

62859-3

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No: 62859-3-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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MARCIA MAGEE,

Respondent

vs.

DAVID ALLEN, Ph.D.

Appellant

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BRIEF OF RESPONDENT

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cause and ordered the certificate of merit lengthened by less than 90 days. Did the trial court abuse its discretion? 1

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## RESTATEMENT OF ISSUES

1. RCW 7.70.150(1) requires filing a certificate of merit in medical negligence cases within 45 days of “commencing the action.” The Washington courts have universally held an action is only “tentatively commenced” by filing or serving the summons and complaint and that an action is “not properly commenced” until both filing and service are completed.” Should this court change the language of RCW 7.70.150(1) from requiring the certificate of merit be filed within 45 days of “commencing an action” to requiring the certificate of merit to be filed within 45 days of “tentatively commencing the action”?
2. RCW 7.70.150(4) provides the court discretion to extend the period for filing the certificate of merit an additional 90 days for good cause shown. The statute contains no requirement that the order providing such a 90 day extension be entered prior to the expiration of said 90 day period. Should this court legislate a requirement, that any order lengthening the period for filing the certificate of merit be entered during said 90 day period?
3. RCW 7.70.150(4) gives the court discretion to lengthen the certificate of merit filing period by 90 days where good cause is shown. The trial court herein found good cause and ordered the certificate of merit lengthened by less than 90 days. Did the trial court abuse its discretion?

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## RESTATEMENT OF THE CASE

This cause is a medical negligence action. It is founded on the failure of a treating psychologist to report repeated sexual abuse of his developmentally disabled patient. CP 60-63.

The summons and complaint were filed September 17, 2007. September 17, 2007 was within 45 days of the expiration of the statute of limitations. Id.

The summons and complaint were served November 13, 2007. This was 57 days after the summons and complaint was filed. Id.

December 7, 2007 Marcia Magee filed her certificate of merit. This was 24 days after service on Allen. Id. It was 81 days after the summons and complaint were filed.

Defendant/Appellant Allen brought a summary judgment motion alleging failure to comply with the certificate of merit requirements of RCW 7.70.150. It was heard by the court December 11, 2008, a year after the certificate of merit was filed. The court addressed questions to counsel at the hearing and on that basis entered an order extending by 90 days the period for filing the certificate of merit for good cause shown. RP 1-20; CP 22-23.

## ARGUMENT

1. The language of RCW 7.70.150(1) requiring a certificate of merit be filed within 45 days of “commencing the action” should not be changed by the court to require filing a certificate of merit within 45 days of “tentatively commencing the action.”

This is an issue of law. It is also an issue of first impression. It is reviewed de novo.

This case is one of an inevitable series of cases dealing with how the new certificate of merit requirement legislated by RCW 7.70.150 should fit in the pre-existing statutory scheme. In particular it deals with the interplay of the certificate of merit statute with RCW 4.16.170. Plaintiff/Respondent Marcia Magee takes the position that the two statutes should be read harmoniously. Defendant/Appellant Allen takes the position that RCW 7.70.150 in effect repeals RCW 4.16.170 in the context of the certificate of merit.

This is an action based on negligence by a health care provider. It is controlled by Chapter 7.70 RCW.

RCW 7.70.150 requires a certificate of merit be filed in an action based on Chapter 7.70 RCW. In relevant part the statute states:

. . . the plaintiff must file a certificate of merit at the time of commencing the action. If the action is commenced within forty-five days prior to the expiration of the applicable statute of limitations, the

plaintiff must file the certificate of merit no later than forty-five days after commencing the action.

RCW 7.70.150(1).

Defendant Allen contends Plaintiff Marcia Magee exceeded this 45 day time period because the date she filed her certificate of merit, December 7, 2007, was 81 days after September 17, 2007, which was when this cause was filed. Plaintiff Marcia Magee maintains she did not exceed this forty-five day time period because she filed her certificate of merit 24 days after Defendant Allen was served.

RCW 7.70.150(1) states the 45 day time period for filing the certificate of merit begins running “after commencing the action.” The question before the court is what the statute intends by the phrase “after commencing the action.”

The statute does not define “commencing the action.” There is no legislative history that provides guidance as to what “commencing the action” means in this context. No Washington court has interpreted the meaning of this phrase in relation to RCW 7.70.150(1).

However, the requirement of a certificate of merit within 45 days of “commencing the action” is in effect a statute of limitations, and the meaning of “commencement” has been interpreted for purposes of statutes of limitations.

RCW 4.16.170 determines when an action is deemed commenced for purposes of the statute of limitations. It provides in part:

For the purpose of tolling a statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served, whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally. . . within ninety days from the date of filing the complaint. . . if following. . . filing, service is not so made, the action shall be deemed not have be commenced for purposes of tolling the statute of limitations.

RCW 4.16.170.

The Washington State Supreme Court discussed RCW 4.16.170 in Martin v. Triol, 121 Wn.2d 135, 847 P.2d 471 (1993). It stated:

The legislature in 1895 created the “90-day rule” by enacting a statute permitting commencement of actions by filing a complaint followed by service within 90 days. The court adopted the rule in 1967 as part of its comprehensive revision of the rules of court procedure. The current version of the Superior Court Civil Rules continues to defer to the statutory provisions for statutes of limitations.

When the new civil rules were adopted in 1967, the forward noted that they were designed “[t]o eliminate many procedural traps now existing in Washington practice.” Subsequent opinions of this court have reiterated the objective of the rules to minimize miscarriages of justice based on unnecessarily complex procedures, and have applied the ninety day rule to a variety of statutory time limits.

Id at 146 [footnotes omitted].

The Martin court went on to state that the legislature was presumed to have full knowledge of RCW 4.16.170 when it enacted other statutes which RCW 4.16.170 might impact. Id. at 148. The court concluded it was reasonable to conclude the legislature intended to coordinate newly enacted statutes with RCW 4.16.170. The Supreme Court in Martin stated:

Legislative enactments which relate to the same subject and are not actually in conflict should be interpreted to give meaning and effect to both. Considering the legislative objective of reducing procedural difficulties and the blanket application of the tolling statute to various statutory time limits, we read together the two statutes, RCW 4.16.170 and RCW 46.64.040, and interpret them to give effect to their legislative purpose. We thus conclude that when a plaintiff commences suit by filing a complaint, it is logical to construe RCW 4.16.170 as extending by 90 days the time period for satisfying the provisions of RCW 46.64.040.

Martin v. Triol, 121 Wn.2d 135, 148-9, 847 P.2d 471, 477-8, (1993)

[footnotes omitted].

Martin makes it apparent that RCW 4.16.170 operates to toll the running of the 45 day statute of limitations for filing the certificate of merit. In this case Plaintiff Marcia Magee filed suit September 17, 2007. Once service was completed her 45 day period for filing the certificate of

merit began running. She filed her certificate of merit December 7, 2007, which was 24 days after service on Defendant Allen.

This result is in line with the consistent holdings of the Washington courts with respect to the meaning of “commencing the action.” Filing prior to service has been defined by the courts as “tentative commencement” which is not perfected until service. Citizens Interested in Transfusion of Yesteryear v. The Board of Regents of University of Washington, 86 Wn.2d 323, 544 P.2d 740 (1976); Banzeruk v. Estate of Haorowitz ex rel. Moody, 135 P.3d 512 (Wn.App. 2006). Likewise filing without service has been found to confer “conditional jurisdiction” which only is perfected when service is accomplished within 90 days of filing. An action is “not properly commenced” until both filing and service are completed. Fox v. Groff, 16 Wn.App. 893, 895, 559 P. 2d 1376 (1977).

Since an action is only “tentatively commenced” by filing without service and since an action is “not properly commenced” until both filing and service take place, the meaning of “the plaintiff must file the certificate of merit no later than 45 days after commencing the action” logically should be interpreted to mean once both filing and service are accomplished, a plaintiff has 45 days to file the certificate of merit. Since Plaintiff Marcia Magee only tentatively commenced this action by filing September 17, 2007 and did not perfect commencement until November

13, 2007, she had 45 days from November 13, 2007 to file her certificate of merit. She did it in 24 days and thus was within the time frame mandated by RCW 7.70.150.

Defendant/Appellant Allen cites CR 3(a), which states an action is commenced by service of a copy of a summons and complaint or by filing a summons and complaint. However, he ignores the concluding sentence of CR 3(a), which states: “An action shall not be deemed commenced for the purpose of tolling a statute of limitations except as provided by RCW 4.16.170.” He, also, ignores CR 3(b) which likewise reserves the issue of tolling to RCW 4.16.170.

Allen’s proposed interpretation of “commencing the action” would result in the statute creating an absurdity. If Allen’s interpretation were accepted, it would mean a certificate of merit must be filed within 45 days of either service or filing of the summons and complaint, whichever occurs first. This interpretation might work where the plaintiff files first, but what happens if the plaintiff serves the summons and complaint first? There is no place to file the certificate of merit required by RCW 7.70.150 until the plaintiff actually files her summons and complaint. Allen’s interpretation thus would require plaintiffs to file within 45 days, instead of the 90 days provided by RCW 4.16.170, in order to have a place to file the certificate of merit required by RCW 7.70.150.

Further, where filing is accomplished before service, the plaintiff under Allen's interpretation is forced to file a certificate of merit even before she is required to serve her summons and complaint on the doctor. Such a requirement would not seem designed to meet any purpose of the statute.

Similarly, what of the plaintiff who is not within range of the statute of limitations? Such a plaintiff under RCW 7.70.150 is required to file a certificate of merit "at the time of commencing the action." RCW 7.70.150(1). Under Allen's interpretation of commencing the action, a plaintiff could never serve first and file later, because a certificate of merit would have to be filed at the time of service, since that would constitute commencement, and there would be no place to file it.

The interpretation that does the least violence to the statutory framework and long developed case law is to interpret RCW 7.70.150 as intending "after commencing the action" to mean after commencement is perfected, not "tentative commencement." It is perfected after the summons and complaint are filed and served.

2. The 90 day extension for filing a certificate of merit is met where a court finds good cause exists and where the certificate of merit was filed within 90 days, regardless of when the motion is made or the order extending the period is entered.

This is an issue of law. It is an issue of first impression. It is reviewed de novo.

Defendant/Appellant Allen argues RCW 7.70.150(4), not only limits the extension of the period for filing a certificate of merit to 90 days, but is, also, a statute of limitations for making a motion for extension or for a court entering such an extension order. This limitation is not found in the statute.

In the case at bar Marcia Magee filed a certificate of merit within 81 days of filing her summons and complaint and within 24 days of serving her summons and complaint. Under any interpretation this was within 90 days of commencement.

As part of her opposition to Allen's summary judgment motion based on the certificate of merit, Marcia Magee argued that the court should exercise its discretion and simply grant a 90 day extension for good cause shown. The court agreed and entered an order granting the extension December 12, 2008. CP 22-23. This was almost a year after the certificate of merit was filed.

Allen contends, although the certificate of merit was filed within 90 days of commencement, Marcia Magee could not obtain the 90 day extension because she did not make her motion for extension within the same 90 day period and that the court did not have discretion to enter an order extending the 90 day period once the 90 day period expired.

RCW 7.70.150(4) does not impose a time limitation on when the court can exercise its discretion. RCW 7.70.150(4) only limits the discretion of the court with respect to the length of the extension it may grant.

A requirement that a motion for extension or order for extension must be made within 90 days is not found in the statute. It should not be created by the courts.

3. The court did not abuse its discretion when it found good cause existed for granting a 90 day extension for filing a certificate of merit.

The trial court's decision to extend the time for filing a certificate of merit 90 days will not be disturbed by an appellate court absent manifest abuse of discretion. Cyrus v. Morton, 64 Wn.2d 810, 394 P.2d 369 (1964). Manifest abuse of discretion can only be found where an appellate court determines no reasonable judge would have made a similar ruling. Vasquez v. Martin, 46 Wn. App. 480, 731 P.2d 510 (1986).

RCW 7.70.150(4) confers discretion on the court to extend the 45 day period for filing the certificate of merit an additional 90 days for good cause shown. Marcia Magee contended that she made a good faith attempt to follow the statute and that, if her interpretation of the amount of time available for filing a certificate of merit was incorrect, the statute at a minimum was ambiguous, and her filing the certificate of merit within 81 days of filing the complaint and within 24 days of service on Defendant

Allen was well intentioned and caused Defendant Allen no harm. Accordingly, Marcia Magee asked for relief under RCW 7.70.150(4) if the court was not inclined to agree she met the requirements of RCW 7.70.150(1). CP 93.

The court found a number of reasons supporting extension. Among other things, Defendant admitted it had been served by Marcia Magee, prior to the action at bar being filed, a declaration meeting the elements of a certificate of merit by the same doctor who signed the certificate of merit that was ultimately filed. The court also noted the short period of time between service of summons and complaint (24 days) and service of the declaration of merit, combined with prior service of what in effect was a certificate of merit, caused Allen to suffer no harm from delay. Additionally, delay was caused because the doctor signing the certificate of merit wanted to conduct more review before signing despite the fact that he had previously signed a declaration. Finally, the court felt at a minimum the ambiguity of the statute led Marcia Magee to a reasonable interpretation of the time limit justifying extension of 90 days, regardless. RP 1-20; CP 93.

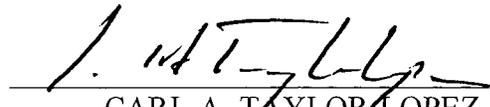
The court did not abuse its discretion in extending the time for filing the certificate of merit 90 days.

CONCLUSION

The certificate of merit was timely filed. The order denying summary judgment should be affirmed. This cause should be remanded for trial.

Dated this 24<sup>th</sup> day of August, 2009.

LOPEZ & FANTEL, INC., P.S.

A handwritten signature in black ink, appearing to read "C. Taylor Lopez", written over a horizontal line.

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