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Appellate Court No. 362094

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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JENNIFER CURTIN, GLEN CURTIN and BECKY CURTIN,  
Appellants

v.

CITY OF EAST WENATCHEE, LEO AGENS, and "JANE DOE"  
AGENS, Respondents

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**REPLY BRIEF OF APPELLANTS**

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WSBA #22160  
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**A. Restatement of the Case**

Appellants rely upon the Statement of the Case contained in Appellants' Opening Brief. Respondent Agens' Statement of the Case in Brief of Respondent Agens at pages 1-4 contains alleged facts which are not part of any of the issues raised in this appeal by Appellants and are irrelevant and beyond the scope of review of the issues before this Court.

**B. Argument**

**No. 1 Washington law, regarding tolling of Parents' claims for injury to their minor Child is now a settled question of law within this jurisdiction under new Legislative changes to RCW 4.24.010.**

In their briefing and during argument to the Trial Court, both Respondents and the Trial Court recognized that there is no Washington law directly on point, and there is an equal split of authority in other jurisdictions on whether a parent's loss of consortium claim is part of the tolling provisions of a statute such as RCW 4.16.190. **CP 604, 617-619; RP 7.** Respondent Agens now asserts that RCW 4.16.190 is not open to judicial interpretation by this Court and that RCW 4.24.010 does not specify a statute of limitations when a parent's claim must be pursued. See Brief of Respondent Agens at page 4.

However the Brief of Respondents Agens and City of East Wenatchee [herein East Wenatchee] fails to address the Washington Legislative changes recently affected in the current statute. RCW 4.24.010 now provides that a (qualified) parent or legal guardian may maintain or **join as a party an action** as plaintiff for the injury or death of the (**minor or adult**) child, and pursue the child's health care expenses and loss of companionship.<sup>1</sup> See RCW 4.24.010; SB 5163-2019-20 [Emphasis added].

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<sup>1</sup> Substitute Senate Bill SB 5163-2019-20 (Effective date 7/28/2019) has amended the language of RCW 4.24.010 to read as follows:

(1) A parent or legal guardian who has regularly contributed to the support of his or her minor child, and a parent or legal guardian who has had significant involvement in the life of an adult child, may maintain or join as a party an action as plaintiff for the injury or death of the child. For purposes of this section, "significant involvement" means demonstrated support of an emotional, psychological, or financial nature within the parent-child relationship, at or reasonably near the time of death, or at or reasonably near the time of the incident causing death, including either giving or receiving emotional, psychological, or financial support to or from the child.

(2) In addition to recovering damages for the child's health care expenses, loss of the child's services, loss of the child's financial support, and other economic losses, damages may be also recovered under this section for the loss of love and companionship of the child, loss of the child's emotional support, and for injury to or destruction of the parent-child relationship, in such amounts as determined by a trier of fact to be just under all the circumstances of the case.

(3) An action may be maintained by a parent or legal guardian under this section, regardless of whether or not the child has attained the age of majority, only if the child has no spouse, state registered domestic partner, or children.

(4) Each parent is entitled to recover for his or her own loss separately from the other parent regardless of marital status, even though this section creates only one cause of action.

(5) If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent: PROVIDED, That notice shall be required only if parentage has been duly established. Such notice shall be in compliance with the statutory requirements for a summons. Such notice shall state that the other parent must join as a party to the suit within twenty days or the right to recover damages under this section shall be barred. Failure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the suit.

The act is remedial and retroactive and applies to all claims, (including this claim) that are not time barred, as well as any claims pending in any court on the effective date of this section. *Id.*, (see Footnote 1, New Section 6).

**No. 2 Statutory interpretation of RCW 4.24.010 supports tolling of Parents' claims for injury to their Child who is now an adult.**

Statutory interpretation begins with the plain meaning of the statute. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1288 (2010). Plain meaning, "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dept. Of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). An unambiguous statute is not open to judicial interpretation. *Lake v. Woodcreek Homeowners Ass'n*, at 526; *Marriage of Robertson*, 113 Wn.App. 711, 713, 54 P.3d 708 (2002). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. *Tesoro v. Dept. of Revenue*, 159 Wn.App. 104, 246 P.3d 211 (2010).

RCW 4.24.010(3) provides the statutory authority that parents have the **right to join the child's claim** *and pursue the child's health care expenses* under RCW 4.24.010(2) *even if the child is an adult*, so long as

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New Sec. 6. This act is remedial and retroactive and applies to all claims that are not time barred, as well as any claims pending in any court on the effective date of this section.

the child's claims are not time barred by the Statute of Limitations. A plain reading of the statute says a parent, "**may maintain or join as a party an action as plaintiff for the injury or death of the child.**" Other than the parent, who else can bring such an action? The child of course; whether through a guardian or independently as an adult. Clearly, the statute is intended on its face to allow joinder of the Parent's claims during the period of the Child's claims even if they are tolled into adulthood. Otherwise, this language in the statute would be rendered meaningless if a 3-year statute of limitations is always applied to the Parents under these circumstances. If the legislature wanted to limit the statute of limitations on Parents claims under RCW 4.24.010 to three (3) years the legislature would have specifically directed so in RCW 4.24.010. In this case the Washington Legislature has not. In fact, the Legislature added the words "or join as a party" when it amended RCW 4.24.010 in 1998. The addition of these words were adopted after discussing putting specific limitations on the timeframe for joining an action. The absence of the inclusion of any specific time frame, after having such a discussion, would indicate that the Legislature chose to leave open the period for joining an action under these circumstances. The Legislature also changed the language from allowing a parent to join as a "plaintiff" to allow a parent to join as a "party" – such as a Litigation Guardian Ad Litem, etc. The Legislature clearly intended to expand the parents' rights to pursue

damages for the death or injury of a child. Moreover, clearly the changes adopted retroactively by our current Legislature clearly continues the trend of expanding the family's rights in these cases.

Respondent Agens wishes the court to focus solely on RCW 4.16.190 as not applying to RCW 4.24.010 claims in order to bar the Parent's claims while ignoring the plain language of RCW 4.24.010. There is no Washington case law that limits *when* a parent may join as plaintiff an action for injury of their child, where the child, as an adult, files his or her own action for personal injury after they turn eighteen years old. Respondent Agens claims this is not a situation open to judicial interpretation by this Court, "*where two statutes are related which deal with the same subject matter...*" See Brief of Respondent Agens at page 7. This is patently false. The parent's claim under RCW 4.24.010, and a child's claims under RCW 4.16.190 (when read separately) appear to give each party their own independent right to assert separate but derivative claims *for injuries to the same child*, including claims for pre-majority medical expenses. Respondent Agens further argues that RCW 4.24.010 does not give the parents the right to join a lawsuit after the child becomes an adult. See Brief of Respondent Agens at page 7. However, RCW 4.24.010 now provides **clear statutory authority** for parents to join an adult child's claim – so long as the child's claim is not time barred by the statute of limitations.

(See footnote 1, New Sec. 6) “Recovery of damages for loss of companionship of the child, or injury or destruction of the parent-child relationship is not limited to the period of the child's minority.” See *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 475, 656 P.2d 483, (1983) citing, *Balmer v. Dilley*, 81 Wn.2d 367, 502 P.2d 456 (1972). This is now codified with these new legislative changes.

**No. 3 Enforcing a Three Year Statute of Limitations under RCW 4.24.010 of Parents’ claims for injury to their Child who is now an adult creates compulsory joinder issues that conflict with RCW 4.16.190.**

Respondents fail to address the issues of claim splitting raised by Appellants. Respondent Agens claims that the Parents here had a number of options available to them. See Brief of Respondent Agens at page 8. They claim that “*only the minor has flexibility when to file suit, because the parents have a three (3) year statute of limitations.*” and that, “*Appellant’s [sic] assertion...that forcing the parent’s to bring their claim within three (3) years will compel the child’s claims to be brought at the same time is obviously not accurate.*” as well that the Appellant Parents were advised (incorrectly) to wait. *Id.* It appears Respondents are now recognizing and making a compulsory joinder argument but still ignore the conflicts created by such an argument. Compulsory joinder of either the parents’ or the

minor child's claims would not always be feasible. This compounded by the conflicting statutes and statute of limitations. Both claims for pre-majority medical expenses are indispensable for the same lawsuit. Failing to bring the Parents' RCW 4.24.010 claims for injury to their Child and subsequent damages, along with the Child's individual claims under RCW 4.16.190 in the same action, creates impermissible claims-splitting. **CP 607; RP 9-15**. It effectively creates compulsory-joinder issues whenever a child's treatment and claim for damages is ongoing beyond three years, or continues beyond the child's minority. Requiring the Parents to bring their claims within three years, and then disallowing the Child to claim her own damages, forces the Child to prematurely bring *all* claims within three years, which violates the Child's right to independently file personal injury claims - which are statutorily tolled under RCW 4.16.190.

Loss of spousal consortium claims are indispensable for the same lawsuit. See RCW 4.08.030<sup>2</sup>. If parent/child loss of consortium claims are also independent, it would follow that they are also indispensable for the same lawsuit. If the parents bring their claim to collect health care expenses

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<sup>2</sup> RCW 4.08.030. Either spouse or either domestic partner may sue on behalf of the community: PROVIDED, That  
(1) When the action is for personal injuries, the spouse or the domestic partner having sustained personal injuries is a necessary party;  
(2) When the action is for compensation for services rendered, the spouse or the domestic partner having rendered the services is a necessary party.

within 3 years, then the child is forced to also bring their claim as an indispensable party. Complicating the matter would be the child's need for injury related medical care and other special costs that do not miraculously disappear within three years - or before the child attains majority. This raises the issue of exactly *when* does the parent's claim arise, since neither the extent of the injury nor the level of destruction to the parent-child relationship with a minor child are always fully known within three years. Compulsory Joinder of the cases would necessarily infringe upon the child's own individual right to pursue his or her claims upon attaining majority. A conflict would always then exist between *any* parent and *any* child's right to have the case tolled into majority, and then lose the right to claim pre-majority damages upon reaching majority.

If not addressed by this Court, a conflict will exist for *every* minor whose claims (including their claim for pre-majority damages) are tolled into majority, only to lose their right to claim any pre-majority damages upon reaching majority. A minor should not lose their right to claim damages by asserting their statutory right to toll their claim. Moreover, for *any* parent's derivative or dependent claims directly related to a child's injury, if the claim is not tolled along with the child's claim- or if it is barred by a three year Statute of limitations- both the parents and the child are prejudiced by losing the right to make pursue their claims. The Trial Court's

ruling, that any right to pursue pre-majority medical expenses is extinguished after three years, allows *no one* to pursue those damages after three years. This outcome was never the intent of the Tolling Statute, and clearly not in line with the cited case law of Washington. Permitting recovery of out-of-pocket expenses, whether by the parents or the Child, helps ensure that available tort remedies provide a comprehensive and consistent deterrent to negligent conduct. See *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 481, 656 P.2d 483, (1983).

**No. 4 Parental Loss of Consortium Statute of Limitation begins when the deprived parent experiences injury, not when child is injured.**

Further, both Respondents' briefs fail to address *when the statute of limitations clock begins running* on a RCW 4.24.010 parental loss of consortium claim. Under Washington state law, the *statute of limitations begins* to run on a *spousal* loss of consortium claim *when the deprived spouse experiences injury, not when the injured spouse is injured*. See *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 250, 178 P.3d 981 (2008) citing, *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d at 776, 733 P.2d 530 (1987) (emphasis added). Timeliness of the injured spouse's claim does not necessarily determine the deprived spouse's loss of consortium claim. *Id.* Similarly, the timeliness of a Child's claim would not

necessarily determine the deprived parent's loss of parental consortium claim if the parent's claims are independent. As with an adult loss of consortium claim, the statute of limitations for a parent's loss of parental consortium claim would also begin to run when the deprived parent *experiences* injury, not when the injured Child is injured. Due to the timing, nature and permanence of the Child's injuries, the parent may be differently deprived at various times in the Child's life, and the parental consortium claim may significantly change as a Child ages. The loss of parental consortium for a new born infant is not the same as for a toddler, pre-teen, teenager, college age or adult Child. Allowing the parents' statute of limitations to be tolled with the minor Child's statute of limitations would be consistent with the claims for spousal loss of consortium and the legislative intent behind RCW 4.24.010 to allow the Parent's claim to extend to the adult Child's claims in this case.

**No. 5 A Minor is not barred from asserting the same claim for pre-majority medical expense if parents are not allowed to recover pre-majority medical expenses.**

Both Respondents argue that because the parents sought recovery of pre-majority medical expenses, the minor is barred from asserting the same claim because her parents elected to assert the right to collect them. See Brief of Respondent Agens at pages 10, 14-15; and Brief of

Respondent East Wenatchee at pages 7-16. Both Respondents further argue that the Child cannot assert her own claim for pre-majority medical expenses because there was no express or implied waiver of the right even though both the Child and the Parents asserted separate claims in the Complaint for Damages. See CP 13; Brief of Respondent East Wenatchee at pages 14-15 and Brief of Respondent Agens at pages 10-13.

Washington Courts, have already rejected Respondents' argument that, (absent an express assignment), only a parent can assert the claim and that no cause of action lies in favor of the minor for recovery of medical expenses as necessities. See *Donald v. City of Ballard*, 34 Wn. 576, 76 P.80 (1904) citing *Daly v. Everett Pulp & Paper Co.*, 31 Wn. 252, 71 P.1014 (1903) (fact that the father prosecuted as next friend was tantamount to a relinquishment of such loss of services); and *Ball v. Pacific Coast R. Co.*, 182 Wn. 221, 46 P.2d 391 (1935) (father effected an equitable assignment to his son of any claim for medical expenses).

Contrary to Respondents' position, Respondent East Wenatchee concedes that, "*There is no statute barring the recovery of Jennifer's pre-majority medical expenses.*" See Brief of Respondent East Wenatchee at page 17(emphasis added). Respondent Agens goes on to concede that, "*If the parents had not sought recovery of pre-majority medical expenses, then Jennifer could have sought recovery of those expenses when she reached*

*majority.*” See Brief of Respondent Agens at page 10 (emphasis added). These admissions undercut Respondents’ arguments and ignores the fact that, if the parents are unable to assert their claim due to the Trial Court’s ruling that the parent’s claim is time barred, that ruling has the same effect as if the claim has never been made by the parents at all. Both the Parents and Child claimed the pre-majority medical expenses at the same time. If the parent’s pre-majority medical expense claim is not allowed to proceed, then the child may assert it in this case, and the trial court was in obvious error in its ruling. Moreover, the Trial Court clearly committed further error by requiring “proof” that the Parents formally assigned their claim to the Child. CP 767, 825; RP 107-109.

In this case, either the Parents failed to make a claim by missing the Statute of Limitations (if the 3-year SOL ruled by the Trial Court applies) which, under *Hammer*, would be recognized to effectively emancipate the Child in so far as her right to recover pre and post majority damages –OR– the Parents’ claim should have been tolled along with the Child’s, and the Parent’s should be allowed to recover the medical expenses. See *Hammer v. Caine*, 47 Wash. 672, at 673, 92 P. 441 (1907) (holding that parent failure to claim parent’s damages effectively emancipated his son, in so far as the right to recover damages thereby permitting son to recover all damages jury awarded both pre minority and post minority accruing from

accident). The fact that the parent was making the claim on behalf of the minor in *Hammer* does not alter the Court's ruling that it is the minor who is now asserting the claim, where the parent did not independently assert the same. Nothing in Washington law requires affirmative proof of an assignment under these conditions.

In fact, Washington Courts, hold the opposite, and such facts as in this case have been held to be an implied waiver of the parent's right. See *Donald v. City of Ballard*, 34 Wn. 576, 76 P.80 (1904) citing *Daly v. Everett Pulp & Paper Co.*, 31 Wn. 252, 71 P.1014 (1903); *Ball v. Pacific Coast R. Co.*, 182 Wn. 221, 46 P.2d 391 (1935) and *McAllister v. Saginaw Timber Co.*, 171 Wn. 448, 18 P.2d 41 (1933). Citing RCW 26.28.030 (formerly Rem. Rev. Stat. §5829) the Washington Supreme Court held the minor liable for medical services on the ground that services were necessities, stating that since the minor's mother would be liable to the physician for the medical services, the court concluded that it did not follow that the son was not equally liable for them. *McAllister v. Saginaw Timber Co.*, 171 Wash. at 451; see also, *Flessner v. Carstens Packing Co.*, 96 Wash. 505, at 509, 165 P. 397 (1917)(citing *Hammer v. Caine*, minor is authorize to recover medical treatment if not claimed by parent).

Obviously, the parents and child may not both recover for the same medical expenses, but one or the other can make recovery. See *Wooldridge*

*v. Woolett*, 96 Wash.2d 659, 666, 638 P.2d 566 (1981); *Harbeson v. Parke-Davis, Inc.*, 98 Wn. 2d 460, 656 P.2d 483 (1983) citing *Woodridge v. Woolett*, 96 Wn.2d, 659, 666, 638 P.2d 566 (1981). In this case Respondents are arguing that no one, not even the minor now as an adult, can ever claim the pre-majority medical expenses, unless expressly waived by the parents. Clearly Washington law requires no such express waiver.

**No. 6 Doctrine of a Minor Child's Medical Expenses as necessities is still valid Washington Law.**

Respondent East Wenatchee suggests that, “While ‘necessaries’ can be the obligation of *a child, a contract for the necessities must first have been made by the child.*” and that “**the statute speaks to contracts actually made by a minor**”. See Respondent East Wenatchee’s Brief at pages 14-15 (emphasis original). This is an unsupported conclusion based on Respondents’ misunderstanding of the common law theory of medical expenses as necessities, and Washington’s informed consent laws which creates the foundational right for medical providers to seek repayment of medical expenses as necessities from either the parent or the child.

An injured minor may recover for his or her medical expenses when those expenses arise from the doctrine that medical expenses are necessities. See 42 Am.Jur.2d Infants § 145. To understand what

“necessaries” are, Appellants again direct this Court’s attention to 42 Am.Jur.2d Infants § 145 Claim for medical expenses, which states as follows:

Generally, a minor child does not have a cause of action for his or her medical expenses because the parents possess the exclusive right to recover for a minor’s pre-majority medical expenses.<sup>3</sup> Since it is the parents’ legal duty and obligation to provide their child’s necessities, the action to recover medical expenses of a child is vested exclusively in the child’s parents.<sup>4</sup> **However, exceptions exist to this general rule that an injured minor may not recover for his or her medical expenses,<sup>5</sup> and he or she may recover those expenses when—**

- the minor child has paid or agreed to pay them.<sup>6</sup>
- the child is legally responsible for their payment, such as by reason of emancipation, or the death or incompetency of his or her parents.<sup>7</sup>
- the child is personally liable for payment of the

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**Note: Following footnotes 3-13 are from 42 Am.Jur.2d Infants § 145 follow below (citation to these authorities are omitted from Appellant’s Table of Contents)**

<sup>3</sup> Clardy v. ATS, Inc. Employee Welfare Benefit Plan, 921 F. Supp. 394 (N.D. Miss. 1996) (applying Mississippi law); National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 (1996); Dewey v. Zack, 272 Ill. App. 3d 742, 209 Ill. Dec. 465, 651 N.E.2d 643 (2d Dist. 1995); Pepper v. Johns Hopkins Hosp., 111 Md. App. 49, 680 A.2d 532 (1996), aff’d, 346 Md. 679, 697 A.2d 1358 (1997); Eaves v. Boswell, 852 S.W.2d 353 (Mo. Ct. App. S.D. 1993); People v. Barnett, 17 Misc. 3d 505, 844 N.Y.S.2d 662 (County Ct. 2007); Byank v. Ski Liberty, 39 Pa. D. & C.4th 255, 1999 WL 483262 (C.P. 1999).

<sup>4</sup> Capp v. Carlito’s Mexican Bar & Grill No. 1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007).

<sup>5</sup> Laughner v. Bryne, 18 Cal. App. 4th 904, 22 Cal. Rptr. 2d 671 (2d Dist. 1993).

<sup>6</sup> Hutto v. BIC Corp., 800 F. Supp. 1367 (E.D. Va. 1992) (applying Virginia law); Pepper v. Johns Hopkins Hosp., 111 Md. App. 49, 680 A.2d 532 (1996), aff’d, 346 Md. 679, 697 A.2d 1358 (1997). As obligation to pay for expenses as a “necessary,” see §70.

<sup>7</sup> Hutto v. BIC Corp., 800 F. Supp. 1367 (E.D. Va. 1992) (applying Virginia law); Packard v. Perry, 221 W. Va. 526, 55 S.E.2d 548 (2007).

expenses because his or her parents cannot afford to pay them.<sup>8</sup>

— **the infant's obligations arise from the doctrine that medical expenses are necessities.**<sup>9</sup>

— the parents have waived or assigned their right of recovery in favor of a minor child.<sup>10</sup>

— **the parents are barred from asserting a claim for a minor's medical expenses due to the statute of limitations.**<sup>11</sup>

— **recovery of medical expenses by the infant is permitted by statute.**<sup>12</sup>

*Id.* (Emphasis Added)

In Washington State, an infant is incompetent to contract except for necessities of life. *Chan Hai, In re*, 11 F.2d 667 (W.D. Wash. 1926), affirmed *Chan Hai v. Weedin* 15 F.2d 296 (U.S. 9th Cir.1926). Unless the minor is a single emancipated minor under the Mature Minor Doctrine, the minor cannot consent and receive treatment without parental consent in health care decisions. See *Smith v. Seibly*, 72 Wn.2d 16, 431 P.2d 719

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<sup>8</sup> *Lopez v. Cole*, 214 Ariz. 536, 155 P.3d 1060 (Ct. App. Div. 1 2007).

<sup>9</sup> *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 697 A.2d 1358 (1997).

<sup>10</sup> *Hutto v. BIC Corp.*, 800 F. Supp. 1367 (E.D. Va. 1992) (applying Virginia law); *Estate of DeSela v. Prescott Unified School Dist. No. 1*, 224 Ariz. 202, 228 P.3d 938, 255 Ed. Law Rep. 991 (Ct. App. Div. 1 2010), as amended, (May 27, 2010); *Myer v. Dyer*, 643 A.2d 1382 (Del. Super. Ct. 1993); *Bauer ex rel. Bauer v. Memorial Hosp.*, 377 Ill. App. 3d 895, 316 Ill. Dec. 411, 879 N.E.2d 478 (5th Dist. 2007), appeal denied, 227 Ill. 2d 577, 321 Ill. Dec. 249, 888 N.E.2d 1182 (2008); *Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 680 A.2d 532 (1996), aff'd, 346 Md. 679, 697 A.2d 1358 (1997); *Eaves v. Boswell*, 852 S.W.2d 353 (Mo. Ct. App. S.D. 1993).

<sup>11</sup> *Myer v. Dyer*, 643 A.2d 1382 (Del. Super. Ct. 1993); *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 697 A.2d 1358 (1997).

<sup>12</sup> *Hutto v. BIC Corp.*, 800 F. Supp. 1367 (E.D. Va. 1992) (applying Virginia law); *Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 680 A.2d 532 (1996), aff'd, 346 Md. 679, 697 A.2d 1358 (1997).

(1967). In addition, emergency medical services provided to minors are medical necessities. See *McAllister v. Saginaw Timber Co.*, 171 Wash. at 451; see also, *Hammer v. Caine*, 47 Wash. 672, at 673, 92 P. 441 (1907). If the parent's consent is not readily available, the consent requirement for that treatment is satisfied and the minor can receive medical services. See RCW 7.70.050(4)<sup>13</sup> There is no requirement that the minor affirmatively enter into a formal contract for medical necessities, rather, it is an implied contract based on the theory that the minor or the parent would have consented to life sustaining treatment if they were able to consent. See *Orwick v. Fox*, 65 Wn.App. 71, 86, 828 P.2d 12, *rev. denied*, 120 Wn.2d 1014 (1992). For non-emergency medical services, all parents have to give express or implied consent to any medical treatment as a prerequisite before receiving treatment by any medical provider licensed<sup>14</sup> whether it was verbal or written, or whether it was consented to by the parent, or the emancipated minor under the Mature Minor Doctrine. See *Miller v. Kennedy*, 11 Wn.App. 272, 281-282, 522 P.2d 852 (1974) *aff'd per curiam*, 85 Wn.2d 151 (1975). Non-written consent to medical treatment would also

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<sup>13</sup> If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required treatment will be implied.

<sup>14</sup> Conditions of Participation for critical access hospitals, and surgery centers requires clinical records to include consent forms. See; 42 C.F.R. §485.6389a(4)(i); 42 C.F.R. § 416.47(b)(7) and 42 C.F.R. §482.24(c)(4)(v)

create an implied contract based on performance of medical services under the theory of unjust enrichment. See *Heaton v. Imus*, 93 Wn.2d 249, 252, 608 P.2d 631 (1980) and 6A Wash. Prac, WPI 301A.02 (7th Ed). Also, as a “family member” insured under her parents’ health insurance policies, Jennifer is personally liable for repayment of the expenses to her insurers under the subrogation and reimbursement clauses from any amounts recovered from the Respondent tortfeasors. **CP 101, 773-776, 778**

Further, the common law doctrine of a minor being liable to pay for necessities has long been codified by state statute and case law. See RCW 26.28.030 (formerly Rem. Rev. Stat. §5829). Under RCW 26.28.030:

**A minor is bound, not only by contracts for necessities, but also by his or her other contracts, unless he or she disaffirms them within a reasonable time after he or she attains his or her majority, and restores to the other party all money and property received by him or her by virtue of the contract, and remaining within his or her control at any time after his or her attaining his or her majority.**

(Emphasis added) See RCW 26.28.030, *Lubin v. Cowell*, 25 Wn.2d 171, 170 P.2d 301 (1946) and *Plummer v. Northern Pac. Ry. Co.*, 98 Wash. 67, 167 P. 73 (1917) (infant is liable on implied contract to pay reasonable value of necessities).

Washington’s Supreme Court held long ago that medical expenses incurred by the minor, injured in an automobile collision, are “necessaries”

for which minor is liable and can independently recover at trial if not recovered by the parent.

**No. 7 Subrogation of pre majority medical expenses under ERISA plans preempt Washington State law will extend far beyond this case.**

Respondent East Wenatchee believes that the presence of a “made whole” clause in the ERISA plan in this case does not damage a minor who may be denied the right to claim her pre-majority medical expenses paid under an ERISA plan that has no “made whole” clause. See Respondent East Wenatchee Brief at pages 18-20. As stated above, in addition to unpaid medical expenses for life-saving medical care received as necessities, a child is also bound by necessities from a parent’s ERISA health insurance policy (including ones that do not contain a “made whole” clause) to reimburse any of the paid medical expenses she received as necessities out of *any* settlement or jury verdict she may receive regardless of the nature of the recovery regardless. “A state's necessities doctrine, pursuant to which minors can only enter into contracts for necessities, may be preempted by the Federal Employee Retirement Income Security Act (ERISA) 29 U.S.C. Chapter 18 § 1001 et seq., to defeat a claim that, because an ERISA health plan provides no necessities to its child beneficiaries, they were thereby relieved from any duty under the plan to reimburse the plan for medical expenses from payments received from a third party.” 42 Am.Jur.2d Infants

§ 70 citing *Blue Cross and Blue Shield of Alabama v. Cooke*, 3 F. Supp. 2d 668 (E.D. N.C. 1997). In other words, if any child is precluded from claiming pre-majority medical expenses at trial, this would *not* prevent a ERISA plan (that contains no “made whole” clause) from recovering their full payment of their reimbursement out of the child’s total award of damages – regardless of the nature of the verdict or award, be it general damages or special damages. Such a ruling in this case acts to limit and alter the status quo for other minors and subrogation carriers “outside of this litigation.” where the “make whole” clause is not contained in an applicable ERISA plan.

**No. 8 Appellants Raised Argument at Trial that the Court’s ruling deprives the Child of her independent right as an adult to claim all of her personal injury damages (to include her pre-majority medical expenses) in violation of the privileges and immunities contemplated in article I, section 12 of the Washington Constitution.**

Respondent East Wenatchee claims that Appellants are raising a constitutional argument for the first time on appeal. This is false. Appellants first raised and briefed the issue of violation of privileges and immunities to the Trial Court on June 11, 2018. **CP 783, 790-791** RCW 4.56.250(1)(a) defines economic damages in part as “objectively verifiable monetary losses, including medical expenses.” *Id.* Medical expenses that are reasonable and necessary are recovered as economic

damages. See *Palmer v. Jensen*, 132 Wn.2d 193, 199, 937 P.2d 597 (1997) and RCW 4.56.250. Disallowing the Child to claim her accident related pre-majority medical expenses incurred as necessities, would grant an immunity to others (like insurance companies and at-fault tortfeasors) and take away a privilege from the Child (the right to make the same claims as an adult has for personal injuries) after the Child's disability under RCW 4.16.190 and RCW 26.28.030 ends (by reaching adulthood). Abridging the Child's rights and creating immunities in this manner constitutes violating the privileges and immunities contemplated in article I, section 12 of the Washington Constitution. *Schroeder v. Weighall*, 179 Wn.2d 556 at 573-574, 316 P.3d 482 (2014).

**No. 9 Plaintiff's Motion for Summary Judgment on Causation and Damages should have been granted by the Trial Court Under Washington State Court Legal Precedence.**

Washington Appellate Courts review summary judgment decisions de novo, engaging in the same inquiry as the trial court, to determine if a moving party is entitled to summary judgment as a matter of law and if there are no genuine issues of material fact requiring a trial. *Int'l Marine Underwriters v. ABCD marine LLC*, 179 Wn.2d 274, 281, 313 P.3<sup>rd</sup> 395 (2013); *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64P.3d 22 (2003). Respondent East Wenatchee cites four U.S. W.D. Washington cases in their argument including, *Thykkuttathial v. Keese*,

2013 WL 2445370 (W.D. Wash. 2013)(that court must find liability before it can determine issue of causation of injury and necessity of treatment); and *Whitford v. Mt. Baker Ski Area, Inc.*, 201 WL 895390 (W.D. Wash. 2012) (that a trial court can deny a summary judgment motion where plaintiff must establish that no reasonable juror could find that the cost of medical care was unreasonable). See Respondent East Wenatchee's Brief at pages 21-23. However these cases are contrary to Washington Supreme Court decisions in *Palmer v. Jensen*, 132 Wn.2d 193, 199-200, 937 P.2d 597 (1997) and *Harris v. Drake*, 116 Wn.App. 261, 65 P.3d 350 (2003), review granted at 150 Wash.2d 1025 (2004). Further, U.S. District Court Cases, applying Washington law are not binding precedent upon a state court nor are they reviewable by Washington Appellate Courts unless certified to Washington's Supreme Court by the Federal Court. See *In re Elliott*, 74 Wn.2d 600, 602-603, 446 P.2d 347 (1968); and RCW 2.60.020.

In the absence of evidence to the contrary, a plaintiff's special medical damages must be accepted as reasonable and necessary. *Palmer v. Jensen*, 132 Wn.2d 193, 199-200, 937 P.2d 597 (1997). The court in *Palmer* reasoned that if a jury were allowed to conclude without evidence that some treatment was unnecessary, **"carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who**

testified as to damages, even though there was no contradiction or dispute." (Emphasis added) 132 Wn.2d at 200 (citing *Ide v. Stoltenow*, 47 Wn.2d 847, 289 P.2d 1007 (1955)). See also *Hills v. King*, 66 Wn.2d 738, 404 P.2d 997 (1965). The trial court granted the plaintiff's motion for a directed verdict on the reasonableness and necessity of medical bills in *Harris v. Drake*, 116 Wn.App. 261, 65 P.3d 350 (2003), review granted at 150 Wash.2d 1025 (2004). The Court of Appeals affirmed, stating at 289-290:

Drake argues that the trial court erred by granting a verdict on causation and special damages. . . A directed verdict is proper when only one view of the evidence is reasonable. Dr. Finkleman and Dr. Nacht both testified that the accident had caused injury to Harris. They also testified that Harris' special damages were reasonably related to the accident. There was no testimony to the contrary, and thus only one reasonable view of the evidence.

Drake contends that we should draw a contrary, competing inference on causation (1) because in May 1996 a chiropractor who did not testify ordered an MRI that is not in the record; (2) because Dr. Nacht testified that Harris had a pre-existing asymptomatic bony prominence in his left shoulder; and (3) because Dr. Nacht testified that a professional painter like Harris is susceptible to impingements of the shoulder. Even assuming that such evidence warrants an inference that Harris had a pre-existing condition, it does not warrant an inference that such condition was symptomatic just prior to the accident, and thus it cannot affect causation. The trial court did not err by ruling as it did.

The Trial Court committed obvious error in denying Appellants' Civil Rule 56 motion for summary judgment that the Child was injured as a direct and proximate cause of the motor vehicle collision on December 9,

2009 (and incurred \$194,147.38 as reasonable and necessary medical expenses), when the defendants failed to present *any evidence whatsoever* to create a question of fact whether Child suffered traumatic brain and other physical injuries from the vehicle/pedestrian collision and required medical care. CP 428-597, 636-646. The only disputed fact presented was Respondent Agens' Declaration from Dr. Russo, that no chiropractic treatment was necessary (\$4,732.). CP 647-650. Respondents failed to present any evidence rebutting \$189,414.45 of medical expenses as reasonable and necessary. In the absence of evidence to the contrary, a plaintiff's special medical damages must be accepted as reasonable and necessary. *Palmer v. Jensen*, 132 Wn.2d 193, 199-200, 937 P.2d 597 (1997). The trial court did not have discretion to deny the Child's summary judgment motion "absent disputed facts." See *Wash. State Dep't of Labor & Indus. v. Davison*, 126 Wn.App. 730, 735, 109 P.3d 479 (2005).

The Respondents failed to present *any* evidence to create a question of fact whether the Child suffered a traumatic brain injury and other physical injuries from the vehicle/pedestrian collision and required medical care. CP 428-597, 633-646; RP 111-118. The Respondents even had conducted CR 35 Independent Medical Examinations of the Child which concluded the Child was injured as a direct and proximate cause of the motor vehicle collision. CP 661-765. Respondent's representation to the

court that it was a “new assertion” that the Child was injured as a direct and proximate cause of the motor vehicle collision” is patently false. **Id.** Both proximate cause and damages were clearly raised in the Child’s Summary Judgment Motion and the Trial Court should have ruled on the remaining issue of proximate cause for the Child’s injuries in which there was no issue of fact to rebut the child’s physical injuries being caused by the collision. **CP 651-660, 661-765.** Instead the entire motion was denied by the Trial Court because the Trial Court ruled that the Child cannot make the claim for pre-majority medical damages, contrary to existing statute or case law. **RP 111-118, 123, 129.**

Respondent East Wenatchee asserts that the issues related to the actual injuries suffered, proximate cause and the reasonable value of the Child’s treatment should be reserved for the jury. This would be true if The Trial Court found there were genuine issues of material fact created for the consideration by the Jury. However, Respondents failed to present any evidence to create any question of material fact on the issues of injury, proximate cause, or the value of the Child’s medical treatment for the Jury. The Respondents’ failure to present any evidence on these issues at the Motion for Summary Judgment and then simply argue that there is other evidence the Jury should consider – like Medicare billing rates or that the Respondents should have the opportunity to cross-examine plaintiffs’

experts, should not be the basis to force the Plaintiffs to re-prove the issues in front of a Jury, where there are no disputed questions of fact.

**C. Conclusion**

The Appellants again request that this Court:

A. Find that the tolling of Parents' RCW 4.24.010 claims for injury to their minor Child is permitted under RCW 4.16.190 and RCW 4.24.010.

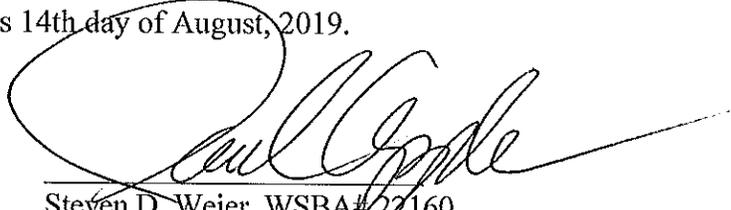
B. Reverse in part the Trial Court's June 21, 2018 Order finding that the plaintiff Child cannot claim pre-majority medical expenses [because such expenses belong to the plaintiff's parents];

C. Reverse in part the Trial Court's June 21, 2018 Order ) denying that the motor vehicle pedestrian collision on December 9, 2009 was the proximate cause of the injuries to plaintiff Jennifer Curtin as outlined in the Plaintiffs' Motion for Summary Judgment sustained, and; and

D. Finding that the undisputed amount of \$189,414.45 of \$194,147.38 are reasonable and necessary medical expenses incurred by the Child as a result of the collision.

Respectfully submitted this 14th day of August, 2019.

By:



Steven D. Weier, WSBA #22160

Paul B. Apple, WSBA #21846

**LAW OFFICES OF STEVEN D. WEIER INC. PS**

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