

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

No. 79506-1

79506-1

~~2007 FEB 8~~ IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SUSAN E. RIVAS,  
Plaintiff/Petitioner,

CLERK

vs.

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

and

EASTSIDE RADIOLOGY ASSOCIATES; OVERLAKE IMAGING;  
WASHINGTON IMAGING SERVICES,  
Defendants/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  
marital community thereof,  
Defendants/Respondents.

WASHINGTON STATE TRIAL LAWYERS ASSOCIATION  
FOUNDATION AMICUS CURIAE MEMORANDUM SUPPORTING  
REVIEW

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On Behalf of  
Washington State Trial Lawyers Association Foundation

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (“WSTLA Foundation”) is a not-for-profit corporation organized under the laws of the State of Washington, and a supporting organization of the Washington State Trial Lawyers Association (“WSTLA”). WSTLA Foundation, which now operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress, including the right of such persons to proper application of Washington’s tolling statute, RCW 4.16.190.<sup>1</sup>

## II. BACKGROUND

Susan E. Rivas (Rivas) brought this medical negligence action against Eastside Radiology Associates, Overlake Imaging, Washington Imaging Services, and Allan Muraki, M.D. and Jane Doe Muraki (collectively “Muraki”), and others for injuries sustained as a result of a renal angioplasty performed on her. See Rivas v. Eastside Radiology Assocs., 134 Wn.App. 921, 923-24, 143 P.3d 330 (2006), *review pending*. Rivas was hospitalized in an intensive care unit for four days after this medical procedure. She sued Muraki three years and one day after the procedure. Muraki moved for summary judgment of dismissal, contending that the action was untimely under RCW 4.16.350, the medical negligence statute of limitations. Rivas countered that the limitation

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<sup>1</sup> The Supreme Court extended the time for filing and serving this amicus curiae memorandum until thirty days after the filing of the answer to the petition for review. See Commissioner Seven M. Goff letter, January 18, 2007.

period was tolled under RCW 4.16.190, because she was “incompetent or disabled” during the four-day period following the surgery.<sup>2</sup> As a consequence, excluding the four-day period, Rivas argued that her action was timely. 134 Wn.App. at 924-27.

The superior court ruled that the tolling statute applied, and that there was a genuine issue of material fact as to whether Rivas was incapacitated at the time her cause of action accrued. Id. at 924-25. Muraki sought discretionary review of this determination, which was granted, and the Court of Appeals, Division I, reversed. For purposes of its opinion, the court assumed that Rivas was “totally helpless” during the four-day period following the medical procedure. Id. at 924. However, the court concluded that, under its reading of RCW 4.16.190, this four-day period was not of the type contemplated by the Legislature under the statute. Id. at 926-31 (majority opinion and concurring opinion of Agid, J.).

In particular, the majority held that the reference in RCW 4.16.190 to “such incompetency or disability as determined according to chapter 11.88 RCW” foreclosed tolling for such a short period of time. It accepted Muraki’s argument that the guardianship statutes do not envision such a short-lived incapacity because RCW 11.88.010(1)(c) provides that “a finding of incapacity must be ‘based upon a demonstration of management insufficiencies *over time*,’ and that the time

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<sup>2</sup> The text of the current version of RCW 4.16.190 is reproduced in the Appendix for the convenience of the Court.

periods referenced in the guardianship statutes show that the phrase ‘over time’ was not intended to apply to short-term incapacity of only a few days.” 134 Wn.App. at 928-29 (quoting RCW 11.88.010(1)(c)).<sup>3</sup> The majority found it significant that, while the guardianship statutes do not set forth a minimum duration for incapacity, they establish minimum procedural timelines for processing a guardianship petition well in excess of four days. Id. at 929-30.<sup>4</sup> It concluded:

While we do not set a bright line rule for the minimum duration of incapacity to qualify for a guardian to be appointed, it is clear that under the guardianship statutes, a four-day incapacity would be insufficient to permit appointment of a guardian. As a matter of law, Rivas cannot meet her burden of proof that a guardianship would have been appropriate when her cause of action accrued.

Id. at 930; see also id. at 930-31 (Agid, J. concurring, emphasizing the guardianship requirement of “management insufficiencies over time” is a substantive standard for guardianship eligibility).

Rivas petitioned this Court for review, urging that the Court of Appeals misconstrued RCW 4.16.190, and that its interpretation violates both public policy and Rivas’ due process rights. See Rivas Pet. for Rev. at 1-3.

### III. ISSUE PRESENTED

Does the proper interpretation and application of Washington’s general tolling statute, RCW 4.16.190, particularly with reference to its requirement that incompetency or disability be established “as determined

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<sup>3</sup> The text of the current version of RCW 11.88.010 is reproduced in the Appendix for the convenience of the Court.

<sup>4</sup> The court specifically identified a minimum twenty four-day period – a three-day period for notice of the hearing on the proposed guardianship to the alleged incapacitated person, coupled with at least a three-week period for that person to prepare for the hearing. Rivas at 929; see also Muraki Ans. to Pet. for Rev. at 12.

according to chapter 11.88 RCW,” present an issue of substantial public interest requiring review under RAP 13.4(b)(4)?

#### IV. ARGUMENT IN SUPPORT OF REVIEW

The Court of Appeals opinion below turns on the meaning of the phrase in RCW 4.16.190 requiring incompetency or disability be established “as determined according to chapter 11.88 RCW.” Rivas, 134 Wn.App. at 926-30. The court holds that persons otherwise allegedly suffering from an incapacitating condition (*viz.* “cannot understand the nature of the proceedings”) are not eligible for tolling if the condition did not endure for the period of time minimally necessary to obtain a guardianship appointment. Id. at 929-30. It does so by concluding “the tolling statute refers to the *process* set forth in chapter 11.88 RCW.” Id. at 928 (emphasis added). In so ruling, the court indicates “we do not set out a bright line rule for the minimum duration of incapacity to qualify for a guardian to be appointed,” thus suggesting there is no fixed period of ineligibility for tolling under its analysis. Id. at 930.

Whether the Court of Appeals correctly interpreted RCW 4.16.190 is an issue of substantial public interest. See RAP 13.4(b)(4). The petition for review should be granted. The availability of the tolling statute to incompetent or disabled persons injured in their person or property is a substantial right. By nature, tolling provisions exist to assure all persons subject to a particular statute of limitations enjoy the full benefit of the limitation period. See generally Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 226, 86 P.3d 1166 (2004). Yet, the effect of the Court of

Appeals interpretation, while it may not set a precise “bright line rule,” is to render persons otherwise incompetent or disabled at the time the cause of action accrued ineligible for tolling if their incapacity did not endure for at least 24 days. See Rivas at 929-30.<sup>5</sup> Imposition of this unprecedented requirement warrants review by this Court.

Review is further justified because of the seeming tension between the Court of Appeals opinion and this Court’s decision in Young v. Key Pharmaceuticals, 112 Wn.2d 216, 770 P.2d 182 (1989), interpreting a prior version of RCW 4.16.190. In Young, the Court held that appointment of a guardian under chapter 11.88 RCW, due to minority, did not stop the tolling of the applicable statute of limitations under RCW 4.16.190. See 112 Wn.2d at 223. In reaching this result, the Court indicated the reference to chapter 11.88 RCW provided the “source for the tolling statute’s definitions.” Id. at 222; see also id. at 221. Nothing in Young suggests the *procedural timelines* set forth in chapter 11.88 RCW should in any way dictate eligibility for tolling under RCW 4.16.190.

It is true that at the time Young was decided RCW 11.88.010 did not include the requirement now codified in sub-section (1)(c) that incapacity be based upon “a demonstration of management insufficiencies *over time.*” See RCW 11.88.010(1)(c) (emphasis added); Laws of 1990, ch. 122 §2; Young at 221. The Court of Appeals majority found this

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<sup>5</sup> Under the Court of Appeals opinion it is possible that the period of ineligibility for tolling could be longer, depending upon “[o]ther time periods set out in the guardianship statutes.” Rivas at 930 (footnote omitted).

“over time” requirement significant because it had already determined the reference to chapter 11.88 RCW in the tolling statute referred to the *process* set forth in the guardianship statutes. Rivas at 928. The court does not appear to have considered whether the interpretation in Young of the incorporation language supports, if not requires, a different approach, that is only the substantive definitions relating to incompetency or disability are incorporated, without regard to the procedural framework for adjudicating such issues in the guardianship context.<sup>6</sup> The Court should address this question, particularly when the consequence of importing guardianship procedural guidelines in applying the tolling statute appears inconsistent with the purposes of the tolling statute, and results in depriving persons with short-term but authentic incapacities of the full benefit of the applicable limitation period.

## V. CONCLUSION

This Court should grant the petition for review in this case, as the proper interpretation and application of RCW 4.16.190 is an issue of substantial public interest under RAP 13.4(b)(4).

FILED AS ATTACHMENT  
TO E-MAIL

DATED this 8<sup>th</sup> day of February, 2007.

\_\_\_\_\_\* \_\_\_\_\_\*  
Bryan P. Harnetiaux Debra L. Stephens

On Behalf of WSTLA Foundation

\* Signed original retained by counsel; document transmitted for filing by email.

<sup>6</sup> Judge Agid’s concurrence below appears to view the “over time” requirement as *substantive* in nature, but does not explore whether importation of this requirement has any plausible relevance to the concept of tolling under RCW 4.16.190. See Rivas at 930-31 (Agid J., concurring).

## Appendix

### **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.]

### **RCW 11.88.010**

#### **Authority to appoint guardians -- Definitions -- Venue -- Nomination by principal.**

(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 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 11.94.010, 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.

[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.]

Rec. 2-8-07

-----Original Message-----

From: WSTLA Foundation [mailto:wstla@winstoncashatt.com]

Sent: Thursday, February 08, 2007 3:01 PM

To: OFFICE RECEPTIONIST, CLERK

Cc: pokano@rmlaw.com; rccarrithers@msn.com; debra@debrastephenslaw.com

Subject: Rivas v. Overlake (S.Ct. #79506-1)

<<Rivas ACM 2-8-07.pdf>> Dear Clerk:

Attached is WSTLA Foundation's Amicus Curiae Memorandum for filing. The parties have agreed to service by email, which will occur this date.

Please confirm receipt.

Respectfully submitted,

Bryan Harnetiaux  
WSBA #05169

On Behalf of WSTLA Foundation

Att.

cc: Pam Okano [email: pokano@rmlaw.com]  
Rick Carrithers [email: rccarrithers@msn.com]  
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