

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

11 JAN -7 PM 2:16

BY RONALD R. CARPENTER

Clerk

Case No. 84707-0

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

LISA UNRUH,

Appellant,

v.

DINO CACCHIOTTI, DDS and JANE DOE CACCHIOTTI,  
husband and wife, and the marital community composed thereof,

Respondents.

**WASHINGTON DEFENSE TRIAL LAWYERS'  
AMICUS CURIAE BRIEF**

Melissa O'Loughlin White, WSBA #27668  
Cozen O'Connor  
1201 Third Avenue, Suite 5200  
Seattle, Washington 98101  
Telephone: (206) 340-1000  
Email: mwhite@cozen.com

Matthew Munson, WSBA #32019  
Thorsrud Cane & Paulich  
1325 Fourth Avenue, Suite 1300  
Seattle, Washington 98101  
Telephone: (206) 386-7755  
Email: mmunson@tcplaw.com

Aaron P. Riensche, WSBA #37202  
Ogden Murphy Wallace P.L.L.C.  
1601 Fifth Avenue, Suite 2100  
Seattle, Washington 98101  
Telephone: (206) 447-7000  
Email: ariensche@omwlaw.com

Attorneys for Amicus Curiae  
Washington Defense Trial Lawyers

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
I. INTRODUCTION .....	1
II. IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT .....	2
A. The Statue of Repose is Necessary to Deter Stale Claims and Further the Public’s Interest in Finality. ....	2
B. The Statute of Repose Does Not Violate the Separation of Powers Doctrine.....	4
C. The Statute of Repose Does Not Violate a Minor’s Access to Courts.....	6
1. The Ohio Case is Distinguishable on Several Grounds.....	7
2. The Statute of Repose Does Not Create a Barrier to Filing Suit and is Distinguishable from Putman. ....	9
D. The Statute of Repose Does Not Violate the Privileges and Immunities Clause by Treating Minors Differently From Legally Incompetent Adults.....	11
1. The Statute of Repose is Not Subject to Intermediate Scrutiny.....	11
a) Intermediate scrutiny is not appropriate because the statute does not impinge upon a fundamental right or target a semi-suspect class.....	12
b) <i>Hunter v. Mason School District</i> does not support the use of intermediate scrutiny. ....	13

	c)	The state privileges and immunities clause does not require the application of intermediate scrutiny.....	13
2.		The Statute of Repose is Rationally Related to the Government's Legitimate Interest in Barring State Claims and Reducing Insurance Rates.....	15
	a)	The appropriate standard of review is rational basis. ....	15
	b)	The statute satisfies the rational basis test because it draws legitimate distinctions between classes. ....	16
V.		CONCLUSION.....	20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>1000 Virginia Ltd. P'ship v. Vertecs</i> , 158 Wn.2d 566, 146 P.3d 423 (2006).....	2
<i>Am. Legion Post No. 149 v. Washington State Dep't of Health</i> , 164 Wn.2d 570, 192 P.3d 306 (2008).....	11, 12, 15, 16
<i>Andersen v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006) (plurality opinion) .....	13, 14, 16
<i>Atchison v. Great Western Malting Co.</i> , 161 Wn.2d 372, 166 P.3d 662 (2007).....	10
<i>Bauman v. Crawford</i> , 104 Wn.2d 241, 704 P.2d 1181 (1985).....	18
<i>Daggs v. City of Seattle</i> , 110 Wn.2d 49, 750 P.2d 626 (1988).....	13
<i>DeYoung v. Providence Medical Center</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	2, 4, 13, 14
<i>Duffy v. King Chiropractic Clinic</i> , 17 Wn. App. 693, 565 P.2d 435 (1977).....	3
<i>Dunn v. St. Francis Hosp., Inc.</i> , 401 A.2d 77 (Del. 1979).....	10
<i>FCC v. Beach Commc'ns, Inc.</i> , 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).....	16
<i>Ford Motor Co. v. Barrett</i> , 115 Wn.2d 556, 800 P.2d 367 (1990).....	7, 8, 12
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wn.2d. 215, 543 P.2d 338 (1975).....	3, 19
<i>Hunter v. Mason School District</i> , 85 Wn.2d 810, 539 P.2d 845 (1975).....	13

<i>In re Boot</i> , 130 Wn.2d 553, 925 P.2d 964 (1996).....	12
<i>In re Custody of Miller</i> , 86 Wn.2d 712, 548 P.2d 542 (1976).....	17
<i>McGuinness v. Cotter</i> , 591 N.E.2d 659 (Mass. 1992).....	18, 19
<i>Mominee v. Schebarth</i> , 503 N.E.2d 717 (Ohio 1986).....	7, 8
<i>Putman v. Wenatchee Valley Medical Center</i> , 166 Wn.2d 974, 216 P.3d 374 (2009).....	9, 10, 11
<i>Shea v. Olson</i> , 185 Wn. 143, 160–61, 53 P.2d 615 (1936).....	12
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	13
<i>State v. Hirschfelder</i> , ___ Wn.2d ___, 242 P.3d 876 (2010).....	16
<i>State v. Smith</i> , 117 Wn.2d 263, 814 P.2d 652 (1991).....	12
<i>Stenberg v. Pacific Power &amp; Light Co.</i> , 104 Wn.2d 710, 709 P.2d 793 (1985).....	19
<i>Tunstall v. Bergeson</i> , 141 Wn.2d 201, 5 P.3d 691 (2000).....	11
<i>Yakima Fruit &amp; Cold Storage Co. v. Central Heating &amp; Plumbing Co.</i> , 81 Wn.2d 528, 503 P.2d 108 (1972).....	3

**STATUTES**

RCW 4.16.190(1).....	17
----------------------	----

RCW 4.16.190(2).....	18
RCW 4.16.350 .....	<i>passim</i>
RCW 11.88.010(1).....	18
RCW 13.04.021(1).....	12
RCW 13.04.030(1)(e)(iv).....	12
RCW 13.64.010 .....	18
RCW 46.20.031(1).....	18
RCW 48.18.020 .....	18
Ohio Revised Code 2305.11(B).....	7, 8

**OTHER AUTHORITIES**

Senate Bill Report 2SHB 2292 .....	17
Ohio Const. Article I, § 16.....	7

## **I. INTRODUCTION**

Washington Defense Trial Lawyers (“WDTL”) file this brief as a friend of the Court to address the constitutionality of the medical malpractice statute of repose, RCW 4.16.350. Although it is not necessary to reach these issues to resolve this case, WDTL provides the following analysis to be considered by this Court if the issues are addressed.

The statute of repose is not unconstitutional. It does not violate the separation of powers doctrine because the Legislature identified a legitimate government purpose. It does not violate minor claimants’ access to courts, even if it were an established right in Washington (it is not), because the statute of repose does not bar minors’ access to the courts. It also does not violate the privileges and immunities clause because the statute is rationally related to the government’s legitimate interest in barring stale claims and reducing insurance rates.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

WDTL, established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its members is

through *amicus curiae* submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

After the issues raised by the parties were fully briefed by both parties, the Court of Appeals called for supplemental briefing to address the relationship between the reenacted RCW 4.16.350 and this Court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998), (holding that the statute of repose violated the privileges and immunities clause of the Washington Constitution). Thereafter, the Court of Appeals transferred the case to this Court to address these constitutional issues, which are of concern to WDTL members and their clients. WDTL believes that additional analysis would be helpful to this Court, in particular, because only limited briefing on the constitutional issues was presented in the parties' supplemental briefs that were filed simultaneously in the Court of Appeals.

### **III. STATEMENT OF THE CASE**

For the purposes of this brief, WDTL relies upon the statement of facts set forth in the brief filed by Respondents Cacchiotti.

### **IV. ARGUMENT**

#### **A. The Statue of Repose is Necessary to Deter Stale Claims and Further the Public's Interest in Finality.**

"[C]ompelling one to answer stale claims in the courts is in itself a substantial wrong." *1000 Virginia Ltd. P'ship v. Vertecs*, 158 Wn.2d 566,

579, 146 P.3d 423 (2006) (quoting *Ruth v. Dight*, 75 Wn.2d 600, 453 P.2d 31 (1969), *superseded by statute*, RCW 4.16.350, *as recognized in Winbun v. Moore*, 143 Wn.2d 206, 214 n.3, 18 P.3d 576 (2001)). This is, in part, because stale claims “are more likely to be spurious and more likely to be supported by untrustworthy evidence.” *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 222, 543 P.2d 338 (1975).

Washington courts have upheld statutes of limitation and statutes of repose in tort cases. *See, e.g., id.*; *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 503 P.2d 108 (1972); *Duffy v. King Chiropractic Clinic*, 17 Wn. App. 693, 565 P.2d 435 (1977). In doing so, courts have recognized that it is unfair and unreasonable to require a defendant to respond years or decades after an incident has occurred. *Gazija*, 86 Wn.2d at 222 n.2.

The Legislature has acted reasonably to uphold Washington’s strong public policy favoring the finality of tort claims and to enforce the statute of repose by eliminating the tolling provisions for a minor’s claims for professional medical negligence. The fact that it is a minor bringing the claim does not abrogate or remove the concerns or burdens on defendants resulting from stale claims.

**B. The Statute of Repose Does Not Violate the Separation of Powers Doctrine.**

Unruh contends that the 2006 version of RCW 4.16.350 violates the doctrine of separation of powers. The only explanation provided by Unruh is that the new statute is “the same statute” as the earlier version of RCW 4.16.350 analyzed by this Court in *DeYoung*. See *DeYoung*, 136 Wn.2d 136; Unruh’s Supp. Br. at 9. Unruh’s argument is easily defeated by looking at the Legislature’s own stated reasons for reenacting the statute, confirming that the Legislature not only considered, but also followed this Court’s reasoning in *DeYoung*. Because the Legislature did not simply reenact the exact same statute for the exact same reasons, Unruh’s separation of powers argument necessarily fails.

The concern in *DeYoung* was that the previous version of the statute of repose was not rationally related to a legitimate government purpose. Instead, the Court held that the Legislature’s stated purpose, in 1976, for enacting the original statute of repose was not rationally related to a legitimate governmental goal. Thus, the appropriate inquiry here is whether the Legislature’s reenactment of the statute of repose remedied the concerns highlighted in *DeYoung*.

*DeYoung* expressly identified the primary reason for enacting a statute of repose was to address issues “in response to a perceived

insurance crisis said to result from the discovery rule and from increased medical malpractice claims, which allegedly created problems in calculating and reserving for exposure on long-tail claims.” The stated purpose links the “insurance crisis” to the claims process, *i.e.*, reserving exposures on long-tail claims. After noting that the statute of repose did not serve any real purpose for those few claims that were more than eight years, *DeYoung* concluded that the statute of repose “could not avert or resolve a malpractice insurance crisis.”

Drawing upon this Court’s concerns in *DeYoung*, the Legislature articulated specific reasons for implementing the statute of repose. The Purpose-Findings-Intent section of the 2006 reenacted statute states, in part, as follows:

The purpose of this section ... is to respond to the court’s decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature’s rationale for the eight-year statute of repose in RCW 4.16.350.

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

RCW 4.16.350, Notes.<sup>1</sup>

---

<sup>1</sup> The full text of RCW 4.16.350, including history, and legislative notes appears in the Appendix to Respondents’ Br. (filed 3/4/10).

By focusing on the cost of malpractice insurance in the 2006 version of the statute of repose, the Legislature highlighted a concern that impacts every single medical practitioner. The overall impact of the reduced premiums is ultimately significant. The fact that the Legislature first identified a medical malpractice crisis in 1976 and determined it important enough to reiterate three decades later in 2006 confirms the Legislature's longstanding determination to address this legitimate governmental goal. Under these circumstances, the Legislature should be given great leeway to achieve this laudable goal.

For the purposes of the separation of powers analysis, this Court need only confirm that the Legislature did not wholly disregard the concerns set forth in *DeYoung*. As part of the 2006 reenactment, the Legislature expressly adopted new reasons for implementing a statute of repose, taken directly from *DeYoung*. It is apparent that the Legislature considered and incorporated this Court's concerns during the reenactment of RCW 4.16.350. The concerns raised by Unruh relating to the potential violation of separation of powers doctrine are without merit.

**C. The Statute of Repose Does Not Violate a Minor's Access to Courts.**

Unruh argues that RCW 4.16.350, as reenacted in 2006, violates a minor's constitutional right to access the courts. As an initial matter, no

such right exists in Washington. See *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 562, 800 P.2d 367 (1990) (“Access to the courts is not recognized, of itself, as a fundamental right.”). Moreover, RCW 4.16.350 does not in any way limit a minor’s parent or guardian from protecting a minor’s access to the courts in cases of medical negligence. Therefore, Unruh’s access-to-courts arguments necessarily fail.

**1. The Ohio Case is Distinguishable on Several Grounds.**

The primary case cited by Unruh is a 1986 case from the state of Ohio, *Mominee v. Schebarth*, 503 N.E.2d 717 (Ohio 1986), that addressed a specific provision mandating open access to the courts. See Ohio Const. art. I, § 16 (providing, in relevant part: “All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice determined without denial or delay.”).

*Mominee* concluded that the statute of repose included within Ohio’s medical malpractice statute of limitations, Ohio Revised Code 2305.11(B), was unconstitutional as applied to minors. *Mominee*, 503 N.E.2d at 719. Notably, Ohio has a “disability” statute providing for the tolling of a minor’s claims until they reach the age of majority. *Id.* (citing Ohio Rev. Code 2305.16). Ohio Revised Code 2305.11(B) added a statute of repose requiring all medical malpractice claims to be brought

within four years. *Id.* (citing Ohio Rev. Code 2305.11(B) (1975)). The statute of repose provided that the statute of limitations was tolled for minors between the ages of ten and fourteen.

The statute of repose was enacted by the Ohio legislature both to reduce medical malpractice insurance premiums and to prevent stale claims. *Id.* at 721. *Mominee* concluded that there was not a substantial relationship between the stated purposes and the statute. *Id.* *Mominee* then concluded the statute was arbitrary as applied to minors as it effectively denied minors access to the courts because it barred minors from bringing suit before they reached the age of majority. *Id.*

*Mominee* is distinguishable on several grounds. First, Ohio's constitution actually contains an open access provision, whereas Washington's constitution does not. *See Ford Motor Co.*, 115 Wn.2d at 562 ("Access to the courts is not recognized, of itself, as a fundamental right."). Second, the Ohio statute of repose provided half the time as the Washington statute of repose, *i.e.*, four years as compared to eight years, to bring suit. Third, RCW 4.16.350 provides exceptions for "fraud, intentional concealment, or the presence of a foreign body..." whereas the Ohio statute did not include any exceptions. RCW 4.16.350 provides a significantly longer period, thus removing the court's concerns about the ability of a very young minor to communicate injuries. The eight-year

period also provides more time for a minor to bring suit upon reaching the age of majority. Thus, the actual number of minors who cannot or do not bring suit as the result of RCW 4.16.350 is much smaller than the same group under the Ohio statute.

Moreover, Washington law provides other protections for minors to provide access to the courts and protections of their rights and interests through a *guardian ad litem*. Therefore, even if the statute of repose operated in a specific case so that the eight-year period ended before a minor reached majority, the minor still would not be denied access to the courts because he or she could petition the court for a *guardian ad litem* to bring suit for him or her.

**2. The Statute of Repose Does Not Create a Barrier to Filing Suit and is Distinguishable from *Putman*.**

Unruh also relies upon *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), on the access-to-courts issue. That decision is easily distinguished from the facts here. *Putman* held that requiring a plaintiff to provide a certificate of merit before filing a medical-malpractice suit unduly burdened access to the courts because, without discovery, it might be impossible to gather the evidence necessary to obtain a certificate. *Id.* at 979. Rather than creating a barrier to filing

suit, as in *Putman*, the statute of repose merely sets an eight-year time limit on filing suit.

In *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, this Court recognized “a general purpose of statutes of limitation and repose is that such statutes serve to prevent plaintiffs from bringing stale claims when evidence might have been lost or witnesses might no longer be available.” 144 Wn.2d 570, 578, 29 P.3d 1249 (2001) (citing *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991)). As explained in a concurrence in *Putman*, statutes of limitation, which are similar to statutes of repose, may limit access to the courts, but they are generally considered constitutional because the public has a countervailing interest in finality and because those statutes deny the right of access only if the limitation period is too brief. *Putman*, 166 Wn.2d at 989 (Madsen, J., concurring); see *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007) (“[T]he purpose of the statute of limitations is to provide finality[.]”) (citing *Dodson v. Continental Can Co.*, 159 Wash. 589, 596, 294 P. 265 (1930)); see also *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77, 80 (Del. 1979) (“[T]he test for constitutionality of the statute was whether the time period before the bar became effective was so short as to amount to a denial of the right itself.”).

The eight-year statute of repose strikes an appropriate balance between a plaintiff's right of access to the courts and a defendant's interest in finality. If accepted by this Court, Unruh's argument would breathe life into Justice Madsen's concern that including the access-to-courts factor in *Putman* "will result in an excessively broad interpretation of the right in the future." *Putman*, 166 Wn.2d at 986 (Madsen, J., concurring).

**D. The Statute of Repose Does Not Violate the Privileges and Immunities Clause by Treating Minors Differently From Legally Incompetent Adults.**

**1. The Statute of Repose is Not Subject to Intermediate Scrutiny.**

When considering a challenge to a statute under the equal protection clause of the U.S. constitution or the privileges and immunities clause of the Washington constitution, the first step is to determine the appropriate standard of review. *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000). Under both clauses, a court uses one of three standards: strict scrutiny, intermediate or heightened scrutiny, or rational basis review. *See Am. Legion Post No. 149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 608–09, 192 P.3d 306 (2008). The appropriate level of scrutiny is rational basis review, not, as Unruh maintains, intermediate scrutiny.

- a) **Intermediate scrutiny is not appropriate because the statute does not impinge upon a fundamental right or target a semi-suspect class.**

This Court has held that under both the equal protection clause and the privileges and immunities clause, intermediate scrutiny applies only if the statute under review implicates an important right and a semi-suspect class. *See Am. Legion*, 164 Wn.2d at 609. Neither condition is satisfied.

The first condition is unsatisfied because access to the courts is not a fundamental right. *See Ford Motor Co*, 115 Wn.2d at 562 (“Access to the courts is not recognized, of itself, as a fundamental right.”); *Shea v. Olson*, 185 Wn. 143, 160–61, 53 P.2d 615 (1936) (“There is ... no express, positive mandate of the Constitution which preserves such [tort] rights of action from abolition by the Legislature[.]”). A semi-suspect classification is also absent here because minors are “neither a suspect class nor a semi-suspect class.” *In re Boot*, 130 Wn.2d 553, 572–73, 925 P.2d 964 (1996) (addressing the level of scrutiny applied to juveniles who are tried as adults under The Basic Juvenile Court Act, RCW 13.04.030(1)(e)(iv)); *State v. Smith*, 117 Wn.2d 263, 278, 814 P.2d 652 (1991) (addressing the level of scrutiny applied to juveniles under RCW 13.04.021(1), allowing the State to move for revision of a commissioner’s ruling). Unruh does not acknowledge this well-established precedent, much less set forth a reason for abandoning it.

**b) *Hunter v. Mason School District* does not support the use of intermediate scrutiny.**

Unruh relies on only one case to support the use of intermediate scrutiny, *Hunter v. Mason School District*, 85 Wn.2d 810, 539 P.2d 845 (1975). But *Hunter* did not make clear what level of scrutiny it applied. See *DeYoung*, 136 Wn.2d at 142. Later cases have relied on *Hunter* only for the narrow proposition that “no substantial hurdle may be imposed on an individual’s ability to sue a governmental tortfeasor,” not for a broad right to a private civil remedy. See *Daggs v. City of Seattle*, 110 Wn.2d 49, 56, 750 P.2d 626 (1988).

**c) The state privileges and immunities clause does not require the application of intermediate scrutiny.**

Unruh wrongly claims that review of the factors in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), suggests that the state privileges and immunities clause points toward application of intermediate scrutiny. A *Gunwall* analysis is appropriate only where the challenged legislation grants a privilege or immunity to a favored minority class. See *Andersen v. King County*, 158 Wn.2d 1, 9, 16, 138 P.3d 963 (2006) (plurality opinion). In *Andersen*, a three-justice plurality declined to perform a separate analysis under the state constitution because the challenged law discriminated against rather than favored a minority class. *Id.* at 18. Here, Unruh argues that the statute of repose discriminates

against minors, not that it privileges a favored class. A separate state constitutional analysis is not justified.

Even if a *Gunwall* analysis were appropriate, it would not support application of a stricter standard of review. The language of the privileges and immunities clause suggests that its drafters intended to curb special privileges for corporations and other narrow interests, rather than to eliminate discrimination, which was the intent of the federal equal protection clause. *Andersen*, 158 Wn.2d at 14–15. An eight-year statute of repose applicable both to competent adults and to minors does not grant any special privileges to a favored class. *See id.* at 17–18.

Other state constitutional provisions also suggest that Article I, section 12 does not require a heightened standard of review here. While Article I, section 1 of the state constitution states that government's purpose is to establish and maintain rights, the following sections of Article I do not identify the pursuit of a tort claim as one of those enumerated rights. *DeYoung*, 136 Wn.2d at 142. The absence in Article I of any specific reference to a right to bring a tort claim suggests that the state constitution does not grant broader protection to that right than does the U.S. constitution.

As Unruh concedes, the third *Gunwall* factor does not point to a different analysis because the history of Article I, section 12 is unknown.

*See id.* at 143. In addressing the fourth factor, *DeYoung* noted that “[p]reexisting state law indicates that there is no bar to absolutely foreclosing a cause of action where one has been injured by medical malpractice.” *Id.* Notably, *Unruh* does not discuss this factor. The last two factors—structural differences between the constitutions and the subject matter’s national or local character—usually support a separate analysis of the state constitution. *Id.* at 143–44.

Of the six *Gunwall* factors, only the last two point to a separate constitutional analysis. *DeYoung* held that these two factors, standing alone, do not justify employing a heightened standard of scrutiny. *Id.* at 144. That holding applies here.

**2. The Statute of Repose is Rationally Related to the Government’s Legitimate Interest in Barring Stale Claims and Reducing Insurance Rates.**

**a) The appropriate standard of review is rational basis.**

Because neither a suspect classification nor a fundamental right is involved, the appropriate standard of review is rational basis. *Am. Legion*, 164 Wn.2d at 609. Legislation subject to this standard is presumed to be constitutional. *Id.* To overcome this presumption, a party must show “beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification, or that the facts have so far changed as to render the classification arbitrary and

obsolete.’” *State v. Hirschfelder*, \_\_\_ Wn.2d \_\_\_, 242 P.3d 876, 884 (2010) (quoting *State v. Smith*, 93 Wn.2d 329, 337, 610 P.2d 869 (1980)).

A legislative distinction withstands minimum scrutiny if (1) all members of the class are treated alike; (2) there is a rational basis for treating differently those within and without the class; and (3) the classification is rationally related to the purpose of the legislation. *Am. Legion*, 164 Wn.2d at 609. In reviewing the statute, “the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification.” *Andersen*, 158 Wn.2d at 31. A legislative choice need not be supported by evidence or empirical data. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).

**b) The statute satisfies the rational basis test because it draws legitimate distinctions between classes.**

Unruh maintains that the statute of repose and the disability tolling statute are invalid because they treat minors differently from legally incompetent adults, even though both are legally incapable of filing suit. The statutes do not, however, distinguish between classes in precisely that manner. Rather, they create one class that consists of legally competent adults and minors, and another class that consists of persons who are incompetent or who are imprisoned on a criminal charge before

sentencing. *See* RCW 4.16.190(1). The statute applies to a class that includes both minors and legally incompetent adults .

Unruh's argument relies on the faulty assumption that there is no difference between minors and legally competent adults. There is at least one rational distinction: persons under age 18 are more likely than legally incompetent adults to have a parent or guardian who can protect their interests. Most minors are raised by one or both parents, and parents have a duty to support their children. *See In re Custody of Miller*, 86 Wn.2d 712, 717-18, 548 P.2d 542 (1976). As the Legislature explained, "Knowledge of a custodial parent or guardian is imputed to a minor ... ." Senate Bill Report 2SHB 2292 (2006).<sup>2</sup> Unruh fails to show that legally incompetent adults are likely to have a parent, guardian, or caregiver to which such knowledge can be similarly imputed. It is therefore reasonable to place a time limit on a minor's claim for medical malpractice but not on legally incompetent adults.

Another rational basis for the distinction is that some minors have the intellectual capacity to understand their rights and to assist in the protection of those rights, even if they cannot file suit themselves. The law recognizes this by granting minors privileges usually reserved for

---

<sup>2</sup> A copy of Senate Bill Report 2SHB 2292 appears in Appendix A to Respondents' Supp. Br., at 6.

adults. *See, e.g.*, RCW 13.64.010 (authorizing minors 16 or older to file petition for emancipation); *Bauman v. Crawford*, 104 Wn.2d 241, 244, 704 P.2d 1181 (1985) (stating that persons age 17 may be considered an adult for purposes of tort liability); RCW 48.18.020 (providing that minors may buy life and disability insurance without right to rescind); RCW 46.20.031(1) (authorizing persons age sixteen and older to obtain driver's license). Minors within a few years of majority can recognize that a medical act or omission has occurred and assist in the prosecution of a medical malpractice claim. Legally incompetent adults, by contrast, do not have that capacity and may be unlikely ever to develop it. *See* RCW 4.16.190(2) (defining competency with reference to 11.88 RCW); RCW 11.88.010(1) (defining incapacitated person as one who has risk of personal harm because of demonstrated inability to provide for health or physical safety or who has risk of financial harm because of demonstrated inability to manage property or financial affairs). Courts outside Washington have recognized this distinction between minors and those who are mentally incapacitated. *See, e.g., McGuinness v. Cotter*, 591 N.E.2d 659 (Mass. 1992). In *McGuinness*, the court found it sensible for a statute to bar medical-malpractice claims brought after a minor's ninth birthday but to exempt mentally incapacitated minors from that time limit because by age nine minors could testify, but mentally incapacitated

minors would not necessarily overcome their incapacity on reaching a certain age. *See id.* at 664-65.

The classification between minors and legally incompetent adults is rationally related to the legislation's two purposes: to reduce malpractice insurance rates and to bar stale claims that place an undue burden on defendants. *See* RCW 4.16.350 (2006), Intent.<sup>3</sup> The Washington courts have long recognized that statutes of limitation and repose serve these legitimate purposes. *See, e.g., Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985); *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 222, 543 P.2d 338 (1975).

Applying the eight-year statute of repose to minors is rationally related to these purposes. First, it protects medical professionals from the undue burden of defending against stale claims. A significant portion of all medical care is provided to minors because they constitute a substantial portion of the population and they receive at least as much medical care as persons over 18. Extending the eight-year statute of repose to minors will therefore reduce the number of stale claims. The statute will also lower malpractice insurance rates by barring dated claims that insurers would otherwise have to spend substantial sums defending against.

---

<sup>3</sup> The full text of RCW 4.16.350, including history, and legislative notes appears in the Appendix to Respondents' Br. (filed 3/4/10).

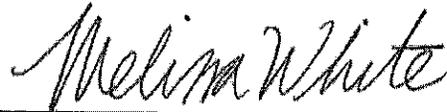
The Legislature also had legitimate reasons not to apply the statute of repose to legally incompetent adults. There are fewer such adults than there are children, so carving out an exception for legally incompetent adults would have a smaller impact on the number of stale claims and on insurance rates. Moreover, the Legislature could have determined that any reduction in stale claims would be outweighed by the interest in granting incompetent adults additional time in which to file suit.

#### V. CONCLUSION

For the reasons discussed above and in the briefing filed by Respondents Cacchiotti, this Court should affirm the trial court's dismissal of Unruh's claims as time barred under the statute of limitations.

Alternatively, this Court should conclude that the statute of repose is not unconstitutional for any of the reasons offered by Unruh. In summary, the statute of repose does not violate the separation of powers doctrine because the Legislature identified a legitimate government purpose; does not violate minor claimants' access to courts (a right that does not exist in Washington) because it does not bar minors' access to the courts; and does not violate the privileges and immunities clause because it is rationally related to the government's legitimate interest in barring stale claims and reducing insurance rates.

RESPECTFULLY SUBMITTED this 7th day of January, 2011.



Melissa O'Loughlin White, WSBA #27668  
Cozen O'Connor  
1201 Third Avenue, Suite 5200  
Seattle, Washington 98101  
Telephone: (206) 340-1000  
Email: mwhite@cozen.com

Matthew Munson, WSBA #32019  
Thorsrud Cane & Paulich  
1325 Fourth Avenue, Suite 1300  
Seattle, Washington 98101  
Telephone: (206) 386-7755  
Email: mmunson@tcplaw.com

Aaron P. Riensche, WSBA #37202  
Ogden Murphy Wallace P.L.L.C.  
1601 Fifth Avenue, Suite 2100  
Seattle, Washington 98101  
Telephone: (206) 447-7000  
Email: ariensche@omwlaw.com

Attorneys for Amicus Curiae  
Washington Defense Trial Lawyers

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

11 JAN -7 PM 2: 16

BY RONALD K. CARPENTER

**DECLARATION OF SERVICE**

\_\_\_\_\_  
CLERK

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 7th day of January, 2011, I caused to be filed via electronic filing with the Supreme Court of the State of Washington the foregoing WASHINGTON DEFENSE TRIAL LAWYERS' AMICUS CURIAE BRIEF. I also served copies of said document on the following parties as indicated below:

Parties Served	Manner of Service
<i>Counsel for Appellant:</i> Paul W. Whelan Stritmatter Kessler Whelan Coluccio 200 – 2 <sup>nd</sup> Avenue West Seattle, WA 98119 Email: paulw@stritmatter.com	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via U.S. Mail (X) Via Email
and	
Ray W. Kahler Garth L. Jones Stritmatter Kessler Whelan Coluccio 413 – 8 <sup>th</sup> Street Hoquiam, WA 98550 Email: ray@stritmatter.com garth@stritmatter.com	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via U.S. Mail (X) Via Email

FILED AS  
ATTACHMENT TO EMAIL

ORIGINAL

Parties Served	Manner of Service
<p><b><i>Counsel for Respondents:</i></b>  Jennifer Campbell  Averil Rothrock  Schwabe Williamson &amp; Wyatt, PC  1420 Fifth Avenue, Suite 3400  Seattle, WA 98101  Email: JCampbell@schwabe.com  ARothrock@schwabe.com</p>	<p>( ) Via Legal Messenger  ( ) Via Overnight Courier  ( ) Via U.S. Mail  (X) Via Email</p>
<p><b><i>Counsel for Amicus WSAJF:</i></b>  Bryan Harnetieaux  517 E. 17<sup>th</sup> Avenue  Spokane, WA 99203  Email: amicuswsajf@winstoncashatt.com</p>	<p>( ) Via Legal Messenger  ( ) Via Overnight Courier  ( ) Via U.S. Mail  (X) Via Email</p>

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 7th day of January, 2011.

  
\_\_\_\_\_  
Melissa O'Loughlin White

SEATTLE\10686873 099277.000