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SUPREME COURT OF  
THE STATE OF WASHINGTON

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JAMIE FAST, et al.,  
*Petitioners*

v.

KENNEWICK PUBLIC HOSPITAL DISTRICT, et al.,  
*Respondents*

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Court of Appeals Cause No. 31509-6-III  
Appeal from the Superior Court of Benton County  
The Honorable Cameron Mitchell  
Benton County Superior Court Cause No. 12-2-01660-4

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**PLAINTIFF'S - APPELLANT'S RESPONSE  
TO BRIEF OF AMICUS CURIAE**

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## ARGUMENT

The Fasts agree for the most part with Amicus Curiae by Washington State Association for Justice Foundation, (“WSAJF”), to the extent that the Fasts would enjoy the benefit of the statute of limitations at RCW 4.16.350. The Fasts emphasize their arguments in a different order than WSAJF, even though the Fasts are indifferent as to which alternative this Court adopts.

The Fasts maintain that the statutory language is clear; the medical negligence statute of limitations applies to any civil action for damages for injury based on medical negligence, which includes any action for damages for wrongful death based on medical negligence. *Wills*<sup>1</sup> is an aberration of the law. As discussed in prior briefs, our courts have largely ignored *Wills*, having ruled many more times contrary to the *Wills* rationale than having acknowledged *Wills* at all.<sup>2</sup> The Fasts argue that *Wills* should be expressly overturned, and that the Fasts should enjoy the medical negligence statute of limitations, as tolled by their request for mediation. The Fasts’ interpretation would apply equally to a chapter 4.20 RCW wrongful death claim as to a claim for the death of a child under RCW 4.24.010; whereas WSAJF appears to restrict its analysis to

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<sup>1</sup> *Wills v. Kirkpatrick*, 56 Wn. App. 757, 785 P.2d 834, review denied, 114 Wn.2d 1024 (1990).

<sup>2</sup> See, e.g., Appellants’ Suppl. Br. at 14-17 and citations therein.

wrongful death of a child under RCW 4.24.010. In practicality, the Fasts are indifferent as to whether this Court applies its decision all wrongful death causes or only to those under RCW 4.24.010.<sup>3</sup>

There is a dilemma, however, in how the court would implement such a decision. Some citizens in Washington might have existing causes for wrongful death based on medical negligence. Some might have correctly read the statutory language and relied upon the medical negligence tolling provisions; and they should enjoy the benefit of Legislature's intent. Others, on the other hand, might have been misled by the *Wills* rule to miss the medical negligence statute of limitations, (RCW 4.16.350), in favor of the personal injury catchall statute of limitations, (RCW 4.16.080(2)). Those plaintiffs should have the benefit of the *Wills* rule, because in fairness it is the court of appeals that created the confusion caused by *Wills*.<sup>4</sup> The Court cannot resolve this dilemma by making its ruling prospective only: The justice it would bestow upon one group would be denied the other. The Fasts therefore tend to disagree with WSAJF's Argument C, (Amicus Curiae Brief at 18-19), that overturning *Wills* should be prospective only. Doing so would produce a substantially

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<sup>3</sup> The Fasts do not concede that theirs is a cause in wrongful death as distinct from a medical negligence cause.

<sup>4</sup> See also Brief of Amicus Curiae by WSAJF at 18-19.

inequitable result to those plaintiffs who relied upon the clear and correct interpretation of the statute.

The Fasts do agree with WSAJF that the Court can resolve this dilemma by following its long-standing rule that where there is confusion as to which statute of limitations applies, the longer one should apply.<sup>5</sup> The question is whether this Court will recognize that Legislature intended that the medical negligence statute of limitations apply to causes of wrongful death based on medical negligence; or instead whether this Court will decline to resolve that issue and leave Legislature to clarify its intent. The Fasts argued primarily for the former; WSAJF seems to prefer the latter. As a practical matter, the Fasts are indifferent as to which approach this court adopts, so long as it is clear in the Court's ruling that the Fasts enjoy the benefit of RCW 4.16.350 and the tolling provision at RCW 7.70.110, and that their claim was timely filed.<sup>6</sup>

The Fasts suggest that the following proposed alternative rulings represent both the Fasts' and WSAJF's interests. The Fasts respectfully request that this court adopt an approach embodied by one of the following proposed alternative rulings.

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<sup>5</sup> See, e.g., Amicus Curiae Br. at 15-18.

<sup>6</sup> If this Court makes its decision prospective only, then this Court should explicitly except *Fast* and apply its ruling to *Fast*, applying its ruling prospectively to all cases except *Fast*. See *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 140-41, 691 P.2d 190 (1984); *Erdman v. B.P.O.E.*, 41 Wn. App. 179, 211-212, 704 P.2d 150 (1985).

**Proposed Alternative Ruling No. 1:** There is confusion as to which statute of limitations applies to cases of wrongful death based on medical negligence: RCW 4.16.350 or 4.16.080(2). The court will defer to Legislature should it wish to clarify that one statute controls over the other. Until such legislative clarification, however, the court falls upon the rule that where there is confusion, the longer statute of limitations applies. Determining which is the longer statute of limitations depends upon the facts of each case. In the case before us, RCW 4.16.350 is the longer statute of limitations because it was tolled when the Fasts requested mediation. RCW 4.16.350 applies here. The Fasts' claim was timely filed, and is remanded for further proceedings. To the extent *Wills* is inconsistent with this ruling, *Wills* is overturned. It is noteworthy, however, that even though we overturn the rationale of *Wills*, under this ruling we would have nonetheless found in favor of the same party as *Wills*, because under the facts in *Wills*, RCW 4.16.080(2) provided the longer statute of limitations.

**Proposed Alternative Ruling No. 2:** Legislature is clear. Any claim for damages for wrongful death based on medical negligence is subject to the statute of limitations at RCW 4.16.350. To the extent that *Wills* is inconsistent with this ruling, *Wills* is overturned. With the exception of the case before us, this rule is prospective only. The Fasts'

request for mediation tolled the statute of limitations for one year under RCW 7.70.110, and their claim was timely filed. The matter is remanded for further proceedings. This court recognizes that the *Wills* interpretation is the product of the court of appeals, and did itself create confusion as to which statute of limitations applies to causes for damages for wrongful death based on medical negligence: RCW 4.16.350 or 4.16.080(2). In fairness, we invoke the rule that where there is confusion, the longer statute of limitations should apply, and determining which is the longer statute of limitations depends upon the facts of each case. We therefore hold retrospectively that causes for damages for wrongful death based on medical negligence that arose before the publication of this opinion, shall be subject to the longer of RCW 4.16.350 or RCW 4.16.080(2). Even though we apply our prospective rule to the Fasts' case, under either analysis the Fasts' claim was timely filed.

**Proposed Alternative Ruling No. 3:** Legislature is clear. Any claim for damages for wrongful death based on medical negligence is subject to the statute of limitations at RCW 4.16.350. To the extent that *Wills* is inconsistent with this ruling, *Wills* is overturned. With the exception of the case before us, this rule is prospective only. The Fasts' request for mediation tolled the statute of limitations for one year under

RCW 7.70.110, and their claim was timely filed. The matter is remanded for further proceedings.

**CONCLUSION**

The Fastos agree with WSAJF's arguments, with the addition that if this Court makes its decision prospective only, then this Court should expressly except *Fast* by recognizing that RCW 4.16.350 applies here, and the Fastos' claims were timely filed.

**RESPECTFULLY SUBMITTED** this 23rd day of June, 2016



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Dear Ms. Carlson:

Please find attached the Plaintiff's / Appellant's Response to the WSAJ Foundation's Brief of Amicus Curiae. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this e-mail.

Respectfully Submitted,

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