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

SUPREME COURT OF
THE STATE OF WASHINGTON

GLEN A. McDEVITT,

Respondent

v.

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

Petitioners

PETITIONERS' REPLY BRIEF

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ORIGINAL

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I. SUMMARY

Respondent does not dispute that C. 433 L. 2009, which eliminated duplicative pre-suit notice requirements for medical negligence cases against governmental entities by requiring plaintiffs to give notice only under RCW 7.70.100(1), constituted an exercise of the Legislature's authority under Art. II, § 26 of the Washington Constitution. Instead, Respondent argues that the separation of powers doctrine applies to laws enacted under Art. II, § 26 in precisely the same manner as it applies to statutes regulating lawsuits between private parties. Therefore, according to Respondent, *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010) controls. This argument is fundamentally flawed and should be rejected because it negates the Legislature's constitutional power to regulate suits against the state.

Respondent next argues that the pre-suit notice requirements under Chs. 4.92 and 4.96 RCW cannot be "resurrected" and applied to him. Petitioners have never advanced this argument, however, because those statutes, as amended in 2009, exempt medical negligence actions against governmental entities from their requirements.

Finally, Respondent has advanced a new theory, under which he would apparently have the Court invalidate all governmental pre-suit notice requirements under Equal Protection principles based on the proposition that the burdens imposed by such statutes are too high relative to the benefits provided. Although it is unclear whether he is complaining about the burdens associated with giving notice under RCW 7.70.100(1),

the requirement to file a claim under RCW 4.92.100 or RCW 4.96.020, or both, in all events, Respondent has managed to ignore the multiple holdings of this Court, which rejected similar Equal Protection challenges. Because no basis for ignoring those precedents has been established, Respondent's Equal Protection argument should be rejected.

II. ARGUMENT

A. **The Law Requiring Medical Negligence Plaintiffs to Comply with RCW 7.70.100(1) as a Condition Precedent to Suing the Government was enacted pursuant to Art. II, §26.**

Ch. 433, L. 2009, which exempted medical negligence actions from RCW 4.92.110 and RCW 4.96.020 in favor of notice under RCW 7.70.100(1), was entitled "AN ACT relating to claims for damages against the state and local governmental entities." Given this statement of purpose, Respondent has not disputed the proposition that Ch. 433 constituted an exercise of the Legislature's authority under Art. II, §26. Indeed, this statement of purpose is very similar to the statement attached to the original waiver of tort immunity in 1963, which was entitled "An Act relating to claims against the state and claims against the state arising out of tortuous conduct." C. 159, 1. 1963.

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B. *Waples*' Separation of Powers Analysis does not apply when the Legislature acts pursuant to Art. II, §26.

While acknowledging that *Waples v. Yi* did not address the constitutionality of RCW 7.70.100(1) as applied to claims against governmental entities, Respondent contends that *Waples* rendered the statute facially invalid because the same separation of powers principles apply to governmental notice of claim statutes. This contention is without merit.

Although the Washington Constitution does not contain a separation of powers clause, the separation of powers doctrine arises by implication to preserve the fundamental functions of the executive, legislative and judicial branches. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The doctrine operates when “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009), quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). The question presented here is whether, or what extent, the doctrine operates where an express provision of the Constitution (Art. II, §26) authorizes the Legislature to establish procedures in cases against the state.

The straight-forward answer is that a statute mandating pre-filing requirements in lawsuits against the state cannot violate the separation of powers because Art. II, §26 gives the Legislature the power to regulate

judicial procedures in such cases.¹ Thus, for example, no separation of powers issue arises with respect to laws governing federal court procedures because Art. III of the United States Constitution gives Congress the authority to enact such laws. *See Sibbach v. Wilson & Co*, 312 U.S. 1, 9-10, 61 S.Ct. 422 (1941) (Congress has “undoubted power to regulate the practice and procedure of federal courts”).² It is no doubt for this reason that the Court in *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40, 905 P.2d 338 (1995) summarily rejected an argument that statute imposing conditions on excise tax challenges was invalid because it conflicts with CR 23.

Respondent attempts to distinguish *Lacey Nursing Center* on the basis that the tax statute there in question regulated the “primary right to bring a class action,” rather than “procedural rights.” Resp. Brf. at 15. The primary/procedural rights distinction, as explained in *City of Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.2d 776 (2006), describes the principal, but not the exclusive, functions of the legislature and the judiciary. Accordingly, *Jensen* upheld a statute governing the admissibility of alcohol breath tests on the basis that procedural rules may be promulgated by both the legislature and the courts. *Id.* at 394.

¹ *See, State v. Superior Court for Thurston County*, 86 Wash. 685, 688, 151 P.2d 108 (1915) (Legislature’s “power to control and regulate the right of suit against [the state] is plenary”); *Northwestern & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 75, 50 P. 586 (1897) (Art. II, § 26 permits the Legislature “to prescribe the method of procedure” in suits against the state).

² This Court follows federal principles regarding the separation of powers doctrine. *State v. Billie*, 132 Wn.2d 464, 489, 939 P.2d 691 (1997).

Even under Respondent's construct, the attempt to distinguish *Lacey Nursing Center* fails. The statute at issue in that case—RCW 82.32.180—both creates a cause of action for tax refund and regulates court procedures in such cases. It mandates venue in Thurston County, and varies from the civil rules with respect to the form of the initial pleading, the manner by which service is accomplished, and by abrogating the requirement for an answer from the state. The statute further precludes persons who have not kept records as required by the excise tax statutes, or persons who have not paid the tax, from bringing an action to challenge the tax. *Lacey Nursing Center* held that these procedural provisions constituted a valid exercise of legislative power under Art. II, §26, which was not overridden by CR 23. 128 Wn.2d at 51.

Further, even if there is some room for operation of the separation of powers doctrine where the Legislature acts under Art. II, §26, this Court's traditional approach would not condemn RCW 7.70.100(1). To the contrary, in areas where the functions of cognate branches overlap, this Court has typically adopted a flexible, practical approach that is deferential to the legislative branch. *Carrick v. Locke*, 125 Wash. 2d at 135; *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 506-07, 198 P.2d 1021 (2009). Of considerable relevance in this regard is the fact that notice of claim statutes have been a routine condition precedent to suits against the state for over one hundred years. *See, Carrick* at 139 ("The long-standing nature of this practice alone is enough to demonstrate that

this amicable history of cooperation has not mortally wounded either branch.”).

Here, no evidence has been presented to show that governmental notice of claim statutes so undermine the integrity, independence or prerogatives of the courts as to render those enactments unconstitutional. In the absence of such proof, RCW 7.70.100(1) remains valid as applied in this case.³ See, e.g., *Washington State Council of County and City Employees v. Hahn*, 151 Wn.2d 163, 169-70, 86 P.3d 774 (2004) (statute requiring judges to collectively bargain with court employees not in unconstitutional conflict with GR 29).

C. Respondent’s Arguments Concerning Application of Chs. 4.92 and 4.96 RCW are Irrelevant.

Oddly, Respondent spends a significant portion of his brief arguing that the Court should reject any argument that if RCW 7.70.100 is deemed facially unconstitutional, RCW 4.92.100 and RCW 4.96.020 can act as gap-fillers. Petitioner has never advanced this argument.

³ Respondent cites *Moody v. United States*, 112 Wn.2d 690, 773 P.2d 67 (1989), seemingly for the proposition that a statute declared unconstitutional in one setting is invalid in all other applications. *Moody* stands for no such proposition. Rather, in that case, the Court simply declined to answer certified questions from a federal court concerning interpretation of a statutory cap on non-economic damages, which had previously been declared to violate the state constitutional right to a jury trial. The dissent contended that the certified questions should be answered because there is no right to jury in cases under the Federal Tort Claim Act, 28 U.S.C. § 2402. *Id.* at 693-94. The majority responded that it declined to do so in part because the parties had raised the issue only in passing and without adequate development. *Id.* at 692, n. 5. *Moody* does not constitute a pronouncement on “as applied” vs. “facial” challenges, nor did it present circumstances similar to those here.

D. Respondent's Equal Protection Theory is Without Merit.

Respondent argues for the first time⁴ that RCW 4.92.100, RCW 4.96.020 and RCW 7.70.100(1) are not rationally related to a legitimate governmental purpose because, while their purpose is to facilitate pre-suit settlement, these statutes "do not obligate a public defendant to engage in settlement negotiations." Resp. Brf. at 22. According to Respondent, the absence of such a requirement renders the pre-suit notice requirements invalid.⁵ This argument should be rejected, for the following reasons.

First, under the rational relationship test, a statute will be upheld if there is any conceivable set of facts that could provide a rational basis for the classification. *Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wn. 2d 303, 313, 53 P.3d 993, 998 (2002), citing *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997). Equal Protection challenges to governmental notice of claim statutes based on the theory that such laws impermissibly discriminate between

⁴ Although RAP 2.5(a) may permit him to raise this new argument as a ground for affirming the judgment below, Respondent is not thereby excused from his burden of demonstrating the unconstitutionality of the statute beyond a reasonable doubt. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 988 (1998). "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir.1970).

⁵ Part V(f) of Respondent's brief is unclear as to whether he is challenging the constitutionality of all pre-suit notice requirements (as appears at page 22) or only the theoretical "resurrection" of RCW 4.92.100 and RCW 4.96.020 (see page 24). Because both challenges are equally without merit, Petitioners have not differentiated between the two.

governmental and non-governmental defendants have rejected repeatedly. See *O'Donoghue v. State*, 66 Wn.2d 787, 405 P.2d 258 (1965); *Nelson v. Dunkin*, 69 Wn.2d 726, 419 P.2d 984 (1966); *Cook v. State*, 83 Wn.2d 599, 521 P.2d 725 (1974); *Coulter v. State*, 93 Wn.2d 205, 608 P.2d 261 (1980); *Hall by Hall v. Niemer*, 97 Wn.2d 574, 649 P.2d 98 (1982); *Daggs v. City of Seattle*, 110 Wn.2d 49, 750 P.2d 626 (1988); *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 405 P.2d 258 (2002).

Hunter v. North Mason High School, 85 Wn.2d 810, 539 P.2d 845 (1975) is of no help to Respondent because, as explained in later cases, its reach is limited to claim statutes that shorten the amount of time to bring an action against the government relative to similar suits against private parties. *Daggs v. City of Seattle*, 110 Wn.2d at 52-53. Later cases focus on whether claim-filing requirements substantially burden the ability to bring suit. Those cases have uniformly concluded that RCW 4.92.100, RCW 4.96.020, and similar measures do not substantially burden claimants. E.g. *Medina*, 147 Wn.2d at 313-14; *Daggs*, 110 Wn.2d at 52; *Hall*, 97 Wn.2d at 581-82. For obvious reasons, Respondent does not contend that RCW 7.70.100(1) creates any greater burden.

Second, with respect to the theory that pre-suit notice statutes are fatally flawed if they do not require the governmental defendant to negotiate, Respondent ignores the fact that RCW 7.70.100(3) requires mediation of health care liability claims. Although the statute and CR

53.4⁶ do not require pre-suit mediation in every case, the Legislature could rationally conclude that pre-suit notice creates the possibility of early resolution, which otherwise would not exist. It could further conclude that normal economic and business incentives will cause governmental defendants to seek to negotiate meritorious cases, but that a statutory mandate for pre-suit negotiations in every case—regardless of merit—would impose costs in excess of the potential benefits.

Even if omission of a mandatory pre-suit mediation/negotiation requirement constitutes some sort of flaw, under minimum scrutiny, the “fit” between the purpose and the legislative remedy need not be perfect. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 567, 800 P.2d 367 (1990). Rather, the Legislature is entitled to address a problem incrementally. *See, Yakima County Deputy Sheriff's Ass'n v. Bd. of Com'rs for Yakima County*, 92 Wn. 2d 831, 836, 601 P.2d 936 (1979) (equal protection does not require a state to attack every aspect of a problem. Rather, the legislature is free to approach a problem piecemeal and learn from experience).

Furthermore, pre-suit notice serves other important purposes in addition to facilitating pre-suit negotiations. *Cook v. State*, 83 Wn.2d at 603. Pre-suit notice also allows for early investigation of claims, preservation of records and other evidence, retention of counsel and

⁶ RCW 7.70.100(3) requires mediation after the filing of a ninety day notice and before trial. CR 53.4 requires that mediation occur not later than 30 days before trial.

confirmation of insurance coverage, all of which serve to facilitate the fair, speedy and inexpensive resolution of cases. These purposes are independently sufficient to sustain the notice requirement. *Id.*

III. CONCLUSION

For the reasons stated, this Court should reverse and remand with directions to enter summary judgment of dismissal, 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 12 day of August 2011.

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DECLARATION OF SERVICE

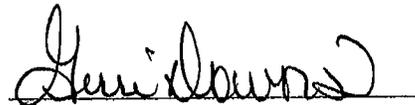
I, Gerri Downs, declare as follows:

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 August 12, 2011, I certify under penalty of perjury under the laws of the State of Washington that I caused service of the foregoing **PETITIONERS' REPLY BRIEF** by causing a true and correct copy to be delivered as follows:

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