71742-1

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No. 71742-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TERRI BLOCK,
as guardian of SARAH BLOCK

Appellant,

v.

THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC, a Washington Professional Limited Liability Company, BEN F. BARCUS and JANE DOE BARCUS, individually and the marital community comprised thereof; LEGGETT & KRAM, a Washington Partnership; PETER KRAM and JANE DOE KRAM, individually and the marital community comprised thereof,

Respondents.

BRIEF OF RESPONDENTS THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC and BEN F. BARCUS and JANE DOE BARCUS

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I. INTRODUCTION

Following a car accident that left her daughter Sarah severely injured and incapacitated, Terri Block ("Block") hired Ben Barcus' firm to pursue any claims that Sarah might have. The Barcus firm promptly began to investigate Sarah's claims, worked tirelessly on her behalf, and recovered more than $2 million on UIM claims. In April 2006, the Pierce County Superior Court approved – at Block's request – payment of the Barcus firm's contractually agreed 1/3 contingent fee for the work on the UIM case. More than *seven years later*, in May 2013, Block sued to claw back that fee.

Under any conceivably applicable limitations period, her claims are time-barred. No matter what label Block ascribes to her claims, each of them contends, fundamentally, that the UIM fee was unreasonable and asks that it be repaid based on an alleged breach of fiduciary duty. Undisputed evidence demonstrates that Block was on inquiry notice of her claims when the fee was approved by the Pierce County Superior Court and paid in April 2006. Because the claims that gave rise to the UIM fee sounded in tort, she had 45 days after getting the bill to challenge it as unreasonable. RCW 4.24.005. Block made no such challenge; instead she paid the fee and continued to employ the Barcus firm on other matters for two more years. If the 45-day limitations period is inapplicable for some reason, and Block claims to assert some new civil claim predicated on violations of RPCs – contrary to clear

Supreme Court authority – it would be subject to a catch-all two-year statute of limitation that expired in April 2008. Treating them as traditional breach of fiduciary duty claims, they are subject to a three-year statute of limitation that ran in April 2009. Block cannot recast tort claims as contract claims by importing an attorney's ethical duties into the retention agreement – clear authority holds otherwise. In any event, the six-year statute of limitation that governs contract claims expired in April 2012, more than a year before she filed suit.

Block tries to avoid this inevitable outcome by arguing that whichever limitations period applies, it is tolled indefinitely under RCW 4.16.190(1), which tolls statutes of limitation while a party is legally incapacitated. This fails as a matter of law because TEDRA, which controls in this case, contains a specific provision rendering RCW 4.16.190(1) inapplicable to those who have a legal guardian, as Sarah Block had at all relevant times. Block's arguments that this TEDRA provision is unconstitutional, or that she is entitled to equitable tolling, also fail as a matter of law.

The undisputed evidence is that Block waited more than seven years to bring her claims. No matter how they are characterized or what statute of limitations governs, that is too long. As this Court has stated, "[o]ne either chooses to enforce his rights in court in a timely manner, or he does not."

Peterson v. Groves, 111 Wn. App. 306, 312, 44 P.3d 894 (2002). Block chose not to do so, and the trial court properly dismissed her claims.

II. COUNTERSTATEMENT OF ISSUES

1. Are Block's claims, the gravamen of which all challenge the reasonableness of fees charged in a tort case, subject to the statute of limitations set forth in RCW 4.24.005 for such challenges of 45 days after receipt of the final billing?

2. Are Block's claims, in substance, claims for breach of fiduciary duty that must be filed within three years of discovery? If so, is there undisputed evidence that Block was on inquiry notice of her claims prior to May 2010?

3. Does Block assert a claim for breach of a specific term in the Barcus retainer agreement, is there evidence of such a breach, and did she file such claims by April 2012? Or does she, in fact, assert civil claims based on duties imposed by other sources – the Rules of Professional Conduct – that she seeks to import into the contract, in contradiction to *Davis v. Davis Wright Tremaine*, 103 Wn. App. 638, 14 P.3d 146 (2000), and *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992)?

4. Are Block's claims, which are assets of a Guardianship estate and which derive from alleged irregularities in proceedings related to the administration of other estate assets, subject to TEDRA, such that applicable

statutes of limitation are not tolled under RCW 4.16.190 because at all relevant times, there was both a guardian (Block, represented by numerous attorneys) and a guardian ad litem (Judson Gray) appointed to represent the incapacitated person? *See* RCW 11.96A.070(4).

5. Is there any evidence of fraudulent conduct on the part of the Barcus firm that prevented Block from timely filing her claims?

III. STATEMENT OF THE CASE

The facts as characterized in Block's brief are largely divorced from the record before the trial court. The following are the undisputed facts as supported by admissible evidence, as required by CR 56.

A. The Accident and Retention of the Barcus Firm

On September 12, 2005, Sarah Block was driving northbound on Interstate 5, driving a car that belonged to the parents of a friend, when Rosalie Meeks struck her head on in a car driving in the wrong direction. Sarah was airlifted to Harborview Medical Center, where she was treated for devastating injuries that affect her to this day.

The following day, Sarah's mother, Terri, contacted Kari Lester at the Barcus firm. Ms. Lester went to Harborview, where she met Terri's father and Sarah's husband, Dale. Mr. Block signed a retainer agreement hiring the Barcus firm to represent Sarah in regard to claims arising out of the accident. After travelling to Seattle from her home in Alaska, Block signed the same

agreement several days later, which provided for a customary one-third contingency fee. CP 110-11 ¶¶ 2-3, 6; CP 136-37.

The Barcus firm immediately began working to ensure that Sarah received the maximum possible recovery for her injuries. It investigated all aspects of the accident, obtained accident and medical records, and began looking into available coverage. It learned that Ms. Meeks, who died in the accident, was covered by a $100,000 liability policy with Hartford, and that the car Sarah was driving was covered by a Farmers policy that had $100,000 in underinsured motorist ("UIM") coverage. The owners of the vehicle, furthermore, had a $2 million umbrella policy, also through Farmers, although there were serious coverage issues under that policy. CP 111-15 ¶¶ 4-12; CP 119-21 ¶¶ 24-27.

The Barcus firm suggested that Block hire separate counsel to set up a guardianship for Sarah and otherwise to advise Block on various matters in her anticipated capacity as Sarah's guardian. It referred Block to Peter Kram, an attorney with extensive experience advising on guardianship matters, and a professional acquaintance of Mr. Barcus, who saw Mr. Kram at various functions a few times a year. CP 53-54 ¶¶ 3-4; CP 707-08 ¶ 3. Mr. Kram's retention agreement stated clearly that he represented no one other than Sarah Block, but the Barcus firm also signed in order to secure Mr. Kram's fees in the event that Block proved unable to pay. CP 54 ¶ 4; CP 707-08 ¶ 3. While

Block alleges and argues in her brief that Mr. Kram was a close "friend" of Mr. Barcus, and that his retention created a "serious conflict of interest," *there is no evidence in the record to support this claim whatsoever.*

Mr. Kram filed a petition for a guardianship on behalf of Sarah Block in the Pierce County Superior Court asking that Block be named as Sarah's guardian, and that an independent guardian ad litem be appointed from several potential alternatives. In her supporting declaration, Block asked the Court to confirm the retention of the Barcus firm and approve the retainer agreement. CP 158-59. The Pierce County Superior Court (hereafter "Guardianship Court") granted the petition to establish the guardianship and appointed Judson Gray as her guardian ad litem ("GAL"). CP 573-74 ¶¶ 2-3.

On November 9, 2005, Mr. Gray submitted his report recommending that Block be named as Sarah's guardian and that the Guardianship Court approve the Barcus firm's retention and fee agreement. CP 574 ¶ 3; CP 578-85. The next day, the Guardianship Court appointed Block as guardian, approved the Barcus firm's retention and fee agreement, and ordered that (1) the Court be notified should funds be realized from any tort litigation, (2) no distribution be made without court order, and (3) Mr. Gray "continue performing further duties or obligations as follows: In the event settlement negotiations are conducted with at fault parties the GAL shall be kept advised of such negotiations and proposed settlement." CP 574 ¶ 4; CP 627-35.

Block was attuned to issues related to fees and costs even as the guardianship for her daughter was being established and Block appointed as guardian. Specifically, she briefly discharged the Barcus firm in favor of the Adler Giersch firm, who reported that Block "was troubled by the reasonableness of [the Barcus firm's] fee agreement." CP 162. The firm's records confirm her concern that a 1/3 contingent fee "may be unreasonable." CP 721. Block ultimately elected to discharge Adler and again retain the Barcus firm, albeit on slightly modified terms. CP 117 ¶ 19; CP 166-71.

B. The Settlement of Claims and Approval of the Barcus Firm's Fee

In mid-November 2005, the Barcus firm made a demand to Farmers for the full $2.1 million in policy limits under the UIM/umbrella policies. CP 120 ¶ 26; CP 267-311. Farmers had previously asserted that Sarah was not an insured under the umbrella policy, because she was over 22 years old, and was not a family member that resided with the vehicle's owners. CP 141-43. The Barcus firm worked hard to overcome this coverage defense, including extensive research into the coverage issues, a thorough investigation into the circumstances of the accident, collection of all documents and evidence in support of Sarah's claim under the policy, and ultimately the preparation of the demand letter on Farmers. CP 113-14 ¶¶ 8-12; CP 119-21 ¶¶ 24-28. After

reviewing the demand letter and the materials that the Barcus firm assembled, Farmers capitulated and agreed to pay the full limits under both polices.

Over the following months, the Barcus firm worked with Mr. Kram and other attorneys to prepare the paperwork necessary to establish a Special Needs Trust (the "Trust"). They anticipated that Providence Health, which was funding Sarah's care, would assert a subrogation interest against proceeds from the UIM settlement, and felt that putting the money into the Trust would make it more difficult for Providence to attach those proceeds. CP 121-22 ¶¶ 29-30; CP 351-65. Their concerns proved to be well-founded; as discussed below Providence later asserted a subrogation claim, which the Barcus firm successfully defended for no additional fee.

Finally, in March 2006, the Barcus firm filed a petition on Block's behalf with the Guardianship Court, asking it to approve the UIM settlement and the Barcus firm's related fee, and to establish the Trust for the net proceeds. The petition – which Block personally verified – advised the Court that the Guardianship estate included $2,115,062.53 held in an interest bearing account, and that the Barcus firm was entitled to its one-third contingent fee pursuant to the previously approved fee agreement. CP 361-65. Block received a copy of the petition in advance in order to obtain her verification, and she spoke at length with the Barcus firm about it, and specifically, the one-third contingent fee. Block expressed concern about the

amount of the fee, but agreed that it be paid in light of what she later called "a huge amount of work" that the firm had undertaken on behalf of Sarah. CP 123 ¶ 31; CP 396-97; CP 446.

In support of Block's petition, the GAL, Mr. Gray, recommended that the Guardianship Court approve the creation of the Trust, that attorney James Bush be appointed as trustee, and that the UIM "fees and costs be approved." CP 574 ¶ 5; CP 637. On March 31, 2006, over Providence's objection, Commissioner Thompson approved the UIM settlement, the creation of the Trust, payment of all requested fees and costs, and deposit of the remaining funds into the Trust. CP 123-24 ¶ 32; CP 401-06. Providence sought revision of these rulings by Pierce County Superior Court Judge Thomas Felnagle, who denied that motion. CP 757-67, 769-70. Providence appealed. CP 772-75.

Block, separately represented by Mr. Kram throughout this process, neither challenged the UIM fee at either hearing, nor appealed those rulings. To the contrary, she not only signed the petition asking that the UIM fee be approved, but shortly thereafter met with the Barcus firm, attorney Jim Bush (trustee of the Trust) and Mr. Kram, and signed a formal Disbursal of Funds consistent with the provisions of the March 31, 2006 Order. CP 424. And only a month later, while reiterating her unhappiness with the UIM fee, Block

expressed her awareness and appreciation of the Barcus firm's work for her family, and asked for its commitment to continue those efforts:

> It's important to me that you know that Dale and I do appreciate and are thankful for all you've done for our daughter Sarah. I also believe we have some of the best attorneys in Washington. I do realize our relationship is based on business *and we will probably never be at peace with the huge fees you require*, at the same time, I do believe you've done well for Sarah and I am thankful you are apart [sic] of our lives since Sarah's crash.
>
> You've all done a huge amount of work recently with Sarah's trust and fighting Providence. You've collected what may be your total fees (if we don't win the suit against Harborview). I understand it would be nice to take a break away from Sarah's case and do work for other people now. I am asking to please keep Sarah at the most highest priority of your work day until she is moved home. Of all you've done and will do for Sarah that will have the most impact on her directly is to move her home. . . .
>
> Also I ask that you realize that Sarah and her father, Dale, are a combined entity. If you don't consider Dale's needs, you hurt him, which could put Sarah at risk to receive good care .... He's 56 years old, if his health or mental state is compromised, Sarah will lose. . . .
>
> My request is for none of you to take a break from Sarah's case until she and Dale board the plane to come home. . . .

CP 446 (emphasis added).

C. The Barcus Firm Continues to Represent Block on Separate Matters

Over the next two years, the Barcus firm honored that commitment, and labored mightily on behalf of the Blocks on a series of separate matters – often without compensation. More specifically:

Relocation of Sarah to Alaska. The Barcus firm, along with Mr. Kram, assisted the Blocks in obtaining the Guardianship Court's approval to move Sarah back to Alaska in June 2006. This involved, among other matters, working with experts to prepare a life care plan to ensure that Sarah's needs could be adequately met. The Barcus firm performed this work free of charge. CP 125-26 ¶ 35; CP 428-78.

The Providence Litigation. The Barcus firm represented Block in defeating the subrogation claim brought by Providence discussed above. After extensive discovery and motion practice, the Honorable Ronald B. Leighton, not only ruled in the Trust's favor, but also awarded Block more than $22,000 in prevailing party fees, noting that Block's participation (through the Barcus firm) "was . . . essential to the vindication of legitimate claims." CP 501, 503. Providence appealed, and settled during the appeal for $200,000 – less than one-fourth of its claim. The Barcus firm waived its fees and received no additional compensation for its efforts in this matter.

The Meeks Litigation and Investigation. The Barcus firm also pursued claims against the at-fault driver, Ms. Meeks. To this end, it set up an estate in Ms. Meeks' name. Discovery revealed that Ms. Meeks owned a home worth approximately $200,000, and that her brother had recorded a quitclaim deed just after her death. After extensive litigation, the Barcus firm settled the claims against the Meeks estate for $200,000 – $100,000 from the

policy and $100,000 from the house – and received its modest, contractually agreed fee of $66,000 for this work. As part of the settlement with Meeks' estate, Block was assigned any claims that Ms. Meeks might have against third parties. The Barcus firm then devoted further and substantial time and money to investigating whether any such claims were viable, but ultimately determined that they were not. The Barcus firm received no compensation for this additional work. CP 129-30 ¶¶ 41-42.

Other Litigation and Investigations. In addition to the cases discussed above, the Barcus firm also pursued a workplace injury matter on behalf of Dale Block, which it typically would not have taken given that it was a small matter to be litigated in Alaska. The case settled in early 2008, and the Barcus firm accepted a reduced fee so that the Blocks could net an even $100,000. CP 130-31 ¶ 43. The Barcus firm also investigated a possible medical malpractice action on behalf of Sarah against Harborview, but was ultimately unconvinced of the viability of such an action. The Barcus firm received no compensation for this work. Block later hired separate counsel and obtained a settlement of $3 million, of which $1.5 million went to the Special Needs Trust. CP 131 ¶ 44; CP 525-26.

D. Block Waits Nearly Three Years to Pursue Claims Related to the UIM Fee, Only After the Barcus Firm Finished Other Work and Refused to Buy Her a House

Two weeks after the Barcus firm transferred its Harborview files to Block's new attorneys, Block requested that the Barcus firm purchase her a $200,000 home, asserting that it "would be a good tax write-off for [the firm] and a great thank-you for the profit [it has] received by representing Sarah, also good PR opportunities." CP 535. Block had previously urged that Trust funds be used to purchase a home in which she and the entire Block family could live. The Trustee, Mr. Bush, declined that request because such a purchase was inconsistent with the purposes of the Trust and also an imprudent investment of Trust assets. CP 639-40 ¶ 5. Not surprisingly, the Barcus firm also declined Block's request, and shortly thereafter ended its representation effective August 5, 2008, after completing its investigation into Ms. Meeks' potential claims. CP 541-46.

Within one month after the Barcus firm terminated its representation, Block contacted attorney Michael Caryl to investigate the reasonableness of the fee paid to the Barcus firm in connection with the UIM matter. CP 906-07 ¶ 6.[1] Caryl requested a $10,000 retainer to pursue the matter, but rather than

[1] This was the second attorney Block had consulted in this regard. Previously, in November 2006 (merely seven months after the fee was paid), Block consulted with attorney Randall Luffberry on this issue. Mot. to Supp., Ex. 3 at 4 (11/28/06 Time Entry). The Trust paid the fees associated with this consultation. *Id.* at 13-14.

pay him out of the $100,000 they had received in settlement of Mr. Block's workplace injury claims several months earlier, Block sought the funds from the Trust. *Id.*; CP 937 ¶ 3. She wrote to Mr. Bush, stating that she "had to wait till the drunk driver case closed" before pursuing her claim against the Barcus firm. CP 645. *Thus, she knew of potential claims related to the UIM fee, but delayed pursing them while the Barcus firm continued other work.*

Mr. Bush responded that he did not feel it was appropriate for the Trust to fund the proposed investigation. CP 640 ¶ 7. Shortly thereafter, Block discharged Mr. Kram and hired Gordon Thomas Honeywell ("GTH") in his stead. CP 640-41 ¶ 8. In December 2008, GTH filed a petition asking the Guardianship Court to authorize Block, at the Trust's expense, to hire Caryl "for a legal opinion related to fees paid to the Barcus law firm." CP 779-85. Mr. Bush opposed the motion for the same reasons he had declined Block's prior request: that he did not see how paying Caryl's fee would directly benefit Sarah, and that the Court had previously approved both the fee agreement and the UIM fee itself. CP 640 ¶¶ 7-8; CP 647-54.

At a hearing on January 16, 2009, the Guardianship Court denied Block's petition, commenting that "Mr. Bush is well within his discretion in rejecting the request for $10,000 and might be outside his powers if he were to approve it." CP 1255-56. The Court further noted that it did not think "it's the job of the trust to become an investment machine to try and generate

more and more money." *Id.* Mr. Barcus also appeared at the hearing, understandably, to defend his professional reputation and to note that any lawsuit brought against his firm might involve counterclaims. CP 1257-58. The Court ultimately refused to "give [its] stamp of approval" to Block's petition, and ordered that she could proceed if she wished, but at her own expense. CP 1256. It further ordered that if Block "wants to take it any further, she does have to come back to the Court and get my approval," and that by allowing her to proceed the Court was "not immunizing Ms. Block from anything. . . . She proceeds at her own risk as a private citizen." CP 1256-58.

E. Block Waits More Than Four More Years to File Suit, Well After Any Potentially Applicable Statute of Limitations Had Run

By this time it was nearly three years after the UIM fee had been paid. But while the Guardianship Court granted Block authority to investigate claims against the Barcus firm – at her expense – Block did not do so. Rather, she informed Caryl that she would not pay his retainer and he declined the case. CP 906-07 ¶ 7.

Block then waited more than two years, until July 2011, before she contacted Caryl again, at which time she paid the retainer and asked him to pursue the UIM fee claim. CP 938 ¶ 3. Caryl then waited several more months, until September 30, 2011, to ask the Barcus firm to turn over "the

entirety of all of [its] case files from storage or wherever they may be, and forward them to [his] office." CP 1140. He claimed that Block was "entitled to the original file," but that the Barcus firm could "retain a copy made at [its] own expense." *Id.* He made the terms of his demand abundantly clear: "We are requesting not only hard copy documents that may exist in your physical file but literally everything that you may have, electronic or otherwise" and that the Barcus firm should "not send me a billing for the cost of reproducing the file." *Id.*

In response to this sweeping request, the Barcus firm filed a motion with the Guardianship Court for a protective order clarifying its obligations with respect to the file. Block cross-moved for production of the files, and again sought authority to use Trust funds to pursue further discovery. On February 10, 2012, the Guardianship Court ordered the Barcus and Kram firms to permit Block to copy the case files at *her* own expense, and firmly rejected – again – Block's requests for Trust funds to support further inquiry. CP 1277-79. "[T]he trustee is not authorized to fund any investigation or any litigation without the court's approval. . . . I am not awarding . . . any fees to the Caryl law firm to proceed further. I'm not authorizing this lawsuit in any way, shape, or form at this juncture, and that includes allowing for any depositions or subpoenas or anything else." CP 1242-43. The Barcus firm

promptly complied with the Guardianship Court's order and made its files available.

Block waited yet *another* year to seek the Guardianship Court's authorization to bring her claims (a process that took less than two weeks once initiated), and then four more months before actually filing suit on May 13, 2013 (in King County instead of Pierce County). By the time Block filed suit, more than seven years had passed since the UIM matter concluded and her claims had accrued. King County Superior Court Judge Inveen summarily dismissed Block's claims on statute of limitation grounds on February 25, 2014.

Appendix A, attached hereto, summarizes graphically some of the more significant events as discussed above.

IV. ARGUMENT

A. Standard of Review

"The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The appellate court should uphold summary judgment whenever "the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the moving party is

entitled to judgment as a matter of law." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

B. The Statute of Limitations Has Run on Block's Claims

Summary: A cursory reading of Block's "claims" reveals that they can all be reduced to a single claim for breach of fiduciary duty, for which she seeks the remedy of disgorgement of the Barcus firm's fee. There is no civil cause of action for violation of the Rules of Professional Conduct; the only civil cause of action in which such matters may be raised is breach of fiduciary duty. In this case, because the underlying claims from which her claims derive sound in tort and involve the reasonableness of attorney fees, Block had 45 days to challenge the Barcus firm's UIM fee after it was disbursed in April 2006. She did not do so. Even assuming that the general three-year statute of limitations applies to Block's breach of fiduciary duty claim, it expired no later than April 2009. Block cannot recast her tort claims as contract claims by reading ethical duties into the retention agreement, and even if she could do so, the statute of limitations for her hypothetical breach of contract claim expired in April 2012.

1. Block's "Claims" Assert a Single Cause of Action for Breach of Fiduciary Duty, and Sound in Tort

Block's creative nomenclature notwithstanding, all of her "claims" against the Barcus firm fundamentally rest on the same alleged breach of

fiduciary duty – namely, that the Barcus firm took an excessive fee, ostensibly in violation of various Rules of Professional Conduct. *See* App. Br. at 31. Indeed, the names she ascribes to her claims simply describe remedies she seeks for that alleged breach. For example, her first claim seeks to "void[] the written contingency fee agreement for ethical violations." App. Br. at 25. Her second claim is entirely derivative of the first, seeking a "determination of reasonableness" of the fees in light of the "voiding of the Barcus [firm's] contingency fee agreement." *Id.*; CP 13 ¶ 5.2. Block's final claim seeks "disgorgement of fees . . . as sanctions for breaches of fiduciary duty." App. Br. at 25 (emphasis omitted); CP 14 ¶¶ 6.1-6.5. None of these "claims" are formal causes of action, but remedies that a litigant may seek. *See, e.g., Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 754, 110 P.3d 796 (2005) (recognizing "remedy of disgorgement of fees" for "breach of fiduciary duty").

In order to determine the nature of Block's claims, one must simply look at what she alleges. "The nature of a cause of action must be determined from a consideration of the facts alleged, and not from the name the pleader may have used to characterize such facts." *Stearns v. Hochbrunn,* 24 Wash. 206, 212, 64 P. 165 (1901). Her claims all focus on recovering the fees that the Barcus firm received, and they are all replete with references to attorneys' duties of "fidelity" and "good faith" toward their clients, and to the Barcus

firm's alleged breaches of its "fiduciary duty" towards her. CP 11-14 ¶¶ 4.3-4.6; 6.2-6.5. *See* 29 David K. DeWolf, *Washington Practice, Elements of an Action: Breach of Fiduciary Duties* § 12:1, at 349–50 (2013) (essential elements of breach of fiduciary duty are existence of a fiduciary relationship, breach of that duty, damages and causation). As such, Block's "claims" can be reduced to a basic assertion of breach of fiduciary duty, sounding in tort.

Block's repeated references to the Rules of Professional Conduct do not alter this analysis, because there is no civil cause of action for violation of the RPCs. *Hizey*, 119 Wn.2d at 258-62.[2] Although a Superior Court may impose disciplinary sanctions ancillary to civil claims for which it has jurisdiction, *Danzig v. Danzig*, 79 Wn. App. 612, 620, 904 P.2d 312 (1995), a Superior Court lacks jurisdiction to impose such penalties where the underlying civil claims are not cognizable. *Id.* at 621; *Ang v. Martin*, 118 Wn. App. 553, 564, 76 P.3d 787 (2003) (client is not entitled to disgorgement

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[2] Even were the Court to recognize such a civil cause of action arising under the Rules of Professional Conduct independent from a civil claim for breach of fiduciary duty, it would still be untimely. RCW 4.16.005 states that "except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued. RCW 4.24.005 arguably prescribes such a limitation period applicable to claims related to the reasonableness of fees in tort cases, as discussed *infra.* But if that statute were not controlling for some reason, because no other statute prescribes a different limitation period for violations of the RPCs, any such claims would fall under the two-year "catch-all" applicable to "[a]n action for relief not hereinbefore provided for." RCW
(Footnote continued)

where it fails to establish merits of the case), *aff'd*, 154 Wn.2d 477 (2005).[3] And even if the civil claims are cognizable, the time for a court to address ancillary disciplinary issues is *after* such claims are adjudicated. *Behnke v. Aherns*, 172 Wn. App. 281, 288, 294 P.3d 729 (2012).

2. Block's Tort Claims Are Untimely

a. Block's Claims Are Barred by RCW 4.24.005 Which Requires That Challenges to the Reasonableness of Fees in Tort Cases to Be Filed 45 Days After Receipt of Final Billing

Block's claims for breach of fiduciary duty are time-barred. First, RCW 4.24.005 establishes a statute of limitations specific to claims challenging the reasonableness of fees in tort matters, which expires 45 days from the date of a final billing, as follows:

> Any party charged with the payment of attorney's fees in any tort action may petition the court not later than forty-five days of receipt of a final billing or accounting for a determination of the reasonableness of that party's attorneys' fees.

Based on the undisputed facts, the deadline to challenge the UIM fee under this statute passed in May 2006. While the continuing representation rule does not apply in this case (see *infra*), it would make no difference, as it

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4.16.130. Block missed the three-year statute of limitations applicable to tort claims (see *infra*). Claims subject to a two-year statute are untimely as well.

[3] To the extent that free-standing RPC violations can be litigated in civil courts, the Washington Supreme Court has *exclusive* original jurisdiction over such (Footnote continued)

would extend the time to challenge the reasonableness of the UIM fee until only August 2008. Nor is this limitation period subject to tolling under RCW 4.16.190, on which Block seeks to rely. *Barrett v. Friese*, 119 Wn. App. 823, 849-50, 82 P.3d 1179 (2003) ("[R]eliance upon the general tolling statute, RCW 4.16.190 is misplaced," because it doesn't apply to Chapter 4.24 of the RCW.).

This statute governs all of Block's claims, regardless of label. The gravamen of all of her claims is that the Barcus firm collected an unreasonable fee in the UIM matter. Allowing Block to end-run a statute that applies specifically to such claims by simply calling them some other form of cause of action would, in effect, read this statute out of existence. This is contrary to every tenet of statutory construction. *See Nisqually Delta Ass'n v. City of DuPont*, 95 Wn.2d 563, 568, 627 P.2d 956 (1981) ("Whenever possible, courts should avoid a statutory construction which nullifies, voids or renders meaningless or superfluous any section or words."); *Taylor v. City of Redmond*, 89 Wn.2d 315, 320, 571 P.2d 1388 (1977) (same); *Miller v. Sybouts*, 97 Wn.2d 445, 448, 645 P.2d 1082 (1982) ("Under the rules of statutory construction, a specific provision controls over one that is general in nature."); *see also*, RCW 4.16.005 (noting that chapter prescribes limitations

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"claims." *See Hahn v. The Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980); *See also*, RCW 2.48.060.

for actions covered by that chapter – e.g., breach of fiduciary duty – but is inapplicable when "a different limitation is prescribed by a statute not contained in this chapter").

b. Block's Claims Are Barred Even If Governed by the Three-Year Statute Generally Applicable to Breach of Fiduciary Duty Claims

Block's claims would also not survive were the Court to disregard the above statute, and instead apply the general statute of limitations applicable to breach of fiduciary duty claims, i.e., three years from discovery. RCW 4.16.080(2) (statute of limitations for breach of fiduciary duty claim is three years); *Meryhew v. Gillingham*, 77 Wn. App. 752, 755, 893 P.2d 692 (1995) (three-year statute of limitations of RCW 4.16.080 applies to breach of fiduciary duty claims); *Douglas v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000) (discovery rule applies to fiduciary duty claims). Block "discovered," i.e., was on inquiry notice of her claims, in April 2006; a three-year statute would have run by April 2009.

Under the discovery rule, the statute of limitations begins to run when the client "discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action." *Cawdrey v. Hanson Baker Ludlow Drumheller P.S.*, 129 Wn. App. 810, 816, 120 P.3d 605 (2005). For the claim to accrue and the limitations period to commence

running, the plaintiff "need not know of the legal cause of action itself." *Id.* at 816-17. Rather, all that is required is that the plaintiff knew or should have known "the facts that give rise" to the claim. *See id.* at 817; *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268 (2005). Further, a plaintiff bears the burden of proving that the facts giving rise to the claim were not and could not have been discovered by due diligence within the applicable limitations period. *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993).

One who has notice of facts sufficient to put him on inquiry is deemed to have notice of all facts which reasonable inquiry would disclose. *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005). Thus, the claim accrues, and the statute of limitations begins to run, when a plaintiff "reasonably suspects" that a specific wrongful act has occurred, and not when conclusive proof of harm is established:

> A smoking gun is not necessary to commence the limitation period. An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken. At that point, the potential harm with which the discovery rule is concerned – that remedies may expire before the claimant is aware of the cause of action – has evaporated. The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable. If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time-barred.

Beard v. King Cnty., 76 Wn. App. 863, 868, 889 P.2d 501 (1995).

Block filed suit on May 3, 2013. Thus, if she had reason to believe a wrongful act occurred before May 3, 2010, her claims are untimely. Undisputed evidence establishes that she was aware of her alleged claims long before this date, no later than April 2006. Specifically, Block claims to have learned that the UIM fee had been paid to the Barcus firm, *over her objection and without her permission*, in April 2006. CP 783-84 ¶¶ 16-20; CP 800 ¶ 6. She claims to have protested the UIM fee to Mr. Kram at the time. CP 784 ¶ 21. She advised the Barcus firm in April 2006 that she would "probably never be at peace with the huge fees [the Barcus firm] require[d]." CP 446. Her longstanding awareness of the issue is corroborated by the fact that she first consulted with counsel regarding the issue in November 2006, at Trust expense. Then, in September 2008, shortly after Mr. Barcus declined to buy Block a new home, Block contacted Caryl to ask him to investigate the reasonableness of the UIM fee. CP 531-35; CP 541; CP 906-07 ¶ 6; CP 937-38 ¶ 3. A month later, in October 2008, Block advised Mr. Bush that she wanted to retain Caryl to investigate the claims related to the Barcus firm's fee, and confessed that she had been waiting to pursue the matter until the Barcus firm completed other matters it was pursuing on her behalf. CP 645. Then, in December 2008, Block petitioned the Guardianship Court to permit the Trust to pay Caryl's retainer fee, and stated under oath that she had

protested the fee *at the time it was paid*, and believed the Barcus firm's fee was "unconscionable." CP 645; CP 779-85.

The foregoing notwithstanding, having waited nearly three years after the UIM fee was paid to petition the Guardianship Court for authorization to investigate the matter, having been granted the authority to do so at her own expense, and despite having recently settled a personal legal matter for a net recovery of $100,000, Block did nothing. She waited almost two more years to retain counsel for that purpose, who then did not file suit for almost another two years. Block's claims are time-barred based on her *actual* knowledge alone, much less knowledge imputed by reasonable investigation.

Even were Block entirely ignorant of the issue – and clearly she was well attuned to it since *before* the UIM settlement – to survive summary judgment Block must *also* show not only that the facts giving rise to her claims were not discovered, but also that they could not have been discovered by due diligence, within the limitations period. *See G.W. Constr.*, 70 Wn. App. at 367. The undisputed evidence proves otherwise. She was by her own admission aware of them at the time, and from the point that she finally retained counsel – June 2011 – she was able to obtain the files and file suit in less than two years, and could have done so months (if not years) earlier had she acted promptly. Any due diligence that needed to be completed before filing suit – if any was actually necessary – could have easily been

accomplished within the limitations period in diligent pursuit of these claims. Block failed to exercise that requisite diligence, and her claims are untimely.

3. Block Cannot Save Her Claims by Renaming Them Breach of Contract

a. Block Cannot Recast Claims for Breach of Fiduciary Duty As Contract Claims

Block's attempt to recast her tort claims as contract claims, thus gaining the benefit of a six-year statute of limitations, fails as a matter of law. The court in *Davis v. Davis Wright Tremaine*, 103 Wn. App. 638, 14 P.3d 146 (2000), addressed this very argument, and squarely rejected it. It held that claims based on duties that arise by virtue of an attorney/client relationship – e.g., the obligation to charge a reasonable fee – and as opposed to specific contractual duties set out in a written agreement, are not governed by the limitation applicable to written agreements, but rather by the three-year limitation applicable to torts. *See also, Owens v. Harrison*, 120 Wn. App. 909, 86 P.3d 1266 (2004) (distinguishing between a breach of contract claim for failure to draft a will from a tort claim for drafting a will negligently). Block attempts to distinguish *Davis* by noting that "[r]easonableness of fees was never at issue" (App. Br. at 30), but this is no answer to its fundamental holding. A party is not entitled to the six-year statute of limitations on a written contract except where the claimed liability is "either expressly stated in a written agreement or . . . follow[s] by natural

and reasonable implication from the promissory language of the agreement, as distinguished from liabilities . . . imported into the agreement from some external source." *Davis*, 103 Wn. App. at 651 (quoting *Bicknell* v. *Garrett*, 1 Wn.2d 564, 570-71, 96 P.2d 592 (1939)). Here, the source of the duty that Block seeks to engraft into the contract are the Rules of Professional Conduct. To suggest that a civil cause of action, sounding in contract, based on alleged RPC violations, is directly contradicted by the Supreme Court's ruling in *Hizey.*

Block does not allege, nor is there evidence, that the Barcus firm breached any specific contractual provision. To the contrary, the undisputed evidence is that the Barcus firm's fee was *exactly* what was specified in the fee agreement. Block clearly understands this distinction because she comments in her brief that if she had "not paid attorney's fees to him, Barcus would have had a six-year statute of limitations period in which to sue her." App. Br. at 26. Block is correct, because if she had not paid the agreed fee under the contract, *that would have been a direct violation of a contractual term*. It would not have been any violation of a non-contractual duty imported into the agreement from an outside source. But that is not her claim here.

In an effort to evade this clear authority, Block cites a series of cases supposedly standing for the proposition that where a client seeks to recover fees or impose "sanctions" against an attorney for violations of ethical duties,

such "claims" for ethical violations "*arise*[] *under* the written contract" between the client and attorney. App. Br. at 28-31. This is not so, nor do any of the cases Block cites so hold. For instance, Block implies that *Fetty v. Wagner*, 110 Wn. App. 598, 36 P.3d 1123 (2001), holds that "a claim to void [a] fee agreement based on ethical violations *arises under* the written contract," and that the six-year statute of limitations thus applies to such a claim. App. Br. at 28. But the *Fetty* court specifically declined to decide which statute of limitations applied in that case because it found that plaintiff's claims were timely regardless. *Fetty*, 110 Wn. App. at 600.

Other cases that Block cites stand only for the unremarkable proposition that an attorney owes fiduciary duties to his or her clients. *See Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983); *Holmes v. Loveless*, 122 Wn. App. 470, 94 P.3d 338 (2004); *Luna v. Gillingham*, 57 Wn. App. 574, 789 P.2d 801 (1990). No one disputes that attorneys owe fiduciary duties to their clients. These cases, however, do not address whether the six-year statute of limitations applies to breaches of such duties, simply because there was a written retainer agreement.

Still other cases Block cites hold only that Washington courts possess, in appropriate cases, inherent authority to order the disgorgement of fees where an attorney has committed a serious ethical violation. Thus, in *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), the Supreme Court held that

"[d]isgorgement of fees is a reasonable way to 'discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type.'" 118 Wn.2d at 463 (quoting *In re Eastern Sugar Antitrust Litig.*, 697 F.2d 524, 533 (3rd Cir 1982)); *see also, Cotton v. Kronenberg*, 111 Wn. App. 258, 275, 44 P.3d 878 (2002) ("The determination of a remedy after a finding of professional misconduct regarding fee agreements is within the discretion of the court."); *Bertlesen v. Harris*, 537 F.3d 1047, 1057 (9th Cir. 2008) (same). The inherent authority of Washington courts to order disgorgement in appropriate circumstances, *as to a claim that is timely brought*, is not the question. The issue here is whether Block can transform tort claims into contract claims by alleging breaches of the Rules of Professional Conduct. These cases offer no support for Block.

Block spills much ink establishing propositions that no one disputes, in an attempt to give the misleading impression that her argument that her claims are governed by the six-year limitations period applicable to breach of contract claims is well-buttressed by precedent. It isn't. In both form and substance, Block seeks to recharacterize what are clear tort claims as contract claims by importing ethical duties imposed by outside sources into the Barcus fee agreement itself. This is precisely the argument that this Court rejected in *Davis*, and should again reject here.

b. Even Claims That Arise Under the Contract Are Untimely

Block's effort to recast her tort claims as contract claims fails for another reason – they would be untimely anyway. The discovery rule is not applicable to contract claims. *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 160, 293 P.3d 407 (2013). As such, Block would have had six years from the date of the alleged breach to bring her claims. RCW 4.16.040. The alleged breach in this case would be the payment of the Barcus firm's fee in April 2006, which Block protested at the time and characterized as "unconscionable," and is the basis of her entire lawsuit. Any contract claims she may have had thus expired no later than April 2012, more than a year before Block filed suit, and nearly a year after she retained Caryl.

Nor can Block rely on the "continuous representation" rule to avoid this outcome. That rule "does not toll the statute of limitations until the end of the attorney-client *relationship*, but only during the lawyer's representation of the client in the *same matter* from which the malpractice claim arose." *Janicki Logging Constr. Co. v. Schwabe Williamson & Wyatt, PC*, 109 Wn. App. 655, 663-64, 37 P.3d 309 (2001). "The inquiry is not whether an attorney-client relationship ended but when the representation of the specific subject matter concluded." *Hipple v. McFadden*, 161 Wn. App. 550, 558, 255 P.3d 730 (2011). The purpose of the continuous representation rule is to

"avoid[] disruption of the attorney-client relationship and give[] attorneys the chance to remedy mistakes before being sued." *Janicki*, 109 Wn. App. at 662.

This Court's decision in *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 120 P.3d 605 (2005), illustrates this point. There, the attorney represented her client, as well as a family partnership, in various business transactions that concluded in 1999. The client retained the attorney for general matters, however, and last employed her in 2000 in connection with issues concerning her personal estate. The client later sued the attorney for legal malpractice in 2003 with respect to the business transactions, after the three-year statute of limitations for malpractice claims had run. The Court refused to apply the continuous representation rule, noting that "the limitations period begins to accrue when the attorney stops representing the client *on the particular matter in which the alleged malpractice occurred*." 129 Wn. App. at 819. The Court refused to expand the rule to apply to an attorney's representation as a whole, commenting that the "purpose of the rule is to give attorneys an opportunity to remedy their errors, establish that there was no error, or attempt to mitigate the damage caused by their errors, while still allowing the aggrieved client the right to later bring a malpractice action." *Id.* Because the attorney's ability to remedy any error she might have made concerning the business transactions ended in 1999, the statute of limitations began to run then. *Id.* at

820; *see also, Burns v. McClinton*, 135 Wn. App. 285, 299, 143 P.3d 630 (2008) (refusing to apply continuous representation rule where there "was nothing [defendant] could have done in an ongoing professional capacity" to fix any prior mistakes).

The situation is no different here. Block seeks to claw back the UIM fee that the Barcus firm received in April 2006, and which Block (represented by Mr. Kram), GAL Judson Gray, and the Guardianship Court approved. That particular matter ended there. Like the attorney in *Cawdrey*, the Barcus firm could not have "remedied any error or mitigated the damage it caused several years after the fact," and so the statute of limitations began to run the moment the fee was paid. Everything that happened afterwards – the Providence litigation, the claims against the Meeks estate, the investigation of the medical malpractice claims – had no impact on the UIM matter. To the extent that Block has asserted any contract claims concerning the fee she approved in April 2006, then, they expired in April 2012 and are untimely.

C. No Other Form of Tolling Applies to Block's Claims

Summary: Tacitly recognizing that the time to bring her claims – no matter how they are characterized – expired well before she filed them, Block resorts to a series of arguments to the effect that, whatever statute governs, it is tolled indefinitely, such that claims could timely be brought now, or in another year, or in 20 years. These arguments fail on all counts. She is not

entitled to toll her claims under RCW 4.16.190(1) because the claims she asserts related to the administration of the Guardianship estate, such that they are subject to TEDRA, which contains an explicit statutory provision rendering RCW 4.16.190 inapplicable where, as here, a guardian was appointed to administer the estate. That provision is not unconstitutional under the Privileges and Immunities Clause of the Washington Constitution because it does not burden any vulnerable group, nor favor any influential constituency. Finally, Block is not entitled to equitably toll the statute of limitations because she cannot show that the Barcus firm engaged in any fraudulent activity that prevented her from asserting her claims earlier.

1. Block's Claims Are Subject to TEDRA and Are Not Subject to the Tolling Provisions of RCW 4.16.190

Block's stunning contention that RCW 4.16.190(1) tolls the limitations period on her claims *indefinitely* is wrong for a fundamental reason – namely, TEDRA contains a specific exception to the tolling provision of RCW 4.16.190(1), and TEDRA governs Block's claims.

RCW 4.16.190(1) tolls the statute of limitations with respect to any causes of action that accrue while the party holding the claim is "incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings." In *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 770 P.2d 182 (1989), the Washington Supreme Court held that the appointment of

a guardian would not stop the tolling of an incompetent's claims without a "clear directive from the Legislature" to that effect. *Id.* at 224-25. But the Legislature provided such a "clear directive" in 1999, when it enacted TEDRA. RCW 11.96A.070(4) states explicitly:

> The tolling provisions of RCW 4.16.190 apply to this chapter except that the running of … any other applicable statute of limitations for any matter that is the subject of dispute under this chapter, is not tolled as to an individual who had a guardian ad litem, [or a] limited or general guardian of the estate, ... to represent the person during the probate or dispute resolution proceeding.

In this case, Block specifically acknowledged in her complaint that TEDRA governs her claims. She predicated the trial court's ability to assume jurisdiction of her claims on its power to adjudicate TEDRA matters. CP 3 ¶¶ 2.1-2.2. Further, in her prayer for relief, she specifically requested "an award of reasonable fee shifting attorney's fees and all costs as provided for in [TEDRA]." CP 15 ¶ 8.6. Having expressly invoked TEDRA as a basis for her claims and related relief, it is disingenuous for Block now to contend that she merely mentioned TEDRA in her complaint "as alternative grounds for venue and jurisdiction." App. Br. at 19.

To the contrary, Block listed no other specific laws or statutes imparting jurisdiction, and she asked for specific relief under TEDRA itself. Further, Sarah had both a guardian (Block herself) who was represented by separate counsel (Mr. Kram) *and* a guardian ad litem (Judson Gray) who

were centrally involved in the proceedings that Block claims were tainted in some fashion, which proceedings are the basis for suit against the Barcus firm – the petitions to the Guardianship Court seeking approval of the Barcus fee agreement, and the subsequent petition seeking the Guardianship Court's approval of the UIM settlement and payment of the UIM fee. TEDRA, and thus RCW 11.96A.070(4), clearly applies to such matters, and Block cannot assert that RCW 4.16.190(1) tolled her claims. *See Kwiatkowski v. Drews*, 142 Wn. App. 463, 496, 176 P.3d 510 (2008) ("[Plaintiff] was represented by a GAL; thus RCW 11.96A.070(4) clearly establishes that tolling does not apply."). Block's reliance on *Rivas v. Overlake Hospital Medical Center*, 164 Wn.2d 261, 189 P.3d 753 (2008), is also unavailing. No court had ever appointed a guardian in that case, which dealt exclusively with the standard by which incompetency is established. The applicability of RCW 11.96A.070(4) thus never arose, and Block cannot rely on *Rivas* to escape its application.

Block argues that because her claims do not "involve the administration of any estate or trust," TEDRA is inapplicable to them. App. Br. 19-21. This contention is belied by both the specific facts of this case and the law in Washington State. As noted above, Block alleged in her complaint that TEDRA governed her claims, and she sought recovery under TEDRA on

those claims. Furthermore, the law is clear that TEDRA is broad enough to govern disputes – such as the one here – that involve trusts or estates.

The "overall purpose of [TEDRA] is to set forth generally applicable statutory provisions for the resolution of disputes and other matters *involving* trusts and estates in a single chapter under Title 11 RCW." RCW 11.96A.010 (emphasis added). In order to accomplish this purpose, the legislature intended "that the courts shall have full and ample power and authority under this title to administer and settle ... [a]ll matters *concerning* the estates of incapacitated, missing and deceased persons." RCW 11.96A.020(1)(a) (emphasis added). TEDRA further defines "matter" to "include[] any issue, question or dispute involving ... [t]he determination of *any question* arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death." RCW 11.96A.030(2)(c) (emphasis added).

As this Court recently determined, the "plain words of this definition of 'matter' make clear the broad scope of this term." *In re Estate of Bernard*, 332 P.3d 480, 496 (Wash. Ct. App. Aug. 4, 2014). Indeed, this Court went on to cite comments to the original Senate Bill stating: "The term 'matter' establishes the issues, questions and disputes involving trusts and estates that can be resolved by judicial or nonjudicial action under the Act. This term is meant to apply broadly. . . ." *Id.*; *see also, In re Estate of Kordon*, 157 Wn.2d

206, 211, 137 P.3d 16 (2006) (TEDRA is applicable to statutory claims arising outside of specific TEDRA provisions when claim "aris[es] in the administration of an estate").

Block ignores this authority, and instead asserts that her causes of action "arise out of actions outside of the special needs trust," and thus are not governed by TEDRA. App. Br. at 21. But TEDRA applies to much more than special needs trusts; it applies to all matters relating to the administration of any trust or estate. The proceedings that are central to Block's claims here – the petition asking the Guardianship Court to approve the Barcus firm's fee agreement and, more significantly, the petition asking the Guardianship Court to approve the UIM settlement and the Barcus firm's related UIM fee, and to create the Special Needs Trust are themselves proceedings subject to TEDRA. All related directly to the administration of the *Guardianship estate*.

The case of *Kitsap Bank v. Denley*, 177 Wn. App. 559, 312 P.3d 711 (2013) – a case that Block references but fails to discuss – clearly demonstrates that the mere label attached to her claims has no bearing on whether TEDRA governs them. In *Kitsap*, the personal representative of an estate alerted Kitsap Bank that it had wrongfully distributed certain funds of the deceased because the beneficiary of those funds had engaged in fraud. The Bank then filed a motion for a temporary restraining order under RCW 30.22.210 enjoining release of the funds, naming both the personal

representative and the beneficiary as defendants. The personal representative filed a cross-claim against the beneficiary, alleging that the beneficiary had exerted "undue influence" over the deceased. The beneficiary prevailed on the merits, and then sought fees pursuant to RCW 11.96A.150 under TEDRA.

The personal representative objected, claiming that because the Bank had initiated the action under RCW 30.22.210, the action was not a "proceeding" for purposes of TEDRA. The court disagreed, commenting that "once the Estate filed its cross claim alleging undue influence, the original proceeding became a matter concerning the nonprobate asset under ch. 11.96A RCW." *Id.* at 581. In other words, even though the original cause of action did not arise under TEDRA, it was still a proceeding governed by TEDRA because it concerned assets of an estate.

That is the situation here. Block's claims are predicated directly on matters related to assets of the Guardianship estate – the UIM claims, the retention of counsel to present them, the settlement thereof, the fee to be paid, and the ultimate creation of a special needs trust that would shield such assets from creditors. While her claims may not assert a breach of a TEDRA statute, they derive from proceedings before the Guardianship Court related to the administration of other estate assets. Every aspect of the underlying litigation in the Guardianship Court involved administration of assets of the

Guardianship estate, which culminated in setting up, funding and otherwise administering assets that would then be deposited into the Trust. The fact that Block invoked TEDRA in her complaint both for purposes of jurisdiction and as a basis to recover fees, just as the beneficiary in *Kitsap Bank* did, confirms her admission that TEDRA governs, and in particular, the statute that claims are not tolled once a guardian is appointed.

In addition, the very claims she asserts against the Barcus firm are also assets of the Guardianship estate. Indeed, the Guardianship Court approved payment of the fees related to her first consultation with counsel in this regard. Further, in motion practice before the Guardianship Court following the grant of summary judgment in this case, the Barcus firm sought to recover fees incurred in this matter under the same TEDRA statute that Block invoked in her complaint. In response, Block argued that the Guardianship Court could not award fees because the matter was not controlled by TEDRA, but admitted, as she had to, that any recovery was an asset of the Guardianship estate that would ultimately be transferred to the Trust. The Guardianship Court flatly rejected the notion that TEDRA did not control, and instead denied fees based on the standards of the TEDRA fee statute. *See* Mot. to Supp., Ex. 1 (Fee Hr'g Tr.) at 32-33. Block did not challenge that ruling, either. Given these circumstances, Block cannot contend that her claims are not TEDRA "matters," and she cannot rely on

RCW 4.16.190(1) to toll the statute of limitations with respect to those claims.

Block's final resort under TEDRA is procedural in nature. She argues that the Barcus firm had the burden to demonstrate that the tolling exception in TEDRA applies to this case, and failed to do so because it made no such showing in this regard in its opening memorandum for summary judgment. But while the "statute of limitations is an affirmative defense, and the defendant carries the burden of proof. . . . [a] plaintiff . . . carries the burden of proof if he or she alleges that the statute was tolled and does not bar the claim." *Rivas*, 164 Wn.2d at 267. Thus, while the Barcus firm had the burden to show that the statute of limitations had run on Block's claims – which it well met as discussed above – Block had the burden to demonstrate that the tolling provision of RCW 4.16.190(1) applied.

The Barcus firm properly addressed this argument in reply, submitting no new evidence, and simply responding to the argument Block advanced in her opposition. While it is "the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment," responding to legal arguments that the non-moving party raises in opposition is what litigants do, and conforms entirely with the Civil Rules. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991); *see also,* CR 56(c) ("The moving party

may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing."). In any event, the superior court was entitled to consider any relevant statutes or legal authorities in rendering its decision, because "any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law." *Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000). Block's suggestion that the Superior Court should not have considered the Barcus firm's argument under TEDRA is therefore simply wrong.

2. The TEDRA Exception to the Tolling Provisions of RCW 4.16.190 Is Not Unconstitutional

Block argued for the first time in a motion for reconsideration that the Washington Supreme Court's recent decision in *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014), renders TEDRA's statute of limitations provision unconstitutional. This argument is untimely, and collapses under a cursory reading of the decision itself in any event.

The *Schroeder* Court held that a *different* TEDRA statute excluding medical malpractice actions from the tolling provisions applicable to minors and disabled persons violated the Washington Constitution's Privileges and Immunities clause because it conferred a benefit on a privileged group of citizens (medical professionals) while simultaneously burdening a vulnerable minority (minors). 179 Wn.2d at 577-78. In so holding, the Court noted that the purpose of the Privileges and Immunities Clause was to prohibit "laws

that confer a benefit on a privileged or influential minority." *Id.* at 572. Indeed, the Supreme Court has stressed that "article I, section 12 was intended to prevent favoritism and special treatment for a few, to the disadvantage of others," and "was historically applied in a manner consistent with its aim of eliminating governmental favoritism toward certain business interests." *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 782, 317 P.3d 1009 (2014). Stated simply, the *Schroeder* Court was concerned that medical professionals had exercised their political power to insulate themselves from suit by minors whom they had injured, thus placing a "disproportionate burden" on children who have no one in their lives with "the knowledge or incentive to pursue a claim on [their] behalf." 179 Wn.2d at 578-79.

The issues raised before the *Schroeder* Court are entirely absent here. The TEDRA provision at issue here does not disadvantage any vulnerable minority; it eliminates tolling only with respect to individuals "who had a guardian ad litem, limited or general guardian of the estate, or a special representative to represent the person during the probate or dispute resolution proceeding." RCW 11.96A.070(4). The exception reasonably exists because a disabled person with a guardian has someone to look out for his or her interests. Courts appoint guardians only after they have reviewed their background and credentials and are satisfied that they have the requisite skills

and knowledge to protect the interests of their charge. With respect to a disabled person who does not have a guardian, the tolling provisions of RCW 4.16.190 still apply. The TEDRA exception thus cannot be read to disadvantage anyone.

Here, Sarah had both a guardian ad litem (Mr. Gray), and a guardian (Block), represented by Mr. Kram. Both Mr. Gray and Block, advised by Kram – with the help of the Barcus firm – aggressively pursued Sarah's interests immediately after her accident. Block, Mr. Gray, Mr. Kram – as well as the Guardianship Court – were all participants in the process where the Barcus firm's fee was approved, and well positioned to act on her behalf if the circumstances warranted. Block has remained as guardian ever since, represented by Kram and later by Gordon Thomas and Caryl. The *Schroeder* Court's concern that an exception specifically designed for medical professionals would burden minors whose parents were not sufficiently sophisticated to pursue their children's medical malpractice claims is not implicated.

Even more fundamentally, the TEDRA provision does not single out any influential group of citizens or business concerns for special treatment. It does not apply only in the case of medical professionals, or to lawyers, or to any other politically advantaged group, but to anyone at all who might be the subject of a claim. "For a violation of article I, section 12 to occur, the law, or

its application, must confer a privilege to a class of citizens." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004). Because the TEDRA provision does not do that, it cannot run afoul of the Privileges and Immunities Clause. Thus, far from being "vitally important" to this case – as Block contends – the Supreme Court's decision in *Schroeder* simply has no bearing here.

3. The Doctrines of Equitable Tolling and Equitable Estoppel Do Not Apply to Block's Claims

Block's final effort to evade the statute of limitations, based on the related doctrines of "equitable tolling" and "equitable estoppel" fails for two basic reasons. ***First***, she cannot show that any action of the Barcus firm fraudulently misled her to delay filing suit until the statute of limitations on her claims had run. ***Second***, even if she could make such a showing, she has failed to exercise the diligence in bringing her claims that Washington courts require.

Washington courts will not equitably toll a statute of limitations in the absence of "bad faith, deception or false assurances by the [defendant] and "reasonable diligence on the part of the plaintiff." *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991) (en banc); *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998) (en banc) (same); *Finkelstein v. Sec. Props., Inc.,* 76 Wn. App. 733, 739-40, 888

P.2d 161 (1995) (same). Likewise, "[e]quitable estoppel is not favored," and is appropriate only where a defendant "*fraudulently or inequitably* invited a plaintiff to delay commencing suit until the applicable statute of limitations has expired." *Robinson v. City of Seattle*, 119 Wn.2d 34, 81, 830 P.2d 318 (1992); *see also, Peterson v. Groves*, 111 Wn. App. 306, 311, 44 P.3d 894 (2002) ("The gravamen of equitable estoppel with respect to the statute of limitations is that the defendant made representations or promises to perform which lulled the plaintiff into delaying timely action."); *Del Guzzi Constr. Co., Inc. v. Global Nw. Ltd.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986) (en banc) (estoppel applicable where defendant's actions "have fraudulently or inequitably invited plaintiff to delay commencing suit"). A plaintiff invoking equity to evade an otherwise applicable limitations period, moreover, must demonstrate defendant's fraudulent or inequitable conduct by "clear, cogent, and convincing evidence." *Robinson*, 119 Wn.2d at 81.

Even where plaintiff has demonstrated defendant's fraudulent or inequitable conduct, "plaintiff must act within a reasonable time after discovering" that conduct. *Peterson*, 111 Wn. App. at 898. "Facts and circumstances which create an estoppel at one point in time do not justify an unreasonable suspension of the statute of limitations. A party claiming estoppel to prevent an inequitable resort to the statute of limitations may

not sleep on his rights." *Cent. Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn.2d 126, 135, 443 P.2d 544 (1968) (finding that equitable estoppel not available 2 years and 10 months beyond the expiration of the limitations period).

A brief examination of several cases that Block cites illustrates the circumstances in which Washington courts have been willing – and unwilling – to toll an otherwise applicable limitations period. In *Thompson v. Wilson*, 142 Wn. App. 803, 175 P.3d 1149 (2008), the court applied equitable tolling where a coroner engaged in activity that specifically misled plaintiff into postponing the filing of her suit. The statute of limitations question concerned the limitations period applicable to a family's attempt to compel a coroner to revisit an autopsy determination. The court determined the statute of limitations to be two years, and the parties agreed that plaintiff had failed to meet her deadline. The court, however, applied equitable tolling because the coroner had met with plaintiff, and assured her he would review certain materials relating to the death of plaintiff's daughter. He never did so. The court held that absent the coroner's "deception and misleading assurances," the plaintiff would have timely filed suit. *Thompson*, 142 Wn. App. at 813-14.

Conversely, the courts in both *Del Guzzi* and *Peterson* refused to apply equitable tolling or estoppel. In *Del Guzzi*, plaintiff argued that the

limitations period should be tolled because defendant had encouraged plaintiff to undertake certain actions that "detained [plaintiff] from filing" suit. The court rejected plaintiff's argument because nothing defendant did or said actually "invited [plaintiff] to delay commencing suit until the statute of limitation had expired." *Del Guzzi*, 105 Wn.2d at 885.

In Peterson, the court refused to apply equitable estoppel where plaintiff waited more than 18 months to file suit against a relative after the statute of limitations had run, commenting that "reluctance to sue a member of the family is indistinguishable from sleeping on one's rights." *Peterson*, 111 Wn. App. at 316; *see also, Douchette*, 117 Wn.2d at 812 (refusing to equitably toll the statute of limitations where plaintiff waited more than three years from the date when her claim accrued, and more than one year beyond the limitations period).

The situation here fits the paradigm of *Del Guzzi* and *Peterson*. While Block levels factually unsupported accusations that the Barcus firm had a "conflict of interest" in that Mr. Barcus was a "friend" of Mr. Kram, she fails to offer any proof of such matters, or otherwise of any action by the Barcus firm that was fraudulent, or in any way prevented her from filing suit before the limitations period ran. The dispute regarding providing Caryl with the Barcus firm's files fails to prove a basis for tolling; Caryl did not request the Barcus firm's case files until September

2011, years after the statute of limitations on Block's claims had already run, and the Barcus firm ultimately produced its files in early 2012. Block still waited more than a year thereafter to file suit. Like the plaintiffs in *Peterson* and *Douchette*, then, she failed to exercise the diligence in pursuing her claims that would entitle her to tolling.

The other cases that Block cites offer no support for her under these circumstances. *See, e.g.*, *Millay*, 135 Wn.2d at 196-98 (holding that equitable tolling may apply to situation where a plaintiff narrowly misses a 60-day limitations period as a direct result of defendant's "grossly exaggerated or fraudulent statement"); *Duke v. Boyd*, 133 Wn.2d 80, 85-87, 942 P.2d 351 (1997) (tolling medical malpractice limitations period where doctor had intentionally concealed his negligence); *Murphy v. Huntington*, 91 Wn.2d 265, 268-69, 588 P.2d 742 (1978) (refusing to toll the statute of limitations where there was no evidence of "misrepresentation or a fraud").

There is no evidence of any fraudulent conduct on the part of the Barcus firm that prevented Block from bringing her claims within the limitations period, and conversely, ample undisputed evidence that Block failed to exercise the diligence in asserting her claims that Courts applying equitable tolling require. Block slept on her rights, and any claims she may have had have long since expired.

V. CONCLUSION

Block waited more than seven years to file her claims against the Barcus firm. No matter what limitations period applies, this delay renders her claims untimely. She has also failed to provide any legally sufficient justification for tolling the statute of limitations. For these reasons, the trial court correctly concluded that there was no genuine issue of material fact with respect to the statute of limitations question, and granted summary judgment. This Court should affirm that decision.

DATED this 15 day of October, 2014.

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The undersigned attorney certifies that a true copy of the foregoing pleading was served upon the following individuals:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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Appendix A
Timeline