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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' SUPPLEMENTAL RESPONSE

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PETER M. RITCHIE, WSBA #41293
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 ORIGINAL

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I. INTRODUCTION

Defendants jointly file this supplemental briefing relating to Plaintiffs' *Petition for Review* pursuant to the March 2, 2016 Order from the Court and RAP 13.7(d).

II. SUPPLEMENTAL ARGUMENT

Defendants have already set forth their position on the *Petition for Review* and do not wish to restate the same arguments. It is their position that the arguments they presented are cogent and persuasive, and demonstrate why this Court should not overturn Division Three's well-reasoned decision. The purpose of this supplemental briefing is to discuss further implications if the Court chooses to reverse Wills v. Kirkpatrick, 56 Wn. App. 757, 785 P.2d 834 (1990), review denied, 114 Wn.2d 1024 (1990) and overturn 25 years of settled law in this State regarding the statute of limitation that applies when alleged medical negligence causes death.

As the Court is aware, at least since Wills, the courts in this State have held that the medical malpractice statute of limitations found in RCW 7.70.010 does not apply to medical malpractice that results in death (*i.e.*, wrongful death). Instead, the general three year

statute of limitations found in RCW 4.16.350 applies. If the Court now overturns the decision in Wills and the other cases holding similarly, it must necessarily hold that the medical malpractice statute of limitations in RCW 7.70.010 applies to every case where medical negligence is alleged, even those where the ultimate result is death rather than mere personal injury.

If that is the case, logically the Court must also overturn the line of cases holding that a cause of action for wrongful death arises at the time of death. *See Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 378, 166 P.3d 662 (2007). This is because “[w]rongful death claims derive from the wrongful act and do not accrue absent a valid subsisting cause of action in the decedent at the time of death.” *Deggs v. Asbestos Corp. Ltd.*, 188 Wn. App. 495, 497, 354 P.3d 1 (2015) review granted, 184 Wn.2d 1018, 361 P.3d 746 (2015).

Overturing Wills and still maintaining that a cause of action for wrongful death caused by medical malpractice accrues at the time of death would be inconsistent with application of RCW 7.70 *et seq.*, since a cause of action for medical negligence under RCW 7.70 accrues at the time of the negligence (or the date the plaintiff

discovered or reasonably should have discovered the negligence) rather than at the time of death. Webb v. Neuroeducation Inc., P.C., 121 Wn. App. 336, 343, 88 P.3d 417 (2004). In fact, it would essentially create two causes of action: one accruing before death and one accruing at the time of death. That is a scheme not found in any of the medical negligence or wrongful death statutes.

Defendants submit that if the Court does overturn Wills, it should hold that the statute of limitations can bar a cause of action for wrongful death even prior to death, if the decedent does not pursue a claim within the three year statute of limitations in RCW 7.70.010. Courts in other contexts (*i.e.*, asbestos cases) have recently ruled that a cause of action for wrongful death can be barred prior to the time of death.

For instance, in Deggs v. Asbestos Corp. Ltd., 188 Wn. App. 495, 505, 354 P.3d 1 (2015), the Court of Appeals held that a decedent must have “a valid subsisting cause of action” at the time of death for a wrongful death claim to accrue. Id. at 497. In that case, Roy Sundberg “successfully sued several defendants for injuries related to asbestos exposure” in 1999. Id. After his death in 2000, his personal

representative “filed a wrongful death action against one of the same defendants from [the previous] lawsuit and several new defendants.” Id. The Court of Appeals determined that Sundberg could not have brought another personal injury claim during his lifetime. Id. at 500. To the extent that *res judicata* did not bar his claims, the statute of limitations barred them. Id.

This is consistent with other cases that have held that a decedent’s inaction as to his claims during his lifetime can preempt the accrual of a personal representative’s wrongful death cause of action. *See, e.g., Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 581, 44 P.2d 193 (1935); *Calhoun v. Wash. Veneer Co.*, 170 Wash. 152, 160, 15 P.2d 943 (1932).

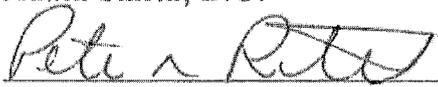
III. CONCLUSION

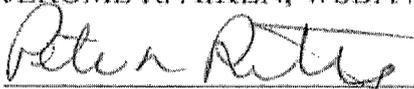
Defendants submit the only appropriate result is that the Court affirm Division Three’s ruling below. It is the province of the Legislature to enact changes to the wrongful death statutory scheme. The Legislature has had many opportunities to overturn Wills or amended the statutes to reflect Plaintiffs’ position in the past 25 years and has never done so. The Court should not do so now. If it does, it

should hold that the specific medical malpractice statute of limitations found in RCW 7.70.010 can bar a cause of action for wrongful death even prior to death.

Respectfully submitted this 5th day of April, 2016.

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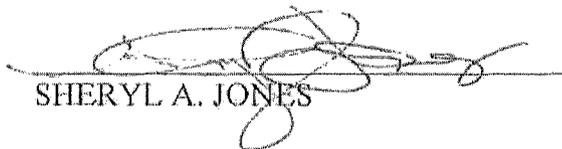
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I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

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Executed this 5th day of April, 2016.



SHERYL A. JONES

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Subject: Fast v. Smith, et al.

Dear Clerk:

Attached please find a cover letter and the revised Respondents' Supplemental Response containing the missing Table of Contents and Authorities for filing. Thank you.

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