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WASHINGTON STATE SUPREME COURT

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STATE OF WASHINGTON

KIMME PUTMAN,

Appellant,

v.

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

REPLY BRIEF OF APPELLANT KIMME PUTMAN

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I. INTRODUCTION

Respondent Wenatchee Valley Medical Center (WVMC) defends the constitutionality of RCW 7.70.150 by arguing that other states have certificate requirements, Resp. Br. 7-9,¹ that medical malpractice cases are special proceedings removed from this Court's authority over civil procedure, *id.* at 10-12, that there is no fundamental constitutional right of access to the courts other than to watch a trial, *id.* at 10-18, that prisoners have greater constitutional rights than law-abiding citizens, *id.* at 30 n.22, that the certification is not burdensome, *id.* at 18-28, that requiring a certificate will reduce defensive medicine and encourage doctors to relocate into underserved areas, *id.* at 35-37, 41, and that the rule is properly limited to medical malpractice litigation, *id.* at 48-49. None of these arguments is availing, as described in greater detail below.²

That a certificate sufficient to meet the statute was filed against the radiology defendants, but not against WVMC, undermines WVMC's

¹ WVMC's citations to other state laws include invalid statutes. *See. e.g.*, 1988 OHIO LAWS § 1, cited in Resp. Br. 9, invalidated in *Hiatt v. South Health Facilities, Inc.*, 68 Ohio St. 3d 236, 626 N.E.2d 71 (1994). A reenactment was invalidated in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

² WVMC misstates the case's procedural history. WVMC calls the order below summary judgment because "the trial court considered matters outside the pleadings." Resp. Br. 2 n.1. Because the parties submitted no evidence on the motion to dismiss and limited their filings to legal memoranda and copies of cases and articles cited in the memoranda, the trial court's order references no outside materials, and the trial court does not describe its decision otherwise, this matter concerns only a motion to dismiss.

claim that RCW 7.70.150 only affects frivolous lawsuits. This is not a frivolous lawsuit. A medical expert has certified that the injury was likely occasioned by malpractice. That a corporate defendant might be vicariously liable for the negligence of the performing doctors should not require separate consideration of the standard of care.

II. THE CERTIFICATE REQUIREMENT VIOLATES SEPARATION OF POWERS

WVMC contends that no separation of powers problem exists between RCW 7.70.150 and CR 11³ because the two provisions pose no actual conflict, Resp. Br. 12-14, and because medical malpractice actions are “special proceedings” over which the Legislature may supplant this Court’s rulemaking authority. Resp. Br. 10-12. Neither contention withstands scrutiny.

A. RCW 7.70.150 directly conflicts with CR 11

WVMC cites no authority for its argument that there is no conflict. Instead, it cites a treatise for the proposition that “[i]f an affidavit or verification is specifically required by an applicable statute or rule, the statute or rule trumps CR 11.” Resp. Br. 12-13, citing 3A Karl B. Tegland,

³ WVMC claims that decisions Putman cites from Ohio and Arkansas are not persuasive because those states’ certificate requirements involved affidavits, either ousted the court of jurisdiction, or “gave the plaintiff only 30 days to file.” Resp. Br. 13. WVMC fails to explain how those insubstantial differences change the separation of powers analysis. The conflict between the statute and the rule in each instance remains the same and must yield, as in those states, to the court-established rule.

Wash. Prac.: Rules Practice CR 11, at 232 (5th ed. 2006). In context, the treatise does not support the broad proposition that WVMC asserts before this Court. Instead, after reciting that “CR 11 was originally intended to eliminate the need for pleadings to be accompanied by formal verification or affidavit,” the commentary notes that “verification and affidavit requirements have been retained by statute or rule in a number of specific instances,” including complaints in stockholder derivative actions (CR 23.1), petitions to perpetuate testimony (CR 27), applications for restraining orders (CR 65), and petitions for statutory writs of certiorari (RCW 7.16.050). 3A *Wash. Prac.: Rules Practice* CR 11. Only after reciting those instances where verification is required does the treatise state that the applicable “statute or rule trumps CR 11.” The treatise’s discussion does not lend any support to WVMC’s claim that the statute and rule do not conflict, when the conflict is palpable, direct, and unavoidable, as detailed in Appellant Putman’s opening brief, because RCW 7.70.150 requires verification when CR 11 plainly says it is unnecessary.

B. Medical Malpractice Actions Are Not Special Proceedings

Alternatively, WVMC claims that medical malpractice actions are special proceedings that fall within the purview of CR 81(a). CR 81(a)

allows statutory procedures inconsistent with the civil rules to govern special proceedings. "Special proceedings," however, encompass statutory remedies unknown to the common law such as attachment, certiorari, mandamus, and prohibition. *Hoagland v. Mount Vernon Sch. Dist. No. 320*, 23 Wn. App. 650, 653, 597 P.2d 1376 (1979), *aff'd*, 95 Wn.2d 424, 623 P.2d 1156 (1981). Medical malpractice cases have never been regarded as special proceedings, nor can legislative action reclassify them as such without transforming the entire nature of the cause of action.

1. Medical Malpractice Is a Common Law Form of Action

Unquestionably, actions for medical malpractice are rooted in Anglo-American common law. The first recorded medical malpractice case was brought in the 14th century. William Prosser, *The Law of Torts* § 32, at 161 n.32 (4th ed. 1971), citing Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 550 (1959).⁴ The case was brought as an action in trespass. *Id.*

All modern negligence actions derive from the common-law action in trespass. Malpractice is no different. William Blackstone characterized malpractice as a "private wrong" that generated a cause of action for

⁴ McCoid reports that the "professional liability of the medical practitioner is almost as old as personal injury actions" and that the first reported American case dates back to 1794. 12 VAND. L. REV. at 550 (citing *Cross v. Guthery*, 2 Root 90, 1 Am. Dec. 61 (Conn. Super. 1794)).

“trespass on the case” for “the neglect or unskillful management of [a] physician, surgeon, or apothecary.” *Quoted in* Kenneth Allen de Ville, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy* 6 (1992).

Reflecting this history, courts throughout the nation have recognized the “right to recover damages for injuries arising from medical malpractice existed at common law . . . and was not the creature of the General Assembly.” *Wright v. Central Du Page Hosp. Ass’n*, 63 Ill. 2d 313, 347 N.E.2d 736, 742 (1976). *See also* *Holton v. Pfingst*, 534 S.W.2d 786, 788 (Ky. 1976) (“that the action, regardless of its form, is in reality one for negligence in failing to conform to a proper professional standard is the soundest approach.”), citing *Prosser, supra*, at 165 (4th ed. 1971). This Court has also recognized that the elements of a medical malpractice action are “merely particularized expressions of the four concepts fundamental to any negligence action: duty, breach, proximate cause, and damage or injury.” *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 468, 656 P.2d 483 (1983) (citation omitted). Despite statutory refinements pursuant to RCW 7.70.010, those fundamental elements have not changed. *See Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 (Div. 3 2001) (citation omitted).

2. Special Proceedings Embrace Causes of Action Unknown to Common Law

Washington law does not define the term “special proceedings,” presumably because the term has a limited and familiar meaning. Perhaps the earliest judicial reference in this State to special proceedings occurred in *Windt v. Banniza*, 2 Wash. 147, 153, 26 P. 189 (1891), where this Court found that special proceedings embraced “only those matters outside of ordinary actions.” The *Windt* Court relied upon a similar California case. *Id.* By that time, California had a well-developed jurisprudence on the distinction between civil actions and special proceedings. As early as 1881, the California Supreme Court found it well-established that special proceedings are “something entirely different—‘new cases the creation of statutes, and the proceedings under which are unknown to the general framework of courts of law and equity’—as not including ‘any class of cases for which courts of general jurisdiction had always supplied a remedy.’” *David Bixler’s Appeal*, 59 Cal. 550, 555, 1881 WL 2020 (1881), citing *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43, 1855 WL 636 (1855). *Cf. Dow v. Lillie*, 26 N.D. 512, 144 N.W. 1082, 1084 (1914) (finding ordinary actions to be those that existed under common law and “formerly conducted in accordance with the proceedings of the

common-law courts,” while special proceedings involve “a remedy which is of statutory origin” and collecting similar decisions of other states).

Modern cases agree with these definitions. Thus, California continues to hold that “[a]s a general rule, a special proceeding is confined to the type of case which was not, under the common law or a suit in equity.” *Tide Water Associated Oil Co. v. Super. Ct. of Los Angeles County*, 43 Cal. 2d 815, 279 P.2d 35, 39 (1955). See also *In re Guardianship and Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262, 273 (2006) (a civil action is “any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong . . . Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding”).

Similarly, under federal law, the U.S. Supreme Court has recognized that statutory actions derivative of those recognized at common law are treated the same as if the common law was unchanged. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), citing *Curtis v. Loether*, 415 U.S. 189, 195-96, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974) (“the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to ‘soun[d] basically

in tort,' and seek legal relief.”). On the other hand, those actions utterly “unknown to the common law” and existing instead only as a creature of statute may proceed as the legislature determines, as long they otherwise comply with constitutional limitations. *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 21, 57 S. Ct. 615, 81 L.Ed. 893 (1937) (upholding provision of the National Labor Relations Act empowering a board to make findings of fact conclusive on review and issue orders concerning labor practices).

Thus, different legislatively formulated procedural rules properly prevail over the civil rules only when the legislature has so massively changed substantive law, including the available remedies, that traditional judicial procedures are inadequate, as in workers compensation. Under that regime, workers injured on the job lost their opportunity to bring a traditional tort action for damages determined by a jury in return for guaranteed compensation, even if it were less than might be obtained in a jury trial. *See Lane v. Dept. of Labor & Indus.*, 21 Wn.2d 420, 428, 151 P.2d 440 (1944) (holding act lawfully replaced “common-law right of action for negligence” with “industrial insurance” system).

3. The Legislature May Not Reclassify Medical Malpractice Cases as “Special Proceedings”

Inherent judicial authority establishes that the rules of civil procedure are a prerogative of the judiciary. *City of Fircrest, Wash. v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), *cert. denied sub nom., Jensen v. City of Fircrest, Wash.*, 127 S. Ct. 1382 (2007). If the General Assembly could overcome that authority and dictate the rules of procedure in common-law actions long governed by court-made rules by simply codifying the common law or reclassifying a civil action as a “special proceeding,” it would no longer be true that the “ultimate power to regulate court-related functions . . . belongs exclusively to this court,” as this Court held in *Washington State Bar Ass’n v. State*, 125 Wn.2d 901, 908-09, 890 P.2d 1047 (1995). Instead, inherent judicial authority, confirmed by the Washington Constitution and essential to our tripartite form of government, would become a creature of legislative grace and subject to displacement by simple legislation.

Medical malpractice has not become a form of special proceeding. The modifications to medical malpractice litigation made by RCW 7.70 did not reconstitute it as a different cause of action. Under RCW 7.70.030, as before enactment, liability attaches only if the injury resulted: (1) from a departure from the applicable standard of care, *see Fritz v. Horsfall*, 24

Wn.2d 14, 17, 163 P.2d 148 (1946); (2) from a promise that the injury would not occur, *see Brooks v. Herd*, 144 Wash. 173, 176, 257 P. 238 (1927); or (3) from health-care injuries for which there was no consent, *see ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn.2d 12, 23, 499 P.2d 1 (1972). While certain modifications to the substantive law of medical malpractice were enacted, none of them transformed the traditional common-law action for medical malpractice into something utterly new. No new remedy was established. Instead, the cause of action exists largely as it always has.

WVMC, however, appears to suggest the mere act of codifying the applicable law is enough to create a “special proceeding,” by focusing on the “statutory” nature of the cause of action and its placement within Chapter 7.⁵ Resp. Br. 10. Such a mechanical approach to determining whether an action is a civil action or a special proceeding is fatally flawed. As an Illinois appellate court once explained,

While sometimes the phrase ‘statutory proceeding’ is used loosely to include [certain] action[s]. . . , a more careful definition restricts the phrase to proceedings such as the Workmen’s Compensation Act in which the statute not

⁵ Placement of an enacted bill into the code is a function performed by the Code Reviser. RCW 1.08.015(3). It is not, without more, an expression of legislative intent. The Legislature in 1975 recognized that the new law was merely modifying the common law and so articulated its intent in Section 6, which became RCW 7.70.010 (acknowledging that the chapter “modifies . . . certain substantive and procedural aspects of all civil actions and causes of action . . . for damages . . . as a result of health care.’). The Code Reviser’s act of placing sections 6-13 of the bill in a new chapter does not transform a traditional common-law action into a “special proceeding.”

only creates a new right but *provides for a new type of proceeding by which the right may be exercised.*

Orlicki v. McCarthy, 2 Ill. App. 2d 182, 119 N.E.2d 1, 3 (1st Dist. 1954) (emphasis added).

Certainly, if medical malpractice actions proceeded only under statutory authority, this Court would not have had any common-law authority to recognize new causes of action that sound in medical malpractice. Yet, subsequent to RCW 7.70 coming into effect, this Court recognized new causes of action for “wrongful birth” and “wrongful life.” *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983). *Harbeson* extensively reviewed RCW 7.70 and its conformance with prior decisions of this Court. *See, e.g., id.* at 470-71 (noting that the elements established for actions based on informed consent “are similar to those set out in *Miller v. Kennedy*[], 11 Wn.App. 272, 522 P.2d 852 (1974), *aff’d per curiam*, 85 Wn.2d 151, 530 P.2d 334 (1975)]”). It found that recognition of the new causes of action turned on the “traditional concepts of duty, breach, injury, and proximate cause.” *Id.* at 472. From that analysis, it is clear that the new actions were analyzed in the same fashion as this Court would have had there been no statutory intervention in Title 7.

While separation of powers does not require that the “branches of government be[] hermetically sealed off from one another,” *Carrick v.*

Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994), the diffusion of power it represents cannot be so porous that the legislature could unilaterally eviscerate a core power of another branch through simple legislation. The certificate of merit requirement plainly invades this Court's authority by requiring a form of verification when the rules promulgated by this Court eschew that requirement. The statutory requirement must yield to the rule in order to preserve the courts' constitutional authority and "ensure that the fundamental functions of each branch remain inviolate." *Id.*

III. RCW 7.70.150 VIOLATES THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS

WVMC argues that the Washington Constitution contains no right of access to the courts, reading Article I, § 10's Open Courts guarantee to provide nothing more than a public trial or public records. Resp. Br. 14-17. In dismissing this Court's recent statement that "[f]ull access to the courts . . . is a fundamental right," *King v. King*, 162 Wn.2d 378, 390, 174 P.3d 659 (2007), 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)),⁶ WVMC argues that this Court's observation was built on a shaky foundation. Resp. Br. 16. If so, then the U.S. Supreme Court is guilty of the same shaky logic.

⁶ Previously, this Court declared 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).

A. Access to the Courts is a Fundamental Right

A right is “fundamental” for equal protection purposes if it is “explicitly or implicitly guaranteed by the Constitution.” *Forbes v. City of Seattle*, 113 Wn.2d 929, 941 n.11, 785 P.2d 431 (1990), quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 93 S. Ct. 2179, 153 L. Ed. 2d 413 (1972). The right of access to courts qualifies under this definition.

Prior to 2002, as WVMC acknowledges, the U.S. Supreme Court had recognized the access right in cases brought by prisoners as well as matters involving parental rights and divorce. *See* Resp. Br. 30.⁷ In *Christopher v. Harbury*, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d. 413 (2002), the Court noted that “prior cases on denial of access to courts have not extended over the entire range of claims.” 536 U.S. at 412. Significantly, however, the Court rejected the notion advanced by WVMC here that the right was limited to prisoner or family cases or to cases asserting a fundamental interest.⁸ Rather, “the essence of the access claim

⁷ WVMC’s argument necessarily implies that prisoners have greater rights than law-abiding citizens. In contrast, however, the courts have recognized that the constitutional rights of prisoners recede upon incarceration. *See, e.g., Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129, 97 S. Ct. 2532, 53 L. Ed. 2d. 629 (1977); *Matter of Young*, 95 Wn.2d 216, 220, 622 P.2d 373 (1980).

⁸ The Court cited with approval examples of access-to-court decisions that included cases involving access to pursue claims for wrongful death in automobile accidents. *See, e.g., Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998); *Swikel v. City of River Rouge*, 119 F.3d 1259, 1263-64 (6th Cir. 1997). 536 U.S. at 413 n.7.

is that official action is presently denying an opportunity to litigate for a class of potential plaintiffs.” *Id.* at 413. The right to go to court is “ancillary to the underlying claim” only in that the plaintiff must present a claim that is at least “arguable.” *Id.* at 415.

Acknowledging that the basis for this right of access had been “unsettled,” the Court held that the right is implicitly guaranteed by no less than five separate constitutional provisions. *Id.* at 415 & n.12. All of the cases cited by WVMC to argue that the right of access to courts is not fundamental predate *Harbury*. *See* Resp. Br. 33.

In Washington, the right of access to the courts is solidly grounded in Art. 1, § 10. WVMC’s crabbed interpretation as a right to attend a trial ignores that § 10 finds its roots in Blackstone’s principle that individuals possess an absolute right to personal security and the right to seek legal remedy for injury. *See* James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 *Seattle J. for Soc. Just.* 383, 392-94 (2005). This Court declined in *Housing Authority of King County v. Saylor*, 87 Wn.2d 732, 557 P.2d 321 (1976), to recognize access to courts as a fundamental right only because the United States Supreme Court had not yet found the same right implicit in the Fourteenth Amendment. *Id.* at 738-39. Rather than rely on that dated view, this Court should reaffirm its

statement in *King* and follow *Harbury* to recognize a right of access for redress of legally cognizable grievances as a fundamental right for equal protection purposes. It is not a right to a remedy, but a right to one's day in court.

B. RCW 7.70.150 Violates the Right of Access

RCW 7.70.150 constitutes an unreasonable burden on medical malpractice claimants. In the unrealistic world that WVMC describes, defendants never withhold necessary information, respond to pleadings and discovery requests promptly, and make their employees available for deposition well within the time available to file the certificate. Moreover, members of the medical profession and medical institutions do not take umbrage and do not ostracize those who sign certificates of merit that might be said to speculate that a departure from the standard of care must have taken place, particularly when the information available is inadequate to draw confident conclusions. Moreover, in WVMC's view, medical professionals willingly put their reputations on the line about the existence of malpractice, even when the available information about what happened is sparse.⁹

⁹ WVMC's rose-colored view of RCW 7.70.150 extends so far that they contend that the certificate requirement does not necessitate an expert. Resp. Br. 37. Surely, the requirement is not satisfied by an attestation from someone without medical expertise. *Cf.* Mary Sue Henifin, *et al.*, *Reference Guide on Medical Testimony*, in *Reference Manual on Scientific Evidence* 439, 441 (Fed. Jud. Ctr. 2d ed. 2000) ("Testimony by physicians is

Contemporary reality is quite different. For example:

- Experience shows that a hospital will almost never disclose the name of a health care provider who was part of the team before the lawsuit is filed and discovery conducted and, even then, the institution often will not divulge the address without a motion and court order.
- Meaningful discovery typically does not occur until the passage of 6-10 months after the complaint is filed.
- Frequently the identity of a health care provider, such as a nurse, is shown in the medical records only by a set of initials, making identification impossible without discovery. Allowing extra time to file a certificate gives the plaintiff an insufficient grace period.
- Sometimes behind the process of peer review, sometimes pretextually so, hospitals and physicians have concealed knowledge of what went wrong. The tendency to keep errors concealed did not suddenly disappear when RCW 7.70.150 passed.

WVMC also does not deny that the certificate requirement entails at least some additional expense, but seems to believe that the expense involved is only negligibly greater because medical experts will be needed anyway. Resp. Br. 22-23. Yet, before one knows which members of a

one of the most common forms of expert testimony in the courtroom today.”) (footnote omitted).

surgical team might be liable, all must be named and certificates must be obtained against all of them, based solely on speculation. Of course, an expert will charge more for signing a document that must be filed in court than the same expert will charge for an oral consultation. To assure that the court filing is not used to impeach the expert's testimony in subsequent litigation as based on inadequate information, the expert will seek more information and may be unwilling to sign a document without that information. It is also axiomatic that as the case develops, as discovery identifies facts and personnel with more information about the matter, the expert who may have been adequate at the pre-filing stage may be entirely inappropriate post-discovery or as a witness at trial. The reluctance of medical experts to conclude that malpractice has occurred without sufficient information is well-documented. *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 before one was able to state that medical malpractice was involved).¹⁰

For example, if a defendant primary-care physician is alleged to have committed malpractice in the treatment of an asthma patient, it is likely that a Plaintiff would consult another primary-care physician at the

¹⁰ Respondents claim that the physicians in *Lo* were not asked to "opine about medical malpractice," Resp. Br. 21 n.14, but they were each asked to determine the medical cause of Plaintiff's cerebral palsy. It was not until the seventh physician was consulted that medical malpractice was identified as a cause. 73 Wn. App. at 453.

prefiling stage. For purposes of trial, however, the Plaintiff would likely call a pulmonary care specialist, whose testimony is more relevant and more likely to meet the applicable expert standards. *See* Mary Sue Henifin, *et al.*, *Reference Guide on Medical Testimony*, in *Reference Manual on Scientific Evidence* 449 (Fed. Jud. Ctr. 2d ed. 2000).

If the certificate requirement is as superficial and meaningless as Respondents portray and if the certificates filed were immune from collateral challenge as inadequately supported as WVMC suggests, Resp. Br. 20, then it is difficult to imagine how the requirement serves any useful purpose, let alone curtails defensive medicine and increases the availability of physicians in underserved areas, which WVMC asserts is the law's objective. Resp. Br. 35-37.

IV. RCW 7.70.150 VIOLATES EQUAL PROTECTION AND DUE PROCESS

WVMC mischaracterizes Putman's equal protection and due process¹¹ argument as a "demand that the poor be provided with identical means as the wealthy." Resp. Br. 28. Rather, Putman contends that RCW 7.70.150 imposes a financial burden upon victims of medical malpractice

¹¹ Respondents mistakenly assert that the Fifth Amendment's due process requirement applies to the States through the 14th Amendment. Resp. Br. 45. The Fifth Amendment applies solely to the federal government. *Davis v. Passman*, 442 U.S. 228, 235, 99 S. Ct. 2264, 60 L. Ed. 2d. 846 (1979). The 14th Amendment has an independent due process requirement that applies to the States. U.S. Const. amend. XIV, § 1.

seeking legal redress that is not visited upon other tort plaintiffs or other victims of professional negligence.

A. RCW 7.70.150 Should Be Evaluated Under Strict Scrutiny

Access to courts is a fundamental right, *see* Section III, A *infra*, and RCW 7.70.150 is thus subject to strict scrutiny. WVMC has failed to show that the State has a compelling interest in deterring medical malpractice claims rather than allowing the civil justice system to weed out claims lacking merit by more usual means. Moreover, its claim of a generalized compelling interest in health care is insufficient to sustain the features of this law. The statute is not narrowly tailored to meet that goal.

B. RCW 7.70.150 Cannot Even Meet the Rational Basis Test

Even if evaluated under the rational-basis test, RCW 7.70.150 is nonetheless invalid if “the record does not reveal any rational basis for believing” the enactment would accomplish its purpose. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50, 105 S. Ct. 3249, 87 L. Ed. 2d. 313 (1985). The Legislature’s purpose in enacting RCW 7.70.150, WVMC states, was to achieve “better, more accessible, less expensive health care.” Resp. Br. 35. WVMC recites at length the minimal showing required to satisfy this standard, Resp. Br. 38-41, yet fails to present any

objective basis for believing that the certification requirement will accomplish that goal.

The obstacle to safer and cheaper medical care, WVMC claims, is defensive medicine.¹² Washington doctors, they state, refuse to treat high-risk patients and order unnecessary tests and procedures, which both increases costs and exposes patients to greater risks. Resp. Br. 35-36.

WVMC's cure is not to impose a penalty on the undesirable conduct of doctors or regulate it directly, but to impose a tax on malpractice victims in the form of a certificate of merit, with the hope of deterring frivolous malpractice actions, which somehow is connected to this behavior.

1. There is no basis for believing that the certificate requirement will eliminate an appreciable number of frivolous lawsuits

WVMC offers no estimate of how many, if any, frivolous lawsuits are filed. Yet, they view the examination required of the certifying expert as not at all exacting. Resp. Br. 5-6. Nevertheless, WVMC assumes without any objective evidence that this early review will enable the

¹² The incidence of defensive medicine is uncertain and sometimes explained by a provider's interest in revenue enhancement. Government Accounting Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, GAO-03-836, at 11, 27 (Aug. 2003), available at <http://www.gao.gov/new.items/d03836.pdf>. Defensive medicine can also be a positive good, while reducing defensive medicine can reduce the availability of health care. Congressional Budget Office, *Medical Malpractice Tort Limits and Health Care Spending, Background Paper*, Pub. No. 2668, at 8 (Apr. 2006), available at <http://www.cbo.gov/ftpdocs/71xx/doc7174/04-28-MedicalMalpractice.pdf>.

medical expert to identify cases wholly lacking in merit without unduly burdening meritorious cases. In addition, WVMC speculates that as many as 40 percent of cases are filed by inexperienced attorneys who do not consult a medical expert prior to filing. Resp. Br. 6, 37. Yet, WVMC's own cited authorities declare that "most lawyers have always" had medical experts review and research their malpractice cases prior to filing, and that no rational attorney would do otherwise. Resp. Br. 22 n.15, 28. Those authorities are undoubtedly correct in that the contingency fee serves as a strong disincentive to pursuing cases that have little hope of ending in a verdict or settlement for the plaintiff. *See* Alexander Tabarrok & Eric Helland, *Two Cheers for Contingent Fees* 1-18 (2005) (detailing empirical support for the screening function of contingency fees); Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 Wash. U.L.Q. 739-57 (2002). If there exists a substantial number of frivolous lawsuits, the only conclusion that can be drawn from WVMC's own argument is that prefiling review by medical experts does little to winnow them out.

2. There is no basis for believing that reducing frivolous suits will reduce defensive medicine

If the statute succeeds in eliminating frivolous lawsuits without affecting those cases that ultimately settle or go to verdict, as WVMC

anticipates, *see* Resp. Br. 42, the insurer may achieve some savings of defense costs. However, if WVMC is correct that the statute increases efficiency, then the doctor's chances of being held liable for actual medical malpractice or enduring a public trial would, if anything, increase. The doctor who is not shielded from liability will have the same motive to avoid treating high-risk patients or to order defensive tests and procedures. The certificate requirement will not change verdicts. And, if it is as simple to satisfy as WVMC claims, it will not change the number of filings.

3. There is no basis to expect that RCW 7.70.150 will result in greater access to medical care

WVMC argues that lack of access to care also results from defensive medicine. WVMC correctly points out that a quotation in Appellant's Brief at 35 n.20 to the effect that cuts in Medicaid reimbursement rates account for much of this difficulty was misattributed to Deborah Lewis-Idema. The text was from Maxwell J. Mehlman, *Quality of Care and Health Reform: Complementary or Conflicting*, 20 *Am. J.L. & Med.* 129, 133 (1994), who cited Ms. Lewis-Idema's work as supporting authority. It is not true, as WVMC claims, that Ms. Lewis-Idema holds that opposite view. *See* Resp. Br. 37. Her work, based on a survey by the National Governors' Association of state Medicaid and Maternal Child Health agencies, found that Medicaid programs in 1985-86

were experiencing difficulty in finding providers to render maternity care. Deborah Lewis-Idema, *Medical Professional Liability and Access to Obstetrical Care: Is There a Crisis?*, in 2 *Medical Professional Liability and the Delivery of Obstetrical Care* 78 (Institute of Medicine 1989). Most of the programs indicated that “rising malpractice insurance costs have contributed to this problem.” *Id.* at 85. Significantly, fear of litigation or meritless claims was not cited. Nor was the high cost of insurance the biggest problem: “About half of the agencies regarded low reimbursement rates as the primary deterrent to provider participation in their programs.” *Id.* Imposing a certificate requirement on medical malpractice claims cannot change the availability of health care in different parts of the state.

4. There is no basis to expect that RCW 7.70.150 will result in less expensive medical care

As WVMC concedes, eliminating baseless suits will not affect indemnity payments by insurers for verdicts or settlements. Resp. Br. 42. At best, success would mean that the insurer will not expend the full defense costs it would have incurred in obtaining dismissal at some later point after the case is filed. Even if the insurer passed along those savings to their insureds in the form of lower premiums, which is not a given, there is nothing in the statute that requires the doctor to reduce fees by a commensurate amount. In fact, WVMC itself argues that doctors currently

seek to increase their compensation. *Id.* at 36. On the other hand, the additional expense incurred by every plaintiff in obtaining certificates of merit will be factored into settlement demands, placing upward pressure on liability insurance premiums and upward pressure on medical costs.

V. RCW 7.70.150 IS AN UNCONSTITUTIONAL SPECIAL LAW

WVMC suggests that RCW 7.70.150 may be a special law, but asserts it is not one of the enumerated examples of special laws rendered unconstitutional by Article II, § 28. Resp. Br. 47. WVMC presumes that Putman relies solely on section 28(6), prohibiting special laws that “grant[] corporate powers or privileges.” *Id.* It is true RCW 7.70.150 resulted in dismissal of the action against a single defendant, a corporate entity—namely, Wenatchee Valley Medical Center, P.S.—but that fact understates the full extent of the special-legislation violation. Section 28(10) prohibits special laws that have the effect of “[r]eleasing or extinguishing in whole or in part, the indebtedness, liability or other obligation, of any person, or corporation to this state.”

That prohibited effect is precisely what RCW 7.70.150 accomplishes by extinguishing entirely a medical defendant’s obligation to answer a civil complaint when a plaintiff lacks sufficient pre-discovery information to enable a medical professional to identify themselves as

believing, at this early stage and on the basis of massively incomplete information, that there is a reasonable probability that a departure from the standard of care occurred.

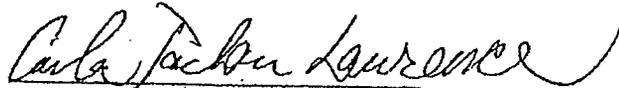
This Court has stated that "to survive a challenge as special legislation, any exclusions from a statute's applicability, *as well as the statute itself*, must be rationally related to the purpose of the statute." *Island County v. State*, 135 Wn.2d 141, 150, 955 P.2d 377 (1998) (citation omitted) (emphasis added). As described *infra*, RCW 7.70.150 fails to meet the rational-basis test because it neither curtails the practice of defensive medicine nor increases health care availability. As such, it merely creates a privilege for health-care defendants not available to other tortfeasors, in violation of the prohibition on special legislation.

VI. CONCLUSION

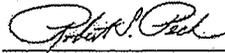
For the foregoing reasons, this Court should reverse the trial court and declare RCW 7.70.150 unconstitutional.

Dated: July 14, 2008

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Case Name: Putman v. Wenatchee Valley Medical Center, et al.
Document: Reply Brief of Appellant Kimme Putman

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