No. _____

In The

Supreme Court of the United States

GEORGE CANTU,

Petitioner,

v.

PROVIDENCE HOSPITAL AND
DR. SAREEV VADERAH, MD.,

Respondents.

Petition For Writ Of Certiorari
To The Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. BUDIGAN
2601 42nd Ave. W
Seattle, WA 98199-3011
(206) 284-5305
info@budiganlaw.com

Attorney for Petitioner George Cantu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

I. Does Washington State's RCW 4.16.350(3), granting one year statute of limitations after discovering medical malpractice and eight year repose compared to three year discovery rule and unlimited repose statute of limitations in other bodily injury cases in RCW 4.16.080(2) violate constitutional rights to equal protection, due process, right to jury trial, and grant special privileges and immunities to health care providers versus their victims and contrary to the situation of other citizens of these United States?

II. Did the Washington Courts, in dismissing and failing to reverse dismissal of Plaintiff's medical malpractice case for failure to provide an expert opinion thereon, violate Mr. Cantu's due process constitutional rights by denying application of the discovery rule extending the statute of limitations to join as a party the allegedly negligent anesthesiologist and by denying him litigation discovery information necessary for his Stanford University anesthesiology professor expert to support his case?

PARTIES TO THE PROCEEDING

Mr. George Cantu, Plaintiff in the underlying suit and Appellant in the Court of Appeals, Petitioner in the Washington Supreme Court, and was Pro se until this Petition.

Providence Hospital was Defendant in the underlying suit and Appellee in the Court of Appeals, and Respondent in the Washington Supreme Court.

Mr. Cantu did not appeal the original uncontested dismissal of Defendant Dr. Vaderah from the case because instead, right before dismissal, Dr. Usoltsev was discovered to have done the anesthesia in error and as an independent contractor company hired by Defendant Providence Hospital.

STATEMENT OF RELATED CASES

Cantu v Providence, No. 18-2-02129-31, Superior Court of Snohomish County.
Judgment entered June 6, 2019.

Cantu v Providence, No. 80229-1-I, Court of Appeals Division I.
Judgment entered August 10, 2020.

Cantu v Providence, No. 99167-7, Supreme Court of the State of Washington.
Judgment entered March 3, 2021.

OTHER RELATED CASES

After the dismissal of the subject case in State Superior Court (not allowing Mr. Cantu litigation discovery of the recently identified anesthesiologist, Dr. Usoltsev, and adding him as a party to the case), Mr. Cantu that very day filed a separate lawsuit against Dr. Usoltsev, Cantu v Usoltsev, and this case was also dismissed. Mr. Cantu is currently seeking a Petition for Review with the Washington Supreme Court, No. 99817-5.

Cantu v Dr. Usoltsev et al., No. 19-2-05127-31, Superior Court of Snohomish County.
Judgment entered October 4, 2019.

Cantu v Dr. Usoltsev et al, No. 80742-2-I, Court of Appeals Division I.
Judgment entered March 22, 2021.

Cantu v Providence, No. 99817-5, Supreme Court of the State of Washington.
Pending.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix 1 to the petition and is unpublished.

The opinion of the state appellate court appears at Appendix 2 to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was March 3, 2021. A copy of that decision appears at Appendix 1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Supreme Court jurisdiction to review a highest state court decision here is invoked by this being a case in law and equity consisting of the right of the parties arising under the Constitution of the United States as its correct decision depends on the construction of the Constitution. *Cohen v. Virginia*, 6 Wheat 264 (1821). **Here, constitutional rights of petitioner arise in a genuine controversy with color of merit which depend upon the effect or construction of the**

United States Constitution amendments iv, v, vi, vii, and xiv. All issues raised here are reviewable because the rule has long been established that where a federal question is raised and a case is presented arising under the Constitution of the United States a Federal court thus having original or removal jurisdiction thereof also has power, and is authorized, to determine all questions in the case, local as well as Federal. *Siler v. Louisville & N.R. Co.*, 213 U.S. 175 (1909). Under the Supremacy Clause, "[w]here state and federal law 'directly conflict' state law must give way." *PLIVA, Inc. v Mensing*, 564 U.S. 604, 617, 131 S.Ct. 2567, 2570, 180 L.Ed.2d 580, 585 (2011).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment IV, Section 2 "the citizens of each state shall be entitled to all **privileges and immunities of citizens** in the several states."

United States Constitution Amendment V: " . . . nor be deprived of life, liberty, or property, without **due process** of law; . . . "

United States Constitution Article VI, clause 2: " . . . This Constitution, and the Laws of the United States . . . shall be the **supreme law of the land**; and the judges in every state shall be bound thereby, anything in the **constitution or laws of any state to the contrary** notwithstanding."

United States Constitution Amendment VII: " . . . the **right of trial by jury** shall be preserved . . . "

United States Constitution Amendment XIV: "No State shall make or enforce any law which shall abridge the **privileges or immunities of citizens** of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process** of law; nor deny to any person within its jurisdiction the **equal protection** of the laws."

Washington State Constitution Article I, sect. 3: "Personal rights. No person shall be deprived of life, liberty or property, without **due process** of law . . . "

RCW 4.16.080(2) "The following actions shall be commenced within three years: . . . An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;"

RCW 4.16.350(3) "An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including, in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative; based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one

year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages."

STATEMENT OF THE CASE

Mr. Cantu saw Dr. Vaderah (Skagit Valley Medical clinic), who told him that he needed to immediately have a surgery for a heart condition. He referred him to Providence Hospital. On 3/6/15, the heart surgery (CABG) was performed by Dr. Brevig and three anesthesiologists were involved. Mr. Cantu did not meet with anesthesiologists before surgery. An unidentified anesthesiologist put him under and caused an 11 minute Code Blue lack of oxygen to the brain and body. Brains need oxygen. Within 2 minutes of a Code Blue (lack of oxygen to the brain) the (neurons) brain cells begin to experience distress, within 5 minutes neurons

start to die, and within 10 minutes brain death is likely to occur. He was saved by a crash team and a miracle when on the brink of death. While he was under, a Dr. Schramm spoke to some of his family members and said that there had been a Code Blue, but provided no explanation of cause or effect and he surprisingly said he was going to go ahead with the surgery. He survived the surgery and had three very short contacts with the subject anesthesiologist. The first one was a conversation and the other two just short checkups (Mr. Cantu thinks that the day after the surgery the anesthesiologist came to his room and told him that there had been a Code Blue and it was due to his medical error and Mr. Cantu thinks he told him that he must not do it ever again to other patients; after this case was dismissed the subject anesthesiologist denies these things, but only says that it was simply a routine follow up after surgery and no such statements were made). Mr. Cantu had memory problems and other neurological related deficits and went to several providers over the next three years but none of the doctors and experts could point to anything the anesthesiologist did to cause the Code Blue and, importantly, did that fell below the standard of care for an anesthesiologist, and not knowing the cause they could not link it to the problems he was dealing with. Finally, on the verge of running out of the three year statute of limitations for medical malpractice in Washington State, he filed a lawsuit pro se which was riddled with errors and only named Providence Hospital and his original doctor, Dr. Vaderah, who referred him to Providence Hospital, thinking in his neurologically challenged

incompetence that it was Dr. Vaderah who did the heart surgery. He did not know the name of the anesthesiologist that caused the Code Blue or the other anesthesiologist involved and did not name them within the three years because he needed to find out medical malpractice and cause, effects on his brain and body for damages, etc. through the lawsuit. He eventually prepared and served interrogatories and requests for production of documents, demanding his medical records. Providence Hospital fought tooth and nail to not provide any discovery whatsoever and brought a motion for summary judgment for failure to file an affidavit of a medical expert to support his case. This is a standard ploy of medical malpractice insurance defense to not provide information and delay discovery and yet bring a motion for summary judgment as early as possible in the case based on lack of information of the Plaintiff to support their case, all the while the defense holding on to said information. Providence Hospital purposely did not provide any of the information requested to keep the identity of the anesthesiologist unknown throughout the entire case so that the anesthesiologist would not be named in the suit and so that Mr. Cantu would not be able to get information about the medical malpractice from the anesthesiologist to prove his case. This is continuous fraudulent concealment which is an exception to the one year "discovery" statute of limitations under Washington State law (RCW 4.16.350(3))

Mr. Cantu served Interrogatories and RFPs on or about 8/27/18 (CLERK'S PAPERS, herein after "CP"

113–194 at Exhibit 11) and when these were never answered by the defendants, contrary to the civil rules. He re-served them a second time 11/7/18 (CP 380–382) and a third time 2/28/19 (CP 113–194 at the end of the document), but instead of answering them defendants brought motions to dismiss and for summary judgment. Mr. Cantu brought numerous motions to compel answers to discovery (see below) and was forced to move for continuances of the summary judgment motions (see below) due to lack of all answers to his discovery requests and most importantly Defendant Providence Hospital refused to provide any medical records requested and any information whatsoever regarding the anesthesiologist. Plaintiff's 3/2/18 Complaint (CP 478–479) clearly alleged that the medical malpractice had to do with administration of anesthesia and both defendants did their darndest to hide who that anesthesia doctor was and to provide no discovery whatsoever to answer questions about the doctor, the anesthesia, or to provide any medical records so that this Pro Se Plaintiff would not name him as a party. Even Plaintiff's 6/15/18 Amended Complaint (CP 405–416) spelled out that he did not know who the anesthesiologist was and needed the doctors to come clean about the specific medication error and what was actually administered and all problems caused by it. Defendant Providence Hospital's Answer 5/29/18 (CP 419–423) does not say who did anesthesia; there never was an answer from defendant Dr. Vaderah and his 5/17/18 motion to dismiss does not say who did the anesthesia (CP 445–449); same with Dr. Vaderah's Motions for Summary Judgment 11/30/18 (CP 365–367),

2/7/19 (CP 227–240) his 1/8/19 motion for summary judgment (CP 320–333), and Providence Hospital's 1/23/19 joinder (CP 295–297) and 2/25/19 joinder (CP 198–200).

The chart summarizes Cantu's repeated motions to compel discovery:

Interrogatories and RFPs Repeated Fillings			Motions to Compel Answers	
1	8/27/18	CP 113–194 Ex 11		
2	11/7/18	CP 380–382	1 12/10/18	CP 348–350
			2 12/12/18	CP 334–345
			3 2/4/19	CP 264–267
3	2/28/19	CP 113–194 at end of document		
			4 3/4/19	CP 113–194
			5 5/28/19	CP 90–93 and CP 75–87
			6 6/5/19	CP 47–63
			7 6/14/19	CP 5–32
			8 3/11/20	CP 77–105

Defendants brought four motions for hearings for summary judgment set for: 12/28/18 (CP 365–376),

2/7/19 (CP 320–333), 3/8/19 (CP 227–240), and 6/6/19 (CP 227–240 continued from 3/8/19 hearing). **Defendants did not confirm and allowed to be stricken all of these except for 6/6/19—**the date of the final order here granting summary judgment and dismissing the case. **So only one motion for summary judgment was ever argued—on the last day of the case.** ***There was also only one motion for continuance by Plaintiff Mr. Cantu heard and decided by the court—3/8/19.*** Each time defendants brought their summary judgment motions early in the case and before any discovery had been provided, though requested on 8/27/18, Plaintiff Mr. Cantu brought a motion to compel the discovery and for continuance (filed 12/10/18 CP 348–350, 12/12/18 CP 334–345, 2/4/19 CP 264–267, 3/4/19 CP 113–194, 5/28/19 CP 90–93 and Exhibits CP 75–87, 6/5/19 CP 47–63, 6/14/19 in Motion for Reconsideration CP 5–32), **but none of these motions were heard and decided by the court because the defendants purposefully struck the summary judgment hearing where the motions to continue would be heard first.** This 3/8/19 sole order of continuance granted a 90 day continuance but specifically refused to compel discovery and ruled that there could be no more motions for continuance to locate an attorney, ***to get an expert***, and most importantly, ***to ask for any discovery in the case.*** THE COURT SPECIFICALLY DENIED MR. CANTU THE RIGHT TO ANY DISCOVERY AFTER 3/8/19 EVEN THOUGH HE HAD NEVER BEEN PROVIDED ANY DISCOVERY BY THAT DATE. The 3/8/19 order (CP 100–101) states "no

more continuances shall be granted" and there were no recordings or court reporting at any of the hearings at any time in the case, so there is no RP available, but the Minute Entry states,

> **"Plaintiff's motion to continue the summary judgment motion: granted. The sworn testimony of an expert likely would be required . . . there will be no more continuances based on not having a lawyer; no more continuances based on not being ready to proceed with expert testimony; and no more continuances based on incomplete discovery."**

On 3/8/19, instead of granting Mr. Cantu's motion to compel the discovery, the trial court ordered that there could never be a continuance thereafter based on discovery or needing discovery for his expert and the court gave him 90 days to get an expert to opine about the medical records basis for medical malpractice or the case would be dismissed. The Court continued the summary judgment hearing to 6/6/19, giving Mr. Cantu 60 days to get the discovery of the medical records and explanation of Code Blue cause from the anesthesiologist, BUT did NOT order compelling discover and prohibited more requests for court compelling of discover so there was no way for Mr. Cantu to get the information for his expert.

By May 2019, Dr. Usoltsev's identity as the anesthesiologist was discovered (without Providence Hospital providing any discovery) by Mr. Cantu stumbling into a Russian-sounding name of anesthesiologist on

the Providence Hospital website and guessing it was him from his family's statement to him that they did not know the anesthesiologist's name, but they thought that it was Russian. So in May 2019 Mr. Cantu took the extraordinary step of getting a court order for a subpoena duces tecum deposition (CP 96–99) of the non-party anesthesiologist, but the anesthesiologist failed to comply with the court order and provided no information. On May 29, 2019, just a few days before Mr. Cantu's 6/4/19 motion to compel discovery and continue summary judgment and just before the 6/6/19 dismissal of the case, the anesthesiologist hired an attorney, Steven F. Fitzer, declared in a Declaration of Counsel and Objection to Attendance Subpoena for Deposition (CP 69–71) that the anesthesiologist was an anesthesiologist and Fitzer was retained to represent him. Mr. Fitzer also stated that Dr. Usoltsev qualifies "as an expert to talk about his own care." Importantly, Steven Fitzer represented to the court that Dr. Usoltsev is "*not* the custodian of documents which would have to come from other sources . . . " (CP 69–71). This is untrue because ***after dismissal*** of the case the attorney provided Mr. Cantu the anesthesiologist's own set of records he kept as anesthesiologist with his own incorporated practice as an independent contractor for Providence Hospital.

The importance of this is that the anesthesiologist would not provide any records himself and this is exactly why the court should have compelled the months old discovery from Providence Hospital and it significantly bolstered Mr.

Cantu's argument that the court require these records from Providence Hospital and the anesthesiologist (and his deposition) so that Mr. Cantu could get the information necessary for an expert opinion on medical malpractice in the case when he was stymied for 10 months of demands for records and the court should have granted Mr. Cantu these orders.

On 5/28/19 (CP 90–93 and Exhibits CP 75–87), Mr. Cantu moved for continuance of the summary judgment hearing to compel the 10 month outstanding discovery, the deposition of Dr. Usoltsev, and to allow an expert to have this evidence to testify to the medical malpractice. Mr. Cantu's Proposed Order asked again for the unanswered discovery (CP 88–89). Mr. Cantu's motion to compel and for continuance was set for 6/4/19, but without hearing it, the court moved it to 6/6/19 (the court did not issue a written order or minute entry to the parties at the 6/4/19 hearing which was unrecorded and not reported; the Clerk's docket said that it was stricken and reset by the court to the very same day of 6/4/19, but the court told the parties that day it would just decide the Mr. Cantu's motions two days later on 6/6/19 at the start of summary judgment hearing. On 6/6/19 the court granted summary judgment (CP 41–42), dismissing the case for lack of an expert, without ever giving appellant his court ordered by civil rules discovery and a chance at getting to the merits on the matter not even set for trial and with no discovery ever provided by Defendant Providence Hospital.

Mr. Cantu took the very extraordinary step of going around Providence Hospital's attorneys and filing a request for his medical records directly with providence hospital 45 days before the dismissal and even these were withheld by Providence Hospital. Turns out, that the undisclosed anesthesiologist who actually caused the 11 minute code blue (not the other two anesthesiologists involved), ***after dismissal***, provided his own medical records he himself kept in addition to those of Providence Hospital because—low and behold—he was not an employee of Providence Hospital, but instead had his own anesthesiology medical practice under his own corporation and kept his own anesthesiology records.

The significance of missing all of this requested discovery is that plaintiff Mr. Cantu could never get an expert to give an adequate opinion about the case without the full anesthesia medical records never provided and the anesthesiologist's explanation of exactly what medication and delivery dose and timing and Providence Hospital refused to ever provide this contrary to the civil rules. Without such an expert opinion and given that the court would only give 90 days without compelling this discovery, the case was dismissed.

Mr. Cantu seeks to overturn the erroneous summary judgment dismissal of Defendant Providence Hospital, ending the case. The trial court should have continued the motion for summary judgment to allow full discovery of the defendant's medical records for

plaintiff appellant (including all of the anesthesiologist's records), answers to interrogatories and RFPs, depositions of all involved the day of the surgery, and allowed the amendment of the complaint to include the new-found identity of the anesthesiologist and the other relevant treaters and have it relate back to the original complaint filing date.

Appeal was filed, an Opinion issued, then withdrawn by the court of appeals after reconsideration motion pointing out all the many errors of fact contrary to the record, then a new opinion issued, another reconsideration denied, and The Washington Supreme Court denied the Petition for review. This Petition to the United States Supreme Court was filed timely.

The Providence Hospital chart notes were received by Mr. Cantu only after the case was dismissed and do not explain any cause of the 11 minute Code Blue or document any error. As explained below, Providence Hospital and their attorneys withheld all the medical records until after the dismissal despite many months of requests for answers to very timely interrogatories and rpfs and pro ses Cantu taking the very extraordinary step of going around providence hospital's attorneys and filing a request for his medical records directly with providence hospital 45 days before the dismissal and even these were withheld by providence hospital. Turns out, that the undisclosed anesthesiologist who actually caused the 11 minute code blue (not the other two anesthesiologists involved), after dismissal, provided his own medical records he himself kept in addition to those of providence hospital because—

low and behold—he was not an employee of providence hospital, but instead had his own ane. medical practice under his own corporation and kept his own records. Though the responsible anesthesiologist.

This was about a week before the dismissal. Cantu brought motions for continuance of the Providence Hospital summary judgment motion and brought motions to compel answers to his discovery requests and for the deposition of the anesthesiologist the court had for whom already issued the subpoena for his deposition with all medical records, snubbed by the anesthesiologist. Timely reconsideration of dismissal, Mr. Cantu motioned for adding him as a party and relation back to the original Complaint, timely under the three year statute of limitation.

Mr. Cantu argued that his due process rights were being violated by the dismissal of his case while discovery was pending to learn the actual cause of injury and find sufficient evidence for his expert and all of the ramifications from that in several motions before the superior court, on reconsideration of the dismissal, on appeal to the higher court, and on appeal to the Washington State Supreme Court. He challenged the constitutionality of the one year discovery statute of limitation versus three years for other bodily injury victims in the Court of Appeals and the Washington State Supreme Court.

REASONS FOR GRANTING THE PETITION

I. THE SUPREME COURT, FEDERAL CIRCUITS, AND STATE HIGHEST COURTS ARE IN CLEAR CONFLICT REGARDING CONSTITUTIONAL PROTECTIONS IN MEDICAL MALPRACTICE DISCOVERY RULE CASES

It is an issue of **substantial public interest** that should be determined by the Supreme Court, when courts grant summary judgment or dismissal when discovery has been thwarted (against the Supreme Court's ordered civil rules) by the very party bringing summary judgment or dismissal motions. We need a paradigm-shifting Supreme Court ruling that makes clear to Washington State courts and all federal and state courts that constitutional due process rights require allowing litigation discovery to reasonably be completed before the summary dismissal of cases. It is a significant question of constitutional law when the guaranteed due process rights for reasonable discovery before Summary Judgment or Motions to Dismiss are trampled upon by too-early dismissals by courts under the excuse that it is in their discretion. Now it is time to make clear that cases should be heard on the merits to do justice between the parties and not dismissed when the other side will not give reasonable discovery, but instead brings a motion for summary judgment or dismissal. The discretion allowed to judges to dismiss cases in the face of clearly needed discovery will always escape true review because the standards for abuse of this discovery are non-existent. The higher courts just

"rubber stamp" the lower court's discretion because it is so fact-oriented and the great presumption in favor of the lower courts' exercise of discretion as trier of fact. The rule should be that if relevant discovery is still outstanding, no summary judgment or motion to dismiss shall be granted and reasonable discovery shall be ordered.

RCW 4.16.350(3), the "discovery rule" "tolling" of statutes of limitations in medical malpractice suits (one year) versus personal injury (three years) suits unconstitutionally. This is a significant question of constitutional law of violations of the **due process** and **equal rights** guarantees under the **constitutions** of the State of Washington and The United States and grants **special privileges and immunities** to doctors in medical malpractice cases, contrary to the rights of all other professionals and tortfeasors in cases where statute of limitations spell out tolling discovery rules in Washington are three years for torts, instead of one year for medical malpractice without any proper legislature purpose or rational reason therefore.

A pro se person prevailing should be allowed reasonable attorney's fees and costs under contract, statute, case law, for attorney's fees and costs incurred in assisting in the matter, but without a formal appearance by the attorney, just as a party whose attorney formerly appeared would be entitled to such reasonable attorney's fees and costs. This is an issue of **substantial public interest** and a **significant question of constitutional law**, as it violates equal rights and

due process guarantees under the constitutions of the Washington and The US.

Washington State's RCW 4.16.350(3), granting one year statute of limitations after discovering medical malpractice and eight year repose compared to three year discovery rule and unlimited repose statute of limitations in other bodily injury cases in RCW 4.16.080(2) violates constitutional rights to equal protection, due process, right to jury trial, and grant special privileges and immunities to health care providers versus their victims and contrary to the situation of other citizens of these United States.

A car accident victim in Washington can sue for negligence upon discovery of ALL four elements of a cause of action up to three years after discovery of ALL four elements and no repose deadline in which to make the discovery—it can be brought any time after the discovery, but within three years of the discovery. NOTE: The starting date of the discovery rule statute of limitations is the major problem in so many cases because the statute of limitation is tolled until discovery of ALL four elements ("Under the Discovery statute, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action: duty, breach, causation and damages." *Allen v. State*, 118 Wn.2d 753, 757–758 (1992)), but the learning of and getting proof of causation and the actual damages attributable to the medical malpractice often vigorously disputed. Here, Mr. Cantu had years of trying to find out whether there was a causal link between

what the anesthesiologist did and mental deficits he was having.

On the other hand, Washington medical malpractice victims can sue within three years statute of limitations, but only within one year of the discovery and with an eight year repose meaning it could never be brought after eight years even if discovered thereafter. This unequal protections for victims of bodily injury, impacting their due process rights to justice through the courts and right to jury and granting of special privileges and immunities to health care providers versus other tortfeasors is unconstitutional and deserves review by this Court because the guidance from this Court is unclear and is state and federal courts are in conflict on these issues and with this Court.

Medical victims get two years fewer than auto accident victims. This, of course, is ridiculous because everyone knows that medical malpractice actions are far more difficult to prove and acquire information for all of the elements because only professional doctors hold this information and they make and keep their own records and a reasonable person will never be on par with a medical provider.

> . . . . In its discussion of the reasons why most jurisdictions have adopted a special rule for medical malpractice cases, the Restatement (Second) of Torts notes
>
> "that the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the

> plaintiff is forced to rely upon what he is told by the physician or surgeon."

Restatement (Second) of Torts § 899, Comment *e*, p. 444 (1979).] **If anything and the court is going to consider victim's differently, the discovery rule should allow *more* than three years in medical malpractice cases (vs in standard injury cases, which have much more obvious injuries and the causes thereof).** This is unequal protection of victims and an inequity in due process rights guaranteed to all victims and a specific privilege and immunities appointed to Washington doctors versus all other bodily injury tortfeasors. This Court should find RCW 4.16.350(3) unconstitutional and grant plaintiff at least three years from discovery.

Furthermore, Washington's one year statute of limitations under the discovery rule is far too short a time and unconstitutionally unequal with other injury statutes of limitations, as many courts point out (See for example *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) Footnote 6: **"The 1-year existing period is unfair to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making claim." Congress writing on the law addressed in the case. And in Footnote 7:**

> Restatement (Second) of Torts § 899, Comment *e*, pp. 444–445 (1979), reflects these developments:

> "One group of cases in which there has been extensive departure from the earlier rule that the statute of limitations runs although the plaintiff has no knowledge of the injury has involved actions for medical malpractice. Two reasons can be suggested as to why there has been a change in the rule in many jurisdictions in this area. One is the fact that, in most instances, the statutory period within which the action must be initiated is short—one year, or at most two, being the common time limit. This is for the purpose of protecting physicians against unjustified claims; but since many of the consequences of medical malpractice often do not become known or apparent for a period longer than that of the statute, the injured plaintiff is left without remedy. The second reason is that the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician or surgeon.

In *Kubrick* the plaintiff patient had treatment for a leg infection in *April 1968*; six weeks after discharge he had ringing in the ears which led to bilateral hearing loss. There is some controversy about various theories about what caused this (occupation work with machines). The Circuit Court of Appeals held that if a medical malpractice claim does not accrue until a plaintiff is aware of his injury and its cause, **neither should it accrue until he knows or should suspect that the doctor who caused the injury was legally blameworthy, and that the two year**

limitations period (normally April, 1970) was not triggered until the second physician indicated, in *June, 1971*, that the neomycin treatment had been improper.

The US Supreme Court Held: A claim ***accrues*** within the meaning of the Supreme Court held FTCA § 2401(b) when the plaintiff knows both the existence and the cause of his injury, and ***NOT*** **at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice.** Hence, respondent's claim accrued in January, 1969, when he was aware of his injury and its probable cause, and thus was barred by the 2-year statute of limitations. The Court, frankly, took a harsh position that a Plaintiff who suffers a bad medical outcome has a prospect

> " . . . not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. *Kubrick*, 444 U.S. at 122."

This has led to many courts around the county, state and federal, dismissing plaintiff's cases under the discovery rule, taking the objective accrual date of injury hardline while other courts, state and federal, have approved of cases going forward under a discovery rule more understanding that plaintiff's often do not have possession of the critical facts and his doctors either not telling him, or not fully telling him that he has been wronged by care falling below the standard

of care. It is a simple fact that most doctors do not want to pass judgment on this for themselves or other doctors.

There are 24 later US Supreme Court cases that cited the *Kubrick* case, but they do not cite it for non-relevant reasons in relation to the discovery rule and change its ruling to grow with the federal circuits and state courts discovery rule expansion beyond the objective accrual standard of date of injury knowledge. The only US Supreme Court ruling that really considers this topic after *Kubrick* was *Rotella v. Wood*, 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047, 68 U.S.L.W. 4153 (2000), which followed the *Kubrick* ruling

> " . . . pattern discovery rule would allow proof even more remote from time of trial and, hence, litigation even more at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities. See, e.g., Klehr, supra, at 187. ***In the circumstance of medical malpractice, where the cry for a discovery rule is loudest, the Court has been emphatic that the justification for such a rule does not extend beyond the injury. United States v. Kubrick, 444 U.S. 111, 122. A person suffering from inadequate treatment is thus responsible for determining within the limitations period then running whether the inadequacy was malpractice.*** There is no good reason for accepting a lesser degree of responsibility on a RICO plaintiff's part. The fact, as

> Rotella notes, that identifying a pattern in civil RICO may require considerable effort does not place a RICO plaintiff in a significantly different position from the malpractice victim, who may be thwarted by ignorance of the details of treatment decisions or of prevailing medical practice standards." Id."

Rotella is also out of step with the reality of complicated medical malpractice causation for most injuries rising to suits.

It is time for the US Supreme Court to grant certiorari in this case to reconsider these very important issues regarding discovery rule statute of limitations in these many decades since *Kubrick* in conflict with many state and federal decisions and leading to disastrous dismissal of many plaintiff's cases contrary to constitutional protections.

A. FEDERAL CIRCUIT COURTS IN CONFLICT WITH KUBRICK AND AMONGST THEMSELVES

Nicolazzo v. United States, 786 F.2d 454 (1st Cir. 1986) distinguished the facts of *Kubrick* and held that plaintiff's awareness that VA physicians were not aiding him did NOT constitute knowledge of injury and its cause.

Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir. 2006) held that ***Kubrick's objective standard did not govern the timeliness of Miller's***

suit and that Barren was factually distinguishable.

Stoleson v. United States, ***629 F.2d 1265 (7th Cir. 1980) held that plaintiff's claim was "unknowable" until she was informed of causal connection between her exposure to nitroglycerin and her heart condition, which was previously not acknowledged by medical community.***

Wollman v. Gross, ***637 F.2d 544 (8th Cir. 1980), held that Congress did not intend "to allow the state statute of limitations to apply whenever plaintiff is unaware of the status of the defendant as a federal employee acting within the scope of his employment."***

Arroyo v. U.S., **656 F.3d 663 (7th Cir. 2011)**

Reiterating 7th circuit's rejection of a *Kubrick*-type rule requiring "all reasonable persons who suffer injuries while under the care of medical professionals [to] assume that their injuries can be attributed to shortcomings in the care they received".

E. Y. v. United States, No. 13-2854 (7th Cir. 2014)

Held that a reasonable trier of fact could find that Ms. Wallace the mother was unaware and had no reason to be aware of the Friend Center's potential involvement in her son's injuries until less than two years before she filed suit.

Santos v. U.S., ***559 F.3d 189 (3d Cir. 2009)***

Holding plaintiff entitled to equitable tolling when she "diligently and vigorously pursued her claim" and, yet, she was unable to ascertain hospital's federal status

Bayless v. United States, **767 F.3d 958 (10th Cir. 2014)**

Holding that an FTCA claim for a plaintiff injured by exposure to nerve gas did NOT accrue during the years in which the plaintiff fruitlessly sought a diagnosis from her doctors, even though, at some point, she had enough information to suspect her injury's true cause

Cloer v. Sec. of Health and Human Serv., ***654 F.3d 1322 (Fed. Cir. 2011)***

Following *Kubrick*: *In Cloer v. Sec'y of Health and Human Services, 654 F.3d 1322 (Fed. Cir. 2011) (en banc) the court held that "the statute's limitations period begins to run on the calendar date of the occurrence of the first medically recognized symptom or manifestation of onset of the injury claimed by the petitioner."*

McIntyre v. U.S., **367 F.3d 38 (1st Cir. 2004)**

Holding that, even assuming arguendo that the plaintiffs had a duty to inquire, their claim would not have accrued during the relevant timeframe because the necessary factual predicate for their claim "was hidden behind a veil of secrecy"

Winter v. U.S., ***244 F.3d 1088 (9th Cir. 2001)***

Holding that the plaintiff's claim had not accrued when, in contrast to Kubrick, "at no point did any doctor tell Steven Winter that the electrodes implanted by Dr. Marsolais caused, or might have caused, his cellulitis"

Brazzell v. United States, ***788 F.2d 1352 (8th Cir. 1986)***

Holding that because the plaintiff's doctor initially told her the cause of her injuries-a vaccination-could not be the cause, the statute of limitations did not begin to accrue until her doctor drew the connection.

B. STATE COURTS IN CONFLICT WITH KUBRICK AND EACH OTHER

Wilson v. El-Daief, 600 Pa. 161 (Pa. 2009) Held: the plaintiff's immediate suspicion of surgical error after surgery did not start the statutory clock as a matter of law because her surgeon denied error and the second opinion she sought suggested surgical error as only one of several possible explanations for her pain. Similar to Mr. Cantu's case.

Degussa Corporation v. Mullens, 744 N.E.2d 407 (Ind. 2001) Holding statute of limitations not triggered where plaintiff suspected illness stemmed from defendant's product and treating physician "said nothing to confirm, deny, or even strengthen her suspicions" Also, similar to Mr. Cantu's case.

Martin v. Richey, ***711 N.E.2d 1273 (Ind. 1999) Holding Indiana Medical Malpractice Act statute of limitations*** *unconstitutional as applied to plaintiffs* ***whose medical condition and the nature of the asserted malpractice make it unreasonable to expect that they could discover the asserted malpractice and resulting injury within the limitations period.***

> Even a restrained interpretation of Section 12 warrants the conclusion that an application of the two-year statute of limitations on the facts of this case violates both Section 12 and "lay concepts of justice." Chaffin, 310 N.E.2d at 870. [11] If Section 12 has any meaning at all, it ***must preclude the application of a two-year medical malpractice statute of limitations when a plaintiff has no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period because, given the nature of the asserted malpractice and the resulting injury or medical condition, plaintiff is unable to discover that she has a cause of action. Stated another way, the medical malpractice statute of limitations is unconstitutional as applied when plaintiff did not know or, in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice, because in such a case the statute of limitations would impose an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim. To***

> ***hold otherwise would be to require a plaintiff to bring a claim for medical malpractice before becoming aware of her injury and damages, an essential element of any negligence claim, and this indeed would be boarding the bus to topsy-turvy land. [12]***

Pedersen v. Zielski, 822 P.2d 903 (Alaska 1992) Holding that even though an informed reading of the medical records may have disclosed the cause of the patient's injuries, it does not necessarily follow that the plaintiff's reliance on the misrepresentations of the defendant doctor were unreasonable, and plaintiff should have the opportunity to prove estoppel. In Mr. Cantu's case the anesthesiologist did NOT put in the records the medical error.

*Maestas v. Zager****, 141 N.M. 154 (N.M. 2007)***

Finding that summary judgment based on the expiration of the statute of limitation was not appropriate, because it was not clear that the plaintiff knew or with reasonable diligence should have known of the decedent's injury and its cause

Anthony v. Abbott Laboratories, 490 A.2d 43 (R.I. 1985)

In Anthony, the court referred to its "conscious balancing of policies" to prevent "the unexpected enforcement of stale claims with the opportunity of a person to have her day in court to vindicate those rights that have been violated but have remained undiscovered or undiscoverable."

Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280, 60 U.S.L.W. 4333 (1992)

The former involves fraudulent concealment; the latter defines undiscovered fraud. The Court concluded in Bailey [*Bailey v. Glover*, 21 Wall. 342, 349–350 (1875)] that fraudulent concealment, which was at issue in that case, tolls the running of the statute of limitation when the fraud "has been concealed, or is of such character as to conceal itself." Id. at 349–350. To hold otherwise, reasoned the Court, would "make the law which was designed to prevent fraud the means by which it is made successful and secure." Id. at 349. In Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946).

Jurich v. John Crane, Inc., 824 N.E.2d 777 (Ind.App. 2005)

In so concluding, we relied primarily on Martin v. Richey, 711 N.E.2d 1273, 1283–84 (Ind.1999), which held the Medical Malpractice Act's two-year occurrence-based statute of limitations violated Article 1, § 12 as applied to plaintiffs who did not know of and could not have discovered the act of malpractice within the two-year period.

> In Walk v. Ring, 202 Ariz. 310, 44 P.3d 990 (Ariz. 2002), the Arizona Supreme Court rejected the *Kubrick* bright-line approach. ***But such a rule would also have some unjust effects. For example, it would bar meritorious actions by those who have been reassured by their doctors, those who have no reason to believe they were negligently injured, or those who had no way to ascertain they were injured through some***

> ***wrongdoing. In addition, it would inject an element of mistrust into the relationship between patients and clients on the one hand and their professional care-givers and advisors on the other. In cases in which an adverse outcome is not in itself sufficient to put a reasonable person on notice to investigate whether a known injury is attributable to negligence, patients and clients should not be required to commence investigation of a malpractice action. We conclude that, on balance, the better rule is the one we have followed before and follow today.***

The *Kubrick* majority justified the bright-line rule with the following reasoning:

> If there exists in the community a generally applicable standard of care with respect to the treatment of his ailment, we see no reason to suppose that competent advice would not be available to the plaintiff as to whether his treatment conformed to that standard. If advised that he has been wronged, he may promptly bring suit.
>
> **"The facts of the present case indicate that such advice is not always so readily forthcoming. Whatever Defendant believed about the propriety of his treatment, he did not tell Plaintiff about the opinion of his colleague or colleagues, and they did not volunteer such information. It is undeniably true that the "best medical treatment sometimes fails,**

. . . or produces bad side effects." Kitzig, 97 Cal.Rptr.2d at 768 (quoting Gutierrez v. Mofid, 39 Cal.3d 892, 218 Cal.Rptr. 313, 705 P.2d 886, 890 (1985)). We decline to adopt a rule that, in every case, would require a patient or client who suffered an adverse result to question her doctors or lawyers about the possible sins of their predecessors. We therefore conclude that for the present case, the questions of discovery, diligent investigation, and resulting accrual were for the jury."

Moreover, if fraudulent concealment is established, the patient is relieved of the duty of diligent investigation required by the discovery rule and the statute of limitations is tolled "until such concealment is discovered, or reasonably should have been discovered." Id. (citing Tom Reed, 39 Ariz. 533, 8 P.2d 449). In fraudulent concealment cases, the duty to investigate arises only when the patient "discovers or is put upon reasonable notice of the breach of trust. . . ." [6] Id. (quoting Griffith v. State, 41 Ariz. 517, 528, 20 P.2d 289, 293).

. . . . Moreover, our cases do not limit the duty to disclose to actual knowledge. A doctor must disclose what he "knew or was chargeable with" knowing. Morrison, 68 Ariz. at 34–35, 198 P.2d at 595.

II. DUE PROCESS IS VIOLATED WHEN STATES DO NOT FOLLOW THEIR OWN CIVIL RULES AND HERE THE SUPREME COURT SHOULD REVERSE WASHINGTON'S RULING AS A BEACON TO ALL STATES AND THIS VIOLATION TOOK AWAY MR. CANTU'S DISCOVERY RULE BASIS FOR HIS SUIT AGAINST THE DOCTOR AND SUIT AGAINST THE HOSPITAL, BOTH WHOM THE COURT DID NOT COMPEL EVIDENCE SUPPORTING THE DISCOVERY RULE, THE EXPERT OPINION, AND THE SUIT.

Washington Courts, in dismissing and failing to reverse dismissal of Plaintiff's medical malpractice case for failure to provide an expert opinion thereon, violate Mr. Cantu's due process constitutional rights by denying application of the discovery rule extending the statute of limitations to join as a party the allegedly negligent anesthesiologist and by denying him litigation discovery information necessary for his Stanford University anesthesiology professor expert to support his case.

We know everyone bringing a case before the US supreme Court claims a due process violation and that most of these cases are seen as a particular individuals slight and review is not accepted. But this time, there is a major systematic problem within the Washington State courts dismissing cases in medical malpractice without allowing the litigation discovery to happen to give

the plaintiffs the information necessary for their mandatory expert to give an opinion to allow the case to proceed. Even having the top expert on topic as Stanford University Anesthesiologist professor on board, without the discovery did not save Mr. Cantu's case.

Breithaupt v. Abram, 352 U.S. 432 (1957)

> . . . due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of "decency and fairness" that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process.

Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951)

> "Due process is perhaps the most majestic concept in our whole constitutional system."

Courts must Continue Summary judgment for Pending Discovery and WA State courts violated Mr. Cantu's Due Process Rights

This duty was applied in a medical malpractice case, *Butler v. Joy*, 116 Wn.App. 291 (2003), where the court held.

> Ms. Butler's attorney, Mr. Umuolo, was retained just the day before the summary judgment hearing. **He appeared without written affidavits in support of a continuance and**

> **presented the motion orally. The hearing was not recorded and we have no indication whether Mr. Umuolo argued that he needed more time to obtain further discovery or what further evidence he expected to produce.** Strictly speaking, his motion does not fit within the guidelines of a CR 56(f) continuance. **However, "[t]he primary consideration in the trial court's decision on the motion for a continuance should have been justice."** *Coggle v. Snow*, 56 Wash.App. 499 (1990). . . . Mr. Umuolo deserved an opportunity to prepare a response on the issues of law. Dr. Joy has not argued that she would have been prejudiced by a continuance. As noted in *Coggle*, it is hard to see "how justice is served by a draconian application of time limitations" when a party is hobbled by legal representation that has had no time to prepare a response to **a motion that cuts off any decision on the true merits of a case.** *Id.* at 508, 784 P.2d 554. ***Because we cannot find a tenable ground for the trial court's decision, we hold that the denial of the continuance was an abuse of discretion.***

The Washington Supreme Court in *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68 (1992), set out the factors in granting a motion to continue a summary judgment motion for additional discovery under CR56(f). In *Tellevik*, 120 Wn.2d at 90 (1992), *Tellevik* dictates that lower courts in Washington MUST grant a motion to continue summary judgment if all of the following three conditions are met (the courts

repeatedly state this in the negative that the lower court cannot be in error if it denies a motion for continuance of summary judgment if any one of the three does not happen, but stated positively the court MUST grant a motion for continuance of summary judgment if all the following are met by the moving party for continuance): (1) the moving party offers a good reason for delay in receiving the desired evidence, (2) the moving party states what evidence would come from additional discovery, and (3) the moving party states the desired evidence will raise a genuine issue of material fact. The Washington State Supreme Court in *Tellevik* applied the three conditions and ruled that "[t]he trial court should have allowed plaintiffs to complete discovery. The necessary information was not obtained because defendants' counsel did not provide the requested documents when asked informally nor when served with requests for production." *Id* at 91. The court, in finding that the plaintiff demonstrated all three factors necessary to show that a continuance should be granted went on to say that the facts the plaintiff claims would be discovered by a continuance "and the reasonable inferences therefrom viewed in the light most favorable to the plaintiffs would raise genuine issues of fact regarding Mrs. Pearson's knowledge of and her acquiescence or consent to the illegal conduct. Therefore, the trial court abused its discretion in not granting the continuance." *Id*.

In *Tellevik*, the facts were the same as in Cantu's in this case: there, plaintiff served interrogatories and requests for production of documents. No answers

came back before defendant brought its motion for summary judgment. Plaintiff found out a needed witness, but he would not answer questions, so plaintiff brought a **CR 56(f) motion to continue the summary judgment motion to complete the discovery.** In our case, Cantu served interrogatories and requests for production of documents. No answers came back before defendant brought its motion for summary judgment. Cantu found out a needed witness (Doctor Usoltsev the anesthesiologist discovered in the month before the 6/6/19 summary judgment motion), but he would not answer questions in a deposition and there were not the required 33 days left before the 6/6/19 summary judgment hearing for the doctor to answer interrogatories even if the court made him a party with less than a month to go, so plaintiff brought a CR 56(f) motion to continue the summary judgment motion to complete the discovery. Similar to *Tellevik*, here, this court should at least find an abuse of discretion. Under (1), as a pro se, he definitely should be given the opportunity to receive the requested discovery months-long delayed by attorneys who have never provided any answers to discovery clearly in non-compliance with court rules. The court knows this: the pecking order is at the top, attorneys who fight hard for their clients within the court rules, below that are attorneys who fight easier and dirty and ignore the court rules, then there is the Pro Se who does his best with the court rules but at the bottom of the pecking order is the mentally challenged Pro Se who will mess up from time to time in trying to follow the court rules, but also the court needs to be more aware of

these Pro Ses and assist them when necessary because the court is also charged with doing justice between the parties. Cantu is mentally challenged from the medical malpractice here and anyone can see that from his pleadings, and it is amazing that he substantially complies with providing the courts with all of the elements of Res Ipsa Loquitur, discovery requests, motions to compel, getting a court issued subpoena for deposition, his many CR 56 and 57 requests, etc. and more reason that the trial court should have granted continuance of summary judgment for him to have the opportunity to get discovery for his experts. And under subsection (4) because Cantu moved to compel discovery several times *before and at* the summary judgment hearing here and on reconsideration. In Cantu's case, Providence Hospital never even came up with any excuses, let alone a self-serving one, for its failure to ever answer at any time any of Cantu's many discovery requests. Similarly, here this court should find the trial court erred in refusing discovery for the first time. Here, pro se Cantu had asked for a continuance and an order compelling discovery to get from Defendants the discovery he submitted to them of interrogatories and requests for production of documents PENDING for nine months since August 2018 without any good faith answer (except Dr. Vaderah's 1/20 answers and one CD of some medical records, but these were not Providence medical records because Dr. Vaderah was with Skagit Valley Medical and NOT with Providence and they had no information relevant here regarding the Providence anesthesia medical malpractice).

These Providence Hospital records were necessary for Plaintiff's potential experts to provide the court DECLARATIONS TO DEFEAT SUMMARY JUDGMENT IN THE PENDING hearing 6/6/19, as argued in CP 90–93, 75–87 RE: Motion to Continue and Motion to Compel Discovery and in all of the eight motions to continue/compel quoted in the chart above. This is all the fault of defendants for not answering discovery required by the CRs AND the 5/19 just-discovered anesthesiologist Dr. Usoltsev refused to go to his deposition 5/31/19 ordered by the court-issued subpoena (CP 99). A court was required to issue this for a Pro Se. Dr. Usoltsev's attorney notified Cantu by mail received the *night before* the 5/31/19 deposition that he would not come for undetailed reasons, CP 90–93 and CP 47–63. The attorney had the gall (in face of discovery court rule and subpoena requiring the deposition and his bald non-compliance and obstruction) to request that the court to allow that deposition to be AFTER the summary judgment hearing on 6/6/19. CP 64–66. This is ridiculous and shows major bad faith dealings on the part of Defendants "hiding the ball" in discovery by simply never providing any discovery and working with Providence to never give any Providence records. It turns out he also worked with Providence to make sure that Cantu never got the anesthesiologist's own medical records he kept himself and never gave providence. Cantu timely moved the court to continue the summary judgment hearing to 8/30/19 and compel the discovery and depositions here.

CONCLUSION

The petition for a writ of certiorari should be granted and attorney fees and costs awarded to Petitioner.

Respectfully submitted,

WILLIAM C. BUDIGAN
Attorney for Petitioner
2601 42nd Ave. W
Seattle, WA 98199-3011
(206) 284-5305
info@budiganlaw.com

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