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No. 51427-3-II

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,

Petitioner,

v.

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

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Teresa Harbottle, the personal representative of the Estate of John F. Harbottle III, asks the Court to review the published Division I decision terminating review identified in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its published opinion on August 28, 2019. A copy of that opinion is in the appendix at pages A-1 through A-23.

C. ISSUES PRESENTED FOR REVIEW

1. Where a treating physician was aware of a patient's possible deadly coronary disease and had not ruled it out as an explanation for his symptoms, did Division II err in upholding the dismissal of the patient's RCW 7.70.050 informed consent claim merely because the patient also pleaded a theory of medical negligence for misdiagnosis under RCW 7.70.040 against that physician?

2. Where the physician defendant lied under oath in interrogatory answers and in his deposition, did Division II err in upholding the trial court's refusal to allow impeachment of that physician under ER 608, particularly where the physician's credibility was central to the case as the physician was the only living witness to his interactions with the decedent?

D. STATEMENT OF THE CASE

Division II's recitation of the facts is largely correct, but internally inconsistent as to Dr. Kevin Braun's treatment of John Harbottle's

coronary disease.[1] Several points bear emphasis.

John Harbottle III saw Dr. Kevin Braun, his primary care physician, on June 28, 2011 after experiencing two months of chest pains and shortness of breath. CP 59, 784. Dr. Braun knew that John was over 50 year old, male, and had a history of elevated lipids in his blood, all risk factors for heart disease. CP 291, 320. Braun performed an EKG which showed a "partial or complete right bundle branch block and possibly some right heart, right ventricular hypertrophy," results that were not normal. CP 323. He determined that John should have a stress test on a treadmill to further investigate his heart condition; he also referred him to a cardiologist to rule out cardiac problems. CP 264. When John did not complete the stress test, Dr. Braun never discussed the importance of getting that test, even when John continued to complain of shortness of breath upon exertion nine months later, or the risks associated with foregoing the test. CP 266-70, 74. An autopsy would later show that he suffered from "severe atherosclerotic occlusion (blockage) of three major coronary arteries." CP 397. One of the Estate's experts testified that these conditions occur over time and were almost certainly present when Dr.

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[1] Under CR 56(e), in reviewing the order on summary judgment *de novo,* Division II 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. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). It did not do so.

Braun first treated John for chest pains and other symptoms of heart disease 11 months before his death. CP 334.[2]

Braun subsequently treated John's problem as heartburn, gastroesophageal reflux disorder ("GERD"), and never followed up on the stress test he had scheduled with a cardiologist. CP 266-67. John consented to the course of treatment being recommended by Dr. Braun, which focused exclusively on heartburn, because he was not advised of the serious risk in failing to pursue other treatment options. Consequently, he relied on Braun and stopped exercising, made some changes to his diet, and accepted a prescription for Prilosec to treat the GERD. CP 191.

John saw Braun four more times, including a visit on March 14, 2012, just two months before his death, 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 John's original symptoms of chest pain during any one of these four visits, including contacts with the cardiologist to whom he referred John. CP 270, 274. He never counseled John about the risk of treating his symptoms solely as GERD, while ignoring and failing to test for a potential cardiac cause. CP 191.

[2] The Estate's experts also testified that Braun's failure to secure John's informed consent proximately caused his death. Dr. Howard Miller testified that more likely than not, the stress test would have come back positive, due to the autopsy which revealed *severe* coronary occlusions, as well as Harbottle's reported symptoms. CP 334. Dr. Jerrold Glassman also testified that the stress test would have come back positive and would have led to medical or surgical intervention. CP 307.

Harbottle died on May 24, 2012 from his untreated coronary artery disease. CP 71, 402-03.

Division II's opinion glosses over critical factual points, in effect, adopting Braun's version of the events over Harbottle's version. Op. at 2-3, 14-15.

First, this was not a case where the physician was unaware of the patient's significantly risky condition. Dr. Braun was fully aware of the existence of John's possible coronary disease. John complained of chest pains and shortness of breath; he had elevated lipids in his blood; his EKG showed some abnormalities; he continued to complain of shortness of breath upon exertion well after Dr. Braun treated him for chest pains with heartburn medication. A jury could have reasonably inferred Braun's awareness of John's heart condition based on the fact that he ordered a stress test and referred John to a cardiologist in the first place.

Second, a high risk condition was present, making this condition a material matter for John's informed decision about treatment. Heart disease is obviously serious. Dr. Jerrold Glassman, a cardiologist, testified that Braun should have treated John's heart disease and secured the performance of a stress test by a cardiologist. CP 291, 306-07. Similarly, Dr. Howard 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 stress test to be cancelled, and that he should have followed-up with John in the subsequent months regarding the need for the test (and the obvious fact that it had not yet been completed). CP 329-31. Dr. Miller testified that John's March 14, 2012 symptoms were additional, significant signs of possible heart disease. CP 331.

Third, there was a simple, inexpensive alternative diagnostic procedure to conclusively determine the presence or absence of heart disease – the stress test.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

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

Division II's opinion is contrary to this Court's precedent on informed consent and misdiagnosis,[3] as well as its own. Review is merited. RAP 13.4(b)(1-2).

RCW 7.70.040 governs medical negligence claims. *See* Appendix. It applies to misdiagnosis claims specifically.[4]

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[3] The jury was instructed on a medical negligence failure to diagnose claim in Instruction 6. CP 1350. *See* Appendix.

[4] *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

Additionally, under principles of "patient sovereignty," a physician has a separate fiduciary duty to inform a patient of abnormalities in the patient's body. RCW 7.70.050. *See* Appendix.[5] In particular, the statute requires the physician to advise the patient of "material risks." Under that statute, 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).[6] Unfortunately, Division II's opinion seems to step back from this broad duty to disclose material facts, suggesting that a physician only needs to advise a patient of "serious" risks. Op. at 8. That is not the correct standard for informed consent. The patient is entitled to information material to her/his health care decision making.

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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] *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. This Court deems *Miller* to be "[t]he seminal case on informed consent in this state." *Smith v. Shannon*, 100 Wn.2d 26, 30, 666 P.2d 351 (1983) (citing *Miller,* 11 Wn. App. 272). The Legislature's codification of informed consent claims in RCW 7.70.050 was "intended to adopt the elements as they appeared in *Miller.*" *Anaya Gomez v. Sauerwein,* 180 Wn.2d 610, 617, 331 P.3d 19, 22 (2014) (citation omitted).

[6] *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.

In a series of decisions, beginning with *Gates v. Jensen,* 92 Wn.2d 246, 250, 595 P.2d 919 (1979), this Court has addressed the pleading of informed consent and misdiagnosis theories in the same case. The *Gates* court held that informed consent and misdiagnosis claims could be present in the same case and determined that the duty to inform a patient arises *throughout* the physician's treatment and is not confined to the post-diagnosis period.

In *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 975 P.2d 950 (1999), this Court reaffirmed *Gates,* but held that in a band of misdiagnosis cases, a claim for lack of informed consent was unavailable:

> 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. But, the Court explained that this policy extends only to situations where the misdiagnosed condition is "unknown to the physician." *Id.* at 661 n.2.

In *Anaya Gomez*, the Court held 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.[7]

Division II in *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 333 P.3d 566 (2014) recognized that a physician's duty to obtain a patient's informed consent to treatment may arise during a diagnostic phase of treatment. Division II reaffirmed that 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. Thus, Division II 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.

The *Flyte* court was correct in stating that 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." *Flyte,* 183 Wn. App. at 574. Under patient sovereignty, the physician must disclose

[7] *See also, Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 772 P.2d 1027, *review denied*, 113 Wn.2d 1005 (1989); *Bays v. St. Luke's Hospital*, 63 Wn. App. 876, 825 P.2d 319, *review denied*, 119 Wn.2d 1008 (1992); *Vinick v. State*, 183 Wn. App. 1042, 2014 WL 4987975 (2014); *Estate of Eikum v. Joseph*, 196 Wn. App. 1005, 2016 WL 5342411 (2016), *review denied*, 187 Wn.2d 1024 (2017); *Estate of Hensley v. Community Health Ass'n*, 198 Wn. App. 1036, 2017 WL 1334433, *review denied*, 189 Wn.2d 1017 (2017).

material risks of treatment alternatives, including no treatment, to enable the patient to exercise self-determination with regard to medical decisions. Where the physician knows of a possible diagnosis from the patient's symptoms, but misapprehends its significance for the patient, concluding that the symptoms are explained by another diagnosis, the physician must still advise the patient of the material risks known to him or her and inform the patient of the alternate diagnoses so that the patient can make an informed decision about a course of treatment; that is consistent with principles of patient self-determination that lie at the core of informed consent. An informed consent action ensures that patients like John (even those who may seem healthy on paper) can "make an informed decision on the course of which future medical care to take." *Gates*, 92 Wn.2d at 251.

Ultimately, Division II's published opinion simply cannot be reconciled with *Gates/Backlund/Anaya Gomez/Flyte.* Its opinion treated the facts in a light most favorable to Dr. Braun in concluding that he ruled out John's coronary condition, when that simply was *not true*. For example, despite the court's own recitation of the facts and the record here, the opinion asserts that "Braun's assessment of Harbottle's condition over time made him believe more firmly that he suffered from GERD and not coronary disease." (op. at 16) and "The record does not reflect that

Braun ever knew of Harbottle's condition." (*id.).* Those statements are obviously *wrong*, particularly if the court viewed the facts in a light most favorable to the Estate, as it should have.[8] And the court's further assertion that "The record in this case reflects that Braun did not know of Harbottle's coronary condition when he scheduled the stress test." (op. at 17) frankly makes no sense. Obviously, Braun was aware that John had a possible coronary condition or *he would not have ordered the stress test or directed him to a cardiologist.*[9]

Having not ruled our coronary disease, Braun was obligated under RCW 7.70.050 to advise John of its obvious significance to his course of

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[8] Nothing in Dr. Braun's own records supports Division II's statements. *See, e.g.*, CP 784 (describing his impressions as "likely GERD"). Rather, Braun performed an EKG, chest x-ray, and determined that John still needed to meet with a cardiologist and perform a stress test. Thus, unlike *Anaya Gomez*, Dr. Braun recognized that John needed more tests in order to rule out heart disease. This diagnosis process, which lasted less than a year before John's untimely death, was incomplete, could have included further tests, and never definitively ruled out heart disease as a cause of John's symptoms. Whether a physician has ruled out a particular disease is, in any event, a *question of fact. Flyte*, 183 Wn. App. at 579-80.

[9] Division II emphasized the fact that John decided to cancel the stress test. Op. at 3, 14-15. But Division II's blame-shifting underscored its misapplication of the law of informed consent. The legal question was not whether John made the decision to cancel the test. Rather, it was whether a jury could find that his decision was *informed*. Did Dr. Braun disclose the material facts—the information that "a reasonably prudent person in the position of the patient or his or her representative would attach significance." *Flyte*, 183 Wn. App. at 573 (quoting RCW 7.70.050(2)). Specifically in the diagnostic phase of treatment, this Court explained, "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 which future medical care will take." *Gates,* 92 Wn.2d at 250-51. By failing to inquire whether a jury could find John made an *informed* decision when he chose to cancel the stress test and pursue the treatment for GERD, Division II's opinion conflicted with the materiality test set out in RCW 7.70.050, *Gates,* and *Flyte*.

care. A jury could have found that a reasonable patient in John's position would have wanted such material information in order to make an informed health care decision. That is precisely what patient sovereignty means. Division II got it wrong, departing from this Court's pertinent precedents and its own recent decision in *Flyte.*

Division II accepted Dr. Braun's argument that it was not "his role as a doctor" to "'rule out' a cardiovascular cause of [his patient's] chest pain." Op. at 16. Division II also heavily weighed Dr. Braun's claim that he believed coronary disease was "very unlikely." Op. at 17. Accordingly, the court believed that Dr. Braun's duty of disclosure did not require him to "obtain informed consent *not* to treat any condition that is not definitively 'ruled out.'" Op. at 17. Never before have Washington courts held that physicians do not have a duty to disclose material information about a potentially fatal disease which the physician has definitively not ruled out as an explanation for a patient's symptoms.

Dr. Braun's duty of disclosure required him to discuss the risk of coronary disease with John so that he could make informed decisions about his own life. Division II had the applicable principle backward. The issue was not Dr. Braun's "role as a doctor," op. at 16, the issue was John's rights as a patient.

Dr. Braun did not dispute that he knew that John had a risk of

coronary disease and that the disease could be fatal if not treated. Yet Division II held John had no right to know about that risk, as a matter of law, because the risk was "highly unlikely," according to Dr. Braun. Op. at 17. But the remoteness of a risk is not dispositive by itself in determining whether a jury question is presented. Indeed, Division II pointed to nothing in RCW 7.70.050 or this Court's precedents holding that materiality is based solely on the numerical probability of a risk. Division II seemed to believe that anything below 50% need not be discussed with the patient.

Under the statute, "materiality" focuses on what a reasonable patient would want to know, and it incorporates concepts both of a risk's numerical probability and its magnitude. Here, even if the possibility of fatal coronary heart disease were only 1%, a jury should have been allowed to conclude that a reasonable patient would have wanted to know about that possibility, to know about the available diagnostic procedures to definitively rule out that possibility, and to know about the risks of forgoing further testing. It is undisputed that Dr. Braun never disclosed *any* such material information to John, and thus a reasonable jury could find that John did not make an informed decision when he canceled the stress test.

That the issue of informed consent and misdiagnosis recurs in

cases is a testimonial to the fact that review by this Court is necessary in order to establish a definitive rule. This Court should grant review to reaffirm the principles set forth in *Gates/Backlund/Anaya Gomez/Flyte.* RAP 13.4(b)(1-2).

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

In a case where the only other witness to the events is dead, Dr. Braun's credibility was a vital question for the jury both as to misdiagnosis and informed consent,[10] Division II condoned depriving the Estate of its right to impeach Braun's testimony for his blatant lies under oath in discovery. That decision is contrary to precedent and constitutes unsound public policy. Review is merited. RAP 13.4(b)(2, 4).

Seeking 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 under oath in interrogatory answers and in deposition that he left MultiCare voluntarily to allow him to manage his own medical practice. Both assertions were *untrue*. Braun had been

[10] Dr. Braun's defense relied entirely on the credibility and reasonableness of his self-generated medical records and recollection of interactions with a deceased patient. Braun does not dispute this or the fact that his expert witnesses relied on them in making their conclusions. Braun br. at 41.

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.[11]

Discovery in Washington is not only essential to civil litigation, but discovery has a constitutional dimension. *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.[12]

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[11] 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.

[12] *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 353-54, 858 P.2d 1054 (1993) (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 failure to disclose prior claims involving alleged back seat failure in car); *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

Simply put, Dr. Braun lied under oath in his discovery responses, CP 275-76, 716, 718, a fact that did not sway the trial court because that court was seemingly more concerned about the impact of the underlying sexual misconduct allegations against Dr. Braun. RP (9/8/17):26.[13]

The trial court misapplied the rules on impeachment of a witness. 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.[14] 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

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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).

[13] 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 were conspicuously absent from the discussion of his reasons for leaving MultiCare.

[14] Pursuant to CR 32, "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness." Likewise, "Interrogatories may relate to any matters which can be inquired into under rule26(b), and the answers may be used [at trial] to the extent permitted by the Rules of Evidence." CR 33.

> inquired into on cross examination of the witness (1) concerning his character for truthfulness or untruthfulness....

Under the sparse case law on this subject, courts allow impeachment of a witness for untruthfulness in specific instances.[15] "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).[16] "Any

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[15] In fact, under Washington's interpretation of ER 608, the false statement need not 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). Here, of course, Dr. Braun's lies were under oath.

[16] In *Wilson,* a statutory rape prosecution, the defendant's wife 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 prejudicial effect since they demonstrate the extent to which Billie Wilson could be untruthful." *Id.* at 893-94.

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).[17]

Notwithstanding this clear-cut Washington authority and cases that root discovery in the Washington Constitution, Division II's published opinion severely restricts the scope of impeachment of lying witnesses. That court's opinion restricts such impeachment to lies *specific* to the particular case. Op. at 22. In a footnote, Division II's incorrect focus is clear: "The Estate has not explained how the underlying sexual misconduct would have been relevant at trial for any reason since it has nothing to do with Braun's veracity." Op. at 18 n.5. That decision is contrary to the authorities set forth above, and constitutes bad public policy. Division II missed the point about Dr. Braun's lies under oath. The Estate was not concerned with Braun's obvious sexual improprieties that are little tolerated in this "#MeToo" movement era. Rather, it is the fact that *he lied about them under oath.* The jury was entitled to know that

[17] 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. *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).

the doctor was willing to lie about his professional history. If that was so, it certainly suggested his willingness to lie about his interactions with John.

And, Dr. Braun's truthfulness *was* germane to the issues on misdiagnosis and informed consent before the trial court. 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 John, and the alleged "shared clinical decision making" in which he and John supposedly engaged. The jury was entitled to know that Braun's word could not be trusted.

Indeed, this Court has held, "the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Dr. Braun is *the* essential living witness in this case, and his

credibility is essential for the jury to consider. To hold otherwise would frustrate the purpose behind jury trials. *Stiley v. Block*, 130 Wn.2d 486, 502, 925 P.2d 194 (1996) ("[I]t is the function and province of the jury to weigh the evidence and *determine the credibility of the witnesses* and decide disputed questions of fact.") (emphasis added) (quotation omitted). Dr. Braun's credibility was a central issue and should have been explored before the jury.

Finally, it is worth noting that Dr. Braun claimed below to remember key conversations with John 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 self-serving and highly selective memory loss, or he was not being truthful when he testified about the specific conversations he and John 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.

Division II's analysis that a trial court may prevent a witness from

being impeached as a liar, unless the lie related to a specific issue in the case at hand severely truncates impeachment in Washington. This Court should exercise its supervisory responsibility over the definitive interpretation of its civil rules and grant review. RAP 13.4(b)(1, 4).

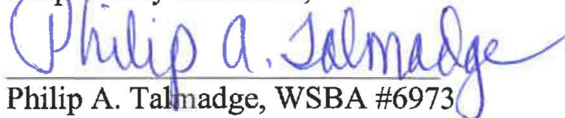
F. CONCLUSION

Division II's published opinion is wrong on two major issues – the intersection of misdiagnosis and informed consent and the impeachment of a lying witness. Review is merited by this Court. RAP 13.4(b).

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 11th day of September, 2019.

Respectfully submitted,



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

August 27, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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.	No. 51427-3-II PUBLISHED OPINION

MELNICK, P.J. — John Harbottle, III became Dr. Kevin Braun's patient. After Harbottle passed away, his wife, individually and on behalf of his estate (collectively Estate) filed a lawsuit for medical negligence and failure to obtain informed consent. The trial court granted summary judgment to Braun on the informed consent claim. The medical negligence claim went to trial and a jury found for Braun. The Estate appeals the summary judgment order and the trial court's exclusion of Braun's prior misconduct from evidence at trial.

The Estate did not have a claim for failure to obtain informed consent because Braun failed to diagnose Harbottle's condition and did not know about it. When a doctor misdiagnoses a patient's condition, and therefore is unaware of an appropriate treatment, a claim for failure to obtain informed consent does not arise. In addition, the trial court did not abuse its discretion by excluding the prior misconduct evidence. We affirm.

FACTS

I. TREATMENT

John Harbottle first became Braun's medical patient in January 2010. In June 2011, Harbottle complained to Braun of "chest burning" he had been experiencing for about two months. Clerk's Papers (CP) at 263. At first, Braun believed numerous potential causes for the chest burning existed, including gastrointestinal and cardiovascular. Braun performed a physical examination and determined the cause was likely gastroesophageal reflux disorder (GERD).[1]

Braun ordered a number of tests for Harbottle, including an electrocardiogram (EKG), a chest x-ray, and a stress test. Braun's nurse performed the EKG on the same day as the appointment. Braun and a cardiologist reviewed the EKG and stated it did not suggest any problems with his cardiovascular system. Another doctor stated the EKG signaled the need for a stress test, but agreed the EKG alone was not a reason to get a stress test. The x-ray came back as normal. Braun referred Harbottle to a cardiologist to perform a stress test, which would determine if the source of Harbottle's pain involved cardiovascular issues.

Braun prescribed a GERD medication. Braun and Harbottle scheduled a follow-up visit for July to see whether the GERD medication resolved Harbottle's symptoms and to review the results of the diagnostic tests.

At the July follow-up appointment, Harbottle reported that his symptoms had resolved. Braun felt he had identified the cause of the chest pain as GERD. The GERD medication would not have prevented coronary artery disease symptoms other than via placebo effect. Braun did not believe a cardiovascular cause of the pain was "ruled out," but thought it was unlikely because the

[1] GERD "is when acidic stomach contents come up into the esophagus, where they don't belong, and they cause symptoms." CP at 37.

symptoms had resolved. CP at 266. Braun did not follow up with Harbottle regarding the stress test, as he believed the issue had been resolved through GERD treatment.

In August, Harbottle saw Braun for unrelated issues. He noted that Harbottle's heartburn was well treated by GERD medication. A physical examination showed no abnormalities. Neither Braun nor Harbottle mentioned the stress test. A cardiologist later stated that Braun should have treated Harbottle for elevated lipids and cholesterol at this visit.

At some point, Harbottle cancelled the stress test believing that Braun had "pinpointed" the problem. CP at 267. Braun did not tell Harbottle to cancel the test and did not know why he did so. If Harbottle had followed through with the stress test, the test would likely have been positive for coronary artery disease. Braun stated, with regard to the stress test, "I engaged in shared decision-making with Mr. Harbottle, with regard to his options for additional testing. At the time he elected a stress test, and it was ordered, and the referral was completed, to the best of my ability." CP at 274.

In March 2012, Harbottle complained to Braun of shortness of breath caused by exertion. After reviewing Harbottle's symptoms, Braun prescribed him medication for asthma. Braun did not believe the issues related to Harbottle's cardiovascular system because Harbottle specifically denied experiencing chest pain. Braun did not see Harbottle again.

The following May, Harbottle died of cardiac arrest at the age of 53. An autopsy report noted his cause of death as atherosclerotic heart disease.

II. Lawsuit

In January 2015, the Estate filed a complaint against Braun alleging medical negligence and failure to obtain informed consent, both of which proximately caused Harbottle's death. Braun moved for summary judgment on the informed consent claim, arguing that failure to diagnose a

condition is a matter of medical negligence but not informed consent. The trial court granted Braun's motion, concluding that no genuine issue of material fact existed.

A. EXPERT TESTIMONY

Dr. Jerrold Glassman, a cardiologist, testified in a deposition that every male patient with chest pressure consistent with heart disease should be referred to a cardiologist for a stress test. Glassman and Dr. Howard Miller, another expert witness, believed that Harbottle suffered from two heart disease risk factors: he was a male and he had a history of elevated lipids. Glassman said that referral to a cardiologist for a stress test would have been appropriate, despite the results of the tests Braun performed and the resolution of his symptoms via the GERD medication. Glassman also stated he believed the failure to refer Harbottle to a cardiologist led to his death. Miller stated Braun should have followed up with the stress test to rule out coronary artery disease, even though the GERD medication resolved Harbottle's symptoms. Miller stated that the standard of care should have required Braun to "rule out" coronary artery disease with a stress test. CP at 330.

Relating to the diagnostic process generally, Braun said, "I'm not sure ruling out is ever what we do. What we do is risk stratify and try and do a responsible history, physical examination, data gathering, like labs and EKG, and subsequent risk stratification as to how high a risk you have rather than ruling out." CP at 274. Throughout his deposition, Braun used terminology reflecting relative likelihood that Braun suffered from various conditions. While he refused to say he felt a cardiac cause was "ruled out," he stated that after the GERD medication resolved Harbottle's symptoms, that "what had been a very unlikely potential cause of his symptoms was even less likely, given that his symptoms had completely resolved." CP at 266.

B. EVIDENCE EXCLUDED

During discovery, the Estate submitted an interrogatory asking whether Braun had "ever been the subject an [sic] 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." CP at 716. Braun responded, "[o]ther than this case, no." CP at 716.

At Braun's subsequent deposition, the Estate asked why he had left his job at a clinic in 2005. Braun said he left to practice on his own and for more direct control over his care and stated that his departure was "favorable." CP at 275. He said he would "have to speculate" whether the clinic would know of additional reasons for his departure. CP at 275-76. Braun listed reasons he wanted to leave the clinic, including complaints about the clinic staff "among other things." CP at 276. When asked whether he was subject to complaints during his time at the clinic, Braun said "[t]here's always complaints" such as by patients who didn't receive prescriptions they wanted. CP at 276. When asked about other complaints, Braun said he would "have to go back and look through" but did not know what he would look through. CP at 276. Braun maintained that his departure from the clinic had been mutual.

The Estate subpoenaed Braun's employment file and various other documents relating to his employment at the clinic, including "any and all complaints, grievances, or investigations, and the like pertaining" to Braun. CP at 590-91. Records produced by the clinic indicated that three female patients had complained of inappropriate flirtatious behavior and untoward touching. The clinic placed Braun on administrative leave as a result of the complaints and considered terminating his employment. Braun resigned five days later.

The Medical Quality Assurance Commission (MQAC) conducted an investigation and described the allegations of misconduct in detail. The MQAC case summary described three incidents between 2003 and 2005 in which Braun allegedly inappropriately touched and made sexual innuendo comments to female patients. Braun denied any wrongdoing. The MQAC dismissed the complaints and closed the file based on insufficient evidence. It determined no disciplinary action was necessary.

Braun moved to exclude evidence of past grievances filed against him, arguing they were irrelevant, overly prejudicial under ER 403, and not germane to his treatment of Harbottle. The Estate responded that Braun's professional misconduct and untrustworthiness during discovery were "highly relevant to his veracity" at trial. CP at 820.

At arguments on the motion to exclude, the trial court stated that "[t]here would never, in this case, be a reveal to the jury as to what the underlying issues were, sexual misconduct, there'd be no way that I would allow that in," as it would be "way too prejudicial." Report of Proceedings (RP) (Sept. 8, 2017) at 26. The Estate's attorney agreed. The court said it was concerned that the facts of the underlying misconduct were "so prejudicial that [it was] concerned about whether it takes over the case as opposed to what needs to be the issue, which is did he violate the standard of care." RP (Sept. 8, 2017) at 27-28. The parties primarily argued about whether the Estate could impeach Braun's credibility with his dishonest discovery responses. The court granted Braun's motion to exclude.

After a trial, the jury returned a verdict for Braun on the medical negligence claim and the trial court entered judgment for Braun. The Estate appeals, arguing the court erred by granting summary judgment on the informed consent claim and excluding evidence of Braun's prior instances of misconduct.

ANALYSIS

I. INFORMED CONSENT

The Estate contends that the trial court erred by granting summary judgment for Braun on the Estate's informed consent claim. It claims that "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." Br. of Appellant at 21. The Estate acknowledges that "a physician cannot advise of a condition he/she does not know," but contends that Braun was aware that Harbottle's "symptoms of severe chest pain and shortness of breath on exertion could evidence a life-threatening coronary disease." Br. of Appellant at 21. Because the facts of this case do not support an informed consent claim, we conclude the trial court did not err in granting summary judgment.

A. LEGAL PRINCIPLES

We review a grant of summary judgment de novo, performing the same inquiry as the trial court. *Volk v. DeMeerleer*, 187 Wn.2d 241, 254, 386 P.3d 254 (2016). "Summary judgment is appropriate when there is 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Volk*, 187 Wn.2d at 254 (quoting CR 56(c)). We construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014).

The doctrine of informed consent refers to the requirement that a health care provider has a duty to his or her patient "to disclose relevant facts about the patient's condition and the proposed course of treatment so that the patient may exercise the right to make an informed health care decision." *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 122, 170 P.3d 1151 (2007). "Informed

consent focuses on the patient's right to know his bodily condition and to decide what should be done." *Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 168, 772 P.2d 1027 (1989).

"Informed consent and medical negligence are distinct claims that apply in different situations. While there is some overlap, they are two different theories of recovery with independent rationales." *Anaya Gomez v. Sauerwein*, 180 Wn.2d 610, 617, 331 P.3d 19 (2014). To prove medical negligence, a plaintiff must show that the defendant proximately caused injuries by failing to exercise the appropriate degree of care, skill, and learning. RCW 7.70.040. To prove failure to obtain informed consent, a plaintiff must prove the following four elements:

> (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).

Informed consent "'does not place upon the physician a duty to explain all possible risks, but only those of a serious nature.'" *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 662 n.3, 975 P.2d 950 (1999) (quoting *Brown v. Dahl*, 41 Wn. App. 565, 570, 705 P.2d 781 (1985)). If the "'*reasonable person* in the patient's position would attach significance to a risk in deciding treatment,'" the doctor must disclose that risk as material. *Backlund*, 137 Wn.2d at 662 n.3 (quoting *Brown*, 41 Wn. App. at 570).

B. MISDIAGNOSIS

The duty to obtain informed consent "is not confined to the choice of treatment once a disease is present and has been conclusively diagnosed." *Gates v. Jensen*, 92 Wn.2d 246, 250, 595 P.2d 919 (1979). In certain circumstances, "the right to informed consent can include the process

of diagnosis." *Anaya Gomez*, 180 Wn.2d at 617. The fact that a patient'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." *Keogen v. Holy Family Hosp.*, 95 Wn.2d 306, 315, 622 P.2d 1246 (1980).

However, a "physician who misdiagnoses the patient's condition, and is therefore unaware of an appropriate category of treatments or treatment alternatives, . . . may not be subject to an action based on failure to secure informed consent." *Backlund*, 137 Wn.2d at 661. "Simply put, a health care provider who believes the patient does not have a particular disease cannot be expected to inform the patient about the unknown disease or possible treatments for it." *Anaya Gomez*, 180 Wn.2d at 618. "In such situations, a negligence claim for medical malpractice will provide the patient compensation if the provider failed to adhere to the standard of care in misdiagnosing or failing to diagnose the patient's condition." *Anaya Gomez*, 180 Wn.2d at 618. This rule is necessary "to avoid imposing double liability on the provider for the same alleged misconduct." *Anaya Gomez*, 180 Wn.2d at 618.

Gates established that the duty of a physician to obtain informed consent applies at the diagnostic stage. 92 Wn.2d at 250-51. In *Gates*, the patient had a condition "which doubled her risk of glaucoma." 92 Wn.2d at 247. She consulted with an ophthalmologist who performed tests that put her "in the borderline area for glaucoma." *Gates*, 92 Wn.2d at 247. An additional test indicated "no evidence of abnormality," so the doctor told the patient he had checked and "found everything all right." *Gates*, 92 Wn.2d at 247-48. He diagnosed her problems as "difficulties with [her] contact lenses" and treated her accordingly. *Gates*, 92 Wn.2d at 248. The ophthalmologist did not inform the patient of her increased risk factors for glaucoma, nor that there existed "two

additional diagnostic tests for glaucoma which [were] simple, inexpensive, and risk free." *Gates*, 92 Wn.2d at 248.

The court ruled that "[t]he patient's right to know is not confined to the choice of treatment once a disease is present and has been conclusively diagnosed" because important treatment decisions are often required in "non-treatment situations" such as "procedures leading to a diagnosis." *Gates*, 92 Wn.2d at 250-51. These decisions "must all be taken with the full knowledge and participation of the patient" and the physician has a duty "to tell the patient what he or she needs to know in order to make them." *Gates*, 92 Wn.2d at 251.

Anaya Gomez further clarified and narrowed *Gates*. In *Anaya Gomez*, a blood test preliminarily determined that the patient's blood cultures were positive for yeast. 180 Wn.2d at 614. Because of the potential seriousness of this result, the doctor determined that if the patient was feeling ill, she should come in immediately for treatment, but, if she was feeling better, it was more likely that the test result was a false positive, "a common occurrence in microbiology labs." *Anaya Gomez*, 180 Wn.2d at 614.

After learning that the patient was feeling better, the doctor concluded the result had been a false positive and never informed her about it. *Anaya Gomez*, 180 Wn.2d at 614. The result was not a false positive and the patient died several months later as a result. *Anaya Gomez*, 180 Wn.2d at 614-15. Her estate sued the doctor and clinic for both medical negligence and failing to obtain informed consent. *Anaya Gomez*, 180 Wn.2d at 615.

"[W]hen 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." *Anaya Gomez*, 180 Wn.2d at 623. "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." *Anaya Gomez*, 180 Wn.2d at 623. In a footnote, the court quoted *Keogan*, 95 Wn.2d at 331 (J. Hicks concurring in part and dissenting in part), "'[There are] 200 different things that might cause chest pain, only 3 of which are related to the heart.' A health care provider cannot possibly inform a patient about every disease that might be causing each of his or her symptoms." *Anaya Gomez*, 180 Wn.2d at 623 n.8.

The court declined to adopt a new rule requiring health care providers "to inform patients of all positive test results," noting that health care providers use many tools to form a diagnosis and "[o]nly after the provider has used these tools to make a diagnosis can he or she inform the patient about possible treatments and the risks associated with each." *Anaya Gomez*, 180 Wn.2d at 619-20. It noted that "[g]iven the vast number of false positive test results that occur in Washington on a daily basis, imposing a duty on health care providers to inform every patient about every test result would be unduly burdensome, pointless, and unwise." *Anaya Gomez*, 180 Wn.2d at 627.

Anaya Gomez clarified that *Gates* "has not been overruled" and that "[u]nder *Gates*, there may be instances where the duty to inform arises during the diagnostic process." 180 Wn.2d at 623. The "determining factor is whether the process of diagnosis presents an informed decision for the patient to make about his or her care." *Anaya Gomez*, 180 Wn.2d at 623.

The court distinguished *Gates* on the grounds that the doctor in *Gates* "had available 'two additional diagnostic tests for glaucoma which are simple, inexpensive, and risk free'" and that the doctor "could have put to Mrs. Gates [the decision of] whether to do the additional testing in light of her borderline test result." *Anaya Gomez*, 180 Wn.2d at 621 (quoting *Gates*, 92 Wn.2d at 248). The doctor in *Gates* also saw that the patient had "consistently high eye pressure readings that pointed to higher risk for glaucoma over a *two year* period," whereas the doctor in *Anaya Gomez*'s

only contact with the decedent was "a phoned-in lab report and her medical record." *Anaya Gomez*, 180 Wn.2d at 621. The doctor in *Anaya Gomez* "[u]s[ed] the information available to him," lacked "the ability to obtain more information," and "determined that there was nothing further to diagnose." 180 Wn.2d at 622.

In *Backlund*, a prematurely born child suffered from jaundice. 137 Wn.2d at 654. The doctor treated the child with phototherapy, a common remedy for that condition, but did not discuss the possibility of a riskier transfusion treatment often used in more severe cases. *Backlund*, 137 Wn.2d at 655. He did not believe the child's condition was serious enough to warrant the transfusion treatment and thought that bringing it up would cause unnecessary stress and distress to the family. *Backlund*, 137 Wn.2d at 656. The risk of brain damage from phototherapy was approximately one in 10,000, while the risk of serious consequences associated with the transfusion were about four or five in 100. *Backlund*, 137 Wn.2d at 656. The phototherapy resulted in permanent brain damage to the child. *Backlund*, 137 Wn.2d at 655. The parents sued for medical negligence and failure to obtain informed consent. *Backlund*, 137 Wn.2d at 655.

Backlund observed that, while the doctor was aware of the child's condition,

> 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.

137 Wn.2d at 661. Physicians should not be liable under RCW 7.70.050 "for a condition unknown to the physician," rather such misdiagnoses are a proper basis for liability in negligence if they breach the standard of care. *Backlund*, 137 Wn.2d at 661 n.2. For example, "a physician who misdiagnosed a headache as a transitory problem and failed to detect a brain tumor may be guilty of negligence for the misdiagnosis," but it would be "anomalous to hold the physician culpable

under RCW 7.70.050 for failing to secure the patient's informed consent for treatment for the undetected tumor." *Backlund*, 137 Wn.2d at 661 n.2. An informed consent claim was available in *Backlund* because "a trier of fact might still have found [the doctor] did not sufficiently inform the patient of risks and alternatives" given that he was aware of the transfusion alternative. 137 Wn.2d at 662.

In *Flyte v. Summit View Clinic*, a pregnant woman felt ill and visited a clinic. 183 Wn. App. 559, 562, 333 P.3d 566 (2014). In the months preceding her visit, the clinic received public health alerts about "a global pandemic of 'swine flu,' a potentially fatal illness." *Flyte*, 183 Wn. App. at 562-63. The clinic neither informed the woman of the dangers of swine flu, nor about an available treatment. *Flyte*, 183 Wn. App. at 563. Her condition deteriorated and she died shortly after delivering her child, who died months later. *Flyte*, 183 Wn. App. at 563. Her estate sued the clinic for medical negligence and failure to obtain informed consent. *Flyte*, 183 Wn. App. at 562.

On the informed consent claim, the trial court instructed 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." *Flyte*, 183 Wn. App. at 572.

On appeal, we ruled that the jury instruction was a "clear misstatement of the law" because "'[e]ven if a doctor has not specifically diagnosed a medical problem, if the doctor embarks on a diagnostic procedure which entails a reasonable foreseeable risk to the patient, the patient must be informed of the risk and possible alternatives.'" *Flyte*, 183 Wn. App. at 578 (quoting *Keogan v. Holy Family Hosp.*, 22 Wn. App. 366, 369-70, 589 P.2d 310 (1979), *rev'd by Keogan*, 95 Wn.2d 306 (emphasis omitted)). The "jury could reasonably have concluded that, in light of [the patient's] symptoms, a reasonable person in [her] position would, in making [her] decision, have attached significance to information regarding the extreme danger [swine flu] posed to pregnant

women and the availability of suitable prophylactic measures." *Flyte*, 183 Wn. App. at 578-79. Accordingly, the patient had an informed consent claim against the clinic and the court reversed the trial court for giving an erroneous jury instruction that contained a clear misstatement of law. *Flyte*, 183 Wn. App. at 580.

Flyte distinguished *Anaya Gomez* on its facts. 183 Wn. App. at 576-77. It observed that, though the doctor testified that he had "ruled out influenza," he said he "had no independent memory" of meeting the patient and "admitted that he based his testimony entirely" on his notes. *Flyte*, 183 Wn. App. at 579. The notes did not "definitively rule[] out influenza as a possible diagnosis" because they used the terms "'working diagnosis,'" with notation of "[c]hills and sweats[;] not sure where coming [sic] from[;] exam normal[.] If gets worse to go to ER," providing space for a "reasonable inference" that upper respiratory infection was only a tentative diagnosis. *Flyte*, 183 Wn. App. at 579. A witness present also testified that he recalled the doctor saying the patient had "influenza." *Flyte*, 183 Wn. App. at 579. This situation provided an issue of fact for the jury as to whether the doctor had actually ruled out influenza, and if the jury found he had not done so, it could have properly considered the informed consent claim. *Flyte*, 183 Wn. App. at 580.

In the present case, Harbottle went to Braun complaining of "chest burning." CP at 36-37. Braun ordered an EKG, a chest x-ray, and a stress test "to try and help diagnose potential causes" of the chest pain. CP at 38. He did not find the x-ray or EKG results remarkable. Braun believed the problem was most likely GERD and prescribed GERD medication. A month later, resolution of Harbottle's symptoms reinforced Braun's belief that GERD had been causing the chest pain. Braun thought a cardiac cause of Harbottle's symptoms was very unlikely and even more unlikely after his symptoms were resolved by GERD medication. Harbottle cancelled the stress test on his

own, without consulting with Braun, and told the cardiologist his doctor had "pinpointed" the cause of his symptoms. CP at 267. Braun never followed up about the stress test or informed Harbottle of potential risks if the chest pain was related to cardiovascular problems. Harbottle died of a condition that the stress test would likely have uncovered.

This case is factually similar to *Anaya Gomez*, where the doctor was aware of a test result, but believed it to be a false positive and did not inform the patient of it. In this case, Braun was aware both that chest pain was a symptom of potentially fatal coronary disease and that Harbottle suffered from chest pain, but he believed the source of Harbottle's chest pain was GERD. Harbottle's condition improved as a result of taking the GERD medication. As *Anaya Gomez* stated,

> Simply put, a health care provider who believes the patient does not have a particular disease cannot be expected to inform the patient about the unknown disease or possible treatments for it. In such situations, a negligence claim for medical malpractice will provide the patient compensation if the provider failed to adhere to the standard of care in misdiagnosing or failing to diagnose the patient's condition.

180 Wn.2d at 618.

The patient in *Gates* had consistently high eye pressure readings pointing to glaucoma risk over two years and that additional diagnostic tests for glaucoma were "simple, inexpensive, and risk free." 92 Wn.2d at 248. Harbottle lacked many risk factors for coronary disease[2] and lived a healthy lifestyle. Unlike the additional glaucoma tests available in *Gates*, the stress test in this case had to be scheduled in advance with a specialist. Braun "use[ed] the information available to

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[2] The record reflects that major risk factors for coronary artery disease include hyperlipidemia, diabetes, smoking, hypertension, male gender, and family history. Male gender and high lipid count were the only two of these factors present in Harbottle. To the extent the parties dispute Harbottle's risk factors for coronary disease, we take the facts in the light most favorable to the Estate.

him" and "determined that there was nothing further to diagnose." *Anaya Gomez*, 180 Wn.2d at 622. *Anaya Gomez* also noted that the doctor knew the patient had "one blood test that was inconsistent with her physical condition and other tests, rendering the positive blood test more likely to be a false positive" and never knew of the specific, particularly threatening strand of yeast that turned out to be present. 180 Wn.2d at 621 n.5. Braun's assessment of Harbottle's condition over time made him believe more firmly that he suffered from GERD and not coronary disease.

The Estate contends that Harbottle's heart condition was "known" to Braun such that the case law regarding unknown conditions does not apply. Reply Br. of Appellant at 3. In support of this contention, the Estate points out that Braun "determined that Harbottle needed to see a cardiologist, then dropped that course of treatment after Harbottle responded to heartburn medication without informing him of the risks involved." Reply Br. of Appellant at 4. The record does not reflect that Braun ever knew of Harbottle's condition. Rather, he sought to diagnose Harbottle's complaints of "chest burning" and scheduled a stress test. After he believed that he successfully diagnosed the chest burning as GERD, he did not follow up further relating to the stress test. To the extent it was negligent for him to misdiagnose Harbottle's heart condition as GERD, the jury found in Braun's favor at trial.

Flyte distinguished *Anaya Gomez* on grounds that the doctor did not "definitively rule[] out influenza" because his chart referred to his diagnosis as "working," included influenza symptoms and that he was "not sure" where the patient's symptoms were coming from, and a witness overheard him say she had "influenza." 183 Wn. App. at 579.

Like *Flyte*, Braun in this case specifically stated he didn't "rule out" a cardiovascular cause of Harbottle's chest pain because he did not believe that was his role as a doctor. Rather, he believed a coronary disease to be an "unlikely cause" of Harbottle's pain made even more unlikely

by the fact that the GERD medication cleared Harbottle's symptoms. No additional evidence, such as the chart or witness present in *Flyte*, suggests that Braun ever believed Harbottle suffered from coronary disease other than Braun scheduling the diagnostic stress test. Additionally distinguishing *Flyte*, that case concerned a public health alert about which the doctor failed to warn the patient. Prophylactic treatment was available to treat swine flu before any test was able to diagnose the disease. Such extraordinary circumstances did not exist in this case.

The record in this case reflects that Braun did not know of Harbottle's coronary condition when he scheduled the stress test. Though he did not definitively "rule out," coronary disease during his diagnostic process, to do so is not the role of a doctor. Imposing a requirement that a doctor must obtain informed consent *not* to treat any condition that is not definitively "ruled out" would "require health care providers and patients to spend hours going through useless information that will not assist in treating the patient." *Anaya Gomez*, 180 Wn.2d at 623. As Braun described, when GERD medication resolved Harbottle's symptoms, "what had been a very unlikely potential cause of his symptoms was even less likely." CP at 266. Braun's misdiagnosis of Harbottle allowed for a medical negligence cause of action, for which the jury ruled in favor of Braun. On the facts of this, Braun's failure to inform Harbottle of the potential risks of coronary disease or of cancelling the stress test did not breach the duty to obtain informed consent.[3]

[3] Braun further contends that summary judgment was appropriate because the Estate failed to make out the prima facie elements of an informed consent case. Because we affirm on the same ground as the trial court, we do not reach this alternative argument.

II. PRIOR MISCONDUCT

The Estate contends that the trial court erred by "refusing to address" Braun's "willful nondisclosure in discovery of past instances of professional misconduct."[4] Br. of Appellant at 22 (initial capitalization omitted). It claims that the trial court should have allowed evidence of Braun's past professional grievances at trial[5] and his attempts to hide those grievances in discovery to impeach Braun's credibility as a witness. The trial court did not abuse its discretion.

"This court reviews a trial court's evidentiary decisions for an abuse of discretion. *Farah v. Hertz Transporting, Inc.*, 196 Wn. App. 171, 181, 383 P.3d 552 (2016). "A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons." *Farah*, 196 Wn. App. at 181.

ER 607 provides that the "credibility of a witness may be attacked by any party." Parties may impeach a witness's credibility with "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility." ER 608(b). Such specific instances "may *not* be proved by extrinsic evidence, but may '*in the discretion of the court, if probative of truthfulness or untruthfulness*, be inquired into on cross examination of the witness . . . concerning

[4] The Estate contends that Braun violated discovery rules and perjured himself in his discovery responses and that such conduct is sanctionable. It does not request sanctions or any action from this court other than reversal of the trial court's decision to exclude evidence of the misconduct.

[5] Although the Estate argues that evidence of both the underlying sexual misconduct and Braun's attempts to cover it up in discovery should have been admissible at trial, its only arguments that this evidence was relevant concern impeachment of Braun's credibility as a witness. The Estate has not explained how the underlying sexual misconduct would have been relevant at trial for any reason since it has nothing to do with Braun's veracity. *See* ER 608(b). The trial court noted at oral argument on the motion to exclude that "[t]here would never, in this case, be a reveal to the jury as to what the underlying issues were, sexual misconduct, there'd be no way that I would allow that in . . . That's way too prejudicial." RP (9/8/17) at 26. The Estate's lawyer agreed with this assessment. We limit our ER 608 analysis to whether the trial court should have permitted the Estate to cross-examine Braun about his dishonest discovery responses.

the witness' character for truthfulness or untruthfulness.'" *State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005) (quoting ER 608(b)). The trial court has "broad discretion to admit or exclude" specific instances of nonconvicted conduct. *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 708, 82 P.3d 1199 (2004).

Impeachable instances of misconduct under ER 608 "must be probative of truthfulness and not remote in time; further, the court should apply the overriding protection of ER 403 (excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury)." *State v. Wilson*, 60 Wn. App. 887, 893, 808 P.2d 754 (1991). "Any fact which goes to the trustworthiness of [a] witness may be elicited if it is germane to the issue." *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). However, requiring the trial court to "admit *any* instance of a key witness's prior misconduct . . . would be clearly contrary to ER 608, which grants trial courts discretion to make such determinations." *O'Connor*, 155 Wn.2d at 350.

In *York*, the State's case against a defendant for delivery of a controlled substance rested largely on the testimony of an undercover investigator with the sheriff's department. 28 Wn. App. at 34. The trial court admitted evidence of the deputy's background and military service, including his experience in undercover work, but denied the defendant's request to cross-examine him about his being fired from a Montana sheriff's department over "irregularities in his paperwork procedures, and his general unsuitability for the job." *York*, 28 Wn. App. at 34.

Despite the discretion due to the trial court's decision, the appellate court reversed. *York*, 28 Wn. App. at 38. It emphasized that allowing criminal defendants "no cross-examination into an important area is an abuse of discretion" and noted that criminal defendants are "given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the state's case." *York*, 28 Wn. App. at 36.

In *State v. Griswold*, the defendant in a criminal child molestation case sought to cross-examine one of the victims and her mother about a specific incident of alleged lying "related to why [she] was unable to continue helping on her friend's paper route." 98 Wn. App. 817, 822, 991 P.2d 657 (2000), *abrogated on other grounds by State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). The victim's mother had stated under oath that the victim quit the route out of fear of the defendant, but the victim stated in an interview that she lost the job because she sometimes threw papers away instead of delivering them. *Griswold*, 98 Wn. App. at 822-23. The defendant wished to impeach the State's witnesses to show their dishonesty, but the trial court did not allow cross-examination on this issue. *Griswold*¸ 98 Wn. App. at 823, 830.

The trial court did not abuse its discretion because, even "assuming the prior false statement [was] relevant to [the victim's] credibility, her prior false statement [was] not germane to the guilt issues." *Griswold*, 98 Wn. App. at 831. The issue was "clearly collateral" and would have led to a "mini trial" relating to the victim's paper route. *Griswold*, 98 Wn. App. at 831.

In *O'Connor*, the State charged the defendant with malicious mischief in the second degree for slashing the tires on his ex-girlfriend's car. 155 Wn.2d at 337. The victim received compensation from both the defendant, and her insurance company, leading to a windfall of about $300. *O'Connor*, 155 Wn.2d at 339-40. The defendant sought to cross-examine the victim about her payment from the insurance company, arguing her windfall went to her credibility and "ability to tell the truth on the stand," but the trial court ruled that facts about the payment were relevant only to her character, not to whether her testimony was likely truthful. *O'Connor*, 155 Wn.2d at 339-40.

The court observed that "the *York*, *Wilson*, *Griswold* line of cases contemplates consideration of whether the evidence sought to be explored during cross-examination under ER 608(b) is *relevant* to the issue at hand." *O'Connor*, 155 Wn.2d at 350. It noted that "[p]rohibiting the trial court from considering the issue of germaneness to the issue at hand when exercising its discretion under ER 608 could result in a system under which a trial court is constitutionally *required* to admit *any* instance of a key witness's prior misconduct," which would be "clearly contrary to ER 608." *O'Connor*, 155 Wn.2d at 350. The court held,

> [I]n exercising its discretion under ER 608, a trial court may consider whether the proposed subject of cross-examination is relevant to the witness's veracity on the stand and germane to the issues in question at trial. While the retention of the $300 may reflect an instance of dishonesty, it did not involve a lie under oath. . . . Moreover, the retention of the excess $300 was not germane to the key factual issue to which [the victim] testified, namely the fact that [the defendant] was outside her house on the night her tires were slashed. Fundamentally, it is reasonable to conclude that the insurance payment is not relevant to the ultimate question of whether [the defendant] slashed the tires. Therefore, the trial court acted within its discretion when it determined that the retention of the excess $300 was not probative of [the victim's] truthfulness on the stand because it was simply too attenuated from her testimony regarding the events on the night in question.

O'Connor, 155 Wn.2d at 352-53.

In this case, Braun denied allegations of misconduct during his employment at a clinic in his discovery responses. He stated this case was the only "allegation, claim, complaint, or lawsuit" alleging any inappropriate conduct or improper and/or negligent or substandard treatment that he had ever been subjected to. CP at 716. As a result of a subpoena to the clinic, the Estate learned of three sexual misconduct grievances filed against Braun that led to his suspension and ultimately his withdrawal.

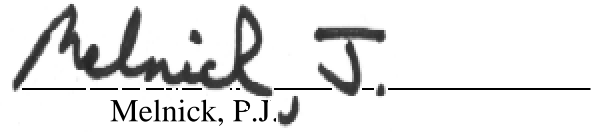
The trial court granted Braun's motion to exclude his past misconduct from evidence and prohibit the Estate from cross-examining him with his false and misleading discovery responses at trial. We review whether this decision was an abuse of discretion by looking to whether the misleading discovery responses were germane to the issues in this case or collateral such that they would likely result in a mini-trial.

This case is most similar to *Griswold*. The defendant in *Griswold* alleged that the victim and her mother had made inconsistent statements at a previous hearing and during an interview and wished to cross-examine them on these statements. 98 Wn. App. at 822-23. As in this case, the alleged misstatements were made during the course of the litigation. Also as in this case, the misstatements had to do with matters collateral and unrelated to the litigation. Braun's sexual misconduct at a clinic in 2005 is no more relevant to his treatment years later of Harbottle than the *Griswold* victim's loss of her paper route were to the state's prosecution of Griswold for child molestation. In both cases, the only relevance of the misconduct would have been to impeach credibility as a witness on a collateral matter.

Unlike *York* and *Griswold*, this case is civil and does not implicate a criminal defendant's fundamental rights or merit "extra latitude" in cross-examination of essential prosecution witnesses. 28 Wn. App. at 36. By comparison, *Loeffelholz*, a civil case, noted the trial court's "broad discretion" to admit or exclude alleged misconduct. 119 Wn. App. at 708.

The trial court had access to the full record and was in the best position to make a decision as to whether to allow cross-examination on this issue. Additionally, Braun's history of sexual misconduct was collateral to the issues in the case. The trial court did not abuse its discretion by excluding evidence of Braun's misleading discovery responses.

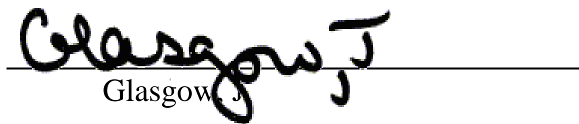
We affirm.



Melnick, P.J.

We concur:

Sutton, J.



Glasgow, J.

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.

RCW 7.70.040:

(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.

RCW 7.70.050:

(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.

DECLARATION OF SERVICE

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

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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: September 11, 2019, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

September 11, 2019 - 4:12 PM

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