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No. 853673

King County Superior Court Cause No., 10-2-24679-7 SEA

SUPREME COURT OF
THE STATE OF WASHINGTON

GLEN A. McDEVITT

Respondent

v.

HARBORVIEW MEDICAL CENTER, UNIVERSITY OF
WASHINGTON, and THE STATE OF WASHINGTON

Petitioners

RESPONDENT'S BRIEF

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I. INTRODUCTION

King County Superior Court correctly applied the ruling in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010) in this case. Former RCW 7.70.100(1) required a pre-suit notice before instituting a lawsuit against all health care providers.¹ The Court in *Waples* ruled RCW 7.70.100(1) unconstitutional as it pertains to claims regarding health care injuries because the statute violated the separation of powers doctrine because that procedural statute conflicts with CR 3(a).² *Waples*, 169 Wn.2d at 161. Former RCW 7.70.100(1) necessitated that a potential plaintiff take an extra step in order to

¹ RCW 7.70.020 defines health care providers as: “(1) a person licensed by this state to provide health care or related services including but not limited to, an East Asian medicine practitioner, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician assistant, midwife, osteopathic physician’s assistant, nurse practitioner... (2) an employee or agent of a person described in part (1) above, acting in the course and scope of his employment... (3) an entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, including but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment...” RCW 7.70.020(1)-(3).

² *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010). Prior to this, the Supreme Court also invalidated the certificate of merit requirement found in RCW 7.70.150 because it violated the separation of powers doctrine. *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 979-85, 216 P.3d 374 (2009). (RCW 7.70.150 impermissibly conflicted with court rules governing procedures for initiating lawsuits, “thereby jeopardizing the court’s power to set court procedures.”)

commence his/her lawsuit. A plain reading of *Waples* mandates that all pre-suit notice requirements pertaining to either private or public health care providers is unconstitutional.

Additionally, Chs. 4.92 and 4.96 RCW specifically exempted injuries related to health care providers from the requirements of the two statutes. Instead, the legislature enacted Ch. 7.70 RCW to exclusively govern health care injuries. In light of this Court's ruling in *Waples*, Harborview³ cannot now argue that the pre-suit notice requirement found in Chs. 4.92 and 4.96 fills Harborview's perceived "gap" left by the *Waples* decision. If plaintiffs wishing to bring an action against a public health care provider must file a pre-suit notice under Chs. 4.92 and 4.96, then *Waples*' constitutional mandate is undermined. Chs. 4.92 and 4.96 specifically exempted claims involving injuries from health care and provided a different, specific statute that governs injuries related to health care. RCW 4.92.100; RCW 4.96.020.⁴

³ Throughout this Brief, Appellants, Harborview Medical Center, University of Washington, and the State of Washington, will be referred to as "Harborview" and the Respondent, Glen McDevitt, will be referred to as "McDevitt."

⁴ "Claims involving injuries from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are exempt from this chapter." RCW 4.92.100.

II. NO ASSIGNMENT OF ERROR

No assignment of error exists because the Trial Court was correct and this Court ruled in *Waples* that the former RCW 7.70.100(1) pre-suit notice requirement for health care providers violated the separation of powers doctrine and, thus, was unconstitutional. *Waples*, 169 Wn.2d at 161. Therefore, the Trial Court correctly denied Harborview's motion for summary judgment based on this Court's ruling in *Waples*. (CP 44-45).

III. ISSUE CORRECTLY DECIDED BY THE TRIAL COURT AND SUPPORTED BY WAPLES.

Whether former RCW 7.70.100(1), which previously required medical malpractice plaintiffs to file pre-suit notice is unconstitutional as to all health care providers? Yes.

RCW 4.96.020(1) states: "The provisions of this section apply to claims for damages against all local governmental entities and their officers, employees, or volunteers, acting in such capacity, except that claims involving injuries from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are exempt from this chapter."

IV. STATEMENT OF THE CASE

a. *PERTINENT FACTS*

On July 9, 2007, while paragliding in the Tiger Mountain area, Plaintiff/Respondent Glen McDevitt crashed into tree branches. CP 8. He was thrown onto a roof, against a chimney, and onto the ground resulting in a fractured femur. *Id.* McDevitt was taken to a Bellevue facility and ultimately transferred to Harborview Medical Center for treatment. *Id.* On July 10, 2007, McDevitt underwent major surgery to repair his fractured left leg. *Id.* During his stay at Harborview, McDevitt received Lovenox, an anticoagulant drug that prevents blood clots. CP 9. McDevitt was taken off Lovenox without his knowledge and without receiving education about the risk of blood clots and the measures necessary to guard against deep vein thrombosis. *Id.* On July 20, 2007, McDevitt went to Northwest Hospital's emergency room where he was diagnosed with bilateral calf level deep venous thrombosis in his right leg. *Id.*

b. TRIAL COURT PROCEEDINGS BELOW

On July 7, 2010, relying on the Supreme Court's ruling, McDevitt initiated his lawsuit against Harborview Medical Center without providing notice of his intent to file an action. CP 1-4. On July 20, 2010, McDevitt filed an amended complaint naming all Defendants. CP 7-10. Shortly thereafter, Harborview filed a motion for summary judgment. CP 16-21. In response, McDevitt argued the Supreme Court declared former RCW 7.70.100(1) unconstitutional and invalidated the pre-suit notice requirement for all claims involving health care injuries and as to all health care providers. CP 22-29. Harborview, in its reply, contended that the ruling in *Waples* did not apply to governmental entities under Art. II, § 26. CP 39.

On October 29, 2010, the parties argued the motion for summary judgment before the Honorable Jeffrey Ramsdell, who entered an Order Denying Harborview's Motion for Summary Judgment. CP 44-45. Harborview sought discretionary review and this Court accepted review on March 30, 2011. CP 46.

V. ARGUMENT/ANALYSIS

a. *STANDARD OF REVIEW*

This Court “reviews an order denying summary judgment de novo, performing the same inquiry as the trial court”, and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Certain Underwriters at Lloyd’s London v. Travelers Cas. Co. of America*, 161 Wn. App. 265, 277, --- P.3d --, (2011) (citing, *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006); *Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007)).

b. *SUMMARY OF ARGUMENT*

The Trial Court correctly denied Harborview’s motion for summary judgment based on the Washington Supreme Court’s ruling in *Waples*, which holds that the pre-suit notice of litigation violated the separation of powers doctrine. The Trial Court, relying on *Waples*, denied Harborview’s motion for summary judgment because the invalidation of former RCW 7.70.100(1) means a plaintiff no longer files a pre-suit notice of claim before instituting an action against a health care provider.

Both Chs. 4.92 and 4.96 specifically exempted claims arising from health care injuries and Chs. 4.92 and 4.96 cannot be resurrected by Harborview to require pre-suit notice against a public health care provider.

Equal protection mandates “like treatment of similarly situated persons”. *Medina v. PUD No. 1 of Benton County*, 147 Wn.2d 303, 312-313, 53 P.2d 993 (2002); *See also, Jenkins v. State*, 85 Wn.2d 883, 890-91, 540 P.2d 1363 (1975). The creation of two classes of distinct tort victims (governmental and private) cannot be permitted where the legislative interest of encouraging settlement fails to serve any real purpose, places a substantial burden on potential plaintiffs, and violates the equal protection clause.

Finally, Harborview’s argument that *Waples* applies only to private health care providers fails. Each and every application of former RCW 7.70.100(1) violates the separation of powers doctrine, and thus is inoperable and unconstitutional.

**c. LEGISLATURE'S AUTHORITY TO DIRECT THE MANNER
IN WHICH SUITS MAY BE BROUGHT AGAINST THE
STATE DOES NOT GUARANTEE THE
CONSTITUTIONALITY OF A STATUTE.**

The well-settled common law doctrine of sovereign immunity was adopted by the framers of the Washington constitution in Art. II, § 26 which allows suit to be brought against the state and authorizes the legislature to “direct by law, in what manner, and in what courts” suits may be brought against the state. Art. II, § 26 of the Washington constitution; Debra L. Stephens and Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*, 30 Seattle Univ. L. R. 35 (2006)⁵. The legislature may direct the manner in which the state may be sued, but the legislature's power is not unlimited as suggested by Harborview. Rather, the Washington constitution is full of checks and balances to ensure that no one governmental branch wields all the power. *Hunter v. North Mason High School*, 85 Wn.2d 810, 813, 539 P.2d 845 (1975). Thus, though Art. II, § 26 grants broad authority to the legislature to direct the manner in which the state may be sued, the

⁵ See also, *Billings v. State*, 27 Wash. 288, 290-11, 67 P. 583, 584 (1902) (liability of state determined by statute under WASH.CONST. art. II, § 26); *Coulter v. State*, 93 Wash. 2d 205, 207, 609 P.2d 261, 262 (1980).

judicial branch has the ability, when a constitutional challenge is raised, to review the legislature's acts. Though the judicial branch attempts to follow the intent of the legislature, it can review a constitutional challenge before it and declare a statute, or a portion of it, constitutional or not.⁶ This concept is one of the bedrocks of the Constitution as it allows each governmental branch the ability to police each other and keep essential checks and balances in place.

Normally the court upholds a statute, or portion thereof, where the legislative interest outweighs the plaintiff's right. The purpose behind the pre-suit notice provision of former RCW 7.70.100(1) is intended to encourage settlement. *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"). The legislature's interest in promoting settlement is not advanced by requiring plaintiffs wishing to bring an action against a public health care provider to provide pre-litigation notice. The pre-suit notice does

⁶ The Court has jurisdiction to pronounce a statute void if it is irreconcilable with the constitution when it is called upon to adjudge the legal rights of litigants. *Liverpool NY, & Phila. S.S. Co v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885).

not obligate a governmental defendant to engage in settlement negotiations. *See*, RCW 7.70.100(3)-(7).⁷ In fact, a plaintiff receives no assurance that the state will engage in settlement negotiations within the 90 days previously required by former RCW 7.70.100(1) or required by RCW Chs. 4.92 and 4.96 – which Harborview wishes to unilaterally and impermissibly fill Harborview’s perceived gap left by former RCW 7.70.100(1). A statutory provision that impermissibly invades the court’s domain and violates the separation of powers doctrine cannot be supplemented by RCW Chs. 4.92 and 4.96 where the legislature specifically exempted health care claims from RCW 4.92 and created a special statute under RCW 7.70.

In summary, though the Washington constitution grants the legislature the authority to direct the manner in which an action is brought against the state, its powers are not as all-encompassing and far-reaching as Harborview argues. The judicial branch exercises an

⁷ In an amicus brief filed on behalf of the Washington State Association for Justice, Bryan Harnetiaux argued that because the state is not obligated to engage in settlement negotiations, no real legislative interest exists. Additionally, mandatory mediation is not linked to the pre-litigation notice of claim required by RCW 7.70.100(1) or as the state argues, by RCW 4.92.110. Brief of Amicus Curiae Washington State Association for Justice Foundation, *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

important function when it reviews the constitutionality of a statute, or a portion thereof, in actual litigation. And it is well within the court's powers to determine a statute is unconstitutional where it interferes with the fundamental rights of a plaintiff or invades the court's domain. Thus, though the legislature has the valid authority to require pre-suit notices, this does not mean the pre-suit notice will always stand up under a constitutional challenge brought before the courts.

d. FORMER RCW 7.70.100(1) VIOLATES THE SEPARATION OF POWERS DOCTRINE BECAUSE IT CONFLICTS WITH THE JUDICIARY'S POWER TO SET PROCEDURAL COURT RULES.

In *Waples*, the Supreme Court of Washington accepted review of two cases involving a plaintiff's failure to provide pre-suit notice pursuant to RCW 7.70.100(1) before filing a health care claim. *Waples*, 169 Wn.2d at 156-57. The Supreme Court held that the pre-suit notice requirement was unconstitutional because it violated the separation of powers doctrine because that procedural statute conflicts with CR 3(a). *Waples*, 169 Wn.2d at 159-160. As noted by this Court in its decision in *Putnam*, "the Washington State Constitution does not contain a formal separation of powers clause". *Waples v. Yi*, 169 Wn.2d at 158, (citing, *Putnam v. Wenatchee Valley Med. Ctr.*, 166

Wn.2d 974, 216 P.3d 374 (2009). However, the division of the Washington State government into different branches raises a presumption of a vital separation of powers doctrine. *Id.* A violation of the separation of powers doctrine occurs when an “activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Id.*

The judicial branch’s fundamental functions include the power to promulgate rules for its practice.⁸ *Waples*, 169 Wn.2d at 158. CR 3(a) is such a rule and provides the method by which any lawsuit may be commenced in the courts. CR 3(a). In *Waples*, the Court stated when:

A statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot..., the court rule will prevail in procedural matters and the statute will prevail in substantive matters.

Waples, 169 Wn.2d at 158.

⁸ RCW 2.04.190 provides the Supreme Court, not the Legislature, with the power to “prescribe...the mode and manner...of giving notice and serving writs and process of all kinds...and generally to prescribe by rule...the kind and character of the entire pleading, practice and procedures to be used in all suits, actions, appeals and proceedings of whatever nature...” RCW 2.04.190.

The court could not harmonize the notice of claim provision in RCW 7.70.100(1) with the provisions of CR 3(a) and, thus, they could not be given effect. *Waples*, 169 Wn.2d at 161. Because former RCW 7.70.100(1) only addressed procedural matters and not “the primary rights of either party” and because it conflicted with the judiciary’s powers to set court proceedings, the Court declared the statute unconstitutional. *Waples*, 169 Wn.2d at 160-61.

Harborview attempts to distinguish *Waples* by arguing that the case involved only private health care providers and, therefore, *Waples* cannot apply to government entities. Harborview notes that the legislature’s power comes directly from the state constitution which grants the legislature the authority to determine the manner in which the state is sued.⁹ However, the legislature’s authority to determine the manner does not automatically render RCW 7.70.100(1) constitutional as to public health care providers. When a constitutional challenge to a statute arises, the Court is charged with determining the

⁹ Art. II § 26 of the Washington State Constitution gives the State the power to grant the right to bring suit against it as it chooses provided that the legislature direct the manner and in what courts suits will be brought against the state. *Northwestern & Pac., Hypotheek Bank v. State*, 19 Wn. 73, 75, 50 P.586 (1897); Art. II, § 26 of the Washington Constitution; Laws 1895, p. 188 § 1.

validity of an act of Congress. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed.688 (1936) (Brandeis, J., concurring). In *Waples*, this Court exercised its powers of judicial review and determined that RCW 7.70.100(1) violated the separation of powers doctrine and declared it unconstitutional - rendering the statute null and void. *Waples*, 169 Wn.2d at 159-60.¹⁰

Harborview cites *Lacey Nursing Ctr., Inc. v. Department of Revenue* to support its argument that *Waples* cannot apply to state agencies. *Lacey Nursing Ctr., Inc. v. Dept. of Revenue*, 128 Wn.2d 40, 905 P.2d 338 (1995). In *Lacey*, the plaintiffs brought an excise tax refund action against the state and sought to make it a class action pursuant to CR 23. *Id.* The court held that the state provided the manner in which it could be sued and that RCW 82.32.180 contained no express language authorizing class actions. *Lacey Nursing Ctr., Inc.*, 128 Wn.2d at 53-54.

¹⁰ In *Moody v. United States*, this Court held that questions as to a statutory cap on noneconomic damages did not require answers because the cap was unconstitutional rendering the statute null and void. *Moody v. United States*, 112 Wn.2d 690, 693, 773 P.2d 67 (1989) (citing, *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989)). (Holding that RCW 4.56.250(2)'s limitation on noneconomic damages was unconstitutional).

However, *Lacey* involved a primary right as opposed to a procedural right – the right to bring a class action against a state agency is a primary right. The court analyzed whether the Legislature “intended to permit class action lawsuits for...excise tax refunds.” *Id.* Though plaintiffs met the requirements for certification of a class action under CR 23, the Legislature did not include a provision in the statute providing plaintiffs with the primary right to bring a class action against the state. *Lacey Nursing Ctr., Inc.*, 128 WN.2d at 53. Harborview asks the court to extend this reasoning to the issue before it now, however, the statute in *Lacey* did not conflict with a court rule or procedure – rather it provided *the type of lawsuit* a plaintiff could bring against the state regarding excise tax refunds. The Court noted in its decision that “[w]here a rule of court is inconsistent with a procedural statute, the court’s rulemaking power is supreme.” *Lacey Nursing Ctr., Inc.*, 128 Wn.2d at 48 (citing, *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984)). Harborview’s reliance on *Lacey* is inherently flawed because in *Lacey* the Court recognized the ability to file a class action as a substantive issue governed by the legislature; whereas, in *Waples* and *Putnam*, the Court determined that the extra step required to file a lawsuit was procedural and violated the

separation of powers doctrine and was unconstitutional. The fact that Harborview is a public health care provider as opposed to private health care providers is irrelevant. The pre-suit notice requirement is procedural and violates the separation of powers doctrine because it conflicts with court rules as demonstrated by *Putnam* and *Waples*. *Waples*, 169 Wn.2d at 161.

The separation of powers doctrine exists in order to safeguard the court's power to set court procedures. In *Putnam v. Wenatchee Valley Med. Ctr.*, this Court ruled that former RCW 7.70.150 violated the separation of powers doctrine and struck down the pre-suit certificate of merit requirement. *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 979-85, 216 P.3d 374 (2009). In its *Putnam* analysis, this Court explained that RCW 7.70.150 addressed how to file a claim to enforce a right provided by law and as such was procedural. *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974 at 985.¹¹ The Court extended its analysis to *Waples* concluding that the legislature's addition of the pre-suit notice requirement to the court

¹¹ See, e.g., *Hiatt v. S. Health Facilities, Inc.*, 68 Ohio St.3d at 238, 985, 626 N.E.2d 71 (1994) ("Since the conflict involves the form and content of the complaint to initiate a medical malpractice case, it is a procedural matter.").

rules for filing suit was unconstitutional because both the merit requirement of *Putnam* and the pre-suit notice requirement in *Waples* involved procedures on “how to file a claim to enforce a right provided by law” and not substantive rights. *Waples v. Yi*, 169 Wn.2d 152 at 160-61; *citing, Putnam*, 166 Wn.2d 974 at 984-84.

Contrary to *Lacey*, where the primary right of whether a party could bring a class action against the state was at issue, this Court recognized that RCW 7.70.100(1) and RCW 7.70.150 addressed only the procedural manner to effectuate the party’s primary right. *Waples*, 169 Wn.2d 152 at 160-61; *citing, Putnam*, 166 Wn.2d 974 at 984-84. Because the court’s rulemaking power is supreme, the statutes impermissibly conflicted with the court rules governing procedures for initiating lawsuits, jeopardizing the judiciary’s power to set procedural rules and, thus, could not prevail over the conflicting court rules. *Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974 at 985.¹²

Though the State has the authority to direct the manner in which it can be sued, when challenged a statute enacted by the legislature can be

¹² The Court also noted that requiring pre-suit notice added additional steps to CR 3(a) and resulted in dismissal for failure to provide the pre-suit notice, “even where the complaint was properly filed and served pursuant to CR 3(a).” *Waples*, 169 Wn.2d 152 at 160.

declared unconstitutional by the judicial branch if it violates constitutional doctrines. Because the Court determined that former RCW 7.70.100(1) involved a procedural right that effectuated the right to sue a health care provider, whether public or private, and that the statute impermissibly conflicted with the court's rules, the invalidation of RCW 7.70.100(1) effects all claims related to health care injuries. Thus, Harborview's argument that the separation of powers doctrine is limited to private health care providers fails.

e. RCW CHS. 4.92 AND 4.96 CANNOT BE RESURRECTED TO ACT AS HARBORVIEW'S PERCEIVED GAP FILLER THUS REQUIRING PLAINTIFFS TO FILE PRE-SUIT NOTICE AGAINST STATE HEALTH CARE PROVIDERS.

Harborview argues that even if former RCW 7.70.100(1) no longer requires a plaintiff to file a pre-suit notice for actions against public health care providers, that RCW Chs. 4.92 and 4.96 still requires plaintiffs to file a 60 day notice. This argument fails on multiple levels. RCW 4.92 and 4.96 specifically exempted health care claims. RCW 4.92.100(1); RCW 4.96.020(1). Where a specific statute exists, the statute applies to the subject matter it covers to the exclusion of the general law, and where related, the provisions of the specific statute govern. *City of Mercer Island v. Walker*, 76 Wn.2d

607, 613-614, 458 P.2d 274 (1969). The legislature specifically exempted health care claims from RCW 4.92 and RCW 4.96 and created a specific statute governing all health care claims. The fact that the Supreme Court ruled former RCW 7.70.100(1) unconstitutional does not allow public health care defendants to revert back to RCW 4.92 and RCW 4.96. The two statutes cannot be used to resurrect the pre-suit notice requirement ruled unconstitutional by this Court's decision in *Waples*. The legislature's exemption of health care claims from RCW 4.92 and 4.96 bars the resurrection of the statutes to require pre-suit notice in place of the former RCW 7.70.100(1).

Harborview points out that the only case to touch upon the separation of powers doctrine and the legislature's authority under Art. II, § 26 is *Lacey Nursing Center, Inc.*, 128 Wn.2d 40, 905 P.2d 338 (1995). Petitioner's Brief at 5. What Harborview fails to point out is that *Lacey* dealt with the substantive primary right of what type of lawsuit a plaintiff could bring against the state in actions for excise tax refunds. *Lacey Nursing Center, Inc.* 128 Wn.2d at 53-54. The Court held that in order to bring a class action against the state, the state had to expressly allow it in the statute. *Lacey Nursing Center, Inc.* 128 Wn.2d at 54. The case did not deal with whether the statute

impermissibly interfered with the court's rulemaking procedural powers but whether a primary right had been established for class action plaintiffs. As noted in the decisions in *Putnam* and *Waples*, a legislative statute prevails in substantive matters, and the court rule prevails in procedural matters. *Waples*, 169 Wn.2d at 161. The decision in *Lacey* illustrates a situation in which the substantive matters of the statute prevailed. The court rule still prevails in procedural matters such as in the *Putnam* and *Waples* decisions. Thus, *Lacey* is inapplicable.

Additionally, RCW 4.92.100(1) has express language specifically exempting health care which states: "claims involving injuries from health care are governed solely by the procedures set forth in chapter 7.70 RCW and *are exempt from this chapter.*" RCW 4.92.100(1); RCW 4.96.020(1). The Legislature intended RCW Ch. 7.70 to control health care claims and if it intended either RCW 4.92 or 4.96 to rule in the absence of RCW 7.70.100(1) it logically should be addressed by the legislature instead of allowing the pre-suit notice requirement in RCW 4.92.110 and/or RCW 4.96.020(1) to act as Harborview's perceived gap filler.

f. THE SUBSTANTIAL BURDEN PLACED ON PLAINTIFFS AGAINST PUBLIC HEALTH CARE PROVIDERS VIOLATES EQUAL PROTECTION.

Washington's privileges and immunities guarantee, Const. art. I, § 12, and the federal equal protection guarantee, U.S. Const. amend. XIV, § 1, require that "persons similarly situated with respect to the legitimate purpose of the law" receive like treatment. *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). Washington courts "analyze equal protection challenges under one of the three standards of review: strict scrutiny, intermediate scrutiny, or rational basis." *State v. Berrier*, 110 Wn. App. 639, 648, 41 P.3d 1198 (2002) (citing, *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996)).¹³ The appropriate level of scrutiny in this case is whether the legislation bears a rational relationship to a legitimate government purpose. *Anderson v. King County*, 158 Wn.2d 1, 18-19, 138 P.3d 962 (2006) (citing, *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134

¹³ To determine if an equal protection violation exists or not, the courts employ one of three tests. "First, strict scrutiny is applied when a classification affects a fundamental right or a suspect class. Second, intermediate scrutiny is applied when a classification affects both a liberty right and a semi-suspect class not accountable for its status. Third under the rational basis test, the legislative classification is upheld unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives." *Harris v. Charles*, 171 Wn.2d 455, 462, ---P.3d --- (2011) (citing, *State v. Harner*, 152 Wn.2d 228, 235-36, 103 P.3d 738 (2004).

L.Ed.2d 855 (1996); *State v. Harner*, 153 Wn.2d 228, 236, 103 P.3d 738, 742 (2004)). For the reasons discussed below, the notice of intent to sue fails to satisfy the most deferential rational basis test.

The purpose behind the former pre-suit notice provision of RCW 7.70.100(1) is intended to encourage settlement. *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"). The legislature's interest in promoting settlement is not advanced by requiring plaintiffs wishing to bring an action against a public health care provider to provide pre-litigation notice under RCW 4.92, RCW 4.96 or the now unconstitutional RCW 7.70.100(1). The pre-suit notice does not obligate a public defendant to engage in settlement negotiations. *See*, RCW 7.70.100(3)-(7). In fact, a plaintiff receives no assurance that the state will engage in settlement negotiations within the 90 days previously required by former RCW 7.70.100(1). Even if Harborview's perceived gap filler statutes (RCW 4.92 and 4.96) replace former RCW 7.70.100(1) (an argument McDevitt contends has no merit), a plaintiff receives no assurance that the state will act to encourage settlement.

Additionally, Washington courts have held that legislative classifications “must conform to the equal protection guaranties of the state and federal constitutions” and grant like treatment to similarly situated persons for legitimate purposes of the law. *Medina v. PUD No. 1 of Benton County*, 147 Wn.2d at 312-313. Claim filing laws like the one previously required under former RCW 7.70.100(1) (and possibly Chs. 4.92 and 4.96 as Harborview perceives to fill the gap to replace RCW 7.70.100(1)) create two classes of tort victims – governmental and private – and grant one class a procedural advantage. *Id.*; *Hunter v. North Mason High School*, 85 Wn.2d 810, 813, 539 P.2d 845 (1975). A claim filing law is upheld unless no rational basis exists for the classification. *Medina*, 147 Wn.2d 303 at 312-313. The legislative intent to encourage settlement does not rationalize two separate classifications of plaintiffs in medical malpractice actions. However, as noted above, the legislative interest in promoting settlement is not advanced by requiring plaintiffs wishing to bring an action against a public health care provider to provide pre-litigation notice under RCW 4.92, RCW 4.96 or the now unconstitutional RCW 7.70.100(1) (especially since there is no guarantee that the state will engage in settlement negotiations). In

conclusion, to require plaintiffs to file pre-suit notice of litigation with regards to public health care providers, places a substantial burden on the potential plaintiff.¹⁴ Unless the plaintiff is well-educated or consults with an attorney, a potential plaintiff will not know that former RCW 7.70.100(1) could be replaced by Chs. 4.92 and/or 4.96 as contended by Harborview, resulting in potentially harsh results for the unwary plaintiff attempting to bring an action for medical malpractice against a governmental defendant. *See, Hunter*, 85 Wn.2d at 814. Whereas, a plaintiff bringing an action against a private healthcare provider is not similarly burdened by the pre-suit requirement. For the reasons above, Harborview's argument that Chs. 4.92 and 4.96 still requires a plaintiff in a medical malpractice claim to issue pre-suit notice to a governmental defendant violates the equal protection guaranties.

g. ***WAPLES FACIALLY INVALIDATED A PRE-SUIT NOTICE REQUIREMENT IN MEDICAL MALPRACTICE CASES.***

Justice Brandeis, in a concurring opinion in *Ashwander*, laid out the Court's rules when it reviews the validity of a statute stating:

¹⁴ Courts have historically inquired whether a claims filing requirement substantially burdened a class of plaintiffs. *Medina v. PUD No. 1 of Benton County*, 147 Wn.2d at 313.

“The court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress.” *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed.688 (1936) (Brandeis, J, concurring). The court developed the following series of rules: (1) the court will not anticipate a question of constitutional law in advance of the need to review its validity; and (2) “The court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.”¹⁵

To succeed, a facial challenge must show that each and every application of the challenged statute is inoperable and cannot be constitutional. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004) (citing, *In Re Detention of Turay*, 139 Wn.2d 379, 417 n. 27, 986 P.2d 790 (1999)). Though the majority in *Waples* did not specifically note whether the invalidation of RCW 7.70.100(1)

¹⁵*Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed.688 (1936) (Brandeis, J, concurring). Compare *Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 169-172, 48 S.Ct. 66, 72 L.Ed. 218. See also, *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899; *Abrams v. Van Schaick*, 293 U.S. 188, 55 S.Ct. 135, 79 L.Ed. 278; *Wilshire Oil Co. v. United States*, 295 U.S. 100, 55 S.Ct. 673, 79 L.Ed. 1329.

applied facially or as-applied, it is implied because the decision effectively renders RCW 7.70.100(1) unconstitutional and completely inoperable. No set of circumstances exists in “which the statute can constitutionally be applied.” *City of Redmond*, 151 Wn.2d at 668-669.

In *Waples*, this Court thoroughly analyzed the statute in question and held it impermissibly conflicted with the court’s power to set its procedural rules and, thus, the pre-suit notice requirement violated the separation of powers doctrine. The Court did not distinguish between public and private health care providers and Harborview argues that the holding in *Waples* is as it applies to private health care providers only and that a facial challenge to the statute cannot be upheld. Harborview is incorrect.

A facial challenge must show that each and every application of the challenged statute is inoperable and cannot be constitutional. *City of Redmond v. Moore*, 151 Wn.2d 664, 668-669, 91 P.3d 875 (2004) (citing, *In Re Detention of Turay*, 139 Wn.2d 379, 417 n.2, 986 P.2d 790 (1999)). The majority decision in *Waples* does not specifically note whether the invalidation of RCW 7.70.100(1) applied facially or only as applied to private health care providers. In fact, the definition of “health care provider” in RCW 7.70 encompasses all

health care providers and does not differentiate between private and public health care providers. It stands to reason that when the Supreme Court invalidated RCW 7.70.100(1) as to health care providers, it understood that the definition in the statute itself encompassed *all health care providers*.¹⁶

Regardless of the status of the health care provider, the statute unconstitutionally and impermissibly conflicts with the court's power to promulgate its own rules. Because the pre-suit notice requirement invades the court's domain regardless of the status of the health care provider, no circumstance exists in "which the statute can constitutionally be applied." *City of Redmond*, 151 Wn.2d at 668-669. Thus, RCW 7.70.100(1) is facially unconstitutional as to *all health care providers*. That fact Harborview does not like the impact of this Court's ruling does not mean that the state escapes the separation of powers doctrine. Rather, this is for the Legislature to address.

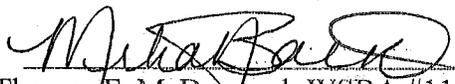
¹⁶ With ample opportunity to differentiate between public or private health care providers in either the *Putnam* or *Waples* cases, and with mention of the issue by the dissent in *Waples*, it is apparent that the Supreme Court knew of the potential issue and, thus, it is implied that the certificate of merit and the pre-suit notice requirements are unconstitutional as to all health care providers. *Waples v. Yi*, 169 Wn.2d 152 at 165.

VI. CONCLUSION

Former RCW 7.70.100(1) has been ruled unconstitutional because it violates the separation of powers doctrine. Therefore, this Court should affirm the trial court's decision under *Waples* and again hold former RCW 7.70.100(1) unconstitutional, facially and/or otherwise. The application of RCW Chs. 4.92 and 4.96 cannot be resurrected to require pre-suit notice against state health care providers where the legislature specifically exempted health care claims from both statutes. Finally, former RCW 7.70.100(1) is also unconstitutional because it violates equal protection. For the foregoing reasons, McDevitt respectfully requests this Court to affirm the trial court's decision denying Harborview's motion for summary judgment.

Respectfully submitted this 13th day of July, 2011.

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DECLARATION OF SERVICE

I, Mika N. Bair, declare as follows:

I am a resident of the State of Washington, residing or employed in Edmonds, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 510 Bell Street, Edmonds, Washington, 98020.

On July 13, 2011, I certify under penalty of perjury under the laws of the State of Washington that I caused service of the foregoing **RESPONDENT'S BRIEF** by causing a true and correct copy to be hand delivered to:

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