

NO. 79506-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUSAN E. RIVAS,
Petitioner,

vs.

OVERLAKE HOSPITAL MEDICAL CENTER; OVERLAKE INTERNAL
MEDICINE ASSOCIATES,
Defendants,

and

EASTSIDE RADIOLOGY ASSOCIATES; OVERLAKE IMAGING,
WASHINGTON IMAGING SERVICES,
Respondents,

and

ROBERT L. DAVIDSON, M.D., and JANE DOE DAVIDSON, his wife, and the
marital community thereto,
Defendants,

and

ALLAN MURAKI, M.D. and JANE DOE MURAKI, his wife, and the
community thereof,
Respondents.

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APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Steven Scott, Judge

ANSWER TO BRIEF OF AMICUS CURIAE WSTLAF

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I. INTRODUCTION

RCW 4.16.190 tolls the statute of limitations for anyone-

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.

RCW chapter 11.88 explains when and how a guardianship may be established. RCW 11.88.010(1)(f) provides:

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.

RCW 11.88.010(1) further explains what "incapacitated" means:

The superior court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons

(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.

(Emphases added.) As amicus curiae Washington State Trial Lawyers Association Foundation (WSTLAF) correctly observes, the issue in this appeal is whether the phrase "over time" in RCW 11.88.010(1)(c) is relevant to RCW 4.16.190's requirement of "incompetency or disability as determined according to chapter 11.88 RCW." (Brief of Amicus 10) WSTLAF is incorrect in concluding that it is not.

II. ARGUMENT¹

The underpinning of WSTLAF's argument is the premise that tolling statutes serve "to provide every person the full benefit of the governing limitations period." (Brief of Amicus at 6) Wrong. Not everyone who files suit beyond the applicable limitations period is entitled to tolling. The only people entitled to tolling are those whose circumstances bring them within the scope of one or more tolling statutes enacted by the Legislature. Plaintiff is not one of those persons.

WSTLAF's mantra is that claimants with short-lived but legitimate incapacities should not be deprived of the full benefit of the limitation

¹ WSTLAF errs in claiming that all defendants except Dr. Muraki have been dismissed. (Brief of Amicus 2) Respondents also include Eastside Radiology Associates, Overlake Imaging, and Washington Imaging Services.

period. But the real question here is what the Legislature intended when it said tolling requires incapacity as "determined according to chapter 11.88 RCW" and that the "determination of incapacity" requires a showing of management insufficiencies over time. RCW 4.16.190, 11.88.010(1)(c). WSTLAF does not claim that plaintiff here had management insufficiencies "over time."

A. **THE FIRST SENTENCE OF RCW 11.88.010(1)(c) CANNOT BE DIVORCED FROM RCW 11.88.010(1)(a)-(b) AND THE SECOND SENTENCE OF SUBSECTION (c).**

RCW 4.16.190 requires "incompetency or disability as determined according to chapter 11.88 RCW." For the purpose of determining when a person is incompetent or disabled as required by RCW 4.16.190, WSTLAF asks this court to pick and choose those portions of RCW 11.88.010(1) most favorable to WSTLAF's constituency. But that is not what RCW 4.16.190 requires.

What RCW 4.16.190 requires is a showing of incompetency or disability "to such a degree that [the claimant] cannot understand the nature of the proceedings, *such incompetency or disability as determined according to chapter 11.88 RCW*" (emphasis added). WSTLAF would have this court read the statute as if it instead said "such incompetency or disability as determined according to RCW 11.88.010(1)(a) or (b) and the first sentence of RCW 11.88.010(1)(c)."

That would make no sense. Although RCW 11.88.010(1)(a)-(b) and the second sentence of subsection (c) do explain incapacity as to the person and the estate, these subsections cannot be divorced from the first sentence of RCW 11.88.010(c). This is because the first sentence of RCW 11.88.010(c) further explains incapacity by expressly stating that "[a] *determination of incapacity is . . . based upon a demonstration of management insufficiencies over time in the area of person or estate.*" (Emphases added.)

WSTLA correctly acknowledges that RCW ch. 11.88 addresses what constitutes incompetency or disability.² (Brief of Amicus 8) Despite this acknowledgement, WSTLAF contends that the first sentence of RCW 11.88.010(1)(c) "is not a factor in determining incapacity" and "does not bear directly on the meaning of 'incompetent or disabled' in the tolling statute". (Brief of Amicus 4)

WSTLAF's position is contradicted by the language of the statutes in question. The tolling statute requires incompetency or disability as

² RCW ch. 11.88 equates these terms with "incapacity." RCW 11.88.010(1)(f) provides:

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.

"determined according to chapter 11.88 RCW". RCW 11.88.010(1)(c)'s first sentence clearly states that "[a] *determination of incapacity is . . . based upon* a determination of management insufficiencies *over time*" (emphases added) WSTLAF cites no authority that actually supports its contention that incompetency or disability (which WSTLA agrees equate to "incapacity") as *"determined* according to chapter 11.88 RCW" somehow does not include the RCW 11.88.010(1)(c)'s requirement that "[a] *determination* of incapacity is . . . based upon a demonstration of management insufficiencies over time" (emphases added).

Indeed, WSLTAF concedes that if the "over time" requirement is part of the determination of incapacity, it must be incorporated into the tolling analysis. (Brief of Amicus 15) To avoid this result, WSTLAF attempts to erect a completely artificial "procedural versus substantive" distinction between the "over time" requirement of RCW 11.88.010(1)(c) and the other criteria for incapacity set forth in the second sentence of RCW 11.88.010(1)(c) and RCW 11.88.010(1)(a)-(b). But nothing in the statute supports this. WSTLAF cannot change the fact that RCW 11.88.010(1)(c) says "[a] *determination* of incapacity is . . . based upon a demonstration of management insufficiencies *over time*" (emphases added).

Indeed, WSTLAF's theory of how the statutes should be interpreted renders the tolling statute's requirement that "such incompetency or disability as determined according to chapter 11.88 RCW" meaningless. Under WSTLAF's theory, RCW 4.16.190 should be read as if it said:

If a person entitled to bring an action mentioned in this chapter . . . be at the time the cause of action accrued . . . incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings,

But the Legislature did not intend that tolling be available simply because the claimant was incompetent or disabled to such a degree that he or she could not understand the nature of the proceedings. The Legislature specified that such incompetency or disability be as determined according to chapter 11.88 RCW. Chapter 11.88 RCW includes the "over time" requirement of RCW 11.88.010(1)(c).

Contrary to WSTLAF's claim, RCW 11.88.010(1)(c) does not "presuppose that an incapacity otherwise exists." (Brief of Amicus 16) At most, it presupposes that "management insufficiencies" exist. Then it says that determining incapacity is dependent on showing those management insufficiencies over time.

In short, RCW 4.16.190 requires incapacity as "determined according to chapter 11.88 RCW", and RCW 11.88.010(1)(c) says the

"determination of incapacity" requires a showing of management insufficiencies over time. Incapacity as "determined according to chapter 11.88 RCW" therefore includes a showing of management insufficiencies over time.

This construction of the statutes is hardly unlikely, absurd, or strained. The Legislature could have concluded that the tolling provisions should apply only for those with management insufficiencies over time because those people would be the one most in need of tolling.

Here, in contrast, plaintiff retained her attorney in 1997, approximately two years before the limitations period was to run. (CP 60-61, 77-78) There was no showing her four days in the ICU somehow impaired her ability to file suit on time despite WSLTAF and plaintiffs claim that she was deprived of the full benefit of the limitation period.

It is simply not true that the Court of Appeals here "incorporate[d] the guardianship process" into the tolling statute, sweeping or otherwise (Brief of Amicus 13, 14) (emphasis omitted). All the Court of Appeals did was to apply the basic statutory construction rule very recently reiterated by this court:

Our goal in statutory interpretation is to effectuate the legislature's intent. When the meaning of a statute is plain, we give effect to that plain meaning as an expression of legislative intent. Plain meaning is discerned from viewing the words of a particular provision *in the context of the*

statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole.

Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) (citations omitted) (emphasis added). Thus, in examining RCW ch. 11.88 to determine what "over time" as used in RCW 11.88.010(1)(c) means, the panel was simply following what this court said it should do.

Nor is it true that the panel's decision necessarily means that one has to be incapacitated for at least 24 days before the limitations period can be tolled. The panel declined to adopt a bright line rule. All the panel did was use the statutory time frames in RCW ch. 11.88 to determine that "over time" must mean an incapacity of more than 4 days.

WSTLAF's reliance on a quote from a now superseded edition of a treatise does not support its position either. That treatise used to say, "It is doubtful that the legislature intended to require a formal determination of incapacity under RCWA 11.88 in order to justify tolling." (Brief of Amicus 16-17) (quoting 15A K. Tegland & D. Ende, WASHINGTON HANDBOOK ON CIVIL PROCEDURE § 4.5, at 79 (2007)). But, as those commentators have since recognized, *Rivas* did not change their observation. In the most recent edition of the treatise, Tegland and Ende say:

It is not necessary for there to be a formal determination of incapacity and for a guardian to have actually been

appointed in order to justify this form of tolling. *Rivas v. Eastside Radiology Associates*, 134 Wash. App. 921, 143 P.3d 330 (Div. 1 2006).

15A K. Tegland & D. Ende, WASHINGTON HANDBOOK ON CIVIL PROCEDURE § 4.5, at 82-83 (2007-08 ed.) (emphasis added).

B. *YOUNG SUPPORTS DEFENDANTS', NOT WSTLAF'S, POSITION.*

WSTLAF, like plaintiff, relies heavily on *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989). But that case says nothing about RCW 11.88.010(1)(c)'s "over time" requirement as applied to RCW 4.16.190. Indeed, the "over time" requirement did not even exist at the time.

Rather, the issue in *Young* was whether the appointment of a guardian ad litem for a minor incompetent stopped the tolling under RCW 4.16.190. Unlike plaintiff here, the minor in *Young* had suffered permanent brain damage. This court ruled that the mere fact that a guardian ad litem had been appointed did not stop tolling. The reason was that RCW 4.16.190 does not say that the appointment of a guardian ad litem stops tolling. Rather, RCW 4.16.190 expressly states that if the limitations period is tolled because of disability, "the time of such disability shall not be part of the time limited for commencement of the action."

Defendants here have no quarrel with *Young's* holding. Indeed, if anything, *Young* supports defendants' position, not WSTLAF's or plaintiff's. This is because *Young* stated, "The reference to RCW 11.88 bears this out: this source for the tolling statute's definitions concerns the appointment, qualification, and removal of guardians." 112 Wn.2d at 222. As discussed *supra*, the "over time" requirement of RCW 11.88.010(1)(c) is part and parcel of the RCW ch. 11.88 definitions. And the definitions must be read in the context of the rest of RCW chapter 11.88's provisions on appointment, qualification, and removal of guardians.

III. CONCLUSION

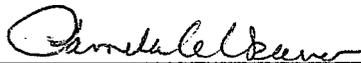
RCW 4.16.190 requires incompetency or disability "to such a degree that [the claimant] cannot understand the nature of the proceedings, *such incompetency or disability as determined according to chapter 11.88 RCW*". RCW 11.88.010 is part of chapter 11.88 RCW. The first sentence of RCW 11.88.010(1)(c) provides that "[a] *determination of incapacity is . . . based upon a demonstration of management insufficiencies over time in the area of person or estate.*" (Emphases added.)

WSTLAF's position that RCW 4.16.190 incorporates RCW 11.88.010(1)(a)-(b) and the second sentence of subsection (c), but not the first, has no basis in the statute, case law, or common sense. This court

should reject WSTLA's reading of RCW 4.16.190 and RCW ch. 11.88
and affirm the Court of Appeals decision.

DATED this 12 day of January 2008.

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