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NO. 55648-7-I

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2005 NOV 29 11:26

SUSAN E. RIVAS,

Respondent,

vs.

OVERLAKE HOSPITAL MEDICAL CENTER; OVERLAKE INTERNAL
MEDICINE ASSOCIATES,

Defendants,

and

EASTSIDE RADIOLOGY ASSOCIATES; OVERLAKE IMAGING;
WASHINGTON IMAGING SERVICES,

Appellants,

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,

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Steven Scott, Judge

BRIEF OF APPELLANTS

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I. NATURE OF THE CASE

Two years before the applicable limitation period ran, plaintiff retained a lawyer to investigate her medical malpractice claim. Her suit was still commenced late. Defendant health care providers moved for summary judgment on the statute of limitations. Plaintiff argued RCW 4.16.190 had tolled the limitations period three days while she was in the ICU immediately after the medical procedure.

But RCW 4.16.190 does not toll the limitations period unless a plaintiff's disability or incompetency is "determined according to chapter 11.88 RCW", the statute for appointment of guardians. Plaintiff did not meet the RCW ch. 11.88 requirements for disability or incompetence. Nonetheless, the trial court refused to dismiss the case. This court accepted discretionary review of the order denying summary judgment. RAP 2.3, 6.2.

II. ASSIGNMENT OF ERROR

The trial court erred in entering the January 7, 2005, Order Denying Defendants Muraki's [*sic*] Motion for Summary Judgment.

III. ISSUE PRESENTED

Is the three-year medical malpractice statute of limitations provided for in RCW 4.16.350 tolled pursuant to RCW 4.16.190 for three

days while plaintiff was in intensive care after the medical procedure during which she claims malpractice was committed?

IV. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Plaintiff/respondent Susan Rivas had severe renal vascular disease. On July 19, 1996, defendant/petitioner Alan Muraki performed a renal angiogram and angioplasty on her to see if the blood flow to the right kidney could be increased.¹ (CP 49, 654) Two days later, on July 21, plaintiff's right kidney had to be removed because of complications that developed during the July 19 procedure. (CP 58) The trial court subsequently ruled, "The loss of the kidney [became] inevitable as of July 20, 1996."² (CP 748)

Plaintiff was in intensive care immediately thereafter, from July 19 until July 23, 1996, a total of 4 days. She was discharged from the hospital on July 26, 1996. (CP 58, 109-10)

Plaintiff began investigating what had occurred. On October 14, 1996, three months after the angioplasty, she authorized release of her

¹ Defendants/appellants are referred to collectively as "Dr. Muraki" or "defendants" or "appellants."

² Defendants believe that 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.

medical records. By July 1997 she had retained an attorney and authorized Overlake Radiology to release her medical records to him. Her attorney sent a medical authorization to Overlake Hospital that month with a cover letter saying, "We are requesting these documents by July 16, and would appreciate whatever you can do to expedite." (CP 60-61, 78)

B. STATEMENT OF PROCEDURE.

Even though she had retained an attorney more than two years earlier, plaintiff did not file suit against defendants until July 21, 1999, three years and two days after the angioplasty she claims was performed negligently.³ (CP 5-11, 60) Plaintiff claims:

[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, which delay proximately caused the loss of Susan's right kidney.

(CP 522-23) RCW 4.16.350 requires medical malpractice cases to be commenced "within three years of the act or omission alleged to have caused the injury or condition."⁴

³ All defendants except appellants herein have been dismissed. (CP 87-88, 723-27)

⁴ The statute also provides that medical malpractice suits may be filed within one year after discovery of the injury or condition caused by the alleged malpractice if that time is later. RCW 4.16.350. This section of the statute is not at issue in this matter.

On September 20, 2000, defendants/appellants moved for summary judgment on the ground plaintiff's suit was barred by the statute of limitations. (CP 48-56) The trial court did not grant or deny, but gave the parties more time to pursue discovery. (CP 211-14) Due to the rehabilitation of the petitioners' insurer, the case was stayed for a period of time. (CP 728-30, 731-33) Petitioners renewed their motion in April 2002. (CP 215-375)

Plaintiff claimed the limitations period was tolled "during the period from July 19, 1996 through July 22, 1996"—*i.e.*, for three of the four days she was in the intensive care unit. (CP 524)

The trial court denied defendants' motion on the ground there were factual issues whether plaintiff was incapacitated as determined according to RCW ch. 11.88. (CP 749) Commissioner Verellen denied defendants' motion for discretionary review. This court granted defendants' motion to modify.

V. ARGUMENT

The issue in this case is whether RCW 4.16.190 tolled RCW 4.16.350's three-year limitations period for bringing medical malpractice claims⁵ during three of the four days plaintiff was in the intensive care unit. Because this appeal hinges on the construction of statutes, this court reviews *de novo*. *Restaurant Development, Inc. v. Cananwill, Inc.*, 114 Wn. App. 194, 198 n.1, 55 P.3d 680 (2002), *aff'd*, 150 Wn.2d 674, 80 P.3d 598 (2003).

A determination of this issue requires an understanding of the history behind the relevant statutes.

A. THE LAW GOVERNING THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS HAS CHANGED.

Plaintiff commenced this action by filing her complaint on July 21, 1999, three years after her kidney was removed by another doctor who is not a party to this suit. (CP 5-11, 58) Her complaint alleged:

Within three years of the date of the commencement of this action, plaintiff suffered injuries and damages as hereinafter alleged, due to the negligence of defendants.

(CP 9) (emphasis added).

⁵ Washington's 3-year limitations period for medical malpractice claims is longer than the limitations period for such claims in several of the neighboring states. *See, e.g.* HAWAII REV. STAT. § 657-7.3 (2 years); IDAHO CODE § 5-219.4 (2 years); ORS 12.110(4) (2 years).

Under prior law, plaintiff's complaint might arguably have been timely, because traditionally, the limitations period on a medical malpractice claim did not begin to run until the cause of action accrued, *i.e.*, when injury was sustained.⁶ See *Gunnier v. Yakima Heart Center, Inc.*, 134 Wn.2d 854, 860, 953 P.2d 1162 (1998). However, in 1976, the Legislature amended RCW 4.16.350 to provide that the three-year medical malpractice limitations period begin to run from "the *act or omission* alleged to have caused the injury or condition." RCW 4.16.350(3) (emphasis added); *Gunnier*, 134 Wn.2d at 861.

The Washington Supreme Court has ruled that amended RCW 4.16.350(3) means exactly what it says: the limitation period begins to run "from the date of the act or omission alleged to have caused injury", *not* from when the injury occurs. *Gunnier*, 134 Wn.2d at 864. Thus, when injury occurs is irrelevant. Indeed, the limitations period may lapse before injury occurs. *Id.*

Here, plaintiff claims that Dr. Muraki failed to obtain her informed consent to the angioplasty, negligently performed the angioplasty, and

⁶ 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 was the limitations period before the 1976 amendment to RCW 4.16.350.

failed to respond properly and promptly after complications developed. She claims that his negligence resulted in her losing her kidney.

Dr. Muraki performed the angioplasty on July 19, 1996. (CP 654) Any informed consent should have been obtained no later than July 19. Therefore, all of the alleged acts or omissions, if any, must have occurred on or before July 19, so that plaintiff was required to sue within three years after July 19, 1999, at the latest.⁷ But she sued on July 21, 1999, two days late.

Plaintiff, however, claims that the limitations period was tolled under RCW 4.16.190. Plaintiff has the burden of showing the limitations period was tolled. See *Wickwire v. Reard*, 37 Wn.2d 748, 751, 226 P.2d 192 (1951); *Easton v. Bigley*, 28 Wn.2d 674, 682, 183 P.2d 780 (1947). As will be discussed, plaintiff has not met that burden.

B. THE LIMITATIONS PERIOD WAS NOT TOLLED.

The medical malpractice statute of limitations, RCW 4.16.350, does not provide for tolling of the limitations period because of illness or any other problems related to the alleged malpractice. The statute of

⁷ The trial court found that “[t]he loss of the kidney [became] inevitable as of July 20, 1996.” (CP 748) Even if acts or omissions occurred after July 19, they could not have occurred any later than July 20. Plaintiff failed to file suit within three years of July 20 as well.

limitations will be tolled, however, if the requirements of RCW 4.16.190 are met. That statute provides:

If a person entitled to bring an action mentioned in this chapter . . . be at the time the cause of action accrued . . . incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, *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 sets forth the procedure for appointing a guardian for incapacitated persons. RCW 11.88.010(1) provides:

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

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

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

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

.....

(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.

(Emphasis added.) RCW 11.88.045(3) states that in a contested case, “[t]he standard of proof to be applied . . . shall be that of clear, cogent, and convincing evidence.” Indeed, because guardianship is a “unique legislative provision” that gives one person power over another, “[i]ncapacity’ is not lightly declared nor is guardianship casually conferred.” *State v. Simms*, 95 Wn. App. 910, 916-17, 977 P.2d 647 (1999).

For purposes of this appeal only, defendants will assume that plaintiff was, as she claims, helpless in the intensive care unit for the three days between July 19 and July 22. Many persons in intensive care are helpless. Thus, under the trial court’s ruling, anyone in the intensive care unit for a few days at the time their cause of action had accrued would be entitled to have the limitations period tolled. The Legislature could not have intended this when it enacted RCW 4.16.190 and RCW ch. 11.88.

RCW 4.16.190 requires that the plaintiff have been determined to be incompetent or disabled “according to chapter 11.88 RCW”—in other words, the person must have been incompetent or disabled enough to have

qualified for a legal guardian. RCW 11.88.010(1)(c) makes clear that determination of incapacity is a legal, not a medical, decision and must be based upon “a demonstration of management insufficiencies *over time*.” (Emphasis added.) A few days’ stay in the intensive care unit does not demonstrate management insufficiencies “over time” that would render plaintiff disabled enough to qualify for appointment of a guardian.

Significantly, RCW 4.16.190 requires that the plaintiff have been determined incompetent or disabled “according to chapter 11.88 RCW”, not just “according to RCW 11.88.010.” Because all language in a statute must be given effect, with no portion rendered meaningless or superfluous, the Legislature’s reference to RCW ch. 11.88 instead of just RCW 11.88.010 must have some meaning. *Hartson Partnership v. Goodwin*, 99 Wn. App. 227, 235, 991 P.2d 1211 (2000). Moreover, “[i]n order to interpret a statute, each of its provisions ‘should be read in relation to the other provisions, and the statute should be construed as a whole.’” *In re Detention of Williams*, 147 Wn.2d 476, 490, 55 P.3d 597 (2002) (quoting *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 133, 814 P.2d 629 (1991)).

Therefore, to ascertain what the Legislature meant when it required “a demonstration of management insufficiencies over time,” a review of other provisions of RCW ch. 11.88 is necessary. As will be discussed, even assuming RCW 4.16.190 does not require that a guardian actually

have been appointed,⁸ RCW ch. 11.88 contains numerous indications that the Legislature intended “over time” to mean more than just three days.

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). 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.* 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

⁸ Defendants reserve the right to raise this issue in a later appeal.

11.88.090(5)(f). Responses to the GAL report may be filed up to two days before the hearing. RCW 11.88.090(7)

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).

As the Washington Supreme Court has 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). 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. The Legislature could not have intended management insufficiencies over just three days to qualify a person for a guardianship.

Indeed, a review of reported Washington guardianship cases 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), 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.⁹

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

These cases and a plain reading of RCW ch. 11.88 demonstrate that a plaintiff who is unable to care for herself for only a few days while in the intensive care unit does not suffer from the “management insufficiencies over time” required by RCW ch. 11.88. See *Rowe v. Floyd*, 29 Wn. App. 532, 536, 629 P.2d 925 (1981) (plain reading of statute determinative). The trial court erred in ruling there were factual issues whether plaintiff could have been determined incompetent or

⁹ 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.

disabled “according to chapter 11.88 RCW.” She could not have as a matter of law.

Even if RCW ch. 11.88 had not provided for the time requirements it did, common sense dictates that plaintiff could not have been disabled or incapacitated—*i.e.*, suffering from “management insufficiencies over time”—within the meaning of RCW ch. 11.88. *See Herrington v. David D. Hawthorne, CPA, P.S.*, 111 Wn. App. 824, 839, 47 P.3d 567 (2002) (commonsense reading of statute). Many ill persons in the intensive care unit, or even outside a hospital or other health care facility, may be unable to attend to their affairs as they usually would for a few days during the worst part of their illness, but they recover sufficiently in a short time. No one would think they would be candidates for a guardianship merely because for a few days they were unable to care for themselves or their affairs.

Indeed, this case well illustrates this. Plaintiff was in the hospital a week, four days of which were in intensive care. She was discharged on July 26, 1996. There is no claim she was incompetent or disabled at that point. Before going to New Mexico in the fall of 1996, she went to see another doctor at the University of Washington because she wanted a second opinion. Three months later, in October 1996, she was seeking copies of her medical records. (CP 59-61)

By 1997, she had retained counsel. (CP 60) Whatever the reason for her delay in filing the lawsuit two years later in July 1999, the fact she was helpless in the intensive care unit for three or four days in 1996 clearly had nothing to do with it. By authorizing the tolling of the statute of limitations due to incompetency or disability "as determined according to chapter 11.88 RCW," the Legislature could not have intended tolling to occur by virtue of a few days' stay in the intensive care unit.

Thus, a three-day stay in an intensive care unit does not qualify a person to be disabled or incompetent under RCW ch. 11.88 as a matter of law. *Cf. In re Guardianship of Nelson*, 12 Wn.2d 382, 394, 121 P.2d 968 (1942) (guardians cannot be appointed merely because one suffering from physical problems may for a few hours be mentally disturbed or disabled). The trial court therefore erred in ruling there were genuine issues of material fact whether plaintiff was disabled or incompetent so that the statute of limitations tolled.

C. PLAINTIFF'S STATUTORY CONSTRUCTION ARGUMENT DOES NOT COMPEL A DIFFERENT RESULT.

Plaintiff claims that when one statute incorporates another and the incorporated statute is subsequently amended, the incorporating statute is deemed to have incorporated the incorporated statute as it existed at the time of incorporation. Because RCW 4.16.190 first incorporated RCW ch.

11.88 in 1977 but RCW ch. 11.88 was amended in 1990, plaintiff argues that the 1990 amendments do not apply when construing RCW 4.16.190.

1. This Court Should Not Review This Issue.

Plaintiff did not raise this argument in the trial court. She raised it in this court for the first time, without citing *any* authority, only in response to the defendants' motion for discretionary review. This court should not review this new issue because RAP 9.12 provides:

On review of an order . . . denying a motion for summary judgment the appellate court will consider only evidence and *issues* called to the attention of the trial court. . . .

(Emphasis added.) *See also Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 38 P.3d 1024, *rev. denied*, 147 Wn.2d 1016 (2002) (on appeal of summary judgment appellate court would decline to consider issue trial court had no opportunity to address).

Moreover, the general rule is that if an issue was not raised in the trial court, it cannot be raised for the first time in the appellate court. *Escude ex rel. Escude v. King County Public Hospital Dist. No. 2*, 117 Wn. App. 183, 192 n.9, 69 P.3d 895 (2003).

2. The 1990 Version of RCW 11.88.010(1)(c) Applies.

Furthermore, the "rule" plaintiff contends should apply is merely a "rule" of statutory construction: *See City of Seattle v. Green*, 51 Wn.2d

871, 874, 322 P.2d 842 (1958). The Washington Supreme Court has cautioned:

It must be remembered, however, that [rules of statutory construction] are not statements of law. Rather, they are rules in aid of construing legislation and an aid in the process of determining legislative intent.

Johnson v. Continental West, Inc., 99 Wn.2d 555, 559, 663 P.2d 482 (1983). The paramount duty of appellate courts is to determine and carry out the intent of the Legislature. *State v. Thomas*, 150 Wn.2d 666, 670, 80 P.3d 168 (2003).

Significantly, plaintiff neglects to mention that *RCW 4.16.190* was amended in 1993, **after the 1990 amendments to RCW ch. 11.88. The 1993-amended RCW 4.16.190 again incorporates RCW ch. 11.88.** 1993 WASH. LAWS ch. 232, § 1 (copy in appendix hereto). “[W]hen a statute is adopted by specific descriptive reference, the adoption takes the statute as it exists at that time.” *City of Seattle v. Green*, 51 Wn.2d 871, 874, 322 P.2d 842 (1958). If the Legislature had intended that the reference to RCW ch. 11.88 in the 1993 version of RCW 4.16.190 be to the 1977 version of RCW ch. 11.88, it would have said so.¹⁰

¹⁰ In 2004, the Legislature again amended RCW 11.88.010 effective January 1, 2006. This amendment preserves the language of RCW 11.88.010(1)(c) that “[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.” 2004 WASH. LAWS ch. 267, § 139.

Thus, because the 1993 amendment to RCW 4.16.190 adopted RCW ch. 11.88 by specific descriptive reference, that adoption takes RCW ch. 11.88 as it existed as of 1993. 1991 WASH. LAWS ch. 289, § 1.¹¹ In 1993, as today, RCW 11.88.010(1)(c) provides, among other things, that “[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.)

This only makes sense. If a lawyer had been retained on the first day of plaintiff’s alleged incapacity in 1996 to look into whether the limitations period would have been tolled, and if that lawyer had that day looked at his or her current version of RCW ch. 11.88, the lawyer would have seen that RCW 11.88.010 required that “[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.” RCW 11.88.010(1)(c) (emphasis added). There would have been no suggestion that although it was 1996, the lawyer was supposed to look into the session laws of 1977 to see what RCW ch. 11.88 said then.

¹¹ On January 1, 2006, a different version of RCW 11.88.010 will become effective. 2004 WASH. LAWS ch. 267, § 139. That version is not at issue here.

3. Plaintiff Was Not Incompetent Under the Pre-1990 Version of RCW 11.88.010(1).

The 1990 amendments to RCW ch. 11.88 apply to RCW 4.16.190. This court need go no further. However, even if the 1990 amendments do not apply, plaintiff's claimed inability to function for three days while in the intensive care unit did not qualify her for a guardian even under the pre-1990 version of RCW 11.88.010(1), which defined an incompetent person to include either a minor (which plaintiff was not) or someone:

Incompetent *by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity*, of either managing his property or caring for himself or both.

(Emphasis added.) Plaintiff does not claim she was any of these and there is no evidence she was. Neither did plaintiff qualify as a "disabled" person under the prior version of RCW 11.88.010(2) she now claims is applicable:

[A]n individual who is in need of protection and assistance *by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity*,¹² but cannot be found to be fully incompetent.

¹² "Other mental incapacity" does not include all other mental incapacities, but only those mental incapacities similar to the specified disabilities. *See Sattler v. Northwest Tissue Center*, 110 Wn. App. 689, 693, 42 P.3d 440 (2002) ("other persons" does not include all other persons but only person similar to those enumerated), *rev. denied*, 147 Wn.2d 1016 (2002); *State v. Wissing*, 66 Wn. App. 745, 753, 833 P.2d 424, *rev. denied*, 120 Wn.2d 1017 (1992) ("other exhibition" does not include all exhibitions, but only those similar to those specified).

(Emphasis added.)

Moreover, although the “over time” language was not added to RCW 11.88.010 until 1990, it is inconceivable that the Legislature intended the pre-1990 version of RCW ch. 11.88 to apply to just three or four days of claimed incapacity. *See, e.g., In re Nelson’s Guardianship*, 12 Wn.2d 382, 121 P.2d 968 (1942). The “over time” language was merely clarification, not a change in prior law, and thus was retroactive. *See State v. Joswick*, 71 Wn. App. 311, 316, 858 P.2d 280 (1993).

Indeed, many of the time limits required by the statute that indicate an incapacity for just a few days would not qualify a person for a guardian were in effect in the pre-1990 version of RCW ch.11.88. *See, e.g., 1977 WASH. LAWS 1ST EX. SESS., ch. 309, § 3(3)* (petitions to be heard within 45 days); § 4 (notice of hearing of not less than 10 days); § 4(3) (minimum 3 days’ notice of hearing required even if good cause shown for less than 10 days’ notice); § 6(3) (guardian ad litem report to be furnished within 20 days); § 13(1) (guardian has 3 months to file inventory of property); § 13(2) (guardian must file annual accounts of administration).

Plaintiff’s reliance on RCW 11.88.040(3) is misplaced. As plaintiff notes at page 11 of her answer to motion to modify commissioner’s ruling, that section exempts certain persons from having to receive notice of the guardianship hearing under certain circumstances,

none of which existed here. Moreover, these persons were the parent (when the incapacitated person is a minor), the children not residing with the incapacitated person, the spouse, and any guardian, limited guardian, or person with whom the allegedly incapacitated person resides. The statute does not exempt the allegedly incapacitated person from having to receive notice.

Roberts v. Pacific Telephone & Telegraph Co., 93 Wash. 274, 160 P. 965 (1916), is also inapposite. Plaintiff there claimed insanity for 3 years and had been committed to a mental institution for 4 months. However, to bring his claim within the limitations period, he had to show he was insane for 4 months. The Supreme Court approved an instruction that “when insanity of a fixed and settled nature is once established . . .”, plaintiff would be presumed to have remained insane until the defendant proved otherwise. *Id.* at 287.

The four-month period of incapacity that plaintiff had to show in *Roberts* is simply not analogous to the 3-day period here. Further, plaintiff’s condition during that period was hardly fixed or stable.

Thus, regardless of which version of RCW ch. 11.88 applies, plaintiff was not incompetent or disabled as contemplated by that statute and RCW 4.16.190. In holding that a trier of fact could find otherwise, the trial court committed an error of law.

VI. CONCLUSION

The Legislature has mandated that tolling of the limitations period will not occur unless the plaintiff was incompetent or disabled “as determined according to chapter 11.88 RCW,” the statutes that govern appointment of a guardian. In 1986 the Washington Supreme Court recognized that “[a]ppointment of a guardian is a time-consuming process.” *Schuoler*, 106 Wn.2d at 505-06. In 1999 the Court of Appeals noted that RCW ch. 11.88 provides “an elaborate methodology” for dealing with incapacity and guardianship and that “[i]ncapacity’ is not lightly declared nor is guardianship casually conferred. *Simms*, 95 Wn. App. at 916-17.

Statutes should be construed to effect the legislative purpose and to avoid unlikely, strained, or absurd results. *Thurston County v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004). Regardless of which version of RCW ch. 11.88.010 applies, plaintiff could not have qualified for a guardian during the three days in the ICU she claims caused the limitations period to toll.

If the Legislature had intended that some lesser standard of incompetency or disability would suffice, it would have said so. See *Hansen v. City of Everett*, 93 Wn. App. 921, 929, 971 P.2d 111, *rev. denied*, 138 Wn.2d 1009 (1999) (refusing to construe statute as Legislature

could have but did not phrase it). The trial court erred in applying a lesser standard to deny defendants summary judgment. This court should reverse the order denying summary judgment and remand for entry of summary judgment in defendants' favor.

DATED this 28th day of November 2005.

REED McCLURE

By *Pamela A. Okano*
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Passed the House April 19, 1993.
Passed the Senate April 6, 1993.
Approved by the Governor May 7, 1993.
Filed in Office of Secretary of State May 7, 1993.

CHAPTER 232

[House Bill 1025]

STATUTE OF LIMITATIONS—IMPRISONMENT NOT TO TOLL

Effective Date: 7/25/93

AN ACT Relating to the limitation of actions brought by prisoners; and amending RCW 4.16.190.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 4.16.190 and 1977 ex.s. c 80 s 2 are each amended to read as follows:

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 (~~or in execution under the sentence of a court for a term less than his natural life~~) prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

Passed the House April 19, 1993.
Passed the Senate April 8, 1993.
Approved by the Governor May 7, 1993.
Filed in Office of Secretary of State May 7, 1993.

CHAPTER 233

[Substitute House Bill 1026]

PUBLIC DEFENDER SERVICES—EXEMPTION FROM BIDDING REQUIREMENTS

Effective Date: 7/25/93

AN ACT Relating to counties contracting for public defender services; and amending RCW 36.32.245.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 36.32.245 and 1991 c 363 s 62 are each amended to read as follows:

(1) No contract for the purchase of materials, equipment, supplies, or services may be entered into by the county legislative authority or by any elected or appointed officer of the county until after bids have been submitted to the