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No. 853673

King County Superior Court Cause No. 10-2-24679-7

SUPREME COURT OF
THE STATE OF WASHINGTON

85367-3

GLEN A. McDEVITT,

Respondent

v.

HARBORVIEW MEDICAL CENTER, UNIVERSITY OF
WASHINGTON, and THE STATE OF WASHINGTON,

Petitioners

PETITIONERS' BRIEF

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ORIGINAL

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I. INTRODUCTION

Art. II, § 26 of the Washington Constitution authorizes the legislature to enact laws governing actions against state and local government, including pre-suit notice requirements. In 2009, in order to streamline the requirements for medical malpractice actions against governmental health care providers, the Legislature exempted such matters from the notice of claim requirements found in Chs. 4.92 and 4.96 RCW in favor of the simpler notice requirement found in RCW 7.70.100(1).¹ Under long-standing Washington precedent, the requirement to give notice prior to commencing suit against a governmental entity under RCW 7.70.100(1) constitutes a legitimate exercise of the legislature's constitutional authority. The question presented here is whether the legislature's express constitutional authority to enact procedural requirements for suits against governmental entities is negated because it attempted to apply the same notice requirement to non-governmental entities, in violation of the separation of powers doctrine as applied in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

Petitioners submit that *Waples* and the separation of powers doctrine cannot be extended to invalidate procedural requirements for suits

¹ Laws of 2009, Ch. 433, § 1-2 amended RCW 4.92.100 and 4.96.020 to provide, "Claims involving injuries from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are exempt from this chapter."

against governmental entities for the simple reason that the Constitution expressly authorizes the legislature to regulate these types of court proceedings. Plaintiff/Respondent should not be excused from a legitimate requirement to give notice prior to commencing suit against a governmental entity on the basis that the notice requirement is invalid *as applied* to cases involving non-governmental entities.

II. ASSIGNMENT OF ERROR

The Superior Court erred when it denied Petitioners' motion for summary judgment. (CP 44-45).

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is the pre-suit notice requirement under RCW 7.70.100(1) valid as applied to governmental health care providers?

IV. STATEMENT OF THE CASE

A. Facts

On July 9, 2007, Plaintiff/Respondent Glen McDevitt crashed into a tree while paragliding. He was thrown onto a roof and a chimney, and then he fell to the ground, fracturing his left femur. CP 8. He was taken to a Bellevue facility and ultimately transferred to Harborview Medical Center ("Harborview").² *Id.* On July 10, 2007, he underwent surgery to

² Harborview, which is operated by the University of Washington, is an arm of the state and persons wishing to sue it must comply with applicable notice requirements. *Hontz v. State*, 105 Wn.2d 302, 309-10, 714 P.2d 1176 (1986); *Kleyer v. Harborview Medical Center*, 76 Wn. App. 542, 547-48, 887 P.2d 468 (1995) (holding that to file suit against Harborview, plaintiff must comply with the pre-claim filing requirements set forth in Chapter 4.92 RCW).

repair his leg. *Id.* On July 13, 2007, he was discharged from Harborview. *Id.* In this lawsuit, Mr. McDevitt alleges that subsequently he developed deep venous thrombosis because he was not maintained on anti-coagulant medications after discharge. CP 9.

B. Proceedings Below

Mr. McDevitt commenced suit on July 20, 2010. CP 10-12. Harborview moved for summary judgment based on the undisputed fact that he did not provide any form of pre-suit notice. CP 16-20. In response, Mr. McDevitt argued that this Court's decision in *Waples* invalidated *all* pre-suit notice requirements. CP 22-23. In reply, Harborview contended that *Waples* was inapplicable because it involved actions against private health care providers; therefore, the *Waples* Court had no occasion to consider whether the notice requirement for health care liability claims was valid as applied to governmental entities under Art. II, § 26. CP 39. The trial court denied Harborview's Motion. CP 44-45. Harborview timely sought discretionary review, which this Court accepted on March 30, 2011. CP 46.

V. ARGUMENT

A. The Washington Constitution Authorizes the Legislature to Enact Procedural Requirements for Actions against the Government.

Art. II, § 26 of the Washington Constitution ("Suits against the State") provides "[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." From early days,

this Court has recognized that Art. II, § 26 permits the Legislature “to prescribe the method of procedure” in actions against the state and its subdivisions,³ stating that the Legislature’s “power to control and regulate the right of suit against [the state] is plenary.”⁴

1. Pre-suit notice requirements are valid under Art. II, § 26.

Compliance with pre-suit notice requirements has been a condition of the state’s waiver of tort immunity from the very beginning. *See* Laws of 1963, Ch. 159, § 3. Such requirements, including those currently codified in RCW 4.92.100 (for state entities) and RCW 4.96.020 (local entities), have been upheld repeatedly against a variety of constitutional challenges.⁵ None of these cases suggests that notice of claim statutes enacted under Art. II, § 26 violate the separation of powers.⁶ And, in the

³ *Northwestern & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 75, 50 P. 586 (1897).

⁴ *State v. Superior Court for Thurston County*, 86 Wash. 685, 688, 151 P. 108 (1915).

⁵ *See e.g., Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 405 P.2. 258 (2002); *Coulter v. State*, 93 Wn.2d 205, 608 P.2d 261 (1980); *Cook v. State*, 83 Wn.2d 599, 521 P.2d 725 (1974); *Nelson v. Dunkin*, 69 Wn.2d 726, 419 P.2d 984 (1966); *O'Donoghue v. State*, 66 Wn.2d 787, 405 P.2d 258 (1965).

⁶ The only Washington cases striking down pre-suit notice requirements for governmental entities were decided under an equal protection rationale. *Hunter v. North Mason High Sch.*, 85 Wn.2d 810, 539 P.2d 845 (1975), invalidated a requirement to submit a claim within 120 days after injury on the ground that, by effectively shortening the statute of limitations, the statute denied governmental claimants equal protection of the laws. *Jenkins v. State*, 85 Wn.2d 883, 540 P.2d 1363 (1975) invalidated a requirement to commence suit within 90 days after submitting a claim on similar, though

only case to touch upon separation of powers in the context of an enactment under Art. II, § 26, this Court summarily rejected a contention that a court rule trumped a statute governing procedures in suits against the state.⁷

B. The Requirement to Comply with RCW 7.70.100(1) is a Valid Exercise of the Legislature's Constitutional Authority to Regulate Suits against Government.

In 2006, the Legislature enacted RCW 7.70.100, which required all medical malpractice plaintiffs to give pre-suit notice. Before this statute was enacted, persons wishing to sue governmental entities for medical negligence were required to comply with the pre-suit notice requirements in RCW 4.92.100 and RCW 4.96.020.⁸ After enactment of RCW 7.70.100, claimants had to comply with both sets of requirements. In 2009, the Legislature passed Laws of 2009, Ch. 433, which was entitled, "AN ACT relating to claims for damages against the state and local governmental entities." In §§ 1-2 of that act, the legislature eliminated the

less broad, grounds. Later cases have commented that such requirements will be upheld so long as they do not impose a substantial burden on the ability to commence an action against the state. See e.g., *Medina v. Public Utility Dist. No. 1 of Benton Cty.*, 147 Wn.2d 303, 313-14, 53 P.3d 993 (2002). Although the constitutional source and parameters of the "substantial burden" test are unclear (*Id.* n.5), RCW 7.70.100(3) imposes a lesser burden than other notice statutes previously upheld by this Court and therefore there is no occasion to apply that test here.

⁷ *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn. 2d 40, 51-52, 905 P.2d 338 (1995).

⁸ See, e.g., *Kleyer v. Harborview Medical Center*, 76 Wn. App. 542, 887 P.2d 468 (1995).

duplication by amending RCW 4.92.100 and RCW 4.92.020 to require plaintiffs suing or intending to sue state or local agencies for medical malpractice to comply with RCW 7.70.100(1). As the title of the act indicates, when the Legislature amended chapters 4.92 and 4.96 RCW to substitute notice under RCW 7.70.100(1) for the notices required under those laws, it was exercising its constitutional authority to regulate suits against government under Art. II, § 26.

C. The Trial Court Erred by Assuming that *Waples* Applies to Suits against Government.

Plaintiff/Respondent has conceded that RCW 7.70.100 (1) would be valid if it only required notice prior to commencing suit against governmental health providers. CP 25. Notwithstanding this concession, he persuaded the trial court that *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), invalidated the statute for all purposes and in all contexts. This proposition is wrong, for several reasons.

1. *Waples* did not address the validity of the statute under Art. II, § 26.

The *Waples* court was not called upon to decide whether RCW 7.70.100(1) was valid as applied to suits against government; all of the defendants in that case were private practitioners. Accordingly, *Waples* did not consider the application of Art. II, § 26. Nor did the trial court in this case.

2. *Waples* did not facially invalidate the statute.

The trial court did not address the validity of the notice requirement under Art. II, § 26, apparently because it failed to appreciate the critical distinction between “facial” and “as-applied” constitutional challenges.⁹ Instead, it seemingly assumed that *Waples* was a facial challenge, which invalidated the statute for all purposes and prevented its application in any circumstances. This assumption was error.

Facial challenges to statutes are disfavored and can be brought only where there are no circumstances, even hypothetical ones, where the statute can be constitutionally applied.¹⁰ As explained in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51, 128 S. Ct. 1184 (2008):

Facial challenges ... run contrary to the fundamental principle of judicial restraint that courts should neither “ ‘anticipate a question of constitutional law in advance of the necessity of deciding it’ ” nor “ ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’ ” *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688

⁹ A “facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *Carlisle v. Columbia Irrigation Dist.*, 168 Wn. 2d 555, 567 n.2, 229 P.3d 761 (2010) (citing *City of Redmond v. Moore*, 151 Wn. 2d 664, 669, 91 P.3d 875 (2004)). “An as-applied challenge ... is characterized by a party’s allegation that application of the statute in the specific context of the party’s actions or intended actions is unconstitutional. Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated.” *City of Redmond*, 151 Wn. 2d at 669 (internal citations omitted).

¹⁰ *Washington State Republican Party v. Washington State Pub. Disclosure Com’n*, 141 Wn.2d 245, 282, n.14, 4 P.3d 808 (2000) (citing *In re Detention of Turay*, 139 Wn.2d 379, 417 n. 28, 986 P.2d 790 (1999)).

(1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)). Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that “ ‘[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.’ ” *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion)).

Nothing in *Waples* indicates that it was anything other than an “as-applied” challenge to the statute. The Court did not consider whether the statute might be legitimately applied in circumstances other than those presented by the record in that case, and there certainly is no evidence that it considered whether the statute might be valid under Art. II, § 26 as applied to government. Accordingly, the trial court should not have assumed that *Waples* facially invalidated the statute.

3. Extending *Waples* to actions against government fails to accord the legislation the presumption of constitutionality.

Two fundamental tenets of this Court’s constitutional jurisprudence are that legislation is presumed constitutional¹¹ and that the

¹¹ *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).

opponent must demonstrate its invalidity beyond reasonable doubt.¹² Here, rather than presuming the statute to be constitutional, the trial court indulged in the opposite presumption, based on its erroneous assumption that *Waples* had already decided the issue. In so doing, it failed to honor the appropriate division of function between the judicial and legislative branches and, in particular, failed to give any weight to the Legislature's authority under Const. Art. II, § 26.

D. *Waples*' Separation of Powers Rationale Cannot Be Extended to Legislation Authorized by Art. II, § 26.

Waples held that RCW 7.70.100(1) violated the separation of powers doctrine because the notice of intent requirement added a step not found in CR 3(a), which provides that 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." *Waples* 169 Wn.2d at 160. The Court held that both CR 3(a) and RCW 7.70.100 "cannot be harmonized and both cannot be given effect. If a statute and a court rule cannot be harmonized, the court rule will generally prevail in procedural matters and the statute in substantive matters." *Id.* at 161.

¹² This rule 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. The court must be "fully convinced, after a searching legal analysis, that the statute violates the constitution." *Id.*

This court-developed doctrine, which is not described in the text of the Constitution, cannot apply to procedural laws that the Constitution expressly authorizes the Legislature to impose. To illustrate, *Lacey Nursing Center, Inc. v. Department of Revenue* rejected that a claim that taxpayers could join a CR 23 class action seeking refunds without complying with the pre-suit and other procedural requirement imposed by the legislature under RCW 82.32.180. It did so despite a finding that all CR 23 requirements had been met, because the taxpayer/class members could not comply with the additional statutory requirements to maintain refund suits, thereby confirming that a statute enacted pursuant to Art. II, § 26 is valid, even when it adds to requirements imposed by court rules. 128 Wn.2d at 54-55.

Because the legislature's decision to require compliance with RCW 7.70.100(1) as a condition of maintaining malpractice actions against governmental health care providers represented an exercise of its authority of Art. II, § 26, the separation of powers analysis utilized to invalidate application of that statute in *Waples* cannot be extended to this case. Because that rationale was the sole basis for the decision below, the trial court's decision cannot stand.

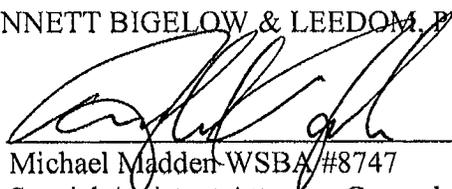
VI. CONCLUSION

For the reasons stated, this Court should reverse and remand with directions to enter an order granting Petitioner's motion, thereby restoring the long-standing principle that the legislature's waiver of sovereign immunity is conditioned on compliance with procedures prescribed under Art. II, § 26.

Respectfully submitted this 13 day of June 2011.

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On June 13, 2010, I certify under penalty of perjury under the laws of the State of Washington that I caused service of the foregoing **PETITIONERS' BRIEF** by causing a true and correct copy to be delivered as follows:

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