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NO. 87207-4

SUPREME COURT OF THE STATE OF WASHINGTON

JARYD SCHROEDER,

Appellant,

v.

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

Respondents.

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

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I. ANSWER TO WSAJF'S ART. I, §12 ARGUMENT

A. RCW 4.16.190(2) Does Not Give Health Care Providers "Privileges or Benefits to the Disadvantage of Others".

This Court's modern Const. art. I, §12 jurisprudence is the product of its application of independent state "*Gunwall*"¹ analysis to art. I, §12 in *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 808, 83 P.3d 419 (2004).² Under that jurisprudence, unless a "privilege or immunity" is implicated, the Court looks to Fourteenth Amendment Equal Protection clause jurisprudence when deciding an art. I, §12 challenge to a state statute. The concern addressed by the federal Equal Protection clause is "majoritarian threats of invidious discrimination against nonmajorities." *Andersen v. King County*, 158 Wn.2d 1, 14, 138 P.3d 963 (2006) (quoting *Grant County*, 150 Wn.2d at 806-07). A statute withstands challenge under the Equal Protection clause unless it treats similarly situated social groups differently without even a conceivable rational basis, or infringes upon "fundamental" rights without a

¹ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

² Although this Court engaged in a "*Gunwall*" independent state constitutional analysis of art. I, §12 in *DeYoung v Providence Med. Ctr.*, 136 Wn.2d 136, 142-44, 960 P.2d 919 (1998), it did so only to determine whether art. I, §12 should be interpreted independent of the federal Equal Protection Clause such that "strict" or "heightened" scrutiny, rather than "rational basis" scrutiny, should apply for purposes of an equal protection challenge to a statute. The *DeYoung* court concluded that *Gunwall* independent state constitutional analysis did not lead to the application of strict or heightened scrutiny.

compelling reason. See, e.g., *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 608-09, 192 P.3d 306 (2008).

Article I, section 12 is part of our state constitution because of popular anger in 1889 with railroads, trusts, monopolies, and eastern “money kings.”³ Thus, “a ‘privilege’ normally ... benefit[s] certain businesses at the expense of others.” *Am. Legion*, 164 Wn.2d at 607. Indeed, even WSAJF acknowledges, *WSAJF Brief at 18*, that the point of art. I, §12 is to prohibit state or local laws that give some people “privileges or benefits to the disadvantage of others.” RCW 4.16.190(2) is not such a law.

Traditionally, art. I, §12 has been the basis for decisions invalidating statutes and ordinances that regulate competing businesses differently. See *Grant County*, 150 Wn.2d at 809, fn. 12 (citing examples). Beginning with *Grant County*, however, the Court has decided four art. I, §12 challenges to statutes that were not classic business-

³ See *Grant County*, 150 Wn.2d at 808 (citing and quoting from Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles: Individuals Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 671-72 (1992)), which also states that “[various agrarian and fraternal] organizations feared that uncontrolled concentrations of capital were threatening social stability and individual freedoms throughout the country. For instance, the populist-minded Washington State Grange lashed out at the ‘money Kings of the East,’ the trusts and monopolies that ‘were oppressing the laborer and robbing agriculture of its just rewards.’ The Grange’s concerns were not imagined; Washington’s citizens had a history of conflict with corporations, primarily railroads. Excessive freight rates charged by railroad monopolies plagued Washington’s farmers. The territorial legislature’s failure to set railroad rates further angered farmers” [footnotes omitted].”

regulation statutes, and has rejected all four challenges. In *Grant County*, the court held that statutes authorizing the petition method for property annexation do not violate art. I, §12. In *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007), statutes providing for disenfranchisement of felons survived an art. I, §12 challenge. In *Am. Legion*, 164 Wn.2d at 607, the Smoking in Public Places Act was held not to violate art. I, §12. And, in *Andersen*, 158 Wn.2d at 44, the Court upheld the Defense of Marriage Act against an art. I, §12 challenge.⁴ This is the Court's first case presenting an art. I, §12 challenge to a statute that applies to personal injury claims and/or that determines how a statute of limitations is applied.

Although WSAJF acknowledges art. I, §12's focus on privileges granted "to the disadvantage of others," *WSAJF Br. at 81* (quoting *Grant County*, 150 Wn.2d at 809), WSAJF then reasons that art. I, §12 impermissibly "disadvantages" persons allegedly injured by medical negligence as children. That reflects a misreading of the point for which WSAJF quotes *Grant County*.

The "disadvantaging" to which *Grant County* refers, and that can invalidate an inadequately justified business regulation, is differential

⁴ The Court considered and rejected an art. I, §12 challenge to a more classic business-regulation statute in *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 178 P.3d 960 (2008) (city's decision to enter into contracts granting exclusive rights to haul solid waste for profit within the city, precluding smaller companies from seeking waste-hauling business within the city, did not confer a "privilege or immunity" in violation of art. I, §12).

treatment of *competitors*; thus, the “others” whom RCW 4.16.190(2) cannot “disadvantage” (absent a constitutionally sufficient reason) are those with whom allegedly negligent health care providers might be said to *compete*, which would mean, if anyone at all, other alleged tortfeasors, not persons claiming to be victims.

As this Court explained in *Grant County*, after concluding that “the historical context as well as the linguistic differences [between art. I, §12 and the federal Equal Protection clause] indicates that the Washington State provision requires independent analysis from the federal provision when the issue concerns favoritism”:

Early decisions of the Washington State Supreme Court that invalidated laws granting special advantages to certain people or classes of people also support this interpretation of the thrust of article I, section 12. *See State v. Robinson Co.*, 84 Wash. 246, 249-50, 146 P. 628 (1915) (invalidating statute that exempted cereal and flouring mills from act imposing onerous conditions on *other similarly situated persons and corporations*); *In re Application of Camp*, 38 Wash. 393, 397, 80 P. 547 (1905) (holding that city ordinance prohibiting anyone from peddling fruits and vegetables within city, but exempting farmers who grew produce themselves violated article I, section 12 as granting privilege to class of citizens); *City of Spokane v. Macho*, 51 Wash. 322, 323-26, 98 P. 755 (1909) (holding Spokane ordinance regulating employment agencies unconstitutional because it imposed criminal penalties upon one party, but imposed no penalties for *others in like circumstances*); *City of Seattle v. Dencker*, 58 Wash. 501, 504, 108 P. 1086 (1910) (invalidating Seattle ordinance as unconstitutional under article I, section 12 because it imposed tax upon sale

of goods by automatic devices that was not imposed upon *merchants selling same class of goods*).

Grant County, 150 Wn.2d at 809 n.12 (emphases added).

RCW 4.16.190(2) does not involve any “disadvantaging” in this sense. Allegedly negligent health care providers do not compete for judicial resources (or for anything else) with alleged tortfeasors generally or with, say, negligent drivers. Nor are allegedly negligent drivers “disadvantaged” by their inability to invoke the nontolling-of-minor-claims provision in conjunction with a statute of limitations defense that negligent health care providers can invoke.⁵ Thus, under art. I, §12 jurisprudence, RCW 4.16.190(2) does not confer “favoritism or special treatment,” or an “advantage,” on negligent health care providers to the “disadvantage” of other kinds of alleged tortfeasors.⁶

WSAJF’s art. I, §12 argument thus reduces to a public policy argument. Whether tolling of causes of action due to minority or for other reasons is good public policy may be debatable, the legislative decision to toll is constitutionally permissible, not mandatory. Because a “privilege or

⁵ Nor do persons claiming injury due to medical negligence compete for opportunities to sue, or for justice, or for anything else with persons claiming injury due to other kinds of negligence, so as to render persons injured by medical negligence “disadvantaged” within the meaning of art. I, §12 jurisprudence simply because RCW 4.16.190(2) applies to injury claims based on medical negligence, but not to injury claims based on other kinds of alleged negligence.

⁶ Nor, within the meaning of *Grant County*, does it confer on victims of other kinds of alleged torts “special” treatment to the “disadvantage” of minors claiming injury due to medical malpractice.

immunity” is not implicated, Equal Protection analysis applies. WSAJF offers no equal protection level-of-scrutiny or rationality arguments calling for an answer by respondents.

II. THE COURT SHOULD DECLINE TO CONSIDER WSAJF’S SEPARATE ART. I, §10 ARGUMENT.

Schroeder’s constitutional challenge to RCW 4.16.190(2), the non-tolling statute for medical malpractice lawsuits, is based exclusively on art. I, §12.⁷ WSAJF mostly offers a challenge to RCW 4.16.190(2) based on art. I, §10.

RAP 12.1(a) provides that “[e]xcept as provided in section (b), the appellate court will decide a case only on the basis of issues set forth *by the parties* in their briefs [italics added].”⁸ The Court rarely considers arguments raised only by *amici*, including constitutional arguments offered by *amici* but not made by the parties with whom they side. *State*

⁷ Schroeder invokes the term “access to courts” only in arguing that “strict” scrutiny applies for purposes of art. I, §12 and Equal Protection analysis. WSAJF apparently thinks Schroeder made a mistake by not advancing a separate “access to courts” argument, and argues that RCW 4.16.190(2) violates art. I, §12 because art. I, §10 makes a “right of access to courts” a “fundamental” right. *WSAJF Br. at 18-20*. But that argument assumes that art. I, §10 creates a constitutional right of “access to courts” that prohibits the legislature from repealing statutes of limitation or adjusting their application by tolling or not tolling. If art. I, §10 does create a right that broad, then analysis under art. I, §12 is unnecessary, as art. I, §10 then becomes a constitutional superclause that swallows art. I, §12 and probably other sections of the state constitution. For the reasons explained in part III below, if the Court considers WSAJF’s art. I, §10 argument at all, it should reject it.

⁸ RAP 12.1(b) relates to issues not briefed by the parties, but raised *by the court*: “If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.”

v. *Clarke*, 156 Wn.2d 880, 894, 134 P.3d 188 (2006), *cert. denied*, 552 U.S. 885 (2007); *Rabon v. City of Seattle*, 135 Wn.2d 278, 291 n.4, 957 P.2d 621 (1998).⁹ Accordingly, the Court should decline to consider WSAJF's art. I, §10 argument.¹⁰

III. IF THE COURT CONSIDERS WSAJF'S SEPARATE ART. I, §10 ARGUMENT, IT SHOULD REJECT IT.

If the Court considers WSAJF's art. I, §10 argument, the Court not only should reject it, but also should take the opportunity to (a) clarify that the Court's "access to courts" holding in *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009), was grounded specifically and narrowly in a right to pursue civil discovery, and (b) disavow any notion that *Putman* recognizes a free-floating constitutional "right of access to courts" that is not grounded in the actual text of art. I, §10 and that requires the invalidation of statutes that impose what the Court finds to be an "undue burden" on the successful pursuit of tort claims.

⁹ See also *State v. Taylor*, 150 Wn.2d 599, 607, 80 P.3d 605 (2003); *Washington State Republican Party v. Washington State Pub. Discl. Comm'n*, 141 Wn.2d 245, 255 n.2, 4 P.3d 808 (2000); *Am. Home Assur. Co. v. Cohen*, 124 Wn.2d 865, 878, 881 P.2d 1001 (1994); and *Schuster v. Schuster*, 90 Wn.2d 626, 585 P.2d 130 (1978).

¹⁰ In a footnote, WSAJF suggests that the Court should address its art. I, §10 argument as "necessary to reach a proper decision," citing *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 843 P.2d 1056 (1993). *WSAJF Br. at 5, fn. 6*. In *Harris*, *amicus* did not offer a state constitutional argument. The court departed from its usual practice of ignoring new *amicus* arguments because "numerous similar cases [challenging the validity of the statute at issue, RCW 51.32.225] are currently pending." *Harris*, 120 Wn.2d at 468.

1. A textual source for a state constitutional “right of access to courts” remains elusive.

WSAJF infers from *Putman* that the source of the “right of access to courts” is Const. art. I, §10. That section provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” Even supposing that *Putman* discerned a “right of access to court” in art. I, §10 that makes it unconstitutional to deprive a plaintiff of a chance to engage in discovery, it hardly follows that art. I, §10 limits the legislature’s long-recognized plenary power to prescribe and adjust statutes of limitation. WSAJF nonetheless offers three routes this Court can take to navigate from art. I, §10 to a conclusion that RCW 4.16.190(2) is unconstitutional: (1) agree with WSAJF that the nontolling statute is “different but analogous” to the statute (RCW 7.70.150) that *Putman* held violated the fundamental right to pursue discovery; (2) accord constitutional significance to the historical fact that tolling due to minority has been a fact of legal life in Washington since Territorial days; and/or (3) proclaim it unfair *not* to toll tort claims on account of minority because parents have no legal duty to sue on behalf of an injured child and cannot be counted on to do so. None of these three routes, however, link the text of art. I, §10 in a satisfactory way to a conclusion that RCW 4.16.190(2) is unconstitutional rather than of debatable merit as a matter of public policy.

2. RCW 4.16.190(2) is not “analogous” to the statute that *Putman* held unconstitutional.

RCW 4.16.190(2) and RCW 7.70.150, the certificate of merit statute held unconstitutional in *Putman*, have nothing in common except that both are statutes that, when enforced in a proper case, could prompt the dismissal of a medical malpractice lawsuit. RCW 7.70.150 required a plaintiff to have a medical expert’s sworn certificate that the plaintiff’s case has merit already in hand when filing suit. RCW 4.16.190(2) imposes no such or any “analogous” requirement. RCW 7.70.150 was held unconstitutional in *Putman* as a denial of “access to courts” because it required the plaintiff to have gathered enough evidence to enable a qualified medical expert to swear the case was probably meritorious without the plaintiff having had any opportunity for discovery under the Civil Rules.¹¹

RCW 4.16.190(2) has nothing to do with what evidence the plaintiff has, or must have, when filing suit. Nor does RCW 4.16.190(2) affect a plaintiff’s opportunity to engage in discovery. The two statutes are indeed different. They are not analogous.

¹¹ RCW 7.70.150 was also invalidated on separation-of-powers grounds because it conflicts with CR 8. Neither Schroeder nor WSAJF argues that RCW 4.16.190(2) conflicts with a civil rule.

3. WSAJF's reliance on history is not persuasive.

WSAJF quotes statements from two 39-year-old decisions, *Hunter v. North Mason Sch. Dist.*, 12 Wn. App. 304, 529 P.2d 898 (1974), *aff'd on other grounds*, 85 Wn.2d 810 (1975), and *Cook v. State*, 83 Wn.2d 599, 605, 521 P.2d 725 (1974), for the “sensibilit[y]” that minors should, in fairness, be protected by tolling of statutes of limitation. *WSAJF Br. at 13-14*. Both decisions gave effect to the *legislative* policy determination, expressed in RCW 4.16.190 – as it was worded prior to the 2006 amendment that added subsection (2) – that the statute of limitations *should* be tolled during minority.¹²

Const. art. XXVII, §2, provides that “[a]ll laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature.” Because the Constitution does not create a right to tolling of statutes of limitation due to minority, and because a tolling statute in effect as of 1889 was not *repugnant to the Constitution*, such a statute was one that could remain “in force until ...

¹² To the extent that WSAJF complains that it is unfair for three-years-after-the-negligent-act-or-omission limitations period to expire before an injured person even knows he or she has a claim, that can happen not only to minors but to adults as well. RCW 4.16.350(3) thus provides for an alternative within-one-year-after-discovery limitations period. The one-year period applicable to Schroeder's claim began to run two months before he turned 18 because of the imputation provision in RCW 4.16.350(3), the constitutionality of which neither Schroeder nor WSAJF has challenged.

altered or repealed by the legislature,” whether in 1890 or in 2006, when the legislature did alter the tolling statute.

4. New adults do not have a constitutional right to undo decisions, even if mistaken and even if made deliberately or by default, that their parents made for them while they were children.

Even if the “right of access to courts” comes from art. I, §10, that begs the question of how those words support a right not to have the statute of limitations begin to run before an injured person turns eighteen. The Court’s decisions recognize that Schroeder’s right to tolling of the statute of limitations while he was a minor was one subject to legislature largesse. The Court stated unequivocally in *Schlarb v. Castaing*, 50 Wash. 331, 338, 97 P. 289 (1908), that it is “indisputable” that the legislature has the power to enact statutes of limitation that run against minors. And, eighty-nine years later, in *Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997), the Court stated that “[i]f the Legislature dislikes the impact of the [tolling] statute as it enacted it, the Legislature, *and not this court*, has the responsibility to change it [emphasis added].”¹³ That neither *Duke* nor *Schlarb* involved an art. I, §12 challenge to a tolling

¹³ See also *Condo Ass’n v. Apartment Sales Corp.*, 144 Wn.2d 570, 582, 29 P.3d 1249 (2001) (“We adopt the view of the Supreme Court of Oregon that ‘[i]t has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest’”) (quoting *Josephs v. Burns*, 491 P.2d 203, 207-08 (Or. 1971)).

statute hardly weakens the force of either statement. The Court would have to repudiate both statements and declare the judiciary to have the plenary power formerly recognized as legislative in order to hold RCW 4.16.190(2) unconstitutional.

The imputation-of-knowledge provision in RCW 4.16.350(3) (which neither Schroeder nor WSAJF argues is unconstitutional) may not impose on parents a duty to assert claims on their children's behalf *per se*, but that does not mean a parent's nonassertion of a claim for a minor cannot work a waiver of the claim. A waiver of a right does not need a matching legal duty; it only need be coupled with an opportunity to exercise the right. Parents do not have a duty to sign their sons up for Cub Scouts, but if a parent declines the opportunity to do so before a boy turns 11, that opportunity is waived and lost. The parental caricature – “ignorant, lethargic, or [un]concern[ed]” – offered in the 1983 Texas decision that WSAJF quotes, *WSAJF Br. at 14*, should not affect review of RCW 4.16.190(2) under the Washington constitution. There is no empirical evidence of record to suggest that parents who do not sue on their injured child's behalf fail to do so because of ignorance or lethargy rather than because of making an informed decision not to sue. Rather, and as even this Court's discretionary case load demonstrates, many parents with injured children do timely avail themselves of their opportun-

ity to sue because of the injury. WSAJF would have this Court toll the medical malpractice statute of limitations as a matter of constitutional right as to claims of any person injured while a minor, even if the minor's parents decided not to sue after consulting every personal injury lawyer and medical expert in the state. How that is even fair – much less constitutionally required – is something WSAJF does not explain.

Nothing in the text of art. I, §10 overrides the settled recognition that there is no *constitutional* right to be afforded at least twelve months or more time after turning eighteen in which to assert a tort claim that a parent did not assert while one was a minor.

5. WSAJF proposes a “right of access to courts” under which the Court could declare a statute unconstitutional based on nothing more than a “we know it when we see it” standard.

WSAJF's “access to courts” argument really is independent of the art. I, §10 mandate that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” All WSAJF is offering is a pretext for invalidating whatever statutes a majority of the Court may find “unduly burden[s] meaningful access to courts for victims of [torts],” *WSAJF Br. at 12*. “Access to courts” surely does not mean a right not to have one's lawsuit or claim dismissed. If it does, then all sorts of statutes and even court rules – CRs 5, 17(a), 19 and 56, to name several – would be rendered unconstitutional. Under the constitution, there is no judicial power to

discern “undue burdens” that trump the legislature’s power to make public policy choices, even when the choices are debatable or controversial. If this Court considers WSAJF’s art. I, §10 argument at all, it should reject the argument and take the opportunity to disclaim any finding of a “right of access” to courts in art. I, §10 that makes the constitutionality of statutes of limitation and nontolling statutes, or other statutes that may provide tort defendants with bases for seeking dismissal of lawsuits, depend on what the Court considers to be the relative strengths of fairness arguments that proponents muster on the one hand and that opponents present but dress up as “access to courts” arguments on the other.

IV. CONCLUSION

Schroeder, even with the aid of WSAJF’s supporting amicus brief, has failed to show beyond a reasonable doubt that RCW 4.16.190(2) violates our state constitution. This Court should affirm the trial court’s dismissal of his complaint.

RESPECTFULLY SUBMITTED this 3rd day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 3rd day of May, 2013, I caused a true and correct copy of the foregoing document, "Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation," to be delivered in the manner indicated below to the following counsel of record:

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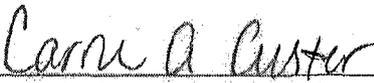
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Subject: Schroeder v. Weighall / Supreme Court No. 87207-4

Dear Clerk of Court,

Attached for filing in .pdf format is the Respondents Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation in *Schroeder v. Weighall*, Supreme Court Cause No. 87207-4. The attorney filing this brief is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com.

Respectfully submitted,

Carrie A. Custer

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