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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JENNIFER CURTIN, GLEN CURTIN and BECKY CURTIN,
Appellants

v.

CITY OF EAST WENATCHEE, LEO AGENS, and “JANE DOE”
AGENS, Respondents

BRIEF OF APPELLANTS

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A. Assignments of Error

No. 1 The Trial Court erred in dismissing the Parents' claims under RCW 4.24.010 - including pre-majority medical expenses - under the three-year statute of limitations, and should have tolled the Parents' RCW 4.24.010 claims along with the Child's claims under RCW 4.16.190.

No. 2 The Trial Court erred in denying Child's motion for summary judgment that the Child incurred \$194,147.38 as reasonable and necessary medical expenses as a direct and proximate cause of the motor vehicle collision on December 9, 2009, when the Court ruled that the Child (now an adult) cannot claim any of her pre-majority medical expenses of \$194,147.38, ruling that such expenses belong solely to her Parents (contrary to established case law that allows the Child to independently claim medical expenses if not claimed by the Parent).

No. 3 The Trial Court erred in denying Child's 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 an undisputed amount of reasonable and necessary medical expenses), where Respondents failed to present any evidence to create a question of fact whether Child suffered traumatic brain and other physical injuries from the vehicle/pedestrian collision and required medical care.

Issues Pertaining to Assignments of Error

No. 1 (a) Whether the Trial Court's ruling is (i) not based on Washington law and (ii) the issue regarding tolling of Parents' claims for injury to their minor Child is not a settled question of law within this jurisdiction, but is allowed in other jurisdictions;

(b) Whether the Trial court committed obvious error by forcing the Parents' claims to be brought within three years which would compel the Child's claims to be brought within three years as well, and thus violates the Child's right as an adult, to independently file her claims, that are previously tolled under RCW 4.16.190;

(c) Whether failing to toll the Parents' RCW 4.24.010 claims for injury to their Child, along with the Child's individual claims under RCW 4.16.190, (i) splits the causes of action and is impermissible claims-splitting under CR 19, and (ii) creates compulsory joinder issues when a Child's claim for damages is tolled during the period of the Child's minority;

(d) Whether the Trial Court's ruling also 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.

No. 2 Whether the Trial Court’s ruling that the adult Child cannot claim her pre-majority medical expenses of \$194,147.38 because such expenses belong to solely to her Parents, (a) is contrary to established case law that allows the Child to independently claim medical expenses if not claimed by the Parent; and (b) was obvious error in the application of precedent Washington case law by the trial judge.

No. 3 Whether it was obvious error by the trial judge to deny Appellants’ Motion for Summary Judgment that Child was injured as a direct and proximate cause of the motor vehicle collision on December 9, 2009 and incurred reasonable and necessary medical expenses, where (a) the Appellants’ Motion was based on *undisputed* facts, and (b) Respondents failed to present *any* facts or evidence to contradict Appellants’ evidence or create any genuine question of fact that plaintiff was injured, and that the collision was the proximate cause of injuries, and (c) Respondents did not dispute \$189,414.45 of \$194,147.38 in medical treatment as reasonable and necessary.

B. Statement of the Case

Appellant Jennifer Curtin (herein referred to as “Child”) was a minor Child seriously injured in a car/pedestrian collision on December 9, 2009 and is now an adult. Appellants, Glen “Skip” Curtin and Rebecca “Becky” Curtin (herein referred to as “Parents”), both joined in their

daughter's law suit asserting claims under RCW 4.24.010. Appellant, Jennifer Curtin (Child) was a minor Child seriously injured in a car/pedestrian collision on December 9, 2009 at approximately 6:16 p.m. in the unmarked crosswalk where Grant Road meets the intersection of N. Georgia Street and S. Grover Street across from Eastmont High School and Eastmont Community Park in E. Wenatchee, Washington. **Clerks Papers (CP) 206-211, 269-275, 282-295, 333-427.**

Respondent Leo Agens (herein Agens), was the driver of the vehicle that struck the Child. **CP 251-257.** Child sustained multiple serious injuries including, but not limited to, left temporal skull fracture and a traumatic brain injury. **CP 428-597.** Child has improved but continues to experience a permanent brain injury and is anticipated to receive future medical treatment over her lifetime. **CP 239-241, 525-531.**

On February 4, 2016, Appellants filed their lawsuit in Chelan County Superior Court against Respondents Mr. Agens, and City of East Wenatchee (herein E. Wenatchee). **CP 001-015.** In addition to alleging the negligence of Agens, the Appellants alleged that E. Wenatchee had notice of the dangerous condition at Grant Road, were negligent in its design and construction, and failed to maintained the roadway or warn of the dangerous condition. **CP 269-295, 297-332.**

As part of Child's claim, the Parents joined in their adult Child's law suit asserting claims under RCW 4.24.010, "for the loss of love and companionship of the Child and for injury to or destruction of the Parent-Child relationship in such amount as, under all the circumstances of the case, may be just." **CP 003-015**. Parents both claim to have suffered anxiety, emotional and financial damages due to the incident, and that the Parent-Child relationship has suffered. **CP 004,013, 544,568**.

Respondent, E. Wenatchee filed Motions for Summary Judgment to dismiss the Appellants' claims on November 6, 2017. **CP 016-031**. Respondent Agens joined in the motions. **CP 809-818**. Respondents contended that the Parents' claims for loss of Parent/Child consortium and for recovery of medical expenses should be dismissed as barred by Washington's three-year statute of limitations, and that the Child cannot claim her pre-majority medical expenses after she reached the age of 18. **CP 613-625**. The Trial Court held oral arguments on March 19, June 4, and June 21, 2018. **CP 634-635, 766-767, 824-826; Report of Proceedings (RP) 1-134**. The Trial Court granted Respondents' Motion to dismiss the Parent's claims as barred by the statute of limitations. The Trial Court ruled that the Parents cannot join their RCW 4.24.010 claims with the adult Child's lawsuit, and further held that Child could not claim pre-majority medical expenses, stating they belong to the Child's Parents.

CP 819-823, RP 80-130. Appellants requested review. **CP 827-840.** Appellants respectfully seek review, by the Court of Appeals Division III, of (1) the Trial Court's Order granting Defendant's Motion for Summary Judgement Re: Claims of Glen and Becky Curtin (Parents) and Claims of Jennifer Curtin (Child) - dismissing all of the claims of Parents as being extinguished by the statute of limitations, and (2) the Trial Court's Order denying Child's Motion For Summary Judgment that Child incurred \$194,147.38 as reasonable and necessary medical expenses as a direct and proximate cause of the motor vehicle/pedestrian collision – for the reason that the Child cannot claim pre-majority medical expenses, as such expenses belong solely to the Parents. **CP 841-916, 917-932.**

C. Argument

No. 1 (a) Trial Court's ruling is not based on Washington law, and tolling of Parents' claims for injury to their minor Child is not a settled question of law within this jurisdiction, but is allowed in other jurisdictions.

Appellants assert that the Trial Court committed obvious (or probable) error when it failed to correctly apply and reconcile conflicting statutes governing recovery of the Parents' loss of parental consortium claims and claims of pre-majority medical expenses with the statutory tolling of

Child's claims. RCW 4.16.080(2) creates a three year statute of limitations for persons making claims for personal injury. See RCW 4.16.080(2). RCW 4.16.190 tolls the statute of limitations for those claims that arose when persons are under eighteen years of age allowing them to bring claims when they are no longer a minor child. See RCW 4.16.190. Finally RCW 4.24.010 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 child, and pursue the child's health care expenses and loss of companionship.¹ See RCW 4.24.010; SB 5163-2019-20 [Emphasis added].

¹ 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

There is no specific Washington legal authority 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. However, RCW 4.24.010 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)

RCW 4.24.010(3) also provides **clear 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 the child's claims are not time barred by the Statute of Limitations. Clearly, the statute is intended to allow joinder of the Parent's claims during the period that the Child's claims are tolled into adulthood. The statute is meaningless if a 3-year statute of limitations is applied to the Parents under these circumstances.

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.

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.

“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). RCW 4.56.250(1)(a) defines economic damages in part as “objectively verifiable monetary losses, including medical expenses.” Medical expenses that are reasonable and necessary are recovered as damages. See *Palmer v. Jensen*, 132 Wn.2d 193, 199, 937 P.2d 597 (1997). 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, including claims for pre-majority medical expenses under different statutes of limitations. Further, a Child has the right to claim pre-majority medical expense as necessities under RCW 26.28.030 if not claimed for any reason by the parent. See below No. 2 of Appellants’ Brief page 24.

The authority for the Parents to join the Child’s action, RCW 4.24.010, does not state which specific statute of limitations applies. However, a careful reading of the statute clearly indicates that Parents may join to claim their Child’s health care expenses *even after the Child has become an adult*. This clearly implies that the intended statute of limitations would fall within the Child’s right to bring the action. Nonetheless, the

Trial Court was apparently confused and failed to reconcile the conflicting statutes and applied the wrong statute of limitations when it denied the Parents' loss of parental consortium claims. The Trial Court further erroneously dismissed Parents' independent claims for the Child's pre-majority medical expenses, and erroneously then denied the Child's right to claim her own pre-majority medical expenses because she had reached adulthood. The result of the Trial Court's rulings is untenable, unjust and flies in the face of equity.

Respondents argued that the Parent's three year statute of limitations precludes the Child from claiming her own pre-majority medical expenses, thereby effectively creating a new statute of limitations on a minor child's tort claims. This is ludicrous. For example, say the Child was injured on her 15th birthday. According to the Respondents, the claims for her health care expenses solely belong solely to the Parents. If the Parents fail to file suit to recover the health care expenses by the Child's 18th birthday, then the claim for recovery of health care expenses is lost since the Child loses the right to claim her pre-majority health care expenses once she attains adulthood. The result is that the Child is prejudiced by exercising her right to toll the statute of limitations. The Trial Court provided little to no substantive legal reasoning in support for its Order dismissing the Parent's parental loss of consortium claims. **CP 819-823, 917-929; RP 80-130.**

Appellants assert that the Trial Court's failure to toll the Parents' claims under RCW 4.24.010 was not properly based on Washington law as the issue of the statute of limitations under these conditions is not settled within this jurisdiction. Even 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.** In this case, the Trial Court committed either obvious error, or at best probable error, which substantially alters the status quo or substantially limits the freedom of a party to act.

Respondents asserted to the Trial Court that pre-majority medical expenses are independent and solely belong to the Parent and not derivative of the Child's claim for all her damages. Respondents were also able to convince the Trial Court that the ordinary provisions of the three-year statute of limitations under RCW 4.16.080 apply to all the claims of the Parent under RCW 4.24.010 and apply to the Child's pre-majority claims as well, without considering the tolling effect of RCW 4.16.190 on a Child's claims for the same pre-majority special damages. There is no current Washington case law to support defendant's argument. Respondents instead cited a plethora of out-of-state cases in an attempt to

convince the Trial Court of their position. However, there are an equal number of out-of-state cases where courts *have* held that the tolling of a statute of limitations during the minority of an injured child should likewise be applied to an action by a parent or guardian arising out of the same injury to the child. See; *Manley v Detroit Auto. Inter-Insurance Exchange* 127 Mich. App. 444, 339 NW2d 205(1983) [motion denied] (Mich) 357 NW2d 664, [held that, to the extent that the parents of an injured child protected by a no-fault insurance policy had independent claims, those claims were protected by the statutory tolling provisions relating to infancy]; *Rost v Board of Education*, 137 NJ Super 79, 347 A2d 811 (1975) [the court, reversing an order dismissing a parent's consequential damage claim, acknowledged that where a parent has given timely notice of claim as required by the tort claims statute, the period of time within which he may commence his action based on injuries to his child is, by virtue of the tolling statute pertaining to parental claims, the same as that which applies to the child, upheld, citing *Vedutis v Tesi*, 135 NJ Super 337, 343 A2d 171, (1975) affd., 142 NJ Super 492, 362 A2d 51]; *Kahale v. City and County of Honolulu*, 104 Haw. 341, 90 P.3d 233 (2004) [Mother's personal injury action, as next friend of minor daughter, against city and county, seeking recompense for injuries sustained by daughter when she was attacked by a pit bull in a city park, was tolled by

infancy tolling provision]; and finally; *Korth v American Family Ins. Co.*, 115 Wis 2d 326, 340 NW2d 494 (1983) [reversing a judgment dismissing parents' claim for damages for medical expenses and loss of society and companionship arising from an injury to their infant daughter, the court, held that the statute tolling the statute of limitations during infancy was applicable to the parents' claim where their action for loss of society and companionship was required to be joined with the daughter's action for personal injuries and where application of the tolling provision to the parents' claims would not impose any additional burden on the defendants].

Respondents also cited Washington cases to the Trial Court claiming that a loss of *spousal* consortium claim (which is a separate common law claim by a plaintiff's spouse) is *independent* instead of *derivative*. **CP 617**. They argue that, *by analogy*, the Parent's claim under RCW 4.24.010 should also be considered as *independent* not *derivative* of the Child's claim – and should therefore have an independent 3-year statute of limitations. This Court should note that a loss of consortium claim based on injury to the parent/child relationship is NOT the same as loss of consortium claims between adult spouses. If it were, the legislature would not have enacted separate and specific laws outlining loss of consortium claims for a parent based upon bodily injury sustained by his or her minor

child. Recently the Washington Legislature has further amended the language of RCW 4.24.010. The amendments do not *directly* identify which statute of limitations applies, or when it begins to run.² However, it is clear when considering all the parts of the statute as a whole, the most meaningful interpretation allows the application of the Child's statute of limitations to be applied.

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*

² It should be noted that actions now 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*, where the [adult] child has no spouse, state registered domestic partner, or children. See RCW 4.24.010; SB 5163-2019-20 (Effective date 7/28/2019). Section (2) also specifically allows for the parent to recover the child's health care expenses regardless of the child's age.

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 parent's 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.

Even if a parent's claim for pre-majority medical expenses is an independent right which is not tolled, then the Child *still has* an independent right to claim the same under Washington law. 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. See *McAllister v. Saginaw Timber Co.*, 171 Wash. 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 necessaries, 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, *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]; and *Flessher v. Carstens Packing Co.*, 96 Wash. 505, at 509, 165 P. 397 (1917) [citing *Hammer v. Caine*, minor is authorize recover medical treatment if not claimed by parent]. Of course, the costs of such care for the child's minority may be recovered only once. *Wooldridge v. Woolett*, 96 Wash.2d 659, 666, 638 P.2d 566 (1981).

(b) Trial Court committed obvious error by forcing the Parents' claims to be brought within three years which would compel the Child's claims to be brought as well and therefore violates the Child's right as an adult, to independently file her claims that were previously tolled under RCW 4.16.190 and RCW 4.24.010.

The Trial Court committed obvious error (or probable error) that substantially alters the status quo or substantially limits the freedom of a party to act. Under RAP 2.3(b)(1) an obvious error is an act or decision that is clearly contrary to existing statute or case law and is not a matter of discretion. See *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P2d 217 (1985). Also under

RAP 2.2(a) (3) and RAP 2.3(b) (1) and in the alternative RAP2.3 (b) (2) the Trial Court committed obvious error and or committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act.

A trial court’s decision under RAP 2.3(b)(2) must show that the trial court committed probable error and that *the decision substantially altered the status quo or substantially limited the party’s freedom to act*. Pursuant to *State v. Howland*, 180 Wn.App. 196, 321 P.3d 303, (Div. 1 2014) the “effect prong” for probable error has been met and is present in this case. *Howland* states:

“where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2). . . .While the decision arguably limited the manner in which Howland can conduct the litigation regarding her conditional release, it has no effect beyond the immediate litigation.

State v. Howland, 180 Wn.App. 196, 207, 321 P.3d 303 (Div. 1 2014).

In addition to limiting the Appellants’ freedom to act within this lawsuit, the Trial Court’s decision in this case has far reaching effects beyond the immediate litigation. A conflict exists 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). The Trial Court failed to correctly apply and reconcile conflicting statutes governing the Statute of Limitations on recovery of pre-majority medical expenses and tolling of minor's claims.

(c) Failing to toll the Parents' RCW 4.24.010 claims for injury to their Child, along with the Child's individual claims under RCW 4.16.190 and RCW 4.24.010, (i) splits the causes of action which is impermissible claims-splitting under CR 19, and (ii) would create compulsory joinder issues when a Child's claim for damages is tolled during the period of the Child's minority.

If the Parents' claims for pre-majority medical expenses are independent, then forcing the Parents to bring their claims only within the three year statute of limitations creates impermissible claims splitting. Compulsory joinder of either a parent's or a minor child's claims would not always be feasible under CR 19. Loss of spousal consortium claims are indispensable for the same lawsuit. See RCW 4.08.030³. 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 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

³ RCW 4.16.080. 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.

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.

As argued to the Trial Court, failing to toll 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, 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. A conflict exists between *any* child's right to have their case tolled into majority, and then lose the right to claim pre-majority damages upon reaching majority. If the Parent's claims are not tolled, or are barred by the three year Statute of Limitations, then the Child is prejudiced by the Trials Court's determination that the Child does not have the right to claim her own special damages after majority.

(d) Trial 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.

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.3d482 (2014).

In this case, the Parents and Child *both* claimed the cost of medical treatment in the Complaint, however the costs of such care for the Child's medical treatment may be recovered only once. *Wooldridge v. Woolett*, 96 Wash.2d 659, 666, 638 P.2d 566 (1981). In this case either the Parent or the Child *will* still be liable for the medical expenses incurred by their then minor Child – as the ERISA health insurance plan has a reimbursement right against *any* recovery in the third party action, regardless of whether it is through the Parent or the Child (a beneficiary of the plan). **CP 768-782**. 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.** Nothing in Washington law requires affirmative proof of an assignment under these conditions. Further, the Trial Court ignored the Child's legal responsibilities to pay for medical treatment as necessities under RCW 26.28.030, and ignored the evidence of subrogation assignment that was in the record. The Child was covered by the Parent's health insurances including an ERISA plan, and the Child, as a covered insured, is bound to reimburse said plan from any third party recovery received. **CP 56, 768-782.**

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.

In addition to unpaid medical expenses for life-saving medical care received as necessities, the Child is also bound by necessities from her Parents' automobile and health insurance policies (Farmers Insurance Company of WA, and Premera Blue Cross, a self-funded ERISA plan), 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. **CP 56, 768-782.** “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 the Child is precluded from claiming pre-majority medical expenses at trial, this would *not* prevent the ERISA plan 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.

The Trial Courts’ ruling is an obvious error and clearly contrary to existing Washington case law. It 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 two ways: First, ruling that pre-majority medical expenses belong *solely* to her Parents is contrary to established case law that allows the Child to independently claim medical expenses if not claimed by the Parent. It was obvious error by the Trial

Judge in the application of Washington case law precedent. Second, a ruling depriving the Child of her right to claim all of her pre-majority medical expenses violates the privileges and immunities contemplated in article I, section 12 of the Washington Constitution. See generally, *Schroeder v. Weighall* 179 Wn.2d 566, 316 P.3d 482 (2014). Disallowing a minor to claim his or her pre-majority medical expenses received as necessities, would grant an immunity to others and take away a privilege from a minor to make the same claims as an adult for personal injuries, after the minor's disability ends under RCW 4.16.190 and RCW 26.28.030. It also acts to limit and alter the status quo for other minors and subrogation carriers "outside of this litigation." See *State v. Howland*, 180 Wn.App. at 207, 321 P.3d 303 (2014).

No. 2 Trial Court's ruling that Child cannot claim her pre-majority medical expenses of \$194,147.38 because such expenses belong to solely to her Parents, (a) is contrary to established case law that allows the Child to independently claim medical expenses if not claimed by the Parent; and (b) was obvious error in the application of precedent Washington case law by the trial judge.

Respondents argue and the Trial Court wrongly believed that only the Parent can claim pre-majority medical expenses in Washington. Respondents cited to other out of state cases to argue that medical expenses incurred during a Child's minority are claims of the parent and a right solely recoverable only by the parents. However, Respondents,

and the Trial Court both ignored the Common law and Washington Supreme Court case law.

In *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), the Washington Supreme Court held that in addition to the parents, a minor child separately has the individual right to sue for compensatory non-economic and economic damages including medical expenses. The *Harbeson* court reasoned as follows:

The court [in *Turpin v. Sortini*, at 348, 182 Cal.Rptr. 337, 643 P.2d 954] acknowledges that "it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care." [10] We agree. The child's need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority. In many cases, the burden of those expenses will fall on the child's parents or the state. Rather than allowing this to occur by refusing to recognize the cause of action, we prefer to place the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training.

Harbeson v. Parke-Davis, Inc., at 479-480, 656 P.2d 483, (1983).⁴

⁴ The *Harbeson*, court goes on to say in Footnote 10: "If such a distinction were established, the afflicted child's receipt of necessary medical expenses might well depend on the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care. Realistically, a defendant's negligence in failing to diagnose an hereditary ailment places a significant medical and financial burden on the whole family unit. Unlike the child's claim for general damages, the damage here is both certain and readily measurable. Furthermore, in many instances these expenses will be vital not only to the child's well-being but to his or her very survival." (Footnote omitted.) *Turpin v. Sortini*, at 348, 182 Cal.Rptr. 337, 643 P.2d 954.

In addition the Trial Court ignored the exception to this “parental right” under the law of “necessaries”. An injured minor may recover for his or her medical expenses when those expenses arise from the doctrine that medical expenses are necessaries. See 42 Am.Jur.2d Infants § 145. To understand what “necessaries” are, Appellants 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.⁵ Since it is the parents’ legal duty and obligation to provide their child’s necessaries, the action to recover medical expenses of a child is vested exclusively in the child’s parents.⁶ **However, exceptions exist to this general rule that an injured minor may not recover for his or her medical expenses,⁷ and he or she may recover those expenses when—**

— the minor child has paid or agreed to pay them.⁸

Note: Footnotes 5-14 are from 42 Am.Jur.2d Infants § 145 follow below (citation to these authorities are omitted from Appellant’s Table of Contents)

⁵ 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).

⁶ Capp v. Carlito’s Mexican Bar & Grill No. 1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007).

⁷ Laughner v. Bryne, 18 Cal. App. 4th 904, 22 Cal. Rptr. 2d 671 (2d Dist. 1993).

⁸ 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.

- the child is legally responsible for their payment, such as by reason of emancipation, or the death or incompetency of his or her parents.⁹
- the child is personally liable for payment of the expenses because his or her parents cannot afford to pay them.¹⁰
- **the infant’s obligations arise from the doctrine that medical expenses are necessities.**¹¹
- the parents have waived or assigned their right of recovery in favor of a minor child.¹²
- **the parents are barred from asserting a claim for a minor’s medical expenses due to the statute of limitations.**¹³
- **recovery of medical expenses by the infant is permitted by statute.**¹⁴

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). Further, the common law doctrine of a minor being liable to pay for necessities

⁹ *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).

¹⁰ *Lopez v. Cole*, 214 Ariz. 536, 155 P.3d 1060 (Ct. App. Div. 1 2007).

¹¹ *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 697 A.2d 1358 (1997).

¹² *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).

¹³ *Myer v. Dyer*, 643 A.2d 1382 (Del. Super. Ct. 1993); *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 697 A.2d 1358 (1997).

¹⁴ *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).

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. See *McAllister v. Saginaw Timber Co.*, 171 Wash. 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, *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]; and *Flessher 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]. Of course, the costs of such care for the child's minority may be recovered only once. *Wooldridge v. Woolett*, 96 Wash.2d 659, 666, 638 P.2d 566 (1981). If the parent cannot, then the child can.

Obviously, the parents and child may not both recover for the same medical expenses. If the parents recover such costs for the child's minority, the child will be limited to the costs to be incurred during his majority. *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).

No. 3 Trial Court committed obvious error by denying Appellants' Motion for Summary Judgment that Child was injured as a direct and proximate cause of the motor vehicle collision on December 9, 2009 and incurred reasonable and necessary medical expenses, where (a) the Appellants' Motion was based on *undisputed* facts, and (b) Respondents failed to present *any* facts or evidence to contradict Appellants' evidence or create any genuine question of fact that plaintiff was injured, and that the collision was the proximate cause of the injuries, and (c) did not dispute \$189,414.45 of \$194,147.38 of medical treatment as reasonable and necessary.

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.3rd 395 (2013); *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64P.3d 22 (2003). 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 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.**

The Trial Court's ruling dismissed the Parents' claims outright, and by denying the Child the ability to make all claims for special damages (medical expenses), makes it nearly useless for the Child to prove at trial the seriousness of her injuries as a direct and proximate cause of the motor vehicle collision, or claim \$189,414.45 of \$194,147.38 as reasonable and necessary medical expenses; expenses that she would be obligated under ERISA to repay *regardless* of whether she is made whole or not by the jury.

D. Conclusion

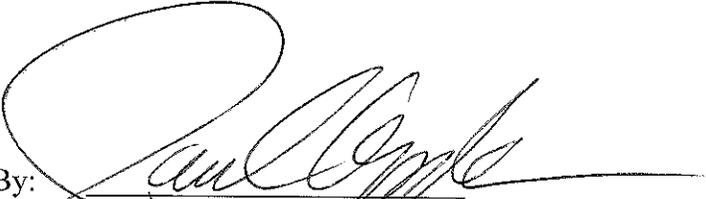
The Appellants request that this Court further find, as a matter of law, that the tolling of Parents' RCW 4.24.010 claims for injury to their minor Child is permitted under RCW 4.16.190 and RCW 4.24.010. Failing to toll the Parents' RCW 4.24.010 claims for injury to their Child with the Child's individual claims under RCW 4.16.190 and RCW 4.24.010 splits the causes of action, is impermissible claims splitting under CR 19 and creates compulsory joinder issues where a Child's treatment and claim for damages is ongoing beyond the three years. Forcing the Parent's claims to be brought within three years would force the Child's claims be brought within three years as well and violates the Child's right to independently file her claims which are statutorily tolled under RCW 4.16.190 and RCW

4.24.010. The Trial 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) and violates the privileges and immunities contemplated in Article I, section 12 of the Washington Constitution.

The Appellants further request that this Court reverse in part the Trial Court June 21, 2018 Order denying: 1) that the plaintiff Child cannot claim pre-majority medical expenses [because such expenses belong to the plaintiff's parents]; 2) that plaintiff Jennifer Curtin was injured in the motor vehicle pedestrian collision on December 9, 2009; 3) 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.

Finally the Appellants also request that this Court further rule on and grant the Appellants' motion for summary judgment 1) that the Child was injured as a direct and proximate cause of the motor vehicle collision on December 9, 2009 and 2) incurred \$189,414.45 as reasonable and necessary medical expenses where there defendants failed to present any evidence to create a genuine question of fact that plaintiff was injured.

Respectfully submitted this 16th day of May, 2019.

By: 
Steven D. Weier, WSBA# 22160
Paul B. Apple, WSBA #21846

LAW OFFICES OF STEVEN D. WEIER INC. PS

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