IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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.	)	NO. 66944-3-I DIVISION ONE UNPUBLISHED OPINION FILED: August 6, 2012

Lau, J. — At issue is the effect of the statute of limitations on Sharon Sumera's medical malpractice lawsuit against chiropractor George Beasley, given the Supreme Court's decision in Waples v. Yi, 169 Wn.2d 152, 161, 234 P.3d 187 (2010). Waples held RCW 7.70.100(1)'s notice of intent to sue provision unconstitutional since requiring plaintiffs to give presuit notice violates the separation of powers. Because the statute's 90-day tolling provision remains valid under post-Waples Supreme Court precedent, we conclude Sumera timely filed her lawsuit. Accordingly, we affirm the trial

court order denying Beasley's summary judgment motion.

FACTS

The facts relevant to this appeal are undisputed. Chiropractor Gregory Beasley treated Sharon Sumera for a back injury on June 29 and 30, 2006. Sumera claimed that Beasley's treatment fell below the standard of care and aggravated her injury. Beasley filed her complaint on September 27, 2010.

On June 25, 2009, several days before the three-year statute of limitations expired, Sumera requested mediation. RCW 7.70.110.[1] This tolled the statute of limitations for one year until June 30, 2010. On June 24, 2010, Sumera mailed Beasley a notice of intent to sue under former RCW 7.70.100(1), six days before the Waples decision. Sumera served Beasley with this notice on June 27, 2010. Service of the notice under that statute extended the statute of limitations by 90 days, plus 5 court days, to September 29, 2010.

Beasley moved for summary judgment as a matter of law, arguing that Sumera's claim is time barred because the Waples decision retroactively rendered Sumera's notice of intent to sue (and the 90-day tolling provision) a legal nullity. Sumera responded that Waples invalidated only the requirement that malpractice plaintiffs provide notice of intent to sue, not the statute of limitations extension. The trial court denied summary judgment. We granted discretionary review.

ANALYSIS

[1] This provision tolls the statute of limitations for one year upon a written, good faith request for mediation.

Beasley contends the Waples decision rendered Sumera's notice of intent to sue a legal nullity and the holding in Waples invalidating the notice requirement necessarily invalidated the language extending the statute of limitations.[2] Sumera argues that after Waples, a notice of intent to sue is not required, but if a party files notice, the statute of limitations is extended. The parties agree that Sumera's complaint was filed beyond the statute of limitations unless extended by 90 days, plus 5 court days by virtue of her notice of intent to sue.

We review the court's summary judgment order de novo. Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "Where summary judgment is predicated on an issue of statutory interpretation, appellate courts review the trial court's interpretation of the statute and its application to a particular set of facts de novo." Blue Diamond Group, Inc. v. KB Seattle 1, Inc., 163 Wn. App. 449, 453-454, 266 P.3d 881 (2011). We review a trial court's interpretation of case law de novo. Mathioudakis v. Fleming, 140 Wn. App. 247, 252, 161 P.3d 451 (2007).

Amendments in 2006 to the medical malpractice act required a claimant to serve a health care provider with a notice of claim (also known as a notice of intent to sue) before suing for medical negligence.[3] Bennett v. Seattle Mental Health, 150 Wn. App.

[2] The opinion refers to this language as the 90-day tolling provision.

[3] Neither party briefed or addressed the Act's severability clause, which states, "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or

455, 460-462, 208 P.3d 578 (2009). The legislature amended this notice requirement in 2007. "As amended, if the notice of intent to sue is served within 90 days of the expiration of the statute of limitations, the claimant has an additional five court days after the 90-day waiting period 'expires' to file suit." Bennett, 150 Wn. App. at 461 (citing Laws of 2007, ch. 119 § 1.). The notice of intent to sue provision states:

> 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.

RCW 7.70.100(1) (emphasis added).

The Waples decision invalidated the requirement that plaintiffs provide this notice. There, two plaintiffs appealed the dismissal of their medical malpractice suits for failure to provide the RCW 7.70.100(1) notice of intent to sue. Waples consolidated both cases to address whether "the notice requirement of RCW 7.70.100(1) violate[s]

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circumstances is not affected." Laws of 2006, ch. 8, § 407. And at oral argument, Beasley's counsel asserted that the severability principles of McGowan v. State, 148 Wn.2d 278, 60 P.3d 67 (2002), do not apply here.

the separation of powers doctrine." Waples, 169 Wn.2d at 158. The court adhered to its analysis in Putnam v. Wenatchee Valley Medical Center, P.S., 166 Wn.2d 974, 216 P.3d 374 (2009). In Putnam, the court held that RCW 7.70.150's requirement that medical malpractice plaintiffs file a certificate of merit violated the separation of powers doctrine because it conflicted with Civil Rules 8 and 11 regarding pleading requirements and thereby encroached on the judiciary's power to set court rules. Putnam, 166 Wn.2d at 979-80. In Waples, the court similarly reasoned, "Requiring [presuit] notice adds an additional step for commencing a suit to those required by CR 3(a)."[4] Waples, 169 Wn.2d at 160. The court held narrowly that "[t]he notice requirement of RCW 7.70.100(1) irreconcilably conflicts with the commencement requirements of CR 3(a) and is unconstitutional because it conflicts with the judiciary's power to set court procedures." Waples, 169 Wn.2d at 161.

Beasley contends, without support, that Waples not only nullified the notice requirement but also the 90-day tolling provision. He then concludes that Waples must be applied retroactively to bar Sumera's untimely action. Sumera agrees Waples applies retroactively.

Recently, the Supreme Court confirmed Sumera's narrow reading of Waples. In

[4] CR 3(a) provides, "Except as provided in rule 4.1, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint. Upon written demand by any other party, the plaintiff instituting the action shall pay the filing fee and file the summons and complaint within 14 days after service of the demand or the service shall be void. An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170."

Unruh v. Cacchiotti, 172 Wn.2d 98, 108, 257 P.3d 631 (2011), the court first determined that the statute of limitations period for Unruh's medical malpractice claim against her orthodontist Cacchiotti began to run on January 3, 2004, when she turned 18 years old.

The Unruh court next addressed the effect of the notice of intent to sue provided by Unruh, shortly before the statute of limitations ran on her claim. Unruh, 172 Wn.2d at 108. Cacchiotti argued that the notice of intent to sue did not toll the statute of limitations because Unruh could not "stack" the RCW 7.70.100(1) statute of limitations extension with the RCW 7.70.110 mediation tolling provision. Unruh acknowledged Waples in a footnote: "The provision of former RCW 7.70.100 requiring a 90-day notice of intent to sue was recently invalidated by this court based on separation of powers. It was a statutory requirement at the time Unruh served her notice." Unruh, 172 Wn.2d at 108 n.7 (citation omitted). Despite this acknowledgement, the court gave effect to RCW 7.70.100(1)'s statute of limitations extension, holding:

> Under former RCW 7.70.100, Unruh was required to serve Cacchiotti with a 90–day notice of intent to sue before filing her lawsuit. The statute is clear that service of the notice of intent to sue extends the time for commencing the action: "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 service of the notice." Former RCW 7.70.100(1).
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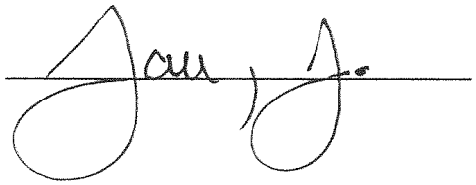
> Unruh served Cacchiotti with the 90–day notice of intent to sue on November 16, 2006. The three-year limitations period was set to expire on January 3, 2007, less than three months later. Accordingly, service of the notice of intent to sue tolled the statute of limitations for 90 days from the date of service, or until the middle of February 2007.

Unruh, 172 Wn.2d at 111-12 (emphasis added). Faced squarely with the 90-day tolling

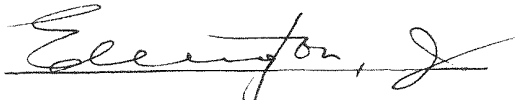
provision's application post-Waples, Unruh applied it to extend the statute of limitations where, as here, plaintiff timely served notice of intent to sue.[5]

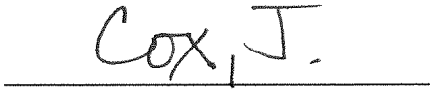
Beasley also asserts that after Waples, a construction that permits the RCW 7.70.100(1) statute of limitations extension is "illogical" and has no "common-sense basis." Appellant's Br. at 9, 10. But Beasley cites no authority and provides no meaningful analysis on this point. See First Am. Title Ins. Co. v. Liberty Capital Starpoint Equity Fund, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (declining to consider an inadequately briefed argument). We also note that Beasley points to no language in Waples that indicates the court intended to nullify the 90 day tolling provision where a party serves notice. Beasley's argument fails in any event for the reasons discussed above.[6]

For the reasons discussed above, we affirm the trial court's order denying Beasley's motion for summary judgment.



WE CONCUR:





[5] We find Beasley's attempts to explain Unruh in supplemental briefing unpersuasive. He fails to address why Unruh applied the statute of limitations extension after Waples if Waples rendered the extension a legal nullity.

[6] Beasley addresses a hypothetical situation—the plaintiff who provides a notice of intent to sue after the court decided Waples. This case does not present that situation and we need not address it.