

OPPOSITION TO HOUSE BILL HB-6687
and hereby move to repeal this unconstitutional law.

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April 1, 2013

State of Connecticut
Judiciary Committee
State Capitol
Hartford, CT. 06106

Dear Rep. Fox and Sen. Coleman

First and foremost, thank-you for your condolences, for the lost of my beloved wife due to medical malpractice.

I am in opposition to House Bill HB-6687 because of two (2) critical points:

The first point is that this law is unconstitutional in nature. Please [click](#) on the video and watch the oral argument delivered by Attorney Robert S. Peck in open court concerning this unconstitutional law. Thereafter, several states within the USA have declared this law unconstitutional.

The second point is that several of our State Legislatures have ignored ethical and constitutional considerations regarding the Bill proposal for the Certificate of Merit. The legislators who have family members in the medical profession or who would benefit by the enactment of key legislation regarding the Certificate of Merit have not recused themselves from the voting process. Legislative members who might benefit from passing The Certificate of Merit requirement and/or members who have questionable motives for key votes need to either petition for the approval to vote or recuse themselves. When legislators announce that they cannot vote in favor of a bill eliminating The Certificate of Merit because their husband is a doctor and then cast their vote against a bill are violating the ethical and legal obligations of their office.

Further, the new game in town seems to be to toss the bill between the House and the Senate. One group will vote for a Certificate of Merit bill and the other group of legislators will vote against the

[Washington State Supreme Court](#)

held on Tuesday February 24th 2009, 10:00AM

Oral arguments: Kimme Putman v. Wenatchee Valley Medical Center, P.S., et al. (**Is the certificate of merit requirement for medical malpractice cases constitutional?**)

**Certificate-Of-Merit "Struck Down"
by Washington Supreme Court**



Please [click here](#) to watch video or paste this url into your browser address bar:

[http://tvw.org/index.php?](http://tvw.org/index.php?op-)

[op-](#)

[tion=com_tvwplayer&eventID=2009020027B#start=12&stop=2836](http://tvw.org/index.php?op-tion=com_tvwplayer&eventID=2009020027B#start=12&stop=2836)

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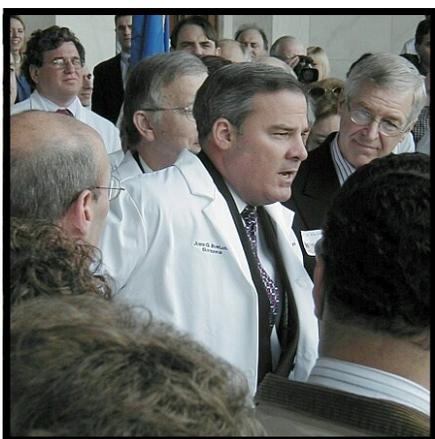
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Certificate of Merit bill. This is done in concert and with the motive to prevent any effective change in the Certificate of Merit requirements.

Did You Know? The lobbyists on behalf of the "Insurance Capitol of the World" located in Hartford, Connecticut have created a tool for the insurance conglomerates and the megabanks which will only benefit the rich, who will flourish no matter what is going on with this economy. The insurance conglomerate does not consider the poor who cannot afford their tool called the Certificate of Merit which costs between \$10,000 - \$20,000. The Certificate of Merit was designed to deprive victims of medical malpractice of their Seventh Amendment right to the United States Constitution, which is your right to a trial by jury.

Patients are being discriminated against on many levels by the insurance industry.



Former (disgraced) Governor John Roland can be seen in this photo not only participating in a professional medical event, but donning a lab coat frequently worn by Medical personnel. By committing this simple act, the Governor is portraying that he is ***one of them and considers himself as part of the professional Medical community***. Who exactly did former Governor Roland represent, the Medical community or the people of the State of Connecticut? This attitude still permeates our State legislature.



Members who have spouses in the Medical and Insurance Industry, or who have an interest in the success of the Insurance and Medical industry, continue to vote on key legislative laws without any questioning or dialogue about their right to do so. When will Connecticut wake up from their legislative coma?

The recent March 2013 Hepatitis C and HIV scare caused by Dr. Scott Harrington's malpractice in Oklahoma may affect the health of Seven Thousand (7,000) patients of Dr. Harrington and the families of those patients. Other malpractice issues include prescription errors and surgical errors. These are real people who deserve justice. When it is YOUR family member or somebody that YOU love who is affected by the malpractice of a physician, then you or those loved ones should have the right to seek adjudication in the matter. To deny individuals the right to access the courts because of their

economic status only serves to perpetuate the injustice and minimize the value of the life of those we love.

I am hereby requesting the chairs of the Connecticut Judiciary Committee to file an Application for an Advisory Opinion pursuant to: Conn. Gen. Stat. Sec.1-84(b) And (c) because certain legislators are acting in conflict of their official duties to the General Public.

- No public official or state employee shall accept other employment which will either impair his independence of judgment as to his official duties or employment or require him, or induce him, to disclose confidential information acquired by him in the course of and by reason of his official duties.
- No public official or state employee shall willfully and knowingly disclose, for financial gain, to any other person, confidential information acquired by him in the course of and by reason of his official duties or employment and no public official or state employee shall use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated.

AN EXAMPLE: LEGISLATORS WHO HAVE A CONFLICT OF INTEREST IN THE STATE OF CONNECTICUT'S LEGISLATURE AS TO MEDICAL MALPRACTICE ISSUES:

The following "State Actors" who are acting as lobbyists on behalf of the medical malpractice insurance companies have created a problematic relationship with both financial and ethical conflicts of interest:

State Representative Prasad Srinivasan, who is also a doctor, is seeking personal gain and enrichment on behalf of his "son" and Dr. Prasad Srinivasan's fellow associates instead of acting on behalf of the "Public's Best Interest" which is inconsistent with the oath that he has taken to uphold the Constitution of the United States. There is no dispute as to the fact that State Representative Prasad Srinivasan is also a doctor, and a member of the Connecticut State legislature, who is bound by oath or affirmation to support and to uphold the 14th Amendment and Article VI of the United States Constitution. However, Prasad Srinivasan continues to act in conflict of interest to the United States Constitution because of a problematic relationship both financial and ethical conflict.

Senator Terry Gerratana is seeking personal gain and enrichment on behalf of "her husband"

and his fellow associates instead of acting on behalf of the "Public's Best Interest" which is inconsistent with the oath that she has taken to uphold the Constitution of the United States. There is no dispute as to State Senator Terry Gerratana's husband, Dr. Frank J. Gerratana, who faced a medical malpractice action in DIGIACOMO, RICCI v. GERRATANA, FRANK, J. See Connecticut Superior Court Docket number: HHB-CV07-5006078-S. The fact is, State Senator Terry Gerratana's husband and his associates are paying the Senator to help stop bills from getting passed which will protect the best interest of victims suffering from medical malpractice. It would appear that State Senator Terry Gerratana is acting in conflict of the 7th. and 14th. Amendment "Due Process" rights through breaching her oath and affirmation under Article VI of the United States Constitution to support and to uphold the 14th, Amendment.

Furthermore, the following state legislators are in fact acting in conflict of interest of their official duties: State Senator Robert Kane, State Senator Tony Guglielmo, State Senator Len Fasano, State Senator Toni Nathaniel Harp, State Senator Anthony Musto, State Senator Toni Boucher, State Senator Jason Welch, State Senator Michael McLachlan, State Senator Kevin Witkos, and State Senator Len Suzio.

The lobbyists who were instrumental in marshaling Connecticut General Statutes 52-190a were, in fact, no more or less acting to petition the State of Connecticut legislators to deny the victims of medical malpractice their rights to a jury of their peers, by requesting the authority of a single judge to assess the merits of a medical malpractice action. This constitutes a violation and deprivation of my rights and the Citizens of Connecticut's 7th. Amendment right to a fair trial by a jury, which provides in pertinent part that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved..." This language does not include a single reference to "manipulation" of a jury by the Court in a conspiracy with lawyers to design a verdict suitable to the Court through the use of lawyer rules, judicial rules, court rules, or otherwise trumped-up "legal technicalities" and instructions which effectively "handcuffs" the jury. All of these activities are no more or less than a denial of the right to a jury of peers with the constitutional authority to judge both the facts and law in a case.

The Connecticut Trial Lawyers Association Vs. The Medical Group Association Dilemma

The Certificate of Merit requirement has persisted because two large factions, the insurance companies and the Connecticut Trial Lawyers Association with its lawyer constituency, con-

tinue to reap the financial benefits of this unconstitutional law.

The insurance companies will continue to raise their premiums for doctors to obtain medical malpractice insurance regardless of malpractice lawsuits. Instead of seeking other ways to cut costs and work closely with the medical community, insurance companies look to increase their profits by raising premiums, lowering percentages of medical coverage claims, and creating roadblocks for malpractice claims via the Certificate of Merit.

The legislative purpose of reducing insurance rates and the frequency of lawsuits has "NO bearing" on the abolition of joint and several liability: The existence of an insurance crisis has not been clearly established. Although many legislators no doubt believed that tort reform was a necessary method to alleviate a crisis in liability insurance, the skyrocketing premiums and the unavailability of insurance in the mid 1980's were caused by two factors:

- A.) Irresponsible cash flow underwriting during the preceding period of high interest rates and
- B.) The manipulation of the supply of insurance by major elements in the industry itself. An insurance company is not only an underwriter of risk but also an investor. As observed by one publication:

1.b For many years, insurance carriers slashed premium prices and wrote as much insurance as they could get. Many companies abandoned traditional underwriting standards and competed fiercely for premium dollars which they could invest in high yield debt. This so-called cash-flow underwriting is probably responsible for most of the damage to company balance sheets today. The party ended when interest rates declined just as claims began to pour in. With careful management, these mistakes can be corrected. But instead, the industry has spent most of its time and energy lately mobilizing attacks on the U.S. tort system like the Certificate of Merit.

2.b Business Week, March 10, 1986. See also, Peck, Constitutional Challenges to the Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability, 62 Wash. L. Rev. 681, 688 (1987); Phillips, Tort Reform and Insurance Crisis in the Second Half of 1986, 22 Gonzaga L. Rev. 277 (1986/1987). Moreover, depriving victims of tortfeasors of compensation for injuries from solvent tortfeasors simply because other tortfeasors also harmed plaintiff is not a rational legislative response to the perceived insurance crisis. Tortfeasors is defined as: A wrongdoer, an individual who commits a wrongful act that injures an-

other and for which the law provides a legal right to seek relief as a defendant in a civil tort action.

Additionally, have you ever wondered why there are differences in coverage amounts paid to doctors for the same services?

Why do you think the insurance industry spent 7 million dollars in one week to challenge President Obama's Healthcare Law? Needless to say, on July 2, 2012, the United States Supreme Court upheld the constitutionality of President Obama's law declaring that it will be unlawful to deny individual policies and prohibit insurers from denying coverage on the basis of pre-existing conditions.

Patients are being discriminated against on many levels by the insurance industry. Non-insured patients have always struggled to find adequate medical care. Now, insured patients may struggle to find quality care based on who their provider is because of "concierge selection" by doctors.

The Connecticut Trial Lawyers Association also has little interest in changing the Certificate of Merit requirement because not only do they collect a percentage of any financial medical legal settlement, but they also collect between ten and twenty thousand dollars for the Certificate of Merit fee required to initiate the legal proceedings. Thus, lawyers "win" financially regardless of the judicial outcome. Why would either faction kill their "cash cow" when the only individuals who suffer from this unconstitutional law are from the General Public?

- Attorneys, "ARE NOT" obligated to pay for our modern day Poll Tax Law, called the "Certificate of Merit." Therefore, should victims fail to obtain a Certificate of Merit, their due process and equal protection rights will be violated under the 14th Amendment of the United States Constitution and Connecticut Constitution Article First Sec. 1, 10, and 20 and Article Fifth (separation of powers) in seeking judicial remedies for a medical malpractice claim.
- The question before you today is: Does the Certificate of Merit create a modern day Poll Tax Law for poor people? What is the impact of the Certificate of Merit on poor people rights? Can the poor people of America even afford the Certificate of Merit? How does the Certificate of Merit violate the poor people of America due process clause to both the State Constitution and United States Constitution?

MY PERSONAL STORY

I am a Veteran of the United States Army. On March 1, 2004, I lost my wife to medical malpractice because of a civilian doctor's negligence in prescribing to my wife the wrong medication while failing to return any urgent telephone calls. The doctor, Dr. Bassam Awwa's own attorney's has even admitted in open court during a legal proceeding that his client destroyed my wife's medical records, but it would appear that I am being deprived of my due process and equal protection rights to seek judicial remedies because of an unconstitutional law which is targeting people of poverty rights and their access to the courts.

The Certificate of Merit has been "**Struck Down**" by the Washington State Supreme Court, and four other states. See the enclosed video.

However, it would appear that the lobbyists on behalf of the "Insurance Capitol of the World" who were in fact instrumental in drafting and enacting such an unconstitutional law, are in fact engaging in corruption by attending an annual party for the meeting of the minds called the Red Wine Night in Hartford, Connecticut. Who attends this party? The Connecticut Trial Lawyers Association, the defense lawyers for the Insurance industry, the Insurance Industry lobbyists, the State legislators, the judges, the Connecticut Attorney General, the State Congressmen, the State Senators, and even the Governor of Connecticut. As a citizen of the State of Connecticut, I was only invited to the Red Wine Party as an observer to be shown how laws are being made in the State of Connecticut.

Whatever happened to the intended expression of the United States Constitution "For the People, by the People"? It would appear that in the State of Connecticut the insurance industry has taken this phrase to new levels of meaning: "For the Insurance Industry and by the Insurance Industry." I didn't know this phrase was in our constitution. Whatever happened to citizen's rights to vote on laws that will have an impact on their constitutional rights, due process, equal protection and/or their rights to challenge an unconstitutional law in the State of Connecticut?

If you would be so kind to OPPOSE this Bill and REPEAL this law, it would be greatly appreciated because some circumstances we can predict, but medical malpractice we cannot.

ARGUMENT

Standard of Review

All issues presented in this appeal are constitutional and require this courts' **de novo** review. M
bury v. Madison, 5 U.S. (1 Cranch) 137 (1803) is a landmark case in United States law and in

the history of law worldwide. It formed the basis for the exercise of judicial review in the United States under Article III of the Constitution. It was also the first time in Western history a court invalidated a law by declaring it "unconstitutional". The appellate court also applies *de novo* review to a dismissal for failure to state a claim upon which relief can be granted.

In upholding CGS 52-190a, the Connecticut 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, CGS 52-190a must be strictly construed, and no intent to alter the common law can be found unless it appears with clarity. "It is a well-established principle of statutory construction that '[t]he common law. . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment & House. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35-36 (1983) (alterations in original) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812)). A law abrogates the common law when "the provisions of a . . . statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force."

The Certificate Requirement Unconstitutionally Usurps the Courts' Exclusive Authority to Promulgate Rules of Civil Procedure

CGS 52-190a directly and unavoidably conflicts with a rule of civil procedure and, under longstanding precedent, must yield to the federal constitution. By the terms of, CGS 52-190a requires that a complaint 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.

Hartford, Connecticut being the insurance capitol of the world, has lobbyist its influenced on legislation over the best interest of the people which has ratified the state's jurisprudence with the enactment of 52-190a. **See the Civil Rico Federal Racketeering Act USC 18, 1961-1963.**

However, the State of Connecticut Court's and its legislator's have been influenced by the "Insurance Capitol of the World," which has ignored the explicit expression in the United States Constitution. The authority to "establish uniform rules for the government of the superior courts"

rests with the "judges of the superior courts, not the legislators. The enactment of CGS 52-190a should be declared unconstitutional because it violated the separation of powers doctrine. Moreover, this Court, the United States District Court has unambiguously held that the powers of the State Court, "State Actors" must not violate the United States Constitution, or the separation of powers, of its own court rules, even if they are created by the Legislatures.

The United Supreme Court has emphasized that "a State legislative enactment may not impair the District 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 the United States Supreme Court.

Despite the fact that Connecticut Supreme Court has the jurisdiction to compel the legislature to act in those situations in which it fails to carry out its constitutional mandate. Needless to say, even the Connecticut Supreme Court judges attend the annual parties present by the "Insurance Capitol of the World, so that the Insurance Company's may continue to have an influence on the state's jurisprudence.

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. The Certificate of Merit requirement and struck it down on 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. Kindly, take Judicial Notice that, the following State Supreme Courts have come to the same conclusions Washington, Oklahoma, and Arkansas:

- (1) KIMME PUTMAN, Appellant, v. WENATCHEE VALLEY MEDICAL CENTER, PS, ET AL., Respondents. No. 80888-1 SUPREME COURT OF WASHINGTON 166 Wn.2d 974; 216 P.3d 374; 2009 Wash. LEXIS 754.**
- (2) MONICA BELINDA ZEIER, Plaintiff/Appellant, v. ZIMMER, INC. and THERON S. NICHOLS, M.D., Defendants/Appellees. No. 102,472 SUPREME COURT OF OKLAHOMA 2006 OK 98; 152 P.3d 861; 2006 Okla. LEXIS 102.**
- (3) (3) TOMOSA SUMMERVILLE, APPELLANT, VS. DR. RUFUS THROWER, JOY WOOLFOLK, AND HEALTHCARE FOR WOMEN, P.A., APPELLEES No. 06-501 SUPREME COURT OF ARKANSAS 369 Ark. 231; 253 S.W.3d 415; 2007 Ark. LEXIS 215.**

Thus, the State of Connecticut Legislature respects this Court's authority, a respect that is absent here since the enactment of CGS 52-190a. More troubling yet, the State Court and the Supreme Court of Connecticut has failed to address my separation of powers argument which was raised in the trial court records. See Connecticut Superior Court Docket No. #06-5001159-S, entry no. #468.00 and #468.50 Motion for An Order to Show Cause....questioning the constitutionality of the CGS. Sec. 52-190a and Sec. 51-88.

CGS 52-190a Requirement Violates the Fundamental Right of Access to Courts

The State of Connecticut 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." article first, section 10 the Connecticut Constitution: ***"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."***

Recently, the United States Supreme Court reaffirmed that the open court doctrine as of right to remedy the wrong done to those who have suffered •• ***Boddie v. Connecticut***, 401 U.S. 371. 91 S. Ct. 780. 28 L. Ed. 2d 113 (1971).

HISTORY OF THE OPEN COURT DOCTRINE

The Open Court Doctrine guarantees consistent with the provision's venerable lineage, which can be traced back to Chapter 40 of Magna Carta in 1215. 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 no one will we deny, or delay right or justice." Magna Carta, Ch. 40 (1215).

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).

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 1, 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 1, 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)(Also see 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, 11 S. Ct 1032, 113 L. Ed. 2d 1 (1991) (Sca1ia, J., concurring).

Similarly, Sir William Blackstone emphasized that, under the common law and consistent with Magna Carta, Clevery Englishman" has the tight to "apply to the courts of justice for redress of injuries." William Blackstone, *Commentaries on the common law 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**, U.S. (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: **1). First**, it is inconsistent with the system of notice pleading that Connecticut has adopted and thus puts a plaintiff to proof without the benefit of necessary discovery. **2). Second**, it unconstitutionally imposes additional and substantial costs to litigation.

CGS 52-190a Requirement Places an Improper and Often Impossible Obstacle to Access to the Courts

In all courts of the United States, a complaint 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). Connecticut courts have endorsed this conception of the essential role performed by court-ordered discovery.

Discovery permits a party both to obtain evidence and to gather information reasonably calculated to lead to admissible evidence. **Schlagenhauf v. Holder - 379 U.S. 104 (1964)**. As the United States Supreme Court has noted, "Liberal discovery. Means that civil trials 'no longer need to 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. Quoting *Hickman*, 329 U.S. at 501). Discovery is so essential to litigation that sanctions for willful denials, pursuant to Denial of Discovery Order under 28 U.S.C. 1651(a) (1970), Duty to Disclose, General Provisions Governing Discovery under Fed. R. Civ. P. Rule 26(a) and (c), and Taking Testimony under Fed. R. Civ. P. Rule 43(c), include a default judgment.

CGS 52-190a, 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, will certify that a specific

medical professional departed from the standard of care even without critical information, available only through discovery.

Many medical specialty organizations have initiated proceedings against member physicians who testify in medical malpractice cases against other members (while point investigating accusations of medical malpractice) and thereby have created a chilling effect on available witnesses. See, e.g., *Austin v. American Association of Neurological Surgeons*, 253 F.3d 967 (7th Cir; 2001); *Fullerton. Florida Mea. Ass'n*, 938 So. 2d 587 (Fla. Dist. Ct. App. 2006). When a medical association acts to discourage testimony in favor of plaintiff, 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.

In enacting CGS 52-190a, 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 affidavit could be deemed insufficient.

Florida requires certification only by counsel, 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) & (l). Michigan has similar production requirements. Mich. Comp. Laws Ann. § 600.2912d. CGS 52-190a'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 for access to the courts.

CGS 52-190a Requirement Constitutes an Unconstitutional Monetary Barrier to Access

CGS 52-190a 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 Randolph I. Gordon & Brook Asse-

fa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care*, 4 Seattle J. for Soc. Just. 693, 106' (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, 00." David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*. 59 Van de L. Rev. 1085, 117 n.l 11 (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, 813 (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.

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 M. Kopstein, "An Unwise Reform' Measure, 39 Trial 26 (May 2006); Straub, 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, such as myself, who initiated has medical malpractice action on behalf of his

wife's wrongful death with a FEE WAIVER, and the Court granted him indigent status. Although, in most cases, such an expenditure on expert witnesses will inevitably be made, the pre-filing certification required by CGS 52-190a 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.

The Certification Requirement Violates the Equal Protection Clause of the Constitution of the United States

CGS 52-190a singles out those tort plaintiffs who are victims of medical negligence for adverse treatment in violation of Article I, § 1 of the Connecticut Constitution states: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

The state of Connecticut Constitution has an "equal rights" provision that is similar to the equal privileges and immunities provision of the Arizona Constitution. It bars the General Assembly from enacting any legislation that provides special benefits corporation over the best interest of the people.

This constitutional provision most recently served as the basis of a Connecticut Supreme Court opinion overturning a 1994 special act that extended a statutory time limit to allow a particular judge's widow to file a lawsuit against the state. The Court found that the special act "constitutes an unconstitutional exclusive public emolument or privilege because it does not serve a public purpose" (Kinney v. State, 285 Conn. 700, March 4, 2008).

CGS 52-190a creates a modern day poll tax against the minority class, and violates the 14th. Amendment to the United States Constitution under equal protection clause.

The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

"Segregation" refers to the "act or process of separation"; Black's Law Dictionary (6th Ed.

1990); or to "the separation or isolation of a race, class, or ethnic group by . . . divided educational facilities, or by other discriminatory means . . ." Webster's Third New International Dictionary (1961); see Merriam Webster's Collegiate Dictionary (10th Ed. 1993).

The segregation in the present day modern Poll Tax law manifested in the Certificate of Merit called CGS 52-190a have a devastating impact on the poor African-Americans. The United States Supreme Court has recognized that segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation of white and [African-American] has a detrimental effect upon [the African-American].

This case further demonstrates to the point, that the subsequent reference to physical or mental disability is a protected class. Many "physical" disabilities carry serious emotional consequences with them that may be more disabling than the physical aspects of the condition. Similarly, many "mental" or emotional disabilities have physical origins. For example, is schizophrenia that is determined to be chemical in origin and treatable by drugs a "physical" or a "mental" disability?

This is precisely my argument under the 14th Amendment to the United States Constitution that the Connecticut Superior Court has discriminated against him as an African-American and as an indigent (poor) litigant by applying a modern day Poll Tax Law as CGS 52-190a which racially segregate the races of who can afford the Certificate of Merit. Therefore, it violates article first, § 20 of the Connecticut constitution in the exercise of the fundamental right to have access to the courts.

Equal Protection. The United States Supreme court has "analyze equal protection challenges under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). The appropriate level of scrutiny depends upon whether a suspect or semi-suspect classification has been drawn or a fundamental right has been implicated; if neither is involved, this Court will inquire whether the 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, CGS 52-190a satisfies neither strict scrutiny nor even the most deferential rational basis test.

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

CGS 52-190a 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.

In fact, this financial hurdle represents a significant barrier to reaching the courthouse. The United States Supreme Court has already 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." See *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). CGS 52-190a requirement also interferes with the right of access to the courts.

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

Under both the Connecticut 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.

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 CGS 52-190a "to prevent frivolous medical malpractice lawsuits." These purposes do not represent a "compelling" governmental interest; CGS 52-190a 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. See, *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130, 13 (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 first, section 10 the Connecticut Constitution. 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 the University of California v. Bakke**, 438 U.S. 265, 98 S. Ct. 2733, 57 L.Ed.2d 750 (1978); (Plurality opinion of Justice Powell).

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. I).

A Government Accounting Office (GAO) 19 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. 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.

The Statute Does Not Pass Muster Under the Rational Relationship Test

Even if this Court should determine that CGS 52-190a 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, under both Connecticut 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." "It **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 D.IS, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)).

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 Blaclonun 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. Zimmerm,an Brush Co.**, 455 U.S. 422. 442, 102 S. Ct 1148,71 L. Ed. 2d 265 (1982)(Blaclanun, J., concurring).

The legislative history

A review of Connecticut legislative history of Public Act 05-275 § 2 clearly illustrated the legislation that the legislators was aware that the enacting of CGS 52-190a was unconstitutional and violated the separation of powers doctrine. **Rep. Ward's** stated to the Speaker concerning the fact that Connecticut General Statute 52-190a was **unconstitutional**, see Conn. General Assembly House proceeding 2005, Volume 48, pages 165, 166, 167, and 168, ***"Mr. Speaker, I am not certain but I raise the question. It appears to me that this provision is probably unconstitutional under the separation of powers provisions."***

The Connecticut legislative history does not discuss the cost for an expert opinion letter which is between \$10,000 to \$20,000; however, common sense would tell you that not

everyone in the State of Connecticut can afford an expert opinion letter.

Furthermore, nowhere in the entire legislative history does it indicate that a qualified expert would be precluded from offering an opinion or that only a similar healthcare provider as defined by Conn. Gen. Stat. § 52-184c(b) or (c) can give the opinion. The Connecticut Appellate Court has held that the use of a similar healthcare provider as referred to by Conn. Gen. Stat. § 52-190a establishes objective criteria, not subject to the exercise of discretion, making the **pre-litigation** requirement more definitive and uniform. Bennett v. New Milford Hospital, et al., 117 Conn. App. 535, 549 (2009). There is nothing in the legislative history to support this holding.

The legislative history of this amendment indicates that it was intended to address the problem that some attorneys, either intentionally or innocently, were misrepresenting in the certificate of good faith the information that they had obtained from experts. Dias v. Grady, 292 Conn. 350, 357-58 (2009) citing Joint Standing Committee Hearing, Judiciary, Pt. 182005 Sessions, Page 5553, testimony of Michael D. Neubert.

The legislative policy it was designed to implement was to force a Plaintiff, prior to initiating a medical malpractice action, to seek competent advice to substantiate the validity of the claim and to present the expert's opinion attached to the certificate of good faith to avoid any misinterpretation. The legislative history makes clear that the goal of the legislature was to establish a procedure wherein plaintiffs had to obtain an opinion from their experts prior to filing suit and to disclose the opinion as part of the initial filing. The Connecticut Appellate Court's interpretation is not supported by the legislative history.

Existing common law and legislative principles

Connecticut has an express policy preferring to bring about a trial on the merits of a dispute whenever possible and to secure for litigants their day in court. Coppola v. Coppola, 243 Conn. 657, 665 (1998); Snow v. Calise, 174 Conn. 567, 574 (1978). Rules of practice and procedure are both to facilitate business and to advance justice. They will be construed liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice. Coppola at 665. Rules are a means to justice and not an end in themselves. In re Dodson, 214 Conn. 334, 363 cert. denied 498 U.S. 896 (1990). Our

practice does not favor the termination of proceedings without a determination of the merits of the controversy when that can be brought about with due regard to necessary rules of procedure. Johnson v. Zoning Board of Appeals, 166 Conn. 102,111 (1974).

It is a fundamental principle that courts do not construe statutes in a linguistic vacuum. Thames Talent Ltd. v. Commission of Human Rights and Opportunities, 265 Conn. 127, 136 (2003). When construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended. Goldstar Medical Services Inc. v. Dept. of Social Services, 288 Conn. 790, 803 (2008). The court should not undertake to examine a statutory provision with blinders on regarding what the legislature intended it to mean. The law favors rational and sensible statutory construction. Connelly v. Comm. of Corrections, 258 Conn. 394,407 (2000). The unreasonableness of the result of one possible alternative interpretation in favor of another that would provide a reasonable result.

The Connecticut legislative intent behind Conn. Gen. Stat. § 52-190a was to have Plaintiffs consult with their experts prior to filing suit. The pre-complaint opinion was intended to avoid meritless actions. By attaching the opinion to the good faith certification, any misrepresentation, mistake, or error in the translation of the opinion would be avoided.

In my personal case I received a good faith letter from Dr. Howard Zonana, a psychiatrist, a professor, and of the Director of Medicine at Yale University School of Medicine, of whom the late Hon. Judge Hurley acknowledge as a legitimate certificate of good faith, and DENIED the Defendant's initial (1st.) Motion to Dismiss, in 2007. See Judge Hurley's initial memorandum of decisions and in response to two (2) separate "oral argument" concerning the Defendants initial Motion to Dismiss.

I had sat down with Dr. Zonana and six other psychiatrists to review his wife's medical malpractice case before Dr. Zonana issued the certificate. Dr. Zonana wrote in his opinion letter that: "***after reviewing Mrs. Traylor's treatment records and other information, Dr. Awwa's failure to call Traylor "played a proximate role in the death of the patient as it would have added to concerns suicidality and prompted more active intervention by the physician."***

Courts have long placed value in the economy of justice – litigating the same issue once. The common law doctrine of Collateral Estoppel, or issue preclusion, embodies that judicial policy in favor of judicial economy, the stability of former judgments and finality. In RE Joseph W., 121 Conn. App. 605 (2010) at [fn 17] The theory of Collateral Estoppel prohibits the re-litigation of an issue when that issue was actually litigated and necessarily determined. The Defendant’s Motion to Dismiss seeks to do exactly this – re-litigate an issue that was ruled upon over three years ago before Hon. D. Michael Hurley.

Attempting to re-litigate “the exact same claims” that were unsuccessfully raised in a prior action is barred by the principles of Collateral Estoppel. Byars v. Berg, 116 Conn. App. 843, 977 A.2d 734 (2009). Byars involved foreclosure action finding the plaintiff liable for monies owed. The plaintiff, who unhappy with the result, attempted to re-litigate the exact same issue a second time. The court found: “concluding that the plaintiff’s claims were the exact same claims he unsuccessfully had raised in the foreclosure action...they were barred under principles of collateral estoppel.

However, in my personal case, Judge Hurley recognized that while I was, a pro se litigant, who does not have a license to disregard procedural and substantive laws – the policy of Connecticut courts is to be solicitous of pro se litigants. See Memorandum of Decision dated May 31, 2007, pleading number 157.

The three (3) years later, after the sudden death of (JUDGE HURLEY) the defendant sought to re-litigate the very same issues that Judge Hurley had dismiss concerning Certificate of Merit.

Judge Parker should have recused himself because of the social relationships that he had established with the doctor in my case, the Defense counsel in my case, and the Defendant’s insurer because he attends an annual Christmas celebrations at Lawrence and Memorial Hospital with the Defense parties which ultimately impairing Judge Parker’s impartiality in the decision making process.

Judge Parker is only one example of why the Certificate of Merit law is being abused, and not carried out as per the legislator’s intent. The discovery process to establish the merit

of a medical malpractice action is vital and should not be replaced with the Certificate of Merit and the pre-litigation cost.

CONN. GEN. STAT. § 52-190a AND SECTION 52-184c SHOULD BE DECLARED UNCONSTITUTIONAL

"The Connecticut Superior Court is empowered to adopt and promulgate rules regulating pleading, practice, and procedure in judicial proceedings in courts in which they have the constitutional authority to make rules, for the purpose of simplifying proceedings in the courts and of promoting the speedy and efficient determination of litigation upon its merits the general assembly lacks the power to enact rules governing procedure that is exclusively within the power of the Courts. **Conn. Const., Art. Second and V, § 1**; State v. Clemente, 166 Conn. 501, 510-11, (1974), so do the courts lack the power to promulgate rules governing substantive rights and remedies." State v. King, 187 Conn. 292,297, (1982); State v. Rollinson, 203 Conn. 641 (1987). Irrespective of legislation, the rule making power is in the courts. Heiberger v. Clark, 148 Conn. 177 (1961).

"[T]he primary purpose of the [separation of powers] doctrine is to prevent commingling of different powers of government in the same hands The constitution achieves this purpose by prescribing limitations and duties for each branch that are essential to each branch's independence and performance of assigned powers It is axiomatic that no branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof [Thus] [t]he separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power." (Citations omitted; internal quotation marks omitted.) State v. McCahill, 261 Conn. 492, 505-06 (2002); Massameno v. Statewide Grievance Committee, 234 Conn. 539,551-52, (1995).

As between the powers of the legislature and those of the judiciary however, the matter of establishing rules to follow to establish and present evidence of a good faith pre-complaint investigation is manifestly "procedural". This is aptly demonstrated by applying the test for determining whether a statute unconstitutionally encroaches on the power of the judiciary. ***"[A] two part inquiry has emerged to evaluate the constitutionality of a statute that is alleged to violate separation of powers and principles by impermissibly infringing on***

the judicial authority A statute will be held unconstitutional on those grounds if: (1) it governs subject matter that not only falls within the judicial power, but also lies exclusively within judicial control; or (2) it significantly interferes with the orderly functioning on the Superior Court's judicial role. (Internal quotation marks omitted.) State v. McCahill, 261 Conn. 492, 505-06 (2002).

I was required to comply with the requirements of Conn. Gen. Stat. § 52-184c(c) when selecting an author for the good faith opinion because Conn. Gen. Stat. § 52-190a establishes an "objective criteria", not subject to the exercise of discretion, making the **pre-litigation** requirement more definitive and uniform.

Conn. Gen. Stat. § 52-190a requires that I disclose its pre-investigation report as part of the initial filing. It establishes a procedure to determine whether a case may proceed and be heard on the merits. It removes from the court the discretion to determine which experts and evidence may be utilized to establish a prima facie case. This act affects all medical malpractice actions and the court's supervision of which case established a prima facie case. The Act removes from the trial court discretion on which cases will be heard on the merits.

Conn. Gen. Stat. § 52-190a governs subject matter that not only falls within the judicial power but also lies exclusively within judicial control. The Connecticut Superior Court has the inherent constitutional power to make rules governing procedure in the courts and any statute regulating procedure not acquiesced by the Superior Court is vulnerable to constitutional attack. State v. Clemente, 166 Conn. 501 (1974); State v. McCahill, 261 Conn. 492, 505-06 (2002). Conn. Gen. Stat. § 52-190a creates a procedure to force the disclosure of the Plaintiff's by a **pre-litigation** opinion letter. The power to enforce discovery is one original and inherent powers of the court of equity. Peyton v. Werhane, 126 Conn. 382, 388 (1940); Skinner v. Judson, 8 Conn. 528, 533 (1831); Carten v. Carten, 153 Conn. 603, 611 (1966); Katz v. Richman, 114 Conn. 165, 171 (1932); State v. Clemente, 166 Conn. 501 (1974).

Courts have an inherent power, independent of statutory authority, to prescribe rules to regulate their proceedings and facilitate the administration of justice as they deem

necessary. In re Appeal of Dattilo, 136 Conn. 488, 492 (1950). Courts acting in the exercise of common law powers have an inherent right to make rules governing procedures in them. In re Hien, 166 U.S. 432,436 (1897); McDonald v. Pless, 238 U.S. 264, 266 (1915). It is the inherent power of the judges of the Superior Court to make rules which would bring about an orderly, expeditious and just determination of the issues. In re Appeal of Dattilo at 493.

Conn. Gen. Stat. § 52-190a attempts to govern the subject matter that lies exclusively within judicial control and violates the separation of powers. In addition, Conn. Gen. Stat. § 52-190a significantly interferes with the orderly functioning on the Connecticut Superior Court's judicial role.

In State v. McCahill, 261 Conn. 492 (2002) this court addressed Public Act 00--200 § 5, in which the legislature had transformed the 1967 statute that was enacted to make post-conviction bail available to all Defendants to a statute that eliminated the trial court's discretion to grant such bail to various classes of convicted offenders. **The Connecticut Supreme Court has held that Public Act 00-200 § 5 was unconstitutional** because it presents a significant interference with the orderly function of the Connecticut Superior Court's judicial role. State v. McCahill at 509. The conclusion was based on the premise that Public Act 00-200 § 5 will create an interference with the trial court's disposition of cases other than just the one at bar. The court considered the separation of powers challenge to have merit because the Superior Court's regular role is in supervising the prosecution of individuals charged with crimes involving force against others. It was the fact that the Public Act impacted a number of cases and along with the elimination of the Superior Court's discretion to grant bail in appropriate circumstances that created the significant interference. State v. McCahill at 509-10.

The Connecticut Court's has traditionally held the role of gatekeeper since 1818, when determining which witnesses or experts were qualified to assist the court with issues beyond the knowledge of the average person. Further, this Court has traditionally determined which cases had merit and which cases lacked merit. It is this Court's discretion that decides when a Plaintiff has presented a prima facie case. There is no doubt that Conn. Gen. Stat. § 52-190a is currently and will continue to impact a large number of potential Plaintiffs endeavoring to bring a medical mal-practice case. This fact, coupled with the fact that the act eliminates this Court's discretion to determine who is competent to offer an opinion, creates significant inter-

ference. Conn. Gen. Stat. § 52-190a violates the Connecticut Constitution, Article V § 1, separation of powers, and is unconstitutional.

Due Process. Both the Connecticut and U.S. Constitution’s guarantee due process, to the U.S. Const. amend. XIV, § 1, and confer equivalent protections. 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.’” *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (citation omitted). The notice of intent and statute of repose are arbitrary and wrongful, forcing plaintiffs to delay their cases with all the consequences described above: delayed lawsuits, delayed discovery that might reveal additional defendants, delayed compensation, reduced claims and damages. Substantive due process claims are evaluated under the same criteria used for equal protection.

N CONCLUSION

I raise three grounds in support of my contention that CGS 52-190a is unconstitutional. These are:

The arbitration process created CGS 52-190a is filled with such interminable delay that it violates the guarantees in the state constitution of access to the courts, justice without delay and the right to jury trials. See Article first, section 10 the Connecticut Constitution: ***“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”***

By requiring litigants to try a complicated and expensive malpractice action in arbitration prior to being permitted a jury trial, CGS 52-190a places an onerous and impermissible condition on the right to jury trials. See the 7th. Amendment to the United States Constitution.

CGS 52-190a and its **pre-litigation** procedures deny medical malpractice victims procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution because the Certificate of Merit described in CGS 52-190a creates an unduly monetary and economic barrier for obtaining access to the courts.

Moreover, the United States Constitution establishes a minimum standard for the protection of indi-

vidual rights and liberties. State courts are free to interpret Connecticut constitutional provisions to afford individuals broader and more significant substantive and procedural rights than those specified in the United States Constitution. Recent Connecticut appellate decisions have relied on the Connecticut Constitution to afford greater protections to individuals than those supplied by the United States Supreme Court in interpreting similar provisions of the federal constitution. See, e.g., State v. Geisler, 222 Conn. 672, 684 (1992), citing State v. Dukes, 209 Conn. 98 (1988); State v. Stoddard, 206 Conn. 157 (1988); see also, State v. Miller, 29 Conn. App. 207, 222 (1992); Horton v. Meskill, 172 Conn. 615 (1977); see generally, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 485, 501 (1977). The decisions of the United States Supreme Court defining federal rights under the equal protection clause of the United States constitution "are, at the least, persuasive authority, although we fully recognize the primary independent vitality of the provisions of our constitution." Horton, 172 Conn. at 641. The Connecticut Constitution provides separate and distinct protection under its equal protection clause and therefore affords Connecticut residents greater protection than its federal counterpart.

CGS 52-190a discriminates between classes of tort victims by denying certain plaintiffs compensation that would have been awarded under the common law rule of joint and several liability. The disparate treatment afforded these classes does not have a fair and substantial relationship to the stated legislative objectives. The discriminatory classifications in § 52-190a therefore violate the plaintiff's right to equal protection under the laws guaranteed by Article I §§ 1 and 20 of the Connecticut Constitution and the Fourteenth Amendment of the United States Constitution.

Even assuming the argument that § 52-190a is found constitutional under a minimum rationality level of scrutiny; it nevertheless would fail to pass constitutional scrutiny under an intermediate or strict standard of review. If a statute discriminates upon a suspect group or impinges upon a fundamental personal right, a strict scrutiny test must be applied by a court. Zapata v. Burns, 207 Conn. 496, 505 (1988). A right is fundamental for purposes of equal protection analysis if it is explicitly or implicitly guaranteed by the constitution. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33 (1973); Cf., Horton, 172 Conn. at 641, 645. Although Connecticut courts have not applied strict scrutiny analysis to the right to recover for personal injury, some state courts have characterized the right to recover damages as similar to a basic liberty interest. See, e.g. Hanson v. Williams County, 389 N.W.2d 319, 325 (N.D. 1986). A strict scrutiny analysis should be applied to tort reform measures since a tort victims' right to bodily integrity and his right to redress for this personal liberty amounts to a fundamental right. See, Conn. Const. Article I § 10.

Wherefore, for the above reasons, I am in opposition to House Bill HB-6687 because of the two (2) above critical points. (1) This LAW is unconstitutional in nature. (2) There are several of our State Legislature has ignored ethical and constitutional considerations regarding the Bill proposal for the Certificate of Merit by acting in conflict of interest to their oath of office.

Respectfully Submitted by

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