Electronically Filed
6/16/2020 3:11 PM
Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREG GOMERSALL and CYNDI GOMERSALL, as the Guardians of the Minor Child Plaintiff, W.G.G., Plaintiffs-Appellants, -vs- ST. LUKE'S REGIONAL MEDICAL CENTER, LTD., an Idaho general nonprofit corporation, dba St. Luke's Boise Medical Center, Defendant-Respondent.	**Supreme Court Case No. 47664**

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County

Honorable Steven Hippler, Presiding

Eric S. Rossman, ISB #4573
Erica S. Phillips, ISB #6009
Matthew G. Gunn, ISB #8763
ROSSMAN LAW GROUP, PLLC
350 N. 9th Street, Suite 500
Boise, Idaho 83702
Telephone: (208) 331-2030
Facsimile: (208) 947-2424
erossman@rossmanlaw.com
ephillips@rossmanlaw.com
mgunn@rossmanlaw.com

Counsel for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Other Authorities:

I. STATEMENT OF THE CASE

A. Nature of the case.

This case arises from the deficient care and treatment provided by Defendant-Appellee St. Luke's Regional Medical Center ("SLRMC") to Plaintiff-Appellant W.G.G. in December of 2010. The inadequacy of SLRMC's care is not in dispute; indeed, SLRMC apologized to W.G.G. and his family and indicated its willingness to adjust W.G.G.'s bill.

The primary issue before this Court is the constitutionality of Idaho Code § 5-230, which tolls applicable limitations periods for a maximum of six years for legal incompetence, such as for minority or insanity. In conjunction with the two-year limitations period applicable to medical negligence actions set forth in Idaho Code § 5-219(4), § 5-230 creates an eight-year limitations period for minors to bring a medical malpractice claim in Idaho, regardless of whether they reach the age of majority within such time period.

The District Court ruled that § 5-230 passes constitutional muster and deemed W.G.G.'s medical negligence claim, filed January 25, 2019, untimely. The District Court also ruled as a matter of law that SLRMC is not estopped from asserting a statute of limitations defense by virtue of its false representation that it would adjust W.G.G.'s bill.

B. Course of Trial Court Proceedings and Disposition.

On January 25, 2019 W.G.G. filed his complaint against SLRMC, alleging a sole count of medical negligence. (R. 006-011.) SLRMC moved for summary judgment on July 18, 2019. (R. 21-42.) After oral argument on October 8, 2019, the District Court granted SLRMC's motion for summary judgment in a memorandum opinion dated November 7, 2019. (R. 120-137.) Judgment

was entered on November 22, 2019. (R. 138-139.) W.G.G. timely appealed the District Court's grant of summary judgment in favor of SLRMC on December 20, 2019. (R. 140-143.)

C. Statement of Facts.

The historical facts in this case are both simple and undisputed. For the purposes of summary judgment, SLRMC admitted the truth of the allegations set forth in W.G.G.'s complaint. (R. 024, n. 1.)

At birth, W.G.G. was diagnosed with methylmalonic academia. (R. 007, ¶ 5.) Based on this diagnosis, W.G.G.'s treating physician at the University of Washington provided an Emergency Care Letter to his parents, Greg and Cyndi Gomersall. (R. 008, ¶ 7; 040.) W.G.G.'s Emergency Care Letter specifically directed, *inter alia*, immediate administration of IV sodium bicarbonate if W.G.G. became acidotic. (R. 008, ¶ 7.)

On December 11, 2010 W.G.G., who was six years old at the time, presented to the SLRMC emergency department with symptoms of diarrhea, vomiting, and difficulty breathing. (R. 007, ¶ 6.) W.G.G. was treated in the emergency room by Dr. Joseph S. Schmutz, M.D. (R. 007, ¶ 6.) As noted in W.G.G.'s medical records, SLRMC was provided the Emergency Care Letter on December 11, 2010. (R. 008, ¶ 8.) Dr. Schmutz ordered W.G.G. a sodium bicarbonate infusion, but somehow the prescription was lost by SLRMC and the sodium bicarbonate infusion was significantly delayed. (R. 008, ¶ 9.)

As a result of the delay in providing W.G.G. a sodium bicarbonate infusion, he fell into a coma and suffered an irreversible hypoxic brain injury. (R. 008, ¶ 10.) After being discharged from

SLRMC on December 17, 2010 W.G.G. began suffering from worsening gait, falls, muscle spasms, and slower speech. (R. 008, ¶ 11.) W.G.G. has been diagnosed with cerebral palsy and currently suffers from severe cognitive and motor-neurological deficiencies. (R. 008, ¶ 12.)

On January 3, 2010 SLRMC sent the Gomersalls a letter apologizing for the "delay in the dose of sodium bicarbonate" and indicating that "[w]e will also be making adjustments to a portion of W.G.G.'s hospital bill." (R. 008, ¶ 13; 74) SLRMC also represented to the Gomersalls that it "put forth efforts to prevent future occurrences of this nature from occurring again within our organization." (R. 008, ¶ 13; 74) The Gomersalls received no further communication from SLRMC regarding the bill. (R. 070, ¶ 5.) Many months later the Gomersalls learned SLRMC never adjusted W.G.G.'s bill. (R. 071, ¶ 6.)

II. ISSUES PRESENTED

1. Did the District Court err by granting summary judgment in favor of SLRMC?

III. ARGUMENT

A. Standard of Review.

"In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Lockheed Martin Corp. v. Idaho State Tax Comm.*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006). Rule 56(c) of the Idaho Rules of Civil Procedure provides, in pertinent part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]" "All disputed facts are to be construed

liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Robert Comstock, LLC v. Keybank Nat'l Assoc.*, 142 Idaho 568, 571, 130 P.3d 1106, 1109 (2006). "This Court freely reviews issues of law." *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011) (*citing Lattin v. Adams Cnty.*, 149 Idaho 497, 500, 236 P.3d 1257, 1260 (2010)).

As discussed in Section B, *ante*, the District Court excluded evidence submitted by W.G.G. in opposing SLRMC's motion for summary judgment. Such evidentiary rulings are reviewed for abuse of discretion. *See McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007).

B. The District Court Abused its Discretion in Excluding the Declarations of Eric S. Rossman and Dr. Daniel Reisberg, Ph.D.

Before addressing the merits of SLRMC's summary judgment motion, the District Court first considered SLRMC's objection to the three declarations submitted by W.G.G. in opposition thereto: from his mother Cyndi Gomersall, his counsel of record Eric S. Rossman, and Dr. Daniel Reisberg, Ph.D., an expert in memory issues. (R. 122-124.)

The District Court declined to consider the Rossman and Reisberg declarations, deeming them irrelevant because W.G.G. failed "to establish that the legislative purpose behind I.C. § 5-230 was to protect against memory loss." (R. 123-124.)[1]

[1] Procedurally, it should be noted that SLRMC objected to this memory evidence for the first time in its reply brief supporting its Motion for Summary Judgment (R. 107-110), after W.G.G. had submitted its lone brief opposing such motion.

The District Court thus ruled that the only way W.G.G. could establish the relevancy of evidence of memory issues vis-à-vis § 5-230 was to establish that the legislative purpose of such statute was to protect against failing memories. The District Court, however, cited no authority supporting this limited view and abused its discretion in so ruling.

In opposing summary judgment, W.G.G. introduced evidence regarding memory and its role in limitations periods because such argument was advanced by SLRMC. SLRMC argued to the Court that "it is important to remember the purpose of these statute [of limitations]" before quoting the Rhode Island Supreme Court:

> It is eminently clear that statutes of limitations were intended to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard for want of seasonable prosecution. They are, to be sure, a bane to those who are neglectful or dilatory in the prosecution of their legal rights. 1 Wood, Limitation of Actions, § 4, p. 8. As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim **against a party who is left to shield himself from liability with nothing more than tattered or faded memories**, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are of value are not usually left to gather dust or remain dormant for long periods of time.

Wilkinson v. Harrington, 243 A.2d 745, 752 (R. I. 1968) (emphasis added). This passage from *Wilkinson* was later quoted by the Idaho Supreme Court in *Renner v. Edwards*, 93 Idaho 836, 838, 475 P.2d 530, 532 (1970), meaning that the Idaho Supreme Court recognizes faded memory as a concern justifying limitations periods.

At oral argument, counsel for SLRMC explicitly advanced its memory argument and noted the concern for "faded memories" as part of the underlying policy rationale undergirding § 5-230:

> The Court: What evidence do I have of the purpose behind it in this case?
>
> Ms. Fouser: "Well, you have case law. *Jones v. State Board of Medicine*, "The statute of limitations are founded in the soundness of principles of public policy. Their existence stimulates the bringing of actions within the designated time limits when events and circumstances are still fresh in the minds of the party."
>
> After that case you have the case of *Renner v. Edwards* that basically they talk about, "The statutes are predicated on the reasonable and fair presumption that valid claims, which are of value, are not usually left to gather dust or remain dormant for long periods of time." They talk about not only faded memories, but they want to protect misplaced or discarded recordings or missing or deceased witnesses.
>
> *Wadsworth v. Department of Transportation*, "Statutes of limitations are designed to promote stability and avoid uncertainty with regard to future legislation."
>
> So our Idaho Supreme Court has already told us they understand the purpose behind statute of limitations and that they find, they acknowledge and they approve of that purpose. . . .

(Tr., 12:25-13:24 (emphasis added).)

Indeed, courts in extensive and diverse jurisdictions have treated as axiomatic the principle that concerns regarding faded memories provide a policy rationale underlying limitations periods. *See, e.g., G & G Prods., LLC v. Rusic*, 902 F.3d 940, 946 (9th Cir. 2018) ("Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."); *Priester v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667, 674 (5th Cir. 2013)

("Without a limitations period, a defendant would be forced to defend himself after memories have faded, witnesses have died or disappeared, and evidence has been lost, all of which would prejudice his defense."); *Aicher v. Wisconsin Patients Compensation Fund*, 237 Wis. 2d 99, 116 (Wis. 2000) ("Statutes of limitation promote fair and prompt litigation and protect defendants from stale or fraudulent claims brought after memories have faded or evidence has been lost."); *McDonough v. Anoka Cnty.*, 799 F.3d 931, 943 (8th Cir. 2015) ("Furthermore, faded memories and time-lost evidence pertaining to the disclosure, obtainment, or use of data are the types of considerations that statutes of limitation are intended to address.")

SLRMC's oral and written citation to the Supreme Courts of both Idaho and Rhode Island opining that "tattered and faded memories" form a part of the policy rationale underlying statutes of limitations rendered W.G.G.'s submission of responsive memory evidence relevant. Given such clear advancement of the argument by SLRMC, the District Court abused its discretion in excluding the rebuttal memory evidence submitted by W.G.G. Such evidence should have been considered by the District Court and provides an independent, threshold basis to remand this matter to the District Court for further proceedings.

C. The District Court Erred in Deeming Idaho Code § 5-230 Constitutional.

The heart of this appeal is the District Court's determination that Idaho Code § 5-230 passes constitutional muster. The District Court noted that "whether § 5-230 is facially unconstitutional is a matter of first impression in Idaho." (R. 7.) W.G.G. advanced two theories upon which § 5-230 is unconstitutional: the procedural guarantee to access the courts and equal protection. The District Court erred in rejecting both arguments.

Two Idaho statutes work in tandem to create the eight-year limitations period for minors to assert medical negligence claims, which the District Court applied to dismiss W.G.G.'s claim in this case. First, § 5-219(4) creates a two-year limitations period for all claims of professional negligence, including medical negligence. Secondly, § 5-230 tolls limitations periods for a maximum of six years for any legal disability, including minority and insanity, thus granting minors at most an eight-year period to assert a claim of medical negligence before such claim is forever barred, regardless of whether the minor reaches the age of majority during such time period. It is axiomatic, however, that under Idaho law a minor is not legally competent; that is, a minor lacks the legal ability to enter into contracts or file lawsuits. *See* Idaho R. Civ. P. 17(c) (minor may not sue or defend independently as a representative is required to "sue or defend on behalf of a minor or an incompetent person").

1. "Facial" and "As-Applied" Constitutionality Challenges.

A party may challenge a statute as unconstitutional "on its face" or "as applied" to the party's conduct. *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003). A facial challenge to a statute or rule is "purely a question of law." *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). Generally, a facial challenge is mutually exclusive from an as applied challenge. *Korsen*, 138 Idaho at 712, 69 P.3d at 132. For a facial constitutional challenge to succeed, the party must demonstrate that the law is unconstitutional in all of its applications. *Id.* In other words, "...the challenger must establish that no set of circumstances exists under which the [law] would be valid." *Id.* In contrast, to prove a statute is unconstitutional "as applied", the party must only show that, as applied to the defendant's conduct, the statute is unconstitutional. *Korsen*, 138 Idaho

at 712, 69 P.3d at 132. A district court should not rule that a statute is unconstitutional "as applied" to a particular case until administrative proceedings have concluded and a complete record has been developed. I. C. § 67-5277 (judicial review of disputed issues of fact must be confined to the agency record for judicial review); *Lindstrom v. Dist. Bd. Of Health Panhandle Dist. I*, 109 Idaho 956, 712 P.2d 657 (1985) (court engaged in an "as applied" analysis because no factual issues remained).

In this case, W.G.G. challenged § 5-230 as being facially unconstitutional, which requires unconstitutionality in all applications. Though not raised by SLRMC or the District Court, W.G.G. recognizes at this juncture that § 5-230 has no impact on minors over the age of twelve because such minors, being less than six years from obtaining the age of majority, enjoy the full benefit of limitations periods once reaching the age of majority by virtue of § 5-230's six years of tolling. Accordingly, in this brief "minor" will refer to those minors under the age of twelve.

Thus, W.G.G.'s challenge to § 5-230 is best characterized as an "as-applied" challenge in the context of all minors under the age of twelve when their cause of action accrues. For such minors the limitations period applicable to their claims will begin to run prior to the minor reaching the age of majority. Normally, a full factual record is required before deciding an "as-applied" challenge. But where, as here, no factual issues remain in dispute, it is appropriate to engage in "as-applied" analysis. *Lindstrom*, 109 Idaho 956, 712 P.2d 657.

2. Idaho Code § 5-230 Violates a Minor's Procedural Guarantee of Access to the Courts.

a. *Article I, Section 18 of the Idaho Constitution.*

The right of Idaho citizens to access the courts is enshrined in Article I, Section 18 of the Constitution of the State of Idaho:

> JUSTICE TO BE FREELY AND SPEEDILY ADMINISTERED. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice.

Thus, by its plain language, Article I, Section 18 guarantees to "every person" in Idaho a "speedy remedy . . . for every injury of person, property or character . . ." The District Court recognized the problem with § 5-230 in relation to Article I, Section 18: "under Idaho law, a minor may not bring an action on his or her own behalf, but rather must file through a parent, guardian, or guardian *ad litem*. Plaintiff points out that if this third person fails to timely file the minor's claim, the minor has no way to access the court." (R. 8.)

Analysis of Article I, Section 18 begins with *Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765 (1944), *overruled on other grounds, Doggett v. Boiler Engineering & Supply Co.*, Inc., 93 Idaho 888, 477 P.2d 511 (1970), described as "seminal" by this Court: "In *Moon* this Court refused to interpret art. 1, § 18, as guaranteeing a remedy to every person for every injury. . . . We thus approved in *Moon* the holding that art. 1, § 18, merely admonishes the Idaho courts to dispense justice and to secure citizens the rights and remedies afforded by the legislature or by the common law, and that art. 1, § 18, did not create any substantive rights." *Hawley v. Green*, 117 Idaho 498, 500-501, 788 P.2d 1321, 1323-1324 (1990).

Utilizing this rationale, the *Hawley* decision ruled that I. C. § 5-219(4)'s "objectively ascertainable" standard for "some damage" to trigger the running of the statute of limitations in medical malpractice actions did not violate Article I, Section 18. *Hawley*, 117 Idaho at 500-501, 788 P.2d at 1323-1324. This Court has thus clearly established the right of the legislature to set limitations on actions and even to abolish common law rights of action without violating Article I, Section 18. *See Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 717 (1990) ("A statute placing limitations on remedies does not contradict the provision of the Idaho Constitution that courts of justice shall be open to every person and a speedy remedy afforded for every injury of person."); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977) (ruling that the legislature clearly has the power to abolish or modify common law rights and remedies); *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982) (It is well established that the "open courts" provision governing access to courts of justice does not prohibit the legislature from abolishing or modifying a common-law right of action).

By ruling in *Olsen* that limitations periods do not "contradict" Article I, Section 18, this Court recognized that Article I, Section 18 is not utterly devoid of meaning. Indeed, no decision of this Court has declared thusly. Accordingly, there remains a "lower bound" of access to the courts of the State of Idaho by its citizens which remains protected by Article I, Section 18, namely a "speedy remedy . . . for every injury of person, property or character . . .", within the limitations and parameters set by the Idaho legislature.

That is, while Article I, Section 18 creates no substantive rights to certain specific limitations periods, remedies, or exhaustion requirements, or a lack thereof, Article I, Section 18 firmly guarantees to all Idahoans a procedural right to access the courts to remedy "every injury of person, property, or character." Presumably, it is axiomatic that the courts in Idaho cannot simply fold up shop, cease all operations entirely, and decline to offer Idahoans any remedy for "injury of person, property or character" without violating Article I, Section 18.

b. *The States of Texas, Alaska, Missouri, Arizona, and Ohio Ruled that the "Open Courts" Provisions in their Respective State Constitutions Means that a Minor's Claim Cannot be Barred Prior to Reaching the Age of Majority.*

W.G.G. cited as compellingly persuasive authority decisions of the supreme courts of Texas, Alaska, Missouri, Arizona, and Ohio ruling that a minor's procedural right to access the courts is infringed when a limitations period runs prior to reaching the age of majority. The Texas Supreme Court ruled:

> A child has no right to bring a cause of action on his own unless the disability has been removed. If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided by article 5.82, the child is precluded from suing his parents on account of their negligence, due to the doctrine of parent-child immunity. 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 by article 5.82. . . . Therefore, we declare the limitations provision of article 5.82, section 4, to be in violation of article I, Section 13 of the Texas Constitution

Sax v. Votteler, 648 S.W.2d 661, 666-667 (Tex. Sup. Ct. 1983); *see also Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. Sup. Ct. 1995) (affirming *Sax* and noting that "[w]e fail to see any benefit

in requiring a minor to show that his or her parent was incompetent or failed to act in the minor's best interests by not pursuing a medical malpractice claim, especially when the very failure of the parent to do so leaves the minor without any legal recourse").

The Alaska Supreme Court reached the same conclusion:

> Although minors possess an independent right of access to the courts, that right can only be exercised during their minority through the diligence of others . . . [t]herefore, whether or not minors are able to exercise their right of access during the period of time mandated under subsection .140(c) depends upon good fortune. While many, perhaps even most, minors have diligent parents or guardians, not all minors are so lucky . . . By forfeiting the personal injury claims of minors injured before the age of eight after their tenth birthdays, subsection .140(c) effectively closes the courthouse doors to minor unfortunate enough to have parents or guardians who fail to diligently pursue their rights . . . it would be fundamentally unfair to a minor to saddle the minor with the consequences of a custodian's neglect. . . . We therefore conclude that when subsection .140(c) forecloses a minor's personal injury claim because his or her parents or guardians have failed to timely file suit it violates the minor's procedural due process right of access to the courts. We are not alone in this determination. The state supreme courts of Arizona, Ohio, Missouri and Texas have all held similar statutory schemes unconstitutional on the ground that they violate their state's constitutional guarantee of access to the courts. We stand with these other courts today in declaring that the State cannot lightly close the courthouse doors to minors.

Sands v. Green, 156 P.3d 1130, 1134-1136 (Alaska Sup. Ct. 2007).

The Missouri Supreme Court ruled likewise:

> The fact of the matter is that for most minors the opportunity to pursue a common law cause of action for injuries sustained from medical malpractice is one that is inextricably linked to the diligence and willingness of their parents to act in a responsible and timely manner . . . we think it is equally unreasonable to expect a minor, whose parents fail to timely vindicate his legal rights, to independently seek out another adult willing to serve as a next friend. Such an expectation would ignore the realities of the family unit and the limitations of youth. . . . as applied to minors, [§ 516.105] violates their right of access to our courts under [Article I, Section 14 of the Missouri Constitution] . . . To the extent that it deprives minor medical malpractice claimants the right to assert their own claims individually, makes them

> dependent on the actions of others to assert their claims, and works a forfeiture of those claims if not asserted within two years, the provisions of § 516.105 are too severe an interference with a minors' state constitutionally enumerated right of access to the courts to be justified by the state's interest in remedying a perceived medical malpractice crisis. Our society takes great pride in the fact that the law remains forever at the ready to jealously guard the fights of minors. [Section 516.105] arbitrarily and unreasonably denies them a set of rights without providing any adequate substitute course of action for them to follow. We consider [Section 516.105], as it pertains to minors, a statutory aberration which runs afoul of our state Constitution and we accordingly hold it constitutionally infirm

Strahler v. St. Luke's Hosp., 706 S.W.2d 7, 10 (Mo. Sup. Ct. 1986).

As did the Arizona Supreme Court:

> While the vast majority of claims on behalf of injured minors will still be brought within a relatively short time after the injury occurs, this all depends upon good fortune; the minor himself is helpless, particularly when under ten years of age. The minor possess a right guaranteed by the constitution, but cannot assert it unless someone else, over whom he has no control, learns about it, understands it, is aware of the need to take prompt action, and in fact takes such action. . . . . a statute which requires a minor injured when below the age of seven to bring the action by the time he reaches the age of ten – regardless of his ability to do so, and without concern for the nature of his adult – caretakers – does not provide reasonable alternatives. The statute abolishes the action before it reasonably could be brought, in violation of the fundamental constitutional right guaranteed by article 18, § 6.

Barrio v. San Manuel Div. Hosp. for Magma Copper Co., 692 P.2d 280, 285-286 (Ariz. Sup. Ct. 1984).

The Ohio Supreme Court followed suit:

> The usual response to this conclusion is that a minor's parent or guardian may sue for, and on behalf of, the child. We find such a suggestion to be troublesome for several reasons. First, because of the inability of many children to recognize or articulate physical problems, parents may be unaware that medical malpractice has occurred. Second, the parents themselves may be minors, ignorant, lethargic, or lack the requisite concern to bring a malpractice action within the time provided by statute. Third, there may effectively be no parent or guardian, concerned or otherwise, in the minor's life. For example, children in institutions, foster homes,

> and wards of court or others are provided no safeguards, nor do such minors have the requisite ability to seek redress or to protect personal interests. . . . [W]e find it unrealistic to expect that children would seek redress against their parents as willingly as against the parties who are alleged to be medically negligent . . . A claim for parental negligence in this context would necessitate proof that there was merit to the underlying claim of medical malpractice. Thus, under such circumstances, litigation of the purportedly stale claims would still be required. As a result, R.C. 2305.11(B) would not advance its ostensible goal of preventing stale claims. Finally, if parents are faced with the prospect of a possible lawsuit for failure to timely file a medical malpractice claim, they may feel obligated to commence an action on behalf of the child in order to preserve a purely speculative claim, regardless of its merit . . . we hold that R.C. 2305.11(B) is unconstitutional as applied to minors under the due course of law provisions of the Ohio Constitution.

Mominee v. Scherbarth, 503 N.E.2d 717, 721-722 (Ohio Sup. Ct. 1986).

These decisions from Texas, Alaska, Missouri, Arizona and Ohio recognized and rejected the fundamental, inherent injustice present in Idaho in deeming a minor's claim time-barred prior to reaching the age of majority. Some minors are fortunate enough to have attentive parents sufficiently sophisticated to assert claims on their behalf, but many minors are not so fortunate. One need not stretch the imagination to realize the harm done to minors by deeming their claims time-barred prior to reaching the age of majority. Idaho minors in institutions, orphanages, or foster homes would be unlikely to have a competent adult ready and willing to pursue a claim on their behalf. Parents of minors could be minors themselves, dilatory in pursuing a claim on behalf of a minor, or even in good faith be ignorant of the process. A parent or guardian could outright refuse to pursue a minor's valid claim, placing a minor potentially as young as four or five years old in the sadly ironic position of having to go to court to have a guardian appointed in order to pursue a tort claim in court, or even attempt to bring a lawsuit against their parents upon reaching the age

of majority. It is supremely unjust to place the consequences of any of these factors solely on a minor with a valid claim. Effectively, in Idaho a minor has no manner to bring a claim where a parent does not do so for whatever reason, thereby barring the minor entirely from accessing the courts.

Indeed, this Court has explicitly recognized these policy issues which troubled the Supreme Courts of Texas, Alaska, Missouri, Arizona and Ohio. In *Doe v. Durtschi*, 110 Idaho 466 , 716 P.2d 1238 (1986), this Court considered whether § 5-230 tolls the time for a minor to file notice under the Idaho Tort Claims Act. This Court was not reserved in recognizing the fundamental unfairness of requiring minors to assert their own claims:

> The consequences of failing to apply Idaho's tolling statute -- I.C. § 5-230 -- to notice requirements for the minor litigant are immediate, severe, and incongruous with the policy of § 5-230. Minors lack the judgment, experience, and awareness to protect their rights with appropriate, timely civil action; they also lack the ability to appear in court on their own behalf. I.C. § 5-306. To strictly apply the notice requirement to minors would inevitably result in the elimination of meritorious and justified claims, through no fault of the innocent minors. The notice requirement would accomplish this elimination just as surely and completely as would a running statute of limitation. Thus, it makes no sense to toll a statute of limitation because of the injured party's minority, while at the same time require that party to provide notice of his or her claim within 120 days. *See Turner v. Staggs*, 89 Nev. 230, 510 P.2d 879, 881 (1973), *cert. den.* 414 U.S. 1079, 94 S.Ct. 598, 38 L.Ed.2d 486 ("The requirement of giving notice presupposes the existence of an individual capable of giving it."); *McCrary, supra*, 482 S.W.2d at 153 ("[P]ersons of tender years . . . are powerless to comply with such conditions."); *Lazich v. Belanger*, 111 Mont. 48, 105 P.2d 738, 739 (1940) ("It would be unreasonable to require that to be done which plaintiff was incapable of doing."); cf. *Callister, supra*, 97 Idaho at 66, 539 P.2d at 994 (Bakes, J., dissenting) ("To hold [that the general tolling statute tolls statute of limitations but not the notice of claim statute] would be to reach the ridiculous conclusion that a 10 year old injured by a governmental entity must file his notice of claim within 120 days of his injury, but then, because I.C. § 5-230 will toll the running of the statute during his minority, may wait the remaining 8 years of his minority before initiating suit in the district court.").

Id. at 476, 716 P.3d at 1248 (emphasis added).

This Court was not persuaded in the least by the premise that a third party, such as a parent or guardian, may assert claims on behalf of a minor:

> Minors should not have to rely upon others to protect their rights. The Washington Court of Appeals stated:
>
> > [I]t 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. 43 C.J.S. INFANTS § 19 (1945). The legislature recognized this when it inserted the provision in RCW 4.96.020 allowing a relative, agent or attorney to file a claim on behalf of the minor. However, . . . his 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.

Id. This Court went on to cite another example, discussed in *Ind. Sch. Dist. of Boise City v. Callister*, 97 Idaho 59, 539 P.2d 987 (1975), of the fundamental unfairness of requiring minors to assert their claims prior to reaching the age of majority:

> If it were otherwise, as Justice Bakes noted, even children orphaned by automobile accidents would be required to file notice, or otherwise be deprived of their access to the courts:
>
> > It cannot be seriously asserted that children in such circumstances are capable of protecting their interests or that there will be a party available who can protect the children's interest by filing a notice of claim within 120 days. I cannot believe the legislature intended to prevent such claimants from bringing their action by non-compliance with the notice of claim statute.

Durtschi, 110 Idaho at 477-478, 716 P.2d at 1249-1250.

Admittedly, the *Durtschi* court did not wrestle with the constitutional issues surrounding the fact that § 5-230 does not toll claims until minors reach the age of majority, but that issue was not presented to the Court on appeal, only the question of whether § 5-230 applied to tort claim notices. There is no reason whatsoever to think that the numerous concerns regarding requiring minors to assert their own claims identified by this Court apply to some sub-set of minors but not to others. The Court's reasoning in *Durtschi* is sound, harmonious with the reasoning of the supreme courts of Texas, Alaska, Missouri, Arizona and Ohio, and appropriately followed.

c. *The District Court Erred in Conflating Permissible Regulation of Causes of Action with Impermissible, Wholesale Abrogation of a Minor's Cause of Action to Seek Redress of Sustained Injury.*

The District Court justified ignoring the incredibly strong policy reasons to not bar a minor's claim prior to reaching the age of majority, as well as the compelling precedent of the Supreme Courts of Texas, Alaska, Missouri, Arizona and Ohio, on the premise that "unlike these other states, Idaho's open courts provision does not confer a substantive due process right upon its citizens. . . . In other words, the open court provision of Idaho's constitution is a procedural guarantee that does not place substantive limits on the legislature's ability to enact laws." (R. 8-9.)

The District Court is not wrong in recognizing that there exists a divergence in the level of protection afforded by "open courts" provisions from state to state, given that there is no explicit federal "open courts" provision in the United States Constitution. Chief Justice Phillips of the Texas Supreme Court helpfully discussed this divergence in detail:

Although there is no similar provision in the federal constitution, a majority of state constitutions contain substantially identical guarantees. These guarantees are also variously known as remedy, certain remedy, right to remedy, remedy for injury, access to courts and open access to courts provisions.

. . .

While it is universally agreed that the open courts provision guarantees a right of access to the courts, there is great divergence among the various states regarding the extent, if any, to which it accords constitutional protection to existing substantive remedies. *See* MCGOVERN, THE VARIETY, POLICY AND CONSTITUTIONALITY OF PRODUCT LIABILITY STATUTES OF REPOSE, 30 Am. U. L. Rev. 579, 615-18 (1981); NOTE, CONSTITUTIONAL GUARANTEES OF A CERTAIN REMEDY, 49 Iowa L. Rev. 1202 (1964); NOTE, CONSTITUTIONAL LAW - DUE PROCESS - IMPAIRMENT OF CONTRACTS - VALIDITY OF STATE STATUTE ABOLISHING ACTIONS FOR ALIENATION OF AFFECTIONS AND CRIMINAL CONVERSATION, 22 Minn. L. Rev. 104 (1937).

In many states, for example, the provision is nothing more than a procedural guarantee of judicial availability. *See, O'Quinn v. Walt Disney Productions, Inc.*, 177 Col. 190, 195, 493 P.2d 344, 346 (1972); *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 24, 644 P.2d 341, 346 (1982); *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d at 594 (Ind. 1980); *Prendergast v. Nelson*, 199 Neb. 97, 103-06, 256 N.W.2d 657, 663-65 (1977); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 279-81, 382 A.2d 715, 720-21 (1978).

A greater number of states, however, appear to place some substantive restrictions on the legislature's authority to abolish or restrict well-established remedies and defenses, particularly common law causes of action. SEE COMMENT, SECTION 13: CONSTITUTIONAL ARMOR FOR THE COMMON LAW, 35 Ala. L. Rev. 127, 138-39 (1984); NOTE, CONSTITUTIONAL GUARANTEES, 49 Iowa L. Rev, at 1205-06. This restriction appears to be absolute only in those few states which also constitutionally forbid any legislative restriction on damages. See, e.g., ARIZ. CONST. art. 18, § 6; KY. CONST. § 54. WYO. CONST. art. 10, § 4. Other states require, in one form or another, a judicial balancing of the individual right to assert a recognized remedy with the public necessity for abrogating or restricting that right.

Lucas v. United States, 757 S.W.2d 687, 715 (Dissent; Phillips, Chief J.) Chief Justice Phillips' analysis is consistent with this Court's interpretation of Article I, Section 18. That is, that Article I, Section 18 provides a "procedural guarantee of judicial availability." Idaho, unlike some other states, have declined to go further and place "substantive restrictions on the legislature's authority to abolish or restrict well-established remedies and defenses, particularly common law causes of action." It is thus fair to say that all states' "open courts" provisions, including Idaho, Texas, Alaska, Missouri, Arizona and Ohio, provide a minimum "procedural guarantee of judicial availability". It is simply the case that some states' "open courts" provisions, unlike Idaho, go even further and substantively restrict the ability of the legislature with regards to abolishing or limiting common law causes of action.

The District Court's analysis and dismissal of the decisions presented to it from Texas, Alaska, Missouri, Arizona and Ohio is erroneous because W.G.G. does not seek a substantive right under Article I, Section 18. Rather, W.G.G. seeks to avail himself of the procedural guarantee of access to the courts to remedy his "injury of person". This right has undisputedly been wholly abrogated and made unavailable to him by operation of § 5-230, which barred his claim prior to reaching the age of majority and becoming legally competent to pursue it. W.G.G. does not argue the unconstitutionality of the two-year limitations period applicable to medical malpractice claims, or the "some damage" rule, or the "local standard of care" rule, or the non-economic damages cap, or any other substantive rule applicable to the bringing of medical malpractice claims in Idaho. W.G.G. simply argues that he has been denied access to the courts in the first instance, full stop, in violation of Article I, Section 18.

For this reason the precedent from Texas, Alaska, Missouri, Arizona and Ohio cannot be differentiated and dismissed, as the issue presented in those cases was identical to that argued by W.G.G.: whether a limitations period wholly barring a minor from accessing the courts prior to his reaching the age of majority violated the procedural guarantee of access to the courts protected by the states' respective "open courts" provisions. Even though those states go further and provide greater restrictions than Idaho regarding the legislature's ability to substantively abolish common law claims and defenses, no consideration of a substantive right was at issue in the Texas, Alaska, Missouri, Arizona and Ohio cases cited herein, just as W.G.G. does not argue his entitlement to a substantive right. Accordingly, the District Court erred in its rejection and dismissal of the compelling authority from Texas, Alaska, Missouri, Arizona and Ohio.

The authority cited by the District Court supporting the premise that Article I, Section 18 provides no substantive rights (R. 8-9) is thus unhelpful, as W.G.G. does not dispute this point. W.G.G. recognizes that Article I, Section 18 provides no substantive rights, indeed he does not seek vindication of any such substantive right, only his procedural guarantee of judicial availability.

The District Court cited *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 108 P.3d 392 (2005), a wrongful death case in which two entities who did not directly employ the decedent argued that they were the decedent's statutory employers for purposes of gaining the protections of the exclusive remedy set forth in Idaho Worker's Compensation Act, I. C. § 72-223. *Id.* at 248, 108 P.3d at 395. This Court affirmed the summary judgment decision determining that the entities

were the statutory employers of the decedent, thereby precluding wrongful death claims against them based on the exclusive remedy doctrine. *Id.* at 249-251, 108 P.3d at 396-398.

Inter alia, the decedent's estate argued that the Worker's Compensation exclusive remedy violated the "remedy clause" of Article I, Section 18 of the Idaho Constitution. *Id.* at 251-253, 108 P.3d at 398-400. The "remedies" claim was that the worker's compensation exclusive remedy "unconstitutionally limits the Venters' remedies to which they are entitled." *Id.* In rejecting this argument, the Supreme Court noted that "Art. 1, § 18 merely admonishes Idaho courts to dispense justice and to secure citizens the rights and remedies afforded by the legislature or by the common law, and did not create any substantive rights." *Id* (citing *Hawley v. Green*, 117 Idaho 498, 500-01, 788 P.2d 1321, 1323-24 (1990)). The Venters were arguing that the remedy available to the them, the Worker's Compensation exclusive remedy, was inadequate and they sought a different remedy. Denial of such argument fits squarely with this Court's precedent that Article I, Section 18 creates no substantive rights to any specific remedy of a claimant's choosing. W.G.G.'s case clearly differs, however, because he is not arguing that a remedy available to him is inadequate or infirm; rather W.G.G. is arguing his complete and total lack of any available remedy to redress his sustained injury.

The District Court also cited *Hawley*, *supra*, for the premise that Article I, Section 18 creates no substantive rights and that I. C. § 5-219(4)'s "objectively ascertainable" standard for "some damage" in order to trigger the running of the statute of limitations in medical malpractice actions does not violate Article I, Section 18. Again, W.G.G. does not contest the legislature's ability to regulate available remedies without running afoul of Article I, Section 18.

The District Court's citation to *Venters* and *Hawley* serves to highlight its error. The dispositive distinction in this matter is that between regulation and abrogation. W.G.G. readily concedes the power of the Idaho legislature to regulate available causes of action and remedies through exhaustion requirements, exclusive remedies, damages caps, and statutes of limitation. Exhaustion requirements, exclusive remedies, damages caps, and limitations periods do not, however, wholly preclude a claimant's right to assert claims; rather, these mechanisms are simply limitations and conditions precedent on when and how the claim must be asserted.

What the legislature may not do, however, is wholly abrogate an individual's right to access the courts to seek a remedy "for every injury of person, property or character" as guaranteed by Article I, Section 18. In order for Article I, Section 18 to not be a complete legal nullity or fiction, it must provide some guarantee to the citizens of Idaho regarding their ability to access the courts, within the limitations and parameters as enacted by the legislature. It is this wholesale denial of access to the courts, rather than a limitation placed on an available remedy, challenged by W.G.G. as constitutionally infirm. The issue is not that W.G.G. dislikes his available remedy; the courts of Idaho are simply not open to W.G.G. to seek redress for his personal injury caused by SLRMC's medical negligence, in any form or fashion, in direct violation of Article I, Section 18.

Justice Bistline, in his dissent in *Theriault v. A.H. Robins Co.,* a case which dealt with the discovery rule for the triggering of limitations periods set forth in I. C. § 5-219(4), explicitly recognized the difference between abrogating the rights of individuals to seek redress for injury, and limiting such rights. In recognizing such distinction, Justice Bistline approvingly cited *Barrio*, *supra*:

In *Barrio v. San Manuel Division Hosp. of Magma Copper*, 143 Ariz. 101, 692 P.2d 280 (1984), the Arizona Supreme Court addressed the issue of whether the Arizona legislature could require a minor injured under the age of seven years to bring his or her action for damages before reaching the age of ten. See A.R.S. § 12-564(d). Noting that the legislature could properly regulate the time within which a plaintiff must bring his or her cause of action, it held that under art. 18, § 6 of the Arizona Constitution (which prohibits the abrogation of the right of action to recover damages for injury), this attempt by the legislature constituted an abrogation of the right to seek damages for injury. *Barrio, supra*, 692 P.2d at 286. Therefore, the limit was held unconstitutional. The court further set down the test for differentiating between valid regulatory statutes of repose and those which are invalid attempts at abrogating a person's right to seek damages for injuries suffered. The test is as follows:

> "If [the statute] . . . were to be construed as taking away the right to pursue the constitutional action of negligence without granting a reasonable election to all persons entitled thereto, it would indeed be unconstitutional.
> . . .
>
> *Ruth v. Industrial Commission*, 107 Ariz. [572,] at 575, 490 P.2d [828], at 831 quoting from *Moseley v. Lily Ice Cream Co.*, 38 Ariz. 417, 421, 300 P. 958, 959 (1931) (emphasis added in Ruth).
>
> . . . .
>
> . . . The legislature may regulate the cause of action for negligence so long as it leaves a claimant reasonable alternatives or choice which will enable him or her to bring the action. It may not, under the guise of "regulation," so affect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action. *Barrio, supra*, 692 P.2d at 285 (emphasis added).

The conclusion of the Arizona Supreme Court in *Barrio* is in harmony with what Id. Const. art. I, § 18 requires: a plaintiff should not be precluded from seeking redress for a wrong before he or she has had a reasonable opportunity to do so.

108 Idaho 303, 311-312, 698 P.2d 365, 373-374 (1985). Justice Bistline is correct in that while Article I, Section 18 permits limitation and regulation of causes of action, a plaintiff cannot be

wholly precluded from accessing the courts to seek remedy for "every injury of person, property or character." This is precisely the argument advanced by W.G.G. in this case; § 5-230 does not merely, permissibly regulate his negligence claim, it wholly abrogates it and gives him no opportunity to assert it whatsoever.

d. *The Rational Basis Test is Inapplicable to W.G.G.'s "Open Courts" Claim, but Nonetheless there Exists no Rational Basis to Wholly Bar Claims of a Minor Prior to Reaching the Age of Majority.*

The District Court alternatively ruled that even if Article I, Section 18 conveys substantive rights, § 5-230 satisfies the rational basis test. (R. 9-13.) As set forth *supra*, however, W.G.G. recognizes the clear authority of this Court that Article I, Section 18 conveys no substantive rights, but will nonetheless address the rational basis argument to the extent the Court finds it germane to W.G.G.'s argument that § 5-230 denies him his procedural guarantee of judicial availability to redress sustained injury.

As a threshold matter, it should be noted that the District Court, without citing authority, simply applied substantive due process standards to analyze an "open courts" challenge based on Article I, Section 18. This Court, however, has not articulated such standard of review as applicable to statutory challenges based on Article I, Section 18. For example, in *Hawley* the Court simply concluded that "the trial court did not err in holding that I.C. § 5-219(4) does not violate art. 1, § 18, of the Idaho Constitution." 117 Idaho at 501, 788 P.2d at 1324. *Hawley* did not analyze whether it applied well-known tests of constitutionality such as rational basis or strict scrutiny. Similarly, in *Jones, supra*, this Court simply ruled that "[n]othing in Art. I, § 18 either explicitly or implicitly

prohibits legislative modification of common law actions", with no explicit application of a rational basis or strict scrutiny test. 97 Idaho at 864, 555 P.2d at 404. Likewise in *Twin Falls, supra*, in rejecting the argument that Article I, Section 18 precludes abolition of a common law cause of action, this Court stated only that it "has previously rejected such a construction in *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977), and we continue to adhere to that decision", again with no mention of any rational basis or strict scrutiny test. 103 Idaho at 24, 644 P.2d at 346. In *Venters*, this Court rejected the "remedies" challenge with no rational basis or strict scrutiny analysis:

> First, Art. 1, § 18 merely admonishes Idaho courts to dispense justice and to secure citizens the rights and remedies afforded by the legislature or by the common law, and did not create any substantive rights. *Hawley v. Green*, 117 Idaho 498, 500-01, 788 P.2d 1321, 1323-24 (1990). Second, the Venters have not raised any argument that would question the legislature's policy decision to provide certain immunities that limit access to the courts to claimants as a trade-off to providing claimants sure and certain relief through the Act. Thus, this Court rejects the Venters' constitutional challenges to the statute.

141 Idaho at 252, 108 P.3d at 399.

Thus, the best conclusion that can be reached based on available Idaho law is that a challenge to a statute as violative of the "open courts" provision, Article I, Section 18, is governed by a simple analysis of whether the statute denies a citizen of Idaho their guaranteed procedural right to access the courts to seek a remedy for "every injury of person, property or character." Such position is in harmony with the decisions of the Texas, Alaska, Missouri, Arizona and Ohio supreme courts, *supra*, which all ruled that the limitations statutes barring minor's claims prior to reaching the age of majority simply violated the states' respective "open courts" provisions,

without application of standard due process tests such as rational basis or strict scrutiny. For the reasons set forth *supra*, § 5-230 violates Article I, Section 18.

To the extent this Court agrees with the District Court that a rational basis test is appropriate, § 5-230 fails to pass muster. Section 5-230's original version was found in Section 170 of the 1881 Code of Civil Procedure and it tolled limitations periods until the disability, including being a minor, "is not a part of the time limited for the commencement of the action." Section 170 was re-codified, unchanged, at § 4070 of the 1887 Revised Statutes of Idaho, 1908 Revised Code, and the 1918 Compiled Laws. Section 4070 was re-codified, unchanged, at § 6623 of the 1919 Compiled Statutes. Section 6623 was re-codified, unchanged, at § 5-230 of the 1932 Idaho Code, Annotated.

Then, in 1976, after being unchanged for nearly a century, House Bill No. 476 proposed to amend § 5-230 to its present form, permitting tolling of limitations periods based on a disability, including minority, insanity, and incarceration, for a maximum of six years. 1976 SESSION LAWS, C. 276. The Statement of Purpose/Fiscal Note for House Bill No. 476 sheds little policy light on the proposed amendment:

> The same reasons which originally led to enactment of statutes limiting the times within which certain lawsuits could be brought now demand a tightening of some of the exceptions to those statutes of limitations.
>
> This bill would provide that the running of the limitation period shall not be tolled for more than six years on account of disabilities such as minority or incompetence of the potential plaintiff or by the defendant's absence from the jurisdiction or for any other reason. It would not, however, affect Section 5-213, Idaho Code, having to do with the statute of limitations for actions affecting real property.

> This bill would have no fiscal impact except insofar as the load of the courts might be affected by reduction of the number of very late filings of lawsuits.

STATEMENT OF PURPOSE/FISCAL NOTE HOUSE BILL NO. 476, 1976 RS 0937. No reason is given necessitating a "tightening of some of the exceptions to those statute of limitations" and no fiscal impact is noted except for a potentially reduced case load for the courts, a natural consequence of shortening a limitations period. Notably absent is any compelling discussion addressing the myriad concerns, raised by this Court in *Durtschi*, created by wholly barring minors' claims prior to reaching the age of majority.

A bit more light is shed by the minutes of the House Health and Welfare Committee. Mr. Thomas explained that the

> problems which arise are that people bring suit for many years later, causing the "tail of the risk" for insurance companies. These incidents require insurance companies to reserve money for many years after an insurance policy has expired, causing increased premiums. . . . no excuse should stop the running of the Statute of Limitations for more than six years.

HOUSE HEALTH AND WELFARE COMMITTEE MEETING MINUTES, JAN. 30, 1976, RS 0937, HOUSE BILL NO. 476. (Mr. Thomas made the same scant arguments in front of a joint meeting of the House Judiciary, Rules and Administration and Health and Welfare Committees, JOINT HOUSE JUDICIARY, RULES AND ADMINISTRATION AND HEALTH AND WELFARE COMMITTEE MEETING MINUTES, FEB. 5, 1976, RS 0937, HOUSE BILL NO. 476.)

In a later, joint meeting of the House Judiciary, Rules and Administration and Health and Welfare Committees, Mr. Duff opposed the amendment as it applied to minors, arguing that "a reasonable period of time after becoming 18 or competent should be allowed." JOINT HOUSE

JUDICIARY, RULES AND ADMINISTRATION AND HEALTH AND WELFARE COMMITTEE MEETING MINUTES, FEB. 11, 1976, RS 0937, HOUSE BILL NO. 476. In a meeting of the House Judiciary, Rules and Administration Committee, Mr. Duff argued that the impact of the "tail of risk" insurance argument would have a "minor impact on the citizens of Idaho but major impact in the field of insurance. . . ." HOUSE JUDICIARY, RULES AND ADMINISTRATION COMMITTEE MEETING MINUTES, MARCH 1, 1976, RS 0937, HOUSE BILL NO. 476.

Evidently the House was unpersuaded by Mr. Duff. House Bill No. 476 reached the Senate, becoming Senate Bill No. 1010 and was passed, thereby enshrining in the Idaho Code the version of § 5-230 in effect today.[2]

Thus, the legislative history of § 5-230 presents exactly two justifications for wholly cutting off minors' claims prior to reaching the age of majority: "tail of risk" requiring large insurance reserves, and (2) "no excuse" for needing more than six years' tolling for legal incompetents, including minors. The "no excuse" argument was squarely rejected by this Court in *Durtschi*, as well as the supreme courts of Texas, Alaska, Missouri, Arizona and Ohio in analyzing the numerous, compelling reasons to toll a minor's claim until such time as the age of majority is reached. Regarding the "tail of risk" argument, there is literally zero evidence in the legislative

[2] Caveats. In 1985, § 5-230 was amended to insert the phrase "under the age of majority" in place of "within the age of majority", which had been in place to describe a minor since 1881, apparently unchallenged. "Within the age of majority" would actually seem to describe an adult, not a minor, but W.G.G. is aware of no case in Idaho interpreting the prior language of "within the age of majority" as inapplicable to minors. In 1993, § 5-230 was amended again with regards to re-locating the tolling provision related to incarceration; such amendment had no bearing on the issues presented in this case.

record of how much such "tail of risk" allegedly raised insurance premiums for citizens of Idaho, only testimony that the impact would be "minimal". While it cannot be reasonably argued that more claims will be brought with a longer limitations period, a cogent analysis requires actual data comparing the financial impact of such longer limitations period so that the significant prejudice of a shorter limitations period can be appropriately weighed, balanced, and considered against it. To the extent the legislature credited an impact on insurance companies, the financial interests of such companies should not be considered paramount to the interests of individual citizens of Idaho such as W.G.G. who are wholly barred from the courts to assert viable claims by operation of § 5-230.

Indeed, the District Court in this case described as "rare" the "potential where a minor is still a minor by the time the statute runs and has no competent parent or guardian who can bring the claim for him." (R. 10.) It is unclear why, if this scenario is so rare, the small chance of it occurring justifies cutting off perfectly valid claims belonging to minor citizens of the State of Idaho prior to reaching the age of majority, when so many compelling reasons, discussed by this Court in *Durtschi*, counsel in favor of tolling limitations periods until a minor reaches the age of majority.

In sum, should this Court find a rational basis analysis necessary, § 5-230 clearly fails even this modest hurdle.

3. Idaho Code § 5-230 Violates a Minor's Equal Protection Rights.

The District Court also rejected W.G.G.'s argument that § 5-230 violates his equal protection rights as enshrined in both the Idaho and United States Constitutions. (R. 13-15.) Both the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 2 of the Idaho Constitution require that all similarly situated persons receive the same benefits and burdens of the law. *See State v. Hansen*, 125 Idaho 927, 933, 877 P.2d 898, 904 (1994). The majority of Idaho cases state that the equal protection guarantees of the federal and Idaho Constitutions are substantially equivalent. See, *e.g., Thompson v. Engelking*, 96 Idaho 793, 818, 537 P.2d 635, 660 (1975). The framework for an equal protection analysis under both the federal and Idaho Constitutions generally involves a three-step process and has been articulated in *Tarbox v. Idaho Tax Commission*, 107 Idaho 957, 959, 961, 695 P.2d 342, 344, 346 (1984). ("The differences between the standard applied under Idaho's equal protection clause and the federal clause are negligible . . ."). The first step is to identify the classification that is being challenged. *Id.* at 959, 695 P.2d at 344. The second step is to determine the standard under which the classification will be judicially reviewed. *Id.* The final step is to determine whether the appropriate standard has been satisfied. *Id.*

When considering the Fourteenth Amendment, strict scrutiny applies to fundamental rights and suspect classes; intermediate scrutiny applies to classifications involving gender and illegitimacy; and rational basis scrutiny applies to all other challenges. *See Meisner v. Potlatch Corp.*, 131 Idaho 258, 261-62, 954 P.2d 676, 679-80 (1998). For analyses made under the Idaho Constitution, slightly different levels of scrutiny apply. Strict scrutiny, as under federal law, applies

to fundamental rights and suspect classes. *Id.* at 261, 954 P.2d at 679. When strict scrutiny is applied, "the state bears a heavy burden to justify the classification by a compelling state interest." *Jones v. State Bd. of Medicine*, 97 Idaho 859, 866, 555 P.2d 399, 406 (1976). Means-focus scrutiny, unlike the federal intermediate scrutiny, is employed "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute." *Coghlan v. Beta Theta Pi Frat.*, 133 Idaho 388, 395, 987 P.2d 300, 307 (1999). Rational basis scrutiny applies to all other challenges. *Id.*

The District Court concluded that because, under § 5-230, "every minor, regardless of whey [sic] type of claim he or she has (with one limited exception) is entitled to a six year tolling of the claim. . . . Thus, there is no deprivation of equal protection." (R. 14-15.) The Court then ruled that, for the same reasons as its analysis under the "open courts" provision, even if a rational basis test applied, such test is satisfied: "Simply because some minors may fall through the cracks does not give rise to a violation of equal protection." (R. 15.)

The District Court is incorrect in its conclusion that § 5-230 treats all minors equally, regardless of claim. As noted *supra*, minors who are over the age of ten[3] in the case of medical malpractice claims will receive the benefit of at least some period of time after reaching the age of majority in which to assert claims on their own behalf. By contrast in this case, by operation of §

[3] This timeframe will vary by claim. For example, a breach of contract claim in Idaho has a four year limitations period, so a minor with a claim accruing once they are eight years of age or older will have at least some time after reaching the age of majority to assert such claim.

5-230 W.G.G. has no period of time after he reached the age of majority to assert his viable claim. Thus, § 5-230 does not treat all minors equally.

Furthermore, contrary to the District Court's dismissiveness of minors like W.G.G. "who may fall through the cracks", the states of West Virginia, New Hampshire, Utah, and South Dakota all ruled that medical negligence claims could not be barred prior to a minor reaching the age of majority without violating equal protection. *See Whitlow v. Board of. Educ.*, 438 S.E.2d 15 (W. Va. Sup. Ct. 1993); *Carson v. Maurer*, 424 A.2d 825 (N. H. Sup. Ct. 1980); *Lee v. Gaufin*, 867 P.2d 572 (Utah Sup. Ct. 1993); *Lyons v. Lederle Labs*, 440 N.W.2d 769, 770 (S. Dakota Sup. Ct. 1989).

W.G.G. recognizes, however, that these four states, as Idaho should, had a general tolling statute which tolled minors' claims until reaching the age of majority. These states then enacted statutes specific to medical negligence claims which precluded the tolling of a minor's claim until reaching the age of majority, and these statutes were struck down because they treated minors who sustained injuries as a result of medical negligence differently from minors with all other types of claims. The District Court correctly noted that in Idaho, § 5-230 treats all minors, indeed all legal incompetents, similarly poorly and unfairly, without regard to the type of claim asserted.

W.G.G.'s equal protection challenge to § 5-230 is best characterized not by the type of claim asserted, but in its unequal treatment of minors, indeed all legal incompetents, as compared to those who are legally competent to bring their own claims. All Idahoans who are legally competent to assert claims on their own behalf have an opportunity to do so, and § 5-230 does nothing to stand in their way. By contrast, § 5-230 serves as a complete and total bar to many legal

incompetents, minors and those suffering from insanity, from ever having the opportunity to assert claims on their own behalf. It may well be that many legal incompetents, minors and the insane, outgrow or overcome their infirmity within the six years of tolling permitted by § 5-230, but there will be those who are not so fortunate, such as W.G.G., who will be incompetent for the entirety of § 5-230's tolling as well as any independent limitations period and who will be completely and forever barred from asserting their claims on their own behalf.

As discussed *supra*, § 5-230 fails even a rational basis test. But there are compelling reasons to apply an even higher level of scrutiny thereto. Strict scrutiny applies when "fundamental rights" are implicated. *Meisner*, 131 Idaho at 261, 954 P.2d at 679. In the context of prisoners, this Court has recognized that the right to access the courts is fundamental. "The 'fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.'" *State v. Brandt*, 135 Idaho 205, 207, 16 P.3d 302, 304 (Ct. App. 2000) (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977)); *Evensiosky v. State*, 136 Idaho 189, 191, 30 P.3d 967, 969 (2001) (access to the courts is a fundamental constitutional right). In *Barrio*, *supra*, the Arizona Supreme Court explicitly recognized the "fundamental" nature of the right to access the courts to remedy sustained injury. 692 P.2d at 285-286. For the same reasons that § 5-230 fails even a rational basis test, discussed at length *supra*, it certainly fails to pass muster when facing the higher bar of strict scrutiny.

Intermediate, or means-focus, scrutiny applies "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication

of a lack of relationship between the classification and the declared purpose of the statute." *Coghlan*, 133 Idaho at 395, 987 P.2d at 307. The discriminatory character of § 5-230 is apparent on its face because it singles out legal incompetents, minors and the insane, who cannot assert claims on their own behalf and treats them different than those who are legally competent and able to being claims on their own behalf. The disparate treatment is manifest in the ability of a legally competent Idaho citizen to assert claims on his or her own behalf. All legally competent Idaho citizens have an opportunity, of varying length and type, to assert a claim on their own behalf. By contrast, by operation of § 5-230, Idaho citizens who are legally incompetent such as W.G.G. may never have an equivalent opportunity to assert their own claim. Again, for the same reasons that § 5-230 fails even a rational basis test, discussed at length *supra*, it certainly fails to pass muster when facing the higher bar of intermediate, means-focus scrutiny.

D. The District Court Erred in Ruling that Equitable Estoppel Does not Apply to W.G.G.'s Claim.

The District Court ruled as a matter of law that WGG is not entitled to any tolling or estoppel with regards to the statute of limitations. (R. 15-17.)

The District Court first addressed equitable estoppel, which would preclude SLRMC from asserting the statute of limitations as a defense, ruling that W.G.G. is not entitled thereto as a matter of law.

The elements of equitable estoppel are "(1) [c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party

subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question[;] (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. *Tew v. Manwaring*, 94 Idaho 50, 53, 480 P.2d 896, 899 (1971). "Estoppel does not depend solely upon the existence of a continuing relationship and estoppel does not "extend" a statute of limitations, but rather prevents a party from pleading and utilizing the statute of limitations as a bar, although the time limit of the statute of limitations may have run." *Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill*, 103 Idaho 19, 22, 644 P.2d 341, 343 (1982).

Regarding the first element of estoppel, W.G.G. argued that the requisite false representation was SLRMC's unfulfilled promise of January 3, 2010 indicating that "[w]e will also be making adjustments to a portion of W.G.G.'s hospital bill." (R. 008, ¶ 13; 74.) The District Court rejected this letter as a false representation as it was a "future" promise, citing *City of McCall v. Buxton*, 146 Idaho 656, 664, 201 P.3d 629, 637 (2009) ("Generally, a statement about a future event does not constitute a misrepresentation. A misrepresentation must be as to a past or existing fact."). (R. 16.)

The District Court erred in this ruling for several reasons. First, parsing grammatical hairs, SLRMC's wording that it "will . . . be making adjustments" to W.G.G.'s bill, lacking a date certain in the future when such adjustments will be made, can certainly be interpreted as a promise to

execute the adjustment simultaneously with the letter, making the representation false at the time it was made and thereby satisfying the first element of equitable estoppel.

Second, the first element of equitable estoppel contains a glaring caveat, ignored by the District Court, that a representation can be false if it "at least . . . is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert." SLRMC's statement, later proved false, that it "will . . . be making adjustments" to W.G.G.'s bill, clearly conveyed one impression, namely the adjustment of W.G.G.'s bill, inconsistent with what ultimately proved true, that SLRMC made no adjustment to W.G.G.'s bill despite its clear, admitted, and tragic error and the reliance of W.G.G.'s parents upon such representation. (R. 70-71.)

Third, numerous courts in other jurisdictions hold that promises to pay estop defendants from asserting limitations defense for sound policy reasons which this Court should consider in applying the principles of equitable estoppel. When relied upon, promises to pay cause litigants to reasonably sleep upon their rights and give defendants such as SLRMC an unjust advantage by utilizing promises to pay to reduce limitations periods to their benefit. Resolving cases efficiently, without resort to the courts, generally benefits all stakeholders such as the parties and the court, and extrajudicial resolution of claims is assisted by permitting claimants to rely on promises to pay. Otherwise, litigants would have no reason to wait to file a lawsuit based on a promise to pay if they are simply jeopardizing their limitations period with no recourse if, like SLRMC did in this case, the promise to pay is reneged upon. Unnecessary lawsuits would inevitably be filed, needlessly further clogging the courts' dockets. See, e.g., *Cange v. Stotler & Co.*, 826 F.2d 581,

587 (7th Cir. 1987) ("the cases are legion that a promise to pay a claim will estop a defendant from asserting the applicable statute of limitations if the plaintiff relied in good faith on defendant's promise in forbearing suit. . . . Moreover, it is not necessary that the defendant intentionally mislead or deceive the plaintiff, or even intend by its conduct to induce delay."); *See also Smith v. Mark Twain Nat'l Bank*, 805 F.2d 278, 294 (8th Cir. 1986) ("Many courts have specifically held that a promise to pay a claim estops a defendant from asserting the limitations defense if the claimant relied in good faith on that promise. *E.g., U. S. v. Reliance Insurance Co.*, 436 F.2d 1366, 1370 (10th Cir. 1971); *Fidelity*, 402 F.2d at 897; *United States v. Continental Casualty Co.*, 357 F. Supp. 795, 800 (E.D. La. 1973).").

Lastly, at minimum, W.G.G. has adduced facts on which a jury could conclude that SLRMC is equitably estopped from asserting a limitations defense. When application of equitable estoppel depends on dispute facts, such issue is appropriately resolved by the jury. See, e.g., *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 780, 839 P.2d 1192, 1194 (1992) ("The primary issue presented is whether the admissible evidence submitted in opposition to the motion for summary judgment was sufficient to raise genuine issues of material fact concerning the defense[ ] of . . . equitable estoppel."); *Hawley v. Green*, 124 Idaho 385, 387, 860 P.2d 1, 2 ("On May 30, the court granted Hawley's motion to alter and set aside the previously entered judgments, ruling that Hawley had raised material issues of fact regarding equitable estoppel, precluding summary judgment.")

Indeed, going to issues of fact, the District Court also opined regarding the second element of estoppel that

> [w]hile Ms. Gomersall claims she did not know of the failure to adjust the bill until 'many months' later, she does not explain how she was unable to discover the truth. The fact that her bills were sent to Medicaid for payment would not prevent her from contacting St. Luke's after the following billing cycle to see if the bill had, in fact, been adjusted . . . Ms. Gomersall had the means to discover the truth of St. Luke's alleged failure to adjust the bill by the next billing cycle following the January 3, 2011 letter.

(R. 16-17.) This statement by the District Court is replete with impermissible factual and credibility determinations regarding what Ms. Gomersall could or should have done, and when and how she should have done it. Ms. Gomersall's testimony however, is that she did not learn of SLRMC's failure to adjust W.G.G.'s bill until "many months" later. (R. 70-71.) The District Court on summary judgment may not discredit Ms. Gomersall's testimony or make factual determinations about what it thinks she should have done; those determinations must be left to the jury.

IV. CONCLUSION

For the reasons stated herein, the District Court erred in finding that § 5-230 does not violate either the "open courts" provision of the Idaho Constitution, Article 1, Section 18, or the equal protection guarantees enshrined in the constitutions of Idaho and the United States. The District Court also erred by making factual and credibility determinations to rule as a matter of law that no jury could conclude that equitable estoppel precludes SLRMC from asserting the statute of limitations defense based on its failed representation of adjusting W.G.G.'s hospital bill.

DATED this 16th day of June, 2020.

ROSSMAN LAW GROUP, PLLC

By _____
Matthew G. Gunn
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2020, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

_____	US Mail	Trudy Hanson Fouser
_____	Overnight Mail	Taylor H.M. Fouser
___X___	iCourt/Electronic Copy	GJORDING FOUSER, PLLC
_____	Hand Delivery	121 N 9th St Ste 600
_____	Facsimile No. 208-336-9177	Boise, ID 83702
		gfcases@gfidaholaw.com
		Attorneys for Defendant

_____
Matthew G. Gunn

Z:\Work\G\Gomersall, Greg\Appeal\Appellant Brief.docx