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2011 JUN 28 10 30 AM  
CLERK OF COURT  
SUPERIOR COURT  
JULY 1 2011

No. 84707-0

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**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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**RESPONDENTS' ANSWER  
TO BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR  
JUSTICE FOUNDATION**

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**ORIGINAL**

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Respondents Dr. Dino Cacchiotti and wife answer the amicus brief of Washington State Association for Justice Foundation ("WSAJF Brief"). This case presents implications reaching beyond medical malpractice claims or recent legislation. This case reached this Court by motion of the Court of Appeals because of the possible effect of the 2006 legislative amendments concerning medical malpractice claims, but the more significant issue is the continued viability of the discovery rule as a defense to stale claims. This Court should not reach the 2006 amendments, but should affirm on the undisputed facts and the application of settled law regarding the discovery rule. WSAJF asks this Court to weaken existing case law concerning when a plaintiff discovers her claim. WSAJF seeks a lenient standard that will permit plaintiffs to sit on claims long after they should act upon them. This Court should reject WSAJF's approach. Existing precedent supports affirmance based on Plaintiff Unruh's frank testimony.

WSAJF concedes that this Court need not reach the constitutional issues if it affirms the trial court's disposition that a reasonable trier of fact could only conclude that she had notice of the alleged breach of duty of care at the time she turned eighteen. *WSAJF Brief*, pp. 1-2. Unruh's clear testimony compels affirmance. Unruh knew that the braces caused her tooth loss, and she knew that the treatment with braces was potentially wrongful. No jury reasonably could find lack of notice. Existing case law concerning the discovery rule supports affirmance.

The Court should not reach the constitutional issues concerning the statute of repose unless it concludes that (1) an issue of fact exists regarding when Unruh learned of the possible breach of the duty of care, and (2) Unruh's request to a third party for mediation denies Dr. Cacchiotti his statute of limitations defense for yet an additional year. Even in that case, this Court also should affirm. The amendments apply to bar Unruh's claim and are not unconstitutional.

### I. ARGUMENT

This Court should affirm the summary judgment.

A. **DISCOVERY RULE: Unruh's Knowledge of a Possible Breach of Duty by Dr. Cacchiotti Is Established by Her Frank Testimony, Which Supports the Trial Court's Dismissal Pursuant to Established Precedent**

The testimony of Unruh herself should compel this Court to affirm the trial court. Unruh's lawyers try to steer the Court to the testimony of Unruh's stepmother and later provider Dr. Bryant to obfuscate Unruh's candid admissions about her knowledge and understanding. The trial court correctly dismissed her tardy lawsuit based on Unruh's testimony.

1. **Unruh's Testimony Establishes Her Notice of the Breach of Duty According to *Ohler* and *Winbun*, Among Other Authorities.**

To rule in favor of Unruh that a question of fact regarding her discovery of her claim precludes summary judgment, this Court necessarily must renounce precedent<sup>1</sup> holding that knowledge of the

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<sup>1</sup> Namely, *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987); *Ohler v. Tacoma General Hosp.*, 92 Wn.2d 507, 551, 598 P.2d 1358 (1979); *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 802

*possibility* of a cause of action is discovery of that cause of action. Under Unruh's argument, the law would be rewritten to require that knowledge is established only if a plaintiff hears another professional refer to her provider's treatment as "negligent." Unruh's attorneys argue she had no notice because Unruh's later providers did not speak the word "negligence" when criticizing Dr. Cacchiotti's treatment. This is not the law in Washington.

Unruh admits she knew the opinions of subsequent providers that there had been "a better way" to treat her, that she "should not" have been in braces "at all," that the braces caused her tooth loss, that what she went through with the braces was not necessary and that her later providers did not agree with Dr. Cacchiotti's treatment. CP 71-75. She testified that she learned this not only from Dr. Bryant, but from multiple providers. CP 277, lines 18-22.<sup>2</sup> Unruh's attorneys implicitly ask this Court to disregard this testimony. The trial court correctly viewed the testimony as foreclosing a conclusion that Unruh was not on notice that Dr. Cacchiotti possibly breached a duty of care. Unruh herself testified as to the import of this knowledge, testifying that when she heard it, she felt bad knowing that

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P.2d 826 (1991); and *Wood v. Gibbons*, 38 Wn. App. 343, 685 P.2d 619 (1984), *rev. den.*; 103 Wn.2d 1009 (1984).

<sup>2</sup> Q: And in 2003, did you understand that the problem with your roots was due to the orthodontic care?

A: Yes.

Q: And is that something that Dr. Bryant told you?

A: We had other people tell me that.

she “didn’t have to go through what I had gone through all those years.” CP 74, lines 1-4. This Court should affirm the dismissal because no jury could reasonably find lack of notice of breach.

WSAJF erroneously argues that a plaintiff’s knowledge of the “possibility” of a breach of duty does not satisfy the discovery rule. *WSAJF Brief*, pp. 11. WSAJF’s formulation of a new standard is that a plaintiff must be shown to “have a sense that a specific wrongful act or omission occurred.” *Id.* This standard is ambiguous. WSAJF has it backwards. This Court already has held that a plaintiff’s “sense” that a wrongful act occurred is insufficient. In *Webb v. Neuroeducation Inc., P.C.*, 121 Wn. App. 336, 88 P.3d 417 (2004), *rev. den.* 153 Wn.2d 1004 (2005), a father felt that his child’s psychologist had acted wrongfully. The father “very strongly believe[d]” that the psychologist improperly relied on misinformation from his ex-wife. *Id.* at 341. The Court held that the father did not have notice of his claim until he had *information* supporting his “sense” that the professional had acted wrongfully. *Id.* at 344-45. The record here demonstrates information known to Unruh, i.e. later providers’ criticism of Dr. Cacchiotti and of his use of braces that Unruh knew caused her tooth loss.

*Reichelt v. Johns-Manville Corp.*, *supra*, 107 Wn.2d at 772, holds that reasonable diligence, not definitive pronouncements, determine notice.<sup>3</sup> WSAJF fails to address *Reichelt* and its progeny including *Zaleck*,

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<sup>3</sup> Unruh argues for an approach rejected by this Court in *Reichelt* when she argues that “prior to a records review by a competent orthodontist, [the

*supra*, and *Wood, supra*. As the Court of Appeals instructed in *Zaleck, supra*, a plaintiff “need only have had . . . information that the provider was *possibly* negligent.” *Zaleck*, 60 Wn. App. at 112 (emphasis added). In *Winbun*, this Court phrased the standard of notice as “knowledge of *suspected* professional negligence.” *Winbun v. Moore*, 143 Wn.2d 206, 223, 221 P.3d 576 (2001) (emphasis added). Here, that notice is demonstrated by the testimony of Unruh herself who described the information she had, i.e., the comments and criticisms made to her by other professionals about the treatment with braces and her articulated understanding from those comments that what she went through had been unnecessary. Unruh had knowledge, not just a mere “sense,” that Dr. Cacchiotti’s treatment was possibly wrongful. WSAJF argues for a standard already rejected by this Court. The trial court applied the correct standard and reached the correct result. The trial court should be affirmed.

Even today experts dispute whether Dr. Cacchiotti *in fact* breached the standard of care. Requiring more than knowledge of the possibility of

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Unruhs] had no way of knowing if their beliefs were founded.” *Opening Brief*, p. 307, lines 1-2. In *Reichelt*, this Court rejected the notion that a plaintiff cannot have notice of her claim prior to a professional giving the opinion that a claim exists. *Reichelt*, 107 Wn.2d at 772. This Court reiterated in 2006 that discovery occurs when a plaintiff learns of “salient facts” supporting her claim, not when the plaintiff learns she has a legal cause of action. *1000 Virginia Ltd. P’hip v. Vertecs*, 158 Wn.2d 566, 575-76, 146 P.3d 423 (2006), *citing Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998). Here, Unruh was aware of salient facts relevant to breach, i.e., other providers’ criticism of the very treatment that she knew caused her tooth loss.

breach is unworkable and contrary to precedent. A layperson's knowledge will necessarily be described in common vernacular. It is not necessary that specialized terms be uttered such as "breach of the standard of care" or "negligence." Unruh testified that she was alerted many times by multiple providers that the quality of Dr. Cacchiotti's care that caused her teeth to fall out was questionable. Under existing Washington law, she had notice of the alleged breach. Even if this Court adopted WSAJF's formulation, which it should not, Unruh's testimony should be found to show that Unruh "had a sense" that a wrongful act or omission occurred.

WSAJF discusses *Ohler v. Tacoma General Hosp.*, *supra*, as if this case were helpful to the plaintiff. See *WSAJF Brief*, pp. 10-11. *Ohler* supports affirmance when applied to the facts of Unruh's case. In *Ohler*, a plaintiff who had been born prematurely knew that her blindness was caused by excessive oxygen at birth, but did not know that the treatment potentially breached the standard of care. *Ohler*, 92 Wn.2d at 512. Because there was an issue of fact whether she learned of the possible wrongfulness of the treatment while a student, the case was reversed and remanded. *Id.* The decision does not enumerate the evidence from her student days, *id.*, but noticeably absent from *Ohler* was any evidence similar to the evidence presented in this case. If the facts of *Ohler* were analogous, the record also would have shown that the plaintiff had learned not only that the oxygen treatment caused her blindness, but that later providers told her that they were critical of the oxygen treatment she received, they disagreed with the oxygen treatment she received, she

should not have received that oxygen treatment, the oxygen treatment was not necessary, and that there had been a better way to treat her. If such facts had been present in *Ohler*, Dr. Cacchiotti submits this Court would have affirmed that case. The result in *Ohler* is distinguishable on its facts.

Another prominent case mentioned by WSAJF is *Winbun v. Moore*, 143 Wn.2d 206, 221 P.3d 576 (2001). *WSAJF Brief*, pp. 10-11. *Winbun* also supports affirmance. In *Winbun*, the plaintiff alleged negligence of multiple providers in diagnosing and treating her perforated gastric ulcer which resulted in complications when finally discovered on the operating table. The trial court denied her OB/GYN's motion for dismissal on statute of limitations grounds based upon the discovery rule. *Winbun*, 143 Wn.2d at 211-12. The OB/GYN argued that the plaintiff knew or should have known of his own negligence more than one year before she joined him in the litigation, making tardy her lawsuit against him. *Id.* On review, this Court addressed in what circumstances a plaintiff is on notice of the negligence of multiple providers when the negligence of one provider ostensibly accounts for the injury. The Court affirmed the trial court, holding that reasonable jurors could disagree about when the plaintiff should have known that her OB/GYN also was potentially negligent. *Id.* at 217.

Dr. Cacchiotti submits that this Court would have reversed in *Winbun* if the facts concerning the plaintiff's knowledge had been analogous to the present situation. If the plaintiff previously had been told by other providers (or her expert consultant) that they were critical of the

treatment by her OB/GYN, they disagreed with the OB/GYN's treatment, that her OB/GYN *should not* have failed to come to the hospital and check her upon her admittance and/or *should not* have failed to discover earlier that her complaints were not gynecological, that what she went through at the OB/GYN's hands had not been necessary, and that there had been a better way for her OB/GYN to treat her, this Court would have concluded that notice of her claim against the OB/GYN was not a jury question. Based on Unruh's testimony, the issue of notice is not a jury question.

The trial court was spot on. Unruh's testimony precludes a determination in her favor on the issue of notice of breach. Her father's testimony, imputed to her when she turned eighteen by RCW 4.16.350, independently supports the result. *See Respondents' Brief*, pp. 28-30.

2. Unruh Had Knowledge of the Specific Breach That She Alleges in Her Lawsuit.

There is no mismatch between Unruh's established knowledge and the plaintiff's theory of the case. Additionally, the record does not support that Unruh herself held an alternative theory regarding her tooth loss at all or until March 2006.

WSAJF urges that to affirm this Court would have to conclude that Unruh had knowledge of a "specific" wrongful act by Dr. Cacchiotti. *WSAJF Brief*, pp. 6-7. It is unclear to what aim WSAJF makes this point since it offers no further analysis. This language comes from *Winbun and Lo v. Honda Motor Co.*, 73 Wn. App. 448, 869 P.2d 1114 (1994), and again addresses the situation of multiple tortfeasors. In the case at hand,

Plaintiff alleges that the single tortfeasor Dr. Cacchiotti breached the standard of care when he treated Unruh with braces as he did.<sup>4</sup> The testimony of Unruh establishes that she understood that Dr. Cacchiotti's decision to treat her with braces was criticized, attributed as the cause of her tooth loss, and described to her as "unnecessary" treatment for which there had been "a better way."

WSAJF's discussion of a "facially logical explanation" of the injury also is irrelevant to Unruh's case. *See WSAJF Brief*, p. 10. This phrase has been used in cases where a plaintiff is aware of a facially logical explanation for her injuries due to one person's negligence, and may not suspect additional negligence by other tortfeasors. *See Winbun* at 219-20 (discussing why a plaintiff may not suspect medical malpractice). The phrase has no application to the circumstances of this case. First, only Unruh's stepmother testified about her own, speculative idea that Unruh lost her teeth as a result of the braces based on genetic predisposition. *See* CP 244-45; CP 249-50; CP 251.<sup>5</sup> Unruh herself offered no such testimony.

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<sup>4</sup> As her attorney stated in letter, "The standard of care issue is very simple. Dr. Cacchiotti should have advised Lisa to wait until her jaw was mature because surgery [rather than 'using braces to correct a jaw defect'] was the only way that her congenital defect could be corrected. Had he done that, Lisa would have had no need to replace teeth." CP 315.

<sup>5</sup> In the Opening Brief, Unruh's attorneys argue from this testimony that Lisa's stepmother testified that "she and Lisa" had no idea that Dr. Cacchiotti's treatment was potentially negligent. *Opening Brief*, p. 7. This misstates the testimony. The stepmother testified as to her own knowledge. She did not testify about Unruh's knowledge. The record regarding Unruh's knowledge is limited to Unruh's deposition testimony, and Unruh makes no mention of any alternative explanations.

Her father offered no such testimony. There is no testimony in the record that Unruh or her father believed her tooth loss was due to genetic causes. It simply is not there. Unruh's and her father's own testimony establishes their early knowledge that the braces caused the tooth loss and that she should not have been treated with braces as she was.

Second, even assuming *arguendo* that Unruh first believed she lost her teeth due to a genetic predisposition (for which there is no support in the record), once Unruh learned that other providers who attributed her tooth loss to the braces believed that she should not have been treated with braces "at all," she could not ignore that knowledge. A facially logical alternative explanation is only relevant to the notice inquiry until a plaintiff receives "knowledge of suspected professional negligence" by the provider in question. *Winbun* at 223. Unruh received information supporting the suspicion of professional negligence more than one year before she brought suit against Dr. Cacchiotti. She had to act on her rights. She failed to do that. This Court should affirm the learned trial court who ruled based on precedent and Unruh's own testimony.

### 3. CR 11 Presents No Bar to Affirmance.

WSAJF would use the spectre of CR 11 violations to gut the discovery rule in Washington. WSAJF raises what it views as a potential tension between knowledge of suspected professional negligence and CR 11. See *WSAJF Brief*, p. 11. These concerns are misplaced. This Court resolved those tensions in *Winbun*. It rejected the Court of Appeals' view that knowledge of medical negligence as to one provider triggered a duty

to investigate or hastily sue all providers. *Winbun* at 221-22. This Court applied existing precedent such as *Zaleck*, and *Reichelt* to inform when a plaintiff has notice of her claim against a particular provider. *Id.* at 219. The discovery rule exists in tandem with CR 11. The inquiry regarding notice of a claim is distinct from the inquiry regarding whether CR 11 was violated. *Cf. Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992) (detailing CR 11 analysis). A plaintiff who has knowledge of suspected medical malpractice by a specific provider cannot sit on that knowledge. No policy concern involving CR 11 prevents affirmance here.

**B. MEDIATION REQUEST: Even if WSAJF's Contention Was Correct That the Provider's Actual Knowledge of the Plaintiff's Request for Mediation Is Determinative of Whether the Statute of Limitations Was Tolloed for an Additional Year by RCW 7.70.110, Plaintiff Still Failed to Meet Her Burden and This Court Should Affirm the Dismissal**

Plaintiff's argument for reversal is complicated by the necessity to patch together different tolling statutes due to the very tardy initiation of suit. To reverse, this Court must find not only a substantiated question of fact regarding when Unruh (or her father) learned about the possible breach of duty, but also must conclude that the letter Unruh's attorneys mailed January 12, 2007, requesting mediation effectively tolled the statute of limitations for one more year pursuant to RCW 7.70.110.

WSAJF argues that because RCW 7.70.110 contains no specific directions on how to comply, this Court should find that actual knowledge by the provider of the request to mediate must be established to qualify under the statute for additional tolling. *WSAJF Brief*, pp. 13 ("The

touchstone of this statute is notice to the health care provider.”). But Unruh submitted no evidence that Dr. Cacchiotti had actual notice of the request for mediation. Unruh’s evidence focuses entirely on third parties.<sup>6</sup> She has not met her burden even under WSAJF’s formulation. Affirmance should result.

WSAJF also does nothing to debunk Dr. Cacchiotti’s agency analysis illustrating that he committed no act as an alleged principal that could be sufficient to confer any authority on the insurance adjuster to receive a request that would operate to eliminate his personal statute of limitations defense. *See Resps.’ Brief*, pp. 32-33. The undisputed facts show that Unruh was not entitled to additional tolling.

The request for mediation cannot toll the *statute of repose* because RCW 7.70.110 by its express terms applies only to statutes of limitations, not statutes of repose. *Resps.’ Supp. Brief*, p. 11; *Resps.’ Brief*, pp. 30-35. WSAJF does not dispute this argument. WSAJF’s briefing overall, however, attempts to treat statutes of repose as statutes of limitations. Unruh also conflates these different statutes. This Court should guard against such an analysis. *See 1000 Virginia Ltd. P’ship., supra* (nature of

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<sup>6</sup> In response to Dr. Cacchiotti’s summary judgment materials, Unruh made only passing reference to a request for mediation, with no evidentiary support. CP 307, lines 10-15, note 6; CP 308, lines 9-10. Unruh then filed a surreply attaching a copy of a letter that was not to Dr. Cacchiotti. CP 315-16. None of the correspondence shows any copy to Dr. Cacchiotti. Additionally, when another insurer replaced the first, he directly informed the plaintiff that he had had no communication with the prior adjuster. CP 320.

statutes of repose different from statutes of limitation). RCW 7.70.110, even if satisfied, does not extend the outer limit established by the statute of repose. By its plain language, the Legislature directed RCW 7.70.110 only to statutes of limitations. This is consistent with the Legislature's intent to create an outer limit on medical malpractice lawsuits through the statute of repose. This Court should affirm.

**C. STATUTE OF REPOSE: Contrary to WSAJF's Argument, Reenactment of the Statute of Repose Applicable to Different Persons and for Newly Articulated Legislative Purposes Does Not Violate Separation of Powers: This Is a New Statute for Purposes of Judicial Review**

The 2006 legislative amendments present no separation of powers issues. Dr. Cacchiotti argued alternative grounds for affirmance. Dr. Cacchiotti argued that the eight-year statute of repose enacted in 2006 legislative amendments to RCW 4.16.350 applied to Unruh's claim and barred it. *Resps.' Brief* at pp. 30-38. If it reaches this issue, which it should not, this Court will review the 2006 amendments for the first time.

This Court should reject WSAJF's argument that this statute of repose is unenforceable because it violates the separation of powers doctrine. *WSAJF Brief*, p. 20-22. WSAJF characterizes the 2006 amendments as "nothing more than the Legislature's disagreement with the legal analysis in *DeYoung*." *Id.* at 20. In so doing, WSAJF misperceives legislative statements of intent, the structure of the new amendments, and their effect. There is no rule that a legislature cannot attempt to fix or remedy invalidated statutes. In pursuing its legislative

goals, a legislature can attempt to respond to the invalidation of statutes with new laws that attempt to correct the articulated deficiencies. That is what the Legislature has done, as expressly permitted in *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 509-10, 198 P.3d 1021 (2009).

The expansion of the applicability of the statute by itself is sufficient to establish that this legislation is new, not simply “reenacted.” Additionally, the legislature articulated new legislative rationales for the statute of repose that were not associated with the prior version of the law. The Legislature declared that the new statute would apply to all actions commenced on or after the effective date of the statute.

This Court should reject WSAJF’s argument that the doctrine of separation of powers is violated by the 2006 amendments. *See also WDTL Amicus Brief*, pp. 4-6; *Washington State Medical Association Amicus Brief*, pp. 6-10. This case presents a new statute for review.

**D. STATUTE OF REPOSE: WSAJF Does Not Support Unruh's Position Regarding How the Statute of Repose Applies to These Facts; the Briefing of Dr. Cacchiotti and Amicus Curiae Washington State Medical Association Demonstrate the Clear Intent of the Legislature That the Statute (1) Apply to Unruh's Action Initiated After the Effective Date of the Act and (2) Bar Her Lawsuit Because She Filed Beyond the Outer Limit**

Unruh and Dr. Cacchiotti argue for different application of the new statute of repose. Dr. Cacchiotti’s position is supported by the legislative intent indicated in the plain language of the 2006 amendments and by the nature of a statute of repose. Unruh disregards the plain language of the Legislature and relies on authorities pertinent to statutes of limitations, not

statutes of repose. WSAJF took no overt position, but indicated case law supports Unruh. *WSAJF Brief*, p. 3, note 2. It does not.

Unruh argues the new statute of repose “begins running” as of the effective date of the statute, giving her eight years from June 7, 2006 to bring her claim. *Supp. Brief of Appellant*, pp. 1-4. This is a misnomer, because statutes of repose do not “run.” See *1000 Virginia Ltd. P’ship*, *supra*, 158 Wn.2d at 574-575 (explaining that “statutes of repose are ‘of a different nature than statutes of limitation,’” a statute of repose “terminates a right of action after a specified time, even if the injury has not yet occurred,” and only statutes of limitations, not statutes of repose, “begin to run” when the cause of action accrues). Unruh’s analysis is faulty.

Dr. Cacchiotti argues the statute applies to Unruh’s claim because her action was filed after June 7, 2006, the date after which the Legislature specified that the statute of repose would apply to new actions.<sup>7</sup> See *Resps.’ Brief*, pp. 35-38; *Resps.’ Supp. Brief*, pp. 10-11. Because Unruh’s last date of treatment was August 1999, when she filed her action more than eight years later in October 2007, it was barred. *Resps.’ Supp. Brief*, pp. 7-9.

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<sup>7</sup> The Act specifies: “The legislature further intends that the eight-year statute of repose reenacted by section 302 of this act be applied to actions commenced on or after the effective date of this section.” Second Substitute House Bill 2292, Sec. 301.

A strong point is made by *amici curiae* Washington State Medical Association (“WSMA”), in support of Dr. Cacchiotti’s position, that the intent of the Legislature should control this issue, as stated in *O’Donoghue v. State*, 66 Wn.2d 787, 791-92, 405 P.2d 258 (1965). See *WSMA Amicus Brief*, pp. 3-5. The Legislature expressed that the eight year statute of repose from date of last treatment should apply to actions commenced on or after the effective date of the statute. The Legislature did not create any exceptions for claims based on prior conduct or events, as it has done on occasion.<sup>8</sup> If the statute applies to Unruh’s claim as the Legislature directed it does, her claim is barred because she brought her lawsuit more than eight years after the last treatment. See *id.* Nothing needs to “run.” The claim is either within the outer limit, or without it. Unruh’s claim is without it. Dismissal of the lawsuit should be affirmed on these alternative grounds.

WSMA supports Dr. Cacchiotti’s position and characterizes the position as arguing for retroactive application. *WSMA Amicus Brief*, pp. 3-

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<sup>8</sup> This Court should compare prior versions of the statute with special attention to the Legislature’s different language choices regarding applicability of the amendments. For example, the Legislature specifically excluded from the 1986 and 1987 amendments claims for injuries resulting from healthcare incurred after June 25, 1976, and before August 1, 1986, the effective date of the 1986 amendments. See *Merrigan v. Epstein*, 112 Wn.2d 709, 714-17, 773 P.2d 78 (1989), *dissapproved in part Gilbert v. Sacred Heart Medical Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995). In contrast, here the Legislature opted not to include a similar exclusion but to specify that the amendments apply to all claims filed after the effective date.

5. Dr. Cacchiotti characterized it as a prospective application, applying to lawsuits filed after the effective date of the statute but not to pending lawsuits. *Resps.' Suppl. Brief*, pp. 7-8. Unruh, relying on statutes of limitations cases, has characterized her argument as arguing for prospective application. *Suppl. Brief of Appellant*, pp. 2-4. No party may be 100% correct. Commentators have rejected these characterizations where statutes of limitations are concerned, concluding that Washington specially treats newly enacted statutes of limitations, giving them (in the absence of legislative direction), a unique retroactive application, stating,

It has been broadly stated that statutes of limitations are to be given prospective application only [unless otherwise provided by the legislature]. However, the matter is not that simple. An examination of the opinions show [sic] that statutes of limitations are acknowledged to be procedural and are retroactively applied, but are given special treatment. More accurately stated, the rule is that the new limitations law operates retroactively on causes of action which accrued prior to the change in law, but the new period of limitations starts to run from the effective date of the states which makes the change.

Orland, Lewis H., *Retroactivity in Review: The Federal and Washington Approaches*, 16 *Gonz. L. Rev.* 855, 881-82 (1980-81).

This formulation of the rule applicable to statutes of limitations suggests that, if there were insufficient expression of legislative intent for application to claims such as Unruh's (which there is not), the statute of repose applies retroactively. The rule also suggests that, because a statute of limitations is not at issue, there is no special treatment to permit

additional “running” time. *See 1000 Virginia Ltd. P’ship*, 158 Wn.2d at 574-75 (statutes of repose do not run). The accrual date is irrelevant to the bar imposed by the statute of repose. Having filed outside the outer limit, Unruh cannot pursue the claim. The bar existed as of June 7, 2006, applies to her case and bars Unruh’s later-filed lawsuit.

There is no constitutional prohibition that prevents such application. Litigants enjoy no vested rights in the continuance of existing laws, especially laws concerning remedies like statutes of repose which have no connection to “accrual” or knowledge of a claim. *See Resps.’ Supp. Brief*, pp. 8-9, citing among other cases *Godfrey v. State*, 84 Wn.2d 959, 962-63, 530 P.2d 630 (1975) (due process does not prevent a change in existing law); *Miebach v. Colasurdo*, 102 Wn.2d 170, 685 P.2d 1074 (1984) (an expectation of the anticipated continuance of the present general laws is not a vested right); and *Keene v. Edie*, 77 Wn. App. 1068, 909 P.2d 1311, 1320 (1995) (a change in the statute of repose affects only a plaintiff’s *remedy*, “not any of his vested rights”), *rev. den.*, 129 Wn.2d 1012 (1996). Unruh’s contrary citations are inapposite, in part, because they relate to statutes of limitations, not statutes of repose. *See Supp. Brief of Appellant*, p. 1-4.

WSAJF suggests that the *Merrigan* case supports Unruh. *WSAJF Brief*, p. 3, note 2. It does not. First, *Merrigan* did not address the same applicability language at issue today, but language that specifically excluded claims for injuries incurred prior to the effective date such as the plaintiff Merrigan’s claims. *Merrigan v. Epstein*, *supra*, 112 Wn.2d at

714-17. As already pointed out by Dr. Cacchiotti, the Legislature this time did not create such exceptions.

Second, in *Merrigan* the Court found the incapacitated plaintiff entitled to tolling of the eight year statute of repose under former RCW 4.16.190. *Id.* at 716. Unruh, not being a minor at the time she argues that her claim accrued, is not entitled to tolling under that statute, even disregarding the 2006 amendments regarding tolling.<sup>9</sup>

Finally, the *Merrigan* decision also conflates statutes of repose and statutes of limitations. This Court's analysis should be guided by its explanation in *1000 Virginia Ltd. P'ship, supra*. For this statute of repose, it does not matter when Unruh's claim accrued. As of June 6, 2007, the statute of repose applied to her claim setting an eight-year outer limit that prevents her action.

No Washington decision applies a new statute of *repose* as Unruh suggests, "running" any period from the date of enactment. Such an analysis is inapposite. Such an application also would contradict legislative intent.

Unruh had an opportunity to pursue her claim despite the 2006 amendments. If Unruh discovered her claim in March 2006, she had an

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<sup>9</sup> Under RCW 4.16.190(1) and former RCW 4.16.190, tolling is triggered "if a person entitled to bring an action . . . be at the time the cause of action accrued [a minor]." If Unruh's claim accrued in March 2006 as she argues, she was twenty-one and was entitled to no tolling of any statute. Tolling has no applicability if this Court accepts Unruh's argument regarding accrual.

ample three months to file her action before the new statute of repose would apply to her case. She waited too long to file.

**E. TOLLING FOR MINORITY: Though Irrelevant to This Case, the Legislature's Elimination of Tolling of the Applicable Statute of Limitations for a Minor Whose Parent Has Knowledge of the Medical Malpractice Claim Does Not Violate Any Rights Guaranteed by the Washington Constitution, and Is a Legislative Prerogative to Balance the Rights of Constituents.**

The 2006 amendments concerning tolling do not directly affect this case. The Court should not reach them. If the Court does, it should not invalidate the legislation, which represents reasonable policy choices by the Legislature tasked with balancing the rights of all its constituents.

Factually, the 2006 amendments concerning tolling are unnecessary to the dismissal of Unruh's claim. This is because even if Unruh gets the benefit of pre-2006 law and the three- and one-year statutes of limitations were tolled until she turned eighteen, the periods expired before Unruh sued. *See Gilbert v. Sacred Heart Medical Center, supra, Resps.' Supp. Brief*, pp. 15-17. The Court, therefore, should not examine this part of the 2006 amendments. *WSAJF's Brief*, C.1., pp. 14-18, is not relevant. Additionally, if this Court accepts Unruh's argument that she may have discovered her claim as late as March 2006, she is entitled to no tolling anyway. The tolling statute RCW 4.16.190 (both current and former) is only triggered if a plaintiff discovers her claim "while a minor." *See infra*, note 9. In March 2006, Unruh was no longer a minor.

The Court in *DeYoung* held that pursuit of a tort claim is not a fundamental right in this state. *DeYoung v. Providence Medical Ctr.*, 136 Wn.2d 136, 142-43, 960 P.2d 919 (1998). WSAJF concedes this. *WSAJF Brief*, p. 24, note 18. This Court should reject WSAJF's argument (*see id.*) to overrule *DeYoung* and create such a right. *See also Shea v. Olson*, 185 Wash. 143, 160-61, 53 P.2d 615 (1936) (state constitution does not contain guaranty of remedy for every legal injury); *Ruth v. Dight*, 75 Wn.2d 660, 666, 453 P.2d 631 (1969) ("We do not doubt that the legislature possesses the constitutional power to strike the balance one way or the other [between the harm of being deprived of a remedy versus the harm of being sued] and by establishing a clear line of demarcation to fix a time certain beyond which no remedy will be available."). Principles of *stare decisis* should convince this Court to reject WSAJF's argument. An eight-year repose period, moreover, is reasonable and within the prerogative of the Legislature to balance the parties' interests.

A party challenging a statute must show that it is unconstitutional beyond a reasonable doubt. *1519-1525 Lakeview Blvd. Condo. Ass'n. v. Apt. Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001). WSAJF and Unruh do not meet that burden.

## II. CONCLUSION

Existing precedent supports affirmance. The trial court appropriately culled Unruh's case from the many that merit a jury trial on the basis that Unruh's own testimony established her claim was stale. This Court should affirm that decision on this evidentiary record. To

reverse the trial court in the face of Unruh's own testimony would upset multiple precedents. The discovery rule applies in multiple contexts beyond medical malpractice, including, for example, products liability, latent construction defects, attorney malpractice, childhood sexual abuse, and negligent cancellation of an insurance policy. When a plaintiff has knowledge of possible wrongful conduct, such as Unruh did, the one-year statute of limitations begins running. The statute expired in this case before suit was brought as a matter of law.

Unruh failed to submit any evidence that Dr. Cacchiotti had actual knowledge of her request to mediate her claim. Merely submitting in sur-reply a written request to mediate addressed to a third party was insufficient. The record contains no evidence that Dr. Cacchiotti had notice of the request or conferred authority on the third party to accept such a request for him. There is no issue of fact whether Unruh was entitled to an additional year of tolling. She was not.

If this Court should reach the 2006 amendments of RCW 4.16.350 and RCW 4.16.190, it should bar Unruh's claim based on the eight year statute of repose.

RESPECTFULLY submitted this 28<sup>th</sup> day of January, 2011.

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PLEASE TAKE NOTICE that on the 28<sup>th</sup> day of January, 2011, I caused to be served via e-mail and first class U.S. mail the foregoing *Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation* on the following parties at the following addresses in the manner indicated:

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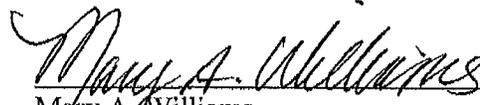
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- *Motion of Respondents to Submit Overlength Answer to Overlength Brief of Amicus Curiae Washington State Association for Justice Foundation*

- *Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation*

*Lisa Unruh v. Dino Cacchiotti*

Supreme Court No. 84707-0

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If you have any questions, please contact our office.

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