NO. 100079-1
SUPREME COURT
OF THE STATE OF WASHINGTON

MARI YVONNE DAVIES,

Respondent,

vs.

MULTICARE HEALTH SYSTEMS, et al.,

Petitioners.

RESPONDENT'S ANSWER TO MEMORANDUM OF MEDICAL AMICI CURIAE WSMA, WA-ACEP, AND AMA

Michael S. Wampold
(WSBA No. 26053)
Ann H. Rosato
(WSBA No. 32888)
Leonard J. Feldman
(WSBA No. 20961)
PETERSON | WAMPOLD | ROSATO | FELDMAN | LUNA
1001 Fourth Avenue, Suite 4131
Seattle, WA 98154
Telephone: (206) 624-6800

Ashton Dennis
(WSBA No. 44015)
WASHINGTON LAW CENTER
15 Oregon Ave. Suite 210
Seattle, WA 98409
Telephone: (253) 476-2653

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Medical Amici wrongly claim that this Court should grant review because the Court of Appeals' decision "conflicts with *Anaya Gomez* and RCW 7.70.030(3) and 7.70.050(1)." Amici Mem. 1 (citing *Anaya Gomez v. Sauerwein*, 180 Wn.2d 610, 331 P.3d 19 (2014)).[1]

Medical Amici's statutory arguments easily fail. A purported conflict with a statute is not one of the bases for granting review under RAP 13.4(b). Moreover, Petitioners here never asserted any conflict with RCW 7.70.030(3) – this argument is raised first and only by Medical Amici – and no such conflict exists.

As to *Anaya Gomez*, Medical Amici ignore the portion of the Court's opinion confirming that "there may be instances where the duty to inform arises during the diagnostic process." 180 Wn.2d at 623. They also ignore critical differences between the facts in *Anaya Gomez* and the facts here: specifically, *Anaya*

[1] This answer uses the same abbreviations as the Memorandum of Medical Amici Curiae ("Amici Mem.").

Gomez is a misdiagnosis case whereas this case is not. The Court of Appeals correctly identified that distinction. Op. ¶¶ 27, 30 (finding this case is "unlike *Anaya Gomez*").

Like Petitioners, Medical Amici have not established any reason to grant review. Worse, Medical Amici's arguments, if accepted, would eviscerate informed consent claims in Washington and undermine the central purpose of the informed consent statute. The petition for review should be denied.

A. The Court Of Appeals' Decision Does Not Conflict With RCW 7.70.030(3).

Medical Amici's lead argument is that the Court of Appeals' decision is flawed because the court "ignored RCW 7.70.030(3)" and thereby "abandon[ed] the premise of informed consent liability in health care." Amici Mem. 2. According to Medical Amici, the correct way to analyze an informed consent claim "begins with RCW 7.70.030(3), which states the limited scope of such claims." *Id*. at 3. In so arguing, Medical Amici overlook or ignore the fact that Petitioners here did not cite RCW 7.70.030(3) in the briefs that they filed in the Court of Appeals,

nor did they cite the statute in the petition for review that they filed in this Court. The Court of Appeals can hardly be criticized for failing to address an argument that Petitioners never asserted. This Court, too, should ignore the argument. *See Washington Imaging Servs., LLC v. Washington State Dep't of Revenue*, 171 Wn.2d 548, 567 n.5, 252 P.3d 885 (2011) ("We decline to address arguments raised first and only by amicus curiae Carr Krueger.").

Additionally, while Medical Amici (similar to Petitioners) also claim that the Court of Appeals "misapplied this Court's decision in *Anaya Gomez*" (Amici Mem. 2), this Court did not cite RCW 7.70.030(3) in analyzing Anaya Gomez's informed consent claim either. Nor did the Court cite RCW 7.70.030(3) in analyzing Backlund's informed consent claim in *Backlund v. University of Washington*, 137 Wn.2d 651, 975 P.2d 950 (1999). Instead, the Court in both cases limited its analysis to RCW 7.70.050 – just as the Court of Appeals did here. *Anaya Gomez*, 180 Wn.2d at 617; *Backlund*, 137 Wn.2d at 663-66; Op. ¶ 16.

Medical Amici's lead argument thus ignores both the briefing in this matter and this Court's precedent.

One reason that Petitioners and the Court of Appeals did not cite or discuss RCW 7.70.030(3) in analyzing Ms. Davies' informed consent claim is that the statute does not provide any dispositive guidance here. RCW 7.70.030(3) requires a plaintiff to establish "[t]hat injury resulted from health care to which the patient or his or her representative did not consent." RCW 7.70.030(3). The statute describes a medical battery claim, not an informed consent claim. *See Bundrick v. Stewart*, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005) (explaining that "[a]n action for total lack of consent sounds in battery, while a claim for lack of informed consent is a medical malpractice action sounding in negligence"). Where, as here, a plaintiff asserts a claim for lack of informed consent, RCW 7.70.050(1) – titled "Failure to secure informed consent—Necessary elements of proof…" – specifically sets forth the elements of such a claim. *See* Amici Mem. 6-7 (quoting statute, acknowledging that "[t]his statute

sets out the elements for informed consent claims"). Consistent with Petitioners' briefing and the plain language of RCW 7.70.050, the Court of Appeals correctly identified and discussed that statute. *E.g.*, Op. ¶ 16.

Additionally, RCW 7.70.030(3) does not set out any material "limits" regarding Ms. Davies' claim as Medical Amici also argue. Amici Mem. 6. The statute does not use the term "treatment," which is the centerpiece of Medical Amici's arguments. *E.g.*, Amici Mem. 5, 7. Instead, it requires "that injury resulted from *health care* to which the patient or his or her representative did not consent." RCW 7.70.030(3) (emphasis added). This Court has broadly defined "health care" to mean "the process in which [a physician is] utilizing the skills which [the physician] had been taught in examining, *diagnosing*, treating or caring for the plaintiff as [the physician's] patient." *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001) (emphasis added; bracketed text in original).

Consistent with these authorities, Ms. Davies alleges that her injuries – which include permanent disability due to stroke – were caused by the process by which Dr. Hirsig utilized the skills he had been taught in examining, diagnosing, treating, and caring for her. *See* Answer to Petition for Review at 10-13; Op. ¶¶ 28-30. She also alleges that she could not provide informed consent to treatment because she was not given sufficient information about material risks and treatment options as required by RCW 7.70.050(1). *See* Answer to Petition for Review at 3, 10-11; Op. ¶ 30. Thus, even if RCW 7.70.030(3) applies to informed consent claims – as opposed to medical battery claims – there is no conflict with RCW 7.70.030(3) that would warrant this Court's review.

B. The Court Of Appeals' Decision Does Not Conflict With RCW 7.70.050(1).

Medical Amici also claim that the Court of Appeals' decision conflicts with RCW 7.70.050(1), which "sets out the elements for informed consent claims." Amici Mem. 1, 6. Those elements, as Medical Amici note, focus on material information

regarding "treatment," consent to "treatment," and injury caused by "the treatment in question." *Id.* at 7 (quoting RCW 7.70.050(1)). Seizing upon these references to "treatment," Medical Amici argue that an informed consent statute cannot arise out of "the failure to discuss and offer the choice of a diagnostic procedure for a condition the physician ruled out and was not treating." *Id.*

Medical Amici's argument ignores the facts of this case and the central thrust of Ms. Davies' informed consent claim. There is no dispute, nor could there be, that Ms. Davies "was *correctly* diagnosed with a cervical fracture." Op. ¶ 27 (emphasis added); CP 504. Having diagnosed Ms. Davies with that condition, Dr. Hirsig was responsible for determining the proper treatment for that diagnosis. One treatment option, which Dr. Hirsig recommended, was to place Ms. Davies in a neck collar, prescribe medication for pain and nausea, and send her home with no additional testing or treatment. CP 55, 59, 64, 72-80, 511; Op. ¶ 4. Ms. Davies alleges, and the record confirms, that

Dr. Hirsig failed to inform Ms. Davies of the material risks associated with that treatment option, including a debilitating stroke, as required by RCW 7.70.050(1). CP 130; Op. ¶ 30.

Another treatment option was to perform a CTA scan and/or prescribe medication (such as Plavix and aspirin) that prevents strokes. CP 145, 147-48. As the Court of Appeals correctly noted (Op. ¶¶ 28-30) and the record confirms (CP 145, 147-48), this treatment option would have prevented the stroke that Ms. Davies suffered following discharge. But Dr. Hirsig failed to inform Ms. Davies of this treatment option. CP 130, 504. This evidence (especially when viewed in the light most favorable to Ms. Davies (*see infra* at 13)) is more than sufficient to establish a treatment-based claim, including that the treatment in question proximately caused injury to the patient, in accordance with RCW 7.70.050(1). Thus, just as the Court of Appeals' decision is consistent with RCW 7.70.030(3), it also is consistent with RCW 7.70.050(1).

Medical amici also fail to cite any case law or other authority supporting their attempt to exclude diagnostic tests from the meaning of "treatment" in RCW 7.70.050(1). While the statute itself does not define "treatment," Black's Law Dictionary has defined "treatment" as "[a] broad term covering all the steps taken to affect a cure of an injury or disease; *including examination and diagnosis* as well as application of remedies." BLACK'S LAW DICTIONARY 1502 (6th ed. 1990) (emphasis added).[2] This definition is consistent with common sense and experience: for many medical conditions, the proper course of treatment necessarily includes diagnostic tests.

[2] This Court often relies on Black's Law Dictionary in defining statutory terms. *See, e.g.*, *City of Seattle v. Long*, __ Wn.2d __, 493 P.3d 94, 103 (2021) (definition of "attachment"); *State v. Delgado*, 148 Wn.2d 723, 734, 63 P.3d 792 (2003) (definition of "offense"). Federal courts have also relied on the definition of "treatment" in Black's Law Dictionary in rejecting the argument, similar to the argument asserted by Medical Amici here, that diagnostic tests are not included within the term "treatment" when recommended by a treating physician. *See, e.g.*, *Piatt v. Barnhart*, 231 F. Supp. 2d 1128, 1130 & n.13 (D. Kan. 2002) (citing cases).

Medical Amici's attempt to exclude diagnostic tests from the reach of RCW 7.70.050(3) ignores common experience and conflicts with both the plain language and purpose of the statute.[3]

Medical Amici's argument also overlooks the portion of *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979), that speaks directly to this issue. In *Gates*, the patient suffered from high pressure in both eyes, and the health care provider failed to inform her of diagnostic procedures to determine the significance of that abnormality. 92 Wn.2d at 246. This Court held that the doctrine of informed consent extends to such facts because "[t]he existence of an abnormal condition in one's body, the presence of a high risk of disease, and the existence of alternative *diagnostic procedures* to conclusively determine the presence or absence of that disease are all facts which a patient must know in order to make an informed decision on the course which future medical care will take." *Id.* at 251 (emphasis added).

[3] Statutory provisions "should not be interpreted to undermine the purpose of the statute." *See Thompson v. Hanson*, 168 Wn.2d 738, 753, 239 P.3d 537 (2009).

Medical Amici wrongly claim that *Gates* does not apply here because it "was decided on facts that predated codification of informed consent in RCW 7.70.050." Amici Mem. 11-12 (internal quotation marks omitted). In *Anaya Gomez*, this Court expressly held that that "*Gates* has not been overruled" and confirmed that "[u]nder *Gates*, there may be instances where the duty to inform arises during the *diagnostic process*." *Anaya Gomez*, 180 Wn.2d at 623. The Washington legislature, which "is presumed to be familiar with judicial decisions on the subject on which it is legislating" (*City of Olympia v. Drebick*, 156 Wn.2d 289, 320 n.20, 126 P.3d 802 (2006)), also did not overrule *Gates* when it enacted RCW 7.70.050, and this Court confirmed its holding in *Anaya Gomez* following the enactment of RCW 7.70.050. For these reasons too, RCW 7.70.050(1) cannot properly be interpreted to exclude diagnostic tests.

In short, even if a purported conflict with a statute were a recognized basis for granting review under RAP 13.4(b), there is

no conflict with RCW 7.70.050(1) that would warrant this Court's review.

C. The Court Of Appeals' Decision Does Not Conflict With *Anaya Gomez*.

Turning to *Anaya Gomez*, Medical Amici rehash Petitioners' argument that the Court of Appeals' analysis is contrary to this Court's "central holding" that "when a health care provider rules out a particular diagnosis . . . the provider may not be liable for informed consent claims arising from the ruled out diagnosis." Amici Mem. 10-11 (quoting *Anaya Gomez*, 180 Wn.2d at 613 & 623). As Ms. Davies has explained previously, there are at least two fatal flaws in this argument.

First, Medical Amici continue to focus on the wrong diagnosis. A vertebral artery dissection is not an alternative diagnosis; rather, it is a risk associated with multiple neck fractures. CP 143 ("[t]hey are commonly found together"), 145 ("It's well-known in the trauma literature that the mechanism of injury that leads to a cervical fracture is one that can also lead to a cervical arterial dissection….") . Dr. Hirsig was required by

RCW 7.70.050(1) to disclose those risks so that Ms. Davies could make an informed decision about her treatment. He failed to do so, and no amount of legal sophistry will change that undisputed fact or the resulting harm to Ms. Davies.

Second, and more fundamentally, Dr. Hirsig did not rule out a vertebral artery dissection as Medical Amici repeatedly claim. *E.g.*, Amici Mem 4, 10, 13. If Dr. Hirsig had ruled out a vertebral artery dissection, he presumably would have said so – either at his deposition or in a subsequent declaration. Instead, he testified only that he "*didn't suspect* that she had a dissection." CP 578 (emphasis added). This testimony does not establish that Dr. Hirsig "ruled out" a vertebral artery dissection, especially when viewed "in the light most favorable to the nonmoving party" as required by Washington law. *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 287, 481 P.3d 1084 (2021).

Additionally, Dr. Hirsig admitted at trial that a CTA scan is the only way to rule out a vertebral artery dissection and it is undisputed that Dr. Hirsig did not order a CTA scan. Addressing

that issue, Dr. Hirsig testified: "if you're concerned for a dissection, the test you want to get is called a CT angiogram," and "[t]he way you would test for a dissection is a CT angiogram." RP 762, 769. While this testimony was elicited at trial rather than prior to summary judgment, neither Medical Amici nor Petitioners can properly argue that Dr. Hirsig ruled out a vertebral artery dissection when they know (or should know) that Dr. Hirsig has admitted that he lacked the required information and testing to do so. Because this is not a misdiagnoses case, it is "unlike *Anaya Gomez*" as the Court of Appeals correctly concluded. Op. ¶¶ 27, 30.

Because Dr. Hirsig did not – and could not – rule out a vertebral artery dissection, Medical Amici's parade of horribles (Amici Mem. 13) is wildly exaggerated. Ms. Davies has never argued that health care providers must "inform patients … of potential tests or diagnostics for the conditions and diagnoses that have just been *ruled out*" as Medical Amici claim. *Id.* (emphasis in original). To the contrary, Ms. Davies alleged that

Dr. Hirsig was required by RCW 7.70.050(1) to inform her of the material risks associated with multiple neck fractures, which Dr. Hirsig *correctly* diagnosed, including a vertebral artery dissection and possible stroke, if she agreed with his recommendation to be discharged from the emergency department with no additional testing or treatment. CP 19-20.

Had Dr. Hirsig complied with RCW 7.70.050(1), the outcome would have been much different. As the Court of Appeals correctly noted (Op. ¶¶ 28-30) and the record confirms (CP 145, 147-48; RP 994-97, 1267-68, 1725, 1806-08), the undisclosed treatment options at issue here would have prevented the stroke that Ms. Davies suffered following discharge. Contrary to Medical Amici's argument, the Court of Appeals' decision does not "disrupt," "frustrate," or "confound" the practice of medicine in Washington (Amici Mem. 13-14); it merely requires health care providers to conform to the plain language of RCW 7.70 so that patients can make informed decisions regarding the course of their treatment as the

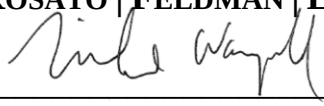
Washington Legislature intended. Medical Amici, in contrast, seek to disrupt, frustrate, and confound that statutory mandate.

For all these reasons, the petition for review should be denied.

This brief contains 2,485 words, in compliance with RAP 18.17.

DATED this 3rd day of November, 2021.

PETERSON | WAMPOLD
ROSATO | FELDMAN | LUNA



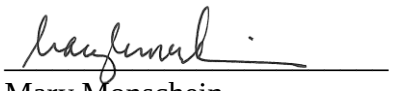
Michael S. Wampold, WSBA # 26053
Ann H. Rosato, WSBA # 32888
Leonard J. Feldman, WSBA # 20961
Attorneys for Respondent
1001 Fourth Avenue, Suite 4131
Seattle, WA 98154
206-624-6800

CERTIFICATE OF SERVICE

I certify that on the 3rd day of November, 2021, a copy of this document was sent as stated below.

Levi Larson Larson Health Advocates, PLLC 1700 7th Avenue, Suite 2100 Seattle, WA 98101	☒ via efiling/email ☐ via messenger ☐ via US Mail ☐ via fax
Jeffrey R. Street Hodgkinson Street PLLC 1620 SW Taylor St., Suite 350 Portland, OR 97205	☒ via efiling/email ☐ via messenger ☐ via US Mail ☐ via fax
Eric A. Norman Chad W. Beck Fain Anderson, et al. 701 Fifth Avenue, Suite 4750 Seattle, WA 98104	☒ via efiling/email ☐ via messenger ☐ via US Mail ☐ via fax
Howard M. Goodfriend Catherine W. Smith Smith Goodfriend PS 1619 8th Avenue North Seattle, WA 98109	☒ via efiling/email ☐ via messenger ☐ via US Mail ☐ via fax
Gregory M. Miller Carney Bradley Spellman, P.S. 701 5th Ave., Ste. 3600 Seattle, WA 98104-7010	☒ via efiling/email ☐ via messenger ☐ via US Mail ☐ via fax

SIGNED in Seattle, Washington this 3rd day of November, 2021.



Mary Monschein

PETERSON WAMPOLD ROSATO FELDMAN LUNA

November 03, 2021 - 3:47 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,079-1
Appellate Court Case Title:	Mari Davies v. Multicare Health System, et al.

The following documents have been uploaded:

- 1000791_Briefs_20211103154409SC507088_8920.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was 100079-1 Respondent Answer to Medical Amici.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- ashton@washingtonlawcenter.com
- cate@washingtonappeals.com
- cbeck@reminger.com
- eric@favros.com
- howard@washingtonappeals.com
- jennifer@washingtonlawcenter.com
- jrs@hs-legal.com
- levi@lhafirm.com
- miller@carneylaw.com
- morgan@favros.com
- rosato@pwrfl-law.com

Comments:

Sender Name: Mary Monschein - Email: mary@pwrfl-law.com
Filing on Behalf of: Michael Simon Wampold - Email: wampold@pwrfl-law.com (Alternate Email:)

Address:
1501 4th Avenue
Suite 2800
Seattle, WA, 98101
Phone: (206) 624-6800

Note: The Filing Id is 20211103154409SC507088