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NO. 99241-0

SUPREME COURT OF THE STATE OF WASHINGTON

ALLYSON SOOCEY, Personal Representative
of the Estate of Stephen Daryl Soocey,

Appellant,

v.

CHI, FRANCISCAN; ST. JOSEPH HOSPITAL,

Respondent.

**RESPONDENT'S ANSWER TO PETITION FOR
REVIEW**

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I. IDENTITY OF RESPONDING PARTY

Respondent CHI Franciscan d/b/a St. Joseph Medical Center (CHI) submits this answer to Petitioner Allyson Soocey's Petition for Review.

II. COURT OF APPEALS DECISION

In an unpublished opinion on October 20, 2020, Division II of the Court of Appeals affirmed the trial court's order dismissing Allyson Soocey's lawsuit for wrongful death occurring as a result of allegedly negligent health care on grounds that it was barred by the medical malpractice statute of limitations, RCW 4.16.350. *Slip Op.* at 2. In so doing, Division II rejected Mrs. Soocey's arguments that the trial court erred in applying the medical negligence statute of limitations, RCW 4.16.350, which begins to run on the date of the alleged negligent act or omission, rather than the general torts catchall statute of limitations, RCW 4.16.080(2), which begins to run on the date of death for wrongful death actions. *Slip Op.* at 5-9. Division II found unpersuasive Mrs. Soocey's arguments that this Court's holding in *Fast v. Kennewick Public Hospital District*, 187 Wn.2d 27, 384 P.3d 232 (2016), was narrow, applying only to child wrongful death claims and not her case. *Slip Op.* at 6. Division II reasoned that this Court explicitly held in *Fast* that the medical negligence statute of limitations, not the general torts statute of limitations, applies to all actions for wrongful death occurring as a result of health care. *Slip Op.*

at 2, 3. Because Mrs. Soocey's lawsuit fell squarely within this category, the trial court properly concluded that the statute of limitations barred it.

III. COUNTERSTATEMENT OF ISSUES

1. Does the medical negligence statute of limitations apply to all wrongful death actions arising from health care, requiring them to be filed within three years from the date of the negligent act or omission, or one year from the date of discovery?

2. Did the Court of Appeals properly affirm the trial court's dismissal of Allyson Soocey's lawsuit as barred by the medical negligence statute of limitations?

IV. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

In September 2015, Stephen Daryl Soocey was diagnosed with a large brain tumor. CP 20-26. The St. Joseph Medical Center neurosurgery team evaluated him and discussed his limited options given the tumor's size and location. *Id.* His surgeons had a frank, detailed conversation with Mr. Soocey about the risks inherent in surgically removing the tumor, including permanent nerve damage and resultant complications such as difficulty swallowing, a post-operative stay in the Intensive Care Unit (ICU), stroke and death. *Id.* Mr. Soocey elected to proceed. *Id.* The surgery occurred on October 16, 2015, taking nine hours. CP 31. Mr. Soocey recuperated in

the Critical Care Unit, and, as anticipated, had dysphagia (difficulty swallowing) postoperatively. CP 33, 35-38. By discharge almost two weeks later on October 28, Mr. Soocey felt he was improving and informed his providers that he was eager to go home. CP 40-42. Because he was medically stable, his providers discharged him with planned follow up. *Id.*

On October 31, 2015, however, Mr. Soocey returned to the emergency department in a significantly changed condition after a controlled fall at home. CP 44-52. His wife reported that Mr. Soocey since discharge had developed congestion and a productive cough. *Id.* On intake, Mr. Soocey's breath sounds were shallow and decreased. *Id.* His blood pressure was low, his heart rate was elevated, and his oxygen saturation was also very low, necessitating supplemental oxygen. *Id.* He was admitted to the Progressive Care Unit for further testing and management of pneumonia. *Id.* Despite these efforts, on November 4, 2015, Mr. Soocey became short of breath and coded. CP 61-65. Although they encountered a difficult intubation, Mr. Soocey's healthcare providers resuscitated him and transferred him to the ICU. *Id.* Notwithstanding robust treatment, he failed to regain consciousness. *Id.* In accord with his wife's wishes, Mr. Soocey's providers removed him from life support on November 14, 2015. *Id.*

B. Procedural History.

Allyson Soocey, as personal representative of her husband Steven Soocey's Estate, filed a lawsuit against CHI two years and 364 days after his death, on November 13, 2018. CP 232-237. She brought claims for wrongful death as a result of medical negligence, specifically alleging that the negligent health care occurred on November 4, 2015, ten days before Mr. Soocey's death. CP 236. CHI asserted a statute of limitations affirmative defense. CP 68-75, 238-45.

On April 12, 2019, CHI moved for summary judgment on the basis that Mrs. Soocey's lawsuit was untimely, CP 8-15, arguing that, under *Fast v. Kennewick*, 187 Wn.2d 27, 384 P.3d 232 (2016), because Mrs. Soocey's claims were for wrongful death resulting from health care, the medical negligence statute of limitations, RCW 4.16.350, applied, requiring Mrs. Soocey to bring her lawsuit within three years from the date of the alleged negligent act or omission, or within one year from the date of discovery, not three years from the date of death. CP 8-15. As she had not done so, the statute of limitations barred her claims. *Id.*

In response, Mrs. Soocey argued that her lawsuit was timely because the overturned Court of Appeals' decision,¹ not the Supreme Court decision,

¹ *Fast v. Kennewick Pub. Hosp. Dist.*, 188 Wn. App. 43, 354 P.3d 858 (2015), *reversed*, 187 Wn.2d 27 (2016).

in *Fast* controlled. CP 76-98. Mrs. Soocey asserted that this Court's decision in *Fast* should be narrowly construed, applicable only to a small sub-category of wrongful death cases involving a deceased child. *Id.* Thus, based on the reversed Court of Appeals' decision in *Fast*, she contended that she had three years from the date of death, rather than three years from the date of alleged negligence, to bring her claims, which she did by filing the lawsuit one day before the third anniversary of her husband's death. *Id.*

In reply, CHI emphasized that this Court's decision in *Fast* was controlling. CHI pointed out that there was no limiting language in this Court's decision; instead, the Court's lengthy and reasoned opinion demonstrated that the legislative intent behind Washington's medical malpractice statutes was that wrongful death actions arising from health care, just like actions for other injuries arising from health care, be subject to the medical negligence statute of limitations. CP 212-222.

The trial court granted CHI's motion, and dismissed the lawsuit, finding that this Court's decision in *Fast* governed and that the medical negligence statute of limitations barred Mrs. Soocey's claims. CP 225-227.

Mrs. Soocey appealed the trial court's dismissal of her lawsuit. CP 228. Division II, in its October 20, 2020 unpublished decision, affirmed the dismissal on statute of limitations grounds, concluding that this Court's decision in *Fast* was unambiguous: the medical negligence statute of

limitations applied to all actions for wrongful death arising from health care, requiring filing within three years of the date of the alleged negligent act, *Slip Op.* at 2, which Mrs. Soocey failed to do, *Slip Op.* at 10.

Mrs. Soocey timely petitioned for review to this Court.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

“An adult with a justifiable grievance usually knows it, and the law affords him ample opportunity to assert it in the courts.” *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 860, 953 P.2d 1162 (1998). Mrs. Soocey had years after her husband passed away from known risks associated with the brain surgery to file her medical negligence/wrongful death lawsuit, but did not avail herself of that ample opportunity.

None of the RAP 13.4(b) considerations governing acceptance of review warrant Supreme Court review in this case.² Division II’s decision affirming dismissal of Mrs. Soocey’s claims on statute of limitations grounds was correct and does not conflict with any decision of this Court or any published decision of the Court of Appeals so as to warrant review

² Mrs. Soocey has not identified the specific basis under RAP 13.4(b) for which she seeks review, *see Pet. at 1*. Under RAP 13.4(b), this Court will accept review only:

- (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 a published 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.

under RAP 13.4(b)(1) or (2). Rather, as discussed below, Division II's decision is consistent with this Court's decision in *Fast*, and aligns with subsequent published appellate decisions applying *Fast's* unambiguous holding. Nor does Mrs. Soocey's petition involve any constitutional question or issue of substantial public interest that should be determined by this Court so as to warrant review under RAP 13.4(b)(3)³ or (4).

A. Division II's Decision Is Not in Conflict with Any Decision of This Court so as to Warrant Review Under RAP 13.4(b)(1).

Fast is this Court's only decision concerning the applicability of the medical negligence statute of limitations to cases of wrongful death resulting from allegedly negligent healthcare. Division II's decision is not in conflict with *Fast* so as to warrant review under RAP 13.4(b)(1). Rather, the unambiguous language used in *Fast* and the rationale underlying the decision confirm that Division II correctly applied the law.

This Court in *Fast* specifically evaluated whether the medical negligence statute of limitations, RCW 4.16.350,⁴ or the general torts

³ Because Mrs. Soocey has not raised any constitutional issue in her petition and did not raise one below, RAP 13.4(b)(3) provides no basis for accepting review in this case.

⁴ RCW 4.16.350 provides in pertinent part: "Any civil action for damages for injury occurring as a result of health care...shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later."

catchall statute of limitations, RCW 4.16.080,⁵ applies to actions for wrongful death resulting from allegedly negligent health care, and concluded in no uncertain terms that “in cases of wrongful death resulting from negligent health care, the MNSOL [medical negligence statute of limitations] (RCW 4.16.350(3)) applies.” *Fast*, 187 Wn.2d at 29.

This Court’s goal in deciding *Fast* was to implement legislative intent. 187 Wn.2d at 32-33. The Court analyzed chapter 7.70 RCW, Washington’s medical malpractice statute, together with RCW 4.16.350, the medical negligence statute of limitations, and the general torts catchall statute of limitations in RCW 4.16.080(2), to conclude that the legislature intended the medical negligence statute of limitations to apply in all actions for wrongful death resulting from negligent health care. *Id.* at 33-34.⁶ Correspondingly, this Court determined that the general torts “catchall” statute of limitations in RCW 4.16.080(2) does not apply to wrongful death

⁵ RCW 4.16.080(2) provides: “The following actions shall be commenced within three years: An action...for any other injury to the person or rights of another not hereinafter enumerated.”

⁶ The Court explained that statutory governance of all actions for injuries arising from alleged negligent health care occurred “in harmony with the nationwide trend to limit recovery by medical malpractice victims,” so as to “reduce the cost of medical malpractice insurance, thereby potentially decreasing the cost of health care.” *Fast*, 187 Wn.2d at 34, 37. This transpired as part of tort reform in 1971, before which the general torts statute of limitations governed medical negligence. *Id.* at 34. In 1971, along with chapter 7.70 RCW, the legislature enacted a specific medical malpractice statute of limitations, RCW 4.16.350, requiring actions for damages for injury occurring as a result of health care to be commenced within three years from the date of the alleged negligent act or omission, or one year from the date of discovery. *Id.*

actions resulting from health care because a specific statute, i.e. the medical negligence statute of limitations, already governs them:

In cases of medical negligence, the language of RCW 4.16.080(2), which provides that it is limited to actions “not hereinafter enumerated,” requires application of the more specific MNSOL in RCW 4.16.350(3). Courts have recognized that RCW 4.16.080(2) imposes a catchall provision that serves as a statute of limitations for any cases that do not fit into other enumerated limitation statutes. *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 721, 709 P.2d 793 (1985). The *Fast* case falls squarely under RCW 4.16.350(3) (MNSOL); thus, RCW 4.16.080(2) (general torts catchall statute of limitations) does not apply.

Fast, 187 Wn.2d at 37. This rationale makes no sense if the holding does not apply equally to all wrongful death actions arising from health care. Thus, this Court’s holding in *Fast* is clear and unambiguous: “[w]e hold that in cases of wrongful death resulting from negligent health care, the MNSOL (RCW 4.16.350(3)) applies.” *Id.* at 29, 33-34, 40.

Consistent with this Court’s decision in *Fast*, Division II concluded that, because Mrs. Soocey’s claims were for wrongful death occurring as a result of allegedly negligent health care, the medical negligence statute of limitations applied, requiring her to sue CHI within three years from the alleged negligence or one year from discovery, which she failed to do. The trial court properly concluded that her claims were time-barred, and Division II properly affirmed. Division II’s decision is not in conflict with this Court’s decision in *Fast* so as to warrant review under RAP 13.4(b)(1).

B. Division II’s Decision Is Also Not in Conflict with Any Published Decision of the Court of Appeals that Remains Good Law so as to Warrant Review Under RAP 13.4(b)(2).

Three published Court of Appeals’ decisions address the statute of limitations applicable to wrongful death actions occurring as a result of alleged negligent health care: *Wills v. Kirkpatrick*, 56 Wn. App 757, 760, 785 P.2d 834 (1990), which this Court abrogated to the extent that it applied the general torts catchall statute of limitations, rather than the medical negligence statute of limitations, to an action for wrongful death occurring as a result of health care; *Fast*, 188 Wn. App. 43, which this Court reversed; and *Fechner v. Volyn*, 3 Wn. App. 2d 716, 418 P.3d 120 (2018), which holds, as Division II here did, that the medical negligence statute of limitations applies to actions for wrongful death that occur as a result of allegedly negligent health care.

In *Wills*, the Court of Appeals applied the general torts catchall statute of limitations, RCW 4.16.080(2), to measure the three-year limitations period from the date of death in that wrongful death action. 56 Wn. App at 760. As applied to actions for wrongful death occurring as a result of health care, however, *Fast* abrogated *Wills*, 187 Wn.2d at 37-40. This Court found that the Court of Appeals’ statutory interpretation in *Wills* was incomplete and incorrect in concluding the “injury” as used in the medical negligence statute of limitations did not include “death.” *Id.*

Specifically, *Wills* failed to acknowledge chapter 7.70 RCW's provisions that contemplate wrongful death. *Id.* This Court thus concluded that *Wills* had no stare decisis effect and abrogated it. *Id.*; *see also id.* at 42 (Madsen, J. Concurring).

This Court reversed the Court of Appeals' decision in *Fast* that incorrectly concluded the general torts catchall statute of limitations, rather than the medical negligence statute of limitations, applied to actions for wrongful death resulting from allegedly negligent health care. *Fast*, 187 Wn.2d at 40 (“[t]he judgment of the Court of Appeals is reversed.”)

In the only published Court of Appeals case that remains good law, *Fechner*, Division III applied *Fast* to a situation just like Mrs. Soocey's, where the plaintiff's husband died as a result of alleged negligent health care. *See Fechner*, 3 Wn. App. 2d at 718-19. In that case, as here, the plaintiff's attorney failed to file suit within three years of the alleged negligence, resulting in dismissal on statute of limitations grounds. *Id.* Reiterating that the claims against the health care provider “accrued on the last date of alleged negligence,” which was five months before the patient died, the *Fechner* court affirmed dismissing the lawsuit as untimely. *Id.*

Division II reached the same, correct result in Mrs. Soocey's case. Here, exactly as Division III concluded in *Fechner*, the medical negligence statute of limitations applied to Mrs. Soocey's claims for wrongful death of

her husband that resulted from allegedly negligent health care. The statute of limitations ran on November 4, 2018, three years after the date of the allegedly negligent care, but Mrs. Soocey did not file her lawsuit by that deadline. Division II properly affirmed dismissal of her time-barred claims, consistent with the *Fechner* decision. Division II's decision is thus not in conflict with a published decision of the Court of Appeals so as to warrant review under RAP 13.4(b)(2).

C. Mrs. Soocey's Petition Does Not Involve Any Issue of Substantial Public Interest that Should Be Determined by This Court so as to Warrant Review under RAP 13.4(b)(4).

Mrs. Soocey argues, *Pet. at 9-13*, that this Court did not intend for the medical negligence statute of limitations to govern all actions for wrongful death occurring as result of health care because the statutory period could close before the injured person's death, thereby precluding a wrongful death suit altogether leading to "absurd" and "impossible" results. Not only is her analysis both legally and factually incorrect, but also this and her other arguments do not present issues of substantial public interest that should be determined by this Court. Indeed, this Court in *Fast* has already resolved them.

First, Mrs. Soocey's position that this Court did not intend for the medical negligence statute of limitation to apply to all actions for wrongful death occurring as a result of health care ignores this Court's clear holding

and rationale in *Fast*. Although *Fast* did concern a medical negligence lawsuit involving the wrongful death of an unborn child, its holding is not, as she asserts, limited to those facts. Consistent with this Court’s analysis of legislative intent, *Fast*’s scope broadly applies to all cases of wrongful death resulting from allegedly negligent health care: “We hold that in cases of wrongful death resulting from negligent health care, the MNSOL (RCW 4.16.350(3)) applies.” *Fast*, 187 Wn.2d at 29, 33-34, 40. There is nothing in this Court’s decision in *Fast* that suggests it applies narrowly only to child wrongful death cases, as Mrs. Soocey asserts, *e.g. Pet. at 7-9*. If that is what this Court meant, it would have used far different, more limiting language. Instead, this Court consistently referred broadly to wrongful death claims throughout its analysis, not limiting its holding to claims based on the death of a child or to the specific facts before it in *Fast*.⁷ *See id.*

Mrs. Soocey similarly misconstrues Justice Madsen’s concurrence. While she is correct that Justice Madsen would apply *Fast* narrowly, *Pet. at*

⁷ Although Mrs. Soocey stresses the differences among the wrongful death statutes, *Pet. at 7-9*, the statute under which she sued is immaterial because the Supreme Court considered all of the wrongful death statutes together:

This action has been repeatedly characterized by Washington cases as an action for “wrongful death.” *E.g., Lockhart v. Besel*, 71 Wn.2d 112, 116, 426 P.2d 605 (1967); *Clark v. Icicle Irrig. Dist.*, 72 Wn.2d 201, 205-06, 432 P.2d 541 (1967); 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* § 7:3, at 344 (4th ed. 2013) (characterizing RCW 4.24.010 as one of the “five statutes in Washington that govern wrongful death actions”).

Fast, 187 Wn.2d at 33, n.8.

14, the limitation that Justice Madsen emphasizes is not to wrongful death of a child actions, but to health care-related wrongful death actions:

I write separately to emphasize the limited scope of the decision in this case.

* * *

By its terms, the MNSOL applies to “[a]ny civil action” where damages for injury are alleged “as a result of health care.” RCW 4.16.350. In RCW 7.70.010, the legislature expressly modified “as set forth in [chapter 7.70 RCW] and in RCW 4.16.350... certain substantive and procedural aspects of *all civil actions and causes of action ... for damages for injury occurring as a result of health care.*” RCW 7.70.010 (emphasis added). Here, the wrongful death action falls within the broad reach of the MNSOL because it is based on a claim for damages allegedly resulting from the provision of health care.

* * *

Restated, the MNSOL applies in this case because the wrongful death claim itself falls within the broad sweep of the “result of health care” provision of the noted statutes. *See* RCW 7.70.010.

See Fast, 187 Wn.2d at 42-43 (Madsen, J., concurring). Justice Madsen’s concurrence, consistent with the majority’s opinion, confirms that the medical negligence statute of limitations applies to all wrongful death actions occurring as a result of health care, including Mrs. Soocey’s.

Second, despite Mrs. Soocey’s assertions to the contrary, this Court specifically considered a situation where the time for filing a wrongful death claim resulting from health care could expire before death. *See Fast*, 187 Wn.2d at 39. This potential did not alter this Court’s decision for several reasons, including because this Court did not find that it would necessarily

create “absurd” or “impossible” results, and the Court had reached similar conclusions previously. *See id.* (citing *Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 731-32, 381 P.3d 32 (2016) (statute of limitations on the underlying claim lapsed during his life, and thus the wrongful death suit was properly dismissed)).

Moreover, the discovery rule prevents unfairly harsh or absurd results by allowing plaintiffs additional time to file. *See, e.g., Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 864, 953 P.2d 1162 (1998). Like Mrs. Soocey here, the plaintiff in *Gunnier* argued that the statute of limitations logically could not begin running until the date of her actual injury, there from a decades-prior undiagnosed heart condition, because no cause of action existed until then; otherwise, “absurd results occur, *i.e.*, the barring of a cause of action which has never existed.” *Id.* at 134 Wn.2d at 859; 863. This Court disagreed, citing the discovery rule as a fail-safe and recognizing that “the one-year discovery period is not an unreasonably short period of time in which to file suit.” *Id.* at 863.

Finally, Mrs. Soocey’s situation was factually not absurd or impossible. Mrs. Soocey had ample time to file her complaint, but simply failed to take advantage of the years she had. Mrs. Soocey alleged that CHI negligently cared for her husband on November 4, 2015, causing Mr. Soocey’s death on November 14, 2015. Just ten days separated the alleged

negligence from the date of death. Mrs. Soocey's ability to file a wrongful death complaint did not expire before her husband died; she still had two years and 355 days after her husband's death to bring her claims. Beyond that, even if her husband had died more than three years after the alleged negligence, which is not the case, she then would have had a full year additional to sue CHI under the discovery rule. Division II recognized this, concluding that Mrs. Soocey had ample time to bring her claim before the statute of limitations lapsed and therefore had not suffered an unreasonably harsh result in dismissal of her claims. *Slip Op.* at 8.

Mrs. Soocey's petition fails to establish an issue of substantial public interest that has not, but should be, determined by this Court so as to warrant review under RAP 13.4(b)(4).

VI. CONCLUSION

For the foregoing reasons, this Court should deny Allyson Soocey's petition for review under RAP 13.4.

RESPECTFULLY SUBMITTED this 21st day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date below I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following counsel of record:

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Dated this 21st day of December, 2020, at Tacoma, Washington.

s/Deidre M. Turnbull

Deidre M. Turnbull
Legal Assistant

FAVROS LAW

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