No. 82142-9 (consolidated with 82973-0)

J.M. JOHNSON, J. (dissenting)—The 90-day notice before filing suit requirement of former RCW 7.70.100(1) (2006)[1] does not irreconcilably conflict with the requirements to commence suit under CR 3(a). The legislature enacted the short notice before suit to "provide incentives to settle cases before resorting to court," Laws of 2006, ch. 8, § 1, not to modify court-prescribed procedures. The legislation can be readily harmonized with CR 3(a) so as to give effect to both provisions (and protect the legitimate interests underlying each). Accordingly, I would hold that the notice requirement of RCW 7.70.100(1) does not violate court rules or the separation of powers and therefore would affirm the Court of Appeals in *Waples* and the trial court in *Cunningham*. Because the majority erroneously holds to the contrary, I dissent.

[1] Like the majority, we refer to the former RCW 7.70.100(1) throughout this opinion.

## Analysis

The majority is correct that "'[i]f a statute appears to conflict with a court rule'" and the two "'cannot be harmonized, the court rule will prevail in procedural matters.'" Majority at 7 (quoting *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009)). However, there is no such conflict here. As I observed above, the notice requirement of RCW 7.70.100(1) prior to filing suit does not irreconcilably conflict with the court rule that outlines the procedure for commencing suit, CR 3(a). Quite the opposite, the two can coexist harmoniously.

A close comparison of the language of CR 3(a) and the statutory notice requirement is appropriate. The rule reads, in relevant part:

> Except as provided in rule 4.1, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint.

CR 3(a).[2] It bears emphasis that this court rule prescribes how an action is to be *commenced*.

In contrast, the statute, RCW 7.70.100(1), states that a notice period is required *before* suit is commenced in certain cases:

> No action based upon a health care provider's professional negligence may be commenced unless the defendant has been

[2] CR 4.1 provides a different procedure for those actions authorized under chapter 26.09 RCW—marital dissolution and legal separation proceedings.

> given at least ninety days' notice of the intention to commence the action.

This statute does not prescribe how such an action will be commenced. Nor does it alter the procedure for commencement under CR 3(a). Rather, the statute creates a prerequisite to litigation: notice and a short time for resolution that must be completed prior to initiating the CR 3(a) procedure in a medical malpractice action.

This prerequisite does not irreconcilably conflict with CR 3(a). A litigant will still commence suit by filing a complaint or by serving the opposing party with copies of a summons and a complaint. RCW 7.70.100(1) does not require the litigant to do anything else in order to commence his suit; it merely requires that he give the opposing party 90 days' notice before commencing. Thus, the CR 3(a) commencement procedure and the notice requirement are not incompatible and both provisions can be given effect. A plaintiff must give notice to a potential defendant pursuant to RCW 7.70.100(1), wait 90 days, and thereafter commence suit as prescribed in CR 3(a), the procedures of which are unchanged by RCW 7.70.100(1).

There being no conflict between the statutory notice requirement and CR 3(a), we need not strike the statute because of a conflict with a court rule as we did in *Putman*. In that case, we held that RCW 7.70.150 directly

conflicted with the pleading requirements of CR 8 and CR 11. *Putman*, 166 Wn.2d at 983. RCW 7.70.150 required a plaintiff in a medical malpractice action to obtain a certificate of merit from a medical professional and to file that certificate with his complaint. No complaint could be filed without a separate certificate (for each cause of action). This, we found, conflicted with the civil rules that governed pleadings, CR 8 and 11. Relevant excerpts of those rules read:

> A pleading . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.

CR 8(a).

> Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by [the] attorney . . . . Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified . . . .

CR 11(a). In *Putman*, the court held that RCW 7.70.150 modified the rules by requiring a certificate of merit in addition to the "'short and plain statement of the claim'" described in CR 8(a) and by requiring this expert certification when CR 11(a) specified that proceedings other than those concerning particular marital and custodial matters need not be verified.

*Putman*, 166 Wn.2d at 983. The additional statutory requirement to file a complaint "fundamentally conflict[ed] with the civil rules regarding notice pleading." *Id.* Moreover, by "essentially requir[ing] plaintiffs to submit evidence supporting their claims before they even ha[d] an opportunity to conduct discovery and obtain such evidence," *id.*, the certificate of merit requirement had the potential to subvert the court-prescribed sequence of trial, which generally allows discovery only after commencement of suit, thereby further conflicting with the rules of our court system.

The court deemed these conflicts too serious to be harmonized: a litigant could not file a pleading containing only a "short and plain statement" of his claim if RCW 7.70.150 also required the pleading to contain a certificate of merit, nor could a litigant have the option of filing without having his complaint verified if the statute required that a medical expert certify its merit. Faced with such irreconcilable conflicts on matters of court procedure, which the judiciary establishes, this court struck down RCW 7.70.150 in favor of CR 8 and CR 11. *Id.*

We need not, however, strike down RCW 7.70.100(1) on similar grounds. *Putman* is distinguishable because, as explained above, no irreconcilable conflict exists between CR 3(a) and the notice requirement of

RCW 7.70.100(1). The statutory notice requirement does not prevent a litigant from commencing his suit pursuant to the procedures of CR 3(a), and he will indeed do so if the suit is not averted during the notice period. It does not insert a new procedure into CR 3(a) as RCW 7.70.150 did with respect to CR 8 and CR 11. Nor does it subvert the sequence of discovery and trial prescribed by court rule. Rather, the notice requirement shifts that sequence forward in time by 90 days (and may make some cases and trials unnecessary). The commencement of trial will proceed in the same way, as prescribed by CR 3(a), after the expiration of that resolution/settlement time period. RCW 7.70.100(1) and CR 3(a) thus are able to coexist harmoniously such that we can—and should—give effect to both our court rule and the legislation.

This conclusion appears even more sensible when one considers the fact that presuit notice requirements often have been legislatively adopted and upheld in many other contexts. *See, e.g.*, RCW 4.96.020(4) (requiring 60 days' notice prior to commencement of tort action brought against government agency); RCW 26.18.070(2)(d) (requiring 15 days' notice prior to commencement of action seeking mandatory wage assignment for overdue child support); RCW 64.50.020(1) (requiring 45 days' notice prior to

commencement of construction defect action brought against construction professional); RCW 70.105D.050(5)(a) (requiring 30 days' notice prior to commencement of civil action for hazardous waste cleanup); 29 U.S.C. § 626(d) (requiring 60 days' notice prior to commencement of action under the Age Discrimination in Employment Act of 1967).

It is significant that none of these long standing notice requirements has been invalidated by this court for irreconcilably conflicting with the commencement procedures of CR 3(a), despite the fact that each requires plaintiffs to do the same as RCW 7.70.100(1)—that is, provide notice of their intent to sue, wait a certain number of days, hopefully encouraging settlement, and only then commence litigation under CR 3(a).

However, I also note with concern that existing statutory notice requirements may be vulnerable to invalidation if we extend the majority's reasoning in the present case to these systems. Such a result would be a greater violation of the separation of powers and a greater disregard of the legislature's legitimate role than that which the majority purports to find in RCW 7.70.100(1). Invalidating such a broad swath of legislative enactments requires the judiciary to invade the legislature's authority to promote settlement and ensure efficiency in many types of civil actions, including

causes of action *created* by the legislature itself. *See, e.g.*, Laws of 1993, ch. 449, § 1 (purpose of chapter 4.96 RCW is "to provide a single, uniform procedure for bringing a claim for damages against a local governmental entity"); RCW 26.18.010 (legislative finding that "stronger and more efficient statutory remedies need to be established" in child support and other family law actions); Laws of 2006, ch. 8, § 1 (purpose of RCW 7.70.100(1) is, in part, 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").

Statutory notice requirements have been upheld by courts in other jurisdictions in the same medical malpractice context as the cases herein. The Supreme Court of Mississippi, for example, upheld a 60-day medical malpractice notice requirement as consistent with the separation of powers under its state constitution. *Thomas v. Warden*, 999 So. 2d 842, 847 (Miss. 2008). In doing so, it distinguished legislatively enacted *prerequisites* to suit from legislatively enacted court procedures that affect case management *after* filing, approving of the former:

> While it is true that the rules governing litigation in Mississippi courts are within this Court's purview, [the] notice requirement is a pre-suit prerequisite to a claimant's right to file suit. . . . The Legislature's authority to make law gives way to this Court's rule-making authority when the suit is filed, not before.

*Id.* This result was supported by the court's reasoning in a contemporaneous case addressing medical malpractice legislation, in which it observed that "pre-suit requirements are clearly within the purview of the Legislature, and do not encroach upon this Court's rule-making responsibility." *Wimley v. Reid*, 991 So. 2d 135, 139 (Miss. 2008). "Indeed," the court concluded simply, "the Legislature has authority to establish presuit requirements as a condition precedent to filing particular kinds of lawsuits." *Id.*; *accord Neal v. Oakwood Hosp. Corp.*, 226 Mich. App. 701, 721, 575 N.W.2d 68 (1997) (holding that a 182-day medical malpractice notice requirement did not violate separation of powers).

Several other courts also have found analogous limitations on litigation for medical malpractice to be consistent with the separation of powers. *See, e.g.*, *Smart v. W. Jefferson Med. Ctr.*, 28 So. 3d 1119 (La. App. 2009) (statute requiring filing fees for medical malpractice actions did not violate separation of powers because imposition of fees is not a judicial function); *Estate of McCall v. United States*, 663 F. Supp. 2d 1276, 1306 (N.D. Fla. 2009) (cap on noneconomic medical malpractice damages did not violate separation of powers because it did not impermissibly interfere with function of judiciary); *N.J. State Bar Ass'n v. State*, 387 N.J. Super. 24, 50, 902 A.2d

944 (2006) (statute allowing judge to require dispute resolution prior to trial for medical malpractice actions did not violate separation of powers); *Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004) (cap on medical malpractice damages did not violate separation of powers); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1056 n.58 (Alaska 2002) (same); *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 101, 376 S.E.2d 525 (1989) (same); *Zdrojewski v. Murphy*, 254 Mich. App. 50, 81-82, 657 N.W.2d 721 (2002) (cap on noneconomic medical malpractice damages did not violate separation of powers because it was based on policy considerations other than regulating procedural operations of the judiciary).[3]

These cases show that courts elsewhere in the nation recognize that state legislatures, under the separation of powers, play a relatively strong role in managing the problems created by excessive medical malpractice and other litigation. Indeed, these are problems that legislatures, not courts, can address.

We should do the same here and thus give effect to the complicated legislative compromise reached by our legislators, governor, trial lawyers,

[3] *Cf.* RCW 7.70.100(3) (subjecting medical malpractice suits to mandatory mediation); RCW 7.70.100(4) (requiring the supreme court to adopt rules implementing such mediation).

physicians, hospital administrators, and government staff in 2006—after two initiatives on the subject were defeated. These laws were expressly adopted to address "one of the most important issues facing the citizens of Washington state." Laws of 2006, ch. 8, § 1; *see also* Br. of Amicus Curiae Wash. Defense Trial Lawyers, *Waples v. Yi*, No. 82142-9, at 4-10 (describing and quoting extensively from the discussions that led to the compromise). Part of this compromise has already been eviscerated in *Putman*. To strike down RCW 7.70.100(1) as well further eviscerates the legislative package such that it can no longer properly be called a compromise. This is not what the legislature, the governor, or those other "good faith" parties at the negotiating table agreed to, and we would be wise to avoid such a dramatic legislative revision.

The majority's reluctance to respect the efforts of the executive and legislative branches to address the malpractice crisis puts these separate constitutional powers in a difficult position of finding ways to manage problems caused by a crisis without affecting our court rules. Since the persistence of excessive court proceedings in the medical malpractice context is the difficulty, this is an extremely challenging task. We should not render it hopeless. We could avoid this dilemma by adopting a court rule explicitly

enforcing the statute in question. *Cf. David v. Sternberg*, 272 Mich. App. 377, 384-85, 726 N.W.2d 89 (2006) (holding a similar medical malpractice statute consistent with separation of powers because the supreme court adopted a rule enforcing it). But to me, judicial "enactment" of legislative prerogatives creates a greater separation of powers problem than the majority concludes is presented by RCW 7.70.100(1).

Conclusion

The presuit notice requirement of RCW 7.70.100(1) does not conflict with the court procedures for commencing suit prescribed in CR 3(a). The former addresses what must happen *before* a litigant files suit, and the latter addresses what must happen *when* suit is commenced pursuant to the court rules. These two provisions can coexist harmoniously. Because we can better respect the separation of powers by reconciling them, I respectfully dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Chief Justice Barbara A.

Justice Mary E. Fairhurst