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DIVISION III
STATE OF WASHINGTON
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NO. 283810-III
COURT OF APPEALS, DIVISION III
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,

Respondent.

Appeal from Grant County Superior Court
Honorable Evan Sperline
NO. 07-2-01238-5

SUPPLEMENTAL BRIEF OF APPELLANT LISA UNRUH

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I. THE REENACTMENT OF RCW 4.16.350 AND AMENDMENT TO RCW 4.16.190 ONLY APPLY PROSPECTIVELY AFTER THEIR EFFECTIVE DATE (JUNE 7, 2006), AND THEREFORE ARE IRRELEVANT TO THIS CASE.

In 2006, the Legislature reenacted language in RCW 4.16.350 providing for an eight-year statute of repose for medical negligence claims. The Supreme Court previously held that the eight-year statute of repose was unconstitutional in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1988). The constitutionality of the reenactment of the eight-year statute of repose is discussed below.

Also in 2006, the Legislature amended RCW 4.16.190. RCW 4.16.190 provides that the time for commencing an action is tolled for minors until the age of 18, and also provides for tolling of statutes of limitation and repose if the claimant is incompetent or disabled. RCW 4.16.190 states that “the time of such disability^[1] shall not be a part of the time limited for the commencement of action.” In 2006, the Legislature added subsection (2) to RCW 4.16.190, which provides as follows:

Subsection (1) of this section [the tolling provision] with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350 [medical negligence claims].

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¹ Being under the age of 18 is considered a “disability” for purposes of RCW 4.16.190.

The effective date of the 2006 amendment to RCW 4.16.190 and reenactment of RCW 4.16.350 is June 7, 2006. *See* notes following RCW 4.16.190 and RCW 4.16.350.

New statutes of limitation or repose apply prospectively from the time of their effective date. *Torkelson v. Roerick*, 24 Wn. App. 877, 604 P.2d 1310 (1979), held that a new tolling statute begins to apply on its effective date, and that the statute of limitations for any pre-existing claims begins to run at that time. At the time of the *Torkelson* case, RCW 4.16.190 provided for tolling of the statute of limitations until age 21, rather than age 18. A minor therefore had until three years after his or her 21st birthday (or until age 24) to file a lawsuit for an injury occurring while they were under age 21. *Torkelson*, 24 Wn. App. at 878. The Legislature amended RCW 4.16.190 effective August 9, 1971 to provide for tolling of the statute of limitations only until age 18. The plaintiff in *Torkelson* was injured on December 1, 1970 (prior to the amendment to the tolling statute), at the age of 18. The issue in the case was whether the tolling statute in effect at the time of injury (which would have given the plaintiff until her 24th birthday to file a lawsuit) or the amended tolling statute applied to the plaintiff's claim.

The *Torkelson* court held that the amended tolling statute began to apply to the plaintiff's claim on its effective date of August 9, 1971.

Torkelson, 24 Wn. App. at 879. In other words, the three-year statute of limitations began to run on the plaintiff's claim on the effective date of the amendment to RCW 4.16.190, giving the plaintiff three years after the effective date of the amendment to the tolling statute in which to file her claim. *Id.* The Court explained as follows:

It is well accepted that statutes of limitations and other statutes providing exceptions to them are to be given prospective application only. . . . [A] new statutory limitation may operate on a claim that has accrued prior to the amendment of the statute of limitations by beginning to run as of the effective date of the amended statute. . . . Such an interpretation is not held to be a retroactive application of a new statute since the critical date is the effective date of the amended statute, not the date on which the claim arose. Therefore, the full time allowed by the new statute is available to the plaintiff. . . . Likewise, when an exception to a statute of limitations is amended or repealed, the new limitation or exception begins to apply at the effective date of the new tolling statute. . . .

Torkelson, 24 Wn. App. at 879-880; *see also Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 486, 209 P.3d 863 (2009) (refusing to apply six-year construction defect statute of repose to claim that accrued before the statute was enacted, even though the lawsuit was filed after the statute's effective date); *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 586-587, 146 P.3d 423 (2006) (“[S]tatutes affecting vested rights will be construed as operating prospectively only.” *O’Donoghue*, 66 Wn.2d at 790, 405 P.2d 258. . . .

[A]n accrued cause of action is a vested right when it “springs from contract or from the principles of the common law.” *Robinson v. McHugh*, 158 Wash. 157, 163, 291 P. 330 (1930.); *State v. T.K.*, 94 Wn. App. 286, 291, 971 P.2d 121 (1999) (“When the Legislature enacts a new, shortened statute of limitations, Washington courts preserve claims which accrued before the new law was enacted and run the statute of limitations from the new statute’s effective date.”).

Thus, RCW 4.16.350’s eight-year statute of repose began to run on Lisa Unruh’s accrued cause of action on the statute’s effective date, June 7, 2006, and would expire on June 7, 2014. Ms. Unruh’s claim, which accrued before June 7, 2006 (the effective date of RCW 4.16.190(2) and RCW 4.16.350), would have to be filed by June 7, 2014, eight years after the effective date of the new legislation. Because Ms. Unruh filed a lawsuit in 2007, the reenactment of RCW 4.16.350 and amendment to RCW 4.16.190 are irrelevant to this case.

Because the eight-year statute of repose only applies as of June 7, 2006 and is therefore irrelevant in this case, the Court need not address the constitutionality of RCW 4.16.190(2) and RCW 4.16.350. Nonetheless, Appellant Lisa Unruh addresses the constitutionality of these statutes below.

II. THE REENACTED EIGHT-YEAR STATUTE OF REPOSE IN RCW 4.16.350 IS STILL UNCONSTITUTIONAL.

In 1998, the Washington Supreme Court in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 139, 960 P.2d 919 (1998), struck down RCW 4.16.350's eight-year statute of repose because it violates the privileges and immunities clause in art. 1, §12 of the Washington State Constitution.² The Court concluded that the statute of repose was unconstitutional because it did not bear any rational relationship to the statutory purposes of stabilizing insurance rates or barring stale claims. *Id.* at 149-150. The language of the reenacted eight-year medical negligence statute of repose is the same as that previously found unconstitutional by the Supreme Court, and the rationale that the Legislature gave for reenacting the statute of repose in 2006 (*see Purpose—Finding—Intent* following RCW 4.16.350) was the same as the rationale specifically addressed and rejected as inadequate in

² Art. I, § 12 of the Washington Constitution provides as follows: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

The plaintiff in *DeYoung* alleged that she was negligently administered radiation treatment to her eyes in 1980, which she learned in 1995 and 1996 had caused injuries to her eyes. *DeYoung*, 136 Wn.2d at 139-140. The defendants argued that the eight-year statute of repose in RCW 4.16.350(3) barred her lawsuit.

DeYoung:

. . . The relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight-year statute of repose is too attenuated to survive rational basis scrutiny.³

Defendants additionally argue, though, that the repose provision is constitutional under another conceivable set of facts – it rationally furthers the legitimate goal of repose for defendants and the barring of stale claims which are more difficult to establish because evidence may be lost or gone. As noted, compelling a defendant to answer a stale claim is a substantial wrong, . . . and setting an outer limit to operation of the discovery rule is an appropriate aim The goal is a legitimate one. Again, however, the minuscule number of claims subject to the repose provision renders the relationship of the classification too attenuated to that goal.

³ In reenacting the eight-year statute of repose in 2006, the Legislature made no pretense that it would reduce medical malpractice insurance costs:

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, 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.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on the defendants.

RCW 4.16.350, **Purpose – Findings – Intent** -- 2006 c. 8, §§ 301 and 302.

We hold that the eight-year statute of repose in RCW 4.16.350(3) violates the privileges and immunities clause of the state constitution. . . .

DeYoung, 136 Wn.2d at 149-150. The Legislature did not change a single word from the statute that was found unconstitutional in *DeYoung*. It did nothing to correct the constitutional problem identified by the Supreme Court. Merely stating a rationale that was already found constitutionally inadequate by the Supreme Court in *DeYoung* does not change the constitutional analysis set forth in *DeYoung*.

The Legislature's declared purpose in enacting Laws of 2006, chapter 8, sections 301 and 302, was to "respond to" *DeYoung*. See **Purpose – Findings -- Intent** following RCW 4.16.350. The Legislature made findings that an eight-year statute of repose "will tend to reduce rather than increase the cost of malpractice insurance" and "will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants."

Although the Legislature stated its reasons for reenacting the eight-year statute of repose in RCW 4.16.350, the language of the statute is the same as the language that the Supreme Court found unconstitutional in *DeYoung*. The reasons given by the Legislature for reenacting the statute are the same as the reasons considered by the Supreme Court in *DeYoung* and found to be inadequate to withstand constitutional scrutiny. The

privileges and immunities clause in the Washington Constitution remains the same. The constitutional analysis remains the same as when the Supreme Court decided *DeYoung*. The eight-year statute of repose violates the privileges and immunities clause of the Washington Constitution and is therefore invalid.

III. THE LEGISLATURE’S REENACTMENT OF RCW 4.16.350 AFTER IT WAS HELD UNCONSTITUTIONAL BY THE SUPREME COURT IN *DEYOUNG* VIOLATES THE DOCTRINE OF SEPARATION OF POWERS.

The Supreme Court recently summarized the doctrine of separation of powers in *Putnam v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009):

The Washington State Constitution does not contain a formal separation of powers clause, but “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The doctrine of separation of powers divides power into three co-equal branches of government: executive, legislative, and judicial. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-394, 143 P.3d 776 (2006), *cert. denied*, 549 U.S. 1254, 127 S.Ct. 1382, 167 L.Ed.2d 162 (2007). The doctrine “does not depend on the branches of government being hermetically sealed off from one another,” but ensures that “the fundamental functions of each branch remain inviolate.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009) (quoting *Carrick*, 125 Wn.2d at 135, 882 P.2d 173). If “the activity of one branch threatens the independence or integrity or invades the prerogatives of another,” it violates the separation of

powers. *Fircrest*, 158 Wn.2d at 394, 143 P.3d 776 (internal quotation marks omitted) (quoting *Moreno*, 147 Wn.2d at 505-506, 58 P.3d 265).

Putnam, 166 Wn.2d at 980.

One of the fundamental functions of the judicial branch is to interpret the Constitution. The Supreme Court has already held that the eight-year statute of repose in RCW 4.16.350 is unconstitutional. Reenacting the same statute does not change that result. The Legislature cannot mandate legal conclusions. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711 (1989) (“[A]ny determination calling for a legal conclusion is constitutionally within the province of the judiciary, not the Legislature. Any legislative attempt to mandate legal conclusions would violate the separation of powers.”). The Legislature cannot reenact a statute the Supreme Court has already held to be unconstitutional and tell the Court that its interpretation of the constitution was wrong. As the Ohio Supreme Court held when presented with a similar situation, reenacting a statute that has already been found unconstitutional violates the separation of powers doctrine:

We agree that “the General Assembly has the right to enact legislation even if the constitutionality of that legislation is questionable.” In fact, any holding which suggests otherwise would itself violate the doctrine of separation of powers as a derogation of the veto power and an intrusion into the legislative domain.

However, it does not follow that the General Assembly has the right or the power to enact legislation that purports to release itself from the binding effect of this court's interpretation of the Ohio Constitution. While the General Assembly "is free to act upon its own judgment of its constitutional powers," *Pfeifer, supra*, 88 Ohio St. at 487, 104 N.E. at 533, it "cannot annul, reverse or modify a judgment of a court already rendered, nor require the courts to treat as valid laws those which are unconstitutional. If this could be permitted the whole power of the government would at once become absorbed and taken into itself by the legislature." *Bartlett, supra*, 73 Ohio St. at 58, 75 N.E. at 941. What the dissent fails to appreciate is that there is a marked difference between the initial enactment of a statute where its constitutionality is questionable and an attempt to nullify this court's opinions which have interpreted the constitutionality of a statute.

... Our previous examination reveals quite clearly that the General Assembly, in enacting Am. Sub. H.B. No. 350, has resolved to deny the power of this court to render a conclusive interpretation of the Ohio Constitution binding upon the other branches

State ex rel. Ohio Academy of Trial Lawyers, et al. v. Sheward, 715 N.E.2d 1062, 1105-1106 (Ohio 1999).

Under the separation of powers doctrine, the judicial branch has exclusive authority to interpret the Washington State Constitution. Our Supreme Court has already held the eight-year statute of repose in RCW 4.16.350 to be unconstitutional. The Supreme Court's interpretation of the Constitution is binding on the Legislature.

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IV. THE REENACTMENT OF RCW 4.16.350 AND THE AMENDMENT TO RCW 4.16.190 VIOLATE THE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS.

In *Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 900 P.2d 552 (1995), the Supreme Court expressed concern that if RCW 4.16.350's statutes of limitation and repose were not tolled during minority, they would be unconstitutional:

Nor do we resolve the Gilberts' *compelling argument that any other interpretation of the relationship between RCW 4.16.190 and RCW 4.16.350 would violate constitutional guaranties.*

Gilbert, 127 Wn.2d at 378 (emphasis added). The Supreme Court did not reach the constitutional issue in *Gilbert* because it resolved the case on statutory interpretation grounds.

The right of access to courts operates as a limitation on the power of the Legislature and the courts to either abolish a common law right of action or place such procedural impediments in its way that it becomes impossible for some or all citizens to realize. RCW 4.16.350's eight-year repose period denies access to courts because it extinguishes certain actions for medical negligence either before any injury is known to or sustained by the victim or before he or she has the legal right to file a lawsuit, without providing any alternate remedy.

The constitutional right of access to courts derives in part from Article I, § 10 of the Washington State Constitution, which provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” The wording of Article I, § 10 is traceable to Chapter 40 of the Magna Carta (“To no one will we sell, to no one will we refuse or delay, right or justice.”), which, under Lord Coke’s interpretation, provided a remedy guarantee. See Charles K. Wiggins, Bryan P. Harnetiaux & Robert H. Whaley, *Washington’s 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 Gonz. L. Rev. 193, 217 (1987/1987) (hereinafter “*Testing the Limits*”); Janice Sue Wang, Comment, *State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 Wash. L. Rev. 203, 205-208 (1989).

The right of access to courts also derives from the due process clause (Article I, § 3)⁴ and the privileges and immunities clause (Article I, § 12), both of which are designed to provide protection for the individual against government infringement. Additionally, Article I, § 1 provides as follows:

⁴ Art. I, § 3 of the Washington Constitution provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

And finally, Article I, § 32 unmistakably focuses on the protection of individual rights in declaring:

A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

Recently, the Washington Supreme Court held that the certificate of merit requirement for medical negligence lawsuits enacted by the Legislature in 2006 is unconstitutional because it unduly burdens the right of access to courts.⁵ *Putnam v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009). The *Putnam* court explained as follows:

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). The people have a right of access to courts; indeed, it is the “bedrock foundation upon which rest all the people’s rights and obligations.” *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). This right of access to courts “includes the right of discovery authorized by the civil rules.” *Id.* As we have said before, “[i]t is common legal knowledge that extensive discovery is necessary to

⁵ This case illustrates how the certificate of merit requirement violates access to courts principles. The requirement of obtaining a certificate of merit before filing a lawsuit significantly delayed the filing of Ms. Unruh’s lawsuit. Without the certificate of merit requirement, Lisa Unruh’s lawsuit could have been filed a year or more earlier, and the limitation/repose defenses at issue here would be irrelevant.

effectively pursue either a plaintiff's claim or a defendant's defense." *Id.* at 782, 819 P.2d 370.

Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. *Id.* Obtaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people. *Id.* at 780, 819 P.2d 370. Accordingly, we must strike down this law.

Putnam, 166 Wn.2d at 979.

Like the certificate of merit requirement held unconstitutional in *Putnam*, the eight-year statute of repose, as applied to minors,⁶ is unconstitutional because it has the effect of extinguishing a cause of action

⁶ The eight-year statute of repose is also subject to constitutional objection as applied to adults who are unable to discover some or all of the elements of a medical negligence claim at the time of the act or omission, because it extinguishes their right to bring a lawsuit for medical negligence before the existence of a medical negligence claim is even known to them. No public necessity can justify foreclosing a cause of action for medical negligence claimants before injury is either sustained or reasonably capable of being discovered. This would be antithetical to "the concepts of fundamental fairness and the common law's purpose to provide a remedy for every genuine wrong . . .", which our Supreme Court has recognized as applying "when, from the circumstances of the wrong, the injured party would not in the usual course of events know he had been injured until long after the statute of limitations had cut off his legal remedies[.]" *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969).

before the victim even has the legal right to bring a lawsuit. The Legislature left intact the substantive right to bring a medical negligence claim. Having done this, it is constitutionally without authority, under access to courts principles, to preclude minors' pursuit of this recognized cause of action before they even attain the legal right to file a lawsuit. RCW 4.16.350 and RCW 4.16.190(2) are therefore facially unconstitutional.

For these reasons, the Ohio Supreme Court struck down, under access to courts principles, a statute of repose for medical negligence cases that exempted minors from Ohio's tolling statute in *Mominee v. Schebarth*, 503 N.E.2d 717 (1986):

The second inquiry to be reviewed is whether R.C. 2305.11(B) is unreasonable or arbitrary as applied to minors. The Ohio due process or due course of law provisions require that all courts be open to every person who is injured. Section 16, Article I, Ohio Constitution. Yet, we believe that upholding R.C. 2305.11(B) against minors effectively closes the courthouse doors to them. It is beyond dispute that a minor has no standing to sue before he or she reaches the age of majority. Civ.R. 17(B). However, given the abrogation of the "disabilities" tolling statute in R.C. 2305.11(B), minors may, as in the cause *sub judice*, lose their rights to redress before they reach eighteen years of age. Thus, the sum and substance of R.C. 2305.11(B) is that a minor shall have no standing to sue before attaining the age of majority, and no right to bring suit thereafter. Such, in our view, is totally unreasonable and patently arbitrary.

The usual response to this conclusion is that a minor's parent or guardian may sue for, and on behalf of, the child. We find such a suggestion to be troublesome for several reasons. First, because of the inability of many children to recognize or articulate physical problems, parents may be unaware that medical malpractice has occurred. Second, the parents themselves may be minors, ignorant, lethargic, or lack the requisite concern to bring a malpractice action within the time provided by statute. *See Sax v. Votteler* (Tex. 1983), 648 S.W.2d 661, 667. Third, there may effectively be no parent or guardian, concerned or otherwise, in the minor's life. For example, children in institutions, foster homes, and wards of court or others are provided no safeguards, nor do such minors have the requisite ability to seek redress or to protect personal interests.

...

Based on all the foregoing, we hold that R.C. 2305.11(B) is unconstitutional as applied to minors under the due course of law provisions of the Ohio Constitution.

Mominee, 503 N.E.2d at 721-722.

The Washington Supreme Court expressed similar concerns about relying on parents to vindicate the legal rights of minors, in a case involving a governmental claims statute that barred claims not presented to the governmental entity within 120 days of the injury:

The remaining question, then, is whether within the subclass of victims of governmental tort there exists any due process or equal protection discordance. In this respect, it is our view that there does arise an incompatibility with due process and equal protection requirements, but only in and with an inflexible and unyielding application of that portion of RCW 4.92.100, which provides:

If the claimant is incapacitated from verifying, presenting, and filing his claim in the time prescribed or if the claimant is a minor, . . . the claim may be verified, presented, and filed on behalf of the claimant by any relative, attorney, or agent representing them.

Given Karen's minority, severe physical injuries, hospitalization, and major surgery, coupled with her mother's asserted grief, worry, and educational disadvantage, it would appear manifestly unjust and fundamentally unfair to apply the above-quoted portion of RCW 4.92.100 as to permit no excuse from strict compliance with the filing time requirement. In the first place, it is totally unrealistic to require that 13-year-old Karen, while lying severely injured and paralyzed in the hospital for 6 months, should, within 120 days of the accident, prepare and verify a claim or direct her mother or anyone else to do so on her behalf. In the second place, it would be almost as unconscionable to require that Karen's allegedly unlettered mother, stricken with the death of one child and greatly concerned over the survival of the second, ferret out the facts of the accident, the law pertaining to potential liability and the filing requirements, and thereupon file a claim as Karen's representative or solicit the aid of another to do so during the course of Karen's first 4 months in the hospital.

. . . The possibility that a friend or relative may possess the foresight to file a timely claim on behalf of an incapacitated victim, in our view, provides too slender a reed to bridge the inherent discrimination, and it becomes arbitrary and unreasonable when it penalizes the incapacitated if a friend or relative through inadvertence or ignorance fails to act.

Cook v. State, 83 Wn.2d 599, 604-605, 521 P.2d 725 (1974).

The Supreme Court again refused to allow parents to waive or release the legal rights of a minor in *Scott v. Pacific West Mountain*

Resort, 119 Wn.2d 484, 834 P.2d 6 (1992). The Supreme Court held that a parent's attempt to release a third party from liability to a child "violates public policy and is unenforceable." *Scott*, 119 Wn.2d at 495. The Supreme Court reasoned as follows:

Under Washington law parents may not settle or release a child's claim without prior court approval. Further, in any settlement of a minor's claim, Washington law provides that a guardian ad litem must be appointed (unless independent counsel represents the child) and a hearing held to approve the settlement.

Since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury. In situations where parents are unwilling or unable to provide for a seriously injured child, the child would have no recourse against a negligent party to acquire resources needed for care and this is true regardless of when the relinquishment of the child's rights might occur.

Scott, 119 Wn.2d at 494. A parent's failure to file a lawsuit to protect a minor's legal right to obtain a remedy for medical malpractice is analogous to a parent's attempt to release a child's legal rights through a pre- or post-injury agreement with the tortfeasor, neither of which is allowed under Washington law. Our Supreme Court has clearly held that a child's legal rights cannot depend on a parent's willingness or ability to vindicate them.

Applying the eight-year statute of repose to minors, before they even have the legal right to file a lawsuit, to bar a minor's medical negligence claim, clearly violates the constitutional right of access to courts. Additionally, allowing the statute of repose to run on a minor's claim because of parental failure to act would be both arbitrary and unduly oppressive and therefore violative of the due process clause. *Testing the Limits*, at 254-256; *cf. Rivett v. Tacoma*, 123 Wn.2d 573, 581-582, 870 P.2d 299 (1994) (city ordinance violates substantive due process because unduly oppressive in imposing liability against landowner in the absence of fault).

V. THE EIGHT-YEAR STATUTE OF REPOSE IN RCW 4.16.350 IS UNCONSTITUTIONAL UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE BECAUSE IT TREATS MINORS, WHO ARE LEGALLY INCOMPETENT, DIFFERENT THAN LEGALLY INCOMPETENT ADULTS.

A minor cannot sue in his or her own right before reaching the age of 18. RCW 4.08.050; RCW 26.28.015. In addition, as the Supreme Court noted in *DeYoung*, minors "generally lack the experience, judgment, knowledge and resources to effectively assert their rights." *DeYoung*, 136 Wn.2d at 146.

Prior to the 2006 amendment to RCW 4.16.190, RCW 4.16.190(1) tolled all limitations and repose statutes, including RCW 4.16.350, until a claimant turns 18:

RCW 4.16.190 Statute tolled by personal disability

(1) If a person entitled to bring an action ... be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW..., the time of such disability shall not be a part of the time limited for the commencement of action.⁷

When a minor turns 18, RCW 4.16.350 imputes a custodial parent's or guardian's knowledge of a potential medical negligence cause of action to the minor, and the three-year statute of limitations begins to run.⁸ This means that, under pre-2006 law, a legally competent minor had until age 21 to file a medical negligence claim for claims known to the minor or his or her parents. For persons of any age who are legally incompetent, developmentally disabled, or mentally incapacitated, the pre-2006 version of RCW 4.16.190 tolled all statutes of limitation and repose indefinitely.⁹

⁷ RCW 11.88.010(1) defines an incapacitated or incompetent person as any person who is: under the age of majority (RCW 11.88.010(1)(d) & (e)) or at risk of personal or financial harm based on a demonstrated inability to adequately provide for their own needs or manage property or financial affairs (RCW 11.88.010(1)(a)&(b)), or incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his property or caring for himself or both (RCW 11.88.010(1)(e)).

⁸ *Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 375-76, 900 P.2d 552 (1995).

⁹ *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 224, 770 P.2d

RCW 4.16.190(2), however, which was enacted in 2006, exempts the medical negligence claims of minors from RCW 4.16.190(1)'s tolling provisions. RCW 4.16.190(2) provides:

(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.

In *DeYoung*, the Supreme Court held that the eight-year statute of repose violates the privileges and immunities clause of the Washington Constitution. The *DeYoung* court's analysis applies with even greater force when the eight-year statute of repose is applied to minors.

There are both grounds and precedent for applying the heightened standard of scrutiny used in *Hunter v. North Mason School Dist.*, 85 Wn.2d 810, 539 P.2d 845 (1975),¹⁰ to review a statute that impairs the

182 (1989):

... RCW 4.16.190 would result in the statute of limitations never running in the case of a permanently disabled or incompetent person. Nevertheless, this result flows from unmistakably clear statutory language.

¹⁰ *Hunter* indicates that legislative enactments that substantially burden "the right to be indemnified for personal injuries" are permissible only if they are "reasonable, not arbitrary, and ... rest upon some ground of difference having a *fair and substantial relation* to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* (emphasis added).

right to sue for personal injuries. However, the Supreme Court has in some decisions insisted that criteria listed in *State v. Gunwall*, 106 Wn.2d 54, 58-59, 720 P.2d 808 (1986), be addressed when a party challenging a statute's validity asks a court to recognize "broader" rights under a provision of the Washington Constitution than exist under a provision of the federal constitution that deals with the same or a similar subject, or asks to have the statute analyzed under independent state constitutional standards. The *Gunwall* criteria are:

- (1) The textual language of the State Constitution;
- (2) Significant differences in the texts of parallel provisions of the federal and state constitutions;
- (3) State constitutional and common law history;
- (4) Preexisting state law (*i.e.*, state law that preexisted enactment of a constitutional right);
- (5) Differences in structure between federal and state constitutions; and
- (6) Matters of particular state interest or local concern.

To the extent that it is necessary here, notwithstanding the fact that the repose provision at issue is a statute that impairs a substantial right, namely, the right to sue for personal injuries, Appellant now addresses the *Gunwall* criteria.

According to Art. I, §1 of the Washington Constitution, governments, including the judicial branches thereof, “are established to protect and maintain individual rights.” The right to be indemnified for personal injuries is a substantial individual property right. *Hunter, supra*, 85 Wn.2d at 814. The protection of an individual's right to a civil remedy for personal injury tortiously inflicted by another is, and traditionally has been, primarily a matter of state and not federal concern.¹¹ Whether a state should have a discovery rule for tort claims as a matter of fundamental fairness, and whether the right of individuals to recover tort damages is “important,” and whether the discovery rule is a rule the benefit of which can be denied arbitrarily to some tort claimants and granted to others, are questions for state courts to answer based on their states' constitutions. Our Supreme Court held that fundamental fairness requires the discovery rule in medical negligence cases:

The discovery rule was adopted for medical malpractice actions in *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631

¹¹ In Washington, a strong public policy favoring and protecting adequate - - even “liberal” -- compensation for personal injuries has long been a principal justification for not allowing punitive damages to be claimed or awarded. See *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996) (“a plaintiff may ‘become whole’ through a full panoply of compensatory damages”), and *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 52, 25 P. 1072 (1891) (“Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation.”).

(1969), where the court reasoned that “fundamental fairness” and “the common law’s purpose to provide a remedy for every genuine wrong” are not served when a statute of limitations passes before the injured party “would not in the usual course of events know he had been injured until long after the statute of limitations had cut off his legal remedies[.]”

DeYoung, 136 Wn.2d at 145, fn.2. Thus, *Gunwall* criterion #6 points toward an independent state constitutional analysis.

Gunwall criterion #5 also points to independent state constitutional analysis, because, as noted in *Gunwall* itself, the federal constitution is a grant of enumerated powers to the federal government, and state constitutions serve “to limit the sovereign power which inheres directly in the people Hence the explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them.” 106 Wn.2d at 62.

As pointed out in *Testing the Limits*,¹² the text of Art. I, §12 indicates that the framers of the Washington Constitution “were primarily concerned with the fundamental rights” that were “closely related to the judicial system’s enforcement of personal rights,” so *Gunwall* criteria #1 and #2 support independent state constitutional analysis. The records of

¹² See C. Wiggins, B. Harnetiaux and R. Whaley, *Washington’s 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 Gonz. L. Rev. 193, 205-206 (1986-87).

Washington's Constitutional Convention do not explain the choice of language for Art. I, §12,¹³ so state constitutional history (*Gunwall* criterion #3) points neither toward separate state constitutional analysis nor to an approach “coextensive” with what federal courts would be expected to use under the 14th Amendment.

Thus, of the two *Gunwall* criteria that strongly indicate one way or another whether a challenge under Washington's “privileges and immunities” clause to a statute that impairs some individuals' right to seek a remedy for personal injury tortiously inflicted by another is or should be subject to independent state constitutional analysis both (#5 and #6) point toward independent state constitutional analysis and to application of the “heightened” scrutiny applied in *Hunter*. Criteria #1 and #2 also support an approach to Art. I, §12 under which that provision is more specifically protective than the 14th Amendment of the individual's right to enforcement of personal rights.

An intermediate scrutiny standard of analysis should be applied to the question of whether excluding minors from the tolling provisions of RCW 4.16.190 for purposes of medical negligence claims violates

¹³ See Note, State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies, 64 Wash. L. Rev. 203, 215-18 (1989).

constitutional guarantees. In *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994), the Supreme Court said:

[T]his court has applied intermediate scrutiny to classifications affecting “both an important right (the right to liberty) and a semi-suspect class not accountable for its status (the poor)”. [*State v.*] *Schaaf*, 109 Wn.2d at 18, 743 P.2d 240. This test requires that the challenged law “fairly be viewed as furthering a substantial interest of the State.” [Citations omitted] . . .

Westerman, 125 Wn.2d at 294-95 (quoting *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991)). There is no question that the right to be compensated for personal injuries is an important property right. *Hunter v. North Mason High School*, 85 Wn.2d 810, 814, 539 P.2d 845 (1975). It goes without saying that minors are not accountable for their status.

Since RCW 4.16.190(2) is a statute reflecting prejudice or indifference to minors and impinges on a fundamental personal right (the right to be compensated for personal injuries), it should qualify for heightened scrutiny. Under that standard, extinguishing a minor’s cause of action before the minor even acquires legal capacity to pursue it clearly cannot “fairly be viewed as furthering a substantial interest of the State.”

RCW 4.16.190(2) cannot withstand constitutional scrutiny even under the less stringent rational basis test. Under the rational basis criteria

in *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994),¹⁴ RCW 4.16.190's exclusion of minors from tolling of the statute of repose for medical negligence claims does not "appl[y] alike to all persons within a designated class" because it tolls the medical negligence claims of mentally and legally incompetent adults, but not the claims of mentally or legally incompetent minors.

Reasonable grounds do not exist "for distinguishing between those who fall within the class [*i.e.* incompetent adults] and those who do not [*i.e.* incompetent minors]" because neither class has the mental or legal capacity to sue in its own right. There also would be no reasonable basis for distinguishing between minors according to whether or not they were mentally disabled because all minors are legally barred from pursuing claims in their own right, regardless of their mental capabilities. There neither was nor could have been a legislative finding that minors share some attribute related to the legislative objective that incompetent adults do not also share. Selecting minors for discrimination because they are legally incompetent due to age (and in some cases due to mental or

¹⁴ *Westerman*, 125 Wn.2d at 294-95 ("Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation.").

physical disabilities as well) as opposed to adults who are disabled because of mental or physical disabilities was manifestly arbitrary and unreasonable.

In *DeYoung*, the Supreme Court recognized that minors should be treated like legally incompetent/mentally disabled adults rather than like legally competent adults because minority itself implies mental incapacity as well as legal incapacity. In addition to being legally barred from filing a lawsuit, minors' mental incapacity also deprives them of the experience, judgment, knowledge and resources necessary to assert their legal rights in a medical negligence lawsuit:

Minors are not similarly situated to adults because they are unable to pursue an action on their own until adulthood, RCW 4.08.050, and they generally lack the experience, judgment, knowledge and resources to effectively assert their rights. ... A person incompetent or disabled to the extent that he or she is unable to understand the nature of the proceedings is not similarly situated to those adults who are competent to assert their rights and assist in a malpractice action.

DeYoung, 136 Wn.2d at 146. A minor is similarly situated to an incompetent or disabled adult for the reasons set forth above.

If the "legitimate purpose" of RCW 4.16.350 and RCW 4.16.190(2) is to reduce insurance costs¹⁵ by protecting doctors and their

¹⁵ The legislative purpose is even more attenuated under the facts of this case. Appellant is not aware of any claims of a malpractice insurance

insurers from “stale” claims, and even granting that claims may be deemed “stale” after eight years, then all persons who were injured by the negligence of a health care practitioner more than eight years ago are similarly situated with respect to that legislative purpose. However, the effect of the repose provision in RCW 4.16.350 and RCW 4.16.190(2) is to carve that class of persons up into subclasses and deny only some of them the benefit of the discovery rule. The legislative objective is not rationally furthered by applying the eight-year absolute cutoff to minors (including mentally incompetent minors), who have no legal ability to file a lawsuit before the age of 18, but not to incompetent adults, who likewise are unable to protect their right to redress by filing a lawsuit.

Since the claims of legally incompetent adults are never barred by RCW 4.16.350’s statute of repose,¹⁶ the claims of minors should not be barred either, regardless of whether the source of the minor’s incompetency is “developmental disability”, or “mental incapacity”, or

crisis for dentists/orthodontists or a problem with the availability of dentists/orthodontists because of insurance rates. The legislative findings relating to the statutes at issue specifically refer to concerns about “the rising cost of *medical* malpractice insurance” and say nothing about *dental* malpractice insurance rates. See **Findings – Intent** – 2006 c. 8, following RCW 5.64.010. Again, the statute sweeps far too broadly to be rationally related to the purposes of the legislation.

¹⁶ *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 224, 770 P.2d 182 (1989).

“minority.”¹⁷ Each and all of these conditions prevent a minor from “either managing his property or caring for himself or both.”¹⁸

The 2006 reenactment of RCW 4.16.350 and amendment to RCW 4.16.190 single out for special treatment a subgroup of negligent health care providers and a corresponding subgroup of injured patients. They create an arbitrary class of minors who are incapable of filing a lawsuit who are singled out for discriminatory treatment compared to incompetent adults, who are likewise incapable of filing a lawsuit. This arbitrary distinction does not rest upon a ground fairly and substantially related to reducing the cost of malpractice insurance or protecting the industry from “stale” claims created by the discovery rule, and treats even those claimants with allegedly “stale” claims differently. The 2006 legislation therefore violates the privileges and immunities clause, Art. 1, § 12 of the Washington State Constitution.

VI. CONCLUSION

Prior to June 7, 2006, the eight-year statute of repose in RCW 4.16.350 did not apply to Lisa Unruh because it was struck down by the Supreme Court in 1998. The reenacted eight-year statute of repose in

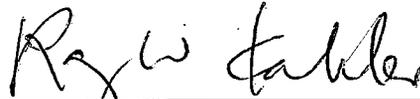
¹⁷ RCW 11.88.010.

¹⁸ *Id.*

RCW 4.16.190 and RCW 4.16.350 for medical/dental negligence claims by minors does not apply to Lisa Unruh's claim until the effective date of the legislation, June 7, 2006. It therefore has no relevance to this case, because Ms. Unruh's lawsuit was filed in September 2007, well within eight years of June 7, 2006. This Court should hold that the reenacted RCW 4.16.350 and amendment to RCW 4.16.190 are inapplicable to this case for that reason, without reaching the constitutionality of the legislation.

However, if the Court wishes to address the constitutionality of the legislation, it is clear under the Supreme Court's recent decision in *Putnam* that the eight-year statute of repose as applied to minors violates access to courts principles, and it is equally clear under the Supreme Court's decision in *DeYoung* that it violates the privileges and immunities clause of the Washington Constitution. The Court should therefore hold that the eight-year statute of repose that the Legislature reenacted in RCW 4.16.350 and RCW 4.16.190(2) is unconstitutional.

RESPECTFULLY SUBMITTED this 14th day of June, 2010.

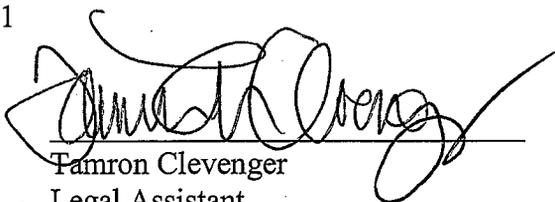


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CERTIFICATE OF SERVICE

I certify that I caused to be served, a copy of the foregoing
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