Supreme Court No. 94713-9

COA No. 32652-7-III

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

ESTATE OF LORRAINE P. HENSLEY by and through its Personal Representative, JESSICA WILSON and LORRAINE HENSLEY, by and through her Personal Representative,
Petitioners-Plaintiffs,

v.

COMMUNITY HEALTH ASSOCIATION OF SPOKANE (CHAS); PROVIDENCE HOLY FAMILY HOSPITAL; SPOKANE EAR, NOSE AND THROAT CLINIC, P.S., and MICHAEL CRUZ, M.D.,
Respondents-Defendants

RESPONDENT COMMUNITY HEALTH ASSOCIATION OF SPOKANE'S (CHAS) ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

I. IDENTITY OF THE RESPONDENT

The Respondent is Community Health Associates of Spokane (hereinafter, CHAS).

II. CITATION TO COURT OF APPEALS DECISION

The Petitioners, the Estate of Lorraine P. Hensley, by and through its Personal Representative, Jessica Wilson, and Lorraine Hensley, by and through her Personal Representative (the Estate), seek reversal of Division III of the Court of Appeal's ruling in *Estate of Hensley by & through Wilson v. Cmty. Health Ass'n of Spokane (CHAS)*, 198 Wn. App. 1036 (2017) upholding the trial court's dismissal of the Estate's claim of lack of informed consent.

III. ISSUE PRESENTED FOR REVIEW

1. Whether Division III of the Court of Appeals erred in upholding the trial court's dismissal of the Estate's claim of lack of informed consent on a directed verdict.

IV. COUNTERSTATEMENT OF THE CASE

Lorraine Hensley was 51 years of age when she passed away in February of 2009. *CP 6-10*. She died as a result of a brain herniation due to cerebromeningitis, an infection in the brain. *Id.* On January 26, 2012 Jessica Wilson, on behalf of the Estate of Lorraine Hensley and her statutory beneficiaries, filed the subject lawsuit in which the Estate claimed, among other things, that medical providers at CHAS, as well as other named Defendants, failed to provide Ms. Hensley with informed consent. *CP 10-12*.

The Estate claimed at trial that the primary care physicians at CHAS failed to appropriately treat a chronic sinusitis which led to a significant infection in her sinus, causing an erosion of the bone leading from her right frontal sinus into the right cranium. *RP 3405*. It was the position of CHAS at trial that the patient did not have a chronic sinusitis, but rather that she had a recurrent sinusitis over the years, most likely contributed to by her allergies and smoking. *RP 3479-3480*.

Prior to, during, and at the close of trial, the Defendants moved for a directed verdict dismissing the Estate's informed consent claim. *RP 3355*. After the parties rested, the Trial Court ruled on this issue and "concluded that this, fundamentally, is not an informed consent case". *Id.* The Trial Court found two bases for the ruling. *Id.* On the one hand, the

Court determined that in most cases you cannot have an informed consent claim and a medical negligence claim, and that this case was not the exception. *RP 3356*. The second basis involved the probability and materiality of the posed risk and the Trial Court found that testimony was lacking on that issue. *RP 3356-3357*. As a result, a directed verdict was granted as to informed consent and the jury was not instructed as to those claims. On May 31, 2014, the jury entered a verdict in which they found that Defendant CHAS violated the standard of care in treating of Lorraine Hensley, but that the violation was not a proximate cause of the injury to Lorraine Hensley. *CP 907-909*.

On June 23, 2014, the Estate filed a Motion for a New Trial pursuant to CR 59 on a number of bases including the dismissal of the informed consent claim. *CP 910-934*. That Motion was denied. *CP 1015*. The Estate then filed an appeal with Division III of the Court of Appeals wherein they reasserted many of those claims. On April 11, 2017 Division III entered an unpublished opinion denying all of the Estate's claims. *Estate of Hensley by & through Wilson v. Cmty. Health Ass'n of Spokane (CHAS)*, 198 Wn. App. 1036 (2017). As to the informed consent claim, the Court held only that this was a misdiagnosis case and thus not an informed consent case. *Id*. Despite the Estate's claims to the contrary, the Court of Appeals opinion did not address the second reason for the Trial

Court's directed verdict; the issue regarding probability or likelihood of the outcome. The Estate now seeks review with the Washington State Supreme Court only on the informed consent claim. Defendant/Respondent CHAS opposes the Estate's Petition for the following reasons.

V. ARGUMENT

A. The Estate's Informed Consent Claim was Properly Dismissed.

1. The Facts of this Case do not establish an Informed Consent Claim.

Medical negligence claims are divided into two distinct categories: standard of care and informed consent. *Gustav v. Seattle Urological Assoc.*, 90 Wash.App. 785, 789, 954 P.2d 319 (1998). Courts have established that "allegations supporting one normally will not support the other." *Id.* The division is significant. On the one hand, patients may blame healthcare providers for decisions or actions they deem imprudent (standard of care), and on the other hand, they may complain that had they been better informed, they may have chosen a different course of treatment (informed consent). *Id.* However, patients generally cannot combine the two concepts to claim that had the provider made the correct decision or action in the first instance, they should, or

would have informed the patient of treatment options for the undiagnosed condition. *Id.*

The unavailability of an informed consent claim does not change in a misdiagnosis case. In such a case:

> a physician who misdiagnoses the patient's condition, and is therefore unaware of an appropriate category of treatments or treatment alternatives, may properly be subject to a negligence action where such misdiagnosis breaches the standard of care, but may not be subject to an action based on failure to secure informed consent."

Backlund v. Univ. of Washington, 137 Wash. 2d 651, 661, 975 P.2d 950, 956 (1999); *See Also, Bays v. St. Luke's Hosp.*, 63 Wash. App. 876, 881-82, 825 P.2d 319, 322 (1992) ("A physician's failure to diagnose a condition is a matter of medical negligence, not a violation of the duty to inform the patient...Informed consent and medical negligence are alternate methods to impose liability").

In *Gustav,* supra, the trial court dismissed an informed consent claim based upon a physician's failure to diagnose prostate cancer. The court of appeals affirmed dismissal, noting that a failure to diagnose did not amount to a failure to inform. The plaintiffs' informed consent allegation was described by the Court of Appeals as follows:

> ...that Dr. Gottesman and Lilly 'failed to fully inform [plaintiff] of the appropriate frequency of diagnostic testing, the dangers involved in not testing more frequently, and the consequences of not completing the

> 1991 biopsy.' Nothing in these allegations relates to a failure to warn of potential consequences of treating Gustav's cancer, a condition he could not have treated because he failed to diagnose it.

Gustav, 90 Wash.App. at 790. The Court emphasized that the duty of informed consent "does not arise until the physician becomes aware of the condition by diagnosing it." *Id.* An identical holding can be found in in *Burnet v. Spokane Ambulance,* 54 Wash. App. 162, 168-69, 772 P.2d 1027, 1030 (1989) *review denied by,* 113 Wash.2d 1005 (1989).

Gomez v. Sauerwein, 180 Wash. 2d 610, 331 P.3d 19 (2014), is the most recent Washington Supreme Court case on this subject and follows the foregoing caselaw precedent. There, the case presented a near identical fact pattern to the case at hand and on appeal, the Supreme Court held that "a health care provider who believes the patient does not have a particular disease cannot be expected to inform the patient about the unknown disease or possible treatments for it." *Id.* at 618, 23.

In this case, the Estate attempted to split its singular claim against CHAS to fit both of the mutually exclusive categories of informed consent and medical negligence. However, just like in *Sauerwein* and the other foregoing cases, CHAS cannot be held liable under an informed consent theory for failing to inform Ms. Hensley of treatment options for conditions of which CHAS did not diagnose. For this reason, the trial

Court herein affirmatively found that this fundamentally is not an informed consent case. *RP 3355; 22-25.*

The requisite elements of informed consent claims illuminate the misapplication of the doctrine to the facts of this case. The essence of the Estate's Complaint is that Ms. Hensley's death was "preventable," but Ms. Hensley did not receive "proper medical treatment." *CP 12, para. 3.1 and 3.3.* As to the informed consent claim, the Estate states: "Lorraine Hensley's death resulted from health care to which she did not consent, **given the failure of diagnoses and interventions**." *Id. at para. 3.5* (**Emphasis Added**). In basic terms, the Estate argues that CHAS failed to appreciate and diagnose Ms. Hensley's condition (a standard of care claim), and likewise that they failed to inform her of the possibilities of treatment for the alleged condition CHAS did not know existed.

The sophistry in which the Estate engages to cast their case as involving both standard of care and informed consent demonstrates why, in this case, the claims/theories are mutually exclusive. Fundamentally, the Estate's claim is that Defendants were negligent because they failed to diagnose the nature and extent of Lorraine Hensley's infection. The providers at CHAS believed they were dealing with one kind of infection, a sinus infection. The only testimony at the time of trial supported the fact that Ms. Hensley did not have any of the signs or symptoms of a

brain infection and the providers at CHAS did not consider it. *RP* 2256-2257. The Estate claims Defendants had an informed consent obligation to disclose to Ms. Hensley the "risk" that the condition they diagnosed and were treating was, in fact, something else, a brain infection. But, Washington case law, as previously cited, makes it abundantly clear that a healthcare provider does not have a duty to provide informed consent with respect to treatment alternatives for, and risks associated with a condition not diagnosed or one that is not statistically significant to make it a "material fact".

Perhaps recognizing this, the Estate now attempts at this late stage to suggest, for the first time, that the Defendants, and especially CHAS, actually did diagnose the condition in question. However, this simply has no factual support in the record. There was no evidence presented at trial that the decedent was suffering from an intracranial infection at any time she was being treated by the providers at CHAS. Likewise there was no evidence presented at trial that the providers at CHAS considered a diagnosis of an intracranial infection. *Id.*

The Estate's reliance on *Gates v. Jensen* is also misplaced. While it is true that the Supreme Court in *Sauerwein* states that *Gates* is not overruled, the Estate failed to mention that the court considers the facts of that case an anomaly at best. 180 Wash. 2d 610, 621, 331 P.3d 19, 24

(2014). The Court states that, "*Backlund* clarifies that *Gates* is the exception and not the rule with regard to the overlap between medical negligence and informed consent. Given the unique factual situation in *Gates,* it is unlikely we will ever see such a case again." *Id.* at 626-27. This is not such a case.

In sum, the Estate criticizes the alleged improper diagnosis and treatment plans of CHAS, yet state that had Ms. Hensley been informed of this alleged standard of care violation (wrong diagnosis), she would have requested different treatment. The law is clear that where an incorrect diagnosis is made, it simply isn't possible for the provider to provide the patient with informed consent of a condition that was not diagnosed. As such, this is not an appropriate case to claim that CHAS failed to obtain informed consent, but rather, the Estate claims were for medical negligence for the alleged misdiagnosis and they were heard on this claim.

VI. CONCLUSION

This is a medical negligence case. The facts of this case do not support a claim of lack of informed consent. At best, this is a misdiagnosis case on the part of the Defendants. Despite the misgivings of the Estate, there is no evidence that the providers at CHAS diagnosed Ms. Hensley with the ultimately fatal condition and therefore said providers lacked the

ability to advise Ms. Hensley regarding that unknown condition. The law on this subject is clear and has been consistently applied by each Court herein. Accordingly, CHAS respectfully requests that this Court reject the Hensley's Petition for Discretionary Review.

DATED: August 3Rd, 2017

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 3rd day of August, 2017, I caused a true and correct copy of the foregoing document, "Answer to Petition for review", to be sent via mail to the following counsel of record:

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DATED this 3rd day of August, 2017, at Kennewick, Washington.

Sandra Stokes
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Comments:

Respondent Community Health Association of Spokane's Answer to Petition for Discretionary Review

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