COA No. 329348

IN THE COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

ESTATE OF JOAN R. EIKUM
By and through its Personal Representative, JOHN J. EIKUM, and JOAN R. EIKUM, By and through her Personal Representative,

Plaintiffs/Appellants,

v.

SAMUEL JOSEPH, D.O,

Defendant/Respondent.

APPELLANTS' REPLY BRIEF

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I. SUMMARY OF REPLY.

The difference between a violation of informed consent and a violation of the standard of care is the difference between failure to *tell* and a failure to *act.* Both are shown by similar evidence, but with different perspectives. A physician may not only *not act*—he may also not tell the patient anything meaningful. And that is what happened here. Just because Dr. Joseph "failed to diagnose" a heart disease, it doesn't relieve him from the duty of informed consent. He is *still* required to disclose the material facts of how he reached the conclusions he *did* reach, or if he reached any conclusions at *all.* This very material information can allow the patient to save their *own* life, even where the physician cannot piece it together. It was the jury's role to determine if Dr. Joseph failed to tell Ms. Eikum of material facts in his possession related to his conclusion. The Respondent's claim that "failure to diagnose" absolves a physician of the duty of informed consent is contrary to statute.

Second, a jury can't decide anything properly where the defense claims that the standard of care is a written standard, and that conformance to a written "2007 cardiac risk index" is conformance to the standard of care, when it refuses to produce that written "standard of care," and does so intentionally. That scenario isn't a hearsay exception, it's a fraud.

Respondent's claim that a "Harrison's treatise" included the 2007 revised cardiac risk index (see Respondent's brief at page 31), is wrong. Defense counsel acknowledged at a bench conference late in the trial that the referenced 2007 index had never been in the courtroom, because he didn't even "acquire" it until the day before the conference, and he still didn't bring it to court. *RP 1835: 22 – RP 1836: 1.*

Third, a medical negligence plaintiff is entitled to instructions that accurately state the standard of care, if evidence supports those instructions. The Eikums were deprived of this right.

II. ARGUMENT.

A. A physician's "failure to diagnose" does not eviscerate RCW 7.70.050's alternate theories of liability.

Respondent asserts that *Backlund* and *Gomez* limit a plaintiff to only a medical negligence theory where a physician "fails to diagnose."[1] They are wrong.

First, the Eikums' medical evidence here was that Dr. Joseph did not "exclude" heart disease at all, as is claimed by the Respondent's brief. His testing did not exclude heart disease.[2] His own notes show that he did

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[1] *Backlund v. Univ. of Washington*, 137 Wn.2d 651, 975 P.2d 950 (1999); *Gomez v. Sauerwein*, 180 Wn.2d 610, 331 P.3d 19 (2014).

[2] *RP 298: 9-11; RP 356: 19 – 357: 17; RP 358: 13-19; RP 360: 11-24; RP 369: 13-17.*

not exclude heart disease. *RP 356: 19 – RP 357: 17.* He reached no conclusions as to heart disease. He affirmatively questioned the etiology of Joan Eikum's syncope. *Id.* *Backlund* and *Gomez* do not rewrite the statutory law of alternative theories of liability. *RCW 7.70.030.* As Joan Eikum's counsel unsuccessfully argued, the suspected conditions had been ruled out in *Backlund* and *Gomez* after all meaningful testing available. That was not the evidence here. Dr. Joseph possessed tests affirmatively signifying heart disease, and never ruled out the existence of that disease. *RP 1127: 7-25.* The use of *Backlund* or *Gomez* to uphold dismissal of the Eikums' informed consent claim was error.

Second, whether or not Dr. Joseph failed to diagnose cardiac disease, the question for informed consent is whether Dr. Joseph *told* his patient what he did know, and what he didn't, when he concluded and conveyed to Joan Eikum, "ready for surgery."

Dr. Joseph obviously "failed to diagnose" heart disease in that conclusion because he didn't look at this own tests or draw conclusions from them. But he also didn't *tell* Joan Eikum the material facts in his possession which would have allowed her the opportunity to save her own life. He didn't tell her that 1) her test results were abnormal tests, 2) her symptoms were cardiac symptoms, 3) he had no diagnosis for her

symptoms, 4) he did not know the cause, 5) he had thought about sending her to a cardiologist as he could not figure it out but he knew these were heart related issues, 6) he could order further testing to find a cause, or that 7) a very simple text existed that she could get in a half hour to find out more. He didn't tell her anything except "ready for surgery." Mrs. Eikum was entitled to have a *jury* determine whether the foregoing diagnostic facts would be "material" to a reasonable patient contemplating surgery, and whether the physician's failure to tell her these facts was a "material" omission in his telling her she was "ready for surgery."

B. ER 803(a)18): The 2007 cardiac risk index represented by defense as the written standard of care was never present in the courtroom, and there could be no testimony "from" it.

Contrary to Respondent's brief, defense counsel did not "read excerpts from an admittedly authoritative medical treatise concerning, (sic) a revised cardiac risk index...." *See Counter Statement of Issues* at 2, *emphasis added.* The referenced Harrison's treatise also did *not* include "a copy of the revised cardiac risk index, as printed in Harrison's," which defense asserted as the governing standard of care. *Id,* at p. 31. The Harrison treatise excerpted certain tables from *something*, but it did not contain that written 2007 risk index. *RP 486: 6-10.* The treatise only referred to the guidelines. *Id.* Had that 2007 risk index actually been

"printed" in the Harrison treatise as Respondent claims, then defense counsel would not have spirited the Harrison's treatise out of the courtroom. Defense counsel would have readily allowed open access to the treatise. And defense counsel would certainly not have conceded, as he did late in the trial, that he had just "acquired" the referenced written 2007 cardiac risk index document the day before the bench colloquy. *RP 1835: 22 – RP 1836: 1 (where, in Vol. 8 of a 10-transcript trial at RP 1835: 24-25, defense counsel reports that he "acquired yesterday the document.")*

Here, the record shows that Dr. Joseph's counsel allowed the "Harrison treatise" to remain in the courtroom only long enough for Plaintiff's counsel to confirm that the treatise *didn't* contain the alleged written 2007 cardiac risk index. Defense counsel then removed the Harrison's treatise from the courtroom before it could be properly inspected. That action was intentional, and could only be designed to conceal. Refusing the Eikums' request to require defense counsel to return the treatise was abuse of discretion. The deception of this defense maneuver—the alleged risk index as printed within the Harrison's treatise—is unequivocally proved as a ruse at the later bench conference reference above. On Oct. 1st, at a bench conference, defense counsel

announced that he just "acquired" the actual 2007 document "yesterday." Trial had commenced on September 18, 2014. *RP 1835: 22 – RP 1836: 1.* And even as late as October 1, 2014, defense counsel wouldn't bring the newly acquired document to the courtroom: "So I acquired yesterday the document, and counsel needs to do the same thing ..." *RP 1835: 25.* The jury did not hear this, or know that defense counsel had just acquired the document he and his witnesses had allegedly been quoting in the courtroom from the start. But the trial court did. And it did nothing but allow this continued deception under ER 803(a)(18).

This deception was allowed even in circumstances where Joan Eikums' counsel was left to attempt to locate on the Internet whatever "2007 cardiac risk index" defense was claiming existed, but in attempting to use what was located, it was never the "right" index. Per defense counsel's question to its own expert: "And is this risk index the one that was adopted by the American College of Cardiology and the American Heart Association *that we've referred to in this case as the 2007 guidelines?*" Defense physician's answer: "It is not." *RP 1258: 7-19 (one effort); and see RP 1835: 10 – RP 1836: 24 (another effort).*[3]

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[3] In Vol. 7 of 10, defense counsel also asked his expert, Dr. John Peterson, if he "used" those guidelines and "*that*" revised cardiac index in his own practice, then announced that he, defense counsel, "had multiple copies of it," but didn't bring them to the courtroom. *RP 1468: 14-24.* Counsel stated: "That was the subject of a great degree

Allowing such a farce day after day as an exception to hearsay is reversible error. Medical trials involve serious injury and death, and they are egregiously expensive to injured parties. The trial court abused its direction by allowing defense gamesmanship and deceit under the guise of ER 803(a)(18). It abused its discretion by failing to require defense counsel to produce the allegedly quoted 2007 document *now*. It abused its discretion by allowing a counsel allegedly quoting a treatise as a "written standard of care" to remove it from the courtroom when questioned as to its actual content. It abused its direction in allowing Dr. Joseph to be absolved of negligence because, according to defense experts and counsel, he conformed to the written "2007 cardiac risk index" that no one ever saw. There is no proper way of reading ER 803(a)(18) to allow for this result.

1) Waiver—Consideration of ER 1000 et seq. was not waived.

Dr. Joseph argues that since there was no "best evidence" or foundational objections under ER 1000 et seq. made at trial, those evidentiary rules cannot be applied here. This is incorrect. An objection need not be stated with precision—it must, however, be able to be

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of the cross, so I didn't see the necessity of bringing it back today." *RP 1468: 25 – RP 1469: 1.* There was no "great deal of cross" with the 2007 document, because that document was never in the courtroom. *See Vol 8, RP 1835: 24-25.*

understood so that the trial court has notice of the issue. Here, the trial court first understood the objection to this alleged 2007 cardiac risk index as a hearsay objection, and the court's use of ER 803 (a)(18) shows its understanding of the basis of the objection as hearsay. But counsel also continued to object on the grounds that the writing was not present. *See, e.g., RP 1476-79; RP 1479: 6-10; RP 1472: 12-14.* Defense counsel continued to claim that he had the document, but didn't "bring" it. *See, e.g., RP 1468: 22 – RP 1469: 3.* Or, he claimed that he just acquired it "yesterday," but the Eikums' counsel needed to get it herself. *RP 1835: 22- RP 1836: 1.* These are all references to ER 1000, et seq.

Second, evidentiary rulings may be upheld on any proper grounds that the record supports. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322, 326 (2007). Conversely, in the trial court's application of ER 803(a)(18), it violated ER 1001 et seq. and the foundational requirements of any writing, right along with ER 803 (a)(18). One cannot rely on statements in a learned treatise when the treatise is not in the room. *ER 803(a)(18).* One cannot prove the content of a writing when the writing isn't present. *ER 1002, 1003.* And one cannot present a summary of the contents of writings that are never shown to exist. *ER 1006.*

Respondent's case law is not similar. In *State v. Carlson*, 61 Wn. App. 865, 869-70, 812 P.2d 536, 538-39 (1991), an objection was made without *any* explanation. "I'm going to object to this line of questioning.'" In *State v. Leavitt,* 111 Wn.2d 66, 71–72, 758 P.2d 982 (1988), the defendant raised no question about child hearsay testimony until he was presenting testimony of his own fourth witness. The matter was not timely raised, and counsel sought no further relief. In *State v. Guloy,* 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied,* 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986), counsel objected, "but did not state what his objection was based on. He merely said that he objected to what Dictado said." In *State v. Bauers,* 23 Wn.2d 462, 466–67, 161 P.2d 139 (1945), overruled in part by *State v. Bauers*, 25 Wn.2d 825, 172 P.2d 279 (1946) overruled by *State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980), and also *overruled on other grounds in Larson v. Seattle,* 25 Wn.2d 291, 171 P.2d 212 (1946), no exceptions were taken. 23 Wn.2d at 464. None of these cases are similar to the ongoing argument over defense conduct here—an argument that went on day after day between the trial court and *both* counsel.

Consideration of the trial court's violation of ER 1000 et seq. is proper.

C. Jury Instructions—Joan Eikum preserved error in the court's rejection of her instructions.

Respondents argue that Joan Eikum did not preserve error in the court's failure to give jury instructions. Sufficient exception was taken to the trial court's failure to give instructions to make the failure reviewable, and the issue should be reviewed.

The purpose of CR 51(f) is "to assure that the trial court is sufficiently apprised of any alleged error in the instructions so that the court is afforded an opportunity to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial. " *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn.App. 609, 615, 1 P.3d 579, 582-83 (2000). But under some circumstances, compliance with the purpose of the rule will excuse technical noncompliance. *Id.* at 615, citing *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1993).

In the instant case, the Eikums' counsel took specific exception to the instructions given by the court. *RP 2183-2198.* Counsel did *not* take specific exception by instruction number to the court's failure to give instructions 23, 24 and 27-28.[4] A global exception was taken to the

[4] Counsel cited time restrictions and "to shorten this" excepted to the court's "failure to use any instructions that we have presented that have not been incorporated as

court's refusal to give the instructions requested, but a global exception does not technically comport with the letter of CR 51. The question is whether the circumstances were such that compliance with the purpose of the rule will excuse the technical noncompliance. *Goehle*, citing *Queen City Farms,* 126 Wn.2d at 63. This is similar to an appellate standard. A technical violation of the rules will not ordinarily bar appellate review where justice is to be served. *Goehle*, 100 Wn.App. at 613, citing *Green River Community College Dist. No. 10 v. Higher Educ. Personnel Bd.,* 107 Wn.2d 427, 431, 730 P.2d 653 (1986).

In none of Respondent's precedent is the legal issue presented that appeared here. Here, the legal principle behind these instructions—that of the difference between the dismissed informed consent claim and the negligence claim—was debated during trial at length. *See, e.g., RP 1387-1390, discussed infra at, e.g., n. 7.*

In *State v. Myers*, 6 Wn.App. 557, 573, *review denied*, 80 Wn.2d 10009, *cert. denied*, 409 U.S. 1061 (1972) cited by Respondents, an objection to a refusal to give an instruction was deemed to be too general, but there is no reference in the ruling to any extended argument about the legal issue. In *Hansen v. Columbia Breweries*, 12 Wn.2d 554, 562, 122

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a whole." *RP 2198.* Counsel stated "I just don't want to go through the three sets right now just given the time, but these are certainly the exceptions I take to this set..." *Id. RP 2198:20-2199: 5.*

P.2d 489, 492 (1942), a party objected and excepted to the court's refusal to give each of the requested instructions without stating any reason. In *State v. Wilson*, 38 Wn.2d 593, 620, 231 P.2d 288, 302 (1951), counsel excepted to "the Court's refusal to submit to the jury each and every one of the defendants' requested instructions as submitted by said defendants."

The circumstances here are different.

The Eikums twice submitted these five very specific instructions stating the Eikums' view of the law of negligence and the evidence. These same instructions 23 and 24 were submitted on August 22nd *(CP 28-29)*, and again on Sept. 15th *(CP 101-02)*. Instructions 26-28 were also submitted twice—on August 22nd *(CP 31-33)*, and on Sept. 15th *(CP 104-06)*. They state the very theory of the Eikums' case.

Second, the proposed instructions instruct on an issue of law that was debated throughout trial, and detailed by both counsel during the defense's motion to dismiss. *RP 1387-90.* The Eikums' position was that certain duties attendant to informed consent also imposed duties related to *negligence*. The defense's position was that such duties related only to an informed consent claim. *Id.* The trial court ultimately avoided deciding the legal issue by choosing to give one single short instruction on negligence, with no supplemental language. *CP 138, Court's Instruction*

5. The trial court was thus fully aware of the legal issue presented, of the debate, and of five instructions specific to the debate, delivered twice, and clearly chose not to instruct on any specifics in favor of a general instruction.

Third, technical violation of the rules will not ordinarily bar appellate review where justice is to be served. *Goehle*, 100 Wn.App. at 613. This issue of law presented by these rejected instructions is significant, because the gravamen of the Eikums' claim was that Dr. Joseph, a pulmonologist, failed to do *anything* in the face of known cardiac abnormalities, and instead sent Ms. Eikum into a high risk surgery. The defense was that Dr. Joseph had no further duty under the standard of care, because he simply missed the existence of the heart disease. The standard of care presented in the Eikums' five instructions in the circumstances of Dr. Joseph, a pulmonologist, operating in a cardiac arena, were thus critical to the negligence claimed.

While Washington's CR 51(f) is specific, other states handle instructional "exceptions" differently when the issue presented is a trial court's failure to give a requested instruction. In Oregon, as an example, the exception is automatically preserved for appeal where a requested instruction is not given. *Beall Transp. Equip. Co. v. S. Pac. Transp. Co.*,

335 Or. 130, 141, 60 P.3d 530 (2002). The submission itself, and the trial court's failure to give it, makes the exception implicit, and the exception is "imported" in favor of the party who proposed, but did not receive the instruction. *Id.*

In Connecticut, "unpreserved" error is reviewed if the error was not induced or implicitly waived. *State v. Kitchens*, 299 Conn. 447, 468-69, 10 A.3d 942 (2011). Induced error, or invited error, cannot be complained of on appeal because the party "through conduct, encouraged or prompted the trial court to make the erroneous ruling." *Id. (Citations omitted.)* "Waiver" of an objection requires an intentional relinquishment. If a party fails to raise *any* claim in the trial court, and acquiesces to the trial court's order, then it cannot have the issue reviewed on appeal. *Id.* at 469. Here, the Eikums preserved error because they didn't induce or invite the error, and they raised the claim over and over in argument and in two separate sets of instructions.

In all respects, the essence of the "exception" rule is that a party may not claim error for the first time on appeal. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). "In order to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an

opportunity to correct it....Ideally, this will be done during the course of trial....." *State v. Wicke*, 91 Wn.2d at 642. That was done here.

The Eikums argued their position on the law of negligence by *five* separate supplemental instructions on a duty they argued was inherent in the standard of care. Argument took place throughout. *See, e.g., Ftnte. 7.* The trial court simply chose to give only a very terse negligence instruction. The point is evident. It simply chose to leave "negligence" to argument. *State v. Wicke*, 91 Wn.2d at 642. The objection is no surprise to the defense. There is no danger of the concern of anyone being "ambushed" by this issue being presented on appeal. *See, e.g., State v. Kitchens*, 299 Conn. at 470. In these unique circumstances, review should occur.

D. The Eikums' proposed jury instructions properly stated the law, the Eikums were entitled to them, and they would be so entitled on any retrial.

1) Instructions 23 and 24 *(CP 101-02)* – the failure of testing as a standard of care.

The Respondents cite *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 663 P.2d 113 (1983) to support the trial court's rejection of the Eikums' instruction 23 and 24. *Harris's* holding entitles the Eikums to the instructions. It confirms that, "Since the law requires reasonable

prudence of health care providers, Ms. Harris was entitled to a reasonable prudence instruction setting forth her theory that Dr. Groth should have tested her intraocular pressure." *Id.*

The defense claims that Instructions 23 and 24 would have allowed for a negligence finding even if Dr. Joseph had met the applicable standard of care, and therefore would have violated *Harris*. That is not true. The language of proposed Instruction 23 is an exact replica of the approved language in *Gates v Jensen*, 92 Wn.2d 246, 247, 595 P.2d 919, 921 (1979), tailored to the Eikums' evidence.[5] The instruction says that

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[5] The Eikums' Instruction number 23, *CP 101*, reads:

"Even if you find that the actions of Dr. Joseph met the applicable standard of care in the diagnosis of a pulmonary disease, if you find that Joan Eikum had heart disease, and that in the presence of symptoms indicating heart disease, where the statistical risk of death from heart disease was serious enough that reasonable prudence under the circumstances required the administrations of additional diagnostic tests before the April 6, 2009 elective knee surgery, then you are instructed that Dr. Joseph's failure to perform those tests constitutes negligence.

In determining whether the tests in question should have been given, you should consider, among other facts, the cost ease or difficulty of the administration of said tests, the risk to the patient of the tests, and/or the ensuing treatment and the reliability of the testing."

The *Gates v. Jensen* instruction number 3 is identical:

"Irrespective of whether you find that any defendant met or failed to meet the applicable standard of care followed by practicing ophthalmologists in the diagnosis of glaucoma, if you find that Mrs. Gates had glaucoma and that the statistical risk of sight loss from glaucoma is serious enough in cases such as Mrs. Gates' that reasonable prudence under the circumstances required the administration of additional diagnostic tests before April 22, 1974, you are instructed that failure to perform those tests before that date would constitute negligence. In determining whether reasonable prudence would require giving the tests in question you should consider, among other facts, the cost, ease or difficulty of administration, risk to the patient and relative reliability of the tests in question."

Dr. Joseph may have met the standard of care in one area (diagnosis of a *pulmonary* disease), but he could still fail to meet the standard in another (heart disease, and the need for additional testing). This wording and concept are approved, and are taken directly from *Gates*, which based its holding on *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974). This line of precedent holds that reasonable prudence may require a standard of care higher than that exercised by the relevant professional group. *Id.* And that is exactly what the proposed instruction says. Dr. Joseph is a pulmonologist, but he has assigned himself a cardiac evaluation. And reasonable prudence may thus require different considerations. Here, the facts are nearly identical to *Gates*, with only a shift in the area of medicine. "The instructions to be given in a particular case are governed by the facts proven in the case." *Harris*, 99 Wn.2d at 447.

Gates and *Helling* involved glaucoma—a disease just like Ms. Eikum's heart disease—meaning "a disease which may go undetected for years until (severe loss of vision is unavoidable). Just as *Gates* and *Helling*, here the existence of a simple and harmless test could have prevented "this terrible result." *Gates*, 92 Wn.2d at 252-53. Just as in *Gates* and in *Helling*, "the instant case presents the same unusual

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Gates v. Jensen, 92 Wn.2d at 252.

features." Just as in *Gates* and *Helling*, "The treating physicians had available to them at least two additional diagnostic procedures," here, an echocardiogram and a cardiac consult with a cardiologist, which are both "simple, inexpensive, conclusive and risk free." Here, just as in *Gates* and *Helling*, "These tests need only be used when other diagnostic procedures are inconclusive for some reason, or when a red flag of warning has been raised by some abnormality suggesting the risk of (heart disease)." And here, just as in *Gates* and *Helling*, "When a patient's condition does indicate the necessity for further examination ... reasonable prudence requires the use of the alternative tests." *Gates*, 92 Wn.2d at 252-53. The Eikums were entitled to the same properly instructed jury as in *Gates* and *Helling*.

Instruction 24 laid out this same instruction in an elements form. *CP 102*. Both are correct statements of the law. Failing to give either instruction allowed the jury to exculpate Dr. Joseph if he conformed to a phantom "2007 cardiac risk index" as a pulmonologist, which defense experts said he did, and to thus relieve him of any cardiology requirements even though simple alternative diagnostic tests were available to him to rule out heart disease. The Eikums were entitled to this instruction as a proper reflection of the law when a pulmonologist tasks himself with

performing a cardiac evaluation.

In *Harris v Groth*, the disapproved instruction is also quite different. That proposed instruction "allowed the jury to speculate as to *any* 'additional tests' which Dr. Groth might have given,..." and was not specific to the disease. That is not the case here. Instruction 23 references heart disease. *CP 101.* And as in *Harris*, the broader instruction of *Gates* is proper because evidence was presented that at least two additional diagnostic tests might have been performed. *Gates,* 92 Wn.2d at 253. Not only was an echocardiogram available, but a cardioangiogram or even a simple cardiac consult would have revealed disease. *RP 375: 2-12.* But all Dr. Joseph tested for was electrical activity, not ventricular or valve dysfunction. *See, e.g., RP 358: 13-19; RP 360: 11-24.* As in *Gates*, the broader instruction proposed by the Eikums is as justified here as it was in *Gates*.

As well, in *Harris*, the rejected instruction failed to correctly state the law because it "stated only that the jury should consider whether 'reasonable prudence under the circumstances' required additional tests and failed to specify what skill and training the jury should assume in making this judgment." *Harris*, 99 Wn.2d at 448. But Instruction 23 here, as in *Gates*, referenced the particular skill and training attendant to a

diagnosis of a pulmonology disease, as distinguished from heart disease. *CP 101.* Instruction 23 was thus properly "framed in the language of RCW 7.70.040(1) and RCW 4.24.290." 99 Wn.2d at 448. Instruction 23 is an exact replica of *Gates* tailored to this pulmonologist "diagnosing" heart disease, and it was error to deprive the Eikums of that instruction.

Respondents argue that this instruction comments on the evidence. *Gates* did not so find. This type of instruction is not a comment on the evidence, but a statement of the law so that the jury can make the proper distinctions between fields of practice and the requirements of physicians who ignore signs of disease outside their specialty.

Respondents argue that these instructions are not necessary for Mr. Eikum to argue a negligent failure to diagnose theory. The Eikums were not arguing a "failure to diagnose" theory. They were arguing that pulmonologist Dr. Joseph was negligent by having obvious evidence of heart disease in front of him, failing to exclude it, failing to test to any conclusion, and sending Joan Eikum off into surgery, as a pulmonologist, with all of the suspicions of heart disease unresolved.

2) Instructions 26, 27 and 28—the duty to communicate as the standard of care – *(CP 104-07).*

Respondents acknowledge that a physician has a duty to disclose material facts relating to the treatment. *See Respondents' Brief* at 46-47,

citing *Backlund v. Univ. of Washington*, 137 Wn.2d at 664-66; RCW 7.70.050(1) and (2). But Respondent argues that it was proper for the court to reject the Eikums' proposed instructions 26, 27 and 28 as unnecessary because the Eikums' informed consent claims had been dismissed. It is not disputed that these instructions are taken from informed consent instructions. But the Eikums' expert evidence at trial was that a physician's duty to communicate is a duty attendant to the standard of care.

The Eikums' medical expert, Dr. Leslie Stricke, testified that a physician's duty to communicate was part of the medical standard of care. Dr. Stricke testified that the phrase "informed consent" is used in medicine as part of the medical duty of care. *RP 292: 24 – 293.* While that duty certainly promotes the patient's understanding, it is required to assist the physician's own decision-making. *RP 293: 11-20.*

The defense also presented evidence on this same issue. After informed consent claims were dismissed, e.g., defense expert Dr. Doornink testified, e.g., that he would not show a patient an EKG heart rhythm test that was signed by a physician as being "abnormal" if he, Dr. Doornink, felt the test was not abnormal. He would not discuss the test with the patient. He would discuss abnormal Holter results only to let the

patient know that there were no "high risk features" to it—he would not send the patient their results. He would not share his written presurgical evaluation. *See e.g., Doornink, RP 1888: 1 – 1889: 5-23.*

The parties had already debated whether Dr. Joseph was required to communicate the series of abnormal test results to Joan Eikum under the standard of care. *See, e.g., RP 1385-1386.* That duty became a contested issue.[6] The law resolves that issue. If the information is material, it must be conveyed and discussed with the patient. *RCW 7.70.050.* And here, Dr. Stricke testified that this is not just an aspect of informed consent liability—here, the duty to communicate was part of the medical standard of care.

In this instance then, once defense experts began testifying that test

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[6] Dr. Joseph insisted that the physician's duty to communicate relates only to an informed consent theory of liability and that such evidence could not be used as standard of care evidence. Dr. Joseph argued that whatever a doctor "chooses to disclose or not disclose is not an issue that is covered by the standard of care…there is no standard of care regarding disclosure or education of patients……there is no standard of care as it relates to disclosures…..plaintiff is simply changing a line of attack that if I don't have an informed consent theory, I'm simply going to say that he was required under the standard of care to make those disclosures anyway, which is exactly the kind of double indemnity or double dipping that the Supreme Court decried in the Sauerwein case." RP 1387-1389. Defense's theory was that the Eikums were simply "repackaging an informed consent claim." *RP 1387: 10-17; RP 1388: 14-19.*

The Eikums responded that it was known from the outset that "the duty to communicate is going to be presented as part of the standard of care….that evidence was allowed through Dr. Stricke….Counsel cross examined. Counsel even elicited it from his own witness…" *RP 1389: 8-13.* The Eikums reiterated "that you have a duty to talk to your patient to figure out what's going on…that's not informed consent…You have to communicate with the patient in order to form an appropriate diagnosis. So this has nothing to do with the statutory cause of informed consent. What this has to do with is the standard of care of medical treatment.'" *RP 1390: 2-16.*

results and evaluations need not be conveyed or discussed with the patient as a part of the standard of care, then Joan Eikum was entitled to the court's instructing on the law that imposes that duty if the information is material, whether the issue is being considered for informed consent or for negligence. Plaintiffs' Instructions 26, 27 and 28 state the legal duty verbatim from *Smith v. Shannon*, 100 Wn.2d 26, 29 (1983); *Gates v. Jensen*, 92 Wn.2d at 250-51, and *Gomez v. Sauerwein*, 180 Wn.2d 610. It was error for the trial court to reject the offered instructions, and to fail to instruct the jury on the legal duties of both communication and alternative testing once defense physicians testified that no such duties existed. The law imposes both duties in these circumstances as standard of care duties, and Dr. Stricke's evidence supported that law. The Eikums were entitled to a jury that was properly instructed.

III. CONCLUSION.

John Eikum is entitled to a new trial on his medical negligence claim under both theories of liability. This court should so hold.

DATED this 11th day of January, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers; and that on **January 11, 2016**, she served a copy of the foregoing document to the following individuals in the manner indicated below:

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DATED this **11th** day of **January, 2016**.