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

# REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## TABLE OF CASES

**Statutes**

**Washington State Court Rules**



**Session Laws**



**Legislative Journals and Reports**

Appellants do not abandon any argument in the Appellant's Brief, even if it is not repeated in this Reply Brief.

## I. THE FASTS' CLAIM WAS TIMELY FILED BECAUSE THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS APPLIES.

### A. *Wills v. Kirkpatrick* applies the Medical Malpractice statute here.

The *Wills* court asserted – however incorrectly – that Legislature intended for the medical malpractice statutes to apply to actions where the plaintiff is the living patient. *Wills v. Kirkpatrick*, 56 Wn.App 757, 761-63, 785 P.2d 834 (Wn.App. Div. 2, 1990). Plaintiff Jamie Fast was the patient here, as evinced by every component of the medical record, (CP 447-706), including but not limited to Defendant's delivery note, (CP 656), fetal heart monitor strips, (CP 582-619), and even the pathology report on tissues produced from the stillborn delivery, (CP 663-64). The only page that refers to "Baby Boy Fast" has a "Patient Label" identifying "Fast, Jamie L" as the patient, (CP 702).

The negligent health care that caused the plaintiffs' injuries was committed upon the living plaintiff, *patient* Jamie Fast. Even if *Wills* is valid – and it is not – then the medical malpractice statute of limitations applies here, (*Wills*, 56 Wn.App. at 761-62). The claim was timely filed.

It is further observed that none of the recorded cases deal with medical malpractice causing the loss of an unborn child. *Philippides v. Bernard* is

a consolidation of four cases for the purpose of determining where the child is an adult, whether a parent must be dependent on the adult child in order to recover under RCW 4.24.010, (151 Wn.2d 376, (2004)). That is not relevant here. *Philippides* does, however, distinguish between RCW 4.24.010 and chapter 4.20 RCW, (*id.* at 381-83). The "sole question" in *Moen v. Hanson* was whether a parent has a cause for the wrongful death of a viable unborn fetus under RCW 4.24.010, and the court held Yes, (85 Wn.2d 597, 598, (1975)). Furthermore, the fetus in *Moen* died in an automobile collision in 1970; the case had nothing to do with medical malpractice, (*id.*), and it is noted that the medical malpractice statutes were not even enacted until 1976, (Laws of 1975-'76 2nd Ex.S. ch. 56 § 6). It is not relevant here. Finally, Defendants cited *Masunaga v. Gapasin*, which like *Philippides*, addressed the issue of whether parents of adult children had to be financially dependent on their adult children in order to recover under RCW 4.24.010, (57 Wn.App. 624, (1990)). It is not relevant here.

None of the cases deal with the issue of medical malpractice that causes the death of a fetus. This is different than another wrongful death case, because the health care is provided to the mother, not to the fetus, and the fetus is wholly dependent on the mother until birth.

To extend *Wills* to remove the loss of an unborn child from a medical

malpractice action, would have far-reaching consequences, and would raise several policy issues. This case illustrates, for example, that Defendants would be held liable under medical malpractice for causing the death of an *unviable* child, but would not be held liable for causing the death of this *viable* child. There is no conceivable set of facts that could rectify why the same acts of professional negligence, the damages for which are covered by the same insurer, should be subject to different standards under the law.

Finally, should this Court hold that *Wills* is valid and extends to cases of unborn children, then this Court should also address the following issues: 1) Whether the patient's spouse can recover general damages, given that he was not the patient; and 2) Whether an award for Jamie's special damages should be reduced by half and characterized as separate property, because those costs were paid from community property, and husband Shane is a mere statutory beneficiary of the community property.

**B. *Wills* is fallacy and should be overturned or refused extension.**

It is critical to understand the rationale of the *Wills*[1] decision. In *Wills*, a physician is alleged to have committed medical malpractice against a

[1] A copy of the *Wills* decision is provided at **Ex. 1**. *Wills v. Kirkpatrick*, 56 Wn.App. 757, 785 P.2d 834 (Wn.App. Div. 2, 1990).

woman, causing her death. *Wills*, 56 Wn.App. at 758-59. Her adult[2] son brought an action against the physician. *Id.* at 759.

Under the medical malpractice statute of limitations, a three-year limitation period begins to run *upon the negligent act or omission*, (*Id.*; RCW 4.16.350). The adult son had filed his case after the medical malpractice limitation period had expired. *Id.* at 758-61. Where wrongful death *is not* caused by medical malpractice, however, the personal injury statute of limitations at RCW 4.16.080(2) applies, and a three-year limitation period begins to run *at the time of death*, (not the time of the negligent act or omission). *Id.* Although the adult son in *Wills* had filed his case *more than* three years after *the act of medical malpractice*, he filed the case *less than* three years after the *death*. *Id.* Thus, if the medical malpractice statute of limitations could apply to wrongful death actions, then the adult son's action would be time-barred; whereas if the medical malpractice statute of limitations *could not* apply, then the adult son's action would have been timely filed. *Id.*

> The critical question is whether "damages for injury" [in the medical malpractice statute] should be interpreted broadly to apply to **injury to statutory beneficiaries in a wrongful death claim**, or should be limited to injury suffered by the patient.

*Wills*, 56 Wn. App. At 761, (*emphasis added*). ***Wills* concedes that**

[2] The son was appointed as personal representative of the woman's estate, (*Wills*, 56 Wn.App. at 759), and we can thus infer that he was an adult.

**wrongful death is an injury to the statutory beneficiaries**. Where wrongful death is an "injury occurring as a result of health care," (RCW 4.16.350), then the medical malpractice statute of limitations should apply.

But that is not what the *Wills* court held. It is transparent that the *Wills* court wanted the adult son to maintain his action. But they could not get to that result by applying the plain meaning of RCW 4.16.350. So they proceeded by construing the term "injury" at RCW 4.16.350 as meaning something more restrictive than "injury." They replaced the term "injury" with "personal injury." *Id.* at 761-763. But that alone does not get to the result; it merely restates the question from whether wrongful death is "injury," to whether wrongful death is "personal injury."

The second proposition the *Wills* court had to assert is that wrongful death is not personal injury. *Id.* The *Wills* court reasoned that wrongful death actions brought under chapter 4.20 RCW are actions pursued for statutory beneficiaries who are not the deceased; that because the statutory beneficiaries did not suffer the injurious act or omission that caused death, then wrongful death actions are not injuries to the person. *Id.*

The *Wills* court then concluded that because the word "injury" at RCW 4.16.350 really means "personal injury," and because wrongful death is not *personal* injury, then the medical malpractice statute of limitations cannot apply to cases where medical malpractice causes death. *Id.* The

*Wills* rule is therefore dependent upon both of the following propositions:

1) That wrongful death is not personal injury; and
2) That "injury" at RCW 4.16.350 means "personal injury."

If either proposition fails, then the *Wills* rule is invalid, and the medical malpractice statute of limitations applies.

**(1). The *Wills* rule fails because wrongful death is personal injury.**

The *Wills* court cited *Dodson* for the principle that the statute of limitations at RCW 4.16.080(2) applies to wrongful death causes.[3] *Dodson*, however, merely states on that issue, "Our decision in *Robinson v. Baltimore* . . . seems to render this plain." *Dodson*, 149 Wn. at 592. It was the *Robinson* court in 1901 that originally decided that wrongful death cases are subject to the statute of limitations at RCW 4.16.080(2). *Robinson v. Baltimore & S. Mining & Reduction Co.*, 26 Wn. 484 (1901).

In *Robinson*, the wife and daughter of a deceased man maintained an action for his wrongful death, (*not* caused by medical malpractice). *Id.* The issue before the *Robinson* court was whether the three-year statute of limitations at RCW 4.16.080(2) applies wrongful death actions, or whether the two-year statute of limitations at RCW 4.16.130 applies instead.[4]

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[3] *Dodson v. Cont'l Can Co.*, 159 Wn. 589, 294 P. 265 (1930), cited in *Wills*, 56 Wn.App. at 760.

[4] Both of the statutes of limitation were enacted with the first Legislative Assembly in 1854, and their language has not changed since; they are, verbatim, today's statutes. RCW 4.16.080(2) corresponds with Laws of 1854 p. 363 § 4(2), and RCW 4.16.130

RCW 4.16.080(2) is the personal injury statute of limitations. It limits to three years, "*any other injury to the person or rights of another*, not hereinafter enumerated," (*Robinson*, 26 Wn. at 486 (emphasis in original)). RCW 4.16.130, on the other hand, limits to two years an "action for relief not hereinbefore provided," (*id.*). The critical question before the *Robinson* court was whether wrongful death constitutes personal injury. The defendants in *Robinson* argued – as Defendants do here – that wrongful death is not personal injury because wrongful death causes accrue to statutory beneficiaries, not to the deceased who suffered the original injury to the person, (*id.*). The *Robinson* court disagreed.

> The words "injury to the person" apply as well to an injury to the deceased father and husband, for which the plaintiffs seek to recover, as an injury to the persons of the plaintiffs themselves. . . . This section [now codified at RCW 4.16.080(2)] clearly means an injury to the person of another when that other is the plaintiff himself, or when that other is the injured party who has since died . . . .

*Robinson*, 26 Wn. at 488.

The *Robinson* court reversed the lower court's summary judgment, and held that **wrongful death actions are subject to RCW 4.16.080(2) *precisely because* wrongful death *is* personal injury[5] to those plaintiffs**

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corresponds with Laws of 1854 p. 364 § 7. At the time of the *Robinson* court's decision, they were codified at Bal. Code §§ 4800 and 4805, respectively, (*Robinson*, 26 Wn. at 486-87).

[5] The language of RCW 4.16.080(2) reads in part, "injury to the person or rights *of another*," [emphasis added]. The term "of another" merely connotes that an action is

**who suffer the loss of the wrongly deceased**. *Id.* at 490.

**(2). The *Wills* rule fails because the court cannot restrict "injury."**

Courts should not read into unambiguous statutes words that Legislature did not write.[6] *Wills* read "personal injury" where Legislature wrote "injury." *Wills*, 56 Wn.App. at 761-62. The *Wills* court read the broader text of the 1975 act in which RCW 4.16.350 was contained.[7] *Id.* Legislature in some parts of that act specified "personal injury," (*id.*), and the *Wills* court reasoned that Legislature probably also meant "personal injury" at RCW 4.16.350, but inadvertently omitted "personal". *Id.*

That Legislature wrote "personal injury" in other parts of the act is a stronger indication that Legislature intentionally omitted "personal" in RCW 4.16.350. Legislature is presumed to know what it is doing. *E.g.*, *State v. Torres*, 151 Wn. App. 378, 385, 212 P.3d 573 (2009). *Moreover*, RCW 4.16.350 existed prior to the 1975 act,[8] where Legislature likewise wrote "injury" not "personal injury;" and RCW 4.16.350 was extensively

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maintained against a tortfeasor who injured *another person*. The functional language also delineates that a person cannot maintain an action against himself for a self-inflicted harm, (e.g., to recover in tort from one's own insurer for a suicide or other self-inflicted wound). *See also* discussion in Appellant's Br. at 18. Specifically, "injury to the person of another" *does not* mean injury to some person other than the plaintiff, as Defense might suggest. Should there be any question whether "injury to the person of another" is "personal injury," it should be observed that no other statute under chapter 4.16 RCW captures personal injury claims, nor does the statute of limitations act of 1854, which is provided in its entirety at Ex. 2.

[6] E.g., Restaurant Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

[7] Laws of 1975, 2d. Ex. Sess., ch. 56

[8] RCW 4.16.350(1971); Laws of 1971, ch. 80 § 1.

revised in the 1975 act. *Moreover still*, medical malpractice Chapter 7.70 RCW was created in the same 1975 act, wherein Legislature wrote "injury" not "personal injury." *Furthermore*, neither RCW 4.16.350 nor Chapter 7.70 RCW restricts "injury" to that suffered directly by the patient, as *Wills* also read into the statute. *Wills*, 56 Wn.App. at 761-62.

Aside from the fallacy, it is impermissible as a matter of law to construe "injury" as "personal injury" at RCW 4.16.350. A court cannot insert words in unambiguous statutory language, even if the court believes that Legislature unintentionally omitted them. *E.g.*, *Alexander v. Highfill*, 18 Wn.2d 733, 140 P.2d 277 (1943). The word "injury" at RCW 4.16.350 means "injury," and thus includes wrongful death.

**(3). The *Wills* rule fails because it circumvents Legislative intent.**

**(a).** *Wills* reasoned that medical malpractice statutes should not apply to wrongful death actions, because wrongful death typically accrued *at the time of death*; and medical malpractice now accrues *at the time of the negligence*, (*Wills*, 56 Wn.App. at 759). *Wills* ignored that Legislature explicitly intended to modify *all* actions caused by medical malpractice:

> 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 (emphasis added). *Wills* seems to argue – as Defendants do here – that wrongful death arises from death, not from the wrongful act causing death, (*Wills*, 56 Wn.App. 759), and thus wrongful death categorically can never occur as a result of health care. *Wills* is incorrect.

Wrongful death actions arise from the wrongful acts of the tortfeasor, not from the person of the deceased. *E.g., Johnson v. Ottomeier*, 45 Wn.2d 419, 423-24, 275 P.2d 723 (1954). Otherwise, death would not be wrongful, but just death. "[T]he gravamen of the [wrongful death] action is negligence of the defendant causing the death of the deceased," *Robinson*, 26 Wn. at 488. Wrongful death occurring as a result of health care is thus a cause subject to the medical malpractice statutes.

**(b).** The Legislative intent of the eight-year repose at RCW 4.16.350 is to protect health care providers from defending stale claims, and to truncate the indeterminate liability of long-tail claims against the insurers. *See* App. Br. at 20-23. *Wills* circumvents Legislative intent by removing wrongful death actions from the eight-year repose.

Here, for example, Hospital has a duty to Defendant Dr. Smith to:

> maintain professional liability insurance . . . insuring against professional liability incurred during the course of the Physician's employment hereunder . . . as to claims made both during and after [his employment]. . . . Tail coverage will be provided . . . .

CP at 57. There is no exception where Dr. Smith's professional

negligence causes death. *Id.* The indemnifier here did not distinguish its coverage among the various types of injuries for which the professional might be liable. *Id.* And neither did Legislature in RCW 4.16.350.

## II. THE CLAIM FORM FILING STATUTE DOES NOT BAR PLAINTIFFS' ACTION.

### A. Defendants concede that no tort claim form exists for them, and that they do not make any such form available.

A Tort Claim Form *does not exist* for the Defendants, ("KGH"). Defendants did not even attempt to make one available. An agent for KGH swore under oath that KGH was aware that the law had recently changed, and now requires KGH to make a tort claim form available. CP 782. KGH testified that it was not in compliance with the law; that it does not make any tort claim form available. CP 782-84. The agent who testified for KGH is the same agent who informed the Plaintiffs' private investigator that a person need not complete any tort claim form before filing a lawsuit against KGH. CP 769-86, 117-19, 289-99.

It is important that this Court further recognize that the tort claim form that Defendant KGH claims to have received, is not a tort claim form required to comply with RCW 4.96.020. *See* App. Br. at 37-41. The form that Defendants claim to have received was a form created and made available by the state to comply with *a different statute*: RCW 4.92.100. *Id.* Furthermore, it requires signature, under penalty of perjury, that the

signator is making a claim against the state of Washington, not a local governmental entity. *Id.* Appellate Brief has also discussed the many ways in which this form is clearly for compliance with chapter 4.92 RCW, and not for chapter 4.96. *Id.* at 38-41. Plaintiffs will move to admit new evidence under RAP 9.11 that will make this distinction incontrovertible.

When Legislature first required that claimants submit their tort claims on a form, Legislature mirrored that local governmental entities shall make such form available, Laws of 2009 ch. 433 § 1. Furthermore, it was Legislature's intent with that amendment to clarify that the statute is designed only to give notice and opportunity to local governmental entities, and that it was never intended to be used as a technical "gotcha" statute to avoid liability.[9] It would be inimical to Legislative intent and to Manifest Justice to hold Plaintiffs responsible for submitting a form to KGH that KGH does not make available, and that does not even exist.

**B. Failure to make a claim form available bars the defense.**

**(1). "Section does not mean "subsection."** Legislature competently used both "section" and "subsection" in RCW 4.96.020. When Legislature meant to refer to a subsection, Legislature wrote "subsection." (e.g., RCW 4.96.020(3)). Legislature moreover appropriately uses the word "section" eight times in RCW 4.96.020, and every instance appears

[9] H.B. Rep. on Engrossed Substitute H.B. 1553 at 4, 61st Leg. Reg. Sess. (Wn. 2009); *see also Myles v. Clark Co.*, 170 Wn.App. 521 (2012); Appellate Brief at 30-32.

within a subsection.[10] Legislature also uses the term "chapter" twice within RCW 4.96.020. Where Legislature stated that failure to comply with this "section" bars a defense under this "chapter," Legislature did not restrict "section" to "subsection (2)." Even if Defendants believe that Legislature meant to have so restricted the language – which leads to absurd results – Defendants are nonetheless unable to read that restriction into the language.[11]

If the word "section" means "subsection" in RCW 4.96.020, then Defendants Smith and Schroff do not have a defense at chapter 4.96 RCW; for the only portion of RCW 4.96.020 that applies to *employees* of local governmental entities is RCW 4.96.020(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.

Under Defendants' rationale, "section" means "subsection (1)," thus only subsection (1) applies to Defendants Smith and Schroff; and because subsection (1) places no tort form requirements on Plaintiffs, then the Plaintiffs' suit was properly filed against Defendants Smith and Schroff.

**(2). RCW 4.96.020 requires more than publishing an agent.** Defendants incorrectly cited *Mavis v. King County Pub. Hosp. Dist. No. 2*,

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[10] All language of RCW 4.96.020 appears solely within subsections.
[11] *E.g.*, *Masunaga v. Gapasin*, 57 Wn.App. 624, 629, 790 P.2d 171, (Wn.App. Div. 1, 1990) ("this court may not amend an unambiguous statute merely because we believe that the Legislature intended something else but failed to express it adequately").

(159 Wn.App. 639, 248 P.3d 558), in an attempt to assert that the only obligations of a local governmental entity under RCW 4.96.020 are to appoint an agent and record the agent with the county auditor, (Def's. Resp. Br.). There are two main reasons why *Mavis* does not stand for that conclusion. First and foremost, *Mavis* was decided on the 2006 version of RCW 4.96.020 (2006), (*Mavis*, 159 Wn.App. at 645), which was before the tort claim *form* was ever introduced into law. The subsection requiring that a local governmental entity "shall make available" a form did not exist until 2009, (Laws of 2009, ch. 433 § 1). Second, *Mavis* does not cite the statute for the purpose of enumerating all of the local governmental entities' obligations; *Mavis* dealt specifically with the question of whether failing to timely record the correct agent would bar a local governmental entity from raising a defense under the chapter – and it did. *Id.* at 648.

A summary of amendments to RCW 4.96.020 is provided at **Ex. 3**.

KGH was required to make a claim form available but chose not to do so, and they are barred from raising the claim form defense.

**C. In the alternative, Plaintiffs substantially complied.**

Plaintiffs substantially complied in two independent ways. First, even under the Defendants' arguments, the only question is whether Plaintiffs made a good-faith attempt to file a tort claim form. Plaintiffs attempted to obtain the form that Defendants "shall make available," (CP 140-41), but

there was no such form available, (CP 140-41), which is consistent with KGH's testimony, (*above*).

Secondly, and most importantly, plaintiffs had provided all of the information that is required on a form that KGH is required to make available – and much more – over ten months prior to filing suit. Plf's. Br. at 42-44; CP 138-42, 132-42, 143-212, 214-20, 229, 231-37, 239-41.

**D. None of Defendants' cited cases applies.**

All of Defendants' cases deal with issues other than the tort claim form, and all of them apply to prior versions of RCW 4.96.020 that have since been modified by Legislature. For example, *Atkins v. Bremerton Sch. Dist.*, 939 F. Supp 2d 1065, involves an issue about the requirements for filing a claim – not a claim form – prior to the 2009 amendment which provided for substantial compliance with content *and procedure*, and which for the first time required that claims be filed on a tort claim *form*. *Renner v. City of Marysville*, 146 Wn.App. 443, likewise addresses what is meant by substantial compliance with content before the 2009 amendment.

**E. The Statute should be construed to avoid the mischief it redresses.**

"It is a legal commonplace that in construing remedial statutes courts will look to the prior law and the mischief to be met in order to determine the scope of the remedy." *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wn. 545, 553, 151 P. 1088, (1915). *See also State ex rel. Ewing v. Reeves*,

15 Wn.2d 75, 88, 129 P.2d 805 (Wn. 1942) quoting *In re Rouss*, 221 N.Y. 81, 91, 116 N.E. 782, 785 ("Statutes must be so construed, if possible, that absurdity and mischief may be avoided."); *State v. Stewart*, 52 Wn. 61, 100 P. 153, (1909) ("courts will look to the old law, the mischief, and the remedy").

It should be clear to this Court that Defendants have long known about this claim, have had ample information and opportunity to investigate it, and after ten months declined to settle or mediate. Now Defendants attempt to use RCW 4.96.020 as a technical "gotcha" to escape their liabilities. But Legislature expressed that its 2009 amendment to the statute was remedial, and was enacted for the expressed purpose of putting an end to the kind of tricks that Defendants are trying to pull here:

> 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). *See* discussion in Plaintiffs' Appellate Brief at 30-33. In construing the "form" requirements introduced at RCW 4.96.020 with Laws of 2009 ch. 433 § 1, this Court should reach an interpretation that

meets the intent of the remedial act: To stop the denial of injured plaintiffs' claims based on technical interpretations that make this a "gotcha" statute. It cannot be said that Legislature meant to dismiss a Plaintiffs' case because Plaintiff did not complete the local governmental entity's form that the entity did not make available.

> 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.

## III. PLAINTIFFS' CONSTITUTIONAL ARGUMENTS ARE PROPERLY BEFORE THIS COURT.

### A. Even if Plaintiffs did not raise the constitutional arguments – which they did – then this court can nonetheless consider them.

RAP 12.1(b) provides that the Court can raise an issue not raised by either party, if the issue should be considered to properly decide the case. Indeed, Defendants' statute of limitations argument, for example, hangs on a single case that the Division 2 court decided on an issue that it raised *sua sponte*:

> Although it may be questionable whether Wills argued below that the general statute of limitations, RCW 4.16.080(2), applied rather than RCW 4.16.350, this court nevertheless has inherent authority to consider an issue which the parties have not raised if doing so is necessary to a proper decision. *Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989).

*Wills*, 56 Wn.App. at 758 (footnote 1).

**B. Plaintiffs preserved the Constitutional challenges below.**

Plaintiffs argued sufficiently before the trial court to preserve the constitutional challenges. Plaintiffs argued at CP 769-70 that RCW 4.96.020 should not apply to this case under due process and equal protection, (*id*). Plaintiffs concede that the constitutional arguments were not as developed as other arguments before the court. But the arguments that Plaintiffs did develop contain the essential elements required under the constitutional challenges. In particular, Plaintiffs argued Waiver and Collateral Estoppel at the trial court, (CP 119-122):

> Certain affirmative defenses, such as insufficient process, can be considered to have been waived as a matter of law. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (1999). The *Lybbert* court reasoned that such defenses can be waived "to reduce the likelihood that the 'trial by ambush' style of advocacy, which has little place in our present day adversarial system, will be employed." *Id.* at 40. "A defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on the ground only after the statute of limitations has run, thereby depriving plaintiff of the opportunity to cure the service defect." *Id.* at 40 (quoting *Santos v. State Farm Fire and Cas. Co.*, 902 F.2d 1092, 1096 (2d. Cir. 1990). "If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised." *Id.* at 39. The courts have concluded that a defendant waives an affirmative defense if "(1) assertion of the defense is inconsistent with defendant's prior behavior, or (2) the defendant has been dilatory in asserting the defense." *Brevick v. City of Seattle*, 139 Wn.App. 373, 160 P.3d 648, *citing King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). A defendant's conduct is dilatory when he knows or should know the necessary facts and fails

to act earlier. *Blakenship v. Kaldor*, 114 Wn. App. 312, 320, 57 P.3d 295 (2002).

Defendant KGH was served on August 1, 2012, (**Exhibit 9**). Defendant Dr. Smith was served on August 3, 2012, (**Exhibit 10**). Under the civil rules, they had 20 days to file either an answer or a motion to dismiss, (CR 8, 12), which were due on August 21 and August 23, 2012, respectively. Had Defendants responded timely, the Fasts would have been able to re-file their complaint within the statute of limitations. . . . Defendants were dilatory in responding.

CP 119-122. The following represents the sequence of deadlines, pleadings, and significant events in this case:

06/07/2012 Legislature removed the medical malpractice exemption from RCW 4.96.020, and for the first time ever, a tort claim form was required in a medical malpractice case.

07/03/2012 Start of 60 days before the expiry of the statute of limitation

07/10/2012 Defendants replied that they are not willing to mediate.

08/01/2012 Plaintiffs served Defendant KGH with a lawsuit. Because KGH did not make a form available under RCW 4.96.020, Plaintiffs offered a different form under a different statute, (RCW 4.92.100), asserting a claim against a different entity.

08/21/2012 Defendant ***was required*** under CR 8, 9(c), 12 to serve an answer or a motion asserting any defense, ***but did not do so***.

08/31/2012 The statute of limitations, as tolled by mediation requests, would have expired if no tort claim form was required.

10/30/2012 The statute of limitations, as tolled by the requests for mediation and by filing a claim form, would have expired. *See* concession at Def's. Resp. Br. at 4.

11/05/2012 Defendants assented to cancel a status conference, representing to the court that there are no affirmative defenses to raise, (CP 120, 315-318)

11/19/2012 Defendants filed motion for summary judgment and for the first time asserted the tort claim form defense.

When on July 10, 2012, Defendants informed Plaintiffs that they are not willing to mediate, the Plaintiffs faced a harrowing set of choices. (Those choices, explained below, are summarized at **Ex. 4**). KGH did not

make a tort claim form available, and there was no form for KGH, (*above*). Plaintiffs were in their rights under the statute to file without completing any form. But if Defendants were simply hiding a form or decided to make one available *after* filing, they might have ambushed Plaintiffs and claimed that Plaintiffs did not comply. Had Plaintiffs filed the incorrect form, on the other hand – the RCW 4.92 form – and waited for 60 days, then Defendants could argue that the RCW 4.92 form does not substantially comply, because it clearly states a claim against the state, not against KGH, and therefore Plaintiffs' suit would be time-barred. Defendants enjoyed a moral hazard: A situation where they could pick one of two contradictory defenses, depending on how Plaintiff proceeded.

There was one move, however, where Plaintiffs could force Defendants' hand to pick any defense it wished to assert, in time for Plaintiffs to cure whatever defect Defendant alleged. By filing an incorrect form concurrently with the lawsuit, Defendants were required to assert any defense in an answer or a motion, **within 20 days**. *See* CR 8, 9(c), and 12. That would have provided Plaintiffs opportunity to cure any alleged defect by dismissing their case without prejudice and providing any additional form or wait time KGH would have asserted it is entitled to receive. (*See* summary at **Ex. 4**). But Defendants chose not to supply any answer or motion within 20 days. **Defendants admitted that they did**

**not file an answer or motion within 20 days**, (CP at 109 ln 19-20). In fact, Defendants **did not answer or assert any defense until over three months after Defendants were served**. To be sure, the defense was asserted two weeks **after there was any possibility to cure the alleged defect raising the defense**. Plaintiffs argued below that Defendants lied in wait to ambush them with a dilatory response. And therefore, the Defendants waived their right to assert the claim form defense, *as a matter of law.*

The arguments asserted above, alone or combined with other arguments before the trial court, contain the elements required for the constitutional arguments. Furthermore, Plaintiffs put the Defendants on notice through their briefs and through oral arguments that if this case goes to the Court of Appeals, then Plaintiffs will further develop their constitutional challenges on due process and equal protection. Plaintiffs trust that this Court can appreciate the volume and complexity of the issues in this case, and that it would have been futile to have developed every conceivable argument before the trial court, when it is obvious from the decision that the trial court did not address even a fraction of the issues advanced.

Plaintiffs also trust that this Court will carefully observe where Plaintiffs have advanced constitutional arguments "as applied to this

case," as opposed to "facially invalid" constitutional arguments. All of Defendants' arguments and cited cases apply to "facially invalid" arguments, not to "as-applied" arguments.

Defendants cited a recent case, *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59 (2013), as standing for the proposition that the *Waples* decision holding a 90-day notice requirement unconstitutional in violation of CR 3, (169 Wn.2d 152), will not be applied to governmental entities. *McDevitt* actually supports Plaintiffs' equal protection argument – as applied – when it upholds that statutory classifications are only permissible and not arbitrary where they rest upon some ground of difference having a fair and substantial relation to the object of the legislation, (179 Wn.2d at 72-74). Here the local governmental entity was provided notice and all elements required on any claim form, and investigated the claim for ten months, then informed the Plaintiffs that they are not willing to settle or mediate. After that point, the purpose of the legislation had been exhausted. There is no substantial relation to a requirement to submit a form with the same information provided ten months earlier, and to wait another 60 days, when the entity had already taken five times that amount of time to investigate the claim, and refused settlement or mediation.

*McDevitt* also refused to apply its decision retroactively to the Plaintiffs, holding that the Plaintiffs had relied on a prior Supreme Court

decision that simply stated that a statute was unconstitutional, without specifying as against a governmental or non-governmental entity, (*id.* at 82-85). McDevitt applied the three-part *Chevron* test for retroactive application, (*id.*).[12] Plaintiffs here meet the *Chevron* test, because 1) A determination that a local governmental entity need not make available a claim form to raise a defense would be in direct conflict with the plain meaning of RCW 4.96.020 and therefore not clearly foreshadowed; 2) retroactive application of such a decision would impede the policy objectives of the statute – to give local entities opportunity to investigate and settle, not to dismiss cases on "gotcha" technicalities – and 3) retroactive application would produce a substantially inequitable result here, particularly where Plaintiffs attempted to resolve any potential ambiguities in reliance on the Defendants' requirement to assert the defense within 20 days of service, yet Defendants waited over three months to ensure that they extinguished every opportunity for Plaintiffs to cure any asserted defect.

Finally, it is observed that this is a summary judgment case, yet generated 1275 pages of CP and no fewer than a dozen major legal arguments and many more secondary ones. It is also observed that the trial court barely discussed three of them and did not even acknowledge

[12] citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971)

the remaining, (CP 1234-36). This case is therefore ideal for this Court to invoke RAP 12.1(b) should Plaintiffs constitutionality arguments be considered here.

## IV. PLAINTIFFS ASSERTED ALL CLAIMS WELL BEFORE ORAL ARGUMENTS.

Plaintiffs' complaint asserted all claims under chapter 7.70 RCW, RCW 4.24.010, and all other claims as allowed by law, (CP 1-16). The complaint includes specific facts about difficulty conceiving, prolonged bleeding, family history of diabetes and cholesterol, polydipsia, polyuria, and many more conditions, and that Defendant failed to follow-up, (*id.*). Plaintiffs described the difficulties that Jamie experiences as a result of failure to diagnose diabetes, in their requests for mediation 11 months before serving plaintiffs with the complaint, (CP 144-212, 239-41; *see also* CP 110-111). Defendant was charged by the state's disciplinary board on March 19, 2012, for among other things, failing to work-up Jamie's diabetes and other health conditions, (CP 243-246). After the child died, Defendants referred Jamie to manage her diabetes, (CP 705-06). Defendant's averred surprise by any claim other than fetal demise is disingenuous and without any practical effect here.

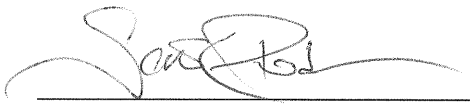
## V. CONCLUSION

The Summary Judgment should be reversed because the medical

malpractice statute of limitations applies here, and it was tolled for one year on making good-faith requests for mediation. Because Defendants failed to meet the requirements of section RCW 4.96.020, they are barred from raising a defense under chapter 4.96 RCW. Even so, in the alternative, the Plaintiffs here substantially complied with the statute when they attempted to locate a form – that Defendants testified does not exist – or at the earliest when they provided all the information required on the form, 10 months earlier. In the second alternative, it is manifestly unjust for the Defendants to escape liability on this abuse of RCW 4.96.020, as Plaintiffs argued below under Waiver, Collateral Estoppel, and constitutional grounds; and Plaintiffs can use its arguments below to better develop its constitutional arguments here.

Plaintiffs therefore respectfully request this court to reverse the trial court's summary judgment.

RESPECTFULLY SUBMITTED this 3rd day of March, 2014,



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Attorneys for Appellant

# Wills v. Kirkpatrick

Court of Appeals of Washington, Division Two
January 29, 1990
No. 11325-2-II

**Reporter:** 56 Wn. App. 757; 785 P.2d 834; 1990 Wash. App. LEXIS 55

Gregory R. Wills, as Personal Representative, Appellant, v. Richard A. Kirkpatrick, et al, Respondents

**Subsequent History:** [***1] Review Denied at *114 Wn.2d 1024 (1990)*.

## Case Summary

**Procedural Posture**
Appellant personal representative sought review of the summary judgment entered by the Superior Court for Cowlitz County (Washington) that dismissed his wrongful death claim against respondent doctors based on the limitation of actions for negligence claims against health care providers found in *Wash. Rev. Code Ann. § 4.16.350*.

**Overview**
The decedent underwent a complete physical examination in October 1982, at which time she complained about chest heaviness, chronic intermittent heart palpitations, and an occasional dizzy spell. She died on May 16, 1983, and the autopsy revealed that her death resulted from a heart condition. The personal representative discovered a letter that led him to believe that the doctor was negligent in the decedent's treatment. The trial court measured the three-year limitation period from the date of the decedent's last visit with the doctor and concluded that the action was barred. The question was whether damages for injury should be interpreted broadly to apply to injury to statutory beneficiaries in a wrongful death claim, or should be limited to injury suffered by the patient. The court reversed and found that there was nothing to suggest that the limitation of actions for medical malpractice embraced a claim for wrongful death. If that were the case, a situation could arise where such a claim could be barred even before death triggered accrual of the right to bring the action. Such a result seemed illogical and unjust.

**Outcome**
The court reversed the dismissal.

**Counsel:** *Lembhard G. Howell, for appellant.*

*Lory R. Lybeck (Mildred J. Carmack, Ridgway K. Foley, Jr., and Schwabe, Williamson, Wyatt, Moore & Roberts, of counsel), for respondents.*

**Judges:** Petrich, J. Alexander, C.J., and Reed, J., concur.

**Opinion by:** PETRICH

## Opinion

**[**835]** **[*758]** Gregory Wills, as personal representative of Cheri Skye's estate, appeals the trial court's summary judgment dismissing his wrongful death claim against Dr. Richard Kirkpatrick based on the limitation of actions for negligence claims against health care providers. *RCW 4.16.350*. The issue on appeal is **[***2]** whether the medical malpractice statute of limitations applies to an action of wrongful death based on medical malpractice. [1] We conclude that the medical malpractice statute of limitations does not apply to a wrongful death action based on medical malpractice. Accordingly, we reverse.

Cheri Skye, the decedent, was Dr. Kirkpatrick's patient. Skye underwent a complete physical examination in October 1982, at which time she complained about chest heaviness, chronic intermittent heart palpitations, and an occasional dizzy spell. Dr. Kirkpatrick treated Skye with medication and indicated that if her condition deteriorated he would favor **[***3]** running an echocardiogram to detect valvular heart disease. Echocardiography never took place **[*759]** although Skye continued to show the same symptoms. Skye's last visit to Dr. Kirkpatrick was on April 28, 1983; she died on May 16, 1983. An autopsy revealed that her death resulted from a heart condition diagnosed as a mitral valve degeneration and prolapse.

In mid-1985, Gregory Wills, the decedent's son, discovered a letter that Dr. Kirkpatrick had sent to the decedent prior to her death. The letter led Wills to believe that Dr. Kirkpatrick was negligent in the treatment of Skye. Wills then took the legal steps necessary to become appointed as personal representative of his mother's estate.

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[1] Although it may be questionable whether Wills argued below that the general statute of limitations, RCW 4.16.080(2), applied rather than RCW 4.16.350, ***HN1*** this court nevertheless has inherent authority to consider an issue which the parties have not raised if doing so is necessary to a proper decision. *Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989).

On May 2, 1986, Wills filed this action against Dr. Kirkpatrick on behalf of the statutory beneficiaries for the wrongful death of his mother, alleging that Dr. Kirkpatrick was negligent in his treatment of her.

The trial court applied the medical malpractice statute of limitations, RCW 4.16.350. Relying on Bixler v. Bowman, 94 Wn.2d 146, 614 P.2d 1290 (1980), the trial court measured the 3-year limitation period from April 28, 1983, the date of Skye's last visit **[***4]** with Dr. Kirkpatrick, and concluded that the action was barred by the lapse of time.

***WA[1]*** [1] ***HN2*** Actions for wrongful death are strictly statutory. They must be instituted by the personal representative of the deceased and the recovery does not become a part of the decedent's estate. RCW 4.20.010-.020; Wood v. Dunlop, 83 Wn.2d 719, 723, 521 P.2d 1177 (1974). ***HN3*** A wrongful death action is not a survivorship action on behalf of the decedent's estate; it creates in the beneficiaries of the decedent a new and original cause of action based on the wrongful death itself. Warner v. McCaughan, 77 Wn.2d 178, 460 P.2d 272 (1969); Gray v. Goodson, 61 Wn.2d 319, 325, 378 P.2d 413 (1963). ***HN4*** Washington's wrongful death statute does not contain an express statute of limitations. [2] Rather, wrongful death actions are governed by RCW 4.16, which **[*760]** sets forth the statutes of **[**836]** limitation applicable to different types of actions. White v. Johns-Manville Corp., 103 Wn.2d 344, 348, 693 P.2d 687 (1985). ***HN5*** The 3-year provision of RCW 4.16.080(2), measured from the date of death, has been applied to wrongful death claims **[***5]** because such claims qualify as "any other injury to the person or rights of another not hereinafter [3] enumerated." Dodson v. Continental Can Co., 159 Wash. 589, 591-92, 294 P. 265 (1930).

The question we are asked to resolve is whether the medical malpractice statute of limitations, RCW 4.16.350, which measures the period from the act or omission causing the injury, embraces **[***6]** a wrongful death claim based on medical malpractice. If it does not, then the general statute of limitations contained in RCW 4.16.080(2) would apply. The determination of this question is essentially one of statutory construction.

The pertinent provisions of RCW 4.16.350, which were in effect at all times relevant to this action, provided:***HN6***

> 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 limited to, a physician, . . .
>
> . . . .
>
> 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 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 **[***7]** a foreign body not intended to have a therapeutic or diagnostic purpose or effect.

As appears from the statute, claims against health care providers *for damages for injury* as a result of health care **[*761]** must be commenced within certain time limits of the act or omission alleged to have caused the injury or condition. The critical question is whether "damages for injury" should be interpreted broadly to apply to injury to statutory beneficiaries in a wrongful death claim or should be limited to injury suffered by the patient.

***WA[2]*** [2] ***HN7*** The objective of statutory interpretation is to ascertain legislative intent. Department of Transp. v. State Employees' Ins. Bd., 97 Wn.2d 454, 645 P.2d 1076 (1982). Context and subject matter of legislation must be considered because the intention of the lawmaker is to be determined, if possible, from what the Legislature said. Hatzenbuhler v. Harrison, 49 Wn.2d 691, 306 P.2d 745 (1957). An act must be construed as a whole, giving effect to all the language used, considering all provisions in relations to each other and, if possible, harmonizing all to insure proper construction of each provision. **[***8]** Newschwander v. Board of Trustees of Wash. State Teachers' Retirement Sys., 94 Wn.2d 701, 620 P.2d 88 (1980).

The provisions of RCW 4.16.350 which are pertinent to our inquiry were enacted as part of Laws of 1975, 2d Ex. Sess., ch. 56. The chapter consists of 15 sections. It is apparent that the Legislature was dealing with various aspects of *personal injuries* by various claimants. In addition to the section dealing with medical malpractice, the chapter deals with: the elimination of a statement of

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[2] Most states have a special statutory limitation, independent of the general statute of limitations, within which an action for wrongful death must be brought. *See* S. Speiser, *Recovery for Wrongful Death* § 11:8 (2d ed. 1975).

[3] Relying somewhat on RCW 4.16.010 (repealed effective 1984), which provided that actions be commenced within specified periods after the cause of action accrued, the *White* court tolled the limitation period of RCW 4.16.080(2) under the discovery rule in a wrongful death alleged to have been caused by exposure to asbestos. White v. Johns-Manville Corp., supra.

damages sought in actions for *personal injuries*, § 2 (RCW 4.28.360); the inadmissibility, to prove liability, of the promise, offer or payment of expenses of injury in **[**837]** an action for *personal injuries* based on professional negligence of a health care provider, § 3 (RCW 5.64.010); the requirement that an award for damages in a claim for *personal injuries* of a totally and permanently disabled claimant be in the form of an annuity plan, § 5 (RCW 4.56.240, *repealed by* Laws of 1986, ch. 305, § 802); the requirement, in a claim for failure to obtain an informed consent, that there be proof that the treatment given caused *injury to the* **[***9]** **[*762]** *patient*, § 10 (RCW 7.70.050); and the allowance of evidence that the *patient has already been compensated for the injury* from any source except assets of the patient or insurance provided by patient's assets, § 13 (RCW 7.70.080).

***WA[3]*** [3] The entire chapter is primarily concerned with various aspects of claims involving personal injuries of the patient. There is nothing to suggest that the limitation of actions for medical malpractice embraces a claim for wrongful death.

If indeed the medical malpractice statute of limitations applied to wrongful death claims, we would have the situation where such a claim could be barred even before death triggers accrual of the right to bring the action. Such a result seems to us illogical and unjust. It is true that the limited discovery period of 1 year may be added to the limitation of time to bring suit if the cause of the injury is unknown. However, in any event, the Legislature placed an absolute 8-year limitation of action for injuries resulting from medical malpractice. [4]

**[***10]** **[*763]** While the Legislature may have the power to enact such a limitation period barring wrongful death claims even before they accrue, it is obvious to us that the Legislature did not do so here. If the Legislature had intended to include wrongful death claims within these limited periods it could have done so by so limiting such actions for damages for injury, *or death*, as a result of health care. It did not do so.

***WA[4]*** [4] We conclude that the 3-year limitation period of RCW 4.16.080(2), measured from the date of death, applies to this claim for wrongful death based on the alleged medical malpractice of Dr. Kirkpatrick. This case was commenced within these time requirements and dismissal therefore was not warranted. In view of our conclusion we need not address the question of how knowledge may be imputed to Wills so as to exhaust the 1-year discovery rule.

Reversed.

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[4] It is obvious from the following exchange that the Legislature intended an absolute cap on medical malpractice claims.

"Mr. Knowles: 'No, the only reason I can give you is the crowded time element we were faced with. We met last Saturday from 8 o'clock until 10 and adopted a surprising number of amendments to this bill, which are essentially the last four. These were things that came up later and they've been agreed to by all parties.'

"Mr. Zimmerman: 'As far as the eight-year statute limitation on exemption to majority, how many people do you feel you are going to be dealing with at that point? Does that really make a major change?'

"Mr. Knowles: 'Under present statute there is no cap, this is in the area of discovery. This is the area where a foreign object will be found in a body after the original statute has run out or radiation or something of that nature. In current law there is no cap and what we're concerned with here is to weigh between about four percent of the cases. We've vacillated between; the House bill a year ago put a cap on of ten years and the Senate bill put a cap on of six years. In committee we've compromised and arrived at eight. It will mean some individuals will come under the discovery of a sponge in the body or something of that nature and may not be able to bring their action because the time will run out on them. On the other hand, it's an expense to the insurance companies to maintain reserves against that contingency, so the question is how long are they going to have to maintain that reserve? I don't have the fear of foreign objects that I once did because we learned that now most hospitals are taking a very careful inventory of everything that goes into that operating room, that it all comes out. So I would say you will take your choice here; we felt eight years was a reasonable time to protect the insurance companies and hopefully not result in too many individuals not getting compensated.'" House Journal, 44th Legislature (1975), at 318.

year; and said notice shall name the person or persons to whom such charge may be paid.

SEC. 5. All persons wishing to cross any bridge or road that may be constructed under the provisions of the foregoing act, shall first pay to the person named in said notice, or his agent, the amount charged in the said list of prices.

SEC. 6. Nothing in this act shall be so construed as to prevent the proper authorities of counties, or the territory, from constructing a public road across any such bridge, plank or turnpike road, doing as little injury as possible to its proprietors, free of charge; and it shall also be lawful for any person building a bridge, plank or turnpike road under the provisions of this law, to build across any public road, provided he shall not in any way obstruct or injure said public road.

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## AN ACT REGULATING THE TIME WITHIN WHICH CIVIL ACTIONS MAY BE COMMENCED.



SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Washington*, That actions can only be commenced within the periods

herein prescribed, after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute. But in the district court, the objection that the action was not commenced within the time limited, can only be taken by answer.

SEC. 2. The period prescribed in the preceding section for the commencement of actions, shall be as follows :

Within twenty years,

1st. Actions for the recovery of real property, or for the recovery of the possession thereof, and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.

SEC. 3. Within six years,

1st. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States ;

2d. An action upon a contract in writing, or liability express or implied, arising out of a written agreement ;

3d. An action for the rents and profits, or for the use and occupation of real estate.

SEC. 4. Within three years,

1st. An action for waste or trespass upon real property ;

2d. 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 ;

3d. Actions upon all contracts, express or implied, which are not in writing, and do not arise out of any written instrument ;

4th. 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 ;

5th. An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape ;

6th. An action upon a statute for penalty or forfeiture, where action is given to the party aggrieved, or to such party and the territory, except where the statute imposing it prescribed a different limitation, and for seduction and breach of marriage contract.

SEC. 5. Within one year,

1st. An action for libel, slander, assault, assault and battery, and false imprisonment ;

2d. An action upon a statute for a forfeiture, or penalty to the territory ;

3d. An action against a sheriff or other officer, for the escape of a prisoner arrested, or imprisoned on civil process.

SEC. 6. An action upon a statute for a penalty given in the whole, or in part to the person who will prosecute for the same, shall be commenced within 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 thereafter in behalf of the territory, by the prosecuting attorney of the district in which the county is situated where the offense was committed.

SEC. 7. An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.

SEC. 8. In an action brought to recover a ballance 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.

SEC. 9. The limitations prescribed in this act, shall apply to actions brought in the name of the territory, or for its benefit, in the same manner as to actions by private parties.

SEC. 10. If when the cause of action shall accrue against any person, who shall be out of the territory or concealed, such action may be commenced within the terms herein respectively limited after the return of such person into the territory, or the time of his concealment, and after such cause of action shall have accrued, such person shall depart from and reside out of this territory or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.

SEC. 11. If a person entitled to bring an action mentioned in this act, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued; either

1st. Within the age of twenty-one years;

2d. Insane;

3d. A married woman.

The time of such disability shall not be a part of the time limited for the commencement of the action.

SEC. 12. If a person entitled to bring an action, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of the time, and within one year from his death.

If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives

after the expiration of that time, and within one year after the issuing of letters testamentary, or of administration.

SEC. 13. When a person shall be an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action.

SEC. 14. When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.

SEC. 15. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff, or if he die, and the cause of action survives, his heirs or representatives, may commence a new action, within one year after the reversal.

SEC. 16. No person shall avail himself of a disability unless it existed when his right of action accrued.

SEC. 17. When two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

SEC. 18. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this act, unless the same is contained in some writing signed by the party to be charged thereby, but this section shall not alter the effect of any payment of principal or interest.

SEC. 19. Whenever any payment of principal or interest has been, or shall be, made upon an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

SEC. 20. When the cause of action has arisen in another state, territory or country between non-residents of this territory, and by the laws of the state, territory or country where the cause of action arose, an action cannot be maintained thereon, by reason of the lapse of time, no action shall be maintained thereon in this territory.

SEC. 21. This act shall not extend to actions already commenced, but the statutes now in force shall be applicable to such cases according to the subject of the action and without regard to form, nor shall any cause of action, barred by the statutes now in force, be revived by the provisions of this act, but causes of action now existing, and not already barred, shall not be barred, by reason of any time already elapsed, prior to this act taking effect.

| REVISIONS TO THE TORT CLAIM STATUTES AT RCW 4.92.100 AND RCW 4.96.020 | |
|---|---|
| **Effective Date** | **Summary of Relevant Components** |
| **June 7, 2006** | Laws of 2006 ch 82 §§ 1 and 3<br>• RCW 4.96.020: Inserted, "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." |
| **July 26, 2009** | Laws of 2009 ch 433 §§ 1 and 2<br>• Both statutes were amended to read that "**claims involving injuries from health care . . . are exempt from this chapter**."<br>• **The tort claim form was introduced**. For the first time, claims were required to be submitted on a form. And **Legislature for the first time imposed the requirement that entities make available a form**.<br>• Legislature clarified that these laws were to be liberally construed such that **substantial compliance will suffice with respect to both the content *and the procedural requirements***.<br>• Legislature expressed its intent that these changes were to restore the statutes to their original intent: To **require notice but not to erect technical "gotchas."** |
| **July 11, 2012** | Laws of 2012 ch 250 §§ 1 and 2<br>• Legislature *removed* the language from both statutes that "claims involving injuries from health care are . . . exempt from this chapter."<br>• **For the first time, Medical Malpractice claims were required to be submitted on a claim form.** |
| **July 28, 2013** | Laws of 2013 ch 188 § 1<br>• RCW 4.92.100, (claims against the State), was revised to change "risk management division" to "office of risk management," and state that the form must be maintained on the "department of enterprise services' web site," instead of "office of financial management's web site."<br>• **RCW 4.96.020, (claims against local governmental entities), *was not* modified**. |

| PLAINTIFFS' DILEMMA<br>When Defendants on July 10, 2012 Declined to Mediate | | |
|---|---|---|
| **OPTION 1**<br>Do not file the RCW 4.92.100 form, but proceed to file the lawsuit. | **OPTION 2**<br>File the RCW 4.92.100 form, wait for 60 days, then file the lawsuit. | **OPTION 3**<br>File the RCW 4.92.100 form and the lawsuit concurrently, at least 20 days before the statute of limitations expires. |
| **Advantages**<br>• There is no form available that complies with RCW 4.96.020, so Defendants cannot assert the defense.<br>• If Defense asserts that they do not make a form available and knowingly waived the defense, then Plaintiffs will have filed suit prior to the statute of limitations.<br><br>**Risks**<br>• Defendants could argue, as they do here, that because the state makes an RCW 4.92.100 form available, they are excused from making an RCW 4.96.020 form available.<br>• Defense could have some RCW 4.96.020 form "in hiding" with an intentionally obscure method of obtaining it, or otherwise prepare an RCW 4.96.020 form after the suit is filed, and make it "available" just days before the statute of limitations expires. Such an ambush could deny Plaintiffs a reasonable opportunity to cure. | **Advantages**<br>• If Defendants argue that they are excused from making an RCW 4.96.020 form available, because the state makes one under RCW 4.92.100, then Plaintiffs will have complied with RCW 4.96.020 by using the RCW 4.92.100 form.<br><br>**Risks**<br>• Defense could argue that because it does not make an RCW 4.96.020 form available, it had already waived the defense, and that the RCW 4.92.100 claim is against a different entity – the state – which does not toll the statute of limitations under RCW 4.96.020, and therefore Plaintiffs' suit will be time-barred by the statute of limitations.<br>• Defense could argue that Plaintiffs had already substantially complied with RCW 4.96.020, well before it applied to medical malpractice cases, because Defendants were on notice and had investigated, and therefore filing a non-conforming form after they refused to settle, would not toll the statute of limitations, and the Plaintiffs' suit would be time-barred. | **Advantages**<br>• This option removes the moral hazard by requiring the Defendants to assert any RCW 4.96.020 defense *before* the statute of limitations expires, in an answer or in a motion, thus providing Plaintiffs the opportunity to cure before the statute of limitations expires.<br>• If Defendants claim that the RCW 4.92.100 form constitutes substantial compliance, then the Plaintiffs would have from 8/20/12 until 10/30/12 to dismiss their suit without prejudice, to give Defendants another opportunity to decline settlement, and then refile the lawsuit.<br>• If Defendants claim that the RCW 4.92.100 does not constitute substantial compliance, then they will be required to produce a form that does comply, and Plaintiffs could file said form, move to dismiss the present complaint, and refile – if necessary – after 10/30/12.<br><br>**Risks**<br>• **NONE**, under the clear meaning of the unambiguous statutory language. |

This chart summarizes that the argument advanced under Waiver of Defense contains the elements for the unconstitutional-as-applied Due Process and Equal Protection arguments.

## CERTIFICATE OF SERVICE

I, the undersigned, certify that on March 3, 2014, *after 5:00 p.m.*, served copies of the documents listed below with all required charges prepaid, by the methods indicated below, to the following persons:

**REPLY BRIEF OF APPELLANT**

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On this 3rd day of March, 2014, *after 5:00 p.m.*

Scott E. Rodgers



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