

NO. 84707-0

SUPREME COURT OF THE STATE OF WASHINGTON

LISA UNRUH,

Appellant,

v.

DINO CACCHIOTTI, DDS and JANE DOE CACCHIOTTI,  
husband and wife and the marital community composed thereof,

Respondents.

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BRIEF OF *AMICI CURIAE*  
WASHINGTON STATE MEDICAL ASSOCIATION,  
AMERICAN MEDICAL ASSOCIATION, AND PHYSICIANS  
INSURANCE A MUTUAL COMPANY

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## I. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington State Medical Association (“WSMA”) is a state-wide professional association of medical and osteopathic physicians, surgeons and physician assistants with over 9000 members. The American Medical Association (“AMA”) is the largest professional association of physicians and medical students in the United States. Physicians Insurance A Mutual Company (“Physicians Insurance”) insures more than 6,100 physicians in Washington, Idaho, and Oregon.

WSMA, AMA, and Physician Insurance have long been concerned about the effect statutes and judicial decisions concerning medical malpractice litigation have on physicians, patients, and the health care system generally. WSMA and Physicians Insurance have been actively involved in health care liability reform measures over the years, and together with the Governor and other constituencies, including the Washington State Association of Justice, were instrumental in forging the 2006 legislative package, *Laws of 2006, ch. 8*, of which the reenactment of the eight-year statute of repose in RCW 4.16.350, with new legislative findings and statements of purpose, is a part. *See id.*, §§ 301 and 302.

## II. INTRODUCTION

In this appeal from a summary judgment dismissing Ms. Unruh’s orthodontic malpractice claims on statute of limitations grounds, the Court

of Appeals requested supplemental briefing from the parties to address whether “the reenactment of RCW 4.16.350 and the amendments of Laws of 2006, Sections 301, 302 and 303 apply to this case, and how they apply in light of the decisions in *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1988) and *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995).” The Court of Appeals then determined that at least one issue warranted certification to this Court, *i.e.*, “what effect does the reenactment of the medical malpractice statute of repose in RCW 4.16.350 have on the decision in *DeYoung* . . . that declared the statute unconstitutional?” This Court accepted that certification.

*DeYoung* involved analysis of the previously enacted medical malpractice statute of repose solely under the privileges and immunities clause of the state constitution, Const. art. I, § 12,<sup>1</sup> but Ms. Unruh in her supplemental briefing also argues that the repose provision violates separation of powers and access to courts.

*Amici* WSMA, AMA and Physicians Insurance believe that the trial court correctly dismissed the case on statute of limitations grounds because Ms. Unruh not only failed to commence her orthodontic

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<sup>1</sup> The Supreme Court website lists the issue in this case as “[w]hether the legislature’s findings in reenacting the medical malpractice statute of repose in RCW 4.16.350, following this court’s decision in *DeYoung* . . . that the statute of repose violated the privileges and immunities clause of the Washington Constitution, established a relationship between a legitimate state interest and the class of persons affected sufficient to survive constitutional scrutiny.”

malpractice action within three years of either Dr. Cacchiotti's allegedly negligent act or omission or Ms. Unruh's attainment of the age of majority, but also, as reflected in the testimony quoted at pages 9-12 of Respondent's Brief, failed to commence the action within one year of the time she discovered the essential elements of her possible cause of action. Should this Court agree, it need not reach any issues concerning the applicability or constitutionality of the reenacted eight-year statute of repose in RCW 4.16.350. If, however, the Court does reach such issues, *amici* WSMA, AMA, and Physicians Insurance respectfully request the Court to consider the arguments and authority that follow.

### III. ARGUMENT AND AUTHORITY.

A. The Legislature Stated Its Intention that the Reenacted Eight-Year Repose Provision Be Applied to Actions Such as Ms. Unruh's that Were Filed on or After June 7, 2007.

Ms. Unruh claims, *Unruh Supp. Br. at 1-4*, that the 2006 reenactment of the eight-year statute of repose in RCW 4.16.350 only applies prospectively after its effective date of June 7, 2006. While that may be a true statement in cases where the Legislature has remained silent about the applicability of a statute of limitation or repose, the Legislature was not silent on that issue with respect to the reenacted eight-year statute of repose in RCW 4.16.350, expressly stating its intention "that the eight-year statute of repose . . . be applied to actions commenced on or after

[June 7, 2006,] the effective of this section.” *Laws of 2006, ch. 8, § 301.*

While quoting other aspects of the Legislature’s statement of intent found in *Laws of 2006, ch. 8, § 301*, Ms. Unruh ignores the statement of intent that the reenacted statute of repose be applied to actions, such as hers, that were commenced on or after June 7, 2006. Yet, it is that statement of legislative intent that matters here.

As the Court explained in *O’Donoghue v. State*, 66 Wn.2d 787, 791-92, 405 P.2d 258 (1965), with respect to the operation of a new statute of limitations on pre-existing rights of action:

[A] new statute of limitations takes effect upon the preexisting rights of action and limits them, but in every such case the full time allowed by the new statute is available to the complainant. In other words, the limitation of the new statute, as applied to pre-existing causes of action, commences when the cause of action is first subjected to the operation of the statute, ***unless the legislature has otherwise provided.*** [Emphasis added.]

And, as the Court indicated in *1000 Virginia Ltd. P’Ship v. Vertecs Corp.*, 158 Wn.2d 566, 583-84, 146 P.3d 423 (2006), statutes of limitation and repose are evaluated the same way for purposes of retroactive application:

Although the parties and amici debate whether RCW 4.16.326(1)(g) is a statute of limitations or a statute of repose, it appears to be neither. . . .

\* \* \*

Regardless of how the statute is characterized, it is presumed to run prospectively, as are all statutes. [Citation omitted.] However, a statute or an amendment to a statute ***may be retroactively applied if the legislature so intended,***

if it is clearly curative, or if it is remedial, provided that retroactive application does not “run afoul of any constitutional prohibition”. . . . [Emphasis added; citations omitted.]

Here, the Legislature’s stated intent was “that the eight-year statute of repose . . . be applied to actions commenced on or after the effective date of the statute,” *i.e.*, June 7, 2006. *Laws of 2006, ch. 8, § 301*. That statement can reasonably be interpreted only as a statement of intent to have the reenacted statute of repose provision “applied” to lawsuits such as Ms. Unruh’s, which was not filed until October 1, 2007. Applying the statute of repose to Ms. Unruh’s action means that the action is time-barred because it was commenced more than eight years after the act or omission alleged to have caused the injury.<sup>2</sup> Ms. Unruh seems to contend that, even if the repose *provision* applies starting June 7, 2007, the repose *period* cannot be computed from dates earlier than then. Such an argument cannot be harmonized with the legislative statement of intent that the reenacted statute of repose be applied to actions commenced on or after June 7, 2006, the statute’s effective date. Had the Legislature intended what Ms. Unruh suggests, it could have accomplished it by saying nothing about the applicability of the reenacted statute of repose or about the commencement dates of actions to which it was to be applied.

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<sup>2</sup> She nonetheless had more than three years after she turned 18 (which occurred on January 3, 2004) in which to sue before the repose period expired.

B. Contrary to Ms. Unruh's Assertions, the Reenacted Eight-Year Statute of Repose Does Not Violate Separation of Powers.

Ms. Unruh makes a "separation of powers" argument, *Uuruh Supp. Br. at 8-11*, contending in effect that the 2006 Legislature was constitutionally powerless, even with new findings and new stated purposes, to reenact a repose provision identical to the 1976 provision that this Court in *DeYoung* held violative of the privileges and immunities clause, Const. art. I, § 12. But that makes her argument a *forfeiture* of powers argument, not a *separation* of powers argument. This Court has never suggested that the Legislature can forfeit legislative powers. And, this Court has never suggested that the enactment of statutes of limitation or repose is not within the Legislature's powers. Indeed, this Court has recognized that it is a legislative function not only to enact statutes of limitation and repose, but also, in doing so, to balance injured persons' rights to assert claims against potential defendants' interest in not having to defend stale claims.

As this Court wrote in *1000 Virginia*, 158 Wn.2d at 582:

[T]he legislature has the authority to enact statutes of limitations and the authority to determine whether a discovery rule should apply in a particular context. *See generally Ruth [v. Dight]*, 75 Wn.2d [660] at 666[, 453 P.2d 631 (1969)].

And as this Court stated in *1000 Virginia*, 158 Wn.2d at 579 (again citing *Ruth*, 75 Wn.2d at 665):

"In determining whether to apply the discovery rule, the

possibility of stale claims must be balanced against the unfairness of precluding justified causes of action.” . . . . A court must consider the goal of the common law “to provide a remedy for every genuine wrong” while recognizing, at the same time, that “compelling one to answer stale claims in the courts is in itself a substantial wrong.” . . . [Citations omitted]

Even more recently, this Court stated in *Lummi Indian Nation v. State*, 170 Wn.2d 247, 262, 241 P.3d 1220 (2010), that “it is wholly within the sphere of authority of the legislative branch to make policy, to pass laws, and to amend laws already in effect,” and that “[c]ourts must exercise care not to invade the prerogatives of the legislative branch lest the judicial branch itself violate the doctrine of separation of powers.”

The notion in Ms. Unruh’s argument that the Legislature lacks the constitutional authority to reenact a statute after it has been declared violative of Const. art I, § 12, *even if the Legislature makes new findings and articulates a different legitimate public purpose for the reenacted statute*, is a truly radical notion. It is not supported by the single decision that Ms. Unruh cites in support, *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999). In *Sheward*, the Ohio legislature had reenacted various statutes of repose that the Ohio Supreme Court, in several decisions, had declared unconstitutional under the right to remedy, due course of law, and open courts provisions in Ohio Const., art. I, § 16. *Sheward*, 715 N.E.2d at 1086. In so doing, the Ohio

legislature stated that its intent was "to respectfully disagree with those holdings" of the Ohio Supreme court and to recognize the legal rationale set forth in a concurring/dissenting opinion to one of those decisions and in several other decisions that the Ohio Supreme Court had overruled. *Id.* at 1073, 1086. The Ohio Legislature then directed, contrary to the Ohio Supreme Court's decisions, that "the concept of a statute of repose does not violate the remedy by due course of law and open courts provisions" of Ohio Const., art. I, § 16, and found that the failure to recognize the validity of the reenacted statutes of repose "would violate the rights of certain defendants to due course of law under that same constitutional provision. *Id.* at 1086. What the Ohio legislature attempted to do bears no resemblance to what the Washington Legislature did in reenacting the eight-year medical malpractice statute of repose.

The Ohio "right to a remedy" clause has no counterpart in the Washington Constitution,<sup>3</sup> and the Ohio Supreme Court had not invali-

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<sup>3</sup> Ohio Const., art. I, § 16 provides in pertinent part that "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Const., art. I, § 10 provides that "Justice in all cases shall be administered openly, and without unnecessary delay," omitting the "every person . . . shall have remedy" language. Const. art. I, § 10 was adopted at the 1889 constitutional convention. The delegates presumably knew that other states' constitutions had "open courts" provisions that included references to "remedy." *See e.g.*, Or. Const. art. I, § 10 (effective 1859) ("No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation"). The omission of such language from Washington's constitution cannot have been inadvertent.

dated the Ohio statutes of repose on grounds that the repose provisions were not rationally related to the stated purposes of their enactment, as this Court in *DeYoung* did with the 1976 medical malpractice statute of repose in RCW 4.16.350. *DeYoung*, 136 Wn.2d at 147-50. The Ohio legislature thus did not state new findings and a new rationale for the reenacted statutes of repose, as the Washington Legislature did, but rather simply claimed the right to have the last word and to overrule the Ohio Supreme Court on a matter of Ohio constitutional law. That is not what the 2006 Washington Legislature did.

The 2006 Washington Legislature did not usurp the judiciary's constitutional power by reenacting the eight-year repose provision based on new findings and statements of purpose. The 2006 Washington legislature's new findings and new statements of purpose distinguish this case and RCW 4.16.350's repose provision from the situation and legislative action that confronted the Ohio Supreme Court in *Sheward*. The question here is not one of "separation of powers," or of which branch of government gets to decide constitutionality, but rather one (as the Court's issue statement, *see footnote 1 above*, seems to reflect) of whether the eight-year statute of repose in RCW 4.16.350 is now rationally related to the legitimate state interests articulated by the 2006 Legislature, even if, as the *DeYoung* court had held, it was not rationally related to the

legitimate state interests that had been articulated by 1976 Legislature.<sup>4</sup>

C. The Reenacted Eight-Year Statute of Repose Is Rationally Related to the Legitimate Interests Articulated by the 2006 Legislature and Thus Does Not Violate Const. art. I, § 12.

In *DeYoung*, applying traditional rational basis review, the Court invalidated the eight-year medical malpractice statute of repose enacted in 1976, concluding that the legislative record at that time showed that the statute of repose would not serve the Legislature's stated purpose to "avert or resolve a malpractice insurance crisis," and that "the miniscule number of claims subject to the repose provision renders the relationship of the classification too attenuated" to the legitimate goal of barring stale claims. *DeYoung*, 136 Wn.2d at 149-50.

When the Legislature reenacted the eight-year statute of repose in 2006, it made a new legislative record with findings and statements of intent and purpose not present in the 1976 legislative record. *See Laws of 2006, ch. 8, § 301*. It is against those findings and statements of intent and purposes that the Court must conduct its rational basis review of the reenacted statute of repose.

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<sup>4</sup> *DeYoung* did not hold that the 1976 Legislature's stated purposes for enacting the eight-year repose provision – stabilizing the health care liability insurance industry and averting or resolving a malpractice insurance crisis by cutting off "long-tail" claims – were illegitimate. The Court accepted those purposes as legitimate, 136 Wn.2d at 147-48, but held that the repose provision was not rationally related to them because uncontroverted data available to the 1971 legislature established "... that less than one percent (plaintiff's calculations show about one-half of one percent) of the claims were those of adults reported over eight years after the incidents of malpractice." 136 Wn.2d at 149.

Under rational basis review plaintiffs have the burden of proving that the classification drawn by the law is not rationally related to a legitimate state interest. . . . The statute is presumed constitutional. . . . Under the rational basis standard, the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification. . . . Production of empirical evidence is not required to sustain the rationality of a classification. . . . In fact, "the rational basis standard may be satisfied where the 'legislative choice . . . [is] based on rational speculation unsupported by evidence or empirical data.'" . . . In addition, within limits, a statute generally does not fail rational basis review on the grounds of over- or under-inclusiveness; "[a] classification does not fail rational basis review because 'it is not made with mathematical nicety or because in practice it results in some inequality. . . . [Citations and footnote omitted.]

*Anderson v. King County*, 158 Wn.2d 1, 31-32, 138 P.3d 963 (2006).

Here, the 2006 Legislature's findings demonstrate a rational basis for the repose statute. The Legislature, although recognizing that "to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance," made clear that its primary purpose was not to bring about directly a reduction in malpractice rates or increase the availability of coverage. *Laws of 2006, ch. 8, § 301*. Rather, it was acting the way Legislatures do when enacting statutes of limitations or statutes of repose: it drew the kinds of lines that often must be drawn to balance competing interests and, "in light of the need to balance the interests of injured plaintiffs and the health care industry," it determined

that the eight-year statute of repose should be reenacted. It focused on the unquestionably legitimate purpose of all statutes of limitations and repose – guarding against “claims, however few, that are stale, based on untrustworthy evidence, or that place undue burden on defendants.” *Id.*; *see also Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). It specifically found, consistent with this Court’s opinions in *DeYoung*, 136 Wn.2d at 150, and *Ruth v. Dight*, 75 Wn.2d 660, 664-66, 453 P.2d 631 (1969), that “compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.” *Laws of 2006, ch. 8, § 301*. And it specifically found that “an eight-year statute of repose [which is longer than other Washington statutes of repose] is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.” *Id.* These goals are consistent with the overall purpose of the 2006 health care liability reform act, which included “making the civil justice system more understandable, fair, and efficient for all participants.” *Laws of 2006, ch. 8, § 1*.

Legislative findings “are deemed conclusive unless they are obviously false and a palpable attempt at dissimulation.” *City of Tacoma v. Luvane*, 118 Wn.2d 826, 851, 827 P.2d 1374 (1992). That is not the case here. Here, the 2006 Legislature did what legislatures commonly do,

it balanced competing interests, determined that it should set an outer limit on the discovery rule in medical malpractice cases, and concluded that an eight-year statute of repose was a reasonable limit. "Courts must exercise care not to invade the prerogatives of the legislative branch lest the judicial branch itself violate the doctrine of separation of powers." *Lummi Indian Nation*, 170 Wn.2d at 262.

Statutes of repose are not constitutionally suspect. Indeed, this Court has recognized the wisdom and fairness of such statutes, and has even suggested that the Legislature adopt them. *See Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 222, 543 P.2d 338 (1975) (recognizing the potential injustice of unlimited tolling of actions and inviting the Legislature to "place some outer limit upon the delayed accrual of actions" for the sole purpose of "avoid[ing] an undue burden on potential defendants"); *Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 582, 29 P.2d 1249 (2001) (recognizing the Legislature's broad power "to pass laws, like statutes of limitations and repose, that tend to promote the public welfare" and holding that the six-year limitations period of RCW 4.16.310 does not violate the federal equal protection clause or Const. art. I, § 10).

As for the Court's statement in *DeYoung*, 136 Wn.2d at 150, that "the miniscule number of claims subject to the [1976] repose provision

renders the relationship of the classification too attenuated” to the legitimate goal of barring stale claims, the 2006 Legislature not only increased the number of claims to which the statute of repose would apply by eliminating tolling for purposes of minority, *see Laws of 2006, ch. 8, §§ 302 and 303*, but also found that “compelling even one defendant to answer a stale claim is a substantial wrong,” *Laws of 2006, ch. 8, § 301*. The 2006 legislative record, unlike the 1976 legislative record the Court in *DeYoung* considered, does not “affirmatively show[ ] that the challenged legislation could not rationally be thought to have furthered the identified legislative interests.” *See Anderson*, 158 Wn.2d at 31 n.13 (explaining why *DeYoung* was “a rare case where the rational basis standard was found not to have been satisfied” because “legislative materials affirmatively showed that the challenged [1976] legislation could not rationally have furthered the identified legislative interests”). As such, the Legislature’s 2006 reenactment of the eight-year statute of repose does not suffer from the constitutional infirmity that was the basis for the *DeYoung* decision, and should be upheld.

D. The Repose Provision Does Not Deny Ms. Unruh “Access to Courts”.

Citing various clauses in our state constitution and *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009), Ms.

Unruh argues that the repose provision in RCW 4.16.350 unconstitutionally denies her “access to courts” because the eight-year period either is not tolled for minority, *Unruh Supp. Br. at 11 and 15-19*, or denies her a guaranteed remedy, *id. at 12*, or “has the effect of extinguishing a cause of action before the victim even has the legal right to bring a lawsuit, *id. at 14-15*. *Amici* address these arguments in reverse order.

1. The repose provision, applied to Ms. Unruh’s claim, would not have the effect of extinguishing her cause of action before she had the legal right to bring her lawsuit.

Ms. Unruh alleged that Dr. Cacchiotti committed orthodontic malpractice from 1995 to August 1999. Ms. Unruh turned 18 in January 2004. The statute of limitations was tolled until she turned 18 on January 3, 2004, and she, herself, could not sue until then. *See DeYoung*, 136 Wn.2d at 146, and RCW 4.08.050. However, *the legal right* to bring a lawsuit on Ms. Unruh’s behalf existed starting in August 1999 and, even though the repose period ran from then and expired in August 2007, there was still a 31-month period, from January 2004 to August 2007, in which she could have sued without running afoul of the repose provision in RCW 4.16.350. Thus, even if an “access to courts” problem is presented when a statute has “the effect of extinguishing a cause of action before the victim even has the legal right to bring a lawsuit,” *Unruh Supp. Br. at 14-15*, the repose provision in RCW 4.16.350 did not have that effect on Ms. Unruh’s

right to bring a lawsuit.<sup>5</sup>

2. The repose provision does not deprive Ms. Unruh of a constitutionally guaranteed remedy.

This Court has never held that the Washington Constitution guarantees anyone a remedy. To some as yet undefined extent it provides a right of "access to courts" that includes, according to *Putman*, 166 Wn.2d at 979, "the right of discovery authorized by the civil rules," which is not implicated in this appeal because Ms. Unruh had every opportunity to do discovery. Apparently, the "right of access to courts" consists in some way of an individual right "to claim the protection of the laws, whenever he [or she] receives an injury." *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803)). The certificate-of-merit statute with which *Putman* was concerned did not allow medical malpractice claimants to even get through a courthouse door to claim the protection of tort law unless they already had a certificate of merit. Someone who could not file a certificate of merit with his or her complaint because of lack of information that might be available through discovery under the civil rules was shut out of court entirely; the *Putman* court held that the constitution does not permit that. But *Putman* did not hold or

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<sup>5</sup> It is in the nature of a statute of repose that it may extinguish a cause of action before a person has a right to bring it. A statute of repose terminates a right of action after a specified time even if the injury has not yet occurred or the claim has otherwise not yet accrued. *1000 Virginia*, 158 Wn.2d at 566.

suggest that the certificate of merit statute unconstitutionally denied the plaintiff in that case a *remedy*. That there is no absolute “right to a remedy” was recognized by this Court in *Ruth*, 75 Wn.2d at 665:

While it has been a long cherished ambition of the common law to provide a legal remedy for every genuine wrong, *it is also a traditional view that compelling one to answer stale claims in the courts is in itself a substantial wrong.* [Emphasis added.]

3. The repose provision applied to Ms. Unruh’s claim does not deny her the “right of access to courts” by reason of the fact that it is not tolled during a person’s minority.

Ms. Unruh’s tolling-based “right of access to courts” argument likens her situation to that of the incapacitated child with “unlettered” parents in *Cook v. State*, 83 Wn.2d 599, 604-05, 521 P.2d 725 (1974), to whom the court was unwilling to rigidly apply a statutory 120-day claim-deadline provision on due process and equal protection grounds. Aside from the fact that Ms. Unruh has not claimed incompetence for any reason except her minority prior to January 2004, and has not claimed to have had parents as unsophisticated as those in *Cook* were, her situation is different from that of the claimant in *Cook* for the simple reason that the deadline (in this case under the repose provision, in *Cook* under a 120-day nonclaim statute) did not run while she was incompetent even though it began to run in 1999. Ms. Unruh had a right, under the statute of limitations *and* under the repose provision, to sue after she became an

adult in January 2004 and before August 2007.

By implication, Ms. Unruh's argument concedes that her "right of access to courts" would *not* be violated if the repose period were tolled during minority and did not start running until she turned 18, barring her claim in January 2012 instead of in August 2007. Thus, her argument is not really a "right of *access* to courts" argument; it is either an argument that the repose period did not leave her *enough time* to exercise her "right of access to courts," or an argument that tolling during minority is itself a constitutionally protected right the denial of which infringes impermissibly on the "right of access to courts."

Insofar as Ms. Unruh is suggesting that she had a constitutional *access to courts* right to tolling irrespective of the imputation of knowledge provisions at the end of RCW 4.16.350, she cites as authority only an Ohio Supreme Court decision, *Mominee v. Schebarth*, 503 N.E.2d 717, (1986), and two Washington decisions, *Cook v. State, supra*, and *Scott v. Pac. West Mtn. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992). The Ohio decision was based on a four-year repose period expiring while the plaintiff was a minor, which is not what occurred here; the eight-year repose period did not expire here until Ms. Unruh had been an adult for three years and 7 months. *Cook* is distinguished above, and *Scott* is not "analogous" to this case for much the same reason that *Mominee* is not –

Ms. Unruh was an adult for more than three years before the earliest date on which the repose period could possibly be held to have expired for her.<sup>6</sup>

Ms. Unruh cites no authority for the proposition that an unconstitutional denial of the “right of access to courts” occurs when someone is afforded only the initial 43 months of his or her adulthood in which to sue. Parties raising constitutional issues must present considered arguments; “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 511, 919 P.2d 62 (1996) (quoting *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (quoting other decisions)).

4. The repose provision does not violate Ms. Unruh’s due process rights.

Ms. Unruh, *Unruh Supp. Br. at 19*, concludes her “access to courts” argument with the assertion that “[a]pplying the eight-year repose statute to minors . . . would be both arbitrary and unduly oppressive and therefore violative of the due process clause,” citing as authority a law review article and a substantive due process decision, *Rivett v. Tacoma*, 123 Wn.2d 573, 581-82, 870 P.2d 299 (1994), that concerned a sidewalk-responsibility ordinance. Again, Ms. Unruh neglects to account for the

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<sup>6</sup> The *DeYoung* court found that there were “reasonable grounds for the tolling and other statutory provisions which except[ed] a cause of action from the eight-year bar,” including the tolling provision applicable to minors, 136 Wn.2d at 146, but did not suggest that such tolling provisions are constitutionally mandated.

fact that she was a minor only for part of the eight-year repose period, and was afforded three years and seven months of that repose period, after becoming an adult, in which to sue. Ms. Unruh cites no authority standing for the proposition that substantive due process is violated when a claimant is limited to a 43-month period in which to sue after a 65 month-period in which a parent or guardian could have brought suit on her behalf. Again, such "naked castings into the constitutional sea" do not rise to the level of considered argument warranting judicial consideration. *Ins. Pool*, 129 Wn.2d at 511.

#### IV. CONCLUSION

For the foregoing reasons, the summary judgment dismissal of Ms. Unruh's dental malpractice complaint on statute of limitations grounds should be affirmed but, if the Court reaches the issues concerning the reenacted eight-year statute of repose, it should hold that the repose provision passes constitutional muster and bars Ms. Unruh's claims.

RESPECTFULLY SUBMITTED this 7th day of January, 2011.

WILLIAMS, KASTNER & GIBBS PLLC

By

  
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 7th day of January, 2011, I caused a true and correct copy of the foregoing document, "Brief of *Amici Curiae* of Washington State Medical Association, American Medical Association, and Physicians Insurance A Mutual Company," to be delivered in the manner indicated below to the following counsel of record:

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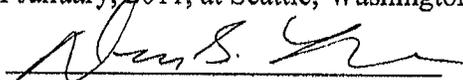
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**Dear Supreme Court Clerk:**

**On behalf of Mary H. Spillane, WSBA #11981, Attorney for *Amici Curiae* Washington State Medical Association, American Medical Association, and Physicians Insurance, please find attached for filing in Unruh v. Cacchiotti, DDS, Supreme Court Case No. 84707-0, the Motion for Leave to File Amicus Curiae Brief, and Brief of *Amici Curiae*. Ms. Spillane's e-mail address is: [mspillane@williamskastner.com](mailto:mspillane@williamskastner.com).**

**Respectfully submitted,**

**DENA LEVITIN** (for Carrie A. Custer)

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