

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NANCY N. WAPLES and MARK  
WAPLES, husband and wife and their  
marital community thereof,

Appellants,

v.

PETER H. YI, DDS and JANE DOE YI,  
husband and wife and their marital  
community thereof, d/b/a/ LAKEWOOD  
DENTAL CLINIC, and DR. PETER H.  
YI, DDS, PS, a Washington Corporation,

Respondents.

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LINDA CUNNINGHAM and  
DOWNEY C. CUNNINGHAM, a  
marital community,

Appellants,

v.

RONALD F. NICOL, M.D.; VALLEY  
RADIOLOGISTS, INC., PS and  
MULTICARE HEALTH SYSTEM, INC.,  
d/b/a COVINGTON MULTICARE  
CLINIC,

Respondents.

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

En Banc

Filed: July 1, 2010

C. JOHNSON, J.—This case involves a challenge to the constitutionality of former RCW 7.70.100(1) (2006),<sup>1</sup> which requires a plaintiff to provide health care providers with 90 days’ notice of the plaintiff’s intention to file a medical malpractice suit. This notice requirement is one of two requirements instituted by the legislature in an effort to provide potential medical malpractice plaintiffs with incentives to settle cases before resorting to court. The second, codified as RCW 7.70.150, required plaintiffs to obtain and file with the complaint a certificate of merit from a medical expert. We recently held that the certificate of merit requirement was unconstitutional, violating both the separation of powers and the right of access to courts. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009).

In these consolidated cases, Nancy Waples seeks reversal of a published Court of Appeals’ decision affirming the dismissal of her medical malpractice suit

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<sup>1</sup> The legislature amended RCW 7.70.100(1) in 2007, but the provisions at issue here were unchanged. Unless noted otherwise, further reference to RCW 7.70.100(1) is to the former statute.

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against her dentist, Peter Yi, DDS, PS.<sup>2</sup> The suit was dismissed based on Waples's failure to give notice as required by the statute. Waples concedes she did not provide the required notice, but argues, among other things, that the requirement is unconstitutional under *Putman*.

Similarly, Linda Cunningham seeks reversal of a trial court order dismissing her medical malpractice suit against her radiologist, Dr. Ronald Nicol.<sup>3</sup>

Cunningham also did not provide the required notice and, like Waples, argues that the requirement is unconstitutional under *Putman*. We agree that the notice requirement of RCW 7.70.100(1) is unconstitutional because it violates the separation of powers.<sup>4</sup> We reverse both the Court of Appeals in *Waples* and the trial court in *Cunningham* and remand for further proceedings.

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<sup>2</sup> *Waples v. Yi*, 146 Wn. App. 54, 189 P.3d 813 (2008).

<sup>3</sup> Cunningham appealed the trial court's dismissal directly to this court.

<sup>4</sup> Because we hold that the notice requirement violates the separation of powers, we do not reach the appellants' arguments that the notice requirement (1) is not mandatory, (2) violates the privileges and immunities clause under article I, section 12 of the Washington State Constitution, (3) violates the open courts clause under article I, section 10 of the Washington State Constitution, (4) violates the equal protection clauses of the state and federal constitutions, and (5) violates the due process clauses of the state and federal constitutions.

FACTS AND PROCEDURAL HISTORY

*Waples*

On September 16, 2003, Waples received dental treatment from Yi. On September 5, 2006, Waples filed a complaint against Yi seeking damages arising from her treatment, alleging that he allowed his staff to administer Novocain negligently, causing her to suffer physical disability, pain, and partial paralysis. On September 14, 2006, Waples served Yi with a copy of the summons and complaint.

Yi moved for summary judgment and sought dismissal of Waples's claims for failure to comply with the notice requirement of RCW 7.70.100(1). Waples did not dispute that she failed to comply with the statute but instead argued that the notice requirement is not mandatory and that noncompliance is excused because the mediation procedures contemplated by RCW 7.70.100(3) through (7) were not in place at the time the action was commenced.<sup>5</sup> After hearing oral argument, the

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<sup>5</sup> The mediation procedures contemplated by RCW 7.70.100 were established by CR 53.4 and became effective September 1, 2007.

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trial court dismissed the action for noncompliance with the notice requirement and Waples appealed.

At the Court of Appeals, Waples made the same statutory construction arguments made below but also contended that RCW 7.70.100(1) violates equal protection under article I, section 12 of the Washington Constitution. Division Two affirmed the dismissal of Waples's suit, holding that the notice requirement of RCW 7.70.100(1) required strict compliance, that Waples failed to strictly comply, and that the statute did not violate equal protection under rational basis review. *Waples v. Yi*, 146 Wn. App. 54, 189 P.3d 813 (2008).

We granted Waples's petition for review.

#### *Cunningham*

On August 24, 2000, radiology specialist Nicol took an MRI (magnetic resonance imaging) image of Cunningham's brain and prepared a report indicating that the imaging studies were normal. In February 2008, Cunningham learned that she required invasive surgery to treat several brain tumors and that the 2000 imaging studies were in fact not normal, but had shown abnormalities of an extra-axial tumor

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mass. On August 4, 2008, Cunningham served a notice of intent to sue Nicol, but to avoid the 8-year statute of repose, filed suit 16 days later on August 20.

Like Yi, Nicol moved for summary judgment and sought dismissal of Cunningham's claims for failure to comply with the notice requirement of RCW 7.70.100(1). Cunningham did not dispute that she failed to comply with the statute, and at the time, specifically conceded the validity of the statute of repose.

Cunningham Clerk's Papers at 162 ("the validity of the subject statute of repose is beyond challenge"). Rather, she sought a continuance pending our decision in *Putman* or, alternatively, a declaratory ruling or summary judgment in her favor.

After hearing oral argument, the trial court granted the motion to dismiss the action for noncompliance with the notice requirement and denied Cunningham's motions.

Cunningham appealed the order granting the motion to dismiss directly to this court. We accepted review and consolidated Cunningham's case with Waples.

*Waples v. Yi*, 165 Wn.2d 1031 (2009).

#### ISSUE

Does the notice requirement of RCW 7.70.100(1) violate the separation of

powers doctrine?

#### ANALYSIS

As we recognized in *Putman*:

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 coequal branches of government: executive, legislative, and judicial. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). 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. *Jensen*, 158 Wn.2d at 394) (internal quotation marks omitted) (quoting *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002)).

Some fundamental functions are within the inherent power of the judicial branch, including the power to promulgate rules for its practice. 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.

*Putman*, 166 Wn.2d at 980 (citations omitted). The crux of the separation of

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powers issue in *Putman* was whether RCW 7.70.150 could be harmonized with this court's rules. After concluding that medical malpractice proceedings are not special proceedings and are therefore not exempt from the civil rules, we held that RCW 7.70.150 conflicted with the pleading requirements of CR 8 and 11, that this conflict involved procedural law and not substantive law, and that the certificate of merit requirement thereby encroached upon the judiciary's power to set court rules.

Appellants contend that *Putman* controls here. They argue that the notice requirement of RCW 7.70.100(1) irreconcilably conflicts with the commencement requirements of CR 3(a), that this conflict involves procedural law, and that the notice requirement thereby encroaches upon the judiciary's power to set court rules. Respondents argue that *Putman* does not apply and that RCW 7.70.100(1) does not violate the separation of powers.

*Putman* considered whether RCW 7.70.150 conflicted with the pleading requirements of CR 8 and 11, and whether that conflict involved procedural law or substantive law. Similarly, here we must consider whether RCW 7.70.100(1) conflicts with the commencement provisions of CR 3(a) and whether that conflict



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involves procedural law or substantive law.

Appellants argue that RCW 7.70.100(1), like RCW 7.70.150, conflicts with this court's rules because the notice requirement fundamentally changes the procedures for the commencement of a civil action under CR 3(a). In *Putman*, we concluded that RCW 7.70.150 conflicted with CR 8 and 11:

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. *John Doe [v. Puget Sound Blood Bank Ctr.]*, 117 Wn.2d [772,] 782[, 819 P.2d 370 (1991)]. 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.

*Putman*, 166 Wn.2d at 983 (first alteration in original). A similar comparison of RCW 7.70.100(1) with CR 3(a) leads to the same conclusion.

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CR 3(a) provides in pertinent 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.

(Emphasis added.) In contrast, the pertinent language of RCW 7.70.100(1) provides:

No action based upon a health care provider's professional negligence may be *commenced* unless the defendant has been given at least ninety days' notice of the intention to commence the action.

(Emphasis added.) Requiring notice adds an additional step for commencing a suit to those required by CR 3(a). And, failure to provide the notice required by RCW 7.70.100(1) results in a lawsuit's dismissal, as it did here, even where the complaint was properly filed and served pursuant to CR 3(a).

Respondents attempt to distinguish *Putman*, contending that the certificate of merit requirement changes the procedures for filing *pleadings* in a lawsuit, while the notice requirement does not impose any *pleading* requirements. But the analysis of *Putman* is not so limited. There, we held that the addition of legislative requirements to the court rules for filing suit was unconstitutional. We based our conclusion on the fact that the statutory certificate of merit requirement involved

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procedures and not substantive rights “because it addresses how to file a claim to enforce a right provided by law . . . . 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.” *Putman*, 166 Wn.2d at 984-85 (citation omitted).

We make the same holding here. The conflict between RCW 7.70.100(1) and CR 3(a) 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. “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.’” *Putman*, 166 Wn.2d at 984 (internal quotation marks omitted) (quoting *Jensen*, 158 Wn.2d at 394). Like RCW 7.70.150, RCW 7.70.100(1) does not address the primary rights of either party and deals only with the procedures to effectuate those rights. Therefore, RCW 7.70.100(1) involves procedural law and will not prevail over CR 3(a).

CONCLUSION

The notice requirement of RCW 7.70.100(1) irreconcilably conflicts with the commencement requirements of CR 3(a) and is unconstitutional because it conflicts with the judiciary's power to set court procedures. We therefore reverse the Court of Appeals in *Waples* and the trial court in *Cunningham* and remand for further proceedings.

AUTHOR:

Justice Charles W. Johnson

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WE CONCUR:

Justice Susan Owens

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Justice Gerry L. Alexander

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Justice Richard B. Sanders

Justice Debra L. Stephens

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Justice Tom Chambers

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