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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 30098-6-III

RODOLFO ANAYA-GOMEZ,
as personal representative of the estate of Christina Palma-Anaya,
deceased,

Petitioner,

v.

MARK F. SAUERWEIN, M.D. and THE YAKIMA VALLEY FARM
WORKERS CLINIC, a Washington corporation,

Respondents.

**PETITIONER'S BRIEF IN ANSWER TO BRIEF OF AMICUS
CURIAE WASHINGTON STATE ASSOCIATION FOR
JUSTICE FOUNDATION**

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INTRODUCTION AND SUMMARY

The brief filed by the Washington State Association for Justice Foundation (“WSAJF”) provides a persuasive analysis of both this case and the law of informed consent. That analysis complements what has already been presented by Petitioner Rodolfo Anaya.

What Mr. Anaya finds particularly helpful in the WS AJF’s analysis is its emphasis on the specific provisions of the informed-consent statute, RCW 7.70.050. (*See, e.g.*, Br. of Amicus Curiae Wash. State Ass’n for Justice Found. (“WSAJF Br.”) at 7–12.) While Mr. Anaya has already shown why that statute requires that the Court of Appeals be reversed (*see* Pet. for Review at 12–14; Supplemental Br. of Pet’r at 19–20), greater emphasis on the statutory text is appropriate.

What follows, therefore, is a return to the statutory text. In keeping with the WS AJF’s focus on four statutory elements of an informed-consent claim, Mr. Anaya will show why substantial evidence supports all of those elements. This intensively factual discussion will flesh out and respond to what the WS AJF has already said about those elements.

LEGAL STANDARD

Because this is an appeal from a CR 50 judgment entered for Defendants, this Court views the record in the light most favorable to Mr. Anaya. *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d

126 (2003). This Court then reviews the record under the “substantial evidence” standard. That means the trial court’s judgment must be reversed, and the informed-consent claim sent to a jury, if a “rational, unbiased person” could return a verdict in Mr. Anaya’s favor on the informed-consent claim. *Id.*; *see also Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) (“The standard on a motion for judgment as a matter of law mirrors that of summary judgment.”).

ARGUMENT

Washington’s informed-consent law is codified at RCW 7.70.050, which sets out the four elements that a plaintiff must prove to recover on 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)(a)–(d). Mr. Anaya adduced substantial evidence on all four elements.

I. Dr. Sauerwein failed to inform Ms. Anaya of a material fact relating to the treatment.

A. “Failed to inform”

Defendants do not dispute that Dr. Sauerwein failed to tell Ms. Anaya about the positive blood test. Nor could they. Dr. Sauerwein admitted he never told Ms. Anaya—or directed any clinic employee to tell Ms. Anaya—about her blood test. (6/7/11 RP 67:1333–70:1386.)

B. “Material fact”

Under the informed-consent statute, a fact is material “if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it [in] deciding whether or not to submit to the proposed treatment.” RCW 7.70.050(2). Determining whether a fact is material involves two steps. The first is to determine the objective, “scientific nature of the risk” posed by the allegedly material fact—“i.e., the nature of the harm which may result and the probability of its occurrence.” *Smith v. Shannon*, 100 Wn.2d 26, 33, 666 P.2d 351 (1983). This first step requires expert testimony. *Id.* at 33–34. The second step is then to determine whether the risk is one that “a reasonable patient would consider in deciding on treatment.” *Id.* at 33. Because this second step requires the jurors to “place themselves in the position of a patient” and “determine whether a reasonable patient would consider a given risk

material,” the second step does not require expert testimony. *Id.* at 32–33 (citation omitted).

To satisfy the first step in the materiality inquiry, and prove the “scientific nature of the risk” posed by the positive blood test, *id.* at 33, Mr. Anaya presented three expert witnesses: Dr. Howard Miller, M.D., an expert in family practice; Dr. Ken Coleman, M.D., an expert in family practice and emergency medicine; and Dr. Jerrold Dreyer, M.D., an expert in infectious diseases and emergency medicine. (6/7/11 RP 77:1524–83:1638; 6/8/11 RP 19:362–26:503; 6/9/11 RP 5:83–8:149.)

All three experts testified that the blood test was material.

“[F]ungus in the blood gone untreated has a high mortality rate in the area of 30 or 40%,” testified Dr. Coleman. (6/8/11 RP 30:573–74.) “So it’s very material . . . that[] that information be conveyed to the patient” (*Id.* at 30:574–75.) Dr. Dreyer, noting that “blood should be sterile,” said that “[i]f you have something growing in your blood that’s a life threatening situation. That’s how people die when they become septic.” (6/9/11 RP 21:400–01.) Dr. Miller pointed out that the already serious blood test was made even more serious by Ms. Anaya’s condition: “[T]his was a young lady who has poorly controlled diabetes who is prone to infections, . . . who then in fact had a positive culture for a fungus

infection, which in a diabetic is a very serious potential fatal occurrence.”¹
(6/7/11 RP 85:1673–76.) So the experts agreed that the positive blood test
for yeast posed a grave threat to Ms. Anaya’s very life.

When a blood test comes back positive for yeast, moreover, it is
almost certainly correct. On this point the experts were unequivocal:

“[U]nfortunately,” said Dr. Coleman,

I think that . . . there was an assumption made that this was
what was called a contaminant in the blood And when
you look at the literature, that almost never occurs. Yeast is
not typically a contaminant. . . . [U]nfortunately the
literature is quite clear that . . . it’s very rare for a fungus to
grow in the blood. Fungus does often times grow from
other cultured areas But when it is cultured from
what’s called a sterile site like the blood, then . . . you have
to assume that it is a true infection.

(6/8/11 RP 29:552–59.) Dr. Dreyer, if anything, was even more emphatic.

A false positive just “doesn’t happen,” he testified. (6/9/11 RP 21:397.)

“[I] mean you, you can never say never but I can say almost never.”

(*Id.* at 21:397–98.)

In sum, there was substantial expert evidence that (1) a yeast
infection in the blood is immediately life-threatening, especially in a
diabetic such as Ms. Anaya; and (2) a positive blood test for yeast is
almost never a false positive. Given this testimony, it is difficult to see

¹ Dr. Sauerwein knew that Ms. Anaya was diabetic. (See 6/7/11 RP 65:1298–301
(testimony that, on the same day he learned of the blood test result, Dr. Sauerwein
was informed that Ms. Anaya was diabetic).)

how a rational finder of fact could find *against* Mr. Anaya on this issue. A rational jury could easily conclude that the blood test was a material fact—that a reasonably prudent patient in Ms. Anaya’s position would “attach significance to,” and indeed be alarmed by, a test that indicates the presence of life-threatening disease and that is almost certainly correct. RCW 7.70.050(2).

C. “Relating to the treatment”

For three reasons, the blood test was a material fact “relating to the treatment.” RCW 7.70.050(1)(a).

First, the blood test was related to diagnosing Ms. Anaya’s condition. Diagnosis is part and parcel of “treatment,” as Mr. Anaya explains in his answer to the amicus brief of the Washington State Medical Association and the Washington State Hospital Association. In short, because the blood test was related to diagnosis, it was related to treatment.

Second, even if diagnosis is not *itself* treatment, diagnosis is *related to* treatment. Without diagnosis, the health provider cannot know which medical procedures must be performed. Thus, a diagnostic test, like the blood test here, is a material fact “relating to” the rest of treatment, because without the blood test, the rest of treatment would be impossible.

Third, the blood test is a material fact “relating to the treatment” for the simple reason that it was related to what Dr. Sauerwein actually

decided to do here. The blood test led him to consult with a colleague, to direct a nurse to ask how Ms. Anaya was currently feeling, and to move up her appointment. The blood test was therefore “relat[ed] to” the treatment decision that Dr. Sauerwein made. RCW 7.70.050(1)(a).

II. Ms. Anaya consented to the treatment without being aware of the material fact.

Given that Dr. Sauerwein never told Ms. Anaya about the blood test, a jury could rationally conclude that Ms. Anaya was not aware of the test. (Indeed, any other conclusion would likely *not* be rational.)

Moreover, Ms. Anaya consented to Dr. Sauerwein’s treatment. Consistent with Dr. Sauerwein’s recommendation, she consented to a rescheduled appointment one week out rather than two weeks out. (*See* 6/7/11 RP 66:1314–16 (noting that the appointment was successfully rescheduled to a new date after the nurse spoke with Ms. Anaya).)

III. A reasonably prudent patient under circumstances similar to Ms. Anaya’s would not have consented to the treatment if informed of the material fact.

In asking whether a reasonably prudent patient in Ms. Anaya’s circumstances would have consented to the treatment if informed of the blood test, the Court engages in an objective inquiry. In this inquiry, “the question becomes whether or not a reasonably prudent patient, fully advised of the material known risks, would have consented to the suggested treatment.” *Backlund v. Univ. of Wash.*, 137 Wn.2d 651,

665 n.4, 975 P.2d 950 (1999) (quoting *Reikes v. Martin*, 471 So. 2d 385, 392–93 (Miss. 1985)).

Thus, this Court must assume that the reasonably prudent patient is “fully advised of the material known risks”—i.e., she knows that a fungal infection in the blood has a frighteningly high chance of killing her, and that the positive blood test is almost certainly correct. *See supra* pp. ~~xx~~ ~~xx~~. A jury could find that in those circumstances a reasonably prudent patient would not have consented to Dr. Sauerwein’s assumption that the blood test was a false positive, and would have asked for an alternative treatment that operated under the assumption that the blood test was correct. This alternative treatment is discussed in more detail below.

IV. The treatment proximately caused Ms. Anaya’s death.

A rational, unbiased jury could conclude that Ms. Anaya’s death was proximately caused by Dr. Sauerwein’s decision to assume the blood test was a false positive and simply to schedule a follow-up appointment.² This becomes clear when one examines the experts’ testimony on the superior alternative treatment. Under that alternative treatment, Ms. Anaya

² Mr. Anaya addresses the proximate-cause element in case this Court should hold that Defendants have not waived it. Defendants have cited *Blaney v. International Ass’n of Machinists & Aerospace Workers, District No. 160*, 151 Wn.2d 203, 210 n.3, 213, 87 P.3d 757 (2004), to support their view that the proximate-cause issue is properly before this Court, but *Blaney* is not on point. Unlike in *Blaney*, Defendants never raised the proximate-cause issue before the trial court (*see* 6/9/11 RP 66–69), and did not raise it in anything other than a conclusory fashion before the Court of Appeals (*see* Br. of Resp’ts at 33).

would very likely have survived—meaning that Dr. Sauerwein’s treatment proximately caused her death.

The superior alternative treatment, according to Mr. Anaya’s experts, would have been to start Ms. Anaya on antifungal drugs immediately. Thus Dr. Coleman testified that

on the 24th immediately as I said, [Ms. Anaya] should have been called in, she should have been re-cultured, she should have been started on the broad spectrum, IV Antifungal agents and it should have been, she had something serious until it’s proved out with the cultures [on] the next day or two or three.

(6/8/11 RP 39:742–45.) Both Dr. Miller and Dr. Dreyer concurred, testifying that Ms. Anaya should have been contacted, recultured, and most importantly, started on antifungal therapy immediately. (6/7/11 RP 86:1703–10; 6/9/11 RP 26:495–501.)

More specifically, the experts agreed that Ms. Anaya should have been treated with the broadest-spectrum antifungal drug available. As Dr. Coleman, who opined that Ms. Anaya should have been treated with intravenous antifungal agents, testified, “[Y]ou start with a broad spectrum. . . . It’s like you use a shot gun at first to make sure you’re getting all of them that could be there and then you back off and use the rifle.” (6/8/11 RP 39:743–44, 39:756, 39:758–60.) Dr. Dreyer agreed, testifying that:

[W]e always try to treat more broadly so that we don't miss anything and then we tailor our therapy subsequently when we know what we're dealing with. So here you have a broad spectrum It could be *Candida tropicalis*, *krusei*, *glabrata*, these are different species of *Candida* and so you may wanna treat more broadly and use something that will cover that So I would, I would have started the patient on a more broad spectrum antifungal and waited to get the speciation [i.e., the species identification].³

(6/9/11 RP 27:519–27.)

Dr. Dreyer identified the broad-spectrum antifungal medicines that could have been used. “[T]he gold standard” for such an antifungal, he said, was Amphotericin B. (*Id.* at 27:526, 29:560.) But other broad-spectrum antifungals could have been used as well, including Voriconazole and Caspofungin. (*Id.* at 29:559–66.) These broad-spectrum medicines, said Dr. Dreyer, would have been effective against *Candida glabrata*, the precise species of yeast that was infecting Ms. Anaya. (*See id.* at 27:530–31 (noting that “the broader approach” he recommended would have been vindicated once *glabrata* was identified); *id.* at 29:560–66 (identifying several medicines that would have been effective against *glabrata*).)⁴

³ The transcript's misspellings of species and drug names have been corrected throughout this brief.

⁴ Dr. Dreyer did not testify that a family practice physician should have administered Fluconazole, an agent that is not effective against *Candida glabrata*. (*Cf.* Supplemental Br. of Resp'ts at 8.) Rather, Dr. Dreyer testified that a family practice physician should have referred Ms. Anaya to an emergency room physician (6/9/11 RP 25:477–80), and

If this broad-spectrum approach had been followed, said Dr. Dreyer, then “to grant a degree of medical probability greater than 50% *and in my opinion much higher*, she would have been treated adequately *and would have survived*. She would not have needed the hospitalization on the 29th or 30th of August.” (*Id.* at 29:555–57 (emphasis added).) Similarly, Dr. Coleman testified that “on a more probable than not basis,” if Ms. Anaya had been “treated on the 24th, like she should have been,” she “would have survived.” (6/8/11 RP 40:781–82.)

There was not merely testimony that Ms. Anaya would have lived had alternative treatment been instituted. There was also testimony that the false culprit to which Defendants have pointed—Ms. Anaya’s diabetes—did *not* kill her. When counsel asked Dr. Dreyer if Ms. Anaya “pass[ed] away because she had diabetes,” Dr. Dreyer offered an unequivocal response: “No. She passed away because she had *Candida glabrata* fungemia. Certainly . . . the diabetes was a comorbid factor in the sense that she had it, but she died because of the fungal infection.” (6/9/11 RP 35:679–83.)

If the jury accepted this evidence—and in this posture we must assume that it would have, *see, e.g., Douglas v. Freeman*, 117 Wn.2d 242,

that an emergency room physician would have administered a broad-spectrum antifungal medicine that *would* have been effective against *glabrata* (*see id.* at 27:517–27 (testifying that “even an emergency room physician” should have administered a broad-spectrum antifungal like Amphotericin B)).

247, 814 P.2d 1160 (1991)—then it would have found that Mr. Anaya had proven proximate cause. Defendants' experts submitted contrary testimony, of course, but that merely means that proximate cause is a question for the jury. Mr. Anaya has adduced substantial evidence to support a finding of proximate cause.

CONCLUSION

Substantial evidence supports all four of the statutory elements of an informed-consent claim. For that reason, as well as the others that Mr. Anaya has given in his other submissions to this Court, the Court of Appeals should be reversed.

Respectfully submitted this October 17, 2013.

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I certify under penalty of perjury of the laws of the State of Washington that on October 17, 2013, I caused a true and correct copy of the foregoing PETITIONER'S BRIEF IN ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION to be delivered via email and U.S. Mail postage prepaid.

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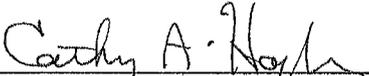
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Attached for filing is Petitioner's Brief in Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation.

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