

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 marital  
community thereof,

Respondents.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Steven Scott, Judge

SUPPLEMENTAL BRIEF OF RESPONDENTS

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## I. NATURE OF THE CASE

RCW 4.16.350 requires medical malpractice suits to be filed within three years of the alleged negligence. Plaintiff did not bring her medical malpractice suit until three years and two days after the alleged negligence. In an attempt to circumvent this problem, she claims RCW 4.16.190 must have tolled the statute of limitations for 4 days while she was in the intensive care unit. But RCW 4.16.190 requires more—a plaintiff must be incompetent “as determined according to chapter 11.88 RCW.” RCW ch. 11.88, which requires a lengthy procedure to appoint guardians for incompetents, defines “incompetency” to require “a demonstration of management insufficiencies *over time*”. A unanimous Division I ruled plaintiff was not incompetent “as determined according to chapter 11.88. RCW.”

## II. ISSUE PRESENTED

Did RCW 4.16.190 toll RCW 4.16.350’s three-year limitations period for four days while plaintiff was in the ICU, where—

RCW 4.16.190 requires incompetency “as determined according to chapter 11.88 RCW,” the guardianship statute,

RCW ch. 11.88 requires management insufficiencies “over time” and a lengthy procedure to appoint a guardian for an incompetent, and

this court has already recognized that “[a]ppointment of a guardian is a time-consuming process.”?

### III. STATEMENT OF THE CASE

#### A. STATEMENT OF RELEVANT FACTS.

Plaintiff/petitioner Susan Rivas had severe renal vascular disease. On *July 19, 1996*, defendant/respondent Alan Muraki, M.D., performed a renal angiogram and angioplasty. Two days later, on July 21, the right kidney had to be removed because of complications that developed during the July 19 procedure. The trial court later ruled, “The loss of the kidney [became] inevitable as of *July 20, 1996*.”<sup>1</sup> (CP 49, 58, 654, 748) (emphasis added).

Plaintiff was in intensive care from *July 19-23, 1996*. She was discharged from the hospital on *July 26, 1996*. (CP 58, 109-10) Then she began investigating.

On October 14, *1996*, three months after the angioplasty, plaintiff authorized release of her medical records. By July *1997* she had retained an attorney. He sent a medical release authorization to Overlake Hospital with a cover letter saying, “We are requesting these documents by July 16,

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<sup>1</sup> Defendants believe all of their alleged acts or omissions, if any, must have occurred on or before July 19. However, for the purposes of this appeal only, defendants will assume the July 20 date.

and would appreciate whatever you can do to expedite.” (CP 60-61, 78)

**B. STATEMENT OF PROCEDURE.**

Plaintiff did not sue until *July 21, 1999*, three years and two days after the allegedly negligent angioplasty. (CP 5-11, 60) Plaintiff claims (CP 522-23):

[Dr.] Muraki failed to disclose to her the risks and complications associated with [the] angioplasty and failed to advise her fully about alternative forms of treatment. Plaintiff also asserts he failed to properly perform the angioplasty causing the right renal artery to dissect, and failed to respond properly to the dissection of her renal artery and waited too long before calling for a vascular consultation or a vascular intervention . . . .

Under prior law, plaintiff’s suit might have been timely, because traditionally, the limitations period on a medical malpractice claim did not begin to run until injury was sustained.<sup>2</sup> See *Gunnier v. Yakima Heart Center, Inc.*, 134 Wn.2d 854, 860, 953 P.2d 1162 (1998). But in 1976, the Legislature amended RCW 4.16.350 to provide that the three-year medical malpractice limitations period run from “the *act or omission* alleged to have caused the injury or condition.” RCW 4.16.350(3) (emphasis added).

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<sup>2</sup> It was likely untimely even under prior law, because, as the trial court found, the loss of plaintiff’s kidney became inevitable on July 20, 1996. Plaintiff filed her complaint on July 21, 1999, one day after expiration of what would have been the limitations period before the 1976 amendment to RCW 4.16.350.

Defendants moved for summary judgment on the statute of limitations. (CP 215-375) Citing RCW 4.16.190, plaintiff claimed the limitations period was tolled *July 19-22, 1996—i.e.*, for four of the five days she was in the ICU. (CP 524) RCW 4.16.190 provides:

[I]f a person entitled to bring an action . . . 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, *such incompetency or disability as determined according to chapter 11.88 RCW* . . . the time of such disability shall not be a part of the time limited for the commencement of action.

(Emphasis added.) RCW ch. 11.88 governs the appointment of guardians.

Defendants did not contend a guardian had to have been actually appointed. Rather, they reasoned that during her 4-day stay in the ICU, plaintiff could not have been incompetent or disabled “as determined according to chapter 11.88 RCW”, since RCW 11.88.010(1)(c) provides:

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. . . .

(Emphasis added.) In other words, to qualify for tolling, plaintiff had to have qualified for a guardian under RCW ch. 11.88, even if one was not actually appointed. Since plaintiff had not demonstrated management insufficiencies “over time”, as required by RCW 11.88.010(1)(c), defendants asserted she could not have been incompetent “as determined according to chapter 11.88 RCW”, as a matter of law.

The trial court denied defendants' motion, finding factual issues whether plaintiff was incapacitated. (CP 749) A Division I commissioner denied discretionary review. However, a panel granted defendants' motion to modify. A different panel unanimously ruled defendants were entitled to dismissal as a matter of law, explaining:

While we do not set out 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.

*Rivas v. Eastside Radiology Associates*, 134 Wn. App. 921, 930, 143 P.3d 330 (2006), *rev. granted*, 161 Wn.2d 1007 (2007).

#### IV. ARGUMENT

A. **RCW 4.16.190'S REQUIREMENT FOR INCOMPETENCY "AS DETERMINED ACCORDING TO CHAPTER 11.88 RCW" MUST MEAN SOMETHING.**

RCW 4.16.190 permits tolling—

if a person entitled to bring an action . . . 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, *such incompetency or disability as determined according to chapter 11.88 RCW . . .*

(Emphasis added.) Thus, being incompetent to such a degree as to be unable to understand the nature of the proceedings is not, by itself, sufficient to toll the limitations period. If it were, the Legislature would not have enacted the above-highlighted language. Rather, the Legislature

specified that such incompetency must also be “as determined according to chapter 11.88 RCW.”<sup>3</sup>

The phrase, “such incompetency . . . as determined according to chapter 11.88 RCW” must mean something. Language in a statute should not be rendered superfluous or read out of the statute. *See State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005); *North Coast Air Services, Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 322-23, 759 P.2d 405 (1988); *Boyce v. Adams*, 87 Wn.2d 56, 60, 549 P.2d 18 (1976). Indeed, “[i]t is the duty of this court to construe statutes so as to avoid rendering meaningless any word or provision.” *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

What does “such incompetency . . . as determined according to chapter 11.88 RCW” mean? Defendants do not claim it means a guardian *actually* has to have been appointed for tolling under RCW 4.16.190. *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989). It does not mean that guardianship proceedings had to have been instituted. Rather, in enacting RCW 4.16.190 to require not just incompetency, but incompetency “as determined according to chapter

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<sup>3</sup> The panel here decided this case under RCW ch 11.88 as it read in 2006. 134 Wn. App. at 926 n.4.

11.88 RCW”, the Legislature must have intended that a plaintiff’s condition be such that she *could have* qualified for a guardian under RCW ch. 11.88 had one been sought. No other interpretation makes sense. *See State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983).

To qualify for a guardian had one been sought, plaintiff here would have had to have demonstrated management insufficiencies “over time.” RCW 11.88.010(1)(c). The Legislature did not specifically define “over time.” However, this court has very recently explained:

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, this court will “consider the entire statute in which the provision is found as well as related statutes or other provisions in the same act that disclose legislative intent.” *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298, 149 P.3d 666 (2006).

**B. RCW CH. 11.88 DEMONSTRATES THAT “OVER TIME” MEANS MORE THAN A FEW DAYS.**

Because RCW 4.16.190 requires a showing of “incompetency or disability as determined according to chapter 11.88 RCW”, plaintiff bears

the burden of showing by clear, cogent, and convincing evidence that she is entitled to tolling. RCW 11.88.045(3). But she provided no admissible medical testimony that when she was in the ICU, her alleged disability was expected to continue “over time.” Rather, plaintiff’s position has been that because, in hindsight, she was disabled for four days, tolling occurred.

To determine what the Legislature meant by management insufficiencies “over time”, it is instructive to look at the remainder of the guardianship statute. The goal is not, as plaintiff claims, to “hypothetically” initiate a guardianship proceeding. (Petition for Review 9) Rather, as amicus curiae Washington State Trial Lawyers Association Foundation has observed, this court in *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 222, 770 P.2d 182 (1989), has aptly observed that RCW ch. 11.88 “provide[s] the ‘source for the tolling statute’s definitions.’” (WSTLAF Amicus Curiae Memorandum Supporting Review 5)

Contrary to what WSTLAF seems to be espousing, however, defendants are not contending that the procedural timelines of RCW ch. 11.88 per se “dictate eligibility for tolling under RCW 4.16.190.” (WSTLAF Amicus Curiae Memorandum Supporting Review 5) Rather, defendants merely ask this court to “consider the entire statute in which the provision is found as well as related statutes or other provisions in the

same act that disclose legislative intent” to determine what the Legislature meant by the phrase “over time.” *See Cosmopolitan Engineering*, 159 Wn.2d at 298.

For example, the person petitioning for appointment of a guardian has *five days* after filing the petition to serve notice that a guardianship proceeding has been commenced. RCW 11.88.030(4)(a). The court has *60 days* to hear a petition for appointment of a guardian. RCW 11.88.030(5).

Upon receipt of a petition to appoint a guardian, the trial court must appoint a guardian ad litem (GAL) to represent the best interests of the allegedly incapacitated person. RCW 11.88.090(3). The GAL has *five days* to file and serve a statement regarding his or her qualifications. Within *three days* of service of this statement, any party may file and serve a motion for a show cause hearing on why the GAL should not be removed. *Id.*

Within *45 days* after notice that the guardianship proceeding has been commenced, and at least *15 days* before the hearing on the petition, the GAL must file its report and send copies to specified persons. RCW 11.88.090(5)(f). Before filing the report, the GAL must meet and consult with the putative ward, meet with the person whose appointment is sought as guardian, obtain the written report required by RCW 11.88.045 and any

other reports from qualified professionals as may be necessary to permit the guardian to complete his report, consult (if necessary) with the putative ward's friends and relatives, investigate whether the putative ward had any alternative arrangements, or whether alternative arrangements could be made, in lieu of a guardianship, and advise the court whether counsel should be appointed for the putative ward. RCW 11.88.090(5).

The GAL's written report must, among other things, describe the needs of the putative ward and his or her probable residential requirements. RCW 11.88.090(5)(f)(ii). Thus, the guardianship proceeding contemplates the obvious—that a guardian will be needed after the guardian is appointed.

While the time set forth in RCW 11.88.090(5)(f) for filing the GAL's report may be extended or reduced upon a showing of good cause, *id.*, responses to the GAL report may be filed up to *two days* before the hearing. RCW 11.88.090(7). If the guardian ad litem fails to timely file his/her report, "the hearing shall be continued to give the court and the parties at least *fifteen days* before the hearing to review the report." *Id.* (emphasis added).

The person claimed to be incompetent or disabled must be personally examined and interviewed by a physician, psychologist, or advanced registered nurse practitioner within *30 days* of that health care

provider's preparing a written report to the court. RCW 11.88.045(4). If an attorney is appointed for the putative ward, the attorney will have at least *3 weeks* for consultation and preparation absent a convincing showing in the record that a lesser time is adequate. RCW 11.88.045(1)(a).

At least *ten days'* notice must be given of the hearing to appoint the guardian. RCW 11.88.040. This time period may be reduced for good cause, but to no less than *three days'* notice. *Id.*

Thus, as this court has so aptly recognized, “[*a*]ppointment of a guardian is a time-consuming process.” *In re Schuoler*, 106 Wn.2d 500, 505-06, 723 P.2d 1103 (1986) (emphasis added); *see also In re Guardianship of Hamlin*, 102 Wn.2d 810, 819, 689 P.2d 1372 (1984) (recognizing “cumbersomeness and costs of legal guardianship proceedings”); A. Quinn, Comment, *Who Should Make Medical Decisions for Incompetent Adults? A Critique of RCW 7.70.065*, 20 SEATTLE U. L. REV. 573, 583 (Winter 1997) (recognizing Washington legal guardianship proceedings as “cumbersome”). If the aforementioned time frames had been applied here, plaintiff would have been out of the intensive care unit *long before* a guardian could have even been appointed. Given the length of the proceedings it has mandated, the Legislature could not have intended management insufficiencies over just three or four days to

qualify as “management insufficiencies over time” as required for a guardianship.

Consequently, it is indeed strange that plaintiff is now claiming that RCW 4.16.190’s requirement of a determination of incompetency “according to chapter 11.88 RCW” somehow “directs the use of the process set out in Chapter 11.88” but not a showing of “management insufficiencies over time”, as required by RCW 11.88.010(1)(c).<sup>4</sup> (Petition for Review 7, 8). Plaintiff’s position ignores RCW 11.88.010(1)(f), which 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.

Furthermore, under plaintiff’s theory, not all the procedures set forth in RCW ch. 11.88 for the determination of incompetency are mandated by RCW 4.16.190. Instead, plaintiff claims the Legislature intended to require only that a hearing be held, whether before a trial court

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<sup>4</sup> Plaintiff’s theory of what RCW 4.16.090 requires has been a moving target. In response to defendants’ summary judgment motion, plaintiff asserted the RCW ch. 11.88 definition of “incompetency” should apply, but simply ignored the “over time” language of RCW 11.88010(1)(c). (CP 524-25) In her brief in the Court of Appeals, plaintiff claimed that RCW 4.16.190 merely required a trial on the incompetency issue. (Brief of Respondent 25)

judge or a jury. But this would make the phrase, “as determined according to chapter 11.88 RCW” superfluous: whenever a plaintiff raises *any* tolling statute to preclude a statute of limitations defense, a hearing will be held, whether before judge or jury, to determine whether the limitations period was in fact tolled.

Further, nothing in the language of RCW 4.19.060 indicates that the Legislature intended to be so selective when it required a determination “according to chapter 11.88 RCW.” If the Legislature had meant to merely incorporate the hearing provisions of that chapter, it would have required a determination “according to RCW 11.88.030(5) and RCW 11.88.045(3)”.

Even after the guardian is appointed, the Legislature mandated that certain things be done within certain time frames that indicate the Legislature never intended that guardianships be established for persons disabled for only a few days. For example, after appointment, a guardian of an estate has *3 months* to file a verified inventory of the ward’s property, including a statement identifying all encumbrances, liens, and other secured charged on any item. RCW 11.92.040(1). The guardian of an estate must file *annual* reports a written verified account of the administration, although the time for filing can be every *36 months* for certain smaller estates. RCW 11.92.040(2)-(3).

A guardian of the person also has filing duties. Within *3 months* of appointment, he or she must file a personal plan for the ward that includes an assessment of the ward's physical, mental, and emotional needs, and his or her ability to perform or assist in the activities of daily living, as well as a specific plan for meeting the identified and emerging personal care needs. RCW 11.92.043(1). The guardian of the person must also file *annual* reports on the ward's status. RCW 11.94.043(2). These provisions all indicate that the ward's management insufficiencies over time must be anticipated to last more than a few days.

A review of reported Washington guardianship cases also indicates that the Legislature contemplated that a person's management insufficiencies must either be permanent or at minimum, last for more than just a few days. For example, in *In re Guardianship of Ingram*, 102 Wn.2d 827, 689 P.2d 1363 (1984), the ward was a 66-year-old woman suffering from dementia due to obstructive pulmonary disease. In *In re Guardianship of Bellanich*, 43 Wn. App. 345, 717 P.2d 307 (1986), *overruled on other grounds by Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 793-94, 791 P.2d 526 (1990), the ward was a 79-year old Alzheimer's patient. In *In re Green's Guardianship*, 125 Wash. 570, 216 P. 843 (1923), the ward was a 71-year-old stroke victim who suffered from hallucinations and needed almost constant care. In *United Pacific*

*Ins. Co. v. Buchanan*, 52 Wn. App. 836, 765 P.2d 23 (1988), the ward suffered from chronic alcoholism with progressive memory loss and dementia.<sup>5</sup>

The minor in *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), had permanent brain damage that would probably necessitate his having custodial care for the rest of his life. The minor in *In re Matter of the Guardianship of K.M.*, 62 Wn. App. 811, 816 P.2d 71 (1991), had an IQ of 40 and the mental age of a 6- or 7-year-old.

**C. PLAINTIFF’S POSITION IGNORES THE LEGISLATIVE PURPOSE.**

The Legislature’s purpose in establishing a time-consuming and expensive process for appointment of guardians is yet another indication that plaintiff here could not have been incompetent “as determined according to chapter 11.88 RCW”, within the meaning of RCW 4.16.190.

Appointing a guardian is not trivial. When a guardian is appointed, the ward loses control over some or all of his or her own affairs. For example, the guardian, not the ward, may be empowered to make medical decisions. The guardian, not the ward, may be empowered to decide if the ward should be institutionalized and where. The guardian,

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<sup>5</sup> Although there was some suggestion in *United Pacific* that the ward there might have recovered after a 3-month alcoholism treatment program, the court declined to decide whether the guardianship could be terminated for that reason due to lack of proof.

not the ward, may take control over the ward's financial affairs. When a guardian is appointed, the ward may lose his or her rights to vote, enter into contracts, marry, drive a motor vehicle, or make decisions about the social aspects of the ward's life. See RCW 11.88.030(4)(b) (contents of notice of hearing).

Accordingly, the decision to impose a guardianship cannot be made lightly. Moreover, because *any* person or entity can petition for a guardianship for another, RCW 11.88.030(1), the procedure has the potential for great abuse absent appropriate safeguards. The Legislature recognized this when it declared:

It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. . . . [T]heir liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.

RCW 11.88.005. This court has also declared:

The principal function the guardianship process serves is to protect against abuse by preventing "too precipitous a decision or the appointment of one with less than proper motives."

*In re Guardianship of Hamlin*, 102 Wn.2d 810, 819, 689 P.2d 1372 (1984) (quoting *In re Welfare of Colyer*, 99 Wn.2d 114, 130, 660 P.2d 738 (1983)).

Accordingly, the Legislature did not want a guardianship proceeding to be a quick and easy matter. Instead, it enacted what it feels are appropriate safeguards. For example, in addition to the notice provisions discussed *supra*, the Legislature determined that a guardianship cannot be established without a written report by a physician or psychologist who has personally examined and interviewed the putative ward within 30 days of filing the report. RCW 11.88.045(4). The guardian ad litem must interview the putative ward, if possible, the person proposed to be guardian, and, if appropriate, the putative ward's family and friends. RCW 11.88.090(5). A putative ward is entitled to separate counsel and a jury trial. RCW 11.88.045(1)(a), (3).

Given these time-consuming and expensive requirements, the Legislature could not have intended "over time" in RCW 11.88.010(1)(c) to mean only 4 days. Rather, the Legislature's intent was to ensure that the drastic measure of guardianship be imposed only upon those who truly warranted such an extreme procedure—those who demonstrate management insufficiencies over time.

## V. CONCLUSION

In concurring with the panel's decision that plaintiff could not have been incompetent "as determined according to chapter 11.88 RCW," Judge Agid said:

While I agree with the majority opinion, I write separately to emphasize the guardianship statute's requirement that incapacity be 'based upon a demonstration of management insufficiencies *over time* in the area of person or estate.

134 Wn. App. at 930 (citing RCW 11.88.010(1)(c)) (emphasis in original).

Here there was no such demonstration. There could not have been since plaintiff's disability was over by the time any guardian could have been appointed had one been sought. The Legislature could not have intended tolling in such a situation when it said that the person seeking tolling had to be incompetent "as determined according to chapter 11.88 RCW."

The unanimous Court of Appeals decision should be affirmed and the case remanded for entry of summary judgment in favor of defendants.

DATED this 7<sup>th</sup> day of December 2007.

REED McCLURE

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