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SUPREME COURT OF
THE STATE OF WASHINGTON

LINDA CUNNINGHAM and DOWNEY C. CUNNINGHAM,
a Marital Community,

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENTS NICOL & VALLEY RADIOLOGISTS

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I. INTRODUCTION

In 2006, after competing medical malpractice reform initiatives were rejected by the voters,¹ representatives of the plaintiff's bar, health care providers and insurers, working with Governor, developed a compromise package which they jointly presented to the Legislature for its approval. *See generally* Laws 2006, ch. 8.² Two important components of that legislation were the imposition of a requirement that plaintiffs must give at least 90 days notice to defendants prior to commencing suit and re-enactment of the eight year statute of repose. *Id.* §§ 314 and 302. In this case, as in *Waples v. Yi*, No. 82142-9, plaintiff/appellants (the Cunninghams) ask the Court to declare the 90-day notice requirement unconstitutional on its face.³ In addition, the Cunninghams mount an "as-applied" challenge, claiming that the notice requirement is

¹ Initiatives 330 and 336 were rejected in the 2005 general election by similar margins. *See* <http://www.vote.wa.gov/Elections/Results/Measures.aspx?e=816913c8-43d7-4b77-be19-3d794615271e>.

² A recording of the Senate hearing where the involved parties recommended passage is available at: <http://www.tvw.org/media/mediaplayer.cfm?evid=2006020206&TYPE=A&CFID=1034293&CFTOKEN=73625188&bhcp=1>

³ Plaintiff/Appellants in *Waples* have requested an identical ruling, but solely on equal protection grounds. Pet. for Disc. Rev. in No. 8142-9 at 4. In *Breuer v. Presta*, 146 Wn.2d 470, 200 P.3d 724 (2009), Division III upheld the notice statute against an equal protection challenge. In *Bennett v. Sound Mental Health*, 150 Wn. App. 455, 208 P.2d 578 (2009), plaintiffs did not challenge the constitutionality of RCW 7.70.100(1).

unconstitutional because, while RCW 7.70.100 extends the limitations period when necessary to allow for 90 days notice, it does not contain a similar provision extending the statute of repose. They assert that they were unable to give 90 days notice without their action being barred by the repose statute and that this alleged conflict voids the notice requirement.

Assuming these arguments have been adequately preserved for appeal, which they have not, it is apparent the notice requirement benefits all parties by facilitating pre-suit resolutions and more efficient handling of cases that must be litigated. Furthermore, the notice requirement does not impose any substantial burdens on plaintiffs. Otherwise, it would not have drawn the unqualified support of the plaintiffs' bar at the time of passage.⁴ Therefore, this Court should reject appellants' facial challenge.

With respect to the as-applied challenge, the record shows that appellants' counsel was on notice of a potential claim at least six months before their action became time-barred. For unexplained reasons, however, notice was not given until 16 days before commencing suit. Therefore, the alleged conflict between the two statutes is entirely of appellants' own making. Furthermore, because the statute of repose operates independently of the statute of limitation to impose an absolute

⁴ See materials cited in n.2, *supra*.

time-bar on malpractice actions, the Legislature was not required to provide for an extension in order to comply with the notice requirement.

II. STATEMENT OF THE CASE

The Cunninghams commenced this action for medical negligence on August 20, 2008 by filing a complaint in which they alleged that a magnetic resonance imaging study of Ms. Cunningham's brain, done on August 24, 2000, showed a tumor. CP 3-9.⁵ They claim that respondents were negligent in failing to note the tumor's presence. CP 5. Recognizing that they had the burden under RCW 4.16.350 to show that the discovery rule exception to the three-year limitations period applies,⁶ appellants' complaint also alleges that they "did not learn of any issues pertaining to the old films ... until February 2008." *Id.*⁷ Accordingly, under the discovery rule, the limitations period would have expired sometime in February 2009.

⁵ The Clerk's Papers are cited herein as "CP ___".

⁶ See *Precision Airmotive Corp. v. Rivera*, 288 F. Supp. 2d 1151, 1153 (W.D. Wash. 2003) ("Where ... a plaintiff invokes the discovery rule to counter the statute of limitations defense, the burden is also on that plaintiff to show that facts constituting the cause of action were not discovered or could not have been discovered by due diligence within the limitations period"), citing *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993) and *Giraud v. Quincy Farm and Chem.*, 102 Wn. App. 443, 449-50, 6 P.3d 104 (2000) (emphasis in original).

⁷ This date coincides with the time when appellants obtained a complete set of Linda Cunningham's medical records. CP 78-80.

But, RCW 4.16.350, as re-enacted by Laws 2006, ch. 8, § 302, also contains a statute of repose, which provides, “in no event shall an action be commenced more than eight years after ... [the] act or omission” alleged to have caused injury.” The re-enacted statute “applie[s] to actions commenced on or after June 7, 2006.” Laws 2006, ch. 8, § 301. Accordingly, the statute of repose prevented appellants from commencing an action after August 25, 2008.⁸

According to their complaint and subsequent filings, at all material times, appellants were aware of both the 90-day notice requirement and the statute of repose. CP 162. Nonetheless, despite their admitted knowledge of a potential claim in February 2008, appellants did not serve their notice of intent until August 4, 2008, 16 days before their lawsuit was commenced. Appellants’ Brf. Appendix D.

When defendants/respondents moved to dismiss based on failure to comply with the notice requirement, appellants responded by seeking a continuance until after a decision by this Court in *Putman v. Wenatchee Valley Med. Ctr., P.S.*, No. 80888-1. CP 81-89. They asserted that *Putman*, which addresses the constitutionality of the certificate of merit required by RCW 7.70.150, would determine the validity of the 90-day

⁸ August 24, 2008 was a Sunday. Under RCW 1.12.028, appellants had until Monday, August 25, 2008 to commence their action.

notice requirement under RCW 7.70.100. While they attempted to incorporate several of the arguments in *Putman* by reference to pages in the appellants' brief in that case, they did not articulate how those arguments would apply to the pre-suit notice requirement. CP 163-64. They did, however, concede the validity of the re-enacted statute of repose, stating, **“the validity of the subject statute of repose is beyond challenge.”** CP 162 (emphasis supplied).⁹

By separate motion, appellants requested a continuance of all dispositive motions pending the *Putman* decision or, alternatively, a “declaratory ruling” or “summary judgment” on an issue that they described as “conflicts between the relevant statute of abrogation/repose and other 2006 amendments.” CP 81-85. Appellants did not make any legal argument or cite any authority on this issue, however. CP 87.

Respondents opposed both motions because *Putman* did not involve RCW 7.70.100 and because, based on their allegation that they became aware of a potential claim in February 2008, appellants could have complied with the notice requirement and still commenced their action in

⁹ Although the introductory section of appellants' brief can be read as suggesting that they are now challenging the constitutionality of the repose statute, their assignments of error, statement of the issues, and arguments are limited to the contention that RCW 7.70.100 is unconstitutional because the Legislature “fail[ed] to provide for an extension of the statute of repose.” Appellants' Brief at 15. Accordingly, this case does not present a challenge to the repose statute.

a timely manner. CP 144-53. Appellants submitted nothing to rebut these contentions. CP 120-180. After hearing oral argument, the trial court entered separate orders granting defendants' motion to dismiss and denying plaintiffs' motions for continuance or for summary judgment. CP 188-90; 185-87. On April 13, 2009, plaintiffs filed a notice of appeal with respect to the Order granting the motion to dismiss only. CP 191-96.

III. STATEMENT OF THE ISSUES

1. Are appellants' constitutional claims properly before the Court?
2. Is requirement to provide notice of intent to commence a medical negligence action unconstitutional on its face?
3. Under the circumstances presented here, is the notice requirement unconstitutional because the Legislature did not provide for an extension of the statute of repose?

IV. ARGUMENT

A. Scope of Review

There are multiple issues concerning the appropriate scope of review in this case. First, to the extent appellants may be deemed to have raised their "as applied" challenge below, they did so only in their motion for a declaratory or summary judgment (CP 81-89) and they have not appealed from the order denying that motion. CP 185-87. Instead, the only trial court decision referenced in the notice of appeal is the order

granting respondents' motion to dismiss. CP 191-97. Furthermore, the sole issue identified in appellants' statement of grounds for direct review is the facial unconstitutionality of the 90-day notice requirement: the "as-applied" challenge was not identified.¹⁰

Although these defects may be overlooked under RAP 2.4(b), the same may not be said with respect to compliance with RAP 2.5(a). In their pleadings below, appellants purported to incorporate by reference certain of the challenges to the certificate of merit statute in *Putman*, which they summarized as whether the notice requirement violates: (1) the separation of powers doctrine; (2) a right of access to courts; or (3) "equal protection, privileges and immunities, and due process principles." CP 163-64. No further explication of how these principles might apply to RCW 7.70.100 was provided. *Id.* This simple recitation of theories did not adequately preserve the claimed errors. See *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993) ("An appellate court may dispose of an issue by applying a theory which was not precisely raised on appeal only if the trial court was adequately apprised of the party's position").

¹⁰ See Statement of Grounds for Direct Review, p. 4. ("ISSUE PRESENTED FOR REVIEW" "By requiring a 90-day waiting period does RCW 7.70.100 violate the Washington State Constitution's separation of powers clause; prohibitions against special laws; rights of open access to the courts; and the privileges and immunities clause; as well as the U.S. Constitution's equal protection and due process clauses?").

Appellants' failure to adequately raise their theories below is not excusable under RAP 2.5(a)(3) relating to "manifest error[s] affecting a constitutional right." This rule is narrowly construed. *State v. Bobic*, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). It is not a means to review every constitutional issue not litigated below. *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). In order for a claimed constitutional error to be considered "manifest," the theory advanced by the appellant must be deemed plausible and the facts necessary to review the claim must be presented in the record. *Id.*; *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). In this case, the crucial fact that supports appellants' "as applied" challenge is absent from the record; *i.e.*, while appellants would have the Court believe that they were compelled to violate the notice requirement in order to avoid their action being barred by the statute of repose, when respondents pointed out that there was ample time to give notice and commence a timely action, appellants did not respond with any kind of evidentiary showing or argument. CP 161-66. Because, as discussed in the following section of this brief, it is appellants' burden to establish the unconstitutionality of the statute, their failure to establish the facts in the record which are necessary to support their theories precludes application of RAP 2.3(a)(3).

B. The Notice of Intent Statute is Constitutional

In order to frame a response to appellants' scattershot of constitutional claims, it is initially appropriate to identify the benefits and burdens related to the notice of intent requirement. The utility of pre-suit notice is evidenced by the fact that similar requirements have been adopted for malpractice suits in 10 states.¹¹ In six of these states, constitutional challenges to the notice statutes resulted in published

¹¹ See, e.g. Arkansas, Ark. Code Ann. § 16-114-204 (plaintiff must file notice of intent to sue sixty days prior to filing medical malpractice complaint); California, Cal. Civ. Proc. Code § 364 (health care action may not be filed unless plaintiff gives notice 90 days prior to commencement of suit); Florida, Fla. Stat. Ann. § 766.106(2), (3) (plaintiff must give defendant 90 day notice by mail prior to filing suit for medical malpractice); Maine, Me. Rev. Stat. Ann. § 2853 (plaintiff commences malpractice suit by filing written notice of claim with court or to provider); Michigan, Mich. Comp. Laws 600.2912b (plaintiffs must give health professional or facility written notice 182 days before action is commenced); Mississippi, Miss. Code Ann. 15-1-36(15) (plaintiff must give written notice 60 days before commencing suit); South Carolina, S.C. Code Ann. § 15-79-125 (plaintiff must file a notice of intent to sue and expert witness affidavit prior to filing malpractice suit); Tennessee, Tenn. Code Annot. § 29-26-121 (medical provider must be given 60 days written notice before plaintiff files complaint); Utah, Utah Code Ann. § 78B-3-412 (action may not be initiated unless and until plaintiff gives at least 90 days notice of intent to commence suit); West Virginia, W. Va. Code § 55-7B-6 (medical malpractice claimant shall give notice of claim by certified mail at least 30 days prior to filing action).

decisions, but only one state (Arkansas) invalidated the measure.¹² These statutes are similar in purpose and effect to governmental notice of claim requirements, such as those contained in RCW 4.92.100,¹³ which this Court has often upheld. It is also similar to the requirement in RCW 11.40.070 to file a creditor's claim prior to maintaining an action against an estate, and the pre-suit notice requirements for residential construction claims (RCW 64.50.020) and for cell phone providers (RCW 35.21.873),

¹² See *Pearlstein v. Malunney*, 500 So.2d 585 (1986) (Florida Court of Appeals held that notice of intent to sue statute did not violate equal protection, did not deny plaintiffs right of access to the courts, and was not unconstitutionally vague); *Neal v. Oakwood Hosp. Corp.*, 226 Mich.App. 701, 575 N.W.2d 68 (1997) (holding that notice of intent to sue statute had rational basis and thus did not violate due process or equal protection clauses, that the statute was not an unconstitutional delegation of legislative authority to private party, and that it did not conflict with civil rule governing commencement of civil actions); *Williams v. Skelton*, 6 So.3d 428 (2009) (Mississippi Supreme Court held that plaintiff's claim that the notice of intent to sue statute was unconstitutional was procedurally barred because plaintiff did not raise it until she filed her petition for writ of certiorari); *Yates v. Vernal Family Health*, 617 P.2d 352 (1980) (Utah Supreme Court held that notice of intent to sue statute did not violate equal protection clause); *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005) (holding that notice of intent to sue statute did not restrict or deny access to the courts); *Houk v. Furman*, 613 F. Supp. 1022 (D.C.Me. 1985) (ruling that pre-litigation notice provision did not violate equal protection); but see *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992) (notice of intent to sue statute conflicted with the Arkansas civil rule governing commencement of civil actions).

¹³ The 2009 Legislature exempted health care liability claims against governmental entities from the notice of claim requirements of Chs. 4.92 and 4.96, stating that pre-suit notice in such cases shall be "governed solely by the procedures set forth in chapter 7.70 RCW." Laws 2009, ch. 433, § 2.

the latter of which has been upheld against state constitutional challenge in *Miller v. Sprint Spectrum, LP*, 2007 WL 4348313 (W.D. Wash. 2007).

1. The Statute is Presumed Constitutional

Because statutes are presumed to be constitutional, the burden is on the challenging party to prove, beyond a reasonable doubt, that it is unconstitutional. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998); *Citizens for More Important Things v. King County*, 131 Wn.2d 411, 415, 932 P.2d 135 (1997); *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 869, 872 P.2d 1090 (1994). This means that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. *Island County*, 135 Wn.2d at 147.

2. Pre-suit Notice Benefits the Parties, the Courts, and the Public

When it adopted the 90-day notice requirement, the Legislature made certain findings, including the following: "It is ... the legislature's intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work." Laws 2006, c. 8, § 1. These are legitimate, highly important public purposes, particularly in the context of the Legislature's efforts to minimize the impact of tort liability on the

availability and cost of health care.¹⁴ In this context, it becomes apparent the notice requirement is not distinctly pro-defense or pro-plaintiff. Rather, it serves the interest of all parties and the public.

Before the notice requirement was enacted, many plaintiffs' lawyers made it a practice to notify defendants and their insurers of claims before commencing suit (sometimes taking advantage of the provision in RCW 7.70.110 to extend the limitations period by one year by making a good faith demand for mediation). All too often, however, the first notice of a claim that defendants and their insurers received was when the lawsuit was served. When the complaint is the first notice of the claim, the energies of the parties are necessarily focused on the initial stages of litigation process, rather than on early settlement. Furthermore, allegations in a lawsuit, particularly if there is attendant publicity, have a tendency to evoke

¹⁴ The legislative findings at the time of adoption included the following:

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

Laws 2006, ch. 8, § 1.

emotions, harden positions and thereby diminish the chances of early compromise. Therefore, in enacting this measure, the Legislature was entitled to believe that requiring reasonable pre-suit notice would benefit all parties by promoting early settlement and thereby containing costs.

In addition, the pre-suit notice requirement fosters fairness and efficiency in the litigation process by allowing defendants to notify insurance carriers, engage counsel, resolve coverage issues, and to identify and preserve relevant evidence. Pre-suit notice also provides an opportunity for health care providers who are not involved in the questioned care, or not at fault, to persuade plaintiffs not to name them. These are significant benefits to plaintiffs and defendants, as well to the court system.

On many occasions, this Court has recognized the benefits of similar pre-notice requirements for suits against the government. In *Hall by Hall v. Niemer*, 97 Wn.2d 574, 584 n. 4, 649 P.2d 98 (1982), the Court recognized that the 60 day buffer period between filing a claim with the County and filing suit led to both early negotiation and settlement between the parties. Likewise, in *Daggs v. City of Seattle*, 110 Wn.2d 49, 750 P.2d 626 (1988), the Court stated that “[c]laims filing laws serve the important function of fostering inexpensive settlement of tort claims.” While the Court’s analysis of governmental notice statutes may differ slightly from

non-governmental notice requirements, the Court's benefit/burden analysis is equally applicable to both types of notice statutes.

3. Pre-suit Notice does not Impose any Substantial Burden on Plaintiffs

RCW 7.70.100(1) does not require a potential plaintiff to do anything more than to mail a letter to the potential defendants stating an intention to commence an action. The statute contains none of the detailed form and content requirements that have so often tripped up plaintiffs intending to sue governmental entities. Furthermore, no factual investigation, legal research or expert support is required before serving the notice, nor does any penalty follow from giving premature notice. For a few minutes time and the cost of a stamp, a potential plaintiff will meet all of the statute's requirements.

This *de minimis* process should be contrasted with some of the government notice provision statutes, all of which are more taxing than the provision at issue here, and that have been upheld in numerous decisions by the Washington courts. *See, e.g. Daggs v. City of Seattle*, 110 Wn.2d 49, 750 P.2d 626 (1988) (Seattle code provision requiring plaintiffs to file a notice of claim against the city 60 days before filing suit did not violate equal protection rights); *Hall by Hall v. Niemer*, 97 Wn.2d 574, 649 P.2d 98 (1982) (upholding constitutionality of former RCW 36.45.040, which

required plaintiffs to give 60 days notice of a claim before filing suit); *Coulter v. State*, 93 Wn.2d 205, 608 P.2d 261 (1980) (upholding RCW 4.92.110's requirement of filing a claim with the statute as a condition precedent to bringing suit).

In *Nierner*, the Court considered whether two notices of claim provisions, RCW 36.45.030 and Seattle City Charter article 4, section 24, violated equal protection. 97 Wn.2d at 576. Typical of these types of government notice provisions, the plaintiffs had to describe the defect that caused the injury, accurately describe the injury, give their addresses for the past six months, specify their damages, and provide all of the following in a sworn statement. *Id.* at 576. In analyzing the burden that these provisions posed, the Court stated that "reasonable procedural burdens may be placed on governmental tort victims as long as the burdens are not substantial and do not constitute a real impediment to relief." After reviewing the requirements of the two notice provisions at issue, the Court concluded that they were constitutional because they placed "an insubstantial burden on governmental tort claimants" and were "reasonably related to fostering negotiation and settlement." *Id.* at 582. Based on these holdings, the burden imposed by RCW 7.70.100 must be deemed insubstantial.

4. The Notice Requirement does not Violate Article 1, § 10

Appellants argue that pre-suit notice impermissibly burdens rights protected under art. I, § 10 of the Washington Constitution. They cite *King v. King*, 162 Wn.2d 378, 388, 174 P.2d 659 (2007) and *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 114 P.2d 1182 (2005) for the proposition that art. I, § 10 guarantees a “right to a remedy for a wrong suffered.” Appellant’s Brf. at 9. Art. I, § 10 simply provides, however, that, “Justice in all cases shall be administered openly, and without unnecessary delay.” Neither of the cited cases holds that it encompasses a right to a remedy. To the contrary, this Court has never recognized the existence of such a right. As shown below, to do so would defy the history and clear intention of the framers.

a. *This Court has never recognized a right to a remedy*

In *King*, this Court held that art. I, § 10 does not encompass a right to counsel at public expense in a dissolution action. *Id.* at 391. Prefatory to this holding, *King* quoted a monograph co-authored by former Justice Utter, stating: “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.’” 162 Wn.2d at 388, *quoting* Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 24 (2002). *King* also cited three cases

as examples of the Court's interpretation of art. I, §10; *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006); *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 819 P.2d 370 (1991). None of these cases discusses, let alone recognizes, a "right to a remedy," however. And the *Rufer* opinion, also cited by appellants as establishing such a right, does not even use the word "remedy."

The Court's only recent substantive discussion of the issue was in *1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 581-582, 29 P.3d 1249, 1255 (2001), where this Court said:

We have previously held that the state constitution does not contain any guaranty that there shall be a remedy through the courts for every legal injury suffered by a plaintiff. *See Shea v. Olson*, 185 Wash. 143, 160-61, 53 P.2d 615 (1936). However, the *Shea* court did not directly address article I, section 10 of the state constitution when it made this conclusion. *See id.* Nevertheless, we decline at this time to determine whether a right to a remedy is contained in article I, section 10 of the state constitution.

We adopt the view of the Supreme Court of Oregon that "[i]t has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest." *Josephs v. Burns*, 260 Or. 493, 503, 491 P.2d 203 (1971), *abrogated on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001). Similarly, the Supreme Court of Missouri has concluded that its open courts provision does not require "that a plaintiff can always go to court and obtain a judgment on the claim asserted." *Blaske*, 821 S.W.2d at 832. Because we recognize that the legislature has broad police power to pass laws tending to

promote the public welfare, we decline at this time to determine whether article I, section 10 of the state constitution guarantees a right to a remedy.

b. *The Framers of our Constitution expressly rejected language recognizing a right to a remedy*

“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, 477, 90 P.3d 42 (2004) quoting *Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959). Appellants have ignored the history of art. I, § 10, which shows that the framers of our state’s Constitution expressly rejected “right to a remedy” language. Accordingly, it is not plausible to say that a right to remedy may be implied under that provision.¹⁵

¹⁵ See e.g., *Staples v. Benton Cty.*, 151 Wn.2d 460, 467, 89 P.3d 706 (2004) (refusing to read requirement into art. XI, § 2 that county officials maintain their offices in the county seat, where parallel provision expressly required state officers to maintain offices in the capitol); *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 461, 48 P.3d 274 (2002) (reference to “schools” in art. IX, § 4 could not be read to include higher education where framers had removed language referencing university); *Gerberding v. Munro*, 134 Wn.2d 188, 202-03, 949 P.2d 1366 (1998) (framers’ rejection of constitutional provisions providing term limits for state officers indicated that statutory term limits violated constitution); *State v. Stroud*, 106 Wn.2d 144, 148 720 P.2d 436 (1986) (framers’ rejection of language identical to Fourth Amendment to United States Constitution required independent application of art. I, § 7).

Article V, § 9 of the Constitution of 1878,¹⁶ which was approved by territorial voters in anticipation of statehood, provided:

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.

When the Constitutional Convention of 1889 convened, it considered a provision, based on similar language in the constitutions of Oregon and Indiana, providing:

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 to him in his person, property, or reputation.

Journal of the Washington State Constitutional Convention 1989 at 51, 499 (B.Rosenow ed. 1962).

But, when they settled upon the final form of art. I, § 10, the framers omitted any language suggesting the existence of a right to a remedy. Based upon the history, this omission could only have been purposeful. Fidelity to fundamental principles requires that this Court honor their intention. *State v. Stroud*, 106 Wn.2d at 148.

¹⁶Available at http://www.secstate.wa.gov/_assets/history/1878Constitution.pdf.

c. *Even if such a right existed, appellants have failed to show how the notice requirement would violate it*

Even where its core protections are at stake, art. I, § 10 does not create absolute rights. *See State v. Easterling*, 157 Wn.2d at 175 and n.3 (measures restricting public's access to courtroom or ability to publicize court proceedings); *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d at 782-83 (right of access subject to court rules regarding discovery and other matters, statutes, court rules and common law regarding privilege, service and limitations). As stated in *Puget Sound Blood Ctr.*, "access must be exercised within the broader framework of the law as expressed in statutes, cases, and court rules."

Measures that only indirectly implicate one's ability to obtain relief through the court system, such as statutes of repose or limitation, clerk's fees and other litigation expenses, or arbitration requirements do not receive similar scrutiny. *See 1519-1525 Lakeview Blvd. Condominium Ass'n*, 144 Wn.2d at 582 (statute of repose); *King v. King*, 162 Wn.2d at 391 (counsel in dissolution matters); *Ford Motor Company v. Barrett*, 115 Wn.2d 556, 562, 800 P.2d 367 (1990) (appeal from arbitration award). Such measures are valid so long as they are enacted "for the purpose of protecting a recognized public interest." *1519-1525 Lakeview Blvd.*

Condominium Ass'n, 144 Wn.2d at 582, citing *Joseph v. Burns*, 260 Or. 493, 491, P.2d 203, 207-08 (1971). Oregon courts have applied this standard to reject challenges under its right to a remedy clause to a requirement that contractors must register in order to bring an action, *Roelle v. Griffin*, 651 P.2d 147 (Or. App. 1982), reasoning that legislatures have authority to place conditions precedent to the right to seek a remedy. See also *Lawson v. Hoke*, 77 P.3d 1160, 1165 (Or. App. 2003) (rejecting art. I, § 10 challenge to law prohibiting uninsured motorists from recovering non-economic damages).

Notice provisions routinely have been upheld, even in states whose constitutions include a right to remedy provision. See *Pearlstein v. Malunney*, 500 So.2d at 586-587 (“We find no violation of the ‘access to the courts’ provision of article I, section 21, Florida Constitution; reasonable restrictions may be placed on the exercise of such rights in the public interest”); see also *Hinchman v. Gillette*, 618 S.E.2d at 394 (notice requirement serves legitimate purposes and does not restrict right of access to courts). Similarly, *Houck v. Furman*, 613 F.Supp. at 1034 held that Maine’s 90-day notice requirement did not violate that state’s right to a remedy clause, and *Neal v. Oakwood Hosp. Corp.*, 575 N.W.2d 68, 76 (Mich. App. 1997) rejected the claim that Michigan’s notice law violated a fundamental right of access to the courts, stating that the notice law “does

not bar medical malpractice plaintiffs from access to the court system, but merely provides a brief temporal restriction before suit may be commenced.” *See also Westmoreland v. Vaidya*, 664 S.E.2d 90, 96 (W.Va. 2008) (pre-suit notice requirements do not restrict or deny access to courts). As these cases illustrate, even if the scope of art. I, § 10 was expanded, the 90-day notice statute should be upheld because it fosters legitimate and important public purposes and imposes the most minimal of burdens.

d. *Putman does not help appellants*

This Court’s decision in *Putman* did not expand the scope of art. I, §10, despite requests by appellant and her *amicus* in that case to do so. *Putman v. Wenatchee Valley Med. Ctr. P.S.*, --- Wn.2d ---, --- P.3d --- (2009) (No. 80888-1 9/17/09) Slip Op. at 3-4. Instead, *Putman* rests on the premise that the requirement to produce an expert’s certificate at the outset of the case interferes with plaintiffs’ ability to conduct discovery, which may be necessary in order to establish the factual predicate for the expert’s opinion. *Id.* This premise was derived from the Court’s 1991 decision in *Puget Blood Center*, which also does not address the existence of an alleged “right to a remedy.”

Unlike the certificate of merit, which in this Court’s view “[r]equir[ed] plaintiffs to submit evidence supporting their claims prior to

the discovery process,”¹⁷ the 90-day notice requirement does not conflict with any court rule or require plaintiffs to do anything more than mail a letter. And, because the notice is not a pleading, CR 11 does not apply and therefore no factual or legal threshold must be met before serving notice. Accordingly, *Putman* does not apply here.

5. The Notice Requirement does not Violate Equal Protection under Art. I, § 12 or the 14th Amendment

Appellants argue that the notice requirement violates equal protection guarantees under art. I, § 12 of the Washington Constitution and 14th Amendment because it discriminates against medical malpractice plaintiffs by (a) requiring them to give notice of intent to sue; and (b) not extending the statute of repose when notice is given within 90 days of the action being barred. Appellants’ Brf. at 11. No argument for a separate privileges and immunities analysis under the state constitution has been

¹⁷ *Putman*, Slip Op. at 4.

presented. *Id.*¹⁸ Instead, they challenge the statute under traditional equal protection principles.¹⁹ *Id.* at 12-13.

a. ***Minimal scrutiny applies***

As appellants acknowledge, and as a multitude of similar cases demonstrate, the pre-suit notice requirement is appropriately reviewed using the “minimal scrutiny” or “rational basis” test. *See, e.g. Medina v. Public Utility Dist. No. 1 of Benton Cty.*, 147 Wn.2d 303, 313, 53 P.3d 993 (2002); *Daggs v. City of Seattle*, 110 Wn.2d at 56-57 and cases cited

¹⁸ Although appellants have not advanced an independent state privileges and immunities claim, the Washington State Association for Justice Foundation (WSAJF) has argued as *amicus* in the *Waples* case that the notice requirement violates art. I, § 12 because it impermissibly burdens the fundamental right to a civil remedy. WSAJF *amicus* brief in No. 82142-9 at 13. As WSAJF has candidly acknowledged, however, this argument requires the Court to find that such a right is afforded by art. I, §10. *Id.* at 14. For the reasons stated above, art. I, § 10 cannot be so interpreted.

¹⁹ Although *Grant County Fire Prot. Dist. v. Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (*Grant County II*) determined that art. I, § 12 provides independent protections in some cases, that decision did not specify whether there is a residual state equal protection analysis that applies when heightened state scrutiny is unwarranted. The plurality opinion in *Andersen v. King Cty.*, 158 Wn.2d 1, 9, 138 P.3d 963 (2006) indicates, however, that in such cases the Court will apply the same equal protection analysis as under the 14th Amendment. *See also Washington Public Employees Ass’n v. State*, 127 Wn. App. 254, 262-263, 110 P.3d 1154 (2005) (standard equal protection analysis appropriate where no separate privileges and immunities argument advanced). This result makes sense because, although the Washington Constitution contains no express guarantee of equal protection, this Court has long held that art. I, § 12 affords such protections. *See, e.g., DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998).

therein (minimal scrutiny applies to notice of claim statutes); *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998) (minimal scrutiny applies to statute of repose); *Miller v. Sprint Spectrum, LP*, 2007 WL 4358313 * 5 (RCW 35.21.873's requirement of 60 days notice and opportunity to cure before suit can be brought against mobile telecommunications provider upheld applying rational basis test; privileges and immunities and open courts claims rejected); *see also Houk v. Furman*, 613 F. Supp. at 1028 ("The vast majority of federal and state courts which have considered equal protection challenges to statutory schemes aimed at reducing the costs of malpractice litigation by providing for pre-litigation notice and review of claims has applied the rational relationship test") and cases cited therein.

b. *Pre-suit notice of malpractice claims is rationally related to legitimate policy goals*

The pre-suit notice requirement easily passes constitutional muster under this standard, which requires a court to uphold legislative classifications if, under any conceivable state of facts, (1) the legislation applies alike to all members of the designated class; (2) there are reasonable grounds to distinguish between those within and those without the class; and (3) the classification has a rational relationship to the proper purpose of the legislation. *DeYoung v. Providence Medical Cnt'r*, 136

Wn.2d at 144. Here, the challenged legislation was passed in order to promote pre-suit resolution of claims and the “fair, efficient and streamlined” litigation of claims that are not settled. Laws 2006, ch. 8, § 1. This Court has often recognized that notice of claim statutes promote these interests. *See e.g., Daggs v. Seattle*, 110 Wn.2d at 55 (pre-suit notice promotes negotiation and settlement); *Medina*, 147 Wn.2d at 310 (pre-suit notice allows opportunity to investigate and evaluate claim).

With respect to the decision to require pre-suit notice in medical malpractice cases, the Legislature could and did find that requiring pre-suit notice in such matters was appropriate and necessary to serve the public interest by decreasing the costs associated with medical liability claims and thereby improving the climate within the state of Washington with respect to the willingness of qualified health care providers, particularly in high risk specialties, to practice here and to increase the availability and reduce the cost of insurance. Laws 2006, c. 8, § 1. Consequently, the Legislature’s decision to apply a notice requirement to malpractice cases was rational and valid. *See Medina*, 147 Wn.2d at 314 (burden on challenger to show that

classification is purely arbitrary)²⁰; *De Young*, 136 Wn.2d at 147-48 (classifications based on rational speculation valid). And, because the notice requirement applies equally to all malpractice plaintiffs, all three elements of the rational relation test are met.

c. *The statute does not substantially or unfairly burden the ability of plaintiffs to maintain an action*

In pre-suit notice cases, the Court also considers whether the statute substantially burdens the rights of the impacted class and, if so, whether that burden rests “upon some ground of difference having a fair and substantial relation to the object of the legislation.” *Medina* at 313-14, quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560 (1920). Here, for obvious reasons, appellant has not attempted to show how the requirement to mail a notice of intent to potential defendants imposes any substantial burden on plaintiffs. This failure dooms their facial challenge to the statute. Consequently, their brief is directed solely at showing that the statutory scheme creates a Catch-22

²⁰ Appellants may suggest that decisions upholding the rationality of pre-suit notice for governmental claims turned on the Legislature’s constitutional authority to determine the manner in which the state may be sued. But *Medina* and earlier cases establish that such measures are subject to the same equal protection analysis as other measures governing tort liability. 147 Wn.2d at 312 (“While the State has the power to regulate suits against the government, this court has held that legislative classifications must conform to the equal protection guaranties of the state and federal constitutions”).

situation where it is impossible for plaintiffs who discover the existence of a claim within 90 days before the statute of repose takes effect to comply with the notice requirement.

6. There is no Unconstitutional Conflict Between the Notice Requirement and the Statute of Repose

There are two problems with appellants' argument. First, appellants are not themselves within the class of persons for whom compliance with the notice requirement prevented them from commencing suit in a timely manner. To the contrary, the record shows that there was a period of approximately three months during which appellants could have given the required notice (from the unspecified date in February 2008, when appellants realized they had a claim, until May 26, 2008, which was 90 days prior to the beginning of the repose period). Accordingly, appellants should not be allowed to manufacture standing to raise their alleged "as-applied" challenge to the notice requirement. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court").

Second, appellants' claim that the failure of the Legislature to provide for extension of the statute of repose unconstitutionally burdened their ability to commence suit reflects a fundamental misunderstanding of the nature and purpose of repose statutes. Like statutes of limitation, repose statutes bar stale claims where evidence may have been lost or witnesses become unavailable. *1519-1525 Lakeview Blvd. Condominium Ass'n*, 144 Wn.2d at 578. But, whereas statutes of limitation bar plaintiffs from bringing an accrued claim after a specified period of time, statutes of repose terminate the ability to bring an action, even though the cause of action may not have accrued or even if the injury has not yet occurred. *Id.*; *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 211-212, 875 P.2d 1213 (1994).

With respect to medical malpractice cases, the Legislature has provided in various ways for tolling or extension of the limitations and repose periods. In some cases, the tolling or extension provisions apply equally to the limitations and repose provisions; *e.g.*, RCW 4.16.350 tolls both the limitations and repose provisions with respect to cases involving child sex abuse, fraud or intentional concealment, and retained non-therapeutic objects intentional torts. In addition, tolling is provided under RCW 4.16.190 for minors, incompetents, and certain pre-trial detainees. Tolling of the repose statute is not provided, however, for so-called "discovery rule plaintiffs;" *i.e.*, those who, despite the exercise of

reasonable diligence, do not know that they were injured as a result of health care negligence. RCW 4.16.350, ¶ 4.

In *DeYoung*, before it reached the facial validity of the previously enacted repose statute, this Court dealt with a narrower challenge to the Legislature's decision to exclude discovery rule plaintiffs from the group for whom the repose provision was tolled. *DeYoung* claimed that this omission was arbitrary and irrational, and therefore violated equal protection guarantees. This Court rejected that challenge, finding that the legislative scheme met the rationality test. 136 Wn.2d at 145-47. Similarly, *Lakeview Blvd. Condominium Ass'n* upheld the Legislature's decision to exclude property owners and manufacturers from a repose provision that otherwise protected builders, architects and engineers.

Appellants make essentially the same argument here, claiming that there is no rational basis for the Legislature's failure to extend the statute of repose in order to accommodate those who serve notices of intent within the 90 days before the repose period takes effect. But, as *DeYoung* illustrates, the appropriate mode of constitutional analysis is to examine whether the exemptions—in the form of tolling provisions—are rational. *De Young* at 146 (“There are reasonable grounds for the tolling and other statutory provisions which except a cause of action from the eight-year

bar, and thus reasonable grounds for the distinctions between the persons affected by those provisions and those who are not”).

Like the plaintiff in *DeYoung*, appellants argue that the Legislature should have added an exception for them. But, just as the Legislature validly determined that the repose statute will not be tolled for discovery rule plaintiffs whose claims have not accrued, it also could rationally conclude that the purposes of the repose statute would be significantly undermined by granting an extension for all late-accruing claims. Such a conclusion was clearly within its discretion. *See De Young* at 146; *Forbes v. Seattle*, 113 Wn.2d 929, 944, 785 P.2d 431 (1990) (tax exemption for non-profit theater and movie presentations did not illegally discriminate against for-profit operations).

7. Appellants' Due Process Claims Lack Merit

The basis for appellants' due process claims is less than clear. Apparently, they contend that the notice requirement violates substantive due process protections under the state and federal constitutions, which they contend “are evaluated under the same criteria used for equal protection.” Appellants' Brf. at 14. They also assert that the notice requirement somehow denies them procedural due process rights. *Id.*

The 14th Amendment and art. 1, § 3 of Washington's constitution protect against the deprivation of life, liberty, or property without due

process of law. Therefore, the threshold inquiry in any due process case is whether a protected interest is implicated. *In re Woods*, 154 Wn.2d 400, 411, 114 P.3d 607 (2005). Absent this threshold showing, neither procedural nor substantive due process principles apply.

Appellants have not identified any constitutionally interest that is infringed by RCW 7.70.100(1). There is no vested right in existing law. *Godfrey v. State*, 84 Wn.2d 959, 962-63, 530 P.2d 630 (1975). Therefore, due process protections “do not curtail a state’s power to amend its laws, common or statutory, to conform to changes in public policy.” *Id.* at 963. Because the notice requirement does not result in the deprivation of a constitutionally protected interest, due process protections—procedural or substantive—do not apply.

8. The Pre-suit Notice does not invade the Province of the Courts to make Procedural Rules governing Litigation

As this Court’s recent decision in *Putman* indicates, statutes addressing procedural matters in litigation may be held invalid if they directly conflict with rules adopted by this Court. *Putman*, Slip Op. at 9. Here, unlike the certificate of merit law, RCW 7.70.100 does not impose any additional pleading requirements or require early production of any evidence. Nor is it asserted that the notice requirement conflicts with any

court rule. Accordingly, the ostensible conflicts that led this Court to invalidate the certificate of merit law in *Putman* are not present here.

Additionally, the cases cited by appellants do not support their position. *Marine Power & Equip. Co., Inc. v. Industrial Indem. Co.*, 102 Wn.2d 457, 687 P.2d 202 (1984) involved the statutory process for disqualification of superior judges. One party sought to prevent another party, which had been added to the case late in the discovery phase, from disqualifying the assigned trial judge, arguing that, although the statute (RCW 4.12.040) allowed late disqualification by the newly added party, the court should override the statute pursuant to art. IV, § 1 of the Constitution. *Id.* at 461. Although the disqualification statute clearly addressed a procedural matter in litigation, it did not conflict with any court rule. Furthermore, the Court stated that it was not inclined to exercise its rule-making authority when the party seeking to prevent disqualification was responsible for the late addition of the other party: “[t]hey have only themselves to blame.” *Id.*

Decisions following *Marine Power* also emphasize that the authority of the legislature and courts with respect to litigation procedure is not exclusive, but shared. *See Sackett v. Santilli*, 146 Wn.2d 498, 506, 47 P.3d 948 (2002) (“The coextensive authority vested by the constitution in the legislature and the court to make rules is not uncommon among the

states”); *State v. Chavez*, 163 Wn.2d 262, 273, 180 P.3d 1250 (2008) (“the separation of powers doctrine allows for some interplay between the branches of government”), citing *Spokane County v. State*, 136 Wn.2d 663, 672, 966 P.2d 314 (1998).

Washington State Bar Ass’n v. State, 125 Wn.2d 901, 890 P.2d 1047 (1995) is similarly unhelpful. That decision emphasizes that legislation will be invalidated because it invades the province of the judiciary only where there is a “direct[] and unavoidable[e] conflict with a rule of court.” *Id.* at 906. Subsequent decisions of this Court confirm the importance of this holding. See *Spokane County v. State*, 136 Wn.2d at 669 (“The District Court Judges have not directed us to, nor can we find any, court rule which conflicts with the questioned provisions of the Act”); *Washington State Council of County and City Employees v. Hahn*, 151 Wn.2d 163, 169, 86 P.3d 774 (2004) (“Our inability to harmonize a court rule with a statute occurs only when the statute directly and unavoidably conflicts with the court rule”).

V. CONCLUSION

The Court could need not and should not invalidate a validly enacted statute in order to dress appellants’ self-inflicted wound. Rather,

for the reasons stated here, it should affirm the trial court's order of dismissal.

RESPECTFULLY SUBMITTED this 30th day of September 2009.

BENNETT BIGELOW & LEEDOM, P.S.

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BY RONALD R. CARPENTER **DECLARATION OF SERVICE**

CLERK I, Nancy Slocum, declare as follows:

I am a resident of the State of Washington, residing or employed in Seattle, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1700 7th Avenue, Suite 1900, Seattle, Washington 98101.

On September 30, 2009, I certify under penalty of perjury under the laws of the State of Washington that I caused service of the foregoing **BRIEF OF RESPONDENTS NICOL & VALLEY RADIOLOGISTS** by causing a true and correct copy to be delivered via electronic mail and U.S. Mail as follows:

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Nancy D. Slocum

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