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COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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

Appellant,

vs.

CHI, FRANCISCAN; ST. JOSEPH HOSPITAL,

Respondent.

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

In 2015, the Appellate Court rendered an opinion in a case called *Fast v. Kennewick* (Wash. App. 2015). In that case, a mother had sued for damages arising from the death of her child under RCW 4.24.010 “Action for injury or death of a child.” Because the death was alleged to have been caused by medical negligence, she had also sued under the medical negligence statutes, which, under RCW 7.70.110, allow the statute of limitations to be extended from three years from the negligent act to four years from the negligent act when a Plaintiff makes a good faith request for mediation. She had requested mediation. When she filed, after the third year from the negligent act but before the fourth year, the Court dismissed the action for injury or death of a child, finding that the extension provision under the medical negligence statutes did not apply to the “Action for injury or death of a child” statutory claim. That decision was appealed and the Appellate Court, in 2015, issued an opinion.

In its opinion, the Court analyzed the issue by looking to the wrong statute. Instead of considering RCW 4.24.010 “Action for injury or death of a child,” the Appellate opinion evaluated the case as it would apply to a very different statute, RCW4.20.010 “Wrongful Death – Right of Action.” The Appellate Court issued an opinion, finding that the Medical Negligence statutes which granted the extension for the medical negligence claims, did not apply to a claim made under RCW4.20.010 “Wrongful Death – Right of Action.” The Opinion was well supported and

involved a detailed discussion of the wrongful death statute. The Supreme Court then accepted the case for review.

In its decision, *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016), the Supreme Court noted that the Appellate Court's analysis was focused on the wrong statute, but that neither party had requested review on that basis, nor had any party asked the Supreme Court to address the Appellate Court's evaluation, logic, or conclusion as to the application of the negligence statutes to RCW4.20.010 "Wrongful Death – Right of Action." The Supreme Court went on to decide that the statute which extended the statute of limitations on medical negligence cases should also extend the deadlines for an action brought by parents to recover for injury or death of a child under RCW 4.24.010 "Action for injury or death of a child," when the injury or death was caused by medical negligence.

Since the 2016 Supreme Court opinion, the Medical Malpractice defense industry has argued that the Supreme Court decision extends to any claim at all that involves an allegation of medical negligence including a claim made under RCW4.20.010 "Wrongful Death – Right of Action." It has also argued to expand the scope of the Supreme Court's *Fast* decision acts to apply other portions of the medical negligence statutes (not just the portion that the Supreme Court was looking at, which allows an extension of the deadlines) to any claim involving an allegation of medication negligence. Specifically, it has taken the *Fast* decision,

which was intended to broaden a Plaintiff's statute of limitations, and pushed to apply it to narrow the statute of limitations by insisting that any claim based on an allegation of medical negligence start counting, for statute of limitations purposes, from the date of the medical negligence, rather than, in case of wrongful death actions, from the date of the death of the decedent.

The appellant in this case filed a lawsuit under RCW4.20.010 "Wrongful Death – Right of Action." Her husband was the victim of medical negligence which occurred on November 4, 2015 and died on November 14, 2105. Based on the date that the lawsuit was commenced (November 13, 2018), it would be within the statute of limitations if the date of death is considered the starting date, but it would have been filed beyond the statute of limitations if the date of the medical negligence is the start date for counting the three years to the statute of limitations. The Appellant has demonstrated, to the Court and the Defendant, that application of the Supreme Court's *Fast* decision to RCW4.20.010 "Wrongful Death – Right of Action" would render the wrongful death statute useless if the death occurred more than three years from the medical negligence. Neither the Respondent nor the Court refuted the logic of the Appellant's statutory evaluation. In this appeal, the Appellant is asking the Court to look at the two *Fast* Decisions and consider the fact that, while applying the *Fast* decision, as the Supreme Court did, to extend deadlines for cases filed under RCW 4.24.010 "Action for injury or death

of a child” makes logical sense, applying it to shorten the statute of limitations under RCW4.20.010 “Wrongful Death – Right of Action” does not. The Appellant’s position is that, either the Supreme Court did not intend for its decision to apply to RCW4.20.010 “Wrongful Death – Right of Action,” and lower courts are over-extending the intended scope of the opinion or, if it did, it was an error, a result of the law of unintended consequences, and justice requires that it be corrected.

## II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in finding that the Supreme Court’s opinion in *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016), in which the Supreme Court applied a statutory provision extending the statute of limitations for medical negligence cases to an action under RCW 4.24.010 “Action for injury or death of a child,” extended to hold that the statute of limitations for an action for wrongful death, brought under RCW4.20.010 “Wrongful Death – Right of Action” would run from the date of a medically negligent act rather than from the date of death of the decedent.
2. Considering that the Appellate Court in *Fast v. Kennewick* (Wash. App. 2015) specifically held that the medical negligence statutes did not apply to the statute of limitations for wrongful death actions under RCW4.20.010 “Wrongful Death – Right of Action” and the Supreme Court in *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016) noted that it was not asked to review and did not review the Appellate Court’s decision as it applied to RCW4.20.010 “Wrongful Death – Right of Action,” the holding from the Appellate decision as to RCW4.20.010 “Wrongful Death – Right of Action” should present unchallenged authoritative law holding that RCW 7.70 (Medical Negligence) does not affect the statute of limitations for actions brought under RCW4.20.010 “Wrongful Death – Right of Action.”
3. If the Supreme Court’s decision in *Fast* was intended to limit the statute of limitations in actions under RCW4.20.010 “Wrongful Death – Right of Action,” then it is an erroneous holding and the Superior Court erred in applying a holding that was erroneous, contrary to the interests of justice.

### III. APPELLANT'S STATEMENT OF THE ISSUES

1. Does the Supreme Court intend for the decision in *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016), in which the Supreme Court applied a statutory provision extending the statute of limitations for medical negligence cases from RCW 7.70.110 to an action under RCW 4.24.010 "Action for injury or death of a child," extend to hold that the statute of limitations for an action for wrongful death, brought under RCW4.20.010 "Wrongful Death – Right of Action" would run from the date of a medically negligent act rather than from the date of death of the decedent?
2. If the Supreme Court did not address a portion of an appellate decision's holding, but overturned it on other grounds, can the portion of the Appellate holding that was not addressed be "good law?"
3. If the Supreme Court's holding in *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016) in which the Supreme Court applied a statutory provision extending the statute of limitations for medical negligence cases to an action under RCW 4.24.010 "Action for injury or death of a child" is interpreted by the Courts to also hold that the statute of limitations for an action for wrongful death, brought under RCW4.20.010 "Wrongful Death – Right of Action" would run from the date of a medically negligent act rather than form the date of death of the decedent, does such an application completely negate effectiveness of the wrongful death statute where a decedent has died more than three years after the negligent act?

### IV. APPELLANT'S STATEMENT OF THE CASE

The factual allegations of this case are set forth in the pleadings and the parties' filings regarding summary judgment. In September 2015, imaging revealed that Stephen Daryl Soocey had a large brain tumor. (CP 19) He was evaluated at St Joseph's Hospital by doctors who recommended surgery. *Id.* One of the risks of surgery included potential nerve damage which could cause difficulty swallowing (dysphasia). *Id.*

Mr. Soocey elected to proceed with surgery. As he recovered, the medical staff noted that Mr. Soocey had the left-sided facial weakness and dysphagia (difficulty swallowing), which had been expected post-surgery. (CP 34 & 36) By the time Mr. Soocey was discharged on October 28, he was still having difficulty swallowing. (CP 41)

On October 31, Mr. Soocey returned to the hospital after having become weak and falling at home. (CP 44) His wife reported to the ER team that, in the three days since he had been discharged, Mr. Soocey had developed chest congestion and a productive cough. *Id.* On intake, the ER doctor noted that Mr. Soocey's breath sounds were decreased and that he was taking shallow breaths. *Id.* His oxygen saturation was very low. He was placed on supplemental oxygen and admitted to the hospital's PCU for management of acute respiratory failure. *Id.* In the PCU, Ms. Soocey reported that her husband had been having a lot of phlegm at home and was short of breath. (CP 54 - 10/31/15 History and Physical Examination). The doctor felt that Mr. Soocey had likely been aspirating (breathing water into his lungs), and started treatment for pneumonia, including aggressive suctioning of his secretions to keep his airways clear, and supplemental oxygen therapy. *Id.*

On November 4, Mr. Soocey became very short of breath. Ms. Soocey found him with his arms restrained, unable to speak, desperately trying to get a nurse to respond to him as he was suffocating. The nurse delayed responding, chastising Mr. Soocey for struggling against his

restraints. (CP 1) A code blue was finally called when Mr. Soocey became unresponsive. (CP 62 - 11/14/15 Discharge Summary). Although Mr. Soocey was resuscitated and rushed to the ICU, he never regained consciousness. He was brain dead, having suffocated due to the delay in clearing his airways. *Id.* Mr. Soocey was removed from life support and died on November 14, 2015. *Id.*

Mr. Soocey's wife, Allyson Soocey, is the personal representative of the estate of her late husband. She filed (and commenced) this lawsuit on November 13, 2018. (CP 232) The complaint asserted a claim under RCW4.20.010 "Wrongful Death – Right of Action" on behalf of Ms. Soocey and the other beneficiaries of Mr. Soocey. Defendant denied that the claim had been timely filed. The Complaint was then amended to include the Estate of Mr. Soocey as a party and a claim for medical negligence on his behalf under RCW 7.70, medical negligence via survivor statutes: RCW 4.20.046 "Survival of Actions" and RCW 4.20.060 "Action for personal injury survives to surviving spouse, state registered domestic partner, child, stepchildren, or heirs." (Amended Complaint) Defendant then moved for Summary Judgment, arguing that both claims had been filed outside the applicable statutes of limitations and asserting that Ms. Soocey's contact with the Defendant soon after her husband's death were not sufficient to trigger the one-year extension of the statute of limitations under the medical negligence statutes. Plaintiff argued that the three-year statute of limitations under the wrongful death

statutes (in the initial complaint) ran from the date of Mr. Soocey's death (November 14<sup>th</sup>) and that the Complaint (filed on November 13<sup>th</sup>) was therefore timely filed. Defendant asserted that a Supreme Court Decision, *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016) held that the statute of limitations for a wrongful death action brought by beneficiaries of a decedent under RCW 4.20.010 "Wrongful Death – Right of Action" must run from the negligent act which led to the demise of the decedent, rather than from the date of the death. The Court received briefs from the parties (CP 8-15, 16-67, 76-211, and 212-223), heard oral argument, and granted summary judgment, finding that the Supreme Court's *Fast v. Kennewick* decision from 2016 applied to limit the statute of limitations in a claim under RCW 4.20.010 "Wrongful Death – Right of Action" to three years from the date of the alleged negligence although the Supreme Court Opinion had been addressing an action by parents to recover for the death of a child under a different statute, RCW 4.24.010 "Action for injury or death of a child." (CP 226) Ms. Soocey timely appealed the Order. (CP 228)

## **V. STANDARD OF REVIEW**

This case was dismissed on Defendant's motion for summary judgment. In reviewing an order granting summary judgment, the Appellate Court considers all facts and reasonable inferences in the light most favorable to the nonmoving party and reviews all questions of law de novo. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692,

698, 952 P.2d 590 (1998). *Erickson v. Chase*, 156 Wash.App. 151, 231 P.3d 1261 (Wash. App., 2010)

## VI. ARGUMENT FOR REVERSAL

**A. The Supreme Court’s decision in *Fast v. Kennewick* doesn’t apply in this case because it evaluates RCW 4.24.010 “Action for injury or death of a child” but the Appellate opinion from the Fast Appellate review does, as it set forth a review of the statutory cause of action at issue, which is 4.20.010 “Wrongful Death – Right of Action.”**

**1. The Supreme Court explicitly notes that its opinion does not reach the decision from the Appellate Court as to RCW 4.20.010**

The Respondent, in its motion for summary judgment, asked the Court to dismiss Ms. Soocey’s claim based on the Supreme Court’s decision in *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016). In that case, the Court of appeals had upheld a dismissal of the plaintiff’s claims for damages arising from the death of her child by the Trial Court on the grounds that it had not been timely filed. The Appellate Court found that a provision of the medical negligence statutes, which extended the deadline to file for one year upon a written request for mediation did not apply to wrongful death claim by Ms. Fast. Ms. Fast was suing over the death of her baby, who was still-born. “the Fast’s filed a complaint against defendants ‘for injuries resulting from healthcare’ and ‘injury or death of a child’ under chapter 7.70 RCW and RCW 4.24.010, respectively.” *Id.* 237 The Supreme Court noted that “*Fast* is the only Washington appellate court decision to address the statute of limitations applicable to claims for injury or death of a child under RCW 4.24.010.”

*Id. 41, Fn. 12* In the instant case, Ms. Soocey, as personal representative of her late husband's estate, brought suit on behalf of herself and Mr. Soocey's children under a different statute, RCW 4.20.010 "Wrongful Death – Right of Action." These are very different statutes. A review of the two statutes, the Appellate Court's review of *Fast*, and the Supreme Court's opinion show that the Supreme Court did not analyze the effect of the medical malpractice statutes on RCW 4.20.010, and that a different conclusion when it comes to the Wrongful Death-Right of Action statute is supported by the unchallenged part of the opinion addressing that statute, from the Appellate Court.

As the Supreme Court explains, the Appellate Court in *Fast* found that the Medical Malpractice statutes did NOT apply because it was analyzing the case under the same statute that Ms. Soocey is suing under in the instant case, RCW 4.20.010 "Wrongful Death – Right of Action," as opposed to the one under which Ms. Fast actually sued, RCW 4.24.010. The Supreme Court discounted the Appellate Court's precedential review and logic based on the Supreme Court's determination that the Appellate Court had analyzed the case under the wrong statute. "However, the Court of Appeals relied on cases applying the general torts catchall statute of limitations to claims that were not brought under the wrongful death of a child statute but rather under a different wrongful death statute, RCW 4.20.010 (wrongful death—right of action)" *Id. at 38*

The Supreme Court identified the language of the actual statute under which *Fast* had sued, and which it was analyzing in its opinion as: “RCW 4.24.010 provides in relevant part: A mother or father, or both, who has regularly contributed to the support of his or her minor child ... may maintain or join as a party an action as plaintiff for the injury or death of the child.” *Id. at 43 Fn.3* In an explanation, perhaps, of the confusion as to what statute was being analyzed in this case, the Supreme Court noted: (Footnote 8): “This action [4.24.010 – Action for injury or death of a child] has been repeatedly characterized by Washington cases as an action for “wrongful death.” *E.g., Lockhart v. Besel* , 71 Wash.2d 112, 116, 426 P.2d 605 (1967); *Clark v. Icicle Irrig. Dist.* , 72 Wash.2d 201, 205–06, 432 P.2d 541 (1967) ; 16 David K. DeWolf and 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 at 43 Fn.8*

In highlighting the fact that the Appellate Court had given an analysis of the wrong statute, the Supreme Court also noted that neither of the parties had ever addressed it. As a result, The Court, in footnote 13, went on to express that the analysis of RCW 4.20.010 “Wrongful Death – Right of Action” by the appellate court below was never actually challenged by either party, and was therefore not considered by the Supreme Court in its opinion on the *Fast* case: “Footnote 13 - See *Fast* , 188 Wash.App. at 45–46, 50, ¶¶ 3, 19, 354 P.3d 858 (citing *Wills* , 56

Wash.App. at 757, 785 P.2d 834 (addressing RCW 4.20.010) ; *Atchison v. Great W. Malting Co.* , 161 Wash.2d 372, 377, ¶ 11, 166 P.3d 662 (2007) (same); *Beal v. City of Seattle* , 134 Wash.2d 769, 776, 954 P.2d 237 (1998) (same); *White v. Johns-Manville Corp.* , 103 Wash.2d 344, 348, 693 P.2d 687 (1985) (same); *Dodson v. Cont'l Can Co.* , 159 Wash. 589, 294 P. 265 (1930) (involving Rem. Comp. Stat. § 183); *Bader v. State* , 43 Wash.App. 223, 227, 716 P.2d 925 (1986) (involving wrongful death of an adult, but not citing statute). **Neither party has challenged the helpfulness of these cases in analyzing the death of a child under RCW 4.24.010.** (emphasis added) *Fast at 43, Footnote 13*

This means that, the Appellate Court opinion regarding the wrongful death statute, although it was not aimed at the correct statute for the *Fast* case, was right on point for an analysis of the statutory claim in the instant case. As a result, even though the *Fast* Appellate opinion (CP 174) was overturned on other grounds, its reasoning, application of precedential case law, and conclusion that wrongful death claims brought under 42.20.010 “Wrongful Death – Right of Action” were not subject to the medical malpractice statutes, remains a sound and unchallenged statement of the law. The Appellant asserts that this opinion has precedential value, at least in its findings that the statute of limitations for the claims that Ms. Soocey has brought under 4.20.010 are not affected by the medical malpractice statutes, and, in fact, represents the controlling law on the issue currently. If the Court is not willing to accept this

appellate opinion as controlling precedent on the issue, then it should take into consideration the language from the Supreme Court's *Fast* opinion along with the argument made below. The case law, analysis, and reasoning presented in the appellate opinion were not rejected by the Supreme Court as to RCW 4.20.010 Wrongful Death – Right of Action, leaving the issue of whether the deadline for limitations should run from the date of injury or date of death on those actions open for debate. The Supreme Court's *Fast* opinion is narrow and, although it refers to RCW 4.24.010 Action for injury or death of a child as a “wrongful death” statute, it is not meant to apply beyond that statute.

**2. The Supreme Court's discussion as to the absurdity of results if the logic from *Wills v. Kirkpatrick* was applied to the injury or death of a child statute is not applicable to the Wrongful Death statute, for which the application of the Supreme Court's decision in *Fast* would pose a problem beyond absurdity, and render the effectiveness of the statute an impossibility.**

The *Fast* Supreme Court includes, in its opinion, a brief discussion of *Wills v. Kirkpatrick*, 56 Wash.App. 757, 785 P.2d 834 (1990) and concludes that, if the *Wills* holding (that the statute of limitations on wrongful death should run from the date of death) were applied to the fact pattern in *Fast*, it would have an absurd result in that Ms. Fast would be able to recover for some damages arising from the death of her child under the survivor statute claim, but not damages which arose from her loss of the relationship with the child. The Supreme Court did not go so far as to consider what would happen if it applied its holding regarding the *Fast*

case to actions under the actual Wrongful Death statute. One factor that changes the analysis is the identification of the person who has standing to bring the action. Under RCW 4.24.010 “Action for injury or death of a child,” the statute clearly identifies the persons who have standing to bring the claim. It is the mother and/or father of the child where the child was dependent on the parent: “A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.” RCW 4.24.010 Under this statute, the persons who have standing to sue are identifiable at all times, starting from the moment of injury to the child, and have the capacity to bring the action at any time, from the date of injury on. The *Fast* Court concluded that applying the holding from *Wills* could result in a case where the parents could recover for injury on behalf of their dead child (which would be extended by the mediation offer statute under 7.70.110), but not for their own loss from the child’s death. The Supreme Court said this would be absurd. If absurdity is the standard for discounting 25 years of jurisprudence (“Equally if not more importantly, *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 v. Kennewick* (Wash. App. 2015), p. 12), then “impossibility” would likely be an excellent reason for

maintaining the *Wills* reasoning and holding as to the Wrongful Death Statutes.

The reason that the Supreme Court clearly did not intend for the *Fast* decision to apply to the wrongful death statute is simple. It has to do with standing, the identification of the person who is authorized to bring the claim, and damages available under the statutory cause of action. “Under Washington law, wrongful death actions are strictly governed by statute. *Atchison v. Great W. Malting Co.*, 161 Wash.2d 372, 166 P.3d 662 (2007). When the death of a person is caused by the wrongful act, neglect or default of another, the decedent's personal representative may maintain an action for damages. RCW 4.20.010. RCW 4.20.020 defines the beneficiaries of such a wrongful death action. First, it specifies that the action is for the benefit of the husband, wife, state registered domestic partner, or children of the decedent. RCW 4.20.020. Then it provides if the decedent leaves no surviving husband, wife, state registered domestic partner, or children, the “action may be maintained for the benefit of the parents, sisters, or brothers, *who may be dependent upon the deceased person for support.*” RCW 4.20.020 (emphasis added). The statute is inescapably plain.” *Triplett v. Washington State Dep't of Soc. & Health Servs.*, 166 Wash.App. 423, 268 P.3d 1027 (Wash. App., 2012)

Unlike the child injury or death statute, the Wrongful Death statute does not authorize pursuit of damages which include any injury to the decedent, only damages arising from injury to those left behind by the loss

of a loved one and provide in their lives due to his or her death. Thus, those people, the ones who have standing to bring the claim can only be identified after the death of the decedent. Under RCW the Wrongful Death statute, the measure of damages is the actual pecuniary loss suffered by the surviving beneficiaries from the death of a relative. *Jensen v. Culbert*, 134 Wash. 599, 605, 236 P. 101 (1925). If one were to predecease the decedent after the initial injury, but before the decedent's death, for example, there would be no claim.

More importantly and more obviously, the only person authorized to actually bring a wrongful death action, the only one who has standing to do so is the personal representative of the decedent's estate. "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" RCW 4.20.010 Unlike under the injury or death of a child statute, where the identity of the persons with standing to sue is evident at the time of injury to the child, the only "person" who has the right, the standing, to bring a claim under the wrongful death statute, a personal representative of the decedent's estate, does not legally exist until after the decedent's death and the creation of a probate estate. As the Fast Court recognized, it would be possible for someone to be injured by medical negligence, and then not to die for more than three years. However, at least during those three years, the persons who had the right to sue exist and could bring the claim at any

time. To apply *Fast* to the wrongful death statute would take the results of the application from the “absurd” to the impossible in the same scenario. If the decedent is injured by medical malpractice but does not die until three years and one day later, there is *NO* possibility of a personal representative existing during that time period, and therefore, not only would no claim exist (as the recovery is for the beneficiaries’ loss of the love and support of the decedent) during the statute of limitations, there would be no person in existence with standing to bring the claim within the statute of limitations. Plaintiff asserts that the Supreme Court was capable of recognizing this and never intended to create this problem. That is why the Supreme Court noted that its decision was not going to overturn the reasoning of the Appellate Court as to RCW 4.20.010.

**B. What are the differences between a statutory wrongful death claim, a child death claim, and a survivor tort claim in light of the decisions in the two *Fast* Decisions?**

**1. RCW 4.20.010 – Wrongful Death – Right of Action**

There is no chapter titled “wrongful death” in the RCW’s. Therefore there, officially are no “wrongful death statutes.” There is only one, with three parts. The chapter is “Survival of Actions.” The three sections of the chapter which apply to a wrongful death are actually titled “Wrongful death.” They include: 4.20.005 “Wrongful Death – Application of terms, 4.20.010 Wrongful death – Right of action, and 4.20.020 Wrongful death – Beneficiaries of action.

**a) Who has standing to recover damages?**

The wrongful death statute has two main parts. The second, called “Beneficiaries of the action” describes who may recover, the “wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused.” RCW 4.20.020 In the even that none of these survive the decedent, it may be extended to other members of the decedent’s family. Of course, this means that we cannot identify who can recover until after the decedent’s death.

**b) Who can bring the action?**

The only “person” who can bring an action for wrongful death under the statute is the personal representative of the decedent’s estate. “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” RCW 4.20.010 Thus, the action cannot be brought at all until after the decedent’s death, the creation of a probate estate, and the appointment of a personal representative.

**c) What damages can be recovered?**

No damages arising from any injury to the decedent can be recovered. This type of action is not about the actual injury to the patient in a medical negligence case. Under RCW 4.20.010 or .020, the wrongful death statutes, the measure of damages is the actual pecuniary loss suffered by the surviving beneficiaries from the death of a relative. *Parrish v. Jones*, 722 P.2d 878, 44 Wn.App. 449 (Wash. App., 1986); *Jensen v. Culbert*,

134 Wash. 599, 605, 236 P. 101 (1925). In addition to monetary contributions lost, "pecuniary loss" includes the loss of other services. *Pearson v. Picht*, 184 Wash. 607, 613, 52 P.2d 314 (1935). A husband's loss of "love, affection, care, companionship, society, and consortium" from the death of his wife is compensable. *Myers v. Harter*, 76 Wash.2d 772, 783, 459 P.2d 25 (1969). Thus, the damages recoverable in a wrongful death action do not exist and cannot be identified until after the decedent's death.

## **2. RCW 4.24.010 Action for injury or death of a child**

The child injury or death statute is in a under a discrete title of the RCW called "SPECIAL RIGHTS OF ACTION AND SPECIAL IMMUNITIES" It is separate from the "Survival of Actions" title which includes the wrongful death statute.

### **a) Who has standing to recover damages?**

The mother and father of the child who is injured or has died are the ones who can recover damages under this statute. "A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child." RCW 4.24.010

### **b) Who can bring the action?**

The mother or the father or both may bring the lawsuit. If one files, he or she must notify the other. “If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent” RCW 4.24.010

**c) What damages can be recovered?**

The parents may recover damages arising from the actual injury to the child, which are identifiable during the child’s life, like medical bills, and also post death damages that they have suffered arising from their own loss of the parent child relationship. “In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.” RCW 4.24.010

**3. The survival statutes: RCW 4.20.046 – Survival of Action and RCW 4.20.060 - Action for personal injury survives to surviving spouse, state registered domestic partner, child, stepchildren, or heirs.**

There are two survival statutes. Unlike the wrongful death statutes, they continue the cause of action of the decedent for the damages which the decedent could have claimed had the death not occurred. *Warner v. McCaughan*, 77 Wash.2d 178, 179, 460 P.2d 272 (1969). RCW 4.20.060

is referred to as the special survival or death by personal injury statute. *Walton v. Absher Constr. Co.*, 101 Wash.2d 238, 240, 676 P.2d 1002 (1984). RCW 4.20.046 is a general survival statute. These two survival statutes have important distinctions. Under RCW 4.20.046, the action which survives is for the benefit of the estate and there is no recovery for pain and suffering of the decedent.

**a) Who has standing to recover damages?**

Under 4.20.046, the action is brought for the same beneficiaries who are enumerated in the wrongful death statutes (surviving family members). Under RCW 4.20.060, the decedent's estate has the right to recover damages.

**b) Who can bring the action?**

The action, if it has already been begun during the life of the decedent, who then dies, transfers to the personal representative of the estate. It can also be brought by the personal representative of the estate after the decedent's death. So, either the injured party can initiate the action before his death or the personal representative can initiate it after death.

**c) What damages can be recovered?**

The RCW 4.20.046 action can recover only the monetary damages that the decedent could have recovered, but not the pain and suffering that the decedent felt before death. Under RCW 4.20.060, the personal representative brings the action for the benefit of certain beneficiaries and

damages for pain and suffering that the decedent experienced are allowed. *Walton* at 240, 676 P.2d 1002. It should be noted that, although the beneficiaries under 4.20.046 are the same people who are listed under the wrongful death statute (RCW 4.20.020), the damages recoverable are not for THEIR loss but for the pain and suffering that the decedent experienced before death as a result of the injury which caused his death.

**4. Comparison of the effect on these statutes of starting the statute of limitations at the date of the negligent act.**

To analyze the effect on each statute, we should assume that the date of the medical negligence which caused the injury occurred three years and one day prior to the death of the decedent. (*For simplicity's sake, we will not consider the extension of the deadline to four years by a letter offering mediation. If we did, then we could simply make the death four years and one day after the medical negligence with the same effect.*)

What we find is that the Supreme Court's holding from *Fast* would completely nullify the Wrongful death statute, but not the injury or death of a child and not the survival statutes.

**a) Survival statutes under the Supreme Court's *Fast* decision**

In the case of a survival action, where the decedent was alive but injured after the medical negligence and then died, he would be aware of the medical negligence which caused the injury he suffered up to his

death, and would have the right and ability to bring the lawsuit within the statute of limitations. The fact that he died three years and one day after the negligent act would not have precluded him from bringing suit during his lifetime. Damages would not be affected, as the recoverable damages in survival actions are the same damages that the decedent could have recovered himself. Survival actions simply transfer the identity of the plaintiff to the estate and specifically allow the action to continue, so there is a seamless transfer of the action from the decedent to his personal representative with no danger of the action being dismissed as a result of the death occurring three years and one day after the negligent act. The survival statutes simply allow an action survive the death of the decedent, but it is the same action the decedent could bring himself. Thus, requiring the statute of limitations to begin on the day of the medical negligence would have not hamper the effectiveness of the statute in any way.

**b) Action for Injury or death to a child under the Supreme Court's *Fast* decision**

In the case of a child who is injured by medical negligence and then dies three years and one day later, there also would be no harm to the effectiveness of the statute under the Supreme Court's *Fast* decision. The parties in interest are identified, clearly, from the moment of the medical negligence as the parents of the child who was injured by the medical negligence and who have standing to sue are the caregivers of the child (the child must have been a dependent). The child injury or death statute,

unlike the wrongful death statute, does not require that the child have died before the cause of action arises. The name of the statute clearly announces this: “Action for INJURY OR death of a child.” The parents, in our scenario in which the child is injured by medical negligence and dies three years and one day later, have notice and the ability to sue under this statute, literally from the day of the negligent act. They would also have damages to sue for from that moment on. If the action were already filed and the child died during litigation, the complaint could simply be amended by way of a relation back amendment under Rule 15 to include the damages that would not have occurred before the death occurred, for “loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.” RCW 4.24.010 One could point out that, in a case where litigation was pursued under the statute while the child was injured but alive, and the litigation was concluded in favor of the parents under the statute before the child’s death, the parents would not be able to come back and recover from the loss due to the death if the action did not accrue at time of death. However, the statute, itself, corrects for this, by allowing for damages to include “destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.” Damages for the potential of loss of the relationship in the future could certainly be argued in a case where the injury was one that would shorten a child’s life.

That kind of argument is made in any substantial injury case where the injury is expected to or could shorten the life of the individual. Like the survival statute, requiring the deadline for the statute of limitations to start on the date of the negligence that causes the injury would not preclude, or even hinder, in any way, the use of the statute by the persons it authorizes to sue or the damages that could arise from the death of the decedent.

**c) Wrongful Death under the Supreme Court's *Fast* decision**

Application of the Supreme Court's decision in *Fast* to cases brought under RCW 4.20.010 "Wrongful death – right of action" would produce a completely different result regarding all three factors. Because the personal representative of the estate of the decedent is the only person authorized to bring an action under this statute, the claim, necessarily, could never be brought during the life of the decedent. Thus, requiring the statute of limitations to run from the date of the negligent act, where that took place three years and one day before death would make it impossible for the statute to be used as intended. There would be person authorized to bring suit during the statute of limitations. The beneficiaries of the statute are, specifically, the family members who SURVIVE the decedent. The wording of the statute does not specifically state "surviving" family members: "Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused." RCW 4.20.020 However, the damages recoverable under the statute necessarily make this

a requirement. As the damages recoverable are only those losses suffered by the family members as a result of the death of the decedent, the only beneficiaries who COULD have a cause of action under the wrongful death statute would be family members who survived the decedent. Thus in the case of a person who died three years and one day after the date of the medically negligent act which killed him, not only would there be nobody authorized to bring the claim during the statute of limitations, there would be no way to identify who the beneficiaries of such a claim would be during the statute of limitations. Finally damages that can be recovered under this statute are not related to the injury to the decedent, or any loss that the decedent would have been able to recover. Under the survival statutes, recovery is for the decedent's losses for the benefit of his estate or his surviving family members. Under the injury or death of a child statute, recovery is for the cost of treatment of the child and the damage to the relationship with the child, both of which are linked to the injury of the child, the decedent in our scenario. As to wrongful death claims, the damages do not exist prior to the death of the decedent. Thus, if the statute of limitations on wrongful death runs from the time of the injury which caused the death, and the decedent dies three years and one day after the negligence, we would have nobody authorized to have brought the action within the statute of limitations, no way to identify in whose name the action would be brought, and no damages to assert in a claim.

The Supreme Court in *Fast* noted that, “This action [action for injury or death of a child] has been repeatedly characterized by Washington cases as an action for ‘wrongful death.’” In footnote 8 to the decision. *Fast* at 43 Fn.8 That does not mean, however, that just because it has been colloquially lumped in with other statutes as “wrongful death statutes” in Tort handbooks and offhandedly in opinions, that an action for injury or death of a child is the same thing as the actual statute which authorizes an action for wrongful death. There is, in fact, only one “Wrongful Death” statute, RCW 4.20.010. The Supreme Court in *Fast* was specifically applying its decision to the statute authorizing parents to sue for injury or death of a child and not RCW 4.20.010 Wrongful death – Right of Action.

**C. Recent case law applying the *Fast* decision: *Fechner v. Volyn*, 418 P.3d 120 (Wash. App., 2018)**

Respondent, in its brief to the Court, raised *Fechner v. Volyn*, 418 P.3d 120 (Wash. App., 2018) as an example of a recent application of the Supreme Court’s *Fast* decision. In the *Fechner* case, the Court was considering whether to reverse a summary judgment order which had dismissed a client’s case against her lawyer for malpractice. The client, *Fechner*, had argued that Mr. *Volyn* (an attorney) owed her a duty starting on a certain date because she had sought his advice. The attorney countered that the duty did not arise until the two had a signed agreement under which he was authorized to investigate the case. The Court looked to the Supreme Court’s *Fast* decision and determined that the deadline at

issue would have been three years from the medical negligence, applying the decision to all wrongful death actions that include medical negligence as the cause of death. Simply put, the Court in the Fechner case recognized Justice Madsen's warning that the *Fast* decision was to be narrowly construed, but then went ahead and construed it broadly anyway, with the reservation that, even the Fechner Court's reading of *Fast* was incorrect, its conclusion in this case would be. "Justice Madsen warned that *Fast*'s statute of limitation rule was based on unique statutory language and was therefore inapplicable to other types of wrongful death claims. *Id.* at 43, 384 P.3d 232. Had *Fast* not applied to wrongful death claims, as asserted by Volyn, then Justice Madsen's observations would have been off point. *Fast* would have had nothing to do with wrongful death claims and the decision would not need to be classified as an exception to the general rule regarding the statute of limitations in wrongful death cases. We do not read Justice Madsen's concerns as having been so misguided. Instead, it is apparent that *Fast* applies to a wrongful death claim if the claim is based on medical negligence. There is no separate cause of action." *Id.* at 123 In fact, as has been argued in this brief, compellingly (the undersigned hopes), *Fast* was meant to apply to one certain type of what the Court recognized have been referred to generally as "wrongful death statutes," the action for injury or death of the child, and not RCW 4.20.010 Wrongful death – right of action.

Even the *Fechner* Court seems to have had the same misgivings about whether the *Fast* Supreme Court decision really affected RCW 4.20.010 rather than just the right to action for death or injury to a child. The Appellate panel “hedged their bet” by finding that even if this was the case, if *Fast* did not apply to RCW 4.20.010 and the three year statute of limitations applied to the wrongful death statute, as is argued in this brief, there was still a genuine issue of material fact as to whether the attorney may have been representing the Plaintiff during the three years after the death of the Decedent. “Even if the law permitted Mrs. Fechner a separate wrongful death claim against Dr. Dietzman (which it does not), summary judgment would still be inapplicable. A mediation request tolls the statute of limitations only in the medical negligence context. RCW 7.70.110. It does not apply to the general torts catchall statute of limitations. Accordingly, any separate wrongful death claim that Mrs. Fechner may have had against Dr. Deitzman would have expired on October 28, 2012, three years after the date of death. Because Mr. Volyn represented Mrs. Fechner during this period, Mrs. Fechner would still have a viable claim that Volyn failed to act on during the limitations period.” *Id. at 123*

## **VII. CONCLUSION**

Thus far, there has been no challenge to Appellant’s analysis of the effect of broadening the *Fast* opinion to include a limitation on the statute of limitations and applying that a wrongful death statute that was not considered in the Court’s decision. As has been shown, hopefully, with

great clarity, in this brief, starting the statute of limitations at the date of a negligent act for wrongful death actions under RCW 4.20.010 “Wrongful Death – Right of Action” is not only non-sensical when you look at the function, goal and intended beneficiaries of the statute, but doing so operates to make the statute completely impossible to use where a death occurs more than three years from a medically negligent act.

Lawyers and Judges are officers of the Court. We have a duty to work to make sure that, at the very least, the application of statutes and the common law makes sense if we are to discharge our duty to the citizens of this State and our Country to offer some justice under the law. At some level, we must address the fact that applying the Supreme Court’s *Fast* decision to RCW 4.20.010 “Wrongful Death – Right of Action” doesn’t work. A reticence to confront this truth is understandable. At the risk of being too frank no Officer of the Court wants to be the one to say that the Supreme Court made a mistake. We would like to, and perhaps need to believe that the judiciary, at that level don’t make results-driven decisions, failing to consider all the consequences. The other alternative, of course, is for us to pay attention to what the Supreme Court says about the 2015 *Fast* Appellate decision and its admonishments to construe its decision narrowly. Simply put, if the Supreme Court intended only for the *Fast* decision to expand Plaintiffs’ access to a legal remedy for a wrong under the statute that it was focusing on in that case, and did not intend to limit Plaintiffs’ access to the Courts in a statute specifically excluded from their

consideration, then its decision in *Fast* makes sense, and our Justices were correct. The Appellant urges the Court to find that the latter alternative is the right answer here. The Appellant is asking this Court to reverse the Superior Court's Order as to Ms. Soocey's claim under RCW 4.20.010 "Wrongful Death – Right of Action" and remand this case to the Superior Court so that the parties can begin to work towards a resolution.

Respectfully submitted



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Attorney for the Appellant

**CERTIFICATE OF MAILING**

SIGNED at Port Orchard, Washington

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 25<sup>th</sup> day of September, 2019, the document to which this certificate is attached, Brief of Appellant, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Scott Matthew O'Halloran  
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And was concurrently emailed to counsel at [scott@favros.com](mailto:scott@favros.com) and [amanda@favros.com](mailto:amanda@favros.com)



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**GSJONES LAW GROUP, PS**

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