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No. 82142-9

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SUPREME COURT OF THE STATE OF WASHINGTON

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NANCY NGYUEN WAPLES

*Appellant/Petitioner,*

v.

PETER H. YI DDS and JANE DOE YI, husband and wife and their  
marital community thereof, dba LAKEWOOD DENTAL CLINIC,  
and PETER H. YI DDS, PS, a Washington Corporation

*Respondents*

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BRIEF OF RESPONDENTS YI IN ANSWER TO BRIEF OF  
AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

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ORIGINAL

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## I. ARGUMENT

Amicus curiae, Washington State Association for Justice (WSAJ) (previously named, Washington State Trial Lawyers Association Foundation) purports to supplement the briefing of Ms. Waples by adding a challenge to former RCW 7.70.100 (pre-litigation notice) and RCW 7.70.150 (merit certificate). Amicus claims these statutory provisions violate Washington State's "Privileges and Immunities" clause because the minimal requirements place barriers to the courthouse doors in front of malpractice litigants, and thus, violate the "open courts" clause. WSAJ raises this issue, despite the undeniable fact that the record below is devoid of briefing on the issue, and makes the untenable argument that malpractice litigants have a fundamental right to pursue litigation against health care providers.

Based upon the presumption that a fundamental right exists, Amicus claims that the minimal requirements imposed by RCW 7.70 *et. seq.* (of pre-litigation notice and merit determination) place an unreasonable barrier to the courts and thus should be stricken down as unconstitutional. There is no precedent for this expansive reading of the "open courts" clause and this Court should decline to accept Amicus's invitation to adopt such a reading.

**A. The Privileges and Immunities challenge to RCW 7.70 is not preserved for review and should not be considered.**

Amicus argues that this Court should consider the “Privileges and Immunities” analysis because: (1) Grant County v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004)(“Grant County II”) requires an independent analysis of the “Privileges and Immunities” clause; and (2) the analysis of this case under “Privileges and Immunities” principles implicates a constitutional error of “manifest” proportion. This Court should not accept Amicus’s invitation to broaden the scope of review beyond that requested by the petitioning party, Ms. Waples.

This Court has stated that points raised solely by amicus should not be considered on appeal:

Some of the briefs of the amici curiae suggest unconstitutionality...But we think the case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by ‘friends of the court’.

Long v. Odell, 60 Wn.2d 151, 154, 372 P.2d 548 (1962); Ruff v. County of King, 125 Wn.2d 697, 887 P.2d 886 (1995)(request by amicus for reconsideration of “reasonably safe” standard in negligence actions would not be considered when solely raised by amicus on appeal). The rationale

for this rule has its basis in the premise that “amici curiae are not parties and cannot assume the functions of parties, nor create, extend or enlarge issues....” Montana Power Company v. Carey, 216 Mont. 275, 276, 700 P.2d 989 (1985)(citations omitted)(Supreme Court will not entertain issues on constitutionality of statutory provision when such issues are not raised by parties to action); see also, Schuster v. Schuster, 90 Wn.2d 626, 629, 585 P.2d. 130 (1978)(constitutional issues raised only by amicus will not be considered on appeal).

In the recent decision of Cummins v. Lewis County, 156 Wn.2d 844, 850-851 (2006), this Court held that points raised by amicus expanding the scope of Supreme Court review beyond that originally requested by the petitioner should not be considered. This was the case even though the issue raised by amicus, the appropriate scope of the waiver of sovereign immunity, presented an issue likely to recur in the future. See generally, id. This Court, appropriately, reasoned:

The Foundation [Washington State Trial Lawyers Association Foundation] is not a party to this case, and its interest in the outcome of it is merely tangential. Under case law from this court we address only claims made by a petitioner, and not those made solely by amici.

Id. at 851; see also, American Home Assurance Company v. Cohen, 124 Wn.2d 865, 878, 881 P.2d 1001 (1994)(constitutional challenge to statute,

even if issue will impact substantial number of litigants, will not be considered when raised for the first time by amicus on appeal).

Further, it is inappropriate to consider an argument, for the first time on appeal, when said argument was not presented to the trial court. Richmond v. Thompson, 79 Wn.App. 327, 338, 901 P.2d 371 (1995). In Richmond, amicus (American Civil Liberties Union) and petitioner joined in raising the issue of absolute privilege for the first time on appeal. Id. at 337. The Court of Appeals noted that “this theory has substantial merit” yet declined to consider the contention because it was not raised to the trial court. Id. at 338; Sorrel v. Eagle Healthcare, Inc., 110 Wn.App. 290, 299, 38 P.3d 1024 (2002)(holding that an issue not raised at the trial court level in summary judgment proceedings should not be considered on appeal).

Amicus also contends that RAP 2.5(a)(3) dictates the appropriateness of review because the claim involves a constitutional error which is “manifest”. The Court of Appeals has held that, “constitutional issues not presented to or considered by the trial court will not be considered on appeal unless the issue involves the jurisdiction of the court.” Bernstein v. State, 53 Wn.App. 456, 462, 767 P.2d 958, 961 (1989). The reasoning of the court in Degel v. Buty, 108 Wn.App. 126, 130, 29 P.3d 768 (2001), cited by Amicus, permits broader review,

however, critically, in Degel the claim of manifest error was made by the party to the suit, not by amicus. Degel, 108 Wn.App. at 131 (because the plaintiff claims error of constitutional magnitude, the error must be considered); see also, Eldred v. Reno, 239 F.3d 372, 378, 345 U.S.App.D.C. 89 (2001)(holding, a court should not “anticipate a question of constitutional law in advance of the necessity of deciding it.”); see also, State v. Green, 99 P.3d 820, 829 (Utah, 2004)(court should not address constitutional claims raised only by amicus even if the party supported by amicus raised analogous constitutional issues). Here, Ms. Waples, despite multiple opportunities, has never raised the issue; this Court should not disregard plain precedent to permit Amicus to do it for her.

**B. This Court should defer to the detailed process engaged in by the Legislature in assessing the constitutionality of former RCW 7.70.100.**

As addressed in Dr. Yi’s briefing, the constitutionality of former RCW 7.70.100 is **presumed** and, as such, Ms. Waples must establish that, beyond a “reasonable doubt”, the statute is unconstitutional. Br. of Yi at pgs. 14-15; see also, Peninsula Neighborhood Association v. Washington State Dept. of Transportation, 142 Wn.2d 328 335, 12 P.3d 134 (2000). The participation by WSAJ requires Dr. Yi to point out, and thereby join with the WSDTL, in noting that WSAJ supported the enactment of former

RCW 7.70.100 as part of compromise legislation addressing the health care crisis in Washington state. See, WSDTL Br. at pgs. 2-10; see e.g., U.S. v. Taylor, 487 U.S. 326, 336, 108 S.Ct. 2413, 2419 (U.S.Wash.,1988)(holding “ [appellate] review must serve to ensure that the purposes of the Act and the legislative compromise it reflects are given effect.”). The support of the compromise legislation by the WSAJ and, notably, the Washington State Bar Association (WSBA) only lends further weight to the verity that the legislature is “presumed to have considered the constitutionality of its enactments” and, therefore, the judiciary should construe statutes as “constitutional if at all possible.” See, WSDTL Br. at pgs. 2-9; see also, City of Seattle v. Webster, 115 Wn.2d 635, 643, 802 P.2d 1333 (1990).

In short, former RCW 7.70.100 resulted from long, difficult efforts at compromise between sides with juxtaposed interests, the statutory scheme does not violate any constitutional principle and this Court should not subvert the difficult work of the Legislature by declaring otherwise.

**C. The Privilege and Immunities Clause of the Washington Constitution provides no greater protection to malpractice litigants than the Equal Protection Clause and therefore a separate analysis is unnecessary.**

Grant County v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004) (Grant County II), as eloquently set forth by Amicus, established

that a challenge under the Privileges and Immunities clause of Washington's Constitution requires a separate analysis from a challenge under the equal protection clause. Madison v. State of Washington, 161 Wn.2d 85, 94-95, 163 P.3d 757 (2007) ("once this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision, it is unnecessary to engage repeatedly in further Gunwall analysis simply to rejustify performing that separate and independent constitutional analysis.")

However, contrary to the contentions of Amicus, the separate constitutional analysis afforded in Grant County, *supra* is not a panacea that always provides civil litigants with yet another means of constitutional challenge anytime a statute purportedly infringes upon their respective ability to bring suit. See generally, Amicus Br. at pgs. 7-11. Belying the argument of Amicus, a review of case law interpreting the Privileges and Immunities clause in the post-Grant County II world, reveals that the "new" analysis enunciated by Grant County II has practical application in very limited circumstances, none of which are present in a constitutional evaluation of the pre-litigation notice requirements of former RCW 7.70.100. Fatal to the premise asserted by Amicus, there is simply no precedent for the proposition that a malpractice plaintiff has a

**fundamental right** to seek redress for injuries allegedly caused by a medical practitioner. Note, Breuer v. Presta, 148 Wn.App. 470, 477, 200 P.3d 724 (2009)(pre-litigation notice of RCW 7.70.100 does not violate the Privileges and Immunities clause); see also, Bennett v. Seattle Mental Health, 150 Wn.App. 455, 460-61, 208 P.3d 578 (2009) (upholding RCW 7.70.100 and noting, legislative intent of pre-litigation notice is 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.” )

As is well stated in Grant County II, a simple statement that a statute violates the “Privileges and Immunities” clause because a “privilege” is conferred upon a select segment of the population is insufficient. Id. at 812. Instead, the statute must infringe upon a “privilege” within the meaning of Article I, §12 and, as such pertain to a “fundamental right” of state citizenship. Id. at 812. The case law interpreting Article I, §12 subsequent to Grant County II has yet to find any “new” fundamental right subject to Privileges and Immunities protection. See, American Legion Post #149 v. Washington State Dept. of Health, 164 Wn.2d 570, 192 P.3d 306 (2008)(statute prohibiting smoking in some facilities but not others did not violate “Privileges and Immunities” because smoking is not

a fundamental right); Madison v. State of Washington, 161 Wn.2d 85, 163 P.3d 757 (2007)(the Privileges and Immunities clause provides no greater protection for felon voting rights than does the equal protection clause because all Washington citizens may be disqualified from the right to vote on equal grounds); Ventenbergs v. City of Seattle, 163 Wn.2d 92, 178 P.3d 960 (2008)(no fundamental right to pursue government employment); Andersen v. King County, 158 Wn.2d 1, 138 P.3d 963 (2006)(inability to establish fundamental right to same sex marriage rendered standard of review under privilege and Immunities clause the same as standard of review under equal protection clause).

As is set forth herein, the “right” at issue is not “fundamental” within the meaning of the Privileges and Immunities clause, therefore precluding a higher standard of review than that afforded under equal protection analysis, *i.e.*, rational basis. As such, to prevail, Ms. Waples must establish that the pre-litigation notice provision is purely arbitrary. Schuchman v. Hoehn, 119 Wn.App. 61, 70, 79 P.3d 6 (2003)(noting, “As long as the state advances a reasonable governmental objective, we must disregard alternative methods of achieving the objective, even methods that we may have preferred.”)

**D. The plain text of Article I, §10 does not provide for a fundamental right to a “remedy”.**

Amicus reasons that the “fundamental right” at issue herein is the “right to a civil remedy”, “imbedded” within Article I, §10 of the Washington Constitution and therefore creating a “fundamental right” inhering in malpractice claimants to seek remedy. Amicus Br. at p. 13. The reasoning of Amicus, is problematic. Critically, as implicitly acknowledged by Amicus, the text of Article I, §10, does not reference a “right to remedy”, it merely states “justice in all cases shall be administered openly, and without unnecessary delay.” Amicus Br. at pg. 13. In short, the Washington Constitution simply does not contain any right to a “remedy”. Shea v. Olsen, 185 Wash. 143, 160, 53 P.2d 615 (1936).

In rendering its argument Amicus even concedes that there is no express authority supporting the claim that there is a “fundamental right” to recover for “injury to person or property” and, instead, urges this Court to create a fundamental right out of select “threads” from distinguishable case law. Amicus Br. at pgs. 14-24. Amicus’s reliance on said cases is misplaced.

State v. Vance, 29 Wash. 435, 90 P. 34 (1902) actually supports the argument of Dr. Yi. There, a criminal defendant, in pertinent part,

challenged the constitutionality of a statute (on Privileges and Immunities grounds) permitting lawyers to recommend commissioners. Id. at 458. The court rejected this contention stating, "a statute can be declared unconstitutional only where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them, and not upon any general theory that the statute conflicts with a spirit supposed to pervade the constitution." Id. at 459 (holding statute constitutional). Vance does contain general language stating that "usual remedies" shall be preserved, but this Court should decline reliance on that language under the axiom that "general expressions in every opinion are to be confined to the facts then before the court". Peterson v. Hagan, 56 Wn.2d 48, 53, 351 P.2d 127 (1960).

A review of Washington case law similarly reveals that citizens have no right to unfettered access to the civil courts. In Housing Authority of King County v. Saylor, 87 Wn.2d 732, 739-740, 557 P.2d 321 (1977) this Court reasoned that the right to appeal a civil judgment is not a fundamental right, even in circumstances where a successful appeal could mean that a Washington citizen could avoid homelessness. See also, Ford Motor Co. v. Barrett, 115 Wn.2d 556, 562, 800 P.2d 367 (1990) ("Access to the courts is not recognized, of itself, as a fundamental right."); Wings of

the World Inc. v. Small Claims Court, 97 Wn.App. 803, 809, 987 P.2d 642 (1999)(right to appeal is not a fundamental right); Miranda v. Sims, 98 Wn.App. 898, 902-903, 991 P.2d 681 (2000) rev. denied 141 Wn.2d 1003 (2000) (right of access did not extend to provision of counsel in civil proceedings); Yurtis v. Phipps, 143 Wn.App. 680, 694, 181 P.3d 849 (2008)(“an individual does not have an absolute and unlimited right of access to the court system.”).

A review of United States Supreme Court law is in accord with the principle that litigants do not have an unfettered right to sue. Ortwein v. Schwab, 410 U.S. 656, 660, 93 S.Ct. 1172 (1973)(requiring payment of fee as condition of appealing welfare administrative decision did not implicate a fundamental right); U.S. v. Kras, 409 U.S. 434, 445, 93 S.Ct. 631, 638 (U.S.N.Y. 1973)(no constitutional violation by requiring payment of filing fee as requisite to filing bankruptcy).

From the general, erroneous, assumption that the “right to recover” in civil cases is “fundamental”, Amicus then makes the leap to case law noting that abolition of a cause of action is not permissible. Perhaps most obvious, former RCW 7.70.100 does not foreclose the “right to remedy” at all, it merely, for the benefit of all citizens of Washington, requires a short period of time to permit the opportunity for malpractice litigants to attempt

settlement before resorting to expensive, court clogging, litigation. Amicus cites no case law from Washington or other jurisdictions establishing that a waiting period for the commendable purpose of encouraging settlement, prior to suit, impermissibly limits access to the courts in violation of Article I, §10.

The case law cited by Amicus addressing abolition of common law causes of action is, therefore, not compelling for purposes of analyzing the current case. McCarthy v. Department of Social and Health Services, 110 Wn.2d 812, 816, 759 P.2d 351 (1988) (worker's compensation statute did not bar causes of action available at common law not compensable under statute); Haddenham v. State, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (right to a remedy provided only by statute could be legislatively abolished).

Amicus places substantial reliance upon Sophie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989)(striking down damage caps as violating the right to trial by jury) in conjunction with the general statement of "right to a remedy" in King v. King, 162 Wn.2d 378, 388, 174 P.3d 659 (2007)(no right to counsel in civil proceedings) for the proposition that a "right to a remedy" is included within Article I, §10. Amicus concedes that Sophie does not address the "right to a remedy", however argues that Sophie implicitly requires compelling reasons for the

burdening of common law remedies as Sophie did not eliminate any remedy, but instead, limited the ability to recover. Amicus Br. at pg. 19. Sophie is not compelling under the facts here. Unlike Sophie, former RCW 7.70.100 does not limit any substantive remedy available to a malpractice plaintiff; instead, it changes the procedure under which plaintiffs may exercise their rights to existing law. This practice is within the appropriate foray of the legislature.

The discussion of Cotten v. Wilson, 27 Wn.2d 314, 178 P.2d 287 (1947) is similarly unavailing. There, the court reasoned that a statute requiring parties incurring injuries while traveling in "victory motor vehicles" to prove "gross negligence" whereas parties incurring injuries while traveling in any other type of vehicle only needed to prove standard negligence failed to pass constitutional muster. See generally, id. In short, the regulation did not treat all parties injured in motor vehicles the same and, as such, did not meet the requirement that the "legislation must apply alike to all persons within the designated class." Id. at 320. Unlike Cotten, here, former RCW 7.70.100 applies equally to all malpractice plaintiffs and health care providers. There simply is no improper classification. Moreover, unlike Cotten, the burden of providing pre-litigation notice is

not “onerous”; certainly not akin to imposition of a higher standard of proof.

**E. Even assuming *arguendo* the expansive reading of Article I, §10 urged by Amicus, former RCW 7.70.100 passes constitutional muster.**

The authority relied upon by Amicus states that the drafters of this provision “borrowed from” the Oregon and Indiana Constitutions. Amicus Br. at p. 13; Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 24 (2002). It is notable that the Oregon<sup>1</sup> and Indiana<sup>2</sup> Constitutions both contain language providing explicitly for a remedy whereas Washington’s Constitution implicitly rejects the “remedy” language. The only answer to be drawn from the differences between the respective Constitutions of Washington, Indiana and Oregon is that the Washington drafters did not intend to include “remedy” language within the Constitution. See, Rhoad v. McLean Trucking Co., Inc. 102 Wn.2d 422, 426, 686 P.2d 483 (1984) (“It is well settled that courts will neither read into a statute matters which are not there nor

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<sup>1</sup> Oregon’s Article I § 10 provides, “no court shall be secret but justice shall be administered openly and without purchase, completely and without delay, and every person shall have remedy by due course of law for injury done him in his person, property or reputation.”

<sup>2</sup> Indiana’s Article I §12 provides: All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

modify a statute by construction.”); State v. Enloe, 47 Wn.App. 165, 170, 734 P.2d 520, 523 (1987) (“...courts may not read into a statute things which it conceives the legislature has left out unintentionally.”); State v. Hastings, 115 Wn.2d 42, 50, 793 P.2d 956 (1990) (holding, courts should not “read into the constitution” that which is not there).

That said, even under the more expansive “remedy” language included in the Oregon and Indiana Constitutions, there is no authority for the proposition that requiring pre-litigation “notice” violates Constitutional principles. The Oregon courts, interpreting the pertinent clause, hold that the legislature is not prohibited from “attaching conditions precedent to invoking a remedy.” Lawson v. Hoke, 190 Or.App. 92, 99, 77 P.3d 1160, 1164 - 1165 (Or.App.,2003). In Indiana, the requirement to submit a proposed complaint to a medical review board for verification as a condition precedent to filing does not violate the “open courts” remedies Hines v. Elkhart General Hospital, 465 F.Supp. 421 (1979) (rejecting open courts, right to jury and equal protection challenges to panel review); Putnam County Hospital v. Sells, 619 N.E.2d 968 (1993)(failure to present case for pre-filing panel review required dismissal). It cannot be stated enough that, in Washington, the “open courts” provision “was never intended to guarantee the right to litigate entirely without expense to the

litigants....” King, supra. at 391. A review of case law from other jurisdictions is in accord.

In Everett v. Goldman, 359 So.2d 1256, 1268 (1978) the Louisiana Supreme Court considered an “open courts” challenge to a malpractice, pre-litigation notice period and squarely determined that the “right” of malpractice claimants to sue for malpractice is not a “fundamental constitutional right” and thus, under the open courts clause, “it is to be tested by the lesser standard of rational basis.” Id., at 1268-1269. The Louisiana “open courts” provision contains substantially broader language than Washington’s, and states:

All courts shall be open and every person shall have an adequate remedy by due process of law and justice, administered without denial, impartiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

Id. at 1268.

In Hines v. Elkhart General Hospital, 465 F.Supp. 421, 433 (1979) the Indiana court upheld a requirement for pre-filing panel review and noted, a review of case law nationally reveals that a “claimant’s right to pursue litigation does not constitute a fundamental right” and therefore reasonable burdens can be placed upon that right.

In sum, multiple state courts, construing far more expansive “open courts” constitutional provisions than Washington’s, reject challenges to pre-litigation notice requirements in malpractice cases. Houk v. Furman, 613 F.Supp. 1022, 1034 (1985)(“...other state courts have rejected, as meritless, the contention that mandatory pre-litigation panel review, involving substantial delay, violates similar [“open courts”] state constitutional provisions.”)(citations omitted.)

**F. This Court should not disregard the language of Washington’s constitution to adopt the “strict scrutiny” standard of review applied by Florida courts in Kluger.**

Amicus propose adoption of Florida’s “strict scrutiny” test as enunciated in Kluger v. White, 281 So.2d 1 (1973). There, the Florida Supreme Court held that a statute abolishing the right of recovery in automobile accidents for a class of “accident victims” (those who chose not to purchase property damage coverage and suffered damages of less than the statutory amount of \$550) violated Florida’s “open courts” provision. Id. at 5.

The Kluger rationale, essentially requiring that any change in procedural law provide “quid pro quo” for litigants is against the weight of authority. See, Hines, 465 F.Supp. at 431 (noting that an analysis turning on the “purported requirement that some ‘quid pro quo’ necessary replace

any change of common law doctrine” has been rejected in numerous jurisdictions.”) The US Supreme Court similarly rejects this position stating:

The Constitution does not forbid the creation of new rights, nor the abolition of old ones recognized by the common law, to obtain a permissible legislative object.

Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57 (1929); see also, Ortwein supra. (access to the courts may be restricted if there is a rational basis for that restriction).

Critically, the Florida Constitutional provision is broader than Washington’s and provides, “the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” Id. at 3. In construing this provision, the Kluger court reasoned that, any abolition of a common law right to sue, must be supported by a compelling government interest. Id. at 5 (noting that the abolition of the “right of action for alienation of affections” was necessary to the public to avoid blackmail). Washington’s “open courts” provision is not analogous to Florida’s and, as such, as discussed supra this Court should not disregard the plain language of Washington’s constitution to adopt the Florida standard.

**G. Former RCW 7.70.100 does not abolish any existing remedy and therefore Kluger analysis is inapplicable.**

Amicus's reliance upon Kluger fails to acknowledge that case law subsequent to Kluger confirms that the strict scrutiny analysis employed by Kluger is applicable **only** where a statute abolishes a right to remedy. Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (1981)("no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action."); Amorin v. Gordon, 996 So.2d 913 (2008)(confirming that Kluger supra is narrowly construed by Florida courts and requires a substitute remedy only where "legislative action has abolished or totally eliminated a previously recognized cause of action.") As such, Kluger analysis simply does not apply to the statute at issue here.

**H. Pre-litigation notice statutes in Florida pass constitutional scrutiny.**

Florida's malpractice statute (F.S.A. 766.106), akin to former RCW 7.70.100, requires ninety days notice to health care practitioners prior to filing of suit and, akin to RCW 7.70.150, requires verification of the complaint with a qualified expert affidavit. Expectedly, the constitutionality of these statutory requirements has been challenged in Florida courts and have been upheld. Largie v. Gregorian, 913 So.2d 635 (2005)(dismissing complaint for failure to comply with verification

requirement); Mount Sanai Medical Center v. Fotea, 937 So.2d 146, 147 (2006)(dismissing malpractice case based upon failure to file pre-litigation notice as required by statute); Pearlstein v. Malunney, 500 So.2d 585 (1986)(notice provisions do not violate guarantees of access to the courts, due process and equal protection).

**I. The pre-litigation notice requirements of former RCW 7.70.100 bear a rational relationship to ensuring continued health care for Washington citizens.**

Amicus argues that the pre-litigation notice period, because it does not impose mandatory settlement obligations, does not “meaningfully” serve the Legislature’s stated interest of promoting settlement and cannot pass muster under a “compelling state interest” test. Amicus Br. at 22-24. This argument is without force.

Note that, as discussed above, there is no authority which would permit this Court to evaluate RCW 7.70 under a “strict scrutiny” test and, as such, the statute must be evaluated under rational basis analysis. Thus, Amicus’s contentions must be considered under the requirement that, “[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation **unsupported** by evidence or empirical data.” F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S.Ct. 2096 (1993)(emphasis added).

It is well settled that a "notice" requirement, in advance of filing suit, facilitates settlement. See e.g., Hallstrom v. Tillamook County, 844 F.2d 598, 601 (9th Cir.,1987) aff. 489 U.S. 1077 (1989)(upholding notice requirement, reasoning, "once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely").

An argument, analogous to that now advanced by Amicus, was presented, and rejected, in Gay v. Rabon, 280 Ark. 5, 652 S.W.2d 836 (1983). There, plaintiff contended the notice requirement bore no "reasonable relationship" to encouraging the reduction of malpractice premiums and improperly "gives the health care provider special Privileges and Immunities not accorded to other tortfeasors." Id. at 8. The court rejected this contention reasoning:

The sixty day notice requirement makes it possible for the insurance carrier and the potential defendant to attempt to arrive at a settlement with the aggrieved person without the necessity of the parties incurring the expense of litigation. The statute in question bears a fair and substantial relation to the object of the legislation, which is to encourage the resolution of claims without judicial proceedings, thereby reducing the cost of resolving claims and consequently the cost of insurance.

Id.

**J. RCW 7.70.150 does not violate the Privileges and Immunities clause.**

Amicus contends that RCW 7.70.150 (requiring a certificate of merit in malpractice cases) burdens malpractice plaintiff's "fundamental right" to a civil remedy. As addressed above, and reincorporated herein by reference, there is no "fundamental right" to a civil remedy. Moreover, RCW 7.70.150, akin to former RCW 7.70.100, does not foreclose any "remedy"; instead, it imposes a procedure upon malpractice claimants for the purpose of discouraging meritless claims; a process which is, undeniably, constitutionally sound.

The Illinois courts considered, and rejected, a similar challenge to a "merit" requirement. In Bloom v. Guth, 164 Ill.App.3d 475, 479, 517 N.E.2d 1154 (1987) the court determined that the certificate of merit requirement does not violate due process, separation of powers, prohibition against special legislation). The court noted, "[T]here is no infringement of the constitution because the right to maintain a bona fide medical malpractice action is not curtailed by section 2-622, which merely establishes a reasonable procedure designed to summarily dispose of meritless cases." Id.

Similarly, in Mahoney v. Doerhoff Surgical Services, Inc. 807 S.W.2d 503, 507 (Mo.,1991), the Supreme Court of Missouri considered,

and squarely rejected, a constitutional challenge to that state's "affidavit" requirement. The Mahoney court noted that the affidavit requirement merely codified the requirement of expert testimony at an early stage of litigation for the purpose of protecting the public "from the cost of ungrounded medical malpractice claims." Id. The court noted:

The affidavit condition of § 538.225 is a reasonable means to hinder a plaintiff whose medical malpractice petition is groundless from misuse of the judicial process in order to wrest a settlement from the adversary by the threat of the exaggerated cost of defense this species of litigation entails.

Id. at 508. Critically, the "screening" procedure did not change "substantive law" instead it enacted a procedure designed to reduce costs inhering in malpractice litigation. Id. (affidavit requirement does not deny access to courts because "it denies no fundamental right, but at most merely redesigns the framework of the substantive law to accomplish a rational legislative end."); Note, Hines, supra at 432 (rejecting plaintiff's argument that "any restriction" placed upon access to court's is per se unconstitutional and noting that court of other jurisdictions are in accord).

The analysis of the court in Sisario v. Amsterdam Memorial Hospital, 159 A.D.2d 843, 552 N.Y.S.2d 989 (1990) is similarly telling. There, a malpractice plaintiff failed to provide the statutorily required certificate of merit at the time of filing his case and, as such, the court

dismissed his claims. Id. at 843. The plaintiff appealed, challenging the constitutionality of the provision on grounds that the statute violated equal protection on grounds that it curtailed his access to court. Id. The court rejected the arguments reasoning that: (1) malpractice plaintiffs do not constitute a protected class; and (2) the right to sue health care providers is not a fundamental right. Id.

Washington's "merit" requirement, notably, less stringent than an "affidavit" requirement, does not either abolish or impermissibly burden a plaintiff's right to redress for an injury. Instead, the "merit" requirement serves to benefit all Washington citizens by ensuring that unnecessary funds are not expended upon groundless malpractice actions. Requiring a showing of merit upon filing imposes no new requirement upon malpractice claimants, instead, it merely imposes the requirement at an earlier stage of the litigation process for the rational purpose of limiting costs in malpractice actions. See, e.g., Berger v. Sonneland, 144 Wn.2d 91, 110-111, 26 P.3d 257 (2001) (expert testimony is required in malpractice actions). It should also be noted that RCW 7.70.150 permits a plaintiff to request additional time to file the certificate of merit and, as such, no insurmountable barrier is erected, even to plaintiffs who wait until the last minute to file their claims.

Amicus also contends that RCW 7.70.150 imposes a “cost” barrier to malpractice plaintiffs. However, Ms. Waples failed to present any evidence establishing that cost actually prohibited her from obtaining a certificate of merit and Amicus cannot present that evidence for her. See, supra section A.

The reasoning of Horsley-Layman v. Angeles, 968 S.W.2d 533 (1998) also provides helpful guidance on this point. There, a plaintiff contended that the requirement of obtaining an expert report and submitting a cost bond prior to suit imposed an unreasonable burden upon ability to access the court. Id. at 537. However, the plaintiff offered no argument as to why cost prohibited him from fulfilling the requirements of the statute and, moreover, failed to present evidence establishing why the cost requirement imposed by statute was more onerous than the general requirement of expert testimony. Id. The court, accordingly, rejected the constitutional challenges. Id. Here, akin to Horsley, Ms. Waples failed to provide any evidence establishing that cost actually prohibited her from filing suit. See also, Hines supra, 465 F.Supp. at 432 (plaintiff failed to provide any evidence supporting the claim of lack of funds or onerous nature of delay and court would decline to consider the contention)

Contrary to the contentions of Amicus, the provision of a certificate of merit at the time of filing is likely to expedite the process by eliminating frivolous claims and encouraging prompt settlement of claims having merit. See, Hines supra at 432 (medical screening panel will expedite handling of malpractice claims).

## II. CONCLUSION

The Court should decline to consider Amicus's contentions as Ms. Waples failed to preserve the issues for review, or, in the alternative, should apply existing law and find that former RCW 7.70.100 and RCW 7.70.150 do not violate the "Privileges and Immunities" clause of the Washington Constitution. The decision of the Court of Appeals should, as such, be affirmed.

Respectfully submitted this 1<sup>st</sup> day of September, 2009.

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