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No.35291-9
WASHINGTON STATE COURT OF APPEALS
DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NANCY FECHNER, Appellant

v.

SCOTT VOLYN., Respondent

APPELLANT'S BRIEF

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Assignment of Error No. 1: The trial court erred in granting the Defendant's Motion for Summary Judgment on the statute of limitations issue.

Issue Pertaining to Assignment of Error No. 1: Did the trial court err in granting summary judgment on the issue of the defendant Volyn's commission of legal malpractice by missing the statute of limitations under the Fast case? (The Court of Appeals reviews conclusions of law de novo.) Olympic Healthcare Serv., 175 Wn. App. 174, 181, 304 P. 3d 491 (2013).)

I. STATEMENT OF THE CASE

A. Procedural History

Plaintiff Nancy Fechner, individually and as Personal Representative for the Estate of Dennis Fechner (deceased) filed this Complaint on October 27, 2015, alleging damages for attorney malpractice for attorney Volyn's failure to file a medical malpractice case within the statute of limitations for medical negligence. **CP 3.** Defendant Scott Volyn filed an Amended Motion for Summary Judgment on February 10, 2017. **CP 218-241.** Judge Culp, visiting judge from Okanogan County, granted the motion for summary judgment related to

the statute of limitations. **CP 560.** Plaintiff filed a Motion for Reconsideration on March 17, 2017 (**CP 563**) which was and denied on April 12, 2017. **CP 572-3.** Plaintiff timely filed a **Notice of Appeal** on May 9, 2017. **CP 574.**

B. Statement of Facts

Nancy Fechner was married to Dennis Fechner, who died on October 28, 2009. **CP 424.** During an office visit with Dr. Dietzman before Dennis Fechner's death, which Nancy Fechner attended, Dr. Dietzman discussed the potential use of Enbrel for Dennis for psoriasis. Nancy Fechner asked Dr. Dietzman about the side effects of Enbrel and whether it would affect Dennis's diabetes regimen or his heart medications and Dr. Dietzman indicated that Enbrel shouldn't interfere with those medications. **CP 425.**

Nancy Fechner told Dr. Dietzman, "Please call Coleman and discuss it before you do anything." **CP 425.** Nancy Fechner explained to Dr. Dietzman that Dr. Coleman had mentioned that the doctors should not change Dennis's meds, add or take away any, without talking to him first because Dennis was getting prepped for heart surgery. **CP 425.** Dr. Dietzman agreed that he would call Dr. Coleman. Dr. Dietzman assured Nancy and Dennis Fechner that he would take care of it. **CP 425.** Three

different times after that Nancy Fechner confirmed with Dr. Coleman that Dr. Dietzman had not called him or left a message for Dr. Coleman to call him back. **CP 425.**

In discussing the Enbrel issue with Dr. Coleman on July 7, 2009, prior to Dennis's surgery on July 8, 2009, it was clear that Dr. Dietzman had never called Dr. Coleman to get permission for Dennis to be prescribed Enbrel. Dr. Coleman and his nurse were upset that Dennis was still taking Enbrel 7 to 10 days before the surgery. **CP 425.**

After Dennis was prescribed Enbrel by Dr. Dietzman, Dennis Fechner received an Enbrel kit from the makers of Enbrel, Immunex Corporation. That kit had two pamphlets: 1) Enbrel for Subcutaneous Injection; and 2) PATIENT'S INSTRUCTIONS FOR USE ENBREL. **CP 425-426.**

These documents provided the following warnings of risks of serious infections, interactions when Enbrel is taken with methotrexate, or Nitroglycerin. The warnings also discussed that Enbrel could lower the ability of the immune system to fight infections, which could cause death. **CP 426.** The warnings also indicated that a patient should tell his doctor if he had heart failure, diabetes, or had any open sores. **CP 426-427.**

The warnings also indicated that a patient should notify his doctor if he was scheduled for heart surgery. **CP 427.** The warnings indicated

that a patient should notify his doctor if the patient developed any symptoms such as persistent fever, bruising, bleeding, or paleness while taking ENBREL. **CP 427.**

That document also lists on page 2 the possible side effects of Enbrel including blood problems (some fatal); new or worsening heart failure; new or worsening psoriasis;....

Dennis Fechner also received information from Save -On Pharmacy on May 11, 2009, warning of the same contraindications and side effects. **CP 427.**

The Enbrel prescription was last prescribed by Dr. Dietzman on May 5, 2009 under Rx#342188, and the instructions stated “inject 50 mg subcutaneously twice a week for three months.” **CP 428.** Although Dr. Yamauchi stated on page 5 of his declaration that the Pre-Op Anesthesia Summary note that Mr. Fechner had last taken Enbrel on June 8, 2009, Nancy Fechner stated that she did not know where Dr. Yamauchi got that information, and that it is incorrect. **CP 428.**

Dr. Dietzman documented in his office visit note on May 15, 2009 that he “instructed the patient to discontinue Enbrel, in response to the patient’s complaints of new onset abdominal pain.” Dr. Yamauchi said in his declaration that there “are inconsistent references in the medical records I reviewed as to whether Mr. Fechner immediately discontinued as

recommended by Dr. Dietzman in May 2009, but it is clear that the cardiothoracic surgeon Dr. Coleman was aware of the patient's prior Enbrel use, and it is clear that by the first week of June, from the July 8, 2009 Pre-Op Anesthesia Summary, the patient had stopped taking it." CP 428.

However, according to Nancy Fechner, Dr. Dietzman was not the one that told Dennis to stop taking Enbrel, it was Dr. Coleman. Dennis Fechner filled out the "NORTHWEST HEART AND LUNG SURGICAL ASSOCIATES, PATIENT HISTORY FORM as follows: "There are 3 meds that Dr. Coleman Requested I Stop till after my Surgery—aspirin/ Metformin/Enbrel." See Appendix F. Dennis did not discontinue the Enbrel until *Dr. Coleman* told Dennis to stop it approximately 7-10 days before the surgery. Dr. Dietzman never told him to stop Enbrel. CP 428. The last time Dr. Dietzman prescribed Enbrel was on May 5, 2009, under RX#342188, with instructions that indicated "inject 50 mg subcutaneously twice a week for **three months.**" CP 428 (Emphasis added) and the copy of Dr. Dietzman's prescription CP 483.

Nancy Fechner also noted that on May 18, 2009, Dr. Keyser discussed Enbrel with Dennis. Nancy Fechner did not remember if she was present for that visit. CP 429. According to Dr. Keyser, Dennis was on Enbrel, and that she was "Defering [sic] to surg and med team timing of whether to go off in periop surgery. Some concern that the med may

have cause [sic] his elly [sic] pain. P. did stop this about a week ago.” On the second page of that note under **Assessment/Plan** it says **Abdominal Pain LLQ, (789.04) Chronic. Improved, may have been Enbrel related- advise take one more week off, then re-challenge, if pain recurs, will not be able to use that. If no pain, we just have to address periop dosing.” CP 429.**

Dennis Fechner did not discuss this issue with Nancy Fechner, and so she did not know if he took one or two weeks off Enbrel and then started again. All Nancy Fechner knew was that Dennis quit taking Enbrel after she called Dr. Coleman’s office and asked if he should also discontinue Enbrel before the surgery, and her recollection is that it was about 7 to 10 days before the surgery. **CP 428.** Nancy Fechner knew this because Nancy Fechner would take his injections to him while he was sitting in his chair in the living room. After he took his injection she would put the shot in the special container to dispose of “bio-hazard medical waste container” made by the Kendall Co. She still has the container. **CP 429.**

The day after Dennis died, October 29, 2009, Nancy Fechner went in and acquired the records that Dennis had sent Social Security. By that time she was quite sure that Enbrel caused her husband’s death, and that based on her discussions with Dr. Coleman, Dr. Dietzman should have

consulted Dr. Coleman about whether Dennis should have been on Enbrel so close to his heart operation. **CP 429.**

Nancy Fechner said that to her best recollection, she took the medical malpractice case to Volyn on or about October 2011. In deposition, Nancy Fechner stated, when she was asked about Scott Volyn withdrawing from the case: “Why couldn’t he have given me more of a notice? I mean yeah, lawyers are busy, they have trials back to back, that happens, *but why would he sit on my case for a year and a half and then all of a sudden say he can’t take it?*” (Emphasis added.) **CP 430; See** pg. 199, lines 12-23 of her deposition dated 6/8/2016. **CP 493.**

Olin Ensley was a friend of Dennis Fechner for 20 years. **CP 506.** CP Mr. Ensley also verified that he was with Nancy and Dennis Fechner at the hospital and that Dr. Coleman was angry because Dennis Fechner had not been off the Enbrel long enough, but indicated that it was imperative that Dennis Fechner have the operation because due to his heart condition immediate surgery was necessary to save his life. **CP 508.** Dr. Coleman indicated during this conversation that Dr. Dietzman should have taken Dennis Fechner off of the Enbrel in enough time before the heart surgery. **CP 508.**

Olin Ensley always had dinner with Nancy Fechner every year on the anniversary of Dennis Fechner’s death. In October 2011, Olin Ensley

was with Nancy on anniversary of Dennis's death. He indicated that Nancy Fechner was discussing that she had a new lawyer and how he only had a year to start her lawsuit. **CP 509.**

On December 25, 2011, Nancy Fechner went to Olin Ensley's home for Christmas dinner, during which she discussed the Christmas decorations at Mr. Volyn's office and the goodies that they had. **CP 509.**

Volyn signed his **Notice of Intent to Withdraw** on 4/15/13. **CP 495.**

II. ARGUMENT

A. There are Genuine Issues of Material Fact related to when Scott Volyn began his representation of Nancy Fechner, so the Court must View the Facts in the Light Most Favorable to the Nonmoving Party, Nancy Fechner.

In reviewing a decision on a motion for summary judgment, the court must review evidence and all reasonable inferences in the light most favorable to the non-moving party. Lipscomb v. Farmers Ins. Co. of Wash., 142 Wash. App. 20, 27, 174 P 3d 1182 (Div. I (2007)).

Viewing the facts in the light most favorable to Nancy Fechner, Scott Volyn began his representation of Nancy Fechner in *October 2011*. Although the Defendant Volyn points to written documents in August and October 2012 as the beginning dates for his representation, (see Defendants exhibits number 20 and 32 submitted with Volyn's Amended Motion For Summary Judgment and for CR 11 Sanctions,) the beginning of Mr. Volyn's representation of Nancy Fechner in this case occurred in 2011, not 2012.

Nancy Fechner indicates in her deposition that when Scott Volyn told her that he was going to withdraw in 2013, Nancy was upset and she was thinking, **"Why couldn't he have given me more of a notice? I mean yeah, lawyers are busy, they have trials back to back, that happens, but why would he sit on my case for a year and a half and then all of a sudden say he can't take it?"** See Appendix H to Fechner Declaration, CP 430 and CP 493. (Emphasis added.)

Ensley describes that Nancy Fechner had Christmas dinner with him in **December 2011**, and Nancy Fechner was talking about that Volyn was representing her against Dr. Dietzman. She was even describing the Christmas decorations that Scott Volyn had at his office and goodies they had.

Scott Volyn officially withdrew on **April 15, 2013**. If he had sat on the case approximately a year and a half before that, that would take his initial taking of the case back to *October, 2011*. By the time he withdrew on April 15, 2013, the medical malpractice statute of limitations had already passed and he had not filed the case *or tolled the statute in a timely fashion*.

B. The Court erred in Granting Summary Judgment on the Plaintiff's Legal Malpractice Claim, where the trial court Misinterpreted the Fast Case.

The court in Fast v. Kennewick Hospital, 187 Wn. 2d 27, 32, 384 P. 3d 242 (2016), holds, in a nutshell “that in cases of wrongful death resulting from negligent healthcare, the **MNSOL (RCW 4.16.350(3)) applies.**” Fast, 187 Wn. 2d at 32. (Emphasis added.)

The court in Fast also held that RCW 7.70.110 provides for the tolling of a *medical malpractice claim* for one year by a good faith request for mediation. Fast, 187 Wn. 2d at 31, 36-37. The *MNSOL* can be tolled as follows: “The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of healthcare prior to filing a cause of action under this chapter shall toll the statute of

limitations provided in RCW 4.16.350 for one year.” RCW 7.70.110.

(Emphasis added.)

The court in Fast and further held that 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.” (Emphasis added.) Fast, 187 Wn. 2d at 37.

In Fast, the court noted that under the facts of that case the “death of the plaintiff’s unborn child and the last act/omission of healthcare were virtually simultaneous.” Fast, 187 Wn. 2d at 39. In Fast, the last date of medical negligence was on 8/31/2011, the same day the baby was born stillborn. Fast, 187 Wn. 2d at 30-31.

As indicated above, the last act/omission of healthcare in Fast was on 8/31/ 2008. Fast, 187 Wn. 2d at 32, 39. So three years from 8/31/ 2008 would have been 8/31/2011.

However, a few days *before* the expiration of the statute of limitations under the medical negligence statute of limitations, RCW 4.16.350 (3), the Fasts filed a mediation request. Thus, the Fasts effectively tolled the MNSOL for one year. Thus, there is nothing in the Fast case which would allow the statute of limitations to be extended by tolling the statute of limitations *after* the MNSOL has expired.

In the Fast case, the plaintiffs requested mediation *before* 8/31/2011, (by filing it on 8/26/2011). The Fasts filed their complaint *before* the last day to file under the MNSOL plus the one year for mediation tolling, which would have been 8/31/2012, by filing it on 7/18/2012. Fast, 187 Wn.2d at 32.

However, in this case, the court erred in granting summary judgment to the Volyn Law Firm because Scott Volyn *did not* effectively toll the MNSOL statute of limitations. The court must analyze the dates based on the facts of *this* case.

First, the MNSOL, RCW 4.16.350(3), provides that the complaint must be filed “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 representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after such act or omission....” (Emphasis added.)

An untimely mediation request has no tolling effect on RCW 4.16.350’s limitations. Cortez-Kloehn v. Morrison, 162 Wn. App 166, 171-72, 252 P. 3d 909 (2011). The court explained as follows:

[RCW 4.16.350’s] language...clearly states the good faith request “shall toll” the period of limitations for one year. In effect, the tolling caused by a timely request

for mediation will create a four-year period within which to file suit, but the statute does not create a four-year statute of limitations. The three year period can be extended by this provision, but it will not revive a period that has already expired because there would be nothing to toll.

(Emphasis added.)

In this case, the applicable dates would be as follows:

Three years from the last act of negligence (prescribing Enbrel) would have been **May 5, 2012**, as that was three years from the *last day* Dr. Dietzman prescribed Enbrel for Dennis Fechner.

One year from the date Nancy Fechner was aware of the medical malpractice, which at the latest was October 29, 2009, would have been **October 29, 2010**. Because the later of these two dates is **May 5, 2012**, Scott Volyn should have requested good faith mediation *before* **May 5, 2012**.

Instead, Scott Volyn filed Fechner's good faith request for mediation on **September 27, 2012**, *after* the statute of limitations under RCW 4.16.350(3) had already expired. Thus, mediation request was too late to toll the statute of limitations. A tolling provision cannot toll anything after the statute of limitations has already expired.

III. CONCLUSION

Summary judgment in this case should be denied, where Nancy Fechner presented evidence that Scott Volyn represented her prior to May 5, 2012, and where Scott Volyn failed to request mediation or file the case prior to **May 5, 2012** when the statute of limitations expired. The case should be reversed and remanded to the superior court for further proceedings.

Respectfully submitted this 27th day of July, 2017

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