

No. 87207-4

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JARYD SCHROEDER,

Plaintiff/Appellant,

vs.

STEVEN WEIGHALL, M.D. and COLUMBIA BASIN IMAGING, P.C.,

Defendants/Respondents.

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STATE OF WASHINGTON  
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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons, including an interest in the proper interpretation and application of RCW 4.16.190, Washington's tolling statute, and the validity of its nontolling provision with respect to claims for medical malpractice.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This appeal involves whether RCW 4.16.190(2), which eliminates tolling based upon minority in medical malpractice actions, is invalid under the Washington Constitution. Jaryd Schroeder (Schroeder) sued Steven Weighall, M.D., and his employer Columbia Basin Imaging, P.C. (Weighall), for alleged medical negligence that occurred when Schroeder was a minor. The underlying facts are drawn from the briefing of the parties. See Schroeder Br. at 1-7, 20-21; Weighall Br. at 1-7. For purposes of this brief, the following facts are relevant:

Schroeder contends that Weighall was negligent in failing to timely diagnose an abnormal medical condition (Arnold-Chiari Type I malformation), involving brain tissue and the spinal canal, and that as a result he has sustained damages. The gravamen of the claim is that Weighall misread a magnetic resonance imaging (MRI) test when Schroeder was a young child. The key facts and dates surrounding this claim are as follows:

**1/14/92:** Schroeder is born.

**5/22/01:** An MRI is taken of Schroeder, then nine years old, with no reported irregularities.

**6/7/06:** The effective date of an amendment to RCW 4.16.190, providing that tolling is no longer available for minors with medical negligence claims subject to RCW 4.16.350, governing actions against health care providers.<sup>1</sup>

**11/10/09 or 11/19/09<sup>2</sup>:** Schroeder, now seventeen years old, undergoes a second MRI and is deemed to know that it reveals the abnormal medical condition, and that the condition was detectable at the time of the first MRI, some eight years earlier.<sup>3</sup>

**1/14/10:** Schroeder turns eighteen years old, and becomes an adult under Washington law, with the capacity to file suit. See RCW 26.28.010 (general rule regarding age of majority); RCW 26.28.015(6) (specific rule for capacity to sue); see also RCW 4.08.050 (regarding need for guardian ad litem when minor is party to suit).<sup>4</sup>

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<sup>1</sup> This revision was part of comprehensive amendments regarding claims against health care providers enacted by Laws of 2006, Ch. 8 (2006 amendments). The Appendix to this brief reproduces five sections from the 2006 amendments relevant here: §1 (general statement of intent); §301 (statement of intent regarding medical malpractice statute of limitations); §302 (reenacting medical malpractice statute of limitations, codified as RCW 4.16.350); §303 (amending RCW 4.16.190 to eliminate tolling for minors with claims subject to RCW 4.16.350); and §407 (uncodified severability clause).

<sup>2</sup> The briefing raises a question regarding whether the date of the second MRI was November 10 or 19, 2009. However, the difference in dates does not appear to be material. See Weighall Br. at 3 n.1.

<sup>3</sup> It appears the basis for Schroeder's knowledge is the knowledge of his mother, imputed to him pursuant to RCW 4.16.350(3). See Schroeder Br. at 20; Weighall Br. at 3.

<sup>4</sup> The current versions of RCW 4.08.050 & 26.28.010-.015 are reproduced in the Appendix to this brief.

1/13/11: Schroeder files this medical negligence action against Weighall within one year of majority, but more than one year after he is deemed to know of the potential claim against Weighall.

Weighall successfully moved to dismiss Schroeder's claim on summary judgment based upon expiration of the statute of limitations, RCW 4.16.350, on the grounds that Schroeder is not entitled to tolling during minority and his claim was filed more than one year after he is deemed to know that the first MRI had been misread.

The superior court rejected Schroeder's argument that RCW 4.16.190(2) is unconstitutional under Washington Constitution, Art. I §12, prohibiting special privileges and immunities. See Weighall Br. at 5. Apparently, Schroeder did not separately argue the nontolling provision violated Washington Constitution Art. I §10, regarding access to courts. Schroeder appealed to this Court, which accepted direct review.

### III. ISSUE PRESENTED

Whether the nontolling provision of RCW 4.16.190(2), eliminating tolling based upon minority in medical negligence actions, violates Washington Constitution Art. I §10 (access to courts) and/or Art. I §12 (privileges and immunities)?<sup>5</sup>

### IV. SUMMARY OF ARGUMENT

RCW 4.16.190(2), which eliminates tolling based upon minority for medical negligence claims subject to RCW 4.16.350, violates the Washington Constitution's guarantee of access to courts and its prohibition against special privileges and immunities. RCW 4.16.190(2) is

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<sup>5</sup> See Schroeder Br. at viii, 1, 10-11, 13-16; Weighall Br. at 1, 6-7, 8-9; Schroeder Stmt. of Grounds for Direct Rev. at 6-7.

unconstitutional under Washington Constitution Art. I §10 because it unduly burdens the affected plaintiffs' right of access to courts. In the absence of tolling, these plaintiffs may either lose a meaningful opportunity to seek redress before expiration of the statute of limitations or find that opportunity substantially impacted. See Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 979-81, 216 P.3d 374 (2009) (regarding access to courts provision).

RCW 4.16.190(2) also violates Washington Constitution Art. I §12 because it favors health care providers with a special privilege—elimination of tolling based upon minority—that is unavailable to other defendants, while unduly burdening the fundamental right of certain medical negligence plaintiffs to access the courts. See Grant Cy. Fire Prot. Dist. v. Moses Lake, 150 Wn.2d 791, 810-14, 83 P.3d 419 (2004) (regarding privileges and immunities provision); Putman, 166 Wn.2d at 979-81. The elimination of tolling during minority for medical negligence claims should be stricken from RCW 4.16.190, pursuant to the severability clause of the 2006 amendments. See Laws of 2006 Ch. 8 §407.

## V. ARGUMENT

Schroeder argues that the nontolling provision of RCW 4.16.190(2) is unconstitutional as violative of Washington Constitution Art. I §§10 & 12. However, Schroeder's Art. I §10 access to courts argument appears to be linked to Art. I §12, with the nontolling provision impermissibly favoring health care providers with a special

privilege while unduly burdening affected plaintiffs' fundamental right of access to courts. See Schroeder Br. at 13-16; Weighall Br. at 1. While WSAJ Foundation supports this argument, it separately urges that Art. I §10 provides a freestanding basis for invalidating the tolling provision under this Court's opinion in Putman, supra.<sup>6</sup>

**A. Overview Of The Medical Malpractice Statute Of Limitations (RCW 4.16.350) And The Tolling Statute (RCW 4.16.190), And The Impact Of The 2006 Amendments Upon Schroeder's Claim.**

The current version of the statute of limitations governing medical malpractice claims provides in relevant part:

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

(3) ... 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 or her 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....

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.

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<sup>6</sup> Schroeder's failure to challenge the constitutionality of the nontolling provision based upon Art. I §10 in superior court, or to make a freestanding Art. I §10 argument in his briefing before this Court, but see Schroeder Stmt. of Grounds for Direct Rev. at 6-7, should not prevent the Court from considering whether the nontolling provision is invalid under Art. I §10 alone. Cf. Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970) (addressing compliance with provision of mandatory statute even though not raised below); Harris v. Department of Labor & Indus., 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993) (addressing issue first raised by amicus curiae where necessary to reach a proper decision); RAP 2.5(a)(3) (allowing a party to raise a claim of manifest error affecting a constitutional right for the first time in the appellate court). WSAJ Foundation assumes for purposes of this brief the Court will address whether the nontolling provision is invalid based solely on an Art. I §10 analysis.

RCW 4.16.350 (as amended by Laws of 2011, Ch. 336 §88).<sup>7</sup> This version of RCW 4.16.350 was enacted to insert gender-neutral language in the statute; otherwise, it is substantively identical to the 2006 version of the statute involved in this appeal. Compare id. with Laws of 2006, Ch. 8 §302.

In 2006, the Legislature reenacted RCW 4.16.350 verbatim, bolstering the enactment with additional findings for the purpose of restoring the 8-year repose period this Court struck down in DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 960 P.2d 919 (1998). See Laws of 2006 Ch. 8 §301. In so doing, the Legislature left unaltered the provisions of the statute imputing the knowledge of custodial parents and guardians to minors for purposes of accrual under the discovery rule, which were fully developed by 1987. See Laws of 1987, Ch. 212 §1401.

The 2006 amendments to RCW 4.16.350, also effected a substantial change in the tolling statute, RCW 4.16.190. See Laws of 2006, Ch. 8 §303.<sup>8</sup> Prior to the 2006 revision, with minor exceptions, *all* statutes of limitation were tolled for minors as well as incompetent, disabled and certain incarcerated persons. See Laws of 1993, Ch. 232 §1.<sup>9</sup> The 2006 amendments added a new subsection eliminating tolling for minors in the medical malpractice context. See Laws of 2006, Ch. 8 §303. The amendments retained tolling for incompetent, disabled and

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<sup>7</sup> This current version of RCW 4.16.350 is reproduced in the Appendix to this brief.

<sup>8</sup> This current version of RCW 4.16.190 is reproduced in the Appendix to this brief.

<sup>9</sup> This tolling provision is traceable to Washington's days as a territory. See Code of Washington §37 (1881).

incarcerated persons generally, and for minors as to nonmedical malpractice statutes of limitations. See id. The constitutionality of RCW 4.16.190(2)'s nontolling provision is the focus of this appeal.

Recently, in Unruh v. Cacchiotti, 172 Wn.2d 98, 105-06, 257 P.3d 631 (2011), the Court was asked to declare the nontolling provision for minors unconstitutional. The Court did not reach the issue because Unruh was already an adult on the effective date of the 2006 amendments and, on that basis, was not subject to the nontolling provision. See id., 172 Wn.2d at 111 & n.9.<sup>10</sup>

Although Unruh did not reach the constitutionality of the minor nontolling provision, it did explain how the nontolling provision of the 2006 amendments would impact application of RCW 4.16.350's three and one-year limitation periods, when the events giving rise to the medical negligence claim occurred before the effective date of the 2006 amendments (i.e., before June 7, 2006). See Unruh, 172 Wn.2d at 109. The Court concluded the 2006 amendments, including the nontolling provision, only apply as of the effective date of the revisions, so tolling under the former version of RCW 4.16.190 continued until June 7, 2006. See Unruh at 109.<sup>11</sup> A minor with a preexisting claim lost tolling eligibility as of June 7, 2006 and the three-year limitation period in

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<sup>10</sup> Nonetheless, the Court noted in dicta, drawing from similar dicta in Gilbert v. Sacred Heart Med. Ctr., 127 Wn.2d 370, 379, 900 P.2d 552 (1995), that "the categorical elimination of tolling for minors would give rise to 'compelling' constitutional challenges." Unruh, 172 Wn.2d at 111 n.9.

<sup>11</sup> Similarly, to the extent it is constitutional, the reenacted 8-year repose period would only begin to run on preexisting claims as of the effective date of the 2006 amendments. See Unruh at 116. Consequently, the repose period is not at issue in this case as the 8-year period would not lapse until June 7, 2014.

RCW 4.16.350 began to run at that time. The alternate one-year limitation period based upon discovery would begin to run on or after June 7, 2006, depending upon the particular facts and circumstances. Thus, under the 2006 amendments a minor's medical malpractice claim could expire before he or she reaches the age of majority, even for claims based upon acts or omissions occurring before the effective date of the 2006 amendments. This is a marked departure from prior law under which, by virtue of the tolling statute, a minor reaching adulthood would have at least the three-year limitation period after majority to commence an action. See Gilbert, 127 Wn.2d at 377.

Under this analysis, the three-year limitation period on Schroeder's claim began to run on June 7, 2006, and expired on June 7, 2009. The one-year limitation period began to run on November 10 or 19, 2009, and expired on November 10 or 19, 2010, approximately ten months after Schroeder reached the age of majority. This would mean Schroeder's medical negligence action is untimely because it was not filed until January 13, 2011. However, if the nontolling provision added to RCW 4.16.190 is unconstitutional, and is stricken under the 2006 amendments' severability clause, Schroeder's claim would be tolled throughout his minority and he would have three years from the time he reached adulthood to commence an action, rendering this action timely. The constitutionality of RCW 4.16.190(2) is addressed below.

**B. Under *Putman*, The Nontolling Provision Of RCW 4.16.190 Violates The Right Of Access To Courts Guaranteed By Art. I §10, And Is Invalid.**

Washington Constitution Art. I §10 requires that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” In Putman, supra, this Court struck down the certificate of merit statute, RCW 7.70.150, as invalid under Art. I §10 because it “unduly burden[ed] the right of medical malpractice plaintiffs to conduct discovery and, therefore, violates their right to access courts.” 166 Wn.2d at 985. Putman should be controlling here, and requires that RCW 4.16.190(2) be invalidated as it unduly burdens certain medical malpractice plaintiffs’ right of access to courts under our state constitution.<sup>12</sup>

The statute invalidated in Putman, RCW 7.70.150, required medical malpractice plaintiffs to file a “certificate of merit” from a medical expert stating that there is reasonable probability the health care provider’s conduct violated the applicable standard of care. See 166 Wn.2d at 977. In concluding this statute violated the right of access to courts, the Court initially noted that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” Putman at 979 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)). Turning then to its own precedent, the Court described the right of access to courts as “the

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<sup>12</sup> Putman also found RCW 7.70.150 invalid because it violated the separation of powers doctrine under the Washington Constitution. See 166 Wn.2d at 979-85. Both the access to courts and separation of powers determinations are precedential holdings. See Milwaukee Terminal Ry. Co. v. City of Seattle, 86 Wash. 102, 105, 149 Pac. 644 (1915) (indicating when court rests decision on two grounds, both are considered holdings).

bedrock foundation upon which rest all the people's rights and obligations.'" Id. (quoting John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). The Court concluded that "[r]equiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts." Id.

While Putman does not explicitly identify which constitutional provision provides access to courts, the Court's specific reliance on Blood Center, 117 Wn.2d at 780, makes it clear that this right is grounded in Art.

I §10. See Putman at 979. As explained in Blood Center:

Plaintiff has a right of access to the courts. In this civil case that right of access includes the right of discovery authorized by the civil rules, subject to the limitations contained therein.

Our constitution mandates that: "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Const. art. I, §10. That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rests all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations.

117 Wn.2d at 780; see also Putman at 986 (Madsen, J., concurring, acknowledging, but disagreeing with, majority analysis that the right of access to courts is based upon Art. I §10).

The Court in Putman found a violation of access to courts under the certificate of merit statute because "[o]btaining the evidence necessary to obtain a certificate of merit *may not be possible* prior to discovery, when health care workers can be interviewed and procedural manuals reviewed." 166 Wn.2d at 979 (emphasis added). The touchstone of the Art. I §10 analysis in Putman (and Blood Center) is meaningful access to

the *processes* of the civil justice system. The certificate of merit requirement was found to unduly burden access to these processes because of the *possibility* that the requirement could not be fulfilled without the benefit of discovery. The opinion in Putman did not reflect, and the Court's analysis did not require, that the certificate of merit requirement could not be fulfilled without the benefit of discovery under the circumstances of that particular case. The potential denial of or burden upon the right of access to courts is unconstitutional, regardless of whether it actually results in the loss of a civil claim.<sup>13</sup>

In a different but analogous way the elimination of tolling in RCW 4.16.190(2) for minor victims of medical malpractice unduly burdens access to the processes of the civil justice system, and thereby violates the constitutional right of access to courts. Under this provision it is possible that the applicable limitation period could expire before a plaintiff has legal capacity to file suit. See RCW 26.28.015(6) (providing capacity to sue upon reaching age of 18).<sup>14</sup> If the act or omission alleged to have caused injury occurs any time between birth and a plaintiff's fifteenth birthday, then the three-year limitation period of RCW 4.16.350 will expire before the plaintiff has legal capacity to sue. If the injury or the causal relationship between the injury and the relevant act or omission is

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<sup>13</sup> The analysis in Putman differs from the analysis of a different facet of Art. I §10 in Rufer v. Abbot Labs, 154 Wn.2d 530, 114 P.3d 1182 (2005), addressing the public nature of court proceedings and citizen attendance. Rufer recognized that this Art. I §10 entitlement may be subject to exception for compelling reasons. See id. at 540-41.

<sup>14</sup> In some instances, the limitations period could expire before the minor can petition the court for appointment of a guardian ad litem to act on his or her behalf. See RCW 4.08.050 (allowing minor to petition for appointment of guardian ad litem at age fourteen).

discovered at any time between birth and the plaintiff's seventeenth birthday, then the alternative one-year limitation period in the statute may also expire before the plaintiff has legal capacity to sue.<sup>15</sup> If the act or omission occurs between ages fifteen and eighteen, or if discovery occurs between ages seventeen and eighteen, then this will impact the time available to the plaintiff once an adult. Overall, the effect of the nontolling provision is to either completely deny or unduly burden meaningful access to court for victims of medical negligence that occurred while the victim was a minor. Under Putman, this violates Art. I §10.<sup>16</sup>

Weighall argues, however, that there is no reason to believe that a custodial parent or guardian with knowledge of the claim will not act in a timely fashion to protect the rights of a minor child, and that, as a consequence, the loss of tolling for medical malpractice claims arising during minority is constitutional. See Weighall Br. at 19-21. Setting aside the fact that this argument is unsupported by the facts of this case, Weighall's argument should be rejected because custodial parents and guardians do not have a legal duty to take affirmative action on the minor's behalf. While RCW 4.16.350(3) provides for imputation of a

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<sup>15</sup> Under the RCW 4.16.350 discovery rule, discovery may be by the minor's "representative," and the knowledge of the minor's custodial parent or guardian is imputed to the minor. "Imputation of knowledge under the statute relates to a custodial parent or guardian and not a guardian ad litem." Merrigan v. Epstein, 112 Wn.2d 709, 717, 773 P.2d 78 (1989) (interpreting prior version of RCW 4.16.350). Schroeder has not separately challenged the constitutionality of the parent/guardian imputation provision in this case, and it is presumed valid for the purposes of this argument.

<sup>16</sup> As happened in this case, the three-year limitation period expired before Schroeder had the legal capacity to access the processes of the civil justice system. Discovery based on imputation of his mother's knowledge occurred during the last year of Schroeder's minority, immediately triggering the one-year limitation period and leaving him with only what remained of that time period to commence an action after becoming an adult.

parent's or guardian's knowledge, it imposes no corresponding duty to act. Washington common law imposes a duty on parents to provide "necessaries," i.e., food, shelter, clothing, medical attention and education, see Esteb v. Esteb, 138 Wash. 174, 178, 244 Pac. 264 (1926), but does not impose upon them an affirmative duty to pursue a civil action on their child's behalf.

On the contrary, Washington statutes and court rules contemplate that court-appointed guardians ad litem protect a minor's right of access to courts. See RCW 4.08.050 (providing for appointment of guardian ad litem for minor party to litigation); RCW 26.28.015(6) (specifying that upon reaching majority a person is entitled "[t]o sue and be sued on any action to the full extent as any other adult person in any of the courts of this state, *without the necessity for a guardian ad litem*" (emphasis added)).<sup>17</sup> In the absence of a duty to act, medical malpractice plaintiffs whose claims accrue during minority are at the mercy of their parent or guardian acting on their behalf, and risk losing their right of access to court through no fault of their own.

The words of then-Judge Vernon Pearson in Hunter v. North Mason School Dist., 12 Wn.App. 304, 529 P.2d 898 (1974), *aff'd on other grounds*, 85 Wn.2d 810, 539 P.2d 845 (1975), are relevant here. In

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<sup>17</sup> See also Ch. 11.88 RCW; Ch. 11.92 RCW; SPR 98.16W (regarding settlement of minors' claims); cf. Mezere v. Flory, 26 Wn.2d 274, 277-79, 173 P.2d 776 (1946) (concluding decree of estate distribution void as to minor heirs not represented by guardian or guardian ad litem); State ex rel. Davies v. Superior Court, 102 Wash. 395, 397-98, 173 P. 189 (1918) (holding court acquired no jurisdiction in eminent domain proceeding where no guardian ad litem appointed for minor landowner for preliminary court proceedings).

Hunter, the Court of Appeals held that former RCW 4.16.190 served to toll a minor claimant's obligations under a notice of claim provision, in addition to statutes of limitation. Judge Pearson explained:

Simply stated, it would be fundamentally unfair for a minor to be denied his recourse to the courts because of circumstances which are both legally and practically beyond his control. The legal disabilities of minors have been firmly established by common law and statute. They were established for the protection of minors, and not as a bar to the enforcement of their rights .... As stated, [the minor's] right of action should not depend on the good fortune of having an astute relative or friend to take the proper steps on his behalf.

12 Wn.App. at 306, 307. A similar sensibility is reflected in this Court's opinion in Cook v. State, 83 Wn.2d 599, 605, 521 P.2d 725 (1974), finding, based on fundamental fairness, an incapacitated 13-year-old's claim not barred by a nonclaim statute despite her representatives' failure to file a claim within 120 days of the tortious act:

The possibility that a friend or relative may possess the foresight to file a timely claim on behalf of an incapacitated victim, in our view, provides too slender a reed to bridge the inherent discrimination, and it becomes arbitrary and unreasonable when it penalizes the incapacitated if a friend or relative through inadvertence or ignorance fails to act.

The Court should find that the absence of any duty of a custodial parent or guardian to act on behalf of a minor child with respect to a medical negligence claim renders the nontolling provision infirm under Art. I §10. In Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983), the Texas Supreme Court struck down a health care provider statute of limitations that modified Texas' minor tolling provision, finding the statute violated the due process guarantee of that state's open courts provision:

The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit. Respondents argue that parents will adequately

protect the rights of their children. This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided....<sup>[18]</sup>

Under the foregoing analysis, RCW 4.16.190(2) violates Schroeder's right of access to courts under Art. I §10. Nonetheless, Weighall basically argues that the nontolling provision is a valid exercise of the Legislature's police power because there is neither a constitutional right to a tort remedy nor to tolling during minority. See Weighall Br. at 23-26. These arguments should be rejected.

The fundamental right of access to courts developed in Blood Center and Putman and applicable here is not grounded in the substantive right to a tort remedy based upon Art. I §10. This is a separate inquiry that need not be reached in this case. As explained in Blood Center, 117 Wn.2d at 781:

It is important to note that our consideration here is of the right of *access*. We are not here considering the validity of a theory of recovery. We are not considering legislative or judicial creation or abolition of a cause of action. We are not considering the abrogation or diminishment of a common law right. These are all issues for other cases.

(Emphasis in original); see also Putman at 979 (citing Blood Center). The facet of the right of access to courts developed in Blood Center and Putman focuses on meaningful access to the processes of the court, which exists without regard to the nature of the underlying civil claim.

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<sup>18</sup> The court in Sax pointed out that the specter of parental immunity was a consideration in finding the Texas statute unconstitutional. See 648 S.W.2d at 667. It is unclear whether in Washington a parent's failure to act under these circumstances would be actionable by the child. See generally Jenkins v. Snohomish County PUD, 105 Wn.2d 99, 713 P.2d 79 (1986) (discussing and upholding parental immunity doctrine).

Weighall's reliance on Stephens v. Stephens, 85 Wn.2d 290, 534 P.2d 57 (1975), Duke v. Boyd, 133 Wn.2d 80, 942 P.2d 351 (1997), and 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 146 P.3d 423 (2006), in support of the Legislature's plenary power to determine whether or not a limitation period is subject to a discovery rule (1000 Virginia) or tolling (Stephens and Boyd) is misplaced. See Weighall Br. at 25-26. None of these cases resolve a state constitutional challenge. Weighall's reliance on Schlarb v. Castaing, 50 Wash. 331, 97 Pac. 289 (1908), is similarly unhelpful. See Weighall Br. at 25, 29. The discussion of tolling in Schlarb involves solely a federal constitutional analysis, and does not foreclose independent analysis under the state constitution. See 50 Wash. at 338-39.

The precise issue in this case is not whether minor tolling is a constitutional right. See Weighall Br. at 23-24. While Weighall is correct that "[n]o provision is made in our state constitution for tolling of statutes of limitation," Weighall Br. at 24, this argument begs the question whether 1) an exemption from tolling that has otherwise been available to Washington minors from territorial days, 2) coupled with legal incapacity of minors to bring suit in their own right, and 3) the lack of any duty of parents or guardians to bring suit on minors' behalf, combine to violate Art. I §10. The convergence of these factors implicates Art. I §10 in much the same way as Putman, where the lack of access to discovery had the potential to prevent a plaintiff from obtaining a certificate of merit

necessary to file suit. See 166 Wn.2d at 979. The Court should strike down the nontolling provision of RCW 4.16.190, just as it struck the certificate of merit requirement in Putman.<sup>19</sup>

**C. Under *Grant County*, The Nontolling Provision Violates Art. I §12 By Providing A Special Privilege To Health Care Providers, While Unduly Burdening Certain Plaintiffs' Fundamental Right Of Access To Court.**

Washington Constitution Art. I §12 provides: “[n]o 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.” WSAJ joins Schroeder in arguing that the nontolling provision of RCW 4.16.190(2) violates Art. I §12, because the nontolling provision favors health care providers by providing special treatment unavailable to other defendants, while unduly burdening certain medical malpractice plaintiffs' fundamental right of access to courts. This Art. I §12 analysis is based on this Court's decision in Grant County, *supra*.

In Grant County, the Court conducted a Gunwall analysis of Art. I §12's privileges and immunities clause. See State v. Gunwall, 106 Wn.2d

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<sup>19</sup> If the Court views this argument, as Weighall suggests, as one based on a claimed constitutional right of tolling during minority, then the Court should find this right was within the contemplation of the framers of Art. I §10. Tolling for minors existed at the time the state constitution was adopted, and this concept may be viewed as embodied in the first principle of access to court guaranteed by Art. I §10. See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 645, 711 P.2d 711, 780 P.2d 260 (1989) (requiring scope of constitutional right to be viewed as it existed when constitution adopted; determining scope of right based on statutory as well as decisional law); State ex rel. Macri v. Bremerton, 8 Wn.2d 93, 109, 111 P.2d 612 (1941) (explaining state constitutions are documents of first principles that contemplate, without necessarily enumerating, protections of common law existing at the time the constitution was adopted). It is for the Court to decide whether this is one of the *compelling* constitutional arguments in did not reach in prior cases involving RCW 4.16.350 and RCW 4.16.190. See Gilbert, 127 Wn.2d at 377-78; Unruh, 172 Wn.2d at 111 n.9.

54, 720 P.2d 808 (1986). The Court concluded an independent analysis of the provision was necessary, and determined that Art. I §12 uniquely prohibits the grant of special privileges and immunities, separate and distinct from traditional federal equal protection analysis. See Grant County, 150 Wn.2d at 805-16. While the Court recognized the state constitution framers' "concern with avoiding favoritism toward the wealthy," 150 Wn.2d at 808, it quoted with approval from Justice Utter's concurrence in State v. Smith, 117 Wn.2d 263, 814 P.2d 652 (1991), which, in distinguishing state privileges and immunities from federal equal protection analysis, focuses more broadly on eliminating favoritism:

Enacted after the Fourteenth Amendment, state privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups.

Grant County at 809 (quoting Smith, 117 Wn.2d at 283, Utter, J., concurring). In addition to a showing that the challenged law provides special treatment, Grant County also requires that those disadvantaged demonstrate that a fundamental right of citizenship is adversely affected. See 150 Wn.2d at 812-14. Ultimately, under Grant County the Court held that a violation of Art. I §12 occurs when: 1) the law, or its application, provides favored treatment for a few to the disadvantage of others, and 2) burdens a fundamental right of citizenship. See id. at 806-14.

In describing what rights are deemed fundamental for purposes of Art. I §12 analysis, the Court turned to its early opinion in State v. Vance, 29 Wash. 435, 458, 70 Pac. 34 (1902):

These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; *the rights to the usual remedies to collect debts, and to enforce other personal rights*; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, Constitutional Limitations (6th ed.) 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.

Grant County at 813 (quoting Vance; emphasis added).<sup>20</sup> Although fundamental rights may not be limited to those emanating from the federal or state constitutions, it is clear that federal or state constitutional provisions are the primary sources of those rights.<sup>21</sup>

The nontolling provision of RCW 4.16.190(2) is unconstitutional under Grant County as violative of the Art. I §12 privileges and immunities clause. This provision should be severed from the statute pursuant to the 2006 amendments' (uncodified) severability clause. See

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<sup>20</sup> Under the Grant County test, the outcome has tended to turn on whether a fundamental right existed or applied to the favored class. See Grant County at 812-13 (holding no fundamental right to particular annexation method); Madison v. State, 161 Wn.2d 85, 95-98, 163 P.3d 757 (2007) (lead opinion by Fairhurst, J.) & id. at 118-19 (J. Johnson, J., concurring) (holding fundamental right to vote does not include class of convicted felons who cannot meet statutory criteria for restoration of right); Ventenbergs v. City of Seattle, 163 Wn.2d 92, 103-04, 178 P.3d 960 (2008) (holding no fundamental right to provide a government service); Am. Legion Post v. Dep't of Health, 164 Wn.2d 570, 608, 192 P.3d 306 (2008) (holding no fundamental right to smoke inside a place of employment); Andersen v. King County, 158 Wn.2d 1, 138 P.3d 963 (2006) (holding fundamental right to marry does not include same sex couples).

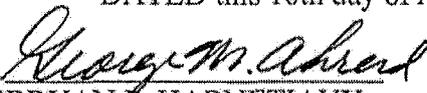
<sup>21</sup> See Grant County, 150 Wn.2d at 813; Madison, 161 Wn.2d at 95 (lead opinion by Fairhurst, J.); see also id. at 120 (J. Johnson, J., concurring) (noting fundamental rights analysis implicates state constitutional provisions); accord Ventenbergs, 163 Wn.2d at 102-04 & n.10 (noting distinction between fundamental rights under federal and state constitutions); Blood Center, 117 Wn.2d at 780-81 (noting "the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights," and stating "Const. art. I, §§1-31 catalog those fundamental rights of our citizens").

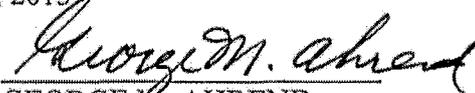
Laws of 2006 Ch. 8 §407.<sup>22</sup> First, the law provides special treatment to defendant health care providers in the form of an exemption from the tolling provision generally applicable to minors. This provision otherwise applies to all civil defendants, and dates back to Washington's territorial days. See Code of Washington §37 (1881). Second, this special treatment burdens certain medical malpractice plaintiffs' right of access to courts, i.e., those claimants whose claims arose during their minority. This right, examined in §B, supra, is properly viewed as *fundamental*. See Vance, 29 Wash. at 458 (recognizing as fundamental right "the right to the usual remedies to collect debts, and to enforce other personal rights"); Blood Center, 117 Wn.2d at 781 (indicating rights declared in Art. I of the Washington Constitution "catalog those fundamental rights of our citizens").<sup>23</sup>

## VI. CONCLUSION

The Court should adopt either or both of the arguments advanced in this brief and resolve this appeal accordingly.

DATED this 16th day of April, 2013

  
FOR BRYAN P. HARNETIAUX,  
WITH AUTHORITY

  
GEORGE M. AHREND

On Behalf of WSAJ Foundation

<sup>22</sup> The nontolling provision should be held invalid on its face because, whether or not the provision would always have the effect of barring a plaintiff's claim, the possibility of an undue burden on the right of access to courts violates Art. I §10, as explained in Putman at 979.

<sup>23</sup> See also Anderson, 158 Wn.2d at 60 (quoting Corfield v. Corvell, 6 F. Cas. 546, 551-52, 4 Wash. C.C. 371 (C.C.E.D.Pa. 1823), for description of fundamental rights including "to institute and maintain actions of any kind in the courts of the state"; J. Johnson, J., concurring in judgment).

# Appendix

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

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

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

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

**Laws of 2006, Ch. 8, §§ 1, 301-303 & 407**

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

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

\* \* \*

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

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

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

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

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

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

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

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

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

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

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative; based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

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

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

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

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

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

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

\* \* \*

**Sec. 407.** If any provision of this 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.

#### **RCW 4.08.050. Guardian ad litem for infant**

Except as provided under RCW 26.50.020 and 28A.225.035, when an infant is a party he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act. Said guardian shall be appointed as follows:

(1) When the infant is plaintiff, upon the application of the infant, if he or she be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

(2) When the infant is defendant, upon the application of the infant, if he or she be of the age of fourteen years, and applies within thirty days after the service of the summons; if he or she be under the age of fourteen, or neglects to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

[1996 c 134 § 7; 1992 c 111 § 9; 1891 c 30 § 1; Code 1881 § 12; 1854 p 132 §§ 6, 7; RRS § 187.]

**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, eff. June 7, 2006; 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.]

**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 or her 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 or her employment, including, in the event such employee or agent is deceased, his or her 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 or her employment, including, in the event such officer, director, employee, or agent is deceased, his or

her 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 or her 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).

[2011 c 336 § 88, eff. July 22, 2011; 2006 c 8 § 302, eff. June 7, 2006. 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.]

#### **RCW 26.28.010. Age of majority**

Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.

[1971 ex.s. c 292 § 1; 1970 ex.s. c 17 § 1; 1923 c 72 § 2; Code 1881 § 2363; 1866 p 92 § 1; 1863 p 434 § 1; 1854 p 407 § 1; RRS § 10548.]

**RCW 26.28.015. Age of majority for enumerated specific purposes**

Notwithstanding any other provision of law, and except as provided under RCW 26.50.020, all persons shall be deemed and taken to be of full age for the specific purposes hereafter enumerated at the age of eighteen years:

- (1) To enter into any marriage contract without parental consent if otherwise qualified by law;
- (2) To execute a will for the disposition of both real and personal property if otherwise qualified by law;
- (3) To vote in any election if authorized by the Constitution and otherwise qualified by law;
- (4) To enter into any legal contractual obligation and to be legally bound thereby to the full extent as any other adult person;
- (5) To make decisions in regard to their own body and the body of their lawful issue whether natural born to or adopted by such person to the full extent allowed to any other adult person including but not limited to consent to surgical operations;
- (6) To sue and be sued on any action to the full extent as any other adult person in any of the courts of this state, without the necessity for a guardian ad litem.

[1992 c 111 § 12; 1971 ex.s. c 292 § 2.]

## OFFICE RECEPTIONIST, CLERK

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**Cc:** Bryan P Harnetiaux; George E. Telquist; Spillane, Mary; dferm@williamskastner.com; Stewart A. Estes  
**Subject:** RE: Schroeder v. Weighall (S.C. #87207-4)

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**Subject:** Schroeder v. Weighall (S.C. #87207-4)

Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, a proposed amicus curiae brief is submitted for filing in the above-referenced case. A letter application to appear as amicus curiae was submitted by the Foundation on April 12, 2013. Counsel for the parties are being served simultaneously by copy of this email, in accordance with a prior agreement among counsel.

Respectfully submitted,

--

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