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' REPLY BRIEF

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

Honorable Steven Hippler, Presiding

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COME NOW, Plaintiffs/Appellants, Greg Gomersall and Cyndi Gomersall, as the Guardians of the Minor Child Plaintiff, W.G.G., by and through their counsel of record, Rossman Law Group, PLLC, and hereby submit this Reply Brief on Appeal from the District Court of the Fourth Judicial District for Ada County.

I. STANDARD OF REVIEW

Defendant St. Luke's Regional Medical Center, Ltd. ("SLRMC") argues that a distinct standard of review governs the Gomersalls' equitable estoppel defense because equitable claims and defenses are tried not by a jury but by a trial court. The Gomersalls do not dispute the initial premise that equitable defenses, including equitable estoppel, are tried by the court and not a jury.

SLRMC is not correct, however, in arguing that a different standard of review applies to equitable claims and defenses at the summary judgment stage of proceedings. Equitable claims and defenses are considered at the summary judgment stage of proceedings under the customary standard of review to determine whether issues of fact exist rendering the entry of summary judgment inappropriate. *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 defenses of waiver and equitable estoppel."); *Morrison v. Young*, 136 Idaho 316, 320, 32 P.3d 1116, 1120 (2001) ("Although the statute of limitations and the equitable doctrine of laches may have precluded the bringing of this action, these affirmative defenses cannot be ruled on by this Court as a matter of law because there are genuine issues of material fact in dispute that remain to be determined by the district judge on remand.")

SLRMC cites *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 206 P.3d 481 (2009), and *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982), for the premise that the summary judgment standard is different when applied to equitable claims. Both *Banner* and *Riverside*, however, considered cases where (1) the court was the trier of fact; and (2) the parties filed cross motions for summary judgment. *Banner* ruled that under such conditions the court may draw "probable inferences" at the summary judgment stage of proceedings because it "would be responsible for resolving conflicting inferences at trial." 147 Idaho 117, 124, 206 P.3d 481, 488 (2009).

Banner, however, further noted that in such circumstances "[c]onflicting evidentiary facts . . . must still be viewed in favor of the nonmoving party." *Id. Riverside* ruled similarly given that the parties in that case filed cross-motions for summary judgment and stipulated that there were no genuine issues of material fact: "Nevertheless, where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." 103 Idaho at 519, 650 P.2d at 661.

Neither *Banner* nor *Riverside* stand for the proposition for which they are cited by SLRMC, that a different standard applies to equitable claims or defenses at the summary judgment stage of proceedings. Generally, at the summary judgment stage of proceedings, inferences must be drawn in favor of the non-moving party. *Banner* and *Riverside* simply permit the relaxation of such standard when (1) facts are not disputed on cross-motions for summary judgment; and (2) the court is the trier of fact. It makes sense to allow a court, when it will be serving as the trier of fact and

the facts are undisputed, to simply draw the "probable" inferences without regards to the non-moving party distinction usually present at summary judgment. *Banner* makes it clear that disputed evidentiary facts still preclude summary judgment, even under these circumstances.

In sum, the summary judgment standard applied to equitable claims or defenses does not differ. The presence of genuine disputes of material fact preclude the entry of summary judgment regarding an equitable claim or defense, just as the presence of such disputes does in the context of a non-equitable claim or defense being considered on summary judgment.

II. ARGUMENT

A. W.G.G.'s Constitutional Argument is Properly Before this Court.

SLRMC first tries to avoid the substantive merits of W.G.G.'s constitutional argument by taking the position that W.G.G.'s constitutional appeal has been waived and is not properly before this Court. As the record of the briefing and argument presented to Judge Hippler below amply demonstrates, however, there has never been any confusion on the part of the parties or the court as to the nature of W.G.G.'s constitutional arguments. SLRMC's self-serving argument to the contrary on appeal is appropriately rejected.

Under Idaho law, it is axiomatic that issues not presented to the district court below are waived on appeal. "Issues not raised below will not be considered by this [C]ourt on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." *State v. Garcia-Rodriguez*, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (emphasis added) (quoting *Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands*, 99 Idaho 793, 799-800, 589 P.2d 540, 546-47 (1979)).

The parties agree that two statutes combine to form the limitations period at issue in this appeal. First, Idaho Code § 5-219(4) sets forth the general, and unchallenged, two-year limitations period applicable to personal injury and malpractice claims in Idaho. Second, Idaho Code § 5-230 tolls any limitations period for a maximum of six years when a disability such as minority or insanity is present.

SLRMC correctly notes that W.G.G. has not challenged the constitutionality of § 5-219(4) and its two-year limitations period applicable to medical negligence claims in Idaho, whether below or before this Court. Indeed, the constitutionality of § 5-219(4) has been considered and affirmed by this Court on several occasions. *See, e.g., Hawley v. Green,* 117 Idaho 498, 501-502, 788 P.2d 1321, 1324-1325 (1990); *Holmes v. Iwasa*, 104 Idaho 179, 657 P.2d 476 (1983). W.G.G. thus has no basis to challenge the constitutionality of such statute and has appropriately declined to assert a frivolous, baseless argument to either this Court or the court below.

W.G.G., however, has undisputedly challenged, both below and before this Court, the constitutionality of the maximum six years' tolling afforded minors by § 5-230. SLRMC does not argue otherwise. (*Resp. Br.*, 6.)

SLRMC argues that if this Court accepts W.G.G.'s argument and strikes down § 5-230 as unconstitutional, then minors such as W.G.G. are left with no tolling of any limitations period whatsoever. Under such circumstances SLRMC argues, § 5-219(4)'s two-year limitations period would apply to W.G.G.'s claim, rendering it untimely, though W.G.G's equitable estoppel arguments would still apply. SLRMC argues that W.G.G. was thus obligated to simultaneously challenge the constitutionality of § 5-219(4):

> If the Gomersalls effectively convince this Court that Idaho Code § 5-230 is unconstitutional, the automatic fallback is Idaho Code § 5-219(4), which means that all minors would have the same two years to bring a personal injury action as everyone else. The Gomersalls cannot obtain any relief unless they convince the Court that Idaho Code § 5-219(4) is unconstitutional as applied to minors.

(*Resp. Br.*, 6.)

SLRMC's pedantic argument is appropriately rejected by this Court. As noted *supra*, W.G.G. does not contend that § 5-219(4) is unconstitutional because he declines to present frivolous arguments. The issue is that § 5-230 only tolls § 5-219(4) for a maximum of six years. Thus, W.G.G.'s argument can be best characterized as asking this Court to strike down the 1976 amendment to § 5-230 and revert such provision to its pre-1976 state, or extend § 5-230's tolling until a minor's disability is lifted by reaching the age of majority. As discussed at length in W.G.G.'s opening brief, for nearly a century, from 1887 until 1976, § 5-230 tolled all limitations periods indefinitely during the presence of a disability, including minority, until such time as the disability no longer existed. In the case of minority, such disability would cease to exist only upon turning eighteen and attaining the age of majority.

Indeed, SLRMC's argument defies credulity in the sense that it presumes (1) this Court accepting W.G.G.'s arguments and striking down § 5-230 as unconstitutional because it only tolls minors' limitations periods for six years; and then (2) having found such scenario unconstitutional, leaving in place a statutory posture allowing no tolling of limitations for minors whatsoever. Whether one chooses to characterize W.G.G.'s argument as striking down the 1976 amendment to § 5-230, or simply asking this Court to interpret § 5-230 as requiring tolling of limitations periods

for minors until the disability is lifted by reaching the age of majority, the substance of W.G.G.'s appeal, fully and fairly presented to the district court below, is the same.

In determining whether an issue was raised below, and therefore preserved for appellate review, an integral consideration is whether the issue was "presented for decision" and supported by a "factual showing or by the submission of legal authority." *IBM Corp. v. Lawhorn*, 106 Idaho 194, 197, 677 P.2d 507, 510 (1984). This Court has exercised discretion in applying this rule, particularly with regards to consideration of constitutional issues. In *State v. Goodmiller*, this Court considered a constitutional question despite explicitly recognizing that the issue was not properly before it. 86 Idaho 233, 242, 386 P.2d 365, 370 (1963). This Court recognized that "[o]n occasion we have allowed an issue that was not formally raised below to be considered on appeal when the issue was implicitly before the lower tribunal, and was considered and passed on by that tribunal. *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 356-357, 787 P.2d 1159, 1164-1165 (1990) (citing *Manookian v. Blaine County*, 112 Idaho 697, 700, 735 P.2d 1008, 1011 (1987)). Indeed, in *Northcutt*, this Court considered the constitutional issues before it related to ski area immunity because "the constitutionality of the Act was argued in the trial court by Sun Valley, and the trial court, in essence, ruled that the Act is constitutional. The parties have fully briefed and argued the issue in this Court." *Northcutt*, 117 Idaho at 357, 787 P.2d at 1165.

There can be no doubt on the record before this Court that both SLRMC and the district court below fully understood, briefed, argued, and considered W.G.G.'s argument that § 5-230 must toll limitations period for minors until reaching the age of majority, as it did prior to 1976, in order to pass constitutional muster.

In his opening brief before the district court, W.G.G. described his argument, in multiple instances, as being premised on the failure of Idaho Code § 5-230 to toll limitations period until a minor reaches the age of majority. "Idaho Code § 5-230 is facially unconstitutional because, by failing to toll limitations periods until reaching the age of majority, it denies minors in Idaho their due process rights to access the courts, as well as their equal protection rights, as enshrined in the Idaho and United States Constitutions." (R., 44.) "Section 5-230 is facially unconstitutional because, by failing to toll limitations periods until a minor reaches the age of majority . . . .." (R. 47, 57.)

SLRMC undisputedly met, and offered argument against, W.G.G.'s argument that § 5-230 is constitutionally infirm because it fails to toll limitations periods until a minor reaches the age of majority. "Plaintiff filed a lengthy brief which contained approximately 20 pages arguing why Idaho Code §§ 5-219(4) and 5-230 are unconstitutional." (R., 107.) "Plaintiff argues the lenient six-year tolling period provided in [§ 5-230] violates a minor's constitutional rights." (R. 112.) "Simply stated, a statute of limitations on a child's right to bring a cause of action cannot violate a constitutional right when multiple different people have the right to recover the cause of action." (R. 116.) "St. Luke's initial Memorandum along with this Reply brief show Idaho's lenient six-year tolling of the statute of limitations for a minor's medical malpractice claim is constitutional . . ." (R. 119.) At oral argument, SLRMC's counsel framed the question as "does the constitution say we have to wait until they are 18, we have to give them 20 years, basically?" (Tr., 22:3-5.)

The district court below, as evident both at oral argument and in its written decision, clearly understood that W.G.G.'s central argument was that § 5-230's constitutional infirmity was that it failed to toll limitations periods for minors until reaching the age of majority:

> No, I think the facts are pretty clear, and the real question comes down to whether the statute of limitations – there's really two issues. You have a statute of limitations that applies generally and then you have a tolling provision for certain classes of people, and within the tolling provision, you have what is essentially a statute of repose. So the question is is that statute of repose unconstitutional.

(Tr., 7:24-8:8.)

> In this sense, this statute, potentially, leaves some children . . . the inability to bring a claim based on their own decision. In other words, they're in a position where they're relying on somebody else necessarily to bring a claim because they lack the legal capacity and perhaps in some cases the intellectual capacity to navigate that on their own. I mean, we wouldn't expect a ten year old, for example, if we're talking about birth trauma, to be able to understand the complexities of filing a medical malpractice action, though they could and request that the court appoint a guardian ad litem, for example. But they would have to get there on the first instance on their own, if they lack a competent adult or a caring adult or a knowledgeable adult who is a parent or guardian to bring that.

(Tr., 11:8-25.)

The district court recognized, and commented on, the crux of the matter being that minors in Idaho previously benefitted from tolling until reaching the age of majority, but such posture changed with the 1976 amendment to § 5-230 which limited tolling to six years: "In Idaho [minors] had until 18 by statute, which this statute changed . . . My understanding is this statute effectively changed the prior statute, which was that minors had until they were 18 to bring a claim in general."

(Tr., 18:7-13.) "Is there some constitutional right of a minor to have the ability to have a cause of action still remain at the time that they turn their majority." (Tr., 22:7-9.)

The Court also noted that while the constitutionality of § 5-219(4) is settled, the constitutionality of § 5-230 is an open question: "It is a question of first impression as to the constitutionality of the statute . . . The constitutionality of the underlying statute 219 has been addressed, but not 230." (Tr., 21:11-21.)

In sum, it is inarguable that both parties and the district court fully understood, briefed, and considered W.G.G.'s argument that § 5-230 became unconstitutional when it was amended to toll limitations periods for minors for a maximum of six years, as opposed to tolling until minors reach the age of majority as it did for nearly a century.

B. In this Case, any Distinction Between As-Applied and Facial Constitutional Challenges is Irrelevant.

SLRMC argues that W.G.G. presented only a "facial" challenge to § 5-230 before the district court, and now presents an "as applied" challenge. SLRMC, however, ignores the simple, easily resolvable issue surrounding this point.

W.G.G. recognizes that his argument as to the constitutionality of § 5-230 was presented below as a "facial" challenge to the statute. (R., p. 46.) 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. In other words, an "as applied" challenge does not argue a statute is unconstitutional in all respects; rather, it argues that an otherwise constitutional statute is applied in an unconstitutional manner based on the particular facts and circumstances of the pending case. *See, e.g., State v. Sherman*, 156 Idaho 435, 442, 327 P.3d 993, 1000 (2014) ("In order for Sherman to prevail in his as applied challenge, he must demonstrate that the statute is unconstitutional as applied in his specific instance." (emphasis added)).

Before the district court, neither SLRMC nor the Court took issue or otherwise argued that W.G.G.'s constitutional challenge to § 5-230 was not "facial", but rather "as applied." W.G.G. undisputedly advanced no argument that § 5-230 is (1) generally constitutional; but (2) applied to him in an unconstitutional manner based on the specific, unique facts of his case. No conduct of SLRMC in applying § 5-230 is at issue in this case, in any form or fashion; there is thus no need to develop a factual record in order to consider W.G.G.'s constitutional claim. W.G..G has not argued anything other than the "facial" unconstitutionality of § 5-230 because it fails to toll the limitations period for all minors until reaching the age of majority.

This issue only arises because W.G.G. recognized, in the course of briefing this appeal, that even though § 5-230 applies to all minors without exception, a subset of minors suffer no harm

by virtue of § 5-230's failure to toll limitations periods until reaching the age of majority. Once a minor reaches the age of twelve, he or she will benefit from § 5-230's tolling of up to six years, meaning they will reach the age of majority and enjoy a full limitations period thereafter in which to assert claims.

Recognition of this limited subset, however, does not mean that W.G.G's constitutional challenge to § 5-230 now neatly fits into the box of an "as applied" challenge because, again, no conduct of SLRMC is at issue and W.G.G. is not arguing that an otherwise constitutional statute was applied in an unconstitutional manner in his specific case.

For these reasons, W.G.G.'s challenge defies neat, easy classification as "facial" or "as applied." It does not fit "as applied" neatly because no conduct of SLRMC is at issue and W.G.G. is not arguing that an otherwise constitutional statute was applied to him, uniquely and specifically, in an unconstitutional manner. Conversely, a "facial" challenge requires demonstration that a statute is unconstitutional in all applications, and W.G.G. recognizes that the subset of minors whose claims accrue after reaching the age of twelve suffer no harm because, indirectly, they receive the benefit of tolling until reaching the age of majority.

Ultimately, this argument is a red herring and should not trouble this Court. Difficulty of neat classification as "facial" or "as applied" does not obviate the efficacy of W.G.G.'s appeal, which was fully presented, argued, and considered by the parties and the district court below. Indeed, SLRMC does not argue that any additional fact-finding need be conducted in order to assess W.G.G.'s argument that § 5-230 is unconstitutional. SLRMC presents no authority supporting dismissal or failure of a constitutional challenge because such challenge does not fit

perfectly neatly into the box for either "facial" or "as applied" constitutional challenges. Nor does SLRMC present any authority mandating differing standards of review applicable to "facial" or "as applied" constitutional challenges.

C. W.G.G. Adduced Evidence on Which Equitable Estoppel Could be Found.

SLRMC argues that W.G.G. failed to put forth a "scintilla of evidence" to support his equitable estoppel defense. (*Resp. Br.*, 10.) To the contrary, W.G.G. adduced evidence upon which equitable estoppel could be found and the district court erred in entering summary judgment in favor of SLRMC with regards thereto.

SLRMC argues that W.G.G. cannot, as a matter of law, establish a false representation made by SLRMC. SLRMC's argument fails because there exist issues of fact regarding whether (1) SLRMC made a false representation; (2) whether such representation was material; and (3) what constitutes a reasonable period of time to delay filing a lawsuit.

SLRMC undisputedly promised to adjust W.G.G.'s bill based on its glaring, harmful, admitted error: "We will also be making adjustments to a portion of [W.G.G.'s] hospital bill." (R., 42, 74.) SLRMC undisputedly failed to adjust W.G.G.'s bill as promised. (R. 71.) The district court did not strike Ms. Gomersall's declaration testimony that she learned that SLRMC did not adjust W.G.G.'s bill as promised. (R. 122.) SLRMC argues that the district court abused its discretion by considering Ms. Gomersall's testimony,[1] but does not dispute that the district court considered such testimony and that SLRMC has adduced no contrary evidence. (*Resp. Br.*, 12.)

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1 SLRMC has not cross-appealed the district court's denial of its motion to strike with regards to Ms. Gomersall's testimony. *See* I.A.R. 18. Nor did SLRMC include this issue as an "Additional Issue Presented on Appeal" in its response brief. *See* I.A.R. 35(b)(4); Resp. Br., 3. Accordingly, SLRMC has not appealed the district court's declination

SLRMC argues that its statement that it "will also be making adjustments" to W.G.G.'s bill is not a false representation as a matter of law because it was not a concealment, rather a statement about a future event. (*Resp. Br.*, 12-13.) As discussed at length in W.G.G.'s opening brief, a conflicting, indeed better, reading of this statement is that SLRMC is adjusting the bill contemporaneously. (Appellant's Br., 36-37.) Such statement could certainly convey the impression that the bill will be adjusted, a state of affairs later proved false. See *Tew v. Manwaring*, 94 Idaho 50, 53, 480 P.2d 896, 899 (1971) (first element of equitable estoppel includes "conduct . . . calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert.") Ultimately, SLRMC and W.G.G. advance competing interpretations of SLRMC's undisputed promise that it "will also be making adjustments" to W.G.G.'s bill, and such competing interpretations constitute a genuine issue of dispute fact such that the district court's grant of summary judgment in favor of SLRMC was erroneous.

SLRMC also argues that nothing about SLRMC's false representation to adjust W.G.G.'s bill was material because "[n]othing about St. Luke's statement would induct someone to refrain from filing suit." This is another issue of fact because record testimony of Ms. Gomersall indicates that SLRMC's letter did in fact cause them to delay pursuit of legal remedies: "in reliance on St. Luke's representation [that it will be adjusting W.G.G.'s bill] we significantly delayed seeking

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to strike Ms. Gomesall's testimony that she learned SLRMC failed to adjust W.G.G.'s bill. Regardless, such testimony is not conclusory because Ms. Gomersall testified, based on her "personal knowledge of all facts" that she "learned" that SLRMC failed to adjust W.G.G.'s bill. (R., 70-71.) Such testimony is thus non-conclusory, admissible, and was properly considered by the district court in this case.

legal counsel or pursuing legal remedies on behalf of our son as we believed the matter would be resolved." (R., 70.) Taking such statement as true, SLRMC's false representation to adjust W.G.G.'s bill was material to the Gomersall's decision to refrain from seeking legal counsel. Indeed, it is difficult to comprehend, as SLRMC argues, that a promise to remedy an error financially would not factor into a party's decision to file suit. Litigation is costly, time-consuming, and emotionally draining. Obviously, if a party is promised compensation without resorting to the judiciary, such outcome is optimal and would weigh heavily into a decision to pursue legal remedies or not. For these reasons an issue of fact exists as to the materiality of SLRMC's false representation to adjust W.G.G.'s bill such that the district court's grant of summary judgment in favor of SLRMC was erroneous.

SLRMC also argues that, as a matter of law, the length of time the Gomersalls delayed in bringing suit in this case was unreasonable. (*Resp. Br.*, 14-15.) SLRMC might believe that the Gomersalls' delay was unreasonable, but reasonability is the archetype of an issue of fact and inappropriately decided on summary judgment. The Gomersalls testified that, based on SLRMC's false representation to adjust W.G.G.'s bill, they "significantly delayed seeking legal counsel or pursuing legal remedies on behalf of our son as we believed the matter would be resolved." (R., 70.) The reasonability of the Gomersalls' testimony that they "significantly delayed" seeking out legal counsel and filing suit constitutes an issue of fact that cannot be decided as a matter of law in the context of a summary judgment decision.

D. SLRMC's Stare Decisis *Arguments are Inapplicable to the Issues Before this Court.*

SLRMC advances significant argument regarding the *stare decisis* effect of decisions of this Court upholding the constitutionality of § 5-219(4)'s two-year limitations period applicable to personal injury claims in Idaho. (*Resp. Br.*, 17-20.)

This argument is a red herring and need not be considered by this Court, as such argument is irrelevant to the issues before it. As discussed in Sec. II.A, *supra*, W.G.G. recognizes that this Court has rejected challenges to the constitutionality of § 5-219(4). *See, e.g., Hawley,* 117 Idaho at 501-502, 788 P.2d at 1324-1325; *Holmes*, 104 Idaho 179, 657 P.2d 476, *supra*. It is thus accurate to call the two-year limitations period applicable to personal injury claims in Idaho set forth in § 5-219(4) settled law.

SLRMC continues to argue that if this court strikes down § 5-230 as unconstitutional, then minors in Idaho would ergo benefit from zero tolling of limitations periods and § 5-219(4)'s two-year limitations period would necessarily bar W.G.G.'s claim. Again, however, the constitutionality of § 5-219(4) is not at issue and, contrary to SLRMC's argument, need not be addressed by this Court. As both parties and the district court clearly understood below, manifest in both the briefing and oral argument, W.G.G.'s argument is that § 5-230 is unconstitutional because it fails to toll limitations periods for minors until they reach the age of majority. One might semantically characterize this argument as either (1) arguing that the 1976 amendment to § 5-230 is unconstitutional and should be stricken, thereby reverting § 5-230 to its pre-1976 state in which it tolled limitations periods for minors until reaching the age of majority; or (2) arguing that § 5-

230 must be interpreted by this Court as permitting tolling of limitations periods for minors until reaching the age of majority in order to pass constitutional muster. Under either scenario the constitutionality of § 5-219(4) is not at issue and need not be addressed by this Court.

E. *The Default Rule in Nearly Every State Except Idaho is that Minors' Claims Toll Until Reaching the Age of Majority.*

Before reaching the constitutional arguments, it should be noted that § 5-230 is more oppressive and onerous than nearly any tolling regime applicable to minors that can be found in this country. SLRMC correctly notes that the majority of limitations periods challenged in the cases discussed herein and in W.G.G.'s opening brief deal with medical malpractice-specific limitations periods. That fact, however, further undercuts the constitutional soundness of Idaho Code § 5-230. In nearly every state in the United States of America, the default rule is that all minors' claims are tolled until reaching the age of majority. *See, e.g.,* Neb. Rev. Stat. § 25-213 (Nebraska); D.C. Code § 12-302 (District of Columbia); N.J. Stat. 2A:14-21 (New Jersey); CPLR Art. 2-208 (New York); 40 P.S. § 5503 (Pennsylvania); Gen. Laws § 9-1-14.1(1) (Rhode Island); 12 V.S.A. § 551 (Vermont).

In the 1970s and 1980s, as a wave of tort reform lobbying swept the country, a number of states enacted limitations periods specific to medical malpractice claims which deviated from a state's default rule and stopped the tolling of limitations periods for medical malpractice claims of minors prior to reaching the age of majority. A significant number of states legislated this tripartite approach in which all minors' claims except medical malpractice claims are tolled until reaching the age of majority. These states included Alabama, Alaska, Arizona, Arkansas, California,

Colorado, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. (*Resp. Br., Addendum.*) In all these states, however, the default rule remained in place, that all minors' claims except medical malpractice claims tolled until reaching the age of majority. And then in a number of these states, as discussed *supra*, the medical malpractice-specific limitations period applicable to minors was deemed unconstitutional.

In sum, in no less than forty states and jurisdictions, the default rule is that minors' claims are tolled until reaching the age of majority. Idaho Code § 5-230 is thus even more onerous and restrictive in that it does not toll any minors' claims until reaching the age of majority, not just medical malpractice claims. For example, in Idaho, unlike the vast majority of states cited *supra*, a minor's simple negligence claim against a driver who strikes the minor in a crosswalk is not tolled until reaching the age of majority.

Idaho thus took a far more oppressive approach in 1976 than did more than forty other states. The legislative history cited by W.G.G. in his opening brief reveals incredibly minimal discussion and evidence for the Idaho legislature to justify breaking from a default rule observed by more than forty states and cease tolling all minors' claims prior to reaching the age of majority. This Court should place significant weight on the fact that more than forty peer states adhere to the default rule that minors' claims toll until reaching the age of majority in considering the constitutionality of § 5-230.

F. Colorado and Mississippi Codified Exceptions to their Medical Malpractice Limitations in Order to Protect Minors.

A "middle of the road" approach taken by Colorado and Mississippi further demonstrates that the vast majority of states, aside from Idaho, take seriously concerns that minors cannot assert claims on their own behalf. These states, though they have enacted medical malpractice limitations periods that do not toll minors' claims until reaching the age of majority, have legislated exceptions for minors who have no parents or guardians.

Col. Rev. Stat. § 13-81-101(3) defines a "person under a disability" as a "person who is a minor under eighteen years of age . . . and who does not have a legal guardian." For such minors, "§ 13-81-103, C.R.S. (1987 Repl. Vol. 6A) provides that the action must be maintained within two years after a legal guardian is appointed if the guardian is appointed prior to the minor's eighteenth birthday." *Hane by Jabalera v. Tubman*, 899 P.2d 332, 336 (Col. Ct. App. May 4, 1995).

Similarly, Mississippi enacted a limitations period applicable to minors which did not toll until reaching the age of majority, but it included an exception where a claim accrues to a minor who lacks a parent or legal guardian:

> If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be a minor without a parent or legal guardian, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have a parent or legal guardian or shall have died, whichever shall have first occurred . . .

MS Code § 15-1-36(4).

Though these statutory exceptions do not answer the concern of parents or legal guardians who fail to pursue a claim on behalf of a minor, at minimum Colorado and Mississippi recognize a valid concern for minors who lack a parent or guardian at the time a medical malpractice claim accrues. Idaho extends no such even minimal consideration to its minors who lack parents or legal guardians.

G. Idaho Code § 5-230 Violates the Open Courts Provision of the Idaho Constitution Because it Wholly Abrogates for Minors' Causes of Action Available to other Idahoans.

1. The Open Courts Provision of the Idaho Constitution is not Meaningless.

SLRMC argues, as it did below, that this Court's ruling that Article I, § 18 of the Idaho Constitution, the "open courts" provision thereof, conveys no substantive rights. *See, e.g., Hawley*, 117 Idaho at 500-501, 788 P.2d at 1323-1324; *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).

SLRMC, however, implicitly equates "no substantive rights" with "meaningless" when such is clearly not the case. Article I, § 18 of the Idaho Constitution explicitly guarantees to every citizen 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 and as recognized by this Court, Article I, § 18 guarantees that "every individual in our society has a right of access to the courts." *State Dep't of Health & Welfare v.*

Slane, 155 Idaho 274, 279 (2013) (quoting *Eismann v. Miller*, 101 Idaho 692, 697, 619 P.2d 1145, 1150, 311 P.3d 286, 291 (1980).)

Even though Article I, § 18 conveys no substantive rights, it is not utterly devoid of meaning as SLRMC argues. There is clearly a minimum threshold of access to the courts required by Article I, § 18, even if such lower boundary has not been fully explored by this Court. A substantive right or remedy would be entitlement to a certain cause of action, limitations period, or type of damage. W.G.G. advances no argument that he is entitled to any substantive right guaranteed by Article I, § 18; rather W.G.G. maintains that the courthouse door is fully and completely slammed shut to him in violation of Article I, § 18.

This slamming of the courthouse door presents the fundamental disagreement between the parties and the dispute before this Court. SLMRC argues, and W.G.G. does not dispute, that this Court has repeatedly held that limitations placed on causes of action, such as statutory limitations periods, damages limitations, immunities, medical malpractice screening panels and tort claim notice requirements do not violate Article I, § 18. These limitations and requirements, however, do not fully slam shut the door of the courthouse to litigants, they simply create "hoops" that must be jumped through and time periods for filing. These limitations and requirements regulate the conditions on which claims may be brought in Idaho courts.

By contrast, and the distinction SLRMC consistently ignores in its briefing, is that § 5-230 goes beyond regulating claims, it wholly abrogates claims for minors. It is this impermissible abrogation, as opposed to permissible regulation, where § 5-230 runs afoul of Article I, § 18. Any

minor in Idaho with a claim accruing prior to the age of twelve will never have an opportunity to assert such claim on his or her own behalf. This is the key distinction SLRMC wholly ignores.

2. Idaho Code § 5-230 Wholly Abrogates Minors' Causes of Action and Denies them Access to the Courts in Violation of the Open Courts Provision of the Idaho Constitution.

The heart of the matter has been reached. Is it just, and compliant with Article I, § 18, to say that a minor child has full and co-equal ability to access the courts as other Idaho citizens because parents may assert a claim on the minor's behalf? This Court should prioritize the well-being of minors in the great State of Idaho and rule in accordance with the numerous other states which have determined that a minor does not enjoy full access to the court when reliance on parents is necessary. Indeed, all parties and the Court would likely agree that the medical malpractice cases asserted more than eight years after accrual are rare. The district court below explicitly noted as much, describing 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.) For these "rare" instances, this Court should err on the side of justice and the resolution of viable claims on their merits. If the choice is between protecting the interests of insurers having to deal with a few more "rare" claims, or protecting the interests of a few children in Idaho who will otherwise suffer fundamentally altered lives because they had no recourse for their "rare" claim, such choice should be obvious to this Court: err on the side of protecting the children of Idaho. SLRMC explicitly acknowledges that W.G.G.'s case has "an awful result." (*Resp. Br.*, 44.) W.G.G., and no other children of Idaho, should suffer such arbitrarily awful results.

SLRMC argues that the door of the courthouse is not slammed shut to W.G.G. because his parents could assert a claim on his behalf: "[f]or purposes of a constitutional analysis, it does not matter that W.G.G. could not personally bring a claim while he was a minor, because the claim was always available to people who could bring it on their own or on his behalf." (*Resp. Br.*, 26-27.) SLRMC notes that the "primary" right to recover a minor's medical expenses lie with the parents who expended such resources. *See Jacobsen v. Schroder*, 117 Idaho 442, 444, 788 P.2d 843, 845 (1990). But such parental right of recovery of past medical expenses may be waived in favor of a minor. *See id.* Even though parents may be able to recover incurred medical expenses without the involvement of a minor in a lawsuit, in many cases, particularly medical malpractice, damages for significant pain and suffering, medical care stretching into adulthood when the parents have no further obligation to support the minor, lifelong disability, and even lifelong reduction in earning capacity belonging solely to a minor may constitute the majority of the damage caused by a defendant's conduct. SLRMC advances no authority, and W.G.G. is aware of none, that a parent may recover these damages without the participation of a minor in a lawsuit. These significant damages categories belong to the injured minor alone.

Is it acceptable to this Court, as it was to the district court below, that "some minors may fall through the cracks?" (R. 15.) Minors in Idaho are owed better than a dismissive "sorry" to their valid claims that they are unable to bring through no fault of their own. There are any number of reasons a parent or guardian might decline to bring a claim on behalf of a minor. Indeed, an orphan or ward of the state might not even have a minor or guardian to bring a claim on his or her behalf. A parent or guardian might be a minor themselves, incarcerated, or suffering from mental

health or addiction issues. A parent or guardian might explicitly decline to bring a claim on behalf of a minor, despite the minor's desire to do so, for whatever reason be it financial or fear of the litigation process. There is absolutely no reason compelling enough to simply dismiss the unfortunate minors who find themselves in these situation as falling "through the cracks."

In his opening brief, W.G.G. presented extensive citations wherein both this Court and the supreme courts of sister states have said no, it is inherently unjust, unfair, and unconstitutional to punish an injured minor for the neglect, ignorance, or laziness of parents or guardians. As this Court observed in *Doe v. Durtschi*, "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 . . . Minors should not have to rely upon others to protect their rights." 110 Idaho 466, 476, 716 P.2d 1238, 1248 (1986) (emphasis added).

The Texas Supreme Court noted that "[i]t 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 . . . ." *Sax v. Votteler*, 648 S.W.2d 661, 666-667 (Tex. Sup. Ct. 1983). The Alaska Supreme Court opined that "[w]hile many, perhaps even most, minors have diligent parents or guardians, not all minors are so lucky . . . it would be fundamentally unfair to a minor to saddle the minor with the consequences of a custodian's neglect." *Sands v. Green*, 156 P.3d 1130, 1134-1136 (Alaska Sup. Ct. 2007). The Missouri Supreme Court ruled 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." *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 10 (Mo. Sup. Ct. 1986). The Arizona Supreme Court likewise noted that "[t]he 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." *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 692 P.2d 280, 285-286 (Ariz. Sup. Ct. 1984). Similarly, the Ohio Supreme Court opined that "the parents themselves may be minors, ignorant, lethargic, or lack the requisite concern to bring a malpractice action within the time provided by statute . . . 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." *Mominee v. Scherbarth*, 503 N.E.2d 717, 721-722 (Ohio Sup. Ct. 1986).

The fifty-state survey appended by SLRMC to its opening brief only reinforces this point. In addition to the decisions cited *supra*, Kentucky, Maryland and Wyoming also determined that forcing minors to rely on a parent or guardian to assert a claim on their behalf does not satisfy their respective states' open courts provisions.

The Kentucky Supreme Court ruled that the statute of limitations cutting off a minor's medical malpractice claim prior to reaching the age of majority violated the open courts provision

of the Kentucky Constitution, and noted in response to the argument that older claims are difficult to defend, that older claims can be just as difficult to prosecute: "We note, however, that the passage of time operates to the disadvantage of injured plaintiffs as well." *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15, 19 (Ky. 1990). This is logical and should be noted by this Court when considering any arguments that older claims only present problems for the defense. Lost medical records and difficult to track down witnesses affect both plaintiffs and defendants.

The Maryland Court of Appeals ruled that a medical malpractice limitations period that did not toll claims for minors until reaching the age of majority violated the open courts provision of the Maryland Declaration of Rights: "The statute makes no exceptions for children who have unconcerned parents, children in foster care, or those in institutions; it applies alike to children who are precocious and those who are retarded, those who are normal and those who are brain injured, it applies to those with guardians and those without." *Piselli v. 75th St. Med., P.A.*, 371 Md. 188, 217, 808 A.2d 508, 525 (2001). Like the Maryland statute, Idaho Code § 5-230 makes no exceptions for children in loving homes with attentive parents possessing financial resources and disabled, handicapped orphans who are wards of the state.

Contrary to SLRMC's assertion that cases from other jurisdictions in which it is determined that limitations periods which do not toll claims for minors until reaching the age of majority violate "open courts" provisions "tend to be older" (*Resp. Br.*, 28), the Wyoming Supreme Court very recently ruled that its medical malpractice limitations period that did not toll claims for minors until reaching the age of majority violated the open courts provision of the Wyoming Constitution

in *Kordus v. Montes*, 2014 WY. 146, 337 P.3d 1138 (2014). Exactly as this Court must do in resolving W.G.G.'s appeal, the Wyoming Supreme Court considered *Sax* from Texas, *Barrio* from Arizona, *Mominee* from Ohio, *Piselli* from Maryland against *Harlfinger* from Massachusetts and *Willis* from West Virginia and decided against "assum[ing] that the rights of children would be protected by their parents and guardians." 2014 WY 146 at P27, 337 P.3d at 1147. In deeming the statute unconstitutional, the Wyoming Supreme Court cited *Barrio*, which in turn cited *Sax*, approvingly for the premise that it is unfair to minors to presume the protection of their parents or guardians:

> We agree with the Texas court that "it is neither reasonable nor realistic to rely upon parents, who may be ignorant, lethargic, or lack concern, to bring the action." *Sax*, *supra*, at 667. We recognize, also, that some children are without parents or have parents who do not fulfill commonly accepted parental functions. The statute makes no exceptions for children who have unconcerned parents, children in foster care, or those in institutions; it applies alike to children . . . who are normal and those who are brain injured. It applies to those with guardians and those without.
>
> A foster mother may be honestly dedicated to hot meals and clean linen and emotional support and quail at the thought of embarking upon several years of legal battle for a member of her changeable brood. As to parents themselves, some are lazy or frightened or ignorant or religiously opposed to legal redress. Still, they have their remedy available to them if they choose to use it. A child does not.

Id (quoting *Barrio*, 692 P.2d at 286). This Court should join the recent ruling of its esteemed neighbor to the east and reject SLRMC's argument that it is "good enough" that parents and guardians may bring claims on behalf of minors, as well as the district court's callous comfort with the notion that some minors might "fall through the cracks."

H. Section 5-230 Does not Satisfy an Equal Protection Test.

Finally, with regards to equal protection analysis, SLRMC recognizes that this Court has deemed the right to access the courts as "fundamental". (*Resp. Br.*, 37.) As discussed in W.G.G.'s opening brief, the class of persons harmed by § 5-230 are (1) those persons who will have the chance to assert a claim on their own behalf with the benefit of a full limitations period, and (2) those persons who will never have the opportunity of a full limitations period in which to assert a claim on their own behalf. Falling into the first category are competent adults and minors with a claim accruing after turning ten years old. Falling into the second category are minors with a claim accruing prior to turning ten years old, as well as the legally incompetent adults whose infirmity does not dissipate within six years of their claim accruing. Section 5-230 inherently treats these classes differently with regards to their access to the courts in the State of Idaho. There is no justification for allowing the first class of Idaho citizens a full limitations period in which to assert a claim on their own behalf, and denying the enjoyment of a full limitations period to the second class of Idaho citizens.

This court should apply a strict level of scrutiny given its characterization of the right to access the courts as "fundamental." Courts in other states have applied various levels of heightened scrutiny to limitations periods like § 5-230 that treat classes of citizens differently.

In *Lee v. Gaufin*, The Utah Supreme Court considered the equal protection implications of that state's medical malpractice limitations period, which contained no tolling for minors. Two classes were considered in *Lee*; (1) the medical malpractice limitations statute treated minors with medical malpractice claims differently than minors with non-medical malpractice claims; and (2)

the medical malpractice limitations statute treated adults and minors equally. 867 P.2d 572, 577-578 (Utah 1993). Section 5-230 makes no distinction for minors' medical malpractice and non-medical malpractice claims, but it does treat minors and adults somewhat, if not exactly, similarly, in that, after six years' tolling, § 5-230 treats a minor who has not yet reached the age of majority exactly like an adult, by commencing the running of all adult limitations periods.

The Utah Supreme Court deemed unconstitutional the treatment of minors the same as adults in the context of limitations periods:

> Minors and adults are not, however, similarly situated under the law with respect to their ability to assert a claim for injuries caused by malpractice. Minors, unlike adults, have no legal capacity to sue. Their legal incapacity is based on fundamental differences between adults and minors with respect to their physical, intellectual, psychological, and judgmental maturity. If the law failed to recognize those differences, the legal rights of minors could be exploited unconscionably and the law made an instrument of oppression as to the legal rights of minors. . . . Because of their lack of experience, judgment, knowledge, resources, and awareness, minors cannot effectively assert and protect their legal rights. . . . Although lawsuits asserting a violation of a minor's rights may be brought by parents, general guardians, or next friends as guardians ad litem, such persons have no legal duty to assert or otherwise protect a minor's legal claims. *See Scott v. School Bd.*, 568 P.2d 746, 747 (Utah 1977); *see also Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 692 P.2d 280, 286 (Ariz. 1984) (en banc); *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 503 N.E.2d 717, 721 (Ohio 1986). If parents and guardians fail to assert a minor's claim because they are neglectful, unavailable, or disinterested, or because they have a conflict of interest in filing a lawsuit for the minor, the minor's legal claim can never be asserted when a statute of limitations bars the cause of action before the minor reaches majority. Accordingly, the general rule for over 360 years has been that statutes of limitations are tolled for minors.

Id. at 578 (emphasis added).

The Utah Supreme Court applied a heightened level of scrutiny because the classes and statute at issue involved the important right to access the courts. *Id.* at 582-583. The Utah Supreme Court then considered whether the medical malpractice limitations period, as applied to minors, worked to control medical malpractice costs, and concluded that it did not and struck down the limitations period:

> In sum, the dramatic increases in medical malpractice insurance premiums and the increased costs of health care were not caused by significant increases in malpractice lawsuits or claims in Utah, by either adults or minors, or by significant increases in the size of jury verdicts. The legislative means for solving the insurance problem by cutting off the malpractice claims of minors simply does not further the legislative objective. Therefore, in applying the standard of scrutiny required under Article I, section 24 set out above, we hold that the nonuniform application of the limitations provisions in the Malpractice Act to minors' malpractice claims does not actually and substantially further the policy of curbing and reducing malpractice premiums and of insuring reasonably priced health-care services to the people of Utah and is not necessary to accomplish those ends..

Id. at 588 (emphasis added). The Utah Supreme Court approvingly quoted the Missouri Supreme Court in Strahler, *supra*, noting:

> We fully appreciate the legislative purpose intended by [the medical malpractice limitations statute], and we are unwilling to denominate it as being illegitimate, but we think the method employed by the legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price from minor plaintiffs like Carol Strahler [the plaintiff in this case] and all other minors similarly situated. For minor plaintiffs like Carol Strahler, the cure selected by the legislature would prove no less pernicious than the disease it was intended to remedy.

Id (quoting *Strahler*, 706 S.W.2d at 11) (emphasis added).

In *Schroeder v. Weighall*, the Washington Supreme Court recently considered its medical malpractice limitations period which allowed no tolling for minors under a "privileges and immunities" analysis, which was similar, but not identical, to equal protection analysis. 179 Wn. 566, 572, 316 P.3d 482, 485-486 (Wn. 2014). The Washington Supreme Court applied a heightened level of scrutiny because the medical malpractice limitations period, like § 5-230, "confers . . . an immunity from suit pursued by certain plaintiffs." *Id.* at 573, 316 P.3d at 486. The Washington Supreme Court found that the statute did not pass heightened scrutiny, rejecting the arguments advanced by the defendants that few minors would be impacted, but the statute would nonetheless greatly reduce medical malpractice costs: "If the statute is to be justified on the basis that it will greatly reduce medical malpractice claims, it cannot also be justified on the ground that it will not prevent very many plaintiffs from having their day in court." *Id.* at 577, 316 P.3d at 488.

Indeed, the Washington Supreme Court previously ruled that an eight-year statute of repose applicable to medical malpractice claims did not pass even the barest rational basis scrutiny: "While we recognized that addressing escalating insurance rates was a legitimate legislative goal, we also found clear evidence in the legislative record that the challenged statute would not advance that goal in any appreciable way." *Id.* at 574, 316 P.3d at 486-487 (citing *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 141, 960 P.2d 919 (Wn. 1998)).

In *Carson v. Maurer*, the New Hampshire Supreme Court applied heightened scrutiny to consider an equal protection challenge to its medical malpractice limitations statute because it implicated "economic and social legislation." 120 N.H. 925, 932, 424 A.2d 825, 831 (N.H. 1980) (overruled on other grounds by *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748,

917 A.2d 707 (N.H. 2006) (invalidating *Carson*'s utilization of heightened scrutiny but leaving outcome otherwise undisturbed)). The New Hampshire Supreme Court ruled that the medical malpractice limitations statute, which deviated from the general rule that minors' and incompetents' claims tolled until the disability was removed, did not satisfy heightened scrutiny: "RSA 507-C:4 (Supp. 1979) does not substantially further the legislative object of containing the costs of the medical injury reparations system because the number of malpractice claims brought by or on behalf of minors or mental incompetents is comparatively small." *Id.* at 937, 424 A.2d at 833.

In *Lyons v. Lederle Labs*, the South Dakota Supreme Court applied the barest level of scrutiny, rational basis, and concluded that South Dakota's medical malpractice limitations statute violated equal protection because it treated differently minors with medical malpractice claims and those with other types of claims: "We fail to perceive any rational basis for assuming that medical malpractice claims will diminish simply by requiring that suits be instituted at an earlier date." 440 N.W.2d 769, 771 (S. Dak. 1989).

W.G.G. urges this Court to apply a heightened level of scrutiny to § 5-230 as this Court has characterized the right to access the courts as "fundamental." But even applying the barest rational basis test, a review of the legislative history of the 1976 amendments to § 5-230 reveals absolutely no evidence that § 5-230 serves any governmental interest. There is one reference to reducing the "tail of risk" for insurance companies, while simultaneously arguing that "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.[2]

As set forth extensively herein, and in W.G.G.'s opening brief, the notion that there is "no excuse should stop the running of the Statute of Limitations for more than six years" is nonsense. As this Court explicitly recognized in *Doe*, and as has been recognized by the supreme courts of numerous other states, many reasons justify tolling a minors' limitations period for more than six years, until a minor reaches the age of majority. A minor cannot bring suit on his own behalf, and must rely on parents or legal guardians to do so. An orphan or ward of the state, however, might not even have a minor or guardian to bring a claim on his or her behalf. A parent or guardian might be a minor themselves, incarcerated, or suffering from mental health or addiction issues. A parent or guardian might explicitly decline to bring a claim on behalf of a minor, despite the minor's desire to do so, for whatever reason be it financial or fear of the litigation process. There is absolutely no reason compelling enough to simply dismiss the unfortunate minors who find themselves in these situation as falling "through the cracks."

Regarding the "tail of risk" reference in the legislative history of § 5-230, the absence of supporting evidence is instructive. Nowhere to be found is an evidence-based analysis of: (1) how many Idaho minors assert medical malpractice claims; (2) how many Idaho minors assert medical malpractice claims more than six years after accrual; and (3) how many Idaho minors assert

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[2] SLRMC does not dispute the propriety of this Court taking judicial notice of the legislative history of § 5-230 as a court may take judicial notice *sua sponte* at any time in the course of proceedings. *See* I.R.E. 201. Legislative history is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." I.R.E. 201(b)(2).

medical malpractice claims more than six years after accrual but prior to reaching the age of majority, and how the cutting off of such claims would actually impact the "tail of risk" of insurance companies.

Indeed, there is nary a single calculation of what the "tail of risk" looked like under the pre-1976 amendment, and what it would look like after the 1976 amendment. There is not even the barest level of analysis of how many claims minors' assert outside of the normal limitations period. The district court below explicitly noted as much, describing 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.) The Washington Supreme Court in *Schroeder* astutely noted that both things cannot be true, that the number of medical malpractice claims cut off by a statute is few, or "rare", but the savings to insurance companies and medical providers is extensive and necessary to justify the cutting off of such claims. W.G.G. does not argue that financial implications to insurance markets is wholly irrelevant, but the children of Idaho deserve the consideration of actual financial evidence before instituting statutory amendments cutting off viable claims belonging to them.

I. Section 5-230 Does not Satisfy Even a Minimal Rational Basis Due Process Test.

SLRMC recognizes that no Idaho authority has applied a due process-based rational basis test to a challenge to a statute based on the open courts provision, Article I, § 18, of the Idaho Constitution. The district court below, however, nonetheless engaged in due process analysis, applying a rational basis test. As set forth in W.G.G.'s opening brief, and section III.H, *supra*, § 5-230 fails even this minimal test. (*Appellant's Br.*, 25-30.) The Idaho legislature engaged in no

financial analysis whatsoever regarding the impact on insurance companies and markets of amending § 5-230, while wholly failing to consider and appreciate the significant policy reasons supporting tolling minors' limitations periods until reaching the age of majority.

The New Mexico Court of Appeals engaged in due process analysis and struck down a New Mexico statute which gave minors three years to file a medical malpractice claim, or a minor's ninth birthday, whichever occurs earlier. *Jaramillo v. Heaton*, 136 N.M. 498, 500, 100 P.3d 204, 206 (N.M. Ct. App. Aug. 17, 2004). The New Mexico Court of Appeals applied a "reasonableness" test to the limitations period, which appears akin to a minimal, rational basis level of scrutiny:

> We begin with the notion that 'considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the Legislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought.' To determine whether a statute of limitations meets this requirement, we look at the reasonableness of the amount of time provided to file a claim, given the circumstances of the claimant.

Id (quoting *Garcia v. La Farge*, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995)).

Jaramillo concluded that the limitations period failed even this minimal reasonableness test because New Mexico law, though allowing a parent or guardian to assert a claim on behalf of a minor, "does not require it." *Jaramillo*, 136 N.M. at 502, 100 P.3d at 208. Similarly, though a parent or guardian in Idaho may bring a claim on behalf of a minor, § 5-230, nor any other statute, requires them to do so, leaving a minor helpless to assert claims prior to reaching the age of majority.

J. W.G.G.'s Appeal Regarding the District Court's Evidentiary Rulings is Appropriately Granted as SLRMC Advances no Opposition or Objection.

SLRMC advanced no argument whatsoever opposing W.G.G.'s appeal of the district court's erroneous decision to strike the testimony of Eric Rossman, Daniel Reisberg, and portions of the testimony of Mrs. Gomersall. Accordingly, W.G.G.'s appeal thereof is appropriately granted based on SLRMC's lack of objection thereto.

III. CONCLUSION

W.G.G. realizes the significance of asking this Court to deem a duly-enacted statute of the legislature of the State of Idaho unconstitutional, that is exactly why this Court exists, to provide a check and balance when the legislature oversteps as it did in amending § 5-230 in 1976. This Court cannot and must not be afraid to strike down unconstitutional statutes when appropriate to do so. The children of Idaho deserve better than the legislature afforded them in 1976, and the Court has the chance to remedy that injustice.

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 15th day of September, 2020.

ROSSMAN LAW GROUP, PLLC

By _____
Matthew G. Gunn
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 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
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