

No. 84707-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LISA UNRUH,

Plaintiff/Appellant,

vs.

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

Defendants/Respondents

APPELLANT'S ANSWER TO AMICUS CURIAE BRIEF OF
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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Garth L. Jones, WSBA #14795
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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 A. Under this Court's analysis in *Ohler v. Tacoma General Hospital*, there are questions of fact as to when Lisa Unruh (and her parents) discovered the factual basis for her dental malpractice cause of action.....1

 B. The legislative intent underlying RCW 7.70.110 supports an interpretation of the statute that allows service of a request for mediation on a defendant's insurance representative and provides for tolling of all limitations periods in RCW 4.16.350.....4

 C. *Merrigan v. Epstein* requires application of the tolling provision of former RCW 4.16.190 to all limitations periods in RCW 4.16.350 if the Court invalidates the non-tolling provision of RCW 4.16.190(2) as unconstitutional.8

TABLE OF AUTHORITIES

Cases

| | |
|--|---------|
| Arborwood Idaho, L.L.C. v. City of Kennewick, 151 Wn.2d 359, 367, 89 P.3d 217 (2004)..... | 4 |
| Gilbert v. Sacred Heart Medical Center, 127 Wn.2d 370, 375, 377, 900 P.2d 552 (1995)..... | 7 |
| Merrigan v. Epstein, 112 Wn.2d 709, 716, 773 P.2d 78 (1989)..... | 7, 8 |
| Ohler v. Tacoma General Hospital, 92 Wn.2d 507, 598 P.2d 1358 (1979)..... | 1, 2, 3 |
| State v. Cooper, 156 Wn.2d 475, 479, 128 P.3d 1234 (2006)..... | 4 |
| State v. Roggenkamp, 153 Wn.2d 614, 630, 106 P.3d 196 (2005)..... | 2 |
| Tarver v. Smith, 78 Wn.2d 152, 155, 470 P.2d 172 (1970)..... | 4 |
| Tenino Aerie v. Grand Aerie, 148 Wn.2d 224, 240, 59 P.3d 655 (2002)... | 4 |

Statutes

| | |
|--------------------|---------------|
| RCW 4.16.190 | 7, 8 |
| RCW 4.16.350 | 2, 7, 8 |
| RCW 5.64.010 | 4, 5 |
| RCW 7.70.110 | 4, 5, 6, 7, 8 |

I. INTRODUCTION

Appellant Unruh submits this answer to the amicus brief of the Washington State Association for Justice Foundation (WSAJ Foundation).

II. ARGUMENT

- A. **Under this Court's analysis in *Ohler v. Tacoma General Hospital*, there are questions of fact as to when Lisa Unruh (and her parents) discovered the factual basis for her dental malpractice cause of action.**

Appellant Unruh agrees with WSAJ Foundation that *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 598 P.2d 1358 (1979), is factually similar to this case and requires reversal of the trial court's ruling that there are no questions of fact as to when Ms. Unruh (or her parents) discovered the basis for her dental malpractice claim. *Ohler* involved a medical malpractice lawsuit filed by a 22-year-old for blindness that occurred when she was an infant. The plaintiff was born two months prematurely and was placed in an incubator and administered oxygen for about two weeks. Shortly after she was discharged from the hospital, her mother discovered that she was blind. *Ohler*, 92 Wn.2d at 508-509.

From an early age, the plaintiff knew that her blindness was the result of "too much oxygen" to her eyes. *Ohler*, 92 Wn.2d at 509. However, the plaintiff believed that the oxygen had been properly administered, that it was necessary for her treatment as a premature baby,

and that the blindness was a complication of her prematurity. *Ohler*, 92 Wn.2d at 509. When the plaintiff was 21 years old, she learned that a friend, who was also blind, had filed a lawsuit alleging that her blindness had been caused by the wrongful conduct of a hospital and an incubator manufacturer. The plaintiff contended that it was at that point that she discovered for the first time that she might not have needed as much oxygen as was administered and that her blindness may have been preventable. *Ohler*, 92 Wn.2d at 509.

The Court held that, in order for the one-year discovery rule in RCW 4.16.350 to begin running, there must be evidence that the plaintiff knew or should have known that the result (in *Ohler*, blindness; in this case, Ms. Unruh's loss of teeth) was due to a health care provider's breach of duty.¹ Knowledge that a health care provider's treatment caused the

¹ The Court stated that "RCW 4.16.350's one-year discovery rule [in referring only to the cause of the injury or condition] omits an essential element of a negligence cause of action: respondent's breach of duty." *Ohler*, 92 Wn.2d at 510. Because this Court interpreted RCW 4.16.350's one-year discovery rule as requiring knowledge of a health care provider's breach of duty, as well as knowledge that the health care provider's actions caused the injury or condition, RCW 4.16.350 must be read as if the element of breach had been originally written into it. *State v. Roggenkamp*, 153 Wn.2d 614, 630, 106 P.3d 196 (2005) ("When amending a statute, the legislature is presumed to know how the courts have construed and applied the statute. . . . Furthermore, '[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.'").

result, without knowledge that the health care provider's treatment was wrongful, is insufficient to trigger the running of the one-year discovery rule. *Ohler*, 92 Wn.2d at 510-511.

In *Ohler*, the defendant doctor pointed to the fact that the plaintiff had known from childhood that her blindness was caused by "too much oxygen." *Ohler*, 92 Wn.2d at 512. Respondent Cacchiotti's argument in this case is very similar. Respondent Cacchiotti argues that Ms. Unruh knew that her braces caused problems with her roots, resulting in her loss of teeth. *Respondent's Brief* at pp.8-11. Respondent Cacchiotti argues that Ms. Unruh's father being told, in a passing conversation with a dentist who never treated Ms. Unruh, that Lisa's braces pulled "too hard" and "too fast at a young age" amounts to knowledge that Dr. Cacchiotti's treatment may have been wrongful. *Respondent's Brief* at 11-13. Respondent Cacchiotti's argument that the word "too" "communicates knowledge of a breach of care" (*Respondent's Brief* at p.28) was rejected by this Court in *Ohler*, where the Court held that a plaintiff's knowledge that her injury was caused by "too much oxygen" was not sufficient to establish as a matter of law that she knew or should have known of a breach of duty by a health care provider. As in *Ohler*, a genuine issue of material fact exists as to when Ms. Unruh (or her parents) knew or should

have known that her loss of teeth may have been caused by *wrongful* acts by Dr. Cacchiotti.

B. The legislative intent underlying RCW 7.70.110 supports an interpretation of the statute that allows service of a request for mediation on a defendant's insurance representative and provides for tolling of all limitations periods in RCW 4.16.350.

In construing RCW 7.70.110, the Court should consider and give effect to the legislative intent. *State v. Cooper*, 156 Wn.2d 475, 479, 128 P.3d 1234 (2006) (“Statutory interpretation requires courts to give effect to the legislature’s intent and purpose in passing a law.”); *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004) (A court’s “fundamental objective in construing a statute is to ascertain and carry out the legislature’s intent.”); *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 240, 59 P.3d 655 (2002) (“The first role of a court is to examine the language of a statute while adhering to the legislature’s intent and purpose in enacting it.”); *Tarver v. Smith*, 78 Wn.2d 152, 155, 470 P.2d 172 (1970) (main purpose of statutory interpretation is to ascertain and give effect to legislative intent).

Although RCW 7.70.110 does not contain any stated legislative intent, RCW 7.70.100, which also deals with mediation of health care claims, refers to RCW 5.64.010 for the statement of legislative intent. The legislative intent stated in the notes following RCW 5.64.010 includes the

“intent to provide incentives to settle cases before resorting to court.” RCW 5.64.010. As argued by WSAJ Foundation, it is apparent from the language of RCW 7.70.110 that the Legislature intended to encourage informal resolution of medical malpractice claims before filing a lawsuit and incurring litigation costs.

Appellant Unruh agrees with WSAJ Foundation’s reading of RCW 7.70.110 as allowing a degree of informality in making a written, good faith request for mediation. It is customary in personal injury cases such as this for a request for mediation and other settlement discussions to be conducted through the defendant's insurance representative or attorney (if the defendant is represented by an attorney). The record in this case shows that this is what happened here. A written request for mediation sent to a defendant's insurance representative or attorney should be presumed to give notice to the defendant and to satisfy RCW 7.70.110.

The record shows that Dr. Cacchiotti’s insurance representative received and acknowledged Ms. Unruh’s written request for mediation. Ms. Unruh’s attorney was contacted by an insurance representative for Dr. Cacchiotti after Ms. Unruh’s attorney served Dr. Cacchiotti with a 90-day notice of intent to sue. CP 309 (attached as Appendix A). Ms. Unruh’s attorney sent a written, good faith request for mediation to Dr. Cacchiotti’s insurance representative in January 2007. CP 315 (attached as Appendix

B). Receipt of the request for mediation was acknowledged by Dr. Cacchiotti's insurance representative. CP 318 (attached as Appendix C). An agreement was reached to schedule mediation in September 2007. CP 309 (Appendix A). Dr. Cacchiotti's insurer was then purchased by another insurance company, and a new adjuster was assigned. The new adjuster hired an attorney to represent Dr. Cacchiotti. CP 310 (Appendix A). Dr. Cacchiotti's attorney acknowledged plans to schedule mediation in September 2007 and discussed possible mediators.² CP 322 (attached as Appendix D). It is clear that Dr. Cacchiotti had notice of the request for mediation and that an insurance representative and attorney acting on his behalf with regard to Ms. Unruh's claim took action based on that request. RCW 7.70.110 merely requires the "making" of a written, good faith request for mediation in order to toll the limitations period for filing a medical malpractice lawsuit for one year. The record in this case shows that the requirements of the statute were satisfied.

The legislative intent of encouraging mediation of medical malpractice claims before commencing litigation also favors an interpretation of RCW 7.70.110 that tolls all limitations periods for filing medical malpractice lawsuits in RCW 4.36.150. First, it should be noted

² Dr. Cacchiotti's attorney later decided not to participate in mediation. CP 324.

that RCW 4.16.350 does not use the terms “statute of limitations” or “statute of repose.” Likewise, in *Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 375, 377, 900 P.2d 552 (1995), this Court simply referred to “the limitations periods of RCW 4.16.350,” including the “8-year limitation period.” And in *Merrigan v. Epstein*, 112 Wn.2d 709, 716, 773 P.2d 78 (1989), the Court referred to “the maximum 8-year statute of limitations” in RCW 4.16.350. Additionally, in *Merrigan*, the Court interpreted the former version of RCW 4.16.190, which provided for tolling for minors, as tolling both the 3-year limitation period in RCW 4.16.350 and the 8-years-from-act-or-omission period. *Merrigan*, 112 Wn.2d at 716, 718. The three-year and eight-year limitations periods in RCW 4.16.350 are equivalent for purposes of RCW 7.70.110, in that they both can result in a plaintiff's claim being time-barred.

The intent of RCW 7.70.110 is to give a plaintiff who is willing to mediate in good faith additional time to pursue settlement negotiations before being forced to file a lawsuit due to an impending statute of limitations or repose. The Court should construe RCW 7.70.110 to fulfill its legislative intent of promoting informal resolution of medical malpractice cases before a lawsuit is filed and hold that service of a request for mediation on a health care provider's insurance representative satisfies the statute, and that all of the limitations provisions of RCW

4.16.350 are tolled for one year by the making of a written, good faith request for mediation under RCW 7.70.110.

C. *Merrigan v. Epstein* requires application of the tolling provision of former RCW 4.16.190 to all limitations periods in RCW 4.16.350 if the Court invalidates the non-tolling provision of RCW 4.16.190(2) as unconstitutional.

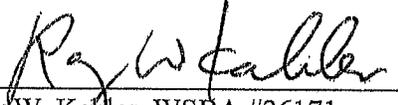
As noted by WSAJ Foundation in footnote 14 of its amicus brief, *Merrigan v. Epstein*, 112 Wn.2d 709, 773 P.2d 78 (1989), which dealt with the interplay between the tolling provisions of former RCW 4.16.190 (providing for tolling for minors) and RCW 4.16.350's eight-year limitations period, held that the tolling statute, RCW 4.16.190, "operates to suspend the 8-years-from-the-act-or-omission period for the duration of the child's minority or incapacity." *Merrigan*, 112 Wn.2d at 716. Thus, if the Court holds that the non-tolling provision in RCW 4.16.190(2) is constitutionally invalid, then the reenacted eight-year limitations period (assuming it is constitutionally valid) would not begin to run until Lisa Unruh turned 18. Because her lawsuit against Dr. Cacchiotti was filed within eight years of her 18th birthday, the eight-year limitations period would not bar her claim.

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RESPECTFULLY SUBMITTED this 26th day of January, 2011.

By: 

Ray W. Kahler, WSBA #26171

Paul W. Whelan, WSBA #2308

Garth L. Jones, WSBA #14795

Stritmatter Kessler Whelan Coluccio

Attorneys for Plaintiff/Appellant

APPENDIX A



07-240493

The Honorable John Knodell
Date of Hearing: February 24, 2009
Time of Hearing: 4:00 p.m.

MARTHA THORNTON
FILED

FEB 17 2009

KIMBERLY A. ALLEN
Grant County Clerk

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

LISA UNRUH, a single woman,

Plaintiff,

v.

DINO CACCHIOTTI, D.D.S. and JANE DOE
CACCHIOTTI, husband and wife and the
marital community composed thereof,

Defendants.

NO. 07-2-01238-5

SUPPLEMENTAL DECLARATION OF PAUL
W. WHELAN IN SUPPORT OF PLAINTIFF'S
SURREBUTTAL TO DEFENDANTS DINO
CACCHIOTTI, D.D.S.'S AND JANE DOE
CACCHIOTTI'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

PAUL W. WHELAN, under penalty of perjury under the laws of the State of Washington
hereby declares as follows:

1. I am the attorney for the plaintiff Lisa Unruh in the above captioned action.
2. On November 16, 2006, I sent Defendants a 90 Day Notice of Intent to Sue.
3. Shortly thereafter, I was contacted by Kim Anderson, of NORDIC Insurance. After
requesting mediation pursuant to chapter 7.70 RCW, we verbally agreed on mediation to be
conducted in September 2007.

DECL. OF PAUL W. WHELAN IN SUPP. OF PL.'S SURREBUTTAL TO DEFS. DINO CACCHIOTTI, D.D.S.'S
& JANE DOE CACCHIOTTI'S REPLY IN SUPP. OF MOT. FOR SUMM. J. - 1

ORIGINAL

CP309 TRITMATTER KESSLER WHELAN COLUCCIO

200 Second Avenue West
Seattle, WA 98119-4204
Tel 206-448-1777

1 4. On February 28, 2007, I received a phone call from Kim Anderson, informing me that
2 NORDIC Insurance had been purchased by a parent company, and that she was being replaced as
3 to this claim.

4 5. The adjuster for the new carrier (keeping the name of NORDIC Insurance), obtained
5 representation through Chris Howard of Schwabe Williamson and Wyatt.

6 3. On May 31, 2007, Mr. Howard sent a letter reaffirming the previous understanding as
7 to mediation occurring in September 2007.

8 4. Some time later, when I tried to schedule the agreed to mediation, Mr. Howard
9 withdrew his offer of mediation.

10 6. The following are true and correct copies of the originals:

- 11 • Letter from Paul W. Whelan to Dino Cacchiotti, D.D.S. (Nov. 16, 2006)
12 (Attachment 1);
- 13 • Letter from Paul W. Whelan to Kim Anderson (Jan. 12, 2007) (Attachment 2);
- 14 • Letter from Kim R. Anderson, CPCU to Paul W. Whelan (Jan. 22, 2007)
15 (Attachment 3);
- 16 • Letter from Bob Petty to Paul Whelan (March 26, 2007) (Attachment 4);
- 17 • Letter from Christopher H. Howard to Paul W. Whelan (May 31, 2007)
18 (Attachment 5);
- 19 • Letter from Christopher H. Howard to Paul W. Whelan (August 22, 2007)
20 (Attachment 6).

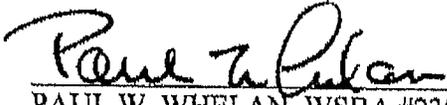
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24 DECL. OF PAUL W. WHELAN IN SUPP. OF PL.'S SURREBUTTAL TO DEFS. DINO CACCHIOTTI, D.D.S.'S
& JANE DOE CACCHIOTTI'S REPLY IN SUPP. OF MOT. FOR SUMM. J. - 2

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 DATED this 13 day of Feb, 2009 at Seattle, Washington.

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5 
6 PAUL W. WHELAN, WSBA #2308
Counsel for Plaintiff

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DECL. OF PAUL W. WHELAN IN SUPP. OF PL.'S SURREBUTTAL TO DEFS. DINO CACCHIOTTI, D.D.S.'S
& JANE DOE CACCHIOTTI'S REPLY IN SUPP. OF MOT. FOR SUMM. J. - 3

APPENDIX B



STRITMATTER KESSLER WHELAN COLUCCIO

SEATTLE OFFICE
200 Second Avenue W
Seattle, WA 98119
206.448.1777
Fax 206 728 2131

HOQUIAM OFFICE
413 Eighth Street
Hoquiam, WA 98550
360 533 2710
Fax 360 532 8032

Reply to Seattle Office

www.stritmatter.com

January 12, 2007

Kim Anderson
Nordic Insurance Company
421 W. Riverside Avenue, Ste. 1200
Spokane, WA 99201

Re: Lisa Unruh
Your Insured: Dino A. Cacchiotti, DDS
Your File: 52685

Dear Mr. Anderson:

We spoke recently about this case. I went back and looked at the file, and you are absolutely correct. The braces were started on Lisa Unruh's deciduous teeth by an orthodontist prior to Dr. Cacchiotti. That, of course, was not the real problem. As stated by Dr. Bryant in his letter of December 19, the length of the treatment resulted in severe reabsorption meaning that most of her teeth on the maxillary arch had to be extracted and many of her remaining teeth are severely weakened as a result of the reabsorption. Dr. Aronowitz in his December 29th note states that, "Dr. Cacchiotti breached the standard of care in the case of Lisa Unruh on the basis that he persisted with braces in the mixed dentition causing severe root reabsorption and loss of permanent teeth.:

I am enclosing a revised list of bills caused by the reabsorption following Dr. Cacchiotti's attempt at using braces to correct a jaw defect. Obviously, we can't claim damages for the jaw surgery which is what she should have had in the first place. The result of the reabsorption caused the need for extractions, bone grafts, implants, revisional restorations, implant abutments, surgical guide, and final restoration for a total of \$41,311.92. The standard of care issue is very simple. Dr. Cacchiotti should have advised Lisa to wait until her jaw was mature because surgery was the only way that her congenital defect could be corrected. Had he done that, Lisa would have had no need to replace teeth.

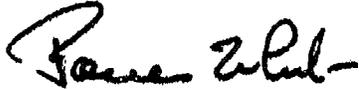
We served Dr. Cacchiotti with a notice of intent to sue in November. That means that in February the statute of limitations will run.

To facilitate the potential resolution of this case, I am asking pursuant to Civil Rule 53.4 and RCW 7.70.100 and 7.70.110 that the statute of limitations be extended one year for the purpose of mandatory mediation.

January 12, 2007
Page 2

Would you please acknowledge receipt of this letter and, if possible, give me some direction on how you wish to proceed. Thank you.

Yours very truly,

A handwritten signature in black ink, appearing to read "Paul W. Whelan". The signature is written in a cursive style with a horizontal line at the end.

PAUL W. WHELAN

PWW/dg

cc: Lisa Unruh
Margaret Unruh

APPENDIX C



Northwest Dentists Insurance Company

RECEIVED

JAN 24 2007

SKWC

January 22, 2007

Paul W. Whelan
Stritmatter Kessler Whelan Coluccio
200 Second Avenue W
Seattle, WA 98119

Re: Unruh v. Cacchiotti
File No. 52685

Dear Mr. Whelan:

Thank you for your letter of January 12, 2007. You have requested mediation based on RCW 7.70.100 and, therefore, we agree that the statute of limitations is tolled for one year by RCW 7.70.110. We will endeavor to resolve the case within that time frame.

Very truly yours,

Kim R. Anderson, CPCU
Claims Department

KRA/emn

070122 LTR WHELAN.DOC

APPENDIX D



SCHWABE, WILLIAMSON & WYATT
ATTORNEYS AT LAW

US Bank Centre, 1420 6th Ave., Suite 3010, Seattle, WA 98101 | Phone 206.622.1711 | Fax 206.292.0460 | www.schwabe.com

CHRISTOPHER H. HOWARD
Admitted in Washington
Direct Line: 206-407-1524
E-Mail: choward@schwabe.com

May 31, 2007

VIA E-MAIL AND FIRST CLASS MAIL

Paul W. Whelan
Stritmatter Kessler Whelan Coluccio
200 Second Ave. West
Seattle, WA 98119-4204

Re: *Unruh v. Cacchiotti*
Prelitigation mediation
Our File No.: 030665/154478

Dear Paul:

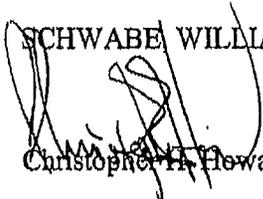
I am following up on our conversation of earlier this week. I have confirmed that we will be available to participate in the mediation on September 27. We believe we should be in the position to engage in meaningful negotiations at that time.

It is my understanding that you are willing to defer to our selection of mediator, including mediators in Seattle. We will look into who might be available in Seattle and/or Yakima for a mediation on September 27. I think your suggestion of Dave Thorner was a good idea. I have also had remarkably good success with John Cooper, here in Seattle. I will let you know who is available and confer with you before we make any final arrangements.

I look forward to working with you on this matter.

Very truly yours,

SCHWABE WILLIAMSON & WYATT, P.C.


Christopher H. Howard

CHH:ckt
cc: Robert Petty

Portland, OR 503-222-8981 | Salem, OR 503-399-7712 | Bend, OR 541-749-4044
Seattle, WA 206-622-1711 | Vancouver, WA 360-694-7551 | Washington, DC 202-488-4302

SEA/030665/154478/CHH/379298.1

CP322