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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JAMIE FAST, et al.,

*Plaintiffs-Petitioners,*

vs.

KENNEWICK PUBLIC HOSPITAL DISTRICT, et al.,

*Defendant-Respondents.*

FILED E  
JUN 03 2016  
WASHINGTON STATE  
SUPREME COURT  
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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in clarification of the time limits applicable to parents' tort claims for the wrongful death of their child.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This case presents the Court with the opportunity to clarify uncertainty regarding the statute of limitations applicable to parents' claims for death of their child under RCW 4.24.010, when the death is allegedly caused by medical negligence. Jamie and Shane Fast (Fast) filed suit against Kennewick Public Hospital District, d/b/a Kennewick General Hospital, and Mid-Columbia Women's Health Center, Adam T. Smith, D.O., and Gregory Schroff, M.D. (collectively KGH), alleging claims for medical negligence resulting in injuries to Jamie and the wrongful death of their son, Robert, in utero. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Fast v. Kennewick Public Hosp. Dist., 188 Wn. App. 43, 354 P.3d 858 (2015), *review*

*granted*, 185 Wn.2d 1001 (2016); Fast Br. at 2-4; Kennewick Br. at 2-9; Fast Pet. for Rev. at 1-4; Kennewick Ans. to Pet. for Rev. at 2-4.

For purposes of this amicus curiae brief, the following facts are relevant: Fast alleges that KGH failed to properly diagnose and treat Jamie's gestational diabetes, causing injuries to Jamie (and Shane, for loss of consortium) as well as the death of Robert. The parents' claims for their own injuries are based on Ch. 7.70 RCW, governing medical negligence actions. Their claims for the wrongful death of their child, also based on medical negligence, are brought under RCW 4.24.010, the statute authorizing an action for death of a child. See Fast, 188 Wn. App. at 48.

Suit was filed more than three years but less than four years after Robert's death. KGH moved for summary judgment on grounds that the claims for wrongful death are untimely under the 3-year general personal injury statute of limitations, RCW 4.16.080(2). Fast argued in response that the claims are subject to the 3-year statute of limitations for medical negligence actions, RCW 4.16.350, which was tolled for an extra year by service of a request for mediation under RCW 7.70.110, rendering the claims timely.<sup>1</sup>

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<sup>1</sup> KGH disputes whether the mediation request satisfies the requirements of RCW 7.70.100, but appears to assume that it does for purposes of summary judgment on the statute of limitations. See Fast, 188 Wn. App. at 49 n.1.

The superior court granted KGH's motion for summary judgment, concluding that the claims for death of a child are subject to RCW 4.16.080(2), and are untimely under that statute. The Court of Appeals affirmed, relying primarily on its decision in Wills v. Kirkpatrick, 56 Wn. App. 757, 785 P.2d 834, *review denied*, 114 Wn.2d 1024 (1990), which holds that a claim under the general wrongful death statute, RCW 4.20.010, based on medical negligence, is subject to the general personal injury statute of limitations, RCW 4.16.080(2), rather than the medical negligence statute of limitations, RCW 4.16.350.

This Court granted Fast's petition for review.

### III. ISSUES PRESENTED

1. Does the general personal injury statute of limitations, RCW 4.16.080(2), apply to *all* actions for death of a child under RCW 4.24.010? Or, does the statute of limitations vary depending on the underlying tort giving rise to the action?
2. In the face of uncertainty regarding the applicable limitations period, is a plaintiff entitled to the benefit of the longer limitations period under the circumstances? If so, does the medical negligence statute of limitations, RCW 4.16.350, apply to Fast's claims for the death of a child caused by medical negligence under the circumstances present in this case?

See Fast Pet. for Rev. at 1; Kennewick Ans. to Pet. for Rev. at 2.<sup>2</sup>

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<sup>2</sup> Other issues addressed by the Court of Appeals have not been presented for review in this Court. See Fast, 188 Wn. App. at 53-59 (regarding pre-suit notice of claim filing requirements under Ch. 4.96 RCW); Fast Pet. for Rev. at 1; Kennewick Ans. to Pet. for Rev. at 2.

#### IV. SUMMARY OF ARGUMENT

Under this Court's teachings, when the nature of an action is uncertain, so that two (or more) statutes of limitations can be read as being applicable to the action, the Court should apply the longer statute of limitations under the particular circumstances. The determination of which limitations period is longer necessarily includes consideration of when the limitations period begins to run (accrual), and the circumstances that suspend the running of the limitations period (tolling).

The nature of an action for wrongful death of a child is uncertain in that the statute creating the action, RCW 4.24.010, does not specify a limitations period, and it is unclear whether the applicable statute of limitations is dependent upon the nature of the underlying tortious conduct. In cases such as this one, where more than one limitations period is implicated, the longer period should be controlling.

Because this action for death of a child is grounded in medical negligence, both the general personal injury statute of limitations, RCW 4.16.080(2), and the medical negligence statute of limitations, RCW 4.16.350, are implicated. Under the facts present here, the Court should apply the medical negligence statute because it provides the longer limitations period in light of tolling under RCW 7.70.110. In other

circumstances, when the general personal injury statute provides the longer limitations period, that statute should apply.

To the extent the Court undertakes to resolve the uncertainty regarding the statute of limitations for actions for death of a child caused by medical negligence—rather than leaving the issue to the Legislature—the medical negligence statute of limitations would appear to be controlling because, by its terms, RCW 4.16.080(2) only applies to actions “not hereinafter enumerated.” However, fundamental fairness requires any such clarification to be given prospective effect only. The contrary decision in Wills, supra, should be disapproved.

## V. ARGUMENT

### **A. Overview Of Actions For Death Of A Child Under RCW 4.24.010, And The Uncertainty Regarding The Statute Of Limitations Applicable To Death Of A Child Caused By Medical Negligence.**

RCW 4.24.010 provides in part:

A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child. This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable . . . . In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

(Ellipses added.)<sup>3</sup> This statute combines a new cause of action for death of a child with a preexisting common law cause of action for injury to a child that does not result in death, and expands upon the damages recoverable for injuries short of death. See Philippides v. Bernard, 151 Wn.2d 376, 389, 88 P.3d 939 (2004). In order to recover under the statute, parents must establish an underlying tort. See id.

RCW 4.24.010 is not expressly subject to any limitations period. It also does not specify whether all actions for injury or death of a child are subject to their own, separate limitations period, or whether they are governed by the limitations period applicable to the underlying tort. If actions for injury or death of a child are subject to their own statute of limitations, then the limitations period will be the same in every action. If they are governed by the statute of limitations applicable to the underlying tort, then the limitations period may vary from case to case.

Until the decision below, no Washington appellate court decision has had the occasion to determine the statute of limitations applicable to claims for injury or death of a child under RCW 4.24.010. The Court of Appeals relied on cases applying the general personal injury statute,

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<sup>3</sup> The full text of the current version of RCW 4.24.010 is reproduced in the Appendix.

RCW 4.16.080(2), to claims for wrongful death brought under a different wrongful death statute, RCW 4.20.010.<sup>4</sup>

The language of the Court of Appeals opinion below seems to suggest that RCW 4.16.080(2) applies to *all* wrongful death actions, regardless of the statute of limitations that would otherwise be applicable to the underlying tortious conduct:

Unlike most states, Washington's wrongful death statutes do not contain an express statute of limitation. *White v. Johns–Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985) (citing S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 11:8 (2d ed.1975)). Instead, *actions for wrongful death have long been held to be subject to the three-year limitations period provided by RCW 4.16.080(2) for “injury to the person or rights of another, not hereinafter enumerated.”* *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 377, 166 P.3d 662 (2007) (“The statute of limitations for a wrongful death action in Washington is three years.”) (citing RCW 4.16.080(2); *Beal v. City of Seattle*, 134 Wn.2d 769, 776, 954 P.2d 237 (1998); *Bader v. State*, 43 Wn. App. 223, 227, 716 P.2d 925 (1986); *Dodson v. Cont’l Can Co.*, 159 Wash. 589, 294 P. 265 (1930)). Like the statute creating an action for death of a child, the statute prescribing the limitations period generally applicable to torts predates statehood. See LAWS OF 1854, § 4, at 363. A wrongful death action accrues, and the time for filing begins, at the time of death. *Atchison*, 161 Wn.2d at 378–79, 166 P.3d 662.

Fast, 188 Wn. App. at 50 (emphasis added).

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<sup>4</sup> See Fast, 188 Wn. App. at 45-46 & 50 (citing Wills, 56 Wn. App. at 760 (involving RCW 4.20.010); Atchison v. Great W. Malting Co., 161 Wn.2d 372, 377, 166 P.3d 662 (2007) (same); Beal v. City of Seattle, 134 Wn.2d 769, 776, 954 P.2d 237 (1998) (same); White v. Johns-Manville Corp., 103 Wn.2d 344, 348, 693 P.2d 687 (1985) (same); Dodson v. Cont’l Can Co., 159 Wash. 589, 294 P. 265 (1930) (involving former Rem. Comp. Stat. § 183); Bader v. State, 43 Wn. App. 223, 227, 716 P.2d 925 (1986) (involving wrongful death of an adult, but not citing statute).

Some of the cases cited by the Court of Appeals likewise seem to suggest that RCW 4.16.080(2) applies to all wrongful death actions.<sup>5</sup> Other cases seem to suggest that the statute of limitations may vary depending on the underlying tortious conduct, although, even in these cases, the Court applied RCW 4.16.080(2), and it remains unclear whether the Court contemplated that any other statute of limitations could apply under different circumstances.<sup>6</sup>

The parties in this case appear to agree that RCW 4.16.080(2) applies to claims for wrongful death of a child under RCW 4.24.010, at least outside of the medical negligence context. However, they disagree regarding the statute of limitations to be applied when the wrongful death

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<sup>5</sup> See Atchison, 161 Wn.2d at 377 (stating “[t]he statute of limitations for a wrongful death action in Washington is three years,” citing RCW 4.16.080(2)); Beal, 134 Wn.2d at 776 (stating “[t]he complaint in the action was filed three years to the day after Fernandez’s death, the last day of the three year statute of limitations period,” citing RCW 4.16.080); Dodson, 159 Wash. at 592 (noting parties’ agreement that the prior version of RCW 4.16.080(2) applies to wrongful death actions); Wills, 56 Wn. App. at 760 (stating “[t]he three-year provision of RCW 4.16.080(2), measured from the date of death, has been applied to wrongful death claims because such claims qualify as ‘any other injury to the person or rights of another not hereinafter enumerated’”); see also Robinson v. Baltimore & S. Min. & Reduction Co., 26 Wash. 484, 67 P. 274 (1901) (holding wrongful death claim under a prior version of RCW 4.20.010 is subject to the 3-year limitations period in a prior version of RCW 4.16.080(2)).

<sup>6</sup> See White, 103 Wn.2d at 348 (stating “Washington’s wrongful death statute [i.e., RCW 4.20.010] does not contain an express statute of limitation; rather, it is governed by RCW 4.16, which sets forth the statutes of limitation applicable to different types of actions . . . . The 3-year tort statute of limitation (RCW 4.16.080(2)) applies to the present action”; brackets & ellipses added); Dodson, 159 Wash. at 591 (stating the wrongful death statute “does not contain any language limiting the time within which such action may be commenced. So as to any such limitation we must look to our general statutory provisions limiting the time within which civil actions may be commenced”). But see Allen v. State, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (seeming to indicate that White applied “the ‘catchall’ 3-year statute of limitations of RCW 4.16.080(2)” to all wrongful death claims).

is based on medical negligence. Fast contends that the medical negligence statute of limitations, RCW 4.16.350, applies to such claims. See Fast Supp. Br. at 10-18. KGH argues that this statute is limited to claims for injuries short of death, and that RCW 4.16.080(2) applies to death claims. See KGH Br. at 13-17; KGH Ans. to Pet. for Rev. at 13-15; KGH Supp. Br. at 1-2.

Analysis of the text of RCW 4.16.080(2) and RCW 4.16.350 and related statutory provisions suggests that they are both implicated by an action for death of a child arising from medical negligence. RCW 4.16.080(2) provides:

The following actions shall be commenced within three years . . . An action for the taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated[.]

(Ellipses & brackets added.)<sup>7</sup> This statute does not expressly include or exclude actions for wrongful death or death of a child, but the word “injury” would appear to be broad enough to include injury in the form of wrongful death.

RCW 4.16.350 provides in part:

*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

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<sup>7</sup> The full text of the current version of RCW 4.16.080 is reproduced in the Appendix.

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, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or *the patient's representative* has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or *the patient's representative* has one year from the date of the actual knowledge in which to commence a civil action for damages.

(Emphasis & ellipses added.)<sup>8</sup> Similar to RCW 4.16.080(2), this statute does not expressly include or exclude medical negligence actions involving death. The phrase “[a]ny civil action for damages for injury occurring as a result of health care” seems broad enough to encompass wrongful death actions. As with the word “injury” in RCW 4.16.080(2), the phrases “damages for injury” and “injury or condition” in RCW 4.16.350 seem broad enough to include injury in the form of wrongful death.<sup>9</sup> The references in RCW 4.16.350 to “the patient’s

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<sup>8</sup> The full text of the current version of RCW 4.16.350 is reproduced in the Appendix.

<sup>9</sup> See Merriam-Webster Online, s.v. “injury” (available at [www.m-w.com](http://www.m-w.com); viewed May 11, 2016) (defining “injury” as “an act that damages or hurts : wrong” and “violation of another’s rights for which the law allows an action to recover damages”); Black’s Law Dictionary s.v. “injury” (10<sup>th</sup> ed. 2014) (defining “injury” as “[t]he violation of another’s legal right, for which the law provides a remedy”). Undefined statutory terms should be given their ordinary meaning as discerned from common dictionaries. See American Continental Ins. Co. v Steen, 151 Wn.2d 512, 519-20, 91 P.3d 864 (2004); State v. Pacheco, 125 Wn.2d 150, 154-55, 882 P.2d 183 (1994).

representative” also seem broad enough to include a personal representative bringing a wrongful death action.<sup>10</sup>

Several statutes governing medical negligence actions codified in Ch. 7.70 RCW recognize that a civil action for injury occurring as a result of health care includes wrongful death. RCW 7.70.010 provides:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of *all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care* which is provided after June 25, 1976.

(Emphasis added.)<sup>11</sup> As with RCW 4.16.350, this statute does not expressly exclude wrongful death actions, and the highlighted language is broad enough to include such actions.

The meaning of the broad language of RCW 4.16.350 and RCW 7.70.010 is illuminated by other provisions of Ch. 7.70 RCW, which specifically mention “death” or “wrongful death” resulting from medical negligence. RCW 7.70.090 provides:

Members of the board of directors or other governing body of a public or private hospital are not individually liable for *personal injuries or death* resulting from health care administered by a health care provider granted privileges to provide health care at the

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<sup>10</sup> The personal representative of the decedent’s estate must bring a wrongful death action for the benefit of statutory beneficiaries under RCW 4.20.010-.020. Parents of a deceased child may bring an action in their own right under RCW 4.24.010.

<sup>11</sup> The full text of the current version of RCW 7.70.010 is reproduced in the Appendix.

hospital unless the decision to grant the privilege to provide health care at the hospital constitutes gross negligence.

(Emphasis added.)<sup>12</sup> While this provision does not appear to be implicated in this case, the grant of limited immunity from liability for death implies that such liability exists under Ch. 7.70 RCW.<sup>13</sup>

Furthermore, RCW 7.70.140(2)(a) imposes claim reporting requirements on health care providers. For purposes of these requirements, “[c]laim’ has the same meaning as in RCW 48.140.010(1),” and “[c]laimant’ has the same meaning as in RCW 48.140.010(2).” See RCW 7.70.140(1)(a)-(b) (brackets added). RCW 48.140.010(1), in turn, defines “claim” to mean:

a demand for monetary damages for *injury or death* caused by medical malpractice, and a voluntary indemnity payment for *injury or death* caused by medical malpractice made in the absence of a demand for monetary damages.

(Emphasis added.) Similarly, RCW 48.140.010(2) defines “claimant” to mean: “a person, *including a decedent’s estate*, who is seeking or has sought monetary damages for *injury or death* caused by medical malpractice.” (Emphasis added.)<sup>14</sup>

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<sup>12</sup> The full text of the current version of RCW 7.70.090 is reproduced in the Appendix.

<sup>13</sup> Cf. Beggs v. DSHS, 171 Wn.2d 69, 78, 247 P.3d 421 (2011) (stating “[a] grant of immunity from liability clearly implies that civil liability can exist in the first place”; brackets added; quotation omitted).

<sup>14</sup> The full texts of the current versions of RCW 7.70.140 and RCW 48.140.010 are reproduced in the Appendix.

Lastly, although no longer enforceable, RCW 7.70.150(1) provides in part:

In an action against an individual health care provider under this chapter for *personal injury or wrongful death* in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action.

(Emphasis added.)<sup>15</sup>

The Court of Appeals concluded that RCW 4.16.350 does not apply to actions for death of a child under RCW 4.24.010 based on medical negligence, relying on its prior decision in Wills, and legislative acquiescence to that decision. See Fast, 188 Wn. App. at 51-53. In Wills, the court applied RCW 4.16.080(2) to a wrongful death claim under RCW 4.20.010 on grounds that “[t]here is nothing to suggest that the limitation of actions for medical malpractice embraces a claim for wrongful death.” 56 Wn. App. at 762 (brackets added). The court did not acknowledge the foregoing provisions of the statutory scheme governing medical negligence actions, which contemplate or specifically reference wrongful death.<sup>16</sup>

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<sup>15</sup> The full text of the current version of RCW 7.70.150 is reproduced in the Appendix. This statute has been struck down as unconstitutional, although it has not been repealed. See Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 216 P.3d 374 (2009). Nonetheless, it is indicative of legislative intent to include wrongful death claims under Ch. 7.70 RCW.

<sup>16</sup> KGH portrays the Wills decision as having stare decisis effect in this Court, relying in part on this Court’s denial of review in Wills. See KGH Ans. to Pet. for Rev. at 10. However, this Court is not bound by lower court opinions under the doctrine of stare

The court in Wills also construed the undefined phrase “damages for injury,” as used in RCW 4.16.350 to *exclude* wrongful death claims. See id. at 761-62. At the same time, the court interpreted the undefined word “injury,” as used in RCW 4.16.080(2) to *include* wrongful death claims, without explaining the incongruity resulting from the differing interpretations of similar statutory language. See id.<sup>17</sup>

The Court of Appeals below and the parties appear to agree that RCW 4.16.080(2) can be fairly read as applying to an action for wrongful death of a child. The Court of Appeals and KGH are incorrect, however, in concluding that RCW 4.16.350 cannot also be fairly read as applying to such actions when they arise from medical negligence. The question

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decisis, and the denial of review is not precedential. See Matia Contractors v. City of Bellingham, 144 Wn. App. 445, 452, 183 P.3d 1082 (2008) (holding “the Supreme Court’s denial of review has never been taken as an expression of the court’s implicit acceptance of an appellate court’s decision”). KGH also relies on ostensible legislative acquiescence to Wills, but legislative inaction is not conclusive and cannot override unambiguous statutory language. See Safeco Ins. Co. v. Meyering, 102 Wn.2d 385, 392, 687 P.2d 195 (1984).

<sup>17</sup> In Wills, the court also expressed concern about the relationship between an inter vivos claim and a wrongful death claim for medical negligence, suggesting that the inter vivos claim might accrue and the limitations period might expire before death triggers the right to bring a wrongful death claim. See id. at 762. KGH makes a similar argument based on Deggs v. Asbestos Corp., 188 Wn. App. 495, 354 P.3d 1, *review granted*, 184 Wn.2d 1018 (2015). See KGH Supp. Br. at 2. The choice of a statute of limitations for a wrongful death action does not justify the concern raised in Wills, and is separate from the question presented in Deggs, i.e., whether a wrongful death action can be brought after the statute of limitations has expired on a related inter vivos action. The concern expressed in Wills is addressed by WSAJ Foundation’s amicus curiae brief in Deggs. In particular, the Foundation argues that there is no basis in the text of the wrongful death statutes for limiting wrongful death actions to cases where there is a subsisting cause of action in the decedent at the time of death, and cases seeming to require a subsisting cause of action should be disapproved or overruled because they conflate the analysis of wrongful death and survival actions.

before the Court is how to handle the uncertainty resulting from the apparent applicability of both statutes of limitations.

**B. Given Uncertainty Regarding Whether The General Personal Injury Statute Of Limitations, RCW 4.16.080(2), Or The Medical Negligence Statute Of Limitations, RCW 4.16.350, Applies To Actions For Wrongful Death Of A Child Resulting From Medical Negligence, Fast Should Have The Benefit Of The Longer Limitations Period Under The Particular Circumstances.**

This Court has previously recognized that, when it is uncertain which of two (or more) statutes of limitations applies to a given action, the plaintiff should have the benefit of the longer limitations period. See Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40, 51-52, 455 P.2d 359 (1969).<sup>18</sup> Applying the longer limitations period under these circumstances maintains the balance between “the possibility of stale claims” and “the unfairness of precluding justified causes of action,” that is involved in interpreting and applying statutes of limitations. See 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 579, 146 P.3d 423 (2006). If two statutes of limitations are applicable to a particular claim, the claim cannot be considered stale as long as it is brought within the longer

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<sup>18</sup> See also Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 714-15, 709 P.2d 793 (1985) (stating “[w]hen there is uncertainty as to which statute of limitation governs, the longer statute will be applied,” citing Shew); Rose v. Rinaldi, 654 F.2d 546, 547 (9th Cir. 1981) (stating “the Washington Supreme Court has stated that in situations where there is uncertainty as to which limitations statute governs, the longer statute will generally be used,” citing Shew); Fast Br. at 15-16 & nn.35, 37; Fast Pet. for Rev. at 17 (citing Shew & Stenberg).

limitation period, and it would be unfair to bar a claim brought within this period.

The uncertainty that justifies application of this rule relates to the nature of the action, rather than ambiguity in the statutes of limitations at issue.<sup>19</sup> Such uncertainty is present here because the statute creating an action for death of a child, RCW 4.24.010, does not specify the applicable statute of limitations, and it is unclear whether all such actions are subject to the same limitations period, or whether they borrow the limitations period applicable to the underlying tort.

Determining which limitations period is longer necessarily requires consideration of accrual and tolling principles governing application of the limitations period. Accrual governs the date when the limitations period begins to run. Tolling governs the circumstances that suspend the running of the limitations period. It is not possible to determine which limitations period is longer without considering these principles.<sup>20</sup>

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<sup>19</sup> See Shew, 76 Wn.2d at 51-52 (citing Andersen v. Thude, 42 Ariz. 271, 274-75, 25 P.2d 272 (1933), and Hughes v. Reed, 46 F.2d 435, 440 (10th Cir. 1931), involving actions that could be characterized as sounding in either tort or contract).

<sup>20</sup> It may also be appropriate to consider the applicable repose period—the outer limit of time within which an action must accrue—to determine the longer limitations period in a proper case. For example, although it is not an issue in this case, the medical negligence statute of limitations contains an 8-year repose period. See RCW 4.16.350. The constitutionality of this repose period remains an open question. See DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 960 P.2d 919 (1998) (holding prior repose period for medical negligence claims does not satisfy rational basis review under Wash. Const. Art. I, § 12); Laws of 2006, Ch. 8, §§ 301-302 (re-enacting repose period with additional legislative findings in response to DeYoung); Unruh v. Cacchiotti, 172 Wn.2d 98, 118

Depending on the facts of a particular case, either the general personal injury statute of limitations or the medical negligence statute of limitations may be longer. For example, while accrual based on discovery is available under both statutes, the medical negligence statute shortens the 3-year limitations period to one year if discovery occurs more than two years after the act or omission alleged to have caused injury. See RCW 4.16.350. In such cases, the general personal injury limitations period, with its 3-year post-discovery limitations period, would be longer. Gunnier v. Yakima Heart Ctr., Inc., 134 Wn.2d 854, 861, 953 P.2d 1162 (1998). However, in cases such as this one, the medical negligence statute of limitations is longer because it is subject to tolling based upon a request for mediation under RCW 7.70.110. Fast should have the benefit of this statute.

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n.15, 257 P.3d 631 (2011) (declining to reach challenge that re-enacted statute of repose violates separation of powers and Wash. Const. Art. I, § 12); see also Ockletree v. Franciscan Health Sys., 179 Wn.2d 769, 797, 317 P.3d 1009 (2014) (describing “reasonable grounds” test applicable to Wash. Const. Art. I, § 12, following Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 145 Wn.2d 702, 42 P.3d 394 (2002)).

**C. To the Extent The Court Undertakes To Resolve The Present Uncertainty, the “Not Hereinafter Enumerated” Language Of RCW 4.16.080(2) Requires RCW 4.16.350 To Be Applied To Actions For Death Of A Child Resulting From Medical Negligence, But Any Such Holding Should Be Prospective Only In The Interests Of Fairness.**

If the Court undertakes to resolve the uncertainty regarding the nature of an action for death of a child—as opposed to applying the longer applicable limitations period until the Legislature clarifies the matter—the language of RCW 4.16.080(2) providing that it is limited to actions “not hereinafter enumerated” requires the Court to apply the more specific statute of limitations in RCW 4.16.350 in cases based on medical negligence because it is “hereinafter enumerated.” Neither the parties nor the Court of Appeals (either below or in Wills) addresses the impact of this statutory language, which appears to be dispositive.<sup>21</sup> If the Court agrees, then Wills must be disapproved.

If the Court applies the medical negligence statute on this basis, it should do so *prospectively* only. See generally Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 267, 208 P.3d 1092 (2009) (noting “[o]rdinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless

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<sup>21</sup> Fast argues that RCW 4.16.350 should be applied under the rule of statutory construction that a specific provision controls over a general one. It is unnecessary to resort to this rule of construction in light of the “not hereinafter enumerated” language in RCW 4.16.080(2). See e.g. Fast Pet. for Rev. at 17.

specifically declared by the opinion to have prospective effect only”). A decision should be given prospective effect if:

(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed, (2) retroactive application would tend to impede the policy objectives of the new rule, and (3) retroactive application would produce a substantially inequitable result.

McDevitt v. Harbor View Med. Ctr., 179 Wn.2d 59, 75, 316 P.3d 469 (2013) (quotation omitted). All of these requirements are satisfied here. No reported decision has ever addressed the statute of limitations for an action for death of a child under RCW 4.24.010, and the applicable limitations period is uncertain for the reasons discussed above. There may well be other cases pending where a retroactive ruling by the Court applying RCW 4.16.350 would doom claims that would otherwise be timely under RCW 4.16.080(2), as applied by Wills in the RCW 4.20.010 context. Retroactive application of RCW 4.16.350 would disregard reliance on Wills as precedent and undermine the balance between “the possibility of stale claims” and “the unfairness of precluding justified causes of action,” underlying the analysis of statutes of limitations. See 1000 Virginia Ltd. Partnership, 158 Wn.2d at 579.

## VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

Dated this 23rd day of May, 2016.

George M. Ahrend  
GEORGE M. AHREND

for George M. Ahrend with  
BRYAN P. HARNETIAUX authority

for George M. Ahrend  
VALERIE D. McOMIE with  
authority

On behalf of WSAJ Foundation

# APPENDIX

West's Revised Code of Washington Annotated Title 4. Civil Procedure (Refs & Annos) Chapter 4.16. Limitation of Actions (Refs & Annos)
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West's RCWA 4.16.080

4.16.080. Actions limited to three years

Effective: July 22, 2011

Currentness

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

**Credits**

[2011 c 336 § 83, eff. July 22, 2011; 1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1; Code 1881 § 28; 1869 p 8 § 28; 1854 p 363 § 4; RRS § 159.]

Notes of Decisions (624)

West's RCWA 4.16.080, WA ST 4.16.080

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KeyCite Yellow Flag - Negative Treatment  
Unconstitutional or Preempted Prior Version Held Unconstitutional by DeYoung v. Providence Medical Center, Wash., Aug. 27, 1998

West's Revised Code of Washington Annotated  
Title 4. Civil Procedure (Refs & Annos)  
Chapter 4.16. Limitation of Actions (Refs & Annos)

West's RCWA 4.16.350

4.16.350. Action for injuries resulting from health care or related services--  
Physicians, dentists, nurses, etc.--Hospitals, clinics, nursing homes, etc.

Effective: July 22, 2011  
Currentness

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

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his or her employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including, in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative; 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, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

**4.16.350. Action for injuries resulting from health care or related..., WA ST 4.16.350**

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This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

**Credits**

[2011 c 336 § 88, eff. July 22, 2011; 2006 c 8 § 302, eff. June 7, 2006. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.]

Notes of Decisions (102)

West's RCWA 4.16.350, WA ST 4.16.350

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KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Prior Version Recognized as Unconstitutional by Estate of Bunch ex rel. Bunch v. McGraw Residential Center, Wash.App. Div. 1, Feb. 07, 2011

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

West's Revised Code of Washington Annotated

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

West's RCWA 4.24.010

4.24.010. Action for injury or death of child

Currentness

A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable.

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent: PROVIDED, That notice shall be required only if parentage has been duly established.

Such notice shall be in compliance with the statutory requirements for a summons. Such notice shall state that the other parent must join as a party to the suit within twenty days or the right to recover damages under this section shall be barred. Failure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the suit.

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

**Credits**

[1998 c 237 § 2; 1973 1st ex.s. c 154 § 4; 1967 ex.s. c 81 § 1; 1927 c 191 § 1; Code 1881 § 9; 1877 p 5 § 9; 1873 p 5 § 10; 1869 p 4 § 9; RRS § 184.]

Notes of Decisions (160)

West's RCWA 4.24.010, WA ST 4.24.010

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West's Revised Code of Washington Annotated

Title 7. Special Proceedings and Actions (Refs & Annos)

Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)

West's RCWA 7.70.010

7.70.010. Declaration of modification of actions for damages based upon injuries resulting from health care

Currentness

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976.

**Credits**

[1975-'76 2nd ex.s. c 56 § 6.]

Notes of Decisions (22)

West's RCWA 7.70.010, WA ST 7.70.010

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West's Revised Code of Washington Annotated

Title 7. Special Proceedings and Actions (Refs & Annos)

Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)

West's RCWA 7.70.090

7.70.090. Hospital governing bodies--Liability--Limitations

Currentness

Members of the board of directors or other governing body of a public or private hospital are not individually liable for personal injuries or death resulting from health care administered by a health care provider granted privileges to provide health care at the hospital unless the decision to grant the privilege to provide health care at the hospital constitutes gross negligence.

**Credits**

[1987 c 212 § 1201; 1986 c 305 § 905.]

West's RCWA 7.70.090, WA ST 7.70.090

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West's Revised Code of Washington Annotated

Title 7. Special Proceedings and Actions (Refs & Annos)

Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)

West's RCWA 7.70.110

7.70.110. Mandatory mediation of health care claims--Tolling statute of limitations

Currentness

The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care 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.

**Credits**

[1996 c 270 § 1; 1993 c 492 § 420.]

Notes of Decisions (11)

West's RCWA 7.70.110, WA ST 7.70.110

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West's Revised Code of Washington Annotated Title 7. Special Proceedings and Actions (Refs & Annos) Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)
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West's RCWA 7.70.140

7.70.140. Medical malpractice closed claim reporting requirements

Effective: June 7, 2006

Currentness

(1) As used in this section:

(a) "Claim" has the same meaning as in RCW 48.140.010(1).

(b) "Claimant" has the same meaning as in RCW 48.140.010(2).

(c) "Commissioner" has the same meaning as in RCW 48.140.010(4).

(d) "Medical malpractice" has the same meaning as in RCW 48.140.010(9).

(2)(a) For claims settled or otherwise disposed of on or after January 1, 2008, the claimant or his or her attorney must report data to the commissioner if any action filed under this chapter results in a final:

(i) Judgment in any amount;

(ii) Settlement or payment in any amount; or

(iii) Disposition resulting in no indemnity payment.

(b) As used in this subsection, "data" means:

(i) The date of the incident of medical malpractice that was the principal cause of the action;

(ii) The principal county in which the incident of medical malpractice occurred;

(iii) The date of suit, if filed;

(iv) The injured person's sex and age on the incident date; and

(v) Specific information about the disposition, judgment, or settlement, including:

(A) The date and amount of any judgment or settlement;

(B) Court costs;

(C) Attorneys' fees; and

(D) Costs of expert witnesses.

**Credits**

[2006 c 8 § 209, eff. June 7, 2006.]

West's RCWA 7.70.140, WA ST 7.70.140

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 KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or Preempted **Held Unconstitutional by** Putman v. Wenatchee Valley Medical Center, P.S., Wash., Sep. 17, 2009

West's Revised Code of Washington Annotated  
Title 7. Special Proceedings and Actions (Refs & Annos)  
Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)

West's RCWA 7.70.150

7.70.150. Actions alleging violation of accepted standard of care--Certificate of merit required

Effective: June 7, 2006

Currentness

(1) In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. If the action is commenced within forty-five days prior to the expiration of the applicable statute of limitations, the plaintiff must file the certificate of merit no later than forty-five days after commencing the action.

(2) The certificate of merit must be executed by a health care provider who meets the qualifications of an expert in the action. If there is more than one defendant in the action, the person commencing the action must file a certificate of merit for each defendant.

(3) The certificate of merit must contain a statement that the person executing the certificate of merit believes, based on the information known at the time of executing the certificate of merit, that there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant.

(4) Upon motion of the plaintiff, the court may grant an additional period of time to file the certificate of merit, not to exceed ninety days, if the court finds there is good cause for the extension.

(5)(a) Failure to file a certificate of merit that complies with the requirements of this section is grounds for dismissal of the case.

(b) If a case is dismissed for failure to file a certificate of merit that complies with the requirements of this section, the filing of the claim against the health care provider shall not be used against the health care provider in professional liability insurance rate setting, personal credit history, or professional licensing and credentialing.

#### Credits

[2006 c 8 § 304, eff. June 7, 2006.]

#### Editors' Notes

#### VALIDITY

<This section was held unconstitutional by the Supreme Court of Washington in Putman v. Wenatchee Valley Medical Center, 216 P.3d 374, Wash., 2009. See Notes of Decisions. >

Notes of Decisions (7)

West's RCWA 7.70.150, WA ST 7.70.150

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West's Revised Code of Washington Annotated Title 48. Insurance (Refs & Annos) Chapter 48.140. Medical Malpractice Closed Claim Reporting (Refs & Annos)
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West's RCWA 48.140.010

48.140.010. Definitions

Effective: June 7, 2006

Currentness

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Claim" means a demand for monetary damages for injury or death caused by medical malpractice, and a voluntary indemnity payment for injury or death caused by medical malpractice made in the absence of a demand for monetary damages.
- (2) "Claimant" means a person, including a decedent's estate, who is seeking or has sought monetary damages for injury or death caused by medical malpractice.
- (3) "Closed claim" means a claim that has been settled or otherwise disposed of by the insuring entity, self-insurer, facility, or provider. A claim may be closed with or without an indemnity payment to a claimant.
- (4) "Commissioner" means the insurance commissioner.
- (5) "Economic damages" has the same meaning as in RCW 4.56.250(1)(a).
- (6) "Health care facility" or "facility" means a clinic, diagnostic center, hospital, laboratory, mental health center, nursing home, office, surgical facility, treatment facility, or similar place where a health care provider provides health care to patients, and includes entities described in RCW 7.70.020(3).
- (7) "Health care provider" or "provider" has the same meaning as in RCW 7.70.020 (1) and (2).
- (8) "Insuring entity" means:
  - (a) An insurer;
  - (b) A joint underwriting association;
  - (c) A risk retention group; or

(d) An unauthorized insurer that provides surplus lines coverage.

(9) "Medical malpractice" means an actual or alleged negligent act, error, or omission in providing or failing to provide health care services that is actionable under chapter 7.70 RCW.

(10) "Noneconomic damages" has the same meaning as in RCW 4.56.250(1)(b).

(11) "Self-insurer" means any health care provider, facility, or other individual or entity that assumes operational or financial risk for claims of medical malpractice.

**Credits**

[2006 c 8 § 201, eff. June 7, 2006.]

West's RCWA 48.140.010, WA ST 48.140.010

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