

NO. 80888-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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KIMME PUTMAN,

Appellant,

vs.

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.; and JOHN DOE NO. 1; JOHN DOE NO. 2; JANE
DOE NO. 1 and JANE DOE NO. 2,

Defendants.

APPEAL FROM CHELAN COUNTY SUPERIOR COURT
Honorable John E. Bridges, Judge

BRIEF OF RESPONDENTS

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I. NATURE OF THE CASE

Plaintiff challenges the constitutionality of the medical malpractice certificate of merit statute, RCW 7.70.150.

II. ISSUE PRESENTED

Has plaintiff met her heavy burden of showing that RCW 7.70.150 is unconstitutional beyond a reasonable doubt?

III. STATEMENT OF THE CASE

Plaintiff/appellant Kimme Putman was diagnosed with ovarian cancer. (CP 295, 338) She then brought a medical malpractice suit against defendant/respondent Wenatchee Valley Medical Clinic 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. The clinic's alleged liability was based on corporate negligence and respondeat superior. (CP 334-61)

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 the clinic. (CP 300, 341, 358)

The clinic and Dr. Kelley moved to dismiss. Plaintiff voluntarily nonsuited Dr. Kelley, who is no longer a party. (CP 115-16, 324-33, 368)

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. Final judgment was certified under CR 54(b). (CP 23-28)

IV. ARGUMENT

A. PLAINTIFF HAS A HIGH BURDEN OF PROOF.

Although this court reviews summary judgment *de novo*,¹ plaintiff here has a heavier than usual burden because she claims RCW 7.70.150 is unconstitutional. A statute is presumed constitutional. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Plaintiff has the burden of showing there is *no reasonable doubt* it violates the constitution. *Id.*

This high standard reflects the courts’ respect for the Legislature as a coequal branch of government. Because both the Legislature and the courts are sworn to uphold the constitution, some deference is due the Legislature’s judgment that the statute is constitutional. *See Island County*, 135 Wn.2d at 147.

¹ While the motion was styled a motion to dismiss, it is treated as one for summary judgment under CR 12(c) since the trial court considered matters outside the pleadings. (CP 25-27) Thus, plaintiff’s reliance on the CR 12(b)(6) standard of review set forth in *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), is misplaced.

Further, because plaintiff challenges RCW 7.70.150's facial validity,² she bears the heavy burden of showing that "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004); see *Crawford v. Marion County Election Board*, ___ U.S. ___, 128 S. Ct. 1610, 1623, ___ L. Ed.2d ___ (2008).

B. A PRIMER ON CERTIFICATE OF MERIT STATUTES.

Before this Court determines the validity of RCW 7.70.150, it is helpful to understand how that statute came to be. After voters rejected competing health care liability reform initiatives, the 2006 Legislature enacted 2SHB 2292. 2006 WASH. LAWS ch. 8. Supported by the Governor, Insurance Commissioner, Washington State Bar Association, health care industry, and Washington State Trial Lawyers Association (2/22/06 Senate Bill Report 2SHB 2292, p. 7), the enactment addresses a wide spectrum of health care issues.

² Plaintiff cannot be mounting a challenge to the statute 'as applied', as she has not presented *any* specific facts, as opposed to speculation, demonstrating the statute's application violates either the state or federal constitution. See *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 223-24, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001); see also *Herrera v. Seton NW Hosp.*, 212 S.W.3d 452, 461-62 (Tex. App. 2006) (plaintiff's challenge to expert report statute as violating Texas constitutional open court guarantee failed where plaintiff failed to show statute made it impossible for him to pursue claim).

For example, to promote patient safety, the enactment requires medical facilities to report adverse events. Drug prescriptions must be legible. The number of public members on the Medical Quality Assurance Commission has been increased. RCW 18.71.015, 69.41.010(13), ch. 70.56.

The enactment also includes insurance industry reforms. For example, RCW 48.18.547 specifies factors a medical malpractice insurer may consider in its underwriting. The notice period before a medical malpractice insurer may cancel a policy has been lengthened, and medical malpractice insurance forms are now subject to insurance commissioner approval. RCW 48.18.100, .290.

Also included are health care liability reform provisions. Medical malpractice claims are now subject to voluntary arbitration and mandatory mediation. The collateral source rule has been amended. RCW 7.70.080, .100, ch. 7.70A. The certificate of merit statute, RCW 7.70.150, is but one of these and other health care liability reform measures. Specifically approved by the Washington State Trial Lawyers Association, as well as the health care profession, it, along with the other statutes in the 2006 enactment, reflects a grand compromise between competing interests to forge a workable plan for improving Washington's health care system.

(Appendix A – Excerpt from Senate Legislative Committee Bill Folder –
2005 HB 2292)

1. What RCW 7.70.150 Is and Is Not.

It is important to understand what RCW 7.70.150 does *not* require. Unlike statutes in many other states, the Washington statute does *not*, among other things, expressly require—

- an affidavit
- a certificate for claims not based on standard of care violations
- an expert with minimum years of practice or currently engaged in the applicable practice
- a certificate based on information not known at the time
- identification of the specific acts or omissions believed to have violated the applicable standard of care
- an expert's written opinion
- alteration in a medical malpractice plaintiff's burden of proof at trial.³

³ Thus, plaintiff's claim that the trial court changed the common law of vicarious liability and required her to sue individual providers is meritless. In any event, plaintiff does not list as an issue the trial court's interpretation of RCW 7.70.150; she challenges only its ruling the statute is constitutional.

All the statute requires is that an expert witness file a certificate that he or she believes, based on information known at the time, there is a reasonable probability the defendant's conduct did not comply with the accepted standard of care. If there is more than one defendant, a certificate must be filed for each. RCW 7.70.150(2)

Significantly, it has long been established that when a plaintiff alleges a medical professional has violated the standard of care, plaintiff must present expert testimony to establish that standard and whether a particular practice was prudent thereunder. *Miller v. Jacoby*, 145 Wn.2d 65, 72, 33 P.3d 68 (2001); *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Indeed, as will be discussed *infra*, many experienced medical malpractice attorneys routinely retain an expert to evaluate a potential claim before filing suit.

However, as will be shown, many less experienced lawyers do not obtain an expert evaluation before suing for medical malpractice. Thus, the statute merely ensures that at an early stage in the litigation, a plaintiff has an expert who—at least preliminarily—believes the case has some merit.

The certificate must be filed with the complaint, or if the complaint is filed within 45 days before the limitations period expires, within 45 days thereafter. For good cause shown, the trial court may extend the time

up to 90 *additional* days. RCW 7.70.150(1), (4). Thus, a plaintiff could have as many as 135 days after filing suit to comply with the statute.

Plaintiff here filed a complying certificate of merit as to two defendants. The certificate simply stated (CP 341):

I, FRED GERBER, M.D., am familiar with the standard of care expected of a reasonable and prudent radiologist. I have reviewed the information available to me at this time and believe that there is a reasonable probability that Dr. David B. Levitsky and Dr. Patrick J. Wendt's care and records do not meet the accepted standard of care required to be exercised in the State of Washington.

Plaintiff presented no evidence she was unable to find, or pay the fees of, an expert willing to file a certificate for other defendants including WVMC. Instead, she claims RCW 7.70.150 is unconstitutional.

2. What Other States Do.

At least 20 states besides Washington have statutes or rules that require a plaintiff bringing a medical malpractice suit to file some type of certificate or affidavit based on an expert's belief the suit has some merit.⁴ Many place a much heavier burden than RCW 7.70.150 does on medical malpractice plaintiffs.

⁴ An appendix listing these states and their statutes is set forth in the Appendix.

For example, some require an expert's formal written opinion or report.⁵ Others require an expert's detailed affidavit or equivalent.⁶

Some require the certificate or affidavit to be filed during a much shorter time frame, with no provision for extensions of time.⁷ The maximum time allowable under others is less than the 135 days possible under RCW 7.70.150.⁸

Some restrict who qualifies as an expert. For example, an expert may have to be engaged in the same type of medical care as the defendant or been actively practicing or teaching medicine within a certain number of years.⁹

⁵ See, e.g., 753 ILL. COMP. STAT. ANN. § 5/2-622; MO. ANN. STAT. § 538.225; 63 OKLA. ST. ANN. § 1-1708.11.

⁶ See, e.g., ARK. CODE ANN. § 16-114-209; GA. CODE ANN. § 9-11-9.1; MICH. COMP. LAWS ANN. § 600.2912d; W. VA. CODE § 53-7B-6; VA. CODE ANN. § 8.01-20.1.

⁷ See, e.g., ARK. CODE ANN. § 16-114-209 (must be filed within 30 days after filing of complaint); NEV. REV. STAT. § 41A.071 (must be filed with complaint).

⁸ See, e.g., CONN. GEN. STAT. ANN. § 52-190a (must be filed with complaint or limitations period may be stayed up to 90 days); 18 DEL. CODE ANN. § 6853 (must be filed with complaint but 60-day extension allowable for good cause); FLA. STAT. ANN. § 766.104 (must be filed in complaint but 90 day continuance available); GA. CODE ANN. § 9-11-9.1 (must be filed with complaint but no more than 45-day extension allowable unless all parties consent); § 753 ILL. COMP. STAT. ANN. 5/2-622 (must be filed with complaint but up to 90 extra days available); MINN. STAT. ANN. § 145.682 (must be filed with complaint or up to 90 days after service); 63 OKLA. STAT. ANN. 1-1708.11 (must be filed with complaint but up to 90 extra days available for good cause).

⁹ See, e.g., ARK. CODE ANN § 16-114-209; 18 DEL. CODE ANN. § 6853 (3 years); 753 ILL. COMP. STAT. ANN. § 5/2-622 (5 years); MO. ANN. STAT. § 538.225 (5 years).

Some expressly require dismissal with prejudice for noncompliance. *See* MINN. STAT. ANN. § 145.682; TEX. CIV. PRAC. & REM. CODE ANN. § 74.351. One requires the trial court clerk to refuse to file the complaint if the affidavit is not filed with it and there is no motion for an extension of time (up to 60 days). *See* 18 DEL. CODE ANN. § 6853. Another even purported to preclude jurisdiction if there is a failure to comply. *See* 1988 OHIO LAWS § 1.

As will be discussed, courts in the majority of states where such statutes have been challenged have upheld them. Despite this and the fact that the often less onerous RCW 7.70.150 was approved by WSTLA and the health care profession, plaintiff claims RCW 7.70.150 is unconstitutional.

C. RCW 7.70.150 IS CONSTITUTIONAL.

1. RCW 7.70.150 Does Not Violate Separation of Powers.

Plaintiff claims RCW 7.70.150 conflicts with CR 11 and thus violates the separation of powers doctrine. But that doctrine does not require different branches of government to be “hermetically sealed off from one another.” *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Rather, it is “grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread.” *Id.* The issue is not whether two branches of government engage in

coinciding activities, but whether one's activity threatens the other's independence or integrity or invades its prerogatives. *Id.*

Thus, when a rule and a statute appear to conflict, this court will first attempt to harmonize them to give effect to both. Only when there is an irreconcilable conflict will the rule prevail. *City of Fircrest v. Jensen*, 158 Wn. 2d 384, 394, 143 P.3d 776 (2006), *cert. denied*, 117 S. Ct. 1382 (2007).

CR 81(a) precludes any conflict between RCW 7.70.150 and CR 11. And even absent CR 81(a), there is no conflict.

a. CR 81(a) Precludes Any Conflict.

CR 81(a) provides that “[e]xcept where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings” (emphasis added). *See also* CR 1 (civil rules inapplicable to exceptions set forth in CR 81). Consequently, to the extent—if any—CR 11 is inconsistent with statutes applicable to special proceedings, the statutes, not CR 11, apply.

“Special proceedings” are those governed largely by statute. 3A K. Tegland, *WASHINGTON PRACTICE Rules* 13 (5th ed. 2006). They are typically set forth in RCW tit. 7, which is entitled “Special Proceedings and Actions”. *Hoagland v. Mount Vernon School District No. 320*, 23 Wn. App. 650, 653, 597 P.2d 1376 (1979), *aff’d*, 95 Wn.2d 424 (1981).

Medical malpractice proceedings are special proceedings. “When injury results from health care, any legal action is governed by chapter 7.70 RCW.” *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001). Located in RCW tit. 7, RCW ch. 7.70 provides:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of *all* civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976.

RCW 7.70.010 (emphasis added). RCW ch. 7.70 governs such things as the burden of proof, the elements of a claim, and the admission of certain evidence. *See, e.g.*, RCW 7.70.030-.050, .080.

Because RCW ch. 7.70 defines a special proceeding exclusive to all others, RCW 7.70.150 is a statute applicable to special proceedings within CR 81(a). *See Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 105, 117 P.3d 1117 (2005); *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002). RCW 7.70.150 thus cannot be inconsistent with any Civil Rule. There is no invasion of the judicial prerogative and hence no separation of powers violation.

State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), provides a helpful comparison. There a statute allowed the admission of certain

hearsay statements that would have otherwise been inadmissible under the Rules of Evidence. Nevertheless, this court found no separation of powers violation. Noting that ER 802 specifies that hearsay is not admissible “except as provided . . . by *statute*,” (italics in original) this court explained there was no separation of powers violation:

Legislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence. . . .

103 Wn.2d at 178 (emphasis added) (citations omitted). *See also State v. Blilie*, 132 Wn.2d 484, 491, 939 P.2d 691 (1997) (court rule “subject to” statute recognizes legislative restrictions).

City of Fircrest, 158 Wn.2d 384, *Hiatt v. Southern Health Facilities, Inc.*, 68 Ohio St. 3d 236, 626 N.E.2d 71 (1994), and *Summerville v. Thrower*, 369 Ark. 231, ___ S.W.3d ___ (2007), and other cases cited by plaintiff did not involve a rule similar to CR 81(a) and thus are irrelevant.

Since CR 81(a) provides that statutes governing special proceedings prevail over inconsistent court rules, RCW 7.70.150 cannot conflict with CR 11. Thus, there is no separation of powers violation.

b. RCW 7.70.150 and CR 11 Do Not Conflict.

Even if CR 81(a) did not apply, there would still be no separation of powers violation because RCW 7.70.150 does not conflict with CR 11. “If an affidavit or verification is specifically required by an applicable

statute or rule, the statute or rule trumps CR 11.” 3A K. Tegland, WASHINGTON PRACTICE *Rules* 232 (5th ed. 2006). The same should be true for statutorily required certificates of merit.

Further, while CR 11 says that pleadings generally “need not, but may be, verified or accompanied by affidavit,” the certificate of merit is not only not a pleading, it does not purport to verify every allegation in the complaint, as a verification would do.

Moreover, while CR 11 provides that “[t]he signature of a party or of an attorney constitutes a certificate *by the party or attorney*,” RCW 7.70.150 requires that an expert sign a certificate. (Emphasis added.) Thus, the statute simply supplements CR 11 in a manner consistent with CR 11’s requirement of reasonable inquiry. See *McAlister v. Schick*, 147 Ill. 2d 84, 588 N.E.2d 1151, 1155 (1992).

Hiatt, 626 N.E.2d 71, and *Summerville*, 369 Ark. 231, which involved affidavits, not certificates, are again not persuasive. See 1988 OHIO LAWS § 1; ARK. CODE ANN. § 16-114-209. In *Hiatt* the statute in question sought to remove the jurisdiction of the court. 626 N.E.2d at 72-73. In *Summerville*, the statute gave the plaintiff only 30 days to file the required affidavit.

Plaintiff attempts to debunk the trial court’s rationale for why RCW 7.70.150 does not violate the separation of powers doctrine. But

this court may affirm on any grounds within the pleadings and the proof. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997). The long and the short of the matter is that the trial court was correct in finding no separation of powers violation, no matter what its reasoning.

2. RCW 7.70.150 Does Not Unconstitutionally Deny Access to the Courts.

“Justice in all cases shall be administered openly, and without unnecessary delay”. WASH. CONST. art. I, § 10. Not surprisingly given its language, this provision “has been construed to mean that members of the public and the press have a right to attend court proceedings.” *In re Recall Charges Against Seattle School District No. 1 Directors*, 162 Wn.2d 501, 508, 173 P.3d 265 (2007); accord *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); see *State v. Lord*, 161 Wn.2d 276, 298, 165 P.3d 1251 (2007) (section 10 prevents secret trials). Because “[p]roceedings cloaked in secrecy foster mistrust and, potentially, misuse of power,” “publicity has been a check on the misuse of both political and judicial power.” *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.2d 861 (2004).

Accordingly, this court has construed section 10 as promoting openness in such aspects of judicial proceedings as disclosure of information. See, e.g., *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772,

780-82, 819 P.2d 370 (1991) (encourages discovery); *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 192 & n.4, 117 P.3d 1134 (2005) (discourages confidentiality agreements); *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005) (discourages sealing records). RCW 7.70.150 does not purport to restrict openness in judicial proceedings. Plaintiff does not dispute this.

Nonetheless, plaintiff argues that RCW 7.70.150 violates section 10. She claims that this is so on the ground that in addition to promoting openness *in* the courts, section 10 guarantees open access *to* the courts by ensuring a remedy for every wrong. But “[t]he Washington constitution does not contain a clause that specifically declares ‘open access’ to the courts.”¹⁰ C. Wiggins, B. Harnetiaux, R. Whaley, *Washington’s 1986 Tort Legislation & the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193, 201 (1986/87). And, unlike constitutions in Oregon and many other states, the Washington Constitution does *not* expressly guarantee a remedy. *Shea v. Olson*, 185 Wash. 143, 160-61, 53 P.2d 615 (1936), *adhered to*, 186 Wash. 700, 59 P.2d 1183 (1936) (*en banc*). *cf.* OR.

¹⁰ As will be discussed *supra*, *Bullock v. Roberts*, 84 Wn. 2d 101, 524 P.2d 385 (1974), did not rule that *any* litigant has full access to the courts. Rather, following federal constitutional case law, *Bullock* merely stands for the proposition that due process and/or equal protection require full access when the right sought to be vindicated is a constitutionally fundamental one such as divorce.

CONST. art. I, sec. 10 (“every man shall have remedy”). Indeed, this court has declined to construe section 10 to include such a guarantee¹¹ See *1519-1525 Lakeview Boulevard Condominium Association v. Apartment Sales Corp.*, 144 Wn.2d 570, 581-82, 29 P.3d 1249 (2001).

Plaintiff’s cases neither hold that section 10 guarantees full access or a remedy nor invalidate a statute on either basis. For example, *Puget Sound Blood Bank* weighed competing interests to determine that a trial court had not abused its discretion in allowing certain discovery. 117 Wn.2d at 789. The court’s weighing process is antithetical to plaintiff’s claim of an absolute right to access or a remedy.

Moreover, although dicta in *King v. King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007), said section 10 provides a right to a remedy, the cases cited therein did not so hold and the treatise cited refers only to cases involving openness *in* the courts—*i.e.*, the right of the press or public to access to court proceedings or records. R. Utter & H. Spitzer, *THE WASHINGTON CONSTITUTION: A REFERENCE GUIDE* 24 (2002). Plaintiff’s

¹¹ Such a guarantee can have a profound impact on the Legislature, as some courts have construed the provision to preclude legislatures from limiting certain claims. See, e.g., *Tindley v. Salt Lake City School Dist.*, 116 P.3d 295 (Utah 2005). Types of statutes invalidated have included those providing for workers compensation exclusivity, *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001); statutes of repose, *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980). As will be discussed *infra*, however, other courts have given such constitutional provisions a much more lenient reading.

other cited cases do not even involve section 10.¹² In short, section 10 does not help plaintiff.

In fact, since neither the federal nor Washington constitutions contain a right to remedy provision, federal courts and this court have determined the validity of legislation impacting access to the courts under the due process and equal protection/privileges immunities clauses.¹³ Why RCW 7.70:150 does not violate either of those clauses will be discussed *infra*.

Even if section 10 were construed to guarantee full access and a remedy, that guarantee would not be absolute. *Dreiling*, 151 Wn.2d at 909; *see DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 588 N.E.2d 1139 (1992) (despite constitutional "guarantee" of remedy, legislature may impose reasonable limitations and conditions on access to courts). As this court has recognized, any right of access "must be exercised within

¹² *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S.1, 29, 111 S. Ct. 1032, 113 L.Ed. 2d 1 (1991) (concurrency) (due process clause); *Payton v. New York*, 445 U.S. 573, 593-94, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (4th Amendment); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S. Ct. 34, 52 L. Ed. 2d 143 (1907) (privileges & immunities clause) *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333, 340 (2001) (Oregon constitutional provision without Washington counterpart).

¹³ *See, e.g., Christopher v. Harbury*, 536 U.S. 403, 415 n.12, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002); *1519-1525 Lakeview*, 144 Wn.2d at 576-81; *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 563-70, 800 P.2d 367 (1990); *Housing Auth. v. Saylor*, 87 Wn.2d 732, 557 P.2d 321 (1976); *Hunter v. North Mason High School*, 85 Wn.2d 810, 539 P.2d 845 (1975).

the broader framework of the law as expressed in *statutes*, cases, and court rules.” *Puget Sound Blood Center*, 117 Wn.2d at 782 (emphasis added). An open courts provision does not require “that a plaintiff can always go to court and obtain a judgment on the claim asserted.”” *Lakeview Boulevard*, 144 Wn.2d at 582 (quoting *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo. 1991)).

Plaintiff argues that RCW 7.70.150 violates section 10, claiming the statute (1) is inconsistent with CR 8, thereby precluding the discovery allegedly necessary to obtain the required certificate, and (2) imposes additional substantial costs. Even if section 10 were implicated, there is no breach.

a. RCW 7.70.150 Is Not Inconsistent with CR 8.

First, RCW 7.70.150 is not inconsistent with CR 8. The rule applies to the content of pleadings. In contrast, the statute refers to a separate certificate to be filed with the complaint or, in certain circumstances, up to 135 days afterwards.

Second, even if there appeared to be an inconsistency, CR 81(a) provides that an inconsistent special proceedings statute trumps such rules. As discussed *supra*, RCW ch. 7.70 is a special proceedings statute.

In any event, plaintiff’s access arguments reflect a fundamental misunderstanding of RCW 7.70.150. Contrary to the implication that

plaintiffs are unable to obtain their medical records before commencing suit (Brief of Appellant 23), a patient generally has a statutory right to receive copies of her own hospital or medical records, wholly independent of litigation. See 45 CFR 164.502(a)(2)(i); 164.524(a)(1); RCW 70.02.030(1). RCW 7.70.150 does not change this.

Further, not only does RCW 7.70.150(1) automatically provide for an additional 45 days to file the certificate if suit is commenced within 45 days before the limitations period expires, RCW 7.70.150(4) provides that for good cause shown, an extra 90-day extension is available, regardless of when suit is commenced. Thus, although the statute does not expressly mention records or discovery, it nevertheless accommodates a plaintiff who needs to take some discovery or whose health care provider refuses to produce records. See, e.g., CR 33-34 (interrogatories and requests for production of documents may be served with summons and complaint).

Plaintiff also complains that unless she is able to engage in discovery *before* filing the certificate, “an expert’s *affidavit* could be deemed insufficient.” (Brief of Appellant 20-21) (emphasis added). For this proposition, she cites only a case holding that an expert’s affidavit was insufficient to defeat a summary judgment motion. See *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 851 P.2d 689, *rev. denied*, 122 Wn.2d 1010 (1993).

RCW 7.70.150 does not require an expert affidavit sufficient to defeat summary judgment. What the statute requires is an expert to certify there is a reasonable probability—*based on the information at the time the certificate is executed*—the defendant breached the standard of care. Unlike an affidavit opposing summary judgment, the certificate need not allege specific facts. And the expert need not have reviewed every possibly relevant document or interviewed every possibly pertinent witness. *Compare* RCW 7.70.150 *with* CP 341.

Thus, plaintiff's contention that depositions of the defendants' employees may be necessary to "reveal the malpractice that the events themselves merely imply" misses the mark. (Brief of Appellant 21). That plaintiff misconceives RCW 7.70.150 is further demonstrated by her claims that discovery is needed to "unearth the 'smoking gun'" and that the Legislature has required "pre-filing development of ultimate facts." (Brief of Appellant 2, 22)

Even in a meritorious case, there may be no "smoking gun." And RCW 7.70.150 does not require the expert to have found it, even if there were one. Nor does the statute require that the expert render his or her final opinion. All the statute requires is an expert certification based on the facts *then known*. As one commentator has explained:

The provision should be carefully designed to deter flimsy claims without imposing undue burdens on valid ones. Prior to suing, the plaintiff may lack information necessary to assess the claim; thus, the expert should be required to certify not that the claim definitely should succeed but rather that, based upon the available information, there is a reasonable likelihood that the claim has merit.

C. Struve, *Expertise & the Legal Process*, MEDICAL MALPRACTICE & THE U.S. HEALTH CARE SYSTEM 173, 174 (2006 ed. W. Sage & R. Kersh). RCW 7.70.150 does just that.

Plaintiff's complaint about the alleged difficulty of obtaining an expert to testify as to the breach of standard of care is a red herring.¹⁴ Prior case law already requires an expert to testify as to the standard of care where breach of that standard is alleged. Consequently, the certificate of merit statute does not make finding an expert any more difficult than it may have already been.

b. RCW 7.70.150 Does Not Erect an Unconstitutional Financial Barrier.

It has long been established that in a medical malpractice action, “expert testimony will generally be necessary to establish the standard of

¹⁴ In any event, the physicians in *Lo v. Honda Motor Co.*, 73 Wn. App. 448, 869 P.2d 1114 (1994), were not asked to opine about medical malpractice, *see* 73 Wn. App. at 463; the expert in *Austin v. American Ass’n of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002), was disciplined not for testifying, but for testifying without basis, and none of plaintiff's authorities demonstrate the “chilling effect” she claims.

care . . . and most aspects of causation.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989). Thus, where, as here, breach of the standard of care is claimed, a plaintiff must bear the expense of retaining an expert to, at minimum, review her medical records and files.

Indeed, “[p]laintiffs’ lawyers who specialize in medical malpractice routinely obtain an expert evaluation before suing.” C. Struve, *Improving the Medical Malpractice Litigation Process*, 23 HEALTH AFFAIRS 33, 35 (Jul/Aug 2004).¹⁵ Thus, with or without RCW 7.70.150, there is always a risk that plaintiff will incur added expense if such an expert later becomes unavailable or if additional experts are required to prove plaintiff’s case. As plaintiff admits, “such an expenditure on expert witnesses will inevitably be made.” (Brief of Appellant 26)

Indeed, not only will plaintiff’s expert have to review medical records, files, and discovery, he or she may later well have to prepare a written opinion, an expert’s affidavit if the defendant moves for summary

¹⁵ See also A. Karlin, *Medical Malpractice Legislation*, 2003-Jan. W. VA. L. REV. 24, 27 n.1 (2003) (“[m]ost lawyers have always had medical experts review their cases before filing them”); D. Kopstein, *An Unwise “Reform” Measure*, 39 TRIAL 26, 27 (May 2003) (unless limitations period is about to expire, “rational attorneys do not file malpractice cases that have not been thoroughly researched and ‘blessed’ by a qualified expert”).

judgment, testify at a deposition, and testify at trial. All this expense would be incurred *even without RCW 7.70.150*.

No one claims plaintiff's having to bear that expense is unconstitutional. Yet, plaintiff contends RCW 7.70.150 "puts an unconstitutional monetary barrier before the courthouse door."¹⁶ (Brief of Appellant 26) But as this court has so recently recognized, article 1, section 10, "was never intended to guarantee the right to litigate entirely without expense to the litigants" *King*, 162 Wn.2d at 391 (quoting *Doe v. State*, 216 Conn. 85, 98, 579 A.2d 37 (1990)).

Even in states with constitutional "access to courts" or "rights to remedies" provisions, several courts have upheld certificate or affidavit of merit statutes. For example, in *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 588 N.E.2d 1139 (1992), plaintiff challenged a statute that required medical malpractice plaintiffs to attach to their complaint not only an affidavit declaring that plaintiff or her attorney had consulted with a health professional who believed there was merit to the action, but also the health professional's report. Failure to file the required documents resulted in dismissal.

¹⁶ Plaintiff has presented *no evidence* of the actual cost of the certificate of merit she did file or what the cost would have been for the certificate of merit she failed to file.

The *DeLuna* plaintiff claimed the statute denied her access to the courts guaranteed by the Illinois Constitution, which provided for “a certain remedy in the laws for all injuries” Nevertheless, the Illinois Supreme Court upheld the statute, explaining:

[S]ection 2-622 does not unconstitutionally infringe on litigants’ right of access to the courts. The provision challenged here merely requires a litigant to obtain, before trial, a certificate from an appropriate health care professional stating that the alleged cause of action is meritorious. . . . [T]he provision is essentially no different from the parallel requirement generally applicable in malpractice cases that the plaintiff in such an action present expert testimony to demonstrate the applicable standard of care and its breach.

Id. at 72-73, 588 NE.2d at 1145-46 (citations omitted). *See also Royle v. Florida Hospital-East Orlando*, 679 So.2d 1209 (Fla. Dist. Ct. App. 1996) (certificate of merit statute did not violate Florida Constitution’s access to courts provision), *rev. denied*, 689 So.2d 1071 (1997); *Peterson v. Columbus Medical Center Foundation, Inc.*, 243 Ga. App. 749, 533 S.E.2d 749 (2000) (affidavit of merit statute upheld despite plaintiff’s inability to pay for medical records needed to obtain affidavit).

Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. 1991), involved a constitutional provision that the courts “be open to every person” and that right and justice “be administered without sale, denial or delay.” *Id.* at 509. The Missouri Supreme Court upheld that state’s

affidavit of merit statute because it “neither denies free access of a cause nor delays thereafter the pursuit of that cause in the courts.” *Id.* at 510. Instead, the court found the statute “serves to free the court system from frivolous medical malpractice suits at any early state of litigation, and so facilitate the administration of those with merit.” *Id.*

Zeier v. Zimmer, Inc., 152 P.3d 861 (Okla. 2006), is not persuasive. Not only were the constitutional provisions¹⁷ there very different than Washington’s and the statute at issue much more onerous than RCW 7.70.150, but the court’s decision is so filled with inaccuracies, speculation, and misleading information as to raise serious doubts as to its persuasiveness.

The Oklahoma Constitution specifically provided not only that the courts be open to everyone but that a speedy and certain remedy be afforded for every wrong and every injury. As discussed *infra*, the Washington Constitution has no comparable provision.

Moreover, unlike RCW 7.70.150, the Oklahoma statute requires a plaintiff to obtain, by the time suit is filed or generally—upon good cause shown—within 90 days thereafter, an expert’s *written opinion* that

¹⁷ The Oklahoma court relied on the Oklahoma Constitution’s right to remedy and special legislation clauses. Why Oklahoma’s special legislation clause bears no resemblance to Washington’s will be discussed in subsection IV.C.5 *infra*.

identifies the specific acts or omissions constituting negligence. Unlike RCW 7.70.150, the Oklahoma statute requires the plaintiff to provide a copy to the defendant upon written request. Unlike RCW 7.70.150, which by its terms applies only where the standard of care is at issue, the Oklahoma statute makes no exception for when the law does not require expert testimony.¹⁸

Further, *Zeier* mistakenly claimed that 14 decisions from other jurisdictions had invalidated certificate of merit statutes. But 13 of these 14 had nothing to do with such certificates and the fourteenth had been vacated. *See* 152 P.3d at 872 and cases cited therein.

Zeier was again inaccurate in citing *Couri v. Gardner*, 173 N.J. 328, 801 A.2d 1134, 1137 (2002), for the proposition that one affidavit of merit cost \$12,000. 152 P.3d at 873. *Couri* did not involve affidavits of merit. The \$12,000 was what a party to a divorce paid a psychiatrist “to prepare a report and testify” about visitation. 801 A.2d at 1136.

Zeier also declared that certificates of merit had already disproportionately reduced claims filed by low income plaintiffs. 152 P.3d at 869. But the *only* empirical study for this proposition cited by the

¹⁸ The *Zeier* plaintiff claimed *res ipsa loquitur*, which did not require expert evidence under Oklahoma law. Yet the trial court dismissed for failure to file the required affidavit of merit.

authorities cited in *Zeier* was a Maryland study that dealt with the collective impact of several liability reforms including a cap on general damages. The study did not determine which reform resulted in which effect. C. Struve, *Expertise in Medical Malpractice Litigation: Special Courts, Screening Panels, & Other Options* 50 (Pew Project on Medical Liability 2003). Thus, the Maryland study was inadequate to provide firm conclusions about the impact of certificate of merit statutes. C. Struve, *Expertise & Legal Process, MEDICAL MALPRACTICE & THE U.S. HEALTH CARE SYSTEM* 173, 174 n.4 (2006 ed. W. Sage & R. Kersh).

Zeier also speculated that certificates of merit prevent meritorious suits, by either discouraging filing or dismissing them for noncompliance. But as one commentator has aptly noted, “[t]here is no feasible way” to determine how many meritorious claims have not been brought or are dismissed due the certificate requirement. M. Stroub, *The Unforeseen Creation of a Procedural Minefield—New Jersey’s Affidavit of Merit Statute Spurs Litigation & Expense in Its Interpretation & Application*, 34 *RUTGERS L. J.* 279, 302-03 (2002).

Zeier (and plaintiff’s brief at p. 25) also rely on A. Karlin, *Medical Malpractice Legislation*, 2003-Jan. *W. VA. L. REV.* 24 (2003). But Karlin favors certificates of merit. Noting that “[m]ost lawyers have

always had medical experts review their cases before filing them” Karlin concludes such certificates are preferable to damages caps:

The [certificate of merit] provision was directly aimed at preventing frivolous lawsuits. It was supported by doctors and lawyers. It focused on preventing the filing of cases in which the lawyer had no medical expert to support the case. Preliminary data indicate that the law has reduced the number of lawsuits filed against medical providers.

Id. at 27 n.1, 24.

Plaintiff complains about collateral litigation without explaining why—should it occur—it would have any constitutional significance. Since plaintiff has the burden of showing the statute is unconstitutional, it was incumbent on her to do so. In fact, tort reform measures often give rise to much collateral litigation,¹⁹ but that in itself does not render the measures unconstitutional.

3. RCW 7.70.150 Does Not Violate the Equal Protection or Privileges & Immunities Clauses.

“[E]qual protection does not demand that the poor be provided with identical means as the wealthy to circumvent the State's valid interest

¹⁹ Litigation over allocation of fault and contribution under RCW 4.22.070 of the Tort Reform Act of 1986 is a good example. See, e.g., *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003); *Kottler v. State*, 136 Wn.2d 437, 963 P.2d 834 (1998); *Edgar v. City of Tacoma*, 129 Wn.2d 621, 919 P.2d 1236 (1996); *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 912 P.2d 472 (1996). *Adcox v. Children's Orthopedic Hosp. & Med. Center*, 123 Wn.2d 15, 864 P.2d 921 (1993); *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999).

in preventing frivolous claims.” *Carter v. University of Washington*, 85 Wn.2d 391, 536 P.2d 618 (1975), *overruled on other grounds*, *Saylors*, 87 Wn.2d at 740-43. Nonetheless, plaintiff claims that RCW 7.70.150 violates the equal protection clause of the federal and state constitutions on the ground that it burdens medical malpractice plaintiffs but not other tort plaintiffs.

The Fourteenth Amendment provides, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State... deny to any person within its jurisdiction the equal protection of the laws.

Plaintiff concedes that in this case, the 14th Amendment analysis is the same as the analysis under art. I, § 12, of the Washington Constitution.²⁰

Equal protection analysis requires determining which standard of review applies. *State v. Shawn P.*, 122 Wn.2d 553, 556, 859 P.2d 1220 (1993). Strict scrutiny applies only if the allegedly discriminatory classification affects a suspect class or threatens a fundamental right. *Shawn P.*, 122 Wn.2d at 560. Plaintiff does not seriously claim a suspect

²⁰ The State Constitution provision provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

class²¹ but argues that access to the courts is a fundamental right. Wrong.

a. There Is No Fundamental Right Subject to Strict Scrutiny.

The federal and state constitutions do not grant a blanket *fundamental* right of access to the courts. “An unconditional right of access exists for civil cases *only* when denial of a judicial forum would implicate a fundamental human interest—such as the termination of parental rights or the ability to obtain a divorce.” *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 317 (3d Cir. 2001) (emphasis added), *cert. denied*, 533 U.S. 953 (2001); *see M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (only for “narrow category” of civil cases must State provide access to courts without regard to ability to pay). “Access to the courts is not recognized, *of itself*, as a fundamental right.”²²

²¹ Suspect classes include, for example, those based on race and national origin. *Andersen v. King County*, 158 Wn.2d 1, 19, 138 P.3d 963 (2006). Plaintiff’s claim that *Andersen* holds that “the politically powerless” are a suspect class is a gross misreading of that case. *Andersen* says that not only must the class be minority or politically powerless, it must *also* have a history of discrimination and as a defining characteristic, an obvious immutable trait typically without relation to the ability to perform or contribute to society. *Id.* Plaintiff makes no claims that such requirements have been met here.

²² *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L.Ed.2d 606 (1996), does *not* hold that access to the courts is a fundamental right in all situations. *Lewis* involved prisoners’ constitutional rights. *See Bounds v. Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977) (“prisoners have a constitutional right of access to the courts”).

Barrett, 115 Wn.2d at 562 (emphasis added); see *Saylors*, 87 Wn.2d at 738-41.

Thus, “[a]s a constitutional matter, when a right is not fundamental, access to the courts may be restricted.” *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 151 (5th Cir. 1981); accord *Suckow v Neowa FS, Inc.*, 445 N.W.2d 776, 778 (Iowa 1989); see *City of Seattle v. Megrey*, 93 Wn. App. 391, 394, 968 P.2d 900 (1998); *In re Marriage of Giordano*, 57 Wn. App. 74, 77, 787 P.2d 51 (1990). Only when the right sought to be vindicated is fundamental is there a compelling interest subject to strict scrutiny.²³ *Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 402 (5th Cir. 1984), cert. denied, 469 U.S. 1159 (1985).

Because marriage is such a fundamental interest, “[f]ull access to the courts in a divorce action is a fundamental right.” *Bullock v. Roberts*, 84 Wn.2d 101, 104, 524 P.2d 385 (1974) (citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)) (emphasis added); *M.L.B.* 519 U.S. at 113. Other fundamental rights for the purpose of access to the courts include child bearing and sterilization. *M.L.B.*, 519 U.S. at 113 n.6.

²³ *Christopher v. Harbury*, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002), supports defendant’s, not plaintiff’s, position, because it says any right of access is “ancillary to the underlying claim.” *Id.* at 415. That decision does not say access to the courts is a *fundamental* right, let alone for equal protection purposes.

In contrast, where economic and social welfare interests are involved, access to the courts is *not* a *fundamental* right under either the federal or state constitution. *United States v. Kras*, 409 U.S. 434, 446, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973); *M.L.B.*, 519 U.S. at 113 n. 7; *In re Dependency of Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995). Such interests include government benefits and bankruptcy discharge. *Kras*, 409 U.S. at 446; *Grove*, 127 Wn.2d at 238. Statutes of limitation, bonding requirements, and cost provisions also fall under the economic and social welfare classification. *Clopper v. Merrill Lynch Relocation Management, Inc. (In re Merrill Lynch Relocation Management, Inc.)*, 812 F.2d 1116 (9th Cir. 1987); *Wayne*, 730 F.2d at 403-04; *Hawes v. Club Ecuestre el Comandante*, 535 F.2d 140, 144 (1st Cir. 1976); *1519-1525 Lakeview Boulevard*, 144 Wn.2d at 582; *Saylors*, 87 Wn.2d at 739.

Consequently, although a plaintiff may have a right to access, it is not necessarily a fundamental right entitled to strict scrutiny. Indeed, this court has held that *the Legislature* may generally determine whether indigents have free access to the courts in *all* civil cases of apparent merit. See *Saylors*, 87 Wn.2d at 740. Thus, restrictions on civil lawsuits are generally not subject to strict scrutiny. See, e.g., *Medina v. Public Utility District No. 1*, 147 Wn.2d 303, 313, 53 P.3d 993 (2002).

That is true with RCW 7.70.150. In fact, many courts have applied the rational relationship test to uphold the constitutionality of affidavit of merit statutes. For example, *Henke v. Dunham*, 450 N.W.2d 595 (Minn. App. 1990), noted that Minnesota's affidavit of merit statute did "not impinge upon a fundamental right or concern a suspect class." *Id.* at 598 n.1. Other courts agree. *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 588 N.E.2d 1139, 1146 (1992); *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (1991); *Sisario v. Amsterdam Memorial Hospital*, 159 A.D.2d 843, 552 N.Y.S.2d 989, *appeal dismissed*, 76 N.Y.2d 844 (1990); *see also Barlett v. North Ottawa Community Hospital*, 244 Mich. App. 685, 625 N.W.2d 470, 475-76, *appeal denied*, 465 Mich. 907 (2001); *Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 708 A.2d 401 (1998); *Horsley-Layman v. Angeles*, 968 S.W.2d 533 (Tex. App. 1998).

Plaintiffs' cases are inapposite. *Christopher*, 536 U.S. at 415 n.12, does *not* say any right of access is fundamental. *M.L.B.*, 519 U.S. at 116-17, involved termination of parental rights, which—like divorce—has long been recognized as a fundamental right. As discussed *supra*, *Puget Sound Blood Center* did not invalidate a statute or involve equal protection. Instead, it merely recognized access to the courts as one competing interest to weigh in determining whether allowing certain discovery was an abuse of discretion.

Plaintiff's out-of-state cases do not apply. Not only do they have nothing to do with certificate or affidavit of merit statutes, they involve right to remedy provisions not included in the Washington Constitution.²⁴

As one court has explained:

This principle [that states are free to create, define, limit and regulate tort law] would ordinarily give our legislature wide latitude, except that, unlike most states, the legislative prerogative in Arizona is expressly limited by our own organic law. Indeed, the Arizona Constitution is almost unique in its provisions regarding tort law. . . .

The relevant provisions include first, in lieu of a general provision requiring the courts to be "open," a specific clause prohibiting abrogation of "the right of action to recover damages . . ."

Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961, 971 (1984) (emphasis added).

b. Plaintiff Has Not Met Her Burden of Showing RCW 7.70.150 Does Not Pass Strict Scrutiny.

Even if strict scrutiny were the proper test, which it is not, plaintiff has failed to carry her heavy burden of showing RCW 7.70.150 does not pass that test.

A State's interest in its citizens' health care may be a compelling one. *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S. Ct.

²⁴*Kluger v. White*, 281 So.2d 1, 3 (Fla. 1973); *Ernest v. Faler*, 237 Kan. 125, 697 P.2d 870, 876 (1985); *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 633 N.E.2d 504, 510-11 (1994); *Thayer v. Phillips Petroleum Co.*, 1980 Okla. 95, 613 P.2d 1041, 1042 n.2 (1980).

2733, 57 L. Ed. 2d 750 (1978); *see also In re A., B., C., D., E.*, 121 Wn.2d 80, 847 P.2d 455 (1993). Plaintiff has not shown that RCW 7.70.150 is not narrowly tailored to further that interest.

Although plaintiff cites numerous studies showing that the number of physicians in the area is increasing, these prove nothing. More doctors does not necessarily equate to better, more accessible, less expensive health care.

For example, sheer numbers say nothing about doctors' conduct. The threat of malpractice litigation has increased doctors' tendencies to perform "defensive medicine"—*i.e.*, overprovision of services and/or voluntary restrictions on the medical practice such as refusal to deliver high risk procedures or treat high-risk patients. *See, e.g.*, M. Mello & D. Studdert, *The Medical Malpractice System*, MEDICAL MALPRACTICE & THE U.S. HEALTH CARE SYSTEM 11, 23 (2006 ed. W. Sage & R. Kersh).

Thus, one study funded by the Pew Charitable Trusts found that 59% of specialists often order more tests than medically indicated, and 39% avoid caring for high-risk patients. T. Brennan, M. Mello, & D. Studdert, *Liability, Patient Safety, & Defensive Medicine*, MEDICAL MALPRACTICE & THE U.S. HEALTH CARE SYSTEM 93, 105-06 (2006 ed. W. Sage & R. Kersh). In another survey, 50-70 percent of family practitioners—who have traditionally been the key providers of obstetrical

care in rural areas and at community health centers— cited malpractice issues as a key factor in reducing or eliminating their obstetrical practice. D. Lewis-Idema, *Medical Professional Liability & Access to Obstetrical Care: Is There a Crisis?*, II MEDICAL PROFESSIONAL LIABILITY & THE DELIVERY OF OBSTETRICAL CARE 78, 81-82, 85 (1989 ed. V. Rostow & R. Bulger); D. Hughes, S. Rosenbaum, D Smith, & C. Fader, *Obstetrical Care for Low Income Women: The Effects of Medical Malpractice on Community Health Centers*, II MEDICAL PROFESSIONAL LIABILITY, *supra*, at 59, 70-71.

Accordingly, the Pew study authors concluded:

Physicians are also recognizing that if they cannot avoid certain kinds of risks, and if assurance behaviors [*i.e.*, ordering medically unnecessary tests] do not really decrease the amount of litigation, then they will need to increase their income in order to compensate for increased overhead costs. As Table 6.5 makes clear, many physician practices are already strategizing to increase compensation by decreasing charity work, increasing the volume of patients seen, and seeking patients whose insurance provides relatively high reimbursement.

Liability, Patient Safety, & Defensive Medicine, supra, at 109. Thus, “a \$1 change in liability costs could induce a change in treatment decisions that costs much more than \$1.” D. Becker & D. Kessler, *The Effects of the U.S. Malpractice System on the Cost & Quality of Care*, MEDICAL

MALPRACTICE & THE U.S. HEALTH CARE SYSTEM 84, 86 (2006 ed. W. Sage & R. Kersh).

Plaintiff quotes Lewis-Idema as discounting the effect the liability system has on the supply of doctors in rural areas. (Brief of Appellant 35 n.20) But the article cited does not contain the “quote” plaintiff says it does. Indeed, Lewis-Idema says exactly the opposite:

Although the causal relationship among malpractice issues, changes in obstetrical practices, and access to care for low-income women and rural women cannot be precisely documented with the available data, the weight of the evidence is in one direction. *It is reasonable to conclude that access to care for Medicaid and other low-income women is being affected by changes in obstetrical practice generated by professional liability concerns.*

Id. at 87 (emphasis in original).

Plaintiff’s claim that RCW 7.70.150 is redundant is meritless. Neither RCW 7.70.150 nor CR 11 requires an expert. While many experienced medical malpractice attorneys retain an expert to evaluate their cases before filing, “[a] sizable number”—perhaps almost 40%—of malpractice cases are brought by lawyers who are not specialists in the area. C. Struve, *Improving the Medical Malpractice Litigation Process*, 23 HEALTH AFFAIRS 33, 34 (Jul/Aug 2004); T. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury’s Shadow*, 54 WTR LAW & CONTEMPORARY PROBLEMS 43, 75 (Winter 1991). By requiring these

nonspecialists to consult with an expert to properly evaluate whether they have a viable case²⁵, RCW 7.70.150 simply compels them to do what more experienced attorneys already do.

Plaintiff's complaint that RCW 7.70.150 sweeps too broadly misses the mark. As discussed *supra*, her argument that the statute allows meritorious claims to be dismissed is based on nothing more than speculation, particularly since the statute is crafted so a plaintiff has time to do some discovery if necessary.

c. RCW 7.70.150 Passes the Rational Relation Test.

In any event, the proper test under the Equal Protection clause and art. I, § 12, is the most relaxed test of minimal scrutiny or rational relationship. *Shawn P*, 122 Wn.2d at 560. Under this highly deferential test, a legislative classification will be upheld unless the individual challenging it can show it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. *In re Detention of Stout*, 159 Wn.2d 357, 375, 150 P.3d 86 (2007). As this court has explained:

[A] challenge, however meritorious, which is directed to the wisdom of the statute will not justify a court in finding it unconstitutional. The legislature represents the people when it determines that a law is necessary, wise, or

²⁵ Empirical evidence shows experienced medical malpractice attorneys tend to bring stronger cases than inexperienced attorneys. *Struve, supra*, at 34-35.

desirable, and the court is not empowered to substitute its judgment for that of the legislature.

State v. Smith, 93 Wn.2d 329, 337, 610 P.2d 869 (citation omitted), *cert. denied*, 449 U.S. 873 (1980)

A state is not required to attack every aspect of a problem: the Legislature may approach a problem piecemeal and learn from experience. *Yakima County Deputy Sheriff's Association v. Board of Commissioners*, 92 Wn.2d 831, 836, 601 P.2d 936 (1979). “It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.” *Seeley v. State*, 132 Wn.2d 776, 801, 940 P.2d 604 (1997) (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955)).

Further, while plaintiff correctly observes that the rational relationship test is not “toothless”, empirical evidence or scientific substantiation is not required. *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976); *Andersen v. King County*, 158 Wn.2d 1, 31, 138 P.3d 963 (2006). Instead, the legislative choice may be based on “rational speculation unsupported by evidence or empirical data.” *Andersen*, 158 Wn.2d at 31. A classification does not fail because “it is

not made with mathematical nicety or because in practice it results in some inequity.”²⁶ *Id.* at 31-32.

Merely showing that a statutory classification may be unwise is insufficient, because the Legislature has a right to its own views. *Brewer v. Copeland*, 86 Wn.2d 58, 65, 542 P.2d 445 (1975). Rather, plaintiff must show “no state of facts exists or can be reasonably conceived to exist that will justify the classification.” *Id.* Furthermore, this court may assume the existence of *any* conceivable state of facts that could provide a rational basis for the classification. *Andersen*, 158 Wn.2d at 31.

Plaintiff claims RCW 7.70.150 bears no rational relationship to promoting safer medical care, affordable health care, or greater

²⁶ Plaintiff’s cited cases do not support her position because none involved a statute requiring a plaintiff to show at least some indication his/her medical malpractice suit had at least some merit. For example, the double bond requirement in *Lindsey v. Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972), bore no rational relationship to the merits of an appeal. The absolute prohibition against paying benefits to all illegitimate children of a disabled worker born after the disability’s onset bore no rational relationship to the goal of preventing fraud. *Jiminez v. Weinberger*, 417 U.S. 628, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974). The special use permit requirement for group homes for the mentally retarded bore no rational relationship to any legitimate government purpose when there was no similar requirement for any other multiple family dwellings. *City of Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). A constitutional provision prohibiting any government action protecting homosexuals from discrimination bore no rational relationship to any legitimate government purpose. *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). A statute precluding illegitimate children from inheriting from their intestate fathers bore no rational relationship to the purported goal of promoting families. *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977). In contrast, *Mathews v. Lucas*, 427 U.S. 495, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976), upheld a statute that conditioned Social Security payments for surviving illegitimate children on proof of parentage, residency and/or dependency.

availability of physicians' services in high risk specialties. Plaintiff forgets that RCW 7.70.150 was but one part of a much larger enactment, some of which dealt specifically with patient safety, the medical liability insurance industry, and health care liability.

In any case, RCW 7.70.150 is rationally related to the legislative goals. For example, as discussed *supra*, the threat of medical malpractice litigation has caused many doctors to engage in defensive medical practices. Subjecting a patient to medically unnecessary tests not only increases the cost of health care, but creates a greater risk of harm to the patient. A. Relman, *Medical Professional Liability & the Relations Between Doctors & Their Patients*, II MEDICAL PROFESSIONAL LIABILITY & THE DELIVERY OF OBSTETRICAL CARE 97, 102 (1989 ed. V. Rostow & R. Bulger). Physicians who refuse to treat high risk patients or perform high risk procedures reduce the availability of care for such patients and procedures. T. Brennan, M. Mello, & D. Studdert, *Liability, Patient Safety, & Defensive Medicine, supra*, at 103.

Furthermore, as one commentator has explained:

[C]ertificate of merit requirements do in fact achieve their goal of reducing malpractice costs because they exert a tangible effect on an insurer's combined ratio [*i.e.*, the percentage of each premium dollar spent on claims, defense costs and underwriting costs]. This is because certificates of merit target and, more importantly . . . , impact the area of greatest economic waste, namely expenses incurred in

defending meritless medical malpractice cases. In addition, and crucially, certificate of merit requirements do not affect those cases which ultimately settle or go to verdict, thus avoiding the negative societal impact associated with capping statutes.

M. Nathanson, *It's the Economy (& Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth & the Factors Critical to Reform*, 108 PENN. ST. L. REV. 1077, 1119 (Spring 2004).

Plaintiff claims the certificate of merit statute will hardly make a dent in the nation's health care costs, arguing that the statute will result only in lowering defense costs and the expense of defending frivolous medical malpractice suits is only a very small proportion of overall health care costs. This "reasoning" is faulty—and indeed, has been criticized—because it fails to consider the complexity of the health care situation. See D. Becker & D. Kessler, *supra*, at 85-86. Becker and Kessler have examined several studies and have concluded:

[M]ost empirical evidence supports the hypotheses that doctors practice defensive medicine. Surveys indicate that physicians believe that the existing malpractice system leads to defensive medicine. Studies of the effects of malpractice pressure on positive defensive medicine [*i.e.*, ordering medically unnecessary tests] find that decreases in malpractice pressure lead to . . . decreases in health care costs with no adverse consequences for health outcomes. . .

[L]iability-reducing tort reforms reduce the prevalence and cost of defensive medicine.

Id. at 91. Consequently, “a \$1 change in liability costs could induce a chance in treatment decisions that costs much more than \$1.” *Id.* at 86.

Plaintiff’s argument that RCW 7.70.150 bears no rational relationship to ensuring an adequate supply of physicians in underserved areas or the availability of specialists is also without foundation. The Legislature could reasonably conclude that since professional liability concerns have detrimentally affected access to care for Medicaid and other low-income patients, alleviating those concerns somewhat would help to minimize or reverse that effect. *See Lewis-Idema, supra*, at 83-85.

Moreover, no one claims the certificate of merit statute on its own will cure all that ails health care in this state. Rather, as the Washington Legislature recognized, RCW 7.70.150 is simply part of a much larger package of statutory reforms aimed at health care providers, health care professional liability insurers, and the legal system.

Plaintiff ignores this when she complains RCW 7.70.150 does not require insurers to pass on any savings. In fact, the Washington State Insurance Commissioner recently announced that the 2006 statutory reforms—of which RCW 7.70.150 was a part—have led to a 12.5% decrease in premiums by the state’s largest medical malpractice insurer. Office of Insurance Commissioner News Release (Jan. 9, 2008)

(<http://www.insurance.wa.gov/news/dynamic/newsreleasedetail.asp?rcdNum=589>).

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985), *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967), and *Boddie*, 401 U.S. 371, do not support plaintiff. Unlike here, none involved a requirement that dealt with the merits, preliminary or otherwise, of the plaintiff's case.

Plaintiff argues that the Legislature could have and should have enacted "better" alternatives. But when the test is whether the legislation bears a rational relationship to its goals, "[i]t is irrelevant that a better alternative could have been devised." *Washington Association of Child Care Agencies v. Thompson*. 34 Wn. App. 225, 234, 660 P.2d 1124, *rev. denied*, 94 Wn.2d 1020 (1983).

Finally, plaintiff claims that negligent health care providers should not be rewarded.²⁷ RCW 7.70.150 does not reward negligence; it seeks to ensure that only the negligent must proceed through the litigation process.

²⁷ Plaintiffs' cited cases for this proposition are inapposite as none involved certificate or affidavit of merit statutes.

4. RCW 7.70.150 Does Not Violate Due Process.

The Fifth Amendment, through the 14th Amendment, provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” WASH. CONST. art. I, section 3, is similar. Both clauses confer procedural and substantive protections. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006), *cert. denied*, 127 S. Ct. 1844 (2007).

Procedural due process requires that an individual receive notice and an opportunity to be heard when the state seeks to deprive her of a protected interest. *Amunrud*, 158 Wn.2d at 216. Substantive due process protects against arbitrary and capricious government action. *Id.* at 218-19.

Plaintiff fails to cite a single case holding that a certificate or affidavit of merit statute violates due process. Several courts elsewhere have held that such statutes do not.²⁸ Nevertheless, citing arguments made as to other constitutional theories, plaintiff claims RCW 7.70.150 violates procedural and substantive due process.

²⁸ See *Peterson v. Columbus Med. Center Foundation*, 243 Ga. App. 749, 533 S.E.2d 749 (2000); *DeLuna v. St. Elizabeth's Hosp.*, 147 Ill. 2d 57, 588 N.E.2d 1139 (1992); *Barlett v. North Ottawa Community Hosp.*, 244 Mich. App. 685, 625 N.W.2d 470 (2000); *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503 (Mo. 1991); *Cornblatt v. Borow*, 153 N.J. 218, 708 A.2d 401 (1998); *Sisario v. Amsterdam Memorial Hosp.*, 159 A.D.2d 843, 552 N.Y.S.2d 989 (1990); *Thoyakulathu v. Brennan*, 192 S.W.3d 849 (Tex. App. 2006); *Horsley-Layman v. Angeles*, 968 S.W.2d 533 (Tex. App. 1998).

Plaintiff concedes substantive due process is analyzed under the same criteria as equal protection. (Brief of Appellant 45) Since, as explained *supra*, there is no equal protection violation, there is no substantive due process violation. As was also discussed *supra*, the statute does not require a plaintiff to “establish” his or her ultimate case, let alone on the basis of information not yet available.

Nor is there a procedural due process violation. As discussed *supra*, any right to access to the courts is not a fundamental one. The risk of erroneous deprivation is not high, since a patient has a statutory right to obtain his or her own medical records, RCW 7.70.150 accommodates some discovery, and the statute requires only a preliminary evaluation based on information then known. Most, if not all, of the expense would have to be incurred by a plaintiff anyway, so even if any right of access to the courts or recovery for personal injuries were constitutionally fundamental (which they are not), the high public interest in discouraging frivolous suits, lowering health care costs, and encouraging more plentiful, affordable, and safe health care would outweigh any minor additional cost.

In sum, plaintiff has not carried her burden of showing a due process violation.

5. RCW 7.70.150 Is Not an Unconstitutional Special Law.

Plaintiff implies *all* special laws are invalid, so that RCW 7.70.150 must be an invalid special law. But Washington Constitution art. II, § 28, precludes special laws only “in certain circumstances”—namely, in 18 specified areas. *See Island County*, 135 Wn.2d at 147-48. A close reading of plaintiff’s brief shows she claims RCW 7.70.150 violates only section 28(6), prohibiting special laws “granting corporate powers or privileges.” (Brief of Appellant 5, n.2)

RCW 7.70.150 does not grant corporate powers or privileges. Plaintiff does not even bother to try to explain how it could.

The special laws provision that led *Zeier*, 152 P.3d 861, to invalidate the Oklahoma certificate of merit statute was very different. Unlike the Washington Constitution, Oklahoma’s Constitution expressly prohibits special laws “[r]egulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts” *Id.* at 865 (quoting OKLA. CONST. art. 5, § 46). There is no comparable Washington provision.

Accordingly, this court need go no further on the special laws issue. But even if RCW 7.70.150 granted corporate powers or privileges,

there would be no constitutional violation because there is no special law.²⁹

“A special law . . . relates to particular persons or things, while a general law is one which applies to all persons or things of a class.” *Island County*, 135 Wn.2d at 149. A general law operates on all persons or things constituting a class, even if the class has only one person or thing. *Id.* The prohibition against special laws does not preclude classification since all laws are necessarily based on some kind of classification. *Id.*

RCW 7.70.150 operates on all persons or things constituting a class, namely, all defendant health care providers in medical malpractice suits involving alleged breach of the standard of care. The statute is a general, not a special, law.

Plaintiff complains the statute does not apply to other professional liability or personal injury defendants. However, if any exclusions from a statute’s applicability, as well as the statute itself, is rationally related to its purpose, the statute is not invalid. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 627, 90 P.3d 659 (2004). As discussed

²⁹ Most statutes have withstood an article 28(6) challenge. See *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 90 P.2d 659 (2004); *Brower v. State*, 137 Wn.2d 44, 969 P.2d 42 (1998), cert. denied, 526 U.S. 1088 (1999); *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass’n*, 83 Wn.2d 523, 520 P.2d 162 (1974); *State v. Sears*, 4 Wn.2d 200, 103 P.2d 337 (1940); *State ex rel. Lindsey v. Derbyshire*, 79 Wash. 227, 140 P. 540 (1914).

supra, the Legislature's purpose was to improve the health care system and RCW 7.70.150 is rationally related to that purpose. Hence, excluding non-medical professional and personal injury defendants is also rationally related to the statutory purpose.

V. CONCLUSION

After the 2006 defeat of the two competing health care initiatives, the Governor, the Insurance Commissioner, the Legislature, the health care profession, the bar association, and the plaintiff's bar worked long and hard to come up with a mutually acceptable solution to improve health care in the State of Washington. RCW 7.70.150 was part of that solution.

Thus, although it is always true that to overcome the presumption that a statute is constitutional, a plaintiff must show that there is no reasonable doubt that it is not, the importance of that rule is magnified here.

Plaintiff has failed to meet this heavy burden. The Legislature was well within its prerogative in enacting RCW 7.70.150. There is no reason for this court to question the Legislature's wisdom. This court should affirm.

DATED this 9 day of June, 2008.

REED McCLURE

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CIVIL JUSTICE REFORM		STRIKER PROVISIONS AND POSITIONS
ISSUE (Sections from proposed striker Certificate of Merit (Sec. 304)	DESCRIPTION	
Current No current requirement except Rule 11	2292 <ul style="list-style-type: none"> Requires a certificate of merit to state there is a reasonable probability conduct did not meet standard of care Attorney must certify that claim is not frivolous and is subject to sanctions for a violation 	All agree to this section (WSHA/WSMA/WSTLA)
Collateral Sources (Sec. 345)	No admissibility of collateral source payments (RCW 7.70.080)	All parties agree to proposed language, but WSHA/WSMA would prefer to include future payments; WSTLA does not agree to this
Expert Witness (Deleted)	No current statute; federal rules limit experts, as does state court discretion	All parties agree these should be stricken (WSHA/WSMA/WSTLA)
Offers of Settlement (Deleted)	There is no applicable statutory provision	All parties oppose Sec. 309 as drafted - strike (WSHA, WSMA/WSTLA) (No agreement on an attorney fees limit)

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**AFFIDAVIT/CERTIFICATE OF MERIT
STATUTES/RULES**

- | | |
|---|--|
| 1. Arizona
ARIZ. REV. STAT. § 12-2602 | 13. Nevada
NEV. REV. STAT. § 41A.071 |
| 2. Arkansas
ARK. CODE ANN. § 16-114-209 | 14. New Jersey
N.J. STAT. ANN. § 2A:53A-27 |
| 3. Colorado
COL. REV. STAT. ANN. § 13-20-602 | 15. New York
N.Y. C.P.L.R. Law § 3012-a |
| 4. Connecticut
CONN. GEN. STAT. ANN. § 52-190a | 16. North Carolina
N.C. GEN. STAT. §. 1A-1
Rule 9(i) |
| 5. Delaware
DEL. CODE ANN. tit.18, § 6853 | 17. North Dakota
N.D. CENT. CODE § 28-01-46 |
| 6. Florida
FLA. STAT. A NN. § 766.104 | 18. Ohio
Civ. Rule 10(D)(2) |
| 7. Georgia
GA. CODE ANN. § 9-11-9.1 | 19. Oklahoma
OKLA. STAT. ANN. tit. 63, §1-1708.1E |
| 8. Illinois
753 ILL. COMP. STAT. § 5/2-622 | 20. Pennsylvania
Pa.R.C.P.1042.3 |
| 9. Maryland
MD. CODE ANN. CTS & JUD. PROC.
§ 3-2A-04 | 21. Texas
TEX. CIV. PRAC. & REM.
CODE ANN. § 74.351 |
| 10. Michigan
MICH. COMP. LAWS ANN. § 600.2912d
MCR 2.112(1) | 22. Virginia
VA. CODE ANN. § 8.01-20.1 |
| 11. Minnesota
MINN. STAT. ANN. § 145.682 | 23. Washington
RCW 7.70.150 |
| 12. Missouri
MO. ANN. STAT. § 538.225 | 24. West Virginia
W. VA. CODE § 55-7B-6 |