71742-1

71742-1

NO. 71742-1-I

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

---

TERRI BLOCK
as guardian of SARAH BLOCK

Appellant,

v.

THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC, a Washington Professional Limited Liability Company, BEN F. BARCUS and JANE DOE BARCUS, individually and the marital community comprised thereof; LEGGETT & KRAM, a Washington Partnership; PETER KRAM and JANE DOE KRAM, individually and the marital community comprised thereof,

Respondents.



---

# CONSOLIDATED REPLY BRIEF OF APPELLANT

---

Michael R. Caryl, WSBA # 7321
Michael R. Caryl, P.S.
200 First Avenue West, Suite 402
Seattle, WA 98119
Ph: 206.378.4125
michaelc@michaelcaryl.com

G. Lee Raaen, WSBA# 6258
Law Office of G. Lee Raaen
2110 N. Pacific St., Suite 100
Seattle, WA 98103
Ph: 206.682.9580
lee@lraaen.com

## TABLE OF CONTENTS


I. INTRODUCTION ..... 1

II. REPLY TO RESPONDENTS' STATEMENT OF THE CASE ..... 1

III. ARGUMENT ..... 3

A. STANDARD OF REVIEW ..... 3

B. BLOCK'S CLAIMS. ..... 3

1. Actions to Set Aside Fee Contracts to Recover and Forfeit Fees Based on RPC Violations Are Proper ..... 4

2. Block's Claims Go Beyond RPC Violations. ..... 7

C. DEFENDANTS MISAPPLY THE DISCOVERY RULE. ..... 8

1. Barcus Turns Discovery Rule Upside Down. ..... 8

2. Barcus and Kram Misapply the Continuous Representation Rule. 11

D. STATUTES OF LIMITATIONS WERE TOLLED BY SARAH'S SEVERE DISABILITY. ..... 14

1. Defendants Omit Critical Elements of the TEDRA Tolling Exception and Ignore Rules of Statutory Construction. ..... 15

2. Defendants' Claimed TEDRA Defense to Tolling Is Insufficient on its Face. ..... 17

3. Defendants Do Not Explain How TEDRA Tolling Exceptions May Apply. ..... 21

a. This action is not a "matter that is subject to dispute under this chapter" (TEDRA) ..... 22

b. Defendants identify no applicable TEDRA statute of limitations for Block's claims. ..... 23

c. Terri did not represent Sarah during any "probate or dispute resolution proceeding" under TEDRA involving claims against Barcus and Kram. ..... 23

d. Sarah did not have guardian who could represent her during a "probate or dispute resolution proceeding" involving claims against Barcus and Kram. ..... 24

E. DEFENDANTS' CLAIMED EXCEPTION TO THE TOLLING STATUTE IS UNCONSTITUTIONAL. ..... 28

F. RCW 4.24.005 DOES NOT BAR BLOCK CLAIMS ..... 29

G. BLOCK'S ACTION WAS FILED WITHIN THE STATUTE OF LIMITATIONS 35

1. Block's Claims are Subject to the Six Year Statute of Limitations. ..... 35

2. Terri's Lawsuit Was Timely Filed ..... 37

H. MATERIAL QUESTIONS OF FACT EXIST ON EQUITABLE TOLLING AND EQUITABLE ESTOPPEL ..... 38

## TABLE OF AUTHORITIES

### Cases

*Anderson v. Dussault*, 181 Wn.2d 360, 333 P.3d 395 (2014) ..... 16, 22, 23

*Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013) ..... 34

*Burlington N. v. Johnston*, 89 Wn.2d 321, 572 P.2d 1085 (1977) ..... 15

*Burns v. McClinton*, 135 Wn. App. 285, 143 P.3d 630 (2008) ..... 13

*C.J.C. v. Corp. of the Catholic Bishop*, 138 Wn.2d 699, 985 P.2d 262 (1999) ..... 8

*Cawdrey v. Hanson Baker*, 129 Wn. App. 810, 120 P.3d 605 (2005) 10, 12

*Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002) ..... 4

*Davis v. Davis Wright Tremaine*, 103 Wn. App. 638, 14 P.3d 146 (2000) ..... 35, 36

*Duke v. Boyd*, 133 Wn.2d 80, 942 P.2d 351 (1997) ..... 39

*Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 837 P.2d 618 (1992) ..... 21

*Hipple v. McFadden*, 161 Wn. App. 550, 255 P.3d 730 (2011) ..... 9

*Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) ..... 4

*In re A.G.M.*, 154 Wn. App. 58, 223 P.3d 1276 (2010) ..... 32, 33, 34

*In re Estate of Bernard*, 182 Wn. App. 692, 332 P.3d 480 (2014) ..... 19

*In re Estate of Kordon*, 157 Wn.2d 206, 37 P.3d 16 (2006) ..... 19

*Janicki Logging v. Schwabe, Williamson*, 109 Wn. App. 655, 37 P.3d 309 (2001) ..... 9

*Johnson v. Morris*, 87 Wn.2d 922, 557 P.2d 1299 (1976) ..... 16

*LK Operating, L.L.C. v. Collection Grp., L.L.C.*, 181 Wn.2d 48, 331 P.3d 1147 (2014) ..... 6, 10, 34

*LK Operating, L.L.C. v. Collection Grp., L.L.C.*, 181 Wn.2d 117, 330 P.3d 190 (2014) ..... 7

*Meryhew v. Gillingham*, 77 Wn. App. 752, 893 P.2d 692 (1995) ..... 37

*Pers. Restraint of Quackenbush*, 142 Wn.2d 928, 16 P.3d 638 (2001) ... 16

*Simburg Ketter v. Olshan*, 109 Wn. App. 436, 988 P.2d 467 (1999) ..... 34

*State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005) ..... 16

*Taylor v. Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977) ..... 16
*Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340 (1997) ..... 34
*Ward v. Richards & Rossano*, 51 Wn. App. 423, 754 P.2d 120 (1988) .. 34
*Pub. Util. Dist's Utils. Sys. v. Pub. Util. Dist. No. 1*, 112 Wn.2d 1, 770 P.2d 182 (1989) ..... 16
*Washington v. Huntley*, 45 Wn. App. 658, 726 P.2d 1254 (1986) ..... 15
*Wright v. Engum*, 124 Wn.2d 343, 878 P.2d 1198 (1994) ..... 15
*Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014) ..... 24, 28

**Statutes**

RCW 4.16.005 ..... 31
RCW 4.16.080 ..... 37
RCW 4.16.040(1) ..... 35
RCW 4.16.190 ..... 14, 15, 16, 17, 20, 23, 28
RCW 4.16.230 ..... 27
RCW 4.24.005 ..... 29, 30, 31, 32, 33, 35
RCW 11.92.035 ..... 20
RCW 11.96A.020 ..... 17
RCW 11.96A.040 ..... 17
RCW 11.96A.050 ..... 17
RCW 11.96A.030(2) ..... 18, 22, 25
RCW 11.96A.070(1) ..... 20
RCW 11.96A.070(4) ..... 14, 15, 16, 19, 20, 21, 23, 24, 25, 28

**Rules**

RPC 1.5 ..... 33 ,34, 35, 37
RPC 1.7 ..... 6, 10
RPC 1.8 ..... 6, 10, 34, 35
RPC 1.15A ..... 30
SPR 98.16W ..... 7, 32, 33, 34

## I. INTRODUCTION

Barcus and Kram's respondents' briefs avoid any mention of Terri's primary causes of action and mischaracterize her other claims. Respondents turn the discovery rule on its head in order to shorten statute of limitations time periods. They avoid addressing the deficiencies in their summary judgment motions and their failure to meet their burden on summary judgment. Barcus and Kram still do not provide any statutory and factual foundations for their TEDRA arguments. Questions of material fact abound. Accordingly, summary judgment was improper.

## II. REPLY TO RESPONDENTS' STATEMENT OF THE CASE

The statements of the case submitted by Barcus and Kram contain factual allegations which are not only incorrect, but irrelevant. Their arguments are often not germane to statute of limitations questions, but efforts to cast Terri in a bad light or argue the merits of Block's claims. Many factual claims are without support in the record or do not accurately reflect the record. It is not possible to address these deficiencies in this reply as a trial is the appropriate forum to address these disputed factual issues. However, a short response is required to a few factual assertions:

- Barcus cites documents not before the trial court or this court several times in his brief. His motion to supplement the record was properly denied by this Court, and any references to the supplementary documents in his brief should be disregarded. Barcus Brief 13, 40, Appx.
- Most of the factual allegations Barcus makes regarding his firm's representation of Sarah and the attorney fee approval process are strongly contested, but are not relevant to the summary judgment motion appealed to this Court. *See* statements of facts and supporting documents in the guardian's response to Barcus' motion for summary judgment (CP 1005-1017), and the guardian's response to Kram's motion for summary judgment (CP 1031-1041).
- Barcus claims that Kram's retention agreement stated clearly that he represented no one other than Sarah. Barcus Brief at 6. However, the agreement listed the Barcus firm as a client, and defendants later cited their attorney-client relationship created by that agreement in their efforts to deny Block access to her files. CP 1204, 1212
- Barcus asserts that Terri Block only pursued her claims against him after he refused to "buy her a house," even putting the accusation in a major heading in his brief. Barcus Brief at 13. But the letter from Terri he references shows that she was seeking funds for a manufactured "home for Sarah." CP 525. This was part of an ongoing discussion between Terri,

the trustee, Kram and the Barcus firm trying to find a way to get a home for Sarah that could accommodate her severe disabilities. *See* CP 1015 and exhibits 531-539. If Terri's request has any connection to this action, Barcus should know that it is inadmissible as an offer of compromise. ER 408.

## III. ARGUMENT

### A. Standard of Review

The parties agree that the Court of Appeals engages in the same inquiry as the trial court in determining whether a party is entitled to judgment as a matter of law. However, respondents ignore the moving parties' heavy burden on summary judgment. Terri's brief discusses this burden and describes how Barcus and Kram failed to meet it. (See App. Brief at 17 – 19). Defendants did not deny or even address these requirements in their briefs in asking the court to affirm their judgments based on the vaguest of allegations.

### B. Block's Claims.

*Summary*: Barcus claims "A cursory reading of Block's 'claims' reveal that they can all be reduced to a single claim for breach of fiduciary duty…" Barcus brief at 18. Terri and Sarah Block deserve more than a "cursory" reading of their claims. A careful review of Block's complaint demonstrates a variety of claims involving violations of court rules and

fiduciary duties. Yet Barcus and Kram treat them as one, refusing to distinguish between claims to designate correct statutes of limitations.

Barcus and Kram argue that Block asserts a single cause of action for breach of fiduciary duty that sounds in tort, and that no such cause of action exists. Defendants' argument claims Block failed to state a claim, a contention not only incorrect but not before the court on motions for summary judgment based on the statute of limitations.

**1. Actions to Set Aside Fee Contracts to Recover and Forfeit Fees Based on RPC Violations Are Proper.**

Barcus claims there is no civil action arising out of violations of the Rules of Professional Conduct, and that the court does not have jurisdiction to consider the reasonableness of his fees mistakenly relying on **Hizey v. Carpenter**, 119 Wn.2d 251, 830 P.2d 646 (1992). In making this argument, Barcus misapplies **Hizey** and ignores clear law to the contrary. **Hizey** itself recognizes that disciplinary rules may be used to determine the reasonableness of fees, and the Supreme Court specifically said that its holding in that case did not alter or affect such use. **Hizey** at 264.

In **Cotton v. Kronenberg**, 111 Wn. App. 258, 44 P.3d 878 (2002), Cotton stated four causes of action: legal malpractice, breach of fiduciary duty, violation of the CPA, and conversion. Cotton moved for partial

summary judgment solely on the breach of fiduciary duty and CPA claims. He sought to set aside a written fee agreement and have the court determine the defendant's attorney's fees on the basis of *quantum meruit*. These are the same claims made by Block. CP 11-14. The defendant, Kronenberg, seeking to set aside summary judgment unsuccessfully made the same **Hizey** arguments that the defendants make in this case.

The trial court granted Cotton summary judgment and this Court affirmed stating,

> "Kronenberg argues that the trial court improperly considered and applied the Rules of Professional Conduct (RPC) in determining that he breached his fiduciary duty to Cotton. Neither *Hizey* nor any other authority supports that proposition, and we reject it."

**Cotton** at 264. The court cited clear case law which adhered to the view that the RPCs may be considered in cases other than legal malpractice, and that the trial court properly considered the RPCs to determine whether Kronenberg breached his fiduciary duty in Cotton's action to recover attorney fees. **Cotton** at 266. It was held to be entirely within the trial court's proper exercise of discretion to order complete disgorgement of the fees on the basis of violation of the RPCs. **Cotton** at 275.

If there was any question regarding the appropriateness of Block's claims in relation to the RPCs, it was put to rest in a decision by the Supreme Court filed two months prior to Barcus and Krams' filing of their

briefs. They completely ignore **LK Operating, LLC v. Collection Grp., LLC**, 181 Wn.2d 48, 331 P.3d 1147 (2014). In **LK Operating**, plaintiff sought to set aside a contract between two collection agencies because a law firm whose members had an interest in one of the companies violated former RPC 1.8(a) regarding business transactions with a client. There, the relationship between the alleged violations of the RPCs and the cause of action was much less direct and significant than in Block's case. The Supreme Court found violations of RPCs 1.8 and 1.7 (conflicts of interest) and stressed that, "We have previously and repeatedly held that violations of the RPCs or the former Code of Professional Responsibility in the formation of a contract may render that contract unenforceable as violative of public policy." **LK Operating** at 85. The Court held that **Hizey** is neither controlling nor persuasive authority on the enforceability of a contract which violates an RPC. **LK Operating** at 90.

As in **Cotton** and **LK Operating**, Block's first, second and third claims seek to void the Barcus contingency fee agreement for breach of fiduciary duties, asks for a determination of the reasonableness of his fees based on *quantum meruit,* and for the forfeiture/disgorgement of his

excessive fees. CP 11-14. Those claims do not mention nor sound in negligence, contrary to the unsupported arguments of Barcus and Kram. [1]

**2. Block's Claims Go Beyond RPC Violations.**

Contrary to defendants' assertions, Terri's claims are not solely based on violations of the RPCs. Non-compliance with SPR 98.16W (the court rule governing the approval of attorney's fees in cases such as Sarah's) is prominently cited throughout Block's complaint (CP 6, 10, 11), in Block's response to defendants' motions for summary judgment (CP 1009-11, 1013-14, 1042), and in Block's opening brief in this appeal. (App. Brief, pgs. 11, 16). Violations of SPR 98.16W are central elements of Block's action. Yet neither respondent even mentions this rule. They present no argument that the claims based on non-compliance with SPR 98.16W are in anyway barred by statutes of limitations. This willful disregard of one of Block's arguments is reason enough to warrant summary judgment inappropriate.

---

[1] In a companion decision to **LK Operating**, the Supreme Court distinguished between that plaintiff's legal malpractice action and its forfeiture/disgorgement action in considering an award of attorney's fees, labeling the forfeiture matter a contract action. **LK Operating, LLC v. Collection Grp., LLC**, 181 Wn.2d 117, 126, 330 P.3d 190 (2014).

**C. Defendants Misapply the Discovery Rule.**

*Summary:* The defendants rely heavily on a misinterpretation of the "discovery rule" to alter the running of the statutes of limitations. In effect, they ask this Court to reverse the discovery rule. The rule *tolls* the running of a statutes of limitations in appropriate circumstances. Here Barcus and Kram would use the rule to *shorten* the statute of limitations periods. They also ask this Court to accept their conclusions on questions of fact regarding the dates to which the rule might apply, a factual issue inappropriately determined on summary judgment.

**1. Barcus Turns the Discovery Rule Upside Down.**

The discovery rule *tolls* a statute of limitations until a plaintiff knew, or in the exercise of due diligence should have known, of the injury that the negligence has caused. **C.J.C. v. Corp. of the Catholic Bishop**, 138 Wn.2d 699, 749, 985 P.2d 262, 283 (1999). Plaintiffs often invoke the rule to extend the allowable time limit for filing an action. But here the defendants attempt to use the discovery rule to shorten it. Barcus asks the Court to apply the rule so the statutes of limitations would begin to run on Sarah's claims on the date that Barcus paid himself over $695,000 from Sarah's settlement in April of 2006.

However in a client's action against an attorney, the date the statute of limitations commences to run is governed by the continuous representation rule. The rule *tolls* the statute of limitations until the end of an attorney's representation of a client in the same matter. **Hipple v. McFadden,** 161 Wn. App. 550, 568, 255 P.3d 730, 738 (2011).

> The continuous representation rule avoids disruption of the attorney-client relationship and gives attorneys the chance to remedy mistakes before being sued. . . The rule also prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired.

**Janicki Logging v. Schwabe, Williamson**, 109 Wn. App. 655, 662, 37 P.3d 309, 314 (2001).

It is uncontested that Barcus and Kram continued to represent Sarah and Terri Block for years after April of 2006: the pertinent question is when their representation ended in the "same matter" out of which Block's claims arise, *a disputed factual issue inappropriate for summary judgment*. Defendants' attempt to argue that the discovery rule changes the normal accrual date for an action shortening the time for suing is without merit or authority. There is no basis for their claim that the discovery rule can be invoked to reduce the time for filing beyond what the law allows. Barcus and Kram would require that a separate limitations period would commence with each individual act of a lawyer throughout the course of litigation, and require a client to act on each mistake or objection within

constantly accumulating limitation deadlines, even if the lawyer was still representing the client. Such a rule would be unworkable, and counter to the goals and policies underlying the continuous representation rule.

Kram claims that Terri should have known about his conflict of interest and sued earlier. However, Kram was under an affirmative obligation to disclose his conflicts and get Terri's written consent or withdraw. *See* RPC 1.7 and cmts 18 & 20. In **LK Operating LLC**, the Supreme Court made this absolutely clear where it stated "compliance with former RPC 1.8(a) is entirely the attorney's responsibility . . . and the rule contains no exceptions for apathetic clients." 181 Wn. 2d at 83. Here, until Kram produced a copy of his fee agreement in his efforts to refuse Block a copy of her file, the conflict was not evident. CP 1203-4, 1237-8. Prior to that, Terri was simply directed by Barcus' associate to sign Kram's fee agreement. CP 1086.

Kram cites **Cawdrey v. Hanson Baker,** 129 Wn. App. 810, 120 P.3d 605 (2005) to argue that Block's claim against him ran years ago because she should have known of the dual representation of Terri and Barcus. However, in **Cawdrey** there was no question of disclosure or even the discovery rule as the plaintiff there had known of the dual representation for years. Here, Terri was unaware, or there is at least a disputed question of fact, concerning her knowledge of Kram's conflict.

At a minimum, the questions of when Terri should have known of Sarah's claims are material questions of fact for which summary judgment is not appropriate.

### 2. Barcus and Kram Misapply the Continuous Representation Rule.

Terri discussed the application of the continuous representation rule and the resulting dates for the accrual of a cause of action in her brief at pages 33-42. The correct application of the rule demonstrates that Terri's actions were timely filed. Barcus and Kram agree that the continuous representation rule applies in this case, and that the rule tolls the statute of limitations during the time a lawyer is representing a client in the same matter out of which the claim arose. Kram Brief at 10; Barcus Brief at 31. The parties differ on how the rule should be applied, *i.e.* what is the "same matter." The question of when representation ended is a question of fact. **Hipple** at 559. Here, the differences in application of the discovery rule do not change the fact that Terri's action was filed within the statute of limitations as determined by the continuous representation rule.

Barcus does not contest the facts concerning the continuous representation rule in-so far as it applies to his representation of Terri in the UIM claim. That representation ended after the settlement of the

Providence subrogation matter in October of 2007 making Terri's filing of this action timely. (*See* Appl. Brief 34-5)

Barcus claims that the continuous representation rule should not apply because he claims that his ability to remedy any error or mitigate any damage ended the "moment the fee was paid." (Barcus brief, pg. 33-4) The contention is factually false and legally incorrect. This action is not based on an error over which a lawyer later has no control. Barcus could and still can remedy his error and mitigate harm to Sarah. As time passed and the overall amount of legal services required in the UIM claim became known, the need to remedy the situation became clearer.

Barcus cites **Cawdrey** for the hypothesis that a defendant's ability to remedy a wrong determines when the continuous representation rule runs. But Barcus confuses a policy underlying the rule with the rule itself. One reason for the rule is to allow time for a lawyer to remedy a harm. However, the *rule* is that the statute of limitations is tolled during the representation of the client in the same matter. **Cawdrey** at 819-820. The rule applies whether a the lawyer can remedy the harm or not. In **Cawdrey**, the rule was held not applicable "Because there is no relationship between the business transactions at issue here and the May 2000 will codicil…". *Id.*

Barcus also cites **Burns v. McClinton,** 135 Wn. App. 285, 299, 143 P.3d 630 (2008) suggesting that the court refused to apply the continuous representation rule when the defendant could not have fixed any errors. Barcus Brief at 33. By taking a phrase out of context, Barcus misrepresents the opinion: the court ruled the continuous representation rule did not extend the statute because the plaintiff's claim did not relate to a particular accounting matter, but arose out of a general course of an ongoing professional relationship. The ability to remedy was not the basis for the holding. **Burns** at 299.

Barcus also claims that the Providence litigation and other matters had no impact on the UIM matter. Barcus Brief at 33. How an $800,000 subrogation claim against Sarah's UIM recovery (CP 729) could have had no impact on the UIM matter is not explained. The Federal Court specifically ruled that Barcus' representation in the Providence subrogation matter was part of his contingent fee agreement, and therefore a part of the same UIM matter. CP 503.

Barcus recognizes that the continuous representation rule is meant to avoid disruption of the attorney-client relationship. Then he criticizes a statement by Terri saying she "had to wait until the drunk driver case

closed"[2] before pursuing her claim. Terri's statement expresses the same concern about disrupting the attorney client relationship as this Court did in adopting the continuous representation rule. As Terri pointed out in her brief, the UIM and Meeks claims were the same matter governed by the same fee agreement. Even if they were not, this action was timely.

Defendants' arguments in support of their motions for summary judgment only work if the continuous representation rule is ignored, and the discovery rule is changed to allow it to be used to shorten the statutory time for filing an action. Respondents present no legal basis for such a result clearly contrary to law.

**D. Statutes of Limitations Were Tolled by Sarah's Severe Disability.**

*Summary:* Barcus and Kram do not deny that all statutes of limitations governing Sarah Block's claims would be tolled by Sarah's incompetency under RCW 4.16.190(1) were it not for RCW 11.96A.070(4). The Supreme Court's rulings regarding RCW 4.16.190(1) disability tolling law are clear, broad and unwavering. App. Brief at 12-14. Although RCW 11.96A.070(4) specifically provides that "The tolling provisions of RCW 4.16.190 **apply** to this chapter [TEDRA]...," Barcus and Kram ask this Court to rule that the enactment of RCW 11.96A.070(4)

[2] Barcus omits the past part of that sentence. She actually said, "...I had to wait till the drunk driver case closed since we paid for that work to be done." CP 645.

was a "clear directive from the Legislature" to nullify RCW 4.16.190 whenever a guardian is appointed. It does not. In making this argument, Barcus and Kram ignore the language of the statute, rules of statutory construction, and the nature of Block's claims. They provide no basis in law or fact to support the contention that the limited tolling exceptions of TEDRA apply, and deliver no foundation for their summary judgment motions to show that such an exception applies to any of Terri's claims.

### 1. Defendants Omit Critical Elements of the TEDRA Tolling Exception and Ignore Rules of Statutory Construction.

In arguing for their exemption from disability tolling under RCW 11.96A.070(4), Barcus and Kram ignore, and ask this Court to ignore, basic rules of statutory construction and the language of the statute itself.

> "In interpreting a statute the act must be construed as a whole, and effect should be given to all language used and all provisions of the act must be considered in their relation to each other and if possible, harmonized to insure proper construction of each provision. Burlington Northern, Inc. v. Johnston, 89 Wn.2d 321, 572 P.2d 1085 (1977)."

**Washington v. Huntley**, 45 Wn. App. 658, 660, 726 P.2d 1254 (1986).

In interpreting statutes, provisions are to be construed to avoid absurd or strained consequences, and to not render any language superfluous. **Wright v. Engum,** 124 Wn. 2d 343, 351-2, 878 P.2d 1198 (1994). "Whenever possible, courts should avoid a statutory

construction which nullifies, voids or renders meaningless or superfluous any section or words." **Taylor v. City of Redmond,** 89 Wn.2d 315, 320, 571 P.2d 1388 (1977). Moreover, the legislature is presumed to know the rules of statutory construction:

> When amending a statute, the legislature is presumed to know how the courts have construed and applied the statute. In re Pers. Restraint of Quackenbush, 142 Wn.2d 928, 936, 16 P.3d 638 (2001). Furthermore, "[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976).

**State v. Roggenkamp**, 153 Wn.2d 614, 629, 106 P.3d 196, 203 (2005). "Further, it is the duty of this court to construe two statutes dealing with the same subject matter so that the integrity of both will be maintained." **Anderson v. Dussault**, 181 Wn.2d 360, 368, 333 P.3d 395 (2014). Barcus and Kram's application of RCW 11.96A.070(4) ignores the clear language of the statute and the rules of statutory construction in several critical respects.

Barcus and Kram claim that RCW 11.96A.070(4) was the clear directive from the Legislature that the Supreme Court required in **Young v. Key Pharmaceuticals, Inc.**, 112 Wn.2d 16, 770 P.2d 182 (1989) to reverse its decision that the appointment of a guardian does not prevent the application of the tolling provisions of RCW 4.16.190(1). Had the Legislature intended that result, it could have said that the tolling provisions of RCW 4.16.190 would not apply to an individual with an

appointed guardian. It did not do so. It specifically provided that the tolling provisions of RCW 4.16.190(1) would apply to TEDRA – with three limited exceptions. Defendants' construction of the statute makes the references to the three specific exceptions and their criteria meaningless and superfluous. It ignores the rule that statutes should be considered in relation to each other and harmonized if possible.

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

Barcus and Kram fail to show that TEDRA or Title 11 apply to Terri's action. Instead, they argue that, because the plaintiff's complaint cited RCW 11.96A.020, 040 and 050 as alternative basis for jurisdiction and venue, TEDRA should apply. But the defendants denied the TEDRA allegations in their answers. CP 27 §2.1, 41 §2.1. Terri cited evidence that her claims are not subject to TEDRA, indicating questions of fact precluding summary judgment.[3] CP 1364. Barcus' claim that "Block specifically acknowledged in her complaint that TEDRA governs her claims" is simply wrong.

Defendants' reliance on the jurisdiction and venue allegations in Terri's complaint also suffers from their basic misunderstanding and misapplication of TEDRA. They cite the broad purpose of the chapter (RCW 11.96A.010) and the general powers of the court (RCW 11.96A.020) regarding estate and trust disputes to somehow claim that

[3] Defendants raised the TEDRA defense for the first time in their summary judgment replies.

Terri's actions fall within RCW Chapter 11.96A. Those sections do not define causes of action, nor do they have anything to do with the tolling provisions defendants seek to invoke. Defendants ignore the statute defining both the subjects of TEDRA and the exceptions to the tolling rule - RCW 11.96A.030(2).

Barcus and Kram never explain how or which of Terri's claims involve the administration of an estate or trust. As pointed out in Terri's brief, her claims are not related to Title 11, much less Chapter 11.96A. None of Barcus' attorney's fees were ever in Sarah's special needs trust. None of his attorney's fees were paid or accounted for by a trustee or a guardian in any actions involved in the administration of a trust or estate. The claims against Barcus and Kram do not involve the administration of an estate or trust, and none of the provisions of Title 11 or TEDRA serve as a basis for Terri's claims. Terri brings no actions against any guardian, trustee or other party relating to the administration of an estate or trust. Complaint, CP 1-17.

Barcus and Kram's only reference to any matter subject to TEDRA quotes a small portion of 11.96A.030(2)(c) concerning the determination of questions arising in the administration of an estate or trust, ignoring the balance of the statute.[4] Barcus brief at 37, Kram brief

[4] The section relied on by defendants, with the portion they quote underlined, reads: "The determination of any question arising in the administration of an estate or trust, or

at 18. After quoting the language, neither defendant explains how Terri's claims involve questions arising in the administration of an estate or trust. If, as defendants argue, the third tolling exception applies to any matter involving estates and trusts, the detailed criteria of exceptions 1 and 2 of RCW 11.96A.070(4) would be meaningless, unnecessary and superfluous.

Defendants cite two cases to support their TEDRA argument which illustrate the deficiencies in their position. Both cite **In re Estate of Bernard**, 182 Wn. App. 692, 332 P.3d 480 (2014) and **In re Estate of Kordon**, 157 Wn.2d 206, 37 P.3d 16 (2006), quoting general language out of context concerning TEDRA's purpose. Barcus brief at 37-8; Kram Brief at 23. Defendants do not mention these cases contain specific references to TEDRA statutory provisions: **Kordon** was a will contest and **Bernard** involved the enforcement of a TEDRA agreement.

Most telling, though, Barcus did not treat the payment of his fees as being governed by TEDRA or Title 11, and Barcus and Kram did not follow any of the procedures or notices required by TEDRA. For

---

with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee;" RCW 11.96A.030(2).

example, RCW 11.92.035 provides that it is the *guardian's* duty to pay an incompetent's liabilities, and 11.92.050 provides for a hearing and the appointment of a *guardian ad litem* for a guardian's interim accounting and reports. Here Barcus, not Terri as guardian, paid Barcus' fees, and no hearing or accounting was involved under the guardianship statute regarding the fees. RCW 11.96A.070(1) sets out the procedures for the approval of a trustee's expenditure of funds. In this case, no trustee was involved in the payment of any of Barcus' fees. Barcus and Kram do not identify any other provisions of Title 11 they claim to have observed. They did not invoke TEDRA in the payment of Barcus' fees. They cannot now claim the protection of law they disregarded.

Barcus claims he need not show that the exceptions to tolling under RCW 11.96A.070(4) apply to Terri's claims because a party asserting tolling carries the burden of proof. In response to defendants' summary judgment motions, Terri submitted uncontested evidence of Sarah's qualification for disability tolling under RCW 4.16.190. Defendants should now have to show how they claim to be exempt from tolling under the TEDRA defense they raise.

In any event, the argument is irrelevant. Whatever the ultimate burden of proof, parties seeking summary judgment have the initial burden

of showing there is no dispute on any material fact. **Hiatt v. Walker Chevrolet**, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). Barcus and Kram have not done so regarding the application of RCW 11.96A.070(4).

### 3. Defendants Do Not Explain How TEDRA Tolling Exceptions May Apply.

In spite of the clear language of RCW 11.96.070(4), defendants argue that all they need to do is to show that TEDRA generally applies to eliminate the disability tolling rule without having to demonstrate that the case falls within the statute's narrowly defined exceptions. Terri has from the beginning pointed out there needs to be a showing that this action falls within the exceptions of 11.96.070(4) as defined by 11.96.030(2). TR 36-39, CP 1361-4. Nevertheless, Barcus and Kram have been unable or unwilling to identify how Terri's claims are subject to the statute. Kram claims that TEDRA carved out an exception to tolling where an incapacitated person was represented by a guardian. Kram Brief at 22. It does not. As discussed below, that misreading of the statute underlies defendants' entire defense to disability tolling.

Terri pointed out in her opening brief that exceptions 1 and 2 referenced in the TEDRA tolling statute do not apply. Appl. Brief at 19. Defendants have not contested that point. Barcus and Kram avoid any discussion of the statute's requirements for the third exception. But that tolling exception does not apply to Block's claims for the following reasons.

### a. *This action is not a "matter that is subject to dispute under this chapter" (TEDRA)*

The third tolling exception refers to "any matter that is the subject of dispute under this chapter." Disputes under the chapter are listed in RCW 11.96A.030(2). Defendants ignore the requirement. What dispute "under this chapter" is Terri bringing? In fact - none. Defendants do not contend otherwise.

Since defendants have identified no provision in Title 11 or TEDRA that they contend Block's claims constitute a "matter or dispute under this chapter," it is not possible to determine if Barcus and Kram complied with its procedural requirements and if Sarah's interests were protected under that law. Compare this case with **Anderson v. Dussault**, 181 Wn.2d 360, 333 P.3d 395 (2014). There the Supreme Court determined that the interests of a minor were not protected when trust accountings were approved because the requirements for a review of trust accounts were not followed and the minor did not have an effective representative. (The mother had a conflict of interest.) The court looked at the requirements for notice under the Trustee's Accounting Act and the statute of limitations contained in 11.96A.070(1) in making its decision. No such analysis is possible with regard to Barcus and Kram's vague and unsupported claims that somehow TEDRA applies. No "matter that is the subject of dispute under this chapter" has been identified which they contend relates to Terri's claims against them. Therefore, there is no way

to determine if the defendants complied with TEDRA in any trust administration matter, or what statute of limitations might apply.

Barcus and Kram attempt to avoid the issue by claiming that anything possibly related to Title 11 or trusts and estates is subject to the restrictions of the tolling exception. The law says the opposite. RCW 11.96A.070(4) specifically applies RCW 4.16.190 tolling to TEDRA.

**b. *Defendants identify no applicable TEDRA statute of limitations for Block's claims.***

The third exception to tolling only applies to "applicable statute of limitations for any matter that is the subject of dispute under this chapter." What applicable statute of limitations for a dispute under the chapter do defendants claim applies? TEDRA often contains its own deadlines. (*See* sections 1, 2 and 3 of RCW 11.96A.070 – the statutes of limitations section). Barcus and Kram identify no applicable statute of limitations applying to the TEDRA chapter, unlike the limitation period under consideration in **Anderson v. Dussault**.

**c. *Terri did not represent Sarah during any "probate or dispute resolution proceeding" under TEDRA involving claims against Barcus and Kram.***

RCW 11.96A.070(4) only applies if an individual had a guardian "to represent the person during the probate or dispute resolution proceeding." What probate or dispute resolution proceeding do defendants contend the statute applies to? They identify none. The language refers to representation *in a proceeding* held under chapter 11.96A. It does not create a statute of limitations requiring a guardian to *initiate* an action or

proceeding. Terri is not bringing a probate or dispute resolution proceeding under TEDRA to which this section could apply. Again, Barcus and Kram's application of the statute ignores the limitation and would render this language meaningless.

**d. *Sarah did not have guardian who could represent her during a "probate or dispute resolution proceeding" involving claims against Barcus and Kram.***

The TEDRA tolling exception only applies if there was a guardian "to represent the person during the probate or dispute resolution proceeding." Defendants contend there only needs to be a guardian, ignoring the requirement that the guardian be able to "represent the person" during the proceeding.

While Barcus and Kram ignore the requirement of a "probate or dispute resolution proceeding" when claiming an exception from tolling, Kram takes the opposite position in trying to explain why the tolling exceptions in RCW 11.96A.070(4) differ from those declared unconstitutional in **Schroeder v. Weighall**, 179 Wn2d 566, 316 P.3d 482 (2014). Regarding the tolling exception in TEDRA when he argues for its constitutionality, Kram says,

> Therefore, it does not affect children generally, and it does not burden a child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf. Rather, it negates the tolling provision only to those individuals, children or otherwise incapacitated individuals, who are represented during a probate or dispute resolution proceeding by a representative who has the knowledge and incentive, in fact a duty, to pursue claims on the individual's behalf. To apply, the individual must already be represented in the probate or dispute resolution proceeding,

> this necessarily requires that the individual is already a party to the proceeding and his or her claims are being represented in that proceeding. [Underline added] Kram Brief at 26-27.

Applying Kram's standard, the tolling exception under RCW 11.96.070(4) would not apply to Terri's representation of Sarah, or at least it would present a question of fact.

Kram does not mention that the "proceeding" referred to must be one arising under the TEDRA chapter as defined by RCW 11.96A.030(2). Neither Kram nor Barcus identify any such proceeding or show that Terri represented Sarah in any such proceeding. If there was such a proceeding, where was Peter Kram, attorney for the guardian or guardianship? How can he shift his professional responsibilities to Terri and claim immunity because his client did not file suit fast enough when he should have acted?

Having a guardian is not enough. The guardian must also have the authority to act. Terri is guardian for her daughter, but for years she was prohibited by court orders from representing her daughter regarding any issue concerning Barcus' fees. Due to the efforts of Barcus and Kram, she was prevented from taking any action or even investigating the matter as Sarah's guardian. Defendants prevented Terri from bringing an action, or allowing "this train to leave the station" as the defendants put it. CP 1236.

Terri was prohibited from taking any action as Guardian regarding Barcus and Kram's fees by court order on January 16, 2009. CP 656-8.

She was not only prohibited from suing, but Barcus and Kram went so far as to claim that Terri and her lawyers violated the court's order when Terri asked for her case files and tried to obtain Farmers Insurance Company files regarding Sarah's UIM claim (with the written consent of Farmers' insureds). CP 1164, 1221, 1229, 1245. At defendants urging, the guardianship court later denied Terri and her lawyers the right to ask for or subpoena files from Farmers Insurance Co., the guardian *ad litem* and trustee by the guardianship court's order of February 10, 2012. CP 1277-79, 1247. Terri Block and her lawyers were denied information necessary to investigate and bring a claim against Barcus and Kram.

The prohibitions against Terri conducting discovery or taking any action as guardian against Barcus and Kram were not removed until January 24, 2013. CP 19-20. For four years and 9 days, Terri was prohibited from acting as guardian for Sarah regarding Barcus and Kram's fees. Having obtained restrictions on Terri's authority, defendants should not now be allowed to claim that Sarah's interests regarding defendants' fees were represented by Terri as guardian in a "probate or dispute or resolution proceeding" against them to justify setting aside the tolling provisions.

Barcus and Kram accuse Terri of waiting, delaying or choosing not to sue. (Barcus uses the terms wait and delay 20 times in his brief to

describe Terri's actions.) They do not acknowledge that due to their own efforts, Terri was prohibited by court order from suing them, or even getting information to learn whether she had a legal basis for doing so from January 2009. When the commencement of an action is stayed by injunction, the time of the injunction or prohibition shall not be part of the time limited for the commencement of the action. RCW 4.16.230. Barcus and Kram accuse Terri Block of waiting to act, ignoring the fact that they had prevented her from doing so for over 4 years.

In considering any allegations of delay by Terri, this Court might ask "Where was her lawyer, Peter Kram?" Whenever Barcus and Kram claim that Terri knew or should have known enough to act, so did Kram. He was the attorney for guardian Terri and Sarah's guardianship. Yet he took no action to protect Sarah's interests or advise Terri to take any action against Barcus. Instead he rejected Terri's concerns about the size of Barcus' fee. CP 784. [5] Defendants argue that Terri should have known she had a claim in 2006, in spite of the fact that her own attorney (Kram) told her she did not.

[5] In a declaration later filed with the court, Kram attacks Terri for questioning Barcus' fees claiming that she is engaging in a "racketeering extortion plot" to "gouge" money out of lawyers who have done nothing but help her. CP 1212.

RCW 11.96A.070(4) is not a clear directive to negate RCW 4.16.190 and overrule the decisions of the Supreme Court as defendants contend. The statute doesn't even apply here.

### E. Defendants' Claimed Exception to the Tolling Statute is Unconstitutional.

The TEDRA tolling exceptions fall within the analysis of the Supreme Court in **Schroeder v. Weighall**, 179 Wn2d 566, 316 P.3d 482 (2014) and are similarly unconstitutional. See App. brief at 22-4. Barcus and Kram, in an attempt to distinguish **Schroeder** from this case, claim that the Supreme Court there was protecting a "vulnerable minority" – minors, but that individuals permanently mentally and physically disabled are not similarly "vulnerable." They also claim the tolling of medical claims benefit "a privileged group of citizens, *i.e.* medical professionals," implying that lawyers are not thought to be similarly privileged. Kram Brief at 25-6.

Quoting **Schroeder**, Kram claims that the minority exception from tolling placed "a disproportionate burden on the child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf." [Underline added] *Id.* at 25. Why would a parent or guardian – such as Terri Block – have a greater degree of knowledge or incentive to

pursue a claim against a doctor than a lawyer? Kram tries to explain the difference by saying that the tolling provisions are negated only to those

> ...who are represented during a probate or dispute resolution proceeding by a representative who has the knowledge and incentive, in fact a duty, to pursue claims on the individual's behalf. To apply, the individual must already be represented in the probate or dispute resolution proceeding, this necessarily requires that the individual is already a party to the proceeding and his or her claims are being represented in that proceeding. [Underline added] Kram Brief at 26.

To what probate or dispute resolution proceeding is Kram referring? Why would Terri have had more knowledge or incentive if she was suing a doctor than her lawyers? How is Sarah not vulnerable if the guardian is represented by the lawyers she is suing?

**Schroeder** applies here. The attempts of Barcus and Kram to distinguish that case from this situation require adopting absurd assumptions and unjustified conclusions.

**F. RCW 4.24.005 Does Not Bar Block Claims**

Barcus claims that RCW 4.24.005 establishes a statute of limitations for challenging the reasonableness of fees in tort actions. Barcus further claims that "Based on the undisputed facts, the deadline to challenge the UIM fee under this statute passed in May 2006." Barcus brief at 21. However, nowhere does Barcus identify what he contends those "undisputed facts" facts might be. He cites to nothing in the record

to support his allegations that RCW 4.24.005 applies or when the 45-day period would run.

The facts surrounding the payment of Sarah's funds to Barcus are disputed. Barcus claims that the fees were approved by the Pierce County Court in April 2006, and that the fees were paid in April 2006, triggering the 45 day period. Barcus Brief at 1. Yet in opposition to his motion for summary judgment, Block pointed out that Barcus paid himself and the other attorneys involved on the 31st of March, 2006 without prior notice to Block – in violation of RPC 1.15A (h)(3). CP 1013, 1301-07.

One factor to be considered by the Court in applying the statute is "...whether the client was aware of his or her right to petition the court under this section." RCW 4.24.005(9). Barcus provides no citation to the record of the settlement funds disbursal statement upon which he presumably relies in invoking RCW 4.24.005. It is undated and provides no notice to Block of her rights to petition to review the reasonableness of the fees. CP 424. The fee agreement Barcus seeks to enforce merely mentions a right to petition a court to determine the reasonableness of the contingent fee, but says nothing about any time limit. Nor does that fee agreement provide any statutory reference which would have enabled Block to learn about any limitations on her right to a review of fees. CP 23. The fee agreement drafted by Barcus, which must be construed against

him, accords Terri a right "to petition the court to determine the reasonableness of the contingent fee." No lay person reading that language would know of any time limitations or that the right to review fees was a right granted by statute. Barcus should not be allowed to change the terms of the contract, and should be estopped from imposing deadlines he did not disclose to his client. Further, Barcus presents no argument or evidence that RCW 4.24.005 would apply to the fees he took from the Meeks settlement.

RCW 4.24.005 is found in the RCW chapter concerning Special Rights of Action and Special Immunities, not within RCW chapter 4.16 where all statutes of limitation are codified. RCW 4.16.005 regarding statutes of limitations provides that "...actions can only be commenced with the periods provided in this chapter...", while RCW 4.24.005 provides that a party charged with the payment of attorney's fees in a tort action "may petition" the court not later than 45 days for a determination of the reasonableness of fees. RCW Chapter 4.16 creates a limitation on the right to sue; RCW 4.24.005 creates a "special right of action."

Does Barcus seriously contend that the legislature intended to shorten all statutes of limitations for suing plaintiffs' tort lawyers to 45 days, giving such lawyers special protection from suit regarding their fees – while allowing those lawyers six years to sue clients to enforce their

written fee agreements? If so, such a limitation would violate the **Schroder** standards by granting special protections to tort lawyers while jeopardizing a vulnerable minority – injured plaintiffs.

Furthermore, RCW 4.24.005 does not immunize Barcus from all potential claims against him, but only to a petition for fee reasonableness. A central element of Block's claims against Barcus and Kram is failing to comply with SPR 98.16W, the rule requiring court approval of settlements and fees in cases involving incompetent and disabled persons, a subject not covered by RCW 4.24.005. Nor would the statute apply to plaintiff's claims for rescission of the fee agreement for ethical violations. Barcus and Kram do not argue these causes of action, SPR 98.16W, or the ethical violations supporting rescission fall under this tort statute. There is absolutely no basis on which it could be claimed that a failure of a plaintiff to request a fee review under 4.24.005 can excuse non-compliance with the standards and procedures of SPR 98.16W and Pierce County's parallel rule.

Sarah was denied the protections offered by the rule and enforced in **In the Matter of the Settlement/Guardianship of A.G.M. et al.** 154 Wn. App. 58; 223 P.3d 1276 (2010). In reviewing the reasonableness of the fees charged by a minor's lawyer under Rule 98.16W, the lawyer there argued that his fees should be evaluated under the standards of RCW

4.24.005. In its opinion, the Court of Appeals pointed out that the criteria of 4.24.005 and RPC 1.5(a) were virtually identical. The court in **A.G.M.** had to evaluate the reasonableness of the fees charged to a minor irrespective of RCW 4.24.005. SPR 98.16W requirements are not dependent on and do not involve a RCW 4.24.005 hearing. The misconduct of Barcus and Kram deprived Terri of her statutory right to a meaningful review of the reasonableness of the fees under SPR 98.16W.

A dismissal of the RCW 4.24.005 remedy on summary judgment is also improper since serious questions of fact were raised regarding the application of the 45-day limitation to Ms. Block. CP 1019. Barcus did not comply with RCW 4.24.005, so he cannot claim its protection.

Lastly, Barcus ignores the primary legal basis for the unquestioned right of *any client* to have the fees of his or her lawyer reviewed for reasonableness. RPC 1.5(a), states, "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[6]

Terri has a right under RPC 1.5(a) to challenge the reasonableness of her lawyers' fees. That right has been recognized in the case of

---

[6] Comment 10 to this rule provides, "*Every fee agreed to, charged, or collected,* including a fee denominated as "nonrefundable" or "earned upon receipt," is subject to Rule 1.5(a) and may not be unreasonable." (Emphasis added). Comment 3 makes clear that the rule of fee reasonableness applies equally to contingency fees.

attorney's liens asserted by terminated lawyers, *see e.g.* ***Taylor v. Shigaki***, 84 Wn. App. 723, 930 P.2d 340 (1997), where lawyers modified fee arrangements to the clients' detriment after fiduciary duties have attached, **Ward v. Richards and Rossano,** 51 Wn. App. 423, 754 P.2d 120 (1988), and when a client who is sued for an unpaid balance has challenged reasonableness, *see e.g.* **Simburg Ketter v. Olshan,** 109 Wn. App. 436, 988 P.2d 467 (1999). Similarly, parties being held responsible for the attorney's fees of an opposing party who prevailed in claims subject to a fee shifting statute or provision in a contract have the same right under RPC 1.5(a) to challenge the reasonableness of fees sought to be imposed. *See e.g.* **Berryman v. Metcalf,** 177 Wn. App. 644, 312 P.3d 745 (2013). A minor or client under a disability subject to SPR 98.16W has an absolute right to challenge the reasonableness of his or her attorney's fees – the reasonableness determination is conducted under RPC 1.5(a). **In re A.G.M,** *supra*, 154 Wn. App at 75-76.

Barcus cannot seriously contend that with the imperative language of RPC 1.5(a), "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee," a client who is the victim of an unreasonable fee has no remedy under RPC 1.5. The charging or collection of an unreasonable fee is an ethical wrong. As the Supreme Court recently stated in **LK Operating, LLC**, where a lawyer violated RPC 1.8(a), the

contract he drafted which provided for compensation was subject to rescission. Where RPC 1.8(a) was a proper basis for the remedy of rescission, certainly RPC 1.5(a) can hardly be denied as the basis for Terri's challenge to the reasonableness of Barcus and Kram's fees. RCW 4.24.005 does not purport to be an exclusive remedy or negate the other rights of clients.

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

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

Block's claims against Barcus and Kram[7] are subject to the six year statute of limitations for actions arising out of a written agreement, RCW 4.16.040(1). Terri's causes of action seek rescission of the written fee agreement and the recovery of attorney's fees taken by Barcus under the authority of that agreement. She is not seeking damages against Barcus. See App. Brief at 24-31.

Barcus relies almost entirely on **Davis v. Davis Wright Tremaine,** 103 Wn. App. 638, 14 P.3d 146 (2000) to attempt to characterize Terri's claims as a tort. But **Davis** was never anything but a legal malpractice case. Dr. Davis claimed that the law firm failed to perform due diligence

[7] Block makes an additional negligence claim against Kram, Plaintiff Fourth Claim for Relief. CP 14-15.

in investigating the medical practice he was considering purchasing. *Id.* at 652. The decision opens by stating, "Does the six-year statute of limitations for written contracts apply to this legal malpractice action because of language in the letter of engagement between Dr. Andrew Davis and Davis Wright Tremaine L.L.P. (DWT)?" Plaintiff Davis admitted his claim was one of legal malpractice "retained new counsel to sue Parsons and DWT for legal malpractice," and his new counsel admitted in a letter that the three year tort statute of limitations applied. *Id* at 645. Nonetheless, Dr. Davis tried to use "best efforts," "high quality legal counsel" and other general language from the retainer agreement to transform his malpractice action into a contract claim. Division I concluded at p. 655:

> To summarize, we conclude that the pending claims, DWT's failure to perform due diligence to check title and to check for claims against Dr. Boyd, are not based on express or implied provisions of the engagement letter. Rather, they are based on implied duties of counsel to client that do not arise from the contract.

Terri's claims seek rescission of the written Barcus fee agreement, a determination of the reasonableness of the fees taken by virtue of the agreements, and issues relating to Barcus' right to pay himself fees under the agreement while sidestepping the court's approval process. A lawyer's ethical duty not to charge or collect an unreasonable fee inheres in every

fee agreement, oral or written. **Davis** does not govern this case. It did not involve a dispute over attorney's fees.

Barcus claims **Meryhew v. Gillingham**, 77 Wn. App. 752, 755, 893 P.2d 692 (1995) stands for the proposition that RCW 4.16.080 applies to breach of fiduciary claims. It does not. The court specifically said that the three year statute would apply Meryhew's attorney malpractice claim for damages. **Meryhew** at 755-6.

**2. Terri's Lawsuit Was Timely Filed.**

This action was timely filed within the six-year statute, without any need to claim an extension of time by tolling or the discovery rule. The parties agree that the continuous representation rule applies to this action. Barcus' fee agreement provides that he is representing Sarah Block "in the above described matter" which simply is designated as "personal injury," "Date of Accident: 9/12/05." CP 22. Barcus claims that the UIM and Meeks matters are different for the purpose of his representation of Sarah. If so, why did he not prepare separate representation agreements? If so, how can he claim a contingent fee on the Meeks matter without a written signed fee agreement as required by RPC 1.5(c)? Barcus' fee agreement only provides for one matter recovering damages for Sarah's personal injuries arising out of her tragic accident in September of 2005.

Regardless of how the continuous representation rule is applied, whether Barcus represented Sarah in one matter or several, and with no consideration of tolling, Block's action was filed within the statute of limitations as demonstrated by the table of relevant dates attached as Appendix A.

Given that Kram acted as attorney for Terri Block and the guardianship, it was his obligation to see that Barcus complied with the law and that his fees were appropriately reviewed and approved. If it is ultimately determined that Sarah's rights were lost because of his conflict of interest and inaction, he will be liable for those damages. The statute of limitations on such a claim has not yet began to run.

**H. Material Questions of Fact Exist on Equitable Tolling and Equitable Estoppel.**

Defendants improperly delimit the legal requirements for equitable tolling and estoppel, and the burden of proof to be applied. Barcus claims that Block's claim for equitable tolling fails because "she cannot show that any action of the Barcus firm *fraudulently misled her* to delay filing suit until the statute of limitations on her claim had run." Barcus Brief at 45. The court's equitable powers are far broader. As pointed out in appellant's brief at pp. 42 -46, besides fraud, "oppression or other equitable circumstances," "bad faith, deception, or false assurances, or other

inequitable conduct"[8] or "when justice requires" are all standards to be considered by courts in deciding the equities of tolling based on the conduct of another party. App. Brief at 42-43.

In an appeal from a summary judgment, the court must view the allegations in a light most favorable to the plaintiff. Whether a plaintiff can prove fraud or intentional concealment for the purpose of tolling is a question of fact for the trier of fact to resolve. **Duke v. Boyd**, 133 Wn.2d 80, 83, 942 P.2d 351 (1997). To support Terri's claims for equitable tolling, a variety of unethical, obstructive and even threatening conduct by her lawyers designed to prevent any inquiry or action by Block regarding their fees has been documented. Barcus and Kram went to extraordinary efforts to prevent Terri from taking any action against them, including withholding her own files from Terri, leveling accusations of criminal conduct against Terri's attorneys for seeking court review of defendants' fees, threatening the financial well-being of Terri and Sarah, threatening to have Terri removed as guardian, and obtaining court orders prohibiting her from asking third parties for information about the claim or taking any action against them without a court order. Defendants directly caused over four years of delays in Terri's ability to bring an action.

---

[8] *See* **Murphy v. Huntington,** 91 Wn. 2d 265, 588 P.2d 742 (1978), where the court stated, "we have held equitable estoppel can be used to prevent the fraudulent or inequitable resort to the statute of limitations."

Defendants claim that Block should not be allowed to seek equitable tolling because she has not offered "clear, cogent and convincing evidence that would satisfy her burden of proof..." Kram brief at 31. That would be Terri's burden at trial but is not the standard to be applied by this Court. It is defendants' burden to show there are no issues of material fact. Terri submitted testimony based on personal knowledge and documents that at the very least raise genuine issues of fact supporting the inequitable conduct of Barcus and Kram preventing Terri from bringing suit.

## CONCLUSION

The summary judgments entered by the trial court based on the statute of limitations should be reversed because this action was timely filed, statutes limitations were tolled by statute and equity, and material issues of fact remain.

Respectfully submitted this 5th day of December, 2014.


MICHAEL R. CARYL, P.S.

Michael R. Caryl, WSBA # 7321
200 First Avenue West, Suite 402
Seattle, WA 98119
Ph: 206.378.4125
michaelc@michaelcaryl.com

LAW OFFICE G. LEE RAAEN

G. Lee Raaen, WSBA# 6258
2110 N. Pacific St., Suite 100
Seattle, WA 98103
Ph: 206.682.9580
Lee@LRaaen.com

## APPENDIX A
## BLOCK TIMELINE TO DATE OF FILING

| Event | Date | Time to Filing of Action |
|---|---|---|
| Meeks claim completed: Barcus paid himself Meeks Fees. CP 1201 | 8/17/2007 | 5 yrs, 8 mo., 16 days |
| Farmers UIM claim completed: Providence settlement approved, CP 129, §40 | 9/16/2008 | 4 yrs, 7 mo, 17 days |
| Barcus terminates representation, CP 548-9 | 7/22/2008 | 4 yrs, 9mo, 11 days |
| Kram withdrawal and Peterson substitution, CP 777 | 12/9/2008 | 4 yrs, 4 mo., 24 days |
| Order prohibiting Block from investigating or challenging fees as guardian, CP 656-8 | 1/16/2009 | 4yrs., 3 mo., 17 days |
| Block obtains personal funds and retains Caryl for review of fees, CP 907, 914, 940 | 8/18/2011 | 1yr, 8 mo, 15 days |
| MC letter to Barcus and Kram requesting Block's files, CP 1140, 1143 | 9/30/2011 | 1yr, 7mo, 3 days |
| Kram attacks Block in violation of fiduciary duties to deny Block authority to investigate or sue, CP 1213 | 2/7/2012 | 1yr, 2 mo., 26 days |
| Order denying discovery and prohibiting Guardian's action against Barcus & Kram without court approval, CP 1277-9 | 2/10/2012 | 1 yrs, 2 mo., 23 days |
| Kram files received, CP 1121 | 3/22/2012 | 1 yr., 1 mo., 11 days |
| Barcus files received, CP 1121 | 4/11/2012 | 1 yr., 22 days |
| Caryl Report to court seeking authority to sue, CP 1181-91 | 1/16/2013 | 3 mo., 17 days |
| Order allowing Block to sue, CP 19-20 | 1/25/2013 | 3 mo., 8 days |
| Suit Filed, CP 1 | 5/3/2013 | |

The above time periods are conservative in that the final completion of the UIM and Meeks matters were likely later than the dates of the cited orders. No time has been deducted for disability tolling, equitable tolling, or the time periods Terri Block was prohibited by court order from acting against Barcus and Kram.

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day I caused to be served via email transmission and US Mail the attached Consolidated Reply Brief of Appellant on the following counsel of record:

Keith D. Petrak, Esq.
Byrnes Keller Cromwell LLP
1000 Second Avenue, Suite 3800
Seattle, WA 98104

Troy A. Biddle
Gordon & Rees LLP
701 Fifth Avenue, Suite 2100
Seattle, WA 98104

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 5th day of December, 2014.

G. Lee Raaen