No. 94713-9

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,

Plaintiffs/Appellants/Cross-Appellees,

v.

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

Defendants/Appellees/Cross-Appellants

PROVIDENCE HOLY FAMILY HOSPITAL'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

This answer is respectfully submitted by Providence Holy Family Hospital (hereinafter "Holy Family"). This answer is respectfully submitted pursuant to RAP 13.4.

II. INTRODUCTION

A. THE PETITION ASKS THE COURT TO REVIEW THE COURT OF APPEALS' DECISION AFFIRMING THE TRIAL COURT'S PRETRIAL DISMISSAL OF MS. HENSLEY'S INFORMED CONSENT CLAIM.

This medical negligence action was tried to a jury over a period of four weeks in May 2014. Lorraine Hensley (by and through her estate) asserted a claim for lack of informed consent and a claim for a breach of the standard of care. After the close of the evidence, the trial court entered an order dismissing Ms. Hensley's informed consent claim. The medical negligence claim was presented to a jury. The jury returned verdicts in favor of two of the Defendants; the jury was unable to reach a verdict against Holy Family.

Ms. Hensley appealed the trial court's pretrial dismissal of her informed consent claim to Division III of the Washington State Court of Appeals.[1] By an unpublished opinion, filed on April 11, 2017, the Court

[1] Ms. Hensley appealed other trial court orders/decision, and the Defendants (including Holy Family) cross appealed certain issues. None of those other issues, however, are implicated by Ms. Hensley's petition for discretionary review.

of Appeals affirmed the trial court's dismissal of Ms. Hensley's informed consent claim.

Following an unsuccessful motion for reconsideration in the Court of Appeals, Ms. Hensley filed a petition for discretionary review. Ms. Hensley's petition is based upon an inaccurate description of the record and upon an inaccurate depiction of the Court of Appeals' decision. The trial court and the Court of Appeals correctly held that Washington's informed consent doctrine was not implicated by the facts of this case. Holy Family, therefore, respectfully asks the Court to deny Ms. Hensley's petition.

B. NONE OF THE DEFENDANTS DIAGNOSED OR APPRECIATED THE SEVERITY OF MS. HENSLEY'S CONDITION.

Ms. Hensley's petition is predicated on the assertion that the Defendants were aware that Ms. Hensley's sinus infection had spread to become a bone-eroding intracranial infection. That assertion is categorically false.

It is undisputed that Ms. Hensley eventually developed an intracranial infection. CP 3-15; 41-51. However, none of the Defendants diagnosed an intracranial infection. In fact, the Defendants maintained (throughout the case) that Ms. Hensley had not yet developed any

intracranial infection at the time of their respective treatment. VRP 1762-64, 1765-66; 2256-57, 3044-45.

Ms. Hensley falsely asserts that the Defendants were aware that Ms. Hensley's condition presented a risk of cranial infection and, therefore, presented a risk of death. There is, quite literally, no support in the record for Ms. Hensley's contention. Notably, Ms. Hensley's record citations do not support her assertions.

The simple fact of the matter is that none of the Defendants appreciated the severity of Ms. Hensley's condition. The Defendants diagnosed Ms. Hensley with an uncomplicated sinus infection. Ms. Hensley's contention that the Defendants owed a duty to secure informed consent for an entirely different condition (*viz.*, a developing intracranial infection) is contrary to established Washington State law.

C. THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY HELD THAT THE DEFENDANTS' FAILURE TO DIAGNOSE MS. HENSLEY'S CONDITION MADE INFORMED CONSENT PRINCIPLES INAPPLICABLE.

Ms. Hensley's petition falsely asserts that the Court of Appeals required her to prove probable harm as part of her informed consent claim. The Court of Appeals (and the trial court before it) held that Ms. Hensley could not maintain an informed consent claim because she could not establish that the Defendants were aware of any medical condition, any

medical risks, and/or any treatment options that were not conveyed to Ms. Hensley. Both of the lower courts correctly held that Ms. Hensley's misdiagnosis claim did not fit within Washington's informed consent doctrine.

D. SETTLED LAW REQUIRED MS. HENSLEY'S CLAIM TO BE DISMISSED; THERE IS, THEREFORE, NO BASIS FOR REVIEW BY THE STATE SUPREME COURT.

Settled law draws a clear distinction between informed consent and standard of care claims. In accord with settled legal principles, a physician's misdiagnosis may give rise to a standard of care claim but it **does not** give rise to a failure to provide an informed consent claim.

The Defendants diagnosed Ms. Hensley with a sinus infection – a routine and pedestrian condition. The Defendants treated Ms. Hensley with oral antibiotics. None of the Defendants believed, understood, or even entertained the notion that Ms. Hensley suffered from an aggressive cranial infection that had the potential to kill her.

The trial court and the Court of Appeals were, therefore, correct in concluding that Ms. Hensley could not make out a *prima facie* informed consent claim. Nothing about those decisions conflicts with prior Washington State law. Nothing about those decisions implicates a State or Federal Constitutional question. And nothing about those decisions

involves an issue of public importance. There is, therefore, no basis for review by the State Supreme Court.

The Court of Appeals' decision accurately states settled Washington State law. And the Court of Appeals' decision is supported by this case's factual record. Holy Family, therefore, respectfully asks the Court to deny Ms. Hensley's petition for discretionary review.

III. STATEMENT OF THE ISSUE

Settled law confirms that a physician cannot provide a patient informed consent with respect to a condition that the physician has not diagnosed. Ms. Hensley claims that the Defendants failed to inform her of treatment risks and options with respect to a condition that the Defendants had not diagnosed – namely, a developing intracranial infection. Not being aware that Ms. Hensley suffered from a developing intracranial infection, the Defendants could not have informed Ms. Hensley regarding the risks or options that existed or were implicated by a developing intracranial infection. Under these circumstances, was the Court of Appeals correct to affirm the trial court's dismissal of Ms. Hensley's informed consent claim?

IV. STATEMENT OF THE CASE

This is a medical negligence case arising from Ms. Hensley's death. *See* CP 3-15. Ms. Hensley suffered from a sinus infection that

developed into an intracranial infection. *Id.* That intracranial infection led to Ms. Hensley's death. *Id.*

Ms. Hensley filed suit, alleging that the Defendants failed to properly diagnose the severity of her condition and to treat that condition aggressively enough. *See id.* Ms. Hensley also alleged that the Defendants failed to properly inform Ms. Hensley regarding the facts of her condition and the risks presented thereby. *See id.*

Ms. Hensley's claims were tried to a jury in May 2014. CP 172-81; *see generally* VRP. After the close of the evidence, the trial court dismissed Ms. Hensley's informed consent claim. URP 3355-56. The jury returned verdicts in favor of two of the Defendants, and a hung jury mistrial was declared as against Holy Family. CP 907-09.

On April 11, 2017, the Court of Appeals issued an unpublished opinion affirming the trial court in every respect. Following an unsuccessful motion for reconsideration, Ms. Hensley filed a motion asking the State Supreme Court to review and reverse the dismissal of her informed consent claim.

V. ARGUMENT

A. MS. HENSLEY'S PETITION DOES NOT MEET ANY OF THE CRITERIA FOR REVIEW BY THE STATE SUPREME COURT.

Ms. Hensley's petition does not satisfy any of the State Supreme Court's criteria for discretionary review. RAP 13.4(b) provides the

considerations for discretionary review in the State Supreme Court. None of those considerations are implicated by this case.

The Court of Appeals' decision is in full accord with the State Supreme Court's decisions. *See* RAP 13.4(b)(1). The Court of Appeals' decision is in full accord with prior Court of Appeals' decisions. *See* RAP 13.4(b)(2). The Court of Appeals' decision presents no constitutional questions. *See* RAP 13.4(b)(3). And the Court of Appeals' decision presents no issues of substantial public interest. *See* RAP 13.4(b)(4). There is, therefore, no basis for review in the State Supreme Court.

B. INFORMED CONSENT DOES NOT APPLY TO THIS MISDIAGNOSIS CASE.

RCW Ch. 7.70.030 provides for three separate theories of recovery for damages resulting from the provision of health care. RCW 7.70.040 allows recovery in instances where a health care provider's failure to comply with that level of skill, care and learning expected of a reasonably prudent provider of his or her class results in injury, loss or damage to a patient – that is, a claim for medical negligence. RCW 7.70.050 allows for recovery in instances where a health care provider fails to provide a patient with sufficient information regarding the material facts and risks implicated by the various treatment options available to the patient – that is, failure to secure informed consent. And finally, RCW 7.70.030(2)

allows recovery in those rare instances wherein a provider guarantees a result or outcome that he or she fails to deliver.

The vast majority of claims resulting from the provision of health care fall under RCW 7.70.040 (a claim for medical negligence) and RCW 7.70.050 (an informed consent claim). The inquiry, for purposes of this matter, is what overlap (if any) exists between medical negligence and informed consent. Properly analyzed, claims under RCW 7.70.040 and claims under RCW 7.70.050 are always and necessarily separate and distinct. Though the two claims may be implicated in the same lawsuit, the two claims can almost never be supported by the same facts because the two claims enforce separate duties. *See Gomez v. Sauerwein*, 180 Wn.2d 610, 617 (2014).

RCW 7.70.040 (medical negligence) aims to ensure both (i) that health care providers exercise due care in treating patients and (ii) that patients who are injured as a result of a provider's failure to exercise due care receive fair compensation. RCW 7.70.040 thus operates as a check on health care provider competence.

RCW 7.70.050 (informed consent) serves entirely different goals. Informed consent is not about policing the quality of medical care. Instead, it seeks to respect patient autonomy and to foster patient decision-making.

The different goals between the RCW 7.70.040 claim and the RCW 7.70.050 claim are well illustrated by the different role for expert testimony in the two claims. A *prima facie* claim under RCW 7.70.040 (medical negligence) requires expert testimony with respect to the standard of care practiced in Washington State by members of the same class of health care provider as the defendant. *Harris v. Groth*, 99 Wn.2d 438, 449 (1983). Such evidence, however, is **not required** in informed consent cases. In fact, the medical community's risk-disclosure practices have no bearing on whether the defendant owed a duty of disclosure. *See Adams v. Richland Clinic, Inc., P.S.*, 37 Wn. App. 650, 657-58 (1984). The requirement for expert testimony in informed consent cases is limited to establishing "the existence of a risk, its likelihood of occurrence, and the type of harm in question." *Seybold v. Neu*, 105 Wn. App. 666, 681-82 (2001).

The statutes' distinct aims are also well illustrated by the fact that a "cause of action can arise against a doctor for failing to obtain the patient's knowledgeable permission to the treatment even though the doctor's actions have not been negligent and would not give rise to a cause of action in any other way." *Holt v. Nelson*, 11 Wn. App. 230, 237 (1974) (citations omitted); *see also Gomez*, 180 Wn.2d at 619.

The differences between medical negligence and informed consent are central to the proper analysis of this case. Once the two statutes' goals and purposes are understood, the wisdom of the State Supreme Court's holdings in *Gomez v. Sauerwein*, 180 Wn.2d 610 (2014), and *Backlund v. Univ. of Washington*, 137 Wn. 2d 651, 661 (1999), is undeniable. A provider may be liable under RCW 7.70.040 (medical negligence) for failing to properly **identify** the pertinent facts and risks with respect to a specific patient. However, **that provider cannot be liable for failure to secure informed consent** (under RCW 7.70.050):

> . . . 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 . . . in misdiagnosis cases, this rule is necessary to avoid imposing double liability on the provider for the same alleged misconduct.

Gomez, 180 Wn.2d at 618. Thus, a provider cannot be liable for failure to inform a patient regarding pertinent facts and risks unless he or she is **subjectively aware** of those facts and risks.

This is a misdiagnosis case. Contrary to Ms. Hensley's assertion to the contrary, there is no evidence – whatsoever – to show that any of the Defendants appreciated the severity of her condition. VRP 1762-64, 1765-66, 2256-57, 3044-45. There is no evidence – whatsoever – to show that any of the Defendants contemplated the possibility that Ms. Hensley's

sinus infection would develop into a cranial infection. *See id.* Similarly, there is no evidence – whatsoever – to show that any of the Defendants contemplated that Ms. Hensley's sinus infection would become life threatening. *See id.* This case was properly presented to the jury as a medical negligence claim, and Ms. Hensley's informed consent claim was properly dismissed.

It is undisputed that each of the Defendants treated Ms. Hensley for an oral/sinus infection. *See* CP 3-15; 41-51. It is also undisputed that Ms. Hensley eventually developed an intracranial infection. *Id.* However, there is no evidence to show that any of the Defendants diagnosed an intracranial infection or appreciated the potential for Ms. Hensley's condition to develop into an intracranial infection. *See id.*; VRP 1762-64, 1765-66, 2256-57, 3044-45.

Ironically, Ms. Hensley's argument runs counter to informed consent's most basic goal. Rather than fostering a patient's sound decision-making, Ms. Hensley pushes a rule that would increase the patient's stress, fear, and disquiet. Ms. Hensley's rule would oblige physicians to conclude all patient encounters with a disclaimer – "Your condition could be far more serious than I appreciate; you may suffer from [whatever calamity could fit within the patient's constellation of symptoms], and the risks related to that condition are considerable."

Washington has long recognized that too much information can pose as great a risk to patient sovereignty as too little information – fear of remote risks can prevent patients from seeking necessary care. *See Mason v. Ellsworth*, 3 Wn. App. 298, 308-9 (1970). In addition, if a physician's potential for error becomes a material fact or risk, the informed consent duty would be infinite and impossible to discharge.[2]

The trial court and the Court of Appeals correctly rejected Ms. Hensley's attempt to twist this misdiagnosis case to fit within the informed consent doctrine. The State Supreme Court should, therefore, decline to accept review.

C. CONTRARY TO MS. HENSLEY'S ASSERTION, THE COURT OF APPEALS DID NOT HOLD THAT PROBABILITY EVIDENCE WAS NECESSARY IN INFORMED CONSENT.

Ms. Hensley's petition is based upon a false premise. Specifically, Ms. Hensley's petition purports that the Court of Appeals affirmed the summary dismissal of Ms. Hensley's informed consent claim due to a lack of probability evidence. *See generally* Ms. Hensley's petition. The Court of Appeals, however, specifically declined to address Ms. Hensley's probability arguments.

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[2] Washington has already resolved that a physician's experience level is not subject to the informed consent duty. *Housel v. James*, 141 Wn. App. 748, 756 (2007). If variable experience levels are not subject to the duty, then every physician's universal and human fallibility surely cannot be.

The Court of Appeals affirmed the trial court's dismissal of Ms. Hensley's informed consent claim precisely because the evidence failed to establish that any of the Defendants were aware of the severity of Ms. Hensley's condition. *See generally* Slip Op. The Court of Appeals held:

> No evidence was presented that any of the defendant providers subjectively knew, given the sinusitis diagnosis and Ms. Hensley's presentation (including the CT scans), that anything approaching a serious risk of intracranial infection and death existed. The estate contends that they should have recognized the risk and responded differently but that was the basis of the medical negligence claims. The estate presented those claims to the jury.

Id. at ¶ 7. Ms. Hensley's attempt to make this case about probability evidence is simply not supported by the record or by the Court of Appeals' decision. Ms. Hensley's informed consent claim was dismissed because this case's facts do not fit within the informed consent doctrine.

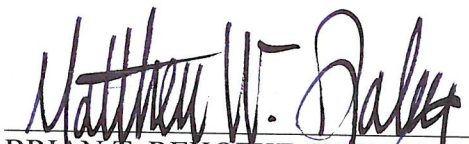
VI. CONCLUSION

Nothing about the Court of Appeals' decision implicates discretionary review by the State Supreme Court. The Court of Appeals' decision is consistent with established law. The Court of Appeals' decision is consistent with all prior decisions. And the Court of Appeals' decision addresses a specific plaintiff's failure to meet a specific evidentiary standard. There is, therefore, nothing about the decision that implicates a constitutional question or the public's interest. Holy Family,

therefore, respectfully asks the Court to deny Ms. Hensley's petition for discretionary review.

RESPECTFULLY SUBMITTED, this fourth (3rd) day of August, 2017.

WITHERSPOON· KELLEY, P.S.



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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 3rd day of August, 2017, the foregoing was delivered to the following persons in the manner indicated:

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