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SUPREME COURT  
STATE OF WASHINGTON

No. 80888-1

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BY RONALD R. CARPENTER WASHINGTON STATE SUPREME COURT

CLERK

KIMME PUTMAN,

Appellant,

v.

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STATE OF WASHINGTON

WENATCHEE VALLEY MEDICAL CENTER, P.S., a Washington  
professional service corporation; PATRICK J. WENDT, M.D.;  
DAVID B. LEVITSKY, M.D.; SHAWN C. KELLEY, M.D. ; and  
JOHN DOE NO. 1; JOHN DOE NO. 2; JANE DOE NO. 1; AND  
JANE DOE NO. 2,

Respondents.

On appeal from Chelan County Superior Court,  
No. 07-2-00060-1  
Honorable John E. Bridges

**CORRECTED OPENING BRIEF OF APPELLANT  
KIMME PUTMAN**

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## INTRODUCTION

Kimme Putman challenges the constitutionality of RCW 7.70.150's certificate of merit requirement in medical malpractice cases. The requirement interferes with the courts' authority to set its own procedural rules and conflicts with CR 11, in violation of separation of powers; places unreasonable, arbitrary and monetary barriers to the guarantee of access to the courts; denies equal protection and privileges and immunities by treating like persons unlike without compelling, or even legitimate, justification and by employing a means that is not the least restrictive; denies due process by foreclosing a meaningful hearing at a meaningful time; and constitutes a special law for the benefit of an identifiable group when a more general law could have been enacted. By ruling that the certification requirement is not unconstitutional, the Superior Court has authorized a far reaching change to the common law of corporate vicarious liability that precludes Putman (or any plaintiff) from claiming Wenatchee Valley Medical Clinic (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.

### ASSIGNMENTS OF ERROR

1. The Superior Court erred in dismissing the claim against WVMC for vicarious liability in medical malpractice by ruling that the certificate of merit requirement in RCW 7.70.150 does not violate **separation of powers**, Wash. Const. art. IV, § 1. CP 63-64.

2. The Superior Court erred in dismissing the claim against WVMC for vicarious liability in medical malpractice by ruling that the certificate of merit requirement in RCW 7.70.150 does not create an unconstitutional monetary barrier and burdensome impediment to filing, contrary to **open access to courts**, Wash. Const., art. I, § 10. CP 61.

3. The Superior Court erred in dismissing the claim against WVMC for vicarious liability in medical malpractice by ruling that the certificate of merit requirement in RCW 7.70.150 does not offend the Washington Constitution's **privileges and immunities clause**, art. I, § 12 and federal and state **due process and equal protection**, U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. CP 62.

4. The Superior Court erred in dismissing the claim against WVMC for vicarious liability in medical malpractice by ruling that the certificate of merit requirement in RCW 7.70.150 is not an unconstitutional violation of the ban on **special laws**, Wash. Const. art. II, § 28(6). CP 61.

### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the certificate of merit requirement in RCW 7.70.150 violate **separation of powers**? Wash. Const. art. IV, §1 (Assignment of Error 1.)

2. Does the certificate of merit requirement in RCW 7.70.150 violate **open access to courts**? Wash. Const. art. I, § 10 (Assignment of Error 2.)

3. Does the certificate of merit requirement in RCW 7.70.150 offend the Washington Constitution's **privileges and immunities clause**, art. I, § 12, and federal and state **due process and equal protection**? U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3 (Assignment of Error 3.)

4. Does the certificate of merit requirement in RCW 7.70.150 violate the ban on **special laws**? Wash. Const., art. II, § 28(6) (Assignment of Error 4.)

### STATEMENT OF THE CASE

Kimme Putman is a 45-year-old woman who, after a delayed diagnosis of Stage 2C ovarian cancer, brought this action for medical malpractice against respondent WVMC and its employees. First Am. Compl. ¶¶ 4.1, 4.10. CP334-343. Putman's treating providers have given her a 40 percent chance of 5-year survival. CP 339 (First Am. Compl. ¶ 4.12).

On **March 8, 2007**, WVMC moved to dismiss the claims against it, contending that RCW 7.70.150, adopted as part of the “Comprehensive Patient Protection Act,” Second Substitute House Bill 2292, effective June 7, 2006, required Putman to file a certificate of merit with her complaint regarding WVMC’s agents’ conduct. CP324-33 (Mot. to Dismiss), CP299-323 (Rogers Decl. with exhibits). After briefing, including supplemental briefs filed by both parties, CP65-72 (WVMC), CP 95-116 (Putman), and oral argument on April 13, 2007, the Superior Court issued a letter ruling on **July 20, 2007**, CP 52-64, corrected September 27, 2007, and entered its Order Regarding Defendants’ Motion to Dismiss Claims Against Wenatchee Valley Medical Center and Dr. Kelley on **September 27, 2007**. CP 366-69 (Sub No. 74).<sup>1</sup> The Superior Court entered a Final Judgment and CR 54(b) Findings on **October 26, 2007**, CP42-43. This appeal timely followed. CP 21-41. On **December 10, 2007**, the Superior Court entered Supplemental CR 54(b) Findings Supporting Final Judgment. CP 8-11.

Putman appeals from the Superior Court’s decision that “a certificate of merit must be filed as to any individual whose conduct forms the basis of the vicarious liability claim against WVMC and that because no such certificate was filed against Dr. Kelley [or Dr. Hsu], any claimed

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<sup>1</sup> Putman voluntarily dismissed Dr. Shawn Kelley on April 10, 2007. CP 115-16.

negligence or failure to comply with the standard of care cannot serve as the basis for WVMC's vicarious liability under a respondeat superior theory." CP 58. This decision is based on the Superior Court's conclusion that Washington's certificate of merit statute is constitutional, because, the court ruled, the statute is not:

- an unconstitutional violation of the ban on special laws, Wash. Const., art. II, § 28(6),<sup>2</sup> because the requirement "is rationally related to the goal of reducing malpractice insurance premiums by attempting to decrease the number of frivolous malpractice suits." CP 61.
- an unconstitutional monetary barrier and delay of justice, contrary to the open access to courts, Wash. Const. art. I, § 32. CP 61.
- inconsistent with the Washington Constitution's privileges and immunities clause, art. I, § 12,<sup>3</sup> state and federal due process and equal protection, U.S. Const. amend. XIV (due process, equal protection); Wash. Const. art. I, § 3.<sup>4</sup> CP 62.
- violative of separation of powers, Wash. Const. art. IV, § 1. CP 63-64.

Putman asks this Court to overturn RCW 7.70.150 as unconstitutional based on any of the above violations of the Washington or United States Constitutions.

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<sup>2</sup> "The legislature is prohibited from enacting any private or special laws in the following cases:- . . . 6. For granting corporate powers or privileges."

<sup>3</sup> "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."

<sup>4</sup> "No person shall be deprived of life, liberty, or property, without due process of law."

## ARGUMENT

### I. Standard of Review

All issues presented in this appeal are constitutional and require this Court's *de novo* review. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006), *cert. denied*, --- U.S. ---, 127 S. Ct. 1844, 167 L. Ed. 2d 324 (2007). The appellate court also applies *de novo* review to a dismissal for failure to state a claim upon which relief can be granted. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Dismissal should be granted only sparingly and with care in the unusual case where "there is some insuperable bar to relief." *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988).

In upholding RCW 7.70.150, the Superior Court read the statute to change the common law of vicarious liability so that a hospital or other health care entity could be held vicariously liable for medical negligence committed by its employees or agents only when a plaintiff also sues those individual providers and submits a certificate of merit as to each. As a statute in derogation of the common law, RCW 7.70.150 must be strictly construed, and no intent to alter the common law can be found unless it appears with clarity. *McNeal v. Allen*, 95 Wn. 2d 265, 269, 621 P.2d 1285 (1980). Nothing in RCW 7.70.150 reveals any intent on the part of the Legislature to abrogate the common law of corporate vicarious liability

when medical malpractice is at issue. Moreover, to construe the statute as changing the common law would render it unconstitutional for all the reasons explained here. *See In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993) (“It is a general rule that statutes are construed to avoid constitutional difficulties when such construction is consistent with the purposes of the statute.”).

**II. The Certificate Requirement Unconstitutionally Usurps the Courts’ Exclusive Authority to Promulgate Rules of Civil Procedure**

RCW 7.70.150 directly and unavoidably conflicts with a rule of civil procedure and, under longstanding precedent, must yield to the courts’ own rules.<sup>5</sup> By its terms, RCW 7.70.150<sup>6</sup> requires that a complaint

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<sup>5</sup> Because there is no comparable division of rulemaking authority under federal law, there is no need to discuss the factors that this Court uses to determine when to rely on the state constitution, rather than the federal constitution. *Cf. State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

<sup>6</sup> RCW 7.70.150. Actions alleging violation of accepted standard of care – certificate of merit required

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

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

(3) The certificate of merit must contain a statement that the person executing the certificate of merit believes, based on the information known at the time of executing

in a medical malpractice case be verified through the simultaneous filing of certificates of merit from qualified experts as to each defendant's failure to conform to the applicable standard of care. CR 11<sup>7</sup> plainly establishes that only divorce and custody petitions require such verification. It further specifies that *pleadings in every other cause of action need not be verified by affidavit.* CR 11(a).

The Washington Constitution vests all judicial power in the Supreme Court and other state courts. Const. art. IV, § 1. One aspect of that power, long understood as exclusively judicial in nature, is the authority to set rules of procedure and rules of evidence. *See* Roscoe Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 601 (1926)(procedure for courts belongs within sphere of judiciary, not legislature); John H. Wigmore, *All Legislative Rules for Judicial*

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the certificate of merit, that there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant.

(4) Upon motion of the plaintiff, the court may grant an additional period of time to file the certificate of merit, not to exceed ninety days, if the court finds there is good cause for the extension.

(5)(a) Failure to file a certificate of merit that complies with the requirements of this section is grounds for dismissal of the case.

The Washington Legislature adopted this statute as part of the "Comprehensive Patient Protection Act," SSB 2292, effective June 7, 2006.

<sup>7</sup> CR 11(a), in pertinent part, states: "Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. **Other pleadings need not, but may be, verified or accompanied by affidavit.**" (Emphasis added).

*Procedure are Void Constitutionally*, 23 Ill. L. Rev. 276, 276 (1928)(same).

The doctrine finds explicit expression in the Constitution and this state's precedents. Authority to "establish uniform rules for the government of the superior courts" rests with the "judges of the superior courts." Const. art. IV, § 24.<sup>8</sup> Moreover, this Court has unambiguously held that "[i]t is within the power of this court to dictate, under the constitutional separation of powers, its own court rules, even if they contradict rules established by the Legislature." *Marine Power & Equip. Co. v. Industrial Indem. Co.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984).

This Court has emphasized that "a legislative enactment may not impair this court's functioning or encroach upon the power of the judiciary to administer its own affairs. The ultimate power to regulate court-related functions . . . belongs exclusively to this court." *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 908-09, 890 P.2d 1047 (1995).

The Ohio Supreme Court's treatment of this precise issue is instructive. In *Hiatt v. Southern Health Facilities, Inc.*, 68 Ohio St. 3d 236, 626 N.E.2d 71 (1994), the Ohio Court reviewed the constitutionality of a similar certificate of merit requirement and struck it down on

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<sup>8</sup> It is worth noting that the Constitution similarly assigns each house of the Legislature the exclusive authority to establish the "rules of its own proceedings." Const. art. II, § 9.

separation of powers grounds. Ohio also has a rule 11 stating that “pleadings need not be verified or accompanied by affidavit.” Ohio Civ. R. 11. The Court concluded that the legislatively imposed certificate requirement conflicted with the court-promulgated rule and thus lacked force and effect. Arkansas’s Supreme Court came to the same conclusion. *Summerville v. Thrower*, 369 Ark. 231, --- S.W.3d --- (2007).

Here, the lower court dismissed these concerns by concluding “that the independence of the judiciary is not threatened by the passage of RCW 7.70.150.” CP 64 (Op. at 13). It determined separation of powers need not be strict and, without determining whether the certificate requirement was procedural or substantive, that “pre-filing requirements” constituted a shared enterprise of the legislative and judicial branches. *Id.*

As examples of this shared enterprise, the court cited RCW 4.92.110, which requires presentment prior to filing a claim against the State, and RCW 7.06.010, which mandates arbitration of certain civil actions in less populous counties. These statutes, however, are inapposite. RCW 4.92.110 falls within the Legislature’s authority to waive sovereign immunity under conditions it chooses and does not implicate this Court’s authority at all. RCW 7.06.010 does not dictate procedures for initiating a lawsuit, but instead assigns certain disputes for resolution through an alternative forum, which is an exercise of the Legislature’s authority over

substantive law. Even so, the rules adopted by this Court still govern the procedures for such actions. RCW 7.06.030. Thus, the Legislature respected this Court's authority over procedural rules in enacting RCW 7.06.010, a respect that is absent here.

More troubling yet, the court below dismissed the separation of powers concerns raised here as insufficient to threaten judicial independence by imposing a substantiality test that this Court has never endorsed. CP 63-64 (Op. at 12-13). But this Court has instructed when a claim is made that the Legislature has arrogated judicial authority to itself:

[t]he question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or *invades the prerogatives of another*.

*Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)(emphasis added). Here, the Legislature unquestionably invaded judicial prerogatives.

The court below also relied upon *City of Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006), *cert. denied sub nom., Jensen v. City of Fircrest*, 127 S. Ct. 1382, 167 L. Ed. 2d 162 (2007), to determine that a change in procedures does not constitute a threat to judicial independence. *Jensen* recognized that the "inherent [judicial] power of article IV includes the power to govern court procedures." *Id.* at 394. In apparent tension with

that statement on inherent authority,<sup>9</sup> the *Jensen* Court further treated RCW 2.04.190 as delegating to the courts “the power to adopt rules of procedure.” *Id.* (citation omitted). It thus concluded:

The adoption of the rules of evidence is a legislatively delegated power of the judiciary. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches. When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both. Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court’s inherent power, the court rule will prevail.

*Id.*

Thus, regardless whether the power is inherent in the judicial branch or delegated by the legislative branch, *Jensen* establishes that a court rule must prevail when legislation conflicts with a court-made rule. Such a conflict exists when the rule eschews any need for an affidavit of verification, as does CR 11, and the statute at issue, RCW 7.70.150, insists upon it. No such conflict existed in *Jensen* because the statute at issue there “is permissive, not mandatory, and can be harmonized with the rules of evidence.” *Id.* at 399. *See also id.* at 400 (concluding the statute

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<sup>9</sup> An inherent judicial power cannot be a matter of legislative grace and thus does not exist by virtue of any delegation. *See, e.g., HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 622, 121 P.3d 1166 (2005)(holding that where a body “does not have inherent power . . . [it] may exercise such power only as is expressly authorized by the legislature.”)(citation omitted). As Justice Utter stated, “[e]ven without statutory enactment, the judiciary possesses all powers necessary for the free and untrammled exercise of its functions.” *Zylstra*, 85 Wn.2d at 755 (citing *Board of Comm’rs v. Stout*, 136 Ind. 53, 35 N.E. 683, 685 (1893))(Utter, J., concurring).

“merely codif[ied]” existing foundational requirements for the admission of breath tests).

Contrary to the reading of *Jensen* in the court below, this Court did not turn a blind eye to “minor invasions” of its prerogatives to set the rules of practice; it simply found no conflict. Traditional notions of separation of powers have uniformly condemned this type of creeping invasion of judicial prerogative. In fact, this Court has recognized that the Constitution does not treat it as merely an exercise of overlapping responsibility, when “a legislative enactment . . . impair[s] this court’s functioning or encroach[es] upon the power of the judiciary to administer its own affairs.” *Washington State Bar*, 125 Wn.2d at 908-09. Changing a civil rule is precisely the type of impermissible encroachment the Constitution condemns.

Observing the constitutional division of authority between that which falls within the Legislature’s purview and that entrusted to the judiciary, this Court has adopted a substantive/procedural dichotomy: the Legislature writes the substantive law; the Court writes the procedural law. Substantive law “creates, defines, and regulates primary rights,” while procedure pertains to “mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.” CP 63-64 (Op. 12-13). Though the Court below chose not to characterize RCW7.70.150, it is

palpably procedural. It does not create, define, or regulate any primary right nor provide any basis for a judgment on the allegations before the court, but instead relates to how the machinery of the courts is operated. *See Summerville*, 369 Ark. 231, 2007 WL 766319, at \*5.

Because RCW 7.70.150 is in clear conflict with a civil rule that specifies that an affidavit of verification is unnecessary outside of a narrow category of cases, the statute violates separation of powers.

### **III. The Certification Requirement Violates the Fundamental Right of Access to Courts**

This State has made a fundamental constitutional commitment to assuring that disputes may be resolved in courts: “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10. Recently, this Court reaffirmed that the open courts guarantee provides a “right to a remedy for a wrong suffered.” *King v. King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007)(quoting Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 24 (2002)). It further noted that, pursuant to Article I, § 10, “[f]ull access to the courts . . . is a fundamental right.” *Id.* at 390 (quoting *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))).<sup>10</sup> In fact, this Court has

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<sup>10</sup> The quotation from *Bullock* specifically asserts that full access to the courts is fundamental in divorce actions, however, nothing in Article I, § 10 limits the

recognized that access to the courts “is the bedrock foundation upon which rest all the people’s rights and obligations.” *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). *Cf. Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S. Ct. 34, 52 L. Ed. 143 (1907)(access to courts “is the right conservative of all other rights, and lies at the foundation of orderly government.”).

Such a reading of the fundamental nature of the Open Courts guarantee is consistent with the provision’s venerable lineage, which can be traced back to Chapter 40 of Magna Carta in 1215.<sup>11</sup> William S. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 395 (2d ed. 1914). Chapter 40 declared: “To no one will we sell, to

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constitutional guarantee to matters of divorce. Instead, the provision’s generalized reach and long history makes it plainly applicable in fundamental fashion to all cases. Thus, in *Doe v. Puget Sound Blood Ctr.*; 117 Wn.2d 772, 781, 819 P.2d 370 (1991)(quoting *Carter v. Univ. of Washington*, 85 Wn.2d 391, 399, 536 P.2d 618 (1975)), this Court acknowledged that the right of access to the courts is fundamental without any categorical limitation. The antecedents of the provision, as described above, further confirm its applicability to all matters that were recognized within the common law.

<sup>11</sup> This Court has used the common history behind federal constitutional concepts to construe provisions of the Washington Constitution. *See Carrick v. Locke*, 125 Wn.2d 129, 135 n.1, 882 P.2d 173 (1994). The U.S. Constitution contains an implicit guarantee of access to justice. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)(holding that the right of access to the courts is “grounded ... in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses.”). The Supreme Court has also held the right to be fundamental. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 346, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). Pursuant to the factors articulated in *State v. Gumwall*, 106 Wn.2d at 58, Washington’s guarantee may be more far reaching. Unlike the U.S. Constitution, where the right is implicit, the Washington Constitution provides a textual guarantee that cases “be administered openly,” Const. art. I, § 32. Otherwise, the provision has a shared history and purpose with the federal right.

no one will we deny, or delay right or justice.” Magna Carta, Ch. 40 (1215).

Upon its reissue in 1225, Chapter 40 was combined with Chapter 39, the antecedent of our due process guarantee, to form a new Chapter 29, a provision that indisputably had significant impact on later American constitutional thinking. Hon. William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 350, 356 (1997). As construed by Sir Edward Coke, Magna Carta’s guarantee was understood as “a promise of full and equal justice for all.” David Schuman, *Oregon’s Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 39 (1986).

Coke was “widely recognized by the American colonists ‘as the greatest authority of his time on the laws of England.’” *Payton v. New York*, 445 U.S. 573, 593-94, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). His gloss on Magna Carta “was widely accepted and imported by early American colonists where it was incorporated into state constitutions.” Jennifer Friesen, *State Constitutional Law* § 6.2(a) at 349 n.16 (1996). See also *Gresham v. Smothers Transfer Co.*, 332 Or. 83, 23 P.3d 333, 340 (2001)(footnote omitted)(noting that “phrasing of remedy clauses that now appear in the Bill of Rights of the Oregon Constitution and 38 other states

traces to Edward Coke's commentary, first published in 1642, on the second sentence of Chapter 29 of the Magna Carta of 1225."). When America's constitution writers read Chapter 29 and adopted it in their state constitutions, "they almost certainly understood it as Coke did." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991)(Scalia, J., concurring).

Similarly, Sir William Blackstone emphasized that, under the common law and consistent with Magna Carta, "every Englishman" has the right to "apply[] to the courts of justice for redress of injuries." 1 William Blackstone, *Commentaries on the Laws of England* 141 (1765). He added that, when the law recognized rights, courts must supply "the remedial part of the law that provides the methods for restoring those rights when they wrongfully are withheld or invaded." *Smothers*, 23 P.3d at 343 (characterizing 1 Blackstone, *Commentaries*, at 56).

Americans had a practical reason to find Coke's and Blackstone's writings consistent with right and reason: their arguments provided a legal brief against the "unconstitutional tax" imposed by the Stamp Act, which effectively closed the civil courts because of the cost associated with obtaining stamps for legal filings. See Laurence H. Tribe & Roger L. Pardieck, *Indiana's Medical Malpractice Reform*, 31 Ind. L. Rev. 1089, 1090-92 (1998). Thus, the concept of open and accessible courts became a

birthright and an article of American faith that found expression in the nation's seminal constitutional decision: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803).

A valid law, consistent with this promise of access, is one, as Daniel Webster argued in *Dartmouth College v. Woodward*, 4 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819), "which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Thomas M. Cooley, *A Treatise on Constitutional Limitations* 432 (1883; 1998 reprint).

The certificate of merit constitutes a significant obstacle, contrary to this history, for two fundamental reasons. First, it is inconsistent with the system of notice pleading that Washington has adopted and thus puts a plaintiff to proof without the benefit of necessary discovery. Second, it unconstitutionally imposes additional and substantial costs to litigation.

**A. The Certification Requirement Places an Improper and Often Impossible Obstacle to Access to the Courts**

CR 8 embodies this State's reliance on notice pleading and requires only a short, plain statement of the claim, along with a demand for judgment. This procedure, as the U.S. Supreme Court has explained,

“restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial.” *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947). Washington courts have endorsed this conception of the essential role performed by court-ordered discovery. Thus, the “discovery rules are intended to “make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”” *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 835-36, 696 P.2d 28 (1985)(citations omitted).

Discovery permits a party both to obtain evidence and to gather information reasonably calculated to lead to admissible evidence. CR 26(b)(1). As this Court has noted, “liberal discovery means that civil trials ‘no longer need be carried on in the dark. The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial.’” *Matter of Firestorm 1991*, 129 Wn.2d 130, 150, 916 P.2d 411 (1996)(quoting *Hickman*, 329 U.S. at 501). Discovery is so essential to litigation that sanctions for willful denials, pursuant to CR 37, include a default judgment. *See, e.g., Associated Mortgage Invest. v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229-30, 548 P.2d 558 (1976).

RCW 7.70.150, however, is premised on the notion that a medical expert, already under pressure from within the medical community not to

testify in favor of plaintiffs generally,<sup>12</sup> will certify that a specific medical professional departed from the standard of care even without critical information, available only through discovery. *See, e.g., Lo v. Honda Motor Co., Ltd.*, 73 Wn. App. 448, 452-53, 869 P.2d 1114 (1994)(detailing a multi-year effort that involved inquiries to at least seven physicians to determine whether medical malpractice was involved).

In enacting RCW 7.70.150, the Legislature acted arbitrarily by foreclosing the crucial role that discovery plays in actions as complex as medical malpractice. To permit a medical expert to determine the appropriate standard of care, whether that standard was met, and which defendant bore responsibility for discharging those obligations, the expert may need to review hospital and other medical records in the possession of adverse parties. Plaintiffs may not, without assistance of court-ordered discovery, obtain written policies and procedures that represent some evidence of the standard of care. Without such evidence, an expert's

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<sup>12</sup> Many medical specialty organizations have initiated proceedings against member physicians who testify in medical malpractice cases against other members (while not investigating accusations of medical malpractice) and thereby have created a chilling effect on available witnesses. *See, e.g., Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001); *Fullerton v. Florida Med. Ass'n*, 938 So. 2d 587 (Fla. Dist. Ct. App. 2006). When a medical association acts to discourage testimony in favor of plaintiffs, it becomes much harder to locate experts familiar with the local standard of care, who are willing to be shunned by colleagues and chance the loss of local hospital privileges that often accompanies such charges. *See, e.g., Lo v. Honda Motor Co., Ltd.*, 73 Wn. App. 448, 452, 869 P.2d 1114 (1994)(documenting such reluctance to face local ostracism). Such difficulties make compliance with RCW 7.70.150's restrictions especially onerous when the expert must form an opinion on incomplete information.

affidavit could be deemed insufficient. *See Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 23, 25-26, 851 P.2d 689 (1993), *review denied sub nom.*, *Guile v. Crealock*, 122 Wn.2d 1010, 863 P.2d 72 (1993)(holding a doctor's affidavit "containing conclusory statements without adequate factual support . . . insufficient" and, doing "little more than reiterate the [complaint's] claims")(footnote omitted).

Parties may also need to depose witnesses within the defendant's employ who can provide facts that reveal the malpractice that the events themselves merely imply. *See Wright by Wright v. Group Health Hosp.*, 103 Wn.2d 192, 194, 691 P.2d 564 (1984)(describing the propriety, as a function of discovery, of plaintiff's counsel seeking to interview fact witnesses in hospital's employ). It is often only through the compulsion of court-supervised discovery that plaintiffs can unearth the "smoking gun" of malpractice, which can reasonably be assumed to exist on the basis of a pre-filing investigation but remains hidden by virtue of the defendants' own internal procedures and processes.

In this case involving delayed diagnosis, without significant discovery including depositions of hospital employees, agents, physicians, administrators, nurses, or other staff, facts sufficient to file a certificate of merit directly against the clinic for corporate vicarious liability (or against Dr. Shawn Kelley, or Dr. Rita Hsu, for that matter) will be lacking.

By adopting RCW 7.70.150, the Legislature has effectively changed the litigation process and deprived plaintiffs of access to the courts by requiring the pre-filing development of ultimate facts upon which a “make-or-break” expert can attest that medical malpractice took place. It is for that reason that this Court has recognized that a “plaintiff’s right of access to the courts *and his concomitant right of discovery* must be accorded a high priority in weighing the respective interests of the parties in litigation.” *Doe*, 117 Wn.2d at 783 (emphasis added). Thus, this Court held:

*This broad right of discovery is necessary to ensure access to the party seeking the discovery. It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense. Thus, the right of access as previously discussed is a general principle, implicated whenever a party seeks discovery. It justifies the limited nature of the exceptions to broad discovery found in CR 26(c). Plaintiff, as the party seeking discovery, therefore has a significant interest in receiving it.*

*Id.* at 782-83 (emphasis added).

Many states impose a certificate of merit only after some amount of discovery can be completed.<sup>13</sup> Maryland’s version specifically provides

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<sup>13</sup> See, e.g., Ariz. Rev. Stat. § 12-2602 (requiring a “preliminary expert opinion affidavit” within 40 days of a responsive pleading to the lawsuit and permitting the court to extend that time period); Colo. Rev. Stat. Ann. § 13-20-620 (requiring counsel’s certification of consultation with expert within 60 days of service); N.J. Stat. Ann. § 2A:53A-27 (requiring certification within 60 days of defendant’s answer); Pa. R. Civ. P. No. 1042.3(a)(requiring counsel’s certification within 60 days of filing complaint).

for discovery. Md. Code. Ann., Cts. & Jud. Proc. § 3-2A-04(b)(3)(ii). Others require automatic disclosures of documentary evidence. For example, Florida requires certification only by counsel<sup>14</sup> but still requires defendants to provide “copies of all medical reports and records, including bills, films, and other records relating to the care and treatment of such person that are in the possession of a health care practitioner” to enable a plaintiff’s counsel to certify that an unidentified consulting expert, in good faith, has determined that “there appears to be evidence of medical negligence.” Fla. Stat. Ann. § 766.104 (3) & (1). Michigan has similar production requirements. Mich. Comp. Laws Ann. § 600.2912d.

RCW 7.70.150’s failure to guarantee access to facts that are a prerequisite to obtaining a certificate of merit constitutes a fatal constitutional flaw that contravenes the fundamental right of access.

**B. The Certificate Requirement Constitutes an Unconstitutional Monetary Barrier to Access**

RCW 7.70.150 also violates the fundamental right of access to courts by imposing burdensome additional costs as the price of entry into the civil justice system. Medical malpractice litigation already involves significant costs that are not present in other types of civil litigation. *See*

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<sup>14</sup> Other states similarly require only certification by counsel that an expert was consulted. *See, e.g.*, Conn. Gen. Stat. Ann. § 52-190a; Minn. Stat. Ann. § 145.682; N.Y. C.P.L.R. § 3012-a.

Randolph I. Gordon & Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care*, 4 Seattle J. for Soc. Just. 693, 706 (Spring/Summer 2006). As one scholar wrote:

Assessing the merits of any case usually costs at least \$2,000 (as of 1991), and most cases will require an expenditure of \$5,000 to \$10,000 before counsel can be sure that the case is meritorious. If the case goes to trial, costs may exceed \$50,000, and expenditures of \$75,000 or more are not extraordinary.

Frank M. McClellan, *Medical Malpractice: Law, Tactics and Ethics* 102 (1994). In fact, the costs, particularly hourly fees of experts, have climbed precipitously since those figures were established. One recent study noted that "the cost of taking a medical malpractice suit to court can be up to \$450,000." David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 Vand. L. Rev. 1085, 117 n.111 (2006).

Obtaining expert affidavits is inevitably time-consuming and costly; plaintiffs must bear the significant expense and burden of obtaining complete medical records and arranging for an expert to review them. See, e.g., *Zeier v. Zimmer, Inc.*, 2006 Okla. 98, 152 P.3d 861, 873 (2006)(estimating the additional cost at between "\$500 to \$5,000" and in one instance \$12,000, creating "an unconstitutional monetary barrier to the

access to courts” and declaring Oklahoma’s certificate requirement unconstitutional). The Oklahoma Supreme Court found:

[T]he additional certification costs have produced a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs. The affidavit of merit provisions front-load litigation costs . . . They also prevent meritorious medical malpractice actions from being filed. The affidavits of merit requirement obligates plaintiffs to engage in extensive pre-trial discovery to obtain the facts necessary for an expert to render an opinion resulting in most medical malpractice causes being settled out of court during discovery. Rather than reducing the problems associated with malpractice litigation, these provisions have resulted in the dismissal of legitimately injured plaintiffs’ claims based solely on procedural, rather than substantive, grounds.

*Id.* at 869 (footnotes omitted). See also Allan N. Karlin, “Medical Malpractice Legislation,” *W. Va. Law.* 24, 25 (Jan. 2003)(estimating the cost of such certificates as ranging from \$1,000 to \$5,000); Melinda L. Stroub, *The Unforeseen Creation of a Procedural Minefield – New Jersey’s Affidavit of Merit Statute Spurs Litigation and Expense In Its Interpretation and Application*, 34 *Rutgers L.J.* 279, 315 & n.195 (2002)(placing the cost at \$1,000 to \$5,000).<sup>15</sup>

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<sup>15</sup> The Court below erroneously suggested that this economic burden was overstated because the plaintiff’s bar handles such cases on a contingency basis. CP 61-62 (Op. at 10-11). In fact, the client, not the lawyer, is responsible for paying the expert’s expense. See Rules of Professional Conduct, 1.8(e)(1)(“the client remains ultimately liable for such expenses”). Relying on the plaintiffs’ bar to cure the constitutional infirmity of the certification requirement is self-defeating. As one practitioner stated, front-loading litigation expenses makes it “difficult to find any attorney who will take most of these cases.” Karlin, *supra*, at 25.

Moreover, certificate requirements increase collateral litigation over whether the requirement was adequately met. *See Zeier*, 152 P.3d at 170-71 & nn.54-77 (listing 24 instances of collateral litigation regarding certificates of merit); David Kopstein, *An Unwise 'Reform' Measure*, 39 *Trial* 26 (May 2006); Stroub, 34 *Rutgers L.J.* 285-314 (describing ten instances in a seven-year span where the New Jersey Supreme Court was called upon to resolve disputes about that state's certificate requirement).

The expenditure of limited resources on an expert opinion prior to filing can easily act as a bar to a lawsuit by a limited-income plaintiff, such as Ms. Putman. Although, in most cases, such an expenditure on expert witnesses will inevitably be made, the pre-filing certification required by RCW 7.70.150 consumes expert time beyond what the expert will expend reviewing files later made available through discovery and in expert depositions, examinations, and testimony. Rather than comprise a fungible expenditure, either made now or later, the requirement often will create duplicate expenditures, especially if the expert becomes unavailable for trial or more than one expert is needed to establish both the standard of care at issue and the breach of that standard. As such, it puts an unconstitutional monetary barrier before the courthouse door that must be removed.

**IV. The Certification Requirement Violates the Privileges and Immunities Clause of the Washington Constitution and the Equal Protection Clause of the Constitution of the United States**

RCW 7.70.150 singles out those tort plaintiffs who are victims of medical negligence for adverse treatment in violation of Washington's privileges and immunities guarantee, Const. art. I, § 12, and the federal equal protection guarantee. U.S. Const. amend. XIV, § 1. While this Court once found the two provisions "substantially identical," *In re Grove*, 127 Wn.2d 221, 239, 897 P.2d 1252 (1995), more recent cases have held that the privileges and immunities provision "requires an independent constitutional analysis from the equal protection clause of the United States Constitution." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 811, 83 P.3d 419 (2004) (*Grant County II*). Still, this Court has limited that independent analysis to instances where "a law is a grant of positive favoritism to a minority class." *Andersen v. King County*, 158 Wn.2d 1, 9, 138 P.3d 963 (2006). Because RCW 7.70.150 favors no minority class, the "same analysis under the state constitution's privileges and immunities clause" is applied as "under the federal constitution's equal protection clause." *Id.*

Both constitutional provisions require that "persons similarly situated with respect to the legitimate purpose of the law" receive like

treatment. *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). Here, the statute expressly burdens one class of tort claimants – victims of medical negligence – and not other tort plaintiffs or other victims of professional negligence.<sup>16</sup> Cf. *Zeier*, 152 P.3d at 867 (holding the “requirement immediately divides tort victims alleging negligence into two classes – those who pursue a cause of action in negligence generally and those who name medical professionals as defendants.”).

Washington courts “analyze equal protection challenges under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis.” *State v. Belitz*, No. 35476-4-II, 2008 WL 497132 at \*12 (Wn. App. Feb. 26, 2008), citing *Manussier*, 129 Wn.2d at 672-73. The appropriate level of scrutiny depends upon whether a suspect or semi-suspect classification<sup>17</sup> has been drawn or a fundamental right has been implicated; if neither is involved, this Court will inquire whether the

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<sup>16</sup> Indeed, the statute imposes this burden on only the subclass of medical malpractice plaintiffs who allege breach of the standard of care. The statute does not impose the certificate of merit requirement on plaintiffs alleging lack of informed consent, e.g., *Backlund v. Univ. of Washington*, 137 Wn.2d 651, 659-62, 975 P.2d 950 (1999)(distinguishing negligence action from action based on lack of informed consent under RCW 7.70.050) or alleging *res ipsa loquitur*, e.g., *Miller v. Jacoby*, 145 Wn.2d 65, 33 P.3d 68 (2001)(error to dismiss claim based on *res ipsa loquitur*). In other states with certification requirements, certification is needed in all claims against “licensed professionals,” presumably to avoid this equal protection problem. See, e.g., Ariz. Rev. Stat. § 12-2601; Pa. R. Civ. P. No. 1042.1.

<sup>17</sup> *Andersen* recognizes that strict scrutiny applies not just to a suspect classification, but to politically powerless classes as well. 158 Wn.2d at 19. Medical malpractice plaintiffs, as opposed to the health care establishment that has an enormous lobbying presence, qualify as such a class.

legislation bears a rational relationship to a legitimate governmental purpose. *Kustura v. Dep't of Labor and Indus.*, 175 P.3d 1117, 1131 (Wn. App. 2008). In this case, RCW 7.70.150 satisfies neither strict scrutiny nor even the most deferential rational basis test.

**A. The Statute Does Not Pass Muster Under the Strict Scrutiny Test**

*I. Strict Scrutiny Applies Because the Certificate Requirement Burdens the Fundamental Right of Access to the Courts*

The right of access to the courts is a fundamental right implicitly guaranteed by the federal Constitution, *Christopher*, 536 U.S. at 415 n.12, and explicitly fundamental under the Washington Constitution. See discussion *supra* at Section III. See also generally, Charles K. Wiggins, Bryan P. Harnetiaux & Robert H. Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 Gonz. L. Rev. 193, 201 (1986/87).<sup>18</sup>

RCW 7.70.150 impermissibly interferes with the exercise of this right by exacting a significant economic cost as the price of justice for those who seek redress for wrongful injury. See discussion *supra* at

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<sup>18</sup> Other courts have also held that legislation that interferes with the state constitutional right of access to the courts is subject to strict scrutiny. See, e.g., *Sorell v. Thevenir*, 69 Ohio St. 3d 415, 633 N.E.2d 504, 513 (1994); *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961, 970 (1984); *Thayer v. Phillips Petroleum Co.*, 1980 Okla. 95, 613 P.2d 1041, 1044-45 (1980); *Ernest v. Faler*, 237 Kan. 1251, 697 P.2d 870, 874 (1985); *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

Section III.B. In fact, this financial hurdle represents a significant barrier to reaching the courthouse.

This Court has declared that the administration of justice “demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief.” *Doe*, 117 Wn.2d at 781, quoting *Iverson v. Marine Bancorp.*, 83 Wn. 2d 163, 167-68, 517 P.2d 197 (1973). *Cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (holding that an appellate court fee for preparation of the record violated due process and equal protection when it forced an impecunious plaintiff to forego her appeal).

The certification requirement also interferes with the right of access by mandating dismissal of those claimants who, prior to any discovery, are unable to present sufficient facts upon which an expert can base an opinion. As established above, it is clear that RCW 7.70.150 infringes upon the fundamental right of access to the courts, warranting strict scrutiny by this Court.

2. *The Certificate of Merit Requirement Does Not Further a Compelling State Interest by the Least Restrictive Means*

Under both the Washington and federal guarantees of equal protection, “strict scrutiny requires that the infringement [of a fundamental right be] narrowly tailored to serve a compelling state interest.” *Amunrud*

*v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006), citing *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

This Court need not speculate as to the Legislature's objective in enacting the certificate requirement. Section 1 of the Second Substitute House Bill 2292, as passed by both houses of the Legislature, expresses the lawmakers' intent:

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. . . .

It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums. Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes.

The Legislature indicated that its primary objective was to assure safe health care. The Legislature also sought to provide greater access to affordable health care and to assure that physicians in certain high-risk specialties would be available. The Legislature sought to accomplish these goals, the trial court concluded, by enacting RCW 7.70.150 "to prevent

frivolous medical malpractice lawsuits.” CP 60 (Op. at 9). These purposes do not represent a “compelling” governmental interest; RCW 7.70.150 is not necessary to further that interest; and the statute is not narrowly tailored to achieve that objective with the least intrusion upon fundamental rights.

As a North Carolina court properly observed:

While doctors may have a legitimate interest in reducing the number of frivolous malpractice actions filed against them, their interest does not outweigh the State’s interest in having these disputes resolved in a court of law. The means by which this resolution is accomplished is by lawsuits. . . . [If those lawsuits are deterred, the] end result would be the limitation of free access to the courts.

*Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130, 135 (1979).

The State’s interest in having disputes resolved in court is of constitutional dimension because of the Open Courts guarantee. A statutory interest in reducing frivolous lawsuits, which the courts have ample preexisting authority to address, cannot outweigh the constitutional mandate expressed by Article I, § 10.

Promoting access to safe affordable health care and to the services of certain specialists does not excuse the violation of fundamental constitutional rights. The U.S. Supreme Court has indicated that there is no compelling interest in increasing physician supply in underserved areas, at least in the absence of strong evidence that such a program is

needed. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 310-11, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978)(plurality opinion of Justice Powell).

Here, such a showing is wholly lacking. A recent study commissioned by the University of Washington's School of Medicine found physician-to-population ratios in Washington are comparable to those in the rest of the country for most specialties, although they are actually higher for family medicine. Alfred O. Berg, MD, MPH & Thomas E. Norris, MD, *A Workforce Analysis Informing Medical School Expansion, Admissions, Support for Primary Care, Curriculum, and Research*, 4 (Suppl. 1) *Ann. Fam. Med.* S40-44 (2006), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1578667>.

In fact, the number of physicians serving the people of Washington has grown faster than the state's population. Washington Department of Health statistics reveal that the number of Washington doctors has increased significantly from 294.3 doctors per 100,000 residents in 1993 to 322.9 for 2005, with the rate of increase largest in the last four years. Public Citizen, *Fewer Lawsuits and More Doctors: The Myths of Washington State's Medical Malpractice "Crisis"* 6-7 & 18 (2005).

A Government Accounting Office (GAO)<sup>19</sup> study reveals that the physician population in metropolitan Washington increased by 10 percent between 1991 and 2001 (from 222 per 100,000 in population to 245) and in non-metropolitan Washington by 19 percent (from 128 to 152). Government Accounting Office, *Physician Workforce: Physician Supply Increased in Metropolitan and Nonmetropolitan Areas, but Geographic Disparities Persisted*, GAO-04-124, at 27 (Oct. 2003), available at [www.gao.gov/new.items.d04124.pdf](http://www.gao.gov/new.items/d04124.pdf). The supply of specialists increased even more dramatically during the same period. Metropolitan Washington experienced a 17 percent increase and non-metropolitan Washington enjoyed a 24 percent increase. *Id.*

Although some obstetricians and emergency room physicians may have stopped practicing, an even larger number has entered those specialties in Washington. American Board of Medical Specialties data reveals that the number of obstetricians practicing in Washington increased by 21 percent, from 9.67 per 100,000 population in 1992 to 11.69 in 2004. Emergency physicians increased by 52 percent, from 5.52 per 100,000 population in 1992 to 8.40 in 2004. Public Citizen, at 20.<sup>20</sup> In

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<sup>19</sup> The GAO is the audit, evaluation, and investigative arm of the U.S. Congress, which produces reports, available on the Internet, on government functions and in response to research requests from Congress and its committees.

<sup>20</sup> Supporters of tort reform often assert that obstetricians stop delivering babies or relocate away from underserved areas because of rising malpractice insurance premiums.

view of these facts, the statute's proponents cannot establish a compelling need to interfere with the right of access to the courts.

Even if providing additional access to health care could be deemed a compelling state interest sufficient to overcome the constitutional mandate of access to justice, the certificate requirement is neither necessary nor narrowly tailored to further that interest. It is unnecessary because it is made redundant by both RCW 7.70.160, which imposes sanctions on attorneys who file frivolous malpractice claims, and CR 11,

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Such attributions of motive are rarely supported by objective evidence. In fact, the pressures on obstetricians are more closely related to the problem of uninsured patients:

Medicaid only pays providers forty-eight percent of their usual fees for obstetric care. This factor is routinely cited in provider surveys as the reason obstetric providers are abandoning the Medicaid patient population. This leads the Institute of Medicine to conclude that "the problems associated with the underfinancing of the maternity system in the United States make it difficult to assess the independent effect of professional liability concerns on the delivery of obstetrical care." Poor reimbursement, together with the lack of access to first-rate facilities and equipment, also undoubtedly accounts for much of the reason that rural practitioners are relocating to urban areas.

Deborah Lewis-Idema, *Medical Professional Liability and Access to Obstetrical Care: Is There a Crisis?*, in 2 Institute of Medicine, *Medical Professional Liability and the Delivery of Obstetrical Care* 78 (1989)(footnotes omitted).

Moreover, "rural areas have been medically underserved for decades." American Academy of Family Physicians Rural Practice, *Keeping Physicians In* (Position Paper) (2002), available at <http://www.aafp.org/online/en/home/policy/policies/r/ruralpractice/keep.printerview.html>. See also National Rural Health Association, *Physician Recruitment & Retention* (1998) 1-2 (reporting that the chronic shortage of physicians in rural areas is associated with various social factors (like professional isolation and the difficulty in finding sufficiently interesting and high-paying jobs for a doctor's spouse), and work-related problems that lead rural doctors to work longer hours and many more weeks than non-rural counterparts. The most important factor, however, is economic. Given that "[r]ural populations are ... older, poorer, sicker, more likely to have higher infant mortality and injury-related mortality rates, fewer hospital beds and physicians per capita, and much less likely than urban residents to have private or public health insurance," it is unsurprising that rural "physicians derive a larger share of their gross practice revenue from Medicare and Medicaid patients than metropolitan physicians.").

which provides that the signature of a party or an attorney constitutes a certification not only that the pleading is well grounded in fact and law, but that the signer has conducted a reasonable inquiry into the circumstances of the case. *See North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 649, 151 P.3d 211 (2007)(duty to conduct reasonable inquiry); *Manteufel v. Safeco Ins. Co.*, 117 Wn. App. 168, 176, 68 P.3d 1093 (2003), *rev. denied*, 150 Wn.2d 1021, 81 P.3d 119 (2003)(upholding sanctions imposed for filing a frivolous lawsuit).

Nor is the statute narrowly tailored to further its goals. The statute sweeps too broadly in denying access to court to those whose claims are meritorious, but who cannot afford a certificate of merit or who cannot marshal sufficient evidence to secure such a certificate without discovery. On the other hand, the statute is underinclusive: It is limited to whether a provider has breached the standard of care. It does not address other deficiencies of proof, such as the absence of causation evidence. Nor does the statute apply to potentially frivolous claims based on allegations of lack of informed consent or *res ipsa loquitur*. Finally, the Legislature had available to it more reliable and precisely targeted means of assuring the availability of providers in particular specialties or geographical locations through direct subsidies, forgiveness of medical school loans, housing assistance, and other targeted incentives that, by definition, would be less

restrictive means of furthering the state's interest. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.) (“a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”).

**B. The Statute Does Not Pass Muster Under the Rational Relationship Test**

Even if this Court should determine that RCW 7.70.150 does not burden a fundamental right, the statute is nevertheless invalid because it does not satisfy even the minimal constitutional requirement that it bear a rational relationship to a legitimate state objective.

The rational basis test defers to the legislature's “broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” *Manussier*, 129 Wn.2d at 673 (quoting *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994)). Under both Washington and federal equal protection analysis, the burden is on the party challenging the statute, and the court's review “is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective.” *Kelo v. City of New London*, 545 U.S. 469, 488 n.20, 125 S. Ct. 2655, 162

L. Ed. 2d 439 (2005)(quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015 n.18, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)).<sup>21</sup>

The rational basis test, however, is not “toothless.” *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976). The U.S. Supreme Court has cautioned that “the Equal Protection Clause requires more than the mere incantation of a proper state purpose.” *Trimble v. Gordon*, 430 U.S. 762, 769, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977). As the Supreme Court has explained, even under “the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Referring to that relation, Justice Blackmun has indicated that “while the connection between means and ends need not be precise, it, at the least, must have some objective basis.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982)(Blackmun, J., concurring).

Independent judicial review of the factual basis for legislation ensures that the acts truly serve the public good and that their statements of public purpose are not merely “incidental or pretextual public

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<sup>21</sup> See also *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981)(“Having established that the purpose of California’s lawmakers in enacting the retaliatory tax was legitimate, we turn to the second element in our analysis: whether it was reasonable for California’s lawmakers to believe that use of the challenged classification would promote that purpose.”).

justifications” for disadvantaging a disfavored group or benefiting a special interest. *Kelo*, 545 U.S. at 490-91 (Kennedy, J., concurring). The U.S. Supreme Court has not hesitated to strike down legislation that had a permissible objective, including combating frivolous litigation, but lacked “sufficient factual context for us to ascertain some relation between the classification and the purpose it served.” *Romer*, 517 U.S. at 632-33. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)(where the “record does not reveal any rational basis for believing” that the ban would further the municipality’s asserted goals); *Jimenez v. Weinberger*, 417 U.S. 628, 636, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974)(no rational relationship to government’s goal of preventing spurious claims); *Lindsey v. Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)(no substantial relationship to the objective of discouraging frivolous appeals).

Similarly, here, no factual basis exists that would lead a reasonable legislature to expect that RCW 7.70.150 would achieve its stated goals.

1. *The Statute Has No Factual Basis that Would Reasonably Lead Legislators to Expect It Would Accomplish Its Objectives*

As previously noted, the Legislature expressly stated that the purpose of the statute is threefold: safer medical care, affordable health care, and greater availability of physicians’ services in high-risk

specialties affected by high malpractice insurance premiums and in underserved localities. To accomplish these goals, the Legislature adopted the certificate requirement “to decrease the number of frivolous malpractice suits” and thereby reduce liability insurance premiums. CP 61 (Op. at 10). In fact, there is no objective rational basis for believing that the statute would achieve any of these goals.

a. *The Statute is Not Rationally Related to Ensuring Safe Medical Care.*

Nothing in RCW 7.70.150 is designed to increase medical safety or reduce medical errors. Indeed, to the extent that practitioners are shielded by the statute from accountability for medical mistakes, it is likely to result in increased medical errors. As the Kansas Supreme Court stated, “It is a major contradiction to legislate for quality health care on the one hand, while on the other hand, ... to reward negligent health care providers.” *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058, 1067 (1987). *See also Hoem v. Wyoming*, 756 P.2d 780, 783-84 (Wyo. 1988)(same, and noting agreement by courts in Rhode Island and California). Leading empirical researchers agree that “[a] world in which health care providers profit by making mistakes is a world in which they will find reasons for allowing high error rates to persist.” David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of*

*the Problem or Part of the Solution*, 90 Cornell L. Rev. 893, 993 (2005)(concluding that the existence of medical malpractice liability modestly improves patient safety, while limits on liability have an adverse affect on improved health care quality).

2. *The Statute is Not Rationally Related to Making Health Care in Washington More Affordable*

Even if RCW 7.70.150 succeeded in eliminating frivolous medical malpractice lawsuits, it is mathematically impossible for the statute to result in significant reductions in the cost of health care.

Frivolous lawsuits are not simply those in which the defendant prevails. "A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts." *Orwick v. Fox*, 65 Wn. App. 71, 90, 828 P.2d 12 (1992). By definition, then, a frivolous lawsuit cannot result in an award to the plaintiff and is almost certain to be disposed of early in litigation. Hence, the only "savings" insurers are likely to realize are the defense costs that would have been incurred between the filing of a frivolous malpractice lawsuit and its subsequent termination. It has been estimated that total medical malpractice costs represent roughly one percent of what Americans pay for health care in the United States. Congressional Budget Office, *Economic Implications of Rising Health Care Costs* 27 (1992); Office of Technology Assessment,

*Impact of Legal Reforms on Medical Malpractice Costs* 5 (1993)(less than one percent). Defense costs in medical malpractice cases, including attorney fees, represent about one-sixth of that. Joni Hersch & W. Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 American L. & Econ. Rev. 330, 331 & 343 (2007). Most of those expenses, of course, are incurred in cases that proceed through discovery and trial. Eliminating all frivolous malpractice actions could trim no more than a small fraction of one-sixth of one percent off the costs entailed in that small fraction of cases.

Consumers are unlikely to see even that tiny reduction. Nothing in the statute requires malpractice carriers to pass along any savings resulting from RCW 7.70.150 to their insureds. As the Oklahoma court observed, those companies are free to spend savings for dividends, investments, or executive bonuses “while continuing to collect higher premiums from doctors and encouraging the public to blame the victim or attorney for bringing frivolous lawsuits.” *Zeier*, 152 P.3d at 869-70.

Still, the certificate requirement will bring increased costs in collateral litigation. *Id.* at 870-72. Other states experienced increased costs over litigation regarding compliance with the certificate requirements. Kopstein, *supra*, at 28; *see also* Stroub, 34 Rutgers L.J. at 285.

Finally, while the measure's proponents may view lawsuits with a jaundiced eye, the Constitution sees no "cause for consternation" in citizens looking to the courts for redress; instead citizens' "access to their civil courts . . . is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985). Thus, even the "dangers of baseless litigation" – the putative goal of RCW 7.70.150 – is insufficient to justify remedies so broad that "seriously cripple[]" the vindication of rights through judicial process. *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967). Thus, in *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), the U.S. Supreme Court invalidated a fee requirement instituted to prevent frivolous litigation. The Court noted that ample alternatives exist to achieve the desired policy goal, including "penalties for false pleadings or affidavits, and action for malicious prosecution or abuse of process, to mention only a few." *Id.* at 381-82.

In Washington, the manifold means available to protect a defendant's interests from frivolous lawsuits foreclose this justification for the statute at issue here and undermine any claim that it will reduce insurance costs. See *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 783 P.2d 82 (1989)(applying RCW 4.84.185 to sanction a party for

bringing a frivolous action and frivolous appeal by awarding the prevailing party reasonable expenses, including attorney fees).

3. *There is No Rational Basis to Believe that the Statute Will Attract Physicians to High-Risk Specialties or in Areas Where They are Most Needed*

Finally, there is no rational relationship between the certificate of merit requirement and the Legislature's goal of ensuring the availability of physicians "in high-risk specialties such as obstetrics and emergency room practice" or in those locations "where citizens need them the most." All physicians receive the benefits of the statute, regardless of specialty or location. Thus, even if the statute were to result in lower malpractice insurance premiums, that result would not make obstetrics or emergency room practice or underserved localities any more attractive than before.

In sum, RCW 7.70.150 violates equal protection whether reviewed under the strict scrutiny or rational basis test, because it does not advance a compelling state interest in the least restrictive manner, nor does it rationally advance a legitimate state interest.

**V. The Certificate Requirement Violates the Due Process Guarantees of the Washington and U.S. Constitutions**

Both the Washington and U.S. Constitutions guarantee due process, Const. art. I, § 3; U.S. Const. amend. XIV, § 1, and confer equivalent protections. *In re Personal Restraint of Dyer*, 143 Wn.2d 384,

394, 20 P.3d 907 (2001). While due process guarantees fair procedures, it also embraces “a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990)(citation omitted). RCW 7.70.150 is arbitrary and wrongful, forcing plaintiffs to establish their cases through an expert lacking information available only through compulsory discovery and at considerable additional expense. Substantive due process claims are evaluated under the same criteria used for equal protection, *see Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220-22, 143 P.3d 571 (2006), and Putman adopts her earlier analysis at Section IV *supra* by reference here.

Due process, “[a]t its core is a right to be meaningfully heard,” *In re Detention of Stout v. Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007), and utilizes a test that balances:

(1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures.

*Id.*, citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). An examination of these interests inexorably leads to the conclusion that RCW 7.70.150 is invalid.

First, as established earlier, the private interest affected is not just of constitutional dimension, but comprises a fundamental right – the right to access to the courts. Second, as detailed earlier, the risk that meritorious lawsuits will be blocked is high because of the significant additional costs that the certification requirement entails and because underlying facts must be established to the satisfaction of all necessary experts before any discovery is available. Other states have addressed the latter obstacle by providing a means of discovery prior to requiring such certification. *See* pages 22-23 *supra*. Finally, the government interests supposedly served by the certification requirement fail to overcome the more substantial constitutional interest in assuring that those aggrieved get their day in court, *see* Section IV.A.2, *supra*, while ample alternative means of serving those interests remain available. *See, e.g.*, RCW 4.84.185.

Thus, RCW 7.70.150 violates the due process right to be heard ““at a meaningful time and in a meaningful manner.”” *Mathews*, 424 U.S. at 333. Creating a threshold to obtain a hearing before having an opportunity to develop the evidence fully makes access to the courts less than meaningful and particularly ill-timed.

## VI. The Certification Requirement Is a Special Law Unconstitutionally Favoring Medical Malpractice Defendants

Article II, section 28 of the Washington Constitution prohibits the Legislature from enacting any private or special laws – laws that favor a particular person, group, or area to exclusion of others. *Municipality of Metro. Seattle v. City of Seattle*, 57 Wn.2d 446, 452, 357 P.2d 863 (1960). Legislation violates this prohibition when the exclusions it creates are not “rationally related to the purpose of the statute.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 628, 90 P.3d 659 (2004)(citations omitted).

Prohibitions on special legislation<sup>22</sup> were added when state legislatures failed “to withstand the constant demands for private grants of power and special privilege.” *Anderson v. Bd. of Comm’rs of Cloud County*, 77 Kan. 721, 95 P. 583, 584 (1908). States had experienced the writing of “law after law granting individuals relief (or exemptions) from the application of general laws, conferring astonishing advantages on private groups, and regulating local governments in extravagant detail.” William J. Keefe, *The Functions and Powers of the State Legislatures, in State Legislatures in American Politics* 48 (Heard ed. 1966). Relief from liability was a frequent form of special legislation. *See, e.g.*, George W.

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<sup>22</sup> The bar on special laws has no federal counterpart and thus does not require analysis under the *Gumwall* factors.

Knepper, *Ohio and Its People* 338 (1989)(emphasis added)(noting the impetus for the special legislation prohibition was the “more palpably unjust process of exonerating the chartered few from liabilities to which the rest of the community are subject.”).

Recently, the Oklahoma Supreme Court invalidated a certificate of merit provision similar to the one at issue here on special-legislation grounds. The court recognized the illogical divide created between “those who pursue a cause of action in negligence generally and those who name medical professionals as defendants.” *Zeier*, 152 P.3d at 867.

The certificate of merit is a burdensome requirement not mandated in any other professional malpractice or personal injury action, or even in complex civil actions. *See id.* at 868 (“Only medical malpractice claimants are burdened with the necessity of obtaining a medical opinion to support the filing of a petition in the district court.”). Moreover, “only medical malpractice defendants, not negligence defendants generally, are granted what is a mandated discovery privilege before a petition for recovery will ever be heard.” *Id.*; *cf. Reynolds v. Porter*, 1988 Okla. 88, 760 P.2d 816, 824 (1988)(three-year medical malpractice statute of limitation that failed to allow tolling for discovery of injury, discriminated against medical malpractice claimants and thus was unconstitutional special legislation); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 831 (Wyo. 1980)(10-year

statute of repose relating to improvements to real property constitutes impermissible special legislation because it arbitrarily and irrationally immunized “only ... a narrow spectrum of [possible] defendants.”). Thus, RCW 7.70.150 disproportionately benefits defendant healthcare providers and hospitals, placing them in a more advantageous position than both injured plaintiffs and other tort defendants without any reasonable justification for doing so. *Cf. Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 1076 (1997)(invalidating, *inter alia*, a cap on noneconomic damages on special-legislation grounds).

As detailed earlier at Section IV.B. *supra*, RCW 7.70.150 fails to satisfy rational basis analysis. Its limited scope, benefiting health-care defendants and burdening medical malpractice plaintiffs, is no more rationally limited. If the state faces a problem of frivolous lawsuits, it does not arise specially in the context of medical malpractice cases. If anything, the economic and evidentiary barriers to bringing medical malpractice cases through contingency-fee representation would naturally operate to screen out frivolous claims, more than in other tort cases. *See* Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 *Judicature* 22, 28 (1997); Randall Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 *Law & Contemp. Probs.* 5, 12, 35-36 (1991)(providing data that because

malpractice cases are complex, expensive to prepare, and very risky, plaintiffs' lawyers act rationally and are deterred from taking most medical malpractice claims); U.S. Department of Justice Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties, 1996*, No. 179769 (Aug. 2000)(providing statistics that plaintiffs won only 23 percent of all medical malpractice trials, while they prevailed in 58 percent of automobile accident trials), available at <http://www.ojp.gov/bjs/pub/pdf/ttvlc96.pdf>.

Nor as demonstrated earlier does a certificate requirement improve health care availability or quality or add to the state's physician supply. There is no rational basis for enacting such a law, let alone for specially benefiting health-care defendants or burdening medical malpractice plaintiffs.

#### CONCLUSION

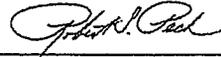
For the foregoing reasons, Appellant Kimme Putman respectfully requests that this Court declare RCW 7.70.150 unconstitutional.

Dated: March 24, 2008

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**PROOF OF SERVICE**

I certify that on April 4, 2008, I sent the **Appellant Kimme Putman's Corrected Opening Brief** to the following attorneys via U.S.

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