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71742-1

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 APPELLANT

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I. INTRODUCTION

In September of 2005 a talented young woman (Sarah Block) was rendered mentally and physical incompetent for the rest of her life by the actions of a drunk driver. Sarah's parents hired the Barcus firm to represent Sarah under a written contingent fee agreement.

Sarah Block's case was characterized by unquestioned liability, uniquely high available insurance coverage and catastrophic damages. It took little effort or time for the Barcus law firm to get an initial $2,100,000 settlement. Barcus' associate prepared a seven and a half page settlement demand about two months after the accident. Farmer's tendered its policy limits of $2,100,000 two weeks after receiving the demand. Another $200,000 recovery followed with little effort.

Barcus had his friend Peter Kram appointed as Terri Block's lawyer in the guardianship. Unknown until years later, Kram also represented the Barcus' firm with regard to Sarah's claims. When Terri presented her concerns about the large fees taken by Barcus, Kram defended Barcus and personally attacked Terri.[1] When Terri obtained independent counsel, Barcus and Kram actively sought to hinder Terri's efforts to have their fees investigated, and obtained orders restricting her ability to do so. Despite their efforts, Terri was ultimately granted court

[1] For simplicity and to avoid confusion, Terri Block and Sarah Block will be referred to by their first names.

authority to sue Barcus and Kram as guardian for her daughter. In this action, she sought to void the Barcus written contingent fee agreement, a determination of the reasonableness of Barcus and Kram's fees, and the disgorgement of their fees based on breaches of fiduciary duties. She also sought damages from Kram for malpractice.

Barcus and Kram filed motions for summary judgment seeking a dismissal of all of Terri's claims based on statute of limitations and laches claims. The trial court improperly granted summary judgment on the basis of statutes of limitations.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Barcus' Motion for Summary Judgment dismissing all of plaintiff's claims, presumably based on a three-year statute of limitations. CP 1353-4.

2. The trial court erred in granting Kram's Motion for Summary Judgment dismissing all of plaintiff's claims, presumably based on a three-year statute of limitations. CP 1355-6

3. The trial court erred in denying Block's Motion for Reconsideration. CP 1393-5.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err in granting summary judgment by not tolling the running of statutes of limitations under RCW 4.16.190(1) when it is undisputed that Sarah Block has been permanently incompetent and disabled since before this action arose?

a. Were defendants' summary judgment claims of an exception to tolling under TEDRA insufficient to support a dismissal of plaintiff's claims when defendants did not identify any legal or factual basis for the claimed exception?

b. Was a dismissal of plaintiff's claim based on a TEDRA exception to tolling improper when the exception by its definitions does not apply to this case?

c. If TEDRA could apply, are there questions of material fact whether the TEDRA exception to tolling applies to Block's claims?

d. Is defendants' claimed exception to tolling under RCW 4.16.190(1) unconstitutional under **Schroeder v. Weighall**, 179 Wn2d 566, 316 P.3d 482 (2014)?

2. Did the court err in granting summary judgment dismissing plaintiff's claims when she filed her action before the expiration of the six-year statute of limitations for contract disputes?
    a. Does RCW 4.16.040(1)'s six-year statute of limitations apply to all or some of plaintiff's claims?
    b. Was plaintiff's action filed within the six-year limitations period, or do material questions of fact exist regarding whether the action was timely filed?
    c. Are there issues of material fact regarding the beginning and ending dates of the statute of limitations?
3. If a three-year statute of limitations applies to plaintiff's claims, did the trial court err in granting summary judgment dismissing plaintiff's action where:
    a. There are issues of material fact regarding the date at which the statue began to run,
    b. There are issues of material fact regarding the date the statute of limitations expired based on the continuous representation rule,
    c. Not all of plaintiff's claims, if any, would be subject to the three-year statute of limitations?

4. Did the trial court err in granting summary judgment dismissing plaintiff's action when material questions of fact exist regarding the running of statutes of limitations under the discovery rule?
5. Did the trial court err in granting summary judgment dismissing plaintiff's action when issues of material fact exist on questions of equitable tolling and equitable estoppel because defendants obstructed plaintiff's efforts to be able to bring this action?

IV. STATEMENT OF THE CASE

On September 12, 2005 Sarah Block ("Sarah") was a young woman with a bright future until she was severely injured by Rosalie Meeks, an intoxicated driver speeding the wrong way on a freeway. Since her injury, Sarah remains profoundly physically and mentally disabled. A guardianship for Sarah was required, and her mother, Terri Block, the Appellant, was appointed Sarah's guardian. CP 248-56. Terri acts here as guardian for the benefit of Sarah's special needs trust. Wells Fargo Bank is the trustee of Sarah's funds.

A. Procedural History

Terri signed a retainer agreement with the Barcus firm the day after Sarah's injuries. CP 22-3. Barcus selected his friend, Peter Kram, to serve as attorney for Terri and/or the guardianship. CP 1086, §7. Until he was replaced, Kram represented to the Court that he was acting as attorney

for the guardian or attorney for the guardianship. Kram admits in his answer to plaintiff's complaint at paragraph 3.5 that was the role he claimed. CP 42. Unknown to Terri, Kram had a serious conflict of interest because he also represented Barcus regarding Sarah's claims. CP 1204. The ramifications of this conflict are discussed below.

Barcus' office had to do very little to obtain the $2,100,000 in policy limits from Farmers Insurance, which was the UIM insurer for the car Sarah was driving when she was injured. The accident occurred on September 12th, 2005. On November 16, 2005, barely two months after the accident, Kari Lester, Barcus' associate, prepared and sent a 7 ½ page settlement letter to Farmers. At the time, the Barcus firm did not even know the total amount of medical bills incurred to that date for Sarah's care. It was clear that Sarah's needs and damages were only beginning. CP 267-74. Lester evidently sent the supporting medical records to the wrong address, nevertheless, within two weeks, Farmer's tendered its full limits without dispute or negotiation. CP 1329, 1330. Barcus claimed his one third contingent fees on the total settlement, less costs, and paid himself $695,602.50 in fees for the UIM settlement. CP 1301.

Meeks' car insurance limit of $100,000 was tendered to Barcus without a settlement demand on October 31, 2005. CP 346. Another $100,000 was obtained by settlement from Meeks' estate. Barcus paid

himself an additional fee of $66,666.67 for the Meeks settlement. CP 1201.

When Terri learned about the nearly $700,000 in attorney's fees Barcus took from Sarah's UIM settlement, she contacted her attorney, Peter Kram, to object. Kram verbally abused Terri, telling her to "shut up," and refused to consider her questions regarding the reasonableness of the fees. CP 784. Over time, Terri became convinced that Kram was more concerned about representing the interests of Barcus than Sarah. In 2008 Terri sought to replace Kram with Eileen Peterson of Gordon Thomas Honeywell in Tacoma. A notice of substitution of counsel was filed with the guardianship court on December 9, 2008. CP 777. Ms. Peterson immediately filed a petition with the guardianship court seeking authorization to have the trust pay a $10,000 retainer to obtain a review of the reasonableness of Barcus' fees. CP 779-89.

Notice of the petition to seek review of Barcus' fees was provided to the trustee for Sarah's funds, James Bush. Mr. Bush, a Tacoma attorney, evidently notified Barcus and Kram of Terri's intention to seek a review of their fees. CP 1109. Without invitation or standing, Mr. Barcus appeared in the guardianship court to oppose the authorization of any funds for the investigation of the reasonableness of his own fees. CP 1253-59. In opposing the investigation, he threatened both Terri and Sarah's

future financial well-being. CP 1257-8. The guardianship court denied the request for $10,000 so that the guardianship might investigate the matter of the fees, ordering that Terri could only proceed as a private person with her own funds, and that she could take no further action without order of the court. CP 656.

Terri was later able to raise personal funds to pay an initial retainer for the review of Barcus' fees. CP 1119. To review the matter, Terri's counsel requested copies of her files from both Barcus and Kram. CP 1140, 1143. These lawyers not only refused to provide the files to which Terri was entitled under WSBA Ethics Opinion 181, but Barcus and Kram took the unusual step of filing motions for protective orders in the guardianship court to permit them to deny Terri her files. They also objected to Terri's lawyers requesting information regarding the handling of Sarah's personal injury claims from Farmers Insurance and other parties, and opposed any investigation into the reasonableness of their fees. CP 1152-67, 1216-51. Terri's counsel filed a motion to require Barcus and Kram to produce their files, and for permission to obtain information from third parties regarding the handling of Sarah's claims. CP 1261-74. At the hearing on the matter, Barcus opposed any investigation into his fees. His stated is purpose was to ask "the Court to not allow this train to leave the station..." CP 1236.

On February 10, 2012, the guardianship court entered an order requiring Barcus and Kram to turn their files over to Terri's lawyers. However, at the urging of Barcus and Kram, they were permitted to take out whatever they considered "work product" without having to tell Terri's lawyers what materials they removed from their files before turning them over to counsel. In addition, at the urging of Barcus, Terri's lawyers were prohibited from requesting any information regarding the underlying claims from Farmers Insurance Company, the *guardian ad litem*, the trustee or any other third parties, or from conducting any discovery without the explicit order of the court. CP 1277-9.

Once Barcus and Kram finally turned their files over to Block's counsel, they were reviewed by Terri's lawyers. Michael Caryl, whose practice focuses on reasonableness of attorney's fees, prepared the report authorized by the guardianship court in the 2009 order. That report (CP 1181-91) was submitted to support Terri's petition seeking permission to sue Barcus and Kram as guardian. CP 918-34. On January 25, 2013 the guardianship court entered an order lifting the restrictions on discovery entered earlier, and authorized Terri to bring this action as guardian for her daughter. CP 19-20. Only then could this action be prepared and filed.

B. Summary Judgment

Terri's claims against Barcus and Kram were filed in King County on May 13, 2013. CP 1. After a stipulated change of case assignment area, the case was assigned to the Hon. Laura Inveen. Upon summary judgment motions by Barcus and Kram, the trial court dismissed all of Terri's claims, based on statute of limitations grounds. CP 1353-6. Terri moved for reconsideration. CP 1359-92. The trial court denied that motion without requiring a response from defendants. CP 1393-5. Terri now seeks review of the trial court's summary dismissal of her claims.

Defendants' motions for summary judgment did not distinguish between Ms. Block's causes of action or discuss the statutes of limitations to be applied to each. They simply asked the court to apply the general three-year limitation applicable to legal malpractice claims. CP 566.

Contrary to the defendants' characterization of Terri's claims, her complaint sought: (1) to void Barcus' written contingent fee agreement for violations of fiduciary duties (CP 11-13); (2) a determination of the reasonableness of the fees paid to Barcus and Kram (CP 13); (3) the forfeiture of fees by Barcus and Kram for breach of fiduciary duties (CP 14), and (4) damages resulting from Kram's malpractice (CP 14-15). As is explained below, none of these claims are barred by statutes of limitations. The guardianship's claims are not only based on the fact that

the fees were unreasonable, but that Barcus and Kram circumvented and violated court rules (SPR 98.16W) and ethics requirements designed to protect incapacitated persons in the settlement of their personal injury claims. *See generally* Guardian's Response to Barcus Defendants' Motion for Summary Judgment, CP 1005-14.

V. ARGUMENT

A. Standard of Review

When reviewing an order for summary judgment, appellate courts engage in the same inquiry as the trial court, and will affirm summary judgment only if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Questions of law are reviewed de novo. **Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.,** 134 Wn.2d 692, 698, 952 P.2d 590 (1998); *see also* CR 56.

B. All Statutes of Limitations Were Tolled by Sarah Block's Severe Disability.

Summary: Sarah was severely and permanently disabled, both mentally and physically, when she was hit head-on by Ms. Meeks. Defendants do not dispute her disability. In response to defendants' summary judgment motions, Terri invoked the tolling statute protecting incapacitated persons, RCW 4.16.190(1). In their replies, defendants

claimed an exception to tolling under RCW 11.96A.070(4), a portion of the TEDRA[2] statute.

TEDRA specifically incorporates the incompetency tolling statute RCW 4.16.190(1) with three limited exceptions. Barcus and Kram did not disclose to the trial court what sections of TEDRA they claimed applied to Terri's claims, nor did they disclose which of Terri's claims fell within the TEDRA tolling exceptions. In dismissing all of Block's claims, the trial court did not disclose if or how any TEDRA exception to tolling may apply.

1. RCW 4.16.190(1) Disability Tolling Protects Sarah.

It is unnecessary to determine which statute of limitations may apply to each cause of action, or when the statute of limitations on each claim commenced or expired. All statutes of limitations have been tolled since the date since Sarah was injured because of her undisputed disability and incompetency. RCW 4.16.190(1) provides:

> Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she

[2] 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.

> cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

The appointment of a guardian does not affect the tolling of the statute. In **Young v. Key Pharms., Inc.**, 112 Wn.2d 216, 770 P.2d 182 (1989) the Supreme Court held that, "The tolling statute's plain language indicates that the right it confers on the 'person entitled to bring an action' is not diminished by the appointment of a guardian. The words 'the time of such disability' refer to the person's disabling condition itself, not merely the disability to bring suit." **Young** at 221. Quoting the majority rule, the Court said:

> In case of the appointment of a guardian ad litem for an infant, it is held that such guardian can sue within the prescribed period of limitation, but is not obligated to do so, and that if he fails to sue, or having instituted an action within the statutory period, discontinues it, the rights of the infant are not prejudiced thereby, and he may still take advantage of his disability.

Young at 223-224. The court held that the same rule applies to an incompetent. Respondents in **Young** (at p. 224) argued this construction of RCW 4.16.190 would result in the statute of limitations never running in the case of a permanently disabled or incompetent person. The Supreme Court rejected the argument, saying it would not imply exceptions to

statutes of limitations when they had not been expressly provided by the Legislature.

Young was affirmed in **Rivas v. Overlake Hosp. Med. Ctr.,** 164 Wn.2d 264, 189 P.3d 753 (2008). **Rivas** also a medical negligence case. The Court pointed out that the legislature had amended the guardianship statutes several times since the **Young** decision, but none showed disapproval of the **Young** opinion. The Court held RCW 4.16.190 has four factors plaintiffs must satisfy to toll the statute of limitations based upon incompetence or disability:

> Plaintiffs must show that (1) they are entitled to bring the action, (2) they are incapacitated at the time the cause of action accrues, (3) they are incompetent or disabled to the degree that they cannot understand the nature of the proceedings, and (4) the incompetency or disability exists as "determined according to chapter 11.88 RCW.

Rivas at 268. In **Rivas** there was a question of fact concerning the degree and duration of the incompetency of the plaintiff. That is not an issue here, as everyone agrees about the profound disability that Sarah has suffered since the night she was hit by Meeks. Defendants Barcus admit in their answer that Sarah Block "is unable to care for herself due to severe physical and mental disabilities..." CP 27, §3.1 Defendants Kram admit the same, using the same language in their answer at CP 41, §3.1. Sarah was found to be disabled according to chapter 11.88 when her mother was

appointed guardian. CP 248-56. Sarah is still disabled and incompetent. *See* Declaration of Eileen Peterson (CP 1100-10), Declaration of Terri Block (CP 1084-94), and Declaration Andrea Greenfeld, M.D. (CP 1095-99). Neither Barcus nor Kram have in any manner disputed that Sarah's disability meets the requirements of RCW 4.16.190(1).

Barcus and Kram claim that the enactment of the TEDRA statute supersedes the tolling provisions of RCW 4.16.190(1) and thereby overrules the application of **Young** and **Rivas** to this TEDRA matters. CP 1334. However, TEDRA plainly states the opposite. The exception relied on by Barcus and Kram begins by specifically adopting the tolling statute by saying, "The tolling provisions of RCW 4.16.190 apply to this chapter…". RCW 11.96A.070(4).

2. Defendants' Claimed TEDRA Defense to Tolling Is Insufficient on its Face.

Defendants claimed an exception to the tolling statute for the first time in their summary judgment motion replies, relying on RCW 11.96A.070(4), which provides:

> The tolling provisions of RCW 4.16.190 apply to this chapter except that the running of a statute of limitations under subsection (1) or (2) of this section, or 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, limited or general guardian of the estate, or a special representative to

represent the person during the probate or dispute resolution proceeding.

Defendants failed to meet their burden for summary judgment in raising the TEDRA exceptions to tolling. They never disclosed why they contend that Block's claims against them fall within Chapter 11, or how any of the three limited exceptions may apply. (*See* defendants' summary judgment replies, CP 1334-1340 and CP 1341-52)

This is not a TEDRA action arising under Title 11. Block makes no claims against Barcus, Kram or any trustee concerning the administration of Sarah's special needs trust or any estate. Sarah's personal injury claims were not brought under TEDRA. The requirements for approving settlements and attorney's fees in SPR 98.16W are not part of Title 11. The requirements that fees claimed by attorneys be reasonable do not arise under TEDRA or Title 11, but RPC 1.5(a). Defendants' handling of Sarah's injury claims is unrelated to TEDRA, and Defendants did not utilize TEDRA or Title 11 in handling Sarah's Claims. Claims of legal malpractice, conflict of interest and breach of fiduciary duties do not arise under RCW Chapter 11.96A or Title 11. Plaintiff's claim seeking avoidance of the Barcus fee agreement is unrelated to TEDRA.

Plaintiff's claims are not involved in the administration of Sarah's special needs trust. There was no trust until after Barcus charged the

disputed fee. Defendants circumvented the trust, by presenting an order to the court which allowed Barcus to pay himself directly from the settlement before settlement proceeds were put into Sarah's trust. CP 401-6, pg. 4. By doing so, the trustee had no involvement in the payment of fees –the trustee's direct involvement would have entailed a report to the court addressing reasonableness and necessitating court approval. Neither the trust nor the trustee is a party to this action.

On summary judgment, the moving party has the initial burden of showing there is no dispute on any material fact. **Hiatt v. Walker Chevrolet**, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

> "If a moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. [Citation omitted.] Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact."

Hash v. Children's Orthopedic Hosp., 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

In ruling on a motion for summary judgment, the court must consider all of the material evidence and all inferences therefrom in a manner most favorable to the non-moving party and, when so considered, if reasonable

persons might reach different conclusions, the motion should be denied. ***Id;*** **Wood v. Seattle**, 57 Wn.2d 469, 358 P.2d 140 (1960).

The failure of defendants to properly support the motion for summary judgment cannot be remedied by a reply memorandum. The motion must be judged on its merits as presented.

> "Moreover, nothing in CR 56(c), which governs proceedings on a motion for summary judgment, permits the party seeking summary judgment to raise issues at any time other than in its motion and opening memorandum."

White v. Kent Medical Center Inc., 61 Wash. App. 163, 168, 810 P.2d 4, 312 P.3d 711 (1991) There is no dispute that Sarah Block has been severely disabled under RCW 4.16.190(1) since her accident, and that she is entitled to the tolling of all statutes of limitations unless Defendants can show an exception to the rule. Defendants have the initial burden to show that (a) TEDRA somehow applies to Plaintiff's claims/causes of action, and (b) that regarding any TEDRA claims, that Plaintiff's claims fall within the narrow exceptions to the tolling statute set out in RCW 11.96A.070(4). Only then does Plaintiff have an obligation (or opportunity) to respond to the issues.

Defendants presented nothing to the Court to show which, if any, of Plaintiff's claims arise under TEDRA. Defendants presented no evidence that TEDRA applies to this matter. They relied solely on limited

allegations in plaintiff's complaint to TEDRA statutes as alternative grounds for venue and jurisdiction (CP 3, §2.1) – which allegations defendants denied in their answers. CP 27, §2.1 and CP 41, §2.1.

Defendants presented nothing in their summary judgment motions to demonstrate that any of Plaintiff's claims fall within the narrowly defined exceptions to the tolling statute. Which of Plaintiff's claims do Defendants allege arise under any provision of Title 11? Which statutes? Which exceptions to the tolling statute do Defendants' claim fall within the provision of 11.96A.070 (4)? Defendants did not attempt to answer these essential questions. Defendants' summary judgment pleadings present no facts or authority to support a TEDRA exception to tolling, and their summary judgment motions are inadequate on their face.

3. Defendants' TEDRA Defense to Tolling Does Not Apply.

Had Defendants carried their initial burden on summary judgment, their motions still fail on the merits. Defendants do not question Sarah's disability or the application of RCW 4.16.190(1) to her. They incorrectly rely on RCW 11.96A.070 (4). The section narrowly defines three exceptions to disability tolling under TEDRA. Defendants do not contend the exceptions in subsections (1) and (2) of the statute apply to this case, and neither applies. The third exception in RCW 11.96A.070(4), refers to "any other applicable statute of limitations for any matter that is the subject of dispute under this chapter." The specific and limited "matters

subject to dispute under the chapter" are defined in RCW 11.96A.030(2).

RCW 11.96A.070(4) and RCW 11.96A.030 specifically define the proceedings to which the tolling exceptions apply. Defendants seem to imply that the exceptions would apply to any proceeding arising under Title 11. Not only is this argument inconsistent with the clear language of the statute, but it would make most of the language of 11.96A.070(4) superfluous. There would be no reason to specifically list exceptions (1) and (2), or limit the application of the third exception to "matters subject of dispute under this chapter" if the mere appointment of a guardian would defeat tolling – a position rejected by the Supreme Court in **Young.** Also, the explicit application of "the tolling provisions of RCW 4.16.190" to the TEDRA chapter by RCW 11.96A.070(4) would be rendered worthless.

The definitions of a "matter" in RCW 11.96A.030(2) are used to determine the authority and jurisdiction of the courts in TEDRA. In **Kitsap Bank v. Denley,** 177 Wn. App. 559, 312 P.3d 711 (2013) the court referred to the definitions of "matters" contained in the subsection to determine whether the proceeding before it was within Chapter 11.96A for the purpose of awarding attorney's fees under TEDRA. Applying rules of statutory construction, the Court found that a specific "matter" definition in RCW 11.96A.030(2) applied, and that therefore the Court had authority to award requested fees. **Kitsap Bank** at 580-581.

Defendants' motions point to no provision in TEDRA to support their claims that an exception to the tolling provision applies here. In oral

argument, Barcus claimed that subsection (c) of RCW 11.96A.030(2) was sufficient justification to have the Court dismiss all of plaintiff's claims. But that subsection is concerned with matters relating to the construction of wills, trusts, etc., and a personal representative's or trustee's accounting. Without explanation, Defendants contend that Plaintiff's claims arise out of the administration of an estate, but fail to articulate how Terri's claims against them relate to the administration of an estate. RP 49, lns.9-14; 50, lns.5-10.

As discussed in the section above, none of the claims against Barcus and Kram arise under Title 11, or involve the administration of any estate or trust. All claims against defendants arise out of actions outside of the special needs trust. Barcus and Kram have not shown otherwise.

Defendants' citation to **Kwiatkowski v. Drews**, 142 Wn. App. 463, 496, 176 P.3d 510 (2008) in its reply does not support defendants' claim to an exemption from tolling in this case. **Kwiatkowski** involved the specifically defined exception number 2 to RCW 11.96A.070(4) regarding actions brought against personal representatives before discharge. No such situation applies here.

Neither TEDRA nor the TEDRA exceptions to the tolling statute apply to Sarah's claims. At the minimum, there are questions of fact concerning which claims, if any, fall within the tolling exceptions making

a summary judgment dismissal of all of Block's claims inappropriate.

4. Defendants' Claimed Exception to the Tolling Statute is Unconstitutional.

Defendants raised their TEDRA defense for the first time in their replies. Prior to that time, Terri had no reason to raise the constitutionality of a statute not mentioned. Constitutional issues may be raised at any time. RAP 2.5(a)(3).

The Supreme Court issued its opinion in **Schroeder v. Weighall**, 179 Wn2d 566, 316 P.3d 482 (2014) shortly before Terri's summary judgment response was due. The trial court in **Schroeder** had dismissed claims for medical malpractice based on an exception to the tolling of medical malpractice claims' of minors under RCW 4.16.190(2). The Supreme Court reversed, holding:

> Petitioner Jaryd Schroeder challenges the constitutionality of RCW 4.16.190(2), which eliminates tolling of the statute of limitations for minors in the context of medical malpractice claims. We hold that RCW 4.16.190(2) violates article I, section 12 of the Washington State Constitution, and we therefore reverse the trial court's summary judgment order dismissing Schroeder's medical malpractice action.

Id, at 569. The **Schroeder** opinion is vitally important to this case. If the Supreme Court found it would violate the state constitution to deny a minor bringing a medical malpractice claim the benefits of the tolling

statute, why would not the same be true for a disabled person suing under TEDRA (as defendants claim Terri is doing).

The court in **Schroeder** initially determined that the right of a person to bring a common law action in court is a *privilege* of state citizenship guaranteed by Washington's privileges and immunities clause, Art. I, §12. **Schroeder** at 486. The Schroeder court noted that it had held in **DeYoung v. Providence Medical Center,** 136 Wn.2d 136, 141, 960 P.2d 919 (1998) "that an eight-year statute of repose applicable to medical malpractice claims violated article I, section 12."

Schroeder discussed the analysis to be taken if the statutory benefit to those who would take advantage of the exemption to tolling "has the potential to burden a particularly vulnerable minority." *Id* at 488. In holding the exemption statute unconstitutional, the court concluded:

> RCW 4.16.190(2) burdens an important right--a "privilege" for purposes of the article I, section 12 reasonable ground analysis. See supra, pp. 6-8. We have recognized the significance of this interest in other contexts as well, and it is undeniably "important" for purposes of our state equal protection analysis.
>
> * * *
>
> While RCW 4.16.190(2) applies by its terms to minors generally, it is evident from the arguments presented in this case that the law places a disproportionate burden on the child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf. Courts in numerous other jurisdictions have recognized this problem, noting that statutes analogous to RCW 4.16.190(2) have the greatest impact on children in the foster care system,

> children whose parents are themselves minors, and children whose parents are simply unconcerned. See Piselli v. 75th St. Med., 371 Md. 188, 215-19, 808 A.2d 508 (2002) (collecting cases). It goes without saying that these groups of children are not accountable for their status. Thus, even if minors generally do not constitute a semisuspect class under article I, section 12, the group of minors most likely to be adversely affected by RCW 4.16.190(2) may well constitute the type of discrete and insular minority whose interests are a central concern in our state equal protection cases.

Id at 488-89.

The condition of a severely disabled-for-life person like Sarah Block presumably has a greater need for protection where her disability, unlike that of the Schroeder child, is for life. The **Schroeder** court had no problem in determining that RCW 4.16190(2) was unconstitutional. For even more important reasons, RCW 11.96A.070 (4) suffers from the same constitutional weakness. This Court should strike this exemption as unconstitutional.

C. Block's Action Was Filed Within the Statute of Limitations.

1. Block's Claims are Subject to the Six Year Statute of Limitations.

With little or no analysis of Terri's claims, Defendants contended below that the statute of limitations is three years for all of the Guardian's claims. They merely asked the trial court to assume that all three claims fall within the rubric of torts. Their position is incorrect. Terri's claims

against Barcus are 1) for voiding the written contingency fee agreement for ethical violations and a determination of the reasonableness of his fees, 2) for a determination of reasonableness of the $760,000 in attorney's fees charged by Barcus and paid to himself from Sarah's settlements based on the written fee agreement, and 3) disgorgement of fees paid to defendants under their written fee agreements *as sanctions* for breaches of fiduciary duty. No malpractice claim is pleaded against Barcus. The claims against Kram are similar to those against Barcus, but include allegations of malpractice.

The trial court's summary order dismissing Terri's claims did not identify the limitation period upon which the court based its dismissal. Presumably the trial court adopted the argument of defendants that the three-year statute governed, because if the six year statute is applied, this action is timely.

The proper statute of limitations for Terri's claims is six years. RCW 4.16.040(1) states that the six year limitation applies in "An action upon a contract in writing, or liability express or implied arising out of a written agreement, except as provided for in *RCW 64.04.007(2)*." [3]

[3] The exception concerns actions for the collection of mortgage secured debts – not applicable here.

Barcus claimed a full one-third fee on the $2.1 million UIM settlement with Farmers Insurance and also on the $200,000 recovery against Rosalie Meeks. Any rights to attorney's fees possessed by Barcus derive solely from his written contract with Terri. CP 22-3. Had Terri not paid attorney's fees to him, Barcus would have had a six-year statute of limitations period in which to sue her.

Terri's claims also include Barcus' breach of his duties under RPC 1.5(a) not to charge or collect an unreasonable fee, a rule implied in literally every attorney's fee agreement in Washington. *See* RPC 1.5(a) and comments 3 & 10. What other statute of limitations would apply here? The same is true of the Block's claim for voiding the Barcus fee agreement. A lawyer may not enter into a fee agreement with a client as the product of violations of disclosure duties of the lawyer to the client. *See e.g* RPC 1.7(a)(1) & (2) and (b); *see also* RPC 1.8(g). These duties inhere in any contract between a lawyer and a client.

Lawyers are forbidden "to make an agreement for, charge or collect unreasonable fees" under RPC 1.5(a). A written fee agreement exists here and the reasonableness of fees charged under that agreement is the principal subject of Terri's claims. In an action for fees brought by an attorney against a client, this Court has pointed out:

> The parties first dispute whether the three-year or six-year statute of limitations applies to Fetty's action for fees. For actions on a contract or liability that is not in writing, and does not arise out of any written instrument, a three-year statute of limitations applies. But a plaintiff has six years to file an action upon a written contract, or upon a liability, express or implied, arising out of a written agreement. In this case, Fetty's action for fees in quantum meruit is not on the parties' contingent fee agreement, but is an equitable claim arising out of their agreement.

Fetty v. Wenger, 110 Wn. App. 598, 600, 36 P.3d 1123 (2001); review denied, 147 Wn2d 1011 (2002). No other type of contract is touched by the ethical duty a lawyer owes the client. Washington law extends to great lengths to protect the client. The court defined in **Perez v. Pappas,** 98 Wn2d 835, 841, 659 P.2d 475 (1983) "that the attorney-client relationship is a fiduciary one **as a matter of law** and thus the attorney owes the highest duty to the client." (Emphasis added) As the Washington Court of Appeals stated:

> "[A] fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients which transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client. Thus, in fixing and collecting fees the profession must remember that it is a 'branch of the administration of justice and not a mere money getting trade.' ABA Canons of Professional Ethics, Canon 12."

Holmes v. Loveless, 122 Wn. App. 470, 478, 94 P.3d 338 (2004). Unlike contracts of the *caveat emptor* variety, attorney's fee agreements involve duties of full disclosure:

> "A contract for attorney fees must be fair and reasonable, free from undue influence and based upon a full and fair disclosure of the facts upon which it is predicated." *Barr v. Day*, 69 Wn. App. 833, 844, 854 P.2d 642 (1993), *aff'd in part and rev'd in part on other grounds*, 124 Wn.2d 318, 879 P.2d 912 (1994)[citation omitted]. Strong public policy in Washington requires counsel to fully disclose and explain the contingent fee agreement to the client.

Luna v. Gillingham, 57 Wn. App. 574, 580, 789 P.2d 801 (1990). The Guardian's claim to void the fee agreement based on violations of duties of disclosure relating to fees inheres in the written fee agreement itself. If the lawyer has duties of disclosure relating to fees and the fee agreement and breaches those duties, a claim to void the fee agreement based on ethical violations *arises under* the written contract. **Fetty** at 600.

Barcus argues that the three-year statute governs the claim for disgorgement of fees due to breach of fiduciary duty. Barcus' only citation supporting such an argument is **Douglass v. Stanger**, 101 Wn.App. 243, 246, 2 P.3d 998 (2000). Barcus misrepresents **Douglass** as the only claim dismissed in **Douglass** based on the three-year statute of limitations was that of fraud, under RCW 4.16.080(4)("An action for relief upon the ground of fraud,"). **Douglass** is distinguishable - it did not entail ethical duties of lawyers, or the concept of disgorgement of earned fees *as sanctions* for ethical violations, but one businessman's suit for damages for breach of contract, fraud, and violation of the securities laws against a

person with whom he did business. Terri's claims here are for **sanctions** for violations of ethical duties owed to her and violations of court rules governing the approval of the disputed fees, and are not claims for damages. *See e.g.* **Eriks v. Denver,** 118 Wn.2d 451, 824 P.2d 1207 (1992); **Cotton v. Kronenberg**, 111 Wn.2d 258, 44 P.3d 878 (2002). The 9th Circuit in **Bertlesen v. Harris**, 537 F.3d 1047, 1057 (9th Cir. 2008) addressed a party's claims for disgorgement of fees for serious ethical violations in this way:

> Under Washington law, disgorgement of fees is a remedy committed to the discretion of the trial court: "Disgorgement of fees is a reasonable way to discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type. Such an order is within the inherent power of the trial court to fashion judgments." *Eriks, 824 P.2d at 1213* (internal quotation marks and citation omitted). A court is not required to order disgorgement, even where a breach of fiduciary duty is proven. *See Kelly, 813 P.2d at 602*. A court's refusal to disgorge fees, whether a breach of fiduciary duty is proven or not, is overturned only for an abuse of discretion. *Id.*

What statute of limitations do defendants contend restrict the equitable powers of the Court? Terri's request for sanctions arises from the misuse of Barcus' and Kram's written agreements and the violation of ethical duties owed in the collection of fees by defendants *arising under* those agreements.

In the trial court, Barcus contended that the Guardian's entitlement to a six-year statute of limitations fails because "controlling case law holds squarely to the contrary." CP 1345. The only authority cited by defendants for this proposition was **Davis v. Davis Wright,** 103 Wn. App. 638, 14 P.3d 146 (2000), ignoring the facts and misinterpreting the holding . The first sentence of **Davis** at 641 reads:

> Does the six-year statute of limitations for written contracts *apply to this legal malpractice action* because of language in the letter of engagement between Dr. Andrew Davis and Davis Wright Tremaine L.L.P. (DWT)? (Emphasis added)

Plaintiff Davis did not seek a review of the reasonableness of the fees charged by Davis Wright, but damages for legal malpractice for failing to do due diligence in investigating the purchase of a medical practice by Plaintiff Davis from another doctor. Apparently, Dr. Davis tried to argue that his claim arose under the written fee agreement which provided that Davis Wright agreed to do its best to provide "prompt, high quality legal counsel." *Id* at 641-42. However, Davis' claim was found to be only one of negligence. Reasonableness of fees was never at issue in **Davis.**

Furthermore, the Supreme Court distinguishes claims for malpractice and negligence from those which go to the business practices of lawyers. The former "go to the competence and strategy of lawyers, and not to the entrepreneurial aspects of practice." **Eriks v. Denver**, 118

Wn.2d 45, 464 (1992). "The entrepreneurial aspects of legal practice are those related to how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients." *Id*, quoting **Short v. Demopolis**, 103 Wn.2d 52, 60-61 (1984). While **Eriks** and **Short** involved questions concerning the application of the Consumer Protection Act to lawyers' activities, the distinction between negligence and the entrepreneurial aspects of legal practice is also important here. Defendants ignore this distinction. Terri's action arises out of Barcus' business practices and written fee agreement, and is not based on negligence claims, as defendants purport. Terri does not contend that Barcus breached his duty of care in failing to achieve an adequate recovery – but that he grossly over charged for obtaining a foregone result with no risk and little work, and that he violated the law in not obtaining court approval of the fees. Absent compliance with rules for approving fees, Barcus had no right to pay himself from Sarah's settlements.

2. Terri's Lawsuit Was Timely Filed.

This action was timely filed within the six-year statute, without any need to claim an extension of time by tolling or the discovery rule. Washington follows the continuous representation rule in determining when the statute of limitations begins to run for claims against lawyers

arising out of their representation of clients. **Janicki Logging v. Schwabe, Williamson**, 109 Wn. App. 655, 37 P.3d 309 (2001).

> The continuous representation rule avoids disruption of the attorney-client relationship and gives attorneys the chance to remedy mistakes before being sued. See Laird v. Blacker, 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691, 698 (1992). The rule also prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired. Laird, 828 P.2d at 698. Courts adopting the rule have found it to be "consistent with the purpose of the statute of limitations, which is to prevent stale claims and enable the defendant to preserve evidence. . . . The attorney-client relationship is maintained and speculative malpractice litigation is avoided." 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 22.13, at 430 (5th ed. 2000) (earlier edition quoted in Pittman v. McDowell, Rice & Smith, Chartered, 12 Kan. App. 2d 603, 752 P.2d 711, 715-16 (1988)).

Janicki at 662. *See also* **Hipple v. McFadden**, 161 Wn.App. 550, 255 P.3d 730 (2011).

The continuous representation rule is not limited to malpractice claims. "'The doctrine is not limited to litigation, nor does it matter whether the theory of liability sounds in tort or contract.' Mallen & Smith, *supra*, § 22.13, at 373." **Burns v. McClinton**, 135 Wn. App. 285, 294, 143 P.3d 630 (2006). Barcus ignored the continuous representation rule in claiming his defense of the statute of limitations.

The tolling of the statute of limitations by the continuous representation rule is determined by the end of the representation of the

client in the same matter from which the claim against the lawyer arose. **Janicki** at 664. The **Hipple** court determined that the lawyer's representation may also end if the attorney withdraws unilaterally, but only if the client has no reasonable expectation of continued representation. The question of when representation ended is a question of fact. **Hipple** at 559.

Barcus' firm represented Terri in all of her claims for Sarah's damages arising out of her September 2005 accident. These claims included the UIM claim with Farmers Insurance, the third party claim against the estate of Meeks, and a possible additional action relating to Sarah's medical care for her injuries and medication Meeks may have been taking. Barcus' fee agreement with Terri does not distinguish between these actions, and all work done by Barcus and all fees claimed by him are based on the same written contingent fee agreement. The fee agreement simply refers to representation Sarah regarding personal injuries for the accident on 9/12/05. CP 22. Therefore, all claims would be within the definition of the "same matter" under the agreement, and would follow the policies of the continuous representation rule. The UIM and third party claims should be considered part of the same matter. They both are based on the same fee agreement, arise out of the same incident, and are based on the same liability facts with the same damages. The

recoveries are just from different insurance companies. Even if the various claims were considered as separate "matters" for the continuous representation rule, this action was filed within the six year statute of limitations for each of them.

Barcus argues that the statute of limitations relating to his UIM fees began to run sometime in April or May, 2006, or September or December, 2008, when he claims Block became aware of the large amount of his fee and expressed dissatisfaction with it. CP 567-568. Any events he refers to in 2008 as a commencement date makes the filing of this action within the six year statute.

The UIM matter was far from finished in 2006. As Barcus admits, Providence Health Care's subrogation claim against the UIM recovery had to be resolved, and he represented her in that dispute. CP 558. The Pierce County court approved the Providence lien settlement on October 12, 2007. CP 129, §40. Six years from the approval of the UIM subrogation settlement is October 12, 2013. This action was filed on May 3rd, 2013 (CP 1) five months before the running of the statute of limitations.

The Federal Court hearing the Providence subrogation claim specifically noted that Barcus' representation of Terri regarding that claim

was part of his contingent fee agreement, and fees in the federal action should be returned to Sarah's trust. CP 503. [4]

The same result applies even if the Meeks settlement is considered a separate "matter." Barcus paid himself attorney's fees from the Meeks settlements on August 7, 2007. CP 1201 This action was filed approximately 3 months before the expiration of the six year statute of limitations using that date.

Terri hired Barcus and Kram for one purpose only – to recover damages for Sarah's lifetime care required because of the severe and permanent injuries she suffered. The recoveries may have been from different sources and occurred at different times, but the "matter" was the same, and it was covered by a single retainer agreement limited to that purpose. The policy underlying the continuous representation rule of avoiding disruption of the attorney-client relationship would only be furthered by applying the rule to the entire matter of Sarah's damages, not each step along the way.

Barcus issued his opinion on other potential claims regarding the 2005 accident, and withdrew from representing Terri and Sarah Block on

[4] Barcus has often claimed generosity toward Terri and Sarah in saying that he waived court awarded fees of $22,639.72 to settle the Providence claim. CP 129, 1162. However, Judge Ronald Leighton ruled that those fees were to be put into the special needs trust for Sarah's benefit. Barcus bargained away Sarah's money, not his. CP 503.

July 22, 2008. CP 132, 548-9. Kram's withdrawal and the substitution of new counsel for Block was signed on October 30, 2008 and filed on December 9, 2008. CP 777. Those dates represent the beginning of the running of statutes of limitations under the continuous representation rule, moving the expiration of the statute of limitations into July and December of 2014 – well over a year after this action was filed.

The six-year statute of limitations applies to claims against Kram in the same manner as it does to claims against Barcus. Plaintiff's second claim for relief seeks a determination of the reasonableness and appropriateness of fees paid to both. CP 13. The same is true regarding plaintiff's third claim for relief for breach of fiduciary duties. CP 14. With respect to Kram, his serious conflict of interest in part arises out of and is documented in this written fee agreement with both Block and Barcus. CP 1204.

Plaintiff's fourth claim for relief alleges negligence by Kram in his representation of Block and the guardianship. CP 14-5. This claim would be subject to the three year statute of limitations. However, this claim was also timely filed. Besides the general tolling statute and the doctrines of equitable tolling discussed below, two additional factors impact the running of the three year negligence statute. Regarding the malpractice claims against Kram, the three-year statute has not yet run for two reasons.

First, three years have yet to elapse since the last of Kram's actionable conduct giving rise to claims against him. Second, the discovery rule uniquely applies to claims against Kram, postponing the running of the statute of limitations.

Among the allegations of the malpractice claim against Kram are that he had a serious conflict of interest in representing both Barcus and Block, that he failed and refused to represent the interests of Block and Sarah's guardianship, and that he put the interests of Barcus ahead of those of the plaintiff. CP 15, §7.2.

Mr. Kram's duties to Terri and Sarah did not end when he was replaced as counsel for them. RPC 1.9 sets out specific obligations prohibiting him from representing someone whose interests are materially adverse to those of his former client, and prohibiting him from using information relating to his prior representation to the disadvantage of his former client. Kram's violations of his duties to Terri and Sarah began early in his representation of them, and continued long after his replacement as counsel. Several examples could be pointed out, but one stands out and is directly relevant to the running of the statute of limitations.

In 2011 and 2012 Block's current counsel sought to obtain copies of her files from Barcus and Kram. Block had a right to the files. In

response, Barcus and Kram filed motions for protective orders to prevent Terri's counsel from getting file materials so the reasonableness of Barcus' fees could be evaluated. CP 1152-1153, 1155-1167. Terri's counsel had to move to compel their production. CP 1261-74. In order to support efforts to prevent a review of Barcus' fees, Kram filed a declaration with the Pierce County Superior Court dated February 7, 2012, supporting Barcus' efforts to deprive Terri of her files. CP 1208-14.

In volunteering as a witness against his former client, Kram violated his fiduciary duties to Terri. In refusing to provide his file which under WSBA Opinion 181 belonged to Terri, he invoked his obligations to his other client – Ben Barcus. Referring to Terri's counsels' request for his file, Mr. Kram highlighted his conflict by testifying, "Their initial letter had some innocuous language about simply wanting to see the file. Bear in mind that Ben Barcus also signed this retainer agreement and he has not authorized release of my file to Lee Raaen." CP 1212, ln. 7.

However, Kram went much further and personally attacked his former client and her new counsel.

> "Terri Block, Michael Caryl, Lee Raaen and Eileen Peterson now engage this smear campaign and an extortion plot to gouge more money out of lawyers who have done nothing but help her. This is nothing more than a racketeering extortion plot dreamed up by Terri Block and her complicit counsel, Mr. Caryl." *Id.* ln.1

> "While Block and Caryl are careful to say that they are only investigating, the truth is that this is extortionate and there is no clearer way to say this." CP 1213, ln. 21.

Mr. Kram concludes with a threat against his former client.

> "Terri Block and Michael Carryl complain that somehow fees were improper or excessive or the relationship was improper. If that is true then for the four years that Terri Block served as the guardian with different lawyers assisting her, she must have failed to look out for the best interest of her daughter. If that is so then she has failed in her fiduciary duty and should be removed as guardian of her child forthwith and immediately." CP 1213, ln 11.

This is not an instance of a lawyer filing a declaration in response to a claim against him, but is instead an attempt to aid someone whose interests are adverse to his former client. In doing so, Kram attacked and threatened his former client. The accusations in Mr. Kram's declaration are evidence of his continuing disregard of his client's interests. The three-year period for the tort claims against Kram will not run until at least February 9, 2015 – three years after that declaration.

The discovery rule also applies to claims against Mr. Kram, including those discussed above regarding his failure to represent Block instead of Barcus.

> "The general rule in ordinary personal injury actions is that a cause of action accrues at the time the act or omission occurs." *In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992) (citation omitted). An exception to this is provided by the common-law discovery rule. Under the discovery rule, "a cause of action accrues when a claimant knows, or in the exercise of due

> diligence should have known, all the essential elements of the cause of action, specifically duty, breach, causation and damages." Id. at 752 (citations omitted). **The question of whether a plaintiff was duly diligent in pursuing a legal claim is a question of fact for the jury unless reasonable minds could reach but one conclusion.** *Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992). [emphasis added]

Funkhouser v. Wilson, 89 Wn. App. 644, 666-667, 950 P.2d 501 (1998). In **Funkhouser**, this Court reversed the granting of summary judgment on the statute of limitations. The case involved a claim for abuse. It was undisputed that the plaintiff had always recalled some of the acts of abuse and that it had harmed her. The Court held that the issue was not when the plaintiff discovered the tort, but when she discovered or should have discovered the elements of her claim against the respondents. This depended on her finding out that others had information about the abusers history and there was a failure to warn plaintiff's father – facts giving rise to the cause of action.

When Eileen Peterson replaced Kram as attorney for Terri, she requested a copy of Mr. Kram's file. He refused to provide it based on his understanding that it might be used to challenge the reasonableness of Barcus' attorney's fees. He only offered to allow her to copy pleadings. CP 1106, 1109-10.

Kram's conflict of interest only came to light when he provided his retainer agreement to Terri's current lawyers in a letter dated November

21, 2011 in support his denial of the production of his case file. CP 1203-4. This fee agreement lists both the Law Offices of Ben Barcus and Terri Block, as clients of Mr. Kram. Kram's refusal to provide his file until November, 2011 prevented discovery of his conflict, preventing the running of the statute of limitations until then, a statute which has not yet run three years.

Barcus and Kram present no legal basis for claiming that the statute of limitations began to run in March of 2006. Their representation had not been completed on any matter by that date regardless of how the subject of their representation could be defined or divided. Defendants' theory would cause a situation in which each act of an attorney in handling a claim would have its own statute of limitations, even though the lawyers' representation in the matter had not yet been completed. Such a situation would be unworkable and would violate the continuous representation rule and its policies adopted by the courts.

Barcus and Kram ignore the continuous representation rule, but instead rely on the discovery rule for their claimed date beginning the running of the statute of limitations. Not only is the discovery rule unnecessary to extend the statute of limitations (it cannot shorten it), but many of the dates cited by Barcus to support the discovery rule fall within six years of the date of filing of this action. CP 567-568. If the discovery

rule applies, defendants' own time line indicates questions of fact as to when it would run.

Even absent tolling, statutory or equitable, this action was filed within the applicable statute of limitations. At the very minimum, questions of fact exist regarding when the statute began to run precluding summary judgment dismissing all of Block's claims.

D. Material Questions of Fact Exist on Equitable Tolling and Equitable Estoppel.

Terri raised equitable issues to toll the statute of limitations based on the misconduct of Barcus and Kram and the breach of their fiduciary duties. The concepts of equitable tolling and equitable estoppel are related. Equitable tolling of the statute of limitations is available where a party seeking to avoid liability with a limitations defense has acted in bad faith, used deception or false assurances, or otherwise sought to prevent a party from bringing suit within the limitation period. This doctrine was the basis for reversal of the denial of redemption rights over a parcel of real property in **Millay v. Cam**, 152 Wn.2d 193, 955 P.2d 791 (1998). **Millay** at 205 states, "Numerous courts acknowledge inherent judicial authority to toll statutory redemption periods upon a finding of fraud, oppression, or other equitable circumstances." The court further explained at 206:

> Likewise, this court allows equitable tolling when justice requires. . . . The predicates for equitable tolling

> are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. . . . In Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations. (Citations omitted)
>
> * * *
>
> We hold the statutory redemption period may be equitably tolled when the redemptioner in possession submits a grossly exaggerated statement of the sum required to redeem and the prospective redemptioner cannot with due diligence ascertain the sum required to redeem within the time remaining.

Closely allied to equitable tolling is the doctrine of estoppel to assert the statute of limitations.[5] In **DeGuzzi Const. v. Global**, 105 Wn2d 878, 885719 P.2d 120 (1986), the court recited the rule:

> Estoppel will preclude a defendant from asserting the statute of limitation when his actions have *fraudulently* or *inequitably* invited a plaintiff to delay commencing suit until the applicable statute of limitation has expired. **Central Heat, Inc. v. Daily Olympian, Inc.**, *74 Wn.2d 126, 443 P.2d 544, 44 A.L.R.3d 750 (1968).*

Mere inequitable conduct which prevents a party's ability to commence suit within the statute suffices to ground this estoppel. *See e.g.* **Murphy v. Huntington,** 91 Wn.2d 265, 267, 588 P.2d 742 (1978)("fraudulent *or inequitable* resort to the statute of limitation as a defense.")

Cases applying these equitable concepts often involve a failure to

[5] This doctrine is applied nationwide in both state and Federal courts, including in Washington. *See generally*, "Fraud, Misrepresentation or Deception as Estopping Reliance on the Statute of Limitation," 43 A.L.R. 3rd 429.

disclose critical information, the concealment of essential facts, or fraud. For example, **Thompson v. Wilson**, 142 Wn. App. 803, 814, 175 P.3d 1149 (2008) involved deception and misleading assurances by the defendant. In **Peterson v. Groves**, 111 Wn.App. 306, 44 P.3d 894 (2002), a stepson borrowed substantial funds from his stepfather and made repeated promises to repay over the years when he sold a piece of real property, but when he sold the property in 1998, he did not repay the stepfather. The plaintiff's reliance on the assurances tolled the statute.

The actions of Barcus and Kram go well beyond the usual situations involving equitable tolling and equitable estoppel based on simple concealment. As pointed out above:

- Barcus and Kram had fiduciary attorney-client relationships with important ethical obligations to their client/former client.
- They had an undisclosed and unpermitted conflict of interest throughout their representation of Terri.
- They used the conflict of interest in their attempts to deny Terri her files to prevent a review of their fees.
- They refused to provide their files to Terri, and when pressed, took the extraordinary step of seeking protective orders to permit them to do so.

- They, along with the original trustee appointed by in the order submitted by Barcus and Kram, appeared in court to oppose any investigation into the reasonableness of Barcus' fees in 2009. In doing so, they not only violated their obligations to their former client, but personally attacked Terri and her counsel merely seeking to investigate the reasonableness of the Barcus fees.
- As a result of their efforts, Terri and her lawyers were prohibited from conducting any "discovery," requesting any information from third parties, or from taking any further action to investigate the matter without authorization by the guardianship court.
- At the urging of Barcus and Kram, Terri was specifically prohibited from taking any legal action, including filing suit against them, without court permission.

Barcus and Kram argue that Terri should have filed suit earlier. However they were instrumental in getting court orders prohibiting her from doing so. At a minimum, this conduct raises questions of fact regarding equitable tolling and estoppel to assert the statute of limitations. In **Duke v. Boyd,** 133 Wn2d 80, 942 P.2d 351 (1997), under the tolling

provisions of the state's statute of limitations for medical malpractice statute, the court held:

> Since this is an appeal from summary judgment for Defendant, we must view the allegations in a light most favorable to Plaintiff. *See Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996)*. The only issue before us concerns the impact of *RCW 4.16.350* in a case of alleged fraud and intentional concealment. Whether Duke can prove fraud or intentional concealment is a question of fact for the trier of fact to resolve. *See Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc., 64 Wn. App. 661, 678, 828 P.2d 565 (1992)* ("Each element of fraud is a material issue to be resolved and must be proven by clear, cogent and convincing evidence[.]")

Id at 83. In dismissing Terri's claims where there were obvious disputed questions of fact regarding equitable tolling and estoppel, the trial court erred.

VI. CONCLUSION

The trial court's dismissal of Terri's complaint with prejudice on the issue of statute of limitations should be reversed. Sarah's undisputed incapacity tolls all statutes of limitations applicable to this case. Even absent tolling, Terri's claims were filed well within the applicable statutes of limitations. At a minimum, questions of material facts exist regarding the application of tolling rules, and the dates of the commencement and expiration of statutes of limitations.

RESPECTFULLY SUBMITTED this 6th day of August, 2014.

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