No. 92216-1

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 315096

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SHANE FAST, JAMIE FAST, the marital community compromised thereof, ROBERT DALTON FAST, and the estate thereof,

Plaintiffs/Appellants,

v.

KENNEWICK PUBLIC HOSPITAL DISTRICT d/b/a KENNEWICK GENERAL HOSPITAL and d/b/a MID-COLUMBIA WOMEN'S HEALTH CENTER, a Washington public hospital district organized as a government entity, municipal or quasi-municipal corporation; ADAM T. SMITH, D.O., individually and for the marital community with spouse or registered domestic partner Jane Doe Smith; GREGORY SCHROFF, M.D., individually and for the marital community with spouse or registered domestic partner Jane Doe Smith; and DOES 1 through 50,

Defendants/Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The majority of the issues in this case are controlled by longstanding Washington case law stated in Wills v. Kirkpatrick, 56 Wn. App. 757, 785 P.2d 834 (1990), review denied, 114 Wn.2d 1024 (1990). Plaintiffs ask the Court to ignore this well-established case law. This is impermissible. The law is clear Plaintiffs' claim for the death of their son is a wrongful death claim. The law is clear wrongful death claims are governed by RCW 4.16.080, not by the medical malpractice statute of limitations, RCW 4.16.350. It is undisputed Plaintiffs filed their wrongful death claim more than three years after the death. Thus, the trial court properly dismissed that claim on summary judgment.

The trial court also properly dismissed the separate claim for injury brought by Jamie Fast. All Defendants were either a governmental entity or employees of the same, and thus were entitled to 60-day presuit notice as provided in the tort claim statute, RCW 4.96.020, before Plaintiffs filed their lawsuit. Plaintiffs failed to comply with that notice requirement in any discernable manner.

Because their lawsuit could not be re-filed within the statute of limitations, the trial court properly dismissed it.

Further, Plaintiffs' constitutional challenges are resolved by the Supreme Court's recent opinion in McDevitt v. Harbor View Med. Ctr., 85367-3, 2013 WL 6022156 (Wash. Nov. 14, 2013). Consequently, this Court should affirm the trial court's summary dismissal of all of Plaintiffs' claims.[1]

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly granted summary judgment on Plaintiffs' wrongful death claim for the death of their child pursuant to Wills v. Kirkpatrick.

2. The trial court properly granted summary judgment on Plaintiff Jamie Fast's medical negligence claims, because Plaintiffs failed to comply in any manner with the 60-day presuit notice requirement for governmental defendants, RCW 4.96.020.

III. COUNTER STATEMENT OF CASE

This appeal involves a claim of wrongful death brought by Plaintiffs on behalf of their deceased infant son, Robert Fast, as well as claims of medical negligence brought by Jamie Fast under RCW

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7.70 for alleged injuries to her personally. The evidence at the trial court level established the following pertinent facts:

On March 7, 2008, Ms. Fast presented to Defendant Adam Smith, D.O. who confirmed she was pregnant and assumed her prenatal care. (CP 6). On August 30, 2008, Ms. Fast was admitted to Kennewick General Hospital ("KGH") for concerns about gestational diabetes under the care of Defendant Gregory Schroff, M.D. (CP 7). Despite receiving appropriate care, Plaintiffs' son died *in utero* on August 31, 2008. (CP 7).

On August 26, 2011, counsel for Plaintiffs hand delivered to all Defendants a "Good Faith Request for Mediation to Resolve Disputes." (CP 144-212). As discussed herein, these requests for mediation did not toll the statute of limitations one year as to Plaintiffs' wrongful death claim.

On August 31, 2011, three years after the death of Plaintiffs' son, the three-year statute of limitations expired.

On July 17, 2012, more than three years after the alleged negligence, Plaintiffs filed their Summons and Complaint, asserting medical negligence in the death of their infant son. (CP 1-18). As

noted herein, Plaintiffs' claim for the death of their son is a wrongful death claim to which the three-year statute of limitations contained in RCW 4.16.080 applies.

It is undisputed KGH is a public hospital district and a "local governmental entity" under RCW 4.96.010. (CP 3). At the subject time, the defendant physicians were all employees of KGH subject to the provisions of RCW 4.96.020(1). (CP 53-60).

It is also undisputed that prior to filing their Complaint, Plaintiffs did not present notice of their claims for damages on a tort claim form to any of the Defendants as expressly required by RCW 4.96.020(3). Instead, Plaintiffs filed a standard tort claim form the same day they filed their Complaint, on July 17, 2012. (CP 80, 83-85, 281-288). They then served KGH with the standard tort claim on August 1, 2012, and served Dr. Smith on August 3, 2012. (CP 80; CP 116-117, 266-267, 269-270).

The three-year statute of limitations period, plus one additional year for the demanded mediation, plus 60 days provided by RCW 4.96.020, expired on October 31, 2012.

To aid in the Court's visual understanding of this timeline, the relevant dates in this matter are set forth in the following tabled chronology:

DATE	**RELEVANT EVENT**
August 31, 2008	Robert Fast dies *in utero*
August 26, 2011	Counsel for Plaintiffs delivers a claimed request for mediation
August 31, 2011	RCW 4.16.080 statute of limitations elapses three years from the decedent's death
July 18, 2012	Plaintiffs file their Summons and Complaint
July 18, 2012	Plaintiffs file a standard tort claim form
August 1, 2012	Plaintiffs serve the standard tort claim form on KGH
August 3, 2012	Plaintiffs serve the standard tort claim form on Dr. Smith
October 31, 2012	The statute of limitations in RCW 4.16.350 elapses three years after the occurrence of the alleged negligence (*i.e.*, the death), plus one additional year for the demanded mediation, plus 60 days provided by RCW 4.96.020 (if applicable)

On November 19, 2012, Dr. Smith filed for summary judgment. (CP 27-48). The other defendants joined in this motion or

filed their own motions. (CP 76-78; CP 89-102). Defendants argued that Plaintiffs' claims are barred as a matter of law because they failed to comply with the notice of claim statute, RCW 4.96.020. (CP 32-35; CP 92-94). They also argued that, even if Plaintiffs complied with the notice of claim statute, the statute of limitations bars the wrongful death claim. (CP 35-47; CP 94-97). Defendants argued that Plaintiffs' request for mediation prior to filing the Complaint did not toll the statute of limitations in RCW 4.16.080, as it only tolls the general medical malpractice statute of limitations found in RCW 4.16.350. (CP 36-37; CP 95-97).

Plaintiffs filed a total of six responses beginning on December 24, 2012. (CP 108-130; CP 378-380; CP 365-367; CP 764-771; CP 789-795; CP 1261-1264).[2] Plaintiffs responded that they complied with the notice of claim statute, and if they had not, Defendants were barred from raising that defense because the hospital did not supply a claim form at its premises. (CP 117-126). Plaintiffs conceded they are not bringing any survival/wrongful death claims under RCW 4.20 *et seq.* (CP 117; CP 766-768).

[2] Dr. Smith objected to Plaintiffs' excessive and inappropriate number of reply briefs. (CP 1197-1200).

Instead, they argued their claims are governed by the general medical negligence statute, RCW 7.70. (CP 127). Thus, they argued their claims are subject to the statute of limitations in RCW 4.16.350, and therefore their requests for mediation tolled the statute of limitations one year. (CP 126-129).

Defendants replied, pointing out that Plaintiffs' characterization of the claim for the death of their son was completely incorrect because it involved death and not mere injury per Wills v. Kirkpatrick. (CP 735-737; CP 721-723). Thus, the wrongful death statute of limitations applies. (CP 737-739). They also pointed out that the hospital complied with the requirements of the tort claim statute, whereas Plaintiffs failed to make even a bona fide attempt to comply with the law. (CP 726-731; CP 740-749).

The matter went to hearing before Judge Cameron Mitchell on February 15, 2013. (RP 1). During oral argument, Plaintiffs did not assert they were bringing any claims on behalf of Jamie Fast, and instead focused on the wrongful death claim. (RP 22-50). The trial court held that, per Wills, Plaintiffs' claim for the death of their son was a wrongful death claim barred by the statute of limitations:

> I think the Wells [Wills] case makes it very clear that medical malpractice resulting in death is in fact a wrongful death claim and the three-year statute of limitations applies under any analysis of the facts. It cannot be said that the plaintiffs complied with that statute of limitations.

(RP 58).

The trial court did not address the tort claim issue at that time, even though the parties had argued it. (See RP).

After the trial court made its ruling, Plaintiffs' counsel indicated that Jamie Fast was asserting medical negligence claim on her own behalf under RCW 7.70. (RP 60-61). As a result, the trial court entered an order granting partial summary judgment with regard to the wrongful death claim. (CP 1241-1245).

On February 22, 2013, counsel for Dr. Smith filed a request that the trial court render an opinion on the issue of whether Plaintiffs' failure to comply with RCW 4.96.020 provided a basis for the complete dismissal of all their claims, as that issue had already been extensively briefed and argued. (CP 1207-1209).

On March 15, 2013, the trial court entered a memorandum decision granting complete summary judgment on all of Plaintiffs'

claims. (CP 1234-1236). The trial court held that Plaintiffs failed to comply with the tort claim statute:

> In the instant case, it is clear from the record that the plaintiffs did not attempt to file a claim form of any kind with the Kennewick Public Hospital District prior to filing suit in Superior Court. Therefore, this court finds that there was no bona fide attempt to comply with the statute within the strict time deadlines provided in RCW 4.96.020(4) and the substantial compliance rule is inapplicable.
>
> Based on the foregoing analysis, this court finds that the plaintiffs' claims for damages for injuries suffered by Ms. Fast are barred because the plaintiffs failed to comply with the requirements of RCW 4.96.020 60 days prior to filing suit in Superior Court.

(CP 1236).

IV. ARGUMENT

A. STANDARD OF REVIEW

The appropriate standard of review for an order granting or denying summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Additionally, constitutional questions are issues of law and are also reviewed *de novo*. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

B. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' CLAIM FOR THE DEATH OF THEIR SON BECAUSE IT IS BARRED BY THE STATUTE OF LIMITATIONS

This issue is not complicated. The resolution of this issue depends on whether Plaintiffs' claim for the death of their son is a wrongful death claim as opposed to a claim for mere injury under RCW 7.70, as they allege. If it is a wrongful death claim, longstanding law states the statute of limitations found in RCW 4.16.080 governs and bars Plaintiffs' claim because it was not timely filed.[3]

1. The Statute of Limitations in RCW 4.16.080 Governs Plaintiffs' Claim for the Death of Their Son

There is no uncertainty as to what statute of limitations applies in this case. In wrongful death actions, the three-year limitation period of RCW 4.16.080(2) governs, not the medical malpractice statute of limitations, RCW 4.16.350. Atchison v. Great W. Malting Co., 161 Wn.2d 372, 377, 166 P.3d 662 (2007) (summary judgment case) (citing RCW 4.16.080(2) as the statute of

[3] It should be noted that a ruling that the statute of limitations bars Plaintiffs'' wrongful death claim still provides Plaintiffs the ability to proceed with Mrs. Fast's individual claim for medical negligence.

limitations for a wrongful death action). See also Beal for Martinez v. City of Seattle, 134 Wn.2d 769, 776, 954 P.2d 237 (1998) (RCW 4.16.080 is the statute of limitations for wrongful death claims); Huntington v. Samaritan Hosp., 101 Wn.2d 466, 468, 680 P.2d 58 (1984); Wills v. Kirkpatrick, 56 Wn. App. 757, 760, 763, 785 P.2d 834 (1990), review denied, 114 Wn.2d 1024 (1990) (summary judgment case).

"The statute of limitations for a wrongful death action in Washington is three years." Atchison, 161 Wn.2d at 377. Wrongful death actions "accrue at the time of death." Id. at 379.

Wills is the seminal case. In Wills, the Court of Appeals held that medical negligence cases resulting in wrongful death claims are subject to the general three-year statute of limitations found in RCW 4.16.080 and not to the medical negligence statute of limitations in RCW 4.16.350, which applies to claims for injury brought under RCW 7.70. Wills, 56 Wn. App. at 763. Accord Atchison, 161 Wn.2d at 377.

Wills is good law and is dispositive here. It is crucial for the Court to note that Wills has never been overruled, abrogated,

modified, or even criticized in any Washington case. The Supreme Court declined to review Wills. Moreover, the Supreme Court recently affirmed that the statute of limitations for a wrongful death action in Washington is governed by RCW 4.16.080. See Atchison, 161 Wn.2d at 377; Beal, 134 Wn.2d at 776. Obviously the Supreme Court does not think Wills is an aberration.

It is well-established in the field of medical malpractice that where alleged malpractice causes death, RCW 4.16.080, not RCW 4.16.350, controls. One of the leading treatises addressing the law in Washington confirms that the holding in Wills controls here. In 15A Wash. Prac., Handbook Civil Procedure § 5.10 (2012-2013 ed.), Mr. Tegland states: "the 3-year limitation period of RCWA 4.16.080(2) applies to a claim for wrongful death based on medical malpractice. Wills v. Kirkpatrick, 56 Wash. App. 757, 785 P.2d 834 (Div. 2 1990)." That confirms what the case law otherwise makes clear.

2. Plaintiffs' Claim for the Death of Their Son Is A Wrongful Death Claim

a. Claims for a Wrongful Death Are Purely Statutory and Do Not Arise Under the Common Law or RCW 7.70

The alleged negligence in this case resulted in the death of Robert Fast. (CP 7).[4] It did not result in a mere injury to him. That distinction is crucial to this case. It is crucial because Washington law distinguishes between medical malpractice that results in death from medical malpractice that results in injury for the purpose of applying the statute of limitations.

Plaintiffs' position in this case is confusing. Plaintiffs' position is that the claim for the death of their son is not a claim for wrongful death. Plaintiffs deny they are bringing any wrongful death or survival claims. Indeed, they conceded at the trial court level that they have no wrongful death or survival claims under RCW 4.20. (CP 117). They argue instead they are "maintain[ing] an action for damages resulting from healthcare under Chapter 7.70 RCW, from which they can recover damages for the resulting loss of their child" under RCW 4.24.010. (App. Br. 9). Thus, they allege the claim for

[4] Robert Fast was a patient in addition to Jamie Fast being a patient.

the death of their son arises under the medical negligence statute, RCW 7.70. This is a misapplication of unambiguous case law.

Plaintiffs' claim for the death of their son does not arise under RCW 7.70 because RCW 7.70 does not apply to medical malpractice that results in death. The law provides only a few limited statutory causes of action when alleged medical negligence results in death. These causes of action are strictly governed by the wrongful death and survival statutes found in RCW 4.20 and RCW 4.24.010. It is well known that wrongful death claims are purely creatures of statute. Atchison, 161 Wn.2d at 376. Because wrongful death claims are purely creatures of statute, there was and is no common law right to recover for wrongful death. Contrary to Plaintiff's claim, the distinction between death and injury is real, not a "false dilemma." (App. Br. 13).

Plaintiffs cannot recover for injury resulting in wrongful death under RCW 7.70 because the law does not provide for recovery for wrongful death under RCW 7.70. RCW 7.70 applies to medical negligence cases involving personal injury. The statute covers "damages for injury occurring as a result of health care."

RCW 7.70.010 (emphasis added). The one-year tolling provision of RCW 7.70 also specifies it relates to disputes "related to damages for injury occurring as a result of health care." RCW 7.70.110 (emphasis added).

That RCW 7.70 does not apply to claims resulting in death is made clear by Wills. The Wills court clearly articulated the death versus injury distinction. It concluded that the provisions of RCW 7.70 pertain to "claims involving personal injuries of the patient." Wills, 56 Wn. App. at 762. It specifically examined the medical negligence statute of limitations, RCW 4.16.350, and concluded that it does not apply to a wrongful death action based on medical malpractice:

> As appears from the statute [RCW 4.16.350], claims against health care providers *for damages for injury* as a result of health care must be commenced within certain time limits of the act or omission alleged to have caused the injury or condition. The critical question is whether "damages for injury" should be interpreted broadly to apply to injury to statutory beneficiaries in a wrongful death claim or should be limited to injury suffered by the patient.
>
> . . . .
>
> The entire chapter is primarily concerned with various aspects of claims involving personal injuries of the patient. There is nothing to suggest that the limitation

> of actions for medical malpractice embraces a claim for wrongful death.
>
> While the Legislature may have the power to enact such a limitation period barring wrongful death claims even before they accrue, it is obvious to us that the Legislature did not do so here. If the Legislature had intended to include wrongful death claims within these limited periods it could have done so by so limiting such actions for damages for injury, *or death,* as a result of health care. It did not do so.
>
> We conclude that the three-year limitation period of RCW 4.16.080(2), measured from the date of death, applies to this claim for wrongful death based on the alleged medical malpractice of Dr. Kirkpatrick.

Id. at 761-63 (italics in original; other emphasis added).

The court in Wills emphasized its holding was consistent with the majority rule, noting, "Most states have a special statutory limitation, independent of the general statute of limitations, within which an action for wrongful death must be brought." Id. at 759 n.2 (citing S. Speiser, *Recovery for Wrongful Death* § 11:8 (2d ed. 1975)).

Thus, the Wills court determined that in RCW 7.70 the Legislature was "dealing with various aspects of personal injuries by various claimants," not death. Id. at 761. Since this case involves a

death, and not a mere injury, Plaintiffs cannot recover under RCW 7.70.

Accordingly, Plaintiffs' argument that the law is clear a medical malpractice action encompasses recovery for the loss of a child has no basis and is directly contradicted by controlling precedent. (App. Br. 12-13). There is nothing strained about this conclusion. Defendants are not reading anything into the law, as Plaintiffs argue. (App. Br. 17). While Plaintiffs obvious disagree with Wills, the language in Wills is clear and unambiguous and it controls here.

b. RCW 4.24.010 Is A Wrongful Death Statute

Wills concisely holds that RCW 4.16.080 applies to wrongful death claims. Thus, if Plaintiffs' claim pursuant to RCW 4.24.010 is a wrongful death claim, it is barred.

There can be no doubt RCW 4.24.010 is a wrongful death statute. Courts consistently refer to it as a wrongful death statute. The Court of Appeals recently characterized it as the "child wrongful death statute." Bennett v. Seattle Mental Health, 166 Wn. App. 477, 483, 269 P.3d 1079, review denied, 174 Wn.2d 1009, 281

P.3d 686 (2012). The trial court correctly held that Bennett is the only authority really on point on this issue and it states that RCW 4.24.010 is a wrongful death statute. (RP 58). It must be emphasized that the Supreme Court declined to review and overturn Bennett.

Other courts have frequently called RCW 4.24.010 a wrongful death statute. See, e.g., Philippides v. Bernard, 151 Wn.2d 376, 385, 88 P.3d 939 (2004) (grouping RCW 4.24.010 as a wrongful death statute as opposed to a survival statute); Moen v. Hanson, 85 Wn.2d 597, 598, 537 P.2d 266 (1975) (RCW 4.24.010 creates a wrongful death action); Masunaga v. Gapasin, 57 Wn. App. 624, 626, 790 P.2d 171 (1990) (calling RCW 4.24.010 the "child-death" statute).

Moreover, RCW 4.24.010 operates like a wrongful death statute. For example, it creates a new and separate statutory cause of action for a child's parents and beneficiaries for the parents' own personal loss and anguish suffered by the loss of the child. See, e.g., RCW 4.24.010 ("This section creates . . . [a] cause of action."). This is identical to RCW 4.20.010, the general wrongful death statute (creating new cause of action "[w]hen the death of a person is

caused by the wrongful act, neglect, or default of another). As with RCW 4.20.010, the character of claims brought under RCW 4.24.010 is one for direct compensation for the parents or beneficiaries for the wrongful death or injury of a child. It is not like medical negligence claims to which the statute of limitations in RCW 4.16.350 applies.

3. Plaintiffs Did Not Timely File Their Wrongful Death Claim

Wills unambiguously states that medical malpractice resulting in death is a wrongful death claim and the three year statute of limitations in RCW 4.16.080 applies. Plaintiffs' son died on August 31, 2008. (CP 7). Therefore the cause of action, if any, accrued on that date. Atchison, 161 Wn.2d at 377. Under RCW 4.16.080, the statute of limitations expired three years later, on August 31, 2011. Plaintiffs filed their Complaint on July 18, 2012, more than three years after the decedent's death. (CP 1-18). As the trial court recognized, "[i]t cannot be said that the plaintiffs complied with that three-year statute of limitations" because they filed the lawsuit nearly four years after the death. (RP 58).

4. Plaintiffs' Requests for Mediation Did Not Toll the Statute of Limitations in RCW 4.16.080

Because RCW 4.16.180 governs the wrongful death claim, Plaintiffs' requests for mediation did not toll the statute of limitations and were in effect a legal nullity as to that claim. Requests for mediation made under RCW 7.70.110 do not toll the statute of limitations in RCW 4.16.180. RCW 7.70.110 provides as follows:

> 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.

RCW 7.70.110 (emphasis added).

When interpreting a statute, courts look to its plain language. HomeStreet, Inc. v. State, Dept. of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Courts "should assume that the legislature means exactly what it says. Plain words do not require construction." Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 329, 815 P.2d 781 (1991). The Supreme Court "will not construe unambiguous language." Id. "It is not the role of the judiciary to second-guess the

wisdom of the legislature . . . ." Rousso v. State, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010).

RCW 7.70.110 is plain and unambiguous. It does not allow for differing meanings; the plain meaning is evident. Thus it does require construction. The Legislature could have, but did not, include RCW 4.16.080 in its tolling provisions.

Plaintiffs provide no statute, rule, legislatively recognized policy, or case law that concludes a good faith request for mediation tolls the statute of limitations found in RCW 4.16.080. The plain language of RCW 7.70.110 demonstrates that it does not apply to the statute of limitations provided in RCW 4.16.080. There is no ambiguity. Courts must "presume the legislature says what it means and means what it says." State v. Costich, 152 Wn.2d 463, 470 (2004).

Consequently, the requests for mediation had no effect on the wrongful death claim. Because it is undisputed Plaintiffs commenced this lawsuit more than three years after the death of their son, the trial court properly found that claim barred.

C. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF JAMIE FAST'S INJURY CLAIMS

1. Plaintiffs Failed to Make Any Bona Fide Attempt to Comply with the Tort Claim Statute

It cannot be reasonably argued that Plaintiffs made a bona fide attempt to comply with the tort claim statute. RCW 4.96.020(4) requires a claimant to serve a tort claim form 60 days before the lawsuit is commenced. The language of the statute is clear and unambiguous. It is not possible that Plaintiffs were confused as to its meaning.

It is clear from the record that Plaintiffs did not attempt to serve any kind of tort claim form on Defendants before filing their lawsuit. Instead of waiting the required 60 days, Plaintiffs filed the lawsuit and the standard tort claim form on the same day: on July 18, 2012. (CP 1; CP 85). Plaintiffs did not even serve the tort claim form until after they filed the lawsuit, (CP 80; 116-117), in direct contravention of the plain language of the statute. RCW 4.96.020(4) ("A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other

person designated to accept delivery at the agent's office."). Plaintiffs served KGH with the standard tort claim on August 1, 2012. (CP 80). They served Dr. Smith with the standard tort claim form on August 3, 2012. (CP 116-117; CP 269-271).

Plaintiffs' failure to comply with the notice of claim statute renders Plaintiffs' lawsuit void. "Filing a pre-claim notice under RCW 4.96.020 is a condition precedent to commencing an action seeking damages from the entity based on its tortious conduct, or the tortious conduct of its employees." Atkins v. The Bremerton Sch. Dist., 393 F. Supp.2d 1065, 1067 (W.D. Wash. 2005).

Plaintiffs cannot escape the requirements of the tort claim statute by arguing they substantially complied with its provisions. Plaintiffs have not established anything remotely like substantial compliance. Washington courts have established what substantial compliance means in this context. Substantial compliance means that

> [f]irst, there must be a sufficient bona fide attempt to comply with the law, notwithstanding the attempt is defective in some particular. Second, the attempt at compliance must actually accomplish the statutory purpose, which is to give the governmental entity such notice as will enable it to investigate the cause and character of the injury.

Renner v. City of Marysville, 145 Wn. App. 443, 451-52, 187 P.3d 283 (2008) aff'd, 168 Wn.2d 540, 230 P.3d 569 (2010) (emphasis added).

Unlike the cases Plaintiffs cite, Renner actually addressed substantial compliance with regard to the application of RCW 4.96.020, and it is controlling. Renner eliminates Plaintiffs' argument that they satisfied the intent of the statute by providing notice. (See App. Br. 41-42). Notice is only one of the two elements of substantial compliance; even if Defendants were aware of the lawsuit via the requests for mediation that does not excuse the lack of any attempt to comply with the statute.

Plaintiffs provide no authority from any jurisdiction showing that their decision to file the tort claim contemporaneously with the lawsuit and serve it after the lawsuit was filed constitutes substantial compliance. The law is clear that because they did not present a notice of claim prior to commencing this action, the instant lawsuit is void. Because it cannot be re-filed within the statute of limitations, the trial court properly dismissed it on summary judgment.

2. Defendants Are Not Barred from Raising the Tort Claim Statute Defense

Plaintiffs actually identified, located, and served a tort claim form. (CP 83-85; CP 278-288; CP 790). This tort claim form is the standard tort claim form. Plaintiffs were able to locate and ultimately file this tort claim form the same day they filed their complaint. There is nothing wrong with this form. On its face, it appears to contain all the required information to comply with RCW 4.96.020. (CP 83-85). Inexplicably, Plaintiffs decided to serve this form after they filed the lawsuit.

Instead of trying to justify the fact that they served the form after they filed the complaint in violation of the plain language of the tort claim statute, Plaintiffs argue Defendants cannot raise this defense because KGH did not make a tort claim form available. (App. Br. 32). Plaintiffs misstate the provisions of the tort claim statute.

The fact that KGH does not have the form on its website does not bar it from raising the defense. RCW 4.96.020(2) states that a tort claim form is deemed presented when the claim form is delivered to the appointed agent of the governmental agency. In the

context of discussing the necessity of designating an agent to accept service of the tort claim form, the statute states: "The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter." RCW 4.96.020(2).

It is apparent from the context of the statute that this bar relates solely to the failure to designate an agent for service noted in RCW 4.96.020(3). There is no indication it applies to the entire Chapter. This is confirmed by the only court decision to address this specific provision. Interpreting the statute, the Court of Appeals recognized that RCW 4.96.020(2) is only concerned with an entity's failure to designate agents:

> RCW 4.96.020(2) essentially creates two requirements for a governmental entity: (1) it must appoint an agent to receive claims for damages and (2) it must record the identity and address of that agent with the county auditor. The first requirement obviously must take place before the second, and it is illogical that a governmental entity can be considered to be in compliance with the statute when the agent that it has appointed to receive claims is not the same agent whose identity it has registered at the county auditor's office.

Mavis v. King Cnty. Pub. Hosp. No. 2, 159 Wn. App. 639, 648-49, 248 P.3d 558 (2011) (emphasis added).

RCW 4.96.020(3) does not state that failure to follow its provisions prevents an entity from asserting the tort claim defense. There is no requirement that a governmental entity provide potential claimants with tort claim forms. There is no indication in the tort claim statute that the bar to raising the defense applies to RCW 4.96.020(3), and Plaintiffs cite no case law at all to support their position. The plain language of the statute and the Mavis decision establish that a local governmental agency is precluded from raising the tort claim statute as a defense only if it fails to designate an agent. Since Plaintiffs have never argued that KGH did not designate such an agent, Plaintiffs' argument fails.

Moreover, RCW 4.96.020(3)(d) makes it clear that the language in subsection 2 does not bar Defendants from raising the tort claim defense. RCW 4.96.020(3)(d) provides the sole remedy for failure to comply with subsection 3. It provides:

> If any claim form provided by the local governmental entity fails to require the information specified in this section, or incorrectly lists the agent with whom the claim is to be filed, the local governmental entity is

> deemed to have waived any defense related to the failure to provide that specific information or to present the claim to the proper designated agent.

RCW 4.96.020(3)(d) (emphasis added).

Subsection 3 is the provision that deals specifically with the standard claim form. RCW 4.96.020(3)(d) states that failure to comply with subsection 3 means only that the governmental entity cannot later claim that the claimant did not provide information that was not requested. That is not an issue here; Defendants do not allege that Plaintiffs filed the wrong form; they allege Plaintiffs did not timely file any form. RCW 4.96.020(3)(d) does not state that failure to provide a form waives the defense.

Plaintiffs' argument that subsection 2 bars the tort claim statute defense results in a strained, unlikely interpretation that renders RCW 4.96.020(3)(d) meaningless and without effect. It makes no sense for the Legislature to have enacted a separate and distinct remedy under subsection 3 if the language in subsection 2 applied. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless

or superfluous." Whatcom Cnty. v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

3. KGH Complied with the Tort Claim Statute

Notwithstanding, KGH did in fact make the standard tort claim form available. RCW 4.96.020(3) indicates that the governmental entity can either have the standard tort claim form available or create its own form. The record is clear KGH did not create its own form; it did not have to do so. However, as the trial court noted, the record is also clear that the standard tort claim form is available online. (CP 1235; CP 755). Defense counsel was able to obtain such a form online. (CP 755). More importantly, Plaintiffs obviously were able to locate and identify the form and ultimately use it, which they concede. (CP 116; CP 790). That Plaintiffs could not actually locate a form is not the bar to Plaintiff's claims; the bar is that they completely failed to comply with the statute despite having identified, located, and used the form.

D. PLAINTIFFS' CONSTITUTIONAL CHALLENGES WERE NOT PROPERLY RAISED

Appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a)(3). "RAP 2.5(a)(3) excepts manifest

error affecting a constitutional right." Link v. Link, 165 Wn. App. 268, 279, 268 P.3d 963 (2011). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." Id. (citing State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). "To demonstrate that an error qualifies as manifest constitutional error an appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" Id. As the Supreme Court has noted, "RAP 2.5(a)(3) was not designed to allow parties 'a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.' If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted." State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).[5]

Plaintiffs' appeal brief fails to demonstrate actual prejudice or indicate why the alleged errors are manifest. Accordingly, the Court

[5] Plaintiffs did not raise any constitutional challenges below. Instead, in their third supplemental reply, they added a vague reservation of constitutional arguments they did not actually advance. (CP 769). Thus, Defendants had no opportunity to address the issues below, nor were they addressed by the trial court. (See RP).

should not consider them. RAP 2.5(a)(3). In the event the Court does consider them, they are without merit, as discussed below.

E. PLAINTIFFS' CONSTITUTIONAL CHALLENGES ARE WITHOUT MERIT; RCW 4.96.020 IS A PROPER AND CONSTITUTIONAL EXPRESSION OF LEGISLATIVE AUTHORITY AS APPLIED

1. RCW 4.96.020 Does Not Violate the Separation of Powers Doctrine

Presuit notice requirements do not violate the separation of powers doctrine. The Washington Constitution clearly empowers the Legislature to determine the manner in which suits may be brought against the State and its hospital districts, and the provisions of RCW 4.96.020 unambiguously derive from this enumerated power. Art. II, § 26 of the Washington State Constitution provides, "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." Through RCW 4.96.020, the Legislature, acting under its constitutional authority, has determined that, in order to bring a tort suit against the State or its hospital districts, claimants must first notify the government.

The Supreme Court recently addressed a separation of powers challenge to a pre-suit notice statute and rejected it. In McDevitt v.

Harbor View Med. Ctr., 85367-3, 2013 WL 6022156 (Wash. Nov. 14, 2013), the Supreme Court held that "the 90 day presuit notice requirement of former RCW 7.70.100(1) as applied to the State is a constitutional application of law under Article II, § 26 of the Washington Constitution." Id. at * 8. The Court found the statute constitutional because the Legislature enacted it pursuant to its Article II authority: "we hold that the presuit notice requirement of former RCW 7.70.100(1) as applied to the State is a constitutionally valid statutory precondition for suit against the State because it was adopted by the legislature as provided in Article II, § 26 of the Washington Constitution." Id. at * 1.[6]

Based on the same reasons articulated in McDevitt, the Court of Appeals recently denied a separation of powers challenge to the very statute in question—RCW 4.96.020. In Myles v. Clark Cnty., 170 Wn. App. 521, 529, 289 P.3d 650 (2012) review denied, 176 Wn.2d 1015, 297 P.3d 706 (2013), the plaintiff argued the claim filing requirements of RCW 4.96.020 violate the separation of

[6] It should be noted that the sole case Plaintiffs cite is Waples v. Yi, 169 Wn.2d 152, 161, 234 P.3d 187 (2010); however, the McDevitt Court completely distinguished Waples because it dealt with private defendants, not state defendants, as here. McDevitt, 85367-3, 2013 WL 6022156 at * 7. Thus Waples is inapposite.

powers doctrine because they directly conflict with the requirements for commencing a civil suit governed by CR 3. Id. at 527-28. The Court of Appeals held that the presuit provisions of RCW 4.969.020 are an appropriate and lawful exercise of legislative authority:

> Here, the Washington Constitution clearly empowers the legislature to determine the manner in which suits may be brought against the State and its municipalities, and the provisions of ch. 4.96 RCW unambiguously derive from this enumerated power.
>
> . . . .
>
> Neither art. II, § 26 nor former RCW 4.96.020(2) are ambiguous: acting under constitutional authority, the legislature has determined that, in order to bring a tort suit against the State or its municipalities, plaintiffs must first notify the government . . . . Art. II, § 26 unambiguously makes it the legislature's prerogative to determine the manner in which State entities may be sued. Accordingly, we hold that the notice provisions of ch. 4.96 RCW are constitutional.

Id. at 528-29 (underlined emphasis added) (internal citations omitted). This Court should similarly reject Plaintiffs' separation of powers challenge.

2. RCW 4.96.020 Is Unambiguous and Does Not Deprive Plaintiffs of Due Process As Applied

In a constitutional challenge, a statute is presumed constitutional "and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt." Island

Cnty. v. State, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). The Supreme Court has set a very high burden:

> The "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.

Id. (emphasis added).

The Fourteenth Amendment requires that people be given notice of that which is prohibited. State v. Reader's Digest Ass'n, 81 Wn.2d 259, 273, 501 P.2d 290 (1972). "The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law." Burien Bark Supply v. King County, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). If individuals of common intelligence must guess at a statute's meaning and differ as to its application, it violates due process. Id. The burden of proving

impermissible vagueness is on the party challenging the statute's constitutionality. City of Seattle v. Shepherd, 93 Wn.2d 861, 865–66, 613 P.2d 1158 (1980).

Courts will not invalidate a statute merely because it could have been drafted more precisely. State v. Sullivan, 143 Wn.2d 162, 184, 19 P.3d 1012 (2001). "Impossible standards of specificity are not required." Hi–Starr, Inc. v. Liquor Control Bd., 106 Wn.2d 455, 465, 722 P.2d 808 (1986) (rule giving liquor licensee additional time to satisfy the requirement upon a showing of unusual, extenuating, and mitigating circumstances was not vague). "No rule can provide the perfect checklist for the eventualities of the future." Id.

Even if RCW 4.96.020 does not define substantial compliance or advise claimants what to do when tort claim forms are not made available, (App. Br. 45-46), that does not render the statute unconstitutionally vague. RCW 4.96.020 states that in order to bring a tort suit against the State or its municipalities, claimants must first notify the government by serving a tort claim form on the agent of the governmental entity at least 60 days prior to commencing a lawsuit. The statute expressly states that the statute of limitations on

a tort claim is tolled during the 60–day waiting period required under the statute. RCW 4.96.020(4). This portion of the statute is not vague or difficult to understand.

Plaintiffs have not demonstrated that persons of common intelligence would misunderstand or be confused about the requirements of this statute. In fact, Plaintiffs actually located and served the tort claim form, and thus they obviously understood the statute's requirements. Plaintiffs cite no authority supporting their contention that the statute is vague. Nothing in the statute allows for arbitrary/erratic enforcement.

Defendants are not aware of any case law indicating that statutes must foresee and delineate every possible scenario that may occur. The fact that a statute contains terms that may be given different meanings by different persons (such as substantial compliance) does not give rise to a constitutional challenge. "[T]the possibility of different meanings alone does not render a statute vague. Cascade Floral Products, Inc. v. Dep't of Labor & Indus., 142 Wn. App. 613, 618-19, 177 P.3d 124 (2008). Courts frequently construe statutory language without finding statutes impermissibly

vague. See Renner v. City of Marysville, 168 Wn.2d 540, 545-46, 230 P.3d 569 (2010) ("[T]his court has interpreted 'substantial compliance' to require that the claimant make a 'bona fide attempt to comply with the law' and that the notice filed 'must actually accomplish its purpose.'").

RCW 4.96.020 provides sufficient notice of what is required of claimants. This Court should hold that RCW 4.96.020 does not violate due process protections.

3. Plaintiffs' Failure to Ascertain Dr. Smith's Employment Status Before Filing The Lawsuit Does Not Give Rise to A Due Process Challenge

Plaintiffs fundamentally misunderstand due process protections. "The Fourteenth Amendment requires that people be given notice of that which is prohibited." Medina v. Pub. Util. Dist. No. 1 of Benton Cnty., 147 Wn.2d 303, 314, 53 P.3d 993 (2002). Lack of notice is not an issue here; RCW 4.96.020 plainly states that governmental entities must be given notice at least 60 days before a claimant files a lawsuit.

The Due Process Clause does not protect against the failure of a party to properly investigate a potential claim prior to filing a

lawsuit and ascertaining the identities of the defendants. That Plaintiffs did not discover Dr. Smith's employment status is the result of their lack of due diligence, not a constitutional defect depriving them of due process. There were only two possibilities: either Dr. Smith was an employee of the hospital, or he was not. If Plaintiffs' counsel could not determine if Dr. Smith was an employee, he could have either served Dr. Smith with a tort claim form out of caution, or simply requested that information from the Defendants. He did neither. Moreover, since the hospital is a public hospital district hospital, Plaintiffs could have easily ascertained this information.

The provisions of the statute did not deprive Plaintiffs of any ability to investigate their claim and ensure compliance with the presuit notice requirement. Defendants are aware of no authority supporting Plaintiffs' claim, and Plaintiffs cite to no authority whatsoever. Plaintiffs' challenge is meritless and unsupported, and should be rejected.

4. RCW 4.96.020 Does Not Violate the Equal Protection Clause As Applied

The equal protection clause of the Fourteenth Amendment to the United States Constitution provides, "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.[7] A rational basis form of scrutiny is used to analyze statutory classifications under both the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). "Under rational basis review, the statute will be upheld as long as there is any conceivable set of facts that could provide a rational basis for classification." McDevitt, 85367-3, 2013 WL 6022156 at * 5.

Where claims filing statutes are concerned, the Supreme Court "has historically inquired whether a class was substantially burdened by the statute . . . . [S]tatutes that substantially burden a right of some but not others are permissible only if reasonable, not arbitrary, and 'rest upon some ground of difference having a fair and

[7] Article I, section 12 of the Washington Constitution provides, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

substantial relation to the object of the legislation.'" Medina v. Pub. Util. Dist. No. 1 of Benton Cnty., 147 Wn.2d 303, 313-14, 53 P.3d 993 (2002).

Plaintiffs mistakenly argue there is no rational basis for RCW 4.96.020 as applied here because the Defendants declined to mediate before the lawsuit was filed. (App. Br. 49). But the Supreme Court "has already held that there is a rational relationship between the purpose of the statute [RCW 4.96.020], which is to encourage negotiation and settlement, and the provision enforcing a uniform waiting period for all claims." Medina, 147 Wn.2d at 313.

In Medina, the Supreme Court rejected an equal protection challenge to RCW 4.96.020, noting that "governmental tort victims are not substantially burdened by waiting 60 days to file suit since the requirement imposes no 'real impediment to relief.' This is so, in part, because the statute provides for a tolling of the statute of limitations during the 60–day waiting period." Id. at 314.

As in Medina, Plaintiffs have not established that the tort claim statute places a real impediment on their ability to seek relief, particularly in light of the tolling provisions of the statute. Thus they

fail to demonstrate that the 60–day waiting period violates equal protection principles. The authority Plaintiffs cite to support their position that Defendants' awareness of the potential claim removes the basis for the presuit notice requirement here is from the dissent in Medina, (App. Br. 48-49), but it is not precedent. In re Domingo, 155 Wn.2d 356, 367, 119 P.3d 816 (2005) ("Dissenting opinions are not binding upon this court.").

Plaintiffs also mistakenly rely on Hunter v. North Mason High School, 85 Wn.2d 810, 539 P.2d 845 (1975) in arguing that presuit notification requirements violate equal protection. McDevitt addressed and discarded the same arguments Plaintiffs raise here. The McDevitt Court rejected an equal protection challenge under Hunter to the medical malpractice 90-day presuit notice requirement in RCW 7.70.100(1), as applied to state defendants, holding that there is a clearly rational and legitimate basis for the Legislature to enact presuit notices for governmental defendants:

> We have consistently upheld presuit notification requirements to state defendants where plaintiffs have challenged that such laws impermissibly discriminate between governmental and nongovernmental defendants. This classification of plaintiffs suing state defendants does not infringe on a fundamental right or

> create a suspect classification. It is also rationally related to a legitimate government interest because of "the multitude of departments, agencies, officers and employees and their diverse and widespread activities, touching virtually every aspect of life within the state." . . . The 90 day presuit notification requirement of former RCW 7.70.100(1) is also rationally related to this legitimate government interest because an advance notice of claims allows the State to make an accurate and timely allocation based on pending claims and use unspent funds for budgeting in other areas of state operations.
>
> Thus, we should find that the 90 day presuit notice requirement of former RCW 7.70.100(1) is consistent with the guarantees of equal protection in the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution.

McDevitt, 85367-3, 2013 WL 6022156 at * 5-6 (emphasis added) (internal citations omitted).

As mandated by McDevitt and Medina, this Court should reject Plaintiffs' equal protection challenge and find the provisions of RCW 4.96.020 consistent with the guarantees of equal protection.

V. CONCLUSION

Based on the foregoing analysis, the trial court's judgment should be affirmed.

Respectfully submitted this 16th day of January, 2014.

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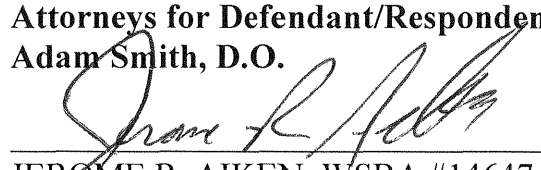

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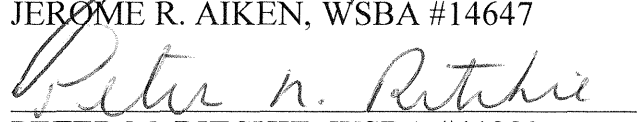

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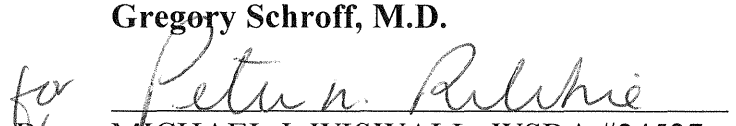

for ~~By~~: MICHAEL J. WISWALL, WSBA #24527
per authorization

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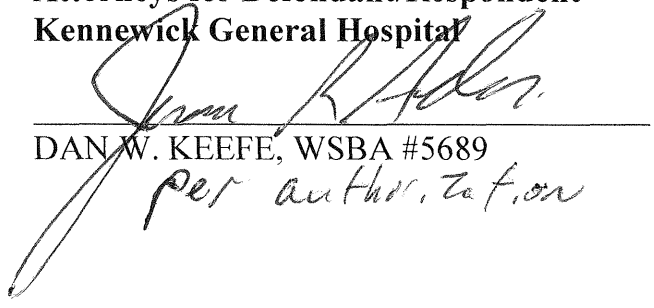

For ~~By~~: DAN W. KEEFE, WSBA #5689
per authorization

CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

For Plaintiffs: Scott E. Rodgers Rodriguez & Associates, P.S. 7502 W. Deschutes Place Kennewick, WA 99336	✓ via U.S. Mail ____ via fax ✓ via e-mail ____ via hand delivery
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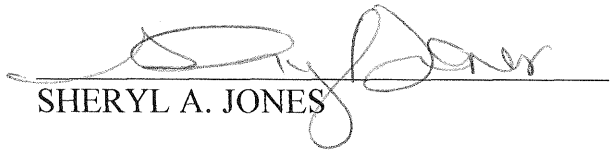
For Deft. Gregory Schroff, M.D.: Mr. John E. Hart Mr. Michael M. Wiswall Hart Wagner LLP 1000 SW Broadway Portland, OR 97205	✓ via U.S. Mail ____ via fax ✓ via e-mail ____ via hand delivery

Executed this 16th day of January, 2014, at Yakima, Washington.



SHERYL A. JONES