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No. 84707-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LISA UNRUH,

Plaintiff/Appellant,

vs.

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

Defendants/Respondents.

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STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons, including an interest in the interpretation and application of statutes governing professional negligence claims, and the constitutionality of these statutes.¹

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves a professional negligence claim by Lisa Unruh (Unruh) against her former orthodontist Dr. Dino Cacchiotti (Cacchiotti) et ux. The events that gave rise to this claim occurred while Unruh was a minor. The threshold legal issue is the proper application of the "discovery rule" under the 2006 version of RCW 4.16.350 (or §350), the applicable statute of limitations, and whether there is an issue of fact regarding the timeliness of Unruh's action. See 2006 Laws Ch. 8 §§1,

¹ Plaintiff/appellant Lisa Unruh is represented by Justin P. Walsh, Paul W. Whelan, Garth L. Jones, and Ray W. Kahler of the law firm of Stritmatter, Kessler, Whelan, Coluccio of Seattle, Washington. Paul Stritmatter, a member of this firm, presently serves on the Board of Directors of WSAJ Foundation. Mr. Stritmatter did not participate in the WSAJ Foundation Amicus Committee's determination to seek amicus curiae status in this case, nor has he or any member of the firm participated in preparing this amicus curiae brief.

301-303 (or 2006 amendments). Resolution of this issue may also require the Court to determine whether Unruh properly made a pre-litigation mediation request under RCW 7.70.110, thereby extending the statute of limitations an additional year.

If the Court concludes there is a question of fact for trial regarding the discovery rule, then Unruh raises two constitutional challenges, stemming from Cacchiotti's additional arguments that 1) §350's eight-year repose period forecloses Unruh's claim in any event, and 2) under §350, read in conjunction with the nontolling provision of RCW 4.16.190, Unruh's action is untimely based upon the imputed knowledge of her father. Unruh argues that both the eight-year repose period and nontolling provision violate one or more aspects of the Washington Constitution.

This amicus curiae brief largely deals with legal issues in the abstract. However, some factual background is necessary to put these arguments in context. The underlying facts are drawn from the briefing of the parties. See Unruh Br. at 3-15; Cacchiotti Br. at 4-16, 31-35; Unruh Reply Br. at 1-5, 13-19. For purposes of this brief, the following facts are relevant:

Unruh's claim against Cacchiotti arises from alleged negligent orthodontic treatment of Unruh between 1995 and August 1999, when she was a minor. See Unruh Br. at 3; Cacchiotti Br. at 2, 4. Unruh turned 18 years old on January 3, 2004. She contends she "did not discover facts supporting the elements of a cause of action against Dr. Cacchiotti until

March 2006," when she obtained new information bearing on the issue of negligence from another dentist. See Unruh Br. at 7. Cacchiotti contends that Unruh, either by virtue of her own knowledge or that imputed from her father, actually knew of the potential cause of action much earlier than she contends, rendering her action untimely as a matter of law. See Cacchiotti Br. at 1, 19-28.

Unruh contends that within one year of her March 2006 discovery of a potential claim she made a written mediation request pursuant to RCW 7.70.110, thereby extending the limitations period under §350 for an additional year. She then filed this action within the one-year extension period. See Unruh Br. at 1, 35; Unruh Reply Br. at 5, 13-19. Cacchiotti contends that Unruh's written request did not comply with RCW 7.70.110, and that the limitation period expired. See Cacchiotti Br. at 31-35.

The 2006 amendments were effective June 7, 2006. See 2006 Laws Ch. 8 §§301, 403-05 and legislative end notes; Cacchiotti Supp. Br. at 10.² These amendments: 1) reenacted §350 in its entirety, including the eight-year repose period found unconstitutional in DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 960 P.2d 919 (1998), and the parent (or

² Unruh and Cacchiotti agree that the effective date of the 2006 amendments is June 7, 2006. See Unruh Supp. Br. at 1-4; Cacchiotti Supp. Br. at 10-11. The dispute is about when the limitations period and repose period each began to run. Unruh urges each period begins to run on the effective date of the amendments, even though her cause of action may have accrued earlier. Cacchiotti contends that the limitations period begins to run from the date of accrual in fact, and the repose period begins to run from the end of treatment.

WSAJ Foundation assumes, solely for the purposes of this brief, that Cacchiotti's contentions are correct. But see Merrigan v. Epstein, 112 Wn.2d 709, 717, 773 P.2d 78 (1989), *disapproved in part in* Gilbert v. Sacred Heart, 127 Wn.2d 370, 900 P.2d 552 (1995).

guardian) imputation provision; and 2) eliminated tolling for minors under RCW 4.16.190 with respect to claims governed by §350. See id. at §§302-303.³

Unruh commenced this action in October, 2007. While this occurred more than one year after what Unruh claims is the date of discovery, she relies on the one-year discovery rule of §350, as extended by the request for mediation under RCW 7.70.110, to support the timeliness of her action. See Unruh Br. at 34-35.

The superior court granted Cacchiotti's motion for summary judgment, dismissing this action as untimely under §350. See Unruh Br. at 15. Apparently, in invoking §350's limitation period before the superior court, Cacchiotti did not raise the eight-year repose period as a defense. See Unruh Reply Br. at 19-22.

Unruh appealed the dismissal to the Court of Appeals, Division III. In defending the result below, Cacchiotti raised as an alternate basis for affirmance that Unruh's action was properly dismissed because the repose period had expired. See Cacchiotti Br. at 36-38. On reply, Unruh argued that re-enactment of the identical eight-year repose provision was unconstitutional in light of DeYoung, or that this issue should not be reached because it was not properly raised below. See Unruh Reply Br. at 19-23.

After completion of the briefing of the parties, Division III requested supplemental briefing regarding the effect of this Court's

³ The texts of 2006 Laws Ch. 8 §§1, 301-303 are reproduced in the Appendix.

opinions in DeYoung and Gilbert v. Sacred Heart, 127 Wn.2d 370, 900 P.2d 552 (1995) (harmonizing parent imputation provision in prior version of §350 with tolling statute), on application of the 2006 amendments to this case. Both parties filed supplemental briefs.

In Unruh's supplemental brief she argues that under DeYoung §350's eight-year repose period is "still unconstitutional," on several different grounds. Unruh Supp. Br. at 5; see also id. at 6-10, 19-30. Unruh further argues that the §350 parent imputation provision, in conjunction with the amendment to RCW 4.16.190, eliminating tolling for minors in claims governed by §350, violates several aspects of the Washington Constitution. See Unruh Supp. Br. at 11-18.

Cacchiotti's supplemental brief first argues that this appeal can be resolved without discussing the impact of DeYoung or Gilbert, because Unruh's action is untimely in fact. See Cacchiotti Supp. Br. at 2-3. Cacchiotti further argues that the eight-year repose period is dispositive, even if genuine issues of fact exist regarding application of the discovery rule, because RCW 7.70.110 does not apply to the repose period. See id. at 3-5. Otherwise, Cacchiotti contends that neither Gilbert nor DeYoung adversely affect the validity of the 2006 amendments. See id. at 11-19.

After submission of the parties' supplemental briefs, the Court of Appeals certified the appeal to this Court. See Order of Certification (6/21/10). This Court accepted the certification of the appeal. See Ruling Accepting Certification (6/30/10).

III. ISSUES PRESENTED

In an action governed by 2006 Laws Ch. 8 §§302-03, amending the tolling statute (RCW 4.16.190) and the health care provider statute of limitations (RCW 4.16.350):

- 1.) Under RCW 4.16.350, what degree of knowledge, actual or constructive, must the claimant have of a possible breach of duty by a health care provider in order to trigger the discovery rule?
- 2.) Under RCW 7.70.110, is a written request for mediation sent to the health care provider's insurance representative sufficient to entitle the claimant to the benefit of the statute's tolling provision, regardless of whether the representative has authority to agree to mediate or toll the limitation period?
- 3.) Does the minor tolling exemption of RCW 4.16.190(2), in conjunction with the parental imputation provision of RCW 4.16.350, violate Washington Constitution Art. I §10 (access to courts) or Art. I §12 (privileges or immunities)?
- 4.) Did reenactment of the eight-year repose period violate the Washington Constitution separation of powers doctrine, or does the repose period violate Art. I §12, in providing health care providers with a special privilege or immunity, while denying medical negligence plaintiffs the fundamental right of access to courts?

IV. SUMMARY OF ARGUMENT

Re: Degree of Knowledge Triggering RCW 4.16.350 Discovery Rule

Under §350's discovery rule, a plaintiff does not have knowledge of a health care provider's possible breach of duty unless he or she has actual or constructive knowledge of *specific* wrongful conduct. Mere suspicion of a wrongful act or omission is not enough to trigger the discovery rule. Moreover, a plaintiff is not deemed to have knowledge of a breach of duty, for failure to exercise due diligence in investigating a

possible negligence claim, when plaintiff is aware of another facially logical explanation for the adverse result.

Re: Efficacy of RCW 7.70.110 Mediation Request

RCW 7.70.110 only requires a good faith, written request for mediation be provided to a health care provider. The touchstone of the requirement is notice. The statute does not require service on the health care provider, or the provider's consent to mediation or tolling.

Re: Constitutionality Of 2006 Amendments Regarding Nontolling/ Parent Imputation Provisions

In disallowing tolling under RCW 4.16.190(2), while at the same time subjecting minors to the imputed knowledge of a custodial parent, the 2006 amendments unduly burden the right of minors to access to courts under Washington Constitution Art. I §10. These amendments also violate Washington Constitution Art. I §12, because they provide health care providers with a special privilege or immunity at the expense of minors' fundamental right of access to courts, and to a civil remedy under the law. On either basis RCW 4.16.190(2) should be invalidated.

Re: Constitutionality of RCW 4.16.350 Eight-Year Repose Period

The 2006 amendments, reenacting the §350 repose period, violate Washington Constitution Art. I §12 and Art. I §10 because they favor health care providers with a special privilege or immunity not generally available to civil defendants, while unduly burdening medical negligence plaintiffs' fundamental right to a civil remedy under the law. The eight-year repose period should be invalidated.

V. ARGUMENT

- A.) **For Purposes Of The Discovery Rule, A Plaintiff Does Not Have Knowledge Of A Health Care Provider's Possible Breach Of Duty Unless He Or She Has Actual Or Constructive Knowledge Of A *Specific* Wrongful Act Or Omission, And Plaintiff Is Not Obligated To Rule Out The Possibility Of Wrongful Conduct When There Is Another Facially Logical Explanation For The Adverse Result.**

The 2006 amendments did not alter the three-year limitation period and one-year discovery rule for medical negligence claims. See 2006 Laws Ch. 8 §302. RCW 4.16.350(3) provides in relevant part that an action

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 representative *discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later....*

(Emphasis added). At the same time, the Legislature restored the eight-year repose period held unconstitutional in DeYoung, provided that the knowledge of a custodial parent (parent) is imputed to a minor child for purposes of triggering the discovery rule, and eliminated the customary tolling provision for minors as to negligence claims against health care providers. See 2006 Laws Ch. 8 §§302-303.⁴

The parent imputation provision of §350 necessarily expands the inquiry under the discovery rule, requiring consideration of what Unruh *and her parents* knew or should have known for purposes of applying the

⁴ The constitutionality of the imputation/nontolling features and of the repose period is dealt with infra, in §C and §D, respectively.

rule. Thus, the legal principles discussed below apply to the degree of knowledge of Unruh and her parents, although for the sake of simplicity the discussion refers only to Unruh.

As the text of the three-year/one-year limitation period remains the same under the 2006 version of §350, case law interpreting prior versions of this statute is relevant here.⁵ With this in mind, it is generally understood that under the discovery rule a claim does not accrue until the plaintiff discovers or reasonably should have discovered all of the essential elements of the possible cause of action. See Ohler v. Tacoma General Hospital, 92 Wn.2d 507, 511, 598 P.2d 1358 (1979) (involving prior version of §350).⁶ These elements are duty, breach of duty, causation and damages. See id. Ultimately, whether a plaintiff has sufficient actual or constructive knowledge of each of these elements is normally a question of fact for the jury, unless reasonable minds cannot

⁵ For that matter, absent unique language in a particular statute, Washington courts have tended to discuss discovery rule principles in a generalized way, irrespective of the particular statute at issue. See e.g. Adcox v. Children's Orthopedic Hosp., 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993).

⁶ A plaintiff "discovers" a potential claim for relief if he or she has *actual knowledge* of it. Actual knowledge is a subjective inquiry, separate and distinct from constructive knowledge, which is based upon what a person should have known. See Hollman v. Corcoran, 89 Wn.App. 323, 334, 949 P.2d 386 (1997) (involving sexual abuse statute of limitations discovery rule); cf. Burbo v. Harley C. Douglass, Inc., 125 Wn.App. 684, 698, 106 P.3d 258 (regarding proof requirements for fraudulent concealment claim), *review denied*, 155 Wn.2d 1026 (2005). Actual knowledge requires proof of discovery *in fact*, and can be proved by circumstantial evidence. See id. As such, actual knowledge turns on the sensibilities of the particular person, and their credibility. On the other hand, language like that in §350(3) ("reasonably should have discovered") allows a trier of fact to find a person *constructively* knew the necessary facts, based upon an objective standard. See Segaline v. Labor & Indus., 144 Wn.App. 312, 332, 182 P.3d 480 (2008) (interpreting discovery rule under RCW 4.16.080(2) limitation period), *aff'd in relevant part*, 169 Wn.2d 467, 238 P.3d 1107 (2010). Cacchiotti argues in her briefing that Unruh's action is time-barred because she *actually* discovered her claim, and dismisses Washington cases characterized as relating to constructive knowledge as inapposite. See Cacchiotti Br. at 27-28.

differ on the issue. See Adcox, 123 Wn.2d at 34-35; Winbun v. Moore, 143 Wn.2d 206, 217, 221 P.3d 576 (2001). There is no precise formula for determining when the discovery rule is triggered, and resolution of this fact-specific issue often involves a case-by-case analysis. See Winbun, 143 Wn.2d at 219.

The element at issue in this appeal is breach of duty. See Cacchiotti Br. at 19. While a plaintiff need not know of the existence of a legal cause of action, with respect to breach of duty he or she must know something "wrongful" has occurred. See Ohler, 92 Wn.2d at 510-12; Winbun at 217. A plaintiff's mere knowledge that a certain mechanism has caused injury is not enough to fulfill the breach element of the discovery rule. See Ohler at 510, 512. This is particularly true when there is another "facially logical explanation" for the claimed injury. See Winbun at 217-20; see also Webb v. Neuroeduc. Inc., P.C., 121 Wn.App. 336, 344, 88 P.3d 417 (2004), *review denied*, 153 Wn.2d 1004 (2005).

For example, in Ohler plaintiff sued a health care provider for blindness that occurred at or around the time of her birth. She did not file her action until after she had reached adulthood, asserting she was unaware of her potential claim until she learned of a similar claim that resulted in a lawsuit. See Ohler at 508-09. The superior court dismissed the action under a prior version of §350 because Ohler had long known that her blindness resulted from excessive oxygen to her eyes when incubated at birth. See id. at 509-11. In a unanimous opinion, this Court

reversed, concluding the superior court erred in finding Ohler's mere knowledge that she was blinded by too much oxygen was sufficient to trigger the discovery rule:

This formulation of RCW 4.16.350's 1-year discovery rule omits an essential element of the negligence cause of action: respondent's breach of duty. She knew the alleged act, administration of oxygen, and she knew the result, blindness, *but there is a factual issue whether she knew or should have known that the result was a breach of the hospital's duty.*

Id. at 510 (emphasis added).

In holding a question of fact existed, this Court noted conflicting evidence on when the discovery rule was triggered. Ohler contended that she believed the oxygen treatment she received was a necessary treatment for a premature baby like her, and that the blindness was a complication of the prematurity. See id. at 509. On the other hand, the health care provider urged that Ohler may have learned of a possible wrongful act or omission while a student at the State School for the Blind. See id. at 512. Resolution of this issue required trial. See id.

Under the above authorities, a mere possibility of breach of duty does not support triggering the discovery rule. Ultimately, the plaintiff must have a sense that a specific wrongful act or omission occurred. See Winbun at 220-21; Ohler at 510-12. As a matter of public policy, any less exacting approach would require plaintiffs to err on the side of commencing litigation prematurely in order to avoid challenges to the timeliness of their actions. This approach potentially conflicts with the CR 11 duties imposed on litigants and their counsel. See Winbun at 220-

22; Webb, 121 Wn.App. at 345-46. The Court should resolve whether genuine issues of material fact exist regarding Unruh's entitlement to the discovery rule with these principles in mind.

B.) The Touchstone Of RCW 7.70.110 Is Notice To The Health Care Provider Of The Mediation Request, And Neither Service Of A Good Faith, Written Request On The Provider Nor The Provider's Consent To Mediation Or Tolling Are Required By The Statute.

Unruh contends that §350's one-year discovery rule was further extended by a timely good faith, written request for mediation pursuant to RCW 7.70.110. See Unruh Br. at 1, 35. The request for mediation was apparently sent to a representative of Cacchiotti's insurer. See id. at 15.⁷ In response, Cacchiotti argues that Unruh's request is ineffective because she "did not send the letter referencing mediation to Dr. Cacchiotti or an agent with authority to accept the request." Cacchiotti Br. at 31-32; see also id. at 33-35. Cacchiotti does not appear to argue that he was unaware of the mediation request when made, contending instead that Unruh presented no evidence that he knew about it. See id. at 35.

RCW 7.70.110 is simple and straightforward:

The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

⁷ Unruh notes that after she sent the then-required statutory notice of intent to sue to Cacchiotti, pursuant to RCW 7.70.100, a representative of Cacchiotti's insurer acted on his behalf in dealings with Unruh. See Unruh Reply Br. at 5. (The notice of intent provision in RCW 7.70.100 was struck down as unconstitutional in Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010)).

As Unruh notes, the statute is silent regarding to whom the request should be directed. See Unruh Reply Br. at 15. Nor does the statute specify how the request is to be delivered, so long as it is in writing and made in good faith. Read as a whole, the statute reflects a level of informality that is in keeping with the legislative purpose of providing "incentives to settle cases before resorting to court." 2006 Laws Ch. 8 §1.

The touchstone of this statute is notice to the health care provider. Cacchiotti's argument that the recipient's representative must have the authority to act on his behalf and "accept" the mediation request misapprehends both the letter and spirit of the statute. See Cacchiotti Br. at 35. The plain and unambiguous text of the statute does not require the health care provider to agree to the mediation request. Instead, the mere "making" of a good faith, written request entitles the plaintiff to the additional tolling period.⁸

Under the foregoing analysis, this Court's inquiry should be confined to whether the record reflects Cacchiotti had notice of the written request for mediation, or whether there is at least a triable issue of fact on this question.⁹

⁸ While the statute does not require the health care provider to mediate at this pre-litigation stage, implicit in the statute is the notion that the health care provider will see the value of attempting to mediate at this juncture in an effort to avoid the rigors of formal litigation.

⁹ There is no suggestion in Cacchiotti's briefing that Unruh's request was not made in "good faith."

C.) The 2006 Amendments Parent Imputation/Nontolling Provisions Violate Minors' Constitutional Rights Under Washington Constitution Art. I §10 (Access To Courts), And Art. I §12 (Privileges Or Immunities), Because Their Right to Pursue A Medical Negligence Claim May Be Extinguished Without Any Meaningful Protection.

Introduction

The parties disagree on how the 2006 amendments apply in this instance, particularly regarding when the limitations and repose periods begin to run. See supra n.2. WSAJ Foundation assumes, solely for the purposes of this constitutional argument, that Cacchiotti's contentions are correct, thereby giving rise to the constitutional challenges raised on review.

Otherwise, the Court should address the constitutionality of the parent imputation/nontolling provisions in the 2006 amendments if it determines to reverse and remand the discovery rule issue for trial. First, Cacchiotti asserts the discovery rule lapsed because of the imputed knowledge of Unruh's father. See Cacchiotti Supp. Br. at 2. Second, the Court of Appeals invited supplemental briefing on the impact of this Court's opinion in Gilbert, supra, on the 2006 amendments. As a result, Unruh challenges the constitutionality of the impact of the parent imputation/nontolling provisions on her claim. See Unruh Supp. Br. at 11-30 (raising privileges and immunities, due process and access to courts challenges).

Lastly, in Gilbert, this Court harmonized the imputation provision in a prior version of §350 with the general tolling provision in

RCW 4.16.190, which applied to most tort claims, including those for medical negligence. See 127 Wn.2d at 375-77. In so doing, the Court avoided addressing constitutional challenges based on the health care provider's argument that the imputation provision implicitly repealed the tolling entitlement for minors in the medical negligence context. See id. at 375. In resolving the appeal in this manner, the Court noted: "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. at 378 (emphasis added). Given the fact that the 2006 amendments eliminate tolling for minors as to medical negligence claims, while retaining parent imputation under §350, the constitutional challenges should be addressed.

1.) Under *Putman*, The Parent Imputation/Nontolling Provisions Violate Minors' Right Of Access To Courts Under Washington Constitution, Art. I §10.

The consequences of the 2006 amendments imputation/nontolling provisions on minors are potentially drastic. As Cacchiotti admits, with a parent's imputed knowledge and no safe harbor tolling under RCW 4.16.190(2), the statute of limitations begins to run on a minor's medical negligence claim once a parent knows the essential elements of a potential claim. See Cacchiotti Supp. Br. at 6, 10 & n.3. This consequence follows, *even though §350 does not impose a duty on the parent (or guardian) to act upon the knowledge that triggers the limitation period.* See 2006 Laws §302.

This result violates minor plaintiffs' right of access to courts, as recently articulated in Putman v. Wenatchee Med. Ctr., 166 Wn.2d 974, 216 P.3d 374 (2009) (striking down RCW 7.70.150, requiring a certificate of merit to pursue medical negligence claims). In Putman, this Court concluded that the certificate of merit requirement unduly burdened medical negligence plaintiffs' right of access to courts under Washington Constitution Art. I §10, relying on its previous holding in John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (referencing Art. I §10 in concluding plaintiffs cannot be denied access to the processes of the court). See Putman, 166 Wn.2d at 979-81.¹⁰

Under Putman, the combined effect of the imputation/nontolling provisions unduly burdens minor plaintiffs in a different way. These plaintiffs are at the mercy of parents acting on their behalf, and risk losing their causes of action through no fault of their own. This is wrong. The words of then-Chief Judge Pearson in Hunter v. North Mason School Dist., 12 Wn.App. 304, 529 P.2d 898 (1974), *aff'd on other grounds*, 85 Wn.2d 810, 539 P.2d 845 (1975), are relevant here. In Hunter, the Court of Appeals held that RCW 4.16.190 served to toll a minor claimant's obligations under a notice of claim provision. Chief Judge Pearson concluded:

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.

¹⁰ Art. I §10, along with the text of Art. I §12, is reproduced in the Appendix to this brief.

They were established for the protection of minors, and not as a bar to the enforcement of their rights.

* * *

As stated, [the minor's] right of action should not depend on the good fortune of having an astute relative or friend to take the proper steps on his behalf.

Id., 12 Wn.App. at 306, 307.¹¹ Similarly, the Texas Supreme Court struck down a health care provider's statute of limitations that lifted Texas' general minor tolling provision, finding the statute violated the due process guarantee of that state's open courts provision. See Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983). Sax held:

The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided....

Id. at 667.¹²

Under the 2006 amendments, a minor injured at birth due to medical negligence would lose his or her cause of action if a parent had

¹¹ Historically, Washington statutes and case law have been protective of the rights of minors. See e.g. RCW 4.08.050; Ch. 11.88 RCW; Ch. 11.92 RCW; Mezere v. Flory, 26 Wn.2d 274, 277-79, 173 P.2d 776 (1946) (concluding decree of estate distribution void as to minor heirs not represented by guardian or guardian ad litem); State ex rel. Davies v. Superior Court, 102 Wash. 395, 397-98, 173 P. 189 (1918) (holding court acquired no jurisdiction in eminent domain proceeding where no guardian ad litem appointed for minor landowner for preliminary court proceedings).

¹² The court in Sax pointed out that the specter of parental immunity was a consideration in finding the statute unconstitutional. See 648 S.W.2d at 667. It is unclear whether a parent's failure to act under these circumstances would be actionable by the child. See generally Jenkins v. Snohomish County PUD, 105 Wn.2d 99, 713 P.2d 79 (1986) (discussing and upholding parental immunity doctrine). To the extent that Cacchiotti may argue parents have an inherent duty to protect a minor child's rights, any failure to do so would seem to partake of parental immunity. In any event, imposing such a duty on parents seems inconsistent with Washington's elaborate guardianship scheme and the tolling statute. See supra n.11.

sufficient knowledge to trigger the discovery rule and did nothing within three years. This is a startling result, wholly inconsistent with longstanding protections afforded minors in this state. RCW 4.16.190(2) should be voided because it results in unduly burdening minors' right of access to courts under Art. I §10. See Putman, *supra*.¹³

2.) The Imputation/Nontolling Provisions Also Violate Art. I §12 In Providing Health Care Providers With A Special Privilege Or Immunity That Burdens Minor Plaintiffs' Fundamental Right Of Access To Courts, And A Civil Remedy Under The Law.

In §D, *infra*, WSAJ Foundation argues that the 2006 amendment eight-year repose period is unconstitutional under Art. I §12, and the heightened privileges and immunities analysis developed recently in Grant Cy. Fire Prot. Dist. v. Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004) (Grant County II). Under that analysis, incorporated here by reference, the Legislature has impermissibly given health care providers a special privilege or immunity at the expense of minors' fundamental right of access to courts. This access to courts argument differs from the access to courts analysis articulated in Putman, in that it is grounded not in the right of access to the *processes* of the courts, but in the right to a substantive remedy under the common law. This issue need not be reached if

¹³ In finding denial of access to courts under Art. I §10, Putman did not indicate whether the right of access may be denied if compelling reasons exist for overcoming the right. It simply found the certificate of merit statute "unduly burdened" the right of access to courts. See 166 Wn.2d at 978 n.1. However, in interpreting the "open courts" prong of Art. I. §10 in Rufer v. Abbott Labs, 154 Wn.2d 530, 540-41, 114 P.3d 1182 (2005), the Court allowed that the right to open courts could be overcome in a given circumstance for compelling reasons. Even if a similar analysis is applied to the access to courts prong of Art. I §10, no such reasons are presented here.

RCW 4.16.190(2) is found unconstitutional under the Putman access to courts analysis.

D.) The Legislature's Reenactment Of The §350 Eight-Year Repose Period Is Unconstitutional Under The Washington Constitution Separation Of Powers Doctrine, And Because It Violates Art. I §12, Based On A *Grant County II* Privileges And Immunities Analysis.

Introduction

As with §C, WSAJ Foundation assumes for purposes of this argument the Court will adopt Cacchiotti's view of how the 2006 amendments are implemented in this case. See supra at 3, n.2 & §C.

Otherwise, the briefing before the Court allows it to reach the issue of the constitutionality of the eight-year repose period for two reasons. First, Cacchiotti contends that regardless of whether Unruh's action is timely under the discovery rule, it fails under the repose period in any event. See Cacchiotti Br. at 35-37. Second, in its call for supplemental briefing the Court of Appeals basically invited constitutional analysis on the impact of this Court's prior opinion in DeYoung on the 2006 amendments, and the parties' briefing includes constitutional argument on this issue. See Unruh Supp. Br. at 5-30; Cacchiotti Supp. Br. at 7, 11-15, 18.¹⁴

¹⁴ On the other hand, it may not be necessary for the Court to address the constitutionality of the repose period if the Court remands for trial on the discovery rule issue and determines that RCW 4.16.190(2) is void, effectively restoring tolling for minor medical negligence plaintiffs. In Merrigan v. Epstein, 112 Wn.2d at 716-18, interpreting the relationship between prior versions of RCW 4.16.190 and §350, the Court held the tolling statute applied to §350's repose period. If this holding in Merrigan applies here, and RCW 7.70.110, like the tolling statute, extends both limitation and repose periods, then it is possible no repose period lapse occurred here.

1.) Reenactment Of §350's Eight-Year Repose Period Violates The Washington Constitution Separation Of Powers Doctrine Because The Reenactment Is Grounded In Nothing More Than The Legislature's Disagreement With The Legal Analysis In *DeYoung*, And A Restated Rationale For The Repose Period That Does Not Meaningfully Differ From That Previously Rejected By This Court.

WSAJ Foundation supports Unruh's argument that the reenactment of the eight-year repose period, in the face of the declaration of unconstitutionality in DeYoung, violates the Washington Constitution separation of powers doctrine. See Unruh Supp. Br. at 8-11. This doctrine prevents the legislative branch from performing a judicial function. See Waples v. Yi, 169 Wn.2d 152, 158, 234 P.3d 187 (2010); Tacoma v. O'Brien, 85 Wn.2d 266, 534 P.2d 114 (1975).

The Legislature's justification for reenacting the repose period, after DeYoung found the prior repose period was unjustified under the rational basis test, is set forth in 2006 Laws Ch. 8 §301, the text of which is reproduced in the Appendix to this brief. The recitations in this section reflect a reworking of the prior justifications given for enacting the repose period, coupled with statements that represent nothing more than disagreement with the Court's constitutional analysis in DeYoung.

For example, in striking down the prior repose period because it did not bear a rational relationship to the purposes of the law, DeYoung concludes that the repose period could not have any meaningful impact on the medical malpractice industry given the limited number of claims at issue. See DeYoung, 136 Wn.2d at 147, 149. The Legislature's response

in §301, which does not appear supported by any new legislative facts or findings, is that even if there is not any actual effect on reducing insurance costs, the mere fact that the repose period will provide some protection against medical negligence claims, "however few," is sufficient. Moreover, the Legislature declares the need for the repose period compelling if even one defendant is excused from having to answer a stale claim. See id.¹⁵

The legislative recitals in §301 reveal a Legislature performing a judicial function. This violates the separation of powers doctrine. See Tacoma v. O'Brien, 85 Wn.2d 266, 534 P.2d 114 (1975). In Tacoma v. O'Brien, certain public works contractors, experiencing unexpected rises in the price of petroleum products, prevailed on the Legislature to pass an act allowing contractors under certain circumstances to avoid performance of public works contracts, in whole or in part, as "economically impossible." See 85 Wn.2d at 268-70. This Court invalidated the act under the separation of powers doctrine because the determination of economic impossibility is a question for the courts, not the Legislature. See id. at 271-72.

In this same vein, the Legislature's re-stated justifications for reenactment of the eight-year repose period are adjudicatory in nature, and

¹⁵ Cacchiotti's argument that with the nontolling provision the number of affected claims is likely increased is unavailing if the nontolling provision is found unconstitutional. See Cacchiotti Br. at 13, 14-15.

are not a legitimate basis for overcoming the prior declaration of unconstitutionality. Faced with the Court's determination in DeYoung, the Legislature was required to support reenactment with additional justifications, whether real or hypothetical, to overcome its prior flawed effort. It cannot reference the same reasons previously found inadequate, or simply declare the original rationale is sufficient.

2.) Under a *Grant County II* Privileges And Immunities Analysis, Enactment Of The Eight-Year Repose Period Violates Art. I §12 Because It Provides A Special Privilege Or Immunity To Health Care Providers While Unduly Burdening Medical Negligence Plaintiffs' Right Of Access To Courts And A Substantive Remedy For A Civil Wrong.

In response to the Court of Appeals request for additional briefing regarding DeYoung, the parties have engaged in a privileges and immunities analysis based upon the rational basis test. See Unruh Supp. Br. at 19-30 (arguing repose period violates privileges and immunities clause under either heightened or minimum scrutiny); Cacchiotti Supp. Br. at 12-15 (defending reenactment of repose period under privileges and immunities clause because Legislature established a new rational basis for the provision). However, Washington privileges and immunities law has evolved since DeYoung was decided.

In a landmark decision in Grant County II, *supra*, this Court conducted a new *Gunwall* analysis of Art. I §12 and devised a new test for when a statutory provision violates Art. I §12.¹⁶ The Court concluded

¹⁶ See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

that, properly interpreted, Art. I §12 uniquely prohibits the grant of special privileges and immunities, separate and distinct from traditional federal equal protection analysis. See 150 Wn.2d at 810-14. The Court held that a violation of the privileges and immunities provision occurs when: 1) the law, or its application, favors a particular class of citizens, and 2) burdens a fundamental right of citizenship.

In cataloging the fundamental rights of citizenship, the Court drew upon its early opinion in State v. Vance, 29 Wash. 435, 458, 70 Pac. 34 (1902):

These terms, as they are used in the Constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; *the rights to the usual remedies to collect debts, and to enforce other personal right*; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, Const. Lim. 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.

(Emphasis added); see also Grant County II at 813 (quoting Vance).

This Court has turned to the Grant County II analysis to weigh a number of privileges and immunities challenges in subsequent cases. See Madison v. State, 161 Wn.2d 85, 163 P.3d 757 (2007); Ventenbergs v. City of Seattle, 163 Wn.2d 92, 178 P.3d 960 (2008); Am. Legion Post v. Dep't of Health, 164 Wn.2d 570, 192 P.3d 306 (2008); see also Andersen v. King County, 158 Wn.2d 1, 138 P.3d 963 (2006) (holding fundamental

right to marry does not include same sex couples, with plurality opinion limiting special favoritism to minority classes).

Reenactment of the eight-year repose period is constitutionally infirm under this Grant County II test. First, the reenactment provides health care providers with a special privilege or immunity not shared by most civil defendants.¹⁷ Second, imposition of the repose period unduly burdens medical negligence plaintiffs right to a civil remedy. This right is articulated in Vance, which includes in its catalog of fundamental rights "the rights to the usual remedies to collect debts and to enforce other personal right[s]...." 29 Wash. at 458; see also In re Marriage of King, 162 Wn.2d 378, 388, 174 P.3d 659 (2007) (stating "[w]e have generally applied the open courts clause in one of two contexts ... [including] 'the right to a remedy for a wrong suffered'"; quoting Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 24 (2002)); Sofie v. Fibreboard Corp., 112 Wn.2d 636, 651 & n.5, 771 P.2d 711, 780 P.2d 260 (1989) (explaining Washington Industrial Insurance Act constitutional because it constituted a substitute remedy for common law claims against employers); Unruh Supp. Br. at 11-13, 19, 24-25. The Court should take this occasion to finally hold that, under Vance, the right to a civil remedy is a fundamental right in this state.¹⁸

¹⁷ Some construction industry claims are subject to a repose period. See RCW 4.16.310. The constitutionality of this repose period was upheld under Art. I §12 in Lakeview Condo. Assn. v. Apartment Sales Corp., 144 Wn.2d 570, 29 P.3d 1249 (2001), in an opinion that, like DeYoung, pre-dates Grant County II.

¹⁸ In the Gunwall analysis conducted in DeYoung, the Court concluded with little discussion there was no fundamental right to pursue a tort claim under the Washington Constitution. See 136 Wn.2d at 142. In reaching this result, it surveyed the various

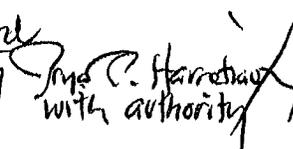
Under Grant County II, the eight-year repose period should be declared unconstitutional on its face, as it impairs the fundamental rights of all medical negligence plaintiffs, minors and adults.¹⁹

VI. CONCLUSION

The Court should adopt the analysis set forth in this brief regarding the issues addressed, and resolve this appeal accordingly.

DATED this 10th day of January, 2011.


BRYAN P. HARNETIAUX


GEORGE M. AHREND by 
with authority

On behalf of WSAJ Foundation

rights identified in Art. I and noted that the state constitution "does not include pursuit of a tort claim within those enumerated rights." See id. This analysis misapprehends the nature of state constitutions, and is inconsistent with the Court's prior recognition that state constitutions are not documents of enumerated powers, but are statements of first principles, inherently preservative in nature. See State ex rel. Macri v. Bremerton, 8 Wn.2d 93, 109, 111 P.2d 612 (1941) (explaining that state constitutions are "conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation"; citations omitted). The analysis in DeYoung was incorrect and has been eclipsed by the subsequent Gunwall analysis in Grant County II.

¹⁹ As explained supra, n.13, in explicating another aspect of Art. I §10, the Court has allowed that the fundamental right to open courts could be overcome for compelling reasons. See Rufer, 154 Wn.2d at 540-41. Under a similar analysis of the right to a remedy component embodied in Art. I §10, §301 of the 2006 amendments falls well short of establishing compelling reasons for imposing an eight-year repose period on medical negligence plaintiffs.

Appendix

APPENDIX

Washington Constitution Art. I, § 10. Administration of Justice

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

Washington Constitution Art. I, § 12. Special Privileges and Immunities Prohibited

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.

Laws of 2006, Ch. 8, §§ 1, 301-303

Sec. 1. The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

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.

* * *

Sec. 301. The purpose of this section and section 302 of this act 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.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.

In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.

The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.

The legislature intends to reenact RCW 4.16.350 with respect to the eight-year statute of repose and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the eight-year statute of repose reenacted by section 302 of this act be applied to actions commenced on or after the effective date of this section.

Sec. 302. RCW 4.16.350 and 1998 c 147 s 1 are each reenacted to read as follows:

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, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his 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 employment, including, in the event such employee or agent is deceased, his 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 employment, including, in the event such officer, director, employee, or agent is deceased, his 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 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).

Sec. 303. RCW 4.16.190 and 1993 c 232 s 1 are each amended to read as follows:

(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.

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Dear Mr. Carpenter

Per Washington State Association for Justice Foundation's prior letter request for amicus status in this case, attached is the proposed amicus curiae brief. Also attached is the accompanying motion to file over-length amicus curiae brief.

Per the recitations in the letter request, service of the above submissions is made on counsel by email.

Respectfully submitted,

Bryan Harnetiaux, WSBA #5169
On behalf of WSAJ Foundation

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