No. 315096

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

SHANE FAST, JAMIE FAST, the marital community comprised thereof, ROBERT DALTON FAST, and the estate thereof,

Appellants,

KENNEWICK PUBLIC HOSPITAL DISTRICT d/b/a KENNEWICK GENERAL HOSPITAL and d/b/a MID-COLUMBIA WOMEN'S HEALTH CENTER, a Washington public hospital district organized as a government entity, municipal or quasi-municipal corporation; ADAM T. SMITH, D.O., individually and for the marital community with spouse or registered domestic partner Jane Doe Smith; GREGORY SCHROFF, M.D., individually and for the marital community with spouse or registered domestic partner Jane Doe Smith; and DOES 1 through 50,

Respondents

APPEAL FROM THE SUPERIOR COURT OF BENTON COUNTY
HONORABLE CAMERON MITCHELL
BENTON COUNTY CAUSE NO. 12-2-01660-4

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

Constitutional Provisions

Statutes

Washington State Court Rules

Session Laws

Legislative Journals and Reports

Secondary Resources

A. ASSIGNMENTS OF ERROR

1. ASSIGMENT OF ERRORS

a. The trial court erred in granting Defendants partial summary judgment on the claim where medical negligence caused Jamie to lose her unborn child.

b. The trial court erred in granting Defendants summary judgment.

2. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

a. Did the trial court err as a matter of law by granting Defendants partial summary judgment, because it applied the personal injury catch-all statute of limitations to a medical malpractice action, directly in conflict with clear statutes?

b. Did the trial court err as a matter of law by granting Defendants summary judgment under the tort claim form statute, because Defendants are barred from raising a tort claim form defense by their failure to make a tort claim form available?

c. In the alternative, did the trial court err as a matter of law by granting Defendants summary judgment under the tort claim form statute, because the Fasts substantially complied with the statute?

d. In the second alternative, did the trial court err as a matter of law by granting Defendants summary judgment under the tort claim

form statute, because the statute is either unconstitutional as a matter of law, or unconstitutional as applied to this case?

B. STATEMENT OF THE CASE

Plaintiff Jamie Fast established care with Defendant Dr. Smith around the beginning of 2008, with complaints of excessive bleeding and inability to conceive. CP 369-77, 243-47, 382-405, 446-706. She became pregnant around March, 2008. *Id.* Defendants Dr. Smith and Dr. Shroff – medical partners and employees of Defendant Kennewick Public Hospital District, ("Hospital") – attended to Jamie's pregnancy. *Id.* Although Jamie never had diabetes prior to her pregnancy, she did have risk factors for diabetes, and she exhibited several warning signs for diabetes during her pregnancy. *Id.* Despite this, Jamie's sugar levels were not tested until August 29, 2008, when her child had reached 29 weeks, an age of viability. *Id.* The test indicated that Jamie had extremely high blood sugar concentration, and she was admitted to the Hospital on August 30, 2008. *Id.* At the Hospital, Dr. Schroff ordered insulin and intermittent fetal heart monitoring. *Id.* The fetal monitor alarmed several times during the evening and throughout the night. *Id.* Upon each alarm, however, instead of delivering the distressed baby, Dr. Schroff or the nurses simply turned off the monitor. *Id.* When the nurses turned on the monitor around 4:00 a.m. the morning of August 31, 2008, they were unable to detect a

fetal heart beat. *Id.* Jamie's baby had died. *Id.*

Almost three years later, on August 26, 2011, the Plaintiffs served written, good faith requests for mediation to each of the Defendants. CP 132-142, 143-212. Despite the Fasts' repeated attempts to persuade Defendants to mediate, (*Id.*; CP 239-41), by July 10, 2012, the Defendants' counsel communicated that they are not willing to mediate. CP 132-142. On July 18, 2012, the Fasts filed a complaint against Dr. Smith, Dr. Schroff, and the Hospital under Chapter 7.70 RCW (medical negligence), to include a remedy provided by RCW 4.24.010 (parents' right to recover from injury or loss of a child). CP 1-16.

On November 19, 2012, Defendant Dr. Smith filed a motion for summary judgment, to which the other Defendants joined. CP 24-66, 76-104. The trial court awarded summary judgment, (RP 3-8, CP 1224-1236), and the Fasts timely appealed, (CP 1224-1248, 1256-1257).

There are two issues here. First, the Court is asked to determine which statute of limitations applies to Jamie's recovery for the loss of her unborn child: The medical malpractice statute of limitations at RCW 4.16.350; or the personal injury catch-all statute of limitations at RCW 4.16.080(2). Both statutes of limitation provide a three-year bar. But the medical malpractice statute of limitations *is tolled for one year* when a plaintiff requests mediation; whereas the personal injury catch-all statute

of limitations *is not tolled* by requesting mediation. Thus, if the personal injury catch-all statute of limitations is applied here, then the Fasts are time-barred from seeking recovery for the loss of their unborn child. If the medical malpractice statute of limitations applies, however, then it was tolled when the Fasts requested mediation, and the Fasts' claim was timely filed.

Second, this Court is asked to interpret new language under the tort claim form notice statute at RCW 4.96.020, requiring local governmental entities to make available a standard tort claim form. The question presented is whether the local governmental entity can claim a defense under the form notice statute if it fails to make a form available. In the alternative, the question is whether the Fasts substantially complied with the form notice statute. In the second alternative, the question is whether the form notice statute is unconstitutional, either as a matter of law or as applied here.

C. ARGUMENT

1. STANDARD OF REVIEW

The Fasts appeal from the trial court's summary judgment. Appellate review of a trial court's decision on summary judgment is *de*

novo; the appellate court engages in the same inquiry as the trial court.[1] The court reviews material submitted for and against a motion for summary judgment in the light most favorable to the non-moving party.[2] If there are genuine issues of material fact undecided or the moving party is not entitled to judgment as a matter of law, then summary judgment must be denied.[3] "The motion should be granted only if, from the evidence, reasonable men could reach but one conclusion." [4]

2. THE TRIAL COURT ERRED BY GRANTING PARTIAL SUMMARY JUDGMENT BECAUSE THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS AT RCW 4.16.350 APPLIES TO THIS CASE, AND IT WAS TOLLED FOR ONE YEAR WHEN THE FASTS REQUESTED MEDIATION, THERFORE THE FASTS' CLAIM WAS TIMELY FILED.

a. <u>This issue will be determined on statutory construction.</u>

The only question under this issue is which statute of limitations applies to the Fasts' claim for the loss of their baby caused by medical malpractice. The parties do not dispute the material facts pertaining to this issue: The dates when Jamie received health care, when the Fasts requested mediation, and when they filed the complaint. The Fasts relied

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[1] *E.g.*, Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004); Myles v. Clark County, 170 Wn.App. 521, 289 P.3d 650 (2012) *review denied* by Myles v. State, 146 Wn.2d 1015, 297 P.3d 706 (2013)

[2] Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 530, 503 P.2d 108 (1973)

[3] Yakima Fruit, 81 Wn.2d 528; CR 56(c).

[4] Yakima Fruit, 81 Wn.2d at 530; CR 56(c).

upon the tolling provision under RCW 7.70.110, providing that the medical malpractice statute of limitations at RCW 4.16.350 is tolled for one year upon requesting mediation. Without tolling, the Fasts' claim would not have been timely filed. Defendants argue that the medical malpractice statute of limitations does not apply to the entirety of the Fasts' claim, but instead the personal injury catch-all statute of limitations at RCW 4.16.080(2) applies to damages for the loss of their child, which is not tolled by requesting mediation. CP 24-47, 89-101.

This issue will be determined on statutory construction. The interpretation of a statute is a pure question of law and is reviewed *de novo*.[5] The court's fundamental purpose in construing a statute is to give effect to Legislature's intent.[6]

> The fundamental purpose in construing statutes is to ascertain and carry out legislative intent. Arborwood Idaho, LLC v. City of Kennewick, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). The legislature's intent can be discovered from the plain meaning of the statute, which is determined "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The court must not add words where the legislature has chosen not to include them, and the statute must be construed so that all language is given effect. Restaurant Dev., Inc. v. Cananwill, Inc.,

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[5] E.g., Wilson v. Grant, 162 Wn.App. 731, 258 P.3d 689 (Wn.App. Div. 3, Jul 19, 2011) as corrected (Aug 18, 2011).

[6] E.g., Arborwood Idaho, LLC v. City of Kennewick, 151 Wn.2d 359, 367, 89 P.3d 217 (2004); State ex rel. M.M.G. v. Graham, 159 Wn.2d 623, 632, 152 P.3d 1005 (2007); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); City of Seattle v. Fuller, 300 P.3d 340, 342-3 (Wash., 2013).

> 150 Wn.2d 674, 682, 80 P.3d 598 (2003). If the statute remains susceptible to more than one reasonable meaning, it is ambiguous and the legislative history and circumstances surrounding its enactment may be considered. Id. Constructions that yield unlikely, absurd, or strained consequences must be avoided. Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

City of Seattle v. Fuller, 177 Wn.2d 263, 269-70, 300 P.3d 340 (2013).

b. The medical malpractice statutes direct the courts to apply the medical malpractice statute of limitations.

Chapter 7.70 RCW[7] is the cornerstone of Washington's medical malpractice[8] statutes. It begins with Legislature's declaration of police power to modify all actions for damages resulting from health care:

> The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976.

RCW 7.70.010. Courts recognize that our medical malpractice statutes sweep broadly and apply to all civil actions for damages resulting from health care, regardless of how a claim is styled.[9] When an injury results

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[7] The full text of Chapter 7.70 RCW is provided at Ex 1.

[8] The terms "medical malpractice" and "medical negligence" will be used interchangeably herein. E.g., RCW 48.140.010(9) under the Insurance title provides, "'Medical malpractice' means an actual or alleged negligent act, error, or omission in providing or failing to provide health care services that is actionable under chapter 7.70 RCW."

[9] *E.g.*, Harris v. Extendicare Homes, Inc., 829 F.Supp.2d 1023 (2011); Hall v. Sacred Heart Medical Center, 100 Wn.App. 53, 995 P.3d 539, *as amended, review denied* 141 Wn.2d 1022, 10 P.3d 1073 (2000).

from health care, chapter 7.70 RCW controls the actions for damages.[10]

Here, the Fasts allege that the Defendants provided health care below the accepted standard of care, and that they suffer damages as a result. CP 1-16. The Fasts' claim is therefore controlled by Chapter 7.70 RCW. RCW 7.70.030 provides bases for recovery under medical malpractice, and RCW 7.70.040 defines the duty, breach, and causation elements of medical negligence.

Although the Fasts claimed many injuries in their cause, (CP 1-16), the only injury pertaining to this issue is the Fasts' injury for the loss of their viable unborn child. RP 5-7. Legislature expressly provides that parents can recover from the loss of a child:

> A mother or father, or both . . . may maintain or join as a party an action as plaintiff for the injury or death of the child. . . . In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

RCW 4.24.010.[11] It is settled law that parents can recover under RCW 4.24.010 for the death of a viable unborn child.[12] This Court recognized,

A viable unborn child is a "minor child" for purposes of RCW

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[10] *E.g.*, Branom v. State, 94 Wn.App. 964, 969, 974 P.2d 335, *review denied*, 138 Wn.2d 1023, 989 P.2d 1136 (1999); *see also* Hall, 100 Wn.App. at 61; Harris, 829 F.Supp.2d at 1028.

[11] The full text of RCW 4.24.010 is provided at Ex. 3.

[12] *See* Cavazos v. Franklin, 73 Wn.App. 116, 867 P.2d 674 (Wn.App. Div. 3, 1994) and cases cited therein.

> 4.24.010; thus, the parents of such minor child are entitled to sue on their own behalf for the death of their child.

Cavazos v. Franklin, 73 Wn.App. 116.[13] The Fasts therefore maintain an action for damages resulting from health care under Chapter 7.70 RCW, from which they can recover damages for the resulting loss of their child.

The only question under this issue is which statute of limitations applies to the Fasts' claim for the loss of their child resulting from medical malpractice. The Court's task here is simple; Legislature expressly directs that the medical malpractice statute of limitations at RCW 4.16.350 control *all* claims for damages resulting from health care. Legislature "modifies as set forth in this chapter *and in RCW 4.16.350* . . . all civil actions . . . for damages for injury occurring as a result of health care," (RCW 7.70.010 *emphasis added*). RCW 4.16.350 provides in part:

> Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976, against [doctors, nurses, hospitals, or other specified health care providers] . . . based on alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition . . . .

RCW 4.16.350.[14]

The medical malpractice statute of limitations is tolled for one year when a plaintiff requests mediation:

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[13] *Citing* Moen v. Hanson, 85 Wn.2d 597, 537 P.2d 266 (1975); Seattle-First Nat'l Bank v. Rankin, 59 Wn.2d 288, 367 P.2d 835 (1962).
[14] The full text of RCW 4.16.350 is provided at Ex. 2.

> The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

RCW 7.70.110. Here, the Fasts served Defendants written, good faith requests for mediation on August 26, 2011, within the three-year period starting on August 31, 2008. CP 143-212, 132-142. The statute of limitations was therefore tolled for one year. The Fasts filed their complaint on July 18, 2012, (CP 1-16, 141), less than one year after requesting mediation. The Fasts' complaint was therefore timely filed. The partial summary judgment should be reversed.

Because the Legislative intent is clear from the plain meaning of the statute, this inquiry should end here.

c. <u>The personal injury catch-all statute of limitations at RCW 4.16.080(2) does not apply here</u>.

Defendants argue that the personal injury catch-all statute of limitations should control instead. CP 27-48, 89-101. They argue that the Fasts' injury is the result of the death of their baby; that a death is not an "injury"; that recovery from the loss of their baby is not a medical malpractice claim; that the personal injury catch-all statute of limitations thus applies; that the Fasts' claim for mediation did not toll the statute of limitations; and hence the Fasts' claim was not timely. CP 35-40.

(1) Legislature enacted RCW 4.16.350 to deliberately remove medical

malpractice causes from the personal injury catch-all statute of limitations at RCW 4.16.080(2).

Legislature deliberately crafted RCW 4.16.350 to respond to the jurisprudence and practical effects of applying the limitations provisions at RCW 4.16.080(2) to medical malpractice actions.[15] Prior to enactment, former RCW 4.16.010 and RCW 4.16.080(2) "applied to all medical malpractice actions. With enactment of RCW 4.16.350, former RCW 4.16.010 and RCW 4.16.080(2) no longer apply to such actions."[16]

(2) There is no conflict between the medical malpractice statutes and the parents' right to recover from the loss of a child.

Defendants characterize the Fasts' claim as a "wrongful death" action, because the Fasts seek to recover damages from the loss of their child. CP 35-40. Defendants argue that wrongful death actions are "creatures of statute," and that therefore the personal injury catch-all statute of limitations should apply instead of the medical malpractice statute of limitations. *Id.* Defendants recognize that RCW 4.24.010 does not contain a statute of limitation, nor does it reference a statute of limitation. CP 38-40.[17] Courts have applied the personal injury catch-all statute of limitations to claims for the death of a child under RCW

[15] Gunnier v. Yakima Heart Ctr., Inc., 134 Wn.2d 854, 860-63, 953 P.2d 1162 (1998)
[16] *Id.* at 862.
[17] See also Wills v. Kirkpatrick, 56 Wn.App. 57, 785 P.2d 834 (Wn.App. Div. 2, 1990)

4.24.010 when no other statute applies.[18]

The Fasts agree with Defendants that the right to recover damages for the death of a child is a right created by statute. But that is irrelevant. "All of the discussion about 'a liability created by statute' is a red hearing. We do not have a statute of limitations, as many states do, specifically applicable to an action for a liability created by a statute."[19] Because the death of the child here is an injury resulting from health care, the action is controlled by chapter 7.70 RCW, which directs that the medical malpractice statute of limitations at RCW 4.16.350 applies.

Neither does it help Defendants to characterize the Fasts' claim as a "wrongful death" action. Chapter 7.70 RCW applies to "all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care," (RCW 7.70.010). This Court has construed the meaning of "all causes of action" in another statute, and held, "'All' means all. It does not mean simply those causes of action that are not otherwise covered by [another statute]."[20] Where RCW 7.70.010 modifies "all civil actions," it applies to wrongful death actions and actions where remedy is had under RCW 4.24.010. This case

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[18] *Id.*

[19] Bond v. State, 59 Wn.2d 493, 368 P.2d 676 (1962); *see also* Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981) (Washington has no statute of limitations that applies to liabilities by virtue of having been created by statute.).

[20] Wilson v. Grant, 162 Wn.App. at 739 (citations omitted)

is thus subject to chapter 7.70 RCW[21] and RCW 4.16.350.

Finally, the Court is not required to choose whether this cause sounds in "medical malpractice" or "wrongful death." That is a false dilemma. When read properly, the statutes are clear that a medical malpractice action encompasses recovery from the loss of a child. The relevant medical malpractice statutes are "merely particularized expressions of the four concepts fundamental to any negligence action: duty, breach, proximate cause, and damage or injury." [22] The medical malpractice statutes modify duty, breach, and causation, but do not address "damage or injury," (chapter 7.70 RCW); whereas RCW 4.24.010 addresses damages, but not duty, breach, or causation. The statutes are not in conflict; to the contrary, they fit together perfectly. Where the duty, breach, and causation elements of a negligence cause align with chapter 7.70 RCW, Legislature is clear that the medical malpractice cause will be controlled by that chapter, regardless of the damages to be recovered.

Courts recognize the harmony between medical malpractice statutes and damages for wrongful death. Harbeson, for example, applied the medical malpractice statutes to parents' claim for emotional damages

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[21] *See* Branom, 94 Wn.App. 964; Harris, 829 F.Supp.2d 1023; Hall, 100 Wn.App. 53.
[22] Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 468-69, 478-83, 656 P.2d 483 (1983) *quoting* Hunsley v. Giard, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). *See also* Mohr v. Grantham, 172 Wn.2d 844, 850, 272 P.3d 490 (2011).

for injury to their child under RCW 4.24.010.[23] Harbeson cited Herskovitz as a case wherein "the plaintiff mother brought a malpractice action for the death of her child from throat cancer," and later referred to a death case as "a medical malpractice suit for failure to diagnose and treat."[24] Herskovits includes a survivorship action brought by the personal representative of the deceased, yet refers to it as a "medical malpractice case."[25] In Harris, the court applied the medical malpractice statute of limitations to an action resulting in death.[26] The trial court here cited Bennett, (RP 2-3), which applied medical negligence statutes to a case of death from negligent prescribing.[27] The Wilson court recognized that the decedent's father sued for damages "based on a claim of medical negligence."[28] RCW 4.16.350 therefore applies here.

(3) The medical malpractice statute of limitations would be applied here, *even if* RCW 7.70.010 did not direct courts to do so.

It is helpful to compare the two statutes of limitation on their faces:

> Medical malpractice statute of limitations, RCW4.16.350:[29]
> Any civil action for damages for injury occurring as a result of health care against [doctors, nurses, hospitals, or other specified health care providers] . . . based on alleged professional negligence shall be commenced within three years of the act or omission

[23] Harbeson, 98 Wn.2d 460 at 474-78
[24] Harbeson, 98 Wn.2d at 477-78
[25] Herskovits v. Group Health Coop., 90 Wn.2d 609, 610, 664 P.2d 474 (1983)
[26] Harris (829 F.Supp.2d at 1031).
[27] Bennett v. Seattle Mental Health, 150 Wn.App. 455, 208 P.3d 578 (Wn.App. Div. 1, 2009).
[28] Wilson v. Grant, 162 Wn.App. at 735
[29] The full text of RCW 4.16.350 is provided at Ex. 2.

alleged to have caused the injury or condition . . . .

> Personal injury catch-all statute of limitations, RCW 4.16.080(2):[30] The following actions shall be commenced within three years: . . . (2) 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.

Courts recognize that the clause in RCW 4.16.080(2) limiting an action "for any other injury to the person or rights of another not hereinafter enumerated," erects a *catch-all* statute of limitations for personal injury.[31] "The catch-all provision serves as a limitation for any cases not fitting into the other limitation provisions."[32] Because the Fasts' cause fits RCW 4.16.350, the personal injury catch-all statute of limitations does not apply.

Second, this Court has held that specific statutory language controls over general statutory language.[33] RCW 4.16.350 is clearly more specific and therefore controls.

Next, where there is doubt, the longer statute of limitations applies. Statutes of limitation "are in their nature arbitrary,"[34] yet they "deprive a plaintiff of the opportunity to invoke the power of the courts in support of

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[30] The full text of RCW 4.16.080 is provided at Ex. 4.
[31] *E.g.*, Rose, 654 F.2d at 547.
[32] Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 721, 709 P.2d 793 (1985); see also Bond, 59 Wn.2d at 497-98
[33] *E.g.*, Wilson, 162 Wn.App. at 735-736.
[34] *Id.*

an otherwise valid claim."[35] In applying statutes of limitations, our Supreme Court has therefore "insisted on a careful scrutiny of the changing conditions and needs of the times to prevent any application of the common law as an instrument of injustice."[36] The Supreme Court thus adopted the decision rule that "[w]hen there is uncertainty as to which statute of limitation governs, the longer statute will be applied."[37] RCW 4.16.350 is the longer statute here because it is tolled for one year.

Moreover, "tolling provisions, by nature, exist to assure all persons subject to a particular statute of limitations enjoy the full benefit of the limitations period."[38] Here, the intent of tolling provision is encourage medical malpractice cases to settle before litigation.[39] The Fasts should enjoy the full benefit of the tolling provision at RCW 7.70.110.

Finally, a plea of the statute of limitations "is not such a meritorious defense that either the law or the facts should be strained in aid of it."[40] Here, Defendants strain both the law *and* the facts to avoid

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[35] Stenberg, 104 Wn.2d at 714 *citing* 51 Am.Jur.2d Limitation of Actions § 17 (1970).
[36] Ruth v. Dight, 75 Wn.2d 660, 664, 453 P.2d 631 (1969) *citing* Lundgren v. Whitney's Inc., 94 Wn.2d 91, 95, 614 P.2d 1272 (1980).
[37] Stenberg, 104 Wn.2d at 715 (citing Rose, 654 F.2d 546; Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40, 51, 455 P.2d 359 (1969));
[38] Rivas v. Overlake Hosptial Medical Center, 164 Wn.2d 261, 189 P.3d 753 (2008), and cases cited therein.
[39] Bennett, 150 Wn.App. at 460-61 *citing* 1976 Final Legislative Report, 44th Wn. Leg., 2d Ex. Sess., at 22. *See also* Laws of 2006 ch. 8 § 301.
[40] Bain v. Wallace, 167 Wn. 583, 10 P.2d 266 (1932) (citing Hein v. Forney, 164 Wn. 309, 2 P.2d 741 (1931). *See also* Cannavina v. Poston, 13 Wn.2d 182, 188, 124 p.2d 787 (1942); Wickwire v. Reard, 37 Wn.2d 748, 226 P.2d 192 (1951) and cases cited therein;

reaching the merits, by declaring that the Fasts' claim is not a claim for damages resulting from healthcare; by construing "all actions" at RCW 7.70.010 to mean "all actions *except those involving death*"; and by reading the same exception into RCW 4.16.350. "Courts will not read into statutes of limitations exceptions not embodied therein."[41] The medical malpractice statute of limitations applies, which was tolled for one year when the Fasts requested mediation. Their claim was timely filed.

(4) "Injury" includes death.

Defendants argue that the Legislature did not intend for the medical malpractice statute of limitations to cover situations where the doctor's negligence results in a death, because the medical malpractice statutes specify "damages for *injury* resulting from health care," and the term "injury" does not include death. CP 32-41, 94-100. It is worth noting at the outset that Defendants argue instead for application of RCW 4.16.080(2), which likewise refers only to "injury" and not "death."

The medical malpractice statutes describe a health care provider's duty, breach, and causation at RCW 7.70.030, 7.70.040, and 4.24.290. The medical malpractice statutes are silent, however, on what is meant by

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Guy F. Atkinson Company v. State, 66 Wn.2d 570, 573, 403 P.2d 880 (1965) and cases cited therein.

[41] Guy F. Atkinson Co., 66 Wn.2d at 575 and cases cited therein.

"injury."[42] "Where a statute fails to define a term, there is a presumption that the legislature intended the term to mean what it meant at common law."[43] No published opinions define "injury" in this statute. The court can consult a dictionary to ascertain an ordinary term's meaning.[44]

Black's Law Dictionary defines "injury" as "1. The violation of another's legal right, for which the law provides a remedy; a wrong or injustice . . . 2. *Scots law*. Anything said or done in breach of a duty not to do it, if harm results to another in person, character, or property . . . 3. Any harm or damage."[45] The Merriam-Webster Dictionary defines "injury" as "1(a) an act that damages or hurts; 1(b) violation of another's rights for which the law allows an action to recover damages; 2 hurt, damage, or loss sustained."[46] Wherever death is a harm or damage, or wherever death represents a wrong for which the law provides a remedy, such death is an "injury." The law provides a remedy for the wrongful death of a child, (RCW 4.24.010), and therefore such wrongful death is an "injury." RCW 4.16.350 applies to "[a]ny civil action for damages for injury occurring as a result of health care," and thus controls this cause.

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[42] *See* Mohr, 172 Wn.2d 844
[43] Baum v. Burrington, 85 Wn.2d 597, 537 P.2d 266 (2003); *see* RCW 4.04.010.
[44] State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008).
[45] Black's Law Dictionary **8/e**, Bryan A. Garner, Ed. in Chief. West Publishing Co., St. Paul, Minnesota, (2004). p 801.
[46] Mirriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/injury [Accessed 11 March 2013].

The statute at RCW 4.24.010 provides parents a remedy for a wrong that causes their child's death, which brings wrongful death of a child squarely within the definition of "injury." Courts recognize that "injury" includes "death." For example, Stenberg characterizes wrongful death as "ultimate injury."[47] Cavazos describes wrongful death as "the most grievous of all injuries."[48] Hedrick notes that the precursor of RCW 4.24.010 construed the time of death as "the time of injury."[49]

Legislature enacted the medical malpractice statutes at chapter RCW 7.70 along with its revision of RCW 4.16.350 within the same act in 1976,[50] over a hundred years after the Washington code provided a remedy for the wrongful death of a child. Had Legislature intended to exclude the injury of death from the medical malpractice statutes, it could have easily done so. Indeed, Legislature did enumerate an exception at RCW 4.16.350, "This section does not apply to a civil action based on intentional . . . childhood sexual abuse as defined in RCW 4.16.340(5)." Legislature could have created a subsection to exclude wrongful death cases, or it could have specified that the statute applies to any claim for "injury *except* death." But it did not. And "[c]ourts will not read into

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[47] Stenberg, 104 Wn.2d at 719
[48] Cavazos, 73 Wn.App. at 118
[49] Hedrick v. Ilwaco R. & N. Co., 4 Wn. 400, 30 P. 714, (1892) construing Code of 1881 § 8.
[50] Laws of 1975-76 2d Ex. Sess., ch. 56 §§ 6, 1. A complete copy of the chapter is provided at Ex. 5.

statutes of limitations exceptions not embodied therein."[51]

The wrongful death of a minor child is therefore an "injury" to the parent, and where such injury results from of health care, it is limited by RCW 4.16.350. The partial summary judgment should be reversed.

(5) Legislature intended the eight-year repose it wrote in the medical malpractice statute of limitations.

Defendants argued that RCW 4.16.350 cannot apply to cases where medical malpractice results in death, because there could be some cases where death does not occur until after the eight-year statute of repose at RCW 4.16.350, and therefore some claims could be barred before the action arises, and Legislature did not intend to bar actions before they arose. CP 32-41, 94-100. Such interpretation, however, fails to recognize the meaning of a statute of repose; ignores the plain language of the statute; and disregards the express intent of Legislature.

A statute of repose specifically operates to bar claims, even if an action has not accrued.

> As this court has explained, statutes of repose are "of a different nature than statutes of limitation." Rice v. Dow Chem. Co., 124 Wn.2d 205, 211, 875 P.2d 1213 (1994). "A statute of limitations bars plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred." Id. at 211-12, 875 P.2d 1213 (citations omitted).

[51] *E.g.*, Guy F. Atkinson Co, 66 Wn. 2d at 575 and cases cited therein.

1000 Virginia Limited Partnership v. Vertecs Corporation, 158 Wn.2d 566, 146 P.3d 423 (2006) *as corrected*.[52]

RCW 4.16.350 specifies that a claim for medical malpractice

> 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. . . .

RCW 4.16.350 (*emphasis added*).

Legislature first created the statute of limitations at RCW 4.16.350 in 1971 with the following language, RCW 4.16.350 (1971):

> Any civil actions for damages against a hospital . . . or against [a health care provider] . . . based upon alleged professional negligence shall be commenced within (1) three years from the date of the alleged wrongful act, or (2) one year from the time that the plaintiff discovers the injury or condition was caused by the wrongful act, whichever period of time expires last.

Laws of 1971 ch. 80.[53] Because there was no limit to the one-year discovery rule, the insurance industry "asserted that because of this 'long

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[52] *See also, e.g.,* Gunnier, 134 Wn.2d at 863

[53] A complete copy of Laws of 1971 ch.80 is provided at Ex. 6.

tail effect' and other reasons, much higher medical malpractice liability premiums were required to cover present and future claims against health care practitioners."[54] Legislature responded in 1976 by writing the eight-year statute of repose in RCW 4.16.350. "The eight-year statute of repose was enacted in 1976 in response to a perceived insurance crisis said to result from the discovery rule and from increased medical malpractice claims, which allegedly created problems in calculating and reserving for exposure on long-tail claims. Laws of 1975-76, 2d Ex. Sess., ch 56." DeYoung, 136 Wn.2d at 147. "By enacting an eight-year statute of repose, the Legislature intended to protect insurance companies while 'hopefully not resulting in too many individuals not getting compensated.'" *Id.*[55]

The DeYoung court held the eight-year statute of repose unconstitutional under an equal protection analysis.[56] Applying minimal or "rational basis" scrutiny,[57] the DeYoung court found that legislators had evidence that only 0.2 percent of claims would be affected by the eight-year statute of repose, and that such few cases "could not rationally be thought to have any chance of actuarially stabilizing the insurance industry

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[54] DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 147, 960 P.2d 919 (1998) (*citations omitted*).
[55] *citing* House Journal, 44th Legis. Sess. 318 (1976) (comment by Rep. Walt O. Knowles)
[56] DeYoung, 136 Wn.2d 136
[57] DeYoung, 136 Wn.2d 136

even if an insurance crisis did exist."[58] Thus, the repose was deemed unconstitutional because "[t]he relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight-year statute of repose is too attenuated to survive rational basis scrutiny."[59]

In 2006, however, Legislature answered the DeYoung court and re-enacted the eight-year statute of repose at RCW 4.16.350, expressly declaring their intent at Laws of 2006, ch. 8, Sec. 301, including not only to control the cost of medical malpractice insurance, but also to protect health care providers from having to defend against stale claims.[60] Legislature understood and intended that the repose would bar some claims before they have accrued. It does not follow that RCW 4.16.350 would not apply where a cause could be barred before it accrued.

(6) Applying the personal injury catch-all statute of limitations would lead to absurd results, would open the floodgates of litigation, would expose healthcare providers to indeterminate liability, would circumvent Legislature's intent, and would render RCW 4.16.350 unconstitutional.

"A statute is not to be interpreted in such a way that it produces an absurd result or renders meaningless its enactment."[61]

"The legislature adopted the medical malpractice act, chapter

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[58] DeYoung, 136 Wn.2d at 148-149
[59] DeYoung, 136 Wn.2d at 149.
[60] The full text of Laws of 2006, ch. 8, Sec. 301 is provided in Ex. 7
[61] *E.g.*, Kirk v. Moe, 114 Wn.2d 550, 789 P.2d 84 (1990) citing Pasco v. Napier, 109 Wn.2d 769, 773, 755 P.2d 170 (1988).

7.70 RCW, in response to the escalating cost of medical malpractice insurance and the corresponding rise in health care costs,"[62] and "to provide incentives to settle cases before resorting to court."[63] Legislative intent would be circumvented if plaintiffs could avoid the eight-year repose by waiting until death, then resurrecting negligence claims under "wrongful death" that had been barred under "medical malpractice" decades earlier.[64] Here, for example, the Fasts' allege that if Dr. Smith had performed a diabetes screen when it should have been performed, then Jamie could have controlled her diabetes and would not have progressed irreversibly to insulin dependence. CP 1-16. Under the Defendant's rationale, Jamie could miss the statute of limitations under medical malpractice, wait for decades until she dies naturally, then her personal representative could come forward and sue Dr. Smith under wrongful death for the same negligent acts or omissions that had been time barred under medical malpractice. Because this is an absurd result that belies legislative intent, the medical malpractice statute of limitations *must* apply, even where medical negligence results in death.

Conversely, if the personal injury catch-call statute of limitations

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[62] Bennett, 150 Wn.App. at 460, *citing* 1976 Final Legislative Report, 44th Wn. Leg., 2d Ex. Sess., at 22.
[63] *Id.* at 460-461, *citing* Laws of 2006, ch. 8, § 1. *See also* Laws of 2006 ch. 8 § 301.
[64] Washington law provides a remedy from the lost chance of survival, even where a medical negligence victim faced an already-less-than-fifty-percent chance of survival. *See* Herskovits, 90 Wn.2d at 614

applies to medical malpractice causes that result in death, then plaintiffs could bring their claims back under the medical malpractice statute of limitations by suing not for wrongful death, but instead for a 100 percent lost chance of survival under the medical malpractice statute of limitations. Indeed, Herskovits stands for the principle that a lost chance of survival is a separate injury than the death itself.[65] If this Court agrees with the trial court that the personal injury catch-all statute of limitations applies to recovery for death from medical negligence, but the medical malpractice statute of limitations applies to injuries *except* death, then the Fasts could merely elect to pursue recovery for the 100 percent lost chance of survival under the medical malpractice statute of limitations. Such interpretation is again absurd, and would circumvent any purported legislative intent under the Defendant's rationale.

Such consequences would also contravene Legislature's purpose under RCW 4.16.350 to reduce medical liability insurance rates, and to prevent health care providers from having to defend against stale claims, (*see* above). Where Legislature has imposed the eight-year repose at RCW 4.16.350 to cap the prior *indefinite one-year* discovery rule under RCW 4.16.350 (1971), Defendants ask the court here to create an *indefinite three-year* discovery rule, extending for the life span of every

[65] See discussion in Herskovits, 90 Wn.2d at 631-633.

patient a provider treats during his career, and resurrecting liabilities upon death that had been barred decades earlier. Rather than stabilize medical malpractice insurance, Defendants' rationale would instead open every physician to indeterminate liability. Moreover, with the advent of electronic medical records and systems to facilitate their collection, retention, and sharing, such an interpretation invites a "wrongful death mill," where each obituary triggers a consultant to mine a database of medical records to drum up a series of wrongful death actions against physicians – or their estates – who probably decades earlier committed some act or omission that contributed, however slightly, to a sooner death than would have otherwise been expected. Applying the personal injury catch-all statute of limitations would thus expose health care providers to indeterminate liability and open the floodgates of litigation, in direct conflict with Legislature's purpose.

Finally, because the Defendants' rationale would widen claims and expose providers to indeterminate liability years beyond the eight-year repose, RCW 4.16.350 would be rendered unconstitutional. The repose at RCW 4.16.350 would be even less able to survive the "rational basis" scrutiny applied in DeYoung. It would not be rationally related to its purposes of reducing medical malpractice insurance premiums and relieving providers from having to defend against stale claims. The

personal injury catch-all statute of limitations must not be applied.

(7) Neither *Wills v. Kirkpatrick* nor *Bennett v. Seattle Mental Health* applies here.

The trial court relied upon Wills v. Kirkpatrick[66] and Bennett v. Seattle Mental Health in arriving at its decision. RP 2-3. Neither of those cases applies here. The issue in Bennett was whether an adult dependent would be deemed a "minor" child under RCW 4.24.010, so the parents could maintain an action for the death of their adult son.[67] Here, it is not contested that the Fasts can recover damages for the loss of their baby under RCW 4.24.010. Bennett simply has no relevance to this case.

Many of Defendants' arguments were before the Wills[68] court, and are addressed in the rebuttals above. The facts in Wills are distinguished here. In Wills, the decedent's son discovered in 1985 that medical negligence was probably the cause of his mother's death in 1983. By the time he filed a lawsuit for wrongful death, the medical malpractice limitations had already expired, because under 4.16.350, a cause accrues when the *act or omission* occurs. Outside medical malpractice, however, a wrongful death cause accrues when the *injury* (death) occurs. In Wills, applying the medical malpractice statute of limitation resulted in barring

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[66] The RP refers to "Wells," (*e.g.*, RP 2), but it is obvious from the briefs and the decision that the trial court meant Wills v. Kirkpatrick, 56 Wn.App. 57, 785 P.2d 834 (Wn.App. Div. 2, 1990).
[67] Bennett, 150 Wn.App. 455.
[68] Wills, 56 Wn.App. at 785

the case, but applying the personal injury catch-all statute of limitations preserved it. The Wills court recognized that "Washington's wrongful death statute does not contain an express statute of limitations. Rather, wrongful death actions are governed by Chapter 4.16 RCW which sets forth the statutes of limitation applicable to different types of actions."[69] The Wills court recognized that RCW 4.16.080(2) "has been applied to wrongful death claims because such claims qualify as 'any other injury to the person or rights of another not hereinafter enumerated.'"[70] The Wills court incorrectly concluded, however, that the medical malpractice statute of limitations does not apply where medical negligence results in death.

Wills is further distinguished from this case because Wills involves a question of wrongful death under chapter 4.20 RCW, Washington's Wrongful Death and Survivorship Actions statutes. The Wills court reasoned that medical malpractice statutes were intended to provide recovery for personal injury, not to statutory beneficiaries for others' injuries under chapter 4.20 RCW.[71] The remedy under RCW 4.24.010, however, provides that the loss of a child is an actionable injury to the parents.[72] Moreover, it is Defendants' negligence in treating Plaintiff, mother Jamie, that caused the injuries. Because Jamie is both the patient

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[69] Wills, 56 Wn.App. at 759.
[70] *Id.* at 760.
[71] *Id.* at 761
[72] *E.g.*, Harbeson at 476.

and the plaintiff, the rationale of Wills does not apply here.

Furthermore, the Wills court based its decision on the mistaken belief that Legislature did not intend to bar claims under the eight-year repose before they accrued.[73] Since the Wills court rendered its decision in 1990, however, Legislature responded in 2006 to clarify that it *precisely* intended to bar claims with the eight-year repose, (*see* discussion *above*).

Finally, it is worth noting that Wills is the only reported decision in Washington addressing the question of whether the personal injury catch-all statute of limitations would control over RCW 4.16.350. It was decided in 1990, and it has never since been cited in any other published opinion for the point of law for which the Defendants offer it here.

d. Conclusion

The Fasts maintain a medical malpractice action subject to chapter 7.70 RCW, against health care providers who provided health care to Jamie that caused the loss of her son. RCW 4.16.350 is thus the controlling statute of limitations, and was tolled by RCW 7.70.110 when the Fasts requested mediation. The Fasts' cause was timely filed, and the partial summary judgment should be reversed.

3. THE COMPLAINT WAS PROPERLY FILED BECAUSE DEFENDANTS HAVE NO DEFENSE UNDER THE TORT CLAIM FORM NOTICE STATUTE AT CHAPTER 4.96 RCW.

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[73] Wills, 56 Wn.App. at 763.

a. Defendants are barred from raising a defense under chapter 4.96 RCW, because they failed to make available a tort claim form as required under RCW 4.96.020.

This is an issue of first impression on the new tort claim form requirements at RCW 4.96.020(3). Legislature waived sovereign immunity to hold both the state of Washington as well as local governmental entities liable for their torts.[74] Washington does require, however, that claimants against the state or local governmental entities give notice of their claims at least 60 days before commencing a lawsuit.[75]

Prior to 2009, the tort claim notice statutes at chapters 4.92 and 4.96 RCW did not require any "form;" they merely required claimants to give notice of their claim to the state (chapter 4.92 RCW), or to the local governmental entity (chapter 4.96 RCW), to include information sufficient for the state or entity to investigate, evaluate, and settle the claim before a lawsuit is commenced.[76] Valid claims were being dismissed under those statutes, however, because of the "tricky procedural requirements" regarding when, how, and to whom a tort

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[74] See RCW 4.92.010; RCW 4.96.010; Medina v. Public Utility District No. 1 of Benton County, 147 Wn.2d 303, 53 P.3d 993 (2002)
[75] RCW 4.92.100; RCW 4.96.020
[76] See RCW 4.96.020 (2008); RCW 4.92.100 (2008); Daggs v. City of Seattle, 110 Wash.2d 49, 57, 750 P.2d 626 (1988); Williams v. State, 76 Wash.App. 237, 248, 885 P.2d 845 (1994); Renner v. City of Marysville, 168 Wn.2d 540, 545, 230 P.3d 569 (2010); Hall v. Niemer, 97 Wn.2d 574, 582, 649 P.2d 98 (1982)

claim was to be served, and precisely what was required in the contents.[77] In 2009, Legislature addressed this issue and revised the tort claim notice requirements under chapters 4.96 and 4.92 RCW. Laws of 2009 ch. 433 § 1. Legislature expressly passed the law as a remedial act, outraged that courts had been unjustly denying claims on "gotcha" technicalities that even the courts regarded as unduly harsh:[78]

> Injured plaintiffs' claims are being denied because of the strict claim filing statutes. The original intent of the statutes was to provide notice so that the government can get the facts of the claim and investigate. They were not meant to be "gotcha" statutes. Some of the procedural requirements are tricky. Cases are being dismissed based on technical interpretations of the statute. The bill is aimed at restoring the original intent. It corrects historical unfairness and makes the statute functional. It requires notice to the government, but eliminates the barnacles of judicial bureaucracy.

H.B. Rep. on Engrossed Substitute H.B. 1553 at 4, 61st Leg. Reg. Sess. (Wn. 2009). The Myles court recognized that prior case law is superseded by statute.[79]

One of Legislature's 2009 fix was to require that the state and the local governmental entities make available a "form" that would specify what information claimants should provide, and include detailed information about when, where, how, and to whom the "form" should be

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[77] *See* H.B. Rep. on Engrossed Substitute H.B. 1553 at 4, 61st Leg. Reg. Sess. (Wash. 2009); Myles, 170 Wn.App. 521; Renner, 168 Wn.2d 540.
[78] *E.g.*, Reyes v. Renton, 121 Wn.App. 509, 86 P.3d 155 (2004).
[79] Myles, 170 Wn.App. 521 (Wn.App. Div. 2, 2012).

served to the state or local governmental entity:

> Local governmental entities shall make available the standard tort claim form described in this section with instructions on how the form is to be presented and the name, address, and business hours of the agent of the local governmental entity. . . .

RCW 4.96.020(3)(c); Laws of 2009 ch. 433 § 1. If a local governmental entity does make the form available, then it is barred from raising a defense under the chapter:

> The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.

RCW 4.96.020(2). In short, a local governmental entity cannot complain that it did not receive a completed tort claim form, if it does not make a tort claim form available.

Defendant Hospital is a public hospital district, a "local governmental entity," and Defendants Dr. Smith and Dr. Schroff are its employees. Thus, RCW 4.96.020 required the Fasts to complete the Hospital's form and present it to them 60 days before commencing its lawsuit. But *the Hospital has no form.* Therefore, the Hospital is *precluded by law* from defending that it did not receive a form.

Even so, the Fasts provided sufficient notice of their claim to the Hospital. They had been discussing the case with Defendants' counsel, and trying to convince Defendants to mediate for *over 10 months* prior to

commencing their lawsuit. Defendants cannot in good faith assert that they did not have notice of the claim. Finally, the tort claim form requirement did not apply to medical malpractice cases until June, 2012, about a month before the Fasts commenced their claim.[80] Thus, *for the first nine months* that the Fasts were discussing their claim and trying to convince Defendants to mediate, *the Fasts were not even required to provide notice.*

For these reasons, the summary judgment should be reversed.

(1) Defendants failed to make available a tort claim notice form.

The Fasts' attorney diligently attempted to obtain a tort claim form from Hospital and from the state to comply with RCW 4.96.020. But there was no such form. CP 140-42. When Defendants attempted to raise a defense under chapter 4.96 RCW, the Fasts' attorney repeated his diligence to document that Defendants do not make available a tort claim form. The Fasts' attorney first phoned Defendant Hospital; no one was aware of any tort claim form; and despite his request, no one returned his call. CP 142. Second, a comprehensive search of Hospital's website reveals that there is no tort claim form or reference to a tort claim form. CP 117-19, 142, 788, 825-1192. Third, a private investigator went to the Defendant Hospital's premises to obtain a standard tort claim form. CP

[80] *See* RCW 4.96.020 (2011); *c.f.* RCW 4.96.020 (2012); Laws of 2012 ch. 250.

117-19, 289-99. He spoke with the receptionist, with Sebina Pettingill, (Risk Manager), and with Mary T. Schumacher, (one of the two agents authorized to receive a tort claim form). *Id.* The investigator was informed that there is no such tort claim form, and that furthermore, persons are not required to complete any such form before filing a lawsuit against the hospital. *Id.*

Finally, the Fasts deposed Mary T. Schumacher, (CP 769, 774-86), a 30-year employee of Defendant Hospital, who works for the Hospital's CEO, and is one of the two authorized agents to receive a tort claim form on behalf of Defendants, (CP 778-79). Under oath, she admitted that she is aware of such a thing as a tort claim form, but she could not recall the last time she received one, (CP 781). When asked how one would go about obtaining a tort claim form, she admitted that the hospital has no process in place for a person to obtain a tort claim form, (CP 782-83), and was ultimately unable to answer how one would go about obtaining a tort claim form, (CP 778-785). She volunteered that she is aware that because of a change in the law, local governmental entities are now supposed to make claim forms available, (CP 782 ln 11-16). When asked directly whether the hospital makes a tort claim form available, her answer was, "Well, we are going to . . ." (CP 784).

Because Defendants did not make available a tort claim form as

required under RCW 4.96.020(3)(c), they have failed to comply with the requirements of RCW 4.96.020, and under RCW 4.96.020(2), they are barred from raising this defense.[81] The trial court therefore erred when it ruled that the tort claim form statute at RCW 4.96.020 prevents the Fasts from pursuing its cause, and summary judgment should be reversed.

This conclusion is clean. It is reached without invoking construction, without judging substantial compliance, and without constitutional issues. The Court's inquiry into this issue can end here.

(2) Defendants cannot escape their statutory obligations by declaring that the word "section" means "subsection."

Defendants argue that their failure to comply with RCW section 4.96.020(3) *would not* bar them from raising a defense under Chapter 4.96 RCW. CP 27-47, 89-101. RCW 4.96.020(2) states in part, "The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter." Defendants argue that the phrase "this section" in RCW 4.96.020(2) really means "this *subsection* (2)," hence failure to comply with subsection RCW 4.96.020(3)(c) does not mean that failure to comply with "this section" as that phrase is used in subsection RCW 4.96.020(2).

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[81] *E.g.*, Mavis v. King County Public Hosp. No. 2, 159 Wn.App. 639, 248 P.3d 558 (2010) (local governmental entity barred from raising defense because of failure to comply with a requirement of RCW 4.96.020).

The Revised Code of Washington is quite clear, however, about what constitutes a chapter and a section:

> Numbering system: The number of each section of this code is made up of three parts, in sequence as follows: Number of title; number of chapter within the title; number of section within the chapter. Thus RCW 1.04.020 is Title 1, chapter 4, section 20. The section part of the number (.020) is initially made up of three digits, constitutes a true decimal, and allows for new sections to be inserted between old sections already consecutively numbered, merely by adding one or more digits at the end of the number. In most chapters of the code, sections have been numbered by tens (.010, .020, .030, .040, etc.), leaving vacant numbers between existing sections so that new sections may be inserted without extension of the section number beyond three digits.

Revised Code of Washington (2012) Preface p iv.[82] RCW 4.96.020 thus constitutes a "section." Legislature properly uses the terms "section" and "subsection" elsewhere within RCW 4.96.020, and could have easily restricted the application of RCW 4.96.020(2) to subsection (2) if they had intended to do so. But they did not. Failure to comply with RCW 4.96.020(3)(c) is failure to comply with 4.96.020, and RCW 4.96.020(2) therefore bars any defense under chapter 4.96 RCW.

(3) Defendants were not excused from their statutory obligation by the fact that the office of financial management was also required to make a tort claim form available, *especially* where the office of financial management *did not* make a standard tort claim form available.

[82] A copy of Revised Code of Washington (2012) Preface p iv is provided in Ex. 8.

RCW 4.96.020(3) provides that "claims for damages must be presented on the standard tort claim form that is maintained by the *risk management division of the office of financial management* . . . . The standard tort claim form must be posted on the *office of financial management's* web site," (*emphasis added*). RCW 4.96.020(3)(e) further states that "[p]resenting either the standard tort claim form or the local government tort claim form satisfies the requirements of this chapter." Defendants argue that they are excused from their obligation to make a tort claim form available because the state is supposed to make one available that will suffice.

First, Defendants' interpretation is untenable because it would render moot the statutory language at RCW 4.96.020(3)(c) mandating that local governmental entities "shall" make a form available. Courts should "give effect to all of the language in a statute."[83]

Second, **there is no tort claim form on the Office of Financial Management's website**. ***In fact***, **THERE IS NO Risk Management Division of the Office of Financial Management**, which under RCW 4.96.020(3) is responsible for maintaining a standard tort claim form. The legal sufficiency of any form provided by Office of Financial Management therefore **could not possibly excuse** Defendants' failure to

[83] Wilson v. Grant, 162 Wn.App at 736.

make a tort claim form available, **because Office of Financial Management did not make a tort claim form available, either**.

The Fasts' attorney did, however, locate a *different* tort claim form maintained by a *different* Washington State agency, for the purpose of a *different* tort claim filing statute. CP 813-24. It clearly *is not* the correct form required under RCW 4.96.020. The form states that it is provided "[p]ursuant to Chapter 4.92 RCW," *not* chapter 4.96 RCW. CP 815. It states that it collects information required by RCW 4.92.100, *not* RCW 4.96.020, (*id.*). It directs claimants to present the form to "Department of Enterprise Services, Office of Risk Management" in Olympia, *not* to the registered agent of the local governmental entity, (*id*). It prompts the claimant to declare the "State agency or department alleged responsible for damages/injury." CP 816. Local governmental entities are not state agencies or departments. The form requests the names of "all state employees having knowledge about this incident," (*id.*). It prompts the claimant to complete the blank at, "I claim damages *from the state of Washington* in the sum of $_____," (*emphasis added*). CP 817. Then it requires signatures under the banner, "I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct." Such declaration should give anyone a harrowing pause before signing a claim against the state of Washington

when the claimant *is not* claiming against the state of Washington, but instead against a local governmental entity. The form includes an authorization for "Release of Protected Health Information (PHI) to Department of Enterprise Services, Office of Risk Management," wherein the claimant authorizes "disclosure of my protected health information to the Department for Enterprise Services, Office of Risk Management (Risk Management) for purposes of processing my claim for damages filed with the state of Washington," (CP 818). The authorization includes a directive "To the Provider or Records Custodian" to deliver the records to "Department of Enterprise Services, Office of Risk Management" in Olympia. CP 819. No claimant against a local governmental entity should expect to have his medical records sent to the state of Washington. The form also informs claimants that "ORM objectively determines the state's liability for claimed injuries. It fairly compensates claimants for damages when liability is supported," (CP 824). Not only should a claimant not expect ORM to adjudicate a claim against a local governmental entity, but he should not expect a determination of the "state's liability for claimed injuries," and should even less expect that ORM "fairly compensates claimants" when the liability belongs to a local governmental entity, not the state. Had the Fasts followed the instructions on the form, they would have sent it to

the state of Washington, and Defendants would have never seen it.

To underscore that is the incorrect form to comply with chapter 4.96 RCW, Legislature recently modified RCW 4.92.100 – requirements to present claim forms *to the state* – to refer to this form, maintained by office of risk management, and posted on the department of enterprise services' web site. Laws of 2013 ch. 188.[84] But Legislature *did not modify RCW 4.96.020* – the requirements to present claim forms *to a local governmental entity*. Laws of 2013.

The Fasts' attorney nevertheless delivered information on that form to Defendants, with the disclaimer, "This Standard Tort Form is not required for this cause. The Claimants, however, offer this Standard Tort Form as a courtesy and convenience to the Respondent," (CP 281). The Fasts' did not intend to wait for 60 days after delivering that information, because first, it was an inappropriate form to claim against a local governmental entity. Second, the Fasts had already substantially complied with chapter 4.96 RCW long before they field their complaint, (*see* substantial compliance argument, below). Finally, and most importantly, the Fasts were not required to wait for 60 days because the Defendants' failure to make a tort claim form available barred their ability to raise a defense under chapter 4.96 RCW, (above). The

[84] The full text of Laws of 2013 ch. 188 is provided at Ex. 9

existence of an improper form does not excuse Defendants' failure to make a proper one available.

b. In the alternative, the Fasts substantially complied with RCW 4.96.020.

RCW 4.96.020(5) states a Legislative directive: "With respect to the *content* of claims under this section *and all procedural requirements* in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory." RCW 4.96.020(5) (emphasis added). Substantial compliance is met where a statute has been followed sufficiently to carry out the intent for which it was adopted.[85] Substantial compliance is determined on the facts of each case.[86]

The intent of the tort claim form filing statute at 4.96.020 is to allow government entities time to investigate, evaluate, and settle claims before they are sued,[87] and to encourage negotiation and settlement of claims.[88] To those ends, "the claim filing statute is intended to provide local governments with notice of potential tort claims, the identity of the claimant, and general information about the claim."[89] The proper inquiry, therefore, is "whether the information the claimant provided

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[85] *E.g.*, In re Habeas Corpus of Santore, 28 Wn.App. 319, 623 P.2d 702 (Wn.App. Div. 2, 1981).
[86] *Id.*
[87] *E.g.*, Connelly v. Snohomish County Public School District # 1, 145 Wn.App. 941, 187 P.3d 842 (2008); Renner, 145 Wn.App. 443; Troxell v. Rainier Public School Dist. No. 307, 154 Wn2d 345, 11 P.3d 1173 (2005).
[88] Hall v. Niemer, 97 Wn.2d 574, 582, 649 P.2d 98 (1982).
[89] Renner, 145 Wn.App. at 546

fulfills the purposes of the requirement of claim filing statute, [RCW 4.96.020] liberally construed."[90] A claimant who "makes a bona fide attempt to provide the required information [under RCW 4.96.020] will substantially comply when the information provided fulfills the purpose of the statute."[91] Legislature struck the health care exemption from RCW 4.96.020 in 2012 to prevent public hospitals from being sued without notice.[92] Therefore, the Fasts will have substantially complied with the requirements at RCW 4.96.020 if they provided sufficient information for Defendants to conduct an investigation and determine if they wish to settle, in sufficient time for them to make that decision before being sued.

Here, the Fasts' attorney, Mr. Rodgers, delivered letters requesting mediation to Defendants on August 26, 2011. CP 143-212. The letters contained details of the incident, a request to mediate, and a commitment to wait at least 30 days before filing suit. *Id.* A few days later, Defendants' then-counsel, Mr. Aiken, informed Mr. Rodgers that he had received the letters. CP 132-142. Over the next several weeks, Mr. Rodgers and Mr. Aiken conversed via telephone and electronic mail. *Id.* Mr. Aiken indicated that Defendants were well aware of the incident.

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[90] Renner, 168 Wn.2d at 548.
[91] *Id.* at 549.
[92] SSB 6187 Final Bill Rpt. of Laws of 2012 ch. 250. C.f. Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010); RCW 7.70.100.

Id. Mr. Rodgers agreed to provide additional notice before commencing a suit, even though no such notice was required.[93] *Id.* In September, 2011, Mr. Rodgers related his difficulty obtaining some records from Hospital, (CP 132-42), and forwarded information to Hospital, including Jamie's date of birth, social security number, Washington Driver License, dates of the incident, and Hospital's medical record number imprint. CP 214-20. In November, 2011, Mr. Aiken delivered to the Fasts' attorney a complete set of medical records from Hospital, including her address, employer, phone number, nearest relatives, and detailed insurance information. CP 132-42, 229, 231-37.

On February 1, 2012, the Fasts' attorney served a second request for mediation to Defendants' counsel, Jerome R. Aiken, recommending six mediators, including their contact information and/or website addresses. **CP** 132-42, 239-41. The letter requested, "Please respond at your earliest convenience if your clients are not willing to mediate, so that we can proceed accordingly." *Id.* By July 10, 2012, Mr. Aiken confirmed that the hospital, physicians, and nurses did not wish to mediate. CP 132-42. The Fasts filed on July 18, 2012. CP 1-16.

Defendants were supplied with information sufficient to

[93] At that time, RCW 4.96.020 (2011) specifically exempted medical malpractice claims from its requirements. RCW 7.70.100 had previously required a 90-day notice period, but that provision was struck down by Washington's Supreme Court as unconstitutional in Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010).

investigate the claim, *did so*, and then declined to settle. Because the Fasts supplied Defendants sufficient time and information to investigate the claim and determine whether they would attempt to settle, the Fasts substantially complied with RCW 4.96.020, and the summary judgment should be reversed.

c. In the second alternative, chapter 4.96 RCW is unconstitutional.

(5) RCW 4.96.020 is unconstitutional because it violates the separation of powers doctrine.

Courts recognize the doctrine of separation of powers under our Constitution.[94] The Waples court held RCW 7.70.100(1) (2006) unconstitutional because it required plaintiffs to provide notice to health care providers prior to filing a lawsuit, which adds a step to commencement in conflict with CR 3(a). Waples, 169 Wn.2d at 155.[95] Here, RCW 4.96.020(4) imposes the same requirement that rendered RCW 7.70.100(1) (2006) unconstitutional; it adds a step to commencement and thus conflicts with CR 3(a). RCW 4.96.020 is therefore unconstitutional, and summary judgment should be reversed.

(2) RCW 4.96.020 is unconstitutional as applied, because it violates due process by failing to give notice of what is prohibited.

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[94] *E.g.*, Waples v. Yi, 169 Wn.2d at 158 and cases cited therein.

[95] *see also* Putnam v. Wenatchee Valley Medical Center, P.S., 166 Wn.2d 974, 216 P.3d 374 (2009) (certificate of merit requirement at RCW 7.70.150 held unconstitutional under separation of powers for conflict with pleading requirements at CR 8 and 11).

Due process demands that statutes are not ambiguous:[96]

> The Fourteenth Amendment requires that people be given notice of that which is prohibited. State v. Reader's Digest Ass'n, 81 Wn.2d 259, 273, 501 P.2d 290 (1972). If individuals of common intelligence must guess at a statute's meaning and differ as to its application, it violates due process.

In 2009, Legislature replaced the language at RCW 4.96.020(3) (2008), with the requirement that claimants present a "form" to local governmental entities before filing a lawsuit,[97] and local governmental entities were required to make a form available.[98] The state was also required to make a form available.

The statute does not specify what a claimant must do before waiting for 60 days where, as here, both the local governmental entity and the office of financial management fail to make a standard tort claim form available. It is unclear whether the risk management division's maintenance of a standard form is a condition subsequent to other requirements in the statute, and if so, whether one or more parties is excused from its obligations.

The statute does not specify what constitutes substantial compliance, and *cannot* specify what constitutes substantial compliance, because substantial compliance is determined on the particular facts of

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[96] Medina 147 Wn.2d at 314-315 and cases cited therein.
[97] RCW 4.96.020(3). The full text of chapter 4.96 RCW is provided in Ex 10. *See* Laws of 2009 ch. 433 § 1; *c.f.* RCW 4.96.020 (2008)
[98] RCW 4.96.020(3)(c)

each case.[99] If a claimant *guesses incorrectly* what constitutes substantial compliance, then his claim will be dismissed and can be completely barred if the 60-day period crosses the statute of limitations.

The statute also does not specify whether a prior substantial compliance precludes the tolling of the statute of limitations on a subsequent actual compliance. Here, if the Fasts, for example, had *substantially* complied with the statute a year earlier, then presented the required form fewer than 60 days before the statute of limitations period expires, and then files a lawsuit 65 days after presenting the required form, then the statute is unclear whether the five "grace" days apply to the *earlier* time when the claimant had substantially complied with the statute, or whether they would apply to the later presentation of the standard tort claim form.

Because RCW 4.96.020 does not give notice of what is required of the Fasts to comply with the statute when no form is available; because persons of average intelligence could differ as to what constitutes "substantial compliance;" and because the statute required the Fasts to guess about its meaning to their detriment, RCW is unconstitutional for want of due process as applied here.

(3) RCW 4.96.020 is unconstitutional for lack of due process because

[99] *E.g.*, In re Habeas Corpus of Santore, 28 Wash.App. at 327.

the statute requires compliance before Plaintiffs have the ability to conduct discovery to learn whether the statute applies.

The notice requirement at RCW 4.96.020 applies to local governmental entities *and their officers, employees, and volunteers*. RCW 4.96.020(1), and such employees are entitled to claim notice under RCW 4.96.010. It is not always public information whether a tortfeasor is an employee of a local governmental entity. Here, for example, the Fasts did not know that Defendant Dr. Smith was an employee of the local governmental entity until they filed a lawsuit against Dr. Smith and he invoked RCW 4.96.020 in his defense. Whether an individual tortfeasor is an officer, employee, or volunteer of a local governmental entity can often neither be anticipated nor compelled until a discovery period, which can only be reached by violating the tort claim form requirement at RCW 4.96.020. The statute is therefore unconstitutional, and the trial court's summary judgment should be reversed.

(4) RCW 4.96.020 is unconstitutional *as applied here* because it violates equal protection by requiring the Fasts to wait for a period of time even after the Defendants declined negotiation and therefore the statute had no rational relation to a legitimate state interest.

Legislature has waived sovereign immunity of the state and governmental entities; all local governmental entities are liable for their tortious conduct to the same extent as are private persons or

corporations. RCW 4.96.010. "Once sovereign immunity has been waived, even partially, any legislative classifications made with reference thereto will be constitutional only if they conform to the equal protection guarantees of the state and federal constitutions."[100] Statutes that discriminate between victims of governmental and nongovernmental tortfeasors are constitutional only if there is, at minimum, a substantial rational reason for the discrimination.[101] Hunter held that there is no rational purpose to discriminate between governmental and nongovernmental tortfeasors based on size, need for investigation, or budgetary planning.[102] In Daggs our Supreme court concluded that where the statute of limitation was not affected, the 60–day waiting period between presenting a claim and filing suit is rationally related to achieving negotiated settlements.[103] "Read together, Hunter and Daggs stand for the proposition that the only rationale we have recognized for discriminating between governmental and private wrong doers is the opportunity to negotiate and settle claims, and then only if the burden on the claimant is a short delay in pursuing the claim."[104]

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[100] Jenkins v. State, 85 Wn.2d 883, 890, 540 P.2d 1363 (1975).
[101] Hunter v. N. Mason High Sch. & Sch. Dist. No. 403, 85 Wn.2d 810, 815 n. 5, 818–19, 539 P.2d 845 (1975)
[102] Hunter, 85 Wash.2d at 816–17, 539 P.2d 845.
[103] Daggs, 110 Wash.2d at 57, 750 P.2d 626 (quoting Hall, 97 Wash.2d at 584 n. 4, 649 P.2d 98).
[104] Medina, 147 Wn.2d at 327-327 (Dissent of J. Chambers)

> Where the government rejects a claim before the expiration of the special 60–day buffer granted governmental defendants for negotiation and settlement, there remains no basis whatsoever for upholding application of a statute that can bar citizens' access to our courts and prevent the full and fair resolution of grievances. Certainly, the state constitution vests the legislature with the power to direct the manner in which suits may be brought against the state. CONST. ART. II, § 26. However, the manner directed must not violate equal protection.

Medina, 147 Wn.2d at 329, (Dissent of J. Chambers).

Defendants here had investigated the claim and declined to negotiate or settle the claim on or around July 10, 2012. After then, any requirement that the Fasts submit a form and wait 60 days no longer rationally related to its purpose of fostering negotiation and settlement, avoiding lawsuits, or reducing costs, and therefore discriminating the Fasts' claim from others on the basis that the wrong doer was a local governmental entity does not meet equal protection. The statute is unconstitutional as applied, and the summary judgment should be reversed.

d. Conclusion

The trial court's summary judgment should be reversed because the Defendants are barred from raising a defense under the tort claim form statute, because they failed to make a form available. Alternatively, the summary judgment should be reversed because the

Fasts substantially complied with the statute long before commencing their cause. In the second alternative, the summary judgment should be reversed because the tort claim form statute is unconstitutional as a matter of law or as applied here.

D. REQUEST FOR ATTORNEY'S FEES

Plaintiffs respectfully request this Court to award their attorney fees and costs incurred during this appeal, pursuant to RAP 18.1.

E. CONCLUSION

Plaintiffs respectfully request this Court to reverse the trial court's orders granting Defendants Partial Summary Judgment and Summary Judgment. The Fasts' damages for the loss of their viable unborn child is based on medical negligence and subject to the medical malpractice statute of limitations which was tolled when they requested mediation. Their claim was timely filed. Defendants are barred from raising a defense under the form notice statute, because they did not make a form available. Even so, the Fasts substantially complied with the requirements. Nevertheless, the form notice statute is unconstitutional, at the least as applied here. The Fasts' claim was therefore properly filed.

RESPECTFULLY SUBMITTED this 1st day of November, 2013,

SCOTT E. RODGERS, WSBA # 41368
Of Attorneys for Appellant

(j) With respect to a dependent person who is a victim of a violent or sex crime, to receive either directly or through the dependent person's legal guardian, if applicable, at the time of reporting the crime to law enforcement officials, a written statement of the rights of dependent persons as provided in this chapter. The statement may be paraphrased to make it more easily understood. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county.

(2) Any party may request a preliminary hearing for the purpose of establishing accommodations for the dependent person consistent with, but not limited to, the rights enumerated in this section. [2005 c 381 § 3.]

7.69B.030 Testimony—Videotaped depositions. (1) The prosecutor or defense may file a motion with the court at any time prior to commencement of the trial for an order authorizing the taking of a videotape deposition for the purpose of preserving the direct testimony of the moving party's witness if that witness is a dependent person.

(2) The court may grant the motion if the moving party shows that it is likely that the dependent person will be unavailable to testify at a subsequent trial. The court's finding shall be based upon, at a minimum, recommendations from the dependent person's physician or any other person having direct contact with the dependent person and whose recommendations are based on specific behavioral indicators exhibited by the dependent person.

(3) The moving party shall provide reasonable written notice to the other party of the motion and order, if granted, pursuant to superior court criminal rules for depositions.

(4) Both parties shall have an opportunity to be present at the deposition and the nonmoving party shall have the opportunity to cross-examine the dependent person.

(5) Under circumstances permitted by the rules of evidence, the deposition may be introduced as evidence in a subsequent proceeding if the dependent person is unavailable at trial and both the prosecutor and the defendant had notice of and an opportunity to participate in the taking of the deposition. [2005 c 381 § 4.]

7.69B.040 Liability for violating chapter—Actions based on other state or federal laws. (1) The failure to provide notice to a dependent person of the rights enumerated in this chapter or the failure to provide the rights enumerated shall not result in civil liability so long as the failure was in good faith.

(2) Nothing in this chapter shall be construed to limit a party's ability to bring an action, including an action for damages, based on rights conferred by other state or federal law. [2005 c 381 § 5.]

7.69B.900 Severability—2005 c 381. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [2005 c 381 § 7.]

Chapter 7.70 RCW
ACTIONS FOR INJURIES RESULTING FROM HEALTH CARE

Sections

Complaint in personal injury actions not to include statement of damages: RCW 4.28.360.

Evidence of furnishing or offering to pay medical expenses inadmissible to prove liability in personal injury actions for medical negligence: Chapter 5.64 RCW.

Immunity of members of professional review committees, societies, examining, licensing or disciplinary boards from civil suit: RCW 4.24.240.

Malpractice insurance for retired physicians providing health care services: RCW 43.70.460.

Statute of limitations in actions for injuries resulting from health care: RCW 4.16.350.

Verdict or award of future economic damages in personal injury or property damage action may provide for periodic payments: RCW 4.56.260.

7.70.010 Declaration of modification of actions for damages based upon injuries resulting from health care. The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976. [1975-'76 2nd ex.s. c 56 § 6.]

Additional notes found at www.leg.wa.gov

7.70.020 Definitions. As used in this chapter "health care provider" means either:

(1) A person licensed by this state to provide health care or related services including, but not limited to, an East Asian medicine practitioner, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician assistant, midwife, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

EXHIBIT 1
Chapter 7.70 RCW
Ex. 1 p 1

(2) An employee or agent of a person described in part (1) above, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, 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. [2010 c 286 § 13; 1995 c 323 § 3; 1985 c 326 § 27; 1981 c 53 § 1; 1975-'76 2nd ex.s. c 56 § 7.]

Intent—2010 c 286: See RCW 18.06.005.

Additional notes found at www.leg.wa.gov

7.70.030 Propositions required to be established—Burden of proof. No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:

(1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;

(2) That a health care provider promised the patient or his or her representative that the injury suffered would not occur;

(3) That injury resulted from health care to which the patient or his or her representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence. [2011 c 336 § 250; 1975-'76 2nd ex.s. c 56 § 8.]

Additional notes found at www.leg.wa.gov

7.70.040 Necessary elements of proof that injury resulted from failure to follow accepted standard of care. The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of. [2011 c 336 § 251; 1983 c 149 § 2; 1975-'76 2nd ex.s. c 56 § 9.]

Additional notes found at www.leg.wa.gov

7.70.050 Failure to secure informed consent—Necessary elements of proof—Emergency situations. (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

(a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;

(c) The recognized possible alternative forms of treatment; or

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required treatment will be implied. [2011 c 336 § 252; 1975-'76 2nd ex.s. c 56 § 10.]

Additional notes found at www.leg.wa.gov

7.70.060 Consent form—Contents—Prima facie evidence—Shared decision making—Patient decision aid—Failure to use. (1) If a patient while legally competent, or his or her representative if he or she is not competent, signs a consent form which sets forth the following, the signed consent form shall constitute prima facie evidence that the patient gave his or her informed consent to the treatment administered and the patient has the burden of rebutting this by a preponderance of the evidence:

(a) A description, in language the patient could reasonably be expected to understand, of:

(i) The nature and character of the proposed treatment;

(ii) The anticipated results of the proposed treatment;

(iii) The recognized possible alternative forms of treatment; and

(iv) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment and in the recognized possible alternative forms of treatment, including nontreatment;

(b) Or as an alternative, a statement that the patient elects not to be informed of the elements set forth in (a) of this subsection.

(2) If a patient while legally competent, or his or her representative if he or she is not competent, signs an acknowledgment of shared decision making as described in this section, such acknowledgment shall constitute prima facie evidence that the patient gave his or her informed consent to the

treatment administered and the patient has the burden of rebutting this by clear and convincing evidence. An acknowledgment of shared decision making shall include:

(a) A statement that the patient, or his or her representative, and the health care provider have engaged in shared decision making as an alternative means of meeting the informed consent requirements set forth by laws, accreditation standards, and other mandates;

(b) A brief description of the services that the patient and provider jointly have agreed will be furnished;

(c) A brief description of the patient decision aid or aids that have been used by the patient and provider to address the needs for (i) high-quality, up-to-date information about the condition, including risk and benefits of available options and, if appropriate, a discussion of the limits of scientific knowledge about outcomes; (ii) values clarification to help patients sort out their values and preferences; and (iii) guidance or coaching in deliberation, designed to improve the patient's involvement in the decision process;

(d) A statement that the patient or his or her representative understands: The risk or seriousness of the disease or condition to be prevented or treated; the available treatment alternatives, including nontreatment; and the risks, benefits, and uncertainties of the treatment alternatives, including nontreatment; and

(e) A statement certifying that the patient or his or her representative has had the opportunity to ask the provider questions, and to have any questions answered to the patient's satisfaction, and indicating the patient's intent to receive the identified services.

(3) As used in this section, "shared decision making" means a process in which the physician or other health care practitioner discusses with the patient or his or her representative the information specified in subsection (2) of this section with the use of a patient decision aid and the patient shares with the provider such relevant personal information as might make one treatment or side effect more or less tolerable than others.

(4)(a) As used in this section, "patient decision aid" means a written, audio-visual, or online tool that provides a balanced presentation of the condition and treatment options, benefits, and harms, including, if appropriate, a discussion of the limits of scientific knowledge about outcomes, for any medical condition or procedure, including abortion as defined in RCW 9.02.170 and:

(i)(A) That is certified by one or more national certifying organizations recognized by the medical director of the health care authority; or

(B) That has been evaluated based on the international patient decision aid standards by an organization located in the United States or Canada and has a current overall score satisfactory to the medical director of the health care authority; or

(ii) That, if a current evaluation is not available from an organization located in the United States or Canada, the medical director of the health care authority has independently assessed and certified based on the international patient decision aid standards.

(b) The health care authority may charge a fee to the certification applicant to defray the costs of the assessment and certification under this subsection.

(5) Failure to use a form or to engage in shared decision making, with or without the use of a patient decision aid, shall not be admissible as evidence of failure to obtain informed consent. There shall be no liability, civil or otherwise, resulting from a health care provider choosing either the signed consent form set forth in subsection (1)(a) of this section or the signed acknowledgment of shared decision making as set forth in subsection (2) of this section. [2012 c 101 § 1; 2007 c 259 § 3; 1975-'76 2nd ex.s. c 56 § 11.]

Severability—Subheadings not law—2007 c 259: See notes following RCW 41.05.033.

Minors
access to personal records: RCW 42.48.020.
alcohol and drug treatment: RCW 70.96A.095.
liability of provider: RCW 26.09.310.
mental health treatment: Chapter 71.34 RCW.
sexually transmitted diseases: RCW 70.24.110.

Records, rights: RCW 70.02.130.

Additional notes found at www.leg.wa.gov

7.70.065 Informed consent—Persons authorized to provide for patients who are not competent—Priority. (1) Informed consent for health care for a patient who is not competent, as defined in RCW 11.88.010(1)(e), to consent may be obtained from a person authorized to consent on behalf of such patient.

(a) Persons authorized to provide informed consent to health care on behalf of a patient who is not competent to consent, based upon a reason other than incapacity as defined in RCW 11.88.010(1)(d), shall be a member of one of the following classes of persons in the following order of priority:

(i) The appointed guardian of the patient, if any;

(ii) The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions;

(iii) The patient's spouse or state registered domestic partner;

(iv) Children of the patient who are at least eighteen years of age;

(v) Parents of the patient; and

(vi) Adult brothers and sisters of the patient.

(b) If the health care provider seeking informed consent for proposed health care of the patient who is not competent to consent under RCW 11.88.010(1)(e), other than a person determined to be incapacitated because he or she is under the age of majority and who is not otherwise authorized to provide informed consent, makes reasonable efforts to locate and secure authorization from a competent person in the first or succeeding class and finds no such person available, authorization may be given by any person in the next class in the order of descending priority. However, no person under this section may provide informed consent to health care:

(i) If a person of higher priority under this section has refused to give such authorization; or

(ii) If there are two or more individuals in the same class and the decision is not unanimous among all available members of that class.

(c) Before any person authorized to provide informed consent on behalf of a patient not competent to consent under RCW 11.88.010(1)(e), other than a person determined to be incapacitated because he or she is under the age of majority and who is not otherwise authorized to provide informed con-

EXHIBIT 1
Chapter 7.70 RCW
Ex. 1 p 3

sent, exercises that authority, the person must first determine in good faith that that patient, if competent, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that the proposed health care is in the patient's best interests.

(2) Informed consent for health care, including mental health care, for a patient who is not competent, as defined in RCW 11.88.010(1)(e), because he or she is under the age of majority and who is not otherwise authorized to provide informed consent, may be obtained from a person authorized to consent on behalf of such a patient.

(a) Persons authorized to provide informed consent to health care, including mental health care, on behalf of a patient who is incapacitated, as defined in RCW 11.88.010(1)(e), because he or she is under the age of majority and who is not otherwise authorized to provide informed consent, shall be a member of one of the following classes of persons in the following order of priority:

(i) The appointed guardian, or legal custodian authorized pursuant to Title 26 RCW, of the minor patient, if any;

(ii) A person authorized by the court to consent to medical care for a child in out-of-home placement pursuant to chapter 13.32A or 13.34 RCW, if any;

(iii) Parents of the minor patient;

(iv) The individual, if any, to whom the minor's parent has given a signed authorization to make health care decisions for the minor patient; and

(v) A competent adult representing himself or herself to be a relative responsible for the health care of such minor patient or a competent adult who has signed and dated a declaration under penalty of perjury pursuant to RCW 9A.72.085 stating that the adult person is a relative responsible for the health care of the minor patient. Such declaration shall be effective for up to six months from the date of the declaration.

(b) A health care provider may, but is not required to, rely on the representations or declaration of a person claiming to be a relative responsible for the care of the minor patient, under (a)(v) of this subsection, if the health care provider does not have actual notice of the falsity of any of the statements made by the person claiming to be a relative responsible for the health care of the minor patient.

(c) A health care facility or a health care provider may, in its discretion, require documentation of a person's claimed status as being a relative responsible for the health care of the minor patient. However, there is no obligation to require such documentation.

(d) The health care provider or health care facility where services are rendered shall be immune from suit in any action, civil or criminal, or from professional or other disciplinary action when such reliance is based on a declaration signed under penalty of perjury pursuant to RCW 9A.72.085 stating that the adult person is a relative responsible for the health care of the minor patient under (a)(v) of this subsection.

(3) For the purposes of this section, "health care," "health care provider," and "health care facility" shall be defined as established in RCW 70.02.010. [2007 c 156 § 11; 2006 c 93 § 1; 2005 c 440 § 2; 2003 c 283 § 29; 1987 c 162 § 1.]

Intent—2005 c 440: "(1) It is the intent of the legislature to assist children in the care of kin to access appropriate medical services. Children being raised by kin have faced barriers to medical care because their kinship caregivers have not been able to verify that they are the identified primary caregivers of these children. Such barriers pose an especially significant challenge to kinship caregivers in dealing with health professionals when children are left in their care.

(2) It is the intent of the legislature to assist kinship caregivers in accessing appropriate medical care to meet the needs of a child in their care by permitting such responsible adults who are providing care to a child to give informed consent to medical care." [2005 c 440 § 1.]

Severability—Part headings not law—2003 c 283: See RCW 71.32.900 and 71.32.901.

7.70.068 Informed consent—May be contained in mental health advance directive. Consent to treatment or admission contained in a validly executed mental health advance directive constitutes informed consent for purposes of this chapter. [2003 c 283 § 30.]

Severability—Part headings not law—2003 c 283: See RCW 71.32.900 and 71.32.901.

7.70.070 Attorneys' fees. The court shall, in any action under this chapter, determine the reasonableness of each party's attorneys fees. The court shall take into consideration the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent. [1975-'76 2nd ex.s. c 56 § 12.]

Attorneys' fees: Chapter 4.84 RCW.

Additional notes found at www.leg.wa.gov

7.70.080 Evidence of compensation from other source. Any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from any source except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation. Compensation as used in this section shall mean payment of money or other property to or on behalf of the plaintiff, rendering of services to the plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the plaintiff. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider. [2006 c 8 § 315; 1975-'76 2nd ex.s. c 56 § 13.]

Findings—Intent—Part headings and subheadings not law—Severability—2006 c 8: See notes following RCW 5.64.010.

Additional notes found at www.leg.wa.gov

7.70.090 Hospital governing bodies—Liability—Limitations. Members of the board of directors or other governing body of a public or private hospital are not individually liable for personal injuries or death resulting from health care administered by a health care provider granted privileges to provide health care at the hospital unless the decision to grant the privilege to provide health care at the hospital constitutes gross negligence. [1987 c 212 § 1201; 1986 c 305 § 905.]

Additional notes found at www.leg.wa.gov

7.70.100 Mandatory mediation of health care claims—Procedures. (1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. The notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW 7.70.020(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW 4.96.020(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial except as provided in subsection (6) of this section.

(4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The implementation contemplates the adoption of rules by the supreme court which will require mandatory mediation without exception unless subsection (6) of this section applies. The rules on mandatory mediation shall address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

(b) Appropriate limits on the amount or manner of compensation of mediators;

(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

(e) The number of days following the selection of a mediator within which a mediation conference must be held;

(f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and

(g) Any other matters deemed necessary by the court.

(5) Mediators shall not impose discovery schedules upon the parties.

(6) The mandatory mediation requirement of subsection (4) of this section does not apply to an action subject to mandatory arbitration under chapter 7.06 RCW or to an action in which the parties have agreed, subsequent to the arisal of the claim, to submit the claim to arbitration under chapter 7.04A or 7.70A RCW.

(7) The implementation also contemplates the adoption of a rule by the supreme court for procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section. [2007 c 119 § 1; 2006 c 8 § 314; 1993 c 492 § 419.]

Findings—Intent—Part headings and subheadings not law—Severability—2006 c 8: See notes following RCW 5.64.010.

Findings—Intent—1993 c 492: See notes following RCW 43.72.005.

Additional notes found at www.leg.wa.gov

7.70.110 Mandatory mediation of health care claims—Tolling statute of limitations. The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year. [1996 c 270 § 1; 1993 c 492 § 420.]

Findings—Intent—1993 c 492: See notes following RCW 43.72.005.

Additional notes found at www.leg.wa.gov

7.70.120 Mandatory mediation of health care claims—Right to trial not abridged. RCW 7.70.100 may not be construed to abridge the right to trial by jury following an unsuccessful attempt at mediation. [1993 c 492 § 421.]

Findings—Intent—1993 c 492: See notes following RCW 43.72.005.

Additional notes found at www.leg.wa.gov

7.70.130 Mandatory mediation of health care claims—Exempt from arbitration mandate. A cause of action that has been mediated as provided in RCW 7.70.100 shall be exempt from any superior court civil rules mandating arbitration of civil actions or participation in settlement conferences prior to trial. [1993 c 492 § 423.]

Findings—Intent—1993 c 492: See notes following RCW 43.72.005.

Additional notes found at www.leg.wa.gov

7.70.140 Medical malpractice closed claim reporting requirements. (1) As used in this section:

(a) "Claim" has the same meaning as in RCW 48.140.010(1).

(b) "Claimant" has the same meaning as in RCW 48.140.010(2).

(c) "Commissioner" has the same meaning as in RCW 48.140.010(4).

(d) "Medical malpractice" has the same meaning as in RCW 48.140.010(9).

(2)(a) For claims settled or otherwise disposed of on or after January 1, 2008, the claimant or his or her attorney must report data to the commissioner if any action filed under this chapter results in a final:

(i) Judgment in any amount;

(ii) Settlement or payment in any amount; or

(iii) Disposition resulting in no indemnity payment.

(b) As used in this subsection, "data" means:

(i) The date of the incident of medical malpractice that was the principal cause of the action;

(ii) The principal county in which the incident of medical malpractice occurred;

(iii) The date of suit, if filed;

(iv) The injured person's sex and age on the incident date; and

(v) Specific information about the disposition, judgment, or settlement, including:

(A) The date and amount of any judgment or settlement;

(B) Court costs;

(C) Attorneys' fees; and

(D) Costs of expert witnesses. [2006 c 8 § 209.]

Findings—Intent—Part headings and subheadings not law—Severability—2006 c 8: See notes following RCW 5.64.010.

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

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

(3) The certificate of merit must contain a statement that the person executing the certificate of merit believes, based on the information known at the time of executing the certificate of merit, that there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant.

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

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

(b) If a case is dismissed for failure to file a certificate of merit that complies with the requirements of this section, the filing of the claim against the health care provider shall not be used against the health care provider in professional liability insurance rate setting, personal credit history, or professional licensing and credentialing. [2006 c 8 § 304.]

Findings—Intent—Part headings and subheadings not law—Severability—2006 c 8: See notes following RCW 5.64.010.

7.70.160 Frivolous claims. In any action under this section, an attorney that has drafted, or assisted in drafting and filing an action, counterclaim, cross-claim, third-party claim, or a defense to a claim, upon signature and filing, certifies that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is not frivolous, and is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause frivolous litigation. If an action is signed and filed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the action, counterclaim, cross-claim, third-party claim, or a defense to a claim, including a reasonable attorney fee. The procedures governing the enforcement of RCW 4.84.185 shall apply to this section. [2006 c 8 § 316.]

Findings—Intent—Part headings and subheadings not law—Severability—2006 c 8: See notes following RCW 5.64.010.

Chapter 7.70A RCW
ARBITRATION OF HEALTH CARE ACTIONS

Sections

7.70A.010 Actions for personal injury or wrongful death—Arbitration authorized. This chapter applies to any cause of action for damages for personal injury or wrongful death based on alleged professional negligence in the provision of health care where all parties to the action have agreed to submit the dispute to arbitration under this chapter in accordance with the requirements of RCW 7.70A.020. [2006 c 8 § 305.]

7.70A.020 Election to submit to arbitration—Procedures. (1) Parties in an action covered under RCW

727 P.2d 226 (1986) be reversed, as well as the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual abuse commences the statute of limitations. The legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later." [1991 c 212 § 1.]

Intent—1989 c 317: "(1) The legislature finds that possible confusion may exist in interpreting the statute of limitations provisions for child sexual abuse civil actions in RCW 4.16.190 and 4.16.340 regarding the accrual of a cause of action for a person under age eighteen. The legislature finds that amending RCW 4.16.340 will clarify that the time limit for commencement of an action under RCW 4.16.340 is tolled until the child reaches age eighteen. The 1989 amendment to RCW 4.16.340 is intended as a clarification of existing law and is not intended to be a change in the law.

(2) The legislature further finds that the enactment of chapter 145, Laws of 1988, which deleted specific reference to RCW 9A.44.070, 9A.44.080, and 9A.44.100(1)(b) from RCW 9A.04.080 and also deleted those specific referenced provisions from the laws of Washington, did not intend to change the statute of limitations governing those offenses from seven to three years." [1989 c 317 § 1.]

Additional notes found at www.leg.wa.gov

4.16.350 Action for injuries resulting from health care or related services—Physicians, dentists, nurses, etc.—Hospitals, clinics, nursing homes, etc. Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976, against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his or her employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

(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.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5). [2011 c 336 § 88; 2006 c 8 § 302. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.]

Purpose—Findings—Intent—2006 c 8 §§ 301 and 302: "The purpose of this section and section 302, chapter 8, Laws of 2006 is to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-year statute of repose in RCW 4.16.350.

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.

In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.

The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.

The legislature intends to reenact RCW 4.16.350 with respect to the eight-year statute of repose and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the eight-year statute of repose reenacted by section 302, chapter 8, Laws of 2006 be applied to actions commenced on or after June 7, 2006." [2006 c 8 § 301.]

Findings—Intent—Part headings and subheadings not law—Severability—2006 c 8: See notes following RCW 5.64.010.

Actions for injuries resulting from health care: Chapter 7.70 RCW.

Complaint in personal injury actions not to include statement of damages: RCW 4.28.360.

Evidence of furnishing or offering to pay medical expenses inadmissible to prove liability in personal injury actions for medical negligence: Chapter 5.64 RCW.

Immunity of members of professional review committees, societies, examining, licensing or disciplinary boards from civil suit: RCW 4.24.240.

Proof and evidence required in actions against hospitals, personnel and members of healing arts: RCW 4.24.290.

Verdict or award of future economic damages in personal injury or property damage action may provide for periodic payments: RCW 4.56.260.

Additional notes found at www.leg.wa.gov

4.16.360 Application of chapter to paternity action. This chapter does not limit the time in which an action for

EXHIBIT 2
RCW 4.16.350
Ex. 2 p 1

determination of paternity may be brought under chapter 26.26 RCW. [1983 1st ex.s. c 41 § 13.]

Additional notes found at www.leg.wa.gov

4.16.370 Actions against personal representative or trustee for breach of fiduciary duties—Statute of limitations. The statute of limitations for actions against a personal representative or trustee for breach of fiduciary duties is as set forth in RCW 11.96A.070. [1999 c 42 § 602; 1985 c 11 § 3. Prior: 1984 c 149 § 2.]

Purpose—Severability—1985 c 11: See notes following RCW 4.16.110.

Additional notes found at www.leg.wa.gov

Chapter 4.18 RCW
UNIFORM CONFLICT OF LAWS—LIMITATIONS ACT

Sections

Limitation of actions generally: Chapter 4.16 RCW.

4.18.010 Definitions. As used in this chapter:

(1) "Claim" means a right of action that may be asserted in a civil action or proceeding and includes a right of action created by statute.

(2) "State" means a state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country, or a political subdivision of any of them. [1983 c 152 § 1.]

4.18.020 Conflict of laws—Limitation periods. (1) Except as provided by RCW 4.18.040, if a claim is substantively based:

(a) Upon the law of one other state, the limitation period of that state applies; or

(b) Upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this state, applies.

(2) The limitation period of this state applies to all other claims. [1983 c 152 § 2.]

4.18.030 Rules of law applicable to computation of limitation period. If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply. [1983 c 152 § 3.]

4.18.040 Application of limitation period of other state—Unfairness. If the court determines that the limitation period of another state applicable under RCW 4.18.020 and 4.18.030 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this state applies. [1983 c 152 § 4.]

4.18.900 Short title. This chapter may be cited as the Uniform Conflict of Laws—Limitations Act. [1983 c 152 § 7.]

4.18.901 Application of chapter—Existing and future claims. This chapter applies to claims:

(1) Accruing after July 24, 1983; or

(2) Asserted in a civil action or proceeding more than one year after July 24, 1983, but it does not revive a claim barred before July 24, 1983. [1983 c 152 § 5.]

4.18.902 Uniformity of application and construction of chapter. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it. [1983 c 152 § 6.]

4.18.903 Severability—1983 c 152. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1983 c 152 § 8.]

4.18.904 Captions not law—1983 c 152. Section captions used in this act constitute no part of the law. [1983 c 152 § 9.]

Chapter 4.20 RCW
SURVIVAL OF ACTIONS

Sections

Action for injury or death of a child: RCW 4.24.010.

Actions by and against executors: Chapter 11.48 RCW.

Imputation of contributory fault of decedent in wrongful death actions: RCW 4.22.020.

4.20.005 Wrongful death—Application of terms. Words in RCW 4.20.010, 4.20.020, and 4.20.030 denoting the singular shall be understood as belonging to a plurality of persons or things. The masculine shall apply also to the feminine, and the word person shall also apply to bodies politic and corporate. [1917 c 123 § 3; RRS § 183-2. Formerly RCW 4.20.010, part.]

4.20.010 Wrongful death—Right of action. When the death of a person is caused by the wrongful act, neglect, or default of another his or her personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

Special proceedings and actions: Title 7 RCW.

4.24.005 Tort actions—Attorneys' fees—Determination of reasonableness. Any party charged with the payment of attorney's fees in any tort action may petition the court not later than forty-five days of receipt of a final billing or accounting for a determination of the reasonableness of that party's attorneys' fees. The court shall make such a determination and shall take into consideration the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent;

(9) Whether the fixed or contingent fee agreement was in writing and whether the client was aware of his or her right to petition the court under this section;

(10) The terms of the fee agreement. [1987 c 212 § 1601; 1986 c 305 § 201.]

Additional notes found at www.leg.wa.gov

4.24.010 Action for injury or death of child. A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable.

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent: PROVIDED, That notice shall be required only if parentage has been duly established.

Such notice shall be in compliance with the statutory requirements for a summons. Such notice shall state that the other parent must join as a party to the suit within twenty days or the right to recover damages under this section shall be barred. Failure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the suit.

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just. [1998 c 237 § 2; 1973 1st ex.s. c 154 § 4; 1967 ex.s. c 81 § 1; 1927 c 191 § 1; Code 1881 § 9; 1877 p 5 § 9; 1873 p 5 § 10; 1869 p 4 § 9; RRS § 184.]

Intent—1998 c 237: "It is the intent of this act to address the constitutional issue of equal protection addressed by the Washington state supreme court in *Guard v. Jackson*, 132 Wn.2d 660 (1997). The legislature intends to provide a civil cause of action for wrongful injury or death of a minor child to a mother or father, or both, if the mother or father has had significant involvement in the child's life, including but not limited to, emotional, psychological, or financial support." [1998 c 237 § 1.]

Additional notes found at www.leg.wa.gov

4.24.020 Action by parent for seduction of child. A father or mother, may maintain an action as plaintiff for the seduction of a child, and the guardian for the seduction of a ward, though the child or the ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service. [1973 1st ex.s. c 154 § 5; Code 1881 § 10; 1877 p 5 § 10; 1869 p 4 § 10; RRS § 185.]

Additional notes found at www.leg.wa.gov

4.24.040 Action for negligently permitting fire to spread. If any person shall for any lawful purpose kindle a fire upon his or her own land, he or she shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful person would do, and if he or she fails so to do he or she shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage. [2009 c 549 § 1001; Code 1881 § 1226; 1877 p 300 § 3; RRS § 5647.]

Reviser's note: The words "on the case" appear in the 1877 law and in the 1881 enrolled bill but were inadvertently omitted from the printed Code of 1881. See also Pettigrew v. McCoy, 138 Wash. 619.

Arson, reckless burning, and malicious mischief: Chapter 9A.48 RCW.

4.24.050 Kindling of fires by persons driving lumber. Persons engaged in driving lumber upon any waters or streams of this state, may kindle fires when necessary for the purposes in which they are engaged, but shall be bound to use the utmost caution to prevent the same from spreading and doing damage; and if they fail so to do, they shall be subject to all liabilities and penalties of RCW 4.24.040, 4.24.050, and 4.24.060, in the same manner as if the privilege granted by this section had not been allowed. [1983 c 3 § 4; Code 1881 § 1228; 1877 p 300 § 5; RRS § 5648.]

4.24.060 Application of common law. The common law right to an action for damages done by fires, is not taken away or diminished by RCW 4.24.040, 4.24.050, and 4.24.060, but it may be pursued; but any person availing himself or herself of the provisions of RCW 4.24.040, shall be barred of his or her action at common law for the damage so sued for, and no action shall be brought at common law for kindling fires in the manner described in RCW 4.24.050; but if any such fires shall spread and do damage, the person who kindled the same and any person present and concerned in driving such lumber, by whose act or neglect such fire is suffered to spread and do damage shall be liable in an action on the case for the amount of damages thereby sustained. [2011 c 336 § 93; 1983 c 3 § 5; Code 1881 § 1229; 1877 p 300 § 6; RRS § 5649.]

guardianship: Chapters 11.88, 11.92 RCW.
sales and mortgages of real estate: Chapter 11.56 RCW; RCW 11.60.010.
Sales not voided by irregularities: RCW 11.56.115.

4.16.080 Actions limited to three years. The following actions shall be commenced within three years:

(1) An action for waste or trespass upon real property;

(2) 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;

(3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

(4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;

(6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise. [2011 c 336 § 83; 1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1; Code 1881 § 28; 1869 p 8 § 28; 1854 p 363 § 4; RRS § 159.]

Reviser's note: Transitional proviso omitted from subsection (6). The proviso reads: "PROVIDED, FURTHER, That no action heretofore barred under the provisions of this paragraph shall be commenced after ninety days from the time this act becomes effective;".

4.16.090 Action to cancel tax deed. Actions to set aside or cancel any deed heretofore or hereafter issued by any county treasurer after and upon the sale of lands for general, state, county or municipal taxes, or upon the sale of lands acquired by any county on foreclosure of general, state, county or municipal taxes, or for the recovery of any lands so sold, must be brought within three years from and after the date of the issuance of such treasurer's deed. [1949 c 74 § 1; 1907 c 173 § 1; Rem. Supp. 1949 § 162.]

Reviser's note: Transitional proviso omitted. The proviso reads: "PROVIDED, This act shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act".

4.16.100 Actions limited to two years. Within two years:

(1) An action for libel, slander, assault, assault and battery, or false imprisonment.

(2) An action upon a statute for a forfeiture or penalty to the state. [Code 1881 § 29; 1877 p 8 § 29; 1869 p 9 § 29; 1854 p 363 § 5; RRS § 160.]

Limitation of action for recovery of transportation charges: RCW 81.28.270.

4.16.110 Actions limited to one year. Within one year an action shall be brought against a sheriff, or other officer for the escape of a prisoner arrested or imprisoned on civil process. [1985 c 11 § 2. Prior: 1984 c 149 § 1; Code 1881 § 30; 1877 p 8 § 30; 1869 p 9 § 30; 1854 p 364 § 5; RRS § 161.]

Reviser's note: 1985 c 11 reenacted RCW 4.16.110 and 4.16.370 without amendment.

Purpose—1985 c 11: "The purpose of this act is to make technical corrections to chapter 149, Laws of 1984, and to ensure that the changes made in that chapter meet the constitutional requirements of Article II, section 19 of the state Constitution." [1985 c 11 § 1.]

Sheriff, civil liability: RCW 36.28.150.

Additional notes found at www.leg.wa.gov

4.16.115 Special provisions for action on penalty. An action upon a statute for a penalty given in whole or in part to the person who may prosecute for the same, shall be commenced within three years [one year] after the commission of the offense; and if the action be not commenced within one year by a private party, it may be commenced within two years after the commission of the offense in behalf of the state by the prosecuting attorney of the county, where said offense was committed. [1877 p 9 § 31; 1854 p 364 § 6; RRS § 163. Formerly RCW 4.16.140. Cf. Code 1881 § 31.]

Reviser's note: "one year" appeared in Laws of 1854 and 1877; "three years" appears in Code of 1881.

4.16.130 Action for relief not otherwise provided for. An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued. [Code 1881 § 33; 1877 p 9 § 32; 1854 p 364 § 7; RRS § 165.]

Limitation of action to recover taxes paid: RCW 84.68.060.

4.16.150 Action on mutual open accounts. In an action brought to recover a balance due upon a mutual open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side, but whenever a period of more than one year shall have elapsed between any of a series of items or demands, they are not to be deemed such an account. [Code 1881 § 34; 1877 p 9 § 33; 1869 p 10 § 33; 1854 p 364 § 8; RRS § 166.]

4.16.160 Application of limitations to actions by state, counties, municipalities. The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310, there shall be no limitation to

town or commercial or industrial area, or scenic system highway may be permitted more than fifty feet from the advertised activity;

(2) A type 3 sign, other than one along any portion of the primary system within an incorporated city or town or within any commercial or industrial area, permitted more than fifty feet from the advertised activity pursuant to subsection (1) of this section shall not be erected or maintained a greater distance from the advertised activity than one of the following options selected by the owner of the business being advertised:

(a) One hundred fifty feet measured along the edge of the protected highway from the main entrance to the activity advertised (when applicable);

(b) One hundred fifty feet from the main building of the advertised activity; or

(c) Fifty feet from a regularly used parking lot maintained by and contiguous to the advertised activity.

(3) In addition to signs permitted by subsections (1) and (2) of this section, the commission may adopt regulations permitting one type 3 sign visible to traffic proceeding in any one direction on an interstate, primary or scenic system highway on premises which, on the effective date of this 1976 amendatory act, are used wholly or in part as an operating business, farm, ranch or orchard which sign bears only the name of the business, farm, ranch or orchard and a directional arrow or short directional message. Regulations adopted under this subsection shall prohibit the erection or maintenance of such type 3 signs on narrow strips of land a substantial distance from but connected with a business, farm, ranch or orchard. Signs permitted under this subsection shall not exceed fifty square feet in area.

(4)(((3))) The commission with advice from the parks and recreation commission shall adopt specifications for a uniform system of official tourist facility directional signs to be used on the scenic system highways. Official directional signs shall be posted by the commission to inform motorists of types of tourist and recreational facilities available off the scenic system which are accessible by way of public or private roads intersecting scenic system highways.

Passed the House February 2, 1976.
Passed the Senate February 13, 1976.
Approved by the Governor February 21, 1976.
Filed in Office of Secretary of State February 21, 1976.

CHAPTER 56

[Substitute House Bill No. 1470]

CIVIL RECOMPENSE AND CLAIMS—— MEDICAL MALPRACTICE

AN ACT Relating to civil recompense and claims; amending section 1, chapter 80, Laws of 1971 and RCW 4.16.350; amending section 1, chapter 157, Laws of 1969 ex. sess. as amended by section 1, chapter 114, Laws of 1975 1st ex. sess. and RCW 4.24.240; adding a new section to chapter 4.28 RCW; adding a new section to chapter 4.56 RCW; adding new sections to Title 5 RCW; and creating a new chapter in Title 7 RCW.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 1, chapter 80, Laws of 1971 and RCW 4.16.350 are each amended to read as follows:

EXHIBIT 5
Laws of 1975-76 2d Ex. Sess., ch. 56
Ex. 5 p 1

Any civil action for damages for injury occurring as a result of health care which is provided after the effective date of this 1976 amendatory act against ((~~a hospital which is licensed by the state of Washington or against the personnel of any hospital, or against a member of the healing arts including, but not limited to, a physician licensed under chapter 18.71 RCW or chapter 18.57 RCW, chiropractor licensed under chapter 18.25 RCW, a dentist licensed under chapter 18.32 RCW, or a nurse licensed under chapter 18.88 or 18.78 RCW,~~)):

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(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 employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

based upon alleged professional negligence shall be commenced within ((~~(1) three years from the date of the alleged wrongful act, or (2) one year from the time that plaintiff discovers the injury or condition was caused by the wrongful act, whichever period of time expires last~~)) 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 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. Any action not commenced in accordance with this section shall be barred: PROVIDED, That the limitations in this section shall not apply to persons under a legal disability as defined in RCW 4.16.190.

NEW SECTION. Sec. 2. There is added to chapter 4.28 RCW a new section to read as follows:

In any civil action for personal injuries, the complaint shall not contain a statement of the damages sought but shall contain a prayer for damages as shall be determined. A defendant in such action may at any time request a statement from the plaintiff setting forth separately the amounts of any special damages and general damages sought. Not later than fifteen days after service of such request to the plaintiff, the plaintiff shall have served the defendant with such statement.

NEW SECTION. Sec. 3. There is added to Title 5 RCW a new section to read as follows:

In any civil action for personal injuries which is based upon alleged professional negligence and which is against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(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 employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Sec. 4. Section 1, chapter 157, Laws of 1969 ex. sess. as amended by section 1, chapter 114, Laws of 1975 1st ex. sess. and RCW 4.24.240 are each amended to read as follows:

(1) ((~~Physicians licensed under chapters 18.71 or 18.57 RCW, dentists licensed under chapter 18.32 RCW, and pharmacists licensed under chapter 18.64 RCW who are members of review committees for medical, dental, or pharmaceutical societies, and licensed hospitals, or committees whose duties require evaluation of credentials and qualifications of physicians, dentists, or pharmacists~~)):

(a) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, including, in the event such person is deceased, his estate or personal representative;

(b) An employee or agent of a person described in subparagraph (a) of this subsection, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(c) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subparagraph (a) of this subsection, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, trustee, employee, or agent thereof acting in the course and scope of his employment, including in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

shall be immune from civil action for damages arising out of the good faith performance of their duties on such committees, where such actions are being brought by or on behalf of the person who is being evaluated.

(2) No member, employee, staff person, or investigator of a professional review committee shall be liable in a civil action as a result of acts or omissions made in good faith on behalf of the committee; nor shall any person be so liable for filing

charges with or supplying information or testimony in good faith to any professional review committee; nor shall a member, employee, staff person, or investigator of a professional society, of a professional examining or licensing board, of a professional disciplinary board, of a governing board of any institution, or of any employer of professionals be so liable for good faith acts or omissions made in full or partial reliance on recommendations or decisions of a professional review committee or examining board.

NEW SECTION. Sec. 5. There is added to chapter 4.56 RCW a new section to read as follows:

In any civil action for personal injuries in which a jury verdict awarding damages is made, the court may, if it finds the plaintiff's injuries totally and permanently disable the plaintiff, enter a judgment requiring that a portion of the damages awarded shall be provided in the form of an annuity plan. Similarly, in any civil action or arbitration for personal injuries in which trial is by the court or the dispute is resolved by arbitration and in which the plaintiff prevails, the court or arbitrator may, if it finds the plaintiff's injuries totally and permanently disable the plaintiff enter a judgment or award requiring that a portion of the damages awarded be provided in the form of an annuity plan.

NEW SECTION. Sec. 6. The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16-.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after the effective date of this 1976 amendatory act.

NEW SECTION. Sec. 7. As used in this chapter "health care provider" means either:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

(2) An employee or agent of a person described in part (1) above, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, 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 employment, including in the event such officer, director, employee, or agent is deceased, his estate or personal representative.

NEW SECTION. Sec. 8. No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after the effective date of this 1976 amendatory act, unless the plaintiff establishes one or more of the following propositions:

(1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;

(2) That a health care provider promised the patient or his representative that the injury suffered would not occur;

(3) That injury resulted from health care to which the patient or his representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

NEW SECTION. Sec. 9. The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

NEW SECTION. Sec. 10. (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

(a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;

(c) The recognized possible alternative forms of treatment; or

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his consent to required treatment will be implied.

NEW SECTION. Sec. 11. If a patient while legally competent, or his representative if he is not competent, signs a consent form which sets forth the following, the signed consent form shall constitute prima facie evidence that the patient

gave his informed consent to the treatment administered and the patient has the burden of rebutting this by a preponderance of the evidence:

(1) A description, in language the patient could reasonably be expected to understand, of:

(a) The nature and character of the proposed treatment;

(b) The anticipated results of the proposed treatment;

(c) The recognized possible alternative forms of treatment; and

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment and in the recognized possible alternative forms of treatment, including nontreatment;

(2) Or as an alternative, a statement that the patient elects not to be informed of the elements set forth in subsection (1) of this section.

Failure to use a form shall not be admissible as evidence of failure to obtain informed consent.

NEW SECTION. Sec. 12. The court shall, in any action under this chapter, determine the reasonableness of each party's attorneys fees. The court shall take into consideration the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent.

NEW SECTION. Sec. 13. Any party may present evidence to the trier of fact that the patient has already been compensated for the injury complained of from any source except the assets of the patient, his representative, or his immediate family, or insurance purchased with such assets. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation. Insurance bargained for or provided on behalf of an employee shall be considered insurance purchased with the assets of the employee. Compensation as used in this section shall mean payment of money or other property to or on behalf of the patient, rendering of services to the patient free of charge to the patient, or indemnification of expenses incurred by or on behalf of the patient. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

NEW SECTION. Sec. 14. Sections 6 through 13 of this 1976 amendatory act shall constitute a new chapter in Title 7 RCW.

NEW SECTION. Sec. 15. If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the

act, or the application of the provision to other persons or circumstances is not affected.

Passed the House February 18, 1976.
Passed the Senate February 13, 1976.
Approved by the Governor February 21, 1976.
Filed in Office of Secretary of State February 21, 1976.

CHAPTER 57

[House Bill No. 1529]
COUNTY OPERATED FERRIES——
FISCAL SUPPORT

AN ACT Relating to county operated ferries; amending section 46.68.100, chapter 12, Laws of 1961 as last amended by section 1, chapter 124, Laws of 1973 1st ex. sess. and RCW 46.68.100; amending section 1, chapter 21, Laws of 1975 1st ex. sess. and RCW 47.56.725; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 46.68.100, chapter 12, Laws of 1961 as last amended by section 1, chapter 124, Laws of 1973 1st ex. sess. and RCW 46.68.100 are each amended to read as follows:

From the net tax amount in the motor vehicle fund there shall be paid sums as follows:

(1) There shall be paid to the cities and towns of the state sums equal to ten and forty-four hundredths percent of the net tax amount to be paid monthly as the same accrues;

(2) To the counties of the state there shall be paid sums equal to thirty-two and sixty-one hundredths percent of the net tax amount out of which there shall be paid to the state highway commission those sums as may be appropriated for assistance to county operated ferries, as provided in RCW 47.56.725, at such times as shall be determined by the commission, with the balance of such county share to be paid monthly as the same accrues for distribution in accordance with RCW 46.68.120;

(3) To the state there shall be paid to be expended as provided by RCW 46-.68.130, sums equal to fifty-five and five-tenths percent of the net tax amount to be paid monthly as the same accrues.

(4) There shall be paid to the Puget Sound ferry operations account sums equal to one and forty-five hundredths percent of the net tax amount to be paid monthly as the same accrues.

Nothing in this section or in RCW 46.68.090 or 46.68.130 shall be construed so as to violate any terms or conditions contained in any highway construction bond issues now or hereafter authorized by statute and whose payment is by such statute pledged to be paid from any excise taxes on motor vehicle fuels.

Sec. 2. Section 1, chapter 21, Laws of 1975 1st ex. sess. and RCW 47.56.725 are each amended to read as follows:

(1) The Washington state highway commission is hereby authorized to enter into a continuing agreement with Pierce, Skagit, and Whatcom counties pursuant to which the state highway commission shall pay to each of the counties from

EXHIBIT 5
Laws of 1975-76 2d Ex. Sess., ch. 56
Ex. 5 p 7

officer of county government who oversees or directs county employees to make the determination as to whether an employee safety award will be made.

Such awards shall be made annually from the county general fund by warrant on vouchers duly authorized by the board according to the following schedule based upon safe and accident-free performance:

5 years	$ 2.50
10 years	5.00
15 years	7.50
20 years	10.00
25 years	12.50
30 years	20.00:

PROVIDED, That the board may give such department heads and other officers overseeing and directing county employees discretion to purchase a noncash award of equal value in lieu of the cash award. If a noncash award is given the warrants shall be made payable to the business enterprise from which the noncash award is purchased.

However, safety awards made to persons whose safe and accident-free performance has directly benefited the county road system shall be made from the county road fund by warrant on vouchers duly authorized by the board.

Passed the House March 10, 1971.
Passed the Senate March 9, 1971.
Approved by the Governor March 23, 1971.
Filed in Office of Secretary of State March 23, 1971.

CHAPTER 80
[Engrossed House Bill No. 720]
LIMITATION OF ACTIONS--
MEDICAL MALPRACTICE

AN ACT Relating to limitations of actions; and adding a new section to chapter 4.16 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. There is added to chapter 4.16 RCW a new section to read as follows:

Any civil action for damages against a hospital which is licensed by the state of Washington or against the personnel of any hospital, or against a member of the healing arts including, but not limited to, a physician licensed under chapter 18.71 RCW or chapter 18.57 RCW, chiropractor licensed under RCW 18.25, a dentist licensed under chapter 18.32 RCW, or a nurse licensed under chapter 18.88 or 18.78 RCW, based upon alleged professional negligence shall be

EXHIBIT 6
Laws of 1971 ch. 80
Ex. 6 p 1

commenced within (1) three years from the date of the alleged wrongful act, or (2) one year from the time that plaintiff discovers the injury or condition was caused by the wrongful act, whichever period of time expires last.

Passed the House March 9, 1971.
Passed the Senate March 8, 1971.
Approved by the Governor March 23, 1971.
Filed in Office of Secretary of State March 23, 1971.

CHAPTER 81
[Engrossed Senate Bill No. 122]
COURTS--
POWERS AND DUTIES

AN ACT Relating to the judiciary; amending section 2, chapter 24, Laws of 1909 as amended by section 1, chapter 119, Laws of 1911, and RCW 2.04.071; amending section 14, page 324, Laws of 1890 and RCW 2.04.080; amending section 2, chapter 38, Laws of 1955 and RCW 2.04.100; amending section 1, chapter 206, Laws of 1909 and RCW 2.04.110; amending section 15, page 344, Laws of 1890 and RCW 2.08.080; amending section 11, page 343, Laws of 1890 as amended by section 1, chapter 149, Laws of 1967 and RCW 2.08.180; amending section 1, chapter 202, Laws of 1969 ex. sess. and RCW 2.12.035; amending section 6, chapter 229, Laws of 1937 as last amended by section 2, chapter 243, Laws of 1957 and RCW 2.12.060; amending section 2, chapter 53, Laws of 1891 and RCW 2.20.020; amending section 3, chapter 124, Laws of 1909 and RCW 2.24.050; amending section 3, chapter 54, Laws of 1891 as amended by section 1, chapter 39, Laws of 1895 and RCW 2.28.030; amending section 3, chapter 57, Laws of 1891 and RCW 2.32.050; amending section 5, chapter 126, Laws of 1921 and RCW 2.48.200; amending section 8, chapter 259, Laws of 1957 and RCW 2.56.080; amending section 90, chapter 299, Laws of 1961 and RCW 3.50.410; amending section 1, chapter 60, Laws of 1929 and RCW 4.56.190; amending section 2, chapter 60, Laws of 1929 and RCW 4.56.200; amending section 8, chapter 60, Laws of 1929 and RCW 4.56.225; amending section 2, chapter 138, Laws of 1933 and RCW 4.76.030; amending section 7, chapter 60, Laws of 1893 and RCW 4.80.050; amending section 17, chapter 60, Laws of 1893 and RCW 4.80.140; amending section 384, page 203, Laws of 1854 as last amended by section 1, chapter 62, Laws of 1959 and RCW 4.84.170; amending section 385, page 204, Laws of 1854 as last amended by section

EXHIBIT 6
Laws of 1971 ch. 80
Ex. 6 p 2

gives notice within such waiting period to the insurer or rating organization which made the filing that he or she needs such additional time for the consideration of the filing. The commissioner may, upon application and for cause shown, waive such waiting period or part thereof as to a filing that he or she has not disapproved.

(b) A filing shall be deemed to meet the requirements of this chapter unless disapproved by the commissioner within the waiting period or any extension thereof.

(3) Medical malpractice insurance rate filings are subject to the provisions of this section.

PART III - HEALTH CARE LIABILITY REFORM

Statutes of Limitations and Repose

NEW SECTION. **Sec. 301.** The purpose of this section and section 302 of this act is to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-year statute of repose in RCW 4.16.350.

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.

In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.

The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.

The legislature intends to reenact RCW 4.16.350 with respect to the eight-year statute of repose and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the eight-year statute of repose reenacted by section 302 of this act be applied to actions commenced on or after the effective date of this section.

Sec. 302. RCW 4.16.350 and 1998 c 147 s 1 are each reenacted to read as follows:

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's

EXHIBIT 7
Laws of 2006, ch. 8, sec. 301
Ex. 7 p 1

PREFACE

Numbering system: The number of each section of this code is made up of three parts, in sequence as follows: Number of title; number of chapter within the title; number of section within the chapter. Thus RCW 1.04.020 is Title 1, chapter 4, section 20. The section part of the number (.020) is initially made up of three digits, constitutes a true decimal, and allows for new sections to be inserted between old sections already consecutively numbered, merely by adding one or more digits at the end of the number. In most chapters of the code, sections have been numbered by tens (.010, .020, .030, .040, etc.), leaving vacant numbers between existing sections so that new sections may be inserted without extension of the section number beyond three digits.

Citation to the Revised Code of Washington: The code should be cited as RCW; see RCW 1.04.040. An RCW title should be cited Title 7 RCW. An RCW chapter should be cited chapter 7.24 RCW. An RCW section should be cited RCW 7.24.010. Through references should be made as RCW 7.24.010 through 7.24.100. Series of sections should be cited as RCW 7.24.010, 7.24.020, and 7.24.030.

History of the Revised Code of Washington; Source notes: The Revised Code of Washington was adopted by the legislature in 1950; see chapter 1.04 RCW. The original publication (1951) contained material variances from the language and organization of the session laws from which it was derived, including a variety of divisions and combinations of the session law sections. During 1953 through 1959, the Statute Law Committee, in exercise of the powers in chapter 1.08 RCW, completed a comprehensive study of these variances and, by means of a series of administrative orders or reenactment bills, restored each title of the code to reflect its session law source, but retaining the general codification scheme originally adopted. An audit trail of this activity has been preserved in the concluding segments of the source note of each section of the code so affected. The legislative source of each section is enclosed in brackets [ ] at the end of the section. Reference to session laws is abbreviated; thus "1891 c 23 § 1; 1854 p 99 § 135" refers to section 1, chapter 23, Laws of 1891 and section 135, page 99, Laws of 1854. "Prior" indicates a break in the statutory chain, usually a repeal and reenactment. "RRS or Rem. Supp.——" indicates the parallel citation in Remington's Revised Code, last published in 1949.

Where, before restoration, a section of this code constituted a consolidation of two or more sections of the session laws, or of sections separately numbered in Remington's, the line of derivation is shown for each component section, with each line of derivation being set off from the others by use of small Roman numerals, "(i)," "(ii)," etc.

Where, before restoration, only a part of a session law section was reflected in a particular RCW section the history note reference is followed by the word "part."

"Formerly" and its correlative form "FORMER PART OF SECTION" followed by an RCW citation preserves the record of original codification.

Double amendments: Some double or other multiple amendments to a section made without reference to each other are set out in the code in smaller (8-point) type. See RCW 1.12.025.

Index: Titles 1 through 91 are indexed in the RCW General Index. A separate index is provided for the State Constitution.

Sections repealed or decodified; Disposition table: Information concerning RCW sections repealed or decodified can be found in the table entitled "Disposition of former RCW sections."

Codification tables: To convert a session law citation to its RCW number (for Laws of 1999 or later) consult the codification tables. A complete codification table, including Remington's Revised Statutes, is on the Code Reviser web site at http://www.leg.wa.gov/codereviser.

Notes: Notes that are more than ten years old have been removed from the print publication of the RCW except when retention has been deemed necessary to preserve the full intent of the law. All notes are displayed in the electronic copy of the RCW on the Code Reviser web site at http://www.leg.wa.gov/codereviser.

Errors or omissions: (1) Where an obvious clerical error has been made in the law during the legislative process, the code reviser adds a corrected word, phrase, or punctuation mark in [brackets] for clarity. These additions do not constitute any part of the law.

(2) Although considerable care has been taken in the production of this code, it is inevitable that in so large a work that there will be errors, both mechanical and of judgment. When those who use this code detect errors in particular sections, a note citing the section involved and the nature of the error may be sent to: Code Reviser, Box 40551, Olympia, WA 98504-0551, so that correction may be made in a subsequent publication.

CERTIFICATION OF ENROLLMENT

SENATE BILL 5136

Chapter 188, Laws of 2013

63rd Legislature
2013 Regular Session

CLAIMS AGAINST STATE--TORTIOUS CONDUCT--ELECTRONIC PRESENTMENT OF CLAIMS

EFFECTIVE DATE: 07/28/13

Passed by the Senate April 23, 2013
YEAS 47 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House April 15, 2013
YEAS 96 NAYS 1

FRANK CHOPP

Speaker of the House of Representatives

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5136** as passed by the Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

Secretary

Approved May 8, 2013, 2:52 p.m.

JAY INSLEE

Governor of the State of Washington

FILED

May 8, 2013

Secretary of State
State of Washington

EXHIBIT 9
Laws of 2013 ch. 188
Ex. 9 p 1

SENATE BILL 5136

AS AMENDED BY THE HOUSE

Passed Legislature - 2013 Regular Session

State of Washington 63rd Legislature 2013 Regular Session

By Senators Padden and Kline; by request of Department of Enterprise Services

Read first time 01/21/13. Referred to Committee on Law & Justice.

AN ACT Relating to electronic presentment of claims against the state arising out of tortious conduct; and amending RCW 4.92.100.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 4.92.100 and 2012 c 250 s 1 are each amended to read as follows:

(1) All claims against the state, or against the state's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct, must be presented to the office of risk management ((~~division~~)). A claim is deemed presented when the claim form is delivered in person or by regular mail, registered mail, or certified mail, with return receipt requested, or as an attachment to electronic mail or by fax, to the office of risk management ((~~division~~)). For claims for damages presented after July 26, 2009, all claims for damages must be presented on the standard tort claim form that is maintained by the office of risk management ((~~division~~)). The standard tort claim form must be posted on the ((~~office of financial management's~~)) department of enterprise services' web site.

(a) The standard tort claim form must, at a minimum, require the following information:

(i) The claimant's name, date of birth, and contact information;

(ii) A description of the conduct and the circumstances that brought about the injury or damage;

(iii) A description of the injury or damage;

(iv) A statement of the time and place that the injury or damage occurred;

(v) A listing of the names of all persons involved and contact information, if known;

(vi) A statement of the amount of damages claimed; and

(vii) A statement of the actual residence of the claimant at the time of presenting the claim and at the time the claim arose.

(b) (i) The standard tort claim form must be signed either:

((~~(i)~~)) (A) By the claimant, verifying the claim;

((~~(ii)~~)) (B) Pursuant to a written power of attorney, by the attorney in fact for the claimant;

((~~(iii)~~)) (C) By an attorney admitted to practice in Washington state on the claimant's behalf; or

((~~(iv)~~)) (D) By a court-approved guardian or guardian ad litem on behalf of the claimant.

(ii) For the purpose of this subsection (1)(b), when the claim form is presented electronically it must bear an electronic signature in lieu of a written original signature. An electronic signature means a facsimile of an original signature that is affixed to the claim form and executed or adopted by the person with the intent to sign the document.

(iii) When an electronic signature is used and the claim is submitted as an attachment to electronic mail, the conveyance of that claim must include the date, time the claim was presented, and the internet provider's address from which it was sent. The attached claim form must be a format approved by the office of risk management.

(iv) When an electronic signature is used and the claim is submitted via a facsimile machine, the conveyance must include the date, time the claim was submitted, and the fax number from which it was sent.

(v) In the event of a question on an electronic signature, the claimant shall have an opportunity to cure and the cured notice shall relate back to the date of the original filing.

(c) The amount of damages stated on the claim form is not admissible at trial.

(2) The state shall make available the standard tort claim form described in this section with instructions on how the form is to be presented and the name, address, and business hours of the office of risk management ((~~division~~)). The standard tort claim form must not list the claimant's social security number and must not require information not specified under this section. The claim form and the instructions for completing the claim form must provide the United States mail, physical, and electronic addresses and numbers where the claim can be presented.

(3) With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory.

Passed by the Senate April 23, 2013.
Passed by the House April 15, 2013.
Approved by the Governor May 8, 2013.
Filed in Office of Secretary of State May 8, 2013.

Chapter 4.96 RCW
ACTIONS AGAINST POLITICAL SUBDIVISIONS, MUNICIPAL AND QUASI-MUNICIPAL CORPORATIONS

Sections

Claims, reports, etc., filing and receipt: RCW 1.12.070.

Interest on judgments: RCW 4.56.115.

Liability of local governments for injury to unauthorized third-party occupant of local government vehicle: RCW 4.92.180.

Liability of public officials and governing body members: RCW 4.24.470.

4.96.010 Tortious conduct of local governmental entities—Liability for damages. (1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035. [2011 c 258 § 10; 2001 c 119 § 1; 1993 c 449 § 2; 1967 c 164 § 1.]

Short title—Purpose—Intent—2011 c 258: See RCW 39.106.010.

Purpose—1993 c 449: "This act is designed to provide a single, uniform procedure for bringing a claim for damages against a local governmental entity. The existing procedures, contained in chapter 36.45 RCW, counties, chapter 35.31 RCW, cities and towns, chapter 35A.31 RCW, optional municipal code, and chapter 4.96 RCW, other political subdivisions, municipal corporations, and quasi-municipal corporations, are revised and consolidated into chapter 4.96 RCW." [1993 c 449 § 1.]

Purpose—1967 c 164: "It is the purpose of this act to extend the doctrine established in chapter 136, Laws of 1961, as amended, to all political subdivisions, municipal corporations and quasi municipal corporations of the state." [1967 c 164 § 17.]

Additional notes found at www.leg.wa.gov

4.96.020 Tortious conduct of local governmental entities and their agents—Claims—Presentment and filing—Contents. (1) The provisions of this section apply to claims for damages against all local governmental entities and their officers, employees, or volunteers, acting in such capacity.

(2) The governing body of each local governmental entity shall appoint an agent to receive any claim for damages made under this chapter. The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located. All claims for damages against a local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within the applicable period of limitations within which an action must be commenced. A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office. The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.

(3) For claims for damages presented after July 26, 2009, all claims for damages must be presented on the standard tort claim form that is maintained by the risk management division of the office of financial management, except as allowed under (c) of this subsection. The standard tort claim form must be posted on the office of financial management's web site.

(a) The standard tort claim form must, at a minimum, require the following information:

(i) The claimant's name, date of birth, and contact information;

(ii) A description of the conduct and the circumstances that brought about the injury or damage;

(iii) A description of the injury or damage;

(iv) A statement of the time and place that the injury or damage occurred;

(v) A listing of the names of all persons involved and contact information, if known;

(vi) A statement of the amount of damages claimed; and

(vii) A statement of the actual residence of the claimant at the time of presenting the claim and at the time the claim arose.

(b) The standard tort claim form must be signed either:

(i) By the claimant, verifying the claim;

(ii) Pursuant to a written power of attorney, by the attorney in fact for the claimant;

(iii) By an attorney admitted to practice in Washington state on the claimant's behalf; or

(iv) By a court-approved guardian or guardian ad litem on behalf of the claimant.

(c) Local governmental entities shall make available the standard tort claim form described in this section with instructions on how the form is to be presented and the name, address, and business hours of the agent of the local governmental entity. If a local governmental entity chooses to also make available its own tort claim form in lieu of the standard tort claim form, the form:

(i) May require additional information beyond what is specified under this section, but the local governmental entity may not deny a claim because of the claimant's failure to provide that additional information;

(ii) Must not require the claimant's social security number; and

(iii) Must include instructions on how the form is to be presented and the name, address, and business hours of the

agent of the local governmental entity appointed to receive the claim.

(d) If any claim form provided by the local governmental entity fails to require the information specified in this section, or incorrectly lists the agent with whom the claim is to be filed, the local governmental entity is deemed to have waived any defense related to the failure to provide that specific information or to present the claim to the proper designated agent.

(e) Presenting either the standard tort claim form or the local government tort claim form satisfies the requirements of this chapter.

(f) The amount of damages stated on the claim form is not admissible at trial.

(4) No action subject to the claim filing requirements of this section shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim has first been presented to the agent of the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty calendar day period. For the purposes of the applicable period of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed.

(5) With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory. [2012 c 250 § 2; 2009 c 433 § 1; 2006 c 82 § 3; 2001 c 119 § 2; 1993 c 449 § 3; 1967 c 164 § 4.]

Purpose—Severability—1993 c 449: See notes following RCW 4.96.010.

4.96.041 Action or proceeding against officer, employee, or volunteer of local governmental entity—Payment of damages and expenses of defense. (1) Whenever an action or proceeding for damages is brought against any past or present officer, employee, or volunteer of a local governmental entity of this state, arising from acts or omissions while performing or in good faith purporting to perform his or her official duties, such officer, employee, or volunteer may request the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity.

(2) If the legislative authority of the local governmental entity, or the local governmental entity using a procedure created by ordinance or resolution, finds that the acts or omissions of the officer, employee, or volunteer were, or in good faith purported to be, within the scope of his or her official duties, the request shall be granted. If the request is granted, the necessary expenses of defending the action or proceeding shall be paid by the local governmental entity. Any monetary judgment against the officer, employee, or volunteer shall be paid on approval of the legislative authority of the local governmental entity or by a procedure for approval created by ordinance or resolution.

(3) The necessary expenses of defending an elective officer of the local governmental entity in a judicial hearing to determine the sufficiency of a recall charge as provided in *RCW 29.82.023 shall be paid by the local governmental entity if the officer requests such defense and approval is granted by both the legislative authority of the local governmental entity and the attorney representing the local governmental entity. The expenses paid by the local governmental entity may include costs associated with an appeal of the decision rendered by the superior court concerning the sufficiency of the recall charge.

(4) When an officer, employee, or volunteer of the local governmental entity has been represented at the expense of the local governmental entity under subsection (1) of this section and the court hearing the action has found that the officer, employee, or volunteer was acting within the scope of his or her official duties, and a judgment has been entered against the officer, employee, or volunteer under chapter 4.96 RCW or 42 U.S.C. Sec. 1981 et seq., thereafter the judgment creditor shall seek satisfaction for nonpunitive damages only from the local governmental entity, and judgment for nonpunitive damages shall not become a lien upon any property of such officer, employee, or volunteer. The legislative authority of a local governmental entity may, pursuant to a procedure created by ordinance or resolution, agree to pay an award for punitive damages. [1993 c 449 § 4; 1989 c 250 § 1; 1979 ex.s. c 72 § 1. Formerly RCW 36.16.134.]

***Reviser's note:** RCW 29.82.023 was recodified as RCW 29A.56.140 pursuant to 2003 c 111 § 2401, effective July 1, 2004.

Purpose—Severability—1993 c 449: See notes following RCW 4.96.010.

4.96.050 Bond not required. No bond is required of any local governmental entity for any purpose in any case in any of the courts of the state of Washington and all local governmental entities shall be, on proper showing, entitled to any orders, injunctions, and writs of whatever nature without bond, notwithstanding the provisions of any existing statute requiring that bonds be furnished by private parties. [1993 c 449 § 5.]

Purpose—Severability—1993 c 449: See notes following RCW 4.96.010.