NO. 80888-1

SUPREME COURT OF THE STATE OF WASHINGTON

KIMME PUTMAN,

Appellant/Petitioner,

v.

WENATCHEE VALLEY MEDICAL CENTER, P.S., a Washington professional service corporation; PATRICK J. WENDT, M.D.; and DAVID B. LEVITSKY, M.D.,

Respondents, and

SHAWN C. KELLY, M.D.; and JOHN DOES,

Defendants.

AMICUS CURIAE BRIEF OF WASHINGTON STATE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, PHYSICIANS INSURANCE, WASHINGTON CASUALTY COMPANY, KING COUNTY MEDICAL SOCIETY, PIERCE COUNTY MEDICAL SOCIETY, THURSTON-MASON COUNTY MEDICAL SOCIETY, WALLA WALLA VALLEY MEDICAL SOCIETY, YAKIMA COUNTY MEDICAL SOCIETY WASHINGTON ACADEMY OF PHYSICIAN ASSISTANTS, WASHINGTON STATE MEDICAL ONCOLOGY SOCIETY, AND WASHINGTON STATE ORTHOPEDIC ASSOCIATION

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466

WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Amicus Curiae Washington State Medical Association, et. al.

601 Union Street, Suite 4100
Seattle, WA 98101-2380
(206) 628-6600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

I. ARGUMENT

A. By Enacting RCW 7.70.150, the Legislature Did Not Usurp the Judicial Branch's Power to Determine the Procedures by Which Courts Adjudicate Medical Malpractice Lawsuits.

The certificate of merit requirement in RCW 7.70.150 is not a "procedural" requirement and does not conflict with CR 8 or CR 11. For purposes of "separation of powers" analysis, there is no "clear line of demarcation . . . between what is substantive and what is procedural[.]" State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974).

> [T]his court follows general guidelines in analyzing the issue. That framework differentiates between substantive and procedural matters:
>
> > Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

State v. Templeton, 148 Wn.2d 193, 213, 59 P.3d 632 (2002) (quoting Smith, 84 Wn.2d at 501). The certificate of merit requirement is not merely "mechanical." It defines one attribute of a viable medical malpractice claim and "regulates primary rights" by requiring a plaintiff to have expert support before filing a medical malpractice lawsuit.

The conclusion that the certificate of merit requirement is substantive finds support in decisions of federal courts in diversity cases holding that state certificate of merit statutes impose substantive rules of

law that they are obliged to apply under Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Chamberlain v. Giampapa, 210 F.3d 154, 160 (3rd Cir. 2000) (New Jersey affidavit of merit statute); Stroud v. Abington Mem. Hosp., 546 F. Supp. 2d 238, 248 (E.D. Pa., 2008) (Pennsylvania certificate of merit statute); Ellingson v. Walgreen Co., 78 F. Supp. 2d 965, 968 (D. Minn. 1999) (Minnesota expert review affidavit statute); Finnegan v. Univ. of Rochester Med. Ctr., 180 F.R.D. 247, 249 (W.D.N.Y. 1998) (New York certificate of merit statute).

Although Ms. Putman suggests that this Court should follow Hiatt v. Southern Health Facilities, Inc., 626 N.E.2d 71 (Ohio 1994), which held that a certificate of merit requirement was a procedural rule that conflicted with Ohio's civil rules and thus infringed impermissibly on the judiciary's prerogative of establishing such rules, Hiatt reflects an approach to "separation of powers" analysis to which this Court does not subscribe. This Court does not reflexively slap down, on "separation of powers" grounds, statutes that affect areas in which it has inherent authority.

> The doctrine of separation of powers evolved side by side with the constitutional scheme of checks and balances. . . . One branch of government may engage in functions that intervene in or overlap with the functions of another branch, so long as it does not undermine the operation of that other branch "or undermine the rule of law which all branches are committed to maintain." . . . [Citations omitted.]

In re Mowery, 141 Wn. App. 263, 281, 169 P.3d 835 (2007).

Under Washington "separation of powers" analysis, when a court rule and procedural statute seem inconsistent, this Court "makes every effort to harmonize such apparent conflicts" and only if it cannot do so does the court rule oust the statute. State v. Blilie, 132 Wn.2d 484, 491, 939 P.2d 691 (1997); Washington State Bar Ass'n v. State, 125 Wn.2d 901, 909, 890 P.2d 1047 (1995); State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984). RCW 7.70.150 can readily be harmonized with CR 8 and CR 11. CR 8 concerns pleadings; a certificate of merit is not a pleading. Requiring a certificate of merit is not inconsistent with CR 11's requirement of reasonable inquiry into the facts before filing a lawsuit. CR 11 excuses persons filing lawsuits (other than in marriage and custody matters) from any verification requirement, but RCW 7.70.150 does not require a certificate of merit made under oath and thus is not a verification requirement. Federal courts in diversity cases have come to similar conclusions. E.g., Chamberlain, 210 F.3d at 160 (New Jersey affidavit of merit statute does not require a pleading or affect what is included in pleadings, so state policy of assuring early termination of unsupported malpractice claims can be effectuated without compromising policy choices reflected in Fed. R. Civ. P. 8); Hill v. Morrison, 870 F. Supp. 978, 982 (W.D. Mo. 1994) (Missouri certificate-of-merit statute goes beyond requirements of, but does not conflict with, Fed. R. Civ. P. 11, so both

may be given effect).[1]

In McAlister v. Schick, 588 N.E.2d 1151 (Ill. 1992), the court rejected a "separation of powers" challenge to Ill. Rev. Stat. 1987, ch. 110, ¶ 2-622(a)(1), which provided that anyone suing for medical malpractice must attach to the complaint an affidavit certifying that he has consulted and reviewed the facts of the case with a health professional, who has determined in an attached report that there is "a reasonable and meritorious cause" for filing the action. Like RCW 7.70.150, the Illinois statute provided that, if the applicable statute of limitations is near expiration or if there is a delay in receiving medical records, an extension of time is available, Ill. Rev. Stat. 1987, ch. 110, ¶ (a)(2) and (3), and that failure to file the certificate "shall be grounds for dismissal," id. at ¶ (g). The court held that the statutory certification-and-report requirement was not in conflict with an Illinois court rule requiring an attorney to conduct a reasonable pre-filing inquiry into whether a claim is well-founded in fact. McAlister, 588 N.E.2d at 1155. Unlike the Ohio court's decision in Hiatt, McAlister is persuasive authority because Illinois' approach to separation-of-powers analysis resembles Washington's:

---

[1] See also Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523 (10th Cir. 1996) (Colorado certificate statute imposes penalties on plaintiff but not attorney, so is more narrowly tailored than, and may co-exist with Fed. R. Civ. P. 11); Clark v. Sarasota County Pub. Hosp. Bd., 65 F. Supp. 2d 1308 (M.D. Fla. 1998), aff'd, 190 F.3d 541 (11th Cir. 1999) (Florida's affidavit of merit statute does not conflict with Fed. R. Civ. P. 8).

> The separate spheres of governmental authority may overlap. Legislative enactments may regulate the court's practice so long as they do not dictate to the court how it must adjudicate and apply the law or conflict with the court's right to control its procedures. This court has repeatedly recognized that the legislature may impose reasonable limitations and conditions upon access to the courts.

McAlister, 588 N.E.2d at 1155-56 (citations omitted). This Court, like Illinois' court, "makes every effort to harmonize such apparent conflicts". Blilie, 132 Wn.2d at 491.[2] As McAlister and the federal decisions cited above have concluded, certificate of merit requirements, even when viewed as procedural rules, do not conflict with CR 8 or CR 11.[3] RCW 7.70.150 does not intrude impermissibly upon the judiciary's powers.

B. The Certificate-of-Merit Requirement Does Not Violate the Washington's "Open Courts" Constitutional Provision.

1. Const. art. I, § 10 does not provide a "right to a remedy".

Const. art. I, § 10 means that courts may not act in secret. In re Recall Charges Against Seattle Sch. Dist. No. 1 Dir. Butler-Wall, 162

---

[2] Ms. Putman cites Summerville v. Thrower, 253 S.W.3d 415 (Ark. 2007), for the proposition that a certificate of merit requirement conflicts with a procedural rule, CR 11(a), that pleadings generally need not be verified or accompanied by affidavit. *Corr. Opening Br. at 10.* The Summerville court found that its state's requirement of an expert's affidavit of reasonable cause was procedural, and conflicted with a rule providing that a civil action is commenced by filing a complaint. Id. at 420-21. The court does not appear to have considered whether the affidavit requirement and the rule could be reconciled, as Washington courts would have done.

[3] Even if the requirement were procedural and inconsistent with CR 8 or CR 11, CR 81(a) provides that the civil rules govern civil proceedings "[e]xcept where inconsistent with rules or statutes applicable to special proceedings. . .," and the generally accepted reference to special proceedings concerns attachment, certiorari, mandamus, prohibition and others incorporated under RCW Title 7. Hoagland v. Mt. Vernon School Dist., 23 Wn. App. 650, 653, 597 P.2d 1376 (1979), aff'd, 95 Wn.2d 424 (1981).

Wn.2d 501, 508, 173 P.3d 265 (2007); State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).[4] Citing In re Marriage of King, 162 Wn.2d 378, 388, 174 P.3d 659 (2007), Ms. Putman contends, *Corr. Opening Br. at 14, Reply Br. at 12-15*, that RCW 7.70.150's certificate of merit requirement contravenes a guarantee, in Const. art. I, § 10, to a "right to a remedy for a wrong suffered." Neither King[5] nor any other Washington case recognizes such a right.[6]

This Court's most recent comment as to a "remedy guarantee" confirms that none has been recognized and suggests that none will be:

> We have previously held that the state constitution does not contain any guaranty that there shall be a remedy through the courts for every legal injury suffered by a plaintiff. See Shea v. Olson, 185 Wash. 143, 160-61, 53 P.2d 615 (1936). However, the Shea court did not directly address article I, section 10 of the state constitution when it made this conclusion. . . . Nevertheless, we decline at this time to determine whether a right to a remedy is contained in article I, section 10 of the state constitution.
>
> We adopt the view of the Supreme Court of Oregon that "[i]t has always been considered a proper function of legislatures to

[4] But even the prohibition on nonpublic court proceedings is not absolute. See Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) ("the public's right of access is not absolute, and may be limited to protect other interests")

[5] King presented a different and narrower issue than Ms. Putman's appeal presents, and the court rejected the arguments the King petitioners made based on Const. art. I, § 10. Id. at 390-91. The King court held that the contours of a right of "access to courts" under art. I, § 10 do not embrace the right to legal counsel at public expense in a divorce case. Id.

[6] See C. Wiggins, B. Harnetiaux, and R. Whaley, Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits, 22 Gonz. L. Rev. 193, 201 (1986/87) (Washington's constitution "does not contain a clause that specifically declares 'open access' to the courts").

> limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest." . . . Similarly, the Supreme Court of Missouri has concluded that its open courts provision does not require "that a plaintiff can always go to court and obtain a judgment on the claim asserted." . . . Because we recognize that the legislature has broad police power to pass laws tending to promote the public welfare, we decline at this time to determine whether article I, section 10 of the state constitution guarantees a right to a remedy. [Citations omitted.]

1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 144 Wn.2d 570, 581-82, 29 P.3d 1249 (2001).

History also is not consistent with recognition of a constitutional "right to a remedy." Const. art. I, § 10 was adopted at the 1889 constitutional convention. The delegates presumably knew that Oregon's and other states' constitutions had "open courts" provisions that included references to "remedy." See Or. Const. art. I, § 10 (adopted in 1857, effective 1859) ("No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation"), and Penn. Const. of 1790 ("all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial, or delay"). Whatever references to "remedy" in other states' "open courts" provisions mean –

and they do not universally prohibit statutory restrictions and conditions on the right to bring lawsuits[7] – Washington's constitution does not include such a reference.[8] The omission cannot have been inadvertent.

2. The certificate of merit requirement does not deny access to an otherwise available remedy.

Ms. Putman argues that the certificate of merit requirement places an "improper and often insurmountable obstacle" or an unfair "monetary barrier" to access to courts in violation of Const. art. I, § 10. *Corr. Opening Br. at 23, 24, 26.* Even if art. I, § 10 prohibited obstacles and

---

[7] See Roelle v. Griffin, 651 P.2d 147 (Or. Ct. App. 1982) (statute providing that builder could not file lien or sue for compensation or breach of contract unless builder had been registered at the time he bid or entered into contract to perform work held not to unconstitutionally deny builder a remedy).

[8] As Ms. Putman notes, *Corr. Opening Br. at 24-25*, the court in Zeier v. Zimmer, Inc., 152 P.3d 861 (Okla. 2006), reh'g denied (2007), held that an "affidavit of merit" requirement for medical negligence cases violated Oklahoma's "open courts" constitutional provision. However, the Oklahoma constitutional provision, Okla. Const. art. 2, § 6, includes a remedy clause:

> The courts of justice of this State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

The Zeier court also based its decision on several factual misconceptions or mistakes. It asserted, 152 P.3d at 872, that 14 decisions from other states have invalidated certificate-of-merit statutes. Thirteen of the cited decisions, however, had nothing to do with such certificates, and the other had been vacated. The Zeier court cited Couri v. Gardner, 801 A.2d 1134, 1137 (2002), for the proposition that a certificate of merit can cost as much as $12,000. 152 P.3d at 873. But Couri had nothing to do with certificates of merit; $12,000 was what a party had paid a psychiatrist to prepare a report on visitation issues. Couri, 801 A.2d at 1136. The Zeier court also asserted that certificates of merit reduce the filing of claims by low income plaintiffs, citing a Maryland empirical study that dealt with the collective impact of several liability reforms, including a noneconomic damages cap, and that assigned no specific impact to certificate-of-merit requirements. See Catherine T. Struve, Expertise & Legal Process, in Medical Malpractice & The U.S. Health Care System, 173, 174 n.4 (W. Sage & R. Kersh eds. 2006).

monetary barriers to access to courts, the obstacles and barriers of which she complains are not ones RCW 7.70.150(1) creates. Before RCW 7.70.150(1) was enacted, it was well established that "to defeat summary judgment in almost all medical negligence cases, the plaintiffs must produce competent medical expert testimony establishing that the injury was proximately caused by a failure to comply with the applicable standard of care." Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).[9] That has been the rule for decades. See, e.g., Douglas v. Bussabarger, 73 Wn.2d 476, 479, 438 P.2d 829 (1968). RCW 7.70.150 did not change it.

Ms. Putman's "insurmountable barriers" argument amounts to a contention that injured persons have a constitutional right to be represented by incompetent counsel, because competent medical malpractice plaintiffs' lawyers typically arm themselves with supporting expert

[9] See also McLaughlin v. Cooke, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989) ("Expert testimony is necessary to prove whether a particular practice is reasonably prudent under the applicable standard of care"), and Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) ("expert testimony will generally be necessary to establish the standard of care"). In the rare instance, a plaintiff may be able to show that the injury complained of is the kind that a layperson could say does not ordinarily occur absent someone's negligence – e.g., an instrument left inside a patient's body – such that *res ipsa loquitur* excuses the plaintiff from having to prove negligence and causation with expert testimony. Bauer v. White, 95 Wn. App. 663, 668, 976 P.2d 664, rev. denied, 139 Wn.2d 1004 (1999). Because a complaint against a health care provider based on *res ipsa* would not need to allege a violation of the standard of care, it would not be subject to the certificate of merit requirement. Ms. Putman has not made any *res ipsa* claim.

testimony before investing their or their clients' resources in a lawsuit.[10] RCW 7.70.150 imposes no new, much less insurmountable, obstacle. Nor does it impose any new *financial* barrier to a medical malpractice lawsuit. Persons competent to provide standard of care opinion testimony in medical malpractice cases typically insist on being paid to do so. RCW 7.70.150(1) does not change that fact for medical malpractice claimants. Because at least one expert will have to be paid to provide a standard of care opinion in order to get to trial, RCW 7.70.150 does not force plaintiffs to obtain or pay for anything they would not otherwise need.

Ms. Putman argues, *Corr. Opening Br. at 18-23*, that plaintiffs need the opportunity for discovery to obtain expert standard-of-care testimony, but cites no authority suggesting that there is a constitutional right to engage in discovery.[11] As a practical matter, depositions of defendants rarely elicit confessions of malpractice, and expert witnesses for both sides typically are retained and their basic opinions are disclosed well before depositions are taken. While information elicited in discovery

---

[10] See Catherine T. Struve, "Improving the Medical Malpractice Litigation Process," 23 Health Affairs 33, 35 (July/August 2004) ("Plaintiffs' lawyers who specialize in medical malpractice routinely obtain an expert evaluation before suing . . ."); David M. Kopstein, "An Unwise 'Reform' Measure," 39 Trial 26, 27 (May 2003) (unless the limitations period is about to expire, "rational attorneys do not file malpractice cases that have not been thoroughly researched and 'blessed' by a qualified expert").

[11] See Midland Steel Prods. Co. v. U.A.W. Local 486, 573 N.E.2d 98, 106 (Ohio 1991) ("contrary to the appellants' contention, '[t]here is no general constitutional right to discovery, . . .,' even in a criminal case" (quoting Weatherford v. Bursey, 429 U.S. 545, 549, 97 S. Ct. 837, 846, 51 L. Ed. 2d 30 (1977)).

may result in refinement of experts' opinions, expert opinions critical of a defendant's care are invariably based on medical records and the expertise of the witness. Even if a litigant could show inability to obtain a certificate of merit without discovery, Ms. Putman has never claimed that as her excuse; furthermore, and the "good cause" exception in RCW 7.70.150(4) would allow a trial court to extend, the deadline for filing the certificate up to 90 days. RCW 7.70.150 does not prevent plaintiffs from conducting discovery to obtain otherwise unavailable information.

C. RCW 7.70.150 Does Not Violate Const. Art. I, § 12.

There is no equal protection violation when persons of different classes are treated differently. Forbes v. Seattle, 113 Wn.2d 929, 943, 785 P.2d 431 (1990).[12] RCW 7.70.150 poses no equal protection problem.

1. RCW 7.70.150 does not treat similarly situated classes of people unequally.

Ms. Putman argues, *Corr. Opening Br. at 27*, that RCW 7.70.150 treats victims of medical negligence differently from victims of other kinds of torts or professional negligence, but cites no pertinent Washington authority, relying instead on Zeier, 152 P.3d 861, as support for the proposition that medical negligence victims and other kinds of tort

[12] Ms. Putman claims, *Corr. Opening Br. at 27*, that RCW 7.70.150 violates the equal protection clause of U.S. Const. Am. XIV as well as Wash. Const. art. I, § 12. She concedes that RCW 7.70.150 "favors no minority class" and that the proper framework for analysis in both instances is found in our state's decisions. *Id.*

victims are similarly situated. Any reliance on Zeier is misplaced. The Zeier court held that no distinction among tort victims is permissible under Oklahoma's constitution, but Washington law is inconsistent with that view. Washington for many years has made distinctions between tort claimants. A plaintiff suing a health care provider must prove different things to prevail under RCW ch. 7.70 than what someone suing a product seller or manufacturer must prove under RCW ch. 7.72: i.e., a medical malpractice claimant may not prevail without proving fault, RCW 4.24.290, but a product liability claimant can recover without proving fault, RCW 7.72.030(1)(a) and (b); see Falk v. Keene Corp., 113 Wn.2d 645, 782 P.2d 974 (1989). A tort victim with contributory fault recovers less than full damages compared to a tort victim with the same injury who is not at fault. RCW 4.22.070(1). A claimant seeking recovery from the State is subject to nonclaim statutes; someone suing a private party is not. See Daggs v. Seattle, 110 Wn.2d 49, 750 P.2d 626 (1988).

Even if RCW 7.70.150 did distinguish between similarly situated classes, a statute that distinguishes between classes of tort victims is subject to minimal judicial scrutiny and will not be held to violate Const. art. I, § 12 as long as it is rationally related to the achievement of a legitimate state interest. Medina v. Public Util. Dist. No. 1, 147 Wn.2d 303, 313, 53 P.3d 993 (2002); Daggs, 110 Wn.2d at 55-57.

2. It is not irrational to impose a certificate of merit requirement on medical malpractice claimants but not on other tort claimants.

Under minimal scrutiny, a statutory classification will be upheld if there is "any conceivable set of facts that could provide a rational basis for the classification." Medina, 147 Wn.2d at 313; Tunstall v. Bergeson, 141 Wn.2d 201, 226, 5 P.3d 691 (2000). RCW 7.70.150(1) readily passes muster under this test. WSTLA joined with *amici* WSMA and Physicians Insurance in supporting the medical malpractice reform package of which RCW 7.70.150 is a part.[13] *Senate Bill Report 2SHB 2292*, p. 7. Not that the plaintiffs' bar's support for the statute is binding on Ms. Putman, but the fact that even WSTLA supported the requirement she challenges surely means she needs to offer better-reasoned arguments than her briefs do to persuade this Court that the requirement is *irrational.*

The Legislature may enact statutes based on "rational speculation" rather than on empirical evidence. Andersen v. King County, 158 Wn.2d 1, 31, 138 P.3d 963 (2006). That a "better" solution could have been devised is irrelevant. Washington Ass'n of Child Care Agencies v. Thompson, 34 Wn. App. 225, 234, 660 P.2d 1124, rev. denied, 99 Wn.2d 1020 (1983). In challenging RCW 7.70.150 on equal protection grounds,

[13] The medical malpractice reform package of which RCW 7.70.150 is a part was enacted in response to competing Initiatives - I-330 sponsored by the WSMA, and I-336 sponsored by the plaintiffs' bar. It was Initiative 336, not Initiative 330, that put forth a certificate of merit requirement. *See House Bill Analysis HB 2292*, p. 4.

Ms. Putman has the burden of showing that "no state of facts exists ***or can be reasonably conceived to exist*** that will justify the classification" made by the statute. Brewer v. Copeland, 86 Wn.2d 58, 65, 542 P.2d 445 (1975) (emphasis added). She has not and cannot meet that burden.

If facilitating public access to major league baseball games is a legitimate public purpose, as this Court held in CLEAN v. State, 130 Wn.2d 782, 796, 928 P.2d 1054 (1996),[14] then one cannot plausibly argue that trying to make health care more accessible and affordable, or trying to deter frivolous medical malpractice lawsuits, is an *illegitimate* public purpose.[15] It is rational to suppose that (a) the cost of health care to consumers is based in part on providers' cost of doing business, including the expense of obtaining liability insurance; and (b) the cost of malpractice insurance is based in part on the cost of defending against all medical malpractice claims, including those that plaintiffs ultimately fail to support with competent expert testimony; and (c) laws that more effectively screen

---

[14] "[P]ublic provision of a venue for professional sports franchises serves a public purpose in that the presence in a community of a . . . sports franchise provides jobs, recreation for citizens, and promotes economic development and tourism." 130 Wn.2d at 796.

[15] See Barlett v. N. Ottawa Cmty. Hosp., 625 N.W.2d 470, 475-476 (Mich. Ct. App. 2001), appeal denied, 625 N.W.2d 745 ("Deterring the filing of frivolous lawsuits against any party or group is a legitimate governmental interest. Moreover, a plaintiff intending to prevail on a medical malpractice claim will eventually be required to provide evidence that a facility or professional deviated from professional norms. Thus, requiring an affidavit of merit is rationally related to achieving the result of reduced frivolous medical malpractice claims. Accordingly, we are not persuaded that [Michigan's affidavit of merit requirement] violates a medical malpractice plaintiff's equal protection rights").

out unsupportable claims will reduce upward pressure on medical malpractice liability insurance premiums and, indirectly at least, the cost of health care to consumers and the State. To foster that outcome, RCW 7.70.150(5)(a) prohibits liability insurers from using, for insurance rate setting purposes, claims against a heath care provider where a case was dismissed for failure to comply with the certificate of merit requirement.

It also is rational for the Legislature to have believed, *or even speculated*, see Andersen, 158 Wn.2d at 31, that reducing the risk for health care providers to defend against unsupportable malpractice claims[16] will reduce an incentive to practice medicine "defensively" (and at greater cost to patient and society), or to refuse to provide care to higher-risk patients.[17] An efficient and sensible way to screen out medical

---

[16] The risks health care providers face from unsupportable medical malpractice claims are not insignificant, as hospitals and health plans typically require health care providers to report any and all claims and use that claims history in making privileging and credentialing decisions. Indeed, the Legislature took into account those risks when it made clear in RCW 7.70.150(5)(b) that: "If a case is dismissed for failure to file a certificate of merit . . ., the filing of the claim against the health care provider shall not be used against the health care provider in professional liability insurance rate setting, personal credit history, or professional licensing and credentialing."

[17] See Mitchell J. Nathanson, It's the Economy (& Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth & the Factors Critical to Reform, 108 Penn. St. L. Rev. 1077, 1119 (Spring 2004) (certificate of merit statutes achieve goal of reducing malpractice costs because they reduce the percentage of each premium dollar spent on claims, defense costs, and underwriting costs and impact the area of greatest waste, which is the cost of defending meritless malpractice cases), and David J. Becker & Daniel B. Kessler, The Effects of the U.S. Malpractice System on the Cost & Quality of Care, Medical Malpractice & The U.S. Health Care System 84, 85-86 (W. Sage & R. Kersh eds. 2006) (studies find that decreases in malpractice pressure lead to decreases in health care costs with no adverse consequences for health outcomes, and liability-reducing reforms reduce the prevalence and cost of defensive medicine).

malpractice claims destined for summary dismissal is to require a certificate of merit up front, as RCW 7.70.150 does.

D. RCW 7.70.150 Does Not Create A "Special Law" In Violation of Const. Art. II § 28 (17).

Under Const. art. II, § 28 (17) "[t]he legislature is prohibited from enacting any private or special laws . . . [f]or limitation of civil or criminal actions." As this Court explained in CLEAN, 130 Wn.2d at 802:

> Special legislation is legislation which operates upon a single person or entity. General legislation, on the other hand, operates upon all things or people within a class. . . . A class . . . may consist of one person or corporation as long as the law applies to all members of the class . . .
>
> [The 1995 Stadium Act, which applies to counties with a population only King County had at the time, and under which the baseball stadium later named Safeco Field was built and leased to the Seattle Mariners is not] special legislation simply because it applies only to counties of a certain size. It is not uncommon for the Legislature to distinguish among cities on the basis of population and such legislation is upheld "[s]o long as population bears a rational relationship to the purpose and subject matter of the legislation." . . . In order 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." . . . [Citations omitted.]

See also Brower v. State, 137 Wn.2d 44, 60-61, 969 P.2d 42 (1998 (statute and referendum providing for construction and financing of stadium facilities for the Seattle Seahawks was not "special legislation," because it applied to "any" county and "a" football team affiliate, and not specifically to King County or the Seahawks).

A statute is not unconstitutional special legislation, even when it creates a class consisting of one member, unless exclusions from the class are irrational. Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 627-28, 90 P.3d 659 (2004); Brower, 137 Wn.2d at 60. RCW 7.70.150 operates upon everyone within the class of persons wishing to bring medical malpractice lawsuits. It is not irrational to exclude plaintiffs suing for injury or death due to something other than alleged medical malpractice from the class of persons required to file certificates of merit. Ms. Putman asserts that it *is* irrational to do so, but fails to explain why.

Zeier v. Zimmer, Inc., 152 P.3d 861, holding that a similar "affidavit of merit" requirement for medical negligence cases violated that state's constitutional prohibition against "special laws," is inapposite because Oklahoma courts use a more expansive definition of "special law" than Washington does.[18] In Oklahoma, a law is "special" where "part of an entire class of similarly affected persons is separated for different treatment," Zeier, 152 P.3d at 868, and that state's court has chosen to treat tort victims as one indivisible class among whose members no distinction at all is permissible. That is inconsistent with the way this Court has interpreted and applied Const. art. II, § 28, which is to allow rationally-based classes even of single persons or entities.

[18] See also footnote 8, supra, for other significant problems with the Zeier decision.

Ms. Putman cites a law review article for the proposition that there should be "one rule for rich and poor, for the favorite at court and the countryman at the plough." *Corr. Reply to Resp. Supp. Br. at 1.* The quotation is colorful but inapt, because RCW 7.70.150 does not distinguish between plaintiffs based on wealth or occupation (or lack thereof). Ms. Putman cites State ex rel. Collier v. Yelle, 9 Wn.2d 317, 331, 115 P.3d 373 (1941), for the proposition that Const. art. II, § 28 was "intended 'to protect people of the state as a whole from legislative favoritism of an individual or a group,'" *Corr. Reply to Resp. Supp. Br. at 2*, but she neglects to explain how this case resembles Collier. The dissenting justice in Brower, 137 Wn.2d at 82, invoked the same general language from Collier, but the fact that the other eight justices disagreed with the dissent and reached the conclusion that Laws of 1997, ch. 220, and Referendum 48 did not constitute an invalid "special law" confirms that the sentence taken from Collier does not supply a test for determining what constitutes a "special law."

Ms. Putman also argues, *Corr. Reply to Resp. Supp. Br. at 2*, that RCW 7.70.150 is a "special law" because it does not apply to "defenses or counterclaims by defendants." It is rational not to make the certificate of merit requirement applicable to affirmative defenses because no litigant can recover damages for personal injury or wrongful death by way of an

affirmative defense. It is difficult to imagine a defendant *counterclaiming* for personal injury or wrongful death due to medical malpractice but, if one could, the requirement may well apply, such that the counterclaim would be subject to dismissal absent a certificate of merit.

As for the argument, *Corr. Reply to Resp. Supp. Br. at 1-2*, that it is irrational to require a certificate of merit for persons suing for personal injury or wrongful death due to *medical* malpractice but not to persons suing for some *other* type of malpractice, Ms. Putman fails to suggest what other types of injury-causing malpractice are not rationally distinguishable from medical malpractice. The Legislature could rationally have concluded that legal malpractice suits seeking *personal injury* damages are too uncommon to worry about. The Legislature likewise could rationally have concluded that lawsuits against design professionals (*e.g.*, for architectural malpractice resulting in collapse of a building and personal injury) pose a less urgent public policy issue than do cases against doctors and hospitals.

E. The Certificate of Merit Requirement Does Not Create A "Special Law" In Violation of Const. Art. II § 28 (10).

Ms. Putman argues, *Corr. Reply to Resp. Supp. Br. at 3-5*, that RCW 7.70.150 violates Const. art. II, § 28 (10) because the certificate of merit requirement "extinguishes an obligation that is due the state by

operation of the Medicaid recoupment statutes and regulations." The notion that "Medicaid recoupment statutes and regulations" can make a state statute a "special law" is without merit and bizarre. Aside from not being a "special law," RCW 7.70.150 does not "extinguish" anyone's liability to the State or anyone else. Nor do "Medicaid recoupment statutes and regulations" require state courts to litigate through trial every medical malpractice claim irrespective whether the plaintiff can prove malpractice or not. Under Ms. Putman's argument, our courts would have to strike down as "special" laws *any* law (including a statute of limitations or RCW 4.24.290 itself) that might, if enforced, "prevent" a medical malpractice plaintiff subject to a Medicaid lien from obtaining a judgment.

II. CONCLUSION

RCW 7.70.150's certificate-of-merit requirement is constitutional. The trial court's dismissal of Ms. Putman's claims should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of January, 2009.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466

Attorneys for Amicus Curiae Washington State Medical Association, et al

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2009, I caused a true and correct copy of the foregoing document, "Amicus Curiae Brief of The Washington State Medical Association, et al." to be delivered via U.S. Mail, postage prepaid, to the following counsel of record:

Counsel for Appellant/Petitioner:
Ron Perey, WSBA #02275
Douglas T Weinmaster, WSBA #28225
PEREY LAW GROUP
1606 8th Ave N
Seattle WA 98109-3006
(206) 443-7600

Carla Tachau Lawrence, WSBA #14120
ATTORNEY AT LAW
10402 40th Ave NE
Seattle WA 98125-7837
(206) 795-9062

Robert S. Peck
CENTER FOR CONSTITUTIONAL LITIGATION PC
777 6th St NW Ste 520
Washington DC 20001

Counsel for Respondents and Defendants:
Sherry Hemming Rogers, WSBA #16844
LEE SMART
701 Pike St, Suite 1800
Seattle WA 98101-3929
(206) 624-7990

Pamela A. Okano, WSBA #07718
Michael Neil Budelsky, WSBA #35212
REED MCCLURE
601 Union St Ste 1500
Seattle WA 98101-1363
(206) 386-7002

Counsel for Amicus Curiae Washington State Association for Justice Foundation:
Bryan P. Harnetiaux, WSBA #05169
ATTORNEY AT LAW
517 E 17th Ave
Spokane, WA 99203-2210
(509) 624-3890

Gary N. Bloom, WSBA #06713
HARBAUGH & BLOOM PS
PO Box 1461
Spokane, WA 99210-1461
(509) 624-4727

Kelby D. Fletcher, WSBA #05623
PETERSON YOUNG PUTRA
1501 4th Ave, Suite 2800
Seattle, WA 98101-1609
(206) 624-6800

Dated this 23rd day of January, 2009 at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer