No. 101300-1

SUPREME COURT OF THE STATE OF WASHINGTON

BETTE BENNETT,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

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

BRIEF OF *AMICI CURIAE* WASHINGTON STATE MEDICAL ASSOCIATION AND WASHINGTON STATE HOSPITAL ASSOCIATION - Corrected

---

Gregory M. Miller, WSBA No. 14459
Isaac C. Prevost, WSBA No. 55629

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Amici Curiae Washington State Medical Association and Washington State Hospital Association

TABLE OF CONTENTS

Page

Page(s)

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Washington

Page(s)

Cases

Page(s)

Statutes

Other Authorities

Page(s)

Constitutional Provisions

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Washington State Medical Association ("WSMA") and the Washington State Hospital Association (WSHA) ("Health Care Amici") ask the Court to answer in the negative the U.S. District Court's certified questions of whether the 8-year medical negligence statute of repose violates the Washington Constitution's privileges and immunities or open courts clause?

The legislature expressly balanced the interests of injured plaintiffs and the health care industry in 2006 to set an outer limit to the discovery rule and restore finality to potential liability for health care providers, while retaining judicially-created exceptions. It protects the public interest by ensuring the availability of health services by balancing the competing interests, thus promoting the public welfare. The 2006 legislation was passed after hard-fought initiatives by health care providers and the plaintiffs' bar. All stakeholders, including these amici and the plaintiffs' bar through WSTLA, publicly agreed and promoted passage as a proper balance.

The WSMA is the statewide professional association of over 11,990 medical and osteopathic physicians, surgeons, and physician assistants. It is thoroughly familiar with the essential features of medical practice in the state and regularly works with the Legislature on laws affecting the practice of medicine, including the legislation at issue here, and regularly appears in this Court as amicus curiae. The WSHA is a nonprofit membership organization representing Washington's 107 member hospitals and several health-related organizations. It works to improve the health of persons in Washington by its involvement in matters affecting the delivery, quality, accessibility, affordability, and continuity of health care. It too appears regularly in this Court as amicus curiae.

II. ISSUES OF CONCERN TO *AMICI*

Health Care Amici WSMA and WSHA are concerned with the challenge to finality of potential claims for medical negligence in RCW 4.16.350(3) which was part of a comprehensive agreement of interested parties in 2006,

including the plaintiffs' bar via WSTLA. They also are concerned with Plaintiff's effort to have the Court effectively ignore the legislature's policy-setting role in establishing the finality policies for different causes of actions and claims, effectively usurping its policy-setting authority. This is not supported by this Court's cases, nor the facts.

Health Care Amici are concerned that Plaintiff seeks to undo the policy consensus and agreement of the interested parties – including Health Care Amici and WSTLA – in 2006 which re-established the 8-year statute of repose. Following the Court's decision in *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014), which restored tolling for minors during their minority by striking a different statute, RCW 4.16.350(3) fully reflects the judicial doctrines providing exceptions for the presence of a foreign object, age-minority tolling and equitable tolling for fraud or concealment while retaining but setting "an outer limit" on the court-created discovery rule, an expressly permissible goal within the legislature's authority.

If successful, Plaintiff's challenge would not only eliminate the most generous statute of repose in Washington, RCW 4.16.350, its logic would constitutionalize the discovery rule under the guise of open courts and require eliminating the other statutes of repose, and statutes of limitation as well. This is not required by the constitution. It is contrary to separation of powers principles embodied in the constitution. It would be harmful to the practice of medicine and the provision of health care throughout the state as described by other amici.

III. STATEMENT OF THE CASE

Health Care Amici accept the statement of the case of Defendant United States and add the following points.

A. The 2002 Health Care Reform Act and SSHB 2292.

The context of the 2006 health care reform litigation is important. It arose after a fierce election battle over competing initiatives following years of disagreement over how to manage increased costs of health care, increased liability, and the consequent threats to the availability of health care to all patients.

These circumstances and subsequent negotiations are detailed at pages 2-10 of the WDTL Amicus Brief in an earlier case before this Court ("Waples Amicus"), included in the appendix herein at App. 3-11 for the Court's convenience.[1] The 2006 legislation was an agreed solution brokered by Governor Gregoire following the efforts of the stakeholders, particularly the WSMA, WSHA, and WSTLA, the state trial lawyers. *Id.* The brief of amicus curiae State of Washington is expected to explain in more detail the legislative history of RCW 4.16.350.

Pertinent to Health Care Amici's position, the 2006 legislation was crafted by the various stakeholders following their unsuccessful initiative campaigns to address a variety of urgent concerns across healthcare. App. 2-11. The final bill was the result of negotiations between members of the legislature, the Governor's office, the state trial lawyers via WSTLA, the

[1] The appendix contains the cover and pp. 1-10 of the amicus brief of the Washington Defense Trial Lawyers, filed in *Waples v. Yi*, No. 82149-9, 169 Wn.2d 152, 234 P.2d 187 (2010). The full brief is appended to Amici's motion.

medical community including amici WSMA and WSHA, the WSBA, the Governor's office, the Department of Health, and the Office of the Insurance Commissioner. App. 5-11. Mr. Budlong, a member of WSTLA's Board of Governors, testified as follows in the Senate in support of the reform bill, which contained the eight-year statute of repose, showing the unusual agreement of normally disparate interest groups:

> John Budlong on behalf of the Washington State Trial Lawyers. We also would encourage this body to enact bill 2292 as written with the striker amendments. We also would like to thank our colleagues in the health care professions who have spent five sessions of three hours each discussing all aspects of 2292, particularly the liability provisions in great detail. These were candid, open, I think very friendly discussions, and I think the voters perhaps would want to know that after this last campaign***. I think that we made a lot of progress in here in enacting comprehensive reform in patient safety, insurance reform, civil justice reform issues***. We also would like to thank Representative Pat Lanz who has put this bill out as the vehicle, for the last, I believe it started four years ago, and finally, of course, for Governor Gregoire, I fully agree with Dr. Dunbar. I think without her gift for bringing opposing parties together that we would not be here today ***unanimously in favor of this bill as written***. Thank you.

Waples Amicus at pp. 6-7 (quoting Senate Committee Hearing transcription at 5) (emphasis added), App. 7-8 hereto.

The Legislature detailed its specific purposes for passing the 2006 medical reforms, including the statute of repose and the legislature's curative response to the decision striking the statute of repose on privileges and immunities grounds, *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998). The legislature invoked the bases *DeYoung* held were proper, particularly that of guarding against answering "a stale claim [which] is a substantial wrong", and "setting an outer limit to operation of the discovery rule". *See id.*, 136 Wn.2d at 150.

The Legislature's specific findings with respect to the re-enacted RCW 4.16.350(3) state:

> 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***.

Laws 2006 c 8 § 301 (emphasis added).

As expressly stated in the intent section, the 8-year statute of repose in RCW 4.16.350(3) is a policy determination made by the Legislature after careful deliberation with all the stakeholders, including the health care community and injured patients via the trial lawyers' via WSTLA.

After SSHB 2292 passed, one successful challenge Plaintiff relies on is *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014). But *Schroeder* does not control, it strengthens the general 8-year statute of repose. First, the statute at issue in *Schroeder* was RCW 4.16.190(2), a different statute from RCW4.16.350(3). Second, it was a dramatic change from prior statutory and common law principles, which generally toll the time for a minor to bring any claims, including medical

negligence claims, until they reach the age of majority. None of the *Schroeder* analysis controls here where the general 8-year statute does not have the same infirmity as the elimination of general tolling for actions brought by minors, which had antecedents in statute and in the common law long before statehood. After *Schroeder* the statute provides:

> Any civil action for damages for injury occurring as a result of health care…against…
>
> (3) [A defined health care provider] … 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.

RCW 4.16.350(3) (emphasis added).

As the statute stands now, it applies to all persons equally. It reflects a legislative policy decision, which this Court has held appropriate, to place an outer limit on the discovery rule for claims for injuries from health care.

B. Plaintiff's Claim.

The spare complaint shows that Plaintiff's claimed injury occurred immediately on her treatment in May, 2009, when she heard – and felt – a loud "cracking" in her nose, felt acute pain, then passed out after it was packed by an ENT physician called to the ER a week after sinus surgery. CP 11. The allegations in her complaint show that she knew her medical problem was not fully resolved in 2009 and continued to have various treatments until she was diagnosed with traumatic brain injury in August and December, 2017. CP 12.

IV. LEGAL DISCUSSION

A. Adoption of Defendant's Arguments That RCW 4.16.350 Does Not Violate the Privileges and Immunities Clause of art. 1, sec. 12 of the Washington Constitution.

Health Care Amici adopt Defendant United States' thorough arguments that RCW 4.16.350, as currently constituted after *Schroeder,* does not violate the privileged and immunities guarantees in Wa. Const. art. 1, sec. 12.

B. The Legislature enacted the statute of repose after careful consideration in its constitutional role of setting public policy.

The Legislature's establishment of the statute of repose is an act of legislative discretion that is protected under the separation of powers principles. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) ("The principle of separation of powers was incorporated into the Washington State Constitution in 1889."). The separation of powers is a "foundational constitutional principal" that "'ensure[s] that the fundamental functions of each coordinate branch [of

government] remain inviolate.'" *Washington State Legislature v. Inslee*, 198 Wn.2d 561, 579, 498 P.3d 496, 508 (2021).

The Legislature performed this fundamental legislative function when it enacted the statute of repose in 2006 and expressly addressed *DeYoung* while implementing the precise appropriate goals specified in the decision. The legislature stated that the statute of repose serves the purpose of "setting an outer limit to the operation of the discovery rule" and that eight years "is a reasonable time period in light of the need to **balance the interests of injured plaintiffs and the health care industry**." Laws 2006, c. 8, §301 (emphasis added). This latter balancing rationale is materially different than merely avoiding what *DeYoung* characterized as a "miniscule number of claims subject to the repose provisions." *See DeYoung,* 136 Wn.2d at 150.

Plaintiff's argument disregards the deliberative, policy-making process and the public collaboration behind it, as well as the legislature's role as policy-setter for the finality rules for claims. Instead, she asks the Court to commandeer the role of

policymaker to invalidate the Legislature's policy determinations. This is inconsistent with the Court's deference to the legislature's policy-setting role in this area. *See, e.g.*, *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 578, 29 P.3d 1249 (2001); *Fowler v. Guerin,* 200 Wn.2d 110, 118 ¶13-14, 515 P.3d 502 (2022).

1. Statutes are presumed to be constitutional exercises of Legislative authority.

Statutes are presumed constitutional. This Court's review of a legislature's decisions must defer to the legislature's "fundamental function[]… to set policy and to draft and enact laws." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009); *see also Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) ("'[T]he drafting of a statute is a legislative, not a judicial, function."'). *Accord*, *Fowler v. Guerin*, 200 Wn.2d at 118.

The Court re-emphasized its deference to the legislature's decisions setting the time period for bringing claims just this past

fall: "**A statutory time bar is a 'legislative declaration of public policy which the courts can do no less than respect**,' with rare equitable exceptions," *Fowler,* 200 Wn.2d at 118, quoting *Bilanko v. Barclay Ct. Owners Ass'n*, 185 Wn.2d 443, 451-52, 375 P.3d 591 (2016) (emphasis added).

2. Statutes of repose are a policy decision entrusted to legislatures.

Statutes of repose thus reflect a policy decision that a "defendant should be free from liability after the ***legislatively determined period of time***." *CTS Corp. v. Waldburger*, 573 U.S. 1, 9, 134 S. Ct. 2175, 189 L. Ed. 2d 62 (2014) (emphasis added). The enactment of such a statute is a fundamental legislative function entitled to discretion as recognized in both the federal and other state courts. *Id.; Fowler*, *supra. See, e.g., Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005) ("We have upheld statutes of repose where we determined that the legislature was pursuing a rational policy in enacting them."); *Kanne v. Bulkley*, 306 Ill. App. 3d 1036, 715 N.E.2d 784 (1999)

(statute of repose serves a legislatively determined policy objective by setting a temporal limit on liability); *Kohn v. Darlington Cmty. Sch.*, 283 Wis. 2d 1, 28, 698 N.W.2d 794, 807 (2005) ("'The question of what the statute of limitations or the statute of repose for a particular action should be is a fundamental question of public policy.'").

The legislature and this Court recognize that statutes of repose serve valuable policy goals for a variety of legal issues, and many statutes of repose have been passed. They can "prevent plaintiffs from bringing stale claims when evidence might have been lost or witnesses might no longer be available," *Lakeview Blvd.*, 144 Wn.2d at 578 (*citing Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991). This is the precise rational cited by both the Court in *Fowler* in fall, 2022,

as to statutes of limitation, and by the legislature in passing RCW 4.16.350. Many statutes of repose are on the books.[2]

For example, the statute of repose for improvements on real property serves the "recognized purpose … that **it limits the discovery rule** and avoids placing too great a burden on defendants who construct improvements upon real estate." *Lakeview Blvd.*, 144 Wn.2d at 578 (emphasis added). The Court upheld the construction defect statute of repose against an equal protection challenge. *Id. Lakeview Blvd.* applies to uphold RCW 4.16.350(3).

Although apparently side-stepping an open courts challenge, the *Lakeview Blvd.* decision specifically adopted the Oregon Supreme Court's position that the legislature is charged with "limiting the availability of causes of action by the use of

---

[2] *See, e.g.*, RCW 7.72.060 (products liability); RCW 19.105.400 (contracts under the Camping Resorts Act); RCW 4.16.310 (improvements on real property); RCW 23B.14.340 (actions against a dissolved corporation); RCW 4.16.060 (irrigation district bonds); RCW 4.16.050 (irrigation or drainage district warrant).

statutes of limitation so long as it is done for the purpose of protecting a recognized public interest," and the Missouri Supreme Court's holding that its open courts provision does not require that "a plaintiff can always go to court and obtain a judgment on the claim asserted." *Id.*[3] This makes sense, because otherwise, not only would all statutes of repose have to fall under Plaintiff's theory, but statutes of limitations also would have to fall.

---

[3] **We adopt the view** of the Supreme Court of Oregon that "[**i]t has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest**." ….. Similarly, the Supreme Court of Missouri has concluded that its open courts provision does not require "that a plaintiff can always go to court and obtain a judgment on the claim asserted." …. Because **we recognize that the legislature has broad police power to pass laws tending to promote the public welfare**, we decline at this time to determine whether article 1, section 10 of the state constitution guarantees a right to a remedy.

Lakeview Blvd., 144 Wn.2d at 582 (emphasis added; citations omitted).

The Legislature's role in considering and crafting statutes of repose thus is part and parcel of its core constitutional function of setting the policy of the appropriate "statutory time bar." *Lakeview Blvd; Fowler,* 200 Wn.2d at 118. Moreover, it makes sense for the reasons stated in Defendant United States' brief. At statehood the statutes of limitation all served as statutes of repose absent an equitable exception, since there was no "discovery rule" at that time. *See* Brief of Defendant, pp. 32-42. If there was any basis to extend the time for bringing a claim in 1889, it was a disability for incompetence (by age or capacity) or an equitable exception for fraud or concealment, both time-honored common law exceptions, but not a "discovery rule".

After *Schroeder,* both of those common law exceptions are built into RCW 4.16.350(3) along with the more recent foreign objects exception and a one-year discovery rule exception, both stemming from *Ruth v. Dight.* This strengthens the statute as consistent with long-standing state law and policy.

3. Because the statute of repose was enacted by the legislature after due deliberation and consistent with the requirements in *DeYoung* and *Lakeview Blvd.*, this Court must defer to the Legislature.

The legislature's decision to enact RCW 4.16.350(3) as part of its medical reforms must be given deference. *City of Redmond v. Arroyo–Murillo*, 149 Wn.2d 607, 616, 70 P.3d 947 (2003) ("[I]t is this court's obligation to determine and carry out the intent of the legislature."). It would violate the constitutional separation of powers principles for the Court to usurp the Legislature's fundamental role to craft policies such as the statute of repose. *Wash. State Legis. v. Inslee, supra.*

C. Plaintiff's Open Courts Argument That Seeks To Constitutionalize The Discovery Rule Is Wrong.

1. The Discovery Rule is not Prescribed by Washington's Open Courts Provision, Nor by Washington Common Law.

Plaintiff's open-courts argument is predicated on an assertion that every plaintiff *always* has the right to a remedy under Article I, § 10, *and* that no statute of repose can be consistent with that provision. Plaintiff seeks to constitutionalize

the discovery rule without limit. This is not supported by constitutional language, by this Court's constitutional jurisprudence, nor by the common law history of the discovery rule for medical malpractice claims. Moreover, it disregards the equitable exceptions contained in the statute, described *supra,* which remain available. In short, no person is unfairly excluded from bringing a claim who had one at common law, unlike the circumstances in *Schroeder*. Medical malpractice claims were subject to a three-year statute of limitations, which also functioned as a statute of repose until the discovery rule in 1969.

2. The Open-Courts Provision Does Not Guarantee a Right to a Remedy, Nor Could It Implicitly Incorporate the Discovery Rule.

(a) The Drafters of the Washington Constitution Did Not Codify the Right to a Remedy.

The Washington Constitution does not guarantee a remedy for every wrong. The Constitutional Convention *considered* including a right to a remedy, as certain other states have

adopted,[4] but it did not adopt this language. A convention delegate offered a proposed bill of rights at the convention, which included the following proposed language:

> No court shall be secret but justice shall be administered openly and without purchase, completely and without delay, and every person shall have remedy by due course of law for injury done him in his person, property or reputation.[5]

This was an ***exact*** duplicate of the open courts provision from the Oregon Constitution.[6] But it was not adopted. Instead, the Convention adopted the following language as Article I, § 10:

---

[4] *See e.g.*, TEX. CONST., art I, § 13. ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."); *see also* ILL. CONST. art 1 § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.").

[5] Stephens, *The Once and Future Promise of Access to Justice in Washington's Article I, Section 10,* 91 WASH.L.REV 41, 42 (2016) (hereafter "Stephens"); The *Journal of the Washington State Constitutional* Convention 1889, 51 (Rosenow ed., 1999) (hereafter "Rosenow").

[6] Stephens at 42 (citing OR. CONST. art. I, § 10.).

> Administration of Justice: Justice in all cases shall be administered openly, and without unnecessary delay.

This language remains in effect as the open courts provision to this day.[7] At the same time, there was no express prohibition of statutes of limitation, or time-limits on causes of action or claims added to the Washington Constitution. Indeed, as Defendant United States pointed out, statutes of limitation were an integral part of the common law in England which Washington adopted.

Finally, the Court held there is no explicit right to a remedy in the Washington Constitution, comparing and contrasting Washington's narrower open courts provision with other states' more expansive provisions:

> However, in so far as any constitutional question is involved in this case, the Oregon, Delaware, and Kentucky cases do not establish a controlling precedent, because ***in each of those states the Constitution contained a provision which was, in effect, a limitation***

[7] *See* WASH. CONST. art. I, § 10.

> ***upon the power of the Legislature to abolish rights of action for injury to person, property, or reputation***.
>
> …
>
> In this state, the Constitution contains no such provision, but only the general 'due process' and 'equal protection' clauses. There is, therefore, no express, positive mandate of the Constitution which preserves such rights of action from abolition by the Legislature, even when acting under its police power.

Shea v. Olson, 185 Wash. 143, 160–61, 53 P.2d 615, *adhered to on reh'g en banc*, 186 Wash. 700, 59 P.2d 1183 (1936) (emphasis added). The *Shea* opinion expressly considered the scope of Article I, § 10, and the Court held that determinations regarding a plaintiff's remedies were properly the domain of the legislature.

Even if there was merit to Plaintiff's assertion that there is a right to remedy implied in the Washington Constitution, that would only beg the next question: what common law remedies for medical malpractice are purportedly being abridged by the eight-year statute of repose? "Access to the courts" necessarily must mean the ability to receive whatever recovery the law allows. Sometimes there is no legal basis for recovery, such as

recovery of attorney's fees in tort cases absent a statute or contract provision authorizing such recovery. The history of common law medical malpractice claims confirms that there is no constitutional nor historical basis for Plaintiff's attempt to constitutionalize the discovery rule.

(b) The Discovery Rule was Not Available for Common Law Medical Malpractice Claims.

From the constitutional drafting in 1889 to 1969, claims for medical malpractice were subject to the general three-year statute of limitations applicable to general tort claims. *See Gunnier v. Yakima Heart Ctr., Inc., P.S.*, 134 Wn.2d 854, 859–62, 953 P.2d 1162 (1998) ("Medical malpractice actions which preceded enactment of the medical malpractice statute of limitations were governed by the limitations period in the general tort statute of limitations."). *See also* RCW 4.16.080(2) (providing that "[a]n action for ... any ... injury to the person or rights of another not hereinafter enumerated" had to be commenced within three years.). A plaintiff's remedy for a claim

of medical malpractice was consistent with their remedy for any other tort claim for the 80 years following the drafting of the Washington Constitution until *Ruth v. Dight, infra.* In that time, a plaintiff's ability to seek a remedy for medical malpractice began to run when the injury was sustained, like any other tort remedy. *See Gunnier,* 134 Wn.2d at 860 (*citing Lindquist v. Mullen*, 45 W.2d 675, 277 P.2d 724 (1954)). *See also McCoy v. Stevens*, 182 Wash. 55, 59, 44 P.2d 797, 799 (1935), *abrogated by Samuelson v. Freeman*, 75 Wn.2d 894, 454 P.2d 406 (1969) ("But, like any other action founded upon a breach of duty imposed either by law or contract, the [medical malpractice] action arises out of the breach, and ***the statute of limitations begins to run from the time of the breach and not from the time of its discovery***.") (emphasis added) (quoting *Cornell v. Edsen*, 78 Wash. 662, 139 P. 602 (1914)), abrogated by *Peters v. Simmons*, 87 Wn.2d 400, 552 P.2d 1053 (1976)). The historical remedy for a plaintiff's medical malpractice claim did not include a discovery rule. Until *Ruth v. Dight,* 75 Wn.2d 660, 453

P.2d 631 (1969), RCW 4.16.080(2) served as both the statute-of-limitations and the functional statute of repose for medical malpractice claims.

3. Plaintiffs' Assertion That the Statute of Repose Violates Their Right to a Remedy Fails Because the Discovery Rule is Not an Available Common Law Remedy.

Plaintiff briefing engages in an ahistorical reading Washington constitutional and common law history to prop up their Article I, § 10 argument. Plaintiff asserts that "having recognized the public's right to bring a medical negligence claim, … ***the legislature is constitutionally without authority under access to courts principles to impose an insurmountable obstacle to pursuing that claim***." Plaintiff's Reply at 26.

Washington's constitutional and common law history refutes Plaintiff's open-courts argument. First, the Washington Constitution does not guarantee the right to a remedy, and such protection was in fact considered and not adopted at the Washington Constitutional Convention. Second, any implied

"right to a remedy" in the open-courts provision would protect a plaintiff's access to available common law remedies. The discovery rule is not a common law remedy for medical malpractice claims, as it instead is based on statute and was formulated in 1969 to overturn decades of common law precedent. The open-courts provision, whether it protects common law remedies or not, does not mandate that the discovery rule is available for every plaintiff in every medical malpractice claim.

D. The medical-negligence statute of repose does not violate the privileges and immunities clause of Article I, § 12 of the Washington Constitution.

WSMA and WSHA agree with and adopt the arguments made by the United States and add the above points.

V. CONCLUSION

The WSMA and WSHA respectfully ask the Court to answer both the federal court's questions in the negative for the reasons given above.

I certify that this document contains 4,675 words excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of May, 2023.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Gregory M. Miller*
Gregory M. Miller, WSBA No. 14459
Isaac C. Prevost, WSBA No. 55629

Attorneys for Amici Curiae Washington State Medical Association and Washington State Hospital Association

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via court e-filing website/Portal, which sends notification of such filing to the following:

Attorneys for Petitioner Bette Bennett
Darrin E. Bailey, WSBA #34955
BAILEY ONSAGER, P.C.
600 University St., Ste. 1020
Seattle, WA 98101
206.623.9900
dbailey@baileyonsager.com

Attorneys for Respondent United States of America
Kristen R. Vogel, NYBA No. 5195664
Teal L. Miller, WSBA #53224
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271
(206) 553-7970
FAX: (206) 553-0755
kristen.vogel@usdoj.com
teal.miller@usdoj.gov

Attorneys for Amicus Curiae Washington State Association for Justice Foundation
Valerie D. McOmie, WSBA No. 33240
4549 NW Aspen Street
Camas, WA 98607
valeriemcomie@gmail.com

Daniel E. Huntington, WSBA No. 8277
422 W. Riverside, Suite 1300
Spokane, WA 99201
DanHuntington@richter-wimberley.com

Attorneys for Amicus Curiae State of Washington
Sara A. Cassidey, WSBA 48646
Assistant Attorney General
PO Box 40126
Olympia WA 98504-0125
sara.cassidey@atg.wa.gov

DATED this 11th day of May, 2023.

/s/Deborah A. Groth
Deborah A. Groth, Legal Assistant

APPENDICES

Page(s)

NO. 82142-9

SUPREME COURT OF THE STATE OF WASHINGTON

NANCY NGYUEN WAPLES,

Appellant,

v.

PETER H. YI DDS and JANE DOE YI, husband and wife and their marital community thereof, d/b/a LAKEWOOD DENTAL CLINIC, and PETER H. YI DDS, PS, a Washington Corporation,

Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

Erin H. Hammond, WSBA #28777

Fain Sheldon Anderson & VanDerhoef, PLLC
701 Fifth Avenue, Suite 4650
Seattle, WA 98104
(206) 749-0094

On Behalf of
Washington Defense Trial Lawyers

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Defense Trial Lawyers ("WDTL") is a nonprofit organization of attorneys who devote a substantial portion of their practice to representing defendants, companies, or entities in civil litigation. WDTL appears in this and other courts as *amicus curiae* on a *pro bono* basis to advance the interests of its members and their clients and to pursue its mission of fostering balance in the civil justice system.

II. STATEMENT OF THE CASE

In 2006, Nancy Waples filed a dental practice lawsuit against Peter Yi, DDS, claiming that an injection had been negligently provided to her in 2003. *Waples v. Yi*, 146 Wn. App. 54, 57, 189 P.3d 813 (2008). Ms. Waples concedes that she failed to file the notice of intent to file suit that is required by RCW 7.70.100. *Id.*

In his answer, Dr. Yi denied any negligence and pleaded the affirmative defense of failure to file the notice of intent. *Id.* He subsequently was granted summary judgment on that basis. *Id.*

On appeal, Ms. Waples asserted several new arguments, including claims of unconstitutionality. *Id.; Respondent's Ct. of Appeals Br. at 3.* These were arguments the trial court neither considered, nor ruled upon.

Id.[1] The Court of Appeals affirmed the trial court, based upon Plaintiff's failure to comply with RCW 7.70.100's mandatory notice of intent. *Id.* In doing so, it analyzed the notice of intent requirement, and found it constitutional. The Court of Appeals was correct. WDTL believes the Supreme Court should affirm the Court of Appeals.

III. ARGUMENT

A. RCW 7.70 Exists Because of the Fundamental Need for Quality, Affordable, and Available Health Care in Washington, and Washington's Ongoing Health Care Crisis.

In 1975, it was widely understood that the entire nation's health care delivery system was under serious threat due to a medical malpractice insurance crisis. *DeYoung v. Providence Medical Ctr.*, 136 Wn.2d 136, 148, 960 P.2d 919 (1998). Washington was not exempt from the crisis. In preparing to confront Washington's difficulties as best it could at the time, the Legislature took evidence from many sources. *Id.*

The information received included advice that, in recent years, medical malpractice loss payments for at least one insurer had skyrocketed, and medical malpractice insurance premiums for specified

[1] Plaintiff's constitutional arguments also address RCW 7.70.150's certificate of merit requirement. However, not only did the trial court not have an opportunity to consider these arguments, the trial court did not even reach the certificate of merit. The dismissal was based upon the failure to comply with the notice of intent requirement. *Waples*, 146 Wn. App. at 61. The Court of Appeals did not address the certificate of merit arguments either; and it is presumed that these arguments will not be addressed here. However, should that presumption be error, WDTL would be pleased and honored to participate as *amicus curiae* on those issues as well should the Court be so inclined.

classes of physicians had doubled and tripled. *Id.* Based upon this and other evidence before the Legislature at the time, this Court has acknowledged that it was rational to surmise that a medical malpractice insurance crisis either was upon Washington or was likely. *Id.*

In response to the urgent situation, the Legislature adopted the laws that became RCW 7.70. *Sherman v. Kissinger*, 146 Wn. App. 855, 866, 195 P.3d 539 (2008) (citing 1975-1976 Final Legislative Report, 44th Wash. Leg., 2d Ex. Sess., at 22). The primary goal of RCW 7.70 was to stem the crisis and the corresponding increase in consumer health care costs. *Id.*

Unfortunately, the crisis was not stemmed. For example, in 2001, because of heavy medical malpractice losses and concerns about the future of these claims, the St. Paul Companies announced that they would leave the medical malpractice insurance business. Milt Freudenheim, *St. Paul Cos. Exit Medical Malpractice Insurance*, N.Y. Times, December 13, 2001. This ended coverage for 750 hospitals, 42,000 physicians, and 73,000 other health care workers nationwide, including a fair number in Washington. *Id.* In 2003, the Office of the Insurance Commissioner placed an insolvent Washington Casualty Co. into receivership, at a time when it reportedly insured 46 Washington hospitals, 20 Washington community health clinics, and other Washington entities and physicians.

See Thurston County Superior Court Cause No. 03-2-00401-1. These are only two of many examples of the continuing crisis.

In the Fall of 2005, competing Initiatives 336 and 330 were introduced by those interested in the important issues related to the delivery of health care. That Fall, the initiatives were at the forefront of the news, and on the minds of every engaged voter. The battle over the initiatives was lengthy. It was expensive. And it was ugly. In the end, Washington's voters rejected both initiatives.

B. In 2006, the Legislature, With Thoughtful Input and Assistance of Governor Gregoire, WSTLA, the WSBA, Physicians' Groups and Others, Adopted Comprehensive Amendments to RCW 7.70, Including RCW 7.70.100's Notice of Intent Requirement.

The furor associated with Initiatives 336 and 330 passed with the November 2005 general election, but Washington was left with the *status quo* for its health care system. Reform was needed; the *status quo* was not acceptable. The Legislature stepped in, and worked on making important changes to health care though House Bill 2292. The bill's prime sponsor, Representative Pat Lanz explained in a February 20, 2006 hearing before the Senate Committee on Health and Long Term Care (the "Senate Committee"):

> We laid a very good foundation when we started this process four years ago in the House, and then last year actually had the bill that kept that foundation of the three

> legged stool. We knew it was important to have all three parts [patient safety, civil liability reform, and insurance reform] of this bill balanced.
>
> * * *
>
> After the initiative election this fall, it was so very clear that what the people were saying was that there are some issues that are just *way* too complex for us to deal with at the ballot box. And we elected you to take on these hard issues.
>
> * * *
>
> So that is why, that first week of session, if you will recall, we made some minor corrections in the bill that we had brought back from Rules, and sent it off the floor. We were hoping that what happened, would happen, that it took a detour to the Governor's office. And in there, with the very very capable hands of the Governor, we had all of those competing interests come together around the table and deal with, I guess we could say the rough edges of the foundation and the walls of the structure. Or, I have a stool, of the legs of the stool that we had constructed.[2]

In also speaking before the Senate Committee that day, Governor Gregoire thanked those who had assisted with the negotiations Representative Lanz referenced; they included: three members of the Washington State Trial Lawyers Association, two members of the Washington State Hospital Association, three members of the Washington State Medical Association, general counsel for Physicians Insurance, two

---

[2] The audio of this hearing can be found at http://www.tvw.org/search/siteSearch.cfm?EvntType=C&keywords=Senate%20Health%20&date=2006&bhcp=1. An unofficial transcription of key portions of the hearing is also included in the appendix to this brief; Senate Committee Hearing transcription at 3.

members of the Washington State Bar Association, members of the Governor's office, and those from the Department of Health and the Office of the Insurance Commissioner. Governor Gregoire continued:

> They came to the table with much trepidation, as you might well imagine, but the negotiations were always very professional and always in good faith. And I will tell you what I think you will hear later, that what you have now is a bill that is better. It is complete. It is not everything that anyone at the table wanted.
>
> * * *
>
> So I think the fact that these people were able to come to the table, and negotiate with the paramount responsibility in mind that they had to be true to their patients and to the public at large is an example of why we were able to reach agreement today. I come on their behalf. We stand arm in arm. We are united in support of the striker to 2292.[3]

The Washington State Association for Justice (then named the Washington State Trial Lawyers Association) added:

> John Budlong on behalf of the Washington State Trial Lawyers.[4] We also would *encourage* this body to enact bill 2292 as written with the striker amendments. We also would like to thank our colleagues in the health care professions who have spent five sessions of three hours each discussing all aspects of 2292, particularly the liability provisions in *great* detail. These were candid, open, I think

---

[3] Senate Committee Hearing transcription at 1-2. The "striker" Governor Gregoire referenced was the final "striker amendment" to (by then) 2SHB 2292. Among other revisions to the bill, this amendment added the notice of intent provision that is at issue in this case. *See* Senate Bill Report 2SHB 2292 at 7 (under heading "Amended Bill Compared to Second Substitute Bill"), a copy of which is included in the appendix to this brief.

[4] Mr. Budlong was then a member of its Board of Governors, and is now a past President.

very friendly discussions, and I think the voters perhaps would want to know that after this last campaign. I think that we made a lot of progress in here in enacting *comprehensive* reform in patient safety, insurance reform, civil justice reform issues. We also would like to thank Representative Pat Lanz who has put this bill out as the vehicle, for the last, I believe it started four years ago, and finally, of course, for Governor Gregoire, I fully agree with Dr. Dunbar. I think without her gift for bringing opposing parties together that we would not be here today unanimously in favor of this bill as written. Thank you.

Senate Committee Hearing transcription at 5.

S. Brooke Taylor explained:

I have practiced law in Port Angeles, Washington for 37 years, and I have to tell you I never thought I'd see this day. I am here today in my capacity as President of the Washington State Bar Association.

* * *

After the bitter initiative campaigns, I was searching for answers. And it seemed to me that the voters were telling all of us, among other things, that they wanted significant balanced reforms in how we resolved these disputes.

* * *

Then Governor Gregoire, with her superb leadership, made it all happen. Doctors and lawyers sitting at the same table face to face, discussing these issues, which have for decades divided our professions, which have so much in common in every other respect.

I can tell you that the Washington State Bar Association endorses this bill as it is currently written, and we would urge this body to enact it. I can also tell you that Dr. Dunbar as president of his association and I as president of mine, have agreed to continue this dialogue, this

> engagement into the future, recognizing that there is still work to be done and this is *only* a start. But it is a *very*, *very* good start. Thank you.

Id. at 6-7. As others at the hearing and the speakers quoted above made clear, the notice of intent provision at issue in this case came about as part of a truly historic and progressive compromise. It was a part of reform that was wanted and needed by Washington's citizens, by Washington's government, by Washington's physicians and patients, and by Washington's lawyers.

This understanding of the thorough, thoughtful, and collaborative discussion and intent that led to the 2006 reforms of RCW 7.70 is imperative as this Court considers this case, because the provisions and their adoption must be considered in context. However, they remain at their core, the Legislature's provisions, and therefore perhaps most important to understanding their rationale and placing the notice provisions in context are the Legislature's official findings adopted in connection with the 2006 reforms to RCW 7.70:

> 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.

Laws of 2006, ch. 8, § 1 (*cited in Waples*, 146 Wn. App. at 61 n. 3).

> 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.

Laws of 2006, ch. 8, § 1.

In other words, RCW's 7.70.100 notice of intent provision was part of the comprehensive, compromise package of laws that served the broad goals of the Legislature and the people of Washington as outlined above. And as part and parcel of that, it also served the more specific purpose of promoting quick and early settlement, which conserves resources for all involved (the parties, insurers, and the courts). *Bennett v. Seattle Mental Health*, 150 Wn. App. 455, 462, 208 P.3d 578 (2009) ("Reading the plain language of RCW 7.70.100(1) as a whole, it is clear that the legislative intent is to require a mandatory 90 day waiting period to allow the parties the opportunity resolve medical malpractice claims against the health care provider."); *Breuer v. Presta*, 148 Wn. App. 470, 477, 200 P.3d 724 (2009) (purpose of notice of intent is to help achieve the Legislature's policy goal of settling cases pre-filing); *Waples*, 146 Wn.

App. at 61 (same); *see also Medina v. Pub. Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 53 P. 3d 993 (2002) (it is generally accepted that a purpose of the governmental claim-filing provisions of RCW 4.96.020 is to allow government entities time to investigate, evaluate, and settle claims).[5] These are rational -- and even substantial – state interests if ever there were any, particularly given the historical context and the important services provided by health care workers.

C. The Law Neither Mandates Nor Permits Unraveling of the Historic Progress Made in 2006.

1. Ms. Waples' claims must be analyzed under the Fourteenth Amendment to the United States Constitution.

Ms. Waples argues that if RCW 7.70.100's notice provisions are mandatory (and they are)[6], they represent a violation of equal protection guarantees. She does not specify under which constitutional provision she

---

[5] For many years, RCW 4.96.020 pre-suit notice requirements applied to public hospitals to facilitate settlement. *See id; Hardesty v. Stenchever*, 83 WN. App. 253, 257, 917 P.2d 577 (1997) (RCW 4.96.020 applies to public hospital districts). However, the Legislature recently amended RCW 4.96.020 to make clear that RCW 7.70's notice (and other) provisions exclusively govern claims against the public hospitals now.

[6] Where statutory language is clear, its meaning is derived from the language of the statute alone. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). RCW 7.70.100 provides in pertinent part, "No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action."

"May" is a permissive term. *See, e.g., Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999). This statute's plain language discusses when there is (and is not) permission to proceed. By the statute's plain language, there is no permission to proceed with (i.e., to commence) a lawsuit unless the 90 day notice has been given. Reading the entire sentence in a reasonable manner designed to avoid an absurd or strained result, it is clear that the notice of intent is mandatory. *See Bennett*, 150 Wn. App. at 462.

CARNEY BADLEY SPELLMAN

May 11, 2023 - 2:28 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,300-1
Appellate Court Case Title:	Bette Bennett v. United States

The following documents have been uploaded:

- 1013001_Briefs_20230511142431SC708885_9561.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Brief of Amici Curiae WSMA and WSHA Corrected.pdf
- 1013001_Motion_20230511142431SC708885_8566.pdf
  This File Contains:
  Motion 1 - Amended Brief
  The Original File Name was Motion of WSMA and WSHA for Leave to File Corrected Brief of Amici Curiae.pdf

A copy of the uploaded files will be sent to:

- Christine.Stanley@ppgnhaik.org
- TORTTAP@atg.wa.gov
- danhuntington@richter-wimberley.com
- dbailey@baileyonsager.com
- kristen.vogel@usdoj.gov
- prevost@carneylaw.com
- sara.cassidey@atg.wa.gov
- teal.miller@usdoj.gov
- valeriemcomie@gmail.com

Comments:

Motion of WSMA and WSHA for Leave to File Corrected Brief of Amici Curiae Brief of Amici Curiae WSMA and WSHA Corrected

---

Sender Name: Deborah Groth - Email: groth@carneylaw.com
Filing on Behalf of: Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20230511142431SC708885