

66944-3

66944-3

Court of Appeals No. 66944-3-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SHARON SUMERA,

Respondent,

v.

GREGORY BEASLEY and JANE DOE BEASLEY, husband and wife  
and the marital community composed thereof d/b/a ADVANCED  
CHIROPRACTIC; and A TOUCH OF HEALTH, P.S., a Washington  
Corporation,

Appellants.

FILED  
APPEALS DIV 1  
STATE OF WASHINGTON  
2011 AUG 26 PM 12:58

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**BRIEF OF APPELLANTS**

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**I. Assignments of Error**

1. The trial court erred by denying appellants Gregory Beasley, D.C., and A Touch of Health P.S.'s ("Dr. Beasley") motion for summary judgment dismissal of respondent Sharon Sumera's ("Ms. Sumera") medical malpractice complaint based on the statute of limitations.

**II. Issues Pertaining to Assignment of Error**

Commissioner Neel succinctly set forth the issues in her ruling granting discretionary review:

At issue is the effect of the Supreme Court decision in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), which held that the notice of claim statute of RCW 7.70.110(1) is unconstitutional because it violates the separation of powers, on the running of the statute of limitations as to Sumera's action against Beasley. Sumera mailed her notice of claim six days before the Supreme Court decision in *Waples*. It is undisputed that Sumera's complaint was filed beyond the statute of limitations unless it was extended by 90 days plus 5 court days by virtue of her notice of claim.

Petitioner Beasley argues that the decision in *Waples* rendered Sumera's notice of claim a legal nullity and that the holding in *Waples* invalidating the notice of claim requirement necessarily invalidated the language extending the statute of limitations. Sumera argues that after *Waples* a notice of claim is not required, but if a party files a notice, the statute of limitations is extended.

Appendix, at 6-7.

### III. Statement of the Case

#### A. **Overview**

The summary judgment hearing presented a pure question of law on undisputed facts. Dr. Beasley moved for dismissal of plaintiff Sharon Sumera's medical negligence claim on the grounds that the statute of limitations for her claim expired on June 30, 2010. Ms. Sumera filed her complaint on September 27, 2010. CP 40-48; 5-10.

Six days before the statute of limitations expired, on June 24, 2010, Ms. Sumera mailed a 90-day notice of claim to Dr. Beasley under former RCW 7.70.100(1) (2007). (The notice of claim is also known as a notice of intent to sue.) Under that statute, serving Dr. Beasley with a notice of claim would have extended the statute of limitations by 90 days plus 5 court days, to September 29, 2010.

However, on July 1, 2010, the Supreme Court issued its opinion in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010). This opinion declared the notice-of-claim requirement in RCW 7.70.100(1) unconstitutional.

This table sets forth the pertinent dates. (For convenient reference, the table is reprinted on a single page in the Appendix to this brief.)

<b><u>Date</u></b>	<b><u>Event</u></b>
6/7/06	RCW 7.70.110(1), notice-of-claim statute, goes into effect. Laws of 2006, ch. 8, § 314.
6/29/06	Dates of treatment and alleged malpractice. Three-year

6/30/06	statute of limitations expires on 6/30/09. RCW 4.16.350.
6/25/09	Ms. Sumera requests mediation. Statute of limitations extended one year to 6/30/10, under RCW 7.70.110.
6/24/10	Ms. Sumera mails notice of claim.
6/27/10	Notice of claim served on Dr. Beasley.
6/30/10	Statute of limitations expires, but for notice of claim.
7/1/10	Supreme Court issues opinion in <i>Waples v. Yi</i> , 169 Wn.2d 152 (2010), declaring notice-of-claim provision in RCW 7.70.110(1) unconstitutional.
9/27/10	Complaint filed.
9/29/10	Statute of limitations expires, if <i>Waples</i> had not been issued.

Dr. Beasley argued on summary judgment that the Supreme Court's invalidation of the notice-of-claim statute in *Waples* related back to the statute's original enactment in 2006. In effect, Dr. Beasley argued, *Waples* means that a notice of claim has never been required for medical negligence cases, because it has always been unconstitutional. The *Waples* decision rendered Ms. Sumera's notice of claim a legal nullity. Since Ms. Sumera was not required to provide a notice of claim, her service of a notice did not extend the statute of limitations. Accordingly, the statute of limitations on her claim expired on June 30, 2010, before she filed her complaint. CP 40-48; 5-10.

At an unrecorded hearing, the trial court (Hon. Thomas. J. Wynne) denied Dr. Beasley's motion, but stated that the issue was ultimately one for an appellate court to decide. He therefore certified his order for

discretionary review under RAP 2.3(b)(4). CP 1-4. This Court accepted discretionary review on June 10, 2011. Appendix, at 6-7.

**B. The Medical Negligence Claim**

Ms. Sumera alleged that (a) she received two chiropractic treatments from Dr. Beasley, on June 29 and June 30, 2006; (b) the treatment fell below the standard of care, causing her unspecified injury; and (c) her injury was immediately apparent to her on June 30. Dr. Beasley denied that he had been negligent. CP 41; 52-56; 58-61.

**C. The Statute of Limitations Timeline**

Ms. Sumera's claim against Dr. Beasley progressed along the following procedural timeline.

**1. The Initial Claim: Statute Expires 6/30/09**

Ms. Sumera's claim was initially subject to a three-year statute of limitations. RCW 4.16.350. The claim accrued, and the statute of limitations started to run, on the date of Dr. Beasley's last treatment, June 30, 2006. (The statute's one-year "discovery rule" did not apply to Ms. Sumera's claim.<sup>1</sup>) Thus, the initial statute of limitations expiration for Ms. Sumera's claim was June 30, 2009. CP 42.

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<sup>1</sup> RCW 4.16.350 provides in pertinent part that a negligence claim against a healthcare provider such as a chiropractor:

shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the

**2. Mediation Request Adds One Year, to 6/30/10**

On June 25, 2009, Ms. Sumera requested mediation of her claim. This had the effect of extending the statute of limitations on her claim for one year, pursuant to RCW 7.70.110.<sup>2</sup> Thus, the statute of limitations went from June 30, 2009 to June 30, 2010. (A mediation did not occur.) CP 42-43; 55; 64-66.

**3. Notice of Claim Would Have Added 90 Days Plus 5 Court Days, to 9/29/10**

On June 24, 2010, Ms. Sumera mailed a notice of claim to Dr. Beasley. At that time (pre-*Waples*), former RCW 7.70.100(1) purported to require patients to provide healthcare providers with 90 days' notice before filing a malpractice claim:

No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action.

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time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later . . .

<sup>2</sup> RCW 7.70.110 provides:

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.

For purposes of the summary judgment hearing, Dr. Beasley did not dispute that Plaintiff's request for mediation constituted the "good faith request for mediation" required to extend the statute of limitations under RCW 7.70.110. CP 43.

This statute had been in effect since June 7, 2006, before Ms. Sumera saw Dr. Beasley for the first time on June 29, 2006. Laws of 2006, ch. 8, § 314. CP 43-44; 55; 68-70.

The statute, former RCW 7.70.100(1), also provided that serving the notice of claim within 90 days of the expiration of the applicable statute of limitations would extend the statute of limitations by 90 calendar days plus 5 courts days from the date the notice was mailed:

If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.<sup>3</sup>

For purposes of the hearing below, it was undisputed that Ms. Sumera's notice of claim was served on Dr. Beasley on June 27, 2010. This was within 90 days of the expiration of the applicable statute of limitations of June 30, 2010. Adding 90 calendar days plus 5 court days to June 24 (the mailing date) would have yielded a statute of limitations date of September 29, 2010.<sup>4</sup> CP 43-44; 9-10.

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<sup>3</sup> After this statute was enacted in 2006 (Laws of 2006, ch. 8, §314), minor procedural amendments were made in 2007. Laws of 2007, ch. 119, § 1. These amendments added five court days to the 90 days contained in the original statute. *Id. See Waples v. Yi*, 169 Wn.2d at 155 n.1.

<sup>4</sup> In their trial court briefing, both Dr. Beasley and Ms. Sumera initially miscalculated this date. Dr. Beasley put it on September 30. CP 44. Ms. Sumera put it on September 25. CP 24. It was undisputed that the correct date – September 29 – was set forth in Dr. Beasley's summary judgment reply. CP 9-10. These mutual calendar errors were immaterial. It was undisputed that Ms.

**4. Supreme Court Invalidates Notice Requirement on 7/1/10**

On July 1, 2010, the Supreme Court filed its opinion in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010). The court held that "the notice requirement of RCW 7.70.100(1) is unconstitutional because it violates the separation of powers." *Id.*, at 155. In so holding, the Supreme Court reversed the Court of Appeals (Division Two), which had held that the notice requirement was constitutional. *Waples v. Yi*, 146 Wn. App. 54, 189 P.3d 813 (2008), *rev'd*, 169 Wn.2d 152, 234 P.3d 187 (2010). The two appellate courts addressed different constitutional issues. The Court of Appeals addressed an equal protection challenge, and declined to reach the separation of powers issue. 147 Wn. App. at 59-62. The Supreme Court relied on separation of powers doctrine. 169 Wn.2d at 155-56.

**5. Complaint Filed on 9/27/10, 90 Days After Service of Notice of Claim**

Ms. Sumera filed her complaint on September 27, 2010. This was exactly 90 days after her notice of claim was served on Dr. Beasley. It was also two days before the statute of limitations would have expired on her claim – September 29, 2010 – if the Supreme Court had not issued its *Waples* opinion on July 1. CP 44;72.

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Sumera's complaint was untimely without the statute of limitations extension contained in former RCW 7.70.100. CP 9-10.

#### IV. Argument

##### A. The Supreme Court's Invalidation of the Notice-of-Claim Statute in *Waples* Rendered Ms. Sumera's Notice of Claim a Legal Nullity.

When the Supreme Court declared former RCW 7.70.100(1)'s notice-of-claim requirement unconstitutional on July 1, 2010, the court stated in effect that a notice of claim has never been required in Washington. When the Supreme Court declares a statute unconstitutional, "the statute is a nullity," and "it leaves the law as it stood prior to the enactment of the invalid statute." *Moody v. United States*, 112 Wn.2d 690, 693, 773 P.2d 67 (1989) (citations omitted). When reviewing a case that involves a constitutionally nullified statute, the court must consider the issues in light of the law as it existed before the unconstitutional statute took effect. *Id.*

Under *Waples*, Ms. Sumera was not – and never had been – required to file a notice of claim. The notice-of-claim statute had been in effect since June 7, 2006, before Ms. Sumera saw Dr. Beasley for the first time on June 29, 2006. Laws of 2006, ch. 8, § 314. The Supreme Court's *Waples* decision Ms. Sumera's 90-day notice of claim a legal nullity. Because she was not required to file a notice of claim, her filing of a notice did not add any time to the applicable statute of limitations.

Moreover, the Supreme Court recently made clear that all of its decisions are applied retroactively, unless the opinion itself states differently. "Historically, Washington has followed the general rule that a new decision of law applies retroactively unless expressly stated otherwise in the case announcing the new rule of law." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 271, 208 P. 3d 1092 (2009); *see also*, *State v. Moen*, 129 Wn.2d 535, 539, 919 P.2d 69 (1996) ("where a statute has been construed by the highest court of the state, the court's construction is deemed to be what the statute has meant since its enactment. In other words, there is no question of retroactivity."). The Supreme Court in *Waples* applied its new rule to the litigants before it, none of whom had served a notice of claim. *Waples*, 169 Wn.2d at 155-56. The opinion said nothing about applying the ruling prospectively.

**B. *Waples'* Holding That a Notice of Claim is Not Required Necessarily Invalidates the Language in the Same Statute Extending the Statute of Limitations**

Ms. Sumera argued that while the Supreme Court invalidated the notice-of-claim requirement, it did not expressly address the portion of the statute which extended the statute of limitations for a claimant who served a notice of claim. CP 25-26. This argument ultimately fails as illogical.

A hypothetical situation illustrates this admittedly paradoxical point. Assume that the statute of limitations on a patient's medical

negligence claim was set to expire today. This patient could not serve a 90-day notice of claim and expect to have the statute of limitations on her claim extended. Even though the notice-of-claim statute is still in the statute books, a notice of claim is legally meaningless in light of *Waples*. Thus, serving a notice of claim would have no effect on the statute of limitations. The hypothetical patient could not argue otherwise. This same principle applied to Ms. Sumera when she served her notice of claim on June 27, 2010 (pre-*Waples*), just as much as it would apply to her if she served a notice of claim today (post-*Waples*).

Incredibly, Ms. Sumera believes that *even today*, serving a healthcare provider with a notice of claim would extend the statute of limitations. (She argued as much in her response to Dr. Beasley's motion for discretionary review.) There is no logical or common-sense basis for this position. Since a notice of claim is not required, there is no reason to extend the statute of limitations if a patient mails a gratuitous notice.

The *Waples* decision necessarily renders the extension language in former RCW 7.70.100(1) a superfluous nullity. Under *Waples*, Plaintiff never had to serve a notice of claim, just as a plaintiff today does not have to serve one either. The law in effect when Plaintiff served her notice (pre-*Waples*) is the same as the law in effect for a plaintiff today (post-*Waples*).

The *Waples* court did not specifically address this question because the answer is clear, even it is unspoken. The answer is based on the logical application of well-settled jurisprudential principles. Dr. Beasley is entitled to have these principles applied logically and objectively to the claim against him. Washington courts have long recognized that the statute of limitations must be applied objectively:

While it has been a long cherished ambition of the common law to provide a legal remedy for every genuine wrong, it is also a traditional view that compelling one to answer stale claims in the courts is in itself a substantial wrong. . . . Consequently, as a matter of basic justice, the courts usually have a cogent reason to give limitation statutes a literal and rigid reading.

*Ruth v. Dight*, 75 Wn.2d 660, 664-65, 453 P.2d 631 (1969). Ms. Sumera filed her complaint more than four years after Dr. Beasley's alleged negligence. Her claim is the type of stale claim which the statute of limitations is designed to restrict.

**C. Ms. Sumera's Reliance on the Invalidated Statute is Immaterial.**

Ms. Sumera also argued that it was unfair for her to rely on a statute, only to have that statute later declared unconstitutional. She felt she should not have been required to "seek out a psychic" or otherwise "comb the dockets of the appellate courts of this State looking for

potential cases that could invalidate statutes that would otherwise be relied upon." CP 26.

While Ms. Sumera's arguments may have some appeal, they are ultimately unavailing. Applying the principles of retroactivity to Ms. Sumera's case may seem unfair *to her*. However, the Supreme Court has recognized that this is a price that must be paid to ensure a rational system that is fair to all litigants. "[O]nce the new rule has been applied in the case announcing the new rule, it must apply to all others regardless of the equities." *Lunsford*, 116 Wn.2d at 276. The court continued:

Although we recognize that changes in the law may work a hardship on those who have relied upon past decisions, we have chosen to favor equality of litigants over individual equities. Nor, finally, are litigants to be distinguished . . . on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new.

*Id.*, at 277-278 (2009) (internal quotations and citations omitted). The Supreme Court reaffirmed in *Lunsford* that its decisions are to be applied retroactively "no matter the reliance, surprise, hardship, or unfairness involved[.]" *Id.*, at 288 (Madsen, J., concurring).<sup>5</sup>

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<sup>5</sup> Moreover, Ms. Sumera's reliance on the statute may have been unreasonable (although the reasonableness of her reliance is immaterial). For almost a year before Ms. Sumera mailed her notice of claim on June 24, 2010, it was widely known and publicized that the notice-of-claim requirement was under review by the appellate courts. *See, e.g.*, Ron Perey, Doug Weinmaster, and Carla Tachau Lawrence, "Special Focus: Medical Negligence. Are the Medical Malpractice Act's 90-Day Notice of Intent to Sue (RCW 7.70.100(1) and Statute of Repose

While Ms. Sumera may feel that retroactive application of *Waples* unfairly penalizes her, healthcare providers may feel that it unfairly benefits other plaintiffs who failed to serve a notice of claim before the Supreme Court issued its *Waples* opinion. Healthcare providers were entitled to rely on the protections afforded by the statute until it was invalidated. Nonetheless, the individual plaintiffs in *Waples* – none of whom had served a notice of claim – benefitted from that opinion’s retroactive application *to them*. The benefit of retroactive application would inure to other plaintiffs as well. It would, for example, apply to a plaintiff whose case had been dismissed for failure to file a notice of claim, where that dismissal was on appeal at the time the Supreme Court issued its *Waples* opinion. Thus, when correctly applied, the principle of

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(RCW 4.16.350) Unconstitutional?" *Trial News*, January 2010, at 11-13. CP 9; 14-17.

This three-page article reported that on September 17, 2009 – ten months before Ms. Sumera mailed her notice – the Supreme Court had unanimously held that the related certificate-of-merit requirement in medical negligence cases was unconstitutional because it violated separation of powers. *Putnam v. Wenatchee Valley Medical Center*, 166 Wn.2d 974 (2009). The article’s authors presciently declared that the same constitutional arguments which doomed the certificate of merit should also apply to the notice of claim.

The Supreme Court had accepted review of the Court of Appeals’ *Waples* opinion back on March 4, 2009, more than a year before Ms. Sumera mailed her own notice of claim. 165 Wn.2d 1031 (2009). The Supreme Court heard oral argument on February 25, 2010, four months before Ms. Sumera served her notice of claim. The court’s ruling on July 1, 2010 was "much anticipated" by Washington practitioners. CP 9; 19.

retroactivity may benefit some claimants while penalizing others. But the principle must be applied objectively, "regardless of the equities" for individual claimants. *Lunsford*, 116 Wn.2d at 276.

**V. Conclusion**

This Court should reverse the trial court's order denying Dr. Beasley's summary judgment motion on the statute of limitations. The order effectively extended the statute of limitations on Ms. Sumera's claim after the Supreme Court's ruling in *Waples* had invalidated the statute authorizing the extension.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of August, 2011.

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**CERTIFICATE OF SERVICE**

THE UNDERSIGNED hereby certifies that on August 25, 2011, she caused to be delivered by messenger the **Brief of Appellants** to the persons whose names and addresses are set forth below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 25th day of August, 2011, at Seattle, Washington.

  
\_\_\_\_\_  
S. Jean Ballard,  
Assistant to Peter Klipstein, WSBA #26507

**APPENDIX**

1. Table of pertinent dates..... 1

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### Table of Pertinent Dates

<u>Date</u>	<u>Event</u>
6/7/06	RCW 7.70.110(1), notice-of-claim statute, goes into effect. Laws of 2006, ch. 8, § 314.
6/29/06	Dates of treatment and alleged malpractice. Three-year statute of limitations expires on 6/30/09. RCW 4.16.350.
6/30/06	
6/25/09	Ms. Sumera requests mediation. Statute of limitations extended one year to 6/30/10, under RCW 7.70.110.
6/24/10	Ms. Sumera mails notice of claim.
6/27/10	Notice of claim served on Dr. Beasley.
6/30/10	Statute of limitations expires, but for notice of claim.
7/1/10	Supreme Court issues opinion in <i>Waples v. Yi</i> , 169 Wn.2d 152 (2010), declaring notice-of-claim provision in RCW 7.70.110(1) unconstitutional.
9/27/10	Complaint filed.
9/29/10	Statute of limitations expires, if <i>Waples</i> had not been issued.



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\*\*\* effective through June 30, 2011 \*\*\*

TITLE 7. SPECIAL PROCEEDINGS AND ACTIONS  
CHAPTER 7.70. ACTIONS FOR INJURIES RESULTING FROM HEALTH CARE

**GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

Rev. Code Wash. (ARCW) § 7.70.100 (2011)

§ 7.70.100. Mandatory mediation of health care claims -- Procedures

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. The notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW 7.70.020(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW 4.96.020(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial except as provided in subsection (6) of this section.

(4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The implementation contemplates the adoption of rules by the supreme court which will require mandatory mediation without exception unless subsection (6) of this section applies. The rules on mandatory mediation shall address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

(b) Appropriate limits on the amount or manner of compensation of mediators;

(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

(e) The number of days following the selection of a mediator within which a mediation conference must be held;

(f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and

(g) Any other matters deemed necessary by the court.

(5) Mediators shall not impose discovery schedules upon the parties.

(6) The mandatory mediation requirement of subsection (4) of this section does not apply to an action subject to mandatory arbitration under chapter 7.06 RCW or to an action in which the parties have agreed, subsequent to the arising of the claim, to submit the claim to arbitration under chapter 7.04A or 7.70A RCW.

(7) The implementation also contemplates the adoption of a rule by the supreme court for procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

**HISTORY:** 2007 c 119 § 1; 2006 c 8 § 314; 1993 c 492 § 419.

**NOTES:** FINDINGS -- INTENT -- PART HEADINGS AND SUBHEADINGS NOT LAW -- SEVERABILITY -- 2006 C 8: See notes following RCW 5.64.010.

**MEDICAL MALPRACTICE REVIEW -- 1993 C 492:** "(1) The administrator for the courts shall coordinate a collaborative effort to develop a voluntary system for review of medical malpractice claims by health services experts prior to the filing of a cause of action under chapter 7.70 RCW.

(2) THE SYSTEM SHALL HAVE AT LEAST THE FOLLOWING COMPONENTS:

(a) Review would be initiated, by agreement of the injured claimant and the health care provider, at the point at which a medical malpractice claim is submitted to a malpractice insurer or a self-insured health care provider.

(b) By agreement of the parties, an expert would be chosen from a pool of health services experts who have agreed to review claims on a voluntary basis.

(c) The mutually agreed upon expert would conduct an impartial review of the claim and provide his or her opinion to the parties.

(d) A pool of available experts would be established and maintained for each category of health care practitioner by the corresponding practitioner association, such as the Washington state medical association and the Washington state nurses association.

(3) The administrator for the courts shall seek to involve at least the following organizations in a collaborative effort to develop the informal review system described in subsection (2) of this section:

- (a) The Washington defense trial lawyers association;
- (b) The Washington state trial lawyers association;
- (c) The Washington state medical association;
- (d) The Washington state nurses association and other employee organizations representing nurses;
- (e) The Washington state hospital association;
- (f) The Washington state physicians insurance exchange and association;
- (g) The Washington casualty company;
- (h) The doctor's agency;
- (i) Group health cooperative of Puget Sound;
- (j) The University of Washington;
- (k) Washington osteopathic medical association;
- (l) Washington state chiropractic association;
- (m) Washington association of naturopathic physicians; and
- (n) The department of health.

(4) On or before January 1, 1994, the administrator for the courts shall provide a report on the status of the development of the system described in this section to the governor and the appropriate committees of the senate and the house of representatives." [1993 c 492 § 418.]

FINDINGS -- INTENT -- 1993 C 492: See notes following RCW 43.72.005.

SHORT TITLE -- SEVERABILITY -- SAVINGS -- CAPTIONS NOT LAW -- RESERVATION OF LEGISLATIVE POWER -- EFFECTIVE DATES -- 1993 C 492: See RCW 43.72.910 through 43.72.915.

#### EFFECT OF AMENDMENTS.

2007 c 119 § 1, effective July 22, 2007, in (1), added the second through fourth sentences and substituted "date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action" for "service of the notice" in the last sentence.

2006 c 8 § 314, effective June 7, 2006, added (1), (2), (6), and (7), and redesignated subsections accordingly; in (3), added "After the filing of the ninety-day presuit notice, and before a superior court trial" at the

beginning and added the proviso at the end; and in the introductory paragraph of (4), added the second sentence, and added "on mandatory mediation" after "rules" in the last sentence.

## **LexisNexis 50 State Surveys, Legislation & Regulations**

### Medical Malpractice Actions

#### JUDICIAL DECISIONS

##### ANALYSIS

Constitutionality

Applicability

Complaint untimely

Evidence

Filing requirements

##### CONSTITUTIONALITY.

Notice requirement of former RCW 7.70.100(1) (2006) irreconcilably conflicted with the commencement requirements of CR 3(a) and was unconstitutional because it conflicted with the judiciary's power to set court procedures. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

Notice requirement of former RCW 7.70.100(1) (2006) is unconstitutional because it violates the separation of powers. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

Former RCW 7.70.100(1) extended the time available to file a claim; even if it did not, it created no arbitrary or irrational classification because the time period helped achieve the policy's aim to settle medical malpractice cases before resorting to court; the requirement was not unconstitutional. *Breuer v. Presta*, 148 Wn. App. 470, 200 P.3d 724 (2009).

##### APPLICABILITY.

Conflict between former RCW 7.70.100(1) (2006) and CR 3(a) cannot be harmonized and both cannot be given effect. Statute involves procedural law and will not prevail over the rule. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

##### COMPLAINT UNTIMELY.

Dental patient's informed consent claim against a dentist was time-barred because it was not filed within the three year statute of limitations. Because RCW 7.70.100(1) required strict compliance with the statute of limitations and a 90-day waiting period, when the patient filed her complaint, the statute of limitations had expired. *Young v. Savidge*, 155 Wn. App. 806, 230 P.3d 222 (2010).

Even if a letter to the doctor started the 90-day waiting period under former RCW 7.70.100(1) (2006), the filing of the patient's complaint was still too late. *Breuer v. Presta*, 148 Wn. App. 470, 200 P.3d 724 (2009).

##### EVIDENCE.

In an insurance dispute, the trial court did not abuse its discretion or violate RCW 5.60.070 in introducing evidence concerning a mediation in an underlying personal injury case because (1) the insurer failed to provide any evidence establishing that the mediation was a result of a court order, a written agreement between

*The Court of Appeals*  
of the  
*State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

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June 13, 2011

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CASE #: 66944-3-1

Sharon Sumera, Respondent v. Gregory Beasley and Jane Doe Beasley, Petitioners

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on June 10, 2011:

In this medical malpractice action brought by plaintiff/respondent Sharon Sumera against defendant/petitioner Gregory Beasley, d/b/a Advanced Chiropractic and A Touch of Health's, Beasley seeks discretionary review of the March 11, 2011 trial court order denying his motion for summary judgment dismissal based on the statute of limitations. The trial court has certified the matter for discretionary review under RAP 2.3(b)(4):

The Court also finds and certifies, pursuant to RAP 2.3(b)(4), that this Order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The summary judgment hearing which produced the Order [denying summary judgment] was based on undisputed facts and involved a pure question of law as to the proper statute of limitations applicable to Plaintiff's claim. If the appellate court were to rule that the statute of limitations had expired on Plaintiff's claim, this ruling would terminate the litigation.

At issue is the effect of the Supreme Court decision in Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010), which held that the notice of claim statute of RCW 7.70.110(1) is unconstitutional because it violates the separation of powers, on the running of the statute of limitations as to Sumera's action against Beasley. Sumera mailed her notice of claim six days before the

Supreme Court decision in Waples. It is undisputed that Sumera's complaint was filed beyond the statute of limitations unless it was extended by 90 days plus 5 court days by virtue of her notice of claim. Petitioner Beasley argues that the decision in Waples rendered Sumera's notice of claim a legal nullity and that the holding in Waples invalidating the notice of claim requirement necessarily invalidated the language extending the statute of limitations. Sumera argues that after Waples a notice of claim is not required, but if a party files a notice, the statute of limitations is extended.

The issue involves a controlling question of law, there is a substantial ground for a difference of opinion, and immediate review may materially advance the ultimate termination of the litigation. The trial court's certification for discretionary review under RAP 2.3(b)(4) is well taken.

Therefore, it is

ORDERED that discretionary review is granted, and the clerk shall set a perfection schedule.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

jh