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NO. 68737-9-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

RONDA SNYDER, individually and as
legal guardian for her minor child B.W., Appellant,

v.

JAMES R. FLETCHER, M.D., CAROLINE STAMPFLI, PA-C, and
WHITEHORSE FAMILY MEDICINE, INC., P.S., a Professional Service
Corporation, Respondents.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF
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COURT OF APPEALS
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I. ARGUMENT

A. **The Legislature's elimination of tolling provisions for minors exclusively for medical negligence claims is unconstitutional.**

1. **Appellant has adequately presented arguments to warrant consideration of her challenges to the constitutionality of the statutory elimination of tolling provisions for minors in medical negligence claims.**

Respondents argue that Appellant has failed to present coherent argument to support her constitutional challenge to the legislative abrogation of tolling for minors in medical malpractice cases, due to Appellant's failure to cite RCW. § 4.16.190 (2). BR at 19-23. Despite Appellant's failure to cite RCW 4.16.190 (2), Appellant nonetheless presents cogent argument against constitutionality of the Legislature's elimination of tolling provisions for minors in medical negligence claims. BA at 14-22. Appellant raised the same arguments in the trial court in opposition to Respondents' motion for summary judgment. CP 105-109.

Respondents argue that Appellant's failure to cite RCW 4.16.190 (2) in the trial court precludes its consideration here. BR at 22-23. The rule that an issue or theory not presented to the trial court will not be considered on appeal is not inexorable and has its limitations. *Maynard Inv. Co. v. McCann*, 77 Wash. 2d 616, 621 (1970); *Hanson v. Snohomish County*, 121 Wn. 2d 552, 557, 852 P. 2d 295 (1993).

The Rules of Appellate Procedure favor deciding cases on their merits. RAP 1.2 (a) (“*These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits....*”). An appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision. Note *City of Seattle v. McCready*, 123 Wn. 2d 260, 269, 868 P. 2d 134 (1994):

Ordinarily, the failure of the parties to raise an issue would preclude its examination at this stage. However, this court has frequently recognized it is not constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent. ...

See also, Falk v. Keene Corp., 113 Wn. 2d 645, 659, 782 P. 2d 974 (1989); *Maynard Inv. Co., v. McCann*, 77 Wn. 2d 623; *State v. Gaines*, 121 Wn. App. 687, 696, 90 P. 3d 1095 (2004); *Crawford v. Wojnas*, 51 Wn. App. 781, 786, 754 P.2d 1302, *review denied*, 111 Wn. 2d 1027 (1988). In *McCready*, the Court recognized that consideration of an issue that implicates constitutional rights is particularly appropriate, even if not raised by the parties. 123 Wn. 2d 269. *McCready* thus supplies strong support for consideration of RCW 4.16.190 (2) here.

Washington courts also recognize that “*a statute not addressed below but pertinent to the substantive issues which were raised below may*

be considered for the first time on appeal.” *Bennett v. Hardy*, 113 Wn. 2d 912, 918, 784 P. 2d 1258 (1990). Appellant raised the constitutionality of the legislative elimination of tolling provisions for minors in medical malpractice claims in the trial court. CP 105-109. In light of *Bennett*, it is therefore appropriate for this Court to consider RCW 4.16.190 (2).

The Court may also waive the rules of appellate procedure when necessary to “*serve the ends of justice.*” RAP 1.2 (c); see RAP 7.3, 12.2; *Greengo v. Public Employees Mutual Ins. Co.*, 135 Wn. 2d 799, 813, 959 P. 2d 657 (1998); *Mader v. Health Care Authority*, 149 Wn. 2d 458, 467, 70 P. 3d 931 (2003). The interests of justice will best be served here by relaxing the rules of appellate procedure to allow consideration of RCW 4.16.190 (2).

In addition, RAP 12.1(b) authorizes the court to present additional written argument if it concludes that an issue not briefed should be considered to properly decide a case. *City of Seattle v. McCready*, 123 Wn. 2d 269; *Crawford v. Wojnas*, 51 Wn. App. 786. If the Court is inclined to consider RCW 4.16.190 (2), Appellant requests an opportunity under RAP 12.1 (b) to provide such additional briefing as the Court deems necessary.

In light of the foregoing, Appellant requests the Court to exercise its discretion and consider RCW 4.16.190 (2) with regard to Appellant's challenge to the constitutionality of the Legislature's elimination of tolling provisions for minors in medical malpractice claims.

2. The statute does not pass muster under the strict scrutiny test.

To qualify for treatment as a suspect class for equal protection analysis, a class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class. *Anderson v. King County*, 158 Wn. 2d 1, 19, 138 P. 3d 963 (2006). *De Young v. Providence Medical Center*, 136 Wn. 2d 136, 146, 960 P. 2d 919 (1998), in invalidating RCW 4.16.350 as violative of Washington Constitution Art. 1, § 12, the Washington Supreme Court addressed the status of minors in relation to that statute:

Minors are not similarly situated to adults because they are unable to pursue an action on their own until adulthood, RCW 4.08.050, and they generally lack the experience, judgment, knowledge and resources to effectively assert their rights.

136 Wn. 2d 146.

The recognition given by the court in *De Young* to the statutory disability to pursue action on their own imposed on minors, plus minors' general lack of experience, judgment knowledge and resources to effectively assert their rights, is sufficient to place minors in a suspect or semi-suspect class.

Respondents misplace reliance upon *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn. 2d 201, 5 P. 3d 691 (2000), *cert denied*, 532 U. S. 902 (2001) is misplaced. In *Tunstall*, the court declined to apply strict scrutiny to RCW Ch. 28A.193, holding that in that case, neither the inmates' incarceration nor juvenile status creates a suspect class. 141 Wn. 2d 226. In *Tunstall*, the court was not called upon, and did not decide, whether minors could be a suspect class in another context. *Tunstall* is therefore not controlling here.

Respondents also misplace reliance upon *State v. Shawn P.*, 122 Wn. 2d 553, 859 P. 2d 1220 (1993). In that case, the parties conceded that the rational relationship test was the appropriate standard against which the challenged legislation should be measured. 122 Wn. 2d 560. The court's discussion of juveniles as a suspect class was dictum. *State v. Shawn P.* is therefore not controlling here.

In *State v. Schaaf*, 109 Wn. 2d 1, 18-20, 743 P. 2d 240 (1987), the court, citing a concurring and dissenting opinion of Justice Marshall *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. ct. 3272 n. 24 (1985), concluded that juveniles form neither a suspect nor a semi-suspect class for equal protection purposes. The dissenting opinion of Justice Marshall relied on the premise that minorities tend to be treated in legislative arenas with full concern and respect. 105 S. Ct. 372 n. 24. Here, the legislative elimination of tolling provisions for minors in medical malpractice cases demonstrates little, if any, concern or respect for minors. Thus, the justification given in *Schaaf* for not recognizing minors as a suspect or semi-suspect class is absent here.

The right in question in *Schaaf* was a right to a jury trial in juvenile proceedings. Here, in contrast, the issue is far more basic. Here, the legislative elimination of tolling for minors in medical malpractice cases threatens to bar access to court for all minors in medical malpractice claims, as minors are unable to pursue an action on their own until adulthood under *De Young*, 136 Wn. 2d 146.

Washington courts have zealously guarded the rights of minors to gain access to courts. Note *Hunter v. North Mason High School*, 12 Wn. App. 304, 306, 529 P. 2d 898 (1974), *affirmed*, 85 Wn. 2d 810, 549 P. 2d 845 (1975):

Although there is no evidence that the plaintiff in the instant case suffered injuries which approached the severity of those of the plaintiff in the Cook case [*Cook v. State*, 83 Wn. 2d 599, 521 P. 2d 725 (1974)], the Fourteenth Amendment principles upon which that decision was predicated form the basis for our holding now. We believe that the basic concepts of due process and equal protection favor an extension of the decision in Cook. Simply stated, it would be fundamentally unfair for a minor to be denied his recourse to the courts because of circumstances which are both legally and practically beyond his control. The legal disabilities of minors have been firmly established by common law and statute. They were established for the protection of minors, and not as a bar to the enforcement of their rights. (Per Pearson, C.J.)

As strict scrutiny applies here, the burden shifts to Respondents, as the parties seeking to uphold the statute “*to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government objective. If no compelling state interest exists, the restrictions are unconstitutional.*” *First United Methodist Church v. Hearing Examiner*, 129 Wash.2d 238, 246, 916 P.2d 374 (1996); *Fusato v. Washington Interscholastic Activities Association*, 93 Wn. App. 762, 768, 970 P. 2d 774 (1999). Respondents make no attempt to meet this burden, as they fail to demonstrate such a compelling state interest. BR at 24-26.

II. CONCLUSION

The Court should consider RCW 4.16.190 (2), and, if necessary, the Court should allow additional briefing on this issue pursuant to RAP 12.1 (b). The Court should further conclude that the legislative elimination of tolling for minors in medical malpractice claims is unconstitutional under Washington Constitution, Art. 1 § 12.

Respectfully submitted,

LAW OFFICES OF MARK G. OLSON

A handwritten signature in black ink, appearing to read "Mark G. Olson", written over a horizontal line.

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11-10-19

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered the foregoing **APPELLANT'S REPLY BRIEF** to the following parties:

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