

NO. 80888-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KIMME PUTMAN,

Appellant,

vs.

WENATCHEE VALLEY MEDICAL CENTER, P.S., a Washington professional
service corporation,

Respondent,

and

PATRICK J. WENDT, M.D.; DAVID B. LEVITSKY, M.D. SHAWN C. KELLEY,
M.D.; and JOHN DOE NO. 1; JOHN DOE NO. 2; JANE DOE NO. 1 and JANE
DOE NO. 2,

Defendants.

APPEAL FROM CHELAN COUNTY SUPERIOR COURT
Honorable John E. Bridges, Judge

RESPONDENT'S ANSWER TO WSAJF AMICUS CURIAE BRIEF

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Amicus curiae Washington State Association for Justice Foundation f/k/a Washington State Trial Lawyers Association Foundation¹ claims Washington Constitution art. I, § 10, says something it does not.

I. ARGUMENT

WSAJF's amicus brief purports to analyze article I, section 10, of the Washington Constitution. This Court has declared:

Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well. The text necessarily includes the words themselves, their grammatical relationship to one another, as well as their context. Our objective is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise.

Malyon v. Pierce County, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997) (footnote omitted). Just as courts will not read into a statute language that is not there, courts will not read into the constitution language that is not there. *See State v. Hastings*, 115 Wn.2d 42, 50, 793 P.2d 956 (1990). As will be discussed, the language that amicus wishes were in the constitution is not there.

A. SECTION 10 DOES NOT SAY WHAT AMICUS SAYS IT SAYS.

WSAJF claims article I, section 10, "limits the Legislature's power

¹ The Washington State Trial Lawyers Association approved the certificate of merit statute when it was enacted. *See* Appendix A to Brief of Respondent. Thus, WSAJF does not expressly argue against the validity of RCW 7.70.150.

to extinguish or substantially impair civil remedies of a type existing at the time the Constitution was adopted.”² (WSAJF Amicus Brief 11) Section 10 says (emphasis added) :

Justice in all cases shall be administered openly, and without unnecessary delay.

That is all it says. Unlike many other states’ constitutions, there is no language about injury, remedies, or redress. *See* section B *infra*. As *Shea v. Olson*, 185 Wash. 143, 160-61, 53 P.2d 615, *adhered to on reh’g en banc*, 186 Wash. 700 (1936), observed:

In this state, the constitution contains no such [provision limiting the Legislature’s power to abolish rights of action for injury to person, property, or reputation], but only the general “due process” and “equal protection clauses.”

Thus, this Court has repeatedly construed “administered openly” in section 10 to refer to openness in the courts.³ For example, *State v. Marsh*, 126 Wash. 142, 217 P. 705 (1923), cited it in ruling that an adult’s trial for contributing to the delinquency of a minor should have been public, not private. *See also In re Detention of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999) (section 10 guarantees public access to sexually

² RCW 7.70.150 does not extinguish a remedy nor does it substantially impair it because, as explained in the Brief of Respondent, a medical malpractice plaintiff generally needs a medical expert in any event.

³ The “compelling interest test” amicus mentions determines whether there a compelling interest to seal court records that “overrides the public’s right to the open administration of justice.” *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005).

violent predator commitment proceedings), *cert. denied by Campbell v. Washington*, 531 U.S. 1125 (2001).

In *State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 75, 483 P.2d 608, *cert. denied by McCrea v. Sperry*, 404 U.S. 939 (1971), this Court ruled that a trial judge's order precluding the media from publishing accounts of criminal proceedings in open court violated section 10. This Court explained, "This constitutional provision . . . mandated an open hearing in the first-degree murder trial . . ."

Cohen v. Everett City Council, 85 Wn.2d 385, 535 P.2d 801 (1975), relied on section 10 to hold that a trial court could not seal the court record after deciding the case on the merits. This Court characterized section 10 as a "separate, clear and specific provision [that] entitles the public, and as noted above the press is part of that public, to openly administered justice." *Id.* at 388.

Similarly, *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59, 615 P.2d 440 (1980), explained that section 10 "provides a textual basis for recognizing a right of public access to court proceedings."

In *Seattle Times Co. v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986), this Court explained section 10 as follows:

Article 1, section 10 provides for a right of access to (1) trials, (2) pretrial hearings, (3) transcripts of pretrial hearings or trials, and (4) exhibits introduced at pretrial

hearings of trials. Unlike the sixth amendment to the United States Constitution in which the right to an open trial is a personal right belonging to the defendant, article 1, section 10 entitles “the *public* . . . to openly administered justice.”

Id. at 155-56 (citations omitted; emphasis in original). *See generally* *Barnett v. Hicks*, 119 Wn.2d 151, 159, 829 P.2d 1087 (1992) (section 10 does not preclude parties to arbitration from stipulating to confidentiality).

In *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993), this Court used section 10 to strike down a statute prohibiting all disclosure of information about child sexual abuse victims:

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Id. at 211. *See also* *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) (applying section 10 criteria for closing hearing to speedy public trial right for criminal defendants); *accord In re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2005).

More recently, confirming that section 10 precludes secrecy in the courts, this Court held that section 10 precluded the automatic sealing of certain documents in the court record:

Our state constitution requires that “[j]ustice in all cases shall be administered openly.” . . . This guarantees the

public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases. Our founders did not countenance secret justice.

Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004) (citation omitted).

Also recently, *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006), ruled that closing the courtroom during pretrial motions in a criminal trial violated the *public's* right to an open public trial under article I, section 10:

. . . [T]he record plainly shows the trial court specifically excluded the public from the closed courtroom hearing. This decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guaranty of providing open access to criminal proceedings. . . .

And *In re Recall Charges Against Seattle School District No. 1 Directors*, 162 Wn.2d 501, 173 P.3d 265 (2007), rejected the argument that persons not subject to recall could not appear at a recall hearing. This Court explained section 10 “mean[s] that members of the public and the press have a right to attend court proceedings.” *Id.* at 508.

It is true that in *King v. King*, 162 Wn.2d 378, 174 P.3d 659 (2007), this Court quoted R. Utter & H. Spitzer, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* 24 (2002)) (hereinafter “REFERENCE GUIDE”), to state:

We have generally applied [section 10] in one of two contexts: “the right of the public and press to be present

and gather information at trial and the right to a remedy for a wrong suffered.”

Id. at 388. But as will be discussed, the REFERENCE GUIDE misread the constitution and its history and thus mistakenly said section 10 provides a right to a remedy. And, as the briefs posted on this Court’s website show, no one in *King* discussed section 10’s history, including that its drafters considered, but rejected, language establishing a right to a remedy.

B. SECTION 10’S DRAFTERS REJECTED REMEDIES LANGUAGE.

Amicus concedes section 10’s so-called “open access” requirement (“Justice . . . shall be administered openly”) refers to the public’s access to court proceedings. (WSAJF Amicus Brief 8 n.7, citing *Rufer*, 154 Wn.2d at 540-51). Yet, it contends section 10 should be read to also contain a “right to a remedy”, despite having no language to that effect. (WSAJF Amicus Brief 8 n.7)

As will be discussed, a *thorough* examination of section 10’s history, which neither amicus nor its cited authorities appears to have undertaken, demonstrates the framers of the Washington Constitution did not intend to provide a “right to a remedy”. As one of amicus’ authorities has declared, “[b]ecause the remedy language is absent from article I, section 10, as adopted by the Washington convention, it seems highly unlikely that it was meant to be retained.” Wang, *State Constitutional*

Remedy Provisions & Article I, Section 10 of the Washington Constitution,
64 WASH. L. REV. 203, 218 (Jan. 1989).

1. The Drafters Rejected Remedies Language.

The cases cited *supra* are consistent with section 10's history. At the constitutional convention, the following language for what became section 10 was proposed:

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.*

JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1989 at 51, 499 (B.P. Rosenow ed. 1962) (emphasis added) (hereinafter "JOURNAL"). The drafters did not adopt this language, omitting, *inter alia*, the phrase "every person shall have remedy by due course of law for injury done him in his person, property, or reputation".

The proposed but rejected version of section 10 was nearly identical to an Oregon Constitution provision and similar to one in the Indiana Constitution.⁴ JOURNAL at 51, 499. Section 10's framers

⁴ INDIANA CONST. art. I, § 12, provides (emphasis added):

All courts shall be open; and *every person, 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.

borrowed from that part of OR. CONST. art. I, § 10, that provides that “justice shall be administered, openly . . . and without delay” and from that part of IND. CONST. art. I, § 12, that provides that “[j]ustice shall be administered . . . without delay”. But they did not borrow from those portions of those provisions that provided that “every man shall have remedy by due course of law for injury done him in his person, property, or reputation” and “every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.”

Thus, when page 24 of the REFERENCE GUIDE said section 10 was modeled after the Oregon and Indiana Constitutions and had been interpreted to not only provide a right of the public and press to be present but also a right to a remedy, it was only partly right. The framers modeled section 10 after *only* those parts of the Oregon and Indiana Constitutions that guarantee a right to justice administered openly and without delay. They did *not* model section 10 after those parts of the Oregon and Indiana Constitutions that guarantee a right to a remedy. As amicus candidly admits, the REFERENCE GUIDE cites no authority that section 10 provides a right to a remedy. (WSAJF Amicus Brief 13)

“In determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered.”

Washington Water Jet Workers Ass'n v. Yarbrough, 151 Wn.2d 470, 90 P.3d 42 (2004) (quoting *Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959), *recons. denied*, 98 P.3d 788 (2004), *cert. denied*, 543 U.S. 1120 (2005)). Since the framers of the Washington Constitution saw fit not to adopt the proposed “right to a remedy” language of the Oregon and Indiana constitutions, that language should not be read into section 10.

Indeed, this Court has many times refused to read into the State Constitution language the drafters rejected or omitted. *See, e.g., State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 48 P.3d 274 (2002) (higher education institutions not art. IX, § 4, “schools” where framers purged higher education references); *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998) (term limits initiative invalid where framers rejected term limits); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) (federal 4th Amendment precedent unpersuasive to construe state constitution provision, where framers of state constitution rejected provision identical to 4th Amendment). *See generally Staples v. Benton County*, 151 Wn.2d 460, 467, 89 P.3d 706 (2004) (since state constitution framers did not specify county office location, no constitutionally required location).

That the omitted language should not be read into section 10 is bolstered by the fact that the constitution’s framers “did not come to their task unprepared or empty-handed.” JOURNAL at v. Rather, they looked

not only at other states' constitutions, but "read the Washington constitution of 1878 with great care." *Id.*

What is the Washington constitution of 1878? In 1878, before Washington became a state, the voters approved a constitution in anticipation that statehood would soon follow. That 1878 constitution was never approved by the federal government and thus never went into effect. <http://www.secstate.wa.gov/history/constitution.aspx> (setting forth history and copy of 1878 constitution).

Article V, section 9 of that ineffective constitution was very similar to the proposed but ultimately rejected language of section 10:

Every person in the state shall be entitled to a certain remedy in the law, for all wrongs and injuries which he may receive in his person, character or property; justice shall be administered to all, freely, and without purchase; completely and without denial; promptly and without delay; and all courts shall be open to the public.

(Emphasis added; copy in Appendix A hereto.) It would have been easy for the framers of the 1889 Washington Constitution to simply copy the language of the voter-approved 1878 version. But they did not.

2. Only One State Has Adopted Section 10's Language.

Ten states besides Washington—Alaska, California, Hawaii, Iowa, Michigan, Nevada, New Jersey, New Mexico, New York, and Virginia—have no constitutional provision requiring a remedy. See D. Schuman, *Emerging Issues in State Constitutional Law*, 65 Temple L.

Rev. 1197, 1201 & n.25 (Winter 1992) (hereinafter “Schuman”). In these states, tort law is alive and well. Medical malpractice suits are still being prosecuted.⁵ The validity of civil litigation legislation is analyzed under other constitutional provisions such as the equal protection, due process, special legislation, privileges or immunities, or right to a jury clauses or the separation of powers doctrine.⁶

Thirty-nine other states (including Oregon and Indiana) have constitutional provisions that in some fashion purport to require a remedy for every wrong. Schuman, at 1201 & n.25; 1 J. Friesen, STATE CONSTITUTIONAL LAW § 6.02[1], at 6-3 & n.10 (4th ed. 2006); *see also* W. Koch, *Reopening Tennessee’s Open Courts Clause*, 27 U. MEM. L. REV. 333, 434 & n.591 (Winter 1997) (not listing Washington as having an open

⁵ *See, e.g., Wilkins v. Marshalltown Med. & Surgical Center*, 758 N.W.2d 232 (Iowa 2008); *Estate of Maxey v. Darden*, 187 P.3d 144 (Nev. 2008); *Maestas v. Zager*, 141 N.M. 154, 152 P.3d 141 (2007); *Mayfield-Brown v. Sayegh*, 276 Va. 555, 667 S.E.2d 785 (2008); *Garibay v. Hemmat*, 161 Cal. App. 4th 735, 74 Cal. Rptr. 3d 715 (2008); *Alves v. Rosenberg*, 400 N.J. Super. 553, 948 A.2d 701 (2008).

⁶ *See, e.g., Wilkins v. Marshalltown Med. & Surgical Ctr.*, 758 N.W.2d 232 (Iowa 2008); *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776 (Iowa 1989); *Estate of Maxey v. Darden*, 187 P.3d 144 (Nev. 2008); *Borger v. Eighth Jud. Dist. Ct.*, 120 Nev. 1021, 102 P.3d 600 (2004); *Maestas v. Zager*, 141 N.M. 154, 152 P.3d 141 (2007); *Garcia v. LaFarge*, 119 N.M. 532, 893 P.2d 428 (1995); *Mayfield-Brown v. Sayegh*, 276 Va. 555, 667 S.E.2d 785 (2008); *Willis v. Mullett*, 263 Va. 653, 561 S.E.2d 705 (2002); *Garibay v. Hemmat*, 161 Cal. App. 4th 735, 74 Cal. Rptr. 3d 715 (2008); *Arredondo v. Regents*, 131 Cal. App. 4th 614, 31 Cal. Rptr. 3d 800 (2005); *Bartlett v. North Ottawa Comm. Hosp.*, 244 Mich. App. 685, 625 N.W.2d 470 (2001); *Alves v. Rosenberg*, 400 N.J. Super. 553, 948 A.2d 701 (2008); *Sisario v. Amsterdam Mem. Hosp.*, 159 A.D.2d 843, 552 N.Y.S.2d 989 (1990).

courts or right to remedy provision). A list of these states with their provisions is in Appendix B hereto (emphasis added).

Of these, 36 provide that “every person”, “all persons”, “every man”, or “every subject” “shall” have, is, or are “entitled to” a “remedy” or “redress” or that a “remedy” be afforded for “every injury.”⁷ GA. CONST. art. I, § 1, para. XII says, “No person shall be deprived of the right to prosecute or defend . . . that person’s own cause in any of the courts of this state.” WYO. CONST. art. I, § 8 requires that “every person for an injury done to person, reputation or property shall have justice administered without . . . denial” ARIZ. CONST. art. 18, § 6, states, “The right of action to recover damages for injuries shall never be abrogated.”

Some provisions are very long. For example, part I, article XI of the Massachusetts Constitution provides:

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or

⁷ See ALA. CONST. § art. I, § 13; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. Bill of Rights § 18; KY. CONST. Bill of Rights § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. Decl. of Rights, art. 19; MASS. CONST. pt. 1, art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. 1, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art I § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; W. VA. CONST. art. III, § 17; WIS. CONST. art. III, § 9.

wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obligated to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Others are very short. For example, section 18 of the Kansas Constitution's bill of rights provides that "[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

Most, if not all, of these remedy clauses were enacted before the Washington Constitution. Thus, the Washington drafters must have been aware of such provisions and how they could be drafted. Yet they elected to not include any sort of remedy clause in section 10.

This Court has accurately recognized that other states' remedy clauses have no counterpart in Washington. *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615, *adhered to on reh'g en banc*, 186 Wash. 700 (1936), explained:

[I]n so far as any constitutional question is involved in this case, the Oregon, Delaware, and Kentucky cases do not establish a controlling precedent, because *in each of those states the constitution contained a provision which was, in effect, a limitation upon the power of the legislature to abolish rights of action for injury to person, property, or reputation*. In Oregon and Delaware, it is specifically declared in the bill of rights, and, in Kentucky, elsewhere in the constitution, that there shall be a remedy at law for injury done to person, property or reputation. . . . [W]e may

say that the Connecticut constitution contains a similar provision

In this state, the constitution contains no such provision, but only the general “due process” and “equal protection” clauses.

Id. at 160-61 (boldface italics added; original emphasis omitted). While not mentioning section 10, this Court correctly recognized the Constitution does not contain a right to a remedy.

Significantly, only Arizona has a constitutional provision identical to section 10. ARIZ. CONST. art. 2, § 11. But Arizona has other constitutional provisions expressly dealing with civil remedies.⁸ The Arizona Supreme Court has explained Arizona’s “section 10” provision:

Democracy blooms where the public is informed and stagnates where secrecy prevails. Only in a case where there is a clear, present threat to the due administration of justice or one which appeals primarily to the morbid and prurient should the right of the public to observe a court proceeding be denied.

Phoenix Newspapers Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563, 567 (1971).

Even one of WSAJF’s cited authorities recognizes that Arizona and Washington’s identical provisions are different from other states’.

⁸ ARIZ. CONST. art. 2, § 31, prohibits laws “limiting the amount of damages to be recovered for causing” anyone’s death or injury. ARIZ. CONST. art. 18, § 6, provides: “The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.”

After noting that one type of “right to remedy” or “access to the courts” provision includes both an open court and right to remedy guarantee while another type refers only to a right to a remedy, the authority then explains:

Two late-entering states, Washington and Arizona, have a derivative but *significantly different* version, suggesting a purely a procedural right: “Justice in all cases shall be administered openly and without unnecessary delay.”

1 J. Friesen, STATE CONSTITUTIONAL LAW § 6.02[1], at 6-4-6-5 & n.11 (4th ed. 2006) (emphasis added). WSAJF erroneously cites to Friesen’s discussion of other states’ constitutions as if it applied to Washington’s even though WSAJF acknowledges Friesen says Washington is different. (WSAJF Amicus Brief 17 n.14)

That the Washington Constitution does not contain a right to a remedy clause does not mean the Legislature is unfettered. Although RCW 7.70.150 does not violate any of them, other constitutional provisions, including, but not limited to those identified in the parties’ briefs, may be relevant whenever courts review a Washington statute dealing with civil litigation. *See, e.g., Shea*, 185 Wash. at 160-61 (due process, equal protection); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989) (right to jury trial).

If the framers of the Washington Constitution had wanted a remedy provision, they knew how to draft one. The 1878 version of the

constitution contained one. The drafters knew the Oregon and Indiana Constitutions and probably the constitutions of other states included such provisions. *At the 1889 constitutional convention, a right to remedy provision was proposed but rejected.*

These circumstances make it inconceivable that by rejecting such a provision, the drafters of the constitution intended that one be inferred.

C. *SOFIE* AND OTHER WASHINGTON CASES DO NOT APPLY.

Although amicus acknowledges that section 10's history suggests it does not contain a remedy guarantee, amicus says that case law, especially *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989), compels a different result. (WSAJF Amicus Brief 17 n.14) Wrong. This Court will not write into section 10 the language its drafters rejected. *See generally Staples v. Benton County*, 151 Wn.2d 460, 467, 89 P.3d 706 (2004) (since state constitution framers did not specify county office location, no constitutionally required location).

In any event, *Sofie* does not apply. The challenged statute there did not seek to ensure that a plaintiff's claim was meritorious. Instead, it precluded a plaintiff *with a demonstrably meritorious claim* from recovering more noneconomic damages than the statute allowed, reducing a \$1,154,592 verdict to \$125,136. The statute violated Washington

Constitution art. I, § 21, the jury trial guarantee, because it “directly change[d] the outcome of a jury determination.” 112 Wn.2d at 653.

Neither amicus nor plaintiff claims section 21 applies here. See Corrected Opening Brief of Appellant 3; WSAJF Amicus Brief 3. In fact, *Sofie* acknowledged, “The Legislature has power to shape litigation” so long as it does not encroach upon constitutional protections. 112 Wn.2d at 651. Since section 10 does not guarantee a remedy, *Sofie* does not apply. The “independent constitutional foundation” *Sofie* referred to is, if not the police power, equal protection or possibly due process. *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 449 n.4, 932 P.2d 628 (1997); see *Mountain Timber Co. v. State of Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *New York Central Railroad Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917).

WSAJF stretches its cited cases beyond recognition when it claims they support its section 10 remedy argument. Indeed, *Wyman v. Wallace*, 94 Wn.2d 99, 100-02, 615 P.2d 452 (1980), and *Stanard v. Bolin*, 88 Wn.2d 614, 565 P.2d 94 (1977), recognize that common law actions or remedies can be abolished. *McCarthy v. Department of Social & Health Services*, 110 Wn.2d 812, 759 P.2d 351 (1988), and *Haddenham v. State*, 87 Wn.2d 145, 550 P.2d 9 (1976), discuss statutory abolition of a cause of

action. No one has abolished the RCW ch. 7.70 medical malpractice cause of action.⁹

D. *KLUGER* SHOULD NOT BE ADOPTED.

Because section 10 does not guarantee a remedy, this Court need go no further vis-a-vis WSAJF's amicus brief. But even if section 10 were somehow read otherwise, WSAJF's claim that *Kluger v. White*, 281 So.2d 1 (Fla. 1973), should be followed should be rejected.

Kluger held that if the Florida Legislature abolished a right of action preexisting the state's declaration of rights, a reasonable alternative for redress was required, absent overpowering public necessity to abolish the right with no alternative. *Kluger* applies only if a statute "has abolished or totally eliminated a previously recognized cause of action." *Amorin v. Gordon*, 996 So.2d 913, 917 (Fla. Dist. App. 2008); *Jetton v. Jacksonville Electric Authority*, 399 So.2d 396, 398 (Fla. Dist. App. 1981), *rev. denied*, 411 So.2d 383 (Fla. 1981). It does not apply if a statute limits but does not destroy a cause of action. *Amorin*, 996 So.2d at 917-18; *Jetton*, 399 So.2d at 398. If compliance with the statute preserves

⁹ Indeed, *Haddenham* declared that "a tort cause of action is not vested until it is reduced to judgment," a statement that contradicts amicus' position. 87 Wn.2d at 149.

access to the court, the *Kluger* test is met. See *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So.2d 1090, 1097 (Fla. 2005).

RCW 7.70.150 does not abolish or completely eliminate a right of action. A plaintiff may avoid dismissal under RCW 7.70.150 by timely filing a certificate of merit. For good cause shown, the time for filing can be extended up to 90 days. RCW 7.70.150(4).

WSAJF's attempt to analogize to the workers' compensation statute fails because RCW tit. 51 actually abolishes a cause of action—employees cannot sue employers for job-related injuries. And the workers' compensation statute's quid pro quo is based on equal protection or possibly due process principles. *Manor*, 131 Wn.2d at 449 n.4.

Kluger has been sharply criticized as converting courts into “super legislatures.” Wang, 64 WASH. L. REV. at 220. One of WSAJF's cited authorities advocates construing remedy clauses to apply *only* when the legislature seeks “to deny *all* recovery for a well-recognized action that implicate[s] absolute rights.” T. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U.L. REV. 1309, 1345 (Oct. 2003) (emphasis added).

Even if *Kluger* were adopted, amicus' claim that RCW 7.70.160 sufficiently addresses the Legislature's concerns is inaccurate. That statute says a court “may impose” sanctions for a frivolous claim. “May” is not mandatory. *National Electrical Contractors Association v.*

Riveland, 138 Wn.2d 9, 28, 978 P.2d 481 (1999). RCW 7.70.150 is. The Legislature could reasonably decide that RCW 7.70.160 alone was insufficient to discourage meritless malpractice suits.

II. CONCLUSION

Section 10 has no language guaranteeing a remedy or redress. Its drafters knew other states' constitutions, including neighboring Oregon's, had such language. They knew the constitution approved by Washington voters in 1878 had such language. They were presented with such language as a proposed revision. Yet they rejected it.

“Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” *Cerillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)). Constitutions are entitled to at least as much deference, particularly where, as here, the framers rejected the language amicus claims should be inferred.

Section 10 requires that justice be administered openly and without delay. Nothing more, nothing less.

DATED this 13th day of February, 2009.

REED McCLURE

By *Pamela A. Okano*

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CONSTITUTION of the State of Washington

PREAMBLE.

We, the people, grateful to the Supreme Ruler of the Universe for our freedom, in order to secure and perpetuate its blessings, form a more independent and perfect government, establish justice, insure tranquility, provide for the common defence and promote the general welfare, do ordain and establish this Constitution for the State of Washington.

Article I. Boundaries,

The Boundaries of the State of Washington shall be as follows:-

Commencing one marine league west from the mouth of the middle of the north ship channel of the Columbia river; thence along the northern boundary of the State of Oregon, up said river to where the forty-sixth parallel of north latitude intersects the same near the mouth of the Walla Walla river; thence east, along said parallel to where it intersects the middle of the main channel of Snake river; thence southerly, along said channel of Snake river to where it intersects the forty-fifth parallel of north latitude; thence east, along said parallel, to where it intersects the meridian thirty-seven degrees and thirty minutes west; thence north along said meridian, to where it intersects the crest of the Bitter Root range of mountains, thence north-westerly, along the crest of said mountains, to where it intersects the thirty-ninth meridian west; thence north, along said meridian to the boundary line of the British Possessions; thence westerly, along the line of the British Possessions to a point one marine league west from the mouth of the middle of the channel of the Straits of Juan de Fuca; thence southerly, at a distance of one marine league west from the east shore of the Pacific Ocean, to the place of beginning.

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against the abuse of the elective franchise, and shall for that purpose have power to pass laws of registration.

Article V. Declaration of Rights.

Section 1. All political power is inherent in the people, and all free governments are founded on their authority.

Sec. 2. The people of this state have the sole right to alter or abolish their constitution and form of government, whenever they deem it necessary to their safety and happiness; provided, such change be not repugnant to the constitution of the United States.

Sec. 3. All persons are by nature free, and equal, entitled to certain natural rights; among which are, those of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining happiness. To secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Sec. 4. All persons have a natural and inalienable right to worship God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship, against his consent; and no preference shall be given by law to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office; nor shall any person be incompetent to be a witness on account of his opinions on matters of religion; but nothing herein shall be construed to dispense with oaths or affirmations; but the liberty of conscience hereby secured shall not be construed so as to excuse acts of licentiousness or practices inconsistent with the peace or safety of the state.

Sec. 5. No person shall be deprived of life, liberty or property, without due process of law, or be denied the equal protection of the law.

Sec. 6. No person, on account of sex, shall be disqualified to enter upon and pursue any of the lawful business avocations or professions of life.

Sec. 7. Every person may freely speak, write and publish his opinions on all subjects, being responsible for the abuse of that liberty; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions for libel, the truth

may be given in evidence to the jury, and if it appears that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party accused shall be acquitted; and the jury shall have the right to determine the law and the fact.

Sec 8. No person shall be held to answer for a criminal offense without due process of law, and no person, for the same offense shall be put twice in jeopardy of punishment, nor again be put upon trial for the same offense after having been once acquitted by a jury, nor shall be compelled, in any criminal cause, to be a witness against himself. All persons shall, before conviction, be bailable by sufficient sureties, except for murder in the first degree and treason, where the proof is evident or the presumption great, and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require. The right of trial by jury of twelve persons shall remain inviolate in all criminal cases. A jury in civil causes, in all Courts, may consist of less than twelve persons, as may be prescribed by law; and the concurrence of three fourths of the whole number of the jury shall be sufficient for a verdict; provided, that the right may be waived by the parties, in such manner as may be provided by law. Hereafter a grand jury shall consist of seven persons, any five of whom, concurring, may find an indictment; provided, the legislature may change, regulate, abolish or re-establish the grand jury system.

Sec 9. Every person in the state shall be entitled to a certain remedy in the law, for all wrongs and injuries which he may receive in his person, character or property; justice shall be administered to all, freely, and without purchase, completely, and without denial; promptly and without delay; and all Courts shall be open to the public.

Sec 10. The right of the people to be secure in their persons, papers, houses and effects,

OTHER STATES' RIGHT TO REMEDY CLAUSES

1. ALA. CONST. art. I, § 13: That all courts shall be open; and that *every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy* by due process of law; and right and justice shall be administered *without sale, denial, or delay*.
2. ARIZ. CONST. art. 18, § 6: *The right of action to recover damages for injuries shall never be abrogated*, and the amount recovered shall not be subject to any statutory limitation.
3. ARK. CONST. art. II, § 13: *Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character*; he ought to obtain justice freely, and without purchase; completely, and *without denial*; promptly and without delay; conformably to the laws.
4. COLO. CONST. art. II, § 6: Courts of justice shall be open to every person, and *a speedy remedy afforded for every injury to person, property or character*; and right and justice should be administered *without sale, denial or delay*.
5. CONN. CONST. art. I, § 10: All courts shall be open, and *every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law*, and right and justice administered *without sale, denial or delay*.
6. DEL. CONST. art. I, § 9: All courts shall be open; and *every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law*, and justice administered according to the very right of the cause and the law of the land, *without sale, denial, or unreasonable delay or expense*. Suits may be brought against the State, according to such regulations as shall be made by law.
7. FLA. CONST. art. I, § 21: The courts shall be open to *every person for redress of any injury*, and justice shall be administered *without sale, denial or delay*.
8. GA. CONST. art. I, § 1, para. XII: *No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause* in any of the courts of this state.
9. IDAHO CONST. art. I, § 18: Courts of justice shall be open to every person, and *a speedy remedy afforded for every injury* of person, property or character, and right and justice shall be administered *without sale, denial, delay, or prejudice*.
10. ILL. CONST. art. I, § 12: *Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives* to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.
11. IND. CONST. art. I, § 12: All courts shall be open; and *every person, 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.
12. KAN. CONST. Bill of Rights § 18: *All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law*, and justice administered without delay.

13. KY. CONST. Bill of Rights § 14: All courts shall be open, and *every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law*, and right and justice administered *without sale, denial* or delay.
14. LA. CONST. art. I, § 22: All courts shall be open, and *every person shall have an adequate remedy by due process of law* and justice, administered *without denial*, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.
15. ME. CONST. art. I, § 19: *Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law*; and right and justice shall be administered freely and without sale, completely and *without denial*, promptly and without delay.
16. MD. CONST. Decl. of Rights, art. 19: That *every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land*, and ought to have justice and right, freely without sale, fully *without any denial*, and speedily without delay, according to the Law of the Land.
17. MASS. CONST. pt. I, art. XI: *Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive* in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and *without any denial*; promptly, and without delay; conformably to the laws.
18. MINN. CONST. art. I, § 8: *Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive* to his person, property or character, and to obtain justice freely and without purchase, completely and *without denial*, promptly and without delay, conformable to the laws.
19. MISS. CONST. art. III, § 24: All courts shall be open; and *every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law*, and right and justice shall be administered *without sale, denial*, or delay.
20. MO. CONST. art. I, § 14: That the courts of justice shall be open to every person, and *certain remedy afforded for every injury to person, property or character*, and that right and justice shall be administered *without sale, denial* or delay.
21. MONT. CONST. art. II, § 16: Courts of justice shall be open to every person, and *speedy remedy afforded for every injury* of person, property, or character. *No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable* except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered *without sale, denial*, or delay.
22. NEB. CONST. art. I, § 13: All courts shall be open, and *every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law* and justice administered *without denial* or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract.
23. N.H. CONST. pt. I, art. 14: *Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries* he may receive in his person, property, or character;

to obtain right and justice freely, without being obliged to purchase it; completely, and *without any denial*; promptly, and without delay; conformably to the laws.

24. N.C. CONST. art. I, § 18: All courts shall be open; *every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law*; and right and justice shall be administered *without* favor, *denial*, or delay.

25. N.D. CONST. art. I, § 9: All courts shall be open, and *every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law*, and right and justice administered *without* sale, *denial* or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

26. OHIO CONST. art. I, § 16: All courts shall be open, and *every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law*, and shall have justice administered *without denial* or delay.

27. OKLA. CONST. art. II, § 6: The courts of justice of the State shall be open to every person, and *speedy and certain remedy afforded for every wrong and for every injury* to person, property, or reputation; and right and justice shall be administered *without* sale, *denial*, delay, or prejudice.

28. OR. CONST. art. I, § 10: No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and *every man shall have remedy by due course of law for injury done him in his person, property, or reputation*.

29. PA. CONST. art. I, § 11: All courts shall be open; and *every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law*, and right and justice administered *without* sale, *denial* or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

30. R.I. CONST. art. I, § 5: *Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs* which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and *without denial*; promptly and without delay; conformably to the laws.

31. S.C. CONST. art. I, § 9: All courts shall be public, and *every person shall have speedy remedy therein for wrongs sustained*.

32. S.D. CONST. art. VI, § 20: All courts shall be open, and *every man for an injury done him in his property, person or reputation, shall have remedy by due course of law*, and right and justice, administered *without denial* or delay.

33. TENN. CONST. art. I, § 17: That all courts shall be open; and *every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law*, and right and justice administered *without* sale, *denial*, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

34. TEX. CONST. art. I, § 13: Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and *every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law*.

35. UTAH CONST. art. I, § 11: All courts shall be open, and *every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law*, which shall be administered *without denial* or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

36. VT. CONST. ch. I, art. 4: *Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs* which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and *without any denial*; promptly and without delay; conformably to the laws.

37. W. VA. CONST. art. III, § 17: The courts of this state shall be open, and *every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law*; and justice shall be administered *without sale, denial* or delay.

38. WIS. CONST. art. I, § 9: *Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive* in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and *without denial*, promptly and without delay, conformably to the laws.

39. WYO. CONST. art. I, § 8: All courts shall be open and *every person for an injury done to person, reputation or property shall have justice administered without sale, denial* or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.