):

Name of person or organization: Myself - Linda Cunningham
Address: 10224 SE 224th Street
City: Kent State: WA Zip: 98031 Phone: 253 852 8141 Fax:

From:
Name of person or organization: Dr. Weise Multicare Neurosurgery
Address: 915 6th Ave Suite 200
City: Tacoma State: WA Zip: 98405 Phone: 253-403-7277

This Authorization Expires:
 in 90 days from the date signed Other (not to exceed 90 days) from the date signed

MY RIGHTS

I understand I do not have to sign this authorization in order to get health care benefits (treatment, payment or enrollment). However, I do have to sign an authorization form:
- To take part in a research study. OR
- To receive health care when the purpose is to create health care information for a third party.

I may revoke this authorization in writing. However, it would not affect any actions/disclosures already taken by MultiCare Health System based upon this authorization. I may not be able to revoke this authorization if its purpose is to obtain insurance. Two ways to revoke this authorization are:
- Fill out a revocation form. The form is available from MultiCare Health System. OR
- Write a letter to MultiCare Health System.

Once MultiCare Health System discloses your health care information, the recipient may re-disclose your information and privacy laws may no longer protect your information.

CHARGES FOR INFORMATION

I understand that I may be charged a reasonable fee for the copies I have requested. A fee schedule is available from the Health Information Management department.

X Linda Cunningham X 2/26/08
Patient's authorized individual signature Date

Authorized individuals printed name if signed on behalf of the patient Relationship (Parent, legal guardian, personal representative)

MULTICARE USE ONLY

- Call patient when complete
- Fax to physician
- Mail
- Request completed at clinic

Provide Copy to Patient

COPY RECEIVED
TIME _____ BY _____

MAR 04 2009

BENNETT BIGELOW
& LEEDOM

The Honorable Cheryl Carey
Hearing Date: March 13, 2009

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

LINDA CUNNINGHAM AND DOWNEY
C. CUNNINGHAM, A MARTIAL
COMMUNITY

Plaintiffs,

vs.

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC

Defendants.

No. 08-2-28582-1

***PLAINTIFFS' JOINT RESPONSE IN OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS***

1. INTRODUCTION

This medical negligence case is based on a 2000 MRI scan that was reported as normal when in fact the scan confirmed the presence of tumors.

Plaintiffs commenced this action last summer shortly before the statute of repose expired; and this Court will now consider motions to dismiss based on

PLAINTIFFS' JOINT RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTIONS TO DISMISS - 1

THE PEARSON LAW FIRM, P.S.
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SNOOQUALMIE, WA 98065
425 831-3100
FAX 425 831-3105

1 on the argument that the case was commenced before a statutory 90 day
2 waiting period had expired.

3
4 **2. ARGUMENT REGARDING ANALYSIS OF STATUTORY CONFLICTS**
5 **BETWEEN RCWA 4.16.350 AND RCWA 7.70.100**

6 In commencing this suit, the plaintiffs were mindful of the 2006
7 amendments in SSHB 2292, the re-enactment of the statute of repose at RCWA
8 4.16.350, the previous judicial analysis in the *DeYoung* case, the legislature's
9 explicit rejection of the Washington State Supreme Court's ruling in *DeYoung*,
10 and the stated legislative intention to reinstate RCWA 4.16.350. Under these
11 references and authorities the validity of the subject statute of repose is
12 beyond challenge.
13

14 It is undisputed that the plaintiffs commenced this legal claim with a
15 Certificate of Merit, after plaintiffs provided the Notice of Intent to Sue, and
16 prior to the expiration of the eight year statute of repose. It is also undisputed
17 that in order to be timely in light of the repose period the plaintiffs commenced
18 the claim before the eight year period had expired, but before the 90 day
19 waiting period pertaining to mediation had ended (RCWA 7.70.100).
20
21

22 Because the plaintiffs commenced this action within the 90 day waiting
23 period, but before the statute of repose period had expired, the plaintiffs' claim
24 is subject to the defense motions to dismiss under RCWA 7.70.100. It is equally
25 true, however, that if the plaintiffs complied with the 90 day waiting period,
26 and delayed commencement of this action until after the eight year period of
27
28
29

1 repose expired, then plaintiffs' claim would be subject to defense motions to
2 dismiss under RCWA 4.16.350.

3
4 Because the legislative intentions and authority pertaining to the 2006
5 amendments are at issue, this Court's consideration in this matter will
6 necessarily include many of the issues briefed and argued in the pending
7 Putman matter.

8
9 For this reason, the plaintiffs have requested that these pending motions
10 be continued until the Washington State Supreme Court has issued its opinion
11 in the Putman appeal, which will address SSHB 2292, and the mandatory
12 conditions on medical negligence claims imposed by the legislature, relevant
13 constitutional inquiries and potential conflicts with the judiciary.

14
15 Plaintiffs hereby incorporate the Putman briefing by this reference, and
16 summarize such issues as follows:

17
18 Can the legislature invade the province of the judiciary by enacting
19 statutes that are essentially aspects of the Civil Rules or in conflict with such
20 rules? See, page 7 of the Putman brief, attached as Exhibit E to the Declaration
21 of Jerald Pearson.

22
23 Do the mandatory pre-conditions embodied in SSHB 2292 constitute an
24 unconstitutional denial or impairment constitutionally guaranteed rights of
25 access to our courts? See, page 14 of the Putman brief, attached as Exhibit E to
26 the Declaration of Jerald Pearson.

27
28 Are the mandatory pre-conditions embodied in SSHB 2292, in this case
29 RCWA 7.70.100 unconstitutional as violations of rights guaranteed under

1 provisions pertaining to equal protection, privileges and immunities, and due
2 process principles, and do the statutes at issue fail under the strict scrutiny or
3 rational basis tests? See, page 27 of the *Putman* brief, attached as Exhibit E to
4 the Declaration of Jerald Pearson.
5

6 More specifically, in the present case the plaintiffs are already in a
7 subgroup of civil remedy claimants (medical negligence claims), and now
8 further segregated into a group of citizens with rights of access who attempt to
9 bring a legal claim within the 90 days prior to the expiration of the repose
10 period. The conflict posed by the 90 day waiting period effectively reduces the
11 repose period to 7 years and 9 months. This result is contrary to the
12 legislature's intent and, if not unconstitutional in whole, such a result confirms
13 that the 90 day waiting period is certainly unconstitutional in this application.
14
15

16 Plaintiffs argue that the foregoing inquiries are raised in the present case
17 because the legislature cannot impose unreasonable and irrational conditions
18 or restrict access to justice and other citizen rights that are guaranteed by our
19 state and federal constitutions.
20

21 3. CONCLUSION

22 Plaintiffs renew their request that this Court delay ruling on these
23 matters until the *Putman* opinion is published, or, in the alternative, plaintiffs
24 ask the Court to recognize that the eight year statute of abrogation is clearly
25 intended as an absolute barrier to plaintiffs' claims, and that the application of
26 RCW 7.70.100 urged by the defense should be rejected and the defense motions
27 should be denied.
28
29

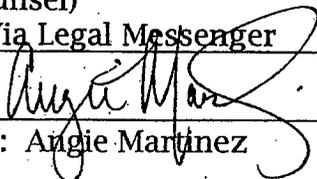
1 DATED this 20 day of MARCH, 2009.

2 THE PEARSON LAW FIRM, P.S.

3
4
5 By: 
6 GERALD D. PEARSON, WSBA #8970
7 Attorney for Plaintiffs

8
9
10 **CERTIFICATE OF SERVICE**

11 I hereby declare under penalty of perjury under the laws of the State of
12 Washington that I have served a true and correct copy of the foregoing upon
13 the individual(s) listed by the following means:

14 Elizabeth Leedom, Esq. 15 1700 Seventh Ave., Ste. 1900 16 Seattle, WA 98101	<input checked="" type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to (206) 622-8986 <input type="checkbox"/> U.S. Postal Service Express Mail <input checked="" type="checkbox"/> Via E-mail (agreement w/counsel) <input type="checkbox"/> Via Legal Messenger
17 18 John Rosendahl, Esq. 19 1301 A Street, Suite 900 20 Tacoma, WA 98402	<input checked="" type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to (253) 593-5625 <input type="checkbox"/> U.S. Postal Service Express Mail <input checked="" type="checkbox"/> Via E-mail (agreement w/counsel) <input type="checkbox"/> Via Legal Messenger
21 22 DATED: March 2, 2009	By:  23 Name: Angie Martinez

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The Honorable Cheryl Carey
Trial: February 8, 2010

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

LINDA CUNNINGHAM AND DOWNEY
C. CUNNINGHAM, A MARTIAL
COMMUNITY

Plaintiffs,

vs.

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC

Defendants.

No. 08-2-28582-1

PLAINTIFFS' CONSOLIDATED MOTIONS FOR:
1) CONTINUANCE OF DISPOSITIVE MOTIONS PENDING WASHINGTON
SUPREME COURT OPINIONS IN PUTMAN; AND
2) SUMMARY JUDGMENT ON CLAIM RELATED IMPLICATIONS OF
STAUTUTORY CONFLICTS PERTAINING TO THE STATUTE OF
ABROGATION/REPOSE, RCW 4.16.350

PLAINTIFFS' CONSOLIDATED MOTIONS FOR: CONTINUANCE OF
DISPOSITIVE MOTIONS PENDING WASHINGTON SUPREME COURT
OPINIONS IN PUTMAN; AND FOR SUMMARY JUDGMENT ON CLAIM
RELATED IMPLICATIONS OF STAUTUTORY CONFLICTS PERTAINING
TO THE STATUTE OF ABROGATION/REPOSE, RCW 4.16.350- 1

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1 COME NOW the plaintiffs, by and through counsel undersigned, and
2 move for two forms of relief: 1) an order of continuance for all motions seeking
3 a dispositive ruling, until after the Washington Supreme Court's opinions in the
4 pending Putman matter set for argument on February 24, 2009 (see Declaration
5 of Jerald Pearson with attachments); and 2) for Summary Judgment on issues of
6 declaratory relief pertaining to the statute of abrogation/repose, RCW 4.16.350.
7

8 Plaintiffs' motions are based upon the files and records herein, and the
9 supporting Declaration of Jerald D. Pearson.
10

11 I. RELIEF REQUESTED

12 Plaintiffs request that the trial court delay decision on any dispositive
13 motions relevant to the statutory conflict between the statute of
14 abrogation/repose, and 2006 statutory amendments, and that dispositive
15 motions on these issues only be considered after the Washington Supreme
16 Court publishes its decisions/opinions in the Putman case, currently scheduled
17 for oral argument on February 24, 2009.
18
19

20 II. STATEMENT OF FACTS

21 See Declaration of Jerald D. Pearson filed separately herein, and 1) the
22 attached pleadings, 2) certificate of merit, 3) documents that confirm the
23 schedule for the Putman case (appellate briefing can also be provided, if helpful
24 to this Court), and 4) recent WSBA article pertaining to rules of statutory
25 construction.
26
27

28 PLAINTIFFS' CONSOLIDATED MOTIONS FOR: CONTINUANCE OF
29 DISPOSITIVE MOTIONS PENDING WASHINGTON SUPREME COURT
OPINIONS IN PUTMAN; AND FOR SUMMARY JUDGMENT ON CLAIM
RELATED IMPLICATIONS OF STATUTORY CONFLICTS PERTAINING
TO THE STATUTE OF ABROGATION/REPOSE, RCW 4.16.350- 2

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III. STATEMENT OF ISSUES

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1. Should all dispositive motions be continued/delayed until after the Washington Supreme Court has addressed the statutory context, and legislative intentions pertaining to the 2006 statutory amendments that conflict with the statute of abrogation/repose at RCW 4.16.350 and guaranteed access to the courts?

2. Assuming the trial court reaches the issues addressed in the dispositive motions, from all parties, are the plaintiffs entitled to summary judgment confirming the timeliness of the present claim, which was filed to comply with the statute of abrogation/repose, but short of the 90 day notice of claim requirement reflected in the 2006 statutory amendments?

The following is an excerpt from the plaintiffs' complaint:

DECLARATORY RELIEF IS REQUESTED DUE TO THE PRESENCE OF A JUSTICIABLE CONTROVERSY: CONTRADICTIONS BETWEEN STATUTORY PREREQUISITES TO SUIT AND THE APPLICABLE STATUTE OF REPOSE: RCWA 7.70.100 requires a mandatory Notice of Intent To Sue; the statute dictates that no claim can be commenced until a Notice is provided and a 90 day waiting period has passed; the statute also confirms that upon compliance with this requirement all applicable statutes of limitation will be extended for 90 days. RCWA 7.70.100, however, does not address the implications of the 90 day notice on the applicable statute of repose under RCWA 4.16.350 which provides that regardless of any late discovery of negligence, no claim can be commenced after eight years.

Under the legislative history of the applicable statute our Legislature specifically declared its intentions in its effort to address judicial concerns:

"The purpose of this section and section 302, chapter 8, Laws of 2006 is to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight year statute of repose in RCW 4.16.350.

Plaintiffs note the potential contradictions between these principles of limitation, repose and extension, and the judicially recognized difference between statutes of limitation and statutes of repose; and plaintiffs note that the Notice of Intent To Sue required by RCWA 7.70.100, if valid, effectively shortens the applicable statute of repose to less than eight years, unlawfully

PLAINTIFFS' CONSOLIDATED MOTIONS FOR: CONTINUANCE OF DISPOSITIVE MOTIONS PENDING WASHINGTON SUPREME COURT OPINIONS IN PUTMAN; AND FOR SUMMARY JUDGMENT ON CLAIM RELATED IMPLICATIONS OF STATUTORY CONFLICTS PERTAINING TO THE STATUTE OF ABROGATION/REPOSE, RCW 4.16.350-3

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1 denying certain citizens like Linda and Downey Cunningham access to the courts and denying
essential rights guaranteed by the Constitution of the State of Washington.

2 ***

3 Plaintiffs seek Declaratory Relief to resolve all ambiguity under these facts, and provide judicial
confirmation that the case has been properly commenced.

4
5 **IV. EVIDENCE RELIED UPON**

6 See Declaration of Jerald D. Pearson, and multiple attachments.

7 **V. LEGAL ARGUMENT/AUTHORITY**

8
9 Plaintiffs' motion for continuance: The trial court has inherent authority
10 to manage its own schedule, and motion proceedings. Plaintiffs assert that it is
11 prudent to delay hearing the dispositive motions because the Putman case is
12 set for argument on 2/24/09. Putman involves conflicts between constitutional
13 guarantees of access to courts, and statutory construction and legislative
14 intentions pertaining to a body of 2006 statutory amendments applicable to
15 medical negligence claims. Putman issues include, but are not limited to, the
16 certificate of merit requirements and pre-conditions on access to our courts.
17 Although Putman may not specifically address the issue pertaining to the
18 statute of abrogation/repose raised in the present matter, the Supreme Court
19 opinions in Putman will be the first guidance available from the appellate
20 courts on the statutory context at issue in this matter.

21
22 Plaintiffs' motion for summary judgment: It is beyond dispute that the
23 plaintiffs have complied with the mandatory requirements of the statute of
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29 PLAINIFFS' CONSOLIDATED MOTIONS FOR: CONTINUANCE OF
DISPOSITIVE MOTIONS PENDING WASHINGTON SUPREME COURT
OPINIONS IN PUTMAN; AND FOR SUMMARY JUDGMENT ON CLAIM
RELATED IMPLICATIONS OF STAUTUTORY CONFLICTS PERTAINING
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1 abrogation/repose embodied in RCW 4.16.350. Such statutes of
2 abrogation/repose are mandatory and distinct from any "statutes of limitation."
3

4 The following authorities are summarized from Washington Practice at
5 15A Wash. Prac., Handbook Civil Procedure § 1.2 (2008-09 ed.).
6

7 Our courts distinguish between statutes of limitation and statutes of
8 repose. A statute of limitation bars plaintiff from bringing a claim after a
9 specified period of time following accrual of the cause of action. Statutes of
10 repose, on the other hand, are considered to be statutes of abrogation, and
11 such statutes terminate any potential claims after a specific arbitrary time, even
12 if an injury has not yet occurred. Gunnier v. Yakima Heart Center, Inc., P.S., 134
13 Wash. 2d 854, 953 P.2d 1162 (1998); Rice v. Dow Chemical Co., 124 Wash. 2d
14 205, 875 P.2d 1213 (1994); Zenaida-Garcia v. Recovery Systems Technology,
15 Inc., 128 Wash. App. 256, 115 P.3d 1017 (Div. 1 2005), review denied, 156 Wash.
16 2d 1026, 132 P.3d 1094 (2006); Morse v. City of Toppenish, 46 Wash. App. 60,
17 729 P.2d 638 (Div. 3 1986).
18
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22 A statute of abrogation/repose provides a time period within which the
23 cause of action *must accrue and commence*. Donovan v. Pruitt, 36 Wash. App.
24 324, 674 P.2d 204 (Div. 2 1983). If the discovery rule is applicable, accrual and
25 commencement will still be limited by the pertinent repose period.
26 Architectonics Const. Management, Inc. v. Khorram, 111 Wash. App. 725, 45
27

28 PLAINTIFFS' CONSOLIDATED MOTIONS FOR: CONTINUANCE OF
29 DISPOSITIVE MOTIONS PENDING WASHINGTON SUPREME COURT
OPINIONS IN PUTMAN; AND FOR SUMMARY JUDGMENT ON CLAIM
RELATED IMPLICATIONS OF STATUTORY CONFLICTS PERTAINING
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1 P.3d 1142 (Div. 1 2002) (abrogated on other grounds by, 1000 Virginia Ltd.
 2 Partnership v. Vertecs Corp., 158 Wash. 2d 566, 146 P.3d 423 (2006)).

3 If a cause of action does not accrue and commence within the
 4 repose/abrogation period, such statutes absolutely bar commencement of suit.

5 Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc., 105 Wash. 2d 878, 719
 6 P.2d 120 (1986).

7
 8 In Washington, statutes of abrogation/repose have been enacted in
 9 multiple settings, including products liability claims (RCWA 7.72.060), actions
 10 to void contracts under the Camping Resorts Act (RCWA 19.105.400),
 11 improvements on real property (RCWA 4.16.310) and actions against a
 12 corporation after dissolution (RCWA 23B.14.340, see Ballard Square
 13 Condominium Owners Ass'n v. Dynasty Const. Co., 158 Wash. 2d 603, 146 P.3d
 14 914 (2006)).

15
 16 Note: The medical malpractice statute of abrogation/repose in RCWA
 17 4.16.350 was declared unconstitutional in 1998. DeYoung v. Providence Medical
 18 Center, 136 Wash. 2d 136, 960 P.2d 919 (1998), but was explicitly reenacted by
 19 our legislature in 2006, to be applied to actions commenced on or after June, 7,
 20 2006. See Laws of 2006, Ch. 8, §§ 301 & 302.

21
 22 The Putman opinions will likely shed specific light on these issues and
 23 the Supreme Court will hear the arguments in Putman on 2/24/09. Even
 24 without Putman, however, plaintiffs assert that there are conflicts between the
 25 relevant statute of abrogation/repose and other 2006 amendments, and such
 26
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PLAINTIFFS' CONSOLIDATED MOTIONS FOR: CONTINUANCE OF
 DISPOSITIVE MOTIONS PENDING WASHINGTON SUPREME COURT
 OPINIONS IN PUTMAN; AND FOR SUMMARY JUDGMENT ON CLAIM
 RELATED IMPLICATIONS OF STATUTORY CONFLICTS PERTAINING
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1 statutory conflicts must be resolved in favor of access to our courts. This
2 Court should rule as a matter of law that plaintiffs' claims have been properly
3 commenced and should be allowed to proceed as timely under applicable
4 substantive laws. Such a ruling would be without any prejudice to the
5 defendants and would be consistent with the stated intention of the legislature
6 as referenced above.
7

8
9 **VI. CONCLUSION**

10 Plaintiffs' motion for continuance should be granted, and plaintiffs
11 should be granted summary judgment on the issue of statutory compliance.
12

13 **VII. PROPOSED ORDER**

14 A proposed Order is provided herewith.

15 DATED this 13th day of February, 2009.

16 THE PEARSON LAW FIRM, P.S.
17

18
19 By: 

20 JERALD D. PEARSON, WSBA#8970
21 Attorney for Plaintiffs
22
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28 PLAINTIFFS' CONSOLIDATED MOTIONS FOR: CONTINUANCE OF
29 DISPOSITIVE MOTIONS PENDING WASHINGTON SUPREME COURT
OPINIONS IN PUTMAN; AND FOR SUMMARY JUDGMENT ON CLAIM
RELATED IMPLICATIONS OF STAUTUTORY CONFLICTS PERTAINING
TO THE STATUTE OF ABROGATION/REPOSE, RCW 4.16.350- 7

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THE HONORABLE CHERYL CAREY
HEARING DATE: MARCH 13, 2009

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

LINDA CUNNINGHAM AND DOWNEY C.
CUNNINGHAM, A MARITAL
COMMUNITY,

Plaintiffs,

vs.

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC,

Defendants.

NO. 08-2-28582-1KNT

DEFENDANT DR. NICOL'S AND
VALLEY RADIOLOGISTS'
OPPOSITION TO PLAINTIFFS'
CONSOLIDATED MOTIONS

I. RELIEF REQUESTED

Defendants Ronald F. Nicol, M.D. and his employer, Valley Radiologists, Inc. P.S. respectfully request that this Court deny plaintiffs' consolidated motions filed on February 13, 2009. Plaintiffs' consolidated motions seek: 1) a continuance, which has not been properly requested under CR 56(f) and is not warranted, and 2) "summary judgment" related to implication of statutory conflicts pertaining to RCW 4.16.350, even though summary

1 judgment is already pending, via motions brought by all defendants, for plaintiffs' failure to
2 comply with RCW 7.7.0.100. Plaintiffs' second request for relief is therefore an improperly
3 brought cross-motion and is, in fact, unnecessary, as the dispositive issue is already before the
4 Court.

5 II. STATEMENT OF FACTS

6 **A. Medical Facts.**

7 Plaintiffs Linda and Downey Cunningham filed a Complaint for medical malpractice
8 on or about August 20, 2008, in King County Superior Court. (See Exhibit A to the
9 Declaration of Jennifer L. Moore)¹. The lawsuit was filed against Defendants Ronald Nicol,
10 M.D., Dr. Nicol's employer Valley Radiologists, Inc. P.S. and Multicare Health System.
11 Plaintiffs allege that the defendants misinterpreted an MRI of the brain taken August 24, 2000
12 and that the failure to accurately report the abnormalities on the MRI caused the plaintiffs'
13 injuries. (*Id.*)

14 **B. Procedural Facts.**

15 Plaintiffs did not file a notice of claim, as required by RCW 7.70.100. Plaintiffs
16 arguably knew of the potential claims months before their August 20, 2008 filing, however.
17 Plaintiffs did submit a certificate of merit from Dr. Randall Patten which referenced a written
18 "review" which was attached to the report summarizing his opinions. (See Exhibit B). The
19 Dr. Patten report was dated June 30, 2008, almost two months before the lawsuit was filed.
20

21 Plaintiffs did request declaratory relief in their complaint, citing "contradictions
22 between statutory prerequisites to suit and the applicable statute of repose." (*Id.*) However,
23
24
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26

1 plaintiffs never formally resolved the matter by seeking an order or declaratory judgment.

2 Plaintiffs' February 13th motion is their first attempt to resolve this issue.

3 **C. Facts Pertaining to the *Putman* Case.**

4 The *Putman* case which plaintiffs refer to repeatedly in their brief and which plaintiffs
5 assert, on page 6 of their brief, will "shed light" on the issues in our case, is a medical
6 malpractice case challenging the certificate of merit requirement. (See Exhibit C). However,
7 as the Brief of Appellant shows, the *Putman* case is about whether or not the trial court erred
8 in dismissing the claim for vicarious liability against the defendant medical center, when the
9 appellant failed to file a certificate of merit for each of the medical center's agents, whose
10 care was at issue. In the *Putman* case, the Appellant asked the Supreme Court to overturn
11 RCW 7.70.150 because it is unconstitutional for several reasons. (See Exhibit C, page 5).
12 That case does not address the issues at bar.

13
14 **II. STATEMENT OF ISSUES**

15 A. Whether the defendants' dispositive motions should proceed, as noted, when 1)
16 the plaintiffs have not properly requested a continuance under CR 56(f), and 2)
17 the *Putman* case does not remotely address the issues pending before this
18 Court.

19
20 B. Whether this Court should deny plaintiffs' request for summary judgment
21 determination that their claims were filed in a timely manner when plaintiffs
22 failed to file a notice of claim as required by RCW 7.70.100.
23
24

25 ¹ All exhibits are attached to the Declaration of Jennifer L. Moore and shall hereinafter be referred to by exhibit
26 number only.

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III. EVIDENCE RELIED UPON

CR 56, RCW 7.70.100, RCW 7.70.150, the pleadings on file, the Declaration of Jennifer L. Moore with exhibits attached thereto.

IV. ARGUMENT AND AUTHORITIES

A. Plaintiffs' Request for Continuance of Dispositive Motions Should be Denied.

1. Plaintiffs failed to Comply with CR 56(f), Which sets Forth the Requirements for Requesting a Continuance.

It is within the trial court's discretion to deny a motion for continuance of a summary judgment hearing. *See Coggle v. Snow*, 56 Wn. App. 499, 508 P.2d 554 (1990). "Under CR 56(f), a trial court may continue a motion for summary judgment if affidavits of the nonmoving party show a need for additional time to obtain affidavits, take depositions or conduct other discovery." *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003). However, here, the declaration from the nonmoving party's counsel, Mr. Pearson, does not show a need for additional time to obtain affidavits, take depositions or conduct discovery. The trial court may deny a motion for a continuance under CR 56(f) where the moving party does not offer a good reason for the delay in obtaining the desired evidence, the party does not state what evidence would be established through additional discovery, or the desired evidence will not raise a genuine issue of material fact. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

Here, plaintiffs' request for the continuance does not fall under any recognized parameters and plaintiff has failed to establish any of the above prerequisites. Plaintiffs are essentially asking the Court to stay the proceeding, without any basis for doing so. In fact, plaintiffs cite no legal basis for their request for continuance. When a motion to stay a

1 hearing is not properly supported, the court has a right and duty to hear the motion for
2 summary judgment on the basis of the showing before it. *Shoberg v. Kelly*, 1 Wn. App. 673,
3 676, 463 P.2d 280 (1969), *review denied*, 78 Wash.2d 992 (1970). Defendants accordingly
4 ask this Court to fulfill its duty to hear these dispositive motions as scheduled.

5 **2. The *Putman* Case Does Not Address the Issues Facing this Court on**
6 **Defendants' Motions.**

7 The plaintiffs' request for a continuance pending the Supreme Court's decision in the
8 *Putman* case misguides one to believe that the *Putman* case addresses the Statute of Repose; it
9 does not. The plaintiffs also mislead this Court into believing that the *Putman* case will affect
10 the Notice of Intent requirements; in fact it does not address RCW 7.70.100. While plaintiffs
11 state on page 4 of their motion that "*Putman* involves conflicts between constitutional
12 guarantees of access to courts, and statutory construction and legislative intentions **pertaining**
13 **to a body of 2006 statutory amendments applicable to medical negligence claims,**" the
14 truth is that the *Putman* case only addresses one of the amendments: RCW 7.70.150.
15

16 The *Putman* case is solely about the certificate of merit requirement, which is codified
17 in RCW 7.70.150. The opening line of Appellant Putman's brief reads as follows: "Kimme
18 Putman challenges the constitutionality of RCW 7.70.150's certificate of merit requirement in
19 medical malpractice cases." (See Exhibit C, p. 1). The Corrected Opening Brief of
20 Appellant Kimme Putman, which is attached herein as an exhibit for the Court's review, does
21 not even mention RCW 7.70.100.
22

23 Even a cursory reading of the headings in the Appellant's Brief, shows that the
24 *Putman* case is only challenging the certificate of merit requirement. Plaintiffs erroneously
25 imply in their motion that the *Putman* case will provide "guidance" to "statutory contest at
26

1 issue in this matter.” (Plaintiffs’ Motion, page 4). However the reasons Appellant Putman
2 challenged the certificate of merit requirements are specific and constitutionally based²; they
3 are wholly separate from the issues present in this matter. Accordingly, the *Putman* case
4 would have no precedential value on the claims present here, or the legal challenges raised by
5 the defendants in their motions.

6 **B. Plaintiffs’ Request For Summary Judgment Determination That Their Claims**
7 **Were Filed In A Timely Manner Should Be Denied Because Plaintiffs Failed To**
8 **File A Notice Of Claim As Required By RCW 7.70.100.**

9 Defendants “Motion for Summary Judgment” is not a motion properly brought under
10 CR 56(a), and is in fact more of a cross-motion to Defendants’ Motions to Dismiss. Because
11 plaintiffs seek a ruling that their motion was timely filed, in direct opposition to defendants’
12 motions to dismiss for failure to properly file under RCW 7.70.100, defendants incorporate by
13 reference all briefing filed by Defendants Dr. Nicol, Valley Radiologists and Multicare in
14 their respective Motions to Dismiss.

15 **1. Failure to Provide Ninety (90) Days’ Notice Bars Plaintiffs’ Claims.**

16 The legislature added new language to RCW 7.70.100 in 2006 that requires plaintiffs
17 to provide defendants with ninety (90) days’ notice of plaintiffs’ intention to commence a
18 medical malpractice action: “No action based upon a health care provider’s professional
19 negligence may be commenced unless the defendant has been given at least ninety days’
20 notice of the intention to commence the action.” RCW 7.70.100(1). The language of the
21 statute itself could not be clearer: notice is mandatory. This statute has been upheld by the
22
23

24 ² For instance, Appellant Putman argues that the certificate of merit requirement unconstitutionally usurps the
25 Court’s exclusive authority to promulgate rules of civil procedure, citing a conflict between RCW 7.70.150 and
26 CR 11. Appellant Putman also argues that the certificate of merit requirement violates the fundamental right of
access to courts; the same cannot be said of RCW 7.70.100 which only applies a brief waiting period.

1 appellate courts. *See Waples v. Yi*, 146 Wn. App. 54, 189 P. 3d 813 (2008). The *Waples*
2 court, which upheld the mandatory notice requirement of the former³ version of RCW
3 7.70.100, held as follows: “By its plain language, former RCW 7.70.100(1) mandated that a
4 plaintiff may only pursue an action based on a health care provider's negligence on the
5 condition that the plaintiff provides at least 90 days' notice.” The required notice of this
6 action was not provided to Dr. Nicol or Valley Radiologists.

7 **2. Similar Notice Statutes Have Been Upheld.**

8 The Washington Supreme Court has consistently required strict compliance with these
9 “waiting periods” when addressing similar statutes. Under RCW 4.96.020, for example, a
10 plaintiff must provide 60 days' notice to a local government entity before filing suit.
11 Likewise, a plaintiff has the same 60-day notice requirement for claims against the State.
12 RCW 4.92.110. In *Medina v. Pub. Util. Dist. No. 1*, 147 Wn.2d 303, 53 P.3d 993 (2002), the
13 Supreme Court addressed questions of substantial compliance and mitigating circumstances in
14 the context of RCW 4.96.020. The plaintiff in *Medina* served the required notice. After the
15 County rejected the claim, the plaintiff filed the complaint four (4) days before the 60-day
16 waiting period was set to expire. The Supreme Court held that the notice requirement had not
17 been met and dismissed the lawsuit.
18
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20 The purpose of RCW 4.96.020(4) is to establish a period of time for
21 government defendants to investigate claims and settle those claims where
22 possible. Compliance with a waiting period can be achieved only through
23 meeting the time requirements of the statute.

24 *Medina* argues, however, that because the purposes of the waiting period have
25 been met, once the County denied his claim, substantial compliance should be
26 found. We disagree. To hold as *Medina* suggests would call into question all
statutory and court rule time requirements because often the underlying

³ The portion of RCW 7.70.100 which subsequently changed did not affect the notice requirement.

1 purpose of the statute or rule may be achieved without regard to time
2 requirements. All time requirements necessarily involve a judgment by the
3 legislature or a court as to the amount of time necessary to achieve the
4 legislative or judicial purpose. Here, the legislature adopted a 60-day waiting
5 period, and Medina simply failed to comply. *Id.* at 317-18.

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11 Strict compliance has also been applied to the notice requirements of RCW 4.92.110:

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Courts have determined that, unlike the content of the filing, the requirement that a plaintiff file the claim under RCW 4.92.110 is strictly enforced. Failure to file a claim in proper fashion results in dismissal of the suit. The procedures of this statute are mandatory, and compliance is a condition precedent to recovery. The failure to comply with this statute before the expiration of the applicable statute of limitations results in a dismissal of the case. A plaintiff must comply with the requirements of the statutorily created right to bring an action against the State, regardless that such requirements may seem harsh and technical. *Levy v. State*, 91 Wn.App. 934, 942, 957 P.2d 1272 (1998) (citations omitted.)

11 The same reasoning and conclusion apply equally to this case and RCW 7.70.100. Here, the
12 legislature adopted a mandatory 90-day waiting period and the Plaintiffs simply failed to
13 comply.

14 15 3. RCW 7.70.100 and RCW 4.16.350 Should and Can Be Harmonized.

16 Defendants dispute plaintiffs' conclusory statement that there is a statutory conflict
17 between RCW 7.70.100 and RCW 4.16.350. Before reaching any conclusions, the Court
18 should engage in statutory interpretation. Washington's approach to statutory interpretation
19 was outlined by the Supreme Court in *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-373
20 (2007):

21
22 A court's objective in construing a statute is to determine the legislature's
23 intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9
24 (2002). "[I]f the statute's meaning is plain on its face, then the court must give
25 effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10.
26 Plain meaning is discerned from the ordinary meaning of the language at issue,
the context of the statute in which that provision is found, related provisions,
and the statutory scheme as a whole. *Id.* at 9-12.

1 Further, where there is more than one applicable rule or statute, the sources of authority
2 should be harmonized whenever possible. *Emwright v. King County*, 96 Wash.2d 538, 543,
3 637 P.2d 656 (1981). In *Pearce v. G.R. Kirk Co.*, 92 Wn.2d 869, 872 (1979), the Court stated
4 that “legislative enactments which relate to the same subject and are not actually in conflict
5 should be interpreted so as to give meaning and effect to both, even though one statute is
6 general in application and the other is special” in order to give significance to both pieces of
7 legislation.

8
9 While it is true that the statute of repose and the statute of limitations may differ in
10 applicability depending on the facts of a particular case, they are both limitation periods on
11 actions to prevent stale claims. Here, when both statutes are given effect, RCW 7.70.100
12 supplements RCW 4.16.350 by providing for the requirement of 90 days notice to defendants
13 in a medical malpractice action, *see Davis v. King County*, 77 Wn.2d 930, 933 (1970), even
14 where the statute of repose is set to expire within 90 days.

15
16 Washington’s Division 2 Court of Appeals has expressly held that there is “no
17 ambiguity” in the language of RCW 7.70.100 which requires plaintiff to provide at least 90
18 days notice before pursuing an action based on a health care provider’s negligence. *Waples v.*
19 *Yi*, 146 Wn. App. 54, 58-59 (2008). As in *Waples*, no one in this action disputes that plaintiff
20 failed to give the requisite mandatory notice. Appropriate harmonization of the mandatory
21 nature of notice under RCW 7.70.100 and the statute of repose under RCW 4.16.350 required
22 plaintiff to give defendants 90 days notice.
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V. CONCLUSION

1 For the reasons stated above, Dr. Nicol and his employer, Valley Radiologists,
2 respectfully request that this Court deny Plaintiffs' Consolidated Motions and proceed with
3 Defendants' Motions to Dismiss. Defendants still maintain that dismissal is appropriate
4 because plaintiff has failed to comply with RCW 7.70.100.
5

6 DATED this 2nd day of March, 2009.

8 BENNETT BIGELOW & LEEDOM, P.S.

9 By Jennifer L. Moore
10 Elizabeth A. Leedom, WSBA #14335
11 Jennifer L. Moore, WSBA #30422
12 Attorney for Defendants Nicol and Valley
13 Radiologists, Inc., P.S.
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BENNETT BIGELOW
& LEEDOM

MAILED
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THE HONORABLE CHERYL CAREY

HEARING DATE: MARCH 13, 2009
WITH ORAL ARGUMENT

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

LINDA CUNNINGHAM AND DOWNEY C.
CUNNINGHAM, A MARITAL
COMMUNITY,

Plaintiffs,

vs.

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC,

Defendants.

NO. 08-2-28582-1KNT

ORDER GRANTING DEFENDANTS
NICOL AND VALLEY
RADIOLOGIST'S MOTION TO
DISMISS

This matter having come before the Court upon Defendants Ronald Nicol M.D. and Valley Radiologist's Motion to Dismiss For Failure to Comply with RCW 7.70.100, the Court having heard oral argument on the matter and the Court having considered the records and pleadings on file in this matter, and the following:

1. Defendant Dr. Nicol's and Valley Radiologist's Motion to Dismiss and the Declaration of Jennifer L. Moore and exhibit attached thereto;

2. Defendant Multicare's Joinder in Motion to Dismiss;

ORDER GRANTING DEFENDANTS NICOL AND VALLEY
RADIOLOGISTS MOTION TO DISMISS - 1

LAW OFFICES
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1700 Seventh Avenue, Suite 1900
Seattle, Washington 98101
T: (206) 622-5511 / F: (206) 622-8986

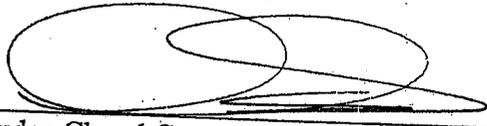
1 3. Plaintiff's Opposition, the Declaration of *Jerald Pearson* and the exhibits
2 attached thereto; and

3 4. Defendant Dr. Nicol's and Valley Radiologist's Reply; and

4 5. Defendant Multicare's Joinder in Reply Brief.

5 And the Court therefore being fully informed, NOW, THEREFORE, IT IS HEREBY
6 ORDERED THAT Defendants' Motion to Dismiss is Hereby GRANTED because plaintiffs
7 failed to state a claim for failure to comply with RCW 7.70.100. It is further hereby
8 ORDERED that all claims against all Defendants in this matter shall be, and are hereby,
9 DISMISSED with prejudice.
10

11
12 DATED this 13 day of March, 2009.

13
14 
15 _____
16 Judge Cheryl Carey

17 Presented by:

18
19 BENNETT BIGELOW & LEEDOM, P.S.

20 By: Jennifer L. Moore
21 Elizabeth A. Leedom, WSBA #14335
22 Jennifer L. Moore, WSBA #30422
23 Attorney for Defendants Nicol and Valley
24 Radiologists, Inc., P.S.
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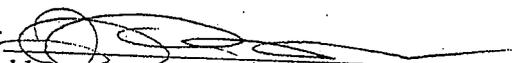
ORDER GRANTING DEFENDANTS NICOL AND VALLEY
RADIOLOGISTS MOTION TO DISMISS - 2

LAW OFFICES
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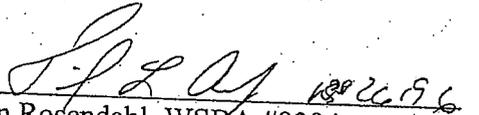
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Approved as to form, notice of presentation waived:

THE PEARSON LAW FIRM

By: 
Jerald Pearson, WSBA #8970
Attorney for Plaintiffs

WILLIAMS KASTNER & GIBBS

By: 
John Rosendahl, WSBA #9394
Attorney for Defendant Multicare Healthy
System d/b/a Covington Multicare Clinic

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MAR 17 2009

BENNETT BIGELOW
& LEEDOM

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THE HONORABLE CHERYL CAREY

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

LINDA CUNNINGHAM AND DOWNEY C.
CUNNINGHAM, A MARITAL
COMMUNITY,

Plaintiffs,

vs.

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC,

Defendants.

NO. 08-2-28582-1KNT

ORDER DENYING PLAINTIFFS'
CONSOLIDATED MOTIONS

This matter having come before the Court upon Plaintiffs' Consolidated Motions for
1) Continuance of Dispositive Motions Pending Washington Supreme Court Opinions in
Putman; and Summary Judgment on Claim Related Implications of Statutory Conflicts
Pertaining to the Statute of Abrogation/Repose, RCW 4.16.350, the Court having heard oral
argument on the matter and the Court having considered the records and pleadings on file in
this matter, and the following:

1. Plaintiffs' Consolidated Motions for 1) Continuance of Dispositive Motions
Pending Washington Supreme Court Opinions in Putman; and Summary Judgment on Claim

ORDER DENYING PLAINTIFFS' CONSOLIDATED
MOTIONS - 1

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
1700 Seventh Avenue, Suite 1900
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T: (206) 622-5511 / F: (206) 622-8986

1 Related Implications of Statutory Conflicts Pertaining to the Statute of Abrogation/Repose,
2 RCW 4.16.350 along with the Declaration of Jerald Pearson attached thereto;

3 2. Defendants Nicol and Valley Radiologists Opposition, along with the
4 Declaration of Jennifer L. Moore attached thereto; and

5 3. Defendant Multicare's Opposition, with Decl. of T. Ashcraft

6 4. Plaintiffs' reply, if any.

7
8 And the Court therefore being fully informed, NOW, THEREFORE, IT IS HEREBY
9 ORDERED THAT Plaintiffs' Consolidated Motions for 1) Continuance of Dispositive
10 Motions Pending Washington Supreme Court Opinions in Putman; and Summary Judgment
11 on Claim Related Implications of Statutory Conflicts Pertaining to the Statute of
12 Abrogation/Repose, RCW 4.16.350 and Hereby DENIED.

13
14 DATED this 23 day of March, 2009.

15
16 

17 Judge Cheryl Carey

18
19 Presented by:

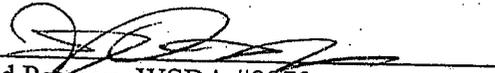
20
21 BENNETT BIGELOW & LEEDOM, P.S.

22
23 By: Jennifer L. Moore
24 Elizabeth A. Leedom, WSBA #14335
25 Jennifer L. Moore, WSBA #30422
26 Attorney for Defendants Nicol and Valley
Radiologists, Inc., P.S.

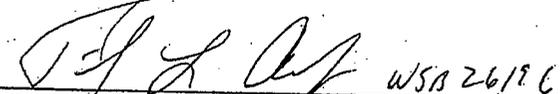
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Approved as to form, notice of presentation waived:

THE PEARSON LAW FIRM

By: 
Jerald Pearson, WSBA #8970
Attorney for Plaintiffs

WILLIAMS KASTNER & GIBBS

By:  WSBA 26186
John Rosendahl, WSBA #9394
Attorney for Defendant Multicare Healthy
System d/b/a Covington Multicare Clinic

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

LINDA CUNNINGHAM AND DOWNEY
C. CUNNINGHAM, A MARITAL
COMMUNITY,

Plaintiffs,

vs.

No. 08-2-28582-1

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC,

Defendants.

***PLAINTIFFS' NOTICE OF APPEAL
TO SUPREME COURT***

Linda Cunningham and Downey C. Cunningham, the parties seeking review, are the plaintiffs herein and they seek review by the Supreme Court of the Order entered by the above-entitled Superior Court on March 13, 2009, dismissing the plaintiffs' personal injury complaint, arising from allegations of medical negligence. Pursuant to RAP 5.3(a), a copy of the trial court's written Order is attached.

1 This request for direct review by the Supreme Court is made pursuant to
2 RAP 4.2(a)(4) because the present matter involves fundamental and urgent
3 issues of broad public importance. These issues include the application and
4 validity of RCW 7.70.100 and RCW 4.16.350, and the material conflicts between
5 the "mandatory" 90-day waiting period under RCW 7.70.100 and the applicable
6 eight year statute of abrogation/repose.
7

8
9 Plaintiffs also confirm the following as notice to both Court and counsel:
10 The Supreme Court's decision and opinion in Putman v. Wenatchee Valley
11 Medical Center, (No. 80888-1, oral arguments completed on 2/24/09) is
12 potentially relevant to this appeal, as is the fact that the Supreme Court has
13 granted review in Waples v. Yi, 146 Wn. App. 54 (2008), (No. 82142-9) which
14 also raises issues pertaining to RCW 7.70.100. Based on the foregoing, the
15 plaintiffs assert additional grounds for Supreme Court review under RCW
16 4.2.(a)(3).
17

18
19 DATED this 13th day of April, 2009.

20 THE PEARSON LAW FIRM, P.S.

21
22
23 By: 
24 JERALD D. PEARSON, WSBA #8970
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THE HONORABLE CHERYL CAREY
HEARING DATE: MARCH 13, 2009
WITH ORAL ARGUMENT

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

LINDA CUNNINGHAM AND DOWNEY C.
CUNNINGHAM, A MARITAL
COMMUNITY,

Plaintiffs,

vs.

RONALD F. NICOL, M.D.; VALLEY
RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC,

Defendants.

NO. 08-2-28582-1KNT

ORDER GRANTING DEFENDANTS
NICOL AND VALLEY
RADIOLOGIST'S MOTION TO
DISMISS

This matter having come before the Court upon Defendants Ronald Nicol M.D. and
Valley Radiologist's Motion to Dismiss For Failure to Comply with RCW 7.70.100, the Court
having heard oral argument on the matter and the Court having considered the records and
pleadings on file in this matter, and the following:

1. Defendant Dr. Nicol's and Valley Radiologist's Motion to Dismiss and the
Declaration of Jennifer L. Moore and exhibit attached thereto;
2. Defendant Multicare's Joinder in Motion to Dismiss;

ORDER GRANTING DEFENDANTS NICOL AND VALLEY
RADIOLOGISTS MOTION TO DISMISS - 1

LAW OFFICES
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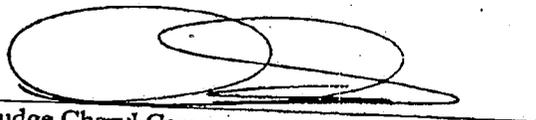
3. Plaintiff's Opposition, the Declaration of Jerald Pearson and the exhibits attached thereto; and

4. Defendant Dr. Nicol's and Valley Radiologist's Reply; and

5. Defendant Multicare's Joinder in Reply Brief.

And the Court therefore being fully informed, NOW, THEREFORE, IT IS HEREBY ORDERED THAT Defendants' Motion to Dismiss is Hereby GRANTED because plaintiffs failed to state a claim for failure to comply with RCW 7.70.100. It is further hereby ORDERED that all claims against all Defendants in this matter shall be, and are hereby, DISMISSED with prejudice.

DATED this 13 day of March, 2009.



Judge Cheryl Carey

Presented by:

BENNETT BIGELOW & LEEDOM, P.S.

By: Jennifer L. Moore
Elizabeth A. Leedom, WSBA #14335
Jennifer L. Moore, WSBA #30422
Attorney for Defendants Nicol and Valley Radiologists, Inc., P.S.

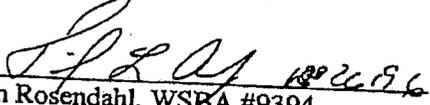
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Approved as to form, notice of presentation waived:

THE PEARSON LAW FIRM

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Jerald Pearson, WSBA #8970
Attorney for Plaintiffs

WILLIAMS KASTNER & GIBBS

By: 
John Rosendahl, WSBA #9394
Attorney for Defendant Multicare Healthy
System d/b/a Covington Multicare Clinic

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ORDER GRANTING DEFENDANTS NICOL AND VALLEY
RADIOLOGISTS MOTION TO DISMISS - 3

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THE HONORABLE CHERYL CAREY
HEARING DATE: MARCH 13, 2009

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

LINDA CUNNINGHAM AND DOWNEY C.
CUNNINGHAM, A MARITAL
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Plaintiffs,

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RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba
COVINGTON MULTICARE CLINIC,

Defendants.

NO. 08-2-28582-1KNT

DEFENDANT DR. NICOL'S AND
VALLEY RADIOLOGISTS' REPLY
BRIEF IN SUPPORT OF MOTION
TO DISMISS

I. RELIEF REQUESTED

Defendants Ronald F. Nicol, M.D. and his employer, Valley Radiologists, Inc. P.S. respectfully request that this Court grant their Motion to Dismiss because plaintiffs failed to Comply with RCW 7.70.100 when they did not provide the defendants with 90 days notice of intent to file suit. The defendants' argument is simple: RCW 7.70.100 mandates any plaintiff in a medical malpractice lawsuit provide the defendants with a 90 day notice before commencing suit; here, plaintiffs did not. Dismissal is warranted.

1 In plaintiffs' opposition they again raise arguments of statutory conflict and again
2 request a continuance based upon the *Putman* case. These issues were first raised in
3 plaintiffs' consolidated motions, which these defendants have opposed. (*See* Defendant Dr.
4 Nicol's And Valley Radiologists' Opposition To Plaintiffs' Consolidated Motions). Rather
5 than restate arguments previously made, defendants hereby incorporate by reference the legal
6 authorities and arguments raised in its Opposition to Plaintiffs' Consolidated Motions.

7 II. ARGUMENT AND AUTHORITIES

8 A. Compliance with RCW 7.70.100 is Mandatory.

9 In *Waples v. Yi*, Wn. App. 54, 189 P. 3d 813 (2008), Division II of the Court of
10 Appeals held that the notice provision of RCW 7.70.100(1) is mandatory, requiring strict
11 compliance:
12

13
14 Waples first contends that former RCW 7.70.100(1) did not require strict
15 compliance. In 2006, the legislature amended RCW 7.70.100, which governs
16 the mandatory mediation of health care professional negligence claims. It
17 added the requirement of a 90-day written notice of intention to sue a health
18 care provider. LAWS OF 2006, ch. 8, § 314. According to former RCW
19 7.70.100(1):

20 *No action based upon a health care provider's professional*
21 *negligence may be commenced unless the defendant has been*
22 *given at least ninety days' notice of the intention to commence*
23 *the action.* If the notice is served within ninety days of the
24 expiration of the applicable statute of limitations, the time for
25 the commencement of the action must be extended ninety days
26 from the service of the notice.

27 We discern no ambiguity in former RCW 7.70.100(1). By its plain language,
28 former RCW 7.70.100(1) mandated that a plaintiff may only pursue an action
29 based on a health care provider's negligence on the condition that the plaintiff
30 provides at least 90 days' notice. No one disputes that Waples failed to do so.

31 *Waples*, 146 Wn. App. at 58-59 (emphasis added.). The Court of Appeals upheld the trial
32 court's dismissal of the plaintiff's claims on summary judgment for failure to comply with the

1 notice provision of RCW 7.70.100(1). The same result should be applied to the
2 Cunningham's claims.

3 Plaintiffs' challenge as to the constitutionality of RCW 7.70.100 is also moot because
4 our appellate courts have twice decided that the statute is constitutional. *See Waples v. Yi*,
5 146 Wn. App. 54, 189 P. 3d 813 (2008); *see also Breuer v. Douglas D. Presta, D.P.M.*, ___ P.3d
6 ___, 2009 WL 198241 (Div. 3 2009). In the *Breuer* case that court was clear in its message
7 about RCW 7.70.100: "We conclude then that the requirement is not unconstitutional." *Id.* at

8 3. Accordingly, plaintiffs cannot hide their insufficient notice under the cloak of an
9 constitutional argument. The constitutionality of RCW 7.70.100 has already been raised and
10 resolved and compliance is still mandatory.

11 **B. Plaintiffs do Not Explain Why They Failed to Comply With RCW 7.70.100.**

12 Despite all of the briefing that has been accomplished on this case, plaintiffs still fail
13 to offer the court any justifiable explanation for why they were unable to comply with RCW
14 7.70.100. Plaintiffs do not assert, as one might expect them to, that they did not discover their
15 claims more than 90 days before the eight year statute of repose period was set to expire. In
16 fact, plaintiffs offer no explanation whatsoever for they could not have filed the notice of
17 intent 90 days prior to the statute of repose was set to expire on August 24, 2008.

18 We know from the Joinder filed by Multicare on February 13, 2009 that Ms.
19 Cunningham signed a release form asking for a copy of her records from the Multicare
20 Covington Clinic in December 2007 and another release asking for her records from Dr.
21 Wiese in February 2008. In fact, by February 2008, the plaintiffs had all of the information
22 necessary to discover their claims. (*See Exhibit 1 to the Declaration of Timothy L. Ashcraft*
23 filed in Support of Defendant Multicare's Joinder in Defendants Nicol and Valley
24 Radiologists Motion to Dismiss for Failure to Comply with RCW 7.70.100). Had plaintiffs
25
26

1 filed a notice of intent in February, March, April or May of 2008, they would have been able
2 to comply with RCW 7.70.100 and still been within the statute of repose period.

3 Additionally, we know that plaintiffs knew enough about their claims to consult with
4 and retain an attorney. Furthermore, that attorney had the case reviewed by an expert and a
5 report, supporting the basis for a claim, was completed by June 30, 2008. (See Exhibit B to
6 the Declaration of Jennifer L. Moore filed in support of Defendants' Motion to Dismiss).
7 Plaintiffs clearly had knowledge of their case prior to May 26, 2008, the last date they could
8 have filed the 90 day notice of intent and still complied with the statute of repose. To the
9 extent that the plaintiffs claim there is a conflict between the Statute of Repose and the Notice
10 of Intent Requirements, plaintiffs themselves created an unnecessary conflict by delaying on
11 their filing of the notice of intent.
12

13 **III. CONCLUSION**

14 For the reasons stated above, Dr. Nicol and his employer, Valley Radiologists,
15 respectfully request that this Court grant their Motion to Dismiss because plaintiffs have
16 failed to comply with RCW 7.70.100.
17

18 DATED this 9th day of March, 2009.

19 BENNETT BIGELOW & LEEDOM, P.S.

20
21 By Jennifer L. Moore
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24 Attorney for Defendants Nicol and Valley
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