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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 Stephen Daryl Soocey,

Appellant,

v.

CHI, FRANCISCAN; ST. JOSEPH HOSPITAL,

Respondent.

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

	<u><b>Page(s)</b></u>
I. INTRODUCTION.....	1
II. ISSUES PRESENTED FOR REVIEW.....	2
III. COUNTERSTATEMENT OF THE CASE .....	2
A. Medical Background .....	2
B. Procedural History .....	5
IV. STANDARD OF REVIEW.....	7
V. SUMMARY OF THE ARGUMENT.....	8
VI. ARGUMENT .....	10
A. Under the Supreme Court’s holding in <i>Fast</i> , the medical negligence statute of limitations applies to all wrongful death actions arising from health care, including the present case .....	10
1. The plain language of the <i>Fast</i> decision demonstrates the Supreme Court’s intention for its holding to apply to all wrongful death claims arising as a result of health care.....	11
2. The Supreme Court’s reasoning in <i>Fast</i> likewise demonstrates that it applies to all wrongful death as a result of health care claims .....	14
3. Subsequent Court of Appeals decisions confirm that <i>Fast</i> applies to all wrongful death claims occurring as a result of health care.....	18
B. The Supreme Court’s decision in <i>Fast</i> , not the Court of Appeals decision that the Supreme Court reversed, applies in this case.....	19

C. There is nothing absurd or impossible about the holding of *Fast* because the discovery rule provides leeway, and Mrs. Soocey had ample time to file her lawsuit .....20

1. The Supreme Court expressly recognized the potentialthat injustice that might occur as a result of its ruling, but maintained its ruling anyway .....20

2. The discovery rule exists to mitigate against unfairly harsh results and provide additional leeway to plaintiffs.....21

3. There are no absurd, impossible, or harsh results under the facts of this case .....23

VII. CONCLUSION ..... 24

## TABLE OF AUTHORITIES

Page(s)

### Cases

<i>Alton v. Phillips Co.</i> 65 Wn.2d 199, 396 P.2d 537 (1964) .....	7
<i>Branom v. State</i> 94 Wn. App. 964, 974 P.2d 335 (1999) .....	14
<i>Bunch v. King County Dep't of Youth Servs.</i> 155 Wn.2d 165, 116 P.3d 381 (2005) .....	19
<i>Clark v. Icicle Irrig. Dist.</i> 72 Wn.2d 201, 432 P.2d 541 (1967) .....	12
<i>Davies v. Holy Family Hosp.</i> 144 Wn. App. 483, 183 P.3d 283 (2008) .....	9
<i>Fast v. Kennewick Pub. Hosp. Dist.</i> 188 Wn. App. 43, 354 P.3d 858 (2015) <i>reversed</i> , 187 Wn.2d 27 (2016).....	6
<i>Fast v. Kennewick Pub. Hosp. Dist.</i> 187 Wn.2d 27, 384 P.3d 232 (2016). .....	6, 7, 8, 9, 10, 11, 12, .....13, 14, 15, 16, 17, 19, 20
<i>Fechner v. Volyn</i> 3 Wn. App. 2d 716, 418 P.3d 120 (2018) .....	18, 19
<i>Gunnier v. Yakima Heart Ctr., Inc.</i> 134 Wn.2d 854, 953 P.2d 1162 (1998) .....	1, 8, 21, 22, 23
<i>LaMon v. Butler</i> 112 Wn.2d 193, 770 P.2d 1027 <i>cert. denied</i> , 493 U.S. 814 (1989) .....	8
<i>Lockhart v. Besel</i> 71 Wn.2d 112, 426 P.2d 605 (1967) .....	12

*Lyons v. U.S. Bank Nat'l Ass'n*  
181 Wn.2d 775, 336 P.3d 1142 (2014) .....7

*Stenberg v. Pac. Power & Light Co.*  
104 Wn.2d 710, 709 P.2d 793 (1985) .....16

*Wills v. Kirkpatrick*  
56 Wn. App. 757, 785 P.2d 834 (1990) .....16, 17

**Statutes**

RCW 4.16.080 .....16

RCW 4.16.350 .....6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23

RCW 4.24.010 .....12

RCW 7.70.010 .....13, 14

RCW 7.70.110 .....15

**Court Rules**

CR 56 .....8

**Other Authorities**

16 David K. DeWolf & Keller W. Allen, Washington Practice:  
Tort Law and Practice § 7:3 (4th ed. 2013) .....12

## I. INTRODUCTION

“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). Appellant Allyson Soocey had years to file a wrongful death lawsuit after her husband, Stephen Daryl Soocey, passed away from known risks associated with surgery to remove his brain tumor, but she did not avail herself of that ample opportunity. The trial court properly dismissed her lawsuit as untimely, and this Court should affirm.

Mrs. Soocey fails to establish that she filed suit within the applicable statute of limitations. Instead, she asks the Court to ignore the law and transform an untimely lawsuit into a timely one. The Washington Supreme Court has clearly stated that the medical negligence statute of limitations applies—without qualification—to *all* wrongful death actions that arise from health care. This lawsuit was no exception. Accordingly, Mrs. Soocey needed to bring her lawsuit within three years from the date of the allegedly negligent health care, or one year from the date of discovery, but she failed to do so.

This does not yield absurd, impossible, or unfairly harsh results, as Mrs. Soocey contends, first, because the discovery rule exists to provide plaintiffs additional leeway to file suit when discovery of their claims is

delayed, and second, because it was not absurd or impossible for Mrs. Soocey to timely bring her claims. Because just a matter of days separated the alleged negligent act from Mr. Soocey's death, Mrs. Soocey had years to file her lawsuit on time, and she was never placed in the "absurd" or "impossible" position she posits of a statute of limitations expiring before the patient died.

## **II. ISSUES PRESENTED FOR REVIEW**

1. Whether the medical negligence statute of limitations applies to this wrongful death action arising from health care, requiring it to be filed within three years from the date of the negligent act or omission, or one year from the date of discovery?
2. Whether summary judgment dismissal of Mrs. Soocey's lawsuit against CHI was proper because Mrs. Soocey failed to file the lawsuit within the applicable statute of limitations?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. Medical Background**

In September 2015, imaging revealed that Stephen Daryl Soocey had a very large tumor near his brain stem that was causing progressively disabling vertigo. CP 20-26. He was evaluated by the surgery team at St. Joseph Medical Center, who discussed at length with Mr. Soocey his limited treatment possibilities, including that surgery was essentially the only option given the large size of the tumor and the symptoms it was causing. *Id.* Mr. Soocey's two surgeons had a long, frank, and detailed discussion with him about the risks of surgery to remove the tumor, and that these risks

could be severe. *Id.* The risks included permanent nerve damage leading to a host of complications such as difficulty swallowing, as well as stroke and death, loss of all hearing in one ear, and a post-operative stay in the intensive care unit due to the extensive and risky nature of the surgery. *Id.* Despite the risks, Mr. Soocey elected to proceed. *Id.*

On the day of surgery, October 16, 2015, Mr. Soocey signed an informed consent document that again reiterated the serious risks associated with neurosurgery to remove his brain tumor, including respiratory failure, nerve injury, and stroke, all of which could be fatal. CP 28-29. The complex brain surgery took roughly nine hours. CP 31. According to plan, Mr. Soocey was sent to the critical care unit to recuperate from the operation. CP 33. As he recovered, it was noted that he had left-sided facial weakness and dysphagia (difficulty swallowing), which had been expected. CP 35-38. By the time of his discharge almost two weeks later, on October 28, Mr. Soocey informed his providers that he was eager to go home, and reiterated that he felt he was slowly improving. CP 40-42. Because he was medically stable, Mr. Soocey's providers discharged him with a plan in place for follow up. *Id.*

On October 31, however, Mr. Soocey returned to the hospital emergency room in a significantly changed condition after sustaining a controlled fall at home. CP 44-52. His wife reported that, in the three days

since he had been discharged, Mr. Soocey had developed chest congestion and a productive cough. *Id.* On intake, Mr. Soocey's breath sounds were decreased and he was taking shallow breaths. *Id.* His blood pressure was low and his heart rate was elevated. *Id.* His oxygen saturation was also very low, and he was placed on supplemental oxygen. *Id.* Mr. Soocey was admitted to the hospital's Progressive Care Unit<sup>1</sup> for further testing and management of acute respiratory failure. *Id.* In the PCU, Mr. Soocey's wife reported that Mr. Soocey had been having a lot of phlegm at home and was short of breath. CP 54-59. The doctor commenced treatment for pneumonia, including antibiotics, aggressive suctioning of Mr. Soocey's secretions, and supplemental oxygen therapy. *Id.*

Despite these efforts, several days later, on November 4, Mr. Soocey developed shortness of breath and a code blue was called, during which time he became unresponsive. CP 61-65. Although it was a difficult intubation, Mr. Soocey was nevertheless resuscitated. *Id.* He was immediately sent to the ICU, but despite treatment, failed to regain consciousness. *Id.* Per his wife's wishes based on her previous discussions with her husband, Mr. Soocey was removed from life support on November 14, 2015. *Id.* In evaluating Mr. Soocey's decompensation after the fact, his surgeon felt, as

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<sup>1</sup> A Progressive Care Unit (PCU) is a hospital unit that specializes in treating medical and surgical patients whose needs are not serious enough for the Intensive Care Unit (ICU) but too complex for the regular hospital floor.

had been discussed with Mr. Soocey prior to the procedure, that following the extensive brain surgery to remove the very large tumor, Mr. Soocey likely developed dysfunction of the lower cranial nerves that ultimately contributed to his respiratory distress and subsequent death. CP 67.

**B. Procedural History**

Mr. Soocey's wife, Allyson Soocey, as personal representative of Mr. Soocey's Estate, filed this lawsuit two years and 364 days after his death, on November 13, 2018. CP 232-237. In her complaint, she asserted claims for wrongful death as a result of medical negligence, specifically alleging that the negligent health care occurred on November 4, 2015—just ten days before Mr. Soocey passed away. CP 236. On April 3, 2019, Mrs. Soocey filed an amended complaint containing largely the same information but specifying that the complaint also included a medical negligence cause of action. CP 1-7. She again alleged that the negligent acts occurred on November 4, 2015. CP 5.

CHI Franciscan Health d/b/a St. Joseph Medical Center (CHI) asserted as a defense in answer to both the original complaint and the amended complaint that Mrs. Soocey had failed to timely bring her claims within the applicable statute of limitations. CP 238-245; CP 68-75.

On April 12, 2019, CHI filed a motion for summary judgment asserting that Mrs. Soocey had failed to timely bring her claims. CP 8-15.

CHI argued that, because the claims for wrongful death arose out of health care, the medical negligence statute of limitations, RCW 4.16.350, applied according to the Washington Supreme Court's decision in *Fast v. Kennewick*, 187 Wn.2d 27, 384 P.3d 232 (2016), 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 complied with this statute of limitations, her lawsuit was untimely and warranted dismissal. *Id.*

In response to CHI's motion, Mrs. Soocey argued that she had filed her lawsuit on time because the overturned Court of Appeals' decision in *Fast*,<sup>2</sup> not the Supreme Court decision, controlled. CP 76-98. Mrs. Soocey asserted that the Supreme Court decision was meant to 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' case, she contended that she had three years from the date of death, rather than three years from the date of the 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.*

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

In reply, CHI emphasized that the Supreme Court decision in *Fast* was the controlling law. CHI pointed out that there was no limiting language contained anywhere in the Supreme 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.

After hearing oral argument and considering the briefing, the trial court granted CHI's motion on May 24, 2019, and dismissed the lawsuit with prejudice, finding that the Supreme Court's decision in *Fast* governed and that Mrs. Soocey's claims were barred by the medical negligence statute of limitations because she did not bring them within three years from the date of negligence, or one year from the date of discovery. CP 225-227.

Mrs. Soocey has appealed from the trial court's summary judgment dismissal of her claims against CHI. CP 228.

#### **IV. STANDARD OF REVIEW**

This Court reviews an order granting summary judgment de novo. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). In reviewing a trial court's grant of summary judgment, an appellate court may consider any argument raised and argued at the trial court, even if the

trial court did not adopt the argument in reaching its conclusion. *See Alton v. Phillips Co.*, 65 Wn.2d 199, 202, 396 P.2d 537 (1964). An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989); *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 858, 953 P.2d 1162 (1998) (citing CR 56(c)).

## V. SUMMARY OF THE ARGUMENT

In Washington, all actions that arise from health care—whether for injury or death—are governed by statute. RCW 4.16.350, the statute of limitations for any lawsuit arising from health care, requires filing the complaint within three years of the alleged negligent act or omission, or within one year of when the negligence is or should have been discovered, whichever is later. Actions for wrongful death arising from health care are no exception: as the Washington Supreme Court has held, in *all cases of wrongful death resulting from negligent health care*, the medical negligence statute of limitations, RCW 4.16.350, governs. *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 29, 384 P.3d 232 (2016). The

statute of limitations for such an action begins running on the date of the alleged negligence or the date of discovery, not the date of death.

Because Mrs. Soocey is claiming injuries sustained as a result of health care, the medical negligence statute of limitations applies to her complaint for wrongful death and medical malpractice. Under the plain language of RCW 4.16.350, the statute of limitations began running on the date of alleged negligence, not on the date of Mr. Soocey's death ten days later. In her complaint, Mrs. Soocey asserts that CHI's alleged negligence occurred on November 4, 2015. Therefore, under RCW 4.16.350, she had three years from that date to bring this lawsuit, yet she did not file her original complaint until November 13, 2018, almost two weeks after the statute of limitations expired.

Contrary to Mrs. Soocey's claims, this does not produce an absurd, impossible, or unfairly harsh result. Mrs. Soocey's speculation that, under the Supreme Court's decision in *Fast*, a person's claim might theoretically expire before it was possible to bring it if the individual's death did not occur until more than three years after the alleged negligence is unfounded, as it ignores the applicability of the one-year discovery rule in such a situation. Moreover, that is not what occurred in this case. Mrs. Soocey had years after Mr. Soocey's death to file suit but did not avail herself of the ample time RCW 4.16.350 provided her to bring her case against CHI.

The trial court's decision dismissing Mrs. Soocey's lawsuit as untimely was correct and should be affirmed.

## VI. ARGUMENT

**A. Under the Supreme Court's holding in *Fast*, the medical negligence statute of limitations applies to all wrongful death actions arising from health care, including the present case.**

The statute of limitations for actions arising from health care is set forth in a specific statute, RCW 4.16.350. That statute provides in pertinent part:

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976, against:

(1) A person licensed by this state to provide health care or related services ...;

\* \* \*

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital ..., based upon alleged professional negligence 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 ....

As the Washington Supreme Court has held in *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 29, 384 P.3d 232 (2016), this statute applies regardless of whether the claim is for injury or death. “[I]n cases of *wrongful death resulting from negligent health care*, the MNSOL

[medical negligence statute of limitations] (RCW 4.16.350(3)) applies.” *Id.* (emphasis added).

Contrary to Mrs. Soocey’s arguments, the Supreme Court’s holding was intended to—and does—apply to all wrongful death actions arising from health care. First, the plain language of the Supreme Court’s decision in *Fast* is broad and contains no limitation; second, the Supreme Court’s rationale in *Fast* underscores RCW 4.16.350’s application to all wrongful death actions resulting from alleged negligent health care; and third, subsequent appellate courts interpreting the Supreme Court’s decision in *Fast* have continued to apply it broadly.

***1. The plain language of the Fast decision demonstrates the Supreme Court’s intention for its holding to apply to all wrongful death claims arising as a result of health care.***

As Mrs. Soocey emphasizes repeatedly, *Fast* concerned a medical negligence lawsuit involving the wrongful death of an unborn child, *e.g.* *App. Br.* at 13. *Fast*, 187 Wn.2d at 33. The Supreme Court’s holding, however, was much broader than she would have this Court construe it. The plain language of *Fast* is clear that it applies to ***all*** wrongful death actions arising from health care, and contains no language limiting its reach to child or any other sub-category of wrongful death claims. The following sentences are ***repeated three times*** at the beginning, middle, and end of the *Fast* Supreme Court decision:

- 1) “We hold that in cases of wrongful death resulting from negligent health care, the MNSOL (RCW 4.16.350(3)) applies.” *Id.* at 29.
- 2) “We hold that in cases of wrongful death resulting from negligent health care, the MNSOL (RCW 4.16.350(3)) applies.” *Id.* at 33-34.
- 3) “We hold that in cases of wrongful death resulting from negligent health care, the MNSOL (RCW 4.16.350(3)) applies.” *Id.* at 40.

In not one of these repeated statements of its holding does the Supreme Court add any qualifying or limiting language to suggest that its holding is applicable only to a small sub-category of child wrongful death cases, as the appellant argues, *e.g. App. Br.* at 13. If that is what the Supreme Court meant, that is what it would have said.

Although Mrs. Soocey devotes a significant portion of her brief to argue about differences among the wrongful death statutes, *App. Br.* at 15-27, whether the Supreme Court believed that the parties in *Fast* focused on the incorrect wrongful death statute is immaterial to the Supreme Court’s holding. Ultimately, it did not matter which wrongful death statute was at issue in *Fast* because the Supreme Court lumped them all 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.

Although Mrs. Soocey asserts that Justice Madsen in her concurrence says the Supreme Court decision is limited in scope, *App. Br.* at 28, the only limitation that Justice Madsen discusses is that the holding applies only to *health care-related* wrongful death actions:

I acknowledge that this decision somewhat alters our wrongful death jurisprudence, but in a very limited way. .... [I]n the health care context the legislature has carved out an exception making the MNSOL applicable. Outside of the health care context, however, the general torts catchall three year SOL still applies.

*Fast*, 187 Wn.2d at 42-43 (Madsen, J., concurring). Instead of demonstrating that she would limit the majority opinion to child wrongful death cases, as Mrs. Soocey contends, the plain language of Justice Madsen’s concurrence re-emphasizes that the medical negligence statute of limitations applies to Mrs. Soocey’s complaint for wrongful death as a result of health care:

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.

*Id.* at 41-42.

**2. *The Supreme Court’s reasoning in Fast likewise demonstrates that it applies to all wrongful death as a result of health care claims.***

The Supreme Court in *Fast* opened its legal discussion by articulating the goal to implement legislative intent when interpreting statutes. *Fast*, 187 Wn.2d at 32-33. The Supreme Court then analyzed chapter RCW 7.70, Washington’s medical malpractice statute, together with RCW 4.16.350, the medical negligence statute of limitations. Reading these statutes together, the Supreme Court explained that the legislature intended for Washington’s medical malpractice statute to “govern all actions for damages resulting from health care.” *Id.* at 34. “[W]henver an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70.” *Id.* (citing *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999)).

The Supreme Court explained that Washington’s legislative governance of all actions 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. With this legislative intent in mind, the Supreme Court looked carefully at the language in the statutes:

RCW 4.16.350 [the medical negligence statute of limitations] and RCW 7.70.110 neither expressly include nor exclude wrongful death actions. The broad language of RCW 4.16.350 and RCW 7.70.110 is illuminated by other provisions of chapter 7.70 RCW that specifically mention “death” or “wrongful death” resulting from medical negligence.

\* \* \*

The repeated references to wrongful death claims in chapter 7.70 RCW strongly suggest that the statute of limitations for medical malpractice should apply to *all cases* alleging medical negligence.

The references to wrongful death in chapter 7.70 RCW and the legislative intent of mandatory mediation in medical negligence cases weigh heavily in favor of concluding that RCW 4.16.350(3) applies to wrongful death suits caused by medical negligence.

*Fast*, 187 Wn.2d at 34-37 (internal quotations omitted) (emphasis added).

The Supreme Court concluded that, because chapter 7.70 RCW applies to all actions arising from health care regardless of whether the claimed injury

is death, so too does RCW 4.16.350, the medical negligence statute of limitations.

As further rationale, the Supreme Court analyzed the general torts “catch all” statute of limitations that applies to other, non-health care related wrongful death cases and begins to run on the date of death. The Supreme Court concluded that the general torts statute of limitations does not apply to wrongful death actions arising from health care because those cases are already governed by a specific statute, *i.e.*, the medical negligence statute of limitations:

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.

In summary, an examination of the Supreme Court’s rationale in *Fast* makes clear that its decision applies to all wrongful death actions arising from health care. The Supreme Court’s rationale makes no sense if, as Mrs. Soocey claims, its holding in *Fast* does not apply equally to all wrongful death actions arising from health care.

Finally, although Mrs. Soocey contends that the Supreme Court’s discussion of *Wills v. Kirkpatrick*, 56 Wn. App. 757, 785 P.2d 834 (1990), indicates an intention to limit the application of its holding in *Fast* to child wrongful death actions, *App. Br.*, 13-15, that is not the case. Mrs. Soocey appears to claim that, because the Court of Appeals in *Wills* said 25 years ago that the statute of limitations in adult wrongful death actions stemming from health care started to run on the date of death, that should be the state of the law today. *See id.* The Supreme Court in *Fast*, however, discussed *Wills* to highlight that the Court of Appeals’ statutory interpretation was incomplete and incorrect, and that application of any rule can lead to “absurd” results in unique circumstances. *Fast*, 187 Wn.2d at 39-40. The Supreme Court thus concluded that *Wills* does not have any stare decisis effect and is no longer good law due to the Supreme Court’s holding in *Fast*. *Id.*; *see also id.* at 42 (Madsen, J. Concurring) (“I acknowledge that this decision somewhat alters our wrongful death jurisprudence...”).

In short, despite Mrs. Soocey’s arguments to muddy it<sup>3</sup>, the Supreme Court’s holding, as emphasized by the Court’s rationale, is clear and

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<sup>3</sup> Although CHI believes that Mrs. Soocey’s lengthy arguments, *e.g.* *App. Br.* at 15-27, distinguishing the child wrongful death statute from other wrongful death actions are irrelevant given the clear breadth of the *Fast* decision, CHI briefly responds to them. While those with standing to bring a wrongful death action on behalf of a child are identifiable before the child’s death as contrasted with those who have standing when an adult dies, a wrongful death action on behalf of a child—just like any other wrongful death action—cannot actually be brought until the death has occurred. Mrs. Soocey’s attempts to distinguish the two types of wrongful death actions are based on semantics devoid of

controlling: in wrongful death cases resulting from health care, *including this one*, the medical negligence statute of limitations applies to begin running on the date of the alleged negligent act or omission.

**3. Subsequent Court of Appeals decisions confirm that *Fast* applies to all wrongful death claims occurring as a result of health care.**

Given the clarity of the Supreme Court’s decision in *Fast*, it is unsurprising that the most recent appellate case interpreting *Fast*, the legal malpractice case of *Fechner v. Volyn*, 3 Wn. App. 2d 716, 720, 418 P.3d 120 (2018), reached the same conclusion. *Fechner*, just like this case, concerned the alleged wrongful death of the plaintiff’s husband, not the death of a child. *Id.* at 718-19. In that case, as here, the plaintiff’s attorney mistakenly failed to file a wrongful death action arising from health care within three years from the date of the alleged negligence. *Id.* at 719. This resulted in dismissal of the complaint as untimely. *Id.* at 718.

Reiterating that the cause of action against the health care provider “accrued on the last date of alleged negligence,” which was five months before the patient died, the *Fechner* court upheld dismissal of the lawsuit as untimely filed. *Id.* The *Fechner* court noted the potential that the statute of limitations could “sometimes work an injustice,” noting that “[b]ecause the

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substance. More, nothing in the Supreme Court’s decision in *Fast* suggests that any issues of standing or of differences in the wrongful death statutes would or should alter the holding of *Fast*.

three-year MNSOL is triggered by the act of negligence, not the date of death, the time for filing a claim could expire even before death.” *Id.* at 720. Even observing this potential, the *Fechner* court nevertheless agreed that the cause of action against the healthcare provider “accrued on the last date of alleged negligence,” which was five months *before* the patient died, and upheld dismissal of the lawsuit as untimely filed. *Id.*

Although Mrs. Soocey in her brief acknowledges *Fechner*, but apparently dismisses it, *App. Br.* at 27-29, she fails to cite any authority suggesting that *Fechner* does not govern here. *See id.* *Fechner* clearly applies to this analogous case, further emphasizing what *Fast* already established: that this lawsuit was untimely. The statute of limitations ran on November 4, 2018, three years after the date of the alleged negligent health care, but Mrs. Soocey did not file her lawsuit by that deadline.

**B. The Supreme Court’s decision in *Fast*, not the Court of Appeals’ decision that the Supreme Court reversed, applies in this case.**

Mrs. Soocey asserts that this Court should ignore the Supreme Court’s decision in *Fast*, and instead adopt the Court of Appeals’ decision that the Supreme Court reversed, *e.g.*, *App. Br.* at 12. Her assertion is incorrect. The Court of Appeals’ decision is not good law—the Supreme Court specifically overturned the entirety of the Court of Appeals’ decision: “The judgment of the Court of Appeals is reversed.” *Fast*, 187 Wn.2d at

40. The Supreme Court is the final reviewing court, and as it has noted, a “Court of Appeals decision has no stare decisis effect on this court.” *Id.* (referencing *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 181, 116 P.3d 381 (2005)). The Supreme Court decision is controlling law, not the overturned court of appeals decision.

**C. There is nothing absurd or impossible about the holding of *Fast* because the discovery rule provides leeway, and Mrs. Soocey had ample time to file her lawsuit.**

Mrs. Soocey argues that the Supreme Court did not intend for the medical negligence statute of limitations to apply to all wrongful death actions because the statutory period could close before the individual’s death, thereby precluding a wrongful death suit altogether. She claims that this can lead to “absurd” and “impossible” results, and therefore the Supreme Court could not have intended that to be the law. There are at least three flaws in her argument.

***1. The Supreme Court expressly recognized the potential that injustice might occur as a result of its ruling, but maintained its ruling anyway.***

First, Mrs. Soocey’s argument is based upon an incorrect assumption. The Supreme Court in *Fast* explicitly recognized that because the three-year medical negligence statute of limitations is triggered by the act of negligence, not the date of death, the time for filing a claim could expire even before death, which might work an injustice on plaintiffs. *Fast*,

187 Wn.2d at 39. Despite openly acknowledging this potential issue, the Court nevertheless maintained its holding that a medical negligence wrongful death action accrues on the date of the alleged negligence. *Id.*

**2. *The discovery rule exists to mitigate against unfairly harsh results and provide additional leeway to plaintiffs.***

Second, the Supreme Court has already evaluated an argument similar to Mrs. Soocey's and concluded that the discovery rule prevents unfairly harsh or absurd results by allowing plaintiffs extra leeway to file their claims. In *Gunnier v. Yakima Heart Ctr., Inc.*, the Supreme Court considered, found unpersuasive, and rejected the argument that the statute of limitations could not begin running until the injury occurred because, otherwise, absurd and harsh results would follow. 134 Wn.2d 854, 864, 953 P.2d 1162 (1998).

*Gunnier* involved the defendant cardiologist's alleged failure to diagnose a heart condition in 1983, but that failure did not result in any injury to the plaintiff until eight years later, in 1991, when she developed an infection as a result of the heart condition. *Gunnier*, 134 Wn.2d at 856-57. She did not realize until that time that her heart condition had been diagnosable in 1983, and did not bring her lawsuit until 1993, ten years after the alleged negligence but only two years after the injury. *Id.* Defendant successfully obtained dismissal on statute of limitations grounds because

the plaintiff filed suit more than three years after the negligent act (in 1986), and more than one year after discovery (in 1992). *Id.* at 858.

The plaintiff in *Gunnier* argued that the statute of limitations logically could not begin running until the date of her injury because there was no cause of action to bring until then and, otherwise, “absurd results occur, *i.e.*, the barring of a cause of action which has never existed.” *Gunnier*, 134 Wn.2d at 859; 863. On review, the Supreme Court disagreed, holding as follows:

The three-year limitations period in RCW 4.16.350(3) begins to run from the date of the act or omission alleged to have caused injury. That three-year period may lapse before injury occurs. This conclusion is neither absurd nor harsh, as a plaintiff still has the alternative limitations period of the one-year discovery rule in which to file suit.

*Id.* The Supreme Court determined that the plaintiff’s argument failed because it did not take into account the one-year discovery rule: “[t]he three year period cannot, then, act to bar a cause of action on the ground that an injury does not occur within the three years, because the plaintiff still has the one-year discovery period in which to file suit.” *Id.*

Here, Mrs. Soocey’s argument fails for all of the reasons articulated by the Supreme Court in *Gunnier*. The existence of the one-year discovery rule effectively unravels her argument about the absurdity and impossibility of requiring a wrongful death action arising from health care to be filed

within three years from the date of the negligence. If Mrs. Soocey had not discovered the claims against CHI until the injury event of her husband's death, then the law would still have provided her with an extra year beyond his death to file the lawsuit under the discovery rule provision of RCW 4.16.350. As the Supreme Court noted, "the one-year discovery period is not an unreasonably short period of time in which to file suit." *Id.* at 863.

**3. *There are no absurd, impossible, or harsh results under the facts of this case.***

Third, and finally, although Mrs. Soocey argues at length about the supposed absurdity and impossibility of taking the Supreme Court's decision in *Fast* at face value, looking at the facts of her case, Mrs. Soocey's situation was not absurd or impossible. To the contrary, Mrs. Soocey had ample time to file her the complaint for wrongful death of her husband, but simply failed to take advantage of the years that she had available. According to the complaint, the alleged negligence occurred on November 4, 2015. Mr. Soocey died on November 14, 2015. A matter of just ten days separated the alleged negligence from the date of death. Her ability to file her wrongful death complaint did not expire before her husband died; Mrs. Soocey still had two years and 355 days after her husband's death to file her complaint, but failed to do so. 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 beyond that date to file the lawsuit under the discovery rule.

## VII. CONCLUSION

Mrs. Soocey did not avail herself of the ample time that the law provided to file her case against CHI. Her lawsuit was untimely. The trial court's decision granting summary judgment dismissal on statute of limitations grounds was correct, and this Court should affirm.

RESPECTFULLY SUBMITTED this 28th day of October, 2019.

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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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**FAVROS LAW**

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