NO. 87207-4
B.C. No. 11-2-00071-8

WASHINGTON STATE SUPREME COURT

JARYD SCHROEDER,

Plaintiff-Petitioner,

vs.

STEVEN WEIGHALL, M.D. and COLUMBIA BASIN IMAGING, P.C.

Defendants-Respondent.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
13 MAY -6 AM 8:14
BY RONALD R. CARPENTER
CLERK

REPLY BRIEF OF APPELLANT TO
Washington State Association for Justice Foundation

GEORGE E. TELQUIST
RICHARD D. WHALEY
TELQUIST ZIOBRO McMILLEN, PLLC
Attorneys for Appellant, Schroeder
1321 Columbia Park Trail
Richland, WA 99352
(509) 737-8500 - *phone*
(509) 737-9500 - *fax*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

I. INTRODUCTION 1

II. CLARIFICATION OF FACT 1

III. ARGUMENT 1

A. Mr. Schroeder Supports WSAJ's Application of RCW 4.16.350(3)'s Three Year Statute of Limitations 1

B. Mr. Schroeder Concurs with WSAJ's Analysis of *Putnum* and WSAJ's Conclusion that RCW 4.16.190 Violates the Right to Access Courts Guaranteed by Art. I § 10 3

IV. CONCLUSION 5

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT CASES:

Alverado v. WPPSS,

111 Wn.2d 424, 429-30, 759 P.2d 427 (1988) 5

Cert. denied,

490 U.S. 1004, 109 S. Ct. 1637, 104 L.Ed.2d 153 (1989)

Gilbert v. Sacred Heart Medical Center,

127 Wn.2d 370, 373, 900 P.2d 552 (1995) 1, 2

Grant County Cy. Fire Prot. Dist. v. Moses Lake,

150 Wn.2d 791, 812-13, 83 P.3d 419 (2004) 4

Harris v. State, Dept. Labor and Indu.,

120 Wn.2d 461, 467-68, 843 P.2d 657 (1993) 5

John Doe v. Puget Sound Blood Ctr.,

117 Wn.2d 772, 780, 819 P.2d 370 (1991) 3, 4

Putnum v. Wenatchee Valley Med. Ctr.,

166 Wn.2d 974, 979, 216 P.3d 374 (2009) 3, 4

See also 166 Wn.2d at 986 3

State v. Vance,

29 Wn.2d 435, 458, 70 P. 34 (1902) 4

FEDERAL CASES

Alverado v. WPPSS,

111 Wn.2d 424, 429-30, 759 P.2d 427 (1988) 5

Cert. denied,

490 U.S. 1004, 109 S. Ct. 1637, 104 L.Ed.2d 153 (1989)

WASHINGTON STATE CONSTITUTIONAL PROVISIONS:

Washington State Constitution, Article I, Section 10 ..... 3, 4, 5

Washington State Constitution, Article I, Section 12 ..... 4, 5

RAP 2.5(a)(3) 5

REVISED CODE OF WASHINGTON PROVISIONS:

RCW 4.16.190 .....1, 2, 3

RCW 4.16.190(2) 1, 2, 3, 4, 5

RCW 4.16.350 .....1, 2, 3

RCW 4.16.350(3) 1, 2, 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

Wash. Const. art. I, § 10:

> Justice in all cases shall be administered openly, and without unnecessary delay.

Wash. Const. art. I, § 12:

> 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.

RCW 4.16.190. Statute tolled by personal disability:

> (1) Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, 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, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

(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.

RCW 4.16.350. Action for injuries resulting from health care or related services--Physicians, dentists, nurses, etc.--Hospitals, clinics, nursing homes, etc.:

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976, against:
(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his or her employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including, in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative; based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event

shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.
For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

I. INTRODUCTION

The Appellant ("Mr. Schroeder") hereby submits this brief in response to the Amicus Curiae brief submitted by the Washington State Association for Justice Foundation (WSAJ).

II. CLARIFICATION OF FACT

Mr. Schroeder's second MRI, which revealed the presence of abnormal medical condition, was conducted on November 19, 2009.

III. ARGUMENT

A. Mr. Schroeder Supports WSAJ's Application of RCW 4.16.350(3)'s Three Year Statute of Limitations.

WSAJ succinctly explains the one year (imputation of parental knowledge) and three year statute of limitations contained in RCW 4.16.350(3) as they would apply in the wake of RCW 4.16.190(2) being declared unconstitutional. *See* WSAJ Br. at 5-8. It is WSAJ's position Mr. Schroder's claim would have been tolled throughout his minority and should be subject to a three year statute of limitations. *Id.* at 8. Mr. Schroeder supports this analysis.

Prior to the 2006 amendment of RCW 4.16.190, in *Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 373, 900 P.2d 552 (1995), this Court was asked to determine whether the statute of limitations set forth in RCW 4.16.350 nullified the tolling effects of RCW 4.16.190 as

applied to a minor. This Court held RCW 4.16.350(3) did not nullify the operation of the tolling statute, RCW 4.16.190. *Id.* at 377. In reaching its decision, the Court recognized its duty to harmonize the two statutes so that the integrity of each could be maintained:

> We therefore must interpret the amendments to RCW 4.16.350 in such a way that the integrity of the tolling statute is preserved rather than destroyed...When read in harmony with [RCW 4.16.190], the limitation periods of RCW 4.16.350 are tolled until a minor reaches the age of majority, whereupon a minor is "charged" with whatever knowledge regarding a potential malpractice claim his or her parents or guardian possess. The additional language "shall operate to bar the claim...to the same extent...[as] an adult" then dictates that a minor to whom knowledge is imputed has only the time which an adult with knowledge would have to file a claim once the minor attains majority. RCW 4.16.350(3). With respect to a competent adult, RCW 4.16.350 requires a medical malpractice action to be commenced 3 years of the act or omission alleged to have caused the injury, or within 1 year of the time that the plaintiff discovers that the injury was caused by the act or omission, whichever expires later.

See Id. at 375-76. The Court read RCW 4.16.190 to toll a minor's claim until he or she reached the age of majority at which time the three (3) year statute of limitation would be applied because it would naturally expire later. *See Id.* at 377. If RCW 4.16.190(2) is struck down as unconstitutional, this Court will be faced with the same issue presented in *Gilbert.*

Mr. Schroeder's claim should be likewise subject to a three year statute of limitations. Mr. Schroeder's claim would be tolled until January 14, 2010, at which point his claim would be subject to RCW 4.16.350.[1] His claim would then be subject to a one year statute of limitations or three year statute of limitations, whichever expires later. RCW 4.16.350(3). The three year statute of limitations would obviously expire later and should control. Thus, Mr. Schroeder's claim was timely filed on January 13, 2011. *See Schroeder Dr.* at 7.

B. Mr. Schroeder Concurs with WSAJ's Analysis of *Putnum* and WSAJ's Conclusion that RCW 4.16.190 Violates the Right to Access Courts Guaranteed by Art. I § 10.

WSAJ argues Washington Constitution Art. I § 10 provides a free standing basis for invalidating RCW 4.16.190(2). *See* WSAJ Br. 5, 9-17. Mr. Schroeder concurs with the WSAJ. This Court's opinion in *Putnum* and its extensive treatment of *Blood Center* makes clear that a fundamental right to access the courts is grounded in Art. I § 10, and any statute which "unduly burdens" this right must be invalidated. *See* WSAJ Br. at 10; *See also Putnum v. Wenatchee Valley Med. Ctr.,* 166 Wn.2d 974, 979, 216 P.3d 374 (2009); *See also* 166 Wn.2d at 986 (citing *John Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). *Putnum* should control the present case, and RCW 4.16.190(2)

---

[1] January 14, 2010 is Mr. Schroeder's eighteenth birthday. *See Schroeder* at 7.

should be invalidated as it unduly burdens certain medical malpractice plaintiff's right of access to courts under the Washington State Constitution. *See* WSAJ Br. at 9.

Mr. Schroeder makes a similar argument to analyze RCW 4.16.190(2) under Art. I § 10. *See Schroeder Br.* at 13-16. In fact, Mr. Schroeder premises his analysis of Art I § 12 on the existence of a fundamental "privilege" contained in Art. I § 10, the right to access the court. *See Schroeder Br.* 13-16; *See also Grant County Cy. Fire Prot. Dist. v. Moses Lake,* 150 Wn.2d 791, 812-13, 83 P.3d 419 (2004). By definition, "privileges and immunities" are:

> [T]hose fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts and to enforce other personal rights...

Id. at 813 (citing *State v. Vance*, 29 Wn.2d 435, 458, 70 P. 34 (1902)). If Art. I § 10 does in fact contain a fundamental right to access, as opined in *Putnum,* it must be analyzed as a predicate to any analysis performed under Art. I § 12. *See Putnum,* 166 Wn.2d at 979); *See also Blood Ctr.,* 117 Wn.2d 772 at 780. Thus, any meaningful analysis of Art. I § 12

requires this Court to consider a challenge to RCW 4.16.190(2) under Art. I § 10.

In the event this Court believes WSAJ has raised a novel constitutional issue with regards to Art I § 10, this Court is not prevented from considering it. *See Harris v. State, Dept. Labor and Indu.,* 120 Wn.2d 461, 467-68, 843 P.2d 657 (1993) (addressing supremacy clause issue first raised by amicus curiae where necessary to reach a proper decision); *See also* RAP 2.5(a)(3). This Court has inherent authority to consider constitutional issues not raised by the party's if necessary to reach a proper decision. *Id.* at 468 (citing *Alverado v. WPPSS,* 111 Wn.2d 424, 429-30, 759 P.2d 427 *(1988) cert. denied,* 490 U.S. 1004, 109 S. Ct. 1637, 104 L.Ed.2d 153 (1989)). As stated in detail above, proper analysis of Art. I § 12 requires consideration of the protections afforded under Art. I § 10.

IV. CONCLUSION

Based on the aforementioned reasons, the Appellant asks this Court to reverse the decision of the trial court and remand this matter for trial in accordance with the Court's decision.

DATED this 3rd day of May, 2013.

TELQUIST ZIOBRO McMILLEN, PLLC

By: _____ 29831 for
GEORGE E. TELQUIST, WSBA #27203
Attorneys for the Appellant, Jaryd Schroeder

TELQUIST ZIOBRO McMILLEN, PLLC

By: _____ 29831 for
RICHARD D. WHALEY, WSBA #44317
Attorneys for the Appellant, Jaryd Schroeder