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NO. 68737-9-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

RONDA SNYDER, individually and as
legal guardian for her minor child B.W., Appellant,

v.

JAMES R. FLETCHER, M.D., CAROLINE STAMPFLI, PA-C, and
WHITEHORSE FAMILY MEDICINE, INC., P.S., a Professional Service
Corporation, Respondents.

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COURT OF APPEALS
DIVISION I
SEATTLE, WA

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case involves a claim of medical malpractice by Ronda Snyder on behalf of her minor daughter B.W. defendants James R. Fletcher M.D., Caroline Stampfli, PA-C and Whitehorse Family Medicine P.S. that was dismissed by the trial court on the basis of the statute of limitations. Because there are questions of fact as to when Plaintiff knew, or should have known, facts sufficient to establish the elements of a cause of action against defendants, the trial court erred in granting summary judgment, and this case should be remanded for trial.

On numerous occasions between March 2000 and April 23, 2003, Plaintiff Ronda Snyder sought medical treatment for her minor daughter B.W. from Defendants.¹ B.W. was repeatedly noted to have signs and symptoms of illness, including but not limited to a pattern of unexplained pain and fevers. On numerous occasions between March 2000 and April 2003, Defendants failed to perform thorough physical examinations, including but not limited to their failure to document in her medical record objective physical measurements such as temperature and vital signs.

The parental report of fevers in B.W. was not evaluated or properly regarded by Defendants on numerous occasions. Defendants failed to further investigate B.W.'s persistent symptoms of fever and pain, even at

¹ This summary is taken from the Declaration of Thomas Clarkson, CP at 16.

times when antibiotics failed to improve her condition. B. W. had been suffering from cystitis, or pyelonephritis, as a result of severe vesicoureteral reflux. Complaint, CP at 2.

However, Defendants persisted in incorrect diagnosis of other conditions. As a direct and proximate cause of Defendants' negligence and carelessness, B.W.'s bilateral vesicoureteral reflux condition went undiagnosed and untreated requiring removal of her left kidney on April 23, 2003. But for the negligent treatment from defendants, B.W. would have two functioning kidneys.

At the time her left kidney was surgically removed, B.W. was three years old.

Plaintiff filed this suit on April 21, 2011, two days ahead of the expiration of the eight year statute of repose. A year later, defendants filed a motion for summary judgment on the basis that Plaintiff's claims were barred by the statute of limitations. CP at 10. The trial court granted defendants' motion for summary judgment on March 30, 2012. CP, at 21. Plaintiff moved for reconsideration, which was denied on April 23, 2012. CP, at 26. Notice of Appeal was filed on May 9, 2012. CP, at 27.

This case involves the application of the discovery rule and the factual question of whether Plaintiff knew or should have known of the existence of the elements of a cause of action against Defendants prior to

the date she filed suit. Also at issue is whether Plaintiff's claim on behalf of her minor survive under the eight year statute of repose. Finally, to the extent that the Court rules that the claim is not timely pursuant to these statutes, Plaintiff challenges the constitutionality of the statutes with respect to claims by minor victims of medical negligence.

Because there are questions of fact for a jury to decide as to when Plaintiff discovered or should have discovered the elements of her medical malpractice cause of action against defendants, the trial court erred in granting defendants' motion for summary judgment.

II. ASSIGNMENT OF ERROR

The trial court erred when it granted summary judgment for Defendants on the issue of whether Ronda Snyder brought her claim on behalf of her minor daughter against defendants within the time allowed by the statute of limitations and the statute of repose.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err in granting summary judgment based on the statute of limitations when there are questions of fact as to when Ronda Snyder discovered the factual basis for the elements of a cause of action against defendants Dr. Fletcher, Ms. Stampfli and Whitehorse Family Medicine and a lawsuit was timely filed?

IV. STATEMENT OF THE CASE

A. Medical treatment performed by Defendants caused B.W., a minor, to lose her left kidney and face significant potential physiological consequences yet unknown.

As set forth in the declaration of Dr. Thomas Clarkson, a Board certified Family Practice physician, B.W.'s medical care was mishandled in various ways throughout the twenty-six months from her birth to the removal of her left kidney on April 23, 2003. CP, at 16. Well-accepted standards of care for young infants less than two months of age with fever were not followed. Routine documentation of the accepted standard for the objective measurement of temperature and other vital signs were almost routinely not recorded in the child's office medical record. The parental reporting of fever was not further evaluated or properly regarded on numerous occasions. The proper evaluation of fever in infants and pediatric patients was not performed on frequent occasions. *Id.*

Furthermore, despite evidence that B.W.'s otitis media (OM) failed to respond to antibiotic therapy, alternative diagnoses were not considered. Not only was the established standard of care violated in this case, the negligence of defendants in failing to properly diagnose B.W.'s vesicoureteral reflux in a timely manner resulted in the loss of her left kidney. *Id.*

V. ARGUMENT

A. Standard of Review.

Review of a trial court's dismissal on summary judgment is de novo. *State v. Heckel*, 143 Wn.2d 824, 831-32, 24 P.3d 404 (2001) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)). On review of summary judgment, this Court engages "in the same inquiry as the trial court and view[s] the facts and all reasonable inferences in the light most favorable to the nonmoving party." *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007) (citing *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn.2d 96, 101, 929 P.2d 433 (1997)). "[S]ummary judgment is granted only if, from all of the evidence, reasonable persons could reach but one conclusion." *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

The statute of limitations is an affirmative defense. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008). The defendant carries the burden of proof on a statute of limitations defense. *Id.* (citing CR 8(c); *Hashund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976)). "While ideally, the statute of limitations is a defense that will be decided pretrial, when the facts are disputed *the fact finder must resolve them.*" *Id.* at 267-68 (citing *Doe v. Finch*, 133

Wn.2d 96, 101-02, 942 P.2d 359 (1997)) (emphasis added); *Duke v. Boyd*, 133 Wn.2d 80, 83, 942 P.2d 351 (1997). Because the Plaintiff Ronda Snyder did not discover the damages caused by defendants' negligence to her minor daughter during the eight year statute of repose which did not expire until April 23, 2011, and because this suit was filed before the expiration of the statute of repose, it was error for the trial court to dismiss Plaintiff's lawsuit based on the statute of limitations.

B. The trial court erred when it granted summary judgment because Ronda Snyder has not discovered the damage elements of her cause of action.

For the statute of limitations to begin running, the plaintiff must know the facts supporting each of the essential elements of the cause of action, which are, in a malpractice action, duty, breach, causation, and damages. *See, e.g., Lo v Honda Motor Co.*, 73 Wn. App. 448, 869 P.2d 1114 (1994) (causation); *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 598 P.2d 1358 (1979), *superseded by statute as stated in Wood v. Gibbons*, 38 Wn. App. 343, 685 P.2d 619 (1984) (breach of duty).

"The determination of when a plaintiff discovered or through the exercise of due diligence should have discovered the basis for a cause of action is a factual question for the jury." *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001). The court must deny summary judgment and allow the statute of limitations issue to go to the jury.

In this instance, Ronda Snyder does not know the damages caused to her minor daughter as a result of the nephrectomy she suffered at age three, and will not know those damages until at two more years when B.W. reaches puberty. As nephrologist Dr. Robert Mak testifies in his accompanying declaration,

The consequences of the loss of a kidney are not yet known. B. W.'s estimated kidney function (glomerular filtration rate) based on her height and serum creatinine information from 2008 was not in the normal range and hence classified her condition into the category of Chronic Kidney Disease Stage II. The true effects of the loss of a kidney and chronic kidney disease on the health and quality of life in a young female cannot reasonably be determined until after puberty. In this case, that would not be until she is at least fourteen years old; I understand that she is now twelve years of age.

Declaration of Robert Mak., CP, at 17. Dr. Mak further states that the only way in which damages could be known today with any certainty would involve a highly invasive risky procedure for which there is otherwise no clinical indication. *Id.*

Thus, while the nephrectomy itself may constitute an injury, this standing alone is insufficient to trigger the statute of limitations. As stated by the Court in *Winbun*, knowledge of the injury alone is insufficient to trigger the statute of limitations. 143 Wn.2d at 218.

The medical malpractice statute of limitations, RCW 4.16.350, provides that a complaint for medical malpractice must be filed "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".

Our courts have long applied the discovery rule in professional negligence and product liability cases where an injured person does not learn of one of the key elements of his or her cause of action until the normal limitation period expired. *See, e.g., Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969) (physician left sponge in patient's body during surgery and symptoms relating to sponge did not manifest themselves until after the traditional statute of limitations expired); *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687 (1985) (asbestosis is asymptomatic for a very long latency period; discovery rule is appropriate because plaintiff cannot know of injury until condition is symptomatic). "In certain torts ... injured parties do not, or cannot, know they have been injured; in these cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action." *White*, 111 Wn.2d at 338; *In re Estates of Hibbard*, 118 Wn.2d 737, 749-50, 826 P.2d 690 (1992) (discovery rule applies to "claims in which the plaintiffs could not have immediately known of their injuries

due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant[,]" including claims in which plaintiffs could not immediately know the cause of their injuries); *U.S. Oil & Ref Co. v. Department of Ecology*, 96 Wn.2d 85, 93 633 P.2d 1329 (1981) (discovery rule should be adopted when the risk of stale claims is outweighed by the unfairness of precluding justified causes of action); *Janicki Logging & Canst. Co., Inc. v. Schwabe, Williamson & Wyatt, p.e.*, 109 Wn. App. 655, 37 P.3d 309 (2001) (discovery rule applies to legal malpractice; adopting "continuous representation" rule).

Our courts have specifically refused to hold as a matter of law that a plaintiff injured by medical malpractice failed to exercise reasonable diligence in discovering a medical malpractice claim within the one year discovery period under RCW 4.16.350. In *Winbun v. Moore*, 143 Wn.2d 206,213, 18 P.3d 576 (2001), the plaintiff consulted her family physician, defendant Dr. Moore, about various symptoms in March 1993. On April 17, 1993, Winbun was seen by the ER physician at Highline Community Hospital. Two days later, Winbun returned to the ER and was seen by Dr. Stephen Epstein, the on-call obstetrician/gynecologist, as requested by the ER physician. Ultimately, Winbun underwent surgery by an on-call surgeon, who discovered an undiagnosed perforated gastric ulcer with

infection. Winbun remained hospitalized for two months for continued infection, requiring additional surgery.

Two years afterward, on June 12, 1994, Winbun met with a lawyer to discuss bringing a medical negligence suit. In January 1996, Winbun authorized the lawyer to obtain an expert opinion regarding her medical care. Winbun sued the family physician and ER physician on April 12, 1996. The 3-year statute of limitations expired a week later, on April 20, 1996. After obtaining the expert's opinion as to Dr. Epstein's care, on November 6, 1996, Winbun amended the complaint to join Dr. Epstein as a defendant. Dr. Epstein moved for summary judgment dismissal based on the lapse of the 1-year discovery period. The court denied that motion, as well as Dr. Epstein's motion for directed verdict on the same issue at the end of trial. The jury found Dr. Epstein's negligence proximately caused 60 percent of her damages. On Dr. Epstein's appeal, the Court of Appeals reversed, ordered the judgment vacated and Dr. Epstein dismissed from the case.

On further review, in a 6-3 decision, the Supreme Court reversed the Court of Appeals decision and reinstated the jury verdict, holding that the plaintiff's knowledge of an act or omission by one health care provider (family physician) that triggers the discovery rule for that provider "does not necessarily trigger the rule as to all providers who treat the plaintiff."

19 Winbun, 143 Wn.2d at 217. "It was the lack of knowledge of any *act or omission* by Epstein which caused the injury that resulted in Epstein not being named as an original defendant." *Id.* at 218. While in the hospital, Winbun was heavily sedated and unaware of defendant Dr. Epstein's full role in her care. Moreover, when Winbun requested her medical records, she was not given a complete copy showing Dr. Epstein's full involvement, nor was she advised that other records existed. Whether she acted reasonably or should have discovered the negligence earlier was "**a fact-specific inquiry properly reserved for the jury.**" *Id.* (Emphasis added.)

The medical-legal theory of negligence against Defendants is the improper treatment (failure to diagnose) B.W.'s vesicoureteral reflux in a timely manner and that she suffered the loss of her left kidney as a result. See *Declaration of Thomas Clarkson*, CP, at 16. Furthermore, the consequences of losing her kidney will not be known for at least two more years. *Declaration of Robert Mak*, CP, at 17.

In granting Defendants' motion for summary judgment, the trial court erred in treating B.W.'s *injury* for her *damages* where they are clearly distinct elements of this malpractice claim under Washington law. A Plaintiff in Washington is only entitled to recover that sum of money that would place her in as good a position as she would have been but for

the defendants' malpractice. See *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002) (where Court of Appeals affirmed jury determination finding defendant at fault, but declining to award damages based upon expert testimony indicating that plaintiff suffered none). Although damages need not be proved with mathematical exactness, the fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss. *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000). Washington courts have not allowed any award of damages where the evidence is speculative or insubstantial. *Sherrell v. Selfors*, 73 Wn. App. 596, 871 P.2d 168 (1994).

Solely on account of B.W.'s physiological immaturity (she is only 12 years old), the damages arising from the medical injury she suffered as a result of Defendants' negligent treatment is not yet known with the kind of certainty Washington law requires. As Dr. Mak testified in his sworn statement, any attempt to assess her damages at this point in her life would only be speculative. In B.W.'s case, the fact of loss cannot yet be established with sufficient certainty to award damages – at this point.

The loss of one kidney in an otherwise healthy three year old girl is essentially an injury without any known damages before puberty. The injury in and of itself is medically superfluous. It is the consequence to the other remaining kidney that poses any medical risk to the young girl's

quality of life – and that information will not be known with any reasonable degree of certainty for another two years. *Declaration of Robert Mak*, CP, at 17.

There is no question that Plaintiff's focus in this suit is the unknown damage arising from the nephrectomy not the nephrectomy itself. The consequence of the loss of the kidney was the exclusive concern in bringing suit against Defendants. Ronda Snyder's counsel's initial contact with Dr. Robert Mak on May 15, 2008 reflects this singular concern. "I am writing to request your assistance in determining the significance of the kidney loss. . . [We] would appreciate your opinion on the significance of the loss of one kidney for this child. We understand from [B.W.'s] mother that her remaining kidney function is unchanged to date . . ." *See Exhibit 1 to Declaration of Mark G. Olson*. CP, at 23. In September 2009, counsel wrote again to Dr. Mak for a follow up review of B.W.'s remaining kidney function and seeking his assessment of "the long-term consequences of the loss of her left kidney." *Id.*

Given this fundamental medical uncertainty, Plaintiff has raised a genuine issue of material fact on the issue of whether she knew or should have known all of the elements of her negligence claims against Defendants before she filed suit on April 21, 2011.

C. The trial court erred when it granted summary judgment because Ronda Snyder timely filed her claim prior to the expiration of the eight year statute of repose.

Because Ronda Snyder did not - and has not - discovered the essential facts relating to the post-nephrectomy condition of her minor daughter, the most significant aspect of her negligence claims against defendants, Plaintiffs' claims are preserved by the eight year statute of repose set forth in RCW 4.16.350(3). The statute provides that "in no event shall an action [against a health care provider] be commenced more than eight years after [the] act or omission." The injury to this little girl as a result of the "act or omission" of defendants occurred on April 23, 2003 at the time her left kidney was surgically removed; this suit was filed on April 21, 2011 within the eight year statute of repose.

D. The elimination of the tolling provisions for minors exclusively for medical negligence claims is unconstitutional.

Should the Court determine that the statute of limitations of three years required Plaintiff's suit to be brought earlier than April 21, 2011, the statute is blatantly unconstitutional.

In the Medical Malpractice, Patient Safety, and Health Care Liability Reform Act of 2006, the Legislature not only created the certificate of merit and 90-day notice of intent to sue requirements, but

also reenacted RCW 4.16.350, the eight-year statute of repose previously held unconstitutional in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998) (Madsen, J., writing; Dolliver, Smith, Johnson, and Sanders, JJ., concurring; Alexander, J., dissenting). The Legislature did not alter a single word in the previous statute, but simply articulated a “rationale” for the statute, in response to *DeYoung*:

The purpose of this section [section 301] 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 [June 7, 2006].

Laws of 2006, ch. 8, § 301 (SSHB 2292; emphasis added).

RCW 4.16.350 singles out those tort plaintiffs who are minor victims of medical negligence for adverse treatment in flagrant violation of Washington's privileges and immunities guarantee, Const. art. I, § 12.² This constitutional provision provides that "no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." The constitution requires that "persons similarly situated with respect to the legitimate purpose of the law" receive like treatment. *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). Here, the statute expressly burdens one class of tort claimants - minor victims of medical negligence - and not other minor tort

² RCW 4.16.350(3) essentially reenacts a previous version of the eight year statute of repose struck down as unconstitutional by the Supreme Court in *De Young v. Providence Medical Center*, 136 Wn.2d 136 (1998).

plaintiffs or other victims of professional negligence. *Zeier v Zimmer, Inc.*, 152 P.3d 861 at 867 (2006) (holding the "requirement immediately divides tort victims alleging negligence into two classes - those who pursue a cause of action in negligence generally and those who name medical professionals as defendants.").

Washington courts "analyze equal protection challenges under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis." *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). The appropriate level of scrutiny depends upon whether a suspect or semi-suspect classification has been drawn or a fundamental right has been implicated; if neither is involved, the Court should inquire whether the legislation bears a rational relationship to a legitimate governmental purpose. *Kustura v. Dep't of Labor and Indus.*, 175 P.3d 1117, 1131 (Wn. App. 2008). In this case, RCW 4.16.350 satisfies neither strict scrutiny nor even the most deferential rational basis test.

1. The statute does not pass muster under the strict scrutiny test.

Elimination of tolling for minors in health care cases does not further a compelling state interest by the least restrictive means. Under the Washington guarantee of equal protection, "strict scrutiny requires that the infringement [of a fundamental right be] narrowly tailored to serve a

compelling state interest." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006), citing *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

The Court can only speculate as to the Legislature's objective in eliminating the tolling provisions for minors in tort actions against health care providers. No expression of legislative intent was even offered in denying children the same rights and protections against health care providers as against other tortfeasors.³ The only potentially relevant statement of legislative intent merely states:

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.

See section 302, chapter 8, Laws of 2006.

Even if protection against potentially stale health care claims could be deemed a compelling state interest sufficient to overcome the constitutional mandate of equal access to justice, the elimination of tolling provisions for minors is neither necessary nor narrowly tailored to further that interest.

³ The only statement of legislative intent regarding the enactment of RCW 4.16.350 had to do with the statute of repose set forth in subs. (3), which is not implicated in defendants' motion.

2. The statute does not pass muster under the rational relationship test.

Even if this Court should determine that RCW 4.16.350 does not burden a fundamental right, the statute is nevertheless invalid because it does not satisfy even the minimal constitutional requirement that it bear a rational relationship to a legitimate state objective.

The rational basis test defers to the legislature's "broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest." *Manussier*, 129 Wn.2d at 673 (quoting *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994)). Under Washington equal protection analysis, the burden is on the party challenging the statute, and the court's review "is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective." *Kelo v. City of New London*, 545 U.S. 469, 488 n.20, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005)(quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015 n.18, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)).⁴

⁴ See also *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981)("Having established that the purpose of California's lawmakers in enacting the retaliatory tax was legitimate, we turn to the second element in our analysis: whether it was reasonable for California's lawmakers to believe that use of the challenged classification would promote that purpose.").

The rational basis test, however, is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976). The U.S. Supreme Court has cautioned that "the Equal Protection Clause requires more than the mere incantation of a proper state purpose." *Trimble v. Gordon*, 430 U.S. 762, 769, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977). As the Supreme Court has explained, even under "the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Referring to that relation, Justice Blackmun stated that "while the connection between means and ends need not be precise, it, at the least, must have some objective basis." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982)(Blackmun, J., concurring).

Independent judicial review of the factual basis for legislation ensures that the acts truly serve the public good and that their statements of public purpose are not merely "incidental or pretextual public justifications" for disadvantaging a disfavored group or benefiting a special interest. *Kelo*, 545 U.S. at 490-91 (Kennedy, J., concurring). The U.S. Supreme Court has not hesitated to strike down legislation that had a permissible objective, including combating frivolous litigation, but lacked "sufficient factual context for us to ascertain some relation between the

classification and the purpose it served." *Romer*, 517 U.S. at 632-33. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)(where the "record does not reveal any rational basis for believing" that the ban would further the municipality's asserted goals); *Jimenez v. Weinberger*, 417 U.S. 628, 636, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974)(no rational relationship to government's goal of preventing spurious claims); *Lindsey v. Narmet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)(no substantial relationship to the objective of discouraging frivolous appeals).

Similarly, here, no factual basis exists that would lead a reasonable Legislature to expect that RCW 4.16.350 would achieve its stated goals by eliminating the historic tolling provisions for minors.

In sum, RCW 4.16.350 violates equal protection whether reviewed under the strict scrutiny or rational basis test, because it does not advance a compelling state interest in the least restrictive manner, nor does it rationally advance a legitimate state interest. This challenge to the constitutionality of the wholesale elimination of tolling provisions for minors in medical malpractice cases was anticipated in the Supreme Court's decisions in *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995) and more recently in *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011).

While we do not decide this case on constitutional grounds, in *Gilbert* we indicated that the categorical elimination of tolling for minors would give rise to “compelling” constitutional challenges.

Unruh, at 172 Wn.2d at 111n (citing *Gilbert*, 127 Wn.2d at 378).

Ronda Snyder’s appeal presents this constitutional challenge.

VI. CONCLUSION

Accordingly, Ronda Snyder requests that this Court reverse the decision of the Snohomish County Superior Court. Ronda Snyder has not discovered all of the elements necessary to support her medical malpractice claim against Defendants and that by filing suit on April 21, 2011 her claims on behalf of minor daughter B.W. are preserved by the eight year statute of repose. Alternatively, the court should strike the elimination of the historic tolling provision for children as an unconstitutional granting of special privileges and immunities under the Washington State Constitution.

RESPECTFULLY SUBMITTED this 15th day of August, 2012.



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DECLARATION OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered the foregoing **APPELLANT'S OPENING BRIEF** to the following parties:

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