IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

No. 98515-4

From Court of Appeals
No. 36420-8-III

ALICE L. FRITZ,

Petitioner,

vs.

CHRIST CLINIC/CHRIST KITCHEN, and DANIELLE RIGGS, ARNP,

Respondents.

ANSWER TO PETITION FOR REVIEW

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CHRIST CLINIC and
DANIELLE RIGGS, ARNP

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I. INTRODUCTION

This is a medical malpractice case where the Petitioner, Alice Fritz ("Fritz") claims Respondents Danielle Riggs ARNP ("Riggs") and her employer Christ Clinic/Christ Kitchen ("Christ Clinic") failed to timely diagnose a thyroid condition which eventually manifested as a cancerous tumor that required surgical removal.

Approximately one year after the case was filed, Riggs and Christ Clinic moved for summary judgment. After the hearing was continued for a month and a half to give Fritz time to procure supporting expert testimony, the trial court dismissed Fritz' informed consent and breach of fiduciary duty claims on the grounds they were unsupported by Washington law. The trial court also dismissed Fritz' standard of care claim because, while she produced a declaration from an expert on the standard of care and its purported breach, she failed to produce competent, non-conclusory expert testimony on proximate cause.

Fritz appealed and Division III affirmed in an unpublished opinion that addressed only informed consent. The Court declined to address Fritz' arguments with respect to the standard of care because she failed to assign error to that aspect of the trial court's ruling.

Fritz' Petition for Review (of the Court of Appeals decision) should be denied. The Court of Appeals' decision on informed consent was a

proper application of the *Backland* rule in this alleged failure to diagnose case. As for the standard of care claim, given the procedural history of the case, the Court of Appeals' decision not to address that issue was a proper exercise of discretion. Regardless, the Petition should still be denied. An appellate court can affirm summary judgment on any basis supported by the record, and the summary judgment record did not support the proximate cause element of Fritz' standard of care claim.

II. STATEMENT OF THE CASE

A. Pertinent Medical Treatment

Fritz received medical care from the Christ Clinic from 2007 through 2014. CP 94. On December 17, 2007, a thyroid function test was done (TSH) which showed abnormal TSH levels. CP 196; CP 200.

On October 11, 2011, Fritz visited the clinic and indicated she was experiencing, among other things, major depression and malaise. CP 62. The Christ Clinic record for that visit referenced the elevated TSH from December 2007, and the test not having been repeated since. CP 64.

Fritz continued treatment at Christ Clinic during the following years. During her visit of February 5, 2014, a large mass was discovered on the right side of her neck. CP 44. The mass was surgically removed and Fritz underwent adjunct radiation therapy. CP 32-33. Subsequent laboratory tests revealed no remaining markers for thyroid cancer. CP 36.

B. Relevant Procedural History

Fritz filed her Complaint on February 2, 2016. CP 1-10. The gravamen of the Complaint was defendants' alleged failure to timely diagnose a thyroid tumor, with virtually every paragraph referring to allegedly negligent care associated with delayed diagnosis of the tumor. CP 1-10. Fritz asserted the delayed diagnosis allowed the cancer to grow to the point her vocal cords were damaged when the tumor was excised. CP 5.

Approximately 11 months after the Complaint was filed, (on January 4, 2017,) Riggs and Christ Clinic moved for Summary Judgment dismissal of Fritz' three causes of action: (1) breach of the standard of care, (2) breach of undefined "fiduciary duties;" and (3) failure to obtain informed consent. CP 11-22.

On January 31, 2017, Fritz moved for a continuance of the February 10, 2017, summary judgment hearing on the ground she needed more time to obtain standard of care testimony from Eileen Owen-Williams, ARNP, and expert testimony on causation/damages from William Ryan, M.D. CP 65-69. Fritz's counsel represented that declaration testimony from those experts would be provided on or before February 28, 2017. Based on that representation, the summary judgment hearing was continued and re-noted for March 31, 2017. CP 316.

On February 15, 2017, Fritz filed the declaration of Ms. Owen-Williams, ARNP. CP 91-107. Therein, Owen-Williams set forth a theory on Riggs' failure to comply with the standard of care. *Id.* The manifest theme of the declaration was negligent failure to diagnose. Generally, Owen-Williams opined Riggs failed to comply with the standard of care because she failed to follow up on relevant history, which led to a lack of investigation of documented complaints, and that Riggs failed to recognize the December 2012 thyroid test as being abnormal, all of which led to a failure to diagnose a "thyroid condition." *Id.* Owen-Williams did not address whether or how the allegedly delayed diagnosis proximately caused injury or damage to Fritz, nor did she identify any material risks of treatment or non-treatment. *Id.*

On proximate cause and damages, Fritz never produced a declaration from Dr. Ryan. Instead, the day before the summary judgment hearing, she submitted a declaration from a psychologist, Brian Campbell, Ph.D. CP 261-288. Riggs and Christ Clinic moved to strike the declaration given the case history, its tardy filing, lack of foundation, and because Dr. Campbell's statements regarding causation were speculative and conclusory. CP 115-120.

In his 2-page declaration, Dr. Campbell listed the psychological diagnoses he claimed Fritz carried when she was a patient at the Christ

Clinic. CP 266-67. He then stated, without explanation or elaboration, that these conditions "... made Alice Fritz more susceptible to injury" and that "Alice Fritz has suffered an aggravation of her pre-existing psychological and neuro-psychological conditions as a result of the violations in the standard of care identified by Eileen Owens (sic) Williams." CP 267.

The trial court granted summary judgment dismissal of Fritz' fiduciary duty claim since that claim is not recognized as a cause of action under RCW 7.70. CP 126-130; CP 131-134.

The trial court also granted summary judgment on the informed consent claim, finding that Fritz' delayed diagnosis liability theory was inconsistent with an informed consent claim under controlling Washington law, specifically citing *Gomez v. Sauerwein*, 180 Wn.2d 610, 618, 331 P.3d 19 (2014).

Finally, the trial court concluded that the late declaration of Dr. Campbell was conclusory, lacked factual foundation, and was based upon assumptions. CP 126-130; CP 131-134. The trial court noted that Dr. Campbell's declaration did not set forth any specific records or explain how or why Fritz' identified pre-existing psychological conditions were aggravated by the delayed or misdiagnosis attributed to Christ Clinic and Riggs. Id.

In the wake of the trial court's letter ruling, presentment of the formal order on summary judgment was set for May 12, 2017, without oral argument. CP 126-130. Fritz was given an opportunity to object to Riggs' and Christ Clinic's proposed order and to propose alternative language. CP 130. Fritz filed no objection or alternate language, and the order was entered on May 18, 2017. CP 131-134.

On May 30, 2017, Fritz moved for reconsideration. CP 225-226. Her counsel filed a declaration that included an "Offer of Proof," a declaration attaching the Curriculum Vitae of Brian R. Campbell, Ph.D., and a "declaration on declaration of clarification of Brian R. Campbell." CP 135-155; 156-183; 184-204.

The trial court denied the motion for reconsideration finding that Fritz provided no legal authority as to why any of the sub-sections of CR 59 applied to the circumstances, or why the trial court should reconsider summary judgment given the case's procedural history. CP 294-298. Notably, Fritz offered no explanation as to why Dr. Campbell's revised testimony had not been provided prior to the court's decision on summary judgment, even though Fritz had been given three months to respond to the motion, and was even allowed to submit Dr. Campbell's original declaration the day before the summary judgment hearing. CP 297.

Fritz appealed, CP 301-312, and on April 2, 2020, Division III of the Court of Appeals affirmed in an unpublished opinion. *Fritz v. Rockwood Clinic, P.S.*, 2020 WL 1649817 (Div. III 2020). In its opinion, the Court thoroughly analyzed the issue of informed consent and affirmed summary judgment dismissal of that claim, reasoning that Fritz' case, regardless of how she characterized it, was one of failure to diagnose. Id at * 3-5. The Court of Appeals refused to address Fritz' arguments on the standard of care and proximate cause because Fritz had not assigned error to that portion of the trial court's ruling. Id at *5.

This Petition for Discretionary Review followed.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review

On appeal of summary judgment, the standard of review is de novo, with the appellate court performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000); *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the non-moving party. *Weyerhauser Company v. AETNA Casualty and Surety Company*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994).

B. Dismissal of Fritz' Informed Consent Cause of Action was Proper Under the *Backland* Rule Because Her Claim was for Alleged Negligent Misdiagnosis

Fritz' complaint, read as a whole, clearly portrayed this case as one of alleged failure to diagnose a thyroid condition/tumor. The Declaration of Eileen Owen-Williams, Fritz' standard of care expert, made this even more evident. Therein, Owen-Williams stated, among other things:

> A thorough relevant history was not taken by Ms. Riggs in most visits with missing components which led to lack of investigation of documented complaints from the patient such as fatigue, palpitations, muscle aches, depression, chronic cough, facial pain, inability to concentrate, and hair thinning, which are all classic symptoms of hypothyroidism. Pain radiating to ears, shortness of breath and a chronic cough are symptoms known to be associated with thyroid cancer, of which Ms. Fritz complained. Ms. Riggs did not recognize the above symptoms as being due to thyroid condition and failed to perform associated physical exams or order appropriate diagnostic testing indicated by the patient's history and exam findings despite the above symptoms being present for years." (emphasis added).

CP 93.

> According to the document provided, Ms. Riggs failed to recognize Ms. Fritz' thyroid test result (TSH) as being abnormal, as there was no assessment or plan of care, or mention of the test within any of the clinic notes. The test had been ordered by Dr. Cox on December 12, 2007, and Ms. Riggs documented that she reviewed the abnormal TSH lab test on December 17, 2007. Ms. Riggs not only failed to recognize both subjective complaints consistent with a thyroid condition, she failed to identify an elevated TSH level that was not addressed until Mr. Larry Carpenter ordered a TSH in December of 2011, and Ms. Fritz was placed on Levothyroxine to suppress the TSH. This resulted

in a 4 year absence of absence and treatment of her thyroid symptoms and disease which was diagnosed as cancer in 2014. (emphasis added)

CP 94.

Ms. Riggs was negligent in her duty to recognize abnormal findings, and order the appropriate testing as well as gain a consult with an Endocrinologist for both Ms. Fritz' diabetes which was out of control for a year without any documentation of a consultation, and the co-existing thyroid disease. (emphasis added)

CP 94.

The screening for thyroid conditions, including thyroid cancer occurs through the process of a focused and relevant history, physical examination, and diagnostic testing, such as laboratory testing and ultrasound testing. It is basic standard of practice for an Advanced Registered Nurse Practitioner to have the skills and abilities to screen and assess the thyroid and neck for normal thyroid, masses, nodules and enlargements, and formulate differential diagnoses for related complaints and physical findings. (emphasis added)

CP 95.

The above information and my review of the documents associated with this case has led me to conclude that Ms. Riggs was negligent in her role as an NP and failed to meet the standard of care for a reasonably prudent NP in the State of Washington for Ms. Fritz in early recognition, consultation and treatment to avoid 4 plus years of symptoms with a subsequent diagnosis of an advanced stage of thyroid cancer with invasive features and encapsulation of the right recurrent nerve requiring removal. (emphasis added)

CP 95.

As the trial court and Court of Appeals recognized, *Gomez*, 180 Wn.2d 610 is controlling. Heeding *Gomez*, both courts recognized Fritz' claim as one of negligent misdiagnosis, which is incompatible with a claim for informed consent.

In an effort to circumvent *Gomez* and the *Backland* rule, Fritz deconstructs the diagnostic process into components, then invokes *Gates v. Jensen*, 92 Wn. 2d 246, 599 P.3d 919 (1979), claiming Riggs' breached her informed consent duty to inform Fritz of an abnormal test result - the December 2008 elevated TSH.

Because of Fritz' emphasis on *Gates*, a careful examination of how the *Gomez* court treated *Gates* is instructive. First, the *Gomez* court emphasized that *Gates* was "decided on facts that pre-dated codification of informed consent in RCW 7.70.050. The statute clearly uses the word 'treatment,' demonstrating the intent to limit informed consent claims to treatment situations." *Gomez, supra* at 617.

Next, after citing *Backland*, the *Gomez* court stated:

> Simply put, a healthcare 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 such situations, a negligence claim for medical malpractice will provide the patient compensation if the provider failed to adhere to the standard of care in misdiagnosing or failing to diagnose the patient's condition.

Gomez, supra, at 618.

Significantly, one of the patient's claims in *Gomez* was that the defendant healthcare provider failed to inform her of a particular test result. According to the patient's interpretation of *Gates*, that was sufficient to support a standard of care claim. The *Gomez* court rejected this approach, stating:

> Mr. Anaya attempts to create a new duty in this case for providers to inform patients of all positive test results. But that is not the rule. (citation to Amicus briefs omitted). Proposing this rule stems from ignorance of the medical process. A lab test is one tool among many that a healthcare provider uses to form a diagnosis. Other tools include the history of present illness, family history, social history, and past medical history, as well as findings from a physical exam. Only after the provider has used these tools to make a diagnosis can he or she inform the patient about possible treatments and the risks associated with each.

Gomez, supra at 619-20.

Ultimately, the *Gomez* court distinguished and limited Gates:

> *Backland* and *Keogan* state the general rule of when a plaintiff can make an informed consent claim. The *Gates* court allowed the informed consent claim based on the unique set of facts that are distinguishable from this case. Under *Gates* there may be instances where the duty to inform arises during the diagnostic process, but this case does not present such facts. The determining factor is whether the process of diagnosis presents an informed decision for the patient to make about his or her care. Dr. Sauerwein's knowledge of the test result provided no treatment choice for Ms. Anaya to make. (Emphasis added)

Gomez, supra, at 622.

In the instant case, citing *Gates*, Fritz claims Riggs had an informed consent duty to inform her of the abnormal December 2007 TSH level. But Riggs' alleged failure to discover and assign diagnostic significance to that particular test result was part and parcel of her alleged failure to diagnose, and that is made abundantly clear by the declaration of Eileen Owen-Williams ("Ms. Riggs not only failed to recognize both subjective complaints consistent with a thyroid condition, she failed to identify an elevated TSH level that was not addressed until Mr. Larry Carpenter ordered a TSH in December of 2011, and Ms. Fritz was placed on Levothyroxine to suppress the TSH. As the Court of Appeals recognized, "[f]ailing to grasp what records show is a failure to diagnose, not a diagnosis. Riggs never formed a diagnosis of an abnormal TSH level and thus never recommended a course of treatment for the ailment." 2020 WL 1649817 at *5.

Fritz strains to avoid *Gomez* by repeatedly urging that this is not a misdiagnosis case. But her complaint and the Declaration of Owen-Williams unambiguously belie that.

In sum, based on *Gomez*, the trial court and Court of Appeals correctly characterized this case as involving alleged misdiagnosis, not informed consent, and both courts' decision on this issue was correct.

C. The Court of Appeals Properly Exercised its Discretion in Refusing to Consider Fritz' Standard of Care Argument.

Citing *BC Tire Corp. v. G.T.E. Directories, Corp.*, 46 Wn. App 351, 355, 730 P.2d 726 (1986), the Court of Appeals refused to consider Fritz' standard of care claim, specifically whether the declaration of Dr. Campbell was sufficient to raise a material issue of fact with respect to proximate cause because Fritz did not assign error to this aspect of the trial court's ruling.

RAP 10.3(a)(5) and 10.3(g) require an appellant/petitioner to assign error to those aspects of a trial court ruling/decision the appellant/petitioner is challenging. An appellate court has discretion to refuse to consider an argument or issue where the appellant/petitioner fails to comply with these rules. See *State v. Olson*, 126 W.2d 315, 893 P.2d 629 (1995).

Riggs and Christ Clinic acknowledge they were not prejudiced because Fritz' standard of care argument was contained in the body of her brief. But given the procedural history of this case, particularly Fritz' persistent tardiness and submission of late filings in connection with the summary judgment motion, and the inconvenience attendant to forcing an appellate court to search through an appellant/petitioner's brief to discern the specific trial court rulings challenged, it was not an abuse of discretion

for the Court of Appeals to refuse to consider the standard of care/proximate cause issue.

D. Even if the Court of Appeals Abused Its Discretion in Refusing to consider the Standard of Care/Proximate Cause Issue, Fritz' Petition for Review Should Still be Denied Because the Trial Court's Ruling on Fritz' Standard of Care Claim Was Amply Supported by the Record.

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005); *Redding v. Virginia Mason*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). Here, the trial court's summary judgment dismissal of Fritz's standard of care claim for want of competent, non-conclusory expert testimony on the issue of proximate cause was amply supported by the record.

Where a plaintiff files medical expert affidavits or declarations in opposition to a summary judgment in a medical negligence case, those affidavits or declarations must set forth specific facts supporting the experts' opinions, not conclusory statements without adequate factual support. *Guile v. Ballard Community Hospital*, 7 Wn. App. 18, 25, 851 P.2d 689 (1993); see also *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555-56, 860 P.2d 1054 (1993) ("broad generalizations and vague conclusions are insufficient to resist a motion for summary judgment") and *Boyer v. Morimoto*, 10 Wn App 2d 506, 525, 449 P.3d 285 (2019) ("in

opposing declaration expert must particularize the conduct or inaction of the physician that constituted negligence"). This is consistent with the general rule that an expert opinion that is conclusory and lacks factual support does not satisfy the summary judgment standard. See *Katare v. Katare*, 175 Wn.2d 23, 39, 283 P.3d 546 (2012); *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787-89, 819 P.2d 370 (1991). *Lilly v. Lynch*, 88 Wn. App. 306, 320, 945 P.2d 727 (1997).

On this point, the trial court's ruling is buttressed by *Reyes v. Yakima Health District*, 191 Wn.2d 79, 419 P.3d 819 (2018). There, in holding that the trial court and the Court of Appeals properly concluded that a declaration submitted by a plaintiff's expert witness in opposition to a motion for summary judgment was insufficient, the court stated:

> Allegations amounting to an assertion that the standard of care was to correctly diagnose or treat the patient are insufficient. Instead, the affiant must state specific facts showing what the applicable standard of care was and how the defendant violated it. Dr. Martinez failed to do so. In affirming the Court of Appeals, we do not require affiants to aver talismanic magic word, but allegations must amount to more than conclusions of misdiagnosis, with a basis in admissible evidence that can support a claim. (emphasis added)

191 Wn.2d at 89.

While *Reyes* involved the sufficiency of an expert's declaration on the standard of care and its breach, the court's reasoning is equally

applicable to the issue of proximate cause. Just as a conclusory statement such as the defendant "failed to comply with the standard of care" is insufficient to create a material issue of fact, so is the bare statement that the defendant's alleged negligence "aggravated a pre-existing condition."

Dr. Campbell's declaration cited no facts, did not address when the alleged delay in diagnosis started or how long it lasted, did not cite to any medical causation testimony indicating that Fritz suffered a worse medical/physical outcome due to a purported delay in diagnosis, and did not point to any facts in support of his global, sweeping conclusion that all of Fritz' pre-existing psychological conditions were somehow aggravated. In short, Dr. Campbell's declaration did not approach or even attempt to explain how or why a delay in diagnosis proximately caused any of Fritz' alleged psychological conditions.

Fritz argues that the attachments to Dr. Campbell's declaration, namely the declaration of Owen-Williams and Campbell's own report, supplied the necessary factual basis for his opinions. But it is not enough for an expert to simply attach medical records to a declaration and then make a conclusory statement on the standard of care or causation. The expert must in his/her declaration, explain how the facts support his/her opinion. See *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 23,

851 P.2d 689 (1993) cited with approval in *Reyes*, *supra* at 87-88, and *Vant Leven v. Kretzler*, 56 Wn. App. 349, 355-56, 783 P.2d 611 (1989).

IV. CONCLUSION

Based on the foregoing argument and authority, Respondents Christ Clinic and Danielle Riggs ARNP respectfully submit that the trial court and Court of Appeals' decisions were correct, and request that Fritz' Petition for Review be denied.

DATED this 28 day of July, 2020.

EVANS, CRAVEN & LACKIE, P.S.

By _____
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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 29th day of July, 2020, the foregoing was delivered to the following persons in the manner indicated:

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VIA REGULAR MAIL [X]
VIA CERTIFIED MAIL [ ]
VIA FACSIMILE [ ]
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DATED July 29, 2020.

Christopher J. Kerley

EVANS CRAVEN & LACKIE, P.S.

July 29, 2020 - 9:14 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98515-4
Appellate Court Case Title:	Alice L. Fritz v. Christ Clinic/Christ Kitchen, et al.
Superior Court Case Number:	16-2-00440-1

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