92216-1

No. 99216-1

SUPREME COURT OF THE STATE OF WASHINGTON

SHANE FAST, JAMIE FAST, the marital community compromised thereof, ROBERT DALTON FAST, and the estate thereof,

Plaintiffs/Appellants,

v.

KENNEWICK PUBLIC HOSPITAL DISTRICT d/b/a KENNEWICK GENERAL HOSPITAL and d/b/a MID-COLUMBIA WOMEN'S HEALTH CENTER, a Washington public hospital district organized as a government entity, municipal or quasi-municipal corporation; ADAM T. SMITH, D.O., individually and for the marital community with spouse or registered domestic partner Jane Doe Smith; GREGORY SCHROFF, M.D., individually and for the marital community with spouse or registered domestic partner Jane Doe Smith; and DOES 1 through 50,

Defendants/Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR REVIEW

JEROME R. AIKEN, WSBA #14647
PETER M. RITCHIE, WSBA #41293
Attorneys for Defendants/Respondents
Meyer, Fluegge & Tenney, P.S.
P.O. Box 22680
Yakima, WA 98907
(509) 575-8500

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

MISCELLANEOUS CITES

I. INTRODUCTION

Twenty-five years ago in Wills v. Kirkpatrick, 56 Wn. App. 757, 785 P.2d 834 (1990), review denied, 114 Wn.2d 1024 (1990), this Court appropriately declined to review the exact issue Plaintiffs present in their Petition. Plaintiffs have presented no justification demonstrating that this Court's decision declining review of that issue was erroneous. To the contrary, the passage of 25 years have provided a stronger basis for this Court's decision. During that time frame the Legislature has had several opportunities to amend the law to legislatively abrogate, modify, or even clarify the Wills decision. It has declined to do so, despite amending RCW 7.70.010 and RCW 4.16.350 four times during that time period. The Legislature's inaction further establishes that this Court correctly denied review of this issue 25 years ago and should do the same now.[1]

[1] This Brief is submitted on behalf of all Defendants.

II. RESPONSE TO PLAINTIFFS' ISSUE PRESENTED FOR REVIEW

The established law in this State for decades, affirmed by this Court, is that the statute of limitations found in RCW 4.16.080 applies to wrongful death claims. Plaintiffs' claim for damages under RCW 4.24.010 for the death of their child is a wrongful death claim to which RCW 4.16.080 applies. There is no dispute or conflict in this regard.

III. COUNTER STATEMENT OF CASE

This appeal solely involves a claim of wrongful death brought by Jamie and Shane Fast on behalf of their deceased infant son, Robert Fast, under RCW 4.24.010. Other issues presented at the Court of Appeals and to the trial court are not presented here.

On March 7, 2008, Ms. Fast presented to Defendant Adam Smith, D.O. who confirmed she was pregnant and assumed her prenatal care. CP 6. On August 30, 2008, Ms. Fast was admitted to Kennewick General Hospital ("KGH") for concerns about

gestational diabetes under the care of Defendant Gregory Schroff, M.D. CP 7. Despite receiving appropriate care, Plaintiffs' son died *in utero* on August 31, 2008. CP 7.

On August 31, 2011, three years after the death of Plaintiffs' son, the three-year statute of limitations expired.

On July 17, 2012, more than three years after the alleged negligence, Plaintiffs filed their Summons and Complaint, asserting a claim for damages for the death of their son under the child wrongful death statute, RCW 4.24.010. CP 1-18.

The Defendants moved to summarily dismiss the claims as barred by the statute of limitations. CP 27-48, 76-7, 89-102. They argued that the statute of limitations bars the wrongful death claim based on Wills v. Kirkpatrick. CP 35-47, 94-97.

The trial court granted summary judgment. The trial court held that Plaintiffs' claim for the death of their son was a wrongful death claim barred by the statute of limitations:

> I think the [sic] Wells case makes it very clear that medical malpractice resulting in death is in fact a wrongful death claim and the three-year statute of

> limitations applies under any analysis of the facts. It cannot be said that the plaintiffs complied with that statute of limitations.

RP at 58.

Plaintiffs appealed. CP 1224. The Court of Appeals, Division Three, affirmed summary judgment, ruling that "[t]he trial court correctly applied the general tort statute of limitations to the Fasts' claim under RCW 4.24.010." Fast v. Kennewick Pub. Hosp. Dist., 188 Wn. App. 43, 53, 354 P.3d 858 (2015), as amended on denial of reconsideration (July 28, 2015).

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. STANDARD FOR ACCEPTING REVIEW

Review by this Court of decisions of the Courts of Appeal terminating review is governed by RAP 13.4. Review is only appropriate in a limited number of circumstances, none of which is present here:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

This Court should not accept review in the present case because Plaintiffs have failed to demonstrate any conflict among the Courts of Appeals or with this Court's precedent, or any significant issue of law or policy that would justify review. On the contrary, as noted below, the issue presented is governed by longstanding precedent affirmed by this Court and acquiesced to by the Legislature.

B. THE COURT SHOULD DENY THE PETITION FOR REVIEW

1. The Court Has Already Declined Review of the Same Issue Presented Here

Plaintiffs argue that the medical negligence statute of limitations, RCW 4.16.350, applies here because RCW 7.70 covers all claims for medical negligence whether causing injury or death. Plaintiffs mischaracterize this as an issue of first impression. *Plaintiffs' Petition for Review* at 4. It is not at all. The sole issue before this Court is what statute of limitations applies to wrongful death actions. That issue has squarely been resolved, and was resolved 25 years ago in Wills.

In Wills, the Court of Appeals addressed the issue whether RCW 7.70.010 covers actions involving wrongful death. Wills, 56 Wn. App. at 761. The Wills court held that the statute of limitations found in RCW 4.16.080 applies to wrongful death cases, and not the medical negligence statute of limitations. Id. at 762. The Wills court addressed and rejected the same

argument Plaintiffs make: that RCW 7.70 encompasses all claims for injury and death. Id.

As noted, the plaintiffs in Wills petitioned for review to this Court. This Court denied review in Wills. Wills, 114 Wn.2d 1024 (1990). Thus, this Court has denied review on the exact same issue Plaintiffs present under the guise of an issue of first impression. There is no conflict with this Court's precedent; the decision below is perfectly consistent with precedent. This Court should reject Plaintiffs' attempt to revisit established law simply because they allege the reasoning unsound or the result unpleasant, and deny review.

2. The Legislature Has Never Abrogated Wills in 25 Years

It also cannot be overemphasized that the Legislature has never abrogated, modified, or clarified in any respect the decision in Wills. The Legislature has amended RCW 4.16.350 and RCW 7.70.010 four separate times since Wills was decided in 1990. See Laws of 2006, ch. 8, § 302 and Laws of 2011, ch.

336, § 88 (amending RCW 4.16.350); Laws of 1993, ch. 492, § 420 and Laws of 1996, ch. 270, § 1 (amending RCW 7.70.010). Yet, the Legislature has taken no action to counter the Wills decision or its result in any fashion despite having 25 years in which to do so.

If Wills does in fact, as Plaintiffs allege, represent an aberration of the law contrary to the Legislature's enacted policies in RCW 7.70, one would expect the Legislature to have acted to nullify it and clarify the law. That it has never done so despite numerous opportunities speaks volumes. "[W]hen a legislature enacts a law, it is presumed to be familiar with its prior enactments and judicial decisions." Leonard v. City of Bothell, 87 Wn.2d 847, 853, 557 P.2d 1306 (1976). This Court should also presume the Legislature was aware of this Court's own decisions. Id. Moreover, this Court must "presume the Legislature says what it means and means what it says." State v. Costich, 152 Wn. 2d 463, 470, 98 P.3d 795 (2004).

Finally, appellate courts presume that the Legislature is aware of judicial interpretation of its enactments. The appellate courts take the Legislature's failure to amend a statute following a judicial decision interpreting that statute as an indication of legislative accidence in that decision. Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 327, 921 P.2d 500 (1999); City of Federal Way v. Koenig, 167 Wn.2d 341, 217 P.3d 1172 (2009).

Thus, in the present case the Court must presume that the Legislature was and is aware of the Wills ruling and this Court's decision denying review when it amended the statutes, and that it did not abrogate Wills because it concurs with the ruling. If the Legislature had wanted to nullify Wills it would have done so. The Legislature certainly knows how to revise legislation in response to a court decision. See Laws of 2006, ch. 8, § 302 (revising RCW 4.16.350 in response to this Court's decision in DeYoung v. Providence Medical Center, 136 Wn.2d 136 (1998) finding the statute of repose unconstitutional).

3. Overturning Wills after 25 Years Would Offend the Doctrine of *Stare Decisis*

"Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law." In re Stranger Creek & Tributaries in Stevens Cnty., 77 Wn. 2d 649, 653, 466 P.2d 508 (1970). The doctrine establishes a deference and respect for precedent to "promote[] the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process." City of Fed. Way, 167 Wn.2d at 347. "The principle of stare decisis 'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'" Id. (quoting Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004)).

Stare decisis requires that the Court deny review. Wills "has answered the question of which statute of limitations applies to actions for a wrongful death caused by medical malpractice for a quarter century." Fast, 188 Wn. App. at 53. Plaintiffs have

made no showing that the ruling in Wills is clearly incorrect and harmful. On the contrary, this Court's denial of review and the Legislature's decision not to modify or abrogate the ruling in Wills demonstrate that the ruling correctly reflects Washington law. Moreover, for the past 25 years, lower courts and parties have relied on the decision in Wills in determining the correct statute of limitations. Changing the rule now would undermine stability and predictability in the law.

4. There Is No Conflict

Plaintiffs claim Wills is an aberration. They note that only two cases have cited it. *Plaintiffs' Petition for Review* at 14. That is irrelevant. It is more of an indication that the rule is common place and widely accepted. More importantly, the argument that Wills is an anomaly is manifestly incorrect. Washington courts, other than Wills, have long held that actions for wrongful death are subject to the three-year limitations period provided by RCW 4.16.080(2) for "injury to the person or rights of another, not hereinafter enumerated." *See, e.g.,* Atchison v. Great W. Malting

Co., 161 Wn.2d 372, 377, 166 P.3d 662 (2007) ("The statute of limitations for a wrongful death action in Washington is three years," citing RCW 4.16.080(2)); Beal v. City of Seattle, 134 Wn.2d 769, 776, 954 P.2d 237 (1998); Bader v. State, 43 Wn. App. 223, 227, 716 P.2d 925 (1986); Dodson v. Cont'l Can Co., 159 Wash. 589, 294 P. 265 (1930)). As the Court of Appeals noted below, "Like the statute creating an action for death of a child, the statute prescribing the limitations period generally applicable to torts predates statehood." Fast, 188 Wn. App. at 50.

Thus, this Court and the Court of Appeals have repeatedly, and over many, many decades, held that actions for wrongful death are subject to the three-year limitations period provided by RCW 4.16.080(2). Wills correctly and accurately stated the law with respect to which statute of limitations applies to actions for wrongful death caused by medical negligence. There is no ambiguity in the law.

5. Plaintiffs Claim that RCW 7.70 Controls is Untenable

Plaintiffs' original claim was for damages for the death of their son under the child wrongful death statute, RCW 4.24.010. Despite this, Plaintiffs now assert that their claim is really a "civil action against health care providers resulting from health care, based on alleged professional negligence." This is a futile attempt to shoehorn the claim into a medical malpractice action governed by RCW 7.70 and escape the applicable wrongful death statute of limitations in RCW 4.16.080(2). *Plaintiffs' Petition for Review* at 9.

Plaintiffs' argument ignores well established precedent, clear statutes, and applies a loose definition of "injury" and "damages." There is no doubt that RCW 4.24.010 is a wrongful death statute. Bennett v. Seattle Mental Health, 166 Wn. App. 477, 483, 269 P.3d 1079, review denied, 174 Wn.2d 1009, 281 P.3d 686 (2012); Upchurch v. Hubbard, 29 Wn.2d 559, 563, 188 P.2d 82 (1947). This characterization is important because

Washington law has long distinguished between medical malpractice that results in death from medical malpractice that results in injury for the purpose of applying the statute of limitations. When medical negligence results in death, the cause of action is governed by the wrongful death statutes found in RCW 4.20.010 and RCW 4.24.010.

Nothing in the wrongful death statutes suggests that they only apply outside the context of medical negligence. That is a necessary conclusion if the Court accepts Plaintiffs' argument. RCW 4.20.010 applies to govern wrongful death actions, and states:

> When the death of a person is caused by the wrongful act, neglect or default of another his or her personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

RCW 4.20.010.

This definition does not exclude medical negligence as a cause of wrongful death. Likewise, nothing in RCW 4.24.010 excludes medical negligence by healthcare providers.

Because Plaintiffs' claim is for wrongful death, the controlling statute of limitations is RCW 4.16.080(2). White v. Johns-Manville Corp, 103 Wn.2d 344, 348, 693 P.2d 687 (1985). RCW 4.16.080(2) applies to govern wrongful death claims as a general catch-all of claims not specifically enumerated. Once a wrongful death action does accrue, the decedent's personal representative must commence the action within the three-year limitation period set forth in RCW 4.16.080(2). Atchison, 161 Wn.2d at 376; Beal, 134 Wn.2d at 776.

In short, Plaintiffs have misconstrued Washington law. It does not support the argument that the claim for the death of their child is not a wrongful death claim and that the medical malpractice statute of limitations applies. A correct analysis of Washington law demonstrates the propriety of Division III's ruling.

V. CONCLUSION

The Court should deny the Petition for Review. Plaintiffs have not presented an issue of first impression. This is precisely the same issue on which this Court denied review 25 years ago. Moreover, the Legislature has never attempted to abrogate Wills despite revising RCW 7.70.010 and RCW 4.16.350 four times in the past 25 years; thus its acquiescence is presumed. Further, abandoning the rule established in Wills at this juncture, after 25 years, would violate principles of *stare decisis.*

Plaintiffs have failed to demonstrate any justification for review as required under RAP 13.4(2). Thus review is improper.

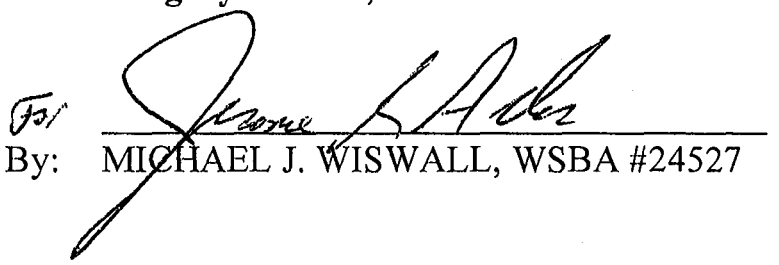
Respectfully submitted this 20 day of October, 2015.

MEYER, FLUEGGE & TENNEY, P.S.
Attorneys for Defendant/Respondent
Adam Smith, D.O.

By: JEROME R. AIKEN, WSBA #14647

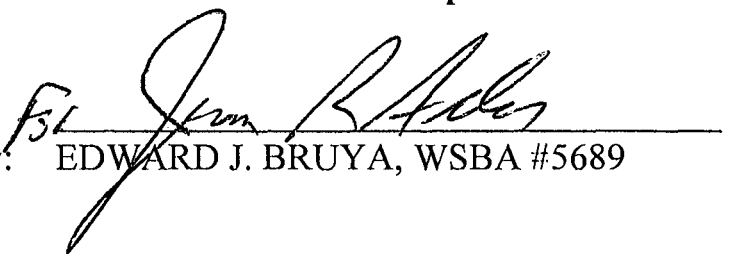
By: PETER M. RITCHIE, WSBA #41293

HART WAGNER LLP
Attorneys for Defendant/Respondent
Gregory Schroff, M.D.



By: MICHAEL J. WISWALL, WSBA #24527

KEEFE BOWMAN & BRUYA, P.S.
Attorneys for Defendant/Respondent
Kennewick General Hospital



By: EDWARD J. BRUYA, WSBA #5689

CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

For Plaintiffs: Scott E. Rodgers Rodriguez & Associates, P.S. 7502 W. Deschutes Place Kennewick, WA 99336	✓ via U.S. Mail ___ via fax ✓ via e-mail ___ via hand delivery
Defts. Kennewick and Mid-Columbia Women's Health Care: Mr. Edward J. Bruya Keefe Bowman & Bruya, PS 221 N. Wall Street, Suite 210 Spokane, WA 99201	✓ via U.S. Mail ___ via fax ✓ via e-mail ___ via hand delivery
For Deft. Gregory Schroff, M.D.: Mr. John E. Hart Mr. Michael M. Wiswall Hart Wagner LLP 1000 SW Broadway Portland, OR 97205	✓ via U.S. Mail ___ via fax ✓ via e-mail ___ via hand delivery

Executed this 22 day of October, 2015.

SHERYL A. JONES

OFFICE RECEPTIONIST, CLERK

To: Sheri Jones
Cc: Jerry Aiken; Peter Ritchie; Ed Bruya; ebyrd@kkbowman.com; mjw@hartwagner.com; Carol Myers; ld@hartwagner.com; Deb Frerichs
Subject: RE: Fast v. Smith, et al., Case No. 99216-1

Received on 10-22-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sheri Jones [mailto:jones@mftlaw.com]
Sent: Thursday, October 22, 2015 4:21 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Jerry Aiken <aiken@mftlaw.com>; Peter Ritchie <ritchie@mftlaw.com>; Ed Bruya <ebruya@kkbowman.com>; ebyrd@kkbowman.com; mjw@hartwagner.com; Carol Myers <cmyers@kkbowman.com>; ld@hartwagner.com; Deb Frerichs <frerichs@mftlaw.com>
Subject: Fast v. Smith, et al., Case No. 99216-1

Dear Clerk:

Attached please find a cover letter and Defendants' Opposition to Petition for Review for filing. Thank you.

Sheri A. Jones
Assistant to Jerome R. Aiken
Meyer, Fluegge & Tenney, P.S.
P.O. Box 22680
Yakima, WA 98907-2680
509/575-8500 Fax: 509/575-4676
jones@mftlaw.com