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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PHYLLIS COOLEN,

APPELLANT,

vs.

GROUP HEALTH COOPERATIVE,

RESPONDENT

RESPONDENT'S BRIEF

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I. INTRODUCTION

In this wrongful death action, Phyllis Coolen asserted a medical negligence claim against Group Health Cooperative, alleging that Patrick Coolen died from prostate cancer that Group Health failed to diagnose, having instead diagnosed benign prostatic hyperplasia (BPH). On the same facts, she tried to assert an informed consent claim, which the trial court precluded in a ruling on Group Health's motion in limine. After both parties rested and before the case went to the jury, the trial court decided not to instruct the jury on Mrs. Coolen's corporate negligence claim. The jury found Group Health not negligent for failing to diagnose Mr. Coolen's cancer.

On appeal, Mrs. Coolen challenges the trial court's rulings that kept the informed consent and corporate negligence claims from the jury. Because the trial court did not err, the judgment on the jury verdict should be affirmed.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly decide not to instruct the jury on Mrs. Coolen's corporate negligence claim with respect to adopting policies and procedures because: (a) an alleged failure to have a policy regarding prostate screening is not a cognizable corporate negligence duty;

and (b) Mrs. Coolen presented no evidence of breach, proximate cause, or damages?

2. Did the trial court properly decide not to instruct the jury on Mrs. Coolen's corporate negligence claim with respect to monitoring and reviewing the competency of its health care providers because Mrs. Coolen put on no evidence of breach, causation, or damages?

3. Did the trial court properly grant Group Health's motion in limine to prevent Mrs. Coolen from pursuing her informed consent claim because under Washington law, Group Health's failure to diagnose Mr. Coolen's cancer potentially gave rise only to a medical negligence claim, not an informed consent claim?

III. STATEMENT OF THE CASE

A. Factual Background

Patrick Coolen was a long-time patient of Group Health Cooperative. VRP 850-860; 970-990. His primary care provider was family practice physician, Jennifer Williams, M.D. VRP 851. Group Health's clinical recommendations for prostate cancer screening involved "shared decision making" about whether the patient, according to his preferences and values, wished to undergo prostate cancer screening after considering the risks, benefits and limitations. VRP 455-458. Shared decision making for prostate cancer screening was made in the context of

a Well Adult Visit. VRP 546-547; VRP 848-849. In the Group Health system, a Well Adult Visit is the opportunity for the primary care provider and the patient to review overall health issues, preventative care, immunization status, medication checks and cancer screening. *Id.* It is typically a longer visit than an “acute” visit which focuses upon a specific health issue. *Id.*; VRP 975-976.

Prostate cancer screening generally entails two potential components, a blood test to measure Prostate Specific Antigen (“PSA”) and a digital rectal examination (“DRE”). VRP 545-546.

1. Group Health provided Mr. Coolen with information regarding prostate cancer screening in 2003, 2006, and 2009.

On January 16, 2003, during a “Well Adult Visit,” Dr. Williams offered Mr. Coolen written information on prostate cancer screening. VRP 851-852. Mr. Coolen indicated “Yes” that he wanted information about prostate cancer screening. *Id.* Dr. Williams’ note states: “done.” *Id.*

On September 26, 2006, again in the context of a Well Adult Visit, Dr. Williams’ electronic record indicates she had the standard discussion of the risks, benefits and limitations of prostate cancer screening with PSA testing and a DRE and the controversy surrounding prostate cancer screening. VRP 854-855. Her notes states:

He indicates understanding of the limitations of this screening test and wishes not to proceed with prostate cancer screening. Digital Rectal Exam for Prostate Screening: deferred.

VRP 856-857.

On March 19, 2009, which was Mr. Coolen's next Well Adult Visit, Randy Weiler, PA-C conducted the examination. VRP 937. PA Weiler's note states:

The natural history of prostate cancer and ongoing controversy regarding screening and potential treatment outcomes of prostate cancer has been discussed with the patient. Digital Rectal Examination for Prostate Screening: Normal.

Id.; VRP 940.

This was Mr. Coolen's last scheduled Well Adult Visit at Group Health. VRP 859-880. He did not schedule a Well Adult Visit with Group Health after 2009. *Id.*

2. Group Health diagnosed Mr. Coolen with BPH in 2010.

On September 13, 2010, Mr. Coolen saw Laurie Rogers, PA-C, for an acute visit with specific urinary complaints of increased frequency/urge up to once per hour during the day and urethral irritation. VRP 973-975.

Ms. Rogers conducted a DRE which she reported as:

Rectal: prostate enlarged, symmetrical, smooth, elastic, non-tender."

Id.

These did not constitute “abnormal” findings according to Group Health Prostate Screening Guidelines. VRP 550-551. PA Rogers made a diagnosis of benign prostatic hypertrophy (“BPH”) without urinary obstruction or lower urinary tract symptoms. VRP 977. A urinalysis was clean. VRP 977-979. She ordered a blood test to rule out sexually transmitted disease. *Id.* This was negative. *Id.* She recommended reduction of caffeine and alcohol. *Id.* The discharge instructions explained the examination findings and indicated he should return for follow-up if there were continued problems or the symptoms worsened. *Id.*

3. Mr. Coolen did not complain of continued or worsening symptoms for over three years.

Ms. Rogers saw Mr. Coolen on January 12, 2011 and February 22, 2011, for knee and shoulder pain, respectively. VRP 980-983. Her notes do not reflect Mr. Coolen made any complaints of urinary symptoms. *Id.* Mr. Coolen was seen at Group Health on March 10, 2011, June 21, 2011, October 11, 2011, and April 4, 2012, for various complaints, none of which related to urinary symptoms or low back pain. VRP 980-983, 859-880. On May 16, 2012, Mr. Coolen had a colonoscopy. VRP 866-867. He checked “No” to having pain with urination, difficulty urinating, and blood in urine. *Id.*

Dr. Williams saw Mr. Coolen on April 8, 2013 for an acute visit. VRP 867-870. Mr. Coolen presented with testicular and scrotal pain. *Id.* The complaint was “mostly groin discomfort, both testicles are tender.” *Id.* He made no complaint of low back pain. *Id.* She made a diagnosis of epididymitis, which is inflammation of the coiled tubes at the back of the testicles. *Id.* Dr. Williams and Mr. Coolen corresponded by email multiple times after this visit regarding his symptoms and treatment plan. VRP 872-876. Mr. Coolen was offered a urology referral. VRP 876-877.

4. Mr. Coolen was diagnosed with prostate cancer in 2014 and passed away in 2016.

Mr. Coolen established primary care with Kaiser Permanente in Hawaii on May 7, 2014. VRP 787-789. After he reported low back pain, fever, and weight loss, the physician ordered a PSA test. VRP 1166. He then had a prostate biopsy, which showed high-grade, high volume malignancy. VRP 412-416.

Mr. Coolen returned to Washington State for treatment. Given the advanced nature of the widely-metastatic cancer, he underwent radical, experimental treatments (including chemotherapy) and enlisted in a number of experimental clinical trials through the Seattle Cancer Care Alliance/University of Washington. Unfortunately, Mr. Coolen passed away on June 13, 2016, at the age of 67. VRP 769.

B. Procedural History

Mrs. Coolen, individually and as personal representative of her husband's estate, sued Group Health, alleging medical negligence under RCW 7.70.040 and lack of informed consent under RCW 7.70.050. CP 5-15. She claimed Group health negligently failed to diagnose Mr. Coolen's cancer and failed to inform Mr. Coolen fully of all material facts relating to his diagnosis and treatment.

1. The trial court granted Group Health's motion in limine to exclude evidence of informed consent.

Group Health filed a motion in limine arguing that "[Mrs. Coolen]'s lack of informed consent claim is not cognizable in the setting of her allegations that Group Health failed to diagnose her decedent's prostate cancer. Such claims are mutually exclusive in Washington and [Mrs. Coolen] must not be permitted to introduce evidence, argument or submit jury instruction supporting a lack of informed consent claim." CP 969-971.

Coolen opposed the motion, but cited no authority in her briefing or oral argument. CP 1030-1031; VRP 54-60.

The following colloquy took place at the end of the hearing:

MR. SHELDON: Your Honor, I think it's really telling that in the reply to this, plaintiffs make no argument supported by any caselaw to challenge the *Backlund* and its progeny. You go through that response, and you won't find a case, because there isn't a case.

The essence, the gravamen of this particular complaint is, there was a failure to diagnose prostate cancer. They have experts that are going to say, in the face of a diagnosis of BPH, you should have done PSA test. That's what they can do. And that's negligence. But we don't interject informed consent on a failure to diagnose when you haven't made the diagnosis.

THE COURT: I agree.

MR. SHELDON: Thank you, Your Honor.

THE COURT: That's the state of the law. It's consistent with the complaint, and it's consistent with the position of the parties, and it's consistent with the framework of this case. VRP 59-60.

2. The trial court elected not to instruct the jury on corporate negligence.

At the close of Mrs. Coolen's case, Group Health moved for a directed verdict on the corporate negligence claim. CP 1949-1960. The trial court denied the motion because it believed there was sufficient evidence for the following issues to go to the jury: (1) whether Group Health was negligent in not adopting policies and procedures for treating patients diagnosed with BPH; and (2) whether Group Health was negligent in not periodically monitoring and reviewing the competency of its health care providers. VRP 833-834.

At the close of Group Health's case, the trial court revisited the issue. It determined the "policies and procedures" claim was not legally supported and the "monitoring and reviewing" claim was not factually

supported. VRP 1360-1368. As a result, the trial court elected not to instruct the jury on corporate negligence. *Id.*

3. The jury's verdict.

The jury returned a verdict answering "No" to the question: "Was Group Health negligent?" CP 2310-2311.

IV. ARGUMENT

A. The Trial Court's Decision Not to Instruct the Jury on Corporate Negligence Was Proper

1. The standard of review.

A trial court's decision to give or refuse to give a jury instruction is reviewed *de novo* if based upon a matter of law, or for abuse of discretion if based on a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

2. The trial court's decision not to instruct the jury on the corporate negligence claim related to "policies and procedures" was proper.

a. An alleged failure to have policy regarding prostate screening is not a cognizable corporate negligence duty.

Washington formally recognized the corporate negligence doctrine in *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984). The doctrine "is based on the proposition that a hospital owes an independent duty of care to its patients." *Douglas v. Freeman*, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991). To prevail on a claim for corporate negligence, plaintiffs

must establish the duty of care owed to the patient by the healthcare facility, breach of that duty, and proximate cause between the breach and the alleged injuries. *See Douglas*, 117 Wn.2d at 248.

The independent duties owed by a hospital to its patients were articulated by the Washington Supreme Court in *Douglas*. Referencing a secondary authority, the Court stated:

One commentary finds four such duties owed by a hospital under the doctrine of corporate negligence: (1) to use reasonable care in the maintenance of buildings and grounds for the protection of the hospital's invitees; (2) to furnish the patient supplies and equipment free of defects; (3) to select its employees with reasonable care; and (4) to supervise all persons who practice within its walls.

Any allegation that Group Health did not have a certain policy is not a recognized corporate duty for hospitals. "The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law." *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). Accordingly, if there is no duty as a matter of law, dismissal or judgment as a matter of law is appropriate. Indeed, "[w]hen no duty of care exists, a defendant cannot be subject to liability for negligent conduct." *Webstad v. Stortini*, 83 Wn. App. 857, 865, 924 P.2d 940 (1996).

The only basis for corporate negligence duty on a hospital to enact particular policies stems not from the Court's holding in *Douglas*, *supra*,

but on the pattern jury instruction for corporate negligence, WPI 105.02.02. The WPI comments state:

The fourth bracketed clause instructs the jury regarding the hospital's duty to exercise reasonable care to adopt policies and procedures. This duty is discussed in *Osborn v. Public Hospital Dist. I, Grant County*, 80 Wn.2d 201, 492 P.2d 1025 (1972), and is based on RCW 70.41.010 and WAC 246-318-190.

In *Osborn*, a fall-out-of-hospital-bed case from 1972, the Court reversed the trial court's dismissal of the negligence claim against the hospital. The Court concluded that the hospital's nurses could not avail themselves of the implied direction of the physician to allow the elderly patient bathroom privileges. 80 Wn.2d at 205-06. In reaching its decision, the *Osborn* court relied on the hospital licensing statute, RCW 70.41, and WAC 248-18-200(7), which imposed a fairly limited regulatory duty to establish "safety policies and procedures for the care of the patients who because of their age or condition are not responsible for their acts." 80 Wn.2d at 205.

There are multiple reasons this Court cannot extrapolate from the WPI and *Osborn* an existent legal duty on a hospital – as opposed to an administrative duty – to adopt policies and procedures directing a trained health care provider as to specific treatment of specific conditions. First, the WPI is not the law. The Pattern Jury Instruction Committee states the

same in its preface instruction found at WPI 0.10 (“The pattern instructions are not authoritative primary sources of the law; rather, they restate otherwise existing law for jurors”). In other words, if the WPI still cites or relies on superseded or otherwise inapplicable authority, but has not been updated yet by the Committee, reliance on the same is a legal nullity.

Second, *Osborn* was decided prior to the enactment of ch. 7.70 RCW, which governs all claims not based on intentional conduct arising out of the provision of healthcare. *See, e.g.*, RCW 7.70.010; *Branom v. State*, 94 Wn. App. 964, 968, 974 P.2d 335 (1999). At the time *Osborn* was decided, a hospital’s liability was wholly vicarious. Now the only three types of actions authorized by statute are limited to violations of the duties articulated at RCW 7.70.030(1)-(3). No other type of claim against a health care provider, short of a possibly an intentional tort, may be made as of 1976. *See Branom*, 94 Wn. App. at 969. The suggestion that liability could be based on RCW 70.41, a licensing statute, in light of the passage of RCW 7.70 is an argument without merit.

Third, *Osborn’s* holding has never been applied in Washington since the opinion was issued over 40 years ago. Indeed, no civil liability under RCW 7.70, whether in corporate negligence or otherwise, has ever been found under either of the administrative rules relied upon by the

Osborn court. Particularly in light of the subsequent passage of RCW 7.70, the opinion indeed stands as a legal and analytical oddity.

Fourth, *Osborn's* holding is inconsistent with the modern understanding of a hospital's potential liability. The nurses at issue in *Osborn* would be themselves liable for falling below the standard of care, rendering the hospital vicariously liable for their negligence as hospital employees. The modern corporate negligence doctrine differentiates from vicarious liability or *respondeat superior* principles, and our highest Court explicitly recognized this principle. See *Pedroza*, 101 Wn.2d at 229. Corporate negligence has nothing to do with the individual practitioner's standard of care or liability, as it concerns duties only owed directly by hospitals.

Fifth, the WAC cited by *Osborn* does not even exist anymore, and addressed only regulatory duties for a hospital's care of patients that could not care for themselves. Meaning, even if the WAC could be the basis of a civil lawsuit, it has no application here.

Sixth, the statute cited by *Osborn*, RCW 70.41, while still in existence, cannot be the basis of liability for a hospital in a civil action. Aside from the fact that to base a claim for civil personal injury damages for violating the hospital licensing statute would run afoul of RCW 7.70.010 and *Branom, supra*, sections of the statute unambiguously

indicate that no private right of action exists for a violation of the statute and that only the Department of Health has enforcement powers. *See, e.g.*, RCW 70.41.005, .040, .160.

The trial court properly concluded that RCW 70.41 and the related WAC provisions do not create a legal duty on hospitals – enforceable in civil litigation – to “establish policies and procedures with respect to a particular area of care, in this case, of course, prostate screening. . . . It has nothing to do whatsoever with establishment or the requirement of a hospital to adopt policies with respect to a particular methodology of providing healthcare.” VRP 1367-1368. The trial court properly decided not to instruct the jury on the corporate negligence claim based on “policies and procedures.”

b. Coolen presented no evidence of breach, proximate cause, or damages in connection with the “policies and procedures” claim.

The trial court’s decision not to give an instruction on the “policies and procedures” corporate negligence claim is also sustainable because Mrs. Coolen presented no evidence of breach, proximate cause, or damages.

A corporate negligence claim, like all negligence claims, requires a showing of breach and proximate causation linking the breach with the alleged harm. *See Pedroza*, 101 Wn.2d at 228. This link is the limitation

that courts have placed upon an actor's responsibility for the consequences of his or her conduct. W. Prosser, *LAW OF TORTS*, § 236, 4th ed. (1971). Medical expert testimony on causation is required, and it must be to a reasonable degree of certainty to be admissible. *See, e.g., Berger v. Sonneland*, 144 Wn.2d 91, 110-11, 26 P.3d 257 (2001); *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989); *O'Donoghue v. Riggs*, 75 Wn.2d 814, 824, 440 P.2d 823 (1968); *Rounds v. Nelicor Puritan Bennett, Inc.*, 147 Wn. App. 155, 163, 194 P.3d 274 (2008); *Conrad ex. rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 282, 78 P.3d 177 (2003) (citation omitted); *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. 326, 331, 966 P.3d 351 (1998) ("that the defendant's actions 'might have,' 'could have,' or 'possibly did' cause the subsequent condition is insufficient") (citation omitted).

If the testimony does not reach this threshold, it cannot be admitted because it would require the lay jury to speculate; a verdict cannot rest on speculation as to causation. *See, e.g., Sortland v. Sandwich*, 63 Wn.2d 207, 210-11, 386 P.2d 130 (1963); *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 148, 381 P.2d 605 (1963) (judgment for plaintiffs affirmed when evidence was enough to create jury question); *Nejin v. Seattle*, 40 Wn. App. 414, 420, 698 P.2d 615 (1985) ("Where causation is based on circumstantial evidence, the factual determination may not rest upon

conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred”); *Lamphicor v. Skagit Corp.*, 6 Wn. App. 350, 356, 493 P.2d 1018 (1972). This basic principle is applicable to a corporate negligence claim, and absent such testimony dismissal is required. *See Alexander v. Gonser*, 42 Wn. App. 234, 241, 711 P.2d 347 (1985) (dismissal affirmed when plaintiff had no expert to show proximate cause link between hospital negligence and damages); *Ripley v. Lanzer*, 152 Wn. App. 296, 324-25, 215 P.3d 1020 (2009) (corporate negligence claim properly dismissed when plaintiff had no expert).

Mrs. Coolen presented no evidence of breach. Even according to her key standard of care and causation expert, Dr. Bretan, Group Health had adequate policies and procedures. On direct exam, Dr. Bretan gave the following testimony:

Q. And is -- the Group Health policy that was well written, is that also compliant with the national standards that you're familiar with?

A. Yes, they are.

VRP 117.

Dr. Bretan went on to testify that the way the guidelines were developed was also appropriate:

- Q. And with respect to the Group Health policies, do you have a criticism of the way that Group Health executed on those policies that were written by a medical director, a urologist, a family medicine practitioner, a clinician, a clinical lab worker, and a health profiler? Are those the type of people that would be involved in making corporate decisions that would apply to family practitioners and to urologists and others in cancer screening?
- A. Yes. I think the writing of those guidelines with the incorporation of those members from diverse backgrounds that are employed in caring for prostate cancer patients or the potential for having prostate cancer was well thought out, and it is well vetted. And they – the Group Health outline and guidelines were updated on a regular basis, as well. It is well written, and it follows the national guidelines of the American Urological Association.

VRP 117.

Mrs. Coolen also failed to proffer the requisite expert testimony to establish, on a more likely than not basis and to a reasonable degree of medical certainty, that Group Health's guidelines proximately caused Mr. Coolen's death.

3. The trial court's decision not to instruct the jury on the corporate negligence claim related to "monitoring and reviewing competency of health care providers" was proper.

The trial court denied Group Health's motion for directed verdict on Coolen's corporate negligence claim based on the alleged failure of

Group Health to periodically monitor and review the competency of its health care providers. VRP 1361. At the time, the trial court believed the testimony of Dr. Handley, Group Health’s corporate representative, was sufficient to support the claim. However, after the trial court reviewed Dr. Handley’s testimony in its entirety, he concluded that it was insufficient to sustain the claim: “Dr. Handley’s testimony on that issue was limited to his testimony regarding, Group Health did not monitor its healthcare providers insofar as their PSA policies, in other words, how often and under what circumstance.” VRP 1362. The trial court properly determined there was no evidence – and Mrs. Coolen cites none in her appellate brief – that Group Health failed to periodically review the competency of its health care workers.

In addition, Mrs. Coolen presented no medical expert testimony – and she cites none in her appellate brief – that Group Health’s review of the competency of its health care workers fell below the standard of care and caused Mr. Coolen’s injuries. In the absence of such evidence, the trial court properly elected not to instruct the jury on corporate negligence.

B. The Trial Court Properly Granted Group Health’s Motion in Limine Precluding Mrs. Coolen’s Informed Consent Claim

1. The standard of review.

“The granting or denial of a pretrial motion to exclude evidence is within the trial court’s discretion.” *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991).

2. Mrs. Coolen failed to raise her appellate arguments at the trial court and should be precluded from raising them in this appeal.

Group Health filed a motion in limine arguing that “[Mrs. Coolen]’s lack of informed consent claim is not cognizable in the setting of her allegations that Group Health failed to diagnose her decedent’s prostate cancer. Such claims are mutually exclusive in Washington and [Mrs. Coolen] must not be permitted to introduce evidence, argument or submit jury instruction supporting a lack of informed consent claim.” CP 969-971. Mrs. Coolen opposed the motion, but cited no authority in her briefing or oral argument. CP 1030-1031; VRP 54-60.

Because she failed to raise her appellate arguments in the trial court, Mrs. Coolen should be precluded from raising them on appeal. “Failure of a party to raise an issue before the trial court generally precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). This rule affords the trial court an

opportunity to rule correctly upon a matter before it can be presented on appeal. *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 482, 256 P.2d 301 (1953).” *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

3. Washington courts have repeatedly held that failure to diagnose a condition is a matter of medical negligence, not informed consent.

Standard of care and informed consent claims are two distinct claims. Allegations supporting one normally will not support the other. *Gustav v. Seattle Urological Assocs.*, 90 Wn. App. 785, 789, 954 P.2d 319 (1998).

Under RCW 7.70.040, the elements of a medical negligence claim are:

- (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.

Under RCW 7.70.050(1), the necessary elements of proof of an informed consent claim – that injury resulted from the failure to secure the patient’s informed consent – are:

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

In *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 661, 975 P.2d 950

(1999), the Washington Supreme Court held:

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 (emphasis added).

The Washington Supreme Court recently reiterated these principles in *Anaya Gomez v. Sauerwein*, 180 Wn.2d 610, 613, 331 P.3d 19 (2014), where it affirmed the Division III decision upholding the dismissal of a lack of informed consent claim. After specifically noting that “[i]nformed consent and medical negligence are distinct claims that apply in different situations,” the court concluded that “[t]he doctrine of informed consent has been distinguished from malpractice as applying to fundamentally

different situations,” noting its previous *Backlund* ruling. *Id.* at 617-618. The physician determined the blood culture for yeast was a false positive based on the patient’s presentation and history, and there was “nothing further to diagnose” with the information available. *Id.* at 622. The court concluded: “[t]his is a misdiagnosis case. Accordingly the *Backlund* rule applies and the trial court properly dismissed the informed consent claim as a matter of law.” *Id.* at 623.

In *Anaya Gomez*, after learning that the patient who had initially presented complaining of a urinary tract infection was feeling better, the physician did not inform the patient, who had uncontrolled diabetes that made her susceptible to infections, of a concerning lab result he received suggesting a yeast infection of the blood because, given the improvement in her condition, he concluded that the lab result was most likely a false positive due to contamination rather than reliable evidence of a very dangerous infection. *Id.* at 613-14. The physician moved up the patient’s next appointment, but when the patient’s condition worsened, she returned to the hospital, where she was diagnosed with a rare yeast infection in the blood that caused fungal sepsis and death. *Id.* at 614-15.

The patient’s husband proceeded to trial against the physician on both medical negligence and failure to obtain informed consent claims, but at the close of the husband’s case the trial court, concluding that this was a

medical negligence failure to diagnose case and not an informed consent case, dismissed the informed consent claim. *Id.* at 614-15. The Supreme Court affirmed, agreeing that “[o]n one set of facts the two theories are mutually exclusive” – either the physician “knew” the patient had a yeast infection, “giving rise to the failure to inform claim,” or “he failed to know she had a yeast infection, giving rise to the negligence claim.” *Id.* at 619.

The Court rejected the husband’s claim that providers must inform patients “of all positive test results,” recognizing “the importance of taking the patient’s condition into account while making a diagnosis” and that lab tests are just “one tool among many that a health care provider uses to form a diagnosis.” *Id.* “[T]he duty to disclose does *not* arise ‘whenever [the provider] becomes aware of a bodily abnormality which may indicate risk or danger’ ... but rather turns on whether or not ‘the diagnosis has been completed.’” *Id.* at 620 n.4 (emphasis in original) (quoting five-justice concurrence/dissent in *Keogan v. Holy Family Hosp.*, 95 Wn.2d 306, 329, 622 P.2d 1246 (1980)). The *Anaya Gomez* court concluded as a matter of law that the husband could only state a cause of action for medical negligence based on the failure to diagnose. *Anaya Gomez*, 180 Wn.2d at 623.

Like the claims in *Anaya Gomez*, Mrs. Coolen’s claims in this case are mutually exclusive – either Group Health knew Mr. Coolen had cancer (giving rise to an informed consent claim), or it failed to diagnose the condition (giving rise to a medical negligence claim). The factual allegations here only support a medical negligence cause of action. This conclusion is supported primarily by *Backlund* and *Anaya Gomez*, but also by *Bays v. St. Luke’s Hosp.*, 63 Wn. App. 876, 883, 825 P.2d 319, *rev. denied*, 119 Wn.2d 1008 (1992) (“A failure to diagnose a condition is a matter of medical negligence. We decline to create a second or alternate cause of action on informed non-consent to a diagnostic procedure predicated on the same facts necessary to establish a claim of medical negligence”); and *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 261, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992) (“[f]ailure to diagnose a condition is a matter of medical negligence, not a violation of the duty to inform a patient”).

In relying on *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979), Mrs. Coolen ignores what the *Anaya Gomez* court had to say about it. While the court in *Anaya Gomez*, citing *Gates*, 92 Wn.2d at 250-51, recognized that “[i]n certain circumstances [it had] held that the right to informed consent can include the process of diagnosis,” it also recognized that *Gates* predated RCW 7.70.050’s codification of informed consent and

its clear use of the word “treatment.” *Anaya Gomez*, 180 Wn.2d at 617. Also, the *Anaya Gomez* court recognized that “[t]he *Gates* court allowed the informed consent claim based on a unique set of facts,” *id.* at 623, that “*Backlund* clarifies that *Gates* is the exception and not the rule with regard to the overlap between medical negligence and informed consent, and that “[g]iven the unique factual situation in *Gates*, it is unlikely we will ever see such a case again.” *Id.* at 626.

This case does not involve the unique factual situation presented in *Gates*. Here, Mr. Coolen had discussions regarding prostate screening procedures – and the controversy surrounding them – with his Group Health providers in 2003, 2006, and 2009. In 2010, PA Rogers from Group Health diagnosed Mr. Coolen with BPH, a condition shared by half of all men his age. VRP 167. PA Rogers ordered a urinalysis and blood test, recommended reduction of caffeine and indicated he should return for follow up if he had continuing or worsening symptoms. Over the next 18 months, Mr. Coolen visited Group Health six times, and never complained of continuing or worsening symptoms. Mrs. Coolen’s urology expert, Dr. Bretan, agreed with the following statement from the American Urological Association regarding treatment of patients with BPH: “[I]f the symptoms are not significantly bothersome or if the patient does not want treatment, no further evaluation is recommended. The patient should be reassured

and be seen again if necessary. This recommendation is based on the opinion that patients with non-bothersome lower urinary tract symptoms are unlikely to experience significant health problems in the future due to their condition.” VRP 176-177.

PA Rogers diagnosed Mr. Coolen with a common condition that the American Urological Association concluded was unlikely to cause significant health problems in the future. She properly advised him to follow up if the symptoms continued or worsened. To the extent Mrs. Coolen claimed Group Health’s providers failed to “follow up” regarding additional testing, the *Anaya Gomez* Court recognized that such a duty to “follow up” is only relevant to a medical negligence claim. In sum, *Gates* does not support an informed consent claim on the facts of this case.

Mrs. Coolen’s apparently separate argument that the trial court should have given an instruction on shared decision-making fails for the same reasons. Mrs. Coolen’s counsel acknowledge that “Shared decision-making” is just another word for informed consent....” VRP 58.

V. CONCLUSION

For the foregoing reasons, the trial court’s rulings that kept the informed consent and corporate negligence claims from the jury, and the entry of judgment on the jury’s verdict should be affirmed.

Respectfully submitted this 20th day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***RESPONDENT'S BRIEF*** on the following individuals in the manner indicated:

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SIGNED this 20th day of May, 2019, at Seattle, Washington.


Elizabeth S. Sado

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