Supreme Court No. 99241-0
(COA No. 53389-8-II)

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioner,

v.

CHI, FRANCISCAN; ST. JOSEPH HOSPITAL,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Washington Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER

Ms. Allyson Soocey, the Petitioner, was the Appellant below and the Plaintiff in the initial case. She is the Personal Representative of the Estate of Daryl Soocey and filed the lawsuit on behalf of beneficiaries under 4.20.010 "Wrongful Death – Right of Action." Ms. Soocey requests review under RAP 13.4.

B. COURT OF APPEALS DECISION

Ms. Soocey seeks review of the Court of Appeals decision dated October 20, 2020, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

In *Fast v. Kennewick Pub. Hosp.Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016) the Washington Supreme Court held that RCW 7.70.110 (a statute allowing a Plaintiff to extend the statute of limitations in a medical negligence claim by one year by making a written request for mediation in good faith before the expiration of the existing statute of limitations) applied to actions brought by parents under RCW 4.24.010 "Action for injury or death of a Child," allowing a mother's claim, which had been dismissed as untimely, to continue. Did the Supreme Court intend for this opinion to also limit Plaintiffs bringing a claim under a different statute, 4.20.010 "Wrongful Death – Right of Action" by imposing a statute of limitations running from the time of injury of the decedent rather than from the time of death of the decedent?

D. STATEMENT OF THE CASE

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

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

"Wrongful Death – Right of Action." The Opinion was well supported and involved a detailed discussion of the Wrongful Death statute. The Supreme Court then accepted the case for review.

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

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

deadlines) to any claim involving an allegation of medication negligence. Specifically, it has taken the *Fast* decision, which was intended to ***broaden*** a Plaintiff's statute of limitations, and pushed to apply it to ***narrow*** the statute of limitations by insisting that the supreme Court's *Fast* holding also required that any claim based on an allegation of medical negligence start counting, for statute of limitations purposes, from the date of the medical negligence, rather than, in case of wrongful death actions, from the date of the death of the decedent.

Daryl Soocey had been admitted to the Respondent's hospital with pneumonia, a complication after surgery. On November 4, Mr. Soocey became very short of breath. Ms. Soocey found him with his arms restrained, unable to speak, desperately trying to get a nurse to respond to him as he was suffocating. The nurse delayed responding, chastising Mr. Soocey for struggling against his restraints. (RP 1) A code blue was finally called when Mr. Soocey became unresponsive. (RP 62 - 11/14/15 Discharge Summary). Although Mr. Soocey was resuscitated and rushed to the ICU, he never regained consciousness. He was brain dead, having suffocated due to the delay in clearing his airways. *Id.* Mr. Soocey was removed from life support and died on November 14, 2015. *Id.*

Mr. Soocey's wife, Allyson Soocey, is the personal representative of the estate of her late husband. She filed (and commenced) this lawsuit on November 13, 2018. (RP 232) The complaint asserted a claim under

RCW4.20.010 “Wrongful Death – Right of Action” on behalf of Ms. Soocey and the other beneficiaries as defined under the statute.

Based on the date that the lawsuit was commenced (November 13, 2018), it would have been commenced within the statute of limitations if the date of death is considered the starting date, but it would have been filed beyond the statute of limitations if the date of the medical negligence is the start date for counting the three years to the statute of limitations. The Petitioner has demonstrated, to the Court and the Respondent, that application of the Supreme Court’s *Fast* decision to RCW4.20.010 “Wrongful Death – Right of Action” would render the wrongful death statute useless if the death occurred more than three years from the medical negligence. Neither the Respondent nor the Court refuted the logic of the Petitioner’s statutory evaluation, but the Superior Court Judge felt that the language from the Fast decision was broad enough to assume that the Supreme Court meant for it to limit wrongful death claims, despite the fact that it does not apply to that statute or address the question of whether the medical negligence statutes would govern the beginning of a statute of limitations for a claim brought under a separate statute. Ms. Soocey brought the same argument to the Court of Appeals, which did not refute Ms. Soocey’s arguments, but felt that they did not have the authority to address what they described as broad language of the Supreme Court’s *Fast* decision. Thus, to date, no Court has actually addressed the merits of the Petitioner’s argument, leaving it to Ms. Soocey to take the

question to the Supreme Court in hopes that it will clarify the application of the *Fast* decision for future parties in this State litigating claims under RCW4.20.010 "Wrongful Death – Right of Action" where medical negligence is the cause of death.

E. ARGUMENT

Review should be accepted to hold that the Court's decision in Fast v. Kennewick, which applies RCW 7.70.110 to RCW 4.24.010 "Action for injury or death of a Child," allowing a Plaintiff to extend the statute of limitations where the child's injury was alleged to have been caused by medical negligence by requesting a mediation in writing, does not also change the initiation date for the statute of limitations in a wrongful death claim under 4.20.010 "Wrongful Death – Right of Action" from the time of death to the time of injury.

The Supreme Court's decision in *Fast v. Kennewick* does not apply in this case because it evaluates RCW 4.24.010 "Action for injury or death of a child" but the Appellate opinion below it does, analyzing and explaining why the medical negligence statutes should not apply to actions under 4.20.010 "Wrongful Death – Right of Action."

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

In *Fast v. Kennewick Pub. Hosp.Dist.*, 187 Wn.2d 27, 384 P.3d 232 (2016) the Court of appeals had upheld a dismissal of a mother's claims for damages arising from the death of her child on the grounds that it had been untimely filed. The Court found that a provision of the medical negligence statutes, which extended the deadline to file for one year upon a written request for mediation did not apply to a wrongful death claim.

Ms. Fast was suing over the death of her baby, who was still-born. "the Fasts filed a complaint against defendants 'for injuries resulting from healthcare' and 'injury or death of a child' under chapter 7.70 RCW and RCW 4.24.010, respectively." *Id. 237* On review, the Supreme Court noted that "*Fast* is the only Washington appellate court decision to address the statute of limitations applicable to claims for injury or death of a child under RCW 4.24.010." *Id. 41, Fn. 12* In the instant case, Ms. Soocey, as personal representative of her late husband's estate, brought suit on behalf of herself and Mr. Soocey's children under a different statute, RCW 4.20.010 "Wrongful Death – Right of Action." These are very different statutes. The Supreme Court did not analyze the effect of the medical malpractice statutes on RCW 4.20.010, as had the Appellate panel below.

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

The Supreme Court noted that Ms. Fast had sued under "RCW 4.24.010, which provides in relevant part: A mother or father, or both, who has regularly contributed to the support of his or her minor child ... may maintain or join as a party an action as plaintiff for the injury or death of the child." *Id. at 43 Fn.3* The Supreme Court recognized the potential for confusion in a footnote, (Footnote 8): "This action [4.24.010 – Action for injury or death of a child] has been repeatedly characterized by Washington cases as an action for "wrongful death." *E.g., Lockhart v. Besel* , 71 Wash.2d 112, 116, 426 P.2d 605 (1967); *Clark v. Icicle Irrig. Dist.* , 72 Wash.2d 201, 205–06, 432 P.2d 541 (1967) ; 16 David K. DeWolf and Keller W. Allen, Washington Practice: Tort Law and Practice§ 7:3, at 344 (4th ed. 2013) (characterizing RCW 4.24.010 as one of the "five statutes in Washington that govern wrongful death actions")." *Fast at 43 Fn.8*

The Supreme Court also noted that neither of the parties had ever addressed the fact that the wrong statute had been analyzed by the Court of Appeals. In footnote 13, the Court went on to express that the analysis of RCW 4.20.010 by the appellate court was never actually addressed and was therefore not considered by the Supreme Court in its opinion on the *Fast* case: *"Footnote 13 - See Fast* , 188 Wash.App. at 45–46, 50, ¶¶ 3, 19, 354 P.3d 858 (citing *Wills* , 56 Wash.App. at 757, 785 P.2d 834 (addressing RCW 4.20.010) ; *Atchison v. Great W. Malting Co.* , 161 Wash.2d 372, 377, ¶ 11, 166 P.3d 662 (2007) (same); *Beal v. City of*

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

Thus, the Appellate opinion from Fast v. Kennewick (CP 174) and its analysis regarding the inapplicability of the medical negligence statutes to wrongful death claims under RCW 4.20.010 remains unchallenged, and provides "good law" that is on point for an analysis of the statutory claim in the instant case. The Supreme Court's *Fast* opinion is narrow and, although it refers to RCW 4.24.010 Action for injury or death of a child as a "wrongful death" statute, it is not meant to apply beyond that statute.

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

The *Fast* Supreme Court provides a brief discussion of *Wills v. Kirkpatrick* , 56 Wash.App. 757, 785 P.2d 834 (1990) and concludes that, if the *Wills* holding (that the statute of limitations on wrongful death should run from the date of death) were applied to the fact pattern in *Fast*,

it would have an absurd result in that Ms. Fast would be able to recover for some damages arising from the death of her child under the survivor statute claim, but not damages which arose from her loss of the relationship with the child. The Supreme Court did not go so far as to consider what would happen if it applied it's holding regarding the *Fast* case to actions under the actual Wrongful Death statue. One factor that changes the analysis is the identification of the person who has standing to bring the action. Under RCW 4.24.010 "Action for injury or death of a child," the persons who have standing to bring the claim include the parents of the child. RCW 4.24.010 Thus, the persons who have standing to sue are identifiable from the moment of injury to the child, and could sue immediately. The *Fast* Court concluded that applying the holding from *Wills* could result in a case where the parents could recover for injury on behalf of their dead child (which would be extended by the mediation offer statute under 7.70.110), but not for their own loss from the child's death. The Supreme Court said this would be absurd. If absurdity is the standard for discounting 25 years of jurisprudence ("Equally if not more importantly, *Wills* has answered the question of which statute of limitations applies to actions for a wrongful death caused by medical malpractice for a quarter century. *Fast v. Kennewick* (Wash. App. 2015), p. 12), then "impossibility" would likely be an excellent reason for maintaining the *Wills* reasoning and holding as to RCW 4.20.010.

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

Unlike the child injury or death statute, the Wrongful Death statute does not authorize pursuit of damages which include any injury to the decedent, only damages arising from injury to those left behind by the loss of a loved one and provide in their lives due to his or her death. Thus, those people, the ones who have standing to bring the claim can ***only*** be identified after the death of the decedent. The same is true as to the recoverable damages.

Under the Wrongful Death statute, the measure of damages is the actual pecuniary loss suffered by the surviving beneficiaries from the death of a relative. *Jensen v. Culbert*, 134 Wash. 599, 605, 236 P. 101 (1925). If one were to predecease the decedent after the initial injury, but before the decedent's death, for example, there would be no claim.

More importantly and more obviously, the only person authorized to actually bring a wrongful death action, the only one who has standing to do so is the personal representative of the decedent's estate. "When the death of a person is caused by the wrongful act, neglect, or default of another his or her personal representative may maintain an action for damages against the person causing the death" RCW 4.20.010 Unlike under the injury or death of a child statute, where the identity of the persons with standing to sue is evident at the time of injury to the child, the only "person" who has the right, the standing, to bring a claim under the wrongful death statute, a personal representative of the decedent's estate, does not legally exist until after the decedent's death and the creation of a probate estate. As the Supreme Court in *Fast* recognized, it would be possible for someone to be injured by medical negligence, and then not to die for more than three years. However, in the case of a claim for injury or death to a child, during those three years, the persons who had the right to sue actually exist and could bring the claim at any time whereas, prior to the death of the decedent, no personal representative (the only one who may bring a wrongful death lawsuit under RCW 4.20.010)

simply cannot, as a matter of law, exist. To apply Fast to the wrongful death statute would take the results of the application from the "absurd" to the impossible in the same scenario. There is ***NO*** possibility of a personal representative existing prior to the death of a decedent. Therefore, not only would no claim exist (as the recovery is for the beneficiaries' loss of the love and support of a person who has died) during the statute of limitations, there would be no person in existence with standing to bring the claim within the statute of limitations. The Justices of the Washington Supreme Court were certainly capable of recognizing this and, Petitioner argues, never intended to create this problem. That is why the Supreme Court noted that its decision was not going to overturn the reasoning of the Appellate Court as to RCW 4.20.010.

3. Recent case law applying the Supreme Court's *Fast* Opinion: *Fechner v. Volyn,* 418 P.3d 120 (Wash. App., 2018)

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

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

death of the child, and not RCW 4.20.010 Wrongful death – right of action.

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

F. CONCLUSION

Thus far, there has been no challenge to the Petitioner's analysis of the effect of broadening the *Fast* opinion to include a limitation on the statute of limitations and applying that a wrongful death statute that was not considered in the Court's decision. As has been shown, hopefully, with great clarity, in this brief, starting the statute of limitations at the date of a negligent act for wrongful death actions under RCW 4.20.010 "Wrongful Death – Right of Action" is not only non-sensical when you look at the function, goal and intended beneficiaries of the statue, but doing so operates to make the statute completely impossible to use where a death occurs more than three years from a medically negligent act.

Lawyers and Judges are officers of the Court. We have a duty to work to make sure that, at the very least, the application of statutes and the common law makes sense if we are to discharge our duty to the citizens of this State and our Country to offer some justice under the law. At some level, we must address the fact that applying the Supreme Court's *Fast* decision to RCW 4.20.010 "Wrongful Death – Right of Action" doesn't work. Petitioner is not surprised to have encountered a reticence to confront this truth by the lower Courts. At the risk of being too frank, no Officer of the Court wants to be the one to say that the Supreme Court made a mistake. We would like to, and perhaps need to believe that the judiciary, at that level don't make results-driven decisions, failing to consider all the consequences. Petitioner believes, however, that the

Justices who penned the *Fast* decision meant, as they said, for it to be construed narrowly and that the Superior Court and Appellate Court judges in this case have erred in characterizing the opinion as employing "broad language." Simply put, if the Supreme Court intended only for the Fast decision to expand Plaintiffs' access to a legal remedy for a wrong under the statute that it was focusing on in that case, and did not intend to limit Plaintiffs' access to the Courts in a statute specifically excluded from their consideration, then its decision in *Fast* makes sense, and our Justices were correct. As no Court below has addressed the merits of Petitioner's request for an interpretation of the Supreme Court's Fast Decision, the issue has been passed onward and upward, and now is being presented to the Court that, without any doubt, has the authority to clarify a prior Supreme Court holding. Ms. Soocey is asking this Court to reverse the Court of Appeals and the Superior Court and to remand this case to the Superior Court so that the parties can begin to work towards a resolution.

Respectfully submitted

CHALMERS C. JOHNSON, WSBA # 40180
Attorney for the Petitioner

CERTIFICATE OF MAILING

SIGNED at Port Orchard, Washington

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 19th Day of November, 2020, the document to which this certificate is attached, Petition for Review to the Supreme Court to which this declaration is affixed, was filed in the Court of Appeals-Division Two under case No. 53389-8-II, and a true copy was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Scott Matthew O'Halloran
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And was concurrently emailed to counsel at scott@favros.com and amanda@favros.com

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APPENDIX

Table of Contents

Filed
Washington State
Court of Appeals
Division Two

October 20, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALLYSON SOOCEY, personal representative of the Estate of Steven Daryl Soocey; and ESTATE OF STEVEN DARYL SOOCEY, Appellant, v. CHI FRANCISCAN; ST. JOSEPH HOSPITAL, Respondent.	No. 53389-8-II UNPUBLISHED OPINION

GLASGOW, J.—Allyson Soocey alleged that her husband, Steven Daryl Soocey, died as the result of negligent health care provided by CHI Franciscan. The alleged negligence occurred on November 4, 2015, and Daryl died 10 days later on November 14, 2015. On November 13, 2018, Soocey brought a wrongful death claim against CHI Franciscan based on the death of her husband. The trial court granted summary judgment to CHI Franciscan and dismissed the case as barred by the three-year statute of limitations for claims based on medical negligence because Soocey brought suit more than three years after the alleged negligence occurred.

Soocey appeals, arguing that the trial court erred in applying the medical negligence statute of limitations, which measures from the date of the negligent act, rather than the general torts catchall statute of limitations, which measures from the date of death in wrongful death claims. She argues that *Fast v. Kennewick Public Hospital District*, 187 Wn.2d 27, 384 P.3d 232 (2016), which held that wrongful death claims based on negligent health care are subject to the medical negligence statute of limitations, does not apply in this case. Instead, she argues, this court should

apply previous Court of Appeals decisions that determined that all wrongful death claims are governed by the general torts statute of limitations.

Applying *Fast*, which explicitly held that wrongful death claims based on negligent health care are governed by the medical negligence statute of limitations, not the general torts statute of limitations, we conclude that Soocey's claim is barred because it was filed more than three years after the date of the alleged medical negligence. We affirm.

FACTS

The relevant underlying facts are not in dispute. In September 2015, CHI Franciscan doctors discovered that Daryl had a large brain tumor. The doctors recommended surgery and informed Daryl of the many risks associated with surgery, including that it could cause him to have difficulty swallowing. Daryl agreed to the surgery.

After the surgery, Daryl had difficulty swallowing, although this was an expected side effect of the surgery. He was discharged from the hospital but returned a few days later after becoming weak and falling at home. Soocey told the doctors that Daryl had developed chest congestion and a serious cough. The doctors put Daryl on oxygen and put him in the primary care unit to treat him for acute respiratory failure and pneumonia.

On November 4, 2015, Daryl developed shortness of breath and became unresponsive. Although he was resuscitated, he never regained consciousness. He died on November 14, 2015.

On November 13, 2018, Soocey filed a claim for wrongful death under RCW 4.20.010, claiming that Daryl's death was the result of the medical negligence of CHI Franciscan. The complaint alleged that CHI Franciscan nurses responded negligently when Daryl became short of breath while in the hospital on November 4, 2015, and their negligence caused his death. Soocey

later filed an amended complaint including claims for medical negligence under chapter 7.70 RCW on behalf of Daryl's estate.

CHI Franciscan moved for summary judgment, arguing that Soocey's claim was barred by the three-year statute of limitations for medical negligence claims because she filed the claim more than three years after the date of the alleged negligence. The trial court granted summary judgment and dismissed the case. Soocey appeals.

ANALYSIS

Soocey argues that the trial court erred in applying the three-year limitations period from the date of the alleged negligence, November 4, 2015, rather than from the date of her husband's death, November 14, 2015. We disagree. The Washington Supreme Court has determined that the medical negligence statute of limitations applies to all wrongful death claims based on medical negligence. *Fast*, 187 Wn.2d at 40. Under *Fast*, Soocey's claim is barred by the medical negligence statute of limitations.

A. Statute of Limitations for Medical Negligence Claims and Wrongful Death Claims

Determining the applicable statute of limitations is a question of statutory interpretation that we review de novo. *In re Marriage of Goodyear-Blackburn*, 12 Wn. App. 2d 798, 801-02, 460 P.3d 202 (2020).

Chapter 7.70 RCW governs all actions for damages resulting from health care. RCW 7.70.010; *Fast*, 187 Wn.2d at 34. RCW 4.16.350 governs the statute of limitations for claims based on medical negligence. *Fast*, 187 Wn.2d at 34.

> Any civil action for damages for injury occurring as a result of health care . . . 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.

RCW 4.16.350(3) (emphasis added).

The general three-year torts statute of limitations applies to "[a]n action for . . . any other injury to the person or rights of another not hereinafter enumerated." RCW 4.16.080(2). The three-year period under this statute of limitations applies generally to wrongful death actions and is measured from the date of death. *Wills v. Kirkpatrick*, 56 Wn. App. 757, 760, 785 P.2d 834 (1990), *abrogated by Fast*, 187 Wn.2d 27.

In 1990, this court held in *Wills* that the statute of limitations for claims based on medical negligence did not apply to wrongful death claims because the statute referred to damages for injury, but not death. *Id.* at 761-62. The *Wills* court reasoned that nothing in the medical negligence statute suggested "that the limitation of actions for medical malpractice embraces a claim for wrongful death." *Id.* at 762. The court held that the phrase "damages for injury" as used in the medical negligence statute of limitations, RCW 4.16.350(3), included only those injuries suffered by the patient, and excluded wrongful death claims, which compensate the decedent's beneficiaries for damages incurred as a result of the death of their loved one. *Wills*, 56 Wn. App. at 761; *see* RCW 4.20.010 (providing a right of action for wrongful death). Moreover, if the medical malpractice statute of limitations applied, then "such a claim could be barred even before death triggers accrual of the right to bring the action." *Wills*, 56 Wn. App. at 762. The *Wills* court concluded that this was not what the legislature intended. *Id.* at 763.

In 2015, Division Three followed *Wills*, in part because the legislature had acquiesced to the *Wills* holding for a quarter century. *Fast v. Kennewick Pub. Hosp. Dist.*, 188 Wn. App. 43, 52-

53, 354 P.3d 858 (2015). In *Fast*, Division Three applied the general tort statute of limitations to the Fasts' claim for the wrongful death of their child. *Id.* at 53.

Then the Supreme Court reversed, concluding instead that the medical negligence statute of limitations in RCW 4.16.350(3), which applies to claims made under chapter 7.70 RCW, must apply "in cases of wrongful death resulting from negligent health care." *Fast*, 187 Wn.2d at 33-34; *see* RCW 7.70.010. The *Fast* court relied on other provisions within chapter 7.70 RCW that mention "death" or "wrongful death" to conclude that "the legislature intended to subject wrongful death claims caused by medical negligence to the provisions of chapter 7.70 RCW." *Id.* at 35-36. The *Fast* court reasoned that the general torts statute of limitations only applies to actions "'not hereinafter enumerated,'" and so the more specific medical negligence statute of limitations in RCW 4.16.350(3) must apply in cases of medical negligence. 187 Wn.2d at 37 (quoting RCW 4.16.080(2)).

B. Statute of Limitations Applicable to Soocey's Claim

Soocey attempts to distinguish the Supreme Court's decision in *Fast* from the facts of this case in several ways. Soocey argues that the Supreme Court's decision in *Fast* does not apply outside of cases arising under RCW 4.24.010, Washington's wrongful death of a child statute, because that was the statute directly at issue in *Fast*. Soocey reasons that her wrongful death claim is based on RCW 4.20.010, which the Court of Appeals analyzed in *Fast*, but which the Supreme Court did not analyze in its opinion because the Supreme Court determined that the Court of Appeals had analyzed the wrong statute.

Soocey argues that the Supreme Court in *Fast* explained that the Court of Appeals mistakenly analyzed RCW 4.20.010, the general wrongful death statute, instead of RCW 4.24.010,

the statute addressing wrongful death of a child. Thus, Soocey asserts, the Court of Appeals' analysis of RCW 4.20.010 was not actually disturbed by the Supreme Court's holding in *Fast*. In other words, Soocey claims that the Court of Appeals' holdings in *Fast* and *Wills* are still good law. She points specifically to a footnote in the Supreme Court's opinion in which the court noted that neither party had challenged whether the cases analyzing the general wrongful death statute, RCW 4.20.010, were helpful in analyzing the statute addressing the wrongful death of a child, RCW 4.24.010. *See Fast*, 187 Wn.2d at 38 n.13.

But the Supreme Court in *Fast* repeatedly used broad language to articulate its holding as applying generally to "cases of wrongful death resulting from negligent health care." *Id.* at 29, 33-34, 40. Throughout its analysis, the court referred broadly to wrongful death claims and did not limit its holding to claims based on the death of a child or to the specific facts of that case. Indeed, the court acknowledged the existence of other wrongful death statutes and stated that "[t]he 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." *Id.* at 36 (emphasis added). Had the Supreme Court intended to limit its holding to the wrongful death of a child statute, it would have used far different, more limiting language. Unlike the Supreme Court, which is free to limit *Fast* in the future, we are not permitted to ignore or overrule *Fast*'s broad holding. *See, e.g.*, *State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997).

Although the Supreme Court recognized in *Fast* that the Court of Appeals had analyzed the wrong statute for that case, it also noted that the Court of Appeals in both *Fast* and *Wills* did not engage in any statutory analysis of the "'not hereinafter enumerated'" language of RCW 4.16.080(2). *Fast*, 187 Wn.2d at 38. Moreover, the Supreme Court's discussion of *Wills* makes

clear that the court rejected the *Wills* court's reasoning that an "injury" in medical negligence cases does not include wrongful death. The Supreme Court noted that *Wills* incongruously interpreted "injury" in the medical negligence statute of limitations, RCW 4.16.350(3), to not include wrongful death while simultaneously concluding that "injury" in the catchall statute, RCW 4.16.080(2), did include wrongful death. *Fast*, 187 Wn.2d at 39. The Supreme Court further explained that "the *Wills* court did not acknowledge the previously mentioned provisions of chapter 7.70 RCW that contemplate or specifically reference wrongful death." *Id.* Thus, although the Supreme Court in *Fast* may have analyzed the issue under a different wrongful death statute than the one at issue here, it is clear that it disavowed *Wills*: "[W]e hold that in cases of wrongful death resulting from negligent health care, the medical negligence statute of limitations . . . (RCW 4.16.350(3)) applies." *Id.* at 40.

Soocey argues that even if this court determines that *Fast* is broadly applicable to all wrongful death claims, this court should nevertheless decline to apply *Fast* in this case because using the medical negligence statute of limitations would lead to absurd results. Specifically, Soocey argues that running the statute of limitations from the date of the negligent act in wrongful death cases, rather than from the date of the death, could lead to a situation where the wrongful death cause of action never materializes if the person dies more than three years after the medical negligence occurred. Because the wrongful death statute permits only the personal representative of the deceased's estate to bring a wrongful death claim, RCW 4.20.010, such a claimant cannot exist to bring a claim if the three-year period expires before the death occurs.

The Supreme Court recognized this possibility in *Fast*, but nevertheless held that wrongful death claims based on medical negligence are governed by the medical negligence statute of

limitations. The court noted that it had reached this very result—barring a wrongful death claim under the statute of limitations because the underlying claim lapsed during the deceased's life—in *Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 732, 381 P.3d 32 (2016). *Fast*, 187 Wn.2d at 39. The Supreme Court declined to go into any further depth on this issue in *Fast* because the concern was not present in that case—the death and the last negligent act had occurred virtually simultaneously. *Id.*

Similarly here, the absurd result that Soocey alleges is not present in this case. Her husband died only 10 days after the last negligent act that allegedly caused his death, so Soocey had ample time to bring her claim before the statute of limitations lapsed. Furthermore, the medical negligence statute of limitations, RCW 4.16.350(3), provides another mechanism to prevent the injustice Soocey is concerned about. The Supreme Court recognized in *Gunnier v. Yakima Heart Center, Inc.*, "[t]hat [the] three-year period may lapse before injury occurs." 134 Wn.2d 854, 864, 953 P.2d 1162 (1998). But the *Gunnier* court explained that "[t]his 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.*; *see* RCW 4.16.350(3). It is true that *Gunnier* was not a wrongful death case, but the reasoning would apply equally here.

Division Three has also recently followed *Fast* to bar a wrongful death claim brought more than three years after the last date of the alleged negligence. *Fechner v. Volyn*, 3 Wn. App. 2d 716, 720-21, 418 P.3d 120 (2018). The court recognized, "*Fast* made clear that all medical negligence claims are governed by the [medical negligence statute of limitations, RCW 4.16.350(3)], even if the medical negligence results in death as opposed to some other sort of harm." *Id.* at 721. Soocey

argues that the *Fechner* court recognized that *Fast* was intended to apply narrowly because of *Fechner*'s discussion of Justice Madsen's concurrence.

Soocey is correct that Justice Madsen would apply *Fast* narrowly, but not in the way that Soocey argues. Justice Madsen would not confine *Fast* only to wrongful death of a child cases under RCW 4.24.010. *See* 187 Wn.2d at 41-43 (Madsen, J., concurring). Instead, Justice Madsen emphasized that the medical negligence statute of limitations applies only in the health care context and clarified that a wrongful death claim remains a distinct and separate cause of action. *Id.* The *Fechner* court relied on Justice Madsen's concurrence to reject the plaintiff's claim there that she could pursue a separate wrongful death claim against her deceased husband's doctor that would be governed by the general statute of limitations. 3 Wn. App. 2d at 721. The *Fechner* court reasoned that Justice Madsen did not intend to cast doubt on whether wrongful death claims can fall under the medical negligence statute of limitations. *Id.* "Instead, it is apparent that *Fast* applies to a wrongful death claim if the claim is based on medical negligence." *Id.*

We reject Soocey's arguments that we should ignore *Fast* and apply the discarded rule from *Wills* that an injury in medical negligence cases does not include wrongful death. The Supreme Court definitively and without qualification held that "in cases of wrongful death resulting from negligent health care, the medical negligence statute of limitations . . . (RCW 4.16.350(3)) applies." *Fast*, 187 Wn.2d at 40. Thus, in any wrongful death case based on an act of medical negligence, the three-year statute of limitations runs from the date of the negligent act or omission, not from the date of death.

Here, it is undisputed that the date of alleged medical negligence was November 4, 2015. Soocey filed suit on November 13, 2018, more than three years later. Therefore, her claim is barred by the medical negligence statute of limitations, as applied by *Fast*. RCW 4.16.350(3).

CONCLUSION

We conclude that the medical negligence statute of limitations applies in this case because Soocey's wrongful death claim is based on alleged medical negligence. Soocey's claim is barred because it was filed more than three years after the date of the alleged medical negligence. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Lee, C.J.

Maxa, J.

LONGSHOT LAW, INC.

November 19, 2020 - 11:03 AM

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Superior Court Case Number:	18-2-12931-7

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