

No. 80888-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BY ROBERT D. CARPENTER

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KIMME PUTMAN,

Plaintiff/Appellant,

vs.

WENATCHEE VALLEY MEDICAL CENTER, P.S., a Washington  
professional services corporation; 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/Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION  
FOR JUSTICE FOUNDATION

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On Behalf of  
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For Justice Foundation

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

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

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

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

This appeal involves a constitutional challenge to the validity of RCW 7.70.150, the medical malpractice certificate of merit statute. The underlying facts are drawn from the briefing of the parties, and the superior court letter opinion and order of dismissal. See Putman Corrected Br. at 1-5; Wenatchee Valley Br. at 1-2; Putman Reply Br. at 1; superior court July 20, 2007 letter opinion, as corrected September 27, 2007 (CP 52-64); Order Regarding Defendants' Motion to Dismiss Claim of Wenatchee Valley Medical Center and Dr. Kelley (CP 366-69).

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<sup>1</sup> WSAJ Foundation has applied to the Washington Secretary of State to register this name change, and the application is pending at this time.

For purposes of this amicus curiae brief, the following facts are relevant: Kimme Putman (Putman) brought this medical malpractice action against Wenatchee Valley Medical Center, P.S. (Wenatchee Valley) for negligent failure to timely diagnose her ovarian cancer. Putman contends Wenatchee Valley is vicariously liable for the acts or omissions of certain of its employees or agents.

Wenatchee Valley moved to dismiss the action because Putman did not file a certificate of merit under RCW 7.70.150, as to certain employees or agents whose alleged negligent acts or omissions formed the basis for its vicarious liability. Putman opposed the motion to dismiss, contending that RCW 7.70.150 is unconstitutional under the U.S. Constitution and Washington Constitution. The federal constitutional challenge was based upon violation of equal protection and due process, and state constitutional challenges included violation of the doctrine of separation of powers, Washington Constitution Art. I §3 (due process), Art. I §10 (open courts), Art. I §12 (privileges or immunities), and Art. II §28 (special legislation).

The superior court concluded that a certificate of merit is required as to any health care provider's conduct that forms the basis for the vicarious liability claim against Wenatchee Valley, and that, in the absence of any such certificate, the claim against Wenatchee Valley must be dismissed. See CP 58. The court also rejected all constitutional challenges to RCW 7.70.150. See CP 59-64.

Putman appealed, preserving all constitutional claims for review.

See Putman Corrected Br. at 2-3. This Court accepted direct review.

### III. ISSUE PRESENTED

Does Washington Constitution, Art. I §10 limit the Legislature's power to extinguish or substantially impair a civil remedy of a type existing at the time the constitution was adopted?

### IV. SUMMARY OF ARGUMENT

Washington Constitution, Art. I §10, the "open courts" provision, is a declaration of first principles that preserves citizens' entitlement to both access to courts and the right to a remedy. This Court has already explicated the access to courts prong of Art. I §10, and imposed a compelling interest test for preserving rights protected thereunder. See Rufer v. Abbot Labs. While the Court acknowledged the right to a remedy prong in dicta in In re Marriage of King, it has yet to apply this prong or establish the test for determining when rights protected thereunder are abridged. This case presents the occasion to do so.

Washington case law, particularly Sofie v. Fibreboard Corp., supports the view that Art. I §10 limits the Legislature's power to extinguish or substantially impair a civil remedy of a type existing at common law at the time the constitution was adopted. In furtherance of preserving remedies subject to Art. I §10, the Court should hold that the Legislature cannot extinguish or substantially burden such a remedy unless it is replaced with an adequate substitute remedy (quid pro quo) or

an overwhelming public necessity exists for doing so, and no alternative method of meeting the public necessity can be shown.

## V. ARGUMENT

### *Introduction*

The certificate of merit statute provides in pertinent part:

(1) In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. (...)

(2) A certificate of merit must be executed by a health care provider who meets the qualifications of an expert in the action. (...)

RCW 7.70.150.<sup>2</sup> The failure to comply with the certificate of merit requirement may result in dismissal of the action, as occurred in this case.

See RCW 7.70.150(5)(a).

This brief addresses only one of the constitutional challenges raised by Putman for invalidating RCW 7.70.150, that based upon Washington Constitution Art. I §10, the “open courts” provision.<sup>3</sup>

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<sup>2</sup> The full text of the current version of this statute is reproduced in the Appendix to this brief. This provision was adopted as part of a comprehensive act on health care liability reform. See 2006 Laws Ch. 8 §304. The act also includes a provision prohibiting the filing of frivolous claims, and allows for sanctions against a party and/or their legal representative for violation thereof. See 2006 Laws Ch. 8 §316 (codified as RCW 7.70.160). The full text of the current version of RCW 7.70.160 is also reproduced in the Appendix.

<sup>3</sup> See In Re Marriage of King, 162 Wn.2d 378, 388, 174 P.3d 659 (2007). This type of provision is also referred to as an “open access” or “right to a remedy” provision. See generally Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims and Defenses, at §6.02[2] (Lexis Nexis 2006 ed.); William C. Koch, Jr., Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, §17 of the Tennessee Constitution, 27 U. Mem. L. Rev. 333, 367 (1997); Thomas R. Phillips, The Constitutional Right to a Remedy, 78 NYU L. Rev. 1309, 1317 & n.8 (2003); Janice Sue Wang, Comment, State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies, 64 Wash. L. Rev. 203, n.1 (1989).

Art. I §10 provides: “Justice in all cases shall be administered openly, and without unnecessary delay.” The parties take strikingly different views of the meaning and intent of this provision. Putman contends that it provides a right to a remedy, and that this right is fundamental in nature. See Putman Corrected Br. at 14-18. She argues this entitlement is abridged here because RCW 7.70.150 poses an unreasonable proof requirement on medical malpractice plaintiffs at the inception of litigation, and that the requirement also imposes a substantial and unjustified financial burden. Id. at 18-23, 26.

Wenatchee Valley argues that Art. I §10 only protects the right of the public and press to access court proceedings and files, and does not guarantee plaintiffs a remedy for civil wrongs. See Wenatchee Valley Br. at 14-18. Wenatchee Valley portrays Putman as seeking an “absolute right” under this constitutional provision, contending that, at most, any guarantee regarding remedies is subject to reasonable limitations imposed by the Legislature. Id. at 17. Wenatchee Valley also challenges whether Putman has demonstrated that the certificate of merit requirement is unreasonable and that it places an undue financial burden on medical malpractice plaintiffs. See id. at 7, 18-28.

This case presents the Court with a clear opportunity to delineate the extent to which Art. I §10 limits the Legislature’s power to extinguish or substantially impair civil remedies, and to explain how this constitutional right is to be enforced.

**A. General Overview Of State Constitutional Law Principles, And “Open Courts” Jurisprudence.**

Only in the last generation or so has there been any sustained focus by courts and commentators on state constitution open courts provisions. See Phillips, 78 NYU L. Rev. at 1311-13. This recent attention parallels the rise of state constitutional analysis generally, following Justice Brennan’s call to reinvigorate state constitutionalism. See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977);<sup>4</sup> Koch, 27 U. of Mem. L. Rev. at 335-37; State v. Hunt, 450 A.2d 952 (N.J. 1982) (concurring opinions involving extended discussion on state constitutional analysis); State v. Gunwall, 106 Wn.2d 54, 59-63, 720 P.2d 808 (1986) (landmark opinion, establishing criteria for when state constitutional analysis appropriate).

Article I §10 is one of as many as 40 state open court provisions. See Phillips at 1310 & n.6; see also Friesen, §6.07[1] at 6-62, and Appendix 6 (listing 39 states, including Washington, with an open courts provision); Koch at 434 & n.591 (listing 37 states, not including Washington); Wang at 203-04 & n.4 (listing 35 states not counting Washington, but advocating that Art. I §10 be recognized as providing a remedy guarantee).<sup>5</sup> The texts of these provisions vary considerably,

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<sup>4</sup> Justice Brennan served on the New Jersey Supreme Court from 1952 to 1956.

<sup>5</sup> There is no parallel open courts provision in the U.S. Constitution, and the United States Supreme Court has declined to find a remedy guarantee in the federal due process clause. See Charles K. Wiggins, Bryan P. Harnetiaux, and Robert H. Whaley, Washington’s 1986 Tort Legislation and the State Constitution: Testing the Limits, 22 Goz. L. Rev. 193, 212-14 (1986/87); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) (upholding constitutionality under federal due process clause of federal act limiting aggregate liability for a nuclear incident).

although it is generally understood that they are traceable to the Magna Carta, with contributions from Lord Coke and Blackstone. See Phillips, at 1319-23; Koch at 364-66; Wiggins at 217; Putman Corrected Br. at 15-18. The texts of most of these provisions focus on access to court, and many also contain explicit language regarding a remedy guarantee of some kind. See Friesen, §6.02[2], and Appendix 6. For example, the Oregon Constitution open courts provision provides: “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.” Oregon Constitution, Art. I §10.<sup>6</sup> The Florida Constitution, Art. I §21 is less explicit: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”

These open court provisions are often found in state constitution articles setting forth a Declaration of Rights. See Phillips at 1309-10; Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, at 15-16 (Greenwood Press 2002). They are generally viewed as statements of first principles, philosophical in nature, and pose unique interpretive challenges because they do not resemble statutes setting forth positivist statements of law. See generally Vreeland v. Byrne, 378 A.2d 825, 831-32 (N.J. 1977) (discussing the difference between state constitutional provisions that are broad philosophical

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<sup>6</sup> The Oregon Constitution was a resource for the framers of the Washington Constitution. See Wang, 64 Wash. L. Rev. at 215-16.

pronouncements, rather than those of a less exalted quality, resembling statutes, that require “entirely different treatment”); see also Lebbeus J. Knapp, The Origin of the Constitution of the State of Washington, 4 Wash. Hist. Q. 227, 233 (1913) (discussing nature of state constitution declarations, including Washington).

Interpretation of open court provisions often centers on the question whether the provision is only designed to provide access to courts, or whether it contains additional protection ensuring an entitlement to certain civil remedies. See generally Phillips at 1319-43; Friesen, §6.02[3]. Some courts have only attributed an access component to their state constitution’s open courts provision; others have found protections for both access to court and civil remedies. See Friesen, §§6.02[2], [3]; 6.07.<sup>7</sup>

In determining whether a state’s open courts provision has a right to a remedy component, the question is whether that provision places a limit on the legislature’s plenary power by restricting it from abolishing or substantially burdening certain civil remedies. See generally Friesen, §6.02[3]. Some courts have read their state constitutional provision to provide a remedy guarantee and imposed rigorous substantive protections against extinguishing or impairing certain remedies, particularly those of a

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<sup>7</sup> This Court has already examined and explained the “open access” component to Art. I §10. See Rufer v. Abbott Labs., 154 Wn.2d 530, 540-51, 114 P.3d 1182 (2005) (recognizing Art. I §10 protects open access to court proceedings, and requiring compelling reasons for overriding this entitlement). As will be seen, the Court has recognized in dicta that Art. I §10 also has a right to a remedy component, but has yet to define the parameters of this component. See infra, §B.

type that existed at common law at the time the constitution was adopted. See generally Phillips at 1335-37. These courts have limited the legislature's ability to substantially alter the common law by requiring that the legislature provide either an adequate substitute remedy or a reasonable, if not compelling, justification for altering the particular remedy. See Wiggins at 201-02, 220 & n.162. Yet other courts have found that the particular open courts provision simply does not contain a limitation on legislation abolishing or impairing traditional common law rights. See Phillips at 1338.<sup>8</sup>

It is generally understood that there is no uniform interpretation of open courts provisions, and that each state's provision must be assessed in light of its own unique constitutional culture. See Koch at 342-48. However, there is a general understanding regarding the proper interpretive approach to state constitutional provisions, including open courts provisions. It is acknowledged that state constitutions are manifestly different than the federal constitution, in that they are intended to serve as a limitation on the plenary powers of government, rather than a grant of limited powers. See Tarr, Understanding State Constitutions, 65 Temple L. Rev. 1169, 1179-81 (1992). At the same time, state constitutions are viewed as preserving common law principles existing at

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<sup>8</sup> There is no assurance the mere fact that a particular state constitution has an explicit remedy guarantee will result in that provision being interpreted as providing heightened protections for longstanding common law rights. See Koch at 415-26, 450-51 (recounting uneven course of Tennessee jurisprudence regarding different formulations of its open court provisions, and criticizing judicial erosion of remedy guarantee); Smothers v. Gresham Transfer, 23 P.3d 333 (Or. 2001) (reversing fifty-plus years of

the time the constitution was adopted, regardless of the absence of language in the document to this effect. This Court recognized this principle in State ex rel. Macri v. Bremerton, 8 Wn.2d 93, 109, 111 Pac. 612 (1941):

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

Id., 8 Wn.2d at 109 (quoting Harrigan v. Gilchrist, 99 N.W. 909 (Wis. 1904), in turn quoting Weimer v. Bunbury, 30 Mich. 201, 214 (1874) (Cooley, J.)).<sup>9</sup>

There is also general agreement regarding the principles of construction that should attend interpretation of constitutional provisions that are statements of first principles. As Judge Koch suggests:

The best interpretation is that which achieves the greatest harmony among the constitutional text, judicial precedents, historical events, moral intuitions, and principled arguments. Courts cannot be arbitrary and must approach their work in a principled way that takes into account the constitutional text itself and the history, structure and underlying values of the entire document. They must also make a full explanation of their resolution of constitutional issues.

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precedent reading Oregon's express right to a remedy provision as not providing substantive protections, and returning to early precedent recognizing such protections).

<sup>9</sup> Washington Constitution, Art. I §1 provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to *protect and maintain individual rights*." (Emphasis added) This provision, along with other declaratory provisions found in Art. I of the Washington Constitution, is "mandatory, unless by express words ... declared to be otherwise." Washington Constitution, Art. I §29.

27 U. of Mem. L. Rev. at 344 (footnotes omitted); see also Gunwall, 106 Wn.2d at 59-60 (recognizing need for a principled approach to state constitutional analysis).

Against this background, the Court must examine the nature of Washington's open courts provision, Art. I §10, and articulate the test necessary to protect rights thereunder.

**B. The Washington Constitution "Open Courts" Provision, Art. I §10, Limits The Legislature's Power To Extinguish Or Substantially Impair Civil Remedies Of A Type Existing At The Time The Constitution Was Adopted.**

Until recently, this Court has said very little about Art. I §10 or whether Washington has a constitutionally-based right to a remedy that serves to limit the Legislature's power to extinguish or substantially impair certain civil remedies. For the most part, what it has said has been inconclusive. For example, in Shea v. Olson, 185 Wash. 143, 161, 53 Pac. 615 (1936), in upholding the constitutionality of an automobile host-guest statute, the Court stated that there is "no express positive mandate of the Constitution which preserves...rights of action from abolition by the legislature." However, Shea did not examine Art. I §10, or whether it implicitly guaranteed certain remedies. See 185 Wash. at 156.

The Court has also remarked on different occasions that there is no vested right in an existing law which precludes amendment or repeal. See e.g. Seattle-First v. Shoreline Concrete, 91 Wn.2d 230, 244, 588 P.2d 1308 (1978) (upholding restrictions on third-party actions against employers); Haddenham v. State, 87 Wn.2d 145, 550 P.2d 9 (1976)

(upholding abrogation of tort claim against state not cognizable at the time the Washington Constitution was adopted). It is difficult to detect whether the no vested right principle was intended to be as sweeping as it sounds when the Court engaged in no Art. I §10 analysis.

On other occasions, the Court has acknowledged that whether Art. I §10 has a remedy component is unresolved and declined to reach the issue. See John Doe v. Blood Center, 117 Wn.2d 772, 781, 819 P.2d 370 (1991) (declining to address whether Art. I §10 limits the abrogation or diminishment of a common law right, while recognizing this issue remains unresolved); Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 144 Wn.2d 570, 581-82, 29 P.3d 1249 (2001) (stating “we decline at this time to determine whether a right to a remedy is contained in article I §10 of the state constitution”)<sup>10</sup>; see also DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 960 P.2d 919 (1998) (acknowledging Art. I §10 issue before the Court, but resolving the case on other grounds).

Despite the uncertainty reflected in the case law, this Court recently stated in dicta in In Re Marriage of King, 162 Wn.2d 378, 174 P.3d 659 (2007), that Art. I §10 has a right to a remedy component. King involved the question of whether a party in a dissolution proceeding is

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<sup>10</sup> Lakeview Blvd. is confusing because of other language in the opinion suggesting the Court is required to defer to legislative enactments so long as they involve the public interest and are not arbitrary or discriminatory. See 144 Wn.2d at 582. At the end of the opinion, the Court concludes:

Because the legislature may alter or restrict a common law right without foreclosing that right, we decline to determine whether a right to a remedy is implied by the language of article I section 10 of the state constitution.

constitutionally entitled to publicly-funded legal counsel under Art. I §10.

In the course of the majority opinion, the Court stated:

We turn first to Miss King's argument that she is entitled to appointed counsel under article I, section 10. We have generally applied the open courts clause in one of two contexts: "the right of the public and press to be present and gather information at trial *and the right to a remedy for a wrong suffered.*" Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, 24 (2002)... .

162 Wn.2d at 388 (emphasis added; other citations omitted).<sup>11</sup> Neither this Court nor the quoted authority explain the nature and extent of this right to a remedy, nor reference legal authorities supporting this statement.

Nonetheless, such authorities do exist, although in many instances the discussion is not framed in express constitutional terms. That a remedy component may be implicit in Art. I §10 is suggested in decisions of this Court approving abolition of common law claims existing at the time the state constitution was adopted. For example, in Wyman v. Wallace, 94 Wn.2d 99, 104-05, 615 P.2d 452 (1980), the Court abolished the common law action of alienation of affections based upon a public policy analysis that this type of claim was a form of blackmail. See also Stanard v. Bolin, 88 Wn.2d 614, 565 P.2d 94 (1977) (limiting damages recoverable for breach of promise to marry based upon similar policy grounds); McCarthy v. Social and Health Servs., 110 Wn.2d 812, 816, 759 P.2d 351 (1988) (upholding right to pursue common law remedy against

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Id. This language seems circular. If Art. I §10 has a right to a remedy component, then this provision may appropriately serve as a limitation on the Legislature's police power to either extinguish or substantially impair certain remedies.

<sup>11</sup> The authors of the quoted authority are recognized Washington Constitution scholars; Justice Utter served on this Court from 1971 to 1995.

employer for injury not compensable under workers' compensation scheme, because "[b]arring a common law action without providing a substitute remedy under the Act would abrogate the quid pro quo compromise between the employee and employer"). Although the analysis in these cases is not explicitly grounded in the state constitution, it reflects a sensibility that cannot be explained simply in terms of the doctrine of stare decisis.

In Haddenham v. State, 87 Wn.2d at 146-50, this Court affirmed dismissal of an action against the state that previously was available by virtue of RCW 4.92.090, because the plaintiff's exclusive remedy was now under the crime victims compensation act, Ch. 7.68 RCW. In reaching this result, the Court explained that plaintiff's rights under RCW 4.92.090, were solely a matter of legislative grace, because the state had waived the sovereign immunity that existed at the time the constitution was adopted. See Haddenham, 87 Wn.2d at 146-50. Under these circumstances, the Court upheld the right of the Legislature to reframe a remedy that *post-dated* the state constitution and had no analog at the time the constitution was adopted.

By far the most important case dealing with the right to a remedy in this state is the Court's landmark opinion in Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989), which does not expressly mention Art. I §10. Sofie involved a number of constitutional challenges to the 1986 Tort Reform Act cap on noneconomic damages,

imposed by RCW 4.56.250. In a majority opinion authored by Justice Utter, the Court struck down this limitation under Washington Constitution, Art. I §21, governing the right to trial by jury. See Sofie, 112 Wn.2d at 638, 669.<sup>12</sup>

While Art. I §10 and the right to a remedy principle were not an express basis for the decision in Sofie, the majority addressed the right to a remedy in the course of answering the arguments of the respondent manufacturers and the criticisms of the dissents. See Sofie, 112 Wn.2d at 650-52. Three separate dissenting opinions questioned, in one way or another, how the majority could conclude the right to trial by jury was violated by the cap on damages statute, when the Court had otherwise upheld a workers' compensation system that entirely supplanted common law rights and remedies. See id. at 676 (Callow, C.J., dissenting); 684, 685-87 (Dolliver, J., dissenting); 689-90 (Durham, J., dissenting).

In answering these dissents, the majority first points to the fact that, in passing the cap on damages, the Legislature neither abolished a cause of action nor extinguished the remedy of noneconomic damages. See Sofie at 649-50. Thus, the right to trial by jury attached to the Sofie claims. More importantly, in answering the dissents' criticisms challenging how the cap on damages could be unconstitutional when the

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<sup>12</sup> Sofie also involved constitutional challenges based upon equal protection and due process, but was not decided on either of these grounds. See 112 Wn.2d at 638. Although Art. I §10 was not referenced in the opinion, amicus curiae briefing urged the Court to adopt an adequate remedy doctrine based in part on Art. I §10. See Brief of Amicus Curiae Washington State Trial Lawyers Association, at 38-40 & Appendix C.

Court had otherwise upheld the constitutionality of the workers' compensation scheme, the Sofie majority explains fully the constitutional footing for that earlier decision:

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

Sofie at 651 (some emphasis added) (footnote omitted).

In the footnote to this passage, the majority further observes:

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

Sofie at 651 n.5. This footnote is critical to understanding the underpinnings of Sofie. Any doubt about the implications of the majority's view dissolve when contrasted with Justice Durham's dissenting view that: "[t]he 'independent constitutional foundation' that the majority apparently believes saves the workers' compensation scheme was nothing other than the state's general police power." See Sofie at 689 (Durham, J., dissenting) (citation omitted).

These passages in the Sofie majority opinion point inexorably to a constitutionally-based right to a remedy, requiring substantial justification for elimination of common law remedies. The only thing missing in Sofie is a direct reference to the state constitution provision or provisions

animating this view, such as Art. I §10. However, the recent statement in King, 162 Wn.2d at 388, should be read as connecting the constitutional discourse in the majority opinion in Sofie with Art. I §10. The Court should take this opportunity to explicitly make this connection.<sup>13</sup>

It remains to determine what test should be used to safeguard the right to a remedy under Art. I §10.<sup>14</sup>

**C. Under Art. I §10 The Legislature Should Be Prohibited From Extinguishing Or Substantially Impairing A Common Law Remedy Of A Type Existing At The Time The Constitution Was Adopted, Absent An Adequate Substitute Remedy Or A Showing Of An Overpowering Public Necessity Justifying The Legislative Action.**

States have taken varied approaches in determining when a common law remedy has been unjustifiably extinguished or impaired in violation of an open courts provision. See text supra at 8-9. Many of these formulations have a quid pro quo component, which upholds the legislative action when the common law remedy is replaced with a reasonably adequate substitute remedy. See Wang, 64 Wash. L. Rev. at 208-11; Phillips, 78 NYU L. Rev. at 1335-39. Some courts allow an alternative basis for upholding the challenged legislation, in the absence of

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<sup>13</sup> It may be that the remedy guarantee could be viewed as emanating from more than one provision of the state constitution. See Wiggins at 216-20 (urging an adequate remedy requirement premised on four clauses of the Washington Constitution, including Art. I §10). There is also some indication in early Washington case law intimating that an adequate substitute remedy is required by the state and federal due process clauses. See Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 426-29, 63 P.2d 397 (1936) (Tolman, J., concurring).

<sup>14</sup> Some commentators tend to view Art. I §10 as addressing only procedural rights regarding access to court. Key considerations for this analysis are Washington's rejection of the Oregon Constitution's text and the absence of historical records (which were lost) of the Washington Constitutional Convention revealing an intent to impose a remedy guarantee. See Friesen, §6.02[1] at 6-4 n.11; Wang at 215-18. However, this

a substitute remedy, when the reason for its enactment is sufficiently justified in its own right as legitimate. See Wiggins at 220.

In some jurisdictions, establishing this alternative basis takes nothing more than reasonable grounds for the legislative act – the equivalent of a due process analysis, essentially asking whether the legislation is arbitrary in nature. See Phillips at 1335-36. Other jurisdictions have adopted a more rigorous alternative test for upholding legislation when a substitute remedy is not involved. Florida is a leading example of this, in requiring that there be either an adequate substitute remedy (*quid pro quo*) *or* “an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.” See Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). Under the Kluger formulation, these two prongs are substantially equivalent, assuring legislation that impacts longstanding remedies in such a profound way is wholly justified.

The Kluger test best fits this state’s jurisprudence and thus is an appropriate standard for enforcing the remedy guarantee in Art. I §10. This test’s adequate substitute remedy prong tracks the analysis in Sofie for upholding Washington’s workers’ compensation scheme. See 112 Wn.2d at 651 & n.5. At the same time, the overpowering public necessity prong is compatible with the compelling interest test this Court imposes when protecting open access to courts under Art. I §10. See Rufer v.

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view is unaccompanied by an analysis of Washington case law, particularly Sofie, and its perception of the role of the common law at the time the state constitution was adopted.

Abbott Labs., 154 Wn.2d at 540-51 (2005) (imposing compelling interest test, described as requiring proof of an “overriding interest”).

Application of the proposed Kluger test to RCW 7.70.150 is for the Court to decide. However, two points bear mention: First, an open courts analysis is appropriate here in assessing whether any tort remedy provided under Ch. 7.70 RCW has been substantially impaired by the certificate of merit requirement. This codified cause of action is traceable to a common law remedy for malpractice that existed at or around the time the constitution was adopted. See Just v. Littlefield, 87 Wash. 299, 151 Pac. 780 (1915) (upholding medical malpractice verdict, discussing “well settled” law regarding scope of physician’s duty); Peterson v. Wells, 41 Wash. 693, 84 Pac. 608 (1906) (reversing medical negligence nonsuit, and remanding for trial).

In Sofie, when commenting upon the applicability of the right to trial by jury under Art. I §21 to modern product liability claims, this Court held that, to enforce this right, it is not necessary to establish that an identical claim existed at the time the constitution was adopted. It need only be shown that the asserted claim is of the type that existed at that time. See Sofie, 112 Wn.2d at 648-49. There is no reason this same analysis should not apply to Art. I §10.

Second, because RCW 7.70.150 represents an added impediment to pursuing a medical malpractice action, and does not involve the adequacy of a substitute remedy, the open courts analysis should focus on

whether there is an overpowering public necessity for certificates of merit. This prong of the open courts analysis requires a showing that the legislative goals to be achieved by the challenged provision cannot be accomplished by any alternative method. See Kluger, 281 So.2d at 4. Under this approach, the Court should ask whether RCW 7.70.150 accomplishes any legislative goal not already achieved by the enactment of RCW 7.70.160, the chapter's frivolous action statute.

### VI. CONCLUSION

The Court should adopt the argument advanced in this brief regarding interpretation and application of Art. I §10, and apply the proposed test for determining whether RCW 7.70.150 is unconstitutional under this provision.

DATED this 26th day of January, 2009.

Kelby D. Fletcher \* Bryan P. Harnetiaux \*  
KELBY D. FLETCHER BRYAN P. HARNETIAUX  
by Bryan P. Harnetiaux with authority

Gary N. Bloom \*  
GARY N. BLOOM by Bryan P. Harnetiaux with authority On behalf of WSAJ Foundation

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

# APPENDIX

**RCW 7.70.150**

**Actions alleging violation of accepted standard of care — Certificate of merit required.**

(1) In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. If the action is commenced within forty-five days prior to the expiration of the applicable statute of limitations, the plaintiff must file the certificate of merit no later than forty-five days after commencing the action.

(2) The certificate of merit must be executed by a health care provider who meets the qualifications of an expert in the action. If there is more than one defendant in the action, the person commencing the action must file a certificate of merit for each defendant.

(3) The certificate of merit must contain a statement that the person executing the certificate of merit believes, based on the information known at the time of executing the certificate of merit, that there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant.

(4) Upon motion of the plaintiff, the court may grant an additional period of time to file the certificate of merit, not to exceed ninety days, if the court finds there is good cause for the extension.

(5)(a) Failure to file a certificate of merit that complies with the requirements of this section is grounds for dismissal of the case.

(b) If a case is dismissed for failure to file a certificate of merit that complies with the requirements of this section, the filing of the claim against the health care provider shall not be used against the health care provider in professional liability insurance rate setting, personal credit history, or professional licensing and credentialing.

[2006 c 8 § 304.]

## **RCW 7.70.160**

### **Frivolous claims.**

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

[2006 c 8 § 316.]

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Dear Mr. Carpenter:

Attached is the WSAJ Foundation amicus curiae brief for filing with the Court. A copy of it has been served on counsel of record by email, per prior arrangement.

Respectfully submitted,

Bryan Harnetiaux, WSBA #5169

On behalf of WSAJ Foundation

<<Putman v. Wenatchee Valley.pdf>>

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