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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD P. GARDNER
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NANCY NGYUEN WAPLES,

Plaintiff/Appellant,

vs.

PETER H. YI, D.D.S and JANE DOE YI, husband and wife, and their
marital community thereof, d/b/a LAKEWOOD DENTAL CLINIC, and
PETER H. YI, D.D.S., P.S., a Washington corporation,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons seeking legal redress under the civil justice system. WSAJ Foundation appears as amicus curiae in this case at the request of the Court.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal principally involves interpretation and application of former RCW 7.70.100(1), and whether this statute is constitutional. If the Court concludes noncompliance with this statute is excused in this case, then it may also address the constitutionality of RCW 7.70.150.

This is a tort action by Nancy Waples (Waples) against Peter H. Yi, D.D.S., P.S., d/b/a Lakewood Dental Clinic (Yi), for alleged negligent dental treatment. The underlying facts are drawn from the Court of Appeals opinion, and the briefing of the parties. See Waples v. Yi, 146

Wn.App. 54, 189 P.3d 813 (2008), *review granted*, 165 Wn.2d 1031 (2009); Waples Br. at 1; Yi Br. at 4-6; Waples Pet. for Rev. at 1-2.¹

For purposes of this amicus curiae brief, the following facts are relevant: This negligence claim is governed by Ch. 7.70 RCW. Waples commenced this action in September, 2006, based upon dental services provided in 2003. However, Yi contended Waples did so without first giving notice to Yi of her intention to commence the action, as required by former RCW 7.70.100(1).² Additionally, Waples did not file a certificate of merit at the time she commenced this action, as required by RCW 7.70.150.³

Yi moved for summary judgment of dismissal based upon Waples' noncompliance with the pre-litigation notice requirement. In response, Waples apparently contended RCW 7.70.100(1) is not mandatory, and that any noncompliance is excused because the mediation procedures contemplated by RCW 7.70.100(3)-(7) were not in place at the time the action was commenced. The superior court dismissed the action for noncompliance with the notice requirement, and Waples appealed.

On appeal, Waples made the same statutory construction arguments apparently urged below, and also contended for the first time that RCW 7.70.100(1) violates Washington Constitution, Art. I §12.

¹ Neither party filed a supplemental brief in this Court after review was granted.

² This statute was amended in 2007, but retained the pre-litigation notice requirement at issue in this case. See Laws of 2007, ch. 119 §1. The 2007 amendment merely clarified the methods for providing the notice. Consequently, former RCW 7.70.100 is simply referred to as RCW 7.70.100 in the balance of this brief. The text of the former and current versions of RCW 7.70.100 are reproduced in the Appendix to this brief.

³ The current version of RCW 7.70.150 is reproduced in the Appendix to this brief.

Waples further contended that RCW 7.70.150 was unconstitutional for several reasons, including violation of Art. I §12. See Waples Br. at 9-10. It is unclear from the parties' briefing whether Yi had sought summary judgment based upon noncompliance with RCW 7.70.150.

Waples' constitutional argument under Art. I §12 was framed in terms of denial of "equal protection," and principally relied upon the analysis in Hunter v. North Mason Sch. Dist., 85 Wn.2d 810, 818-19, 539 P.2d 845 (1975) (striking down as discriminatory under both the federal and state constitutions a nonclaim statute requiring a pre-litigation four-month notice of claim against certain governmental entities).⁴ In framing her equal protection argument, Waples did not invoke the privileges and immunities analysis of this Court in Grant County Fire Prot. Dist. v. Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004), and the case was not called to the attention of the Court of Appeals in the briefing of the parties.⁵ Waples did argue, referencing Hunter, that there is no "compelling state interest" for the special treatment of defendants under RCW 7.70.100(1). See Waples Br. at 7-8; see also Waples Pet. for Rev. at 6.

Division II affirmed dismissal of Waples' negligence action for noncompliance with RCW 7.70.100(1). See Waples, 146 Wn.App. at 62.

⁴ This Court has since retreated from the "broad equal protection" framework of Hunter in assessing the constitutionality of government notice of claim provisions. See Hall v. Niemer, 97 Wn.2d 574, 580, 649 P.2d 98 (1982); Daggs v. City of Seattle, 110 Wn.2d 49, 50-56, 750 P.2d 626 (1988).

⁵ This opinion is generally referred to as Grant County II, because it superseded the Court's earlier opinion in Grant County Fire Prot. Dist. v. Moses Lake, 145 Wn.2d 702, 42 P.3d 394 (2002) (Grant County I).

The court rejected Waples' statutory construction arguments, see id. at 58-59, and her equal protection challenge under Art. I §12, see id. at 59-61. In upholding the constitutionality of the notice requirement, the court concluded that it did not implicate a fundamental right, and applied rational basis review. See id. The court did not reference the privileges and immunities analysis of this Court in Grant County II. See id.⁶

Waples petitioned this Court for review, which was granted. The petition raises the same statutory construction and constitutional arguments pursued at the Court of Appeals. Waples' petition does not invoke the privileges and immunities analysis set forth in Grant County II, nor specifically urge that her right to a civil remedy is a fundamental right. See Waples Pet. for Rev. at 1-7.

III. ISSUES PRESENTED

- 1.) Is RCW 7.70.100(1), requiring plaintiffs with claims against health care providers to furnish pre-litigation notice of intent to sue, unconstitutional under Washington Constitution, Art. I §12, in favoring a class of defendants with a special privilege and immunity that burdens plaintiffs' fundamental right to a remedy?
- 2.) If compliance with RCW 7.70.100(1) is excused in this case for any reason, is RCW 7.70.150, requiring plaintiffs filing claims against health care providers to file a certificate of merit, unconstitutional under a similar Art. I §12 analysis?

IV. SUMMARY OF ARGUMENT

RCW 7.70.100(1), requiring pre-litigation notice of intent to sue a health care provider, offends Washington Constitution, Art. I §12, and is

⁶ Division II referenced but did not reach Waples' challenge to the constitutionality of RCW 7.70.150 because Waples' noncompliance with RCW 7.70.100(1) was outcome determinative. See Waples at 61-62.

unenforceable. Under Grant County II, this statutory provision impermissibly favors the class of private health care providers with a special privilege and immunity unavailable to all citizens that burdens Ch. 7.70 plaintiffs' fundamental right of access to court to pursue a civil remedy. There is no compelling reason for the Legislature to burden this fundamental right. If the Court reaches the constitutionality of RCW 7.70.150, it is likewise unconstitutional under this analysis.

V. ARGUMENT

Re: Scope of Brief

This amicus curiae brief only addresses the constitutional challenge to RCW 7.70.100(1) under Washington Constitution, Art. I §12. Thus, it is assumed for purposes of this brief that the statutory provision otherwise applies here, and that Waples' noncompliance with it is fatal to her claim. This brief also analyzes the constitutionality of RCW 7.70.150 under Art. I §12, to the extent noncompliance with this statute may be considered as an alternate ground for affirming the superior court if, for any reason, non-compliance with RCW 7.70.100 is not determinative. See RAP 2.5(a)(3).

Re: Preservation of Error

The Court may question whether to consider the Art. I §12 privileges and immunities argument presented here because the issue was not properly preserved below. First, Waples' constitutional challenges apparently were not made until the Court of Appeals level, although that

court addressed and then rejected these challenges on the merits. See Yi Br. at 3; Waples, 146 Wn.App. at 59-61. Second, Waples did not argue at the Court of Appeals, nor raise in her petition for review, the privileges and immunities analysis articulated in Grant County II. See Waples Br. at 3, 6-8; Waples Pet. for Rev. at 4-6. Perhaps as a consequence, the Court of Appeals confined its Art. I §12 analysis to rational basis review. See Waples, 146 Wn.App. at 60 (applying rational basis review to Waples "equal protection argument," concluding her claim does not involve a suspect classification or fundamental right).

Despite these shortcomings, the Court should address the constitutional challenge under Art. I §12 based on the privileges and immunities analysis articulated in Grant County II. First, the Court of Appeals addressed the Art. I §12 challenge, albeit without discussion of privileges and immunities or Grant County II. See Waples at 59. Second, because Grant County II has now established a discrete test for challenges under Art. I §12 based upon violation of privileges and immunities, this test should be the starting point for any Art. I §12 challenge involving an underlying right that is arguably fundamental in nature. Cf. State v. Collier, 121 Wn.2d 737, 745-46, 854 P.2d 1046 (1993) (recognizing primacy of state constitutional analysis, and need to develop consistent approach to assist lawyers in predicting the future course of state decisional law). When the parties' briefing has not taken into account ground-breaking developments in state constitutional analysis, the Court

may call for additional briefing, see RAP 12.1, or seek the assistance of amicus curiae. See Ellis v. Seattle, 142 Wn.2d 450, 459-60 n.3, 13 P.3d 1065 (2000) (recognizing appellate court should consult the relevant law whether or not cited by the parties); Harris v. State Dept of Labor & Indus., 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993) (noting that while amicus curiae generally may not address new issues, this rule does not apply when consideration of the issue is necessary for proper disposition of the case).

Lastly, the issue of proper application of Art. I §12 to RCW 7.70.100(1) should be viewed as one involving a claim of "manifest constitutional error," under RAP 2.5(a)(3). See Degel v. Buty, 108 Wn.App. 126, 130, 29 P.3d 768 (2001), *review denied*, 145 Wn.2d 1031 (2002). A claim of constitutional error involving whether a civil litigant's right to a remedy is being impermissibly burdened should be deemed "manifest" in nature.

A. Overview Of Washington Constitution, Art. I §12, And The Privileges And Immunities Test Articulated In *Grant County II*.

Washington Constitution, Art. I §12 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.

For a significant part of this state's history, this provision was interpreted and applied in lockstep with the analysis of the federal equal protection

clause.⁷ See e.g. Hanson v. Hutt, 83 Wn.2d 195, 200-01, 517 P.2d 599 (1973) (applying same analysis to Art. I §12 as applied to federal equal protection clause); State v. Pitney, 79 Wash. 608, 610, 140 Pac. 918 (1914) (same). In the shadow of federal constitutional jurisprudence, the focus was often on discriminatory treatment against disfavored individuals, with little attention given to the "privileges or immunities" language of Art. I §12. See generally State v. Smith, 117 Wn.2d 263, 282-91, 814 P.2d 652 (1991) (Utter, J., concurring) (urging departure from lockstep treatment of Art. I §12 and federal equal protection clause).

However, there have been exceptions. See e.g. Cotten v. Wilson, 27 Wn.2d 314, 178 P.2d 287 (1947) (involving only Art. I §12 privileges and immunities challenge); see generally J. Thompson, The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?, 69 Temp. L. Rev. 1247, 1269-76 (1996) (collecting cases with Art. I §12 focus).

Consistent with the re-invigoration of state constitutionalism that began in the late 1970s, see William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977), in the last generation or so this Court has reexamined a number of this state's constitutional provisions having federal constitution counterparts to determine whether the particular state provision is more protective of

⁷ The federal equal protection clause, embodied in United States Constitution, amendment XIV §1 provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

individual rights. See State v. Gunwall, 106 Wn.2d 54, 59-63, 720 P.2d 808 (1986) (landmark opinion establishing so-called Gunwall analysis with six non-exclusive criteria for determining when independent examination of state constitutional provisions is justified).

Recently, in Grant County II the Court conducted a Gunwall analysis of Art. I §12's privileges and immunities clause and held that an independent analysis was necessary to determine whether it was more protective of citizens' rights than the federal equal protection clause. See 150 Wn.2d at 805-16. It concluded that, properly interpreted, Art. I §12 uniquely prohibited the grant of special privileges and immunities, separate and distinct from traditional federal equal protection analysis. See id. at 810-14. Ultimately, the Court held that a violation of the privileges and immunities provision occurred when: 1) the law, or its application, favored a particular class of citizens, and 2) burdened a fundamental right of citizenship. See id. at 806-14. In cataloging these fundamental rights, the Court drew upon its early opinion in State v. Vance, 29 Wash. 435, 458, 70 Pac. 34 (1902):

These terms, as they are used in the Constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal right; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, Const. Lim. 597. By analogy these words as used in the state constitution should receive a like definition and

interpretation as that applied to them when interpreting the federal constitution.

See also Grant County II at 813 (quoting Vance with slight alteration).

This Court has applied the Grant County II test in a number of subsequent cases. See Madison v. State, 161 Wn.2d 85, 163 P.3d 757 (2007); Ventenbergs v. City of Seattle, 163 Wn.2d 92, 178 P.3d 960 (2008); Am. Legion Post v. Dep't of Health, 164 Wn.2d 570, 192 P.3d 306 (2008); see also Andersen v. King County, 158 Wn.2d 1, 138 P.3d 963 (2006) (holding fundamental right to marry does not include same sex couples, with plurality opinion limiting special favoritism to minority classes).

Under the Grant County II test, the outcome has tended to turn upon whether a fundamental right existed or applied to the favored class, as opposed to whether the law itself favored a particular class. See Grant County II at 812-13 (holding no fundamental right to particular annexation method); Madison, 161 Wn.2d at 95-98 (lead opinion by Fairhurst, J.) & id. at 118-19 (J. Johnson, J., concurring) (holding fundamental right to vote does not include class of convicted felons who cannot meet statutory criteria for restoration of right); Ventenbergs, 163 Wn.2d at 103-04 (holding no fundamental right to provide a government service); Am. Legion Post, 164 Wn.2d at 608 (holding no fundamental right to smoke inside a place of employment).

Regarding fundamental rights, it is clear that such a right may be grounded in the federal or state constitutions. In resolving the

fundamental rights issue in Grant County II, this Court said "[t]he statutory authorization to landowners to commence annexation proceedings by petition does not involve a fundamental attribute of an individual's *national or state citizenship*." 150 Wn.2d at 813 (emphasis added). Similarly, in Madison v. State, where the fundamental right at issue was the right to vote, the question was framed in terms of whether "the right to vote is a privilege of state citizenship, implicating the privileges and immunities clause of the Washington Constitution." 161 Wn.2d at 95 (lead opinion by Fairhurst, J.); see also id. at 120 (J. Johnson, J., concurring) (noting fundamental rights analysis implicates state constitutional provisions); accord Ventenbergs, 163 Wn.2d at 102-04 and accompanying notes.

Under Grant County II, the questions before the Court on review are whether RCW 7.70.100(1) favors health care providers with a special privilege or immunity and, if so, whether this burdens a fundamental right of state citizenship belonging to Waples and other citizens.

B. RCW 7.70.100(1) Violates Art. I §12 By Favoring Private Health Care Providers With A Special Privilege That Burdens Ch. 7.70 RCW Plaintiffs' Fundamental Right To A Civil Remedy.

1. RCW 7.70.100(1)'s Pre-Litigation Notice Requirement Bestows A Special Privilege On Private Health Care Providers Unavailable To Other Citizens.

There is little doubt that RCW 7.70.100(1) bestows a special privilege on defendant health care providers subject to negligence claims under Ch. 7.70 RCW. This provision prohibits a Ch. 7.70 RCW plaintiff

from commencing an action *unless* the 90-day pre-litigation notice requirement is met. Such a notice requirement is unprecedented with respect to personal injury actions against private sector defendants.⁸ Normally, these civil defendants are not entitled as a matter of right to advance warning that a tort action for injuries or wrongful death will be brought against them.⁹ Yi and similarly situated health care providers are provided with a barrier to civil liability not available to other citizens. In turn, Ch. 7.70 RCW plaintiffs are faced with an additional impediment to accessing court, not imposed on any other plaintiffs suing private sector defendants in tort for personal injury or wrongful death. The first element of the Grant County II test is met here. The question remains whether the effect of this privilege is to burden a fundamental right of Waples and similarly situated plaintiffs.

⁸ Certain public sector health care providers may not be subject to the same Art. I §12 privileges and immunities analysis because these defendants are not citizens. See Locke v. City of Seattle, 162 Wn.2d 474, 482 & n.1, 172 P.3d 705 (2007) (holding “Article I, section 12 does not apply to municipal corporations”; footnote omitted); Mudarri v. State, 147 Wn.App. 590, 617-18, 196 P.3d 153 (2008) (holding “the plain language of our State Constitution’s Privileges and Immunities Clause applies to individual citizens; it does not apply to governmental entities such as cities and counties, even though governmental entities are generally composed of individual citizens”). In addition, the pre-litigation notice requirements for claims against state and local government entities are linked to the limited waiver of sovereign immunity. See Washington Constitution, Art. II §26; RCW 4.92.090-.110 (state); RCW 4.96.010-.020 (local governmental entities).

⁹ But see RCW 64.50.020 (requiring pre-litigation notice by homeowners and homeowner associations for property damage claims based upon construction defects, but excluding tort actions alleging personal injury or wrongful death resulting from construction defects). The constitutionality of Ch. 64.50 RCW has not been tested to date.

2. **The Special Privilege Granted To Private Health Care Providers Burdens Ch. 7.70 RCW Plaintiffs' Fundamental Right To A Civil Remedy Under Washington Constitution, Art. I §10.**

The fundamental right burdened by RCW 7.70.100(1)'s pre-litigation notice requirement is the right of all Washington citizens to access court in order to obtain a civil remedy for injuries to person or property. This right is imbedded in Washington Constitution, Art. I §10's open courts clause, which preserves common law remedies existing at the time the Constitution was adopted.¹⁰ Art. I §10 provides: "Justice in all cases shall be administered openly, and without unnecessary delay." Recently, in commenting on the scope of Art. I §10, this Court stated in dicta:

We have generally applied the open courts clause in one of two contexts: "the right of the public and press to be present and gather information at trial *and the right to a remedy for a wrong suffered.*" Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, 24 (2002)

In re Marriage of King, 162 Wn.2d 378, 388, 174 P.3d 659 (2007) (emphasis added; other citations omitted).¹¹ Neither this Court nor the quoted authority explain the nature and extent of this right to a remedy, nor reference legal authority supporting this statement. However, this view is supported by Washington case law, including State v. Vance, 29

¹⁰ A similar argument is made by WSAJ Foundation in Putman v. Wenatchee Valley Med. Center (S.C. #80888-1), involving the constitutionality of RCW 7.70.150. See Brief of Amicus Curiae Washington State Association for Justice Foundation. (A copy of this amicus curiae brief will be provided to the parties and amicus curiae in Putman.) Putman is pending before the Court at this time.

¹¹ The authors of the quoted authority are recognized Washington constitutional law scholars; Justice Utter served on the Washington Supreme Court from 1971 to 1995.

Wash. 435, 438, 70 Pac. 34 (1902), which is the touchstone for Grant County II's fundamental rights analysis. See Grant County II at 812-13; §A, supra. In Vance, the Court clarified that the privileges and immunities intended to be preserved by Art. I §12 were those fundamental rights belonging to all citizens of the state, including "the rights to the usual remedies to collect debts, and to enforce other personal right." 29 Wash. at 458:

The question before the Court now involves whether there is a connection between the pronouncement in Vance and the interpretation of Art. I §10 set forth in King. In other words, does Art. I §10 preserve a fundamental right of plaintiffs to recover for injury to person or property? The answer should be yes.¹² The Court has yet to expressly *hold* that Art. I §10 preserves the fundamental right to a remedy for common law actions existing at the time the Washington Constitution was adopted. Yet, this is the clear implication of its cases.¹³

¹² There is no parallel open courts provision in the U.S. Constitution, and the United States Supreme Court has declined to find a remedy guarantee in the federal due process clause. See Charles K. Wiggins, Bryan P. Harnetiaux, and Robert H. Whaley, Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits, 22 Gonz. L. Rev. 193, 212-14 (1986/87); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) (upholding constitutionality under federal due process clause of federal act limiting aggregate liability for a nuclear incident).

¹³ For cases recognizing it is an open question on whether Art. I §10 preserves a right to a remedy see Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 144 Wn.2d 570, 581-82, 29 P.3d 1249 (2001) (stating "we decline at this time to determine whether a right to a remedy is contained in article I §10 of the state constitution"); DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 150, 960 P.2d 919 (1998) (acknowledging Art. I §10 issue before the Court, but resolving the case on other grounds); John Doe v. Blood Center, 117 Wn.2d 772, 781, 819 P.2d 370 (1991) (declining to address whether Art. I §10 limits the abrogation or diminishment of a common law right, while recognizing this issue remains unresolved); see also Shea v. Olson, 185 Wash. 143, 161, 53 Pac. 615 (1936) (upholding constitutionality of automobile host-guest statute and stating there is "no express positive mandate of the Constitution which preserves ... rights of action from abolition by the legislature," but failing to examine the impact of Art. I §10).

Preliminarily, the absence of express language in Art. I §10 declaring a right to a remedy is not dispositive. Statements of first principles in state constitutional provisions are predicated on an understanding that the existing common law was intended to be preserved by the framers of the constitution. As this Court explained in State ex rel. Macri v. Bremerton, 8 Wn.2d 93, 109, 111 P.2d 612 (1941):

The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

(Quoting Harrigan v. Gilchrist, 99 N.W. 909 (Wis. 1904), in turn quoting Weimer v. Bunbury, 30 Mich. 201, 214 (1874) (Cooley, J.).)¹⁴

There is a discernable thread of precedent of this Court that supports connecting the fundamental right to a remedy at common law, alluded to in Vance, to Art. I §10. The Court has been unwilling to abolish a common law right of action except for the most compelling reasons. For example, in Wyman v. Wallace, 94 Wn.2d 99, 104-05, 615

The Court has also said that there is no vested right in an existing law which precludes amendment or repeal. However, there is no indication whether this vested rights principle is intended to be as sweeping as it sounds, when the Court engaged in no Art. I §10 analysis. See Seattle-First v. Shoreline Concrete, 91 Wn.2d 230, 244, 588 P.2d 1308 (1978); Haddenham v. State, 87 Wn.2d 145, 550 P.2d 9 (1976).

¹⁴ That existing common law rights were intended to be imbedded in the Washington Constitution is supported elsewhere in the document. Art. I §1 provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to *protect and maintain individual rights*." (Emphasis added) This provision, along with other declaratory provisions found in Art. I

P.2d 452 (1980), the Court abolished the common law action of alienation of affections based upon a public policy analysis that this type of claim was a form of blackmail. See also Stanard v. Bolin, 88 Wn.2d 614, 565 P.2d 94 (1977) (limiting damages recoverable for breach of promise to marry based upon similar policy grounds).

The Court has also been unwilling to approve of legislative abolition of a common law right of action in the absence of an adequate substitute. For example, in McCarthy v. Social and Health Servs., 110 Wn.2d 812, 816, 759 P.2d 351 (1988), the Court upheld an employee's right to pursue a common law remedy against the employer for injury not compensable under the workers' compensation scheme, because "[b]arring a common law action without providing a substitute remedy under the Act would abrogate the quid pro quo compromise between the employee and employer." Although the analysis in these cases is not explicitly grounded in the state constitution, it reflects an unwillingness to limit the usual rights to a remedy that cannot be explained simply in terms of the doctrine of stare decisis.

Further support for the link between the common law right to a remedy and Art. I §10 is found in Haddenham v. State, 87 Wn.2d at 146-50, where this Court affirmed dismissal of an action against the state that previously was available by virtue of RCW 4.92.090 because the plaintiff's exclusive remedy was now under the crime victims

of the Washington Constitution, is "mandatory, unless by express words ... declared to be otherwise." Id., Art. I §29.

compensation act, Ch. 7.68 RCW. In reaching this result, the Court explained that plaintiff's rights under RCW 4.92.090, were solely a matter of legislative grace, because the state had waived the sovereign immunity that existed at the time the constitution was adopted. See Haddenham, 87 Wn.2d at 146-50. Under these circumstances, the Court upheld the right of the Legislature to reframe a remedy that *post-dated* the state constitution precisely because there was no right to such a remedy at the time the constitution was adopted.

By far the most important case dealing with the right to a remedy in this state is the Court's landmark opinion in Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989), which does not expressly mention Art. I §10. Sofie involved a number of constitutional challenges to the 1986 Tort Reform Act, Laws of 1986, ch. 305, cap on noneconomic damages, imposed by §301 (codified as RCW 4.56.250). In a majority opinion authored by Justice Utter, the Court struck down this limitation under Washington Constitution, Art. I §21, governing the right to trial by jury. See Sofie, 112 Wn.2d at 638, 669.¹⁵

While Art. I §10 and the right to a remedy principle were not an express basis for the decision in Sofie, the majority addressed the right to a remedy in the course of answering the arguments of the respondent manufacturers and the criticisms of the dissents. See Sofie, 112 Wn.2d at

¹⁵ Sofie also involved constitutional challenges based upon equal protection and due process, but was not decided on these grounds. See 112 Wn.2d at 638. Although Art. I §10 is not referenced in the opinion, amicus curiae briefing urged the Court to

650-52. Three separate dissenting opinions questioned, in one way or another, how the majority could conclude the right to trial by jury was violated by the cap on damages statute, when the Court had otherwise upheld a workers' compensation system that entirely supplanted common law rights and remedies. See id. at 676 (Callow, C.J., dissenting); 684, 685-87 (Dolliver, J., dissenting); 689-90 (Durham, J., dissenting).

In answering these dissents, the majority first points to the fact that, in passing the cap on damages, the Legislature neither abolished a cause of action nor extinguished the remedy of noneconomic damages. See Sofie at 649-50. Thus, the right to trial by jury attached to the Sofie claims. More importantly, in answering the dissents' criticisms challenging how the cap on damages could be unconstitutional when the Court had otherwise upheld the constitutionality of the workers' compensation scheme—which abrogated employee common law remedies—the Sofie majority explains fully the constitutional footing for that earlier decision:

In the case of workers' compensation, this court in *State v. Mountain Timber Co.*, [75 Wash. 581, 135 P. 645 (1913), *aff'd*, 243 U.S. 219 (1917)], did not engage in the historical analysis regarding the right to a jury trial. Our analysis instead centered on the State's police power to abolish causes of action and replace them with a mandatory industrial insurance scheme. *Because the use of such power was done for the public health and welfare and a comprehensive scheme of compensation was inserted in its place, the abolition of the cause of action was not unconstitutional.* 75 Wash. at 583.

adopt an adequate remedy doctrine based in part upon Art. I §10. See Brief of Amicus Curiae Washington State Trial Lawyers Association, at 38-40 & Appendix C.

Sofie at 651 (some emphasis added; footnote omitted). In the footnote to this passage, the majority further observes:

We note here that while the Legislature has the power to abolish a civil cause of action, *Mountain Timber* establishes that *such a legislative act must have its own independent constitutional foundation*.

Sofie at 651 n.5 (emphasis added). This footnote is critical to understanding the underpinnings of Sofie, and the sanctity of common law rights existing at the time the state constitution was adopted. Any doubt about the implications of the Sofie majority's view dissolve when contrasted with Justice Durham's dissenting view that: "[t]he 'independent constitutional foundation' that the majority apparently believes saves the workers' compensation scheme was nothing other than the state's general police power." See Sofie at 689 (Durham, J., dissenting; citation omitted). Having required an "independent constitutional foundation" to limit the common law right to a remedy, the majority rejected Justice Durham's view that the legislative police power is essentially unbridled.

These passages in the Sofie majority opinion point inexorably to a constitutionally-based right to a remedy, requiring compelling reasons for elimination of common law remedies, such as those supplanted by the workers' compensation scheme. The only thing missing in Sofie is a direct reference to Art. I §10. However, the analysis in Sofie confirms the link between the fundamental right to common law remedies recognized in Vance, and the statement in King that one of the two purposes of Art. I

§10 is to protect a citizen's "right to a remedy for a wrong suffered." King, 162 Wn.2d at 388.¹⁶

Additional support for concluding that burdening a common law remedy existing at the time the constitution was adopted may violate the Art. I §12 privileges and immunities clause is found in the pre-Grant County II case of Cotten v. Wilson, *supra*. In Cotten, this Court condemned under an Art. I §12 analysis a statute requiring a higher burden of proof for plaintiffs seeking to recover in tort against certain motor vehicle carriers. See 27 Wn.2d at 318-20 (characterizing statute elevating burden of proof to gross negligence against a particular class of motor vehicle carriers as a form of extreme class legislation). The result in Cotten is wholly consistent with the above right to a remedy analysis.¹⁷

Under this analysis, Art. I §10 preserves Washington citizens' right to a remedy for common law actions existing at the time the Washington constitution was adopted.¹⁸ However, as suggested in Sofie, the

¹⁶ It may be that the remedy guarantee is based upon more than one provision of the state constitution. See Testing the Limits, 22 Gonz. L. Rev. at 216-20 (urging an adequate remedy requirement premised on four clauses of the Washington Constitution, including Art. I §10). There is also some indication in early Washington case law intimating that an adequate substitute remedy is required by the state and federal due process clauses. See Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 426-29, 63 P.2d 397 (1936) (Tolman, J., concurring).

¹⁷ This analysis is analogous to and consistent with the fourth Gunwall factor. See 106 Wn.2d at 61-62 ("Previously established bodies of state law ... also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established").

¹⁸ Although this negligence action here is statutory and of relatively recent origin, it is traceable to a common law remedy that existed at or around the time the constitution was adopted. See Just v. Littlefield, 87 Wash. 299, 151 Pac. 780 (1915) (upholding medical malpractice verdict, discussing "well settled" law regarding scope of physician's duty); Peterson v. Wells, 41 Wash. 693, 84 Pac. 608 (1906) (reversing medical negligence nonsuit and remanding for trial). This is enough to subject the statutory remedy to

fundamental right to a remedy may be overridden where there is sufficient justification, as in the case of enactment of workers' compensation laws. See 112 Wn.2d at 651 & n.5. Sofie recognized that one way to alter a common law remedy is to replace it with an adequate substitute remedy. See id. In a related context, in safeguarding the other fundamental right protected by Art. I §10—the right of the public and press to open access to courts—this Court has required proof of a compelling state interest in order to uphold any abridgement of this right. See Rufer v. Abbott Labs, 154 Wn.2d 530, 540-51, 114 P.3d 1182 (2005). The teachings of Sofie and Rufer should be applied here. A right to a remedy should not be able to be burdened unless a substitute remedy is provided, or, when no substitute remedy is involved, unless there is a compelling state interest justifying the burden.

The test proposed here is essentially the same as that devised by the Florida Supreme Court in protecting that state's constitutional right to a remedy. In Kluger v. White, 81 So.2d 1, 4 (Fla. 1973), the court held that a remedy may only be extinguished or impaired when there is either an adequate substitute remedy (quid pro quo) or “an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.” Under this formulation, these two alternative bases are substantially equivalent, ensuring that

protection under Art. I §10. See Sofie, 112 Wn.2d 648-49 (applying right to trial by jury under Art. I §21 to modern product liability claims traceable to the common law).

legislation that impacts long standing remedies in such a profound way is wholly justified.¹⁹

RCW 7.70.100(1) does not meet this test. In the absence of a substitute remedy, the question in this case is whether there is a compelling state interest that cannot be achieved by alternate means. No such interest is present here. Both Yi and the Court of Appeals urge that this provision serves the salutary purpose of encouraging settlement. See Yi Br. at 15-21; Waples, 146 Wn.App. at 61 (quoting Laws of 2006, ch. 8 §1, identifying the Legislature's intent "to provide incentives to settle cases before resorting to court").²⁰ The state's interest in augmenting the existing incentives to settle cases before resorting to court should not be deemed compelling, so as to override a plaintiff's fundamental right of access to court.

Moreover, any state interest in promoting settlement is not meaningfully served here because the pre-litigation notice requirement does not impose on either plaintiff or defendant an obligation to engage in settlement negotiations. See RCW 7.70.100(3)-(7). A state interest in furthering incentives to explore pre-litigation settlement cannot be compelling when the notice requirement does not mandate settlement

¹⁹ In Testing the Limits, *supra*, the authors, one of which is a signatory to this brief, urged that the fundamental rights analysis under Art. I §12 should require heightened scrutiny, as opposed to the kind of strict scrutiny associated with the compelling state interest test. See 22 Gonz. L. Rev. at 204-11. However, this analysis did not focus on Art. I §10 and predated Rufer, which imposed a compelling state interest test in safeguarding the fundamental right to open access guaranteed under this constitutional provision. This Court rightfully imposed a compelling interest test in Rufer for overriding the open access prong of Art. I §10, and it should do the same with the right to a remedy prong of this provision.

negotiations, while otherwise serving as an impediment to a plaintiff's access to court. The mere possibility that settlement negotiations may follow is not enough to justify burdening the fundamental right to a remedy.

Although health care claims are subject to mandatory mediation, mediation is not linked to the substance or timing of the pre-litigation notice of claim.²¹ Thus, even if the Court considers there to be compelling reasons for imposing mandatory mediation in Ch. 7.70 RCW cases, the 90-day pre-litigation notice is not a component of the mediation scheme.

Instead, the pre-litigation notice of claim is tied to the date of the commencement of the action. See RCW 7.70.100(1). It does not relate to nor trigger mediation, which may occur at any time up to 30 days before trial unless otherwise ordered by the court or stipulated by the parties. CR 53.4(c). There is no requirement for service of a request to engage in mediation before commencing an action, although a request for mediation is encouraged under RCW 7.70.110. If the parties do not request mediation, the court cannot even designate a mediator until the case is within 180 days of trial. CR 53.4(e). If the parties do request mediation, but cannot agree on a mediator, the court cannot designate a mediator until a minimum of 180 days after the request. Id. In either case, the mediation cannot occur until well after the expiration of the 90-day pre-litigation notice period. In fact, there is no assurance that any settlement

²⁰ The full text of Laws of 2006, ch. 8 §1 is reproduced in the Appendix to this brief.

negotiations will occur earlier than 90 days after commencement of the action, assuming that one of the parties requested mediation on the same date as a pre-litigation notice of claim was provided.

The Court should conclude that no compelling interest saves the pre-litigation notice of claim provision of RCW 7.70.100(1) from offending the privileges and immunities clause of Art. I §12. If the pre-litigation notice requirement offends Art. I §12, then only those portions of RCW 7.70.100 bearing on the 90-day notice are unenforceable, and the mediation provisions of the statute would remain in effect.²²

C. RCW 7.70.150 Likewise Violates Art. I §12 By Favoring Private Health Care Providers With A Special Privilege That Burdens Plaintiffs' Fundamental Right To A Civil Remedy Under Art. I §10.

If this Court reaches the constitutionality of RCW 7.70.150 under Art. I §12, it should conclude that this statute is also unconstitutional under Grant County II because it impermissibly favors the class of private health care providers and burdens Ch. 7.70 RCW plaintiffs' fundamental right to a civil remedy. See § B.2. supra. Like RCW 7.70.100(1), the certificate of merit statute impermissibly burdens plaintiffs suing these health care providers by requiring them to file a certificate of merit in conjunction with commencement of a negligence action, or face dismissal of their case. See RCW 7.70.150(1), (5).

²¹ See RCW 7.70.100(3-7); RCW 7.70.110; CR 53.4. The current versions of these authorities are reproduced in the Appendix to this brief.

²² The severability clause of Laws of 2006, ch. 8, provides: that "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the

Working with an expert to develop a certificate of merit is likely to involve considerable time and expense, and it constitutes a separate and distinct burden on Ch. 7.70 RCW plaintiffs with no compelling benefit to the parties or the court. Under RCW 7.70.040, plaintiffs are already required to present expert testimony in support of their claims. In addition, under RCW 7.70.160 they must certify by their signatures on the pleadings that their claims are not frivolous but rather are well grounded in fact and law. These obligations combine to require that expert testimony be secured in advance of filing the claim, and serve to deter filing of meritless actions, rendering the certificate of merit a costly technical requirement. As such, it serves as a barrier to access to court that does not add meaningfully to what Ch. 7.70 RCW plaintiffs must already do to legitimately pursue their claims.

Under the analysis in §B.2, supra, there is no discernable compelling interest that justifies burdening Ch. 7.70 RCW plaintiffs' access to court in this way. The certificate of merit is a mere technical flourish with no enduring role in the life of adjudication of the claim. It is based on (presumably incomplete) information known at the commencement of the case, rather than information made available through the course of discovery. See RCW 7.70.150(3). It is based on a standard of "reasonable probability that the defendant's conduct did not follow the accepted standard of care." Id. Whatever "reasonable

act or the application of the provision to other persons or circumstances is not affected." Laws of 2006, ch. 8 §407.

probability” means, this assessment could well differ from the more-probable-than-not standard for admissibility of expert testimony at trial. Nonetheless, despite the lack of utility of the certificate of merit, noncompliance with the requirement serves as a basis for dismissal of a plaintiff’s claim. See RCW 7.70.150(5)(a). In the absence of a compelling interest, the certificate of merit requirement violates the privileges and immunities clause of Art. I §12.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief regarding the proper application of the Grant County II privileges and immunities analysis in this case, and hold that both RCW 7.70.100(1) and RCW 7.70.150 violate Art. I §12’s privileges and immunities clause.

DATED this 30th day of July, 2009.


BRYAN P. HARNETIAUX
per authority


GEORGE M. AHREND

On behalf of WSAJ Foundation

*Brief transmitted for filing by e-mail; signed original retained by counsel.

APPENDIX

RCW 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. 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.
- (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.

[2006 c 8 § 314, eff. June 7, 2006; 1993 c 492 § 419.]

RCW 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.

[2007 c 119 § 1; 2006 c 8 § 314; 1993 c 492 § 419.]

RCW 7.70.110.

**MANDATORY MEDIATION OF HEALTH CARE CLAIMS--
TOLLING STATUTE OF LIMITATIONS**

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.

[1996 c-270 § 1; 1993 c 492 § 420.]

RCW 7.70.150

**ACTIONS ALLEGING VIOLATION OF ACCEPTED STANDARD
OF CARE — CERTIFICATE OF MERIT REQUIRED.**

- (1) In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, 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.
- (2) The certificate of merit must be executed by a health care provider who meets the qualifications of an expert in the action. If there is more than one defendant in the action, the person commencing the action must file a certificate of merit for each defendant.
- (3) The certificate of merit must contain a statement that the person executing the certificate of merit believes, based on the information known at the time of executing the certificate of merit, that there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant.
- (4) Upon motion of the plaintiff, the court may grant an additional period of time to file the certificate of merit, not to exceed ninety days, if the court finds there is good cause for the extension.
- (5)
 - (a) Failure to file a certificate of merit that complies with the requirements of this section is grounds for dismissal of the case.
 - (b) If a case is dismissed for failure to file a certificate of merit that complies with the requirements of this section, the filing of the claim against the health care provider shall not be used against the health care provider in professional liability insurance rate setting, personal credit history, or professional licensing and credentialing.

[2006 c 8 § 304.]

RCW 7.70.160

FRIVOLOUS CLAIMS

In any action under this section, an attorney that has drafted, or assisted in drafting and filing an action, counterclaim, cross-claim, third-party claim, or a defense to a claim, upon signature and filing, certifies that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is not frivolous, and is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause frivolous litigation. If an action is signed and filed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the action, counterclaim, cross-claim, third-party claim, or a defense to a claim, including a reasonable attorney fee. The procedures governing the enforcement of RCW 4.84.185 shall apply to this section.

[2006 c 8 § 316.]

LAWS OF 2006, CH. 8 §1

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants. It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums. Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes. It is also the legislature's intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. Finally, it is the intent of the legislature to provide the insurance commissioner with the tools and information necessary to regulate medical malpractice insurance rates and policies so that they are fair to both the insurers and the insured.

CR 53.4

PROCEDURES FOR MANDATORY MEDIATION OF HEALTH
CARE CLAIMS

- (a) **Scope of Rule.** This rule governs the procedure in the superior court in all claims subject to mandatory mediation under RCW 7.70.100 and .110.
- (b) **Voluntary Mediation.** The parties may establish a procedure for mediation that differs from this rule provided the procedure and the selection of the mediator are agreed to in writing and signed by all parties.
- (c) **Deadlines.** Except as otherwise ordered by the court for good cause shown, mediation under RCW 7.70.100 shall be commenced no later than 30 days before the trial date. Mediation under RCW 7.70.110 shall be commenced no later than 90 days after the selection of the mediator.
- (d) **Waiver of Mediation.** Upon petition of any party that mediation is not appropriate, the court shall order or the mediator may determine that the claim is not appropriate for mediation.
- (e) **Appointment of Mediator.** Subject to the conditions in this section, the court shall designate a mediator from the register described in section (g) upon the request of any party. Except upon stipulation in writing signed by all parties, the court shall not make this designation if the parties have agreed in writing to the selection of a mediator as contemplated by section (b) or have obtained a waiver of mediation under section (d). Except upon stipulation in writing signed by all parties, the court shall designate a mediator no sooner than 180 days before trial, or for mediation requested under RCW 7.70.100, no sooner than 180 days after the good faith request for mediation.
- (f) **Mediation Procedure.** Promptly upon the designation of a mediator, the plaintiff shall arrange a conference call among the mediator and counsel for each party to discuss the procedural aspects of the mediation. Except to the extent the mediator directs otherwise, the following procedures shall apply:
 - (1) *Copy of Pleadings.* Upon selection of a mediator, the parties shall provide the mediator with copies of the relevant pleadings.
 - (2) *Notice of Time and Place.* The mediator shall fix a time and place for the mediation conference, and all subsequent sessions, that is reasonably convenient for the parties and

shall give them at least 14 days' written notice of the initial conference. In giving notice the mediator may use a form provided by the court.

- (3) *Memoranda.* Each party shall provide the mediator with a confidential memorandum presenting in concise form its contentions relative to both liability and damages. This memorandum shall not exceed 10 pages in length. A copy of the memorandum shall be delivered to the mediator at least seven days before the mediation conference. Any party may deliver a copy of his or her memorandum to any other party. In addition, each party shall deliver to the mediator a confidential statement of its current offer or demand. Any party may deliver a copy of his or her statement to any other party.
- (4) *Attendance and Preparation Required.* The attorney who is primarily responsible for each party's case shall personally attend the mediation conference and any subsequent sessions of that conference. The attorney for each party shall come prepared to discuss the following matters in detail and in good faith:
 - (A) All liability issues.
 - (B) All damage issues.
 - (C) The position of his or her client relative to settlement.
- (5) *Attendance of Parties and Insurers.* For purposes of this section, "insurer" shall include "self insurer." In addition to counsel, all parties and insurers shall attend the mediation in person. In the event a party defendant has provided his or her insurer with full authority to settle, such party's attendance is optional. The mediator may also, at his or her discretion, but only in exceptional cases, excuse a party or insurer from personally attending the mediation conference. Those excused from personal attendance by the mediator shall be on call by telephone during the conference.
- (6) *Failure to Attend.* Willful or negligent failure to attend the mediation conference, or to comply with this rule or with the directions of the mediator, shall be reported to the court by the mediator in writing and may result in the imposition of such sanctions as the court may find appropriate.
- (7) *Proceedings Privileged.* All proceedings of the mediation conference, including any statement made by any party,

attorney or other participant, shall, in all respects, be privileged and not reported, recorded, placed in evidence, used for impeachment, made known to the trial court or jury, or construed for any purpose as an admission. No party shall be bound by anything done or said at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement.

- (8) *Mediator's Suggestions.* The mediator shall have no obligation to make any written comments or recommendations, but may in his or her discretion provide the parties or their counsel with a confidential written settlement recommendation memorandum, but only if all parties agree. No copy of any such memorandum shall be filed with the clerk or made available, in whole or in part, directly or indirectly, either to the court or to the jury.
- (9) *Certification of Mediation.* Not more than 10 days after the mediation concludes or the mediator determines that the claim is not appropriate for mediation, the parties shall certify in writing to the court the manner of mediation, if any, and compliance with the provisions of this rule.

(g) Register of Volunteer Mediators.

- (1) *Court to Maintain Register.* The court shall establish and maintain a register of qualified attorneys who have volunteered to serve as mediators. The attorneys so registered shall be selected by the court from lists of qualified attorneys at law who are current members in good standing of the Washington State Bar Association.
- (2) *Qualifications.* In order to qualify as a mediator, an attorney shall:
- (A) Have been a member of the Washington State Bar Association for at least five years; and
 - (B) Have experience or expertise related to litigating actions arising from injury occurring as a result of health care; and
 - (C) Have 6 hours of CLE mediator training and acted as a mediator in at least 10 cases, three of which were medical malpractice; or
 - (D) Be a retired judge having experience or expertise related to actions arising from injury occurring as a

result of health care and satisfy the requirements of
(2)(C) herein.

[Adopted effective March 11, 1997; amended effective September 1,
2007.]