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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 283810-III

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

LISA UNRUH,

Appellant,

v.

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

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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- A) Second Substitute House Bill 2292, as passed
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Respondent Dr. Dino Cacchiotti offers this supplemental brief as requested by the Court on the issue of whether 2006 legislative amendments to RCW 4.16.350 and RCW 4.16.190 apply to this case, and how the enactments are reconciled with existing case law.

These enactments effectuated two changes relevant to Lisa Unruh's claims for injuries arising from the provision of health care services (i.e. dental malpractice claims): 1) reenactment of the eight-year statute of repose to medical malpractice actions for enumerated legislative purposes and to a broader class of claimants, and 2) elimination of tolling based on a minor's infancy. In other words, pursuant to these amendments the period in which a minor must bring her medical malpractice claim is not tolled by infancy. In this respect, the 2006 amendments effectuated a change from how the Supreme Court had construed the former statutes in *Gilbert v. Sacred Heart Medical Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995). The 2006 amendments also cured constitutional deficiencies with the former enactment of the statute of repose identified in *DeYoung v. Providence Medical Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998). The Legislature specified that the changes are effective prospectively from the effective date of the amendments, i.e. "to actions commenced on or after June 7, 2006." 2006 c 8 §301. Unruh filed her suit in October, 2007, CP 1, after the changes were effective.

In this brief Dr. Cacchiotti first addresses why the Court need not resolve the applicability of the 2006 amendments to affirm. Dr. Cacchiotti

next urges that the 2006 amendments apply to Unruh's case, and provide yet another basis for affirmance.

I. ARGUMENT

This Court should conclude that the 2006 amendments apply to Unruh's case filed in October 2007. The Court should affirm for other reasons, but also can affirm based on the 2006 amendments.

A. The Court Need Not Reach These Issues to Affirm

Resolution of these issues is unnecessary to affirm. Unruh clearly testified that she had knowledge of the alleged breach of care when she turned eighteen on January 3, 2004. Even if the three-year limitation on the period in which she could bring suit was tolled by her minority, she failed to file suit (or request mediation) three years after reaching majority, by January 3, 2007. *See Respondent's Brief*, p. 20. Additionally, under the discovery rule, she failed to sue within one year of her own discovery of her claim. *See Respondent's Brief*, pp. 20-28. This supports affirmance of the dismissal of her claim.

In addition, Unruh's father had knowledge of her claim before she reached the age of majority. The pre-2006 law as construed in *Gilbert, supra*, requires that his knowledge be imputed to her *when she reached majority*. Again, because she failed to sue within one or three years of turning eighteen, her claim is barred based on her father's knowledge. *See Respondent's Brief*, pp. 28-29.

Unruh has conceded that survival of her claim, even with the benefit of tolling that existed prior to the 2006 amendments, depends on application of the discovery rule. Her entire argument is premised on the discovery rule. *Opening Brief*, pp. 17-33. Given Unruh's and her father's testimony about discussions they had with health care providers about her dental condition, the discovery rule does not save her action. No reasonable trier of fact could conclude that Unruh lacked knowledge of the potential breach of the duty of care until March 2006, as she argues.

For all of these reasons, none of which rely on the 2006 amendments, this Court should affirm.

B. The 2006 Amendments Do Apply, and Provide Another Basis to Affirm.

The Court only need address the 2006 amendments if it finds that a trier of fact could conclude that Unruh and her father did not discover the breach of care element of her claim until March 2006, *and* if this Court finds that the request for mediation sent not to Dr. Cacchiotti but to his insurer could have been effective under RCW 7.70.110.

If the Court does reach examination of the 2006 amendments, it should conclude that they apply to Unruh's case. This does not require the Court to find that the enactments apply retroactively. This merely requires prospective application from the effective date of the amendments.

Because the amendments prevent tolling of medical malpractice claims such as Unruh's based on minority of the plaintiff, the amendments mean that Unruh's claims expired even earlier than Dr. Cacchiotti has

argued.¹ Her claims were barred long before Unruh filed her lawsuit and long before Unruh attempted to request mediation under RCW 7.70.110 on or about January 12, 2007. But, if the Court has determined that a trier of fact could conclude that Unruh *and* her father did not discover her claim until March 2006, application of the one-year from discovery limitations period without any tolling per the 2006 amendments makes no difference in the outcome of this appeal. The Court must turn to the statute of repose.

There is no applicable exception to the reenacted statute of repose, thus the statute of repose completely bars Unruh's claim. This is true notwithstanding RCW 7.70.110, which on its face does not apply to a statute of repose but only to statutes of limitations. The eight year statute

¹ When Dr. Cacchiotti argued for dismissal before the trial court, he noted that application of the 2006 amendments was not necessary to dismiss the claim, stating:

In 2006, the Legislature amended RCW 4.16.190 to provide that the statute of limitations is no longer tolled for claims of minors. See RCW 4.16.190(2). Because plaintiff's claims are barred regardless if the statute began running in 2000 or in 2004, Dr. Cacchiotti does not address the potential retroactive effect of this statute on plaintiff's claim.

CP 32, note 7. In other words, Dr. Cacchiotti has maintained that *even if* the 2006 amendments did not apply, Unruh cannot maintain her claims. The claims simply were brought too late. *Respondent's Brief*, p. 20; 29-30. The reference to "retroactive effect" was gratuitous and incorrect, because the application of the statute to Unruh's claims does not require retroactivity. The statutory amendments apply prospectively to claims filed after their June 2006 effective date, such as to Unruh's October 2007 lawsuit.

of repose, applicable to Unruh's claim at the time she commenced this lawsuit, bars her claim.

1. The Substance of the Legislative Amendments

In 2006, the Legislature approved Second Substitute House Bill 2292, Ch. 8, Laws 2006. Excerpts of the bill as passed are attached as Appendix A. Regarding health care liability reform, the Legislature intended to "re-establish" the eight-year statute of repose that had been "overturned" in *DeYoung*.² Senate Bill Report 2SHB 2292, p. 6 (February 22, 2006) (Appendix B); Final Bill Report 2SHB 2292, C8 L06, p. 7 (Appendix C). At the same time, the Legislature intended to "eliminate" tolling of statutes of limitations during minority. Senate Bill Report 2SHB 2292, p. 6 (February 22, 2006) (Appendix B); Final Bill Report 2SHB 2292, C8 L06, p. 7 (Appendix C).

The text of the bill reflects these intentions. The Legislature addressed these changes in the successive Sections 301, 302 and 303 within the bill. (Appendix A, pp. 50-52). Section 301 addresses the purpose of the section "to respond to the court's decision" in *DeYoung* "by expressly stating the legislature's rationale for the eight-year statute of repose in RCW 4.16.350." *Id.* at p. 50, lines 25-29. The Legislature stated that "setting an outer limit to the operation of the discovery rule is

² The Supreme Court in *DeYoung* found the statute of repose unconstitutional based on equal protection grounds. *DeYoung* is discussed in detail in Section C, *infra*.

an appropriate aim.” *Id.*, p. 51, lines 7-8. The Legislature further stated that the 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.” *Id.*, p. 51, lines 9-11.

In Section 302, the Legislature reenacted RCW 4.16.350, setting forth the text of the statute. Appendix A, pp. 51-52. The law recounts the three-year statute of limitations from the act or omission and the one-year discovery rule, but qualifies *both* of these by the pronouncement that “in no event shall an action be commenced more than eight years after said act or omission.” Section 302. Following that pronouncement are three special circumstances (fraud, intentional concealment, or unknown presence of a foreign body), not relevant in this case, that would extend even the eight year statute of repose. *Id.*

In Section 303, the Legislature made the necessary adjustment to RCW 4.16.190, the tolling statute, to dovetail that statute with its intent that under RCW 4.16.350 a minor not be entitled to tolling. The Legislature excluded application of the tolling statute to RCW 4.16.350 by turning the original text of RCW 4.16.190 into subsection (1), and adding an opening clause: “Unless otherwise provided in this section.” It then added subsection (2) to prohibit tolling of the time limits stated in RCW 4.16.350, as follows:

(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.

Id., p. 53, lines 6-8.

Within these sections of the bill, the Legislature also indicated its intent that the changes apply to “actions commenced on or after the effective date of this section.” *Id.*, p. 51, lines 15-17 (Section 301). The effective date was June 7, 2006. *Id.*, p. 1.

This Court should conclude that as a result of the 2006 amendments, a minor does not benefit from tolling where medical malpractice claims are asserted, and that the reenacted eight year statute of repose applies without qualification from the last act or omission, except in three circumstances not relevant here.

2. Effective Date of the Legislative Amendments

As noted, with the 2006 reenactment of RCW 4.16.350, the Legislature specifically provided for prospective application to actions commenced on or after the effective date of the bill, June 7, 2006. Unruh commenced her lawsuit in October 2007. The amendments apply to her action.

“Regardless of how the statute is characterized, it is presumed to run prospectively, as are all statutes.” *1000 Virginia Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006) (citing *Wash. Waste Sys., Inc. v. Clark County*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990)). Courts generally presume prospective enactment from the effective date of the statute, as the Supreme Court explained:

The necessary conclusion is that RCW 13.04.260 is **effective from the date of enactment in accordance with the law in this state that a legislative enactment will not be held to apply retrospectively** unless that is clearly the legislative intent. *Baker v. Baker*, 80 Wn.2d 736, 498 P.2d 315 (1972), and cases cited therein.

Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) (emphasis added). Here, the Legislature plainly expressed its intent that the statute apply prospectively from date of enactment. This would have been the presumption even without an express Legislative directive. The 2006 amendments apply prospectively to actions commenced after June 7, 2006, and thus apply to Unruh's claims.

Additionally, Unruh had no vested right in the pre-2006 statutory scheme and common law, as the Supreme Court has explained:

Due process does not prevent a change in the common law as it previously existed. There is neither a vested right in an existing law which precludes its amendment or repeal nor a vested right in the omission to legislate on a particular subject. *Henry v. McKay*, 164 Wash. 526, 3 P.2d 145, 77 A.L.R. 1025 (1931); *see also Gelbman v. Gelbman*, [245 N.E.2d 192 (1969)] *supra*. The Fourteenth Amendment does not curtail a state's power to amend its laws, common or statutory, to conform to changes in public policy. *Henry v. McKay*, *supra*; *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998 (1936); *Overlake Homes, Inc. v. Seattle-First Nat'l Bank*, 57 Wn.2d 881, 360 P.2d 570 (1961); *Gelbman v. Gelbman*, *supra*. A vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*

Godfrey v. State, 84 Wn.2d 959, 962-63, 530 P.2d 630 (1975). The Court reiterated in 1984 that a mere expectation is not equivalent to a vested right, stating:

[A] right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property . . .

Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984) (citing *Gillis v. King County*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953) (quoting 2 T. Cooley, *Constitutional Limitations* 749 (8th ed. 1927))); *see also* 2 C. Sands, *Statutory Construction* § 41.06 (4th ed. 1973).

Parties have no vested rights in statutes of repose. “Generally, statutes of repose involve remedies and do not create fundamental rights.” *Keene v. Edie*, 77 Wn. App. 1068, 1320, 909 P.2d 1311 (1995), *rev den.*, 129 Wn.2d 1012 (1996). A plaintiff’s *remedy* against a defendant is affected with a change in statutes of repose, “not any of his vested rights.” *Id.* “The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy--are arbitrary enactments by the law-making power.” *Herr v. Schwager*, 145 Wash. 101, 104, 258 P. 1039 (1927). “And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete.” *Id.*

The prospective amendments apply to her claim for these multiple reasons.

3. Application of the Amendments to Unruh's Case Supports Affirmance

Unruh filed her lawsuit in October 2007. CP 1. This was clearly after the effective date of the amendments. The amendments apply to her lawsuit.

The amendments require that Unruh's lawsuit be dismissed pursuant to the eight-year statute of repose. Even if this Court accepted Unruh's counsel's argument that Unruh's and her father's testimony does not establish knowledge of her claim until March 2006, which argument is contradicted by their actual testimony, this Court should still affirm because the eight year statute of repose absolutely bars Unruh's claim. Unruh acknowledges that Dr. Cacchiotti removed the last of her 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 was below the standard of care. Unruh sued more than eight years later on October 1, 2007. In the absence of fraud, intentional concealment, or unknown presence of a foreign body, none of which are at issue in this case, the eight year statute of repose bars the claim. This is plain on the face of the statute, which permits no other exceptions to application of the eight year statute of repose.³ This Court should affirm the dismissal of the lawsuit based on the reenacted statute of repose.

³ To the extent that minority of a claimant might have tolled the former statute of repose, the Legislature has clearly extinguished such tolling with the 2006 amendments. *See* Section 303 (Appendix A).

Dr. Cacchiotti has already argued that a request for mediation under RCW 7.70.110 does not extend the statute of repose. *Respondent's Brief*, p. 37. On the face of that statute, the extension permitted by RCW 7.70.110 only applies to "statutes of limitations." Statutes of repose are not mentioned. Where RCW 7.70.110 applies only to "statutes of limitations," no extension to the statute of repose exists. This Court should construe RCW 7.70.110 according to this plain language. Additionally, the Legislature's intent to impose an "outer limit" on medical malpractice lawsuits would be undermined if a request for mediation under RCW 7.70.110 impacted the statute of repose. This Court should construe the statute of repose and RCW 7.70.110 in harmony, as the Court in *Gilbert* instructed,⁴ to give effect to the legislative intent that the eight year statute of repose be absolute, but also to allow tolling pursuant to RCW 7.70.110 of the three-year and one-year statutes of limitations found in RCW 4.16.370.

Application of the statute of repose, reenacted in 2006, supports affirmance.

C. The Impact of the 2006 Amendments on *DeYoung* and *Gilbert*

This Court asked "how [the 2006 amendments] apply in light of the decisions in" *DeYoung* and *Gilbert*. As of the June 7, 2006 effective

⁴ *Gilbert*, 127 Wn.2d at 375 (court should harmonize statutes to maintain integrity of both).

date of the amendments, the 2006 amendments supersede the holdings of *DeYoung* and *Gilbert*.

1. *DeYoung v. Providence Medical Center Is Superseded By the Amendments, Meaning That the Reenacted Statute of Repose Bars Unruh's Claims.*

Because the eight-year statute of repose was reenacted, it applies to bar Unruh's claim. The Supreme Court's invalidation on equal protection grounds of the former statute of repose is superseded.

In *DeYoung*, the Court considered whether the eight year statute of repose in former RCW 4.16.340 was unconstitutional under the equal protection clause. *DeYoung*, 136 Wn.2d at 139-40. In a 5-4 decision, the Supreme Court struck down the statute of repose on the basis that the statute was not rationally related to alleviating the medical insurance crisis because "the class of persons affected by the eight-year statute of repose is too attenuated to survive rational basis scrutiny." *Id.* at 149.⁵ The Court also found that the statute was not rationally related to the legislative objective of avoiding stale claims because the provision only applied to a "minuscule number of claims." *Id.* at 150.

In reaching this decision, the Court first noted that the plaintiff conceded that a general statute of repose applying to all tort claims would

⁵ The Court applied the rational basis analysis applicable to the federal Equal Protection Clause, after completing the *Gunwall* analysis and concluding that no higher scrutiny was justified under Washington's state constitution. *Id.* at 142-144. That analysis need not be repeated, and the rational basis test should apply.

not violate the equal protection clause. *Id.* at 145, note 1. The Supreme Court agreed that the classification of persons subject to the statute of repose was small. *Id.* 145-45, 150.⁶ While the Court rejected the argument that these classifications were not based on reasonable grounds, *id.* at 146, it concluded that the statute was not rationally related to its purposes.⁷ In essence, the Court concluded that the statute affected so few claims, it would have an insignificant impact on avoiding stale claims or curing the health care crisis. Therefore, the statute failed the rational basis test.

The Legislature's 2006 amendments and reenactment of RCW 4.16.340 established a new rational basis for the statute of repose. First, the Legislature made the statute of repose applicable to many more claims by eliminating tolling for minors with claims. Section 303 (Appendix A). More importantly, the Legislature specified its exact purpose in enacting the statute to "tend to reduce rather than increase the cost of medical malpractice insurance" even if not solving the crisis, and to "provide

⁶ The Court summarized Plaintiff's argument that, "as a result of tolling and other provisions, the eight-year statute of repose does not apply uniformly to all persons who discover their malpractice claims over eight years after the malpractice occurred." *Id.* at 145. The Court later referred to "the minuscule number of claims subject to the repose provision." *Id.* at 150.

⁷ In *DeYoung*, the defendant had won summary judgment based on the statute of repose. The Plaintiff challenged its constitutionality. Finding the statute of repose violated the equal protection because it was not rationally related to its presumed purposes, the Supreme Court reversed and remanded the claim.

protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.” Section 301 (Appendix A). The Legislature also found 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.” *Id.* The Legislature also stated that enactment of the statute of repose reflects its exercise of legislative discretion to “balance the need of the interests of injured plaintiffs and the health care industry.” *Id.*⁸

The 2006 amendments correct deficiencies noted in the Supreme Court’s *DeYoung* decision. This Court should conclude that the amended statute satisfies the rational basis test. The statute is reasonably related to the Legislature’s newly expressed purposes to avoid even one stale claim, to set an outer limit to the discovery rule, to avoid undue burdens on defendants from stale claims, and to tend to reduce rather than increase the cost of medical malpractice insurance even if not solving the entire health care crisis. Additionally, the statute is uniquely within the legislative prerogative to balance the interests of claimants and health care providers. Finally, the statute also applies to a broader number of claimants than the

⁸ These specific purposes identified in Section 301 are augmented by the introduction to the Bill, which further enunciates the legislative purposes of the bill to support accessible health care for its citizens, and to make “the civil justice system more understandable, fair and efficient for all participants.” *See* SSHB 2292 §1 (App. A, pp. 1-2).

former version. The new statute, applicable to many more claims, is rationally related to the stated legislative purposes.

In contrast to the Supreme Court's conclusion in *DeYoung*, the newly enacted statute together with the express intentions of the Legislature satisfies equal protection.

2. *Gilbert v. Sacred Heart Medical Center Is Superseded By the Amendments, Which Amendments Eliminate Tolling for Minors, Although This Is Not Outcome Determinative Regarding Application of the Three-Year and One-Year Statute of Limitations in This Case.*

The 2006 amendments also supersede *Gilbert* regarding whether the statute of limitations periods run against a minor with a medical malpractice claim. *Gilbert* held that they do not run, and that the statute of limitations periods only begin to run once the minor reaches the age of majority. The amendments impose the reverse: the statute of limitations periods run even during the claimant's minority. Pursuant to the amendments, there is no tolling for minority for medical malpractice actions. This means that the statute of repose was not tolled in this case, as discussed above. As to application of the three-year and one-year statute of limitations, this change should not be outcome determinative.

Cacchiotti has argued that either applying pre-2006, *Gilbert* law, or applying post-2006 law, the evidence shows that the three-year and one-year statutes of limitations under RCW 4.16.350 have expired. This is true based on Unruh's own knowledge, or, alternatively, on her father's knowledge. But Unruh argues that the evidence shows she and her father

did not know of her claim until March 2006.⁹ If the Court determines contrary to the trial court that a trier of fact could agree with Unruh, the one-year statute of limitations from time of discovery would not have expired when Unruh requested mediation in January 2007. In that case, whether her lawsuit was timely depends on whether the request for mediation was effective to keep her lawsuit alive for another year. *See Respondent's Brief*, pp. 30-35 (discussion on that issue).

In *Gilbert*, the Supreme Court addressed whether tolling provided for by former RCW 4.16.190 applied to the three-year and one-year statute of limitations for medical malpractice claims by minors, given new provisions in former RCW 4.16.350 imputing a parent's knowledge to the minor. The former statutes did not make reference to each other. *Gilbert*, 127 Wn.2d at 373-74.

The Supreme Court acknowledged that in 1986 and 1987 the Legislature had amended former RCW 4.16.350 to delete reference to RCW 4.16.190, and to add language stating that a parent's knowledge shall be imputed to a minor. *Id.* The Supreme Court remarked, however, that the Legislature expressed no exception to tolling, stating, "The Legislature did not expressly repeal the operation of the tolling statute, RCW 4.16.190, when it imputed parental knowledge to minors in its 1986 and 1987 amendments to RCW 4.16.360." *Id.* at 375. Because the court

⁹ If this Court finds that the evidence shows that her father knew of the claim before then, Unruh is charged with his knowledge pursuant to the amendments without any tolling, and her claim would be barred.

could harmonize the statutes, the court construed the statutes to give effect to each. *Id.* The Court concluded that the tolling of RCW 4.16.190 does apply to a minor, and that upon reaching majority a minor is charged with the parent's knowledge and must sue within three years. *Id.* at 375-76. Under *Gilbert*, an injured child would always have at least until they were 21 to initiate an action.¹⁰

The Legislature's 2006 amendments change the result in *Gilbert*. Where the *Gilbert* court found no "repeal" of the tolling statute for health care claims by minors, the Legislature added this repeal by amending RCW 4.16.190. The Legislature specifically made tolling under RCW 4.16.190 unavailable to the time limitations in RCW 4.16.340. With these changes, an injured child no longer has the benefit of tolling under RCW 4.16.190 to preserve a medical malpractice claim. None of the time limits applicable to Unruh's claim pursuant to RCW 4.16.340 receive the benefit of any tolling.

The holdings of *Gilbert* and *Young* are superseded by the 2006 amendments.

¹⁰ In *Gilbert*, the defendant had won summary judgment on the theory that the limitations periods were not tolled during the minor's minority. *Id.* at 373. The Court reversed, holding that tolling under former RCW 4.16.190 continued to apply to claims brought under RCW 4.16.350. Therefore, the three-year limitation was tolled until the child reached the age of majority. The Court reversed and remanded the claim.

II. CONCLUSION

Even if this Court did not apply the 2006 amendments to Unruh's claim, her claim is time-barred based upon the testimony of Unruh and her father. When she reached the age of majority, both she and her father knew the elements of her claim. She failed to file within three years of her eighteenth birthday, barring her claim under the pre-2006, *Gilbert* decision. Additionally, the discovery rule does not spare her claim because she failed to file within one year of learning the elements of her claim. Even under former RCW 4.16.350, prior to its amendment in 2006, Unruh's claims are time-barred.

Alternatively, if this Court finds that the evidence presents a question of fact whether Unruh discovered her claims as late as March 2006, the Court should affirm based on the 2006 amendments. The 2006 amendments are specifically applicable to actions commenced on or after June 7, 2006, such as Unruh's. The amendments eliminated tolling for minors. Unruh failed to file suit within eight years of her undisputed last wrongful treatment with Dr. Cacchiotti in August 1999. The Legislature has reenacted the statute of repose to serve legitimate, expressed purposes and to apply to more claims instead of a "minuscule number." The statute is rationally related to these purposes, and satisfies the rational basis test articulated in *DeYoung*. The statute, therefore, is constitutional. Nothing in this case supports extending the eight year statute of repose, including the request for mediation because, pursuant to RCW 7.70.110, only

statutes *of limitations* are extended, not the statute of repose. The claim is time-barred.

RESPECTFULLY submitted this 14th day of June, 2010.

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CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on the 14th day of June, 2010, I caused to be served the Respondents' Supplemental Brief on the following parties at the following addresses in the manner indicated:

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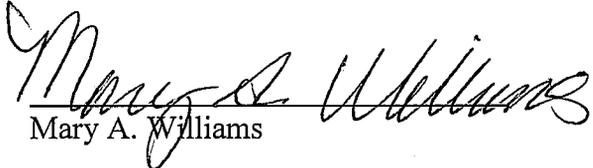
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Attorneys for Appellant Lisa Unruh

DATED this 14th day of June, 2010.

SCHWABE WILLIAMSON & WYATT

By:


Mary A. Williams

APPENDIX

- A) Second Substitute House Bill 2292, as passed
- B) Senate Bill Report 2SHB 2292, 2/22/06
- C) Final Bill Report 2SHB 2292
- D) RCW 4.16.350 (as amended in 2006)
- E) RCW 4.16.190 (as amended in 2006)
- F) RCW 7.70.110
- G) *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998)
- H) *Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 900 P.2d 552 (1995)

APPENDIX - A

CERTIFICATION OF ENROLLMENT
SECOND SUBSTITUTE HOUSE BILL 2292

Chapter 8, Laws of 2006

59th Legislature
2006 Regular Session

MEDICAL MALPRACTICE

EFFECTIVE DATE: 6/07/06 - Except sections 112 and 210, which
become effective 7/01/06.

Passed by the House February 28, 2006
Yeas 82 Nays 15

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate February 22, 2006
Yeas 48 Nays 0

BRAD OWEN

President of the Senate

Approved March 6, 2006.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk
of the House of Representatives of
the State of Washington, do hereby
certify that the attached is
SECOND SUBSTITUTE HOUSE BILL 2292
as passed by the House of
Representatives and the Senate on
the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

March 6, 2006 - 2:10 p.m.

Secretary of State
State of Washington

1 years, or incompetent or disabled to such a degree that he or she
2 cannot understand the nature of the proceedings, such incompetency or
3 disability as determined according to chapter 11.88 RCW, or imprisoned
4 on a criminal charge prior to sentencing, the time of such disability
5 shall not be a part of the time limited for the commencement of action.

6 (2) Subsection (1) of this section with respect to a person under
7 the age of eighteen years does not apply to the time limited for the
8 commencement of an action under RCW 4.16.350.

9 **Certificate of Merit**

10 NEW SECTION. **Sec. 304.** A new section is added to chapter 7.70 RCW
11 to read as follows:

12 (1) In an action against an individual health care provider under
13 this chapter for personal injury or wrongful death in which the injury
14 is alleged to have been caused by an act or omission that violates the
15 accepted standard of care, the plaintiff must file a certificate of
16 merit at the time of commencing the action. If the action is commenced
17 within forty-five days prior to the expiration of the applicable
18 statute of limitations, the plaintiff must file the certificate of
19 merit no later than forty-five days after commencing the action.

20 (2) The certificate of merit must be executed by a health care
21 provider who meets the qualifications of an expert in the action. If
22 there is more than one defendant in the action, the person commencing
23 the action must file a certificate of merit for each defendant.

24 (3) The certificate of merit must contain a statement that the
25 person executing the certificate of merit believes, based on the
26 information known at the time of executing the certificate of merit,
27 that there is a reasonable probability that the defendant's conduct did
28 not follow the accepted standard of care required to be exercised by
29 the defendant.

30 (4) Upon motion of the plaintiff, the court may grant an additional
31 period of time to file the certificate of merit, not to exceed ninety
32 days, if the court finds there is good cause for the extension.

33 (5)(a) Failure to file a certificate of merit that complies with
34 the requirements of this section is grounds for dismissal of the case.

35 (b) If a case is dismissed for failure to file a certificate of
36 merit that complies with the requirements of this section, the filing

SECOND SUBSTITUTE HOUSE BILL 2292

AS AMENDED BY THE SENATE

Passed Legislature - 2006 Regular Session

State of Washington 59th Legislature 2006 Regular Session

By House Committee on Judiciary (originally sponsored by Representatives Lantz, Cody, Campbell, Kirby, Flannigan, Williams, Linville, Springer, Clibborn, Wood, Fromhold, Morrell, Hunt, Moeller, Green, Kilmer, Conway, O'Brien, Sells, Kenney, Kessler, Chase, Upthegrove, Ormsby, Lovick, McCoy and Santos)

READ FIRST TIME 01/18/06.

1 AN ACT Relating to improving health care by increasing patient
2 safety, reducing medical errors, reforming medical malpractice
3 insurance, and resolving medical malpractice claims fairly without
4 imposing mandatory limits on damage awards or fees; amending RCW
5 5.64.010, 4.24.260, 18.71.015, 18.130.160, 43.70.075, 43.70.510,
6 42.56.400, 48.18.290, 48.18.2901, 48.18.100, 48.18.103, 48.19.043,
7 48.19.060, 4.16.190, 7.70.100, and 7.70.080; reenacting and amending
8 RCW 42.17.310 and 69.41.010; reenacting RCW 4.16.350; adding new
9 sections to chapter 7.70 RCW; adding a new section to chapter 48.18
10 RCW; adding a new chapter to Title 70 RCW; adding a new chapter to
11 Title 48 RCW; adding a new chapter to Title 7 RCW; creating new
12 sections; prescribing penalties; providing an effective date; and
13 providing an expiration date.

14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

15 NEW SECTION. **Sec. 1.** The legislature finds that access to safe,
16 affordable health care is one of the most important issues facing the
17 citizens of Washington state. The legislature further finds that the
18 rising cost of medical malpractice insurance has caused some
19 physicians, particularly those in high-risk specialties such as

1 obstetrics and emergency room practice, to be unavailable when and
2 where the citizens need them the most. The answers to these problems
3 are varied and complex, requiring comprehensive solutions that
4 encourage patient safety practices, increase oversight of medical
5 malpractice insurance, and making the civil justice system more
6 understandable, fair, and efficient for all the participants.

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

21 **PART I - PATIENT SAFETY**

22 **Encouraging Patient Safety Through Communications With Patients**

23 **Sec. 101.** RCW 5.64.010 and 1975-'76 2nd ex.s. c 56 s 3 are each
24 amended to read as follows:

25 (1) In any civil action against a health care provider for personal
26 injuries which is based upon alleged professional negligence ((and
27 which is against:

28 ~~(1) A person licensed by this state to provide health care or~~
29 ~~related services, including, but not limited to, a physician,~~
30 ~~osteopathic physician, dentist, nurse, optometrist, podiatrist,~~
31 ~~chiropractor, physical therapist, psychologist, pharmacist, optician,~~
32 ~~physician's assistant, osteopathic physician's assistant, nurse~~
33 ~~practitioner, or physician's trained mobile intensive care paramedic,~~
34 ~~including, in the event such person is deceased, his estate or personal~~
35 ~~representative;~~

1 (7) In the event a hearing is held on the actions of the
2 commissioner under subsection (3) of this section, the burden of proof
3 is on the commissioner.

4 **Sec. 217.** RCW 48.19.060 and 1997 c 428 s 4 are each amended to
5 read as follows:

6 (1) The commissioner shall review a filing as soon as reasonably
7 possible after made, to determine whether it meets the requirements of
8 this chapter.

9 (2) Except as provided in RCW 48.19.070 and 48.19.043:

10 (a) No such filing shall become effective within thirty days after
11 the date of filing with the commissioner, which period may be extended
12 by the commissioner for an additional period not to exceed fifteen days
13 if he or she gives notice within such waiting period to the insurer or
14 rating organization which made the filing that he or she needs such
15 additional time for the consideration of the filing. The commissioner
16 may, upon application and for cause shown, waive such waiting period or
17 part thereof as to a filing that he or she has not disapproved.

18 (b) A filing shall be deemed to meet the requirements of this
19 chapter unless disapproved by the commissioner within the waiting
20 period or any extension thereof.

21 (3) Medical malpractice insurance rate filings are subject to the
22 provisions of this section.

23 **PART III - HEALTH CARE LIABILITY REFORM**

24 **Statutes of Limitations and Repose**

25 NEW SECTION. **Sec. 301.** The purpose of this section and section
26 302 of this act is to respond to the court's decision in *DeYoung v.*
27 *Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating
28 the legislature's rationale for the eight-year statute of repose in RCW
29 4.16.350.

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

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

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

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

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

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

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

22 (1) A person licensed by this state to provide health care or
23 related services, including, but not limited to, a physician,
24 osteopathic physician, dentist, nurse, optometrist, podiatric physician
25 and surgeon, chiropractor, physical therapist, psychologist,
26 pharmacist, optician, physician's assistant, osteopathic physician's
27 assistant, nurse practitioner, or physician's trained mobile intensive
28 care paramedic, including, in the event such person is deceased, his
29 estate or personal representative;

30 (2) An employee or agent of a person described in subsection (1) of
31 this section, acting in the course and scope of his employment,
32 including, in the event such employee or agent is deceased, his estate
33 or personal representative; or

34 (3) An entity, whether or not incorporated, facility, or
35 institution employing one or more persons described in subsection (1)
36 of this section, including, but not limited to, a hospital, clinic,
37 health maintenance organization, or nursing home; or an officer,

1 director, employee, or agent thereof acting in the course and scope of
2 his employment, including, in the event such officer, director,
3 employee, or agent is deceased, his estate or personal representative;
4 based upon alleged professional negligence shall be commenced within
5 three years of the act or omission alleged to have caused the injury or
6 condition, or one year of the time the patient or his representative
7 discovered or reasonably should have discovered that the injury or
8 condition was caused by said act or omission, whichever period expires
9 later, except that in no event shall an action be commenced more than
10 eight years after said act or omission: PROVIDED, That the time for
11 commencement of an action is tolled upon proof of fraud, intentional
12 concealment, or the presence of a foreign body not intended to have a
13 therapeutic or diagnostic purpose or effect, until the date the patient
14 or the patient's representative has actual knowledge of the act of
15 fraud or concealment, or of the presence of the foreign body; the
16 patient or the patient's representative has one year from the date of
17 the actual knowledge in which to commence a civil action for damages.

18 For purposes of this section, notwithstanding RCW 4.16.190, the
19 knowledge of a custodial parent or guardian shall be imputed to a
20 person under the age of eighteen years, and such imputed knowledge
21 shall operate to bar the claim of such minor to the same extent that
22 the claim of an adult would be barred under this section. Any action
23 not commenced in accordance with this section shall be barred.

24 For purposes of this section, with respect to care provided after
25 June 25, 1976, and before August 1, 1986, the knowledge of a custodial
26 parent or guardian shall be imputed as of April 29, 1987, to persons
27 under the age of eighteen years.

28 This section does not apply to a civil action based on intentional
29 conduct brought against those individuals or entities specified in this
30 section by a person for recovery of damages for injury occurring as a
31 result of childhood sexual abuse as defined in RCW 4.16.340(5).

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

34 (1) Unless otherwise provided in this section, if a person entitled
35 to bring an action mentioned in this chapter, except for a penalty or
36 forfeiture, or against a sheriff or other officer, for an escape, be at
37 the time the cause of action accrued either under the age of eighteen

APPENDIX - B

SENATE BILL REPORT

2SHB 2292

As Reported By Senate Committee On:
Health & Long-Term Care, February 22, 2006

Title: An act relating to improving health care by increasing patient safety, reducing medical errors, reforming medical malpractice insurance, and resolving medical malpractice claims fairly without imposing mandatory limits on damage awards or fees.

Brief Description: Addressing health care liability reform.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Lantz, Cody, Campbell, Kirby, Flannigan, Williams, Linville, Springer, Clibborn, Wood, Fromhold, Morrell, Hunt, Moeller, Green, Kilmer, Conway, O'Brien, Sells, Kenney, Kessler, Chase, Upthegrove, Ormsby, Lovick, McCoy and Santos).

Brief History: Passed House: 1/23/06, 54-43.

Committee Activity: Health & Long-Term Care: 2/20/06, 2/22/06 [DPA].

SENATE COMMITTEE ON HEALTH & LONG-TERM CARE

Majority Report: Do pass as amended.

Signed by Senators Keiser, Chair; Thibaudeau, Vice Chair; Deccio, Ranking Minority Member; Benson, Brandland, Johnson, Kastama, Kline, Parlette and Poulsen.

Staff: Edith Rice (786-7444)

Background: Patient Safety

Statements of Apology: Under both a statute and a court rule, evidence of furnishing or offering to pay medical expenses needed as the result of an injury is not admissible in a civil action to prove liability for the injury. In addition, a court rule provides that evidence of offers of compromise are not admissible to prove liability for a claim. Evidence of conduct or statements made in compromise negotiations are likewise not admissible.

In 2002, the Legislature passed legislation that makes expressions of sympathy relating to the pain, suffering, or death of an injured person inadmissible in a civil trial. A statement of fault, however, is not made inadmissible under this provision.

Reports of Unprofessional Conduct: A provision of law gives immunity specifically to physicians, dentists, and pharmacists who in good faith file charges or present evidence of incompetency or gross misconduct against another member of their profession before the Medical Quality Assurance Commission, the Dental Quality Assurance Commission, or the Board of Pharmacy.

Medical Quality Assurance Commission Membership (MQAC): The MQAC is responsible for the regulation of physicians and physician assistants. This constitutes approximately 23,000

credentialed health care professionals. The MQAC currently has 19 members consisting of 13 licensed physicians, two physician assistants, and four members of the public.

Health Care Provider Discipline: The Uniform Disciplinary Act (UDA) governs disciplinary actions for all 57 categories of credentialed health care providers. The UDA defines acts of unprofessional conduct, establishes sanctions for such acts, and provides general procedures for addressing complaints and taking disciplinary actions against a credentialed health care provider. Responsibilities in the disciplinary process are divided between the Secretary of Health (Secretary) and the 16 health profession boards and commissions according to the profession that the health care provider is a member of and the relevant step in the disciplinary process.

Upon a finding of an act of unprofessional conduct, the Secretary or the board or commission decides which sanctions should be ordered. These sanctions include: revocation of a license, suspension of a license, restriction of the practice, mandatory remedial education or treatment, monitoring of the practice, censure or reprimand, conditions of probation, payment of a fine, and surrender of the license. In the selection of a sanction the first consideration is what is necessary to protect or compensate the public, and the second consideration is what may rehabilitate the license holder or applicant.

Disclosure of Adverse Events: A hospital is required to inform the Department of Health when certain events occur in its facility. These events include: unanticipated deaths or major permanent losses of function; patient suicides; infant abductions or discharges to the wrong family; sexual assault or rape; transfusions with major blood incompatibilities; surgery performed on the wrong patient or site; major facility system malfunctions; or fires affecting patient care or treatment. Hospitals must report this information within two business days of the hospital leaders learning of the event.

Coordinated Quality Improvement Programs: Hospitals maintain quality improvement committees to improve the quality of health care services and prevent medical malpractice. Quality improvement proceedings review medical staff privileges and employee competency, collect information related to negative health care outcomes, and conduct safety improvement activities. Provider groups and medical facilities other than hospitals are encouraged to conduct similar activities.

Insurance Industry Reform

Medical Malpractice Closed Claim Reporting: The Insurance Commissioner (Commissioner) is responsible for the licensing and regulation of insurance companies doing business in this state. This includes insurers offering coverage for medical malpractice. There is no statutory requirement for insurers to report to the Commissioner information about medical malpractice claims, judgments, or settlements.

Cancellation or Non-Renewal of Liability Insurance Policies: With certain exceptions, state insurance law requires insurance policies to be renewable. An insurer is exempt from this requirement if the insurer provides the insured with a cancellation notice that is delivered or mailed to the insured no fewer than 45 days before the effective date of the cancellation. Shorter notice periods apply for cancellation based on nonpayment of premiums (10 days) and for cancellation of fire insurance policies under certain circumstances (five days). The written notice must state the actual reason for cancellation of the insurance policy.

Prior Approval of Medical Malpractice Insurance Rates: The forms and rates of medical malpractice policies are "use and file." After issuing any policy, an insurer must file the forms and rates with the Commissioner within 30 days. Rates and forms are subject to public disclosure when the filing becomes effective. Actuarial formulas, statistics, and assumptions submitted in support of the filing are not subject to public disclosure.

Health Care Liability Reform

Statutes of Limitations and Repose: A medical malpractice action must be brought within time limits specified in statute, called the statute of limitations. Generally, a medical malpractice action must be brought within three years of the act or omission or within one year of when the claimant discovered or reasonably should have discovered that the injury was caused by the act or omission, whichever period is longer.

The statute of limitations is tolled during minority. This means that the three-year period does not begin to run until the minor reaches the age of 18. An injured minor will therefore always have until at least the age of 21 to bring a medical malpractice action.

The statute also provides that a medical malpractice action may never be commenced more than eight years after the act or omission. This eight-year outside time limit for bringing an action is called a "statute of repose." In the 1998 Washington Supreme Court decision *DeYoung v. Providence Medical Center*, the eight-year statute of repose was held unconstitutional on equal protection grounds.

Certificate of Merit: A lawsuit is commenced either by filing a complaint or service of summons and a copy of the complaint on the defendant. The complaint is the plaintiff's statement of his or her claim against the defendant. The plaintiff is generally not required to plead detailed facts in the complaint; rather, the complaint may contain a short and plain statement that sets forth the basic nature of the claim and shows that the plaintiff is entitled to relief.

There is no requirement that a plaintiff instituting a civil action file an affidavit or other document stating that the action has merit. However, a court rule requires that the pleadings in a case be made in good faith (Civil Rule 11). An attorney or party signing the pleading certifies that he or she has objectively reasonable grounds for asserting the facts and law. The court may assess attorneys' fees and costs against a party if the court finds that the pleading was made in bad faith, or to harass or cause unnecessary delay or needless expense.

Voluntary Arbitration: Parties to a dispute may voluntarily agree in writing to enter into binding arbitration to resolve the dispute. A procedural framework for conducting the arbitration proceeding is provided in statute, including provisions relating to appointment of an arbitrator, attorney representation, witnesses, depositions, and awards. The arbitrator's decision is final and binding on the parties and there is no right of appeal. A court's review of an arbitration decision is limited to correction of an award or vacation of an award under limited circumstances.

Collateral Sources: In the context of tort actions, "collateral sources" are sources of payments or benefits available to the injured person that are totally independent of the tortfeasor. Examples of collateral sources are health insurance coverage, disability insurance, or sick

leave. Under the common law "collateral source rule," a defendant is barred from introducing evidence that the plaintiff has received collateral source compensation for the injury.

The traditional collateral source rule has been modified in medical malpractice actions. In a medical malpractice action, any party may introduce evidence that the plaintiff has received compensation for the injury from collateral sources, except those purchased with the plaintiff's assets (e.g., insurance plan payments). The plaintiff may present evidence of an obligation to repay the collateral source compensation.

Summary of Amended Bill: The Legislature finds that addressing the issues of consumer access to health care and the increasing costs of medical malpractice insurance requires comprehensive solutions that encourage patient safety, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient. The Legislature intends to prioritize patient safety and the prevention of medical errors, to provide incentives to settle cases prior to going to court, and to provide the insurance commissioner with tools and information necessary to regulate medical malpractice insurance rates and policies so they are fair to insurers and the insured.

Part I

PATIENT SAFETY

Statements of Apology: In a medical negligence action, a statement of fault, apology, or sympathy, or a statement of remedial actions that may be taken, is not admissible as evidence if the statement was conveyed by a health care provider to the injured person or certain family members within 30 days of the act or within 30 days of the time the health care provider discovered the act, whichever is longer.

Reports of Unprofessional Conduct: A health care professional who makes a good faith report, files charges, or presents evidence to a disciplining authority against another member of a health profession relating to unprofessional conduct or inability to practice safely due to a physical or mental condition is immune in a civil action for damages resulting from such good faith activities. A health care professional who prevails in a civil action on the good faith defense is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense.

Medical Quality Assurance Commission (MQAC): The public membership component of the MQAC is increased from four to six members, and at least two of the public members must not be from the health care industry.

Health Care Provider Discipline: When imposing a sanction, a health profession disciplining authority may consider prior findings of unprofessional conduct, stipulations to informal disposition, and the actions of other Washington or out-of-state disciplining authorities.

Adverse health event : "Adverse event" is defined as the list of serious reportable events adopted by the national quality forum in 2002. "Incident" is defined as a situation involving patient care which results in an unanticipated injury not part of the patient's illness, or a situation which could result in injury or require additional health care services but did not. Other definitions are provided.

Adverse Event Notification: Medical facilities must notify the Department of Health (DOH) within 48 hours of confirmation that an adverse event has occurred. A report must be submitted to the DOH within 45 days after confirmation that an adverse event has occurred. If DOH determines that an adverse event has not been reported or investigated, DOH will direct the facility to report or investigate it.

Independent entity to receive notification of adverse events and incidents: DOH will contract with an independent entity to develop an internet based system for reporting adverse events by facilities immediately available to DOH. The system will protect confidentiality, and the independent entity will develop recommendations for changes in health care practices for the purpose of reducing the number and severity of adverse events.

Whistleblower protection: An adverse event or incidents are specifically mentioned as information for which whistleblowers are protected if reported to DOH in good faith.

Confidentiality: Notification or reports of adverse events or are subject to the confidentiality provisions in current law and are exempt from public disclosure.

Prescription Legibility: Prescriptions for legend drugs must either be hand-printed, typewritten, or generated electronically.

Part II

INSURANCE INDUSTRY REFORM

Medical Malpractice Closed Claim Reporting: Self-insurers and insuring entities that write medical malpractice insurance are required to report any closed claim to the Office of the Insurance Commissioner (OIC). OIC may fine those who violate this requirement, up to \$250 per day. The reports must contain specified data that is (to the extent possible) consistent with the format for data reported to the national practitioner data bank.

The Office of the Commissioner is required to prepare aggregate statistical summaries of closed claims based on the data submitted, while protecting the confidentiality of the underlying data.

OIC must prepare an annual report starting in 2010 which should include an analysis of closed claim information and any information the Commissioner finds is relevant to trends in medical malpractice. OIC will monitor losses and claim development patterns in the Washington state medical malpractice insurance market.

If the National Association of Insurance Commissioners adopts revised model statistical reporting standards for medical malpractice insurance, the OIC must analyze them and report any changes and recommendations to the Legislature by December 1, the year after they are adopted.

Written notice of a medical malpractice policy non-renewal must be delivered or mailed to the named insured at least 90 days before policy expiration and must include the actual reason for refusing to renew.

Medical malpractice policy forms or application forms are subject to the requirements under current law which must be filed with and approved by the OIC unless exempted from doing so by rule.

Part III

HEALTH CARE LIABILITY REFORM

Statutes of Limitations and Repose:

The eight-year statute of repose is re-established. Legislative intent and findings regarding the justification for a statute of repose are provided in response to the Washington Supreme Court's decision overturning the statute of repose in *DeYoung v. Providence Medical Center*. This means that a civil action for injury from health care must be commenced within three years of the act causing injury or within one year of the time that the patient discovered the injury or should have discovered the injury, whichever is later. However, this cannot be more than eight years after the original act causing the injury.

There are exceptions for fraud or intentional concealment until the date the patient has actual knowledge of the act of fraud or concealment, then they have one year from knowledge of the fraud or concealment. Knowledge of a custodial parent or guardian is imputed to a minor (person under 18 years of age). This means that tolling of the statute of limitations during minority is eliminated. Any actions not meeting these requirements are barred.

Certificate of Merit: In medical negligence actions involving a claim of a breach of the standard of care, the plaintiff must file a certificate of merit at the time of commencing the action (or no later than 45 days after filing the action if the action is filed 45 days prior to the running of the statute of limitations). If there is more than one defendant, a certificate of merit must be filed for each defendant. The person executing the certificate of merit must state that there is reasonable probability that the defendant's conduct did not follow the accepted standard of care required.

Failure to file a certificate of merit that complies with these requirements results in dismissal of the case. If a case is dismissed for failure to comply with the certificate of merit requirements, the filing of the claim may not be used against the health care provider in liability insurance rate settings, personal credit history, or professional licensing or credentialing.

Voluntary Arbitration: A voluntary arbitration system is established for disputes involving alleged professional negligence in the provision of health care. The voluntary arbitration system may be used only where all parties have agreed to submit the dispute to voluntary arbitration once the suit is filed, either through the initial complaint and answer, or after the commencement of the suit upon stipulation by all parties.

Arbitration award: The maximum award an arbitrator can make is limited to \$1 million for both economic and non-economic damages. In addition, the arbitrator may not make an award of damages based on the "ostensible agency" theory of vicarious liability (an agency created by operation of law - a principle's actions would reasonably lead a third party to conclude that an agency relationship existed). Fees and expenses shall be paid by the non-prevailing party.

Appeal: There is no right to a trial de novo on an appeal of the arbitrator's decision. An appeal is limited to the bases for appeal provided under the current arbitration statute for vacation of an award under circumstances where there was corruption or misconduct, or for modification or correction of an award to correct evident mistakes.

Notice: Ninety days notice of intent to file a lawsuit is required if the lawsuit is based on a health care provider's professional negligence. Mandatory mediation does not apply to parties who have agreed to arbitration.

Collateral Sources: The collateral source payment statute is amended to remove the restriction on presenting evidence of collateral source payments that come from insurance purchased by the plaintiff. The plaintiff, however, may introduce evidence of amounts paid to secure the right to the collateral source payments (e.g., premiums).

Frivolous Lawsuits: When signing and filing a claim, counterclaim, cross claim, or defense, an attorney must certify that the claim or defense is not frivolous. An attorney who signs a filing in violation of this section is subject to sanctions, including an order to pay reasonable expenses and reasonable attorneys' fees incurred by the other party.

Amended Bill Compared to Second Substitute Bill: The amended bill provides that statements of fault or apology are not admissible if conveyed within 30 days of the act, no longer contains a reference to mandatory revocation of a health care professional license. Adverse events are defined and reporting requirements for adverse events are described. The amended bill removes the reference to burden of proof for license suspension or revocation, and deletes the reference to business and occupation tax credits for physicians treating the uninsured. Reference to filing underwriting standards is removed, the limitation on number of expert witnesses is deleted, as is the reference to offers of settlement. A 90 day notice of intent to file a medical malpractice lawsuit is required.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: This bill is an improvement, but not necessarily everything everyone wanted. There is more work to be done in the future, but this is a good start. This bill has appropriate trade-offs. This bill will allow us to be better prepared for future changes. Real data will allow us to make meaningful changes in the future. This is an important first step. We fully support the striking amendment. This is an important step towards comprehensive reform. We have agreed to continue the dialogue started with this striking amendment. We have concerns about the additional data required. This will add cost, and we have concerns about the penalties in this bill.

Testimony Against: None.

Who Testified: PRO: Governor Christine Gregoire; Insurance Commissioner Mike Kreidler; Representative Pat Lantz, Prime sponsor; Randy Revelle, Washington State Hospital Association; Peter Dunbar, MD, Washington State Medical Association; John Budlong, Washington State Trial Lawyers Association; Mary Selecky, Secretary, Department of Health; Gary Morse, Physicians Insurance; S. Brooke Taylor, Washington State Bar Association; Tom Parker, Surplus Lines; Mike Kapplohn, Farmers Insurance.

APPENDIX - C

FINAL BILL REPORT

2SHB 2292

C 8 L 06

Synopsis as Enacted

Brief Description: Addressing health care liability reform.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Lantz, Cody, Campbell, Kirby, Flannigan, Williams, Linville, Springer, Clibborn, Wood, Fromhold, Morrell, Hunt, Moeller, Green, Kilmer, Conway, O'Brien, Sells, Kenney, Kessler, Chase, Uptegrove, Ormsby, Lovick, McCoy and Santos).

House Committee on Judiciary

Senate Committee on Health & Long-Term Care

Background:

The Legislature has considered a number of legislative proposals relating to medical malpractice over the past several years. These proposals have included a wide variety of issues that fall into three main areas designated as "patient safety," "insurance industry reform," and "civil liability reform."

PATIENT SAFETY

Statements of Apology. Under both a statute and a court rule, evidence of furnishing or offering to pay medical expenses needed as the result of an injury is not admissible in a civil action to prove liability for the injury. In addition, a court rule provides that evidence of offers of compromise are not admissible to prove liability for a claim. Evidence of conduct or statements made in compromise negotiations are likewise not admissible.

In 2002, the Legislature passed legislation that provides that an expression of sympathy relating to the pain, suffering, or death of an injured person is inadmissible in a civil trial. A statement of fault, however, is not made inadmissible under this provision.

Reports of Unprofessional Conduct. The Uniform Disciplinary Act (UDA) gives immunity to any person who, in good faith, either submits a written complaint to a disciplining authority charging a health care professional with unprofessional conduct or reports information to a disciplining authority indicating that a provider may not be able to practice his or her profession with reasonable skill and safety because of a mental or physical condition.

Another provision of law gives immunity specifically to physicians, dentists, and pharmacists who in good faith file charges or present evidence of incompetency or gross misconduct against another member of their profession before the Medical Quality Assurance Commission, the Dental Quality Assurance Commission, or the Board of Pharmacy.

Medical Quality Assurance Commission Membership (MQAC). The MQAC is responsible for the regulation of physicians and physician assistants. This constitutes approximately

23,000 credentialed health care professionals. The MQAC has 19 members consisting of 13 licensed physicians, two physician assistants, and four members of the public.

Health Care Provider Discipline. The UDA governs disciplinary actions for all 57 categories of credentialed health care providers. The UDA defines acts of unprofessional conduct, establishes sanctions for such acts, and provides general procedures for addressing complaints and taking disciplinary actions against a credentialed health care provider. Responsibilities in the disciplinary process are divided between the Secretary of Health and the 16 health profession boards and commissions according to the health care provider's profession and the relevant step in the disciplinary process.

Upon a finding of an act of unprofessional conduct, the Secretary or the board or commission decides which sanctions should be ordered. These sanctions include: revocation of a license, suspension of a license, restriction of the practice, mandatory remedial education or treatment, monitoring of the practice, censure or reprimand, conditions of probation, payment of a fine, denial of a license request, corrective action, refund of billings, and surrender of the license.

Disclosure of Adverse Events. A hospital is required to inform the Department of Health (DOH) when certain events occur in its facility. These events include: unanticipated deaths or major permanent losses of function; patient suicides; infant abductions or discharges to the wrong family; sexual assault or rape; transfusions with major blood incompatibilities; surgery performed on the wrong patient or site; major facility system malfunctions; or fires affecting patient care or treatment. A hospital must report this information within two business days of learning of the event.

Coordinated Quality Improvement Programs. Hospitals are required to maintain quality improvement programs to improve the quality of health care services and prevent medical malpractice. Quality improvement programs review medical staff privileges and employee competency, collect information related to negative health care outcomes, and conduct safety improvement activities. Medical facilities other than hospitals, and health care provider groups consisting of five or more providers, also may maintain quality improvement programs approved by the DOH.

INSURANCE INDUSTRY REFORM

Medical Malpractice Closed Claim Reporting. The Insurance Commissioner (Commissioner) is responsible for the licensing and regulation of insurance companies doing business in this state. This includes insurers offering coverage for medical malpractice. There is no statutory requirement for insurers to report to the Commissioner information about medical malpractice claims, judgments, or settlements.

Underwriting Standards. Underwriting standards are used by insurers to evaluate and classify risks, assign rates and rate plans, and determine eligibility for coverage or coverage limitations. Insurers, including medical malpractice insurers, are not required to file their underwriting standards with the Commissioner nor to notify an insured of the significant risk factors that lead to an underwriting action.

Cancellation or Non-Renewal of Liability Insurance Policies. With certain exceptions, state insurance law requires insurance policies to be renewable. An insurer is exempt from this requirement if the insurer provides the insured with a cancellation notice that is delivered or mailed to the insured no fewer than 45 days before the effective date of the cancellation. Shorter notice periods apply for cancellation based on nonpayment of premiums (10 days) and for cancellation of fire insurance policies under certain circumstances (five days). The written notice must state the actual reason for cancellation of the insurance policy.

Prior Approval of Medical Malpractice Insurance Rates. The forms and rates of medical malpractice policies are "use and file." After issuing any policy, an insurer must file the forms and rates with the Commissioner within 30 days. Rates and forms are subject to public disclosure when the filing becomes effective. Actuarial formulas, statistics, and assumptions submitted in support of the filing are not subject to public disclosure.

HEALTH CARE LIABILITY REFORM

Statutes of Limitations and Repose. A medical malpractice action must be brought within time limits specified in statute, called the statute of limitations. Generally, a medical malpractice action must be brought within three years of the act or omission or within one year of when the claimant discovered or reasonably should have discovered that the injury was caused by the act or omission, *whichever period is longer.*

The statute of limitations is tolled during minority. This means that the three-year period does not begin to run until the minor reaches the age of 18. An injured minor will therefore always have until at least the age of 21 to bring a medical malpractice action.

The statute also provides that a medical malpractice action may never be commenced more than eight years after the act or omission. This eight-year outside time limit for bringing an action is called a "statute of repose." In 1998 the Washington Supreme Court held the eight-year statute of repose unconstitutional on equal protection grounds.

Certificate of Merit. A lawsuit is commenced either by filing a complaint or by service of summons and a copy of the complaint on the defendant. The complaint is the plaintiff's statement of his or her claim against the defendant. The plaintiff is generally not required to plead detailed facts in the complaint; rather, the complaint may contain a short and plain statement that sets forth the basic nature of the claim and shows that the plaintiff is entitled to relief.

There is no requirement that a plaintiff instituting a civil action file an affidavit or other document stating that the action has merit. However, a court rule requires that the pleadings in a case be made in good faith. An attorney or party signing the pleading certifies that he or she has objectively reasonable grounds for asserting the facts and law. The court may assess attorneys' fees and costs against a party if the court finds that the pleading was made in bad faith or to harass or cause unnecessary delay or needless expense.

Voluntary Arbitration. Parties to a dispute may voluntarily agree in writing to enter into binding arbitration to resolve the dispute. A procedural framework for conducting the

arbitration proceeding is provided in statute, including provisions relating to appointment of an arbitrator, attorney representation, witnesses, depositions, and awards. The arbitrator's decision is final and binding on the parties, and there is no right of appeal. A court's review of an arbitration decision is limited to correction of an award or vacation of an award under limited circumstances.

Pre-Suit Notice and Mandatory Mediation. Generally, a plaintiff does not have to provide a defendant with prior notice of his or her intent to institute a civil suit. In suits against the state or a local government, however, a plaintiff must first file a claim with the governmental entity that provides notice of specified information relating to the claim. The plaintiff may not file suit until 60 days after the claim is filed with the governmental entity.

Medical malpractice claims are subject to mandatory mediation in accordance with court rules adopted by the Washington Supreme Court. The court rule provides deadlines for commencing mediation proceedings, the process for appointing a mediator, and the procedure for conducting mediation proceedings. The rule allows mandatory mediation to be waived upon petition of any party that mediation is not appropriate.

Collateral Sources. In the context of tort actions, "collateral sources" are sources of payments or benefits available to the injured person that are totally independent of the tortfeasor. Examples of collateral sources are health insurance coverage, disability insurance, or sick leave. Under the common law "collateral source rule," a defendant is barred from introducing evidence that the plaintiff has received collateral source compensation for the injury.

The traditional collateral source rule has been modified in medical malpractice actions. In a medical malpractice action, any party may introduce evidence that the plaintiff has received compensation for the injury from collateral sources, except those purchased with the plaintiff's assets (e.g., insurance plan payments). The plaintiff may present evidence of an obligation to repay the collateral source compensation.

Frivolous Lawsuits. Under both statute and court rule, the court may sanction a party or attorney for bringing a frivolous suit or asserting a frivolous claim or defense. Under the statute, which applies to all civil actions, if the court finds that the action, or any claim or defense asserted in the action, was frivolous and advanced without reasonable cause, the court may require the non-prevailing party to pay the prevailing party reasonable expenses and attorneys' fees incurred in defending the claim or defense.

Summary:

The Legislature finds that addressing the issues of consumer access to health care and the increasing costs of medical malpractice insurance requires comprehensive solutions that encourage patient safety, increase oversight of medical malpractice insurance, and make the civil justice system more understandable, fair, and efficient.

PATIENT SAFETY

Statements of Apology. In a medical negligence action, a statement of fault, apology, or sympathy, or a statement of remedial actions that may be taken, is not admissible as evidence in a civil action if the statement was conveyed by a health care provider to the injured person or certain family members within 30 days of the act or omission, or the discovery of the act or omission, that is the basis for the claim.

Reports of Unprofessional Conduct. The statute granting immunity to a physician, dentist, or pharmacist who files charges or presents evidence about the incompetence or misconduct of another physician, dentist, or pharmacist is expanded to apply to any health care professional subject to the Uniform Disciplinary Act and to apply to reports or evidence relating to unprofessional conduct or the inability to practice with reasonable skill and safety because of a physical or mental condition. A health care professional who prevails in a civil action on the good faith defense provided in this immunity statute is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense.

Medical Quality Assurance Commission (MQAC). The public membership component of the MQAC is increased from four to six members, and at least two of the public members must not be representatives of the health care industry.

Health Care Provider Discipline. When imposing a sanction against a health care provider, a health profession disciplining authority may consider prior findings of unprofessional conduct, stipulations to informal disposition, and the actions of other Washington or out-of-state disciplining authorities.

Disclosure of Adverse Events. A medical facility must notify the Department of Health (DOH) within 48 hours of confirmation that an adverse event has occurred. The medical facility must submit a subsequent report of the adverse event to the DOH within 45 days. The report must include a root cause analysis of the adverse event and a corrective action plan, or an explanation of the reasons for not taking corrective action. Facilities and health care workers may report the occurrence of "incidents." "Adverse event" is defined as the list of serious reportable events adopted by the National Quality Forum in 2002. "Incident" is defined as an event involving clinical care that could have injured the patient or that resulted in an unanticipated injury that does not rise to the level of an adverse event.

The DOH must contract with an independent entity to develop a secure internet-based system for the reporting of adverse events and incidents. The independent entity is responsible for receiving and analyzing the notifications and reports and developing recommendations for changes in health care practices for the purpose of reducing the number and severity of adverse events. The independent entity must report to the Legislature and the Governor on an annual basis regarding the number of adverse events and incidents reported and the information derived from the reports.

Coordinated Quality Improvement Programs. The types of programs that may apply to the DOH to become coordinated quality improvement programs are expanded to include consortiums of health care providers that consist of at least five health care providers.

Prescription Legibility. Prescriptions for legend drugs must either be hand-printed, typewritten, or generated electronically.

INSURANCE INDUSTRY REFORM

Medical Malpractice Closed Claim Reporting. Self-insurers and insuring entities that write medical malpractice insurance are required to report medical malpractice closed claims that are closed after January 1, 2008, to the Office of the Insurance Commissioner (Commissioner). Closed claims reports must be filed annually by March 1, and must include data for closed claims for the preceding year. The reports must contain specified data relating to: the type of health care provider, specialty, and facility involved; the reason for the claim and the severity of the injury; the dates when the event occurred, the claim was reported to the insurer, and the suit was filed; the injured person's age and sex; and information about the settlement, judgment, or other disposition of the claim, including an itemization of damages and litigation expenses.

If a claim is not covered by an insuring entity or self-insurer, the provider or facility must report the claim to the Commissioner after a final disposition of the claim. The Commissioner may impose a fine of up to \$250 per day against an insuring entity that fails to make the required report. The DOH may require a facility or provider to take corrective action to comply with the reporting requirements.

A claimant or the claimant's attorney in a medical malpractice action that results in a final judgment, settlement, or disposition, must report to the Commissioner certain data, including the date and location of the incident, the injured person's age and sex, and information about the amount of judgment or settlement, court costs, attorneys' fees, or expert witness costs incurred in the action.

The Commissioner must use the data to prepare aggregate statistical summaries of closed claims and an annual report of closed claims and insurer financial reports. The annual report must include specified information, such as: trends in frequency and severity of claims; types of claims paid; a comparison of economic and non-economic damages; a distribution of allocated loss adjustment expenses; a loss ratio analysis for medical malpractice insurance; a profitability analysis for medical malpractice insurers; a comparison of loss ratios and profitability; and a summary of approved medical malpractice rate filings for the prior year, including analyzing the trend of losses compared to prior years.

Any information in a closed claim report that may result in the identification of a claimant, provider, health care facility, or self-insurer is exempt from public disclosure.

Underwriting Standards. During the underwriting process, an insurer may consider the following factors only in combination with other substantive underwriting factors: (1) that an inquiry was made about the nature or scope of coverage; (2) that a notification was made about a potential claim that did not result in the filing of a claim; or (3) that a claim was closed without payment. If an underwriting activity results in a higher premium or reduced coverage, the insurer must provide written notice to the insured describing the significant risk factors that led to the underwriting action.

Cancellation or Non-Renewal of Liability Insurance Policies. The mandatory notice period for cancellation or non-renewal of medical malpractice liability insurance policies is increased from 45 days to 90 days. An insurer must actually deliver or mail to the insured a written notice of the cancellation or non-renewal of the policy, which must include the actual reason for the cancellation or non-renewal and the significant risk factors that led to the action. For policies the insurer will not renew, the notice must state that the insurer will not renew the policy upon its expiration date.

Prior Approval of Medical Malpractice Insurance Rates. Medical malpractice rate filings and form filings are changed from the current "use and file" system to a prior approval system. An insurer must, prior to issuing a medical malpractice policy, file the policy rate and forms with the Commissioner. The Commissioner must review the filing, which cannot become effective until 30 days after its filing.

HEALTH CARE LIABILITY REFORM

Statutes of Limitations and Repose. Tolling of the statute of limitations during minority is eliminated.

The eight-year statute of repose is re-established. Legislative intent and findings regarding the justification for a statute of repose are provided in response to the Washington Supreme Court's decision overturning the statute of repose.

Certificate of Merit. In medical negligence actions involving a claim of a breach of the standard of care, the plaintiff must file a certificate of merit at the time of commencing the action, or no later than 45 days after filing the action if the action is filed 45 days prior to the running of the statute of limitations. The certificate of merit must be executed by a qualified expert and state that there is a reasonable probability that the defendant's conduct did not meet the required standard of care based on the information known at the time. The court for good cause may grant up to a 90-day extension for filing the certificate of merit.

Failure to file a certificate of merit that complies with these requirements results in dismissal of the case. If a case is dismissed for failure to comply with the certificate of merit requirements, the filing of the claim may not be used against the health care provider in liability insurance rate setting, personal credit history, or professional licensing or credentialing.

Voluntary Arbitration. A new voluntary arbitration system is established for disputes involving alleged professional negligence in the provision of health care. The voluntary arbitration system may be used only where all parties have agreed to submit the dispute to voluntary arbitration once the suit is filed, either through the initial complaint and answer, or after the commencement of the suit upon stipulation by all parties.

The maximum award an arbitrator may make is limited to \$1 million for both economic and non-economic damages. In addition, the arbitrator may not make an award of damages based on the "ostensible agency" theory of vicarious liability.

The arbitrator is selected by agreement of the parties, and the parties may agree to more than one arbitrator. If the parties are unable to agree to an arbitrator, the court must select an arbitrator from names submitted by each side. A dispute submitted to the voluntary arbitration system must follow specified time periods that will result in the commencement of the arbitration no later than 12 months after the parties agreed to submit to voluntary arbitration.

The number of experts allowed for each side is generally limited to two experts on the issue of liability, two experts on the issue of damages, and one rebuttal expert. In addition, the parties are generally entitled to only limited discovery. Depositions of parties and expert witnesses are limited to four hours per deposition and the total number of additional depositions of other witnesses is limited to five per side, for no more than two hours per deposition.

There is no right to a trial de novo on an appeal of the arbitrator's decision. An appeal is limited to the bases for appeal provided under the current arbitration statute for vacation of an award under circumstances where there was corruption or misconduct, or for modification or correction of an award to correct evident mistakes.

Pre-Suit Notice and Mandatory Mediation. A medical malpractice action may not be commenced unless the plaintiff has provided the defendant with 90 days prior notice of the intention to file a suit. The 90-day notice requirement does not apply if the defendant's name is unknown at the time of filing the complaint.

The mandatory mediation statute is amended to require mandatory mediation of medical malpractice claims unless the claim is subject to either mandatory or voluntary arbitration. Implementation of the mediation requirement contemplates the adoption of a rule by the Supreme Court establishing a procedure for the parties to certify the manner of mediation used by the parties.

Collateral Sources. The collateral source payment statute is amended to remove the restriction on presenting evidence of collateral source payments that come from insurance purchased by the plaintiff. The plaintiff, however, may introduce evidence of amounts paid to secure the right to the collateral source payments (e.g., premiums), in addition to introducing evidence of an obligation to repay the collateral source compensation.

Frivolous Lawsuits. An attorney in a medical malpractice action, by signing and filing a claim, counterclaim, cross claim, or defense, certifies that the claim or defense is not frivolous. An attorney who signs a filing in violation of this section is subject to sanctions, including an order to pay reasonable expenses and reasonable attorneys' fees incurred by the other party.

Votes on Final Passage:

House	54	43	
Senate	48	0	(Senate amended)
House	82	15	(House concurred)

Effective: June 7, 2006

July 1, 2006 (Sections 112 and 210)

APPENDIX - D

RCW 4.16.350

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

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

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

[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.]

Findings -- Intent -- Part headings and subheadings not law -- Severability -- 2006 c 8: See notes following RCW 5.64.010.

Application -- 1998 c 147: "This act applies to any cause of action filed on or after June 11, 1998." [1998 c 147 § 2.]

Application -- 1988 c 144: See note following RCW 4.16.340.

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

Severability -- 1975-'76 2nd ex.s. c 56: "If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 56 § 15.]

Actions for injuries resulting from health care: Chapter 7.70 RCW.

Complaint in personal injury actions not to include statement of damages: RCW 4.28.360.

Evidence of furnishing or offering to pay medical expenses inadmissible to prove liability in personal injury actions for medical negligence: Chapter 5.64 RCW.

Immunity of members of professional review committees, societies, examining, licensing or disciplinary boards from civil suit: RCW 4.24.240.

Proof and evidence required in actions against hospitals, personnel and members of healing arts: RCW 4.24.290.

Verdict or award of future economic damages in personal injury or property damage action may provide for periodic payments: RCW 4.56.260.

APPENDIX - E

RCW 4.16.190
Statute tolled by personal disability.

(1) Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.

[2006 c 8 § 303; 1993 c 232 § 1; 1977 ex.s. c 80 § 2; 1971 ex.s. c 292 § 74; Code 1881 § 37; 1877 p 9 § 38; 1869 p 10 § 38; 1861 p 61 § 1; 1854 p 364 § 11; RRS § 169.]

Notes:

Findings -- Intent -- Part headings and subheadings not law -- Severability -- 2006 c 8: See notes following RCW 5.64.010.

Purpose -- Intent -- 1977 ex.s. c 80: "It is the purpose of the legislature in enacting this 1977 amendatory act to provide for a comprehensive revision of out-dated and offensive language, procedures and assumptions that have previously been used to identify and categorize mentally, physically, and sensory handicapped citizens. It is legislative intent that language references such as idiots, imbeciles, feeble-minded or defective persons be deleted and replaced with more appropriate references to reflect current statute law more recently enacted by the federal government and this legislature. It is legislative belief that use of the undefined term "insanity" be avoided in preference to the use of a process for defining incompetency or disability as fully set forth in chapter 11.88 RCW; that language that has allowed or implied a presumption of incompetency or disability on the basis of an apparent condition or appearance be deleted in favor of a reference to necessary due process allowing a judicial determination of the existence or lack of existence of such incompetency or disability." [1977 ex.s. c 80 § 1.]

Severability -- 1977 ex.s. c 80: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1977 ex.s. c 80 § 76.]

Severability -- 1971 ex.s. c 292: See note following RCW 26.28.010.

Adverse possession, personal disability, limitation tolled: RCW 7.28.090.

APPENDIX - F

RCW 7.70.110

Mandatory mediation of health care claims — Tolling statute of limitations.

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.

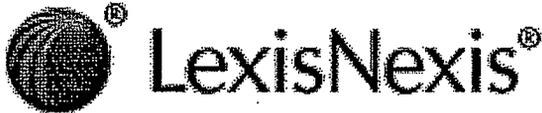
[1996 c 270 § 1; 1993 c 492 § 420.]

Notes:

Findings -- Intent -- 1993 c 492: See notes following RCW 43.72.005.

Short title -- Severability -- Savings -- Captions not law -- Reservation of legislative power -- Effective dates -- 1993 c 492: See RCW 43.72.910 through 43.72.915.

APPENDIX - G



LEXSEE 136 WN.2D 136

SHIRLEE DEYOUNG, *Appellant*, v. PROVIDENCE MEDICAL CENTER, ET AL.,
Respondents.

No. 65373-9

SUPREME COURT OF WASHINGTON

136 Wn.2d 136; 960 P.2d 919; 1998 Wash. LEXIS 581

August 27, 1998, Filed

PRIOR HISTORY: [***1] Appeal from Superior Court of King County. Docket No: 96-2-21955-0. Date filed: 03/28/97. Judge signing: Hon. Carol Schapira.

accountable for its status.

SUMMARY:

Nature of Action: Action alleging medical malpractice.

Superior Court: The Superior Court for King County, No. 96-2-21955-0, Carol A. Schapira, J., on March 28, 1997, entered a summary judgment dismissing the action.

Supreme Court: Holding that a statute of repose that barred the plaintiff's action violated the privileges and immunities clause of the state constitution, the court *reverses* the judgment and *remands* the case for further proceedings.

[2] **Constitutional Law -- Equal Protection -- Classifications -- Level of Scrutiny -- Semisuspect Class -- Persons Affected by Statute of Repose** Persons affected by a statute of repose do not constitute a semisuspect class.

[3] **Constitutional Law -- Construction -- State and Federal Provisions -- Independent State Interpretation -- Factors** In determining if a state constitutional provision should be interpreted independently of its federal counterpart in a particular case, a court considers the state constitutional provision in light of the following six criteria: (1) the textual language of the state constitutional provision, (2) differences in the parallel texts of the state and federal constitutions, (3) the history of the state constitution and the common law, (4) preexisting state law, (5) structural differences between the state and federal constitutions, and (6) whether the state constitutional provision addresses a subject matter that is of particular state interest or local concern.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Constitutional Law -- Equal Protection -- Classifications -- Intermediate Scrutiny -- Applicability -- In General** The validity of a legislative classification is analyzed under the intermediate level of scrutiny test only if the classification implicates an important right and involves a semisuspect class not

[4] **Limitation of Actions -- Statutory Provisions -- Statute of Repose -- Validity -- Privileges and Immunities -- Independent Interpretation** *Const. art. I, § 12*, the privileges and immunities clause, is not more protective than the equal protection clause of the Fourteenth Amendment with respect to the issue of the validity of a statute of repose as applied to a particular

group of plaintiffs.

[5] **Limitation of Actions -- Statutory Provisions -- Statute of Repose -- Validity -- Privileges and Immunities -- Level of Scrutiny** A claim that a statute of repose violates *Const. art. I, § 12*, the privileges and immunities clause, by denying certain persons the right to be indemnified for personal injuries caused by the negligence of others is analyzed under the rational basis (or minimal scrutiny) test.

[6] **Constitutional Law -- Equal Protection -- Classifications -- Minimal Scrutiny -- Test** In analyzing the validity of a legislative classification under the rational basis (or minimal scrutiny) test, a court must determine (1) whether the legislation applies alike to all members within the designated class, (2) whether there are reasonable grounds to distinguish between those within and those not within the class, and (3) whether the classification bears a rational relationship to the proper purpose of the legislation. Stated another way, a legislative classification will be upheld under the rational basis (or minimal scrutiny) test if the classification does not rest on grounds wholly irrelevant to the achievement of a legitimate state objective.

[7] **Constitutional Law -- Equal Protection -- Classifications -- Minimal Scrutiny -- Court's Role** A court's role in analyzing the validity of a legislative classification under the rational basis (or minimal scrutiny) test is to ensure that the classification is constitutional; the court must invalidate a legislative classification in the rare case when the test cannot be met.

[8] **Medical Treatment -- Malpractice -- Limitation Period -- Statute of Repose -- Validity -- Legislative Classifications** *RCW 4.16.350(3)*, which sets an absolute limit of eight years on the filing of certain medical malpractice actions after the injurious act or omission is alleged to have occurred, does not violate *Const. art. I, § 12*, the privileges and immunities clause, by limiting some plaintiffs and not others.

[9] **Constitutional Law -- Privileges and Immunities -- Classifications -- Validity -- Evaluation of Legislative Materials** In analyzing the validity of a legislative classification under *Const. art. I, § 12*, the privileges and immunities clause, a court may consider the materials that were before the Legislature when the classification was created and draw its own conclusions.

[10] **Constitutional Law -- Equal Protection -- Classifications -- Minimal Scrutiny -- Relationship to Objectives** A legislative classification will be invalidated under *Const. art. I, § 12*, the privileges and immunities clause, if the relationship between the classification and the legislative goal is so attenuated as to render the classification arbitrary or irrational.

[11] **Medical Treatment -- Malpractice -- Limitation Period -- Statute of Repose -- Validity -- Relationship to Objectives** *RCW 4.16.350(3)*, which sets an absolute limit of eight years on the filing of certain medical malpractice actions after the injurious act or omission is alleged to have occurred, is invalid under *Const. art. I, § 12*, the privileges and immunities clause, in that the relationship between the limitation requirement and the statutory goal of alleviating a perceived crisis in the cost and availability of medical insurance to medical practitioners is too attenuated to survive rational basis scrutiny.

COUNSEL: *Luvera, Barnett, Brindley, Beninger & Cunningham*, by Joel D. Cunningham; and *James L. Holman & Associates*, by Daniel W. Ferm, for appellant.

Lee, Smart, Cook, Martin & Patterson, P.S., Inc., by David L. Martin and Karen A. Kalzer; and *Wilson, Smith & Cochran*, by Kathy A. Cochran and David M. Jacobi, for respondents.

Elizabeth A. Leedom and *Carol S. Janes* on behalf of Washington Defense Trial Lawyers, amicus curiae.

[**2] *Bryan P. Harnetiaux, Gary N. Bloom, Debra L. Stephens*, and *Daniel E. Huntington* on behalf of Washington State Trial Lawyers Association, amicus curiae.

JUDGES: Authored by Barbara A. Madsen. Concurring: James M. Dolliver, Charles Z. Smith, Charles W. Johnson, Richard B. Sanders. Dissenting: Gerry L. Alexander, Richard P. Guy, Philip A. Talmadge, Barbara Durham.

OPINION BY: Barbara A. Madsen

OPINION

En Banc. [*139] [**920] Madsen, J. -- Plaintiff Shirlee DeYoung appeals from summary judgment granted on the ground that the eight-year statute of repose

in *RCW 4.16.350(3)* bars her negligence action. Plaintiff contends that the repose provision violates the privileges and immunities clause of the Washington State Constitution and denies access to the courts. We find the statute of repose unconstitutional because it violates the privileges and immunities clause. Accordingly, we reverse the summary judgment.

Facts

Ms. DeYoung alleges that Dr. J. T. Griffin negligently administered radiation treatment to her eyes in 1980 and [*140] that Providence Medical Center is liable for Dr. Griffin's [***3] malpractice under a theory of corporate negligence. She asserts that she learned in 1995 that the radiation treatment caused injury to her right eye, and learned in 1996 that her left eye was injured as well. She sued defendants in August 1996.

[**921] Dr. Griffin and Providence moved for summary judgment, arguing that the eight-year repose provision in *RCW 4.16.350(3)* bars Ms. DeYoung's suit. Ms. DeYoung argued that the repose provision is unconstitutional. The trial court granted defendants' motions and dismissed the action.

This court granted Ms. DeYoung's motion for direct review. The Washington State Trial Lawyers' Association and the Washington Defense Trial Lawyers have filed amici curiae briefs.

Analysis

Review of summary judgment is de novo, with the appellate court engaging in the same inquiry as the trial court. *DeWater v. State*, 130 Wn.2d 128, 133, 921 P.2d 1059 (1996). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*.

Privileges and Immunities

Plaintiff maintains that the eight-year statute of repose in *RCW 4.16.350(3)* violates the privileges and immunities [***4] clause of the Washington Constitution. She maintains that the provision arbitrarily denies the benefits of the discovery rule to a small class of adult medical malpractice claimants who cannot reasonably discover their injuries within eight years of the alleged negligent act or omission. *RCW 4.16.350(3)* provides that medical malpractice actions

shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of [*141] 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

The state privileges and immunities clause, *article I, section 12 of the Washington State Constitution*, provides that "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."

The initial inquiry is the standard of review which applies to plaintiff's privileges and immunities [***5] claim. Plaintiff first argues that settled law establishes that her *article I, section 12* challenge should be assessed under a heightened scrutiny standard. She maintains that the court has already determined that heightened scrutiny applies where an important right or a semisuspect class is involved, citing *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993), and that this court has held that the right to be indemnified for personal injuries is a substantial individual property right, citing *Hunter v. North Mason High Sch.*, 85 Wn.2d 810, 814, 539 P.2d 845 (1975). Under a heightened scrutiny standard, she maintains, the repose provision falls.

[1] [2] However, despite plaintiff's contention, it is not settled law that intermediate scrutiny applies in this case. In a number of recent cases we have held that intermediate scrutiny will be applied only where a statute implicates both an important right and a semisuspect class not accountable for its status. *E.g.*, *State v. Schaaf*, 109 Wn.2d 1, 17-18, 743 P.2d 240 (1987); *In re Personal Restraint of Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993); *Westerman v. Cary*, 125 Wn.2d 277, 294, 892 P.2d 1067 (1994); *Griffin v. Eller*, [***6] 130 Wn.2d 58, 65, 922 P.2d 788 (1996). The group affected by the statute of repose is not a semisuspect class. Included in the class barred by the eight-year statute of repose are those who choose not to bring an action, those

who have slept on their rights, and those who have not [*142] diligently investigated their cause of action. Thus, many of the persons whose actions are barred by the repose provision are accountable for the fact that their claims are barred. Further, plaintiff has not explained what characteristics of the class identify it as a semisuspect class.

Moreover, in *Hunter*, it is unclear what level of scrutiny the court applied, as noted later in *Daggs v. City of Seattle*, 110 Wn.2d 49, 56, 750 P.2d 626 (1988). *Hunter* involved a claims-filing statute, and, as also indicated [**922] in *Daggs*, more recent decisions suggest a minimum scrutiny analysis applies in assessing such statutes. *Id.* Thus, *Shawn P.* and *Hunter* do not justify a conclusion that Washington law is already settled that intermediate scrutiny applies in assessing plaintiff's privileges and immunities challenge.

[3] Plaintiff next argues that the state constitution should be interpreted independently of the Equal [***7] Protection Clause and that under an independent state constitutional analysis heightened scrutiny should be applied. She presents a *Gunwall* argument in support of this contention. See *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986). The first two *Gunwall* factors involve an analysis of the textual language of the state constitutional provision and a comparison of the federal equal protection clause and the state privileges and immunities clause. The court has recently noted that while there are differences in the provisions, these differences do not require an independent state analysis; "this court has repeatedly found these provisions substantially similar and treated them accordingly." *Seeley v. State*, 132 Wn.2d 776, 788, 940 P.2d 604 (1997) (citing cases). Plaintiff states, however, that the framers of the state constitution were primarily concerned with fundamental rights, and this concern is closely related to the judicial system's enforcement of those rights. While article I, section 1 does state the intent that governments are to establish and maintain rights, the state constitution goes on to enumerate constitutional rights in article I, sections 2-32 [***8] but does not include pursuit of a tort claim within those enumerated rights.

[*143] The third factor involves examination of the state constitutional and common law history of the privileges and immunities clause. See *Gunwall*, 106 Wn.2d at 65-66; *Seeley*, 132 Wn.2d at 788. Plaintiff reasons this factor neither favors nor disfavors

independent analysis because such history is lacking. The fourth factor concerns preexisting state law. "Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights." *Gunwall*, 106 Wn.2d at 61. Plaintiff does not address the fourth factor. Providence argues that preexisting state law supports the principle that a boundary can be set which cuts off a tort claim regardless of when discovery of a cause of action occurs. Until 1969, when the court adopted the discovery rule for medical malpractice actions in *Ruth v. Dight*, 75 Wn.2d 660, 666, 453 P.2d 631 (1969), superseded by statute as stated in *Teeter v. Lawson*, 25 Wn. App. 560, 610 P.2d 925 (1980), a cause of action could accrue and the statute of limitations expire without a patient's knowing of injury. E.g., *Lindquist v. Mullen*, [***9] 45 Wn.2d 675, 277 P.2d 724 (1954), overruled by *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631. Plaintiff does not dispute that this was the status of the law when the state constitution was enacted. Preexisting state law indicates that there is no bar to absolutely foreclosing a cause of action where one has been injured by medical malpractice.

Plaintiff maintains the fifth and sixth factors strongly favor independent state analysis. The fifth *Gunwall* factor addresses the structural differences between the state and federal constitutions. This factor always favors an independent state analysis. *Seeley*, 132 Wn.2d at 789-90. The sixth factor requires examining whether the subject matter is local in character or, alternatively, whether there appears to be need for national uniformity. *Gunwall*, 106 Wn.2d at 62. Plaintiff points to article I, section 1, which provides that the branches of government, including the judicial branch, "are established to protect and maintain individual rights" and urges that the right to be indemnified is a substantial property right, citing *Hunter*. She maintains that the right [*144] to a civil remedy in tort actions is a matter of state and not federal concern [***10] and whether the discovery rule can be denied to some but not all individuals is a matter of local concern. Providence concedes that both these factors favor independent state analysis.

[4] [5] Taken together, Plaintiff's arguments do not establish that an independent state constitutional analysis applying a heightened scrutiny standard is justified in this case. Therefore, we will use the rational basis analysis [**923] applicable to the Equal Protection Clause. See *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997).

[6] Plaintiff contends that even under the rational basis standard, the eight-year repose provision is unconstitutional under article I, section 12. A legislative enactment survives a constitutional challenge under minimum scrutiny analysis if "(1) . . . the legislation applies alike to all members within the designated class; (2) . . . there are reasonable grounds to distinguish between those within and those without the class; and (3) . . . the classification has a rational relationship to the proper purpose of the legislation." *Griffin*, 130 Wn.2d at 65 (quoting *Convention Ctr. Coalition v. City of Seattle*, 107 Wn.2d 370, 378-79, 730 P.2d 636 (1986)). Stated [***11] somewhat differently, under the rational basis standard the law must be rationally related to a legitimate state interest, and will be upheld unless the classification rests on grounds wholly irrelevant to the achievement of a legitimate state objective. *Seeley*, 132 Wn.2d at 795. "The rational relationship test is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause." *State v. Heiskell*, 129 Wn.2d 113, 124, 916 P.2d 366 (1996) (quoting *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990)).

[7] As relaxed and tolerant as the rational basis standard is, however, the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional. In the rare case, unconstitutionality may be found; this is that rare case.

Plaintiff first maintains that the repose provision in *RCW 4.16.350(3)* [*145] singles out a subgroup of negligent practitioners and a corresponding subgroup of injured patients for special treatment in violation of article I, section 12.¹ She reasons that as a result of tolling and other provisions, the eight-year statute of repose does not apply uniformly to all persons [***12] who discover their malpractice claims over eight years after the malpractice occurred. She further reasons that the repose provision is fundamentally unfair because a very small subgroup created by default is arbitrarily denied the benefit of the one-year discovery rule in *RCW 4.16.350(3)*.²

¹ Plaintiff concedes that a general statute of repose applying to all tort claims would not violate *Constitution article I, section 12*.

² The discovery rule was adopted for medical malpractice actions in *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969), where the court

reasoned that "fundamental fairness" and "the common law's purpose to provide a remedy for every genuine wrong" are not served when a statute of limitations passes before the injured party "would not in the usual course of events know he had been injured until long after the statute of limitations had cut off his legal remedies[.]" *Ruth* construed former *RCW 4.16.010* and *RCW 4.16.080(2)*, which then provided a three-year accrual-based statute of limitations for medical malpractice actions, as providing that a medical malpractice action might accrue upon discovery. In response to *Ruth*, the Legislature enacted *RCW 4.16.350* in 1971, and provided for a one-year discovery rule. LAWS OF 1971, ch. 80, § 1.

[***13] The eight-year statute of repose does not apply to bar malpractice claims of all persons discovering their cause of action over eight years after the act or omission alleged to have caused injury. The time for commencement of an action is tolled upon proof of fraud or intentional concealment, as well as where a foreign body not intended to have therapeutic or diagnostic purpose or effect is left inside the patient. *RCW 4.16.350(3)* The time is also tolled in the case of minors. *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995). Tolling also occurs for the time a patient is incompetent or disabled to a degree that he or she cannot understand the nature of the proceedings. *RCW 4.16.190*. Further, under the present statutes, tolling occurs for the period of time a person is imprisoned on a criminal charge prior to sentencing. *RCW 4.16.190*. By its terms, *RCW 4.16.350(3)* does not apply to actions against health care providers for damages for injury where the [*146] claim is based upon intentional conduct and childhood sexual abuse as defined in *RCW 4.16.340(5)*.

[8] Although not all claims of persons who discover their malpractice actions over eight years after the alleged malpractice [***14] are subject to the eight-year statute of repose, we do not agree that the group of persons to whose [**924] claims the repose provision applies was created arbitrarily. There are reasonable grounds for the tolling and other statutory provisions which except a cause of action from the eight-year bar, and thus reasonable grounds for the distinctions between the persons affected by those provisions and those who are not. Minors are not similarly situated to adults because they are unable to pursue an action on their own until

adulthood, *RCW 4.08.050*, and they generally lack the experience, judgment, knowledge and resources to effectively assert their rights. Tolling in the case of fraud or intentional concealment is reasonable because the certainty and protection from stale claims a repose statute provides should not be extended to benefit those who by their wrongful acts prevent timely filing of a cause of action. Cases where foreign objects are left in the claimant's body present the clearest cases of malpractice with the result that evidentiary problems are of lesser concern than in other cases. A person incompetent or disabled to the extent that he or she is unable to understand the nature [***15] of the proceedings is not similarly situated to those adults who are competent to assert their rights and assist in a malpractice action. Inapplicability of the eight-year repose period to actions against health care providers for damages for injury where the claim is based upon intentional conduct and childhood sexual abuse as defined in *RCW 4.16.340(5)* is also based upon reasonable grounds. The Legislature has found that victims of childhood sexual abuse may suffer from repressed memory of the abuse, may be unable to understand or make the connection between injury and such abuse until years later, and may discover more serious injuries years after awareness of some injury. LAWS OF 1991, ch. 212, § 1. In view of such concerns, the Legislature has [*147] enacted limitations and discovery periods specifically applicable to actions based upon child sexual abuse involving intentional conduct. *RCW 4.16.340*. Where the gravamen of the action is such abuse, the limitations in *RCW 4.16.340* apply even if health care, within the meaning of *RCW 4.16.350*, is also involved. The fact that child sexual abuse forms the grounds for the action distinguishes such cases from most medical malpractice actions, [***16] which fall within the ambit of *RCW 4.16.350*. There are reasonable grounds for the distinction between actions covered by the statute of repose and those which are not.

Plaintiff next contends that the classification of medical malpractice claims which are subject to the eight-year statute of repose does not bear a rational relationship to the purpose of the statute. We agree.

The eight-year statute of repose was enacted in 1976 in response to a perceived insurance crisis said to result from the discovery rule and from increased medical malpractice claims, which allegedly created problems in calculating and reserving for exposure on long-tail claims. LAWS OF 1975-76, 2d Ex. Sess., ch. 56. Insurers

asserted that because of this "long tail effect" and other reasons, much higher medical malpractice liability insurance premiums were required to cover present and future claims against health care practitioners. Christopher J. Trombetta, Note, *The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience Versus Legislative Will*, 34 Vill. L. Rev. 397, 404-06 (1989). By enacting an eight-year statute of repose, the Legislature intended to protect insurance companies [***17] while "hopefully not resulting in too many individuals not getting compensated." HOUSE JOURNAL, 44th Legis. Sess. 318 (1976) (comment by Representative Walt O. Knowles).

In addressing plaintiff's challenge, we are mindful that "[t]he rationality of a classification does not require production of evidence to sustain the classification; it is not subject to courtroom fact-finding." *Gossett*, 133 Wn.2d at 979 (citing *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, [*148] 125 L. Ed. 2d 257 (1993).) Indeed, the rational basis standard may be satisfied where the "legislative choice . . . [is] based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). We also do not quarrel with defendants' contention that the Legislature could rationally speculate that protection of the medical malpractice insurance industry was needed to alleviate or [**925] avert a malpractice insurance crisis. When the Legislature enacted the repose provision, decreased availability of malpractice insurance and increased malpractice insurance premiums were widely viewed as a threat to the nation's health care system. [***18] Among materials before the Legislature was a 1975 report of the Washington State Medical Association Professional Liability Insurance Program to the Insurance Committee, which stated in its introduction, at 1, that although a crisis in the professional liability market in Washington had up to that time been prevented, the situation had worsened and reached a critical stage in many states. Clerk's Papers (CP) at 65. Also before the Legislature was a Medical Malpractice Report prepared by the Washington State Bar Association for the Board of Governors in December 1975 which noted, at vi, that premiums for specified classes of physicians had doubled and tripled between 1972 and 1976. CP at 89. This report also noted that information from Aetna Life and Casualty Insurance Company indicated substantial increases in losses paid out between 1972 and 1974. *Id.*³ The Legislature could rationally surmise that, even if a crisis

did not then exist in Washington, one was likely.

3 The report noted part of the increase was due to an increase in the number of physicians covered by the company.

[***19] [9] The difficulty with the legislation, however, is that materials before the Legislature also showed that an eight-year repose provision could not rationally be thought to have any chance of actuarially stabilizing the insurance industry even if an insurance crisis did exist and even if every state adopted an eight-year statute of repose. Among [*149] other documents before the Legislature was a 1975 report by the National Association of Insurance Commissioners (NAIC). That report discloses, based upon a study of 3,247 claims nationwide, that less than one percent (plaintiff's calculations show about one-half of one percent) of the claims were those of adults reported over eight years after the incidents of malpractice. According to plaintiff's calculations, of the total of \$ 24,446,469 paid in indemnity on all claims, less than .2 percent was paid for claims reported over eight years after the incidents of malpractice.

A repose provision affecting so few claims and involving such a small amount of what insurers were paying could not possibly have any meaningful impact on the medical malpractice insurance industry, much less when only claims of the type subject to Washington's eight-year repose provision [***20] are considered. The eight-year statute of repose could not avert or resolve a malpractice insurance crisis.

[10] [11] We are aware that "the Legislature may constitutionally approach" a problem "one step at a time." *Griffin*, 130 Wn.2d at 66; see *Beach Communications, Inc.*, 508 U.S. at 316 (" [t]he legislature may select one phase of one field and apply a remedy there, neglecting the others' ") (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 75 S. Ct. 461, 99 L. Ed. 563 (1955)). However, the relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *Hayes v. City of Miami*, 52 F.3d 918, 922 (11th Cir. 1995); *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 651, 854 P.2d 23 (1993); *Foley v. Department of Fisheries*, 119 Wn.2d 783, 788, 837 P.2d 14 (1992). The

relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight-year statute of repose is too attenuated [***21] to survive rational basis scrutiny.

Defendants additionally argue, though, that the repose [*150] provision is constitutional under another conceivable set of facts--it rationally furthers the legitimate goal of repose for defendants and the barring of stale claims which are more difficult to establish because evidence may be lost or gone. As noted, compelling a defendant to answer a stale claim is a substantial wrong, *Ruth*, 75 Wn.2d at 665, and setting an outer limit to operation of the discovery rule is an appropriate aim, *Ruth*, 75 Wn.2d at [***926] 664-66; see *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 217, 543 P.2d 338 (1975). The goal is a legitimate one. Again, however, the minuscule number of claims subject to the repose provision renders the relationship of the classification too attenuated to that goal.

We hold that the eight-year statute of repose in *RCW 4.16.350(3)* violates the privileges and immunities clause of the state constitution. ⁴ In light of our holding, we decline to reach the additional argument raised by plaintiff, i.e., that the eight-year repose provision violates access to the courts provisions of the state constitution. The summary judgment is reversed and this matter is remanded for further proceedings.

4 The parties have cited a number of out-of-state opinions addressing the constitutionality of medical malpractice statutes of repose. A clear majority of courts have upheld such statutes. See generally, Christopher J. Trombetta, Note, *The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience Versus Legislative Will*, 34 Vill. L. Rev. 397 (1989) (and cases cited therein); William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 441-42 (1997) (and cases cited therein); Josephine Herring Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627 (1985) (and cases cited therein). It is difficult to draw generalizations because the cases involve both state and federal constitutional claims, including equal protection, due process, uniformity of laws, special legislation, and access

to the courts/right to remedy claims. Further, the statutes vary widely, with some having discovery rule provisions, others not having discovery rule provisions, some constituting an absolute bar to all claims while others, as Washington's, contain exceptions.

[***22] Dolliver, Smith, Johnson, and Sanders, JJ., concur.

DISSENT BY: Gerry L. Alexander

DISSENT

Alexander, J. (dissenting) -- Twenty-two years after the Legislature enacted the statute of repose at issue here, a [*151] majority of this court holds that the statute violates the privileges and immunities clause of our state's constitution. Because I believe that the statute meets the test of constitutionality under the permissive rational basis test, even applying the facts set forth in the majority opinion, I respectfully dissent.

The majority correctly finds that a rational basis analysis is to be applied here, which it concedes is the most deferential standard of review—resulting in a finding of unconstitutionality for challenged legislation only in the "rare case." Majority op. at 144. Under that test legislation is constitutional "if there is any conceivable set of facts" to justify the legislation. *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 [***23] (1997) (citing *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)).

Statutes of limitations and repose are justified because they guard against untrustworthy evidence, stale

claims, and undue burdens placed on defendants. See *Douchette v. Bethel School Dist. No. 403*, *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991); *Duffy v. King Chiropractic Clinic*, 17 Wn. App. 693, 697, 565 P.2d 435 (1977), review denied, 89 Wn.2d 1021 (1978). The majority concedes this point, but concludes that the statute runs afoul of the constitution because the small number of claims subject to the repose provision renders the legislation too remote from its purpose. Majority op. at 150. Yet, guarding against untrustworthy evidence, stale claims, and undue burdens placed on defendants, for even the fewest of claims, provides the required conceivable set of facts to give the statute a rational basis.

Sympathy for the plaintiff in this case, and those similarly situated, is not enough to compel this court to jump into a time machine and undo what was done by the Legislature 22 years ago. As former Justice Utter once wrote, "Hard cases make bad law." *State v. Shoemaker*, 85 Wn.2d 207, [***24] 215, 533 P.2d 123 (1975) (Utter, J., dissenting). This case appears to offer a clear illustration of that maxim. [*152] This court cannot, after all, *legislate*—no matter how admirable its objectives might be in doing so. Rather, it is the Legislature itself that must provide the legislative remedy for Shirlee DeYoung and others similarly situated that is required here. For this reason, I would affirm the trial court. Because the majority does otherwise, I must dissent.

Durham, C.J., and Guy and Talmadge, JJ., concur with Alexander, J.

Motions for reconsideration denied October 14, 1998.

APPENDIX - H



LEXSEE 127 WN.2D 370

LARRY GILBERT, ET AL., as Guardians, Appellants, v. SACRED HEART MEDICAL CENTER, ET AL., Respondents.

No. 60570-0

SUPREME COURT OF WASHINGTON

127 Wn.2d 370; 900 P.2d 552; 1995 Wash. LEXIS 192

June 22, 1994, Oral Argument

August 10, 1995, Filed

SUBSEQUENT HISTORY: [***1] As Corrected October 3, 1995.

amendment can be harmonized with existing statutory provisions and the purposes of the statutory scheme.

SUMMARY:

Nature of Action: Action for damages for medical malpractice on behalf of a child who suffered brain damage at or before birth. The action was filed nearly 15 years after the events giving rise to the action.

[3] Statutes -- Construction -- Acts Relating to Same Subject -- In General Two statutes dealing with the same subject matter are construed so that the integrity of both is maintained, if possible.

Superior Court: The Superior Court for Spokane County, No. 92-2-01535-2, Thomas E. Merryman, J., on May 26, 1993, entered a summary judgment dismissing the action.

[4] Limitation of Actions -- Medical Treatment -- Malpractice -- Limitation Period -- Tolling Statute -- Minors Under RCW 4.16.190, the medical malpractice limitation periods of RCW 4.16.350 for an action by an injured patient are tolled during the injured patient's minority. Upon attainment of majority, the patient is "charged" with whatever knowledge is possessed by the patient's parents or guardians regarding a potential malpractice claim. The one-year, three-year, and eight-year limitation periods of RCW 4.16.350 commence on the date the patient attains majority if the patient is a competent adult. (Merrigan v. Epstein, 112 Wn.2d 709, 773 P.2d 78 is disapproved insofar as it is inconsistent.)

Supreme Court: Holding that the statute of limitation on the child's action is tolled until such time as the child turns 18 years of age and that the action was not time barred, the court reverses the judgment and remands the case for further proceedings.

HEADNOTES

COUNSEL: Richter, Wimberley, Ericson, Woods & Brown by Daniel E. Huntington; and Robert Drummond, for appellants.

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Statutes -- Repeal -- By Implication -- Disfavored Status The implicit repeal of a statute is strongly disfavored.

Chase, Hayes & Kalamon by Richard E. Hayes and Christine M. Weaver; Witherspoon, Kelley, Davenport & Toole by William M. Symmes and Brian T. Rekoske; Keefe, King & Bowman by Dan W. Keefe and Christopher J. Kerley; and Etter & McMahon by William

[2] Statutes -- Repeal -- By Implication -- Ability To Harmonize There is no implicit repeal if a statutory

F. Etter and Stephen M. Lamberson, for respondents.

Jeffrey I. Tilden and Elizabeth A. Alaniz on behalf of
Liability Reform Coalition, amicus curiae.

Bryan P. Harnetiaux and Gary N. Bloom on behalf of
Washington Trial Lawyers Association, amicus curiae.

Barbara A. Shickich on behalf of Washington State
Hospital Association, amicus curiae.

JUDGES: Madsen, J.; Dolliver, Smith, Johnson, J.J.,
Utter, Brachtenbach, J.P.T., concur. Durham, C.J.
(dissenting by separate opinion), Guy, J., Andersen,
J.P.T., dissenting.

OPINION BY: MADSEN

OPINION

[**2] [*372] [**552] En Banc. Madsen, J. --
Plaintiffs Larry and Cynthia Gilbert, as guardians of their
daughter, Laura, appeal the dismissal of their medical
malpractice action against the defendant medical care
providers. The trial court dismissed the action on the
grounds that it is barred by the statute of limitations in
RCW 4.16.350. At issue here is the propriety of that
ruling.

Laura Gilbert was born at Sacred Heart Medical
Center on June 19, 1977, by way of emergency caesarean
section. At the time of her birth, Laura was postmature.
During labor, Laura's heart rate dropped twice, prompting
the caesarean delivery.

[**553] A few days after Laura's birth, her father
met with doctors to discuss the circumstances of her
birth. At this time, Laura was experiencing seizures and
other medical problems. The only explanation the doctors
could provide was that the umbilical cord might have
been wrapped around Laura's neck, depriving her of
oxygen.

Laura was diagnosed with cerebral palsy. In
November 1978, her parents took her to the Child
Development and Mental Retardation Center at the
University of Washington. The Center concluded that
asphyxiation before or at birth caused Laura's cerebral
palsy. It thus became [**3] obvious to the Gilberts that
their daughter was brain damaged, and that the damage
related to events surrounding her birth. They had some

concern that improper care had caused Laura's condition,
and that her brain damage might have been avoided had a
caesarean section been performed earlier.

These concerns led Laura's father to seek legal
counsel [*373] in 1979, regarding a possible malpractice
action against the physicians and health care providers
involved in Laura's birth. Two attorneys and Laura's
godfather, who is a physician, evaluated the case and
found no basis for a medical malpractice action.

The Gilberts subsequently moved to New Mexico
and continued to seek medical evaluation and treatment
of their daughter's condition. After encountering great
expense for spinal surgery Laura needed in 1990, the
Gilberts again sought legal counsel in May 1991,
regarding a possible medical malpractice action. This
time their attorney advised them that there may have been
deviation from the community standard of care during
Laura's birth and that they did have a potential
malpractice claim.

The Gilberts filed this action on Laura's behalf on
April 13, 1992. The trial court dismissed the action
[**4] on summary judgment, finding it barred by the
statute of limitations set forth in *RCW 4.16.350*. The
Gilberts appealed directly to this court, arguing that their
action was not time barred and, if it was, that such a
limitations period unconstitutionally deprived their
daughter of legal redress.

The principal issue is whether the 1986 and 1987
amendments to the medical malpractice statute of
limitations set forth in *RCW 4.16.350* nullify the tolling
effects of *RCW 4.16.190* as applied to a minor.

RCW 4.16.190, the tolling statute, provides as
follows:

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

Prior to the 1986 amendment, *RCW 4.16.350* provided:

Any civil action for damages for injury
occurring as a result of health care which

is provided after June 25, 1976 against:

1987, to persons under the age of eighteen years.

(1) . . . [A] physician . . .

....

[*374] (3) . . . [A] hospital . . . based upon alleged professional negligence shall be commenced within three years of the act [***5] 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 limitations in this section shall not apply to persons under a legal disability as defined in RCW 4.16.190.*

(Italics added to show language that has been deleted.) Thus, before amendment, the statute of limitations for medical malpractice claims clearly was tolled during minority.

The 1986 amendment to RCW 4.16.350 deleted the language highlighted above and added the following:

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be [**554] imputed to a person under the age of eighteen years . . .

The 1987 amendment further added:

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 [***6] 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,

The Gilberts contend that the tolling effects of RCW 4.16.190 upon medical malpractice actions remain intact after the 1986 and 1987 amendments to RCW 4.16.350, while the Defendants maintain that the amendments repeal the tolling provisions of RCW 4.16.190 with regard to medical malpractice actions. The trial court agreed with the Defendants' interpretation of the amendments' effect upon the continued applicability of the tolling statute to RCW 4.16.350.

[*375] [1] [2] [3] The Legislature did not expressly repeal the operation of the tolling statute, RCW 4.16.190, when it imputed parental knowledge to minors in its 1986 and 1987 amendments to RCW 4.16.350. Further, this court has stated many times that the implicit repeal of statutes is strongly disfavored. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 503 (1993); *State v. Greenwood*, 120 Wn.2d 585, 593, 845 P.2d 971 (1993). Where an amendment may [***7] be harmonized with the existing provisions and purposes of a statutory scheme, there is no implicit repeal. *Tollycraft Yachts, at 439; Bellevue Sch. Dist. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 123, 691 P.2d 178 (1984). Stated another way, it is the duty of this court to construe two statutes dealing with the same subject matter so that the integrity of both will be maintained. *Tacoma v. Cavanaugh*, 45 Wn.2d 500, 503, 275 P.2d 933 (1954); see also *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993).

[4] We therefore must interpret the amendments to RCW 4.16.350 in such a way that the integrity of the tolling statute is preserved rather than destroyed. Such an interpretation supports the Gilberts' position. When read in harmony with the tolling statute, the limitations periods of RCW 4.16.350 are tolled until a minor reaches the age of majority, whereupon that minor is "charged" with whatever knowledge regarding a potential malpractice claim his or her parents or guardians possess. The additional language "shall operate to bar the claim . . . to the same extent . . . [as] an adult" then dictates that a minor to whom knowledge is imputed has only the time [***8] which an adult with knowledge would have to file a claim once the minor attains majority. RCW 4.16.350(3). With respect to a competent adult, RCW 4.16.350 requires a medical malpractice action to be commenced within three years of the act or omission

alleged to have caused the injury, or within one year of the time that the plaintiff discovers that the injury was caused by said act or omission, whichever expires later. Where there is no knowledge, an adult has eight years to file a medical malpractice action. This [*376] interpretation gives effect to the language of both *RCW 4.16.190* and *RCW 4.16.350*.

Our interpretation is also consistent with *Merrigan v. Epstein*, 112 Wn.2d 709, 716, 773 P.2d 78 (1989), in which this court also considered the interplay between the two statutes. The minor plaintiff there sought review of a trial court decision interpreting the 1986 and 1987 amendments to *RCW 4.16.350*. The trial court ruled that because the action had not been commenced within eight years of the date of the alleged act or omission the minor's claim was barred. *Merrigan*, at 714. This court reversed, holding that the action was not barred because the tolling statute, *RCW 4.16.190*, suspends the [***9] "8-years-from-act-or-omission period for the duration of the child's minority or incapacity". *Merrigan*, at 716.

The Defendants acknowledge that *Merrigan* supports our interpretation of the amendments to *RCW 4.16.350* as applied to the eight-year statute of limitations, but point to [**555] language in the opinion contrary to our holding regarding the relationship between the tolling statute and the one-year and three-year limitation periods set forth in *RCW 4.16.350*. We note initially that any discussion of the one-year and three-year periods in *Merrigan* is dicta, since the issue in *Merrigan* was the impact of the amendments to *RCW 4.16.350* upon the eight-year limitation period. *Merrigan*, at 711. We acknowledge, however, that despite the conclusion that the eight-year period is tolled, *Merrigan* suggests that the one-year and three-year statutes of limitation are not tolled during minority following the amendment of *RCW 4.16.350*. This suggestion apparently stems from the conclusion that the one-year and three-year periods alone are affected by the imputation of knowledge provisions set forth in the amendments.

This conclusion is not supportable. All of the limitation periods are interconnected, as the following [***10] example illustrates: A plaintiff with knowledge of a claim in the first year following the act or omission will have only three years from the date of the occurrence to bring an action [*377] since the three-year period will be the later of the two pertinent limitation periods of *RCW 4.16.350*. This plaintiff will not have eight years to

bring this claim because he or she had knowledge within one year of the triggering clause. Thus, it is knowledge which deprives a plaintiff of the full eight-year limitation period. To the extent that *Merrigan* contains dicta to the contrary, it is disapproved.

In analyzing the effect of the 1986 and 1987 amendments to *RCW 4.16.350* on the tolling statute, *RCW 4.16.190*, it is also important to recognize that the tolling provision operates without regard to knowledge. Thus, the statutory limitations periods of *RCW 4.16.350* are tolled for a minor by virtue of age, not lack of knowledge of a claim.

Finally, the defendants cite *Merrigan* in suggesting that the dates provided in the final paragraph of the 1987 amendment to *RCW 4.16.350* somehow show the Legislature's intent to abrogate the tolling provisions of *RCW 4.16.190* with regard to medical malpractice claims. Here again, [***11] these dates are not pertinent to the resolution of the issues in *Merrigan* and the discussion therefore carries no weight in this case. In any event, these dates relate not to tolling but to the retroactivity of the imputation of knowledge provisions set forth in the 1987 amendment. This final paragraph provides that with respect to care provided between June 25, 1976, and August 1, 1986, knowledge shall be imputed as of April 29, 1987, the effective date of the 1987 amendment. The final paragraph makes no reference to the tolling statute and we will not read one into it. Nor will we read a repeal of the tolling provisions into any other section of *RCW 4.16.350*.

We therefore read *RCW 4.16.350* in such a way that a minor's rights are preserved until the age of majority but, when knowledge is imputed, for a three-year period of time only. Such a reading gives effect to the language of both *RCW 4.16.190* and *RCW 4.16.350* and to the right of every citizen to seek redress for injuries sustained during minority.

[*378] Given our resolution of the relationship between *RCW 4.16.190* and *RCW 4.16.350*, we need not address the other legal questions raised by the Gilberts, including the effect of Laura's [***12] mental incompetency on the tolling provisions set forth in *RCW 4.16.190*. 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 guaranties. We hereby reverse the trial court's order of summary judgment and order the

Gilberts' cause of action reinstated.

Dolliver, Smith, and Johnson, JJ., and Brachtenbach and Utter, JJ. Pro Tem., concur.

DISSENT BY: DURHAM

DISSENT

Durham, C.J. (dissenting) -- The majority would allow a Plaintiff to bring suit for a birth injury up to 21 years after the alleged injury, even though the Plaintiff's parent or guardian knew of the injury and of its link to an alleged act or omission shortly after the birth. Because that result is directly contrary to the language and legislative history of *RCW 4.16.350*, I must dissent.

I start with the elementary fact that this case turns solely on the preexisting claims [**556] provision of the 1987 amendment to the medical malpractice statute of limitation. The 1987 amendment distinguished between preexisting claims and those that would arise only after the effective date of the amendment. [***13]

[*379] 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.

(Italics mine.) *RCW 4.16.350*; Laws of 1987, ch. 212, § 1401, p. 796. See also *Merrigan v. Epstein*, 112 Wn.2d 709, 716-17, 773 P.2d 78 (1989) (construing only the preexisting claims provision of the 1987 amendment because care was provided in 1977).

1 To be precise, *RCW 4.16.350* is a combination of three different kinds of limitation periods. First, the statute includes a three-year statute of limitation. Onto that three-year limit is grafted a one-year delayed discovery rule, which allows an action to be brought more than three years later if the injury or omission caused by a negligent act was not immediately apparent. However, a plaintiff must bring an action within one year of the time the injury is discovered or reasonably should have been discovered. Finally, regardless of when an injury is discovered, no action may be brought more than eight years after the act or

omission. *RCW 4.16.350*.

This last eight-year limit is a statute of repose rather than a statute of limitation, since it terminates causes of action regardless of whether they have accrued. "A statute of limitation bars plaintiff from bringing an already accrued claim after a specified period of time". (Citations omitted.) *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211, 875 P.2d 1213 (1994). In contrast, a "statute of repose terminates a right of action after a specific time, even if the injury has not yet occurred". (Citation omitted.) *Rice*, at 212.

[***14] The Gilberts' claim falls under the preexisting claims provision, since the allegedly negligent care was provided in 1977. Notwithstanding this central fact, the majority insists on deciding an issue not before the court, namely, how claims that do *not* fall under the preexisting claims provision should be treated. Majority, at 375 (purporting to hold generally that all three limitation periods in *RCW 4.16.350* are tolled until a minor reaches age 18). Because Laura Gilbert fits within the special preexisting claims provision of the 1987 amendment, the majority's sweeping declaration that minority tolls every limitation in *RCW 4.16.350* not only is mistaken but also is merely dicta.

Given the 1987 amendment, this case boils down to one simple question. Did the Gilberts discover, or should they reasonably have discovered, that Laura's condition was caused by acts or omissions of the Defendants during her birth? If the answer is "yes", the one-year discovery rule set by *RCW 4.16.350* ran in 1988, and this action must be dismissed.

Under the medical malpractice statute, an action must be commenced within three years of an act or omission causing an injury. The action may be brought later [***15] than three years, but must be within "one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by" the act or omission. *RCW 4.16.350(3)*. For care provided between June 25, 1976, and August 1, 1986, such knowledge is imputed as a matter of law as of April 29, 1987. *RCW 4.16.350*.

[*380] Like the plaintiffs in our prior decision construing this provision, the Gilberts had one year from April 29, 1987, to preserve a cause of action for a preexisting claim. *Merrigan*, at 716 (any knowledge a

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mother had of the elements of a medical malpractice action would be imputed to her son as of April 29, 1987, and would be barred if not filed by April 29, 1988). Unlike the plaintiff in *Merrigan*, the Gilberts failed to commence this action by April 29, 1988. This suit, therefore, must be dismissed. *RCW 4.16.350* ("Any action not commenced in accordance with this section shall be barred.")

The issue is simple enough to be disposed of on summary judgment. If the Gilberts had "discovered or reasonably should have discovered" that Laura's condition was caused by acts or omissions at her birth, such knowledge was imputed [***16] to Laura as of April 29, 1987, the effective date of the 1987 amendments. See *RCW 4.16.350; Merrigan*, at 716-17.

The delayed discovery rule requires a plaintiff to use due diligence in discovering [**557] the basis for the cause of action. *RCW 4.16.350*. See also *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). The record overwhelmingly establishes the Gilberts either actually discovered, or reasonably should have discovered, that Laura's condition was caused by an alleged act or omission surrounding her birth. Laura was born in June 1977 by way of emergency caesarean section. A few days after Laura's birth, Mr. Gilbert, believing something had gone wrong during the birth process, spoke with one of the partners of the delivering physician about the circumstances of the birth. He told Mr. Gilbert there was a possibility the cord may have wrapped around the baby's neck, causing oxygen deprivation. At this time, Laura was experiencing seizures and other problems. In November 1978, the Gilberts took her to the University of Washington Child Development and Mental Retardation Center, where it was confirmed she had cerebral palsy resulting from asphyxiation at or prior to birth. [***17] The Gilberts suspected Laura's condition might [**381] have been caused by improper care, and sought legal advice during 1979-1980 regarding a possible malpractice claim. In May 1991, the Gilberts again sought legal counsel regarding the events of Laura's birth and a possible malpractice claim. The Gilberts acknowledge they had no new or different information about the birth in 1991.

This factual information, known to the Gilberts, was sufficient to trigger the discovery rule.

The key consideration under the

discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action.

Allen, 118 Wn.2d at 758 (summary judgment affirmed). See also *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988) (action barred by statute of limitation because failure to discover causation and legal basis of a claim does not toll the statute when plaintiff had knowledge of the facts surrounding her injury (summary judgment affirmed)); *Olson v. Siverling*, 52 Wn. App. 221, 228, [***18] 758 P.2d 991 (1988) ("If the plaintiff has [information regarding each of the elements], then the statute will run even if she is advised by a physician or an attorney that she has no cause of action". (summary judgment dismissal reversed)), *review denied*, 111 Wn.2d 1033 (1989).

Under the delayed discovery rule and the 1987 amendment, the Gilberts had one year from April 29, 1987, to bring suit. They failed to do so, and so this action is time barred.

Although this case turns on the application of the one-year delayed discovery rule to the preexisting claims provision, the majority mentions it only once. The majority contends, rather implausibly, that the one-year limit is tolled during minority, *even for preexisting claims*. The preexisting claims provision "makes no reference to the tolling statute and we will not read one into it". Majority, at 377.

[*382] It is not a matter of reading something into the statute, but rather of simply reading the statute. The statute unambiguously states that (1) for claims which existed prior to the 1987 amendments, (2) the one-year delayed discovery rule applies, and (3) the knowledge of a parent or guardian "shall be imputed as of April 29, 1987, [***19] to persons under the age of eighteen years". *RCW 4.16.350*. The statute does not mention tolling, because it declares a specific date for imputation as a matter of law. The idea is simple; the language is simple; the effect is simple.

Brushing aside the unambiguous language of the statute, the majority asserts that parental knowledge is imputed only when each plaintiff turns 18. ² Whatever the merits of [**558] this argument for cases that do not

involve the preexisting claims provision, the argument makes no sense here. If the knowledge should be imputed on each minor's 18th birthday, it would make no sense for the Legislature explicitly to fix the particular date for imputation for preexisting claims at April 29, 1987. The obvious reason for specifying that date is, as this court already noted in *Merrigan*, that "[t]he time limit for bringing a claim under a new statute [of limitation] begins to run upon preexisting claims only on the effective date of the statute". (Citations omitted.) *Merrigan*, 112 Wn.2d at 717. The one-year delayed discovery limit for claims which preexisted the 1987 amendment was fixed by statute at April 29, [*383] 1988. As of that date, the Gilberts had not commenced [***20] this action.

2 The majority's implausible reading causes it to contend that the Legislature's deletion of a major portion of the statute has no effect whatever.

Prior to the 1986 amendment, the eight-year statute of repose, as well as the three-year limit and the one-year delayed discovery period, were restricted by the following language: "Provided, That the limitations in this section shall not apply to persons under a legal disability as defined in *RCW 4.16.190*". In 1986, the Legislature deleted the quoted language and in its place substituted the following: "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". (Italics mine.) *RCW 4.16.350*; Laws of 1986, ch. 305, § 502, p. 1361.

The Legislature specifically deleted the exception to the limitation periods for persons under 18. It deliberately added language stating that in spite of the general tolling statute, knowledge of a parent shall be imputed to a person under 18 for purposes of calculating the limitation periods. The majority would have this language disappear.

[***21] HISTORY OF THE MEDICAL MALPRACTICE STATUTE

Even if this were not a preexisting claims case, the majority would still be mistaken, as the language and legislative history of the statute demonstrate. The statute governing time limits on actions for medical malpractice

has gone through a number of changes over the years. In its first incarnation, the statute was a model of simplicity. It embodied a three-year statute of limitation modified by a one-year discovery rule:

Any civil action . . . based upon alleged [medical] professional negligence shall be commenced within (1) three years from the date of the alleged wrongful act, or (2) one year from the time that plaintiff discovers the injury or condition was caused by the wrongful act, whichever period of time expires last.

Laws of 1971, ch. 80, § 1, pp. 194-95 (codified as *RCW 4.16.350*).

The 1976 amendment added three refinements. It added a "knew or should have known" element to the discovery rule; it added a statute of repose which barred actions beyond eight years regardless of when they accrued; and it exempted persons under a disability from "the limitations in this section", which presumably included the three-year statute [***22] of limitation, the one-year discovery rule, and the eight-year statute of repose. As of 1976, then, actions had to 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. Any action not commenced in accordance with this section shall be barred: PROVIDED, That the limitations in this section shall not apply to persons under a legal disability as defined in *RCW 4.16.190*.

[*384] Laws of 1975-76, 2d Ex. Sess., ch. 56, § 1, pp. 214-15 (amending *RCW 4.16.350*).

The Legislature revisited the statute in the 1986 tort reform act. That act amended *RCW 4.16.350* once again. The amendment made three changes. First, it added a tolling provision for fraud or intentional concealment.

Second, it deleted the 1976 exception to the eight-year statute of repose for persons under a disability as defined by *RCW 4.16.190*, which includes minority as a disability. [***23] Third, in place of the exception to the eight-year statute of repose, it added the following language:

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 or [sic] eighteen years.

Laws of 1986, ch. 305, § 502, p. 1362. The act also required the insurance commissioner to prepare a report for the Legislature on the impact of the 1986 amendments. Laws [**559] of 1986, ch. 305, § 909, p. 1367. The commissioner empaneled a Tort Reform Committee, which examined the 1986 amendments and made recommendations. See *Report of the Tort Reform Committee to the Insurance Commissioner of the State of Washington on the 1986 Tort Reform Act* (January 1987).

LEGISLATIVE HISTORY OF 1987 AMENDMENT

The Tort Reform Committee's report to the Legislature specifically addressed the language added to *RCW 4.16.350* in 1986 regarding imputation of knowledge to minors. The Committee noted that the language of the 1986 amendment "was apparently intended to cut off what has been characterized as 'the long tail' of liability for malpractice committed on minors". *Report*, at 56. Under the 1976 statute, [***24] doctors could be sued up to 26 years after an alleged injury. After acknowledging the constitutional questions surrounding imputing knowledge to minors, the Committee stated,

However, assuming that the legislative objective is accepted [*385] as appropriate, the language of the [1986] amendment fails to achieve that objective in a clear or uncontestable manner. It provides for the imputation of knowledge of the parents to the person under the age of eighteen, but this imputation will not start the running of the statute of limitations. Even before the enactment of the change, *actual* knowledge of a minor

that he or she had been a victim of malpractice did not start the running of the statute of limitations. The statute started to run only when the person reached majority, even if, as a minor, the claimant had knowledge of the malpractice. The elimination of the last provision to former *RCW 4.16.350* [by the 1986 amendment] indicates that *the section now is to apply to persons under a legal disability*, but, as just stated, imputation of knowledge of the parents to a minor does not start the running of the statute any more than actual knowledge by the minor did.

(Some [***25] italics mine.) *Report*, at 56-57. Thus, changes in addition to the 1986 amendment were needed in order for the imputation of knowledge to start the running of the statute. The Committee recommended changing the language of the 1986 amendment to make clear that the limitations periods *begin to run when the knowledge is imputed*.

In response to the Committee's recommendation, the Legislature adopted language underscoring the fact that knowledge is imputed during the period of minority and that the imputation starts the statute of limitation running. See *Report*, at 58. Specifically, the Legislature added the following underlined language:

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.

Laws of 1987, ch. 212, § 1401, p. 796.

There is not the slightest doubt the Legislature intended to impute the knowledge to the [***26] minor at the time the [*386] knowledge was acquired by the parent or guardian, not at age 18. The majority's interpretation is exactly opposite to the clear meaning of the 1987 amendment and to the manifest intent of the

Legislature.

CONCLUSION

I would hold the Gilberts discovered or reasonably should have discovered the basis for their cause of action prior to 1987. Such knowledge, whether it occurred in 1977, 1987, or any point in between, is imputed to Laura under the 1987 amendments as of April 29, 1987. Once the knowledge was imputed, the Gilberts had one year under the discovery rule to bring suit. They did not and, therefore, their claim is time barred.

Finally, I note that I do not necessarily agree with the policy embodied by the Legislature in its 1986 and 1987 amendments. However, it is not this court's role to

provide counterpoint to the Legislature's decisions on matters of policy. Our constitutional scheme delegates the duty of policy making to the Legislature; we should, therefore, uphold duly enacted statutes unless they are unconstitutional. If the majority believes there [**560] are constitutional problems with the medical malpractice statute as amended, it should rely on [***27] a constitutional analysis, rather than accomplish a desired result by different and dubious means.

Guy, J., and Andersen, J. Pro Tem., concur with Durham, C.J.

Motions for reconsideration denied February 22, 1996.