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

CLERK

WASHINGTON STATE SUPREME COURT

JARYD SCHROEDER,

APPELLANT,
Plaintiff-Petitioner,

vs.

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

Defendants-Respondent.

APPELLANT
BRIEF FOR PETITIONER

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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.

Wash. Const. art. I, § 32:

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

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. ISSUES/ASSIGNMENT OF ERROR

- A. APPLICATION OF RCW 4.16.190(2) TO MR. SCHROEDER'S CLAIM VIOLATED THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE WASHINGTON STATE CONSTITUTION.
- B. APPLICATION OF RCW 4.16.190(2) TO MR. SCHROEDER'S CLAIM VIOLATED THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

II. STATEMENT OF THE CASE

A. NEGLIGENCE CLAIM

Appellant, Jaryd Schroeder ("Mr. Schroeder"), was born on January 14, 1992. (CP 1)¹. On May 22, 2001, at the age of nine years old, Mr. Schroeder presented to Kadlec Regional Medical Center ("KRMC") for an MRI². (CP 2, 18). Mr. Schroeder suffered from headaches, nausea, dizziness, weakness in his legs and double vision. (CP 2, 18). Mr. Schroeder's mother, Tobi Schroeder ("Ms. Schroeder"), transported Mr. Schroeder to KRMC and was present for all the events relevant in this matter. (CP 18).

On May 22, 2001, Dr. Steven Weighall ("Dr. Weighall") was employed by KRMC as a radiologist. (CP 2). Dr. Weighall was responsible for Mr. Schroeder's diagnosis. (CP 2, 18). After reviewing

¹"CP" refers to Clerk's Papers.

²MRI stands for "magnetic resonance imaging." It is a technique that uses a magnetic field and radio waves to create detailed images of the organs and tissues within your body. Mayo Clinic, Section on Tests and Procedures, 1998-2002, available at <http://www.mayoclinic.com/health/mri/MY00227>, (last visited May 30, 2011).

Mr. Schroeder's MRI, Dr. Weighall concluded "normal MRI of [the] head." (CP 2). This conclusion was relayed to the Schroeder's. (CP 2, 18).

On November 19, 2009, Mr. Schroeder, at the age of seventeen years old, presented at KRMC for a second MRI. (CP 2, 18-19). Mr. Schroeder suffered from headaches, nausea, dizziness, weakness in his legs and double vision. (CP 3). These were the same ailments reported to Dr. Weigall prior to Mr. Schroeder's 2001 MRI. (CP 2-3). As a result of the second MRI, Mr. Schroeder was diagnosed with Arnold-Chiari Type 1 Malformation³. (CP 3, 18). The radiologist concluded, "[i]n retrospect, this finding is present on the prior MRI exam of 5/22/2001 and appears unchanged." (CP 2, 18-19). These findings were explained to the Schroeder's. (CP 18-19). This was the first time the Schroeder family became aware of the Arnold-Chiari Type 1 Malformation diagnosis. (CP 2, 19).

On January 14, 2010, Mr. Schroeder turned eighteen years old. (CP1). On January 13, 2011, Mr. Schroeder filed a medical malpractice

³Arnold-Chiari Type 1 Malformation is a condition in which brain tissue protrudes into your spinal canal. It occurs when part of your skull is abnormally small or misshapen, pressing on your brain and forcing it downward. Mayo Clinic, Section on Tests and Procedures, 1998-2002, available at <http://www.mayoclinic.com/health/chiari-malformation/DS00839>, (last visited May 30, 2011).

naming KRMC, Columbia Basin Imaging, P.C., and Dr. Steven Weighall as defendants. (CP 1).

B. 2006 LEGISLATION

Prior to June 2006, RCW 4.16.190 tolled the statute of limitations in any civil action involving a minor plaintiff until the minor reached the age of majority. *See* RCW 4.16.190 (amended 2006). It read, in pertinent part:

If a person entitled to bring an action mentioned in this chapter...be it the time of the cause of action occurred either be under the age of eighteen years, or incompetent or disabled...the time of such disability shall not be part of the time limited for the commencement of action.

RCW 4.16.190 (amended 2006). The statute consisted of this one section and applied equally to all claims involving minors and incompetent/disabled adults. *See Id.*

On June 7, 2006, the Washington State legislature enacted Second Substitute House Bill (“SSHB”) 2292. Final B. Rep. on Second Substitute H.B. 2292, at 8, 59th Leg., Reg. Sess. (Wash. 2006). The legislation reflected significant changes to RCW 4.16.190.

RCW 4.16.190 was split into two separate and distinct subsections. *See* RCW 4.16.190. It now reads, in pertinent part:

(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 4.16.190 (italics added). The addition of subsection (2) eliminated tolling in medical malpractice claims with respect to minors. *See LAWS* of 2006, ch. 8, § 303. No other claims were excluded from the traditional tolling safe-harbor of RCW 4.16.190(1) and the exclusion of medical malpractice claims was not made applicable to incompetent/disabled adults. *See RCW 4.16.190(2)*. As a result, medical malpractice claims involving minor plaintiffs are subjected to the statute of limitations and repose provided in RCW 4.16.350(3), including a one year statute of limitations which accrues at the time a parent/guardian discovers or should reasonably have discovered an injury was caused by the act or omission of a licensed health care provider. RCW 4.16.350(3).

RCW 4.16.190(2) was adopted as part of a much larger Senate House Bill, titled Medical Malpractice—Patient Safety—Health Care Liability Reform. Final B. Rep. on Second Substitute H.B. 2292, at 8, 59th

Leg., Reg. Sess. (Wash. 2006). The preamble of SSHB 2292 states, in pertinent part:

It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums. Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes. It is also the legislature's intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. Finally, it is the intent of the legislature to provide the insurance commissioner with the tools and information necessary to regulate medical malpractice insurance rates and policies so that they are fair to both the insurers and the insured.

See LAWS of 2006, ch. 8, § 1 (italics added). This portion of the preamble specifically states that the intent of SSHB 2292 was to prioritize patient safety, prevent medical errors, and address the problem of high medical insurance premiums. *See Id.*

RCW 4.16.190(2) was enacted in subsection III, titled Health Care Liability Reform. *See* LAWS of 2006, ch. 8, § 301-316. Section III contains a brief rationale underlying the re-enactment of an eight year statute of repose in medical practice claims pursuant to this Court's decision in *DeYoung v. Providence Medical Center*, in which a previous version of the statute of repose was struck down as unconstitutional. LAWS of 2006, ch. 8, § 301; 136 Wash.2d 136, 150, 960 P.2d 919 (1998).

Thus, it has to be assumed that RCW4.16.190(2) was adopted under the shadow of the government purposes enumerated in the preamble.

C. TRIAL COURT PROCEEDINGS

On January 13, 2011, Mr. Schroeder filed a medical malpractice claim naming KRMC, Columbia Basin Imaging, P.C., and Dr. Weighall as defendants. (CP 1). On April 27, 2011, the parties agreed to stay proceedings, pending this Court's decision in *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011). (CP 15-17). In *Unruh*, this Court did not address the constitutionality of the non-tolling amendment of RCW 4.16.190(2) as it applies to RCW 4.16.350(3), specifically with regards to the imputation of knowledge onto a minor in the absence of tolling. See *Unruh*, 172 Wash.2d 98. The stay was lifted and the parties proceeded to trial. (CP 17). KRMC was dismissed from the claim by agreement of the parties. (CP 20-22).

Subsequently, Dr. Weighall and Columbia Basin Imaging, P.C. moved for summary judgment. (CP 23). Defendants' argued Mr. Schroeder's claim was barred based on a strict application of RCW 4.16.190(2) and RCW 4.16.350(3). The trial court granted summary judgment in favor of Dr. Weighall and Columbia Basin Imaging, P.C., and dismissed Mr. Schroeder's claim. (CP 23).

D. TIMELINE

For purposes of this Court’s analysis, the following dates are relevant:

May 22, 2001	Mr. Schroeder has MRI at KRMC. Dr. Weighall concludes “normal MRI of Head.” (CP 2, 18-19).
June 7, 2006	Legislature (1) re-enacts the eight-year medical malpractice statute of repose, and (2) amends RCW 4.16.190 to eliminate tolling for minors in medical malpractice cases.
November 19, 2009	Mr. Shroeder has second MRI at KRMC. Mr. Schroeder is diagnosed with Arnold Shiari Type 1 Malformation. (CP 2, 18).
January 14, 2010	Mr. Schroeder turns 18. (CP 1).
January 13, 2011	Mr. Schroder files a claim against KRMC, Columbia Basin Imaging, P.C., and Dr. Weighall. (CP 1).

III. ARGUMENT

A. APPLICATION OF RCW 4.16.190(2) TO MR. SCHROEDER’S CLAIM VIOLATED ARTICLE I, SECTION 12 OF THE WASHINGTON STATE CONSTITUTION.

The privileges and immunities clause of the Washington State Constitution warrants separate and independent analysis from its federal counter part, the equal protection clause of the United States Constitution. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150

Wash.2d 791, 811, 83 P.3d 419 (2004); *Madison v. State*, 161 Wash.2d 85, 94, 163 P.3d 757 (2007). This distinction is based on the greater protection afforded to Washington citizens through article I, section 12, with respect to the inherent right of each system to access the court system. *See* Wash. Const.art I. § 10.

Washington law clearly establishes the right to access justice through the courts as an inherent fundamental right. *Putnam v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (Madsen, J., concurring) (“I do not dispute that there is right to access to courts inherent in article I, section 10 of the Washington State Constitution.”). RCW 4.16.190(2), as applied, directly infringed upon a Mr. Schroeder’s fundamental right to access the courts. Accordingly, RCW 4.16.190(2) must be subject to strict scrutiny review, and may only be upheld if its purpose is necessary to achieve a compelling government interest. *State v. Coria*, 120 Wash.2d 156, 170, 839 P.2d 890 (1992) (citing *State v. Schaaf*, 109 Wash.2d 1, 17, 743 P.2d 240 (1987)).

1. Standard of Review.

Mr. Schroeder argues RCW 4.16.190(2) violates the privileges and immunities clause of the Washington State Constitution. This Court reviews the constitutionality of a statute *de novo*. *Putnam*, 166 Wn.2d at

979. Accordingly, this Court must review the constitutionality of RCW 4.16.190(2) *de novo*.

2. Article I, Section 12, of the Washington State Constitution Must be Analyzed Separate and Independent from the Equal Protection Clause of the United States Constitution.

Determining whether a provision of the Washington State Constitution affords greater protection than its federal counterpart, and is therefore entitled to independent analysis is a three part inquiry. See *Madison*, 161 Wash.2d at 93. A separate and independent analysis is appropriate when a provision of the Washington State Constitution: (1) warrants an interpretation independent from that given to the corresponding federal constitution pursuant to *State v. Gunwall*; (2) extends greater protection than its federal counterpart; and (3) the statute at issue involves a positive grant of favoritism to a special class. See *Id.* at 93-94.

This Court has previously held that article I, section 12 of the Washington State Constitution must be analyzed separate and independent of the equal protection clause. *Grant County Fire Protection Dist. No. 5*, 150 Wash.2d at 81. This decision was reached after an in-depth examination of the *Gunwall* factors. See *Id.* at 805-811. And, once the *Gunwall* test has been satisfied it is unnecessary to engage in subsequent

analyses to “re-justify” that proposition. *Madison*, 161 Wash.2d at 94.

Thus, this Court analysis must focus on the remaining two inquiries.

a. Article I, Section 12 of the Washington State Constitution Affords Greater Protection of the Right to Access Courts than the Equal Protection Clause of the United States Constitution.

Independent review is only necessary if a provision of the Washington State Constitution affords greater protection than its federal counterpart. *Id.* at 93. To determine whether a state constitutional provision affords greater protections, a reviewing court should consider the language of the provision, its relationship to other constitutional provisions, the existing and preceding statutory and common law at the time the provision is adopted, and other historical context. *Id.* at 94. Here, the greater protections afforded through the article I, section 12, are gleaned from a review of Washington’s constitutional landscape.

Article I, section 10 is significant. Section 10 mandates that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” Wash.Const. art. I, § 10. This constitutional provision inherently guarantees the right of every citizen to access justice through the courts. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780-81, 819 P.2d 370(1991) (“In the course of administering justice the courts protect those rights and enforce those obligations.”). There is no

federal constitutional provision that affords the same right. The creation of article I, section 10, and the absence of a similar federal provision, indicates that the framers of the Washington Constitution intended to specifically designate the right to access justice beyond any supposed protections offered by the United State Constitution.

A review of the Washington constitutional landscape highlights is also insightful. Article I, titled “Declaration of Rights,” catalogues all the rights guaranteed to the citizens of Washington State. *See* Wash. Const. art. I; *John Doe*, 117 Wn.2d at 781. The framers placed such great importance upon these rights they provided: “[a] frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” Wash. Const. art. I, § 32. Thus, it must be concluded that the framers of the Washington Constitution intended to afford broader protection to the right of Washington citizens to access the courts, by expressly labeling it a fundamental right. The second inquiry of this Court is therefore satisfied.

b. RCW 4.16.190(2) Grants Favoritism to Licensed Health Care Providers, Employers of Health Care Providers, and Medical Malpractice Insurance Companies.

The final inquiry of this Court is to determine whether the statute at issue involves a positive grant of favoritism. *Grant County Fire*

Protection Dist. No. 5, 150 Wash.2d at 812; *Madison*, 161 Wash.2d at 96.

This analysis is based on the different aims underlying the Federal and the state constitution.

In *Grant County II*, we explained that the text of the federal constitution “is concerned with majoritarian threats of invidious discrimination against nonmajorities,” while the state constitution “*protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.*”

Madison, 161 Wash.2d at 97 (quoting *Grant County Fire Protection Dist. No. 5*, 150 Wash.2d at 806-07) (italics added). The additional analysis “reflects, in part, our framers’ concerns with undue political influence exercised by those with large concentrations of wealth and avoiding favoritism toward the wealthy.” *Id.* (quoting *Grant County Fire Protection Dist. No. 5*, 150 Wash.2d at 808) (internal quotations omitted).

RCW 4.16.190(2) favors licensed health care providers, employers of licensed health care providers, and medical malpractice insurance providers. *See* RCW 4.16.350(1). RCW 4.19.190(2) eliminates tolling for minors only in medical malpractice claims. No other types of claims are excluded from the general tolling provision of RCW 4.16.190(1). Any other claim pursued by a minor, against any other defendant, would be subject to tolling provision of RCW 4.16.190(1). For example, a minor who has a potential negligence claim for injuries suffered as a result of a car accident will have their claim tolled until they reach majority pursuant

to RCW 4.16.190(1), and the defendant will be forced to defend a claim. *See* RCW 4.16.190(1). But, a licensed health care professional who commits medical malpractice during the subsequent treatment of that minor will not be forced to defend upon the minor reaching majority. *See* RCW 4.16.190(2). In essence, RCW 4.16.190(2) holds licensed health care providers to a lower standard of liability than any other defendant. It can only be concluded that RCW 4.16.190(2) was intended to favor those who would possibly be named as defendants in medical malpractice claims—licensed health care providers, employers of licensed health care providers, and medical malpractice insurance providers. These parties represent a small class of persons and corporations with considerable economic and political clout. This is exactly the type of favoritism the framers intended to prevent by creating the privileges and immunities clause. *See Madison*, 161 Wash.2d 97. Thus, the final inquiry of this Court is satisfied, and RCW 4.16.190(2) must be subject to independent analysis under the privileges and immunities clause.

3. RCW 4.16.190(2), as Applied, Violates Washington State Citizens' Fundamental Right to Access the Courts Guaranteed by the Privileges and Immunities Clause of the Washington State Constitution.

As a threshold matter, this Court must determine whether the alleged constitutional right at issue is a “privilege” within the meaning of

article I, section 12. *See Madison*, 161 Wash.2d at 95. Privileges are “those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship.” *Grant County Fire Protection Dist. No. 5*, 150 Wash.2d at 813 (internal quotations omitted). Hence, the protections of the privilege and immunities clause are triggered if the right to access the courts is determined to be a fundamental right of Washington citizens.

The fundamental nature of the right to access courts is undisputedly sewn into Washington’s constitutional landscape. Article I, titled “Declaration of Rights,” catalogues all the rights guaranteed to the citizens of Washington State. *See Wash. Const. art. I; John Doe*, 117 Wn.2d at 780-81. Article I, section 10, and its inherent protection of the right to access the courts, was adopted as one of the top ten most important rights of Washington citizens. Moreover, the inclusion of article § 32 denotes that a “frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” Wash. Const. art. I, § 32. There can be no stronger indication that the right to access the courts is a fundamental right that is “essential” to Washington citizens.

Washington case law supports the designation of the right to access courts as fundamental. For example, in *John Doe v. Puget Sound Blood*

Ctr., this Court was tasked with determining whether a trial court properly exercised its discretion under CR 26(c) by identifying and weighing the interests of each party that might require confidential disclosure. 117 Wn.2d at 780. This Court bluntly stated, the “[p]laintiff has a right to access the courts.” *Doe*, 117 Wn.2d 780. As a basis for this conclusion, this Court pointed directly to the protections afforded under the Washington State Constitution:

Our constitution mandates that “[j]ustice in all cases shall be administered openly, and without unnecessary delay. Const. art.1, § 10. That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the *bedrock foundation* upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations. Indeed, the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights. Const. art.1, § 1. Const. art. 1, §§ 1–31 catalog those fundamental rights of our citizens.

The drafters of our constitution placed such great importance upon rights that they provided: “A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” Const. art.1, § 32.

Id. at 780-81 (emphasis added). In short, the Court’s decision recognizes the right to access the justice, through the courts, as a fundamental right guaranteed by the Washington State Constitution. *Id.* These same sentiments were echoed in *Putnam*. 166 Wn.2d 974. In *Putnam*, RCW 7.70.150, which required medical malpractice plaintiffs to submit a

certificate prior to discovery, was struck down as unconstitutional because it hindered the right of plaintiffs to access the courts. 166 Wn.2d at 979. This Court held, “[t]he people have a right of access to courts; indeed, it is the bedrock foundation upon which rest all the people's rights and obligations.” *Id.* (internal quotations omitted). It should be noted that this Court prefaced the above holding by quoting *Marbury v. Madison*:

The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

5 U.S. (1 Cranch) 137, 163, 2 L.Ed.60 (1803). Thus, the right to access the courts must be expressly designated as a fundamental right guaranteed to the citizens of Washington protected by the privileges and immunities clause.

a. RCW 4.16.190(2) Must be Subjected to Strict Scrutiny Because it Infringes Upon the Fundamental Right of Washington Citizens to Access the Court.

Constitutional analysis pursuant to the privileges and immunities clause requires a determination of the applicable standard of review. *See DeYoung*, 136 Wash.2d at 141. There are three distinct standards of review that may be applied, depending on the nature of the interest affected or the characteristics of the class created by a statute. *State v. Shawn P.*, 122 Wash.2d 553, 560, 859 P.2d 1220 (1993). The highest

level of review, strict scrutiny, applies when the alleged discriminatory legislation affects a suspect class or threatens a fundamental right. *Id.* An intermediate standard of review, or heightened scrutiny, is applied in limited circumstances where strict scrutiny is not mandated, but where an important right or semi-suspect class has been affected. *Id.* Minimal scrutiny, commonly known as rational basis review, is applied in all cases that do not warrant a higher level of scrutiny. *Id.* As explained in more detail above, the right to access the courts must be deemed a “privilege” before it triggers a privileges and immunities analysis. *Grant County Fire Protection Dist. No. 5*, 150 Wash.2d at 813. This standard equates a “privilege” with a fundamental right. *Id.* Therefore, the logical standard of review is strict scrutiny.

The fundamental nature of the right to access courts is undisputedly sewn into Washington’s constitutional landscape. Article I catalogues all rights guaranteed to the citizens of Washington State. *See* Wash. Const. art. I; *John Doe*, 117 Wn.2d at 780-81. Article I, section 10, inherently protects the right of Washington citizens to access the courts. *Putnam*. 166 Wn.2d 974 (Madsen, J., concurring) (“I do not dispute that there is right to access to courts inherent in article I, section 10 of the Washington State Constitution.”). Article I, section 32 denotes that a “frequent recurrence to fundamental principles is essential to the security

of individual right and the perpetuity of free government.” Wash. Const. art. I, § 32. Thus, article I, section 10 inherently guarantees the fundamental right of each Washington citizen to access the courts.

Washington case law supports the designation of the right to access courts as fundamental. For example, in *John Doe*, 117 Wn.2d at 780-81, This Court bluntly stated: “[p]laintiff has a right to access the courts.” *Doe*, 117 Wn.2d 780. The Court went on to opine:

Our constitution mandates that “[j]ustice in all cases shall be administered openly, and without unnecessary delay. Const. art.1, § 10. That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the *bedrock foundation* upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations. Indeed, the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights. Const. art.1, § 1. Const. art. 1, §§ 1–31 catalog those fundamental rights of our citizens.

The drafters of our constitution placed such great importance upon rights that they provided: “A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” Const. art.1, § 32.

Id. at 780-81(emphasis added). In short, the Court’s decision recognizes the right to access the justice, through the courts, as a fundamental right guaranteed by the Washington State Constitution. These same sentiments were echoed in *Putnam*. 166 Wn.2d 974. In *Putnam*, RCW 7.70.150, which required medical malpractice plaintiffs to submit a certificate prior

to discovery, was struck down as unconstitutional because it hindered the right of plaintiffs to access the courts. 166 Wn.2d at 979. This Court held, “[t]he people have a right of access to courts; indeed, it is the bedrock foundation upon which rest all the people's rights and obligations.” *Id.* (internal quotations omitted). Accordingly, the right to of all Washington citizens, including minors, to access the courts is a fundamental right that should not be degraded by the adoption of a statute unless it can survive strict scrutiny. RCW 4.16.190(2) must be analyzed be analyzed in accordance with this principle.

b. RCW 4.16.190(2), As Applied, Unconstitutionally Infringed Upon Mr. Schroeder’s Ability to Access Courts.

Under strict scrutiny review, a statute will only be upheld if the state has a compelling purpose and the statute is necessary to accomplish that purpose. *Coria*, 120 Wash.2d at 170 (1992) (citing *Schaaf*, 109 Wash.2d at 17).

The constitutionality of a statute may be challenged as (1) facially invalid, or (2) invalid as applied. *City of Redmond v. Moore*, 151 Wash.2d 664, 668-69, 91 P.3d 875(2004). An “as-applied” challenge of a statute is characterized by a party’s allegation that application of the statute in the specific context of the party’s actions is unconstitutional. *Id.* at 669. If a statute is held unconstitutional it prohibits future application of the rule in

a similar context, but the statute is not totally invalidated. *Id.* A statute is presumed constitutional and the burden is on the party challenging the statute to prove the statute is unconstitutional beyond all reasonable doubt. *Id.* Thus, the Court's analysis must begin by looking at the particular context in which RCW 4.16.190(2) was unconstitutionally applied to Mr. Schroeder.

The application of RCW 4.16.190(2) violated Mr. Schroeder's right to access the courts and seek redress for injuries he suffered as a minor. RCW 4.16.190(2) prevented Mr. Schroeder's claim from being tolled during his minority. Rather, RCW 4.16.190(2) subjected Mr. Schroeder's claim to the statutes of limitation contained in RCW 4.16.350(3). As a result, RCW 4.16.350(3) imputed parental knowledge of a potential medical malpractice claim onto Mr. Schroeder at the age of seventeen, and triggered a one year statute of limitations. *See* RCW 4.16.350(3); (CP 1,18-19). Once Mr. Schroeder reached the age of majority the statute of limitations had been running for two months, and he had a mere ten months remaining to discover and file a claim. (CP 1). Mr. Schroeder filed a medical malpractice claim on January 13, 2011; two months after the statute of limitations had extinguished. (CP 1). Had Mr. Schroeder's claim been preserved until Mr. Schroeder reached the age of majority, his claim would have been timely filed within the one year

statute of limitation. The application of RCW 4.16.190(2) infringed upon Mr. Schroder's rights guaranteed by the privileges and immunities clause of the Washington State Constitution. This is the type of application of RCW 4.16.190(2) that must be prohibited in the future.

Washington law stresses that, when possible, statutes must be read in a manner that avoids any issues of constitutionality. *Gilbert v. Sacred Heart Medical Center*, 127 Wash.2d 370, 375, 900 P.2d 552 (1995). This Court's decision in *Gilbert* is instructive on this point. In *Gilbert*, Larry and Cynthia Gilbert, brought a claim on behalf of their minor daughter, Laura, for injuries she suffered during delivery as a result of the hospital's negligence. 127 Wash.2d at 373. Laura's injuries were discovered in 1978, when Laura was diagnosed with cerebral palsy, but the Gilberts' did not claim file a claim against Sacred Heart Medical Center until 1992. *Id.* 372-73. Citing amended RCW4.16.350(3), the trial court dismissed the Gilberts' claim, holding that the Gilberts' knowledge of their daughter's potential claim was imputed to their daughter, thereby triggering a one year statute of limitations. RCW 4.16.350(3); 127 Wash.2d at 374. This would have required the Gilberts to file a claim by November 1979 to satisfy the statute. The Gilberts' appealed directly to this Court, arguing that their claim was not time barred because their daughter's claim was tolled until their daughter reached the age of majority, pursuant to RCW

4.16.190. *Id.* Moreover, the Gilberts argued that if the tolling granted by RCW 4.16.190 was implicitly repealed by the parental imputation of parental knowledge provision of RCW 4.16.350(3), it unconstitutionally deprived their daughter of her right to seek legal redress. *Id.* at 373.

This Court held that RCW 4.16.350(3) did not “expressly repeal the operation of the tolling statute, RCW 4.16.190, when it imputed parental knowledge to minors in its 1986 and 1987 amendments to RCW 4.16.350.” *Id.* at 375. In reaching its decision, the Court was able to harmonize the two statutes.

When read in harmony with the tolling statute, the limitations periods of RCW 4.16.350 are tolled until a minor reaches the age of majority, whereupon that minor is charged with whatever knowledge regarding a potential malpractice claim his or her parents or guardians possess.

Id. at 375. In short, this Court read the two statutes in a manner that preserved tolling for medical malpractice claims involving minor plaintiffs until the minor reached the age of majority, at which point, parental knowledge was imputed onto the minor and the one year statute of limitations accrued. The Court opined that “[s]uch a reading gives effect to the language of both RCW 4.16.190 and RCW 4.16.350 and to the *right of every citizen to seek redress for injuries sustained during minority.*” *Id.* at 378 (italics added). Being able to harmonize the statutes, this Court did

not address the Gilberts' argument that a repeal of the tolling statute for minors' claims would violate a minor's constitutional right to seek redress:

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 guarantees.

Id. (emphasis added). The Court warned that implicit repeal of a statute is "strongly disfavored." *Id.* at 375 (citing *Tollycraft Yachts Corp. v. McCoy*, 122 Wash.2d 246, 439, 848 P.2d 503 (1993)). These statements evidenced this Court's concern that a repeal of RCW 4.16.190, whether express or implicit, would violate the right of every individual to seek redress for injuries suffered as a minor.

Similarly, in *Merrigan v. Epstein*, the Court interpreted the tolling provision of RCW 4.16.190 against the eight year statute of repose contained in RCW 4.16.350(3) as it applied to medical malpractice claim pursued by a minor. Again, this Court harmonized the two statutes to avoid any issue of constitutionality, holding that tolling of RCW 4.16.190 suspended the claim "8-years-from-act-or-omission period for the duration of the child's minority or incapacity." *Id.* at 716. 112 Wash.2d 709, 716, 773 P.2d 78 (1992).

Both of these decisions differ from the present case in one critical respect—they were both decided prior to the adoption of RCW 4.16.190(2) in 2006. It is no longer possible to harmoniously interpret the

statutes in a manner that preserves tolling for medical malpractice claims involving minors. RCW 4.16.190(2) expressly prohibits this interpretation. In every application, as was the case with Mr. Schroeder, RCW 4.16.190(2) will unconstitutionally allow the statute of limitations to run on a minors claim before they reach the age of majority and strip them of their right to access the courts. This is unconstitutional.

The present case represents the exact interpretation of RCW 4.16.190 that the Court warned of in *Gilbert*. The 2006 amendment to RCW 4.16.190 expressly repealed the tolling provision for minors with respect to medical malpractice claims. RCW 4.16.190(2) states “[s]ubsection (1) of this section with respect to persons under the age of eighteen years does not apply to the time limited for the commencement of an action pursuant to RCW 4.16.350.” Instead, RCW 4.16.350(3) imputes parental knowledge upon the minor and effectuates a one year statute of limitations. If implicit repeal of the tolling statute was “strongly disfavored” by this Court, then the express repeal of RCW 4.16.190(1) must fall upon this Court with even stronger disfavor. *Id.* at 375. Thus, RCW 4.16.190(2) must be struck down as unconstitutional.

The government cannot establish a compelling interest for eliminating tolling with respect to minors in medical malpractice cases. The only source of information indicating a possible government interest

in excluding minors' medical malpractice claims is found in the preamble to the entire House Bill:

It is the intent of the legislature to prioritize public safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums.

* * *

Finally, it is the intent of the legislature to provide the insurance commissioner with the tools and information necessary to regulate medical malpractice insurance rates and policies so that they are fair to both the insurers and the insured.

LAWS of 2006, ch. 8, §§ 301-302. The stated intent of the legislature seems three-fold: (1) Prioritization of public safety; (2) Prevention of medical malpractice errors; and (2) Regulation of medical malpractice insurance premiums. None of these interests are compelling.

The stated purpose of the legislation was to “prioritize safety and the prevention of medical errors above all other considerations.” LAWS of 2006, ch. 8, § 1. The adoption of RCW 4.16.190(2) directly contradicts this purpose. It expressly strips minors of the ability to seek recourse for acts of malpractice committed against them. In fact, it seems that RCW 4.16.190(2) makes minors more vulnerable to medical malpractice errors than the rest of society because licensed health care providers suffer no repercussions for errors.

The government has no compelling interest in regulating “fair” medical malpractice insurance rates. This point was addressed by this Court in *DeYoung v. Providence Medical Center*.¹³⁶ Wash.2d at 150. In *DeYoung*, this Court evaluated the constitutionality of the eight year statute of repose previously contained RCW 4.16.350(3). According to the legislative notes accompanying RCW 4.16.350(3), the eight year statute of repose was enacted in response to a perceived insurance crisis and the rise in cost of medical malpractice insurance said to have resulted from the discovery rule, which allegedly created problems in calculating and reserving for exposure of long-tail claims. Laws of 1975-76, 2d Ex. Sess., ch. 56. Ultimately, this Court held that this stated the relationship between the goal of alleviating a perceived medical malpractice insurance crisis was too attenuated to survive rational basis review:

A repose provision affecting so few claims and involving such a small amount of what insurers were paying *could not possibly have any meaningful impact on the medical malpractice industry*, much less when only claims of the type subject to Washington’s eight year statute of repose provision are considered. The eight year statute of repose could not avert or resolve a malpractice insurance crisis.

* * *

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.

Id. at 149. The Court reasoned that a statute affecting a small number of claims could have no “meaningful impact” on alleviating medical malpractice insurance premiums. *Id. DeYoung* makes clear a statute a statute affecting only the rights of minors affects a small number of claims cannot be rationally related to the goal of reducing medical malpractice premiums. It must then be concluded that the same purpose proposed by the government in the present case cannot survive strict scrutiny.

It should be noted that this Court has ardently sought to protect the right of minors from being affected by acts of a third party, even their legal guardians. *See e.g., Scott v. Pacific West Mountation Resort*, 119 Wn.2d 484, 492, 834 P.2d 6 (1992) (“A parent does not have legal authority to waive a child’s own future cause of action for personal injuries resulting from a third parties negligence.”). In fact, this Court has emphatically held it is “arbitrary and unreasonable” to bar a minor’s claim because a “friend or relative through inadvertence or ignorance fails to act.” *Cook v. State*, 83 Wn.2d 599, 604-05, 521 P.2d 725 (1974). The Court’s language reflects the unsettling proposition that a minor’s rights will be vested in another who may or may not assert them. This is exactly what the application of RCW 4.16.190(2) did in this case—it placed the onus of filing Mr. Schroeder’s claim upon Ms. Schroeder, instead of

allowing Mr. Schroder to file a claim on his own behalf after reaching the age of majority.

Because RCW 4.16.190(2) is unconstitutional as applied this Court must prohibit it from being interpreted in this manner in the future. *Moore*, 151 Wash.2d at 669. Prohibiting this application in the future essentially means striking down RCW 4.16.190(2) so that medical malpractice claims involving minor plaintiffs are tolled until they reach majority. Only this interpretation will prevent RCW 4.16.190(2) from triggering the statute of limitations against minors before they reach the age of majority. This is exactly the type of application urged by the Court in *Gilbert* to harmonize RCW 4.16.190 and RCW 4.16.350(3) and to avoid violating minors' constitutional rights.

B. RCW 4.16.190(2) VIOLATES EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

1. Standard of Review.

Mr. Schroeder argues RCW 4.16.190(2) violates the equal protection clause of the United States Constitution. This Court reviews the constitutionality of a statute *de novo*. *Putnam*, 166 Wn.2d at 979. Accordingly, this Court must review the constitutionality of RCW 4.16.190(2) *de novo*.

2. RCW 4.16.190(2) Unconstitutionally Infringed Upon Mr. Schroeder's Ability to Access Courts Under the Equal Protection Clause.

The equal protection clause of the fourteenth amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1. It requires that persons similarly situated with respect to a legitimate purpose of the law receive equal treatment.

State v. Harner, 153 Wash.2d 228, 235, 103 P.3d 738 (2004).

The threshold question in any constitutional analysis is to determine the applicable standard of review. *See DeYoung*, 136 Wash.2d at 141. There are three standards of review that may be applied, depending on the nature of the interest affected or the characteristics of the class created by a statute. *Id.* at 560. The highest level of review, strict scrutiny, applies when the alleged discriminatory legislation affects a suspect class or threatens a fundamental right. *Id.* (citing *Schaaf*, 109 Wash.2d 1, 17-18, 743 P.2d 240 (1987)). An intermediate standard of review, or heightened scrutiny, is applied in limited circumstances where strict scrutiny is not mandated, but where an important right or semi-

suspect class has been affected. *Shawn P.* 122 Wash.2d at 650. Minimal scrutiny, commonly known as rational basis review, is applied in all cases that do not warrant a higher level of scrutiny. *Id.* Because Federal law does not expressly recognize the right to access the courts as a fundamental right, as the Washington State Constitution does, rational basis review must be applied.

A legislative enactment will be invalidated under a minimal scrutiny analysis if (1) the legislation does not apply alike to members within a designated class, (2) there are no reasonable grounds to distinguish between those within or those without the class, and (3) the classification has a no rational relationship to the proper purpose of the legislation. *Id.* at 144 (citing *Griffin v. Eller*, 130 Wash.2d 58, 65, 922 P.2d 788 (1996)). Plainly stated, under a rational basis of review, a statute must be rationally related to a legitimate state interest and will be invalidated if the relationship between the classification and the legislative goal is “so attenuated as to render the distinction arbitrary and irrational.” *Id.*

Here, the pertinent class is minors and incompetent/disabled adults. RCW 4.16.190(1) treats minors and incompetent/disabled alike by tolling the statute of limitations in all claims until minority or competency is reached. *See* RCW 4.16.190(1). This treatment reflects the realization that

minors and incompetent/disabled adults cannot pursue an action on their own, and “generally lack experience, judgment, knowledge and resources to effectively assert this rights.” *DeYoung*, 136 Wash.2d at 146. RCW 4.16.190(2) inexplicably distinguishes minor medical malpractice plaintiffs from the safe harbor protections of RCW 4.16.190(2). Thus, RCW 4.16.190(2) must fail because minors are not treated equally.

The government has no legitimate interest in regulating “fair” medical malpractice insurance rates. As previously stated in more detail, the stated intent of the legislature underlying the adoption of RCW 4.16.190(2) seems three-fold: (1) Prioritization of public safety; (2) Prevention of medical malpractice errors; and (2) Regulation of medical malpractice insurance premiums. See LAWS of 2006, ch. 8, § 1. None of these interests are rationally related to the implementation of RCW 4.16.190(2).

This Court’s decision in *DeYoung*, is clear on this point. 136 Wash.2d at 150. In *DeYoung*, this Court evaluated the constitutionality of the eight year statute of repose previously contained RCW 4.16.350(3). According to the legislative notes accompanying RCW 4.16.350(3), the eight year statute of repose was enacted in response to a perceived insurance crisis and the rise in cost of medical malpractice insurance said to have resulted from the discovery rule, which allegedly created problems

in calculating and reserving for exposure of long-tail claims. Laws of 1975-76, 2d Ex. Sess., ch. 56.

A repose provision affecting so few claims and involving such a small amount of what insurers were paying could not possibly have any meaningful impact on the medical malpractice industry, much less when only claims of the type subject to Washington's eight year statute of repose provision are considered. The eight year statute of repose could not avert or resolve a malpractice insurance crisis.

* * *

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.

Id. at 149. The Court reasoned that a statute affecting a small number of claims (i.e. medical malpractice claims pursued by minors who are citizens of Washington) could have no “meaningful impact” on alleviating medical malpractice insurance premiums. *Id.*

The stated legislative interest in *DeYoung* is almost identical to the stated intent of the legislature with respect to RCW 4.16.190(2). RCW 4.16.190(2) was apparently adopted “regulate medical malpractice insurance rates and policies so that they are fair to both insurers and the insured.” LAWS of 2006, ch. 8, § 1. RCW 4.16.190(2) affects a small number of claims—medical malpractice claims filed by minors. There is no evidence to indicate that the exclusion of minors’ medical malpractice claims will have any effect on medical malpractice premiums whatsoever.

The relationship between the goal of alleviating a perceived medical malpractice crisis and the class of persons affected by imputation of knowledge statute is too attenuated to survive even rational basis review. Thus, RCW 4.16.190(2) must be struck down as unconstitutional.

RCW 4.16.190(2) arbitrarily discriminates against minor plaintiffs in medical malpractice actions. Incompetent/disabled adults are not subject to the same exclusion with respect to medical malpractice claims. *See* RCW 4.16.190(2). This differentiation is baseless. Further, RCW 4.16.190(2) arbitrarily only discriminates against minors that advance medical malpractice claims. In any other negligence claim, a minor's claim would be tolled until the age of majority. *See* RCW 4.16.190(1); former RCW 4.16.190. There is absolutely no rationale given for the exclusion of minors from the general tolling provision of RCW 4.16.190(1). Thus, RCW 4.16.190(2) must be struck down as unconstitutional.

IV. CONCLUSION

Based on the foregoing analysis, RCW 4.16.190(2), as applied to Mr. Schroeder, unconstitutionally stripped him of his fundamental right to access the court and file a medical malpractice claim for injuries he suffered as a minor. The express repeal of tolling pursuant to RCW 4.16.190(2) cannot be harmonized with the imputation of knowledge and

one year statute of limitations of RCW 4.16.350(3). Further, the government has not enumerated any purpose that would legitimize or necessitate the creation of RCW 4.16.190(2). As a result, RCW 4.16.190(2) must be struck down as a violation of the Washington State privileges and immunities clause and the equal protection clause of the United States Constitution. This case must be remanded back to the trial court so that a new trial may be conducted in accordance with this decision.

DATED this 11 day of June, 2012.

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