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No. 92216-1
(COA No. 31509-6-III)
SUPREME COURT OF
THE STATE OF WASHINGTON

SHANE FAST, JAMIE FAST, the marital community
compromised thereof, ROBERT DALTON FAST, and the estate
thereof,

Plaintiffs/Appellants,

v.

KENNEWICK PUBLIC HOSPITAL DISTRICT d/b/a
KENNEWICK GENERAL HOSPITAL and d/b/a MID-
COLUMBIA WOMEN'S HEALTH CENTER, a Washington
public hospital district organized as a government entity,
municipal or quasi-municipal corporation; ADAM T. SMITH,
D.O., individually and for the marital community with spouse or
registered domestic partner Jane Doe Smith; GREGORY
SCHROFF, M.D., individually and for the marital community
with spouse or registered domestic partner Jane Doe Smith; and
DOES 1 through 50,

Defendants/Respondents.

RESPONDENTS' RESPONSE TO AMICUS BRIEF

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MISCELLANEOUS

Karl B. Tegland, 15A *Wash. Prac. Handbook Civil Procedure* § 5.10
(2012-2013 ed)1

I. INTRODUCTION

The Amicus party's position will create chaos where there has been stability for over 25 years since the decision in Wills v. Kirkpatrick. Since this rule of law was established over 25 years ago, it is now well-recognized by lawyers and judges. It is also by implication recognized by the Washington legislature, since the legislature has not deemed it appropriate to pass an amendment to the statute which would abrogate the holding in Wills. The law is so well settled that it is concisely stated in the leading treatise discussing Washington tort law. Karl B. Tegland, *15A Wash. Prac., Handbook Civil Procedure § 5.10* (2012-2013 ed.) (“[T]he 3-year limitation period of RCWA 4.16.080(2) applies to a claim for wrongful death based on medical malpractice. Wills v. Kirkpatrick, 56 Wash. App. 757, 785 P.2d 834 (Div. 2 1990).”

The only real justification for overturning the Wills decision is change for the sake of change. This Court's adoption of what the Plaintiffs and the *amicus* party are advocating would be the antithesis of the rule of *stare decisis*.

II. LEGAL ARGUMENT

A. **AMICUS' POSITION CREATES CONFUSION IN A SETTLED AREA OF LAW AND SHOULD BE REJECTED**

Amicus characterizes the legal issue before the Court as one of uncertainty. It is not. This is not an issue of first impression in this State. This is not even an issue where the law is ambiguous.¹ The courts in this State have specifically addressed what statute of limitations applies in wrongful death cases, and over 25 years ago it was decided that the applicable statute of limitations is RCW 4.16.080 rather than the medical negligence statute of limitations, RCW 4.16.350. For over 25 years that has been the law for all wrongful death cases, and it has survived a myriad of Legislative sessions where the law could have been, but was never, changed from the position outlined in Wills v. Kirkpatrick. During that time, defense counsel is aware of no legal challenge in the appellate courts to the Wills ruling, and this Court has affirmed that RCW 4.16.080 applies to “a wrongful

¹ Amicus reiterates most of Plaintiffs' arguments that the Court should overturn Wills v. Kirkpatrick. Because those arguments were addressed elsewhere, we do not focus on them here.

death action.” Atchison v. Great W. Malting Co., 161 Wn.2d 372, 377, 166 P.3d 662 (2007).²

The uncertainty Amicus attempts to read into the law is illusory. This is simply a case where Plaintiffs, and Amicus, are seeking a change in the law because they do not care for the result.³

Rather than clarify the law, Amicus’ position, if adopted, would only create uncertainty and confusion and engender future litigation, first by overturning settled law jurists have relied on for over 25 years, and second by creating a fuzzy, undefined standard as to what statute of limitations applies. Amicus argues that what statute of limitations applies should be determined on a case by case basis, “depend[ing] upon the nature of the underlying tortious conduct.” *Amicus Brief at 4*. It is unclear how this would work in practice, but it

² Amicus’ argument ignores that overturning Wills would also entail overturning this Court’s holding in Atkinson, which would be the antithesis of the rule of *stare decisis*. It is also noted that Amicus off-handedly dismisses the Legislature’s decades-long tacit approval of Wills as inconclusive because the statutes are “unambiguous.” *Amicus Brief at 14 n. 16*. This is an odd argument to make, given that Amicus’ entire brief is based on the premise that the law is in fact ambiguous.

³ Amicus, in footnote 6 on page 8, cites several cases for the proposition that it is unclear whether courts agree that RCW 4.16.080 applies to all wrongful death cases. But none of the cited cases states that the statute of limitations varies depending on the underlying tortious activity, and recent cases from this Court, such as Atchison v. Great W. Malting Co., 161 Wn.2d 372, 377, 166 P.3d 662 (2007), indicate the contrary.

is clear it would create more litigation to determine what statute of limitations applies.

The best example of this is Amicus' own brief. RCW 4.24.020 is accepted to be a wrongful death statute. Bennett v. Seattle Mental Health, 166 Wn. App. 477, 483, 269 P.3d 1079, review denied, 174 Wn.2d 1009, 281 P.3d 686 (2012). The statute also refers to "injury," as does the medical negligence statute, RCW 7.70 *et seq.* Which statute of limitations, then, applies to RCW 4.24.020? Under settled law, per Wills, the answer is clear. This is a predictable, foreseeable result attorneys and judges can rely on.

But under Amicus' position the answer is "uncertain." *Amicus Brief at 15*. Amicus does not propose an answer, it only proposes substituting one statute for another for the sake of preventing unfairness. This mudding of the water is change for the sake of change. From a policy perspective, the Court should reject Amicus' attempt to replace something settled and predicable with something vague and unpredictable. Justice is diminished when the law becomes unpredictable.

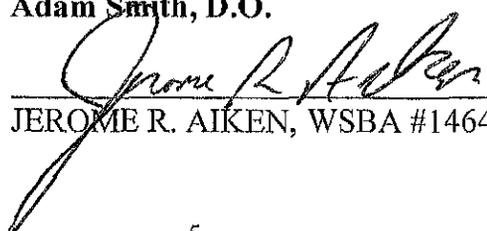
B. THE "HEREINAFTER ENUMERATED" LANGUAGE IS NOT DISPOSITIVE OR RELEVANT

This argument is difficult to understand because it is supported by almost no legal analysis at all. In a never before raised argument, Amicus claims it "appears" the language in RCW 4.16.080 that the statute applies to injuries "not hereinafter enumerated" is dispositive. The Court should reject this new argument because it was never raised below. Moreover, it is simply incorrect. There is no indication in the statute that the "hereinafter language" applies outside of RCW 4.16.080.

More fundamentally, the basis for the Court of Appeal's decision in Wills and the decisions below is that a wrongful death is not an injury as contemplated by RCW 7.70 or RCW 4.16.350. Thus, the issue turns on whether Wills is correct. The argument is therefore circular and ultimately unavailing.

Respectfully submitted this 23 day of June, 2016.

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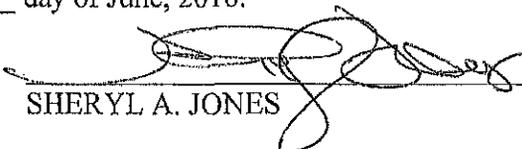

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Dear Clerk:

Attached please find a cover letter and Respondents' Response to Amicus Brief for filing. Hard copies to follow by email and regular first class mail to counsel only.

Respectfully yours,

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