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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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NO. 364208-III

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ALICE FRITZ,

Appellant,

vs.

CHRIST CLINIC and DANIELLE RIGGS,

Respondents.

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APPELLANT'S OPENING BRIEF

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**I. ASSIGNMENT OF ERROR AND ISSUES PRESENTED**

**ASSIGNMENT OF ERROR No. 1:** The trial court erred by granting Defendants' motion to dismiss her informed consent claim.

**ISSUE NO. 1:** Did Plaintiff present legally sufficient evidence regarding her informed consent claim to raise a material issue of fact regarding causation?

**ISSUE NO. 2:** The "Backlund Rule" applies to medical malpractice cases involving misdiagnosis. See *Gomez v. Sauerwein*, 180 Wn.2d 610, at 619, 331 P.3d 19 (2014). Did the trial court's reliance on the "Backlund Rule" as a basis of dismissal constitute reversible error, in that the Plaintiff's informed consent claim did not arise from misdiagnosis but, rather, from the failure to inform the Plaintiff of an abnormal thyroid condition that was disclosed in laboratory test results obtained by and in possession of the Defendant health care providers?

**II. STATEMENT OF THE CASE**

This is a medical malpractice action brought by Alice Fritz (Ms. Fritz) arising out of care and treatment provided by Danielle Riggs (Riggs) while employed as an advanced registered nurse practitioner (ARNP) by

Christ Clinic/Christ Church (Christ Clinic) in Spokane, Washington. CP 3.

Ms. Fritz was a patient at Christ Clinic in Spokane in 2007. On December 12, 2007, a blood draw was done on Ms. Fritz for laboratory tests to be done by Pathology Associates Medical Laboratories (PAML) to determine, among other things, the patient's thyroid function. Thyroid function is determined, in whole or in part, by measuring the thyroid stimulating hormone (TSH) level. CP 94. The order was electronically signed by Riggs. CP 155.

Testing results (five pages) were returned to the Clinic on December 17, 2007, and received by Riggs, as reflected by electronic signature. CP 200. The testing indicated an abnormal TSH level. CP 196; see also, CP 94, Declaration of ARNP Owen-Williams, ¶ 9.

There is no evidence in the record -- and before the trial court the Defendants did not contend -- that Ms. Fritz was informed of the abnormal TSH level.

Although the abnormal TSH level was received by the Clinic in 2007, no action was taken by the Clinic until October 11, 2011. The Clinic record for that visit indicates Ms. Fritz was experiencing, among other things, major depression and malaise. CP 62. Additionally, it was noted that "Upon review, I note that had an elevated TSH back In Dec.

2007, and it hasn't been repeated since then.” CP 64. Thus, the record reflects that Ms. Fritz was experiencing hypothyroidism, which went untreated for four years. CP 94.

In early 2014 Ms. Fritz was seen at the Clinic, at which time a mass was discovered on the right side of her neck. CP 44. The tumor was treated by radiation therapy and thereafter surgically removed. Subsequent laboratory tests revealed no remaining markers for thyroid cancer. CP 36.

On February 2, 2016, Ms. Fritz filed a complaint, naming as defendants Rockwood Clinic, P.S, Christ Clinic, and Riggs. CP 2. Rockwood Clinic, P.S. was voluntarily dismissed. CP 299.

Ms. Fritz alleged that Defendants were negligent in their care of her by failing to timely respond to and treat an abnormal thyroid condition (CP 4), and failing to secure her informed consent. E.g., CP 6, ¶¶ 3.23. and 3.24.

Ms. Fritz alleged that as a result of such negligence, a thyroid tumor was not timely diagnosed and treated and, additionally, the delayed discovery of hypothyroidism aggravated preexisting mental and emotional conditions. CP 5, ¶ 3.18. This appeal pertains to the latter claim.

Finally, Ms. Fritz alleged that Defendants “breached the fiduciary duty owed to Plaintiff Alice L. Ms. Fritz.” CP 8, ¶ 6.4.

The Defendants denied liability, causation and damages, CP 13, and on January 4, 2017, filed a motion for summary judgment, raising several arguments. CP 11.

First, they contended that Plaintiff's informed consent claim is not supported by Washington law, primarily citing *Backlund v. University of Washington*, 137 Wn.2d 651, 661, 975 P.2d 319, 322 (1999): (single set of facts cannot support both a negligence claim and an informed consent claim). CP 15.

Second, Defendants contended the breach of fiduciary duty must be dismissed, in that it does not come within any cause of action authorized by the legislature pursuant to RCW 7.70.010. CP 18.

Ms. Fritz voluntarily dismissed Rockwood Clinic. CP 299. Hereafter, references to "Defendants" include only Riggs and Christ Clinic.

Third, Defendants argued that Ms. Fritz lacked sufficient evidence to support her claims regarding the standard of care and causation, citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). CP 14; CP 20-21.

In response, Ms. Fritz filed the declaration of ARNP Eileen Owens-Williams, Ph.D. CP 91-96. Attached were ARNP standards

issued by the American Association of Nurse Practitioners. CP 103-105.

See also, Owens-Williams - curriculum vitae, CP 80-90.

Owens-Williams reviewed Ms. Fritz's medical records, including Christ Clinic records generated by Riggs and others, ultrasound imaging, the tumor removal surgical report and related pathology, and the deposition of Riggs. CP 92.

Owens-Williams determined that Riggs breached the applicable standard of care in failing to: (1) take a thorough patient history, which would have revealed classic symptoms of hypothyroidism, such as fatigue, palpitations, muscle ache, depression, and inability to concentrate; (2) recognize an abnormal TSH level in 2007; (3) order appropriate diagnostic testing regarding TSH levels, and (4) identify health and risk factors. Owens-Williams' ultimate determination was that as a result of these breaches of the standard of care, Ms. Fritz's hypothyroidism went untreated for four years. CP 94-95.

Ms. Fritz also filed the declaration of Brian R. Campbell, Ph.D. to establish that a four-year delay in treating hypothyroidism caused the aggravation of her pre-existing psychological conditions. CP 266-283.

Dr. Campbell's declaration reflects that he is a psychologist and neuropsychologist, licensed to practice in the state of Washington, that he had evaluated and was presently treating Ms. Ms. Fritz, and that he had

submitted a psychological assessment and report (Report) to Ms. Fritz's physician, Dr. Saima Ahmad, in November, 2015, approximately three months before the present lawsuit was filed. CP 269-283. The Report was referenced in and attached to Dr. Campbell's declaration. CP 266, ¶ 4.

The Report recited that he had received medical records from Providence Medical Group and related, among other things, a history of depression, insomnia, acquired hypothyroidism and thyroid cancer. CP 272. His recited history further noted a psychological evaluation by Dr. Toews in 2008 revealing major depression disorder (MDD), mild to moderate. CP 271.

Further, Dr. Campbell reviewed the declaration of ARNP Owens-Williams in which she opined that Riggs had violated the standard of care and Ms. Fritz's hypothyroidism had consequently gone untreated for four years, from 2007 to 2011.

Dr. Campbell stated that his opinion was offered "on a more probable than not basis." CP 266, ¶ 3. He stated that "I am assuming her [Owens-Williams] opinion as to the standard of care is true" and "Based on the foregoing assumption the following is my opinion." CP 267, ¶¶ 5-6.

Knowing from the Owens-Williams declaration that Ms. Fritz's hypothyroidism had gone untreated for four years, Dr. Campbell then referenced the psychological conditions Ms. Fritz had when she became a patient at Christ Clinic, including, among other things, dysthymia,<sup>1</sup> major depression, attention deficit, hypothyroidism, and PTSD. CP 267, ¶ 7.

From the foregoing facts, Dr. Campbell drew the following conclusion: "Alice Ms. Fritz has suffered an aggravation of her pre-existing psychological and neuropsychological conditions as a result of violations in the standard of care identified by Eileen Owens-Williams." CP 267, ¶ 8. Again, Owens-Williams' ultimate determination was that as a result of Defendants' breaches of the standard of care, Ms. Fritz's hypothyroidism went untreated for four years. CP 94-95.

On April 18, 2017, the trial court issued a letter opinion granting the Defendants' motion for summary judgment. The court explained that the declaration of Dr. Campbell was conclusory and unsupported by facts and, therefore, insufficient to establish a causal relationship between alleged conduct by Defendants (failure to treat thyroid condition for four years) and the aggravation of pre-existing psychological problems. CP 129-130.

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<sup>1</sup> Any condition caused by defective function of the thymus. 2. Any anomaly of intellect. 3. Mental depression. Taber's Cyclopedic Medical Dictionary 507 (15th ed. 1985).

The order granting summary judgment was entered May 18, 2017.

CP 121. Specifically, the court reasoned that:

5. Dr. Campbell's declaration failed to chronicle or specify what Christ Clinic records he had reviewed, what psychological diagnoses had been rendered previously, or how any pre-existing psychological conditions were aggravated by the delayed diagnosis to which Eileen Owen-Williams ARNP testified. Dr. Campbell's declaration contains conclusions without specific factual support and which are based on unstated assumptions.

CP 133. *See Hubbard v. Spokane County*, 146 Wn.2d 699, 706, n. 14, 50 P.3d 602 (2002): (trial court's findings and conclusions are superfluous, given de novo review).

Ms. Fritz filed a motion for reconsideration, based on CR 59(a)(1), (a)(3), (a)(4) and (a)(8). CP 225. In support of reconsideration, Ms. Fritz filed a supplemental declaration of Dr. Campbell. CP 242-246.

Reconsideration was denied, the court reasoning as follows:

The standard of review of a trial court decision on reconsideration is abuse of discretion. *Id* at 88. *Go2Net* provides five factors for admissibility of newly discovered evidence under CR 59(a)(3). *Id* at 88. Failure to prove any one factor is a ground for denial of reconsideration. *Id*. Two of the factors listed in *Go2Net* are dispositive of reconsideration, under CR 59(a)(3). First, the new evidence must have been discovered after the granting of summary judgment. *Id*. Second, the new evidence must not have been discoverable before the summary judgment hearing, in the exercise of due

diligence. *Id.* The record demonstrates that Dr. Campbell's revised declaration does not satisfy either of these two factors.

CP 297-298. See *Go2net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003).

Following the court's dismissal of Riggs and the Clinic, Rockwood Clinic was voluntarily dismissed on October 12, 2018. CP 299. Ms. Fritz timely filed her notice of appeal October 30, 2018. CP 301.

### **III. ARGUMENT**

#### **(1) Standard of Review**

The purpose of summary judgment is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), citing *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960).

Summary judgment should be granted only if the pleadings and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Meaney v. Dodd*, 111 Wn.2d 174, 177-78, 759 P.2d 455 (1988).

Any doubts as to the existence of a genuine issue of material fact are resolved against the moving party. Appellate courts must consider all

facts submitted and the *reasonable inferences* therefrom in the light most favorable to the nonmoving party. *Atherton Condominium Apartment-Owners Ass'n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). On appeal, the court engages in the same inquiry as the trial court. *Kennedy v. Sea-Land Serv., Inc.*, 62 Wn. App. 839, 855, 816 P.2d 75 (1991).

Appellate courts review de novo a trial court's dismissal of an action on legal grounds. *Brundridge v. Fluor Fed. Servs. Inc.*, 109 Wn. App. 347, 352, 35 P.3d 389 (2001).

Summary judgment in favor of the defendant in a medical negligence case is proper if the plaintiff fails to make a prima facie case concerning an essential element of his or her claim." *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). If the defendant meets the burden of showing no material facts remain and the plaintiff lacks sufficient evidence to support an essential element in the case, "the burden shifts to the plaintiff to produce evidence sufficient to support a reasonable inference that the defendant was negligent." *Id.*

**(2) Informed Consent: Elements**

Under Washington law, a patient claiming failure to secure informed consent must establish evidentiary prongs:

- (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). A material fact is one to which "a reasonably prudent person in the position of the patient or his or her representative would attach significance." RCW 7.70.050(2).

Proximate cause is a necessary element of an informed consent claim. RCW 7.70.050(1)(d). "Proximate cause" means" (1) the cause produced the injury in a direct sequence, and (2) the injury would not have happened in the absence of the cause." *Gomez v. Sauerwein*, 180 Wn.2d 610, 624, 331 P.3d 19 (2014).

Expert testimony is required to prove causation. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)). The plaintiff must produce competent expert testimony establishing that the injury was proximately caused by a failure to comply with the applicable standard of care." *Seybold*, 105 Wn. App. at 676, 19 P.3d 1068; RCW 7.70.040.

Expert testimony must be based on facts in the case, not speculation or conjecture." *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990)). The testimony must establish that the injury-producing situation "probably" or "more likely than not" caused the subsequent condition. *Merriman v. Toothaker*, 9 Wn. App. 810, 814, 515 P.2d 509 (1973). Expert testimony must be based on a reasonable degree of medical certainty. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989).

An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989). The question is, therefore, would Dr. Campbell's testimony sustain a jury verdict on the element of causation.

**(3) Standard of Care**

It has not been disputed that Dr. Owen-Williams' declaration raised a material issue of fact regarding breach of the standard of care by the Defendants. In that regard, the sole ground upon which Plaintiff's negligence claim was dismissed was insufficient evidence to raise a material issue of fact regarding causation. CP 129-130.

(4) **Dr. Campbell's Causation Opinion**  
**Not Conclusory**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence and determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. ER 702.

The facts or data upon which an expert bases an opinion *or inference* may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied on by experts in the particular field in forming opinions *or inferences* upon the subject, the facts or data need not be admissible in evidence. ER 703.

A "fact" is an event, an occurrence, or some thing that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition. *Grimwood v. Univ. Puget Sound*, 110 Wn.2d 355, 358, 753 P.2d 517 (1988).

An inference is "a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986).

Dr. Campbell's conclusion was that the Defendant's negligence caused an aggravation of Ms. Fritz's pre-existing psychological conditions. Applying the foregoing principles to Dr. Campbell's declaration, it will be seen that his conclusion was based on facts "perceived by or made known" to him -- from which he drew reasonable inferences regarding causation.

First, the declaration of Owens-Williams informed him of the following facts: (1) Ms. Fritz experienced hypothyroidism as early as 2007 (CP 94); (2) her hypothyroidism went untreated for four years (CP 94); between 2007 and 2011 Ms. Fritz experienced depression and decreased ability to concentrate, which are "classic symptoms" of hypothyroidism (CP 93); (4) the Defendants' breached the applicable standard of care when they failed to treat hypothyroidism disclosed to Riggs in the lab report of December 12, 2007 (CP 94).

Second, Dr. Campbell himself treated Ms. Fritz, and reviewed records provided by Providence Medical Group, and was thereby informed that Ms. Fritz was diagnosed in 2008 by Jay Toews, Ed.D. with major depressive disorder (MDD). CP 274.

The foregoing facts are facts Dr. Campbell either knew based on his own evaluation and treatment of Ms. Fritz, or facts made known to him by reviewing medical records and/or the sworn statement of Owens-

Williams. These are facts that formed a proper foundation for a hypothetical question put to an expert such as Dr. Campbell.

For example: “Doctor, I want you to assume the following facts: (1) between 2007 and 2011, Ms. Fritz experienced major a depressive disorder; (2) a lab report received and reviewed by her health care provider in late 2007 reflected hypothyroidism; (3) Ms. Fritz’s health care provider allowed the hypothyroidism to go untreated for four years; (4) depression is a classic symptom known by health care professionals to be associated with hypothyroidism. Based on those assumed facts, do you have a professional opinion as a licensed psychologist as to whether her pre-existing depression would be aggravated by a failure to treat the hypothyroidism for four years and, if so, what is that opinion?”

The four elements of the foregoing hypothetical are not derived through speculation and conjecture. Rather, they are facts derived from medical records and the sworn declaration of Owens-Williams. Based on those facts, as well as his experience and education, and consequent licensure as a psychologist, his opinion was that the failure to treat her hypothyroidism for four years caused the aggravation of Ms. Fritz’s pre-existing psychological condition.

As a licensed psychologist, Dr. Campbell could reasonably infer from the foregoing facts that pre-existing depression was, more probably

than not, aggravated by ongoing and untreated hypothyroidism. His conclusion was based on inferences drawn from facts. Thus, he was not speculating that: (1) Ms. Fritz reported depression between 2007 and 2008; (2) Dr. Toews found major depressive disorder in 2008; (3) hypothyroidism is associated with depression; (4) the hypothyroidism went untreated for four years.

**(5) Informed Consent Action Improperly Dismissed: This Is Not A Misdiagnosis Case**

The Defendants argued, and the trial court ruled, that in a medical malpractice case, one set of facts can never support both a negligence claim and an informed consent claim: In short, the Defendants contended that under one set of facts, the two causes of action are mutually exclusive. CP 15-17. In support of the foregoing proposition, the Defendants relied primarily on two cases: *Backlund v. Univ. of Washington*, 137 Wn.2d 651, 661, 975 P.2d 50, 956 (1999) and *Gomez v. Sauerwein*, 180 Wn.2d 610, 331 P.3d 19 (2014).<sup>2</sup>

Careful analyses of these two cases reflects that, under the facts in the present case, neither case supports the proposition that under one set of facts in a medical malpractice action, negligence and informed consent

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<sup>2</sup> In *Gomez*, the Court noted that “The proposition that a provider cannot be liable for failure to inform in a misdiagnosis case has been referred to as “the *Backlund* rule.” *Id.*, at 618.

actions are mutually exclusive. In fact, each case illustrates precisely why the trial court erred in dismissing Ms. Fritz's informed consent action.

Ms. Fritz presented evidence supporting each of the four prongs set forth in RCW 7.70.050(1).

First, thyroid function tests were ordered for diagnostic purposes on December 12, 2007. CP 155. The results were returned to Christ Clinic on December 17, reflecting an abnormal TSH level. CP 200; Declaration of Owens-Williams, CP 94, ¶ 9. Common sense tells us that the status of one's thyroid function is a material fact. Before the trial court, the Defendants did not contend Ms. Fritz was informed of the abnormal thyroid condition reflected in the diagnostic

Second, from 2007 to 2011, Ms. Fritz continued with treatment at Christ Clinic. CP 43 (CP 64, office visit October 18, 2011, noting elevated TSH level in 2007). It was not until 2011 Ms. Fritz was informed of the abnormal TSH condition.

Third, applying an objective standard, a reasonable person would want to know of an abnormal thyroid condition.

Fourth, as discussed above, Dr. Campbell stated that the ongoing and untreated hypothyroidism more likely than not aggravated Ms. Fritz's pre-existing psychological conditions.

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The main thrust of the Defendants' argument is reflected in the following quotation from *Backlund v. Univ. of Washington*, 137 Wn.2d 651, 661, 975 P.2d 50, 956 (1999): "A physician who misdiagnoses the patient's condition, and is therefore unaware of an appropriate category of 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." *Id.*, at 661. The foregoing statement from *Backlund* is inapplicable to Ms. Fritz's case.

First, there was no misdiagnosis of Ms. Fritz's condition. This is not a misdiagnosis case. Dr. Cox obviously suspected a thyroid abnormality, and otherwise would have no reason to have ordered testing for TSH level. That is, potential thyroid abnormality was part of Dr. Cox's differential diagnosis.<sup>3</sup>

Second, unlike circumstances involving a misdiagnosis, where the health care provider is unaware of a condition and therefore cannot consider and share with the patient applicable treatment alternatives, Christ Clinic was apprised of Ms. Fritz's hypothyroid condition: They simply failed to inform her of the condition, and therefore failed to offer

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<sup>3</sup> Differential diagnosis: Diagnosis based on comparison of symptoms of two or more similar diseases to determine which the patient is suffering from. Taber's Cyclopedic Medical Dictionary 463 (15th ed. 1985).

thyroid medication, such as levothyroxine, which she was subsequently prescribed and used, both before and after she was diagnosed with thyroid cancer. CP 34.

Third, as noted in *Backlund*, at 659: “Negligence and informed consent are alternative methods of imposing liability on a health care practitioner. Informed consent allows a patient to recover damages from a physician even though the medical diagnosis or treatment was not negligent.” *See also, Holt v. Nelson*, 11 Wn. App. 230, 237, 523 P.2d 211 (1974).

The Defendants also mistakenly relied on *Gomez v. Sauerwein* in support of their motion to dismiss the informed consent action. CP 16-17. In *Gomez*, the Court unequivocally clarified that the “Backlund Rule” is to be applied where, unlike the present case, a diagnosis has been “ruled out” by the health care provider:

We hold 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. To hold otherwise would require health care providers and patients to spend hours going through useless information that will not assist in treating the patient. [Citations omitted]. The provider may be liable for negligence in failing to diagnose the condition if the

mistaken diagnosis otherwise meets the elements of a medical malpractice claim.

Accordingly, the *Backlund* rule applies and the trial court properly dismissed the informed consent claim as a matter of law. Therefore, we affirm the Court of Appeals but point out that *Gates* has not been overruled. [Citations omitted]. *Backlund* and *Keogan* state the general rule of when a plaintiff can make an informed consent claim. The *Gates* court allowed the informed consent claim based on a unique set of facts that are distinguishable from this case. Under *Gates*, there may be instances where the duty to inform arises *during the diagnostic process*, but this case does not present such facts. *The determining factor is whether the process of diagnosis presents an informed decision for the patient to make about his or her care.*

*Gomez v. Sauerwein*, 180 Wn.2d, at 623 (emphasis added).

The blood draw ordered by Dr. Cox was part of a diagnostic process. The TSH test results received by Christ Clinic a few days later, presented Christ Clinic with the duty to inform and discuss with Ms. Fritz the presence of an abnormal thyroid condition. *See Miller v. Kennedy*, 11 Wn.App. 272, 282, 522 P.2d 852 (1974): (The duty of the doctor to inform the patient is a fiduciary duty); *Gates v. Jensen*, 92 Wn.2d 246, 250, 595 P.2d 919 (1979): (physician has a fiduciary duty to inform a patient of abnormalities); (“The facts which must be disclosed are all those facts the physician knows *or should know* which the patient needs in order to make the decision. To require less would be to deprive the patient of the

capacity to choose the course his or her life will take.” *Id.*, at 251 (emphasis added).

The record reflects, however, that Christ Clinic did not inform Ms. Fritz of the diagnostic results it had received reflecting her hypothyroid condition until 2011. In the absence of knowing of the hypothyroid condition, she consented to ongoing treatment.

The facts in *Gomez* are clearly distinguishable from those in the present case. In *Gomez*, Dr. Sauerwein ordered a lab test to culture for bladder infection. By the time the culture had grown out and the results came back to Dr. Sauerwein, Ms. Gomez’s infection had progressed too far to be arrested, and she succumbed to the illness. The *Gomez* Court reasoned that because Ms. Gomez passed away before Dr. Sauerwein received the test results, there was no timely treatment choice available to discuss with Ms. Gomez.:

The allegedly tortious cause in this case is Dr. Sauerwein's failure to inform Mrs. Anaya about a positive test result for yeast in her blood. Taking all facts in a light most favorable to Mr. Anaya, it is unclear what Mrs. Anaya could have done with the knowledge of the test result because there was nothing for Dr. Sauerwein to put before her in the form of an informed choice.

*Gomez v. Sauerwein*, 180 Wn.2d, at 625.

In the present case, however, Dr. Cox did in fact suspect an abnormal thyroid function and, accordingly, on December 12, 2007, she ordered a blood draw to measure Ms. Fritz's TSH level. CP 142.

Unlike Dr. Sauerwein's predicament in *Gomez*, i.e., not receiving the culture report in time to discuss it with Ms. Gomez, Christ Clinic *did* receive the TSH test results promptly, that is, on December 17, 2007. CP 196-200. Clearly, licensed health care providers at Christ Clinic could have informed Ms. Fritz of the test results and could have discussed with her the option of either taking or rejecting thyroid medication. But, for whatever reason, Ms. Fritz was not informed of the test results and, therefore, she was not able to exercise her right of informed consent.

Clarification of the "Backlund Rule" is enhanced by the concurring opinion of Justice Gonzales in *Gomez*, which was endorsed by Justices Fairhurst, Stephens, and Wiggins.

Referring to *Backlund*, Justice Gonzales noted his concern with that case as: "I write separately to stress 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 v. Sauerwein*, 180 Wn.2d, at 627, and "...I take this occasion to reject a distortion of the '*Backlund* rule' -- that a plaintiff cannot bring both an informed consent and a negligence claim." *Id.*, at 631.

In summary, Justice Gonzales endorsed application of the “Backlund Rule” in *Gomez* because it involved a true case of misdiagnosis: “*Backlund* sets out a set of facts that would not support both a negligence claim and an informed consent claim: a health care provider misdiagnoses a headache as a transitory problem, resulting in a failure to detect a brain tumor.”

Regarding Ms. Fritz, however, Christ Clinic (Dr. Cox) ordered diagnostic testing to investigate thyroid function, obtained test results promptly, and simply failed to inform Ms. Fritz of the result.

Again, licensed health care providers at Christ Clinic could have informed Ms. Fritz of the diagnostic test results and could have discussed with her the option of either taking or rejecting thyroid medication. But for the failure of Christ Clinic to inform Ms. Fritz of her abnormal thyroid condition, she would have had information upon which she herself could decide whether to obtain thyroid treatment four years earlier.

#### **IV. CONCLUSION**

The *Backlund Rule* does not preclude both a negligence claim and an informed consent claim where, as here, diagnostic information in the hands of the health care provider, material to the patient’s informed

decision regarding treatment, was not provided to the patient. This is not a misdiagnosis case.

ARNP Owens-Williams provided expert opinion demonstrating that diagnostic testing in 2007 revealed Ms. Fritz to be experiencing an abnormal thyroid function. That abnormal thyroid function was not revealed to Ms. Fritz, nor treated, until 2011.

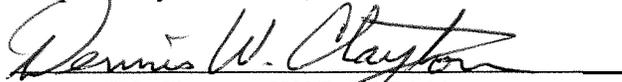
Dr. Campbell provided expert testimony stating that, more probably than not, the failure to treat Ms. Fritz's hypothyroidism resulted in the aggravation of her pre-existing psychological conditions.

Because Ms. Fritz presented medical expert testimony that hypothyroidism went untreated for at least four years, and because she presented expert testimony of a psychological expert that nontreatment of hypothyroidism more probably than not aggravated pre-existing psychological conditions, the informed consent action should not have been dismissed.

Ms. Fritz respectfully requests that the trial court's dismissal of her informed consent claim be reversed, and the case be remanded trial.

DATED this 3<sup>rd</sup> day of June, 2019.

Respectfully submitted,

  
Dennis W. Clayton, WSBA #7464  
Attorney for Appellant Alice Fritz

**DECLARATION OF SERVICE**

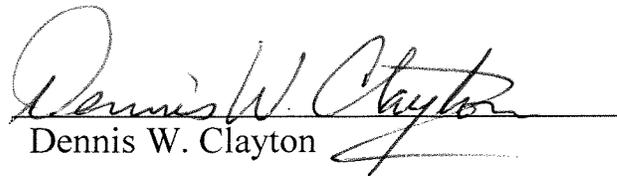
Dennis W. Clayton declares as follows, under penalty of perjury of the State of Washington:

1. I am over the age of 18 years, competent to testify herein, and do so based upon personal knowledge of the matters stated.

2. On June 4, 2019, I personally served a copy of Appellant's Opening Brief upon Robert Sestero at the following address:

Robert Sestero  
Evans, Craven & Lackie  
818 West Riverside Avenue  
Suite 250  
Spokane, WA 99201

DATED this 4<sup>th</sup> day of June, 2019.

  
Dennis W. Clayton