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No. 89866-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PHYLLIS PAETSCH,

*Plaintiff/Petitioner,*

vs.

SPOKANE DERMATOLOGY CLINIC, P.S., as a Washington  
Corporation; and WILLIAM P. WERSCHLER, M.D., individually,

*Defendants/Respondents.*

Filed *E*  
Washington State Supreme Court  
AUG 18 2014  
Ronald R. Carpenter  
Clerk *by h*

BRIEF OF AMICUS CURIAE WASHINGTON STATE  
ASSOCIATION FOR JUSTICE FOUNDATION

George M. Ahrend  
WSBA #25160  
16 Basin St. SW  
Ephrata, WA 98823  
(509) 764-9000

Bryan P. Harnetiaux  
WSBA #5169  
517 E. 17th Avenue  
Spokane, WA 99203  
(509) 624-3890  
OID #91108

On Behalf of  
Washington State Association for Justice Foundation

 ORIGINAL

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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 under Washington law, and a supporting organization to 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 Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of persons seeking redress under Ch. 7.70 RCW, governing claims for damages for injury occurring as a result of health care.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This review raises questions regarding the nature of the relationship between a health care provider and his or her patient, if any, that is required before the health care provider is potentially subject to liability under Ch. 7.70 RCW. This action was commenced by Plaintiff/Petitioner Phyllis Paetsch (Paetsch) against Defendants/Respondents Spokane Dermatology Clinic, P.S. (Clinic), and its owner, William P. Werschler, M.D. (Werschler), for negligence under RCW 7.70.040 and failure to secure informed consent under RCW 7.70.050.

WSAJ Foundation is familiar with the briefing before the Court. See Paetsch Br.; Clinic/Werschler Br.; Paetsch Reply Br.; Paetsch Pet. for Rev.; Clinic/Werschler Ans. to Pet. for Rev.; Paetsch Supp. Br.; Clinic/Werschler Supp. Br. The underlying facts are drawn from the unpublished Court of Appeals opinion. See Paetsch v. Spokane Dermatology Clinic, P.S., 2013 WL 6843951 (Wn. App., Div. III, Dec. 26, 2013), *review granted*, 180 Wn. 2d 1020 (2014).

For purposes of this amicus curiae brief, the following facts are relevant: The superior court and the Court of Appeals below assumed that proof of a physician-patient relationship is a prerequisite to imposition of a duty under Ch. 7.70 RCW. See Paetsch at \*2. The parties also appear to assume that a physician-patient relationship is a prerequisite to imposing a tort duty under Ch. 7.70 RCW, although they disagree regarding the nature of the relationship required, and whether Werschler had such a relationship with Paetsch. Their dispute appears to center on whether there was a *contract* or personal *contact* between Werschler and Paetsch. See e.g. Paetsch Supp. Br. at 9-10; Clinic/Werschler Supp. Br. at 1, 10-13. Both reference the attorney-client relationship in the course of their arguments, which requires a subjective belief by the client that a relationship exists that is objectively reasonable. See e.g. Paetsch Pet. for Rev. at 7, 13; Clinic/Werschler Supp. Br. at 12. Werschler seems to

advocate that a degree of reliance upon the existence of a relationship must exist before the duties under Ch. 7.70 RCW can arise. See Clinic/Werschler Supp. Br. at 11. Werschler also suggests RCW 7.70.040 and RCW 7.70.050 have no bearing on the physician-patient relationship issue. See Clinic/Werschler Ans. to Pet. for Rev. at 6 n.11

### III. ISSUE PRESENTED

Is proof of a physician-patient relationship a prerequisite to imposing a duty on a health care provider under Ch. 7.70 RCW?

See Paetsch Supp. Br. at 3 (assignment of error 1); Clinic/Werschler Supp. Br. at 8 (heading A).<sup>1</sup>

### IV. SUMMARY OF ARGUMENT

Under Ch. 7.70 RCW, a duty to follow the standard of care and obtain informed consent is imposed whenever a physician renders “health care.” The provision of health care gives rise to the physician-patient relationship as a matter of law. Proof regarding the existence of a

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<sup>1</sup> The Court granted review “on all issues except the issue of informed consent.” A copy of the order granting review is reproduced in the Appendix to this amicus curiae brief. This review should encompass the issue of whether a physician-patient relationship is necessary between Werschler and Paetsch, in order to give rise to a duty under Ch. 7.70 RCW. To the extent this issue is not addressed by the parties, this Court is not bound by the way that they have framed the case. See Maynard Inv. Co. v. McCann, 77 Wn. 2d 616, 623, 475 P.2d 657 (1970) (addressing compliance with provision of mandatory statute even though not raised below); Harris v. Dep’t of Labor & Indus., 120 Wn. 2d 461, 467-68, 843 P.2d 1056 (1993) (addressing issue first raised by amicus curiae when necessary to reach a proper decision). These principles are particularly apt here because, as discussed in the main text, the parties and courts below have overlooked relevant precedent. Notwithstanding the exclusion of “the issue of informed consent” on review, a complete analysis of the physician-patient relationship issue requires consideration of both the medical negligence and informed consent contexts.

physician-patient relationship is not a prerequisite to the duties imposed under RCW 7.70.040 (standard of care) and RCW 7.70.050 (informed consent).

Physicians provide health care whenever they utilize their skills in examining, diagnosing, treating or caring for a person. Physicians also provide health care when they secure informed consent for anticipated treatment from the intended recipient of such treatment, i.e., the patient.

## V. ARGUMENT

Historically, this Court has considered the importance of the physician-patient relationship in the context of discovery and evidentiary issues arising in medical malpractice cases. See e.g. Youngs v. PeaceHealth, 179 Wn. 2d 645, 316 P.3d 1035 (2014); Smith v. Orthopedics Int'l, Ltd., 170 Wn. 2d 659, 244 P.3d 939 (2010); Loudon v. Mhyre, 110 Wn. 2d 675, 756 P.2d 138 (1988); Carson v. Fine, 123 Wn. 2d 206, 867 P.2d 610 (1994). This is the first time since Ch. 7.70 RCW was enacted that the Court must determine whether proof of a physician-patient relationship is itself a prerequisite to pursuing a medical malpractice claim.

**A.) Overview Of Ch. 7.70 RCW.**

Ch. 7.70 RCW “modifies ... certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring *as a result of health care*[.]” RCW 7.70.010 (emphasis added); see Berger v. Sonneland, 144 Wn. 2d 91, 109, 26 P.3d 257 (2001) (stating “[w]hen injury results from health care, any legal action is governed by RCW chapter 7.70”).

The claims covered by Ch. 7.70 RCW include those based on failure to follow the standard of care (medical negligence) and breach of the duty to secure informed consent. RCW 7.70.030 provides:

No award shall be made in any action or arbitration for damages for injury occurring *as the result of health care* which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:

- (1) *That injury resulted from the failure of a health care provider to follow the accepted standard of care;*
- (2) *That a health care provider promised the patient or his or her representative that the injury suffered would not occur;*
- (3) *That injury resulted from health care to which the patient or his or her representative did not consent.*

(Emphasis added.)

The elements of a claim for medical negligence are set forth in RCW 7.70.040:

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

The elements of a claim for failure to secure informed consent are delineated in RCW 7.70.050:

(1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

The phrase “health care” as used in the RCW 7.70.010, 7.70.030 and 7.70.050 is not defined in Ch. 7.70 RCW. See RCW 7.70.020

(definitions); Berger, 144 Wn. 2d at 109 (noting lack of definition). However, this Court has defined the phrase to mean “the process in which [a physician is] utilizing the skills which [the physician] had been taught in examining, diagnosing, treating or caring for the plaintiff as [the physician's] patient.” Berger at 109 (brackets in original; internal quotations omitted); accord Beggs v. State, 171 Wn. 2d 69, 79, 247 P.3d 421 (2011) (quoting similar definition). This definition is now read into the statute as if it were part of the original enactment. See State v. Darden, 99 Wn. 2d 675, 679, 663 P.2d 1352 (1983) (stating “[w]e have long adhered to the principle that when the highest appellate court construes a statute, that construction must be read into the statute as if it had been enacted that way originally”).

The definition of health care implicitly includes informed consent, although no court has specifically addressed the issue. The connection between health care and informed consent is explicit in RCW 7.70.030, which provides that “injury occurring as the result of *health care*” in the first sentence of the statute includes injury resulting “from *health care* to which the patient or his or her representative did not consent” in subsection (3) of the statute. (Emphasis added.) This connection is confirmed by RCW 7.70.050, which describes the “necessary elements of proof that injury resulted from *health care* in a civil negligence case or

arbitration involving the issue of the alleged breach of the duty to secure an informed consent[.]” (Emphasis added.)

The phrase “health care provider” as used in RCW 7.70.030, 7.70.040 and 7.70.050 is defined in terms of the provision of health care. Specifically, the phrase refers to “[a] person licensed by this state to provide health care or related services including, but not limited to ... a physician[.]” RCW 7.70.020(1). The definition also includes an employer, employee or agent of a health care provider. See RCW 7.70.020(2), (3).

The word “patient,” which appears in RCW 7.70.030(3) and 7.70.050 with respect to informed consent, is not separately defined, but the ordinary meaning of the word refers to a person who will receive or is receiving health care. See Merriam-Webster Online, s.v. “patient” (defining noun form of “patient” as “an individual awaiting or under medical care and treatment,” “the recipient of any of various personal services,” and “one that is acted upon”; viewed Aug. 3, 2014; available at [www.m-w.com](http://www.m-w.com)); see also Berger at 109 (adopting ordinary meaning of “health care”). The duty to secure informed consent thus runs to the intended recipient of health care—the patient—not to third parties. See e.g. Crawford v. Wojnas, 51 Wn. App. 781, 784-85, 754 P.2d 1302, *review denied*, 111 Wn. 2d 1027 (1988). This is so even though informed consent may be obtained in certain circumstances from a third party on

behalf of the patient, i.e., the patient's representative. See RCW 7.70.050, 7.70.060, 7.70.065.<sup>2</sup>

As codified in Ch. 7.70 RCW, neither a claim for medical negligence nor for failure to secure informed consent expressly requires proof of a physician-patient relationship. The focus is on the provision of health care. The question remains whether Washington decisional law holds otherwise.

**B.) Under Decisional Law Interpreting Ch. 7.70 RCW, The Existence Of A Physician-Patient Relationship Is Not A Prerequisite For Imposing A Duty To Follow The Standard Of Care, And The Same Should Be True For Informed Consent Claims.**

The parties and the Court of Appeals below have overlooked decisions holding, at least in the context of medical negligence, that no physician-patient relationship is required to impose a duty under Ch. 7.70 RCW. See Eelbode v. Chec Med. Ctrs., Inc., 97 Wn. App. 462, 467, 984 P.2d 436 (1999) (stating “a claim of failure to follow the accepted standard of care does not require a physician-patient relationship”); Judy v. Hanford Environmental Health Fdn., 106 Wn.App. 26, 37-38, 22 P.3d

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<sup>2</sup> This is in contrast with the duty to follow the standard of care, which is not limited to the recipient of health care and runs to all foreseeably injured parties. See e.g. Daly v. United States, 946 F.2d 1467, 1470 (9th Cir. 1991) (discussing Harbeson v. Parke-Davis, Inc., 98 Wn. 2d 460, 480, 656 P.2d 483 (1983)). The contrast relates to the fact that the informed consent claim focuses on protecting the patient's sovereignty over health care decisions, not the health care provider's conduct. See e.g. Smith v. Shannon, 100 Wn. 2d 26, 30, 666 P.2d 351 (1983) (regarding patient sovereignty underlying informed consent claim).

810 (stating “[i]n Washington, the medical malpractice act, chapter 7.70 RCW, extends malpractice liability beyond traditional physician-patient relationships”), *review denied*, 144 Wn. 2d 1020 (2001); Daly v. United States, 946 F.2d 1467, 1469 (9th Cir. 1991) (stating Washington “relaxed” the requirement of a physician-patient relationship when the Legislature adopted Ch. 7.70 RCW).<sup>3</sup> While these decisions are obviously not binding on this Court, to the extent that they do not require proof of a physician-patient relationship for medical negligence claims they are in keeping with the text of Ch. 7.70 RCW and should be approved.

Before the enactment of Ch. 7.70 RCW, proof of a physician-patient relationship was required for a medical negligence claim. See Daly, 946 F.2d at 1469 (citing Riste v. General Elec. Co., 47 Wn. 2d 680, 682, 289 P.2d 338 (1955)). With the adoption of Ch. 7.70 RCW, however, the existence of a duty based upon the physician-patient relationship has been eliminated by the Legislature in favor of a duty based simply upon the provision of health care. As noted above, the chapter was intended to modify certain aspects of tort law applicable to medical negligence claims,

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<sup>3</sup> See also WPI 105.01 Comment (citing Eelbode for the proposition that “a physician-patient relationship is not always required to establish liability for breach of the standard of care”); 16 David K. DeWolf & Keller W. Allen, Wash. Prac., Tort Law & Practice § 16:4 (4th ed.) (citing Daly for the proposition that Ch. 7.70 RCW “does not require a physician-patient relationship in order for liability to be imposed upon a physician for failure to diagnose”); Dan B. Dobbs, et al., The Law of Torts § 285 n.1 (2d ed.) (citing Eelbode for the proposition that “[s]tatutes prescribing liabilities of ‘health care providers’ and including providers who ordinarily have no direct relationship with the plaintiff, may be read to impose a duty of care without regard to any relationship”).

and it does so by not expressly requiring a physician-patient relationship. See RCW 7.70.010, 7.70.030(1); Eelbode, 97 Wn. App. at 467; Judy, 106 Wn. App. at 37; Daly, 946 F.2d at 1469. This is understandable because the chapter applies to professionals other than physicians—such as pharmacists and paramedics—who do not establish physician-patient relationships with the people they serve. See RCW 7.70.020(1); Eelbode at 467; Judy at 37; Daly at 1469. The chapter also applies to health care provided through agents, where the principal may have no “relationship” with the recipients of health care in any ordinary sense of the word. See RCW 7.70.020(2), (3); Judy at 37.<sup>4</sup>

Eelbode, Judy and Daly deal with the duty of care imposed under RCW 7.70.030(1) and 7.70.040. In Eelbode, the court held that a physical therapist who performed a pre-employment physical examination had a duty to follow the standard of care in performing the examination and reversed summary judgment in the physical therapist’s favor on this basis. See 97 Wn. App. at 467-69. Similarly, in Daly, the court held that a radiologist who interpreted a pre-employment x-ray had a duty to follow the standard of care, and affirmed a finding of liability for medical negligence based on the radiologist’s failure to notify the plaintiff of an

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<sup>4</sup> But see Lam v. Global Med. Sys., Inc., 127 Wn. App. 657, 664-65 & n.15, 111 P.3d 1258 (2005) (rejecting analysis based on definition of health care provider under Ch. 7.70 RCW in favor of contract-based analysis). Although Lam did not apply the analysis of Eelbode, Judy and Daly, the result in Lam can be harmonized with these cases.

abnormality on the x-ray. See 946 F.2d at 1469-71. Conversely, in Judy, the court found that a physician who merely reported the results of a pre-employment physical capacity evaluation performed by another health care provider to the plaintiff's employer did not have a duty and was not subject to liability under Ch. 7.70 RCW. See 106 Wn. App. at 37-39; accord Webb v. Neuroeducation Inc., 121 Wn. App. 336, 88 P.3d 417 (2004) (describing Judy as holding that the physician in question was not providing "health care" to the employee).<sup>5</sup>

With respect to informed consent claims under RCW 7.70.030(3) and 7.70.050, no court has *held* that proof of a physician-patient relationship is required. Both Eelbode and Daly suggest that a physician-patient relationship would be required in the informed consent context, reading the word "patient" in RCW 7.70.030(3) and 7.70.050 as requiring such a relationship. See Eelbode at 467; Daly at 1471. However, these statements are dicta because neither case involved an informed consent claim. See Eelbode at 465 (describing claim in terms of negligently administered test); Daly at 1471 (rejecting invitation to analyze

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<sup>5</sup> In Webb, 121 Wn. App. at 346-49, the Court of Appeals holds that a parent may pursue a medical negligence claim against a psychologist under RCW 7.70.040 arising from health care provided to his child, despite the lack of a physician-patient relationship between the parent and the psychologist. In the course of its analysis, Webb incorrectly describes Eelbode as not involving a claim under Ch. 7.70 RCW. Compare Webb, 121 Wn. App. at 347 with Eelbode, 97 Wn. App. at 467-68; see also Judy, 106 Wn. App. at 38 (recognizing Eelbode approves medical negligence claim under Ch. 7.70 RCW without requiring physician-patient relationship); WPI 105.01 Comment (similar).

radiologist's omissions in terms of informed consent); see also Pedersen v. Klinkert, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960) (stating language that is not necessary to the decision in a particular case is dicta).

While Eelbode and Daly correctly analyze medical negligence claims, the reasoning underlying the dicta in these cases regarding informed consent claims is unpersuasive and should not be adopted by this Court.<sup>6</sup> The use of the word “patient” in RCW 7.70.030(3) and 7.70.050 does not implicitly require proof of a physician-patient relationship to trigger an informed consent duty. As noted above, the ordinary meaning of “patient” merely refers to the intended recipient of health care. The word is included in the informed consent statutes for the purpose of identifying those to whom the duty to secure informed consent runs, in light of the fact that informed consent can be secured from a patient’s representative under appropriate circumstances.<sup>7</sup> Otherwise, there is no more reason to

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<sup>6</sup> If the Court is disinclined to address the informed consent dicta in Eelbode and Daly, given the limited grant of review, the Court should clearly indicate in the text of its opinion that a decision regarding the need for a physician-patient relationship in the informed consent context must await another day.

<sup>7</sup> In equating the word “patient” as it appears in RCW 7.70.030(1) and 7.70.050 with a physician-patient relationship, Daly improperly relies on Crawford, *supra*. See Daly at 1471. In Crawford, the court held that the duty of informed consent runs to the patient (a minor), rather than the patient’s representative (his mother). The case stands for the proposition that breach of the duty to secure informed consent is actionable by the recipient of health care rather than the representative who provides informed consent under circumstances where such representative consent is permitted or required. Crawford does not discuss the physician-patient relationship, and it does not support the interpretation placed upon it by Daly.

require proof of a physician-patient relationship in the informed consent context than there is in the medical negligence context.

RCW 7.70.030(3) and 7.70.050 do not expressly require proof of a physician-patient relationship for informed consent claims, and none should be implied. It would have been a simple matter for the Legislature to require a physician-patient relationship as an element of proof in RCW 7.70.050. It did not, despite the fact that it is deemed to be aware that the fiduciary nature of this relationship was prominent in imposing a common law duty to secure informed consent. See Miller v. Kennedy, 11 Wn. App. 272, 280-88, 522 P.2d 852 (1974), *aff'd*, 85 Wn. 2d 151, 530 P.2d 334 (1975). The Court should assume that this was a deliberate choice by the Legislature, and honor it by resisting any call for superimposing a common law gloss on the plain and unambiguous language of the statute. See State ex rel. Madden v. Pub. Util. Dist. No. 1, 83 Wn.2d 219, 222, 517 P.2d 585 (1973) (stating “where ... a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning without regard to the previous state of the common law”), *cert. denied*, 419 U.S. 808 (1974).

Under a plain reading of Ch. 7.70 RCW, the Court should not require proof of a physician-patient relationship as a prerequisite to imposing any duty, whether grounded in medical negligence or informed consent. Fact-finding regarding the existence of the relationship is a

potential quagmire. See e.g. Mead v. Legacy Health Sys., 283 P.3d 904, 910-12 (Or. 2012) (majority opinion, indicating existence of physician-patient relationship may hinge upon customary practice in the relevant community, and depend upon expert testimony); id. at 915 (DeMuniz, J., concurring, finding it “problematic that the jury was required to base its determination for the most part on the opinions of opposing experts”); id. at 919 & n.5 (Walters, J., dissenting, indicating the physician-patient relationship is only a label that courts use to make short-hand reference to certain predicate facts that give rise to legal consequences). Accordingly, the Legislature has determined that under Ch. 7.70 RCW the only pertinent fact is the provision of health care. The existence of a physician-patient relationship follows by operation of law from this fact.<sup>8</sup>

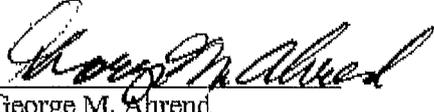
## VI. CONCLUSION

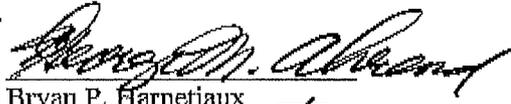
The Court should resolve the issues presented in this appeal in accordance with the argument advanced in this brief.

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<sup>8</sup> Recognizing that a physician-patient relationship is not required to impose a substantive duty under Ch. 7.70 RCW does not undermine the fiduciary relationship between physician and patient, operation of the privilege that applies to information acquired by the physician in “attending” to the patient under RCW 5.60.040(4), or application of the *Loudon* rule in the discovery context. See Carson, 123 Wn. 2d at 213-20; Youngs, 179 Wn. 2d at 651-53. It simply reflects that the issue of a health care provider’s duty is *analytically prior* to the existence of the relationship. In other words, the relationship arises from the provision of health care, not the other way around.

DATED this 8th day of August, 2014.

  
George M. Ahrend

  
Bryan P. Harnetiaux  
*with authority*

On Behalf of WSAJ Foundation

# APPENDIX

THE SUPREME COURT OF WASHINGTON

PHYLLIS PAETSCH,

Petitioner,

v.

SPOKANE DERMATOLOGY CLINIC P.S., et al.,

Respondents.

NO. 89866-9

ORDER

C/A NO. 30688-7-III

Filed Washington State Supreme Court

JUN - 6 2014

Ronald R. Carpenter Clerk

This matter came before the Court on its June 5, 2014, En Banc Conference. The Court considered the Petition and the files herein. A majority of the Court voted in favor of the following result:

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is granted on all issues except the issue of informed consent. Any party may serve and file a supplemental brief within 30 days of the date of this order, see RAP 13.7(d).

DATED at Olympia, Washington this 6th day of June, 2014.

For the Court

Madsen, C.J. CHIEF JUSTICE

69/118

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**To:** George Ahrend  
**Cc:** Mary Schultz; Spillane, Mary; Bryan P Harnetiaux; Stewart A. Estes  
**Subject:** RE: Paetsch v. Spokane Dermatology (S.C. #89866-9)

Received 8-8-14

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**From:** George Ahrend [mailto:gahrend@trialappeallaw.com]  
**Sent:** Friday, August 08, 2014 4:01 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Mary Schultz; Spillane, Mary; Bryan P Harnetiaux; Stewart A. Estes  
**Subject:** Paetsch v. Spokane Dermatology (S.C. #89866-9)

Dear Mr. Carpenter,

On behalf of the Washington State Association for Justice Foundation, a letter application to appear as amicus curiae and proposed amicus curiae brief are attached to this email and submitted for filing in the above-referenced case. These documents are being served on the parties by copy of this email, per prior arrangement.

Respectfully submitted,

George Ahrend  
Ahrend Albrecht PLLC  
16 Basin St. SW  
Ephrata WA 98823  
Office (509) 764-9000  
Fax (509) 464-6290  
Cell (509) 237-1339



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