

FILED
Court of Appeals
Division III
State of Washington
7/15/2019 2:01 PM

Cause No. 36209-4
Consolidated with Cause No. 36210-8

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

Appeal from Chelan County Superior Court No. 16-2-00123-2
Hon. Kristin M. Ferrera

JENNIFER CURTIN, GLEN CURTIN
and BECKY CURTIN,

Appellants,

vs.

CITY OF EAST WENATCHEE and LEO AGENS,

Respondents.

**BRIEF OF RESPONDENT CITY OF EAST
WENATCHEE**

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I. STATEMENT OF FACTS

Jennifer L. Curtin was injured on Dec. 9, 2009 when she was struck by a car driven by Defendant Leo E. Agens. (CP 6-7.) Jennifer was born in April 1995 and was 14-years-old at the time of the occurrence. On Feb. 4, 2016 a lawsuit was filed by Jennifer and Jennifer's parents. (CP 3-15.) Jennifer was two months short of 21-years-old at the time the lawsuit was filed. (Jennifer attained the age of 18 in April 2016.) The claims of Jennifer's parents were brought pursuant to RCW 4.24.010 (action for injury or death of child). (CP 4 ¶ 1.4.) Plaintiffs' complaint alleged that Jennifer's parents were not required to file their lawsuit within the general three-year statute of limitations because their claims were tolled pursuant to RCW 4.16.190. (*Id.*) Plaintiffs have never asserted that Jennifer was an emancipated minor at the time the lawsuit was filed or that her parents assigned their medical expenses claim to her. Most if not all of Jennifer's medical and care expenses were incurred before she attained 18 years of age.

II. STATEMENT OF THE ISSUES

A. Are the claims of Glen and Becky Curtin, the parents of Jennifer Curtin, barred by the three-year statute of limitations?

B. Is Jennifer Curtin permitted to recover damages for her pre-majority medical and care expenses?

C. Should the jury decide the reasonable value of Jennifer Curtin's medical expenses and only after the jury determines that there is liability on the part of the City?

III. STATUTES UNDER CONSIDERATION

The statutes under consideration are RCW 4.24.010, RCW 4.16.190(1), RCW 11.88.010(d) and (e), RCW 4.16.080(2) and RCW 4.16.250. Copies are set forth in the Appendix.

IV. ARGUMENT

A. The claims of Glen and Becky Curtin, the parents of Jennifer Curtin, are barred by the three-year statute of limitations.

Glen and Becky Curtin's lawsuit was brought seven years after the occurrence that is the subject of their lawsuit. Their individual claims were not tolled until three years after Jennifer attained the age of 18. **The incompetent person tolling statute applies to persons who are minors, incompetent or disabled (such that they could not manage their property or care for themselves) to such a degree that they cannot understand the nature of the proceedings.** RCW 4.16.190(1); RCW 11.88.010(e). Glen and Becky Curtin were not below the age of majority, incompetent or disabled at the time their causes of action accrued.

“For this statute [RCW 4.16.190] to apply, the plaintiff’s incompetency or disability must exist at the time the cause of action accrues.” *Rivas v. Overlake Med. Center*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008), *citing* RCW 4.16.250. A cause of action accrues “when a plaintiff knew or should have known the essential elements of the cause of action -- duty, breach, causation and damages.” *Green v. Am. Pharmaceutical Co.*, 136 Wn.2d 87, 95, 960 P.2d 921 (1998).

Because Glen and Becky Curtin’s causes of action accrued well more than three years before they brought their lawsuit, the trial court did not err in dismissing the parents’ claims based upon the expiration of the statute of limitations.

The weight of authority from other states appears to be that a parent is not entitled to the benefit of a statute tolling a minor’s statute of limitations. *See* Annot., *Tolling of statute of limitations, on account of minority of injured child, as applicable to parent’s or guardian’s right of action arising out of the same injury*, 49 A.L.R.4th 216 (1986 – updated weekly). § 3 of the annotation sets forth cases in which the minor tolling statute was held not applicable to an action by a parent and § 4 of the annotation sets forth cases to the contrary. The annotation does not include any cases from the state of Washington. Of course, the cases

depend upon the particular wording contained in the minor tolling statute enacted in each state.

In *Fancsali ex rel. Fancsali v Univ. Health Ctr. of Pittsburgh*, 761 A.2d 1159 (Pa. 2000), the Pennsylvania Supreme Court stated at 1164 (emphasis added):

In this case, Susan Fancsali’s cause of action accrued when she was born on July 16, 1992. Pursuant to [Pennsylvania statute] the two-year limitation period for her personal injury claim does not begin to run until July 16, 2019. **Her parents’ claims arising out of the same facts likewise accrued when Susan was born, but the two-year limitations for their claims began to run at that time.**

In *Kim L. v. Port Jervis City Sch. Dist.*, 908 N.Y.S.2d 725 (N.Y. App. 2010), the court stated at 728 (emphasis added):

“The infancy toll [statute] is personal to the infant . . . and does not extend to [a] derivative cause of action.” [Citations omitted.] Accordingly, any causes of action asserted by the [child’s mother] in her individual capacity must be dismissed as time-barred.

Other courts also hold that a tolling statute for a minor is personal to the minor and does not extend the statute of limitations for a parental loss of consortium claim. *See., e.g., Donovan v. Idant Laboratories*, 625 F.Supp.2d 256, 265-66 (E.D. Pa. 2009), *aff’d* 2010 WL 1257705 (3d Cir. 2010); *Campbell v. Supervalu, Inc.*, 565 F.Supp.2d 969, 976-77 (N.D. Ind. 2008); *Hansen v. Bd. of Trustees for Hamilton Southeastern Sch. Corp.*, 522 F.Supp.2d 1101, 1105-06 (S.D. Ind. 2007); *Kahale v. City and Cnty.*

of Honolulu, 90 P.3d 233, 241 (Hawaii 2004);¹ *Smith v. Long Beach City Sch. Dist.*, 715 N.Y.S.2d 707, 708 (N.Y. App. 2000); *Elgin v. Bartlett*, 973 P.2d 694, 698 (Colo. 1999); *S.A.P. v. State Dep't of Health and Rehab. Servs.*, 704 So.2d 583, 585-86 (Fla. App. 1997), *aff'd* 835 So.2d 1091 (Fla. 2003); *Myer v. Dyer*, 542 A.2d 802, 806 (Del. Super. 1987), *Apicella v. Valley Forge Military Academy & Junior College*, 630 F.Supp. 20, 23 (E.D. Pa. 1985); *Macku ex rel. Macku v. Drackett Prods. Co.*, 343 N.W.2d 58, 62 (Neb. 1985).

In *Kahale v. City and Cnty. of Honolulu*, 90 P.3d 233 (Hawaii 2004), the court held that a mother's claim *as next friend of the minor* was tolled by the infancy tolling provision but the parents' individual claims were not so tolled. The *Kahale* court stated at 241:

However, in their individual capacities, Francis and Rachael suffered no disability with regard to their claims, and, by its plain language, HRS § 657-13(1) nowhere provides for the tolling of derivative actions. In this connection, we note that other jurisdictions have refused to extend the scope of infancy tolling provisions to derivative claims. . . . Thus, **because Francis and Rachael did not timely comply with [the statute of limitations] with respect to their individual claims, those claims are time-barred.**

¹ As will be explained below, the Curtins erroneously cited *Kahale* as supporting their position. (Curtin Brief at 12.)

(Emphasis added.) Jennifer’s parents also cited two opinions (1983 and 1986) resulting from a single case decided by the Michigan Court of Appeals and the Michigan Supreme Court regarding no-fault automobile insurance,² a 1975 *per curiam* opinion from a superior court appellate division in New Jersey³ and a 1976 *per curiam* opinion from a superior court appellate division in New Jersey.⁴

The *Manley* opinions should be limited to the context of no-fault insurance. As the *Manley II* court stated at 222:

A no-fault insurer is not relieved of the obligation to pay no-fault benefits for products, services, and accommodations provided a child which, if the injured party were an adult, are allowable expenses within the meaning of § 3107 [of the no-fault insurance act]. **Although the parents of the child might be obliged to pay for such products, services, or accommodations as “necessaries essential to the health of a child” if there was not a no-fault act, there is a no-fault act.** Under that act, the question is whether the product, service, or accommodations is an allowable expense, not whether someone else might also be legally obligated to pay such expense under some other provision of law.

(Emphasis added.) The *Manley* opinions did not discuss the issue in this case.

² *Manley v. Detroit Auto Inter-Insurance Exch.*, 339 N.W.2d 205 (Mich. App. 1983) (*Manley I*); *Manley v Detroit Auto Inter-Insurance Exch.*, 388 N.W.2d 216 (Mich. 1986) (*Manley II*).

³ *Rost v. Bd. of Educ. of Borough Fair Lawn*, 347 A.2d 811 (N.J. Super. App. Div. 1975).

Glen and Becky Curtin’s cause of action accrued when they “knew or should have known the essential elements of the cause of action -- duty, breach, causation and damages.” *Green v. American Pharmaceutical Co.*, 136 Wn.2d 87, 95, 960 P.2d 921 (1998). Here, **Glen and Becky Curtin were aware that their cause of action accrued within three years of Jennifer’s injury.**

RCW 4.16.190 (Statute tolled by personal disability) does not apply to the parents’ claims for consortium. A child is incapable of making an effective decision whether to initiate suit. As a result, Washington enacted a tolling statute to ensure that a minor because able to make an effective election. An adult parent, on the other hand, is ordinarily not subject to that incapacity. Once a parent knows that his or her child was injured a parent must decide whether to bring a lawsuit.

A parent is not excused from the consequences of making the strategic decision not to timely bring suit. Jennifer’s parents could have easily avoided this issue by filing an action on behalf of Jennifer within three years after Jennifer’s injury together with an action for their loss of consortium.

B. Jennifer Curtin is not permitted to recover damages for her pre-majority medical and care expenses.

⁴ *Vedutis v. South Plainfield Bd. of Educ.*, 343 A.2d 171 (N.J. Super. 1975), *aff’d* 362 A.2d 151 (N.J. Super. App. Div. 1976).

All or most of Jennifer Curtin's medical and care expenses were incurred before she attained 18 years of age. Jennifer is not entitled to claim her pre-majority medical expenses on her own because her parents' lawsuit is barred by the statute of limitations.

The Washington Supreme Court has held that a claim for a minor's medical expenses is a claim of the minor's parents – not a claim of the minor. In *Harris v. Puget Sound Elec. Ry.*, 52 Wash. 299, 100 Pac. 841 (1909), a claim was made for personal injuries sustained by a child in a motor vehicle collision. The *Harris* court stated at 301:

When a minor is injured, **two causes of action arise** – one in favor of the minor for pain and suffering and permanent injury, **the other in favor of the parents for . . . expenses of treatment.**

(Emphasis added.) The Washington Supreme Court also ruled that a minor's medical bills are damages to be recovered only by the minor's parents in *Handley v. Anacortes Ice. Co.*, 5 Wn.2d 384, 105 P.2d 505 (1940). In *Handley*, a boy was seriously injured when he was struck in the head by a foul ball. "Plaintiff suffered a skull fracture, which necessitated a serious surgical operation, the lad's parents incurring other medical and surgical expenses." 5 Wn.2d at 388. The Court stated at 396 that the jury was properly instructed that separate verdicts should be returned upon the two causes of action set forth in their complaint: (1) damages suffered by

the child and (2) compensation to the parents for necessary medical expenses resulting from the child's injury.

The *Harris* opinion was cited in Section III(c) of Annot., *What items of damage on account of personal injury to infant belong to him and what to parent*, 37 A.L.R. 11 (1925 – updated weekly). In Section III(c) the annotation states “in the usual situation . . . the parent, and not the child, may recover the [medical expenses] damages.” The annotation was supplemented by Annot., *What items of damages on account of personal injury to infant belong to him, and what to parent*, 32 A.L.R.2d 1060 (1953 – updated weekly), which states at § 4 [a] (emphasis added):

Damages for expenses already incurred for the treatment of the injuries of an unemancipated minor generally belong to the parents, unless the parent has waived his right thereto, or the child is responsible for his own debts.

In *Flessner v. Carstens Packing Co.*, 96 Wash. 505, 165 Pac. 397 (1917), a lawsuit was brought for the injury a minor daughter sustained through the negligence of defendant. The Court stated at 509:

The law is that, when a minor is injured, **two causes of action arise**, one in favor of the minor for pain and suffering and permanent injury, **the other in favor of the parent for loss of services during minority and expenses of treatment.**

(Emphasis added.) The basis for the parents' action for recovery of medical expenses resulting from the injury to their child arises from the

common law rule that obliges parents to provide medical attention for their minor child. W. Keeton, D. Dobbs, P. Keeton & D. Owen, Prosser and Keeton on Law of Torts § 125 (5th ed. 1984). “[T]he parent’s action [for medical expenses] and the child’s action are essentially separate.” *Id.*

The Restatement (Second) of Torts § 703 (1977) provides:

One who by reason of his tortious conduct is liable to a minor child for illness or other bodily harm is subject to liability to

(a) the parent who is entitled to the child’s services for any resulting loss of services or ability to render services, and to

(b) **the parent who is under a legal duty to furnish medical treatment for any expenses reasonably incurred or likely to be incurred for the treatment during the child’s minority.**

(Emphasis added.) Comment b to § 703 of the Restatement provides: “The liability to the parent stated in this Section is distinct from the liability of the actor to the child. Damages recoverable in the one action are not recoverable in the other”

Comment h to § 703 of the Restatement provides:

The parent is also entitled to recover for any reasonable expenses incurred in treating the child’s illness or injury. This includes not only expenses already incurred but also future medical expenses that are likely to be incurred during the child’s minority if the parent is legally bound to furnish the treatment.

42 Am.Jr.2d *Infants* § 145 (2d ed. – updated May 2018) states:

Generally, **a minor does not have a cause of action for his or her medical expenses because the parents possess the exclusive right to recover for the minor's premajority medical expenses.** Since it is the parents' legal duty to provide their child's necessities, the action to recover medical expenses of a child is vested exclusively in the child's parents.

(Emphasis added.)

See also Swallows v. Adams-Pickett, 811 S.E.2d 445, 447 (Ga. App. 2018) (“the right to recover damages for a child’s medical expenses vests solely in the child’s parents, while the right to recover damages for pain and suffering vests in the child, not the parent”); *Pirrello v. Maryville Academy, Inc.*, 19 N.E.3d 1261, 1264 (Ill. App. 2014) (“The cause of action [for recovery of a minor child’s medical expenses] belongs to the parents, and if the parents are not entitled to recover, neither is the child.”).

Plaintiffs advanced an argument based on *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), which was an action for “wrongful life” for the “wrongful birth” of unhealthy twin girls named Elizabeth and Christine. In *Harbeson*, the Court stated at 479-80 (emphasis added):

We hold, accordingly, that a child may maintain an action for wrongful life in order to recover the **extraordinary expenses** incurred during the child’s lifetime, **as a result of the child’s congenital defect.**

In recognizing a claim for wrongful life the Court relied in large part on a California case: *Turpin v. Sortini*, 643 P.2d 954 (1982). The *Harbeson* Court stated at 479:

The Supreme Court of California rejected the claim of a child for general damages, but allowed the recovery of **extraordinary medical expenses occasioned by the child's defect**. *Turpin v. Sortini*, 31 Cal.3d 220, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982).

(Emphasis added.) The injured child in *Turpin* was named Joy. Footnote 11 to the *Turpin* opinion stated that “Joy’s separate claim applies as a practical matter only to medical expenses to be incurred after the date of majority.”

The holding in *Harbeson* was limited to extraordinary medical expenses due to the children’s congenital defects. The *Harbeson* court stated at 483:

[W]ere it not for the negligence of the physicians, the minor plaintiff would not have been born, and would consequently not have suffered fetal hydantoin syndrome. More particularly, the plaintiffs would not have incurred the **extraordinary expenses** resulting from that condition.

(Emphasis added.) The *Harbeson* Court stated at 482: “But one of the consequences of the birth of the child who claims **wrongful life** is the incurring of **extraordinary expenses for medical care** and special training.” (Emphasis added.) Here, Jennifer did not incur any extraordinary medical expenses due to being born with congenital defects.

Jennifer also relied upon *Hammer v. Caine*, 47 Wash. 672, 92 Pac. 441 (1907), *Flessher v. Carstens Packing Co.*, 96 Wash. 505, 165 Pac. 397 (1917) and *McAllister v. Saginaw Timber Co.*, 171 Wash. 448, 18 P.2d 41 (1933).

In *Hammer*, a minor pursued an action through his mother as guardian ad litem to recover damages for personal injuries. The Supreme Court concluded that the mother, by filing suit solely as guardian, had emancipated her son insofar as the right to recover damages was concerned. The defense claimed that the mother's prosecution of the lawsuit as guardian ad litem estopped her from making a claim for medical expenses. 47 Wash. at 673. The statute of limitations was not at issue. *Hammer* has only been cited by our courts on one occasion: in *Flessher*.

In *Flessher*, a minor's action was brought by his parent as guardian ad litem but the minor did not assert a claim for medical expenses. The Court cited the general rule that about two causes of action arises when a minor is injured: (1) in favor of the minor for pain and suffering and permanent injury and (2) in favor of the parent for the minor's pre-majority medical expenses. 96 Wash. at 509. The Court held that since parents have a separate cause of action for the recovery of medical expenses the parents were not precluded from separately recovering those medical expenses. The statute of limitations was not at issue. The minor

was injured when he was 10-years-old on October 15, 1912 and suit was filed on Oct. 14, 1913. *Id.* at 506.

In *McAllister*, the minor pursued a claim for damages on his own behalf with his mother acting as guardian ad litem. The mother herself did not pursue any claim for damages. Rather than the court finding an implied waiver (or consent) by the parent to allow the minor to recover medical expenses, the *McCallister* court instead reasoned that the child (and his mother) were equally liable for the medical expenses because the services were necessities. Nowhere in the opinion did the Court address whether the minor contracted to pay the medical services. No other Washington case has been found that used a “necessaries” analysis in regards to a minor’s recovery of medical expenses.

The Curtins did not produce any evidence to suggest that Jennifer Curtin became emancipated before she attained the age of 18 or that she personally contracted for her medical services. While “necessaries” can be the obligation of a child, **a contract for the necessities must first have been made by the child.** See RCW 26.28.030, which states:

A minor is bound, not only by **[the minor’s] contracts for necessities**, but also by his or her other contracts, unless he or she disaffirms them within a reasonable time after he or she attains his or her majority, and restores the other party all money and property received by him or her by virtue of the contract, and remaining within his or her control at any time after his or her attaining his or her majority.

(Emphasis added.) **The statute speaks to contracts *actually made by a minor*.** The statute does not involve contracts made by parents attributable to their child. Jennifer cannot be liable for her medical bills because she did not even impliedly agree to pay the bills. *Madison Gen. Hosp. v. Haack*, 369 N.W.2d 663, 666 (Wis. 1985). Moreover, a minor is not liable for necessary medical expenses when living with or supported by a parent unless the parent neglects, fails, refuses or is unable to pay. *Id.* at 667. The record must establish the parent’s neglect, failure, refusal or inability to pay. *Id.* See also *Myers v. Americollect, Inc.*, 194 F.Supp.3d 839, 848-49 (E.D. Wis. 2016) (a minor is not liable for a parent’s default on paying the child’s medical expenses unless the record establishes the parent’s default). Under RCW 26.16.205, a parent is subject to civil liability for failing to pay for necessities including necessary medical expenses of a minor child. *State v. Williams*, 4 Wn.App. 908, 912, 484 P.2d 1167 (1971). “A parent . . . has a duty to provide necessary medical care for the child.” Restatement of the Law – Children and the Law § 2:30(2)(a) (Tentative Draft No. 1 2018).

In *Vaughan v. Moore*, 366 S.E.2d 518 (N.C. App. 1988), the court held that plaintiff could not recover pre-majority medical expenses under a statute allowing her to bring an action within three years after removal of

disability where she had obtained a waiver and assignment of her mother's claim for pre-majority medical expenses more than four years after the cause of action arose. The court stated that to give effect to the waiver "would essentially extend the parent's claim beyond its three-year statute of limitations." 366 S.E.2d at 520.

If Jennifer Curtin had unpaid, pre-majority medical expenses, the medical creditors would sue Jennifer's parents – not Jennifer. If a medical creditor sued Jennifer then without any doubt she would claim that she was not liable for her pre-majority medical expenses. The claim for the recovery of Jennifer's pre-majority medical expenses was a claim owned by Jennifer's parents – not a claim owned by Jennifer.

Constitutional Argument – Jennifer Curtin argued for the first time on appeal that barring her from the recovery of her pre-majority medical expenses violated Art. 1, § 12 of the Washington Constitution, which provides:

No law shall be passed granting any citizen, class of citizens, or corporation . . . privileges and immunities which upon the same terms shall not equally belong to all citizens or corporations.

Jennifer argued that disallowing her pre-majority medical expenses gave immunity to others and took away her privilege to make the same claim as an adult has for injuries after she reached adulthood. (Curtin

Brief at 21.) The primary case cited by Jennifer was *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014), which held that a statute eliminating one class of lawsuits -- medical malpractice actions -- from the minor tolling statute violated Art 1, § 12 unless there was reasonable ground for the statute. The case is inapplicable to the case at bar.

In *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004), the Washington Supreme Court considered the wrongful death statute, which required financial dependency for parents to recover for the death of an adult child. The Court held that the statute did not violate the state constitution's privileges and immunities clause. 151 Wn.2d at 392-93. The Court noted that "legitimate differences between the groups provide a reasonable basis for treating the groups differently." *Id.* at 392. The Court stated that "there is a reasonable basis for the statute's treating the parents of adult children differently from parents of minor children." *Id.* at 393. The Court noted that "this court will construe a statute as constitutional if at all possible." *Id.* at 391. "The statute is presumed constitutional and the party challenging it has a heavy burden of proof." *Id.* When a suspect class or fundamental right is not involved, the standard of review is "rational basis, also called minimal scrutiny." *Id.*

There is no statute barring the recovery of Jennifer's pre-majority medical expenses. Jennifer's parents could have recovered those expenses

if they had filed their action on a timely basis. It is the common law – not a statute – providing that a claim for a child’s pre-majority medical expenses is owned by the parent of the child.

ERISA Plan Argument – Jennifer argued that she was covered under her parents’ health insurances including an Employee Retirement Income Security Act (ERISA) plan and “as a covered insured [was] bound to reimburse said plan from any third party recovery received.”⁵ (Curtin Brief at 22.) Jennifer inaccurately asserted:

[I]f she was precluded from claiming pre-majority medical expenses at trial, this would *not* prevent the ERISA plan from recovering their full payment of their reimbursement out of [Jennifer’s] total award of damages – regardless of the nature of the verdict or award, be it general damages or special damages.

Id. (Emphasis in original.) Jennifer relied on *Blue Cross and Blue Shield of Alabama v. Cooke*, 3 F.Supp.2d 668 (E.D. N.C. 1997), which does not apply because the ERISA plan in *Blue Cross* did not have a “made whole” provision like in the ERISA plan in this case.

⁵ Jennifer cited to CP 56, 768-82. CP 56 does not reference an ERISA plan. CR 768-76 is a Farmers Insurance Company automobile plan with \$35,000 in medical / no fault coverage that is private insurance owned by Becky and Glen Curtin – not an ERISA plan. CP 778-82 sets forth excerpts for an ERISA self-funded ERISA plan through Glen Curtin’s employer. By letter dated July 27, 2012, the Subrogation Department stated that the current subrogation amount for Jennifer Curtin’s health coverage was \$94,998.21. (CP 778.) The letter did not state or imply that the subrogation provision gave the ERISA plan rights in claims other than those for medical expenses.

The ERISA plan at issue specifically states that the right of subrogation applies only “after you have been fully compensated for your loss.” (CP 782.) This is in accordance with Washington’s “made whole” doctrine. *See, e.g., Daniels v. State Farm Mut. Auto. Ins. Co.*, ___ P.3d ___, 2019 WL 2909308, *3 (Wash. July 3, 2019) (“an insurer generally cannot obtain a [subrogation] recovery if its insured has uncompensated damages.”); *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1976) (establishing the “made whole” doctrine in Washington). The *Thiringer* court stated at 219 that the insurer “can recover only the excess which the insured has received from the wrongdoer, remaining **after the insured is fully compensated for his loss.**” (Emphasis added.)

Because the ERISA plan’s subrogation claim is only for medical expenses -- which Jennifer cannot recover -- she is entitled to recover her general damages for pain and suffering without the payment of subrogation. *See, e.g. Cooper Tire & Rubber Co. v. St. Paul Fire and Marine Ins. Co.*, 48 F.3d 365, 371 (8th Cir. 1995), *cert. denied* 516 U.S. 913 (1995) (“Per the language of the Plan [the Plan] ‘succeeds’ only to rights of recovery an employee or dependent may have ‘with respect to services or drugs covered by the Plan.’”), *cert. denied* 516 U.S. 913 (1995). The *Cooper Tire* court stated at 371 (emphasis added):

Cooper Tire's subrogation rights are expressly limited to Maza's right to **recovery of medical expenses**. . . . Thus, Cooper Tire's subrogation rights do not extend beyond its claim for medical expenses. Given this limitation, Cooper Tire may not demand written consent prior to settlement of non-medical expense claims

C. The jury should decide the reasonable value of Jennifer Curtin's medical expenses and only after the jury determines that there is liability on the part of the City.

Initially, this issue becomes moot once the Court determines that Jennifer Curtin does not have a claim for damages for her pre-majority medical and care expenses.

The Curtins provided copies of medical bills from numerous different medical providers which they claimed to total \$194,147.93. (CP 841-932.). They filed the Declaration of Gary Schuster, M.D., who opined that Jennifer received appropriate treatment from her various medical providers and all of her bills including chiropractor care was reasonable and necessary. (Decl. of Dr. Schuster ¶¶ 4, 7; CP 104-08.) They also filed the Declaration of James M. Russo, M.D., who opined that Jennifer's chiropractic care was not related to the occurrence. (Decl. of Dr. Russo ¶¶ 5-7, CP 647-50.) Dr. Schuster's CV noted that he is an internal medicine physician who practices sports medicine and internal medicine. (CP 110-13.) Dr. Schuster provided no foundation about his expertise as to the reasonable cost of many of the services provided to

Jennifer including ambulance services, physical therapy, airlift transportation, behavioral medicine or chiropractic care.

The City should be allowed to test Dr. Schuster's opinions on cross examination at trial. Dr. Schuster's far-ranging opinions well outside his areas of expertise put his credibility at issue. The jury is the appropriate evaluator of both lay and expert witness credibility.

At trial the Court instructs members of the jury under WPI 2.10 that they are not required to accept the opinion of any expert witness. In *Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*, 16 Wn.2d 631, 649-50, 134 P.2d 444 (1943), the Court stated at 650:

Even if those instances where several competent experts concur in their opinion and no opposing expert evidence is offered, the jury are still bound to decide the issue upon their own fair judgment, assisted by the statements of the experts.

(Emphasis added.)

A determination of liability on the part of the City is required before addressing causation. *Thykkuttathil v. Keese*, 2013 WL 2445370 (W.D. Wash. 2013) (applying Washington law). In *Thykkuttathil*, plaintiffs brought a motion for summary judgment as to defendants' tort liability and a motion for partial summary judgment "on causation and plaintiffs' past medical expenses." *Id.* at *1. The district court denied plaintiff's motion to establish that defendants were negligent as a matter of

law and then stated at *5: “**Without such liability determination, the Court cannot address the remaining portions of plaintiffs’ motion on causation of their injuries, and the necessity of their medical treatment.**” (Emphasis added.)

When a defendant denies the reasonable cost of a plaintiff’s medical care (as the City did here) then a plaintiff must establish that *no reasonable juror* could find that the cost of plaintiff’s medical care was unreasonable. In *Whitford v. Mt. Baker Ski Area, Inc.*, 2012 WL 895390 (W.D. Wash. 2012) (applying Washington law), the district court denied plaintiff’s motion for partial summary judgment seeking a ruling by the court that the entirety of the medical expenses incurred by plaintiff were reasonable and necessary. The district court noted that plaintiff filed a declaration of an expert stating that plaintiff’s medical expenses were reasonable and necessary and then stated:

[E]vidence that the expenses were reasonable and necessary does not shift the burden to Defendant to prove that they were not. Rather, **Plaintiff must show that no reasonable jury could find that the amount of damages were reasonable and necessary. . . . This, Plaintiff has failed to do.**

Id. at *2. The district court concluded: “Damages are a factual question. . . . Trial courts should act with caution in granting summary judgment. . . .”

Id. Similar court opinions applying Washington law to deny partial

summary judgment seeking to establish reasonable and necessary medical expenses are: *Bishop v. Brand Energy & Infrastructure Servs.*, 2012 WL 1145092, *2 (W.D. Wash. 2012) (“The evidence does not shift the burden of persuasion on the issue of reasonableness from Plaintiffs” and “Plaintiffs must show that no reasonable jury could find that the amount of damages were unreasonable or unnecessary.”); *Smith v. Ardew Wood Products, Ltd.*, 2009 WL 577270, *3 (W.D. Wash. 2009) (“[T]he jury is the appropriate body to weigh evidence and evaluate both lay and expert credibility [so] there is an issue of material fact as to the reasonable and necessary expenses . . .”).

The City should be allowed to cross-examine Dr. Schuster (or whoever testifies) with authoritative works such as the Medicare Physicians’ Fee Schedule (PFS). Jennifer’s actual medical bills and the Medicare fee schedules should both be considered by the jury to determine the reasonable value of Jennifer’s medical services. **The amount Medicare pays, while not dispositive, is admissible evidence on the reasonable value of medical services.** *Robinson v. Bates*, 857 N.E.2d 1195, 1200 (Ohio 2006).

V. CONCLUSION

The Court should affirm the trial court in all respects.

RESPECTFULLY SUBMITTED this 15th day of July, 2019.

JERRY MOBERG & ASSOCIATES, P.S.

A handwritten signature in black ink, appearing to read "Jerry Moberg", written over a horizontal line.

JERRY J. MOBERG, WSBA No. 5282

JAMES E. BAKER, WSBA No. 9459

Attorneys of Respondent City of East Wenatchee

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the foregoing via JIS/ACCORDS. I further certify that I emailed a copy of this document to:

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DATED this 15th day of July, 2019 at Ephrata, WA.

JERRY MOBERG & ASSOCIATES, P.S.



DAWN SEVERIN, Paralegal

APPENDIX

RCW 4.24.010**Action for injury or death of child.**

*** CHANGE IN 2019 *** (SEE 5163-S.SL) ***

A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable.

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent: PROVIDED, That notice shall be required only if parentage has been duly established.

Such notice shall be in compliance with the statutory requirements for a summons. Such notice shall state that the other parent must join as a party to the suit within twenty days or the right to recover damages under this section shall be barred. Failure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the suit.

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

[1998 c 237 § 2; 1973 1st ex.s. c 154 § 4; 1967 ex.s. c 81 § 1; 1927 c 191 § 1; Code 1881 § 9; 1877 p 5 § 9; 1873 p 5 § 10; 1869 p 4 § 9; RRS § 184.]

NOTES:

Intent—1998 c 237: "It is the intent of this act to address the constitutional issue of equal protection addressed by the Washington state supreme court in *Guard v. Jackson*, 132 Wn.2d 660 (1997). The legislature intends to provide a civil cause of action for wrongful injury or death of a minor child to a mother or father, or both, if the mother or father has had significant involvement in the child's life, including but not limited to, emotional, psychological, or financial support." [1998 c 237 § 1.]

Severability—1973 1st ex.s. c 154: See note following RCW 2.12.030.

RCW 4.16.190**Statute tolled by personal disability.**

(1) 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 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.

(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW **4.16.350**.

[**2006 c 8 § 303**; **1993 c 232 § 1**; **1977 ex.s. c 80 § 2**; **1971 ex.s. c 292 § 74**; Code 1881 § 37; **1877 p 9 § 38**; **1869 p 10 § 38**; **1861 p 61 § 1**; **1854 p 364 § 11**; RRS § 169.]

NOTES:

Reviser's note: As to the constitutionality of subsection (2) of this section, see *Schroeder v. Weighall*, 179 Wn.2d. 566, 316 P.3d 482 (2014).

Findings—Intent—Part headings and subheadings not law—Severability—2006 c 8: See notes following RCW **5.64.010**.

Purpose—Intent—1977 ex.s. c 80: "It is the purpose of the legislature in enacting this 1977 amendatory act to provide for a comprehensive revision of out-dated and offensive language, procedures and assumptions that have previously been used to identify and categorize mentally, physically, and sensory handicapped citizens. It is legislative intent that language references such as idiots, imbeciles, feeble-minded or defective persons be deleted and replaced with more appropriate references to reflect current statute law more recently enacted by the federal government and this legislature. It is legislative belief that use of the undefined term "insanity" be avoided in preference to the use of a process for defining incompetency or disability as fully set forth in chapter **11.88** RCW; that language that has allowed or implied a presumption of incompetency or disability on the basis of an apparent condition or appearance be deleted in favor of a reference to necessary due process allowing a judicial determination of the existence or lack of existence of such incompetency or disability." [**1977 ex.s. c 80 § 1**.]

Severability—1977 ex.s. c 80: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [**1977 ex.s. c 80 § 76**.]

Severability—1971 ex.s. c 292: See note following RCW **26.28.010**.

Adverse possession, personal disability, limitation tolled: RCW 7.28.090.

RCW 11.88.010

Authority to appoint guardians—Definitions—Venue—Nomination by principal.

*** CHANGE IN 2019 *** (SEE 5604-S2.SL) ***

(1) The superior court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.

(a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

(b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

(c) A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.

(d) A person may also be determined incapacitated if he or she is under the age of majority as defined in RCW **26.28.010**.

(e) For purposes of giving informed consent for health care pursuant to RCW **7.70.050** and **7.70.065**, an "incompetent" person is any person who is (i) incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both, or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.

(f) For purposes of the terms "incompetent," "disabled," or "not legally competent," as those terms are used in the Revised Code of Washington to apply to persons incapacitated under this chapter, those terms shall be interpreted to mean "incapacitated" persons for purposes of this chapter.

(2) The superior court for each county shall have power to appoint limited guardians for the persons and estates, or either thereof, of incapacitated persons, who by reason of their incapacity have need for protection and assistance, but who are capable of managing some of their personal and financial affairs. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and restrictions on an incapacitated person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance. A person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship. In addition, the court order shall state the period of time for which it shall be applicable.

(3) Venue for petitions for guardianship or limited guardianship shall lie in the county wherein the alleged incapacitated person is domiciled, or if such person resides in a facility supported in whole or in part by local, state, or federal funding sources, in either the county

where the facility is located, the county of domicile prior to residence in the supported facility, or the county where a parent or spouse or domestic partner of the alleged incapacitated person is domiciled.

If the alleged incapacitated person's residency has changed within one year of the filing of the petition, any interested person may move for a change of venue for any proceedings seeking the appointment of a guardian or a limited guardian under this chapter to the county of the alleged incapacitated person's last place of residence of one year or more. The motion shall be granted when it appears to the court that such venue would be in the best interests of the alleged incapacitated person and would promote more complete consideration of all relevant matters.

(4) Under RCW 11.125.080, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if guardianship proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

(5) Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights. When a court determines that the person is incompetent for the purpose of rationally exercising the right to vote, the court shall notify the appropriate county auditor.

[2016 c 209 § 403; 2008 c 6 § 802; 2005 c 236 § 3; (2005 c 236 § 2 expired January 1, 2006); 2004 c 267 § 139; 1991 c 289 § 1; 1990 c 122 § 2; 1984 c 149 § 176; 1977 ex.s. c 309 § 2; 1975 1st ex.s. c 95 § 2; 1965 c 145 § 11.88.010. Prior: 1917 c 156 § 195; RRS § 1565; prior: Code 1881 § 1604; 1873 p 314 § 299; 1855 p 15 § 1.]

NOTES:

Short title—Application—Uniformity—Federal law application—Federal electronic signatures in global and national commerce act—Application—Dates—Effective date—2016 c 209: See RCW 11.125.010 and 11.125.900 through 11.125.903.

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

Effective date—2005 c 236 § 3: "Section 3 of this act takes effect January 1, 2006." [2005 c 236 § 5.]

Expiration date—2005 c 236 § 2: "Section 2 of this act expires January 1, 2006." [2005 c 236 § 4.]

Findings—2005 c 236: "The legislature finds that the right to vote is a fundamental liberty and that this liberty should not be confiscated without due process. When the state chooses to use guardianship proceedings as the basis for the denial of a fundamental liberty,

an individual is entitled to basic procedural protections that will ensure fundamental fairness. These basic procedural protections should include clear notice and a meaningful opportunity to be heard. The legislature further finds that the state has a compelling interest in ensuring that those who cast a ballot understand the nature and effect of voting is an individual decision, and that any restriction of voting rights imposed through guardianship proceedings should be narrowly tailored to meet this compelling interest." [**2005 c 236 § 1.**]

Effective dates—2004 c 267: See note following RCW **29A.08.010**.

Effective date—1990 c 122: See note following RCW **11.88.005**.

Severability—Effective dates—1984 c 149: See notes following RCW **11.02.005**.

Severability—1977 ex.s. c 309: See note following RCW **11.88.005**.

RCW 4.16.080**Actions limited to three years.**

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

[2011 c 336 § 83; 1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1; Code 1881 § 28; 1869 p 8 § 28; 1854 p 363 § 4; RRS § 159.]

NOTES:

Reviser's note: Transitional proviso omitted from subsection (6). The proviso reads: "PROVIDED, FURTHER, That no action heretofore barred under the provisions of this paragraph shall be commenced after ninety days from the time this act becomes effective;"

RCW 4.16.250

Disability must exist when right of action accrued.

No person shall avail himself or herself of a disability unless it existed when his or her right of action accrued.

[2011 c 336 § 87; Code 1881 § 42; 1877 p 10 § 43; 1854 p 365 § 16; RRS § 174.]

JERRY MOBERG & ASSOCIATES, P.S.

July 15, 2019 - 2:01 PM

Transmittal Information

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Appellate Court Case Title: Jennifer Curtin, et al v. City of East Wenatchee, et al
Superior Court Case Number: 16-2-00123-2

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