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**SUPREME COURT OF WASHINGTON RULES "CERTIFICATE OF MERIT"
RULE IS UNCONSTITUTIONAL**

The Supreme Court of Washington recently ruled on the case of Putnam v. Wenatchee Valley Medical Center. The case had originally been thrown out by a lower court because Putnam did not file a "Certificate of Merit" along with her initial complaint. In Washington, the law required that a plaintiff submit such a certificate when filing a claim alleging medical malpractice. The Certificate of Merit is a piece of paper signed by a doctor (presumably in the same field as the defendant) that states that there is a probability that the defendant violated the standard of care. The law putting the requirement into effect is a relatively recent one that falls under the category of tort reform as it was made in an effort to curb medical malpractice suits.

According to the court, the requirement goes too far and inhibits access to the courts. By requiring the plaintiff to submit evidence before discovery (the process whereby the two sides share and divulge information and documents) an undue burden was placed on the plaintiff. Often the cost of hiring an expert to simply look at the case before filing excluded not those with frivolous lawsuits, simply those with shallow pockets. Regardless whether or not the rule was effective it is now a moot point as the court has tossed it out.

Fairfax, Virginia attorney Ben Glass says "this is an example of supposed tort reform, but the legislators who are trying to cut back on frivolous lawsuits have to understand that they don't have the authority to impose restrictions on access to the courts." Glass continued, "Now at least the case will be allowed to go to trial and be heard on its merits rather than thrown out haphazardly."

Ben Glass is Fairfax, Virginia personal injury attorney who specializes in car accident and medical malpractice cases. He is author of the book *The Truth About Lawyer Advertising*. To schedule an interview with Attorney Benjamin Glass call (703) 591-9829

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
|---|---|--------------------------|
| KIMME PUTMAN, |) | |
| |) | |
| Appellant, |) | No. 80888-1 |
| |) | |
| v. |) | En Banc |
| |) | |
| WENATCHEE VALLEY MEDICAL |) | |
| CENTER, P.S., a Washington professional |) | |
| service corporation; PATRICK J. WENDT, |) | |
| M.D.; DAVID B. LEVITSKY, M.D., |) | |
| |) | |
| Respondents, |) | |
| |) | |
| and |) | |
| |) | |
| SHAWN C. KELLEY, M.D.; JOHN DOE |) | |
| NO. 1; JOHN DOE NO. 2; JANE DOE |) | |
| NO. 1; and JANE DOE NO. 2, |) | |
| |) | |
| Defendants. |) | |
| |) | Filed September 17, 2009 |
| |) | |

Owens, J. -- Appellant Kimme Putman sued respondents for negligently failing to diagnose her ovarian cancer. The trial judge dismissed her lawsuit because she failed to file a certificate of merit from a medical expert, as required for medical

malpractice lawsuits under RCW 7.70.150. Putman challenges the constitutionality of the certificate of merit requirement on a number of grounds. We hold that RCW 7.70.150 is unconstitutional because it unduly burdens the right of access to courts and violates the separation of powers.¹

FACTS

In 2007, Putman filed a lawsuit against Wenatchee Valley Medical Center and several of its employees, alleging that they negligently failed to diagnose her ovarian cancer in 2001 and 2002. She alleges that the delay in her diagnosis until 2005 caused her to miss the opportunity to undergo early treatment, and that she now has a 40 percent likelihood of surviving the next five years. The trial court dismissed Putman's claims because she failed to file a certificate of merit as required by the state's medical malpractice litigation statute, RCW 7.70.150. The trial court also held that the certificate of merit requirement is constitutional. Putman appealed the ruling directly to this court, alleging that RCW 7.70.150 is unconstitutional because, *inter alia*, it unduly burdens the right of access to courts and violates the separation of powers.

ISSUES

¹ Because we find that the certificate of merit requirement unduly burdens the right of access to courts and violates the separation of powers, we do not reach Putman's arguments that the certificate of merit requirement (1) violates the privileges and immunities clause of the Washington State Constitution and the equal protection clause of the United States Constitution, (2) violates the prohibition on special laws in the Washington State Constitution, and (3) violates the due process clause of the United States Constitution.

1. Does RCW 7.70.150 unduly burden the right of access to courts?
2. Does RCW 7.70.150 irreconcilably conflict with procedural court rules and therefore violate the separation of powers?

STANDARD OF REVIEW

We review the constitutionality of a statute de novo. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008).

ANALYSIS

I. Does RCW 7.70.150 Unduly Burden the Right of Access to Courts?

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803). The people have a right of access to courts; indeed, it is “the bedrock foundation upon which rest all the people's rights and obligations.” *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). This right of access to courts “includes the right of discovery authorized by the civil rules.” *Id.* As we have said before, “[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense.” *Id.* at 782.

Requiring medical malpractice plaintiffs to submit a certificate prior to

discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. *Id.* Obtaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people. *Id.* at 780. Accordingly, we must strike down this law.

II. Does RCW 7.70.150 Violate the Separation of Powers?

Putman contends that RCW 7.70.150's certificate of merit requirement violates the separation of powers because it conflicts with CR 8 and 11 regarding pleading requirements and thereby encroaches on the judiciary's power to set court rules.

Wenatchee Valley Medical Center argues that RCW 7.70.150 does not conflict with CR 8 and 11 and that, even if it did, CR 8 and 11 do not apply because medical malpractice claims are special proceedings. *See* CR 81(a) (exempting special proceedings from civil rules).

The Washington State Constitution does not contain a formal separation of powers clause, but “the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of

powers doctrine.”” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The doctrine of separation of powers divides power into three co-equal branches of government: executive, legislative, and judicial. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006), *cert. denied*, 549 U.S. 1254 (2007). The doctrine ““does not depend on the branches of government being hermetically sealed off from one another,”” but ensures “that the fundamental functions of each branch remain inviolate.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009) (quoting *Carrick*, 125 Wn.2d at 135). If ““the activity of one branch threatens the independence or integrity or invades the prerogatives of another,”” it violates the separation of powers. *Fircrest*, 158 Wn.2d at 394 (internal quotation marks omitted) (quoting *Moreno*, 147 Wn.2d at 505-06).

Some fundamental functions are within the inherent power of the judicial branch, including the power to promulgate rules for its practice. *Id.*; *In re Disbarment of Bruen*, 102 Wash. 472, 476, 172 P. 1152 (1918). If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters. *Fircrest*, 158 Wn.2d at 394.

Thus, this court must determine whether RCW 7.70.150 can be harmonized

with this court's rules. If it cannot, the court rule will prevail under the separation of powers doctrine if RCW 7.70.150 involves fundamentally procedural matters. But first, the court must determine if the civil rules even apply to medical malpractice proceedings or if, instead, medical malpractice proceedings are now "special proceedings" and therefore exempt from the civil rules.

- A. Are medical malpractice proceedings special proceedings and therefore exempt from the civil rules?

Wenatchee Valley Medical Center contends that medical malpractice proceedings are special proceedings and therefore exempt from CR 8 and 11 under CR 81(a), which states that "[e]xcept where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings." (Emphasis added.) The term "special proceedings" is not defined within the rule. This court has not set out a rule for determining whether a proceeding is ordinary or special, but Washington courts have identified certain actions as special proceedings, including lien foreclosures, sexually violent predator petitions, garnishment, will contests, and unlawful detainer actions.²

Wenatchee Valley Medical Center argues that medical malpractice proceedings

² See *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007) (unlawful detainer actions); *Zesbaugh, Inc. v. Gen. Steel Fabricating, Inc.*, 95 Wn.2d 600, 627 P.2d 1321 (1981) (garnishments); *In re Estate of Kordon*, 157 Wn.2d 206, 137 P.3d 16 (2006) (will contests); *In re Det. of Aguilar*, 77 Wn. App. 596, 892 P.2d 1091 (1995) (sexually violent predator petitions); *Pac. Erectors, Inc. v. Gall Landau Young Constr. Co.*, 62 Wn. App. 158, 813 P.2d 1243 (1991) (lien claims).

are “special proceedings” because the legislature has set out statutory requirements for filing medical malpractice cases. This argument is unsustainable because it places no limits on the ability of the legislature to determine procedural rules. Under this standard, the legislature could reclassify any common law action as a special proceeding by passing statutes regulating its procedures, thereby eroding this court’s power to determine its own court rules.

A more appropriate definition of special proceedings would include only those proceedings created or completely transformed by the legislature. This would include actions unknown to common law (such as attachment, mandamus, or certiorari), as well as those where the legislature has exercised its police power and entirely changed the remedies available (such as the workers’ compensation system). Other states have adopted similar standards within their civil codes, typically defining an ordinary action as one based in common law and a special proceeding as any other action. *See, e.g., Tide Water Associated Oil Co. v. Superior Court*, 43 Cal. 2d 815, 822, 279 P.2d 35 (1955); *Dow v. Lillie*, 26 N.D. 512, 520, 144 N.W. 1082 (1914). This standard protects the separation of powers because it preserves this court’s abilities to set its own court rules for traditional actions but allows the legislature to set rules for newly created proceedings.

Medical malpractice claims are fundamentally negligence claims, rooted in the

common law tradition. *See, e.g., Wright v. Cent. Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 327, 347 N.E.2d 736 (1976). While the legislature has made some changes to medical malpractice claims, it has not extinguished the common law action and replaced it with a statutory remedy. *Cf. Lane v. Dep't of Labor & Indus.*, 21 Wn.2d 420, 428, 151 P.2d 440 (1944) (holding that the workers' compensation act "took away from the workman his common-law right of action for negligence" and "[i]n its place it provided for industrial insurance," thereby "creating the right of the workman to compensation" from the workers' compensation fund). Therefore, under the standard described above, medical malpractice suits do not qualify as special proceedings and are not exempt from the civil rules under CR 81(a).

B. Does RCW 7.70.150 conflict with CR 8 and 11?

RCW 7.70.150 requires plaintiffs in medical malpractice actions to file a certificate of merit with the pleadings.³ The certificate of merit must contain a

³ The first two subsections of RCW 7.70.150 state:

(1) In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. If the action is commenced within forty-five days prior to the expiration of the applicable statute of limitations, the plaintiff must file the certificate of merit no later than forty-five days after commencing the action.

(2) The certificate of merit must be executed by a health care provider who meets the qualifications of an expert in the action. If there is more than one defendant in the action, the person commencing the action must file a certificate of merit for each defendant.

statement from an expert that, “based on the information known at the time of executing the certificate of merit, . . . there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care.” RCW 7.70.150(3).

This requirement directly conflicts with CR 11, which states that attorneys do not have to verify pleadings in medical malpractice actions, as well as CR 8, which details our system of notice pleading. First, RCW 7.70.150 conflicts with CR 11 because it requires the attorney to submit additional verification of the pleadings—a requirement that CR 11 explicitly limits to “dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and [related modifications].” CR 11(a). Second, RCW 7.70.150 conflicts with CR 8 and our system of notice pleading, which requires only “a short and plain statement of the claim” and a demand for relief in order to file a lawsuit. CR 8(a). Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims. *Doe*, 117 Wn.2d at 782. The certificate of merit requirement essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence. For that reason, the certificate of merit requirement fundamentally conflicts with the civil rules regarding notice pleading—one of the primary components of our justice system.

C. Does the conflict between RCW 7.70.150 and CR 8 and 11 involve procedures or substantive law?

As noted above, if a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both. *Fircrest*, 158 Wn.2d at 394. If they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters. Substantive law “creates, defines, and regulates primary rights,” while procedures involve the “operations of the courts by which substantive law, rights, and remedies are effectuated.” *Id.* (quoting *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)).

Several other state supreme courts have invalidated certificate and affidavit requirements for medical malpractice litigation, holding that they conflict with court rules regarding the procedures for filing lawsuits and therefore violate the separation of powers. *See, e.g., Summerville v. Thrower*, 369 Ark. 231, 239, 253 S.W.3d 415 (2007) (invalidating a statute that required medical malpractice plaintiffs to submit an affidavit of reasonable cause from a medical expert within 30 days of filing); *Wimley v. Reid*, 991 So. 2d 135, 138 (Miss. 2008) (invalidating a statute that required the plaintiff’s attorney to submit a certificate that he or she has consulted a medical expert prior to filing); *Hiatt v. S. Health Facilities, Inc.*, 68 Ohio St. 3d 236, 237-38, 1994-Ohio-294, 626 N.E.2d 71 (invalidating a statute requiring the plaintiff’s attorney in a

medical malpractice action to submit an affidavit attesting that he or she had requested a copy of the medical records). *But see McAlister v. Schick*, 147 Ill. 2d 84, 94, 588 N.E.2d 1151, 167 Ill. Dec. 1021 (1992) (upholding an affidavit statute, holding that the statute fell within the legislature’s power to enact laws “to determine and effectuate public policy” and did not impede court’s ability to control its procedures).

We hold that RCW 7.70.150 is procedural because it addresses how to file a claim to enforce a right provided by law. *See, e.g., Hiatt*, 68 Ohio St. 3d at 238 (“Since the conflict involves the form and content of the complaint to initiate a medical malpractice case, it is a procedural matter.”). The statute does not address the primary rights of either party; it deals only with the procedures to effectuate those rights. Therefore, it is a procedural law and will not prevail over the conflicting court rules.⁴

CONCLUSION

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

⁴ Amicus curiae Washington State Medical Association, et al. encourage us to follow several federal courts sitting in diversity that have held that certificate of merit requirements are substantive rather than procedural. However, those courts used the *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), outcome-determinative test, designed to discourage forum shopping. *See, e.g., Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000). Neither the test nor its underlying rationale apply to this court when determining whether a state statute is substantive or procedural for a separation of powers analysis.

jeopardizing the court's power to set court procedures. When the activity of one branch invades the prerogatives of another, there is a violation of the doctrine of separation of powers. The court must strike down this law because it violates the right of access to courts and conflicts with the judiciary's inherent power to set court procedures. We reverse the trial court's dismissal and remand for further proceedings.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Richard B. Sanders

Justice Debra L. Stephens

Justice Tom Chambers
