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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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LISA UNRUH,

Appellant,

v.

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

Respondents.

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**RESPONDENTS' BRIEF**

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## I. INTRODUCTION

Lisa Unruh's ("Unruh") dental malpractice claims against Dr. Dino Cacchiotti are barred by the statute of limitations. At the trial court level, Dr. Cacchiotti moved for summary judgment on the grounds that (1) Unruh's claim for continuing negligent treatment fails because (a) the treatment was not continuous, (b) there is no expert testimony that Dr. Cacchiotti was negligent in delivering the second course of treatment, and (c) the second course of treatment was separate and not interrelated to the first course of treatment; (2) Unruh filed her claim against Dr. Cacchiotti well over three years after Dr. Cacchiotti's alleged negligence and more than three years after she attained the age of majority; (3) Unruh's father knew of the facts underlying all of the elements of Unruh's cause of action a decade ago. His knowledge is imputed to Unruh; and (4) Unruh filed her claim more than one year after she discovered the facts underlying all the elements of her cause of action. Unruh has abandoned her argument regarding the continuing negligent treatment and her argument that her lawsuit was filed within three years of the alleged negligence. This appeal is about the application of the discovery rule to Unruh's dental malpractice claim.

In dental malpractice cases, a claimant has one year from the date of discovery to file her cause of action. Unruh testified that she

discovered all of the elements of her cause of action against Dr. Cacchiotti as early as 2000 and again in 2003 and 2005, all of which is well over two years before she filed her lawsuit in October 2007. Her father, whose knowledge is imputed to Unruh pursuant to RCW 4.16.350(3), testified that he discovered all of the elements of Unruh's cause of action nearly a decade before this lawsuit was filed. This Court should affirm dismissal of Unruh's claims because she did not diligently pursue them.

Unruh has argued that she did not discover her cause of action until March 2006. Despite Unruh's and her father's clear, undisputed testimony that each discovered the cause of action well before March 2006, Unruh claims that a material issue of fact exists. It does not. Even if the Court were to accept this argument, Unruh must also establish that her January 2007 request for mediation to an insurance adjuster tolled the running of the statute of limitations until January 2008 to prevail on appeal. It did not. The request for mediation was ineffective because it was not made to Dr. Cacchiotti. Moreover, a request for mediation could not toll the eight-year statute of repose from act or omission set forth in RCW 4.16.350(3). The last date of allegedly negligent treatment occurred in August 1999. In no event could she bring her lawsuit after August 2007. Her October 2007 lawsuit is untimely pursuant to the statute of repose even if questions of

fact remain about her discovery of the claim and despite the mediation request.

The trial court correctly dismissed the action and should be affirmed.

## II. ISSUES ON APPEAL

The issues on appeal are:

- A. Whether this lawsuit is time-barred based on Unruh's undisputed testimony that she had actual knowledge of all elements of her claim more than two years before she brought suit;
- B. Whether this lawsuit is time-barred based on Unruh's father's undisputed testimony that he had actual knowledge of all elements of her claim before she turned eighteen, which knowledge is imputed to Unruh, and Unruh failed to sue within three years of her eighteenth birthday;
- C. Whether a dispute of fact exists about the timing of Unruh's knowledge when both she and her father plainly testified at deposition that each understood from other health care professionals that Dr. Cacchiotti's treatment with braces was possibly wrongful and caused injury;
- D. If a material question of fact exists whether Unruh did not discover her claim until March 2006, whether Unruh's January 2007 letter to Dr. Cacchiotti's insurer was effective to toll the one-year discovery period even though she did not make or copy the request to Dr. Cacchiotti, she did not establish that Dr. Cacchiotti's insurer had authority to receive such a request, and the statute of limitations is a personal defense; and
- E. If this lawsuit is not barred based on any of the above, whether this lawsuit is barred by the eight-year from act or omission statute of repose set forth in RCW 4.16.350(3), because the undisputed last date of alleged negligence was August 1999, and Unruh did not sue until October 1, 2007, more than eight years later.

### III. STATEMENT OF THE CASE

The parties agree that Dr. Cacchiotti treated Unruh with braces from March 1995 to August 1999. *Opening Brief*, p. 3, citing CP 59.<sup>1</sup> The parties agree that only this treatment, and no subsequent treatment, underlies Unruh's claims of malpractice. *Id.* See also CP 10 (Certificate of Merit from Dr. Aronowitz); CP 165-166, ¶¶ 3.2, 3.3, 3.5, 3.6 (Amended Complaint). On appeal Unruh has abandoned an argument of continuing negligence. The trial court correctly rejected this argument. The argument was meritless because of the undisputed break in treatment. The allegedly negligent treatment occurred between March 1995 and August 1999. That Dr. Cacchiotti began a different treatment with Unruh years later to prepare her mouth for planned surgery has no relationship to her present claims, as Dr. Cacchiotti argued to the trial court. See CP 32-36. Her experts did not opine that this subsequent phase of treatment was negligently performed. See CP 91, lines 1-11. Unruh was correct to abandon this argument on appeal.

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<sup>1</sup> Dr. Cacchiotti testified, "Lower braces were removed July, 1997, a year and a half later; upper braces were removed in 8 of 1999." Dr. Cacchiotti then was asked, "Okay. And then she had no more braces after that; is that true?", to which he responded, "Correct, at that point she had no other braces." CP 59.

Unruh alleges that Dr. Cacchiotti's treatment of Unruh with braces was not within the standard of care, and that the braces were kept on too long, resulting in the loss of Unruh's permanent teeth. *Id.*; CP 165 at ¶ 3.5. Unruh states in her Opening Brief, "As a result of Dr. Cacchiotti keeping Lisa in braces for too long with heavy forces, her roots 'resorped,' or dissolved, and she lost all of her teeth." *Opening Brief*, p. 7. If the claim had proceeded to trial, Dr. Cacchiotti would have intensely disputed that he breached the standard of care, and that the treatment with braces caused Unruh's tooth loss. This appeal does not concern the merits of those inquiries.

**A. Unruh Received Allegedly Negligent Orthodontic Care from Dr. Cacchiotti from March 1995 to August 1999.**

Unruh was born January 3, 1986. CP 70, lines 8-10. At the time of her first visit with Dr. Cacchiotti in March 1995, she was 9 years old. CP 56, lines 6-9; CP 54, line 10. When Dr. Cacchiotti first saw Unruh on March 3, 1995, he found that she had no remaining primary (baby) teeth, a Class III malocclusion (her bottom jaw juttred out past her upper jaw), insufficient space for teeth numbers 6 and 11 to erupt, and a narrow maxillary arch. CP 54, lines 10-14. As Unruh grew, her Class III malocclusion continued to worsen. CP 56, line 22 to CP 57, line 2. Unruh would eventually need jaw surgery once she stopped growing to correct her severe skeletal deformity. Additionally, due to size of her upper jaw

there was insufficient room for her permanent teeth to erupt into. The lack of room eventually caused some of her teeth to loosen and fall out.

On June 14, 1995, Dr. Cacchiotti applied partial braces to Unruh's upper teeth. CP 57, line 25 to CP 58, lines 1-5. In September 1995, he applied the remaining braces on her upper teeth, and in January 1996, he added all of her lower braces. CP 58, lines 21-24. Dr. Cacchiotti testified that he applied braces to Unruh's teeth to "A, make space for No. 6 and No. 11 to erupt in; B, to widen her maxilla which was narrow; and C, as an adjunct, to help alleviate her Class III condition." CP 55, lines 7-11.

During Dr. Cacchiotti's treatment of Unruh and thereafter, the roots of several of Unruh's teeth were resorbed by the permanent teeth erupting into the path of those roots. CP 62, lines 6-24. The root resorption suffered by Unruh was extremely rare and idiopathic.<sup>2</sup> CP 81, lines 12-13; CP 82, lines 3-5. This root resorption irreparably damaged several of Unruh's permanent teeth, causing them to loosen and eventually fall out. Unruh contends that she lost her teeth due to Dr. Cacchiotti's negligence. Specifically, she alleges that the "result of Dr. Cacchiotti's prolonged orthodontic care of Plaintiff has resulted in the decay and loss of the majority of her adult teeth in her upper jaw and unnecessary expenditures for failed efforts to correct her condition with braces." CP 165.

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<sup>2</sup> A disease is considered idiopathic if there is no known cause.

Dr. Cacchiotti removed Unruh's lower braces in July 1997. CP 59, line 1. He removed her upper braces in August 1999. CP 59, lines 2-3. Unruh's claim of negligence is based on the treatment that occurred from 1995 to August 1999.

From August 1999 to November 14, 2000, Unruh went to see Dr. Cacchiotti only when she had problems associated with the root resorption. CP 99; CP 63, lines 18-21. Unruh did not return to Dr. Cacchiotti until November 19, 2002. CP 100.

In 2002, when Unruh was 16 years old, she was referred to Dr. Roger West for jaw surgery. Dr. West is now retired, but at the time, he specialized in oromaxillofacial surgery with a subspecialty in orthognathic surgery.<sup>3</sup> CP 106, line 23 to CP 107, line 1. When Unruh first presented to Dr. West, based on her age, Dr. West determined that it was necessary to monitor her jaw growth with serial head films before proceeding to surgery. CP 109, lines 6-8. Dr. West's plan was to correct Unruh's Class III malocclusion surgically. CP 113, lines 15-17. The surgery was intended to bring Unruh's upper jaw forward (which would require bone grafts) and move her lower jaw back (which would require removal of segments of bone). CP 114, lines 6-8. In order to prepare Unruh's mouth for jaw surgery, additional orthodontics were necessary to align the teeth as much as possible and to serve as "a handle" during the surgery. CP 109, line 19 to CP 110, line 7. Unruh does not allege, nor could she, that

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<sup>3</sup> Orthognathic surgery is surgery performed on the bones of the jaws to change their positions.

her need for jaw surgery was in any way related to the braces applied in 1995 and 1996 or Dr. Cacchotti's treatment. Unruh needed jaw surgery to correct her severe Class III malocclusion.

After a two-year break in treatment, on November 19, 2002, Unruh presented to Dr. Cacchiotti to discuss jaw surgery. CP 100. On March 12, May 15, and June 10, 2003, Dr. Cacchiotti applied pre-surgical braces. CP 100.

On July 29, 2003, Dr. West performed Unruh's jaw surgery to correct her skeletal deformity. CP 134-36. Following this jaw surgery, Unruh received treatment from Dr. Douglas Trimble, an oral surgeon, for extraction of teeth and bone grafting prior to the placement of teeth implants. Dr. Ronald Bryant, a prosthodontist,<sup>4</sup> placed Unruh's implants.

**B. Unruh's Uncontested Testimony Establishes that She Personally Knew that Dr. Cacchiotti's Treatment with Braces Was Potentially Wrongful As Early As 2000.**

Unruh testified at her deposition that several health care providers told her that her root resorption and subsequent loss of her teeth was due to Dr. Cacchiotti's care. According to Unruh's own testimony, she discovered her all elements of her cause of action by 2000. Unruh testified that Dr. James Lord<sup>5</sup> told her that the problem with her roots

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<sup>4</sup> A prosthodontist is a dentist who specializes in the replacement of missing teeth and the restoration of natural teeth.

<sup>5</sup> Dr. Lord fitted Unruh with an overdenture that was designed to cover her missing front teeth.

which was causing her to lose teeth was due to Dr. Cacchiotti's orthodontic care. CP 27; CP 71, lines 18-24; CP 50, line 1; CP 140 (Dr. Lord treated Unruh from October 2000 to January 2001).

This knowledge of her cause of action was reinforced at some point between August 5, 2002 and June 8, 2005 by Dr. West. Unruh testified that Dr. West told her that her "roots were smaller than average because of the braces being on so long my teeth couldn't shift, and because of that my bone is not as thick as it was." CP 72, lines 11-16; *see also* CP 75, lines 18-22.

And, Unruh's knowledge of her cause of action was again reinforced by Dr. Bryant in 2003. CP 71, lines 18-20; CP 73, lines 5-8; CP 74, line 5 to CP 75, line 5. Unruh testified to the following conversations with Dr. Bryant in 2003:

Q. And in 2003, did you understand that the problem with your roots was due to the orthodontic care?

A: Yes.

\* \* \* \*

Q: Did Dr. Bryant tell you what should have happened or what should have been done by Dr. Cacchiotti?

A: He told me what he believed—

Q: Okay.

A --would have been a better way.

Q: And was that like on the same second or third visit?

A: Around that time.

Q: Around that time. Okay. And what did he tell you that he believed should have been done?

A: I shouldn't have had braces, and I should have gone through the jaw surgery.

Q: Earlier?

A: No, I couldn't go through it earlier.

Q: So Dr. Bryant did not agree with Dr. Cacchiotti's decision to put you in braces at all?

A: Yes.

Q: Do you recall if—do you recall if Dr. Bryant ever told you that you would have lost your teeth even if you weren't wearing braces?

A: He said that I wouldn't have lost them.

Q: So Dr. Bryant said that you wouldn't have lost teeth—

A: He doesn't believe that I would have.

Q: Was that part of the same conversation around this second or third visit that you had with him?

A: Yes.

CP 71, lines 18-20; CP 74, line 5 to CP 75, line 5; *see also* CP 73, lines 5-21. Unruh's second visit with Dr. Bryant was October 17, 2003 and her third visit was March 30, 2005.<sup>6</sup> CP 142. Unruh also testified:

Q: [W]hen he told you that around the second or third visit he didn't agree with Dr. Cacchiotti's care, do you recall what you were thinking at that time?

A: What I went through wasn't mainly necessary.

Q: Did that make you feel bad?

A: Of course.

CP 73, lines 15-21. She explained her understanding from what Dr. Bryant told her in 2003 that,

I didn't have to go through what I had gone through all those years. That hurt a lot because that was a lot of years and through over half my life spent that way.

CP 74, lines 1-4.

**C. Unruh's Father's Uncontested Testimony Establishes that He Personally Knew that Dr. Cacchiotti's Treatment with Braces Was Potentially Wrongful As Early As a Decade Before His 2007 Deposition.**

Unruh's father Bryan Unruh testified that he was aware of Dr. Cacchiotti's alleged negligence more than a decade before his 2007 deposition. CP 152, lines 8-14; CP 152, line 19 to CP 153, line 15; CP 154, lines 5-19. He testified as follows:

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<sup>6</sup> This conversation occurred earlier than 2005, because when asked if this conversation occurred in 2005 or 2006, Lisa said "no." CP 73, lines 5 to 8.

Q: What were you told about Lisa losing her teeth when she was in middle school/high school?

A: What was I told about it?

Q: Yes.

A: By who?

Q: By everybody who ever told you about it.

A: **Pulling too hard and too fast at a young age.**

CP 152, lines 8-14 (emphasis added). He continued,

Q: When you say pulling too hard and too fast, are you referring to the orthodontic appliances?

A: Yes.

Q: Now, who told you that?

A: If I remember right, I think Dr. Bryant said it, if I remember right.

Q: Okay. Now is that something Margaret [Unruh] ever told you?

A: And also – and also a dentist up in Canada said the same thing.

Q: Which dentist in Canada?

A: He's retired, but it was Dr. Anderson.

Q: Now, did he ever see Lisa?

A: No.

Q: And when did you speak to Dr. Anderson?

A: 10, 12 years ago—10 years ago it could have been. I lose track of time. I mean, I can't pinpoint every specific time.

Q: Okay. But it was—it was many years ago that you spoke to Dr. Anderson? It wasn't in the last couple of years?

A: No.

CP 152, line 19 to CP 153, line 15.

He also testified that on May 25, 2005, Dr. Bryant told him and Unruh that the orthodontics caused Unruh to lose many of her teeth. CP 154, lines 5-19 (referring to medical record at CP 143) (Q: "And so you were told [on May 25, 2005] that the orthodontics had caused Lisa to lose many of her teeth at that time?" A: "Yes. As far as I remember.").

The record indicates that Unruh's stepmother Margaret was not present at this appointment. CP 143.

These uncontroverted conversations all predate the March 2006 appointment that Unruh argues triggered knowledge of her claim.

**D. Unruh Commenced This Lawsuit On October 1, 2007, More Than Three Years from Her Emancipation, More Than One Year from When Both She and Her Father Had Knowledge of Her Claim, and More Than Eight Years After the Last Act or Omission.**

Unruh was born January 3, 1986, CP 70, and turned eighteen on January 3, 2004. Dr. Cacchiotti removed the last of Unruh's braces in August 1999. CP 59. The three-year statute of limitation expired at the

latest three years after she reached majority, or on January 3, 2007. Unruh did not commence the lawsuit until October 1, 2007. CP 1. She was, at the least, nine months late. Application of the discovery rule does not extend the life of Unruh's claim due to her and/or her father's actual knowledge of the claim more than one year before she filed.

Belatedly, Unruh sent a letter to Dr. Cacchiotti's insurance adjuster dated January 12, 2007. CP 315. It contained this paragraph referencing "mandatory mediation":

To facilitate the potential resolution of this case, I am asking pursuant to Civil Rule 53.4 and RCW 7.70.100 and 7.70.110 that the statute of limitations be extended for one year for the purpose of mandatory mediation.

CP 315. Unruh offered no testimony or evidence concerning the insurance adjuster's authority to accept the communication on behalf of Dr. Cacchiotti. In fact, this letter was first put before the trial court in Unruh's surreply.<sup>7</sup> The January 12, 2007 letter was written more than three years after Unruh's eighteenth birthday on January 3, 2007 and more than one year after Unruh and her father discovered the elements of her cause of action.

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<sup>7</sup> Dr. Cacchiotti moved to strike Unruh's surreply.

Unruh's October 2007 lawsuit was more than eight years after Dr. Cacchiotti removed the last of the braces in August 1999. *See Opening Brief*, p. 3, citing CP 59.

To assist the Court, a timeline of relevant events is provided.

<b>Date</b>	<b>Event</b>
January 3, 1986	Unruh is born. CP 70, lines 8-10.
March 3, 1995	Unruh became a patient of Dr. Cacchiotti CP 54; CP 97.
June 14, 1995	Dr. Cacchiotti applied partial braces to Unruh's upper teeth. CP 97.
September 20, 1995	Dr. Cacchiotti applied the remaining braces to Unruh's upper teeth. CP 97.
January 9, 1996	Dr. Cacchiotti applied braces to Unruh's lower teeth. CP 97.
July 1, 1997	Dr. Cacchiotti removed the braces from Unruh's lower teeth. CP 98.
August 26, 1999	Dr. Cacchiotti removed the braces from Unruh's upper teeth. CP 99.
October 20, 2000	Unruh presents to Dr. James Lord to obtain an overdenture. Unruh's stepmother tells Dr. Lord that Unruh lost several teeth due to braces. CP 138-39.
November 14, 2000	Unruh's last visit to Dr. Cacchiotti. CP 99.
October 2000 to January 2001	Unruh testified that Dr. Lord told her that Dr. Cacchiotti's care caused her to lose her teeth. CP 27; CP 71, lines 18-24; CP 50, line 1.
August 5, 2002	Unruh presents to Dr. West. CP 128.
November 19, 2002	Unruh returns to Dr. Cacchiotti to discuss jaw surgery. CP 100.
March 12, 2003 May 15, 2003 June 10, 2003	Dr. Cacchiotti applied partial braces in preparation for Unruh's jaw surgery. There is no allegation of negligence regarding this treatment. CP 100.
July 29, 2003	Dr. West performs jaw surgery. CP 134-36.
2003	Unruh learns from Dr. Bryant that

	the problem with her roots is due to orthodontic care. CP 71, lines 18-20; CP 73, lines 5-8; CP 74, line 5 to CP 75, line 5.
January 3, 2004	Unruh turns 18 years old. CP 70, lines 8-10.
May 25, 2005	Unruh and her father again learn from Dr. Bryant that the problem with her roots is due to orthodontic care. CP 154, lines 5-19 (referring to medical record at CP 143)
March 19, 2006	Unruh, her father and her stepmother again learn from Dr. Bryant that the problem with her roots is due to orthodontic care. The Unruhs decide to pursue a lawsuit. CP123, lines 12-25-CP 124, lines 1-18, CP 125, lines 14-21
January 3, 2007	Unruh turns 21 years old. Statute of limitations expired. CP 70, lines 8-10.
January 12, 2007	Unruh's counsel sends letter regarding mediation to insurance carrier. CP 315-16.
October 1, 2007	Lisa files her lawsuit. CP 1-8.

#### IV. ARGUMENT

This Court should affirm the trial court's dismissal of Unruh's lawsuit. The statute of limitation applicable to this case is RCW 4.16.350. It provides, in relevant part, that a dental malpractice claim "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 [.]” RCW 4.16.350. The statute further provides “Any action not commenced in accordance with this section shall be barred.” *Id.*

The alleged negligent treatment occurred between March 1995 and August 1999. The three-year statute of limitation began running on Unruh's eighteenth birthday, January 3, 2004. It expired on January 4, 2007. Unruh testified that she was aware of her cause of action as early as 2001 (and this knowledge was reinforced several other times in the following years). Her father testified that he knew about Dr. Cacchiotti's alleged negligence more than a decade before his deposition. His knowledge is imputed to her. Unruh did not file her lawsuit until October 1, 2007. Her claims are barred. Unruh's only hope is the discovery rule, and her testimony undermines that hope.

Unruh's testimony establishes that she knew more than one year before she commenced this lawsuit that Dr. Cacchiotti should not have treated her with braces which she alleges caused her teeth to fall out. Unruh testified that, well over one year before she commenced the litigation, at least three separate practitioners told her that Dr. Cacchiotti's treatment was causing her tooth loss. Additionally, Unruh testified that Dr. Bryant told her in 2003 that he disagreed with Dr. Cacchiotti's treatment, there would have been a better way to treat her, that treatment with braces was not "necessary," that she "shouldn't have had braces," and that Dr. Bryant "did not agree with Dr. Cacchiotti's decision to put

[her] in braces at all.” She testified that Dr. Bryant told her that she would not have lost her teeth if Dr. Cacchiotti had not put her in braces.

Unruh’s father’s testimony establishes his same knowledge, and at a much earlier date. The trial court correctly dismissed the lawsuit. This uncontested testimony directly contradicts any conclusion that Unruh only learned of her claim in March 2006. Reasonable minds cannot differ that the statute of limitations bars Unruh’s claims.

A statute of limitation defense is not unconscionable and is entitled to the same consideration as any other defense. *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 403 P.2d 880 (1965). Statutes of limitation seek to avoid the difficulty of a trial long after witnesses have disappeared and memories have dimmed. *See Summerrise v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969). Summary judgment under a statute of limitations should be granted when the record demonstrates no genuine issue of material fact as to when the statutory period commenced. *Olson v. Siverling*, 52 Wn. App. 221, 224, 758 P.2d 991 (1988). *See also Wood v. Gibbons*, 38 Wn. App. 343, 685 P.2d 619 (1984) (affirming summary judgment of dismissal where reasonable minds could not differ that plaintiff had actual knowledge of all elements of claim more than one year before he pursued his claim), *rev. den.*, 103 Wn.2d 1009 (1984); *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 113, 802 P.2d 826 (1991) (same). If reasonable minds

could not reach different conclusions upon the evidence, the court should grant summary judgment. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

Unruh's claims are barred by the statute of limitations. The trial court's decision should be affirmed.

**A. The Trial Court Correctly Dismissed the Lawsuit Because the Statute of Limitations Had Expired.**

Unruh's lawsuit is time-barred upon the undisputed facts of this case. Dismissal was proper. This appeal puts at issue the operation of the discovery rule and, specifically, when Unruh discovered the element of breach of the standard of care. Unruh's knowledge of the other elements of her claim is not at issue. Unruh argues that although she knew that the braces placed by Dr. Cacchiotti were causing her teeth to fall out, she did not know that placement of the braces was wrongful until March 2006. Her testimony shows otherwise.

Unruh testified that other health care professionals told her far in advance of one year before she commenced this lawsuit that it was Dr. Cacchiotti's treatment with braces that was causing her teeth to fall out. Dr. Bryant specifically disparaged Dr. Cacchiotti's treatment, stated that it was not necessary, and that she "shouldn't" have been in braces. Receiving this information "hurt" Unruh, she felt "bad," and she realized that what she had gone through had not been "necessary." She testified

that Dr. Bryant told her that she would not have lost her teeth if Dr. Cacchiotti had not put her in braces. Unruh had actual knowledge of breach of the standard of care. So did her father. Their testimony supports affirmance.

1. Application of the Three-Year Statute of Limitation Establishes That Unruh Brought Her Lawsuit At the Least Nine Months Too Late

Without application of the discovery rule, Unruh's claim is time-barred. RCW 4.16.350 provides a party claiming injuries from health care must bring suit "within three years of the act or omission alleged to have caused the injury or condition. . . ." RCW 4.16.350 (Appendix). The treatment by Dr. Cacchiotti ended in August 1999.

Due to Unruh's minority, the statute expired on January 4, 2007, which was three years after her eighteenth birthday on January 3, 2004. (Unruh was born January 3, 1986. CP 70, lines 8-10.) Unruh did not file her lawsuit until nine months later on October 1, 2007; therefore her claim was time-barred.

2. The Discovery Rule Does Not Save Unruh's Lawsuit Because of the Undisputed Testimony of Unruh and Her Father That Each Had Knowledge of Her Claim More Than One Year Before She Brought Suit

The testimony of Unruh and her father demonstrate that they knew the salient facts of Dr. Cacchiotti's wrongful treatment causing her tooth

loss long before Lisa turned eighteen. They knew that other providers criticized his treatment plan, felt there had been “a better way” to treat her, and felt she “should not” have been in braces “at all,” which braces they admit they knew was causing her tooth loss. Based on their specific testimony, no trier of fact could conclude that Lisa and her father did not discover the alleged breach until March 2006.

The one-year post-discovery period allowed for suit by RCW 4.16.350 commences “when the plaintiff ‘discovered . . . all of the essential elements of [his or] her possible cause of action, i.e. duty, breach, causation, and damages.’” *Ohler v. Tacoma General Hosp.*, 92 Wn.2d 507, 511, 598 P.2d 1358 (1979); *Zaleck v. Everett Clinic*, *supra*, 60 Wn. App. at 110-11. Here, the element of breach is at issue. A plaintiff need not know *with certainty* that a breach occurred to commence the one-year period. The Washington Supreme Court has rejected that notion. In *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987), the Supreme Court rejected that knowledge of the *possibility* of breach of duty was insufficient to trigger the statute, stating,

Mr. Reichelt would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer's office and is specifically advised that he or she has a legal cause of action; that is not the law. A party must exercise reasonable diligence in pursuing a legal claim. If such diligence is not exercised in a timely manner, the

cause of action will be barred by the statute of limitations.

*Id.* The *Zaleck* court similarly stated, “To discover a ‘breach’ in a medical malpractice action, the plaintiff need not have known with certainty that the health care provider was negligent.” *Zaleck*, 60 Wn. App. at 112. “Instead, the plaintiff need only have had . . . information that the provider was possibly negligent.” *Id.* Unruh had that information. Dr. Cacchiotti and expert witnesses to this day dispute the element of breach, but Unruh knew from multiple providers the possibility that Dr. Cacchiotti provided incorrect treatment.

*Wood v. Gibbons, supra*, illustrates the proposition that a plaintiff only must know of a *possible* breach of duty. In *Wood*, the plaintiff suffered intestinal disease after a surgery, and underwent further surgery to remove the majority of his intestines. 38 Wn. App. at 348-49. He later was alerted by the surgeon that another doctor “was of the opinion” the plaintiff “might” have suffered a reaction to glove starch powder during the first surgery that caused the intestinal disease. *Id.* at 348. After considering this information and seeking the advice of an attorney, Mr. Wood did not pursue his claim. *Id.* at 348-49. Eleven years later he learned more information “to buttress his complaint.” *Id.* at 349. The appellate court rejected his argument that he originally did not have actual knowledge of the elements of his claim, stating,

But the defendant's duty, possible breach of that duty, possible causation and damages were all known to Mr. Wood in 1969 [when he first learned the other doctor's opinion that he might have suffered a reaction to the glove starch powder].

*Id.* at 349. The court affirmed dismissal of his malpractice lawsuit because the statute of limitations barred his claim based on his prior, actual knowledge.

Unruh's and her father's knowledge is similar to that of the plaintiff in *Wood*. They knew that other professionals disapproved of Dr. Cacchiotti's treatment, believed the braces caused her tooth loss, believed she should never have been placed in braces, and the believed there had been a better way to treat her for years before Unruh filed suit. Unruh testified that she understood that undergoing Dr. Cacchiotti's treatment and suffering the loss of her teeth had not been "necessary." This knowledge bars her lawsuit.

- a. *Unruh's uncontested testimony establishes that she discovered her claim much earlier than one year before she commenced her lawsuit.*

Unruh learned that Dr. Cacchiotti possibly provided negligent treatment from three other care providers far in advance of one year before she filed her lawsuit. Reasonable minds could only conclude that she discovered the breach of care element of her claim far in advance of one year before she filed. She knew from Dr. Lord in 2001 or 2001, from Dr.

West in at some point between August 5, 2002 and June 8, 2005, and from Dr. Bryant in 2003 that the braces caused her root problems and her tooth loss. CP 71; CP 72; CP 75, lines 15-22. She learned from Dr. Bryant in 2003 that Dr. Bryant “didn’t agree with” Dr. Cacchiotti’s care and that what she went through with the braces “wasn’t mainly necessary.” CP 73, lines 5-19. She also learned in 2003 that Dr. Bryant felt there had been a better way for Dr. Cacchiotti to treat her. CP 53. She testified that Dr. Bryant told her that she would not have lost her teeth if Dr. Cacchiotti had not put her in braces. CP 75, lines 1-5.

This information made Unruh “feel bad.” CP 73, lines 20-21. She explained her understanding from what Dr. Bryant told her in 2003 that,

I didn’t have to go through what I had gone through all those years. That hurt a lot because that was a lot of years and through over half my life spent that way.

CP 74, lines 1-4. She explained that Dr. Bryant told her in 2003 that she “shouldn’t have had braces,” that Dr. Bryant “did not agree with Dr. Cacchiotti’s decision to put [her] in braces at all,” and that she would not have lost her teeth if she had not worn braces. CP 74, lines 15-25; CP 75, lines 1-5.

In her appellate brief, Unruh argues that she while she knew earlier that her teeth fell out due to the treatment with braces, she did not understand that the treatment had breached the standard of care. *Opening*

*Brief*, p. 21. She argues that it was only based on what Dr. Bryant told her in March 2006 that she realized the treatment may have been negligent. *Id.*, pp. 21, 27.

The first problem with Unruh's argument is that her testimony flatly contradicts it. Her attorneys make this argument despite the parade of Unruh's own contradictory testimony. To accept the argument, one would have to ignore that Unruh testified that in 2003 Dr. Bryant told her, "I shouldn't have had braces." *Id.*, citing CP 74. The word "shouldn't" indicates improper care or mistake. One would also have to ignore that Dr. Bryant told her in 2003 that there "would have been a better way" to treat her, suggesting compromised judgment by Dr. Cacchiotti. One would also have to ignore that Dr. Bryant plainly stated that he "did not agree with Dr. Cacchiotti's decision to put [Unruh] in braces at all." *Id.* See also CP 73. One would have to ignore her testimony that she felt bad in 2003 when she had this conversation with Dr. Bryant because she understood that what she went through with the braces was not necessary. CP 73, lines 5-19. And, one would have to ignore that Unruh testified that Dr. Bryant told her in 2003 that she would not have lost her teeth if Dr. Cacchiotti had not put her in braces. CP 54, lines 1-5.

The content of these discussions, all of which occurred more than four years before she filed suit, unequivocally reflect on the quality of care

and soundness of Dr. Cacchiotti's professional judgment to put her in braces. Unruh understood that Dr. Bryant took direct issue with Dr. Cacchiotti's judgment and the treatment that she already knew had led to her tooth loss.

Another problem with Unruh's argument is that Dr. Bryant did not tell her anything different in March 2006 than he had told her earlier. There is no material difference in the information that Dr. Bryant conveyed to Unruh and her father in 2003 (and the May 25, 2005 visit) and in 2006. Unruh explains that Dr. Bryant "never told them that Dr. Cacchiotti's application or the orthodontics was negligent." *Opening Brief*, p. 11, citing Dr. Bryant's testimony at CP 249-50. He never used the word "negligent" in 2003 or 2006. But Dr. Bryant conveyed the same substantive information in both the 2003, 2005 and 2006 conversations with Unruh, i.e., that the braces caused her tooth loss and he disapproved of the treatment with braces.

It is inaccurate that prior to March 2006 Unruh knew "only that her root resorption was related to her orthodontics" without any knowledge of a potential breach of the standard of care. *See Opening Brief*, p. 21. To the contrary, Unruh knew that Dr. Cacchiotti's judgment had been impugned by other providers. Her testimony plainly states that she knew that her other care providers disagreed with the course of treatment that

Dr. Cacchiotti followed and felt that she should not have been in braces at all, that her treatment had not been necessary and that there had been a better way. On this testimony, a reasonable trier of fact could reach but one conclusion that Unruh discovered the alleged breach of care through these conversations.

This case is like *Wood, supra*, because the undisputed facts establish that Unruh had knowledge of her claim based on the statements of other professionals. This case is not like the case Unruh cites, *Webb v. Neuroeduc., Inc., P.C.*, 121 Wn. App. 336, 88 P.3d 417 (2004), in which a father speculated based on intuition and knowledge of his wife, but entirely independently, about a psychiatrist's improper course of treatment with his son. The father later obtained a GAL report describing the course of treatment to have been improper. His earlier belief, although correct, had been speculative and conclusory. Here, Dr. Cacchiotti does not argue that Unruh independently speculated in 2003 (and before) that Dr. Cacchiotti should not have put her in braces. Other health care providers stated this to her directly and repeatedly in 2000 or 2001, 2003 and 2005.

Unruh argues that a facially valid explanation for her tooth loss (i.e., a hereditary or congenital cause) establishes that she should not have discovered the negligence until March 2006. *Opening Brief*, pp.22-33. This argument, and the case law related to when a plaintiff "should have

discovered” her claim, is not relevant. Dr. Cacchiotti does not argue that Unruh *should* have discovered her claim. He argues that she *did* discover it. Her testimony and the testimony of her father establishes actual discovery. For this reason, the cases *Winbun v. Moore*, 143 Wn.2d 206, 18 P.3d 576 (2001), and *Adcox v. Children’s Orthopedic Hosp. & Medical Ctr.*, 123 Wn.2d 15, 864 P.2d 921 (1993), are inapposite.

- b. *Unruh’s father’s testimony establishes that he discovered her claim before she turned eighteen and his knowledge is imputed to Unruh.*

Unruh’s father knew that Dr. Cacchiotti’s treatment of Unruh with the braces was potentially wrongful as much as a decade ago. He summed up his knowledge held while Unruh was still in school by describing the reason for Unruh’s teeth loss as, “Pulling too hard and too fast at a young age,” referring to Dr. Cacchiotti’s application of braces. CP 152, lines 8-14, 19-21. Use of the word “too” communicates knowledge of a breach of a standard of care, i.e., “too hard and too fast” for what was appropriate. Not only did he learn that from a dentist in Canada a decade ago, but Dr. Bryant told him that in 2005. According to Unruh’s father, in 2005 Dr. Bryant told him that “the orthodontics had caused Lisa to lose many of her teeth at that time.” CP 154, lines 5-19. This information from Dr. Bryant was that *the braces* had caused the tooth loss, not hereditary or genetic

causes. Unruh's father testified that he had known that Unruh had lost her teeth because of "pulling too hard and too fast" both from the Canadian dentist and from Dr. Bryant. *Id.* These conversations undisputedly occurred long before March 2006. Unruh's father's knowledge is imputed to Unruh, barring her claim.

RCW 4.16.350 states the three-year bar and the one-year discovery period, and then provides that a parent's knowledge is imputed to a minor, as follows,

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.

RCW 4.16.350(3). The Washington Supreme Court construed RCW 4.16.350 to mean that, when a parent has knowledge of the claim, a child's minority tolls the statute of limitations only until the child reaches eighteen. *Gilbert v. Sacred Heart Medical Ctr.*, 127 Wn.2d 370, 377, 900 P.2d 552 (1995). At age eighteen, the minor is 'charged' with the same knowledge of the potential claim that her parent has. *Id.* At age eighteen, the three-year statute of limitations will begin to run against a minor

whose parent has knowledge of her claim. *Id.*<sup>8</sup> Under *Gilbert*, a minor whose parent has knowledge of the claim only has three years from reaching majority in which to sue.

Unruh is “charged” with her father’s knowledge of her claim held long before she turned eighteen. The statute of limitations began running, therefore, on Unruh’s eighteenth birthday. At the latest, the statute was tolled until three years after Unruh’s eighteenth birthday, or January 3, 2007. Unruh failed to commence suit by that date. Her claims are barred.

The undisputed testimony of Unruh and her father demonstrates their knowledge of her claim more than one year before Unruh sued. The statute of limitations expired on this action before it was brought. This Court should affirm the trial court’s dismissal.

**B. If a Question of Fact Exists Whether Unruh Did Not Discover Her Claim Until March 2006 Despite the Clear Testimony to the Contrary, This Court Still Should Affirm Dismissal Notwithstanding Unruh’s January 12, 2007 Letter to Dr. Cacchiotti’s Insurer**

The January 12, 2007, letter referencing “mandatory mediation” cannot save Unruh’s lawsuit. Assuming this Court agrees with Dr. Cacchiotti that application of the discovery rule does not successfully toll

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<sup>8</sup> The Supreme Court also held that despite amendments to RCW 4.16.190 in 1986 and 1987, the legislature did not expressly or implicitly repeal the

Unruh's claim, the statute expired at the latest on January 4, 2007. The statute already had expired when Unruh sent the letter. The statute could not have been tolled since it already had expired. Unruh offers no argument or authority that a statute that already has expired can be tolled or "revived." It cannot be. *See Morris v. Swedish Health Servs.*, 148 Wn. App. 771, 774-76, 200 P.3d 261 (2009) (request for mediation must be made timely "within the original statutory time limits" to toll statute of limitations for an additional year).

If Unruh convinces this Court that a question of fact exists whether she discovered the elements of her cause of action in March 2006 *and* that her father did not learn of the elements more than a decade before this lawsuit was filed, to win reversal Unruh also must have presented sufficient evidence that she made a written request for mediation that successfully tolled the state of limitations for another year until January 12, 2008. *Opening Brief*, pp. 27-28. Even if the Court finds that the evidence supports a question of fact regarding discovery of the cause of action, this Court should affirm because Unruh did not meet her burden of proof regarding the mediation letter. Unruh's lawsuit remains untimely because she did not send the letter referencing mediation to Dr. Cacchiotti

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operation of the tolling statute. *Id.*

or an agent with authority to accept the request, making it ineffective against Dr. Cacchiotti to toll the statute. Also, the lawsuit was filed after the eight-year statute of repose expired, creating a complete bar to this action.

1. The Letter Was Ineffective Because It Was Not Sent to Dr. Cacchiotti

The statute of limitations expressed at RCW 4.16.350 can be tolled by one year when a plaintiff makes 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 . . . .” RCW 7.70.110. On January 12, 2007, Unruh’s attorney sent a letter to Dr. Cacchiotti’s insurance company: CP 315 – 316. The letter stated: “To facilitate the potential resolution of this case, I am asking pursuant to Civil Rule 53.4 and RCW 7.70.100 and 7.70.110 that the statute of limitations be extended for one year for the purpose of mandatory mediation.” CP 315.

It is undisputed that Unruh made no request to Dr. Cacchiotti. CP 343. The right to plead a statute of limitations as an affirmative defense “has been always held to be a personal privilege.” *Sanger v. Nightingale*, 122 U.S. 176, 183 (1887); *see also Liebl v. Schaeffer*, 134 Wash. 168, 170, 235 P. 26 (1925). It, therefore, has followed that issues of waiver and tolling of a statute of limitations can only be made by, and in relation to, the person who holds the right to assert the statute of limitation as a

defense. *Liebl*, 134 Wash. at 170. While RCW 7.70.110 does not designate to whom a written request for mediation should be directed, it is unreasonable to interpret the statute to permit the request for mediation to be directed to anyone other than the potential defendant since the statute of limitations is a personal defense.

In *Breuer v. Presta*, 148 Wn. App. 470, 200 P.3d 724 (2009), the Court evaluated a plaintiff's compliance with the requirements of RCW 7.70.110. In that case, the Court concluded the plaintiff had not requested mediation, instead finding that the plaintiff had merely communicated a willingness to consider mediation. *Id.* at 475. "[A] willingness is not a request. At best, it is an invitation for the defendant physician to request mediation. We then agree with the trial judge. None of the correspondence amounts to a request for mediation as a matter of law." *Id.* at 475–76. Unruh's request similarly does not fall within the terms of the statute because Unruh's request was not made to the defendant, Dr. Cacchiotti. The request does not qualify to toll Dr. Cacchiotti's personal defense of the statute of limitations.

Unruh's Opening Brief and her trial court briefing<sup>9</sup> did not address how her request could have been effective against Dr. Cacchiotti. Unruh may argue in reply that the insurer had apparent authority to receive the request. This Court should reject such an argument because the record does not support it. No evidence establishes that the adjuster had apparent authority to accept Unruh's written request for mediation and, therefore, toll the statute of limitations. "Apparent authority can only be inferred from the acts of the principal and not from the acts of the agent." *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989) (emphasis added) (citing *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 374 P.2d 677 (1962)). To establish apparent authority, there must also be some evidence that the principal had knowledge of the act being committed by its agent. *Id.* (citing *Taylor v. Smith*, 13 Wn. App. 171, 177, 534 P.2d 39 (1975)). Where no evidence is presented to create a question of fact whether an agent had apparent authority, the issue is properly resolved on summary judgment. *Id.*

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<sup>9</sup> In her opposition to summary judgment, Unruh made passing reference to a request for mediation with no evidentiary support. CP 307, lines 10-15, note 6; CP 308, lines 9-10. When Unruh filed a surreply without leave of court, she offered the letter, but did not offer evidence, argument or authority as to how the letter addressed to "Kim R. Anderson" could have been effective pursuant to RCW 7.70.110 to prevent Dr. Cacchiotti from asserting his statute of limitations defense. *See* CP 326.

There is no evidence that Dr. Cacchiotti made representations that this communication (or any communication) could be made to the insurer. There is no evidence that Dr. Cacchiotti knew of the request. And, there is no evidence that Dr. Cacchiotti acquiesced in the tolling of the statute of limitations. When Unruh submitted the letter in surreply, she also submitted May 2007 correspondence after the fact from counsel for Dr. Cacchiotti that participates in calendaring a potential mediation. CP 322. No evidence suggests that Dr. Cacchiotti or his counsel had knowledge of the purported written request for mediation. More significantly, no evidence addresses or establishes apparent agency in the adjuster for the purpose of accepting on or after January 12, 2007 a written request for mediation. Unruh failed to meet her burden to establish that the January 12, 2007 letter was effective to prevent Dr. Cacchiotti's personal privilege to assert his statute of limitations defense.

2. The Letter Could Not Extend the Statute of Repose, Which Expired August 2007

Alternatively, if this Court reaches analysis of the effect of the mediation letter, it should affirm because the claim is time-barred by the eight-year statute of repose in RCW 4.16.350. A request for mediation has no effect on the statute of repose. Dr. Cacchiotti's summary judgment motion asked the superior court to decide whether Unruh's lawsuit is barred by RCW 4.16.350. The parties developed the record regarding the

timing of Unruh's treatment, liability theory, knowledge, and institution of the lawsuit. Unruh did not present the mediation letter to the trial court until she filed a surrebuttal to which Dr. Cacchiotti could not respond. CP 326; CP 309-311, 315-316. Dr. Cacchiotti did not specifically discuss the eight-year statute of repose within RCW 4.16.350 before the superior court. Dr. Cacchiotti based his motion on RCW 4.16.350 and the untimeliness of the lawsuit. This sufficiently called RCW 4.16.350 to the attention of the trial court. *See* RAP 9.12 (appellate court will consider only evidence and issues called to the attention of the trial court).

Additionally, a party can raise at any time failure to establish facts upon which relief can be granted. RAP 2.5(a). Here, Unruh can establish no facts upon which relief can be granted due to the statute of repose barring her claim. This Court should consider pursuant to RAP 9.12 and/or RAP 2.5(a) the legal issue whether RCW 4.16.350's absolute bar to any medical lawsuit more than eight years after the act or omission prohibits Unruh's claim.

RCW 4.16.350 states a statute of repose extinguishing all claims eight years after a medical act or omission. The statute first describes the three-year and one-year statutes of limitation, and then states, "except that in no event shall an action be commenced more than eight years after said act or omission." RCW 4.16.340. There is no dispute of fact that Dr.

Cacchiotti removed the last of Unruh's braces in August 1999. *Opening Brief*, p. 3, citing CP 59. This was the last act or omission according to Unruh's theory of liability and her experts' opinions that treatment with braces was below the standard of care. Unruh sued in October 2007, more than eight years later. An absolute bar to her lawsuit existed as of August 2007.

RCW 7.70.110, which provides for the tolling of a statute of limitation as a result of a request for mediation, does not provide for the tolling of the eight-year statute of repose. Tolling of a statute of repose is an oxymoron. By its terms, RCW 7.70.110 states that a written request for mediation "shall toll the *statute of limitations* provided in RCW 4.16.340 for one year." RCW 7.70.110 (emphasis added). This refers to the three-year and one-year from discovery statutes of limitation in RCW 4.16.340. RCW 7.70.110 does not refer to the statute of repose within RCW 4.16.340. The Legislature itself unequivocally characterizes the eight-year limit as a "statute of repose." *See* 2006 C 8 §§ 301 and 302 (Appendix). The policy as expressed by the Legislature when it re-enacted the eight-year statute of repose is absolutely to protect medical providers from any

suit filed more than eight years after they provide treatment. *Id.*<sup>10</sup> The Legislature also expressed its intent that the eight-year statute of repose “be applied to actions commenced on or after June 7, 2006.” *Id.* The statute of repose applies to bar this lawsuit. Unruh waited too long. Her claims are barred.

## V. CONCLUSION

This Court should affirm the trial court’s correct dismissal of Unruh’s untimely lawsuit. Unruh’s testimony establishes that she knew all the elements of her claim far in advance of one year before she commenced suit. She understood that Dr. Cacchiotti’s treatment was possibly wrongful. To conclude otherwise requires one to ignore the substance of Unruh’s conversations with other medical providers who criticized Dr. Cacchiotti’s treatment. Her father’s testimony about his knowledge that Unruh should not have been treated with braces, and that Dr. Cacchiotti pulled “too hard” and “too fast” at a young age compels the same conclusion that the discovery rule cannot save her lawsuit.

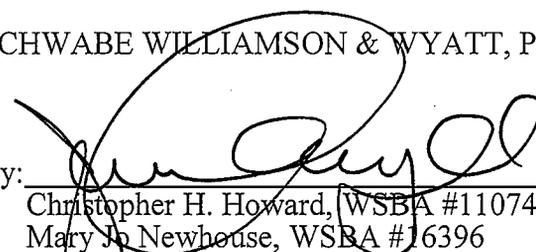
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<sup>10</sup> Stating, “[T]he legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim. The legislature further 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.”

If the Court concludes that material questions of fact concern Unruh's and her father's discovery of her claim, it should still affirm. Unruh is not entitled to an additional one year of tolling under RCW 7.70.110 because she did not request mediation from Dr. Cacchiotti. Additionally, RCW 7.70.110 by its terms does not alter the statute of repose. The lawsuit comes too late given Washington's eight-year statute of repose for medical malpractice cases. The trial court's dismissal should be affirmed.

RESPECTFULLY submitted this 4th day of March, 2010.

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# **APPENDIX**

## APPENDIX

Rev. Code Wash. (RCW) § 4.16.350 (2010)

§ 4.16.350. Action for injuries resulting from health care or related services -- Physicians, dentists, nurses, etc. -- Hospitals, clinics, nursing homes, etc

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, 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).

**HISTORY:** 2006 c 8 § 302. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.

**NOTES: PURPOSE -- FINDINGS -- INTENT -- 2006 C 8 §§ 301 AND 302:** "The purpose of this section and section 302, chapter 8, Laws of 2006 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, chapter 8, Laws of 2006 **be applied to actions commenced on or after June 7, 2006.**" [2006 c 8 § 301.] (emphasis added)

**CERTIFICATE OF SERVICE**

PLEASE TAKE NOTICE that on the 4th day of March, 2010, I caused to be served the Respondents' Brief on the following parties at the following addresses in the manner indicated:

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DATED this 4<sup>th</sup> day of March, 2010.

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