

Date: July 26, 2008

**MEMO TO:** Potential Participants – Amicus Curiae

**FROM:** Tim Layton  
Director, Legal Affairs

**SUBJECT: PUTMAN V. WENATCHEE VALLEY MEDICAL CENTER -  
*Certificate of Merit Constitutional Challenge***

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***How the Putman constitutional challenge to the state's certificate of merit statute could adversely impact current or future tort reform measures in Washington State***

**Facts:** Plaintiff/appellant Kimme Putman was diagnosed with ovarian cancer. She then brought a medical malpractice suit against defendant/respondent Wenatchee Valley Medical Center (WVMC) and three of its doctors, Drs. Patrick Wendt, David B. Levitsky, and Shawn C. Kelley. Plaintiff claimed the defendant doctors and nondefendant Rita Hsu, M.D., failed to timely diagnose her disease. WVMC's alleged liability was based on corporate negligence and respondeat superior (employer vicarious liability).

A medical malpractice plaintiff must file with the complaint (or within up to 135 days afterwards) a certificate of merit for each defendant. RCW 7.70.150. Plaintiff filed a certificate for Drs. Wendt and Levitsky, but not for Dr. Kelley or WVMC.

WVMC and Dr. Kelley moved to dismiss. Plaintiff voluntarily nonsuited Dr. Kelley, who is no longer a party. The trial court reserved ruling on the corporate negligence claims. It dismissed those respondeat superior claims against WVMC based on "conduct by any health care provider for whom a Certificate of Merit has not been filed." The court upheld the constitutionality of RCW 7.70.150.

Plaintiff argues that the Superior Court by upholding the constitutionality of the statute authorizes a far reaching change to the common law of corporate vicarious liability that precludes Putman (or any plaintiff) from claiming WVMC (or any health care facility) is vicariously liable for medical negligence committed by its employees or agents whenever the plaintiff does not also sue those individual providers and submit a certificate of merit as to each.

**Why the case matters:** The plaintiffs are seeking to have declared unconstitutional the certificate of merit requirement that was enacted as part of the SSHB 2292 legislative compromise that followed the unsuccessful I-330 and I-336 initiative campaigns. The plaintiffs have argued that the certificate of merit requirement violates:

- The separation of powers doctrine, the access to courts provision of the state constitution (art. 1, sec. 10),
- The Fourteenth Amendment equal protection guarantee and the privileges and immunities clause of the state constitution (art. 1, sec. 12),
- The Fifth Amendment and state constitutional (art. 1, sec. 3) due process clauses, and
- The state constitutional provision prohibiting the enactment of any special law (art. 2, sec. 28).

While the courts' current jurisprudence might be viewed as giving plaintiffs an uphill battle, nothing prevents the court from expanding its state constitutional jurisprudence to strike down the certificate of merit provision.

Should plaintiffs succeed in convincing the court to put more flesh on the bones of any of the constitutional provisions plaintiffs have cited, so as to interpret any of them in a way that would render the certificate of merit provision unconstitutional, the court's decision will likely impact, and place in jeopardy, other liability reform provisions that were included in SSHB 2292, or that the health care community or other liability reform advocates might seek to have enacted in the future.

Thus, if plaintiffs are successful with any of their constitutional arguments in Putnam, not only will the certificate of merit requirement be eliminated, but also the stage will have been set for the courts to more readily declare other liability reform measures unconstitutional! Thus, irrespective of whether one believes the certificate of merit is an effective liability tort reform measure or not or cares whether or not it is eliminated, the Putnam decision will likely have significant impact on other attempted tort reform measures and foretell whether they will pass constitutional muster.

This case merits consideration and involvement by those organizations concerned with preserving liability reforms or advocating for them in the future in Washington State. The WSMA would encourage these organizations to have their voices heard as amicus curiae in the Putnam case.