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**COURT OF APPEALS**  
**DIVISION III**  
**OF THE STATE OF WASHINGTON**

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**JENNIFER CURTIN, GLEN CURTIN and BECKY CURTIN,**  
**Appellants,**

**vs.**

**CITY OF EAST WENATCHEE and LEO AGENS,**  
**Respondents**

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**BRIEF OF RESPONDENT AGENS**

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## II. Statement of the Case

Plaintiff Jennifer Curtin (Jennifer), currently age 24, was injured when she was 14-years-old in a pedestrian-car accident. On December 9, 2009, at about 6:16 p.m., Jennifer elected to run across what she claims was an “unmarked crosswalk” on Grant Road near the intersection of North Georgia/South Grover Place. Clerks Papers (“CP”) 001-15; 205-332. Grant Road consists of five (5) lanes, and is the main east/west travel corridor in East Wenatchee.

Defendant Leo E. Agens was traveling eastbound on Grant Road. There was no crosswalk, marked or unmarked, where Jennifer crossed Grant Road, as Jennifer was struck by Mr. Agen’s car approximately 40 feet east of North George Avenue/South Grover Place. CP 031-065.

Jennifer alleged in her complaint that the nearest “marked crosswalks” were  $\frac{1}{4}$  mile to the west (Grant Road and Eastmont Avenue) and  $\frac{3}{4}$  miles to the east (Grant Road and Kentucky Avenue). CP 001-15.

On the day of the accident, Jennifer had previously crossed Grant Road by foot three separate times. First, she and her friend, Cassie, crossed Grant Road by using the crosswalk and traffic light at Grant Road and Kentucky Avenue to go to Tony's Market. They then crossed Grant Road again at the same intersection and walked west to Eastmont Park. CP 205-332. After about 45 minutes, Jennifer and her friend crossed Grant Road from the north to the south "at or very, very, very close to where the accident occurred." CP 205-332.

While on the south side of Grant Avenue they went to see Jennifer's mother at Safeway (located at the intersection of Grant Road and Eastmont Avenue, where there is a marked, regulated crosswalk). When Jennifer left Safeway, instead of crossing at the marked, regulated crosswalk at Grant Road and Eastmont Avenue, she instead walked east up Grant Road and again crossed in the vicinity of the subsequent accident. CP 205-332.

Jennifer claims she does not have any memory of crossing Grant Road from north to south later when the accident occurred, yet plaintiffs assert that Jennifer and her friends had proceeded at a

hurried but safe pace across the first and second westbound lanes of Grant Road. CP 205-332. Witness statements to the police paint a different picture, however. The Traffic Collision Report by Officer Michael L. Robbins of the East Wenatchee Police Department stated in relevant part:

[Jennifer] Curtin and her friends were running across Grant just east of Georgia. Curtin was wearing dark clothing.

CP 032-065.

The separate Police Incident Report stated:

I spoke with one of the witness[es], Bobby Jo Adams. Adams stated that the Curtin and the other juveniles were running across Grant Road in traffic, when Curtin was struck by the vehicle. Adams stated that the juveniles were not in the crosswalk. The juveniles were running south bound across grant [*sic*]

I then spoke with another witness, Robin Freeman. Freeman stated that he was behind Agens ... east bound. Freeman stated that the juveniles ran across Grant Road, southbound. The vehicle in front of him slammed on his brakes and got stopped, but the driver of the Maxima could not get stopped.

I then spoke with the juveniles who were with Curtin. They stated that they did not run across Grant Road [*sic*], they were walking across Grant Road. They were not in the intersection, crosswalk area. They were

crossing from north of Grant Road to the south side of Grant Road.

CP 032-065.

### III. Argument

#### A. When is the Statute of Limitations tolled.

RCW 4.24.010 (Action for injury or death of child.) provides in pertinent part:

A mother or father, or both, who has regularly contributed to the support of his or her minor child, ... may maintain or join as a party an action as plaintiff for the injury or death of the child.

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered 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. (emphasis ours)

It is undisputed that RCW 4.24.010 does not specify a time deadline (i.e. a statute of limitations) when a claim must be pursued. In Washington, unless a specific statute controls (i.e., claims arising

from construction – RCW 4.16.300-320; actions based on childhood sexual abuse – RCW 4.16.340; actions for breach of fiduciary duty – RCW 11.96A.070, etc), one must look to the limitation of action statutes set out at RCW 4.16.020 through 4.16.110. For injury to a person, any action for damages must be commenced within three (3) years. See RCW 4.16.080(2).

The Appellants argue that the parents’ independent claim (under RCW 4.24.010) should be tolled, similar to claims of minors. RCW 4.16.190, entitled “Statutes tolled by personal disability”, provides in relevant part:

(1) ..., if a person entitled to bring an action mentioned in this chapter, ... be at the time the cause of action accrued ... under the age of eighteen years, ... the time of such disability shall not be a part of the time limited for the commencement of action.

1. General Rules on Statutory Interpretation.

The purpose of statutory interpretation is to give effect to legislative intent. *Hubbard v. Dept. of Labor & Industries*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). The meaning of a statute is a question of law. *Dep’t. of Ecology v. Campbell & Gwinn, LLC*, 146

Wn.2d 1, 9, 43 P.3d 4 (2002). 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*, 146 Wn.2d at 11. When the meaning of the statute is plain on its face, the court must give effect to that plain meaning as the expression of the legislature’s intent. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007); *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006).

An unambiguous statute is not open to judicial interpretation. *Lake*, supra at 526; *Marriage of Robertson*, 113 Wn. App. 711, 713, 54 P.3d 708 (2002). A statute is ambiguous only if it is susceptible to two or more reasonable interpretations. *Tesoro v. Dept. of Revenue*, 159 Wn. App. 104, 246 P.3d 211 (2010). Here, RCW 4.16.090 is limited to tolling the statute of limitations to those under the age of eighteen years. On the other hand, RCW 4.24.010 authorizes a cause of action for parents due to injury or death of a

minor child. Neither statute is susceptible to an interpretation different than their plain meaning.

Despite the foregoing, Appellants assert that RCW 4.16.190 should be expansively read to toll parents' claims under RCW 4.24.010, thus allowing parents to pursue their claim at the same time as their child after the child becomes an adult. In making this assertion, Appellants do not allege that either of these statutes are ambiguous, nor have plaintiffs presented any evidence of the legislature's intent in creating these two (2) distinct statutes.

This is also not a situation where the two statutes are related, which deal with the same subject matter, or where one statute incorporates the other by reference. See *Anderson v. Dussault*, 181 Wn.2d 360, 368, 333 P.3d 395 (2014). As such, the RCW 4.16.190 and RCW 4.24.010 do not need to be harmonized to effectuate a consistent statutory scheme. See *State v. Velasquez*, 176 Wn.2d 333, 292 P.3d 92 (2013).

Appellants assert that because RCW 4.24.010 gives parents the ability to join their child's claim as a party, that right of joinder must include the right to join after the child become an adult. This

argument ignores the fact that parents, per RCW 4.24.010, also have the right to independently assert their own claim for damages. As such, the parents here had a number of options available to them:

- They could have independently filed suit within three (3) years for pre-majority medical expenses and other damages per RCW 4.24.010, while Jennifer waited until age of majority to pursue her damages, including post-majority medical expenses.
- They could have independently filed suit within three (3) years, but not sought recovery of pre-majority medical expenses. The child, at age of majority, then could have pursued her damages including pre and post majority medical expenses.
- The parents and child could have joined their claims together and pursued all damages within three (3) years of the date of the accident.

In each of these scenarios, only the minor has flexibility when to file suit, because the parents have a three (3) year statute of limitations.

Appellant's assertion (at P. 16 of Appellant's Brief) 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. Unfortunately, Appellant parents were

advised (incorrectly) to wait to assert their claims until after the statute of limitations had run.

B. Because the parents sought recovery of pre-majority medical expenses, the minor is barred from asserting the same claim.

Jennifer is asserting a claim for \$194,147.38 in pre-majority medical expenses (see CP 066-075). It is undisputed that Jennifer's parents also made the election to recover those same pre-majority medical expenses. CP 001-015. Paragraph 8.2 of plaintiff's complaint states:

As a further direct and proximate result of Defendants' negligence and carelessness as herein alleged, Plaintiffs Glen and Becky Curtin incurred damages under RCW 4.24.010 in the form of medical expense in support of their minor daughter Jennifer Curtin who sustained severe and permanent injuries, ...  
(emphasis ours)

(CP 001-015). See also section 5.7 of the plaintiff's complaint at CP 001-015.

A parents' right to recover pre-majority medical expenses is specifically addressed in RCW 4.24.010, supra. This statute requires the parents to make an election; either independently maintain an action as plaintiffs, or join in the minor child's action for damages.

Appellant's assert that:

“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.”

(See Appellant Brief at PP. 17-18). Appellant's argument ignores the fact that the reason Jennifer could not pursue recovery of pre-majority medical expenses is because her parents elected to assert their statutory right to collect them per RCW 4.24.010.

1. Parents failed to consent or waive their rights.

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. While Washington courts have not expressly addressed this issue, surrounding jurisdictions have. In *Palmore v. Kirkman Laboratories*, 270 Or. 294, 527 P.2d

391 (1974), the Oregon Supreme Court concluded that medical expenses incurred due to the negligent injury of an unemancipated minor child are damages suffered by the parent and not the child. *Id.* at 396. The *Palmore* court then noted that an Oregon statute (ORS 30.810) provides a means whereby medical expenses can be recovered by a minor child by the parents filing a consent accompanying the complaint. *Palmore v. Kirkman Laboratories*, at 396-397.

In *Barrington v. Sandberg*, 164 Or. App. 292, 991 P.2d 1071 (1999), a minor child's parent (acting as guardian ad litem), brought suit on the child's behalf, but failed to file a consent statement.<sup>1</sup> The defendant moved to strike the child's claim for past medical expenses. The Oregon Court of Appeals rejected plaintiff's argument that since the parent and guardian were the same person, the Court should imply that the father consented (*Id.* at 1075), holding that the statute provides an express way to allow inclusion of a claim for medical expenses. *Id.*

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<sup>1</sup> The father did not pursue a claim on his own behalf for damages.

In Idaho, parents also have the primary right of action to recover expenses incurred by a minor child. See *Lasselle v. Special Products Co.*, 106 Idaho 170, 677 P.2d 483 (1983); *Baldwin v. Ewing*, 204 P.2d 430 (1949). However, parents may also waive or relinquish their rights to recover medical expenses so the child can recover those damages. In *Lasselle*, the parents did not object, and also filed a ratification to their son separately seeking payment of medical expenses incurred. The *Lasselle* court concluded that such conduct constituted a waiver by the parents of their primary right to recover medical expenses. *Id.* at 486.

In Alaska, the general rule is that the parent has the primary right of action for past medical expenses incurred by a minor. In *Alaskan Village Inc. v. Smalley*, 720 P.2d 945 (1986), an unemancipated minor child brought suit for injuries, and the defendant argued that the minor had no right to recover for past medical expenses. *Id.*, at 949-950. The Alaska Supreme Court concluded that a parent impliedly waives their right in favor of a child by not pursuing a claim for medical expenses, and also by allowing the child to assert the claim without objection. *Id.* at 950.

In the present case, Glen Curtin and Becky Curtin (the parents) separately sought recovery for pre-majority medical expenses, and at no time did they consent or impliedly waive their right to recover those expenses.

2. Remedy when two parties seek recovery for the same damage.

Since Jennifer and her parents both assert damages for the same medical expenses in the complaint, and double recovery is not allowed, the obvious question is then what happens? Appellants argue that even though the parents sought recovery of pre-majority medical expenses, since their claim is time barred by statute, the minor should now be able to recover for those.

In *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), the court recognized that parents can pursue an action for wrongful birth (including medical expenses), citing RCW 4.24.010 (Id. at 474-75), while the child can pursue a separate action for wrongful life (for extraordinary expenses incurred during the child's life for medical and other expenses attributable to the birth defect). While the Washington Supreme Court did not address who

has standing to pursue the medical expenses incurred, the Washington Supreme Court did cite as authority the California case of *Turpin v. Sortini*, 643 P.2d 954, 965 (1982), as follows:

The court 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.”

See *Harbeson v. Parke-Davis*, 98 Wn.2d at 479. But the *Turpin* court then clarified what medical expenses are recoverable when both parent and child assert a claim for medical expenses:

“As noted, in a separate cause of action Joy’s parents seek to recover, inter alia, for the medical expenses which they will incur on Joy’s behalf during her minority. Since both Joy and her parents obviously cannot both recover the same expenses, Joy’s separate claim applies as a practical matter only to medical expense to be incurred after the age of majority. (emphasis ours)

See *Turpin v. Sortini*, supra at footnote 11.

3. The Trial Court did not say a minor could never recover pre-majority medical expenses.

The trial court’s order states that the minor child “cannot claim pre-majority medical expenses. Such expenses belong to (the

minor child's) parents." CP 930-31. The respondent would submit that the trial court was not attempting to establish a blanket rule, because in this case the court's ruling was based on the fact the parents had sought recovery for pre-majority medical expenses, and never waived or relinquished that claim.

4. Medical Expenses as necessities.

Appellants assert that medical expenses incurred by the minor child are "necessaries" for which the minor is personally liable. As authority, plaintiffs' cite the case of *McAllister v. Saginaw Timber Co.*, 171 Wash. 448 (1933). In *McAllister*, the minor pursued a claim for damages on his own behalf, with his mother acting as guardian ad litem. The mother herself did not pursue any claim. While this fact alone would evidence consent or at least an implied waiver by the parent, the *McAllister* court instead reasoned that the child was liable for the medical expenses because they were "necessaries".

No other case has been found in Washington where a court used a "necessaries" analysis. In *Hammer v. Caine*, 47 Wash. 672 (1907), a minor pursued an action through his mother, as guardian ad litem, to recover damages for personal injuries. On appeal, *Caine*

argued that the minor could not recover for time loss, as the mother was entitled to claim that during *Hammer's* minority. The Supreme Court disagreed, concluding that the mother, by filing suit solely as a guardian, had emancipated her son in so far as the right to recover damages was concerned.

The only citing reference to the *McAllister* case is *Nagala v. Warsing*, 36 Wn.2d 615 (1950). In *Nagala*, a minor, by and through his father as guardian ad litem, pursued a claim for damages, including medical expenses incurred. The Supreme Court allowed recovery, citing as authority to the case of *Donald v. Ballard*, 34 Wash. 576 (1904). Neither *Nagala* or *Donald* relied on “necessaries” as a legal basis. Instead, the court held that by the parent not filing a separate action, and pursuing the action as guardian ad litem, the father “consented to this recovery by the son....” *Id.*, at 578.

In the present case, the parents did seek recovery of pre-majority medical specials paid out, so the cases Appellants cite as authority are inapplicable.

5. Subrogation.

In the present case, all medical expenses were covered by Farmers Insurance and Premera Blue Cross. The parties to the Farmers' Insurance Contract are Becky and Glen Curtin, while the party/member to the Premera self-funded Erisa Plan is Glen Curtin. See insurance policies attached to Paul Apple's Second Supplemental Declaration at CP 661-765. Neither Farmers or Premera contracted with the minor child, and thus the minor is not personally "liable" to repay any medical expenses.

Further, when an insurance company steps into the shoes of its insured, it only has the same rights that its insured has. See *State v. Ewing*, 102 Wn. App. 349, 353, 7 P.3d 835 (2000). Virtually all insurance policies and many health care plans have subrogation clauses written into them, where the insurance company stands in the shoes of the injured claimant and is entitled to collect as much of its payment back from an at-fault party as the injured party is able to collect. In other words, the carrier is "subrogated" to the injured party's rights. *Mahler v. Szucs*, 135 Wn.2d 398, 413, 957 P.2d 632 (1998).

Under equitable principles, the insured cannot recoup any part of its loss until the insured is fully compensated by the tortfeasor for the full value of the loss, including general damages for personal injury. *Thiringer v. American Motor Ins. Co.*, 91 Wn.2d 215, 558 P.2d 191 (1978); 2 A. Windt, *INSURANCE CLAIMS & DISPUTES* § 10.06 (3d ed. 1995). Here, the named insured (the parents) will never be made whole, since they cannot recover the pre-majority medical expenses. Even if medical expenses are necessities, in modern times (unlike the situation the court faced in 1933 in *McAllister*) the minor child will never be personally liable to repay pre-majority medical expenses.

IV. Plaintiff's Motion for Summary Judgment on Causation and Damages.

On plaintiff's summary judgment motion, since the parents asserted a claim for pre-majority medical expenses, the trial court concluded that those expenses were not a claim of the minor child, and accordingly the child's summary judgment motion (seeking a judgment for all pre-majority medical expenses incurred) had to be denied.

Because the parents never relinquishing their statutory right to assert pre-majority medical expenses, the trial court properly rejected the minor child's summary judgment motion.

Respectfully Submitted this 14<sup>th</sup> day of June, 2019.

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CERTIFICATE OF SERVICE

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