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SUPREME COURT
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82142-9
No. 82973-0

WASHINGTON SUPREME COURT

LINDA CUNNINGHAM AND DOWNEY C. CUNNINGHAM, A MARITAL
COMMUNITY

Appellants

vs.

RONALD F. NICOL, M.D.; VALLEY RADIOLOGISTS, INC., P.S. and
MULTICARE HEALTH SYSTEM, INC. dba COVINGTON MULTICARE
CLINIC

Respondents.

On appeal from King County Superior Court

No. 08-2-28582-1

Honorable Cheryl Carey

APPELLANTS' REPLY BRIEF

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A. INTRODUCTION

Appellants file this Reply Brief following consolidation with the *Waples* appeal, and pursuant to the Court's Order dated January 8, 2010 (attached), to address misstatements by respondents and the principal issues of whether RCW 7.70.100(1) (hereafter the 90-day notice) unduly burdens the right of access to the courts; whether the 90-day notice irreconcilably conflicts with procedural court rules and therefore is in violation of the separation of powers; and whether principles of privilege and immunities and equal protection support the appellants' position that the 90-day notice is unconstitutional. The relevance of the September 17, 2009 decision in *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009) is also emphasized.

B. APPELLANTS' CORRECTIONS TO MISSTATEMENTS BY RESPONDENTS

The briefing on behalf of the respondents contains multiple misstatements, and some require clarification:

1. In an attempt to blame the patient herself, respondents misstate the facts pertaining to Linda Cunningham's knowledge of her legal claim. The patient did not learn of her legal claim in February 2008. She was, however, then informed of earlier positive imaging findings (from films in 2000) by her current providers. She was advised by her treating physicians that she would require multiple invasive brain surgeries and other aggressive treatments to save her life. Appellants reject respondents assertions that this patient's focus was, or should

have been, on the statutory and procedural aspects of her legal rights, as opposed to the concerns for her life, her health and her family.

2. Appellants also reject the repeated assertions of the respondents that the legislative immunity granted to defendants under the facts of the present case, and the denial of access to the courts for a civil negligence claim, and the statutory conflict raised in this appeal, arise solely from appellants' unreasonable delays. Rather, the record confirms that medical information in February 2008 led to a principled investigation culminating in the (pre-*Putman*) Certificate of Merit, dated August 13, 2008, as the basis for CR 11 compliance by counsel, and the allegations of breach of standards of care, proximate causation and harms associated with provider negligence.

3. Respondents attempt to marginalize the recent *Putman* decision and misstate its relevance at the trial court. Even though the *Putman* decision was issued before the respondents briefing was filed, the respondent Multicare elected to omit any reference, and respondent Nicol attempts to marginalize the implications of *Putman*. Instead respondents mischaracterize the trial court record and appellants' efforts to present and preserve constitutional issues below. Respondents misrepresent appellants position regarding the relevance of the pending *Putman* appeal at the trial court level, where, having complied with the Certificate of Merit requirement on August 13, 2008, appellants would never suggest that *Putman* would resolve all issues pertaining to the 90 day notice

requirement. Counsel for appellants did in fact, on multiple occasions, argue that in order to resolve *Putman*, and the various constitutional arguments presented, this Court would address the context for the 2006 legislative enactments (which included the 90 day notice), and this Court would address the rights of access to the courts, the potential conflicts between the legislative enactments and the province of the courts under principles involving separation of powers, and potentially address the equal protection considerations created by the 90 day notice. We argued below that clarity on such issues would provide guidance to the trial court as it addressed the 90 day notice requirement in the *Cunningham* context.

C. The Putman Analysis Applies and Confirms That The Ninety Day "Notice Of Intention To Commence" Requirement Unduly Burdens Fundamental Rights Of Access To Our Courts, and Violates Separation of Powers Principles

The *Putman* opinion at *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), addressed the respective powers of our Courts and legislature. The *Putman* court confirmed that personal injury actions arising from allegations of health care services are negligence actions grounded in the common law, *Putman*, at 982; and *Putman* confirmed that a statute is procedural when it addresses how to file a claim that enforces a right provided by law, and that such a statute will not prevail over conflicting court rules. *Putman*, at 984-85.

As acknowledged by the respondent in the consolidated *Waples* matter, but not in *Cunningham*, the procedure for “commencement” of a civil negligence action is defined in the Civil Rules at CR 3(a) as follows:

“Except as provided in rule 4.1, a civil action is *commenced* by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint. Upon written demand by any other party, the plaintiff instituting the action shall pay the filing fee and file the summons and complaint within 14 days of service of the demand or the service shall be void. An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170”.

In the instant case, the mandatory 90 day notice is unconstitutional because the legislature has imposed additional procedural requirements by redefining “commencement” of a civil negligence action, in violation of the separation of powers and authority of this Court. The respondents then assert that these additional “commencement” obstacles are minimal burdens (only stamps and letters apparently in the view of the respondents); and it is clear that counsel for the respondents support and encourage the currently evolving practice of threatening providers with litigation (serving a Notice) any time medical records are requested.

Indeed, in the view of the appellants such a practice may assure compliance with the Notice requirement, but such a practice cannot be justified as any rational expression of prudent public policy. In fact such activities can be reasonably expected to increase costs of insurance and diminish respectful

communications among patients and professionals in an already overly-fragmented health care environment. Such practices would also be inconsistent with principles of judicial efficiency.

Further, as respondents argue to justify the re-definition of commencement, they completely avoid consideration of the Notice requirement as mandated and applied in the last 90 days of the period of repose. Respondents avoid the specifics of this scenario and appeal, because there is no argument that can justify the respondents' analysis as a principled application of public policy concerns. Respondents cannot cite any authority, judicial or legislative, that identifies or addresses the rights of the class of citizens who attempt to commence an action well within the time limits imposed by the statutes of limitation and repose, only to be barred by a mandatory 90 day notice requirement.

~~In this context the 90 day notice provision at issue is clearly procedural and it is unconstitutional.~~

D. Privilege and Immunity Principles Apply to Support the Appellants

Challenge to the 90 Day Notice.

Regarding the equal protection and privilege and immunities issues, we reject the argument of the respondents that some health care providers are entitled to immunity and special privilege when the injured patient learns of her legal claim arising from health care negligence within the eight year repose period, and within the statute of limitation, but not in time to provide the 90 day notice. Based

on the authorities cited by the respondents, such an assertion is without contemplation by the legislature, and without legal or rational justification and does not meet even minimal judicial scrutiny.

Contrary to the repeated assertions by respondents who attempt to rationalize the actions of the legislature citing chronic political dynamics, there is no evidence of any legislative consideration of, or rational basis for, the statutory conflict between the statute of repose and the 90 day notice requirement. There is no evidence of any consideration of why a defendant would be granted immunity during the last three months of the repose period while the same defendant would not be immune in earlier months; and similarly, respondents cannot credibly assert that the legislature rationally considered the rights of citizens to access to the courts in the last 90 days of the repose period.

Appellants acknowledge that, like the assertions attempting to justify the recently invalidated Certificate of Merit, the respondent's arguments in the present matter can provide defendants with strategic and tactical advantages at the expense of the rights of our citizens.

E. CONCLUSION

It is beyond dispute that the appellants, due to no fault of their own, find themselves within a class of citizens/plaintiffs that the legislature would bar from access to the courts. Such citizens should not be barred from *access* to legal

rights and remedies that are guaranteed to all citizens under constitutional principles and the judicial reasoning and analysis as reflected in *Putman*.

Such citizens were not considered in any context of public policy discussions, and their constitutionally protected access was denied arbitrarily and irrationally by imposing the new requirements for commencement as referenced above. While this obstacle to access to justice occurred most likely as a result of inattention in drafting of the extension language that applies only to the statute of limitations, the source of the obstacle is immaterial. What does matter is access to justice.

Appellants respectfully request that this matter be remanded for trial on the merits, with confirmation by this Court that this action was commenced in a timely manner.

Dated this 15th day of January, 2010.

THE PEARSON LAW FIRM, P.S.

By:



JERALD D. PEARSON, WSBA #8970
Attorney for Appellants

APPENDIX

APPENDIX A

Order dated January 8, 2010

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SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

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January 8, 2010

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Re: Supreme Court No. 82142-9 - Nancy N. Waples, et ux v. Peter H. Yi, DDS, et ux, et al.
Court of Appeals No. 36211-2-II



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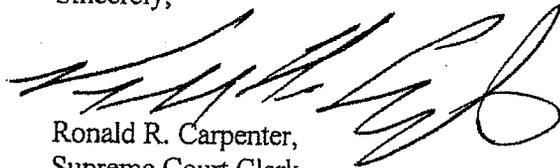
Counsel:

In the above entitled cause, the following notation ruling was entered on January 8, 2010, by the Supreme Court Clerk in regards to the Appellant Cunninghams' "MOTION FOR EXTENSION OF TIME":

**"Motion granted at the direction of the assignment Justice;
the Reply brief shall be served and filed by not later than
January 15, 2010."**

/s/ Ronald R. Carpenter,
Supreme Court Clerk

Sincerely,



Ronald R. Carpenter,
Supreme Court Clerk

RRC:alb