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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

NANCY NGYUEN WAPLES, Plaintiff/Appellant,

vs.

PETER H. YI, DDS and JANE DOE YI, husband and wife, and their marital community thereof, d/b/a LAKEWOOD DENTAL CLINIC; and PETER H. YI, DDS, P.S., a Washington corporation, Defendants/Respondents;

consol. with

LINDA CUNNINGHAM and DOWNEY C. CUNNINGHAM, a marital community, Plaintiffs/Appellants,

vs.

RONALD F. NICOL, M.D.; VALLEY RADIOLOGISTS, INC., P.S. and MULTICARE HEALTH SYSTEM, INC. d/b/a COVINGTON MULTICARE CLINIC, Defendants/Respondents.

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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**I. INTRODUCTION AND BACKGROUND REGARDING
SUPPLEMENTAL ARGUMENT**

In Waples v. Yi, this Court invited amicus curiae briefing and Washington State Association for Justice Foundation (WSAJ Foundation) filed a brief. See "Brief of Amicus Curiae Washington State Association for Justice Foundation."¹ Cunningham v. Nicol is now consolidated with Waples, and WSAJ Foundation has been granted permission to file this supplemental amicus brief. The following background is helpful to place this supplemental amicus brief in context.

Waples principally involves a constitutional challenge to RCW 7.70.100(1) under Washington Constitution, Art. I §12, the privileges and immunities provision. See WSAJ Fdn. Waples Am. Br. at 2-3; see also Waples Br. at 9-10; Waples Ans. to WDTL Am. Br. at 3. This statutory provision imposes a mandatory pre-litigation notice of suit requirement for medical negligence claims against health care providers. Waples also challenges RCW 7.70.100(1) on separation of powers grounds. See Waples Br. at 10. However, Waples does not make a free-standing challenge to the notice provision under Washington Constitution, Art. I §10, governing access to courts.

In its Waples amicus brief, WSAJ Foundation argues that RCW 7.70.100(1) violates Art. I §12 under the heightened privileges and

¹ This amicus brief is cited as "WSAJ Fdn. Waples Am. Br." The Washington Defense Trial Lawyers (WDTL) also accepted the invitation of the Court and filed an amicus brief. More recently, a joint amicus brief was filed by Washington State Medical Association and Physicians Insurance A Mutual Company.

immunities analysis first articulated in Grant County Fire Prot. Dist. v. Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004) (Grant County II). See WSAJ Fdn. Waples Am. Br. at 9-12. The predicate fundamental right identified as supporting this privileges and immunities analysis is a substantive "right to a remedy" under Art. I §10, Washington's "open courts" provision. See WSAJ Fdn. Waples Am. Br. at 13-24. In particular, WSAJ Foundation argues that RCW 7.70.100(1) impermissibly burdens medical negligence plaintiffs' right to a remedy, traceable to the time the state constitution was adopted. See id. Waples has adopted this argument. See Waples Ans. to WDTL Am. Br. at 3.

In Cunningham v. Nicol, Cunningham challenges the constitutionality of the pre-litigation notice provision on its face, based upon violation of Art. I §10, independently of the Art. I §12 privileges and immunities provision. See Cunningham Br. at 9-10 (focusing on right to a remedy); Cunningham Reply Br. at 3-5 (focusing on Putman analysis). While Cunningham also contends the notice provision violates Art. I §12, the argument is based on rational basis review. See Cunningham Br. at 4, 11-14. Cunningham separately argues the notice provision violates the separation of powers doctrine. See id. at 4, 15-16.

Recently, after completion of the briefing in Waples, and midway thorough the briefing in Cunningham, this Court decided Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 216 P.3d 374 (2009). In Putman, the Court struck down RCW 7.70.150, the "certificate of merit"

statute applicable to medical negligence claims against health care providers. This statute required medical negligence plaintiffs suing health care providers to provide certification that there exists a reasonable probability that the health care providers violated the standard of care in order to pursue the claim in court. This Court held the statute was unconstitutional because it denied access to courts and violated the separation of powers doctrine. See id., 166 Wn.2d at 979-85.

II. SUPPLEMENTAL ISSUE

Is Putman v. Wenatchee Valley Med. Ctr., supra, dispositive in resolving the constitutionality of the pre-litigation notice provision, RCW 7.70.100(1)?

III. SUMMARY OF SUPPLEMENTAL ARGUMENT

Under Putman, supra, RCW 7.70.100(1), the pre-litigation notice of suit provision, violates Washington Constitution, Art. I §10, by impermissibly burdening Ch. 7.70 RCW plaintiffs' right of access to courts to pursue medical negligence claims against health care providers. (This analysis is distinct from the Art. I §10-based substantive "right to a remedy" analysis that WSAJ Foundation provides in its Waples amicus brief.)

The pre-litigation notice provision also violates the constitutional doctrine of separation of powers because, under Putman, the notice provision impermissibly adds to the procedures for filing a lawsuit in contravention of the Court's plenary power to set those procedures.

IV. SUPPLEMENTAL ARGUMENT

A. Overview Of *Putman*, Holding The Certificate Of Merit Statute Unenforceable Under The Washington Constitution Based Upon Denial Of Access To Courts And Violation Of The Separation Of Powers Doctrine.

In Putman, this Court struck down the certificate of merit statute, RCW 7.70.150, under the Washington Constitution. The Court held that the statute violated the right of access to courts. See Putman, 166 Wn.2d at 979. Initially, the Court noted “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)). Turning to its own precedent, the Court then described the right of access to courts as “the bedrock foundation upon which rest all the people's rights and obligations.” Id. (quoting John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). In particular, the Court concluded that “[r]equiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts.” Id.

While Putman did not explicitly identify the textual basis for the constitutional right of access to courts, the Court's reliance on Blood Center, 117 Wn.2d at 780, makes it clear that the right is grounded in Washington Constitution, Art. I §10. See Putman at 979. As explained in Blood Center:

Plaintiff has a right of access to the courts. In this civil case that right of access includes the right of discovery authorized by the civil rules, subject to the limitations contained therein.

Our constitution mandates that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Const. art. 1, § 10. That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations.

117 Wn.2d at 780.²

In striking down the certificate of merit statute in Putman, the Court did so without weighing whether there was any possible justification, such as a compelling reason, that supported burdening medical malpractice plaintiffs' access to courts in this fashion.³ Instead, the Court held the mere potential that the certificate of merit requirement would impede the process of accessing courts was enough to render it unenforceable. See Putman at 979.⁴

In addition to its holding based on the right of access to courts, Putman concludes that RCW 7.70.150 also violated the separation of powers doctrine. See 166 Wn.2d at 979-85. The Court stated that

² A concurrence in Putman recognizes that the majority analysis of the constitutional right of access to courts is based on Art. I §10. See 166 Wn.2d at 986 (Madsen, J., concurring).

³ Article I §10 has also been recognized as preserving the *public* nature of court proceedings and citizens' access to the proceedings. See Rufer v. Abbott Labs, 154 Wn.2d 530, 114 P.3d 1182 (2005). In this context, the Court has allowed that compelling reasons may justify denial of full public access to court proceedings. See id., 154 Wn.2d at 540-41.

⁴ In deciding Putman, the Court did not address a related argument based upon Art. I §10, urging that this provision also protects remedies traceable to those existing at the time the Washington Constitution was adopted. See WSAJ Fdn. Waples Am. Br. at 13 & n.10 (referencing this argument and WSAJ Foundation Putman amicus brief). The "right to a remedy" argument is made in the Foundation's amicus brief in Waples, in support of its Art. I §12 privileges and immunities analysis. See id. at 13. This question was reserved in Blood Center. See Blood Center, 117 Wn.2d at 781.

RCW 7.70.150 impermissibly conflicted with court rules governing procedures for initiating lawsuits, “thereby jeopardizing the court's power to set court procedures.” *Id.* at 985.

B. The Access To Courts Analysis In *Putman* Is Controlling Here, Rendering RCW 7.70.100(1) Unconstitutional Under Washington Constitution Art. I §10 Because It Hinders The Initiation Of Legal Actions.

Under *Putman*, imposition of the pre-litigation notice obligation as an additional requirement to pursuing a medical negligence claim under Ch. 7.70 RCW violates the right of access to courts under Washington Constitution, Art. I §10. *See* 166 Wn.2d at 979. *Putman* is controlling here because it condemns hindrances to the right of access to courts. Like the certificate of merit statute, the notice provision imposes an additional hindrance for accessing the courthouse.⁵

Putman struck down the certificate requirement outright, and did not engage in any assessment of whether imposition of the additional burden was justified under the circumstances. *See* 166 Wn.2d at 979. The mere possibility that a plaintiff may not be able to obtain a certificate of merit in the absence of civil discovery rendered the statute

⁵ As previously noted, *supra* n.4, this right of access to courts rationale differs from the analysis proposed in the WSAJ Foundation *Waples* amicus brief. *See* WSAJ Fdn. *Waples* Am. Br. at 13-24. In that brief, the substantive “right to a remedy” based on Art. I §10 is proffered as the predicate fundamental right supporting the argument that RCW 7.70.100(1) violates Art. I §12 under the *Grant County II* privileges and immunities analysis.

In light of *Putman*, it appears to be unnecessary for the Court to reach the privileges and immunities question under Art. I §12. Moreover, in the event the Court does evaluate RCW 7.70.100(1) under Art. I §12 and *Grant County II*, the *Putman* access to courts analysis provides the predicate fundamental right supporting an elevated privileges and immunities analysis.

unconstitutional as a hindrance to the right of access to courts. See id. This same analysis applies here. The pre-litigation notice requirement must be invalidated because it constitutes an additional obstacle to access to courts. The right recognized in Putman invalidates limitations on access to courts beyond the discovery context. See Putman at 979. Further, Nicol and Valley Radiologists' argument that the notice requirement is *de minimis* finds no support in Putman. See Nicol Br. at 14. No balancing of interests is undertaken. Because non-compliance with the added requirement has the potential effect of turning a plaintiff away at the courthouse steps, the provision is invalid.⁶

C. The Separation Of Powers Analysis In Putman Is Controlling Here, Rendering RCW 7.70.100(1) Unconstitutional Because It Impinges Upon The Court's Procedural Rules Governing Notice Pleading.

Under Putman, RCW 7.70.100(1) also offends the separation of powers doctrine. The Legislature requires an additional procedure for medical negligence plaintiffs to obtain access to courts by imposing the pre-litigation notice requirement. See Putman, 166 Wn.2d at 979-85. Nicol and Valley Radiologists seek to distinguish Putman because the certificate of merit statute undermined the role of the discovery process

⁶ Even if such a pre-litigation notice requirement could be upheld if compelling reasons existed for doing so, cf. Rufer, supra, no such reasons have been established here. See WSAJ Fdn. Waples Am. Br. at 22-24 (arguing no compelling reasons exist for imposing pre-litigation notice requirement because it does not mandate that plaintiffs and defendant health care providers engage in pre-litigation settlement negotiations). At most, the statute only highlights the opportunity for settlement discussions in advance of litigation—an opportunity which already exists apart from the statute—but this is hardly a compelling reason justifying impingement on the right of access to courts. See Cunningham Br. at 19 (contending creating incentive to settle is "legitimate state purpose").

and directly conflicted with court rules governing initiation of civil actions. See Nicol Br. at 22-23. These arguments fail because the holding in Putman is broader than the discovery context, and condemns altering the customary procedures for initiating legal actions. As the Court explained:

RCW 7.70.150 unduly burdens the right of medical malpractice plaintiffs to conduct discovery and, therefore, violates their right to access courts. *In addition, RCW 7.70.150 changes the procedures for filing pleadings in a lawsuit, thereby jeopardizing the court's power to set court procedures.*

Putman at 985 (emphasis added).

RCW 7.70.100(1) also changes the procedures for filing pleadings in a lawsuit and jeopardizes the Court's plenary power over court procedures. It states, with one exception, "[n]o action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action."⁷ RCW 7.70.100(1); see also WSAJ Fdn. Waples Am. Br. at 2, n.2 and Appendix (2006 and 2007 versions of RCW 7.70.100). With this requirement, simple notice pleading via the customary complaint process is not enough.

Nor should there be any *de minimis* exception to the separation of powers doctrine. Under Putman, even requiring Ch. 7.70 RCW plaintiffs to "mail a letter" in order to pursue a claim encroaches on a unique judicial function. See Nicol Br. at 23. This requirement invades the Court's

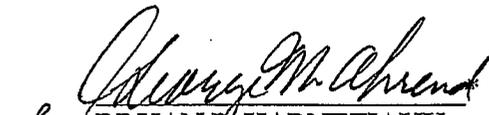
⁷ There is a limited exception for unknown defendants. See RCW 7.70.100(2).

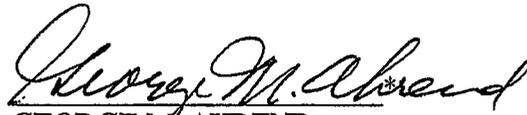
domain in the same way that the certificate of merit statute did.
RCW 7.70.100(1) is unconstitutional on its face.⁸

V. CONCLUSION

The Court should conclude RCW 7.70.100(1) offends the Washington Constitution on one or more of the bases advanced in WSAJ Foundation's Waples amicus brief and this supplemental amicus brief.

DATED this 21st day of January, 2010.


for BRYAN P. HARNETIAUX,
with authority


GEORGE M. AHREND

On Behalf of WSAJ Foundation

*Brief transmitted for filing by email; signed original retained by counsel.

⁸ Because RCW 7.70.100(1) is unconstitutional on its face, the Court need not decide in Cunningham whether it is unconstitutional as applied. See Cunningham Br. at 11-14.