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Division III
State of Washington

No. 35291-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NANCY FECHNER, Appellant,

v.

VOLYN LAW FIRM, PLLC, a Washington professional limited
liability company, Respondent.

BRIEF OF RESPONDENT VOLYN LAW FIRM, PLLC

V. Andrew Cass, WSBA #31365
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I. INTRODUCTION

Appellant Nancy Fechner (Fechner”) seeks review of the trial court’s summary judgment order dismissing her legal malpractice claim against Respondent the Volyn Law Firm, PLLC (the “Volyn Firm”), based on the 2016 Washington Supreme Court case of *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn. 2d 27, 384 P.3d 232 (2016). In *Fast*, the Washington Supreme Court unequivocally held that wrongful death claims arising from negligent healthcare are subject to the medical negligence statute of limitations, RCW 4.16.350(3) (“MNSOL”), such that the wrongful death statute of limitations based on medical malpractice is tolled for one year upon the filing of a good faith request for mediation pursuant to RCW 7.70.110.

Ms. Fechner appeals the trial court decision, arguing both that there are genuine issues of fact as to when the Volyn Firm commenced representing Ms. Fechner, and that the trial court misinterpreted the *Fast* case. Because there is no admissible evidence to create a genuine issue of material fact as to when representation of Ms. Fechner commenced, and because the Washington State Supreme Court has unequivocally held that the statute of limitations for a wrongful death claim based on medical

negligence can be tolled upon serving a good faith request for mediation pursuant to RCW 7.70.110, the trial court properly dismissed the legal malpractice case. For these reasons, this Court should affirm the trial court's decision dismissing this action with prejudice.

II. RESTATEMENT OF ISSUES

Respondent Volyn Firm acknowledges the issues advanced in the Brief of Appellant, but believes the issues are more appropriately formulated as follows:

1. Did the trial court properly determine that the Washington Supreme Court's decision in *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn. 2d 27, 384 P.3d 232 (2016) controls this case, such that the statute of limitations for Ms. Fechner's wrongful death claim did not expire until well after the Volyn Firm withdrew from her representation, thereby defeating the legal malpractice claim?

2. Did the trial court properly find that there is no genuine issue of material fact as to when Mr. Volyn began representing Ms. Fechner, such that the MNSOL had already run on the medical negligence claim when the Volyn Firm began representing her?

III. COUNTERSTATEMENT OF THE CASE

The Volyn Firm began representing Ms. Fechner for the limited

purpose of investigating a potential claim against her late husband Dennis Fechner's longtime dermatologist, Daniel Dietzman, M.D., on August 8, 2012, when Ms. Fechner signed an Authority to Investigate. CP 138. The Volyn Firm withdrew from representation on April 5, 2013 (CP 495-96), because it was unable to find any expert support for Ms. Fechner's contentions. Ms. Fechner then found another attorney, her current attorney Ms. Anderson, to take her case. Facing a motion for summary judgment on the statute of limitations by Dr. Dietzman, Ms. Fechner voluntarily dismissed her wrongful death action against him, because she erroneously believed that the statute of limitations had run on the wrongful death claim.

Ms. Fechner sued the Volyn Firm in October 2015. CP 003-012. In her complaint, Ms. Fechner asserted that the Volyn Firm negligently allowed the statute of limitations to lapse on both the medical negligence claim and the wrongful death claim before withdrawing from representation in April 2013. However, it is clear both that the Volyn Firm began representing Ms. Fechner only after the MNSOL had expired, and that the Volyn Firm properly tolled the statute of limitations on the wrongful death claim. The trial court, carefully applying the Washington Supreme Court's recent decision in *Fast*, properly found that the statute of limitations on Ms. Fechner's

wrongful death claim did not expire until well after the Volyn Firm withdrew as counsel, thereby defeating Ms. Fechner's legal malpractice claim as a matter of law.

A. Dennis Fechner's Medical Care And Treatment¹

In August 2001, then 49-year old Dennis Fechner presented to Central Washington Hospital in Wenatchee, Washington, complaining of chest and neck pain. CP 58. He was subsequently transferred to Sacred Heart Medical Center in Spokane, Washington, where cardiothoracic surgeon William Coleman, M.D. performed an aortic valve replacement procedure. CP 61.

In October 2005, Mr. Fechner presented to Wenatchee dermatologist Daniel Dietzman, M.D., of Confluence Health for plaque psoriasis², which at that time was covering 15% of his body surface area. CP 65. Between 2006 and 2009, Dr. Dietzman treated Mr.

¹ Although the underlying facts of Dennis Fechner's medical treatment and actions of his treating doctors are a part of the court record and are set forth in Appellant's Brief, the sole issue on appeal is whether Ms. Fechner's case is barred by the statute of limitations. The Volyn Firm, however, includes these facts in its Counterstatement of the Case solely so the facts are accurate before this Court.

² According to the National Psoriasis Foundation, plaque psoriasis is a psoriatic disorder and "appears as raised, red patches covered with a silvery white buildup of dead skin cells or scale. These patches or plaques most often appear on the scalp, knees, elbows and lower back. They are often itchy and painful, and they can crack and bleed." See <https://www.psoriasis.org/about-psoriasis/types/plaque>.

Fechner's psoriasis with methotrexate, intermittent phototherapy and prescription-strength topical ointments. See CP 86. During this time, Mr. Fechner was also suffering from other medical conditions, including hyperlipidemia (high cholesterol), hypertension (high blood pressure), type 2 diabetes, sleep apnea, coronary artery disease and cardiovascular disease. CP 82-84. In a February 2007 assessment, Wenatchee Valley Clinic cardiologist R. Kirby Primm, M.D., declared Mr. Fechner to be "totally disabled." CP 84.

At a January 2009 appointment with Dr. Dietzman, Mr. Fechner expressed frustration that his psoriasis had not gotten better with current treatment. CP 86-87. Dr. Dietzman increased the dose of methotrexate and advised that they would discuss instituting a "biologic"³ such as Enbrel if there was no major improvement. *Id.* "Enbrel" is the brand name for the drug etanercept, which is a biologic medication used to treat moderate to severe rheumatologic inflammatory conditions such as plaque psoriasis. CP 223.

Mr. Fechner continued to suffer from the painful psoriasis and, on March 4, 2009, Dr. Dietzman recommended that Mr. Fechner try

³ According to the National Psoriasis Foundation, a biologic is a drug given by injection (shot) or intravenous (IV) infusion. A biologic is a protein-based drug derived from living cells cultured in a laboratory. See <https://www.psoriasis.org/about-psoriasis/treatment/biologics>

Enbrel. CP 89. The clinic note for the March 4, 2009 appointment documented that Dr. Dietzman discussed the risks of taking a biologic with Mr. Fechner during the visit:

He has had psoriasis for about 35 years. We have previously discussed ENBREL. I think at this point, with his elevated LFTs, we probably need to find an alternate therapy for his psoriasis other than methotrexate. . . . He is interested in ENBREL. We will submit paperwork for instituting ENBREL at 15 mg subcutaneous twice a week for 3 months and then 15 mg weekly. . . . Discussed increased potential for infection as well as aggravation of heart failure.

Id. Mr. Fechner received his first injection of Enbrel on March 23, 2009 and thereafter received two injections per week. CP 91.

On May 14, 2009, over eight weeks after Dr. Dietzman first recommended Enbrel, Mr. Fechner returned to his cardiologist, Dr. Primm, at Wenatchee Valley Clinic with symptoms of chest pain and abnormal heart rhythm. CP 93. An echocardiogram performed two weeks before had revealed “grade two diastolic dysfunction,” and “prosthetic valve stenosis and moderate regurgitation,” suggesting deterioration of the aortic valve which Dr. Coleman had implanted in 2001. *Id.* Mr. Fechner was referred back to Dr. Coleman to be assessed for further heart surgery. *Id.*

The next day, on May 15, 2009, Mr. Fechner presented back to Dr. Dietzman reporting abdominal pain. CP 96. Dr. Dietzman noted

that Mr. Fechner might be undergoing cardiac valve replacement surgery and recorded his recommendation that he “may stop his ENBREL presently” until the abdominal pain resolved. Dr. Dietzman also advised Mr. Fechner to discuss the use of Enbrel with his cardiac surgeon, Dr. Coleman, documenting:

I have never seen this previously, but as the etiology of his abdominal pain is unclear, he may stop his ENBREL presently. If he does report significant flare of his psoriasis, he is to call. . . . When his abdominal pain improves, then we will see if we can re-institute his ENBREL and see whether he does have further abdominal pain from this. . . . Regarding his possible ENBREL use and cardiac valve replacement, I would recommend he discuss this with the cardiac surgeon if he will be undergoing this procedure.

CP 97.

On June 1, 2009, Mr. Fechner reported back to the surgeon Dr. Coleman, pursuant to Dr. Primm’s recommendation of May 14. CP 99. During that appointment, Dr. Coleman recommended that Mr. Fechner undergo a second valve replacement surgery. CP 102.

On July 8, 2009, Mr. Fechner underwent his second heart surgery at Sacred Heart in Spokane, Washington. CP 104. He stated in a patient history form that Dr. Coleman had instructed him to stop taking Enbrel prior to surgery. CP 109. The anesthesiologist documented in his pre-operative anesthesia report that the patient had

last taken Enbrel on June 8, 2009. CP 113. Dr. Coleman documented his discussion with Mr. Fechner about the heightened risks of the procedure given Mr. Fechner's autoimmune disorder (psoriasis) and other significant medical problems:

This operation is going to be fairly complicated and fairly risky. I have explained this in detail to the patient and his family, who accompany him today. They understand the risks and benefits, and he wishes to proceed with surgery.

CP 117. The July 8 surgery went well, and Mr. Fechner was discharged several days later. CP 120.

On July 27, 2009, however, Mr. Fechner was re-admitted to Central Washington Hospital, with fever and chills and increasing drainage from a right groin incision made during surgery. CP 124-27. A large pancreatic pseudo cyst⁴ was also discovered, which was found to be infected with staphylococci bacteria. CP 129. Mr. Fechner was diagnosed with sepsis⁵ and immediately placed on antibiotics,

⁴ A pancreatic pseudocyst is a fluid collection contained by a membrane that can develop within the pancreas after major surgery.

⁵ Sepsis is "a potentially life-threatening complication of an infection. Sepsis occurs when chemicals released into the bloodstream to fight the infection trigger inflammatory responses throughout the body. This inflammation can trigger a cascade of changes that can damage multiple organ systems, causing them to fail. If sepsis progresses to septic shock, blood pressure drops dramatically, which may lead to death." Mayo Clinic, *accessible at* <http://www.mayoclinic.org/diseases-conditions/sepsis/home/ovc-20169784>.

given a feeding tube, and transferred back to Sacred Heart in Spokane for intensive care. *Id.*

Mr. Fechner remained in intensive care on ventilation and a feeding tube as his condition deteriorated until his death on October 28, 2009. CP 133. According to the death certificate, the cause of death was “multi-organ failure, sepsis, pancreatitis necrotizing.” CP 136.

B. The Volyn Firm’s Representation Of Nancy Fechner

On August 8, 2012, Ms. Fechner retained the Volyn Firm on a limited basis to investigate a potential wrongful death claim against Dr. Dietzman concerning Mr. Fechner’s brief course of treatment on Enbrel. CP 138. By this time, the three-year MNSOL had already expired on any potential medical negligence claim Ms. Fechner may have had, as the last act of alleged negligence by Dr. Dietzman occurred on May 5, 2012, as acknowledged by Ms. Fechner. Br. of Appellant at 13.

While continuing to investigate a potential wrongful death claim, on September 27, 2012, the Volyn Firm served a good faith request for mediation on Dr. Dietzman and Wenatchee Valley Medical. CP 140-42. The request stated that Ms. Fechner intended to bring a claim and requested mediation pursuant RCW 7.70.110. CP 141. Ms.

Fechner executed a Fee Agreement with the Volyn Firm a few weeks later, on October 16, 2012. CP 144-50. Unable to find an expert to testify that Dr. Dietzman had breached the standard of care or that Enbrel had proximately caused Mr. Fechner's death, the Volyn Firm withdrew as counsel on April 5, 2013. CP 495-96.

C. Nancy Fechner's Lawsuit Against Dr. Dietzman

On October 25, 2013, Ms. Fechner, who by then had hired new counsel, filed a wrongful death lawsuit against Dr. Dietzman and Confluence Health. CP 153-63. In her complaint, Ms. Fechner claimed that Dr. Dietzman had negligently prescribed her husband Enbrel for psoriasis prior to his second heart surgery. CP 157-58. She also claimed that Enbrel had weakened his immune system and thus proximately caused her husband's post-operative infection and death. *Id.*

On September 3, 2014, Dr. Dietzman and Confluence Health filed a motion for summary judgment, arguing that Ms. Fechner's claims were barred by the statute of limitations. CP 165. Inexplicably, instead of opposing the motion, Ms. Fechner voluntarily dismissed the case against both defendants. CP 180-81.

D. Procedural History of Legal Malpractice Action Against The Volyn Firm

After surrendering to the medical defendants without even opposing their motion to dismiss, Ms. Fechner commenced the present action against the Volyn Firm on October 25, 2015. CP 003. In her complaint, she alleged that the Volyn Firm failed to file medical negligence and wrongful death claims within the applicable statute of limitations. CP 003-011.

On February 10, 2017, the Volyn Firm moved for summary judgment on a number of grounds, including that, pursuant to the Washington Supreme Court's decision in *Fast v. Kennewick Hospital*, 187 Wn.2d 27, 384 P.3d 232 (2016), the Volyn Firm's filing of the good faith request for mediation in September 2012 extended the statute of limitations on Ms. Fechner's wrongful death claim until October 2013. Therefore, Ms. Fechner, as a matter of law, still possessed a timely cause of action against Dr. Dietzman after the Volyn Firm withdrew (and at the time she and her current counsel filed a complaint against the medical defendants, to whom they subsequently capitulated) . CP 218-41.

On March 9, 2017, the trial court granted the Volyn Firm's motion for summary judgment, finding that the *Fast* case controlled

the issue of the statute of limitations, and dismissed Ms. Fechner's case with prejudice. CP 560-62. Ms. Fechner moved for reconsideration on March 21, 2017. CP 570-71. The trial court denied the motion, reiterating that the *Fast* case applied to the wrongful death claim.

IV. SUMMARY OF ARGUMENT

The evidence before this court definitively establishes that the Volyn Firm did not represent Ms. Fechner until August 8, 2012, well after the May 5, 2012 statute of limitations on the medical negligence claim had expired. Ms. Fechner failed to raise a genuine issue of material fact with respect to the date of the inception of the attorney client relationship and the trial court correctly applied the law in finding that the MNSOL was already expired before the Volyn Firm represented Ms. Fechner.

It is also beyond dispute that Ms. Fechner had a viable wrongful death claim when the Volyn Firm withdrew from representation. Mr. Fechner died on October 28, 2009. Br. of Appellant at 2. It is well settled that an action for wrongful death accrues on the date of death and not on the date of the last alleged negligent act. *Deggs v. Asbestos Corp., Ltd.*, 186 Wn.2d 716, 732, 381 P.3d 32 (2016) ("It is now clear that a wrongful death cause of

action accrues at the time of death, not the time of the underlying injury of the deceased.”) Because the Volyn Firm timely filed a good-faith request for mediation in September 2012, extending the statute of limitations on the wrongful death claim until October 2013, well after the time the Volyn Firm withdrew from representation, the wrongful death claim was viable when Ms. Anderson began representing Ms. Fechner.

V. ARGUMENT

A. Standard of Review

“In reviewing a grant of summary judgment, an appellate court engages in the same inquiry as the trial court.” *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). Summary judgment is properly granted (as here) where the pleadings, affidavits and depositions establish the absence of a genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). This Court reviews questions of law *de novo*. *Barr v. Day*, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). Summary judgment can be affirmed on any basis supported by the record. *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

B. Fast v. Kennewick Pub. Hosp. Dist. Controls the Outcome Of This Case

The trial court specifically found that *Fast v. Kennewick Hospital*, 187 Wn.2d 27, 384 P.3d 232 (2016) controls the statute of limitations issue in this matter. In *Fast* the Supreme Court held “...this language is controlling: ‘[t]he references to wrongful death in chapter 7.70 RCW and the legislative intent of mandatory mediation in medical negligence cases weighs heavily in favor of concluding that RCW 4.16.350(3) applies to wrongful death suits caused by medical negligence.’” *Fast* at 37. [Emphasis in original.]

In granting the Volyn Firm’s summary judgment, the trial court properly applied *Fast* and found that, because the Volyn Firm had timely served a good-faith request for mediation, the statute of limitations on Ms. Fechner’s wrongful death claim was extended for an additional year, and Ms. Fechner therefore had a viable wrongful death claim after the Volyn Firm withdrew.

1. The Good Faith Request for Mediation pursuant to RCW 7.70.110 extended the Statute of Limitations for the Wrongful Death Claim

In *Fast v. Kennewick Hospital*, 187 Wn.2d 27, 384 P.3d 232 (2016), the Washington Supreme Court unambiguously held that a good faith request for mediation filed pursuant to RCW 7.70.110 tolls

the three-year statute of limitations for wrongful death claims based on negligent healthcare. *Fast* at 40. Ms. Fechner initially had until the three-year anniversary of her husband's October 28, 2009 death—October 28, 2012—to commence a wrongful death action against her husband's dermatologist. Yet, because the Volyn Firm timely served a good faith request for mediation pursuant to RCW 7.70.110 on September 27, 2012, under *Fast*, the statute of limitations on her wrongful death claim was tolled for an additional year, until October 28, 2013. It is also undisputed that The Volyn Firm withdrew on April 5, 2013. CP 495-96. After the Volyn Firm withdrew, Ms. Fechner retained new counsel and *timely* filed her wrongful death action against Dr. Dietzman and his employer on October 25, 2013, three days before the statute of limitations expired. Although Ms. Fechner chose to voluntarily dismiss her timely complaint, the trial court properly dismissed the case against the Volyn Firm, because, as a matter of law, the statute of limitations on her wrongful death claim had not expired while the Volyn Firm represented Ms. Fechner.

In *Fast*, the plaintiff-mother brought claims for negligence and wrongful death⁶ based on Kennewick Public Hospital's alleged failure to detect gestational diabetes, which she claimed resulted in premature intervention and death of her unborn child. The plaintiff filed the action over three years after the death of her child. However, she had served the medical provider defendants with a good faith request for mediation under RCW 7.70.110 four days before the three-year anniversary of her child's death. The trial court dismissed the wrongful death claim based on the statute of limitations and the Court of Appeals affirmed, concluding that a good faith request for mediation under RCW 7.70.110 does not toll the statute of limitations for the wrongful death claim.

On review, the Washington Supreme Court reversed. It held that the statute of limitations for wrongful death claims based on medical malpractice is tolled for one year upon the making of a good faith request for mediation pursuant to RCW 7.70.110. Because the parents in *Fast* had served a good faith request for mediation before the three year anniversary of the child's death, the wrongful death

⁶ In *Fast*, the wrongful death claim was brought under the injury-or-death to an unborn child statute, RCW 4.24.010. The negligence claim was brought by the mother for her own claimed injuries from alleged negligent treatment she received.

claim was tolled for one year. The same rule applies with equal weight here. Mr. Fechner died on October 28, 2009. Thus, the three year statute governing the purported wrongful death, unless tolled, would have run on October 28, 2012. However, like the plaintiffs in *Fast*, the Volyn Firm, on behalf of Ms. Fechner, served Dr. Dietzman with a good faith request for mediation pursuant RCW 7.70.110 on September 27, 2012, which, under *Fast*, tolled the statute of limitations for one year. Thus, when the Volyn Firm withdrew from Ms. Fechner's representation in April 2013, she still had a viable cause of action for wrongful death. Specifically, Ms. Fechner had until October 28, 2013 to file her claim, which, under *Fast*, was timely filed on October 25, 2013. CP 003.

2. **Ms. Fechner Misinterprets *Fast*-the Wrongful Death Claim Accrued on the Date of Death and Was Still Timely When the Volyn Firm Withdrew**

Ms. Fechner misinterprets *Fast* when she claims that the statute of limitations on the wrongful death claim started running on the date Dr. Dietzman allegedly last prescribed Enbrel—May 5, 2009, instead of on the date of Mr. Fechner's death. Br. of Appellant at 10-13. Ms. Fechner would have this Court construe *Fast* as uprooting almost a century's worth of legal precedent holding that wrongful

death claims do not accrue until the date of death. It is well settled that there can be no wrongful death claim until a death actually occurs. Washington courts have consistently held, since at least the 1930s, that a wrongful death claim accrues on the date of death. See *Dodson v. Continental Can Co.*, 159 Wash. 589, 294 P. 265 (1930); *Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P.2d 193 (1935).

The Washington Supreme Court reaffirmed this rule most recently in *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 732, 381 P.3d 32 (2016) (“a wrongful death cause of action accrues at the time of death, not the time of the underlying injury to the deceased”). *Deggs* further explained: “[t]he action for wrongful death...is a distinct and separate action from the survival action...In accordance with the great weight of authority, this court has held that the action accrues at the time of death, and that the statute of limitations then begins to run.” *Deggs*, supra at 4. The Supreme Court did not displace this longstanding precedent when it decided *Fast*.

Ms. Fechner’s argument that the trial court misinterpreted the *Fast* case is unsupported by any law or logic. Ms. Fechner urges the court to limit the application of *Fast* to instances only where the good faith request for mediation is served before the statute of limitations has expired on the underlying medical negligence claim. Ms. Fechner

argues that, because the MNSOL had already expired, the wrongful death claim was not tolled by filing of the good-faith request for mediation. Br. of Appellant at 10-13. This is wholly unsupported by *Fast*.

The *Fast* Court framed the issue as a pure question of statutory interpretation, requiring the Court to determine simply whether a wrongful death claim premised on negligent healthcare is governed by the medical malpractice statute of limitations, RCW 4.16.350(3), “with an additional year of tolling for a good faith mediation request” or by “the general torts catchall statute of limitations,” RCW 4.16.080(2). *Fast, supra*, at 33.⁷ The Court’s answer to this question was unequivocal: “[w]e hold that in cases of wrongful death resulting from negligent health care, the MNSOL (RCW 4.16.350(3)) applies.” *Id.* Indeed, Ms. Fechner’s interpretation of *Fast* would require this Court to read into *Fast* the following limitation: “this rule only applies if the good faith request for mediation is served before the statute of limitations on the underlying medical negligence claim expires.” Had

⁷ The Court framed the issue as follows: “The Fasts argue for the application of the three-year MNSOL (RCW 4.16.350(3)) with an additional year of tolling for a good faith mediation request. RCW 7.70.110. The defendants argue for the application of the general torts catchall statute of limitations (RCW 4.16.080(2)), and the Court of Appeals agreed.”

the Washington Supreme Court intended to limit its holding as Ms. Fechner suggests, it would have done so.

Moreover, Chief Justice Madsen's guidance in her concurrence rejected such an approach and emphasized that a wrongful death claim based on medical negligence is tolled by a timely good faith request for mediation because they are separate claims arising from negligent healthcare, not because they are derivative of some other claim or statute of limitations:

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. A wrongful death action "derives from the wrongful act causing the death, rather than from the person of the deceased." Accordingly, under the facts of this case the MNSOL's three year statute of limitations, plus one year's tolling for a good faith mediation request, applies to the child death claim. 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. The application here of the MNSOL is not because the wrongful death claim is derivative of some personal claim that the decedent may have had.

....

Finally, I note that a wrongful death action itself remains a "separate and distinct" cause of action. This case does not change the distinct character of a wrongful death claim. It merely recognizes the exception that the legislature has carved out for all claims alleging damages resulting from health care. Accordingly, this case is not an invitation to go behind any wrongful death action to the underlying harm in

search of a potentially more favorable SOL.

Fast, supra, at 39-40 (Madsen, concurring). [Citations omitted.]

This Court should decline Ms. Fechner's invitation to construe *Fast* in a manner directly contrary to Justice Madsen's guidance, and should reject the notion that her wrongful death claim was merely derivative of Mr. Fechner's underlying claim for healthcare malpractice, which expired before she retained the Volyn Firm. As the Supreme Court has expressly foreclosed that approach, this Court should decline to adopt it here, and should affirm the trial court's well-reasoned and supported conclusion that the Volyn Firm's filing of a good faith mediation request, as a matter of law, created an opportunity for Ms. Fechner to have pursued the wrongful death claim through her new counsel, even though her late husband's medical malpractice claim had long before gone stale.

C. The Volyn Firm Began Representing Ms. Fechner in August 2012, After the Statute of Limitations on the Medical Negligence Claim Expired

It is beyond dispute that the statute of limitations had expired on Mr. Fechner's medical negligence claim against Dr. Dietzman before the Volyn Firm began representing Ms. Fechner, a date which is corroborated by a written agreement between the Volyn Firm and Ms. Fechner, and which is not disputed by any admissible evidence or

by any reasonable inference from admissible evidence. Ms. Fechner nevertheless erroneously argues that a genuine issue of material fact exists as to when the Volyn Firm commenced its representation of Ms. Fechner. Br. of Appellant at 8-10. She proffers only the following in support: (1) Olin Ensley's testimony that "[i]n October of 2011, Nancy and I were together on the anniversary of Dennis's death, having our dinner together and we were discussing her new lawyer and how he only had a year to date [sic] to her new suit", (2) Olin Ensley's testimony that "[o]n December 25, 2011 Nancy came to my home for Christmas dinner where she discussed the Christmas decorations of Mr. Volyn office, and goodies they had", and (3) Ms. Fechner's contention that Mr. Volyn sat on her case for a year and a half before telling her he could not take it. The trial court properly found each of these statements inadmissible, and this evidence should not be considered by this court.

1. **The declaration of Olin Ensley does not create a genuine issue of material fact as to when the Volyn Firm began representing Ms. Fechner**

Ms. Fechner offers two statements made by Olin Ensley, Mr. Fechner's friend, to attempt to create an issue of fact regarding when the Volyn Firm began its representation of Ms. Fechner: (1)"[i]n

October of 2011, Nancy and I were together on the anniversary of Dennis's death, having our dinner together and we were discussing her new lawyer and how he only had a year to date [sic] to her new suit" (CP 509), and (2) "On December 25, 2001 Nancy came to my home for Christmas dinner where she discussed the Christmas decorations of Mr. Volyn office, and goodies they had." *Id.* Neither of these statements creates a genuine issue of material fact. Notably, the statement regarding Ms. Fechner's "new lawyer" makes no mention of Mr. Volyn or the Volyn Firm.⁸ In fact, it could have been another lawyer Ms. Fechner had discussed her case with. The fact that Mr. Volyn's name is not mentioned in the sworn statement is telling. If Mr. Ensley and Ms. Fechner had discussed Mr. Volyn specifically, he logically would have included that in his sworn statement. He did not. Courts have held that a "summary judgment motion will not be denied on the basis of an unreasonable inference." *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (1989). The court cannot reasonably infer that Mr. Volyn was representing Ms.

⁸ Although Ms. Fechner represents to the court that "... Nancy Fechner had Christmas dinner with him [Olin Ensley] in December 2011, and Nancy Fechner was talking about that Volyn was representing her against Dr. Dietzman" (Br. Of Appellant at 9), the evidence does not support this.

Fechner at this time, based on a statement referencing nothing more than her “new attorney.”⁹

Likewise, Mr. Ensley’s statement regarding the Christmas decorations and goodies at Mr. Volyn’s office does not create a genuine issue of material fact as to whether the Volyn Firm was representing Ms. Fechner at that time. The statement merely states that Ms. Fechner commented on the decorations and goodies, and nothing further. There is nothing in this statement that either discusses or infers representation by the Volyn Firm at that time. Indeed, Ms. Fechner could have looked through his window and seen the decorations and goodies. The declaration is silent on the issue of representation, and the court cannot reasonably infer representation by the Volyn Firm based on this testimony. Mr. Ensley’s testimony simply does not give rise to a genuine issue of fact.

⁹ *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). In *Marshall*, the plaintiff’s medical records clearly showed that plaintiff first learned of his asbestos poisoning at a doctor’s visit in 1982. In response to a summary judgment motion based on the failure to bring the claim within the statute of limitations, the plaintiff offered an affidavit in which he attested that he did not learn of the asbestos poisoning until 1983 (which would have made the action timely). The Court held that, in giving testimony by affidavit that contradicted his medical records which showed that his first visit was in 1982, the plaintiff was asking the Court to draw an inference that was not reasonable in light of the evidence. *Id.* at 184-85. The Court, noting that the affidavit testimony was “clearly self-serving at this juncture,” rejected the affidavit, holding that it was insufficient to create an issue of fact.

2. **The Court Should Decline to Consider Ms. Fechner's conclusory statement contained in her declaration which contradicts her prior sworn testimony and the Authority to Investigate.**

In addition to the two Ensley statements, Mr. Fechner offers the statement contained in her Declaration filed in Opposition to the Volyn Firm's motion for summary judgment: "[m]y best recollection is that I took the case to Volyn on or about October 2011." CP 430. She also cites her deposition testimony, referencing merely a thought that she had: "...why could he sit on my case for a year and a half and then all of a sudden say he can't take it?" CP 493. She offers these statements to support her argument that there is a genuine issue of fact as to when the Volyn Firm first represented her. The court should reject these statements because they flatly contradict her deposition statements based on facts and documents (the Authority to Investigate) presented to her which she did not dispute.

Specifically, Ms. Fechner was asked during her deposition about when she first met with the Volyn Firm in relation to executing the Authority to Investigate, signed and dated by Ms. Fechner on August 8, 2012 . CP 527-29. Ms. Fechner admitted under oath that she signed the Authority to Investigate at her first meeting with Scott Volyn, but then said she could not recall whether she had signed the

document at the first visit, or at another meeting shortly after their

August 8, 2012 first meeting:

Q. Take a look at what we have marked as Exhibit 16, which is authority to investigate document in which it says, "I have discussed a potential claim with arising out of the following incident, prescription use of Enbrel for Dennis Fechner," and then it says, "I have not employed Volyn Law Firm to file suit or to represent us as my legal attorneys. I authorize Volyn Law Firm to conduct an investigation of this incident with the understanding that the results of such investigation remain the property of Volyn Law Firm." And then it says, "Check one, Volyn Law Firm agrees to advance the costs involved in the conduct of this investigation." And it was signed August 8th of 2012. And then has your signature and it has Scott's signature.

You see that?

A. I see that, but I have a question, please.

Q. Okay.

A. May I ask?

Q. Go for it.

A. It says here, "I have not employed Volyn Law Firm to file suit or to represent us as my legal attorneys."

When I went in and talked to Mr. Volyn about taking the case, and we had talked about contingency basis and et cetera, he said he would look into everything and he said, yes, he says, just by looking at things and from what I told him, he said he felt I had a case but without looking into everything and investigating, he cannot give me anymore accurate answer than that, but --

Q. When was that?

A. That's when I went in to see him the first time.

Q. This was signed on August 8th of 2012.

A. Well, whenever that was, I had went in to see him and he had me sign this paper and there was a couple other papers he had me to sign. I don't know if it was giving him allowance to get information on records or what they were, I don't remember at this time, but....

Q. So did you sign Exhibit 16 the first time you ever met Scott Volyn?

A. I can't remember if that was the first time --no, because when I went in for consultation the very first time and took the records to him to look at, I didn't sign anything at that time. It was like the next visit or the next couple visits that I did. He had -- he said that he felt that I had a good case and he was -- would take the case.

CP 527-29.

Ms. Fechner has never contradicted the accuracy of the date on the Authority to Investigate, including at her deposition while under oath. Nor has she offered any testimony prior to her declaration filed in opposition to the Volyn Firm's summary judgment in February 2017 that her initial meeting with Mr. Volyn was, as she now claims, actually in 2011, not in 2012. Ms. Fechner cannot avoid summary judgment by offering an affidavit that is contradicted, not only by the documents, but by her own prior testimony. Such testimony is inadmissible and insufficient as a matter of law to create an issue of fact under CR 56. Washington law is clear on this point:

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

Overton v. Consul. Ins. Co., 145 Wn.2d 417, 430, 38 P.3d 322 (2002).

In addition, conclusory, argumentative comments about the Volyn Firm allegedly “sitting on her case” are not properly considered on summary judgment. *Id.* at 431 Likewise, one cannot defeat summary judgment through conclusory or unreliable assertions that directly contravene the unambiguous record. *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (rejecting declaration that attempted to create issue of fact by contradicting unambiguous documentation).

Under *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989), there is simply no basis for the court to reasonably infer that Ms. Fechner first retained Mr. Volyn in 2011 when the Authority to Investigate was not signed until August 2012 and where Ms. Fechner has previously acknowledged under oath that she signed the Authority to Investigate the day she met Mr. Volyn or shortly thereafter. CP 527-

29. For the above reasons, the testimony proffered in Ms. Fechner's declaration contained in CP 213-15 should be excluded.

VI. CONCLUSION

The trial court correctly found undisputed that the Volyn Firm did not start representing Ms. Fechner until August 2012, after the statute of limitations expired on the medical negligence claim.

Moreover, the Washington Supreme Court made clear that a good faith request for mediation filed pursuant to RCW 7.70.110 tolls the three-year statute of limitations for wrongful death claims based on negligent healthcare. The trial court properly found that, because the Volyn Firm served a good faith request for mediation before the three-year anniversary of Mr. Fechner's death, Ms. Fechner still had a viable claim for wrongful death at the time that Mr. Volyn withdrew. For each of these reasons, this Court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 27th day of October,
2017.

LEWIS, BRISBOIS, BISGAARD & SMITH LLP

By 
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Counsel for Volyn Law Firm, PLLC

DECLARATION OF SERVICE

I, Lynn R. Ohls, under penalty of perjury under the laws of the State of Washington, declare and state as follows:

1. I am a legal secretary with the law firm of Lewis Brisbois Bisgaard & Smith LLP.

2. On the 27th day of October, 2017, I caused to be delivered a copy of the foregoing BRIEF OF RESPONDENT VOLYN LAW FIRM, PLLC in the Court of Appeals, Div. III Cause No. 35291-9-III for service on the following:

Julie A. Anderson	<input type="checkbox"/>	via U.S. Mail
Law Office Julie A. Anderson	<input type="checkbox"/>	via Legal Messenger
409 N. Mission St.	<input type="checkbox"/>	via Overnight Mail
Wenatchee, WA 98801	X	via ECF/Court
Email: reception@jaallaw.net	<input type="checkbox"/>	via Electronic Mail

SIGNED this 27th day of October, 2017, at Seattle, Washington.



Lynn R. Ohls

LEWIS BRISBOIS BISGAARD & SMITH LLP

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