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NO. 68737-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

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BRIEF OF RESPONDENTS

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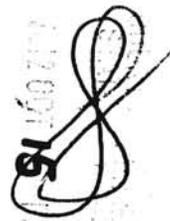


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## I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In this medical malpractice action in which Ronda Snyder claims that defendants, in 2003, negligently failed to earlier diagnose her minor daughter's vesicoureteral reflux and thereby caused her daughter to lose a kidney, did the trial court properly dismiss Snyder's 2011 complaint as barred by the medical malpractice statute of limitations, RCW 4.16.350, where the complaint was not filed within either three years of the defendants' allegedly negligent acts or omissions or one year of the time Snyder discovered that her daughter had sustained some injury as a result of the defendants' alleged negligence?

2. May Snyder avoid RCW 4.16.350's within-one-year-after-discovery limitations period by claiming that the full extent of the sequelae her daughter may sustain in the future as a result of the loss of one kidney is not yet known?

3. Is Snyder's challenge to the constitutionality of "elimination of the tolling provision for minors" too incoherent and inadequately briefed to warrant the Court's consideration?

4. Has Snyder demonstrated beyond a reasonable doubt that the legislature's elimination of tolling on the basis of minority in medical malpractice actions is unconstitutional beyond a reasonable doubt?

## II. COUNTERSTATEMENT OF THE CASE

Ronda Snyder's minor daughter, B.W., born on January 18, 2000, CP 102 (¶ 2), was diagnosed with cystitis due to severe vesicoureteral reflux and underwent a left nephrectomy (removal of her left kidney) on April 23, 2003. CP 4 (¶ 3.5-3.6). Snyder believed in April 2003 that her daughter's kidney had to be removed because of delay by defendants James R. Fletcher, M.D., Caroline Stampfil, PA-C, and Whitehorse Family Medicine, Inc., P.S., in diagnosing the reflux disease. CP 15, 40 (pp. 29-30). In 2004, Snyder consulted legal counsel about a possible malpractice claim against defendants. CP 16, 54 (p. 85).

In July, 2008, Snyder served an RCW 7.70.100(1) mediation request on defendants. CP 16, 30 (¶ 3), 58-61. Mediation did not occur. CP 17. As legal guardian for B.W., Snyder filed this medical malpractice lawsuit against defendants on April 21, 2011. CP 1-6. Snyder alleges that defendants were negligent in incorrectly diagnosing B.W.'s symptoms of unexplained pain and fevers, CP 3-4 (¶ ¶ 3.2-3.5); that "[h]ad B.W. received proper evaluation, care and treatment from Defendants, B.W. would have two functioning kidneys," CP 4 (¶ 3.7); and that defendants' negligence directly caused B.W.'s need to have her left kidney removed, CP 4 (¶ 3.6), pain and mental anguish, and need for past and future medical and surgical treatment, CP 4 (¶ 3.12).

Defendants moved for summary judgment, CP 13-28, based on the medical malpractice statute of limitations, RCW 4.16.350, CP 20-25, and on the ground that Snyder lacked the necessary expert medical testimony to support her medical malpractice claim, CP 17-19, 25-27.

Snyder opposed defendants' motion with a memorandum, CP 89-101; a declaration of Dr. Thomas Clarkson, opining that defendants violated the standard of care and caused B.W.'s loss of a kidney, CP 102-05; and a declaration of Dr. Robert Mak, CP 107-08, opining that the consequences of B.W.'s loss of one kidney "are not yet known" and will not be determinable until she is at least 14 years old. CP 108 (¶ 4).

In opposing defendants' summary judgment motion, Snyder made no argument that her complaint had been timely under RCW 4.16.350's three-year-from-act-or-omission limitations period. She argued only that RCW 4.16.350's within-one-year-after-discovery limitations period had not expired more than a year before she filed suit in April 2011 because she *still* has not discovered all of the essential elements of her daughter's malpractice claim because she "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 . . . [the child] reaches puberty." CP 93. Snyder also argued that she had filed suit "within" RCW

4.16.350's eight-year repose period and that doing so somehow "preserved" her claims. CP 96.

Snyder further argued that the "elimination of the tolling provision for minors in medical negligence claims is unconstitutional," CP 96 (header); that the only potentially relevant statement of legislative intent in eliminating such tolling was a legislative statement of reasons for re-enacting the eight-year medical malpractice statute of *repose* in 2006, CP 98 (lines 4-8); and that RCW 4.16.350 "does not satisfy even the minimal constitutional requirement that it bear a rational relationship to a legitimate state objective," CP 98. Snyder did not cite, much less offer any argument concerning, RCW 4.16.190(2), the statute that actually eliminated tolling of the medical malpractice statute of limitations due to minority effective June 7, 2006.

In light of Dr. Clarkson's declaration, defendants limited their reply to the timeliness of Snyder's complaint under RCW 4.16.350's "within one year of discovery" limitations period. CP 142-58. Defendants cited, among other authorities, *Steele v. Organon, Inc.*, 43 Wn. App. 230, 234, 716 P.2d 920 (1986), *rev. denied*, 106 Wn.2d 1008 (1986), for the proposition that "if [a] plaintiff is aware of some injury, the statute of limitations begins to run even if [s]he does not know the full extent of [the] injuries," and *Lindquist v. Mullen*, 45 Wn.2d 675, 677, 277 P.2d 724

(1954), *overruled on other grounds*, *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969), for the propositions that the statute of limitations begins to run as soon as an injury, even if slight, is sustained in consequence of a tortious act and that “[i]t is not material that all the damages resulting from the act shall have been sustained at that time [or] that the actual or substantial damages do not occur until a later date.” CP 146-47. Defendants cited Snyder’s deposition testimony that she had believed in April 2003 that her daughter’s loss of a kidney was the result of the health care that defendants had provided, and argued that the one-year limitations period had expired more than a year before Snyder filed suit on April 21, 2011. CP 146-47.<sup>1</sup>

The trial court granted defendants’ summary judgment motion, CP 172-74, and denied Snyder’s motion for reconsideration, CP 190-91. Snyder timely appealed. CP 192-98.

### III. STANDARD OF REVIEW

A court reviews a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Lallas v.*

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<sup>1</sup> Defendants also explained that the eight-year repose provision in RCW 4.16.350 does not toll either the three-year-from-act-or-omission or the one-year-from-discovery *limitations* periods, but rather sets an outer limit on the time within which a medical malpractice claim may be asserted if the one-year “discovery” *limitations* period has not yet expired. CP 148. The Supreme Court held in *Unruh v. Cacchioitti*, 172 Wn.2d 98, 117, 257 P.3d 631 (2011), that the repose provision re-enacted by the legislature in 2006 did not begin to apply to the medical malpractice claim of any minor until June 7, 2006. The repose provision thus would not have extinguished any unasserted claim on behalf of B.W. until June 7, 2014, and was not a basis upon which defendants moved to dismiss the complaint Snyder filed in 2011.

*Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

*Tracfone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010).

As to Snyder's constitutional arguments, Washington appellate courts avoid passing on constitutional issues unless absolutely necessary to the determination of the case. *Cary v. Mason County*, 173 Wn.2d 697, 703, 272 P.3d 194 (2012) (quoting *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981)). Courts "will not address constitutional issues not supported by adequate briefing." *State v. Kinzy*, 141 Wn.2d 373, 385 n. 33, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). "Parties raising constitutional issues must present considered arguments" to the court. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

If the issue of a statute's constitutionality is reached on appeal or review, it is subject to *de novo* review. *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012); *Putman v. Wenatchee Valley Med. Ctr.*,

166 Wn.2d 974, 978, 216 P.3d 374 (2009). Statutes are presumed to be constitutional and, Snyder bears the burden of persuading the court beyond a reasonable doubt that the statute she is challenging is unconstitutional. *E.g., Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 609-10, 192 P.3d 306 (2008); *Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998). As the Washington Supreme Court has explained:

[T]he separation of powers requires a careful balance by the judiciary that respects the role and authority of the legislature, while assuring its adherence to the constitution. This court's reasoned judgment for nearly the past century has been that the "beyond a reasonable doubt" standard for reviewing the constitutionality of a statute achieves the appropriate balance.

*Sch. Dists.' Alliance for Adequate Funding of Special Education v. State*, 170 Wn.2d 599, 606 n.1, 244 P.3d 1 (2010).

#### IV. ARGUMENT

A. Because Snyder Discovered the Elements of Her Daughter's Medical Malpractice Claim, Including the Injury Element, More than One Year Before She Sued, the Trial Court Properly Dismissed Her Complaint on Statute of Limitations Grounds.

RCW 4.16.350, the medical malpractice statute of limitations, provides in pertinent part that:

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976, against . . . a physician, . . . physician's assistant, . . . or . . . [a]n entity, whether or not incorporated, facility, or institution employing one or more persons described in

subsection (1) of this section, including, but not limited to, a hospital [or] clinic . . . based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

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

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

Snyder has never contended that her complaint was timely under the within-three-years-of-act-or-omission limitations period of RCW 4.16.350. Because of the "imputation of knowledge" provision in RCW 4.16.350, the within-one-year-after-discovery limitations period applicable to B.W.'s medical malpractice claim against defendants is determined

based on when *Snyder*, not B.W., “discovered” certain facts. Snyder does not argue otherwise. Rather, she argues that, because she does not yet know the full extent or amount of the damages B.W. may sustain as a result of the loss of one kidney, she has not yet discovered all of the essential elements of B.W.’s medical malpractice cause of action.

1. Washington law does not permit a plaintiff to distinguish between an injury and its future sequelae for “discovery rule” purposes.

Snyder implicitly concedes that she discovered, at or before the time of her daughter’s nephrectomy on April 23, 2003, all of the elements of B.W.’s malpractice claim *except* that she did not then discover (and still has not discovered) the extent to which, and whether, the injury consisting of the loss of the kidney will adversely affect B.W. sometime after 2013. To avoid RCW 4.16.350’s “discovery rule,” Snyder is essentially asking the Court to ignore any injury that B.W. *already* has suffered. *See App. Br. at 13* (“[t]he consequence of the loss of the kidney was the exclusive concern in bringing suit against Defendants”).

But, Washington law does not permit a personal injury plaintiff to disconnect an injury from its sequelae to avoid the effect of the “discovery rule.” RCW 4.16.350’s one-year limitations period begins to run when the plaintiff (or, as in this case, the plaintiff’s parent or legal representative) discovers that a health care provider’s allegedly negligent omission (here,

failure to earlier diagnose) resulted in *some* injury (here, loss of a kidney), even though it is, and may remain for some indefinite time, unclear what the future progress of that injury will be, how seriously that injury will affect the plaintiff (if at all) in the future and what amount of money, if any, it will cost to treat and compensate for that injury in the future. The law in this regard is well established:

Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. ***It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.***

*Lindquist v. Mullen*, 45 Wn.2d 675, 677, 277 P.2d 724 (1954), overruled on other grounds by *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969) (quoting 34 Am. Jur. 126, Limitation of Actions, § 160) (emphasis added). The legal rule quoted above has not changed since *Lindquist* was decided in 1954. See *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998) (“[t]he statute of limitations is not postponed by the fact that further, more serious harm may flow from the wrongful conduct”).

Thus, to start the within-one-year-after-discovery limitations period of RCW 4.16.350 running, Snyder did not need to know the full extent of B.W.’s injury or the full amount of damages required to compen-

sate B.W.; she needed only to know that some actual and appreciable harm had occurred because of some act or omission by defendants. *Zaleck v. The Everett Clinic*, 60 Wn. App. 107, 112, 802 P.2d 826 (1991) (citing *Steele v. Organon, Inc.*, 43 Wn. App. 230, 235, 716 P.2d 920, *rev. denied*, 106 Wn.2d 1008 (1986), for the proposition that “to have discovered element of damages, plaintiff need not know full amount of damage; she need only know that some actual and appreciable damage occurred”).

Snyder acknowledges, *App. Br. at 7*, that “nephrectomy itself may constitute an injury,” but argues that “this[,] standing alone[,] is insufficient to trigger the statute of limitations.” She offers no authority for that assertion, and is simply wrong. If, as the complaint alleges, CP 4 (¶¶ 3.6, 3.12), B.W. lost her left kidney in 2003 and suffered pain and mental anguish because of alleged malpractice by defendants, the nephrectomy certainly is an injury and, under the authorities cited above, that injury, coupled with Snyder’s admitted belief as of 2003 that defendants’ failure to earlier diagnose B.W.’s reflux disease is what caused the kidney to be lost, CP 40 (pp. 29-30), started the “within one year of discovery” limitations period running as soon as tolling for B.W.’s minority was eliminated,<sup>2</sup> whether or not all of the sequelae of having lost

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<sup>2</sup> RCW 4.16.190(2), the legislative enactment that eliminated tolling of the medical malpractice statute of limitations for minority, became effective on June 7, 2006. Snyder did not file this action until April, 21, 2011, more than four years and ten months later.

one kidney remains unknown to Snyder to this day.

This case is controlled by *Zaleck* and *Steele*. In *Zaleck*, the court held that, because plaintiff knew his thumb had gone numb immediately following an injection given by the defendant physician in November 1981, that was sufficient to establish discovery of the causation and damage elements of his medical malpractice action in November 1981, even if the plaintiff did not know initially that he ultimately would suffer a permanent partial disability. *Zaleck*, 60 Wn. App. at 111-12, 114.

In *Steele*, the plaintiff experienced sensory loss and tingling in her arms and legs, and was hospitalized with ergot poisoning, in 1973 after taking excessive amounts of an ergot, Wigraine, that her physician prescribed for her headaches. *Steele*, 43 Wn. App. at 231. It was undisputed that, by April 1975, the plaintiff knew that her physician had not warned her of the need to limit her intake of ergot and that, as a result she overdosed on ergot necessitating her hospitalization in 1973. *Id.* at 233. The plaintiff nevertheless decided not to sue at that time. *Id.* at 232. The plaintiff suffered a heart attack in late 1981 and a stroke in early 1982 and sued within one year of those events, alleging that they were due to the earlier Wigraine overdose. *Id.* at 232-33. Even though the plaintiff sought damages only for the heart attack and stroke, the Court of Appeals held that her complaint was time-barred because plaintiff had known in

1975 that she had a medication-related injury possibly due to malpractice by the defendant physician:

Although Mrs. Steele may have considered the *amount* of her damages small in 1975, nevertheless, it is uncontroverted she was aware of some injury. Early on, she had suffered actual and appreciable damages resulting from the drug overdose, *i.e.*, she experienced loss of sensation in her arms and legs and required hospital care. Thus, the trial court was correct when it determined Mrs. Steele knew all of the elements of a cause of action in 1975.

. . . [Mrs. Steele] maintains that a separate cause of action exists for the latter injuries and that this cause did not accrue until the injuries became manifest in 1981-82. Hence, she reasons the statute of limitation for that cause of action had not run so as to bar this action. We find, however, the rationale rejecting the previous issue applies to this argument, as well.

*Steele*, 43 Wn. App. at 235.

Snyder's "no discovery yet" argument relies largely on meaninglessly general propositions stated in decisions that are beside the point.<sup>3</sup> Snyder fails even to acknowledge *Lindquist*, *Green*, *Zaleck*, or

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<sup>3</sup> *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969) (*App. Br. at 8*); *In re Estates of Hibbard*, 118 Wn.2d 737, 826 P.2d 690 (1992) (*App. Br. at 8*); *U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981) (*App. Br. at 9*); *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001), *rev. denied*, 146 Wn.2d 1019 (2002) (*App. Br. at 9*); *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002) (*App. Br. at 12*); *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000) (*App. Br. at 12*); *Sherrell v. Selfors*, 73 Wn. App. 596, 871 P.2d 168, *rev. denied*, 125 Wn.2d 1002 (1994) (*App. Br. at 12*). None of these cases stand for the proposition that Snyder advances in this case, *i.e.*, that a plaintiff with knowledge that she has sustained some actual and appreciable injury as a result of the defendant's alleged negligence can nonetheless postpone the running of the statute of limitations until such time as she becomes aware of all of the sequelae of that injury (or as in this case, until whatever time she finally decides to sue even while claiming that she still does not know what sequelae may ensue from that injury).

*Steele*, even though all of those cases, except *Green*, were cited by defendants in their trial court briefing. CP 146-47.

2. Snyder's reliance on *Winbun v. Moore* is misplaced.

The only "discovery rule" decision Snyder actually discusses in her opening appellate brief is *Winbun v. Moore*, 143 Wn.2d 206, 18 P.3d 576 (2001). *App. Br. at 9-11*. But, *Winbun* is inapposite.

In *Winbun*, the plaintiff *knew* she had been *injured* and, within RCW 4.16.350's "within three years from act or omission" limitations period, sued three health care providers alleging that her injury was due to their malpractice. *Winbun*, 143 Wn.2d at 209. What the plaintiff in *Winbun* claimed not to have known within the three-year period was that her injury also was the result of negligence by a fourth health care provider (Dr. Epstein). *Id.* at 216. The *Winbun* court held that RCW 4.16.350's one-year discovery rule applies separately to a plaintiff's claim against each alleged tortfeasor, such that her adding Dr. Epstein as defendant more than three years after she was injured but within one year after she learned of that his negligence also had been a cause of her injury was timely under RCW 4.16.350. *Winbun*, 143 Wn.2d at 223.

Here, there is no issue as to when Snyder "discovered" the alleged negligence of a specific *defendant*, so *Winbun* is inapposite. *Winbun* does not hold, or even suggest, that an injury attributable to negligence on the

part of multiple tortfeasors can be divided into older, newer, and future injuries for “discovery rule” purposes.<sup>4</sup> Snyder’s reliance on *Winbun* is misplaced.

3. Contrary to Snyder’s assertions, neither the speculative nor uncertain character of damages nor the difficulty of proof tolls the “within one year of discovery” medical malpractice limitations period.

In her complaint, Snyder specifically alleges not only that defendants negligently diagnosed B.W.’s symptoms of unexplained pain and fevers incorrectly, CP 3-4 (¶¶ 3.2-3.5), but also that “[h]ad B.W. received proper evaluation, care and treatment from [d]efendants, B.W. would have two functioning kidneys.” CP 4 (¶ 3.7). Moreover, she has alleged that defendants’ negligence caused B.W. to need to have her left kidney removed, CP 4 (¶ 3.6), to suffer pain and mental anguish, and to need past and future medical and surgical treatment, CP 4 (¶ 3.12). Snyder believed in April 2003 that B.W.’s kidney was being removed because of delay on the part of defendants in diagnosing B.W.’s vesicoureteral reflux disease, CP 15, 40 (pp. 29-30), and certainly was aware of the pain and mental anguish B.W. suffered at the time. Thus, Snyder knew in 2003 the essential elements of B.W.’s medical malpractice

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<sup>4</sup> If an injury could be distinguished from its sequelae for statute of limitations purposes as Snyder implicitly proposes, then personal injury litigation would become a “sue as you go” proposition, with alleged tortfeasors found liable for an injury being re-sued as their victims develop new sequelae of their original injuries, and application of statutes of limitation would be destroyed.

claim against defendants, rendering the complaint that she waited until 2011 to file untimely under the limitations periods set forth in RCW 4.16.350.<sup>5</sup>

Even though Snyder knew the fact of some damage in 2003 (the loss of a kidney, pain and mental anguish, and medical expenses), Snyder seeks to avoid the bar of the statute of limitations, by arguing:

[A]ny attempt to assess [Snyder's daughter's] damages at this point in her life would only be speculative [and] 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. . . .

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. . . 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. . . .

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<sup>5</sup> Moreover, Snyder consulted legal counsel in 2004, CP 54 (p. 85), and served a mediation request on defendants in July 2008, CP 16, 30 (¶ 3), 58-61, so even if it were somehow possible for her to deny having discovered the elements of her daughter's claim in 2003, she cannot deny having discovered all the elements by 2004 or, at the very latest, 2008, which was three years before she sued. No statute of limitations calculations are affected materially by Snyder's service in July 2008 of the RCW 7.70.100(1) mediation request. RCW 4.16.350's three-year limitations period was tolled due to the daughter's minority from April 23, 2003 until RCW 4.16.190(2) took effect on June 7, 2006. *See Unruh*, 172 Wn.2d at 110-11. Even if the RCW 7.70.100(1) mediation request extended the expiration date for the three-year period for one year from June 7, 2009 to June 7, 2010, Snyder did not sue until April 2011. CP 1. And, even if the mediation request gave Snyder a second year in which to sue from the date she "discovered" all elements of her daughter's medical malpractice cause of action, "discovery" had occurred more than two years before she filed suit on April 21, 2011.

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 the elements of her negligence claims against Defendants [at least one year] before she filed suit on April 21, 2011.

*App. Br. at 12-13.* Snyder, however, fails to cite any statute of limitations “discovery rule” case that suggests that the statute of limitations does not begin to run as long as the full extent of future damages is somewhat speculative or uncertain, even though the fact of some injury or damage due to defendants’ alleged negligence is known.

Indeed, Washington case law, which Snyder fails to cite, holds otherwise.

“ . . . [I]t is uncertainty as to the *fact* of damage, rather than its *amount*, which negatives the existence of a cause of action. . . .”

[Italics by the court.] *Davies v. Krasna*, 14 Cal. 3d 502, 513, 535 P.2d 1161, 121 Cal. Rptr. 705, 713, 79 A.L.R.3d 807 (1975) (quoting *Walker v. Pacific Indem. Co.*, 183 Cal. App. 2d 513, 6 Cal. Rptr. 924 (1960)). Moreover, “neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.” *Davies*, at 514.

*Steele*, 43 Wn. App. at 235. Thus, contrary to Snyder’s assertions, her claimed inability as yet to foresee or prove with certainty the full impact that B.W.’s loss of one kidney in 2003 might have on B.W. in the future does not mean Snyder has yet to discover the fact that B.W. has sustained some injury as a result of defendants’ negligence so as to trigger the

running of the statute of limitations.<sup>6</sup> The one-year-from-discovery limitations period of RCW 4.16.350 expired long before Snyder filed her complaint in 2011 and so the trial court properly dismissed her complaint.

4. Snyder's arguments concerning RCW 4.16.350's eight-year statute of repose provision are not germane because her complaint was not dismissed on the basis of that provision, which contrary to her characterization is not a claim-preserving provision.

Snyder asserts, *App. Br. at 14*, that the trial court erred in dismissing her complaint on statute of limitations grounds because she filed her complaint prior to the expiration of RCW 4.16.350's eight-year statute of repose. Her assertion is incorrect and based upon a mischaracterization of the repose provision as a provision that "preserved" her daughter's claims because Snyder sued within eight years of defendants' negligence. The repose provision does not "preserve" claims. It simply sets a limit on how long after the alleged negligent act or omission a claim can be asserted if a plaintiff relies on the "within one

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<sup>6</sup> Snyder asserts, *App. Br. at 11*, that "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." She cites no authority, however, to support her claim that "injury" and "damages" are "clearly distinct elements" of a medical malpractice claim in Washington, much less that they are "clearly distinct elements" insofar as what a plaintiff must have discovered to trigger the running of the "within one year of discovery" limitations period of RCW 4.16.350. To trigger the running of the one-year-from-discovery limitations period, plaintiff need only have discovered some information about the essential elements of the cause of action, *i.e.*, duty, breach, causation and damages. *Steele*, 43 Wn. App. at 233 (citing *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 511, 598 P.2d 1358 (1979)). "Generally, if the plaintiff is aware of some injury, the statute of limitation begins to run even if he does not know the full extent of his injuries. *Steele*, 43 Wn. App. at 234 (citing 2 J. Dooley, *Modern Tort Law* § 34.80, at 528 (rev. ed. 1983)).

year of ‘discovery’” limitations period.”<sup>7</sup> The repose provision is irrelevant to this appeal because Snyder’s daughter’s claim is barred by RCW 4.16.350’s three-year-from-act-or-omission and one-year-from-discovery *limitations* periods.<sup>8</sup>

B. Snyder Has Not Met Her Burden of Presenting Sufficiently Coherent and Developed Arguments to Warrant Consideration of Her Constitutional Challenges or to Prove Beyond a Reasonable Doubt that Elimination of Tolling for Minority in Medical Malpractice Cases Is Unconstitutional.

Snyder argues, in effect, that even if she did discover all the elements of B.W.’s medical malpractice claim, including injury, more than a year before she filed suit on April 21, 2011, B.W. has a constitutional right to have the within-one-year-of-discovery limitations period tolled while she is a minor. Snyder bears the burden of presenting an argument sufficiently coherent and forceful to persuade the Court beyond a reasonable doubt that RCW 4.16.190(2) – the statute that eliminated tolling for minority in medical malpractice cases, but that Snyder never even cites –

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<sup>7</sup> There is no interplay between the repose provision and RCW 4.16.350’s three-year limitations period because, obviously, a plaintiff who sues for medical malpractice within three years of the alleged negligent act or omission also sues within eight years of that act or omission, and does not run afoul of the repose provision.

<sup>8</sup> The Supreme Court held in *Unruh*, 172 Wn.2d at 117, that the repose provision did not begin to apply to the claim of any minor injured by medical malpractice until June 7, 2006. The eight-year repose period applicable to Snyder’s daughter’s claim thus would not expire until June 7, 2014. Snyder’s daughter’s claim thus is not barred by the repose provision, and defendants have never argued, and the trial court never ruled, that it is.

is unconstitutional. *See, e.g., Am. Legion Post No. 149*, 164 Wn.2d at 609-10; *Island County*, 135 Wn.2d at 146-47. Yet, she fails to do so.

The constitutional arguments she makes about tolling are too incoherent and unsupported by adequate briefing to warrant consideration. *See State v. Kinzy*, 141 Wn.2d at 385 n.33 (“This Court will not address constitutional issues not supported by adequate briefing”); *State v. Johnson*, 119 Wn.2d at 171 (“Parties raising constitutional issues must present considered arguments to this court”); *In re Rosier*, 105 Wn.2d at 616 (“naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion”) (quoting *United States v. Phillips*, 433 F.2d at 1366).

1. Snyder complains that elimination of tolling due to minority for medical malpractice claims is unconstitutional but neglects to quote, cite, or present any constitutional analysis of RCW 4.16.190(2) anywhere in her brief.

While arguing about the constitutionality of the elimination of tolling due to minority in medical malpractice actions, Snyder repeatedly refers to the repose provision in RCW 4.16.350, and the legislature’s purpose in enacting it, as if it were the repose provision that eliminated tolling due to minority. *See App. Br. at 14-16, 18*. It did not. The statute that eliminated tolling due to minority for medical malpractice claims is

RCW 4.16.190(2), which was enacted by Laws of 2006, ch. 8, § 303, and which took effect June 7, 2006.<sup>9</sup> RCW 4.16.190(2) provides:

Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.<sup>10</sup>

Snyder never once cites, quotes, or acknowledges RCW 4.16.190(2) or the legislative findings supporting its enactment. Instead, she inexplicably confuses the *repose* provision in RCW 4.16.350 with the elimination-of-tolling-due-to-minority provision.

Respondents have found no decision where a Washington appellate court has overlooked the failure of a plaintiff to even cite the statute (or the legislative findings for the statute) that the plaintiff claims is unconstitutional. This Court should not overlook Snyder's failure to cite or discuss RCW 4.16.190(2), and should decline to reach what constitutional arguments her brief offers.

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<sup>9</sup> RCW 4.16.190(2), along with the separate repose provision, were parts of a medical malpractice reform package that was publicly endorsed by, among others, the organized plaintiffs' personal injury bar. *2SHB 2292 Senate Bill Report (Feb. 22, 2006)*, at p. 7 (identifying, as among those testifying "Pro" the bill that enacted RCW 4.16.190(2), "John Budlong, Washington Trail [sic] Lawyers Association").

<sup>10</sup> What became RCW 4.16.190(1) in 2006 provides in pertinent part that:

Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter . . . be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW . . ., the time of such disability shall not be a part of the time limited for the commencement of action.

Thus, RCW 4.16.190(1) generally tolls statutes of limitation during minority, but RCW 4.16.190(2) makes tolling due to minority inapplicable to medical malpractice claims.

Even if ignorance were a valid excuse for failing to cite the statute which provides the source of law that one is challenging as unconstitutional, Snyder cannot claim she was ignorant of the fact that a constitutional challenge to “elimination of tolling” for minors’ medical malpractice claims would require her to cite RCW 4.16.190(2) and to explain why the Court should not defer to the legislature’s findings as to why that statute was enacted in 2006. After Snyder raised her constitutionality argument in response to defendants’ summary judgment motion, defendants cited RCW 4.16.190(2) and quoted the 2006 legislature’s findings in their reply memorandum. CP 151-52, 155-57. Thus, Snyder was on notice that, in enacting RCW 4.16.190(2) and other provisions in 2006, the legislature found that:

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums.

Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes. It is also the legislature's intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. Finally, it is the intent of the legislature to provide the insurance commissioner with the tools and information necessary to regulate medical malpractice insurance rates and policies so that they are fair to both the insurers and the insured.

*Laws of 2006, ch. 8, § 1.*

Snyder makes no attempt to refute these legislative findings. She does not even acknowledge that the legislature made them. Snyder bears the burden of persuading the Court beyond a reasonable doubt that the statute she is challenging is unconstitutional. *E.g., Am. Legion Post No. 149*, 164 Wn.2d at 609-10; *Island County v. State*, 135 Wn.2d at 146-47. To carry such a burden, she must offer adequate briefing and "considered" arguments. *State v. Kinzy*, 141 Wn.2d at 385 n.33; *State v. Johnson*, 119 Wn.2d at 171. Yet, her briefing and arguments fail to satisfy those basic requirements.

2. Even if one overlooks Snyder's failure to cite the pertinent statute, her constitutional arguments do not warrant consideration.
  - a. Snyder fails to explain why "strict scrutiny" is called for, much less why elimination of tolling as to minors' medical malpractice actions would not survive it.

Although recognizing, *App. Br. at 17*, that "strict" scrutiny applies only if a suspect or semi-suspect classification has been drawn, or a fundamental right has been implicated by, a statute, Snyder argues that the statute (RCW 4.16.350 being the only one she cites) "does not pass muster under the strict scrutiny test." Snyder does not argue or offer authority for the proposition that minors are a suspect class for purposes of constitutional analysis. Nor does she ever define the specific right that she contends is both fundamental and threatened by elimination of tolling of the medical malpractice statute of limitations due to minority. Snyder thus fails to establish a predicate for applying "strict" scrutiny, even if the Court overlooks her failure to identify the statute to which she contends "strict" scrutiny should be applied. *Miles v. Child Protective Servs.*, 102 Wn. App. 142, 157-58, 6 P.3d 112 (2000), *rev. denied*, 142 Wn.2d 1021 (2001) (a plaintiff bears the burden of identifying and showing the right asserted to exist and be clearly established and violated).

Moreover, minors *are not* a suspect class for purposes of applying "strict" scrutiny. A classification based upon age is subject to rational

basis review. *Campbell v. Dep't of Soc. & Health Svcs.*, 150 Wn.2d 881, 900, 83 P.3d 999 (2004). Juveniles are neither a suspect nor a semi-suspect class for purposes of equal protection analysis. *Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001); *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993); *State v. Schaaf*, 109 Wn.2d 1, 19, 743 P.2d 240 (1987). Moreover, pursuit of tort claim is not a *fundamental* right. See *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 142, 960 P.2d 919 (1998) (“pursuit of a tort claim” is not among the rights enumerated in our state constitution and thus is not a fundamental right). Indeed, “[u]ntil 1969, when the court adopted the discovery rule for medical malpractice actions in *Ruth v. Dight*, 75 Wn.2d 660, 666, 453 P.2d 631 (1969), . . . a cause of action could accrue and the statute of limitations expire without a patient’s knowing of injury,” which means that under state law preexisting adoption of the discovery rule “there [was] no bar to absolutely foreclosing a cause of action where one has been injured by medical malpractice,” *DeYoung*, 136 Wn.2d at 143. Inasmuch as it is *constitutional* for the law to extinguish one’s claim before one knows one has it, it was incumbent on Snyder to explain *why* eliminating tolling of the statute of limitations on minors’ medical malpractice claims violates the constitution. Nowhere in her brief has she done so.

Nor does Snyder offer a coherent argument as to why elimination of tolling of the statute of limitations applicable to minors' medical malpractice claims would not survive strict scrutiny if that was the proper level of scrutiny. Snyder asserts that the legislature's stated reason for re-enacting the eight-year *repose* provision in RCW 4.16.350 is "neither necessary nor tailored to further" a legitimate state interest," *App. Br. at 18*, but RCW 4.16.350's *repose* provision is not germane because (as explained above) it was not a basis either for defendants' summary judgment motion or for the court's grant of summary judgment. With respect to RCW 4.16.190(2), Snyder offers no "strict scrutiny" (or any other) argument at all for respondents to provide a response or for this Court to evaluate.

- b. Snyder's "rational basis scrutiny" argument fails because (among other reasons) she fails to acknowledge, or address, or attempt to refute, the legislature's stated reasons for enacting RCW 4.16.190(2).

Snyder's "rational basis" arguments likewise refer to RCW 4.16.350 rather than RCW 4.16.190(2) and, although her challenge is ostensibly predicated on Const. art. I, § 12, she offers no argument, or any authority, as to what "privileges and immunities" means under our state's jurisprudence. Snyder relies on *federal* court decisions, none of which applied Const. art. I, § 12, without explaining what makes them

authoritative. It is not defendants' responsibility to posit and refute constitutional arguments that Snyder has failed to make.

Snyder cites *State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992), for the proposition that “persons similarly situated” must receive “like” treatment. *App. Br. at 16*. Snyder, however, ignores Washington case law that explains what the terms “similarly situated” and “like treatment” mean – and what those terms do *not* mean. Aside from the fact that *Coria* rejected a privileges-and-immunities challenge to the statute at issue in that case, if the proposition for which Snyder cites *Coria* were to be taken literally, no statutory classification of *any* kind could pass constitutional muster under *any* level of scrutiny.

This state's privileges-and-immunities decisions, however, overwhelmingly *uphold* statutory distinctions against Const. art. I, § 12 rationality-based challenges, which means that it is not enough for Snyder simply to invoke terms like “similarly situated” and “like treatment.” Much more is required. As the Washington Supreme Court has explained:

“[I]n order to defeat the legislation [on equal protection grounds], the defendant must show, beyond a reasonable doubt, that no state of facts exists *or can be conceived* sufficient to justify the challenged classification, or that the facts have so far changed as to render the classification arbitrary and obsolete.” [Emphasis added.]

*State v. Hirschfelder*, 170 Wn.2d 536, 552, 242 P.3d 876 (2010) (quoting

*State v. Smith*, 93 Wn.2d 329, 337, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980)); *see also Am. Legion Post No. 149*, 164 Wn.2d at 609 (“In reviewing [a] statute, ‘the court may assume the existence of any conceivable state of facts that could provide a rational basis for the [statutory] classification’”). Snyder does not dispute the reasons the legislature gave for enacting RCW 4.16.190(2), or make a “changed facts” argument, or seek to address reasons that the legislature conceivably could have had for enacting RCW 4.16.190(2). Those reasons, at a minimum, would include justifications that courts in other jurisdictions have noted for statutes that limit the class of persons for whom medical malpractice statutes of limitation is tolled.<sup>11</sup>

Snyder also fails to account for the fact that no provision is made in our state constitution for tolling of statutes of limitation, that tolling has always been a creature of statute, and that the legislature has never ceded

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<sup>11</sup> *See Owens v. White*, 380 F.2d 310, 316 (9th Cir. 1967) (predicting that the Idaho Supreme Court would decline to recognize a discovery rule for medical malpractice cases based on claims of misdiagnosis); *Fitz v. Dolyak*, 712 F.2d 330, 333 (8<sup>th</sup> Cir. 1983) (citing *Owens* in rejecting an Equal Protection challenge to an Iowa statute applying a discovery rule to foreign-object medical malpractice claims, but not to other types of medical malpractice claims); *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1176-77 (Me. Supr. Ct. 1990) (noting that “[t]he production of evidence and records” necessary to meet medical malpractice claims “becomes progressively more difficult with time”); *Deen v. Egleston*, 597 F.3d 1223, 1233 (11th Cir. 2010) (citing *Owens*, *Fitz* and *Maine Med. Ctr.* in upholding, against an Equal Protection challenge, a Georgia statute that eliminated tolling as to persons with medical malpractice claims based on foreign objects being left in their bodies, unrepresented estates, or persons held liable for malpractice who sue for contribution because “[d]efending law suits is hard; defending malpractice suits is harder; and defending old malpractice suits is harder still”). Snyder has offered no considered explanation as to why this Court should reach a different conclusion and hold that the distinction made by RCW 4.16.190(2) is *irrational*.

to the judicial branch the authority to enact, amend, or repeal either statutes of limitation or tolling provisions. Snyder ignores the fact that this Court held more than a century ago that it is “indisputable” that the legislature has the power to enact statutes of limitation that run against minors. *Schlarb v. Castaing*, 50 Wash. 331, 338, 97 P. 289 (1908). Thus, as a matter of *stare decisis*, tolling of claims due to minority confers a special but constitutionally *permissible* exemption from the limitations periods that the legislature has the power and authority to impose for asserting tort and other causes of action. See *1000 Virginia Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 582, 146 P.3d 423 (2006) (“the legislature has the authority to enact statutes of limitations and the authority to determine whether a discovery rule should apply in a particular context”),<sup>12</sup> and *Stephens v. Stephens*, 85 Wn.2d 290, 295-96, 534 P.2d 571 (1975) (“Collateral *policies* [not constitutional guarantees], unrelated to capacity to bring suit,” *may justify* tolling, and “[t]he tolling of the statute [of limitations, through legislative enactment of RCW 4.16.190, because of minority] was a *permissible* recognition of the need for special protection of minor plaintiffs before 1970, even though such minors could bring suit

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<sup>12</sup> See also *Condo Ass’n v. Apartment Sales Corp.*, 144 Wn.2d 570, 582, 29 P.3d 1249 (2001) (“We adopt the view of the Supreme Court of Oregon that ‘[i]t has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest’”) (quoting *Josephs v. Burns*, 260 Or. 493, 503, 491 P.2d 203 (1971)).

through a guardian ad litem [emphases supplied]).<sup>13</sup> Snyder fails to explain what makes this case different from others or makes RCW 4.16.190(2) different from statutes that our courts have found constitutional in the face of far more articulately stated challenges than Snyder has stated here.

The 2006 legislature enacted RCW 4.16.190(2) based on such findings as “the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most,” and that “[t]he answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.” *Laws of 2006, ch. 8, § 1*. The interests of fairness and efficiency, in particular, are rationally advanced by reducing the number of “long-tail” medical malpractice claims that are litigated. Snyder bore the burden of persuading this Court of the converse proposition, but has made no considered effort to carry that burden. Her

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<sup>13</sup> See also *Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997) (“If the Legislature dislikes the impact of the [tolling] statute as it enacted it, the Legislature, *and not this court*, has the responsibility to change it [emphasis added]”).

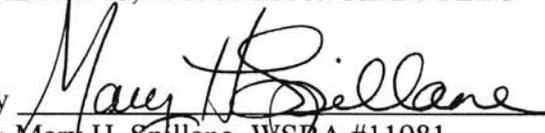
constitutional challenge to elimination of tolling of medical malpractice statutes of limitation due to minority should be rejected.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment to the defendants.

RESPECTFULLY SUBMITTED this 15th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 15th day of October, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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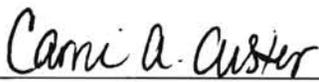
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DATED this 15th day of October, 2012, at Seattle, Washington.

  
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Carrie A. Custer, Legal Assistant