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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TERESA HARBOTTLE, individually and as
Personal Representative of the Estate of
JOHN F. HARBOTTLE, III, deceased,

Appellant,

v.

KEVIN E. BRAUN, M.D. and JANE DOE BRAUN,
and their marital community,

Respondents.

BRIEF OF APPELLANT

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A. INTRODUCTION

John F. Harbottle III was a renowned golf course architect, a loving husband, and a devoted father of two children. Although he had otherwise been in good health, Harbottle began complaining of chest pain to his wife, Teresa, in June 2011. Shortly thereafter, he made an appointment to see Dr. Kevin E. Braun, his primary care physician, for appropriate diagnosis and treatment. Dr. Braun misdiagnosed Harbottle's heart problems as gastroesophageal reflux disorder ("GERD"), and failed to secure Harbottle's informed consent for that course of treatment that would have advised Harbottle of that treatment course's pertinent risks, including the possibility that Harbottle's symptoms were coronary-related. Harbottle subsequently died of untreated coronary artery disease.

The trial court here deprived Harbottle's widow and his Estate of a fair trial by refusing to allow instructions to the jury on both medical negligence and lack of informed consent when both theories were available under Washington law.

The court also excluded key evidence of Dr. Braun's prior acts of professional misconduct while employed by MultiCare Health System ("MultiCare") at its University Place facility, and his attempts to cover up those acts. That evidence was important where Dr. Braun's credibility was a vital aspect of this case.

This Court should reverse the trial court's judgment and order a new trial.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

1. The trial court erred in entering a partial summary judgment in the defendants' favor on September 16, 2016.

2. The trial court erred in entering an order granting defendants' motion to exclude evidence of past grievances against Dr. Brown on September 11, 2017.

3. The trial court erred in entering the judgment on the jury's verdict on October 20, 2017.

(2) Issues Pertaining to Assignment of Error

1. Did the trial court err in precluding submission of a claim under RCW 7.70.050 for a physician's failure to provide information to a patient to enable the patient to give his informed consent to the physician's course of treatment that resulted in his death merely because the patient pleaded a theory of medical negligence for misdiagnosis under RCW 7.70.040 against that physician? (Assignments of Error Numbers 1, 3).

2. Did the trial court err in excluding the past grievances against a physician for misconduct that resulted in his resignation from employment where the physician deliberately refused to disclose such grievances throughout pre-trial discovery and the physician's failure to truthfully respond to such discovery was relevant to the physician's credibility, a fit topic for the impeachment of his testimony? (Assignments of Error Numbers 2, 3).

C. STATEMENT OF THE CASE

John Harbottle III made an appointment to see Dr. Kevin Braun, his primary care physician, on June 28, 2011, after experiencing two months of chest pains and shortness of breath. CP 59, 263. Braun performed an EKG test on Harbottle, whose results were not entirely normal. CP 47, 218, 264-65, 289, 323-24. Braun initially referred Harbottle to a cardiologist and ordered an exercise treadmill test (“stress test”) to rule out a possible cardiac cause of his symptoms. CP 264. Braun later diagnosed the problem as heartburn, gastroesophageal reflux disorder (“GERD”), and never followed up on the stress test he had scheduled with a cardiologist. CP 266-67. Harbottle consented to the course of treatment being recommended by Dr. Braun, which focused exclusively on heartburn; as a result, he stopped exercising, made some changes to his diet, and accepted a prescription for Prilosec to treat the GERD. CP 191.

Harbottle saw Braun four more times before his death, including a visit on March 14, 2012 in which Harbottle complained of shortness of breath on exertion, another symptom of heart disease. CP 269-70. Dr. Braun failed to follow up on Harbottle’s original symptoms of chest pain during any one of these four visits, including contacts with the cardiologist to whom Braun referred Harbottle. CP 270, 274. He never counseled

Harbottle about the risk of treating his symptoms solely as GERD, while ignoring and failing to test for a potential cardiac cause. CP 191. Harbottle died on May 24, 2012 from his untreated coronary artery disease. CP 71, 402-03.

Teresa Harbottle and the Estate (hereinafter “Estate”) filed an action in the Pierce County Superior Court on January 9, 2015 against Dr. Braun. CP 1-6. Dr. Braun answered. CP 9-13. The case was assigned to the Honorable Susan K. Serko.

The Estate produced evidence that a reasonably prudent physician should have informed Harbottle of the risk of a cardiac cause and the need for further testing as a facet of the physician’s duty to the patient. For example, Dr. Jerrold Glassman, a cardiologist, testified that Braun breached the standard of care in failing to treat Harbottle’s heart disease and in not securing performance of a stress test by a cardiologist. CP 291, 306-07. Similarly, Dr. Howard B. Miller, a family practice physician in Renton and former Assistant Clinical Professor of Family Medicine for the University of Washington, testified that Braun should not have allowed the exercise treadmill test to be cancelled, and that he should have followed-up with Harbottle in the subsequent months regarding the need for the test (and the obvious fact that it had not yet been completed). CP 329-31. This failure to follow-up on the previously ordered, subsequently

cancelled stress test breached the standard of care, CP 330. Dr. Miller testified that Harbottle's March 14, 2012 symptoms were additional, significant signs of possible heart disease. CP 331.

Dr. Braun moved for a partial summary judgment against the Estate on the Estate's informed consent claim. CP 14-28. The Estate resisted that motion. CP 189-201. The trial court granted the motion on September 16, 2017. CP 526-27.

Prior to trial on the remaining medical negligence claim against Dr. Braun, the Estate's counsel learned that Dr. Braun had lied in response to discovery requests with regard to prior professional discipline. The Estate's counsel subpoenaed the records of MultiCare, Braun's former place of employment, on March 6, 2017. CP 590-92.¹ Dr. Braun moved to quash the subpoenas and filed an April 13, 2017 motion for a protective order claiming the records were privileged. CP 528-38. The Estate opposed both motions. CP 622-56. The trial court entered an order on April 21, 2017 denying Braun's motion to quash and ordering MultiCare to produce its non-privileged records, CP 664-65, but also issuing protective orders. CP 666-81.

¹ Counsel also filed Public Records Act requests to the Department of Health ("DOH") that administers medical professional discipline. CP 705-06. DOH produced the records of complaints made against Dr. Braun. *Id.*

The Estate moved on August 3, 2017 for an *in camera* review of the MultiCare records upon which Braun claimed privilege. CP 702-56. Braun moved to exclude such evidence on August 17, 2017 as irrelevant. CP 751-66.² The trial court granted *in camera* review, CP 880-81,³ and reviewed the documents. The court took the question of whether to entirely exclude the Braun misrepresentations under advisement, RP (9/8/17):33, but then granted Dr. Braun's motion on September 11, 2017, barring the Estate from using the documents to impeach Dr. Braun at trial. CP 956-57.

The case went to trial on the remaining medical negligence claims against Dr. Braun. The jury rendered a defense verdict. CP 1359-60. The trial court entered a judgment on the jury's verdict on October 20, 2017, CP 1361-62, from which the Estate timely appealed to this Court. CP 1363-67.

D. SUMMARY OF ARGUMENT

² Braun relied heavily on the fact that the Medical Quality Assurance Commission ("MQAC") dismissed charges against him. CP 754-55, 813-19. However, the burden of proving such charges by the Commission was clear and convincing evidence, a standard far higher than the traditional preponderance standard. *Nguyen v. State, Dep't of Health*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002). In any event, MQAC's dismissal of charges did not relieve Braun of his obligation to truthfully answer discovery requests and questions about those complaints, or his reasons for leaving MultiCare.

³ The trial court wanted to afford MultiCare ample time to assert any privilege in connection with the documents; it deferred any decision on a motion to exclude. RP (8/25/17):11-13.

The trial court misapplied Washington law on the Estate's ability to pursue both a misdiagnosis claim under RCW 7.70.040 and a breach of informed consent claim under RCW 7.70.050 against Dr. Braun. Under well-established authority in Washington where Dr. Braun was aware of severe coronary disease as an explanation for John Harbottle's symptoms, Dr. Braun was obligated to inform him of the material risks of treatment, and non-treatment, for both heart disease and heartburn. As Braun failed to do so, it was error for the trial court to grant summary judgment on the informed consent claim when that issue was for the jury.

The trial court erred in excluding the fact that Dr. Braun was dishonest in his discovery responses relating to his departure from MultiCare. ER 608(b). That evidence was relevant to Dr. Braun's impeachment at trial. The trial court's decision tainted the jury's decision, requiring a new trial.

E. ARGUMENT

- (1) An Informed Consent Claim under RCW 7.70.050 Was Available to Harbottle's Estate Even Where Misdiagnosis by Dr. Braun Was Also Pleaded⁴

⁴ Under CR 56(e), Dr. Braun was entitled to summary judgment on the Estate's claim only if there was no genuine issue of material fact and the City was entitled to judgment as a matter of law. The trial court should have taken the facts, and reasonable inferences from those facts, in light most favorable to the Estate as the non-moving party on summary judgment. *Dowler v. Clover Park Sch. Dist. No. 409*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). This Court reviews the trial court's decision *de novo*. *Id.*

The trial court here labored under the misconception that the Estate could not pursue a claim of lack of informed consent and misdiagnosis against Dr. Braun. CP 526-27. The trial court was wrong.

RCW 7.70.040 governs medical negligence claims. The statute sets forth the necessary elements of such a claim against a health care provider:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
- (2) Such failure was a proximate cause of the injury complained of.

That statute applies to misdiagnosis claims specifically. *E.g.*, *Keogan v. Holy Family Hospital*, 95 Wn.2d 306, 622 P.2d 1246 (1980) (reversing summary judgment on physician's misdiagnosis of heart disease and failure to administer an EKG test for it); *Gustav v. Seattle Urological Associates*, 90 Wn. App. 785, 954 P.2d 319, *review denied*, 136 Wn.2d 1023 (1998) (failure of physician to diagnose cancer); *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 187 P.3d 291 (2008) (jury could find physician negligent for failure to diagnose coronary artery disease or to refer patient to specialist).⁵ *See generally*,

⁵ Here, the jury was instructed on a medical negligence failure to diagnose claim in Instruction 6. CP 1350.

Philip A. Talmadge, Anne Marie Neugebauer, *A Survey of Washington Medical Malpractice Law*, 23 Gonz. L. Rev. 267, 283-85 (1987/88) (collecting early misdiagnosis cases).

Under Washington law, a physician has a fiduciary duty to inform a patient of abnormalities in the patient's body. *Miller v. Kennedy*, 11 Wn. App. 272, 281-82, 522 P.2d 852 (1974), *aff'd*, 85 Wn.2d 151, 530 P.2d 334 (1975). "The patient has the right to chart his own destiny, and the doctor must supply the patient with the material facts the patient will need in order to intelligently chart that destiny with dignity." *Id.* at 282.

RCW 7.70.050 prescribes four necessary elements of proof for an informed consent claim:

- (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
- (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
- (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
- (d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1). The statute defines material facts as those "a reasonably prudent person in the position of the patient or his or her representative would attach significance to [in] deciding whether or not to

submit to the proposed treatment.” RCW 7.70.050(2). *See also, Miller*, 11 Wn. App. at 282 (“The scope of the duty to disclose information concerning the treatment proposed, other treatments, and the risks of each course of action and of no treatment at all is measured by patient’s need to know.”). As the *Miller* court summarized, “Would the patient as a human being consider this item in choosing his or her course of treatment?” *Id.* at 282-83.

Although the statutory standard respectively for claims based on failure to secure informed consent and medical negligence are distinct theories of recovery against a health care provider, *Keogan*, 95 Wn.2d at 325, their presence in the same case has presented considerable practical difficulties for Washington courts.

For example, in *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979), our Supreme Court recognized that instances exist in which a plaintiff may have an informed consent claim available where a physician’s failure occurred during the diagnostic phase. There, *Gates* consulted Dr. Hargiss, an ophthalmologist, with complaints of difficulty in focusing, blurring, and gaps in her vision. *Gates* was 54 years old and had a severe myopia, which doubled her risk of glaucoma. Hargiss took eye pressure readings and found that *Gates* was in the borderline area for glaucoma. Hargiss then conducted an examination of *Gates*’s eyes that

was difficult to do without dilating her pupils. Yet, he did not dilate her pupils, saw no further evidence of glaucoma, and made no further tests for glaucoma. Hargiss diagnosed the problems that Gates complained of as difficulties with contact lenses and treated her accordingly. Several years later, Gates was diagnosed with glaucoma and eventually became functionally blind.

At trial, the defendant argued that the doctrine of informed consent does not apply to questions of appropriate diagnostic procedures, and the trial court agreed, not giving an instruction on informed consent to the jury.

The Supreme Court reversed concluding that there were fact issues to be addressed:

The existence of an abnormal condition in one's body, the presence of a high risk of disease, and the existence of alternative diagnostic procedures to conclusively determine the presence or absence of that disease are all facts which a patient must know in order to make an informed decision on the course of which future medical care will take.

Id. at 250. Indeed, the Court determined that the duty to inform a patient arises *throughout* the physician's treatment and is not confined to the post-diagnosis period:

The patient's right to know is not confined to the choice of treatment once a disease is present and has been conclusively diagnosed. Important decisions must frequently be made in many nontreatment situations in

which medical care is given, including procedures leading to a diagnosis, as in the case. These decisions must all be taken with the full knowledge and participation of the patient.

Id. at 250.

In *Keogan*, the Supreme Court reversed a jury verdict for the decedent's physician and the hospital in whose ER he had been treated, concluding that the trial court erred in refusing to give an informed consent instruction as to his family doctor who failed to diagnose his coronary artery disease and to find the decedent's ER doctor culpable for negligence as a matter of law in failing to conduct an EKG test to rule out heart disease. As for the former, the Court held that the duty to disclose alternatives to the patient arises when the physician becomes aware of an abnormality or risk, citing *Gates*, 95 Wn.2d at 314-15. Specifically, the Court stated:

Snyder testified that Keogan's mid-chest pain constituted an abnormality, and that he suspected angina as the cause of the pain. Instead of fulfilling his duty to disclose, as set forth in the following section, Dr. Snyder began treating Keogan for a stomach ailment and for mild heart trouble through the prescription of an antacid and Sorbitrate without allowing Keogan to determine for himself if additional diagnostic procedures should be pursued to determine the cause of his chest pain. The fact that Keogan's symptoms were "inconclusive" does not prevent the doctrine of informed consent from applying. It merely points out the duty to inform the patient of potentially fatal causes of his abnormality, and the means of ruling out or confirming this source of illness.

Id. at 315 (citations omitted). The decedent’s doctor was obligated to inform him of the different course of action in order to fulfill what the Court described as his “right to self-determination.”

In this case, Dr. Snyder, upon being presented with symptoms of angina and borderline readings on cardiac enzyme tests for heart disease, did not inform Keogan of the tests available to determine if the condition was due to rapidly progressing heart disease, a highly serious, potentially lethal illness. Instead, he treated Keogan for lesser probable causes of the abnormality indigestion and mild, drug-controllable angina. The failure to inform of alternative diagnostic procedures, as in *Gates*, violated the duty to disclose within the scope of the doctrine of informed consent. Dr. Snyder was negligent as a matter of law in his uncontroverted failure to inform Keogan of material facts regarding his future medical care.

Id. at 320-21 (citations omitted).

In *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 975 P.2d 950 (1999), a physician properly diagnosed a newborn infant child with jaundice. Two forms of treatment were available at the time for that condition, one that was generally prescribed, and the other prescribed in more serious cases. The second treatment alternative carried far more severe risks for the patient. The physician prescribed the general form of treatment, without first discussing the second, and much riskier, option with the child’s parents. The treatment was unsuccessful, and the infant ultimately suffered brain damage and subsequent developmental issues. *Id.*

The infant's parents sued the physician for negligence, later adding an informed consent claim. The jury found that the physician was not negligent, but could not reach a verdict on the informed consent claim. The parties agreed to a bench trial on the informed consent issue. The trial court found that, although there existed a material fact of which the parents were unaware, a reasonably prudent patient under similar circumstances would not have chosen the more severe form of treatment, and therefore the claim failed. *Id.* Plaintiffs appealed.

On appeal, the physician argued that because a jury had already found that the physician was not negligent, that he could not be found to have breached his duty to secure informed consent. *Id.* at 659. The Court disagreed, holding that, while the jury upheld the physician's professional judgment regarding which course of treatment to pursue, "a trier of fact might still have found he did not sufficiently inform the patient of risks and alternatives in accordance with RCW 7.70.050." *Id.* at 662. However, the court went on to affirm the judgment of the trial court that the plaintiffs did not in fact meet their burden under RCW 7.70.050. *Id.* at 668.

In determining whether the jury's finding that the physician's actions were not negligent foreclosed an informed consent claim, the Court explained:

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, 137 Wn.2d at 661. Critically, the Court explained in a footnote that this policy extends only to situations where the misdiagnosed condition is “unknown to the physician.” *Id.* at 661 n.2. In the following sentence of the text the Court confirmed this view, stating “[w]e have no facts in this case, however, suggesting [the physician] was unaware of the transfusion alternative.” *Id.* at 662. The Court also made clear that “[w]henver a physician *becomes aware* of a condition which indicates risk to the patient's health, he has a duty to disclose it.” *Id.* at 660.⁶

In *Gomez v. Sauerwein*, 180 Wn.2d 610, 331 P.3d 19 (2014), a more classic misdiagnosis case, a patient's blood and urine samples had been taken after she complained of urinary tract infection (“UTI”) symptoms. A physician at her primary care facility was called with the lab results showing that the patient had a blood infection, which concerned the physician. He determined that the clinic should contact her and, if she was feeling ill, she should come in immediately for treatment. But, if she was feeling better, according to the physician, it was more likely that the test

⁶ Indeed, the Court forcefully noted that disclosure of material risks to patients was compelled by patient self-determination principles. *Id.* at 662 n.3.

result was a false positive which was a common occurrence in microbiology lab tests. A nurse from the clinic contacted the patient, who was feeling better. Accordingly, the physician concluded that the test was a false positive, and did not tell her about her lab results. The patient died soon thereafter from symptoms caused by the blood infection.

The patient's husband sued the physician who chose not to disclose the test results to his wife for malpractice, later adding a claim for failure to obtain informed consent. The trial court granted a defense motion for judgment as a matter of law on the informed consent claim, and the jury later found that the physician did not breach any duty owed to the patient.

The Supreme Court affirmed, holding that "when a health care provider rules out a particular diagnosis based on the circumstances surrounding a patient's condition, including the patient's own reports, there is no duty to inform the patient on treatment options pertaining to a ruled out diagnosis." *Id.* at 623.

Justice Gonzalez concurred in result only, stressing "that a health care provider may be liable for both a negligence claim and an informed consent claim arising from the same set of facts." *Gomez*, 180 Wn.2d at 627 (Gonzalez, J., concurrence). Justice Gonzalez explained that although *Backlund* distinguishes medical negligence arising from misdiagnosis, and failure to obtain informed consent, it does not prevent a plaintiff from

bringing both claims if the facts of a given case support both. *Id.* at 629.

Decisions from all three divisions of the Court of Appeals have also addressed this question of the intersection between informed consent and medical negligence for misdiagnosis principles beginning with *Gustav*.

In *Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 772 P.2d 1027, *review denied*, 113 Wn.2d 1005 (1989), Division III ruled that a physician had no duty to secure the informed consent of the parents of a child who was treated for a seizure disorder. The doctor did not perform diagnostic tests or treatment of the brain herniation caused by the child's seizure because "he was unaware of the risk of brain herniation and [the child's] subsequent injury." *Id.* at 168.

Similarly, in *Bays v. St. Luke's Hospital*, 63 Wn. App. 876, 825 P.2d 319, *review denied*, 119 Wn.2d 1008 (1992), Division III affirmed a directed verdict in favor of a doctor on informed consent, concluding that a doctor who had not yet diagnosed the patient's thrombophlebitis had no duty to secure the patient's informed consent to its treatment. There, although the doctor had not diagnosed that condition, his differential diagnosis included thrombophlebitis as a possibility. *Id.* at 881. *Accord*, *Estate of Eikum v. Joseph*, 196 Wn. App. 1005, 2016 WL 5342411 (2016), *review denied*, 187 Wn.2d 1024 (2017).

In *Gustav, supra*, in a split decision, Division I adopted the *Bays* court's analysis that the duty to disclose did not arise until the physician becomes aware of a condition by diagnosing it. 90 Wn.2d at 790. Consequently, the court concluded that the failure to disclose was not breached where the physician failed to appreciate the patient's actual danger. *Id.* at 790-91. Any informed consent claim was subsumed under a medical negligence claim.

But the dissent in *Gustav* cogently observed that this was not a situation where the physician, in misdiagnosing the plaintiff's cancer, was oblivious to the possibility that he had cancer. "Gustav is not invoking Dr. Gottesman's duty of care in making a diagnosis. He is invoking Dr. Gottesman's duty to provide complete information about the PSA levels and the biopsies in order to enable Gustav to intelligently choose the course of his own medical care." *Id.* at 794. The physician chose between explanations for the patient's condition. The patient was entitled to information on the alternative explanations, and their risks, to make an informed decision on treatment. *Accord, Vinick v. State*, 183 Wn. App. 1042, 2014 WL 4987975 (2014).

In *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 333 P.3d 566 (2014), a case the trial court simply did not read (RP 9/16/17:7), this Court largely adopted the *Gustav* dissent's analysis and once again recognized

that a physician's duty to obtain informed consent may arise during the diagnostic phase of treatment. Kathryn Flyte visited a clinic while feeling ill during pregnancy and died shortly after from the H1N1 influenza virus. *Id.* at 562. The clinic had received public health alerts concerning the global pandemic of "swine flu," a potentially fatal illness caused by the H1N1 virus, and had been advised to treat pregnant women prophylactically (preventatively) with a drug known as "Tamiflu." *Id.* at 563. Although her symptoms were consistent with the influenza, the clinic staff did not inform Flyte about the pandemic or the available treatment. *Id.* Her condition deteriorated. *Id.* Her baby was delivered by caesarean section, after Flyte had been placed in a medically induced coma. She and her newborn infant died shortly thereafter. *Id.*

The trial court gave an instruction to the jury that "[a] physician has no duty to disclose treatments for a condition that may indicate a risk to the patient's health until the physician diagnoses that condition." *Id.* at 564. The jury returned a verdict in favor of the clinic and the husband appealed.

This Court rejected the position of Divisions I and III in *Gustav*, *Burnet*, and *Bays* and reaffirmed that *Gates* remained good law after *Backlund* and *Gomez*. A patient's right to know is not confined to the choice of treatment determined when the condition is *definitively*

diagnosed. *Id.* at 572. It is only where the physician is *entirely unaware* of the patient's condition because of the physician's misdiagnosis that the patient may not pursue an informed consent claim. *Id.* at 575-76. *Backlund*, 137 Wn.2d at 661 n.2. Thus, this Court concluded that the patient was entitled to disclosure of flu treatment alternatives where the clinic had not conclusively been diagnosed with the flu and an instruction requiring a conclusive diagnosis was error. *See also, Estate of Hensley v. Community Health Ass'n*, 198 Wn. App. 1036, 2017 WL 1334433, *review denied*, 189 Wn.2d 1017 (2017) (Division III held that unlike the physician in *Flyte*, the defendant physicians had no knowledge that a patient was at risk of an intercranial infection or death, and then minimized the risk and chose not to inform her of it).

The lesson of these various decisions is that there is no requirement in RCW 7.70.050 itself that the duty to inform arises only after the diagnostic phase of treatment. *Flyte*, 183 Wn. App. at 574 (the “statute, on its face, does not impose the requirement ... that the duty to disclose arises only after the provider has diagnosed a particular condition.”). The Legislature did not intend to add an additional element to the informed consent statute that the physician failed to get informed consent from a patient outside of the diagnostic phase of treatment. *Id.* at 574.

Further, the physician must disclose material risks of treatment alternatives, including no treatment, to enable the patient to exercise self-determination with regard to medical decisions, as the Supreme Court clearly determined in *Gates*, and this Court determined in *Flyte*. This means that the trial court's belief here that an informed consent claim cannot coexist with a misdiagnosis claim was error. Washington cases only foreclose a claim for failure to obtain informed consent in a situation where a physician misdiagnoses a condition if the physician's misdiagnosis meant he/she was unaware of the patient's possible condition. Obviously, a physician cannot advise of a condition he/she does not know; for that situation, a claim under RCW 7.70.040 is the remedy. But where the physician knows of the condition but misdiagnoses it believing another condition is present, the physician must advise the patient of the possible conditions known to him or her and inform the patient of them so that the patient can make an informed decision, consistent with principles of patient self-determination that lie at the core of informed consent.

Here, Dr. Braun knew that Harbottle's symptoms of severe chest pain and shortness of breath on exertion could evidence a life-threatening coronary disease. Braun originally ordered a stress test to determine whether Harbottle's symptoms were related to a coronary condition, but

before the test could be performed, he focused on GERD and allowed the test to be cancelled, without any follow up or discussion with Harbottle of the risk of that course of action. Braun never definitively ruled out heart disease as an explanation for Harbottle's symptoms. Nothing in his records so states. Harbottle then continued with a course of treatment for heartburn, while Braun failed (on multiple occasions) to follow-up and advise him regarding the potential cardiac cause and the need for a stress test or a referral to cardiology to rule out the possibility of heart disease.

Braun breached his RCW 7.70.050 duty in failing to advise Harbottle of a known possible explanation for his symptoms and to inform him of the risks associated with the treatment for heartburn and for a coronary condition. Summary judgment was improper on these facts.⁷

(2) The Trial Court Erred in Refusing to Address Dr. Braun's Willful Nondisclosure in Discovery of Past Instances of Professional Misconduct⁸

⁷ Even if Braun was correct (and he is not) that claims of informed consent and medical negligence for misdiagnosis are incompatible, at a minimum, the Estate should have been allowed to present these issues to the jury in the alternative. Washington law endorses the proposition that a plaintiff may plead and submit alternate theories for recovery to the jury. CR 8(a) ("Relief in the alternative or of several types may be applied."); CR 8(e). Washington law rejects the harsh application of an election of remedies. *Melby v. Hawkins Pontiac, Inc.*, 13 Wn. App. 745, 749-50, 537 P.2d 807 (1975).

⁸ This Court reviews a trial court's sanction decision for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Id.* at 339. "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard, the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard' to the supported

In an attempt to conceal his history of sexual misconduct with female patients, Dr. Braun denied being the subject of any complaints of professional misconduct both in answers to interrogatories, which he signed under penalty of perjury, and again during his deposition, also while under oath. He also swore that he left MultiCare voluntarily to allow him to manage his own medical practice. Both assertions were untrue. Only later was it revealed that Braun had been accused of sexual misconduct by three separate patients while employed by MultiCare. Following the third incident, in which he failed to have “chaperones” present when he was examining unclothed women, he was summarily placed on administrative leave while MultiCare considered his termination, CP 732, and he then resigned from MultiCare in lieu of termination. CP 734; RP (9/8/17):17-20.⁹ Far from sanctioning Braun for his willful, untruthful responses to its discovery requests, the trial court acceded to Braun’s argument to exclude any of this evidence relevant to Braun’s impeachment.

facts, adopts a view ‘that no reasonable person would take.’” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

⁹ Even in his response to the Estate’s motion to exclude, Braun continued to insist, untruthfully, that his departure from MultiCare was “voluntary,” CP 832, when he was summarily placed on administrative leave from his MultiCare employment by an April 27, 2005 letter from MultiCare’s Dr. J. D. Fitz, its Medical Director. CP 732.

(a) Washington Law on the Willful Refusal to Truthfully or Fully Answer Discovery Requests

The cases in Washington are *legion* that a party's untruthful answers to interrogatories constitute sanctionable conduct. Both our Supreme Court and all three decisions of the Court of Appeals have so held. Indeed, the usual question arising in such decisions is the severity of the sanction for the untruthful discovery response, not whether the conduct is sanctionable.¹⁰

Our Supreme Court has held that discovery is not only essential to civil litigation, but that it is constitutionally mandated. *Lowy v. Peacehealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012). Moreover, parties must act in good faith to *fully* respond to discovery requests and not to *unilaterally* decide to withhold information requested by another party. *Fisons*, 122 Wn.2d at 353-54 (failure to disclose "smoking gun" letters relating to drug). *See also, Burnet v. Spokane Ambulance*, 131 Wn.2d 184, 933 P.2d 1036 (1997) (failure to disclose expert witnesses); *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006) (failure to disclose memo that defendant's product was flawed); *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009) (manufacturer's

¹⁰ Willful refusal to respond to discovery inquiries can result in severe sanctions up to default judgment in a party's favor. *See generally*, Philip Talmadge, Emmelyn Hart-Biberfeld, Peter Lohnes, *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 Seattle U. L. Rev. 437, 454-59 (2010).

failure to disclose prior claims involving alleged back seat failure in car).

Similarly, the Court of Appeals has long emphasized the need for candid and complete discovery responses. Where a party to litigation fails to completely respond to questions in discovery, such conduct can result in sanctions. *E.g.*, *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985) (failure to disclose accident reports pertaining to loader); *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 696 P.2d 28, *review denied*, 103 Wn.2d 1040 (1985) (new trial awarded where manufacturer refused to disclose information relating to information on its aircraft fuel system) (default judgment upheld where defendant willfully refused to disclose evidence relating to defects in its product); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002) (this Court upheld default judgment awarded where paint manufacturer withheld reports on wood product's defects); *Wash. Motorsports Limited P'ship v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 282 P.3d 1107 (2012) (\$341,000 in monetary sanctions imposed personally against attorney who wrongfully certified incomplete and inaccurate interrogatory answers); *Town of Skykomish v. Benz*, 193 Wn. App. 1013, 2016 WL 1306417 (2016) (parties held in contempt for untruthful and incomplete discovery answers); *Camicia v. Cooley*, 197 Wn. App. 1074, 2017 WL 679988 (2017) (attorney and city

sanctioned for incomplete discovery responses as to bicycle accidents in city).

The import of the cases referenced above is that Washington law requires parties to be candid in their answers to interrogatories, Dr. Braun was not, as will be documented *infra*. He should not be allowed to benefit from his lack of candor in discovery.

(b) Dr. Braun Was Untruthful in His Discovery Responses

The record here is unambiguous that Dr. Braun was untruthful in his discovery responses, a fact that did not sway the trial court because the court was seemingly more concerned about the impact of the underlying sexual misconduct allegations against Dr. Braun. RP (9/8/17):26. At the outset of the case, the Estate sent written interrogatories to Braun asking him about his education, background, and employment history; this included a specific question about prior complaints of unprofessional conduct and/or substandard care, questions typically asked in medical malpractice cases to help understand *why* Braun's care of Harbottle fell so far below accepted standards. CP 711-19. On May 5, 2015, Braun provided the following discovery response:

Interrogatory No. 5: Has Defendant Braun ever been the subject an allegation, claim, complaint, or lawsuit (including any civil claims, criminal claims, and/or professional complaints) alleging inappropriate conduct or

improper and/or negligent or substandard treatment? If so, identify the complaining party, describe the nature of the allegation, and set forth the ultimate outcome of the claim, complaint, lawsuit, or professional complaint.

Answer: Other than this case, no.

CP 716. Similarly, in response to Interrogatory No. 6, Braun swore that he had never been under disciplinary review by any medical board. *Id.* Braun's counsel certified the responses pursuant to CR 26(g). CP 718.

In his deposition, Dr. Braun testified that he left MultiCare "for an opportunity to practice on his own," and to have "more direct control over care." CP 275. He asserted that there were other reasons he wanted to leave, unrelated to any complaints against him. CP 276. He denied being the subject of any claims of unprofessional conduct and stated the only "complaints" he could remember pertained to patients who didn't get the medications they were looking for (implying that these were drug-seeking patients):

Q: Were you subject to any complaints while you were an employee of MultiCare?

A: There's always complaints.

Q: Okay. What complaints do you remember being subject to when you were employed with MultiCare?

A: There were patients who didn't get the prescriptions that they were looking for.

Q: Any other complaints that you remember being subject

to when you were with MultiCare?

A: I'd have to go back and look through.

Q: What would you go back to look through?

A: I don't know.

CP 276.

As noted *supra*, after being told by an outside source that Braun was not being candid about his background, the Estate's counsel subpoenaed Dr. Braun's prior employers seeking his personnel files. Dr. Braun sought to prevent the disclosure of the MultiCare records. The trial court ordered MultiCare to produce them. The Estate also sought MQAC disciplinary records on Dr. Braun from DOH. The upshot of these materials was that Dr. Braun's discovery responses were deliberately misleading as to his history of professional misconduct, and regarding his reasons for leaving his prior employment with MultiCare. Dr. Braun was the subject of complaints of sexual misconduct by at least three separate women during his time at MultiCare, contrary to his sworn answers to interrogatories and his deposition testimony given under oath. Moreover, he apparently resigned from MultiCare in lieu of termination.¹¹

¹¹ Dr. Braun's conduct implicated his medical license. Even in the pre-Me, Too era, Washington courts have held that professional's sexual misconduct as to colleagues and patients or clients may result in the professional's loss of a license. *E.g., Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 818 P.2d 1062 (1991) (doctor's sexual relationship with former teenage patient constituted unprofessional conduct); *In re*

Thus, the record was unambiguous that Braun was untruthful in his discovery responses.¹²

(c) The Trial Court Erred in Excluding the Evidence of Dr. Braun's Resignation from MultiCare for Misconduct

Rather than recognizing Braun's discovery violations as a serious issue, the trial court actually rewarded his misconduct by excluding this fully relevant evidence that pertained to Braun's credibility.¹³

(i) RCW 70.41.200 Was Inapplicable Here

The Estate sought *in camera* review predicated upon the trial court's initial belief that the MultiCare records fell within the peer review

Disciplinary Proceedings Against Halvorson, 140 Wn.2d 475, 998 P.2d 833 (2000) (attorney's sexual relationship with marriage dissolution client). Although, MQAC chose not to pursue charges against Braun, that does not make his summary departure from MultiCare any less relevant or condone his obviously untruthful discovery responses.

¹² Dr. Braun's conduct bordered on perjury, it is hard to believe that Dr. Braun was the subject of three complaints by female patients at MultiCare such that he was suspended without pay, forced to hire a lawyer, resigned in lieu of termination, and defended himself against the ensuing Department of Health investigation – yet “could not remember” those facts during his deposition. His suspension and pending termination area conspicuously absent from the discussion of his reasons for leaving MultiCare. *See* RCW 9.72.090 (“Whenever it shall appear probable to a judge, magistrate, or other officer lawfully authorized to conduct any hearing, proceeding or investigation, that a person who has testified before such judge, magistrate, or officer has committed perjury in any testimony so given, or offered any false evidence, he or she may, by order or process for that purpose, immediately commit such person to jail or take a recognizance for such person's appearance to answer such charge. In such case such judge, magistrate, or officer may detain any book, paper, document, record or other instrument produced before him or her or direct it to be delivered to the prosecuting attorney.”).

¹³ As not all of the MultiCare record has been made available to the Estate, this statement is predicated on records that are now of record and what would likely have been disclosed once all the MultiCare records were revealed.

privilege of RCW 70.41.200. CP 702-56. A request for *in camera* was appropriate as a means to allow a court to assess whether privilege applies to particular records, so long as an appropriate showing is made. *E.g.*, *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 743 P.2d 832 (1987), *review denied*, 109 Wn.2d 1025 (1988), *rev'd on other grounds*, *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001) (crime/fraud privilege to attorney/client privilege); *Barry v. USAA*, 98 Wn. App. 199, 989 P.2d 1172 (1999) (same).

RCW 70.41.200 does not support suppression of Dr. Braun's MultiCare records. That privilege relates only to specific hospital quality improvement programs;¹⁴ the statute provides for exceptions, including disclosure of information relating to a professional's staff privileges.¹⁵

¹⁴ There are other privilege statutes pertinent to internal reviews or investigations of physician misconduct. For example, the Legislature enacted RCWA 4.24.250 to shield from discovery the records of internal proceedings conducted by peer review committees in which allegations of negligent or incompetent care provided by a fellow health care professional are reviewed. In 1986, the Legislature directed hospitals to collect information concerning negative health care outcomes, to conduct periodic review of the competence of health care providers and staff, and to establish a coordinated quality improvement program, a quality improvement committee, and a medical malpractice prevention program. RCW 70.41.200. In order to encourage candor in the evaluation of the quality of care that a hospital delivers, the statute prohibits disclosure in discovery of the proceedings, reports, or records of a quality improvement committee.

¹⁵ RCW 70.41.200(3) states:

(3) Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into

Our Supreme Court has construed the statute narrowly:

The quality improvement privilege must be narrowly construed in favor of discovery. It is not necessarily the case that all records documenting a hospital's efforts to comply with the statutorily mandated quality improvement program are privileged; indeed, the quality improvement privilege requires that protected documents be "created specifically for, and collected and maintained by, a quality improvement committee." The "created specifically for" and "collected and maintained by" requirements guard against a hospital funneling records through its quality improvement committee in order to make them undiscoverable.

Fellows v. Moynihan, 175 Wn.2d 641, 655, 285 P.3d 864 (2012) (internal citations omitted). *See also, Cornu-Labat v. Hosp. Dist. No. 2 Grant County*, 177 Wn.2d 221, 235-36, 298 P.3d 741 (2013) (consistent with

evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection *does not preclude*: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) *in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions*; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.

narrow application of privilege, RCW 70.41.200 inapplicable unless proceedings of actual, formal quality improvement committee were at issue).¹⁶ The *Lowy* court summarized the appropriate principle: “[H]ealth care quality assurance privileges in particular, are not to be used as a mechanism to conceal from discovery otherwise discoverable information.” *Lowy*, 174 Wn.2d at 781.

Moreover, “the quality improvement privilege does not protect a hospital’s reasons for terminating or restricting a staff member’s privileges.” *Fellows*, 175 Wn.2d at 658.¹⁷ See also, *Anderson v. Breda*, 103 Wn.2d 901, 907, 700 P.2d 737 (1985) (RCW 4.24.250 privilege inapplicable to physician’s loss or restriction of privileges); *Lafferty v. Stevens Memorial Hosp.*, 136 Wn. App. 1027, 2006 WL 3775848 (2006) (RCW 70.41.200 inapplicable to physician personnel file).

Further, RCW 70.41.200 applies only where the entity at issue is a “hospital.” And while MultiCare does own and operate several hospitals, Dr. Braun was not employed in one of them; he was employed at a family

¹⁶ This narrow construction of such privilege is consistent with the Supreme Court’s interpretation of RCW 4.24.250. *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.2d 173 (1984).

¹⁷ *Fellows* states that “[t]he plain language of the statute requires that a hospital disclose the fact that it has terminated or restricted a staff member’s privileges and its reasons for doing so.” 175 Wn.2d at 656. “Complaints” and other “incident reports” are privileged only if “created specifically for, and collected and maintained by, a quality improvement committee.” RCW 70.41.200(3); *Coburn*, 101 Wn.2d at 277.

practice clinic in the community. It does not appear that this clinic would meet the definition of a “hospital” as set forth in RCW 70.41.020.

In sum, nothing in RCW 70.41.200 foreclosed the admission of the MultiCare records.

(ii) The MultiCare Records Were Admissible and the Trial Court’s Exclusion of Them Constituted Prejudicial Error

The trial court erred in precluding the Estate from advising the jury of Dr. Braun’s MultiCare employment and resignation where the records were fully relevant to Dr. Braun’s credibility, a key aspect of the case against him as to his misdiagnosis of John Harbottle’s condition, and their exclusion prejudiced the Estate’s misdiagnosis claim under RCW 7.70.040 against Braun, necessitating a new trial.

As set forth *supra*, Braun gave untruthful testimony in deposition and in answers to interrogatories, prejudicing the Estate. The Estate was entitled to impeach Dr. Braun with such direct evidence of his dishonesty.

In general, impeachment of a witness is broadly allowed in Washington: “The credibility of a witness may be attacked by any party, including the party calling the witness.” ER 607. The Estate was entitled to impeach Dr. Braun where his untruthful discovery responses were probative of his untruthfulness. ER 608(b) provides:

Specific instances of the conduct of a witness, for attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning his character for truthfulness or untruthfulness....

The question of impeachment of a witness for untruthful statements has arisen more often in Washington law in the criminal context, where sensitivity to the rights of the defendant is more often in the forefront. But ER 608(b) is not confined to criminal cases. Even in the civil context, courts allow impeachment of a witness for untruthfulness in specific instances. “In exercising its discretion [under ER 608(b)], the trial court may consider whether the instance of misconduct is relevant to the witness’s veracity on the stand and whether it is germane or relevant to the issues presented at trial.” *State v. O’Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005); *State v. Lile*, 188 Wn.2d 766, 783-84, 398 P.3d 1052 (2017). “Washington case law allows cross-examination under ER 608(b) to specific instances that are relevant to veracity.” *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991). Evidence of a witness’s prior false statement under oath is relevant to veracity, and admission of such statements under ER 608(b) is “well

within the trial court's discretion." *Id.*¹⁸ "Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue," *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). Put another way, perjury is *always* relevant where the credibility of the witness is at issue in the case.

In *Wilson*, a statutory rape prosecution, the defendant's wife (Ms. Billie Wilson) was properly impeached where "she had previously stated under oath, on DSHS financial assistance forms, that her husband was not a member of her household at the time in question." *Wilson*, 60 Wn. App. at 891. Although the defendant's residency was not at issue, this Court held that her prior false statement under oath was properly admitted for impeachment under ER 608(b) because "evidence of Mrs. Wilson's prior false statement under oath was relevant to veracity. It was also germane to the issue of sexual abuse because Billie Wilson testified that Wilson could not have committed sexual abuse. Further, her credibility was important because her testimony corroborated that of the defendant's." *Id.* at 893. The court rejected the argument that ER 403 barred the testimony finding the "probative value of these questions outweighs any cumulative or

¹⁸ In fact, under Washington's interpretation of ER 608, the false statement need be sworn to be admissible; under ER 608(b), a court has discretion to admit "specific instances of lying may be admitted whether sworn or unsworn." *State v. Kunze*, 97 Wn. App. 832, 859, 988 P.2d 977 (1999), *review denied*, 140 Wn.2d 1022 (2000).

prejudicial effect since they demonstrate the extent to which Billie Wilson could be untruthful.” *Id.* at 893-94.

In *York*, Division III held that it was reversible error to foreclose impeachment under ER 608(b) regarding the fact that the State’s primary witness (an undercover investigator) had been fired from his prior job with the sheriff’s department “because of irregularities in his paperwork procedures, and his general unsuitability for the job.” 28 Wn. App. at 36. Division III noted that the undercover investigator was the only witness to have allegedly seen the defendant engaged in criminal conduct, such that the importance of his testimony could not be overstated. *Id.* at 35.¹⁹ *See also, State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (1998) (this Court held that defendant’s deceptive conduct in using four aliases in the past was appropriately used for impeachment in case of assault and illegal possession of a weapon).

¹⁹ The *Griswold* case cited below by Braun, CP 761, is inapposite. Not only was it overruled by our Supreme Court in *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), it is inapplicable. *Griswold* was an appeal from a child molestation conviction in which the offender sought to cross-examine the victim and her mother about “why [the victim] was unable to continue helping on her friend’s paper route.” *State v. Griswold*, 98 Wn. App. 817, 822-23, 991 P.2d 657 (2000). The victim’s mother believed the child had quit her paper route because she feared the defendant, but the victim had previously stated she lost the job because she and her friend had not performed to expectations. *Id.* Thus, there was a question about whether the victim had possibly told a white lie to her mother to cover-up the reason for losing the job, versus whether the mother was operating on assumption. Because there was no clear actual falsehood, and because any alleged untruth had outside the context of the court proceedings (*i.e.* between the daughter and her mother), exploration of that topic would have required a “mini trial” as to “whether or not she got fired from a paper route.” *Id.* at 831. Unlike this case, *Griswold* did not involve patently false testimony delivered by a key witness in an attempt to fool the tribunal.

In this civil case, the trial court erred in foreclosing the Estate's use of Dr. Braun's sworn discovery responses to impeach his testimony at trial. While it is a matter of trial court discretion, the trial court's decision allowed Dr. Braun to get away with untruthful discovery responses and prejudiced the Estate's presentation of its case on his misdiagnosis of John Harbottle's condition in particular.

As noted *supra*, there is clear-cut Washington authority, predicated upon the Washington Constitution, that discovery is vital to civil cases and truthful responses to discovery requests are imperative in our civil justice system. The trial court was oblivious to this overachieving principle that should have guided its ER 608(b) decision in connection with Braun's motion to exclude.

Further, the Estate met the criteria of ER 608(b), as interpreted by our courts, for the admission of this key evidence for impeachment of Dr. Braun. Dr. Braun's truthfulness was germane to the issues on misdiagnosis and informed consent before the trial court.

Here, as in *Wilson* and *York*, Braun's credibility was a paramount consideration. There were only two people in the examination room while Braun was treating Harbottle. One of those people is now dead, giving Braun free reign to supplement the medical record with his self-serving testimony. Virtually all of the defense experts in this case relied on Dr.

Braun's testimony to support their opinion that his clinical decision was reasonable and his treatment choices met or did not meet the standard of care. This includes Dr. Braun's deposition testimony about his conversations with Harbottle, and the alleged "shared clinical decision making" in which he and Harbottle supposedly engaged. The jury was entitled to know that Braun's word could not be trusted.²⁰

Finally, it is worth noting that Dr. Braun claimed below to remember key conversations with Harbottle that occurred during clinical visits in 2012 and 2013, despite seeing upwards of thirty patients per day, five days per week, in fifteen-minute intervals. CP 826-27. In the same deposition, however, he claimed not to remember being the subject of multiple complaints of sexual misconduct, being summarily suspended from his prior employment with MultiCare, resigning in lieu of termination, and being investigated by DOH. Braun either suffered from

²⁰ One of the key issues below was why Dr. Braun failed to review Harbottle's chart, including his missing test results, during the three office visits prior to his death. Dr. Braun had an extremely busy schedule and had booked himself with somewhere between twenty-five (25) and thirty (30) patients per day, set in fifteen-minute increments, back-to-back-to-back. Time management was therefore critical to Dr. Braun's ability to provide adequate patient care, as any extra time spent with Patient A or Patient B would necessarily cut in to the fifteen minutes allocated to Patient C, Patient D, and so on. In the final case that resulted in Dr. Braun's termination, he is described as lingering in the female patient's room *after* the examination, touching her inappropriately and "rubbing concentric circles on the inside of her thigh" while discussing recommendations and offering her his business card. CP 826. His other misconduct also involved "inappropriate flirtatious behavior involving verbal advances and untoward touching of an unaccompanied female patient." *Id.* Given his tight schedule, every minute spent coming-on to a female patient was a minute he no longer had to spend working-up one of his male patients (or receiving their chart).

self-serving and highly selective memory loss, or he was not being truthful when he testified about the specific conversations he and Harbottle had five years ago. This, too, would be a fair subject of cross-examination for Braun, and for his many medical experts who claim to rely on his deposition testimony to support their opinions about his care.

In sum, Dr. Braun deliberately withheld the truth in responding to legitimate Estate discovery requests and later in deposition testimony. Such willful misconduct was appropriately the subject for impeachment of Dr. Braun at trial. The trial court erred in foreclosing the Estate from pursuing such questioning.

F. CONCLUSION

The trial court erred in depriving the Estate of presenting an informed consent claim to the jury. Moreover, although Dr. Braun was caught red-handed in failing to respond to appropriate discovery requests, rather than sanctioning him for his discovery misconduct, the trial court rewarded him by closing off from jury scrutiny evidence that clearly impeached his credibility. The Estate was prejudiced. The appropriate remedy is a new trial.

This Court should reverse the judgment on the jury's verdict and order a new trial on remand. Costs on appeal should be awarded to the Estate.

DATED this 16th day of April, 2018.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

John R. Connelly, Jr., WSBA #12183
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2301 North 30th Street
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Attorneys for Appellant
Harbottle

APPENDIX

Court's Instruction 6:

A health care professional owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.

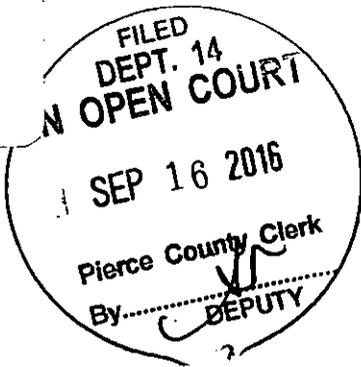
A family practice physician has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent family practice physician in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

CP 1350.



0304



Honorable Susan K. Serko
Hearing Date: September 16, 2016
Time: 9:00 a.m.

9/20/2016 13958

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

TERESA HARBOTTLE, individually and as
Personal Representative of the Estate of JOHN
F. HARBOTTLE III, deceased,

Plaintiff,

v.

KEVIN E. BRAUN, M.D. and JANE DOE
BRAUN, and their marital community,

Defendant.

NO. 15-2-05013-9

ORDER GRANTING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: INFORMED CONSENT

~~PROPOSED~~ [Signature]

THIS MATTER came before this Court on Defendant's Motion for Partial Summary
Judgment Re: Informed Consent. The Court is familiar with the records and files herein and
has considered the court file and specifically the following documents:

1. Motion for Partial Summary Judgment Re: Informed Consent;
2. Declaration of Elizabeth McAmis in Support of Defendant's Motion for Partial
Summary Judgment Re: Informed Consent;
3. Plaintiffs' Response in Opposition to Motion for Partial Summary Judgment Re:
Informed Consent;
4. Roberts Declaration in Opposition to Defendant Braun's Motion for Summary
Judgment;

ORDER GRANTING DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE: INFORMED
CONSENT - I

FAIN ANDERSON VANDERHOEF ROSENDAHL
O'HALLORAN SPILLANE, P.L.L.C.
1301 A Street, Suite 900
Tacoma, Washington 98402-4200
(253) 328-7800 Tacoma

9/20/2016 13958 0305

1 5. Defendant's Reply in Support of Motion for Partial Summary Judgment Re:
2 Informed Consent; and

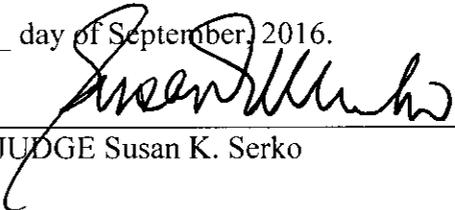
3 6. Declaration of McAmis in Support of Reply to Motion for Partial Summary
4 Judgment Re: Informed Consent.

5 The Court has reviewed these documents and heard the arguments of counsel. Based
6 on the evidence presented, the Court finds that there is no genuine issue of material fact on the
7 informed consent claims, and defendant is entitled to judgment as a matter of law on the
8 informed consent claim.

9 Therefore, it is hereby ORDERED:

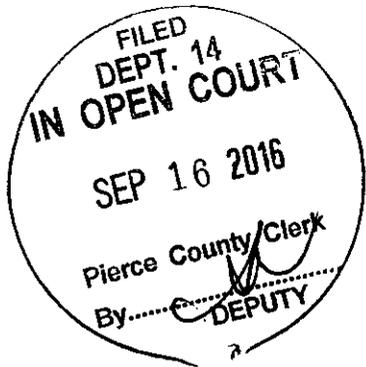
10 That Defendant's Motion for Partial Summary Judgment Re: Informed Consent is
11 GRANTED and all of plaintiff's informed consent claims against defendant are hereby
12 dismissed with prejudice.

13 DONE IN OPEN COURT this 16 day of September, 2016.

14 
15 _____
16 JUDGE Susan K. Serko

17 Presented by
18 FAIN ANDERSON VANDERHOEF
19 ROSENDAHL O'HALLORAN SPILLANE, PLLC

20 By: _____
21 Scott M. O'Halleran, WSBA #25236
22 Elizabeth Lee McAmis, WSBA #24224
23 Attorneys for Defendant



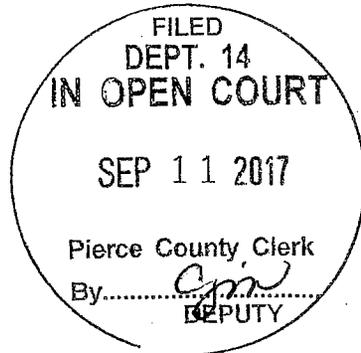
24 Approved as to form; notice of presentation waived:

25 CONNELLY LAW OFFICES
By: _____
Nathan P. Roberts, WSBA #40457
Attorneys for Plaintiffs

RECEIVED

SEP 13 2017

CONNELLY LAW OFFICES, PLLC



The Honorable Susan Serko

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TERESA HARBOTTLE, individually and as
Personal Representative of the Estate of JOHN
F. HARBOTTLE, III, deceased,

Plaintiffs,

v.

KEVIN E. BRAUN, M.D. and JANE DOE
BRAUN, and their marital community,

Defendants.

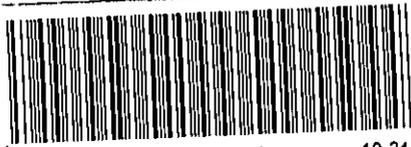
NO. 15-2-05013-9

[Signature] ORDER GRANTING
DEFENDANT'S MOTION TO EXCLUDE
EVIDENCE OF PAST GRIEVANCES
AGAINST DR. BRAUN

THIS MATTER came before this Court upon Defendant's Motion to Exclude Evidence of Past Grievances against Dr. Braun. This Court considered the following pleadings in this action:

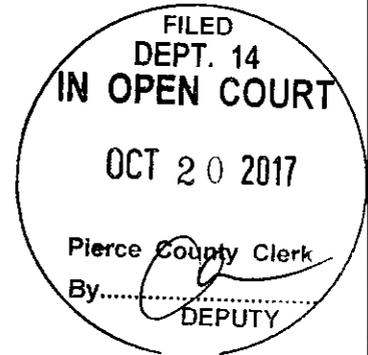
1. Defendant's Motion to Exclude All Evidence of Past Grievances against Dr. Braun;
2. Declaration of Barret J. Schulze in Support of Defendant's Motion to Exclude as well as its exhibits;
3. Plaintiffs' Response in Opposition to Defendant's Motion to Exclude;
4. Reply in Support of Defendant's Motion to Exclude;

PROPOSED ORDER GRANTING DEFENDANT'S
MOTION TO EXCLUDE EVIDENCE OF PAST
GRIEVANCES AGAINST DR. BRAUN - 1



15-2-05013-9 50150294 JDV 10-24-17

The Honorable Susan Serko
Special Set Hearing: October 20, 2017



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TERESA HARBOTTLE, individually and as
Personal Representative of the Estate of JOHN
F. HARBOTTLE, III, deceased,

Plaintiffs,

v.

KEVIN E. BRAUN, M.D. and JANE DOE
BRAUN, and their marital community,

Defendants.

NO. 15-2-05013-9

JUDGMENT ON THE VERDICT FOR
DEFENDANT

Clerk's Action Required

THIS MATTER came on regularly for trial before the undersigned Judge, sitting with a jury. Plaintiff Teresa Harbottle, Individually and as Personal Representative of the Estate of John F. Harbottle, III, was represented by John R. Connelly, Jr., and Nathan P. Roberts of Connelly Law Offices, PLLC; and, defendant Kevin E. Braun and Jane Doe Braun were represented by Scott M. O'Halloran and Michele C. Atkins of Fain Anderson VanDerhoef Rosendahl O'Halloran Spillane, PLLC. Trial commenced on September 25, 2017. The jury was impaneled and sworn, evidence was introduced, plaintiff and defendant rested, and the jury was instructed by the Court. The closing arguments were completed on October 11, 2017, and

JUDGMENT ON THE VERDICT FOR DEFENDANT - I

FAIN ANDERSON VANDERHOEF
ROSENDAHL O'HALLORAN SPILLANE, PLLC
1301 A Street, Suite 900, Tacoma, WA 98402
p. 253-328-7800 • f. 253-272-0386

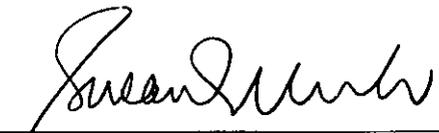
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1 the jury retired to deliberate on October 12, 2017. A special Verdict Form was submitted to
2 the jury and the jury found for the defendant.

3 Now, therefore, it is hereby

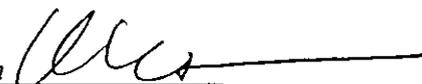
4 ORDERED, ADJUDGED AND DECREED that the plaintiff's claims in the above-
5 entitled action are hereby dismissed with prejudice. Defendant is entitled to recover their
6 taxable costs herein from plaintiff.

7
8 DATED this 20 day of October, 2017.

9
10 
11 _____
12 The Honorable Judge Susan Serko

13 Presented by:

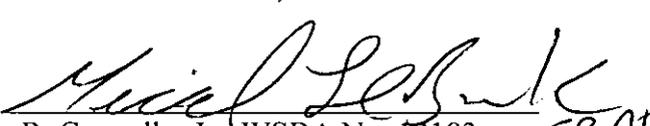
14 FAIN ANDERSON VANDERHOEF
15 ROSENDAHL O'HALLORAN SPILLANE, PLLC

16
17 By: /s/ Scott M. O'Halloran 
18 Scott M. O'Halloran, WSBA No. 25236
19 Michele C. Atkins, WSBA No. 32435
Attorneys for Defendant



20 Approved as to form; notice of presentation waived:

21 CONNELLY LAW OFFICES, PLLC

22
23 By: 
24 John R. Connelly, Jr., WSBA No. 12183 WSBA # 380117
25 Nathan P. Roberts, WSBA No. 40457
Attorneys for Plaintiff

JUDGMENT ON THE VERDICT FOR DEFENDANT - 2

FAIN ANDERSON VANDERHOEF
ROSENDAHL O'HALLORAN SPILLANE, PLLC
1301 A Street, Suite 900, Tacoma, WA 98402
p. 253-328-7800 • f. 253-272-0386

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellant* in Court of Appeals, Division II Cause No. 51427-3-II to the following parties:

John R. Connelly, Jr., WSBA #12183
Nathan P. Roberts, WSBA #40457
Connelly Law Offices, PLLC
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Tacoma, WA 98403

Scott M. O'Halloran, WSBA #25236
Barret J. Schulze, WSBA #45332
Fain Anderson VanDerhoof Rosendahl O'Halloran Spillane, PLLC
1301 A Street, Suite 900
Tacoma, WA 98402

Mary H. Spillane, WSBA #11981
Jennifer D. Koh, WSBA #25464
Fain Anderson VanDerhoof Rosendahl O'Halloran Spillane, PLLC
701 Fifth Avenue, Suite 4750
Seattle, WA 98104

Original E-filed with:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 10, 2018 at Seattle, Washington.



Brendon McCarroll, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

April 10, 2018 - 3:58 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51427-3
Appellate Court Case Title: In re the Estate of John F. Harbottle, III
Superior Court Case Number: 15-2-05013-9

The following documents have been uploaded:

- 514273_Briefs_20180410155342D2807793_8825.pdf
This File Contains:
Briefs - Appellants
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A copy of the uploaded files will be sent to:

- assistant@tal-fitzlaw.com
- barret@favros.com
- bmarvin@connelly-law.com
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- jconnelly@connelly-law.com
- jennifer@favros.com
- mary@favros.com
- nroberts@connelly-law.com
- scott@favros.com

Comments:

Sender Name: Brendon McCarroll - Email: assistant@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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