No. 101300-1

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
IN

BETTE BENNETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITIONER'S REPLY BRIEF

*Plaintiff's Reply Brief

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I. RESTATEMENT OF THE CASE

Petitioner provides a brief restatement to correct a presumably harmless error contained in the Government's Opening Brief. The Government states that 32 C.F.R. § 750.27(a)(2)(i) requires claimants to provide a "physician report" along with their administrative claim, and that Bennett "failed to satisfy that requirement." Respondent's Brief, p. 11. However, neither 32 C.F.R. § 750.27 nor its controlling law 28 C.F.R. Part 14 require a physician report to be attached to the claim form; on the contrary, § 750.27 provides only that a written report "may be required." 32 C.F.R. § 750.27(a)(2)(i) (*emphasis added*); *see also* 28 C.F.R. § 14.4(b)(1) (using identical language). In fact, § 750.27 goes on to state that if the Navy wants such supporting documentation, then it must make at least three requests for it. 32 C.F.R. § 750.27(b).[1]

[1] Under 32 C.F.R. § 750.27(b), "[i]f claimant fails to provide sufficient supporting documentation, claimant should be

Regardless, the Government concedes it investigated and denied Bennett's claim even in the absence of a physician report,[2] and this issue should have no bearing on the questions posed to this Court.

II. ARGUMENT

A. RCW 4.16.350(3) violates Article I, § 12 because it grants an immunity (and burdens a privilege) without reasonable grounds.

A statute violates Article I, § 12 if it grants a privilege or immunity implicating a fundamental right and is not supported with reasonable grounds. *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 481 P.3d 1060, 1065 (2021). If the privilege or immunity granted is not a fundamental right, this Court will use the rational basis test.

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notified of the deficiency. If after notice of the deficiency, including reference to 28 CFR 14.4, the information is still not supplied, two follow-up requests should be sent by certified mail, return receipt requested. If after a reasonable period of time the information is still not provided, the appropriate adjudicating authority should deny the claim."

[2] Respondent's Brief, 11.

It is undisputed that Washington citizens have a fundamental right to pursue medical negligence actions. *Schroeder v. Steven Weighall, M.D., & Columbia Basin Imaging, P.C.*, 179 Wn.2d 566, 316 P.3d 482, 486 (2014). It is also undisputed that the eight year repose period in RCW 4.16.350(3) expressly limits the ability of certain plaintiffs to bring claims against medical providers. Because RCW 4.16.350(3) grants an immunity to medical providers from certain plaintiffs, and burdens those plaintiffs' fundamental right to bring a medical negligence action, the statute must be supported by reasonable grounds.

The Government counters that RCW 4.16.350(3) neither grants an immunity or privilege nor implicates the fundamental right to sue; rather, the Government argues that the statute relates more narrowly to the discovery rule. As such, the Government argues that Bennett is actually

claiming a right to an unlimited discovery rule. Respondent's Brief, p. 25. This argument fails.

1. RCW 4.16.350(3) implicates a fundamental right because it limits a plaintiff's ability to bring a claim against their medical providers.

On their face, statutes of repose limit a plaintiff's ability to sue. Indeed, the Government concedes that the repose period "limits the right to pursue a common-law cause of action" and that it "extinguishes the right to sue." Respondent's Brief, p. 30, 63 (*emphasis added*). Nevertheless, the Government urges the Court to view the interplay between statutes of repose and fundamental rights more narrowly, recharacterizing repose provisions limiting the right to discover and not the right itself. This is too narrow.

The Government cites several cases for the broader proposition that this Court should narrowly construe fundamental rights. Each of these cases are readily distinguishable from the case at bar:

- In *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wash.2d 570, 607, 192 P.3d 306 (2008), this Court held that a law prohibiting smoking in places of employment did not implicate the fundamental right to engage in business because the law "merely prohibited smoking" and did not actually "prevent any entity from engaging in business."
- In *Grant Cty Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 811 (2004), this Court held that annexation "rests exclusively in the sovereign power of the state" and that citizens had no fundamental right to petition for annexation under either the state or federal constitutions.
- In *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.,* 182 Wn.2d 342, 362 (2015), this Court found that a WAC assessing liquor licensing fees according to position in distribution chain did not involve a privilege or immunity because 1) its uniform fee to

distributors did not unfairly discriminate one class of businesses to the advantage of another and 2) the courts have never recognized the right to sell liquor which is authorized solely by license pursuant to the state's police power.

- In *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 103 (2008), the court found that hauling waste is a government service and that the fundamental right to hold "private employment" did not extend to public services. Here, again, there is no dispute that
- In *Ockletree v. Franciscan Health Sys., Corp.*, 317 P.3d 1009, 1015 (Wash. 2014), this Court held that no jurisdiction has ever recognized a fundamental right to sue a private employer for discrimination.
    - Finally, in *Madison v. State*, 161 Wn.2d 85, 96 (2007) this Court held that the felon disenfranchisement law implicates the fundamental right to vote, but even so the law does not violate the privileges and immunities

clause because 1) the Washington Constitution expressly mandates the disenfranchisement of felons, 2) the Washington Constitution grants the right to vote and disqualifies voters on equal terms, and 3) the disenfranchisement law restores voting rights to felons on equal terms.

Importantly, in these cases this Court was not trying to restrict or narrow the fundamental rights of Washington citizens; rather, the Court simply looked to whether the challenged legislation implicated a privilege (e.g., a fundamental right). In each of these cases (except *Madison*), this Court found either that the challenged law did not actually burden the fundamental right (*Am. Legion Post No. 149*) or that the right alleged to be fundamental was in fact not fundamental at all. (*Grant County II*, *Ass'n of Wash. Spirits & Wine Distribs., Ventenbergs, Ockletree*). In *Madison*, the Court found that the disenfranchisement

law did implicate the fundamental right to vote, but because the law applied equally to all citizens it did not exhibit favoritism or otherwise convey an advantage to one group to the disadvantage of another.

Bennett acknowledges that "not every legislative classification constitutes a privilege or immunity within the meaning of article I, section 12," only those classifications that implicate fundamental rights. *Ockletree*, 317 P.3d at 1015. However, unlike the cases cited above, here 1) the right to sue has been recognized as a fundamental right; 2) RCW 4.16.350(3) implicates that right by limiting some plaintiff's ability to pursue a medical negligence claim; and 3) the statute conveys an immunity on medical providers while burdening certain patients' privilege of pursuing a cause of action. Because RCW 4.16.350(3) grants an immunity implicating a fundamental right, it satisfies the first prong.

The Government further argues that fundamental rights are substantively constrained by the contours of the common law at the time Article I, Section 12 was adopted. Respondent's Brief, p. 45. However, in none of the cases cited by the Government did this Court explore the state of the common law surrounding the fundamental right in order to determine whether the challenged legislation implicated that right.[3] Indeed, Petitioner is unaware of any cases where the Court applied this analytical framework to an Article I, Section 12 challenge.[4]

Notably, this Court did not utilize this framework in *Schroeder*. In that case, the Plaintiff challenged the constitutionality of RCW 4.16.190(2), which eliminated the

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[3] However, under *Gunwall* this Court has looked at pre-existing state law to determine whether an independent state constitutional analysis is appropriate. *See DeYoung*, 136 Wn.2d at 142.

[4] Conceivably, applying such a framework would call into question much of this Court's privileges and immunity jurisprudence. *E.g., Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021).

tolling of the statute of limitations for minors in the context of medical malpractice claims. *Schroeder* 316 P.3d at 486. Recognizing that the plaintiff had a fundamental right to sue his medical provider, and finding that the statute limited his ability to pursue that fundamental right, this Court held that the statute "therefore grants an immunity (and burdens a privilege) triggering the reasonable ground test under article I, section 12." *Id*. This Court did not explore the common law surrounding the right to pursue a medical malpractice claim and tolling provisions that may or may not have been available at that time; rather, it is sufficient that the statute "limits the ability of certain plaintiffs…to bring medical malpractice claims."

2. RCW 4.16.350(3) benefits medical providers to the disadvantage of their patients.

Finally, the Government argues that Bennett is not a member of a "disfavored class" and that RCW 4.16.350(3) "treats all prospective medical malpractice plaintiffs the

same." Respondent's Brief, p. 46. As an initial matter, the Fourteenth Amendment is directed to preventing discrimination against disfavored individuals and "Article I, section 12 was intended to prevent favoritism and special treatment for a few, to the disadvantage of others." *Ockletree*, 317 P.3d at 1013. As the Government points out, the raft of medical liability reforms enacted in 2006 was sponsored by medical providers, insurers, and lawyers. Respondents Brief, pp. 57-58. Many of those reforms favored medical providers to the disadvantage of patients,[5] and the same is true here: the eight-year repose period benefits medical providers, but not their patients.

[5] See, e.g., RCW 7.70.100 (90-day notice, found unconstitutional in Waples v. Yi. 169 Wn.2d 152,161, 234 P.3d 187 (2010)); RCW 7.70.150 (certificate of merit, found unconstitutional in *Putman v. Wenatchee Valley Medical Center, PS*, 166 W2d 974 (2009)); RCW 4.14.190(2) (eliminating tolling for minors, found unconstitutional in *Schroeder*).

It should also be noted, and is discussed below, RCW 4.16.350(3) does not treat all medical malpractice claimants the same; it tolls the repose period for several classes of claimants, including classes who through no fault of their own fail to discover their injury in time.[6] Although the legislative distinctions between such claimants do not necessarily establish that some are advantaged to the disadvantage of others, these distinctions do show that RCW 4.16.350(3) is not rationally related to its legislative purpose and therefore cannot withstand rational basis nor the heightened reasonable grounds.

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[6] For example, the repose period does not apply where the plaintiff fails to discover her injury in cases of fraud, intentional concealment, discovery of foreign body, incompetence, or disability. RCW 4.16.350(3). Other exceptions include imprisonment and childhood sexual abuse. RCW 4.16.190(1); RCW 4.16.340(5).

3. RCW 4.16.350(3) is not supported by reasonable grounds.

The Government advances two arguments that the statute of repose is justified by legislative purpose: 1) it will help reduce medical malpractice insurance premiums and 2) it serves the purpose of barring stale claims. Respondent's Brief, pp. 7-8. This Court has already rejected both arguments.

a. RCW 4.16.350(3) is not rationally related to the legislative purpose of reducing medical malpractice insurance premiums.

The Government advances, but does not actually brief, the contention that RCW 4.16.350(3) will help reduce medical malpractice insurance premiums. Respondent's Brief, p. 7. Nevertheless, Petitioner will address this issue.

When it enacted RCW 4.16.350(3) in 1976, the legislature sought to limit stale medical negligence claims to address a "perceived insurance crisis said to result from the discovery rule and from increased medical malpractice

claims." *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 147 (1998). However, this Court has twice rejected the relationship between stale claims and rising insurance premiums. *DeYoung*, 36 Wn.2d at 149-150; *Schroeder* 316 P.3d at 487-489.

In *DeYoung* this Court found that the repose period in RCW 4.16.350 was not rationally related to the legislative goal of lowering insurance premiums. *DeYoung,*136 Wn.2d at 141 (holding statute of repose would not advance goal of reducing insurance premiums in any appreciable way). Sixteen years later, this Court revisited *DeYoung* when it reviewed an Article I, § 12 challenge to RCW 4.16.190(2).[7] *Schroeder*, 179 Wn.2d

[7] RCW 4.16.190(2), the minority tolling statute, is similar to, and was passed at the same time as, RCW 4.16.350(3). *See* Laws of 2006, ch. 8, § 301-303; *see also Schroeder*, 316 P.3d at 486 (2014) ("This court addressed a statute similar to RCW 4.16.190(2) in *DeYoung*, 136 Wn.2d at 141, where we held that an eight-year statute of repose applicable to medical malpractice claims violated article I, section 12. ").

566 (2014). In *Schroeder*, this Court applied the heightened reasonable grounds test and stated:

> Under *DeYoung*, the relationship of the class of persons affected by RCW 4.16.190(2) to the goal of reducing insurance costs must be deemed "too attenuated to survive [even] rational basis scrutiny" unless RCW 4.16.190(2) will have a significantly greater effect on insurance premiums than the eight-year statute of repose did. Id. The respondents in this case offer no evidence for this greater effect…".

Schroeder, 316 P.3d at 487. Finding no support for the contention that RCW 4.16.190(2) would reduce insurance premiums, the Court moved on to the Respondent's second argument: that the statute served the legislative goal of barring stale claims. *Id*.

Here, as in *Schroeder*, neither the Government nor the legislative record provide any factual support for the theory that RCW 4.16.350(3) will reduce insurance premiums. Accordingly, under both *DeYoung* and *Schroeder*, the Government's insurance premium theory

provides neither a rational basis nor reasonable grounds for the eight-year repose period.

b. RCW 4.16.350(3) is neither rationally related to the legislature's purpose of eliminating "even one" stale claim nor supported by reasonable grounds.

The Government next argues that RCW 4.16.350(3) is constitutionally valid because it serves the legislative goal of barring "even one stale claim." Respondent's Brief, pp. 47, 52. The statute's legislative scheme, however, does not support this contention.

This Court has repeatedly recognized that "compelling a 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." *Schroeder*, 316 P.3d at 486 (*citing DeYoung*) (*internal citations omitted*). At the same time, this Court has emphasized that the challenged law must be supported by the legislative scheme. *See Schroeder*, 316 P.3d at 486 (the court "will

scrutinize the legislative distinction to determine whether it in fact serves the legislature's stated goal."); *cf. DeYoung*, 136 Wn.2d at 146-147.

Citing *Schroeder*, the Government argues that RCW 4.16.350(3) "applies to 'stale claims generally'" and therefore "serves the legitimate legislative purpose of preventing defendants from answering stale claims." Respondent's Brief, p. 4. The Government misapplies this Court's reasoning in *Schroeder*.

In *Schroeder*, this Court specifically found that RCW 4.16.190(2) was

> not addressed to stale claims generally, it is (at best) addressed to stale claims arising from medical malpractice injuries to minors. Thus, the principle for which the statute really stands is not that "compelling even one defendant to answer a stale claim is a substantial wrong." Laws of 2006, ch. 8, § 301. Rather, it is that a stale claim is a substantial wrong when it arises from a medical incident that occurred when the plaintiff was under 18. According to this legislative scheme, a stale claim is not a substantial wrong—at least, not substantial enough to warrant preventative legislation—when it is brought by a

> plaintiff who was unable to sue at the time of injury for any reason other than minority.

Schroeder, 316 P.3d at 487 (*emphasis added*). Because the statute did not in fact apply to "stale claims generally," the Court held that it was not rationally related to the stated legislative purpose:

> If [the statute] is to be justified on the basis that it is a substantial wrong to permit even one stale medical malpractice claim to proceed, then there can be no rational explanation for the legislature's failure to eliminate tolling for other incompetent plaintiffs.

Schroeder, 316 P.3d at 487 (*emphasis added*).

This analysis applies equally to RCW 4.16.350(3). Like its companion statute RCW 4.16.190(2), the repose statute does not apply to stale claims generally; on the contrary, RCW 4.16.350(3) expressly permits claims beyond eight years in a number of circumstances, including proof of fraud or intentional concealment, discovery of foreign body, incompetence, disability, imprisonment, and childhood sexual abuse. RCW

4.16.350(3); RCW 4.16.190(1); RCW 4.16.340(5). [8] Instead of applying generally to stale claims, the repose statute applies "at best" to stale medical negligence claims where the plaintiff did not discover the injury within eight years *and is not otherwise entitled to some form of tolling excusing the late discovery.* In other words, under this legislative scheme a stale claim is only a substantial wrong – at least substantial enough to warrant prevention – if the Plaintiff's failure to discover the injury is based on anything other than the many legislatively created exceptions for failing to discover the injury (e.g., fraud, concealment, incompetence, disability, etc.).

Under such a scheme – where the stated purpose is to prevent *even one* stale claim – "there can be no rational

[8] Petitioner does not suggest that such distinctions between claimants are arbitrary; rather, that the eight-year statute of repose is not rationally related to the legislative goal of preventing "even one" stale claim. *DeYoung*, 136 Wn.2d at 145-47.

explanation for the legislature's failure to eliminate tolling for other…" plaintiffs who through no fault of their own could not discover their injury. *Schroeder*, 316 P.3d at 488.

Because the repose period is not rationally related to the purpose of barring stale claims, it can survive neither rational basis nor the reasonable grounds test and violates Article 1, section 12 of the Washington Constitution.

B. RCW 4.16.350 Unconstitutionally Restricts Ms. Bennett's Right to Access Courts in Violation of Washington State Constitution, Article I, § 10.

The Government argues that Article I, § 10 does not provide a right to a remedy in court. However, this Court has long championed individual rights and access to courts. *See, e.g., Putman,* 166 Wn.2d at 979; *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).

RCW 4.16.350(3) extinguishes certain plaintiffs' rights to bring a medical negligence claim before their claim even accrues. For these plaintiffs – as opposed to those plaintiffs for whom repose is tolled, *supra* – the bar

presents an impossible burden and denies even the most diligent plaintiff her day in court. *E.g., In re Marriage of King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007); cf. *Hall v. Niemer*, 97 Wn.2d 574, 581, 649 P.2d 98 (1982) (recognizing unconstitutionality of procedural impediments that "substantially undermine the possibility of obtaining tort relief.").

Barring a cause of action before the injury is capable of being discovered violates "concepts of fundamental fairness and the common law's purpose to provide a remedy for every genuine wrong…". *Ruth v. Dight*, 75 Wash.2d 660, 665, 453 P.2d 631 (1969). Having recognized the public's right to bring a medical negligence claim, RCW 7.70.010 *et seq*, the legislature is constitutionally without authority under access to courts principles to impose an insurmountable obstacle to pursuing that claim.

Respectfully submitted this 13th day of January, 2023.

Counsel certifies under RAP 18.17
that this brief contains 3,185 words.

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I declare under penalty of perjury under the laws of the State of Washington that on this 13th day of January, 2023, I served a true and correct copy of the document to which this Certificate of Service is attached, on the following in the manner indicated:

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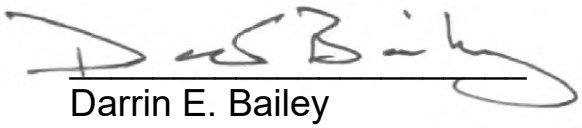

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