IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

No. 98515-4

ALICE FRITZ,

Petitioner,

vs.

CHRIST CLINIC and DANIELLE RIGGS,

Respondents.

Second Corrected PETITION FOR DISCRETIONARY REVIEW

Dennis W. Clayton
Clayton Law Firm, PLLC
WSBA #7464
Attorney for Respondents
423 West First Avenue,
Suite 210
(509) 838-4044
dennis@claytonlawfirmpllc.com

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I. IDENTITY OF PETITIONER

Alice Fritz, by and through her attorney, Dennis W. Clayton, of Clayton Law Firm, PLLC, petitions this Court for review of the Decision of the Court of Appeals, filed April 2, 2020, in No. 36420-8-III.

II. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in ruling that the health care provider did not make any diagnosis and, therefore, Ms. Fritz did not present facts supporting an informed consent claim?

2. Does the foregoing ruling conflict with this Court's ruling in *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (.1979)?

3. Did the Court of Appeals err by disregarding Ms. Fritz's argument addressing the causation element of her negligence claim where, although a corresponding assignment of error was not set forth, the issue was argued at length by both the Appellant and Respondents, supported by ample legal authority and citation to the record.

4. Did the trial court mistakenly apply the *Backlund* Rule in this case, in that the facts herein are susceptible to both informed consent and negligence claims?

III. STATEMENT OF THE CASE

This is a medical malpractice action brought by Alice Fritz (Ms. Fritz) arising out of care and treatment provided by Danielle Riggs (Riggs) while employed as an advanced registered nurse practitioner (ARNP) by Christ Clinic/Christ Church (Christ Clinic) in Spokane, Washington. CP 3.

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

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

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

TSH level. Thus, the record reflects that Ms. Fritz was experiencing hypothyroidism, which went untreated for four years. CP 94.

On February 2, 2016, Ms. Fritz filed a complaint, naming as defendants Rockwood Clinic, P.S,[1] Christ Clinic, and Riggs. CP 2.

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

Ms. Fritz alleged that the failure to inform her of abnormal thyroid levels, and the delayed discovery of hypothyroidism, aggravated preexisting mental and emotional conditions. CP 5, ¶ 3.18.

The Defendants filed a motion for summary judgment, denying liability, causation and damages. CP 11-13. They contended that (1) Plaintiff's informed consent claim is not supported by Washington law, in that factual allegations supporting a negligence claim cannot also support an informed consent claim, citing *Backlund v. University of Washington*, 137 Wn.2d 651, 661, 975 P.2d 319, 322 (1999): (single set of facts cannot support both a negligence claim and an informed consent claim). CP 15; (2) Ms. Fritz lacked sufficient evidence to support her claims regarding the

[1] Ms. Fritz voluntarily dismissed Rockwood Clinic. CP 299. References to "Defendants" include only Riggs and Christ Clinic.

standard of care and causation, citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). CP 14; CP 20-21.

In response, Ms. Fritz filed the declaration of ARNP Eileen Owens-Williams, Ph.D. CP 91-96. Owens-Williams reviewed Ms. Fritz's medical records, including Christ Clinic records generated by Riggs and others, ultrasound imaging, the tumor removal surgical report and related pathology, and the deposition of Riggs. CP 92.

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

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

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

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

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

On April 18, 2017, the trial court issued a letter opinion granting the Defendants' motion for summary judgment. The order granting

summary judgment was entered May 18, 2017. CP 121. Specifically, the court reasoned that:

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

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

Ms. Fritz filed a motion for reconsideration, based on CR 59(a)(1), (a)(3), (a)(4) and (a)(8). CP 225. In support of reconsideration, Ms. Fritz filed a supplemental declaration of Dr. Campbell, which the trial court reviewed, over Defendants' objection. CP 242-246. Reconsideration was denied.

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

III. ARGUMENT

(1) Standard of Review

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

Summary judgment orders are reviewed de novo, engaging in the same inquiry as the trial court. Summary judgment is warranted only when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. CR56(c). The facts and all reasonable inferences are viewed in the light most favorable to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); *Northgate Ventures LLC v. Geoffrey H. Garrett PLLC*, 10 Wash. App.2d 850, 450 P.3d 1210 (2019).

The Court of Appeals declined to address Ms. Fritz's argument regarding negligence, in that she did not assign error to the trial court's dismissal of her negligence action. Ms. Fritz asks that this Court invoke its discretion to address her negligence claim, that is, whether Dr. Campbell's declarations raised material issues of fact regarding delayed diagnosis and treatment exacerbated Ms. Fritz's depression and related

conditions. *See State v. Breitung*, 155 Wn.App. 606, 619, 230 P.3d 614 (2010).

Both Ms. Fritz and the Respondents devoted several pages of argument before the Court of Appeals regarding the causation element of negligence. *See, e.g.*, Brief of Respondents, pp. 19-23.

(2) The Court of Appeals' Decision Materially Conflicts With This Court's Decision in *Gates v. Jensen*

The decision of the Court of Appeals in this case is in conflict with this Court's decision in *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (.1979). See RAP 13.4(1).

Citing *Gustav v. Seattle Urological Associates*, 90 Wn.App. 785, at 790, 954 P.2d 319 (1998), the Court of Appeals in the present case held that the duty of a health care provider to inform a patient "…does not arise until the doctor becomes aware of the condition by diagnosing it." Decision, at pp. 10 and 12. The Court of Appeals concluded that:

> Riggs never declared in the records that she discovered the high levels of TSH. Failing to grasp what records show is a failure to diagnose, not a diagnosis.

The Court of Appeals noted that "… the *Gustav* court noted that the duty to disclose does not arise until the doctor becomes aware of the condition by diagnosing it." Decision, at p. 12

In *Gates v. Jensen*, this Court described the scope of the duty to inform, which description is clearly at odds with what Division 1 said in *Gustav* and Division 3 said in the present case:

> Contrary to respondents' contention**,** application of the doctrine of informed consent to circumstances other than treatment of a diagnosed disease is nothing new**.** *Miller v. Kennedy* itself involved evaluating the risks of a diagnostic procedure, a kidney biopsy. In *Young v. Group Health Cooperative of Puget Sound,* 85 Wn.2d 332, 534 P.2d 1349 (1975), the doctrine was applied to a determination whether childbirth should take a natural course, where this question again was not one of treatment of a known disease. See also *Holt v. Nelson,* 11 Wn.App. 230, 523 P.2d 211 (1974).The physician's duty of disclosure arises, therefore, *whenever the doctor becomes aware* of an abnormality which may indicate risk or danger. *Betesh v. United States,* 400 F.Supp. 238 (D.D.C.1974). The facts which must be disclosed are all those facts the physician knows or should know which the patient needs in order to make the decision. To require less would be to deprive the patient of the capacity to choose the course his or her life will take. [Emphasis added].

Again, the Court of Appeals based its ruling regarding Ms. Fritz's informed consent claim on the fact that the attending ARNP, Ms. Riggs, did not reach a "diagnosis" of hypothyroidism. Decision, at pp. 12-14. But neither cases from this Court, nor the applicable statute, RCW 7.70.050, support the Court of Appeals' decision. In that regard, the latter statute focuses on 'material facts," not the narrow criterion of whether a formal diagnosis was reached.

Similarly, under *Miller v. Kennedy*, the scope of the duty to disclose information concerning material facts attending medical care is measured by the patient's need to know information necessary to an intelligent choice, not whether a formal diagnosis was reached by the provider. *Miller v. Kennedy*, 11 Wn.App. 272, at 282-83, 522 P.2d 852(1974).

The conflict between this Court's view of the scope of informed consent, and the views of Division 1 and Division 3 should be resolved.

(3) Dr. Campbell's Testimony On Causation Was Not Conclusory

Proximate cause is a necessary element of informed consent and negligence claims. RCW 7.70.050(1)(d); RCW 7.70.040.. "Proximate cause" means" (1) the cause produced the injury in a direct sequence, and (2) the injury would not have happened in the absence of the cause." *Gomez v. Sauerwein*, 180 Wn.2d 610, 624, 331 P.3d 19 (2014). RCW 7.70.050(1). A material fact is one to which "a reasonably prudent person in the position of the patient or his or her representative would attach significance." RCW 7.70.050(2).

Expert testimony is required to prove causation. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)). The plaintiff must produce competent expert testimony establishing that the injury was proximately

caused by a failure to comply with the applicable standard of care." *Seybold,* 105 Wn. App. at 676, 19 P.3d 1068; RCW 7.70.040.

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

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

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

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

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

The foregoing facts are facts Dr. Campbell either knew based on his own evaluation and treatment of Ms. Fritz, or facts made known to him by reviewing medical records and/or the sworn statement of Owens-Williams. These are facts that formed a proper foundation for a hypothetical question put to an expert such as Dr. Campbell. His conclusion was based on inferences drawn from facts. Thus, he was not speculating that: (1) Ms. Fritz reported depression between 2007 and 2008; (2) Dr. Toews found major depressive disorder in 2008; (3)

hypothyroidism is associated with depression; (4) the hypothyroidism went untreated for four years.

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

The Court of Appeals mistakenly applied the *Backlund* rule to this case.

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

Careful analyses reveals that neither *Backlund* nor *Gomez* are applicable to this case. In fact, each case illustrates precisely why the trial court and the Court of Appeas erred.

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

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[2] In *Gomez*, the Court noted that "The proposition that a provider cannot be liable for failure to inform in a misdiagnosis case has been referred to as "the *Backlund* rule." *Id.*, at 618.

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

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

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

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

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

treatment alternatives, may properly be subject to a negligence action where such misdiagnosis breaches the standard of care, but may not be subject to an action based on failure to secure informed consent." *Id.*, at 661. The foregoing statement from *Backlund* is inapplicable to Ms. Fritz's case.

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

Second, unlike circumstances involving a misdiagnosis, where the health care provider is unaware of a condition and therefore cannot consider and share with the patient applicable treatment alternatives, Christ Clinic was apprised of Ms. Fritz's hypothyroid condition: They simply failed to inform her of the condition, and therefore failed to offer thyroid medication, such as levothyroxine, which she was subsequently prescribed and used, both before and after she was diagnosed with thyroid cancer. CP 34.

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

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

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

> We hold that when a health care provider rules out a particular diagnosis based on the circumstances surrounding a patient's condition, including the patient's own reports, there is no duty to inform the patient on treatment options pertaining to a ruled out diagnosis.
>
> *The determining factor is whether the process of diagnosis presents an informed decision for the patient to make about his or her care.*

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

The blood draw ordered by Dr. Cox was part of a diagnostic process. The TSH test results received by Christ Clinic a few days later, presented Christ Clinic with the duty to inform and discuss with Ms. Fritz the presence of an abnormal thyroid condition. *See Miller v. Kennedy*, 11

Wn. App. 272, 282, 522 P.2d 852 (1974): (The duty of the doctor to inform the patient is a fiduciary duty); *Gates v. Jensen*, 92 Wn.2d 246, 250, 595 P.2d 919 (1979): (physician has a fiduciary duty to inform a patient of abnormalities); ("The facts which must be disclosed are all those facts the physician knows *or should know* which the patient needs in order to make the decision. To require less would be to deprive the patient of the capacity to choose the course his or her life will take." *Id.*, at 251 (emphasis added).

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

The facts in *Gomez* are clearly distinguishable from those in the present case. In *Gomez,* Dr. Sauerwein ordered a lab test to culture for bladder infection. By the time the culture had grown out and the results came back to Dr. Sauerwein, Ms. Gomez's infection had progressed too far to be arrested, and she succumbed to the illness. The *Gomez* Court reasoned that because Ms. Gomez passed away before Dr. Sauerwein received the test results, there was no timely treatment choice available to discuss with Ms. Gomez. *See, Gomez v. Sauerwein*, 180 Wn.2d, at 625.

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

Unlike Dr. Sauerwein's predicament in *Gomez*, i.e., not receiving the culture report in time to discuss it with Ms. Gomez, Christ Clinic *did* receive the TSH test results promptly, and could have informed Ms. Fritz of the test results and could have discussed with her the option of either taking or rejecting thyroid medication. But, for whatever reason, Ms. Fritz was not informed of the test results and, therefore, she was not able to exercise her right of informed consent.

Clarification of the proper role of the "Backlund Rule" is clearly explained by the concurring opinion of Justice Gonza'lez in *Gomez*, which was endorsed by Justices Fairhurst, Stephens, and Wiggins.

Referring to *Backlund*, Justice Gonza'lez noted his concern with that case as: "I write separately to stress that a health care provider may be liable for both a negligence claim and an informed consent claim arising from the same set of facts" *Gomez v. Sauerwein*, 180 Wn.2d, at 627, and "…I take this occasion to reject a distortion of the '*Backlund* rule' -- that a plaintiff cannot bring both an informed consent and a negligence claim." *Id.*, at 631.

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

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

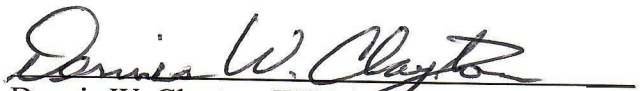
IV. CONCLUSION

The Court should accept review of this case in order to resolve the conflict between its ruling in *Gates v. Jensen* regarding the scope of the duty of informed consent, and contrary rulings by Division 3 in this case and Division 1 in *Gustav*.

Additionally, the Court should review and reverse the trial court's ruling that Dr. Campbell's testimony was conclusory and unsupported, and therefore insufficient to support the proximate cause elements of Ms. Fritz's informed consent and negligence claims.

DATED this 17th day of June, 2020.

Respectfully submitted,



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

DECLARATION OF SERVICE

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

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

2. On June 17, 2020, I personally emailed a copy of this corrected Petition for Discretionary Review to Robert Sestero at the following address:

Robert Sestero
Evans, Craven & Lackie
rsestero@ecl-law.com

DATED this 17th day of June, 2020.

Dennis W. Clayton

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ALICE L. FRITZ, an individual, Appellant, v. ROCKWOOD CLINIC, P.S., a Washington Corporation, Defendant, CHRIST CLINIC/CHRIST KITCHEN, a Washington Corporation; and DANIELLE V. RIGGS, ARNP, an individual, Respondents.	)	No. 36420-8-III UNPUBLISHED OPINION

FEARING, J. — The superior court dismissed, on summary judgment, Alice Fritz's cause of action for lack of informed consent. Because Fritz's cause of action arises from an alleged misdiagnosis, we affirm the dismissal based on the *Backlund* rule. *Backlund v. University of Washington*, 137 Wn.2d 651, 975 P.2d 950 (1999).

FACTS

Plaintiff Alice Fritz received medical care from defendant Christ Clinic/Christ Kitchen (Christ Clinic) in 2007 through 2014. By 2007, Fritz suffered from depression, hepatitis C, hypertension, and Type II diabetes.

Alice Fritz first visited Christ Clinic on December 12, 2007. Dr. Svetlana Cox, a clinic employee, then ordered a blood draw to determine, among other things, Fritz's thyroid function. Five days later, on December 17, the laboratory delivered five pages of blood test results to Christ Clinic. According to an electronic signature, defendant Danielle Riggs, ARNP, another clinic employee, received the results. Fritz's test results revealed an elevated thyroid stimulating hormone (TSH) level. The high level indicates the likelihood of an underactive thyroid gland. The trial court record does not indicate whether Danielle Riggs or any other employee of Christ Clinic recognized the higher TSH level or informed Fritz of the abnormal level. From 2007 to 2011, Fritz's abnormal TSH level went untreated.

On October 12, 2011, Alice Fritz visited Christ Clinic and reported fatigue and problems coping with posttraumatic stress disorder (PTSD). The Christ Clinic chart for that visit indicates Fritz suffered from malaise, chronic fatigue, and elevated blood sugar levels. Dr. Scott Edminster noted Fritz's reason for malaise and fatigue could be related to hypothyroidism. Dr. Edminster wrote, "[u]pon review, I note that [Fritz] had an elevated TSH back in Dec. 2007, and it hasn't been repeated since then." Clerk's Papers (CP) at 64. On October 18, 2011, Danielle Riggs, ARNP, electronically signed Fritz's October 12 chart notes.

Fritz's vocal cords when surgically excising the tumor. She also alleges profound aggravation of her pre-existing mental and emotional condition resulting from the negligent treatment.

Christ Clinic and Danielle Riggs denied liability, causation, and damages. Both brought a summary judgment motion to dismiss all causes of action. They argued that Washington law does not support Alice Fritz's informed consent claim because the cause of action arises from the alleged negligence. Christ Clinic and Riggs argued the breach of fiduciary duty claim must be dismissed because the cause of action does not come within any action authorized by the legislature pursuant to RCW 7.70.010. Finally, the clinic and its nurse practitioner argued that Fritz lacked a competent expert to support her claims regarding a breach of the standard of care and causation.

On the day before the summary judgment hearing, Alice Fritz submitted a declaration from Brian Campbell, Ph.D., a neuropsychologist. Christ Clinic and Danielle Riggs moved to strike the declaration due to its untimely filing, lack of foundation, hearsay statements, and conclusory opinions. Even though Dr. Campbell is a psychologist and not a physician, Christ Clinic and Riggs did not argue Dr. Campbell was unqualified to render causation opinions in this case. The trial court declined to strike Campbell's declaration.

Christ Clinic practitioners probably prescribed Levothyroxine sometime after Alice Fritz's October 12, 2011, visit. Fritz's next chart note, dated August 2, 2012, lists Fritz's medication as including Levothyroxine. Levothyroxine suppresses high levels of TSH.

Alice Fritz continued treatment at Christ Clinic in the following years and predominantly received counseling for her PTSD and depression. On February 5, 2014, Fritz returned to Christ Clinic with a large mass in the right side of her neck. The same day, Larry Carpenter, PA-C, scheduled an ultrasound to evaluate the mass. Health care providers diagnosed Fritz with thyroid cancer. A surgeon removed the tumor, and Fritz underwent radiation treatment in May 2014. Subsequent laboratory tests revealed no remaining markers for thyroid cancer.

PROCEDURE

Alice Fritz filed suit against defendants Rockwood Clinic, PS, Christ Clinic/Christ Kitchen, and Danielle Riggs, ARNP. Fritz alleges Riggs, an employee of Christ Clinic, performed negligently by failing to timely respond to and treat her abnormal thyroid condition and by failing to secure her informed consent. Fritz also alleges that the defendants breached their fiduciary duty to Fritz. Fritz claims that Riggs's and Christ Clinic's breaches of duty resulted in an untimely diagnosis of her thyroid tumor. In turn, the late diagnosis allowed the thyroid tumor to grow to such a size that surgeons damaged

In his declaration, Dr. Brian Campbell averred that he evaluated and he treats Alice Fritz. Campbell appended, as exhibit B to his declaration, a November 22, 2016, report he prepared about Alice Fritz for the use of Dr. Saima Ahmad of Providence Internal Medicine. The report recited that Dr. Campbell received medical records from Providence Medical Group that related, among other things, a history of depression, insomnia, acquired hypothyroidism, type II diabetes, hepatitis C, and thyroid cancer. Dr. Campbell opined that, based on his review of Fritz's medical records and the opinions of a nurse practitioner, Alice Fritz suffered an aggravation of her pre-existing psychological and neuropsychological conditions as a result of violations in the standard of care by Danielle Riggs and Christ Clinic.

The trial court granted Christ Clinic's and Danielle Riggs's summary judgment motion in full. The trial court concluded that the breach of fiduciary duty cause of action failed as a matter of law under chapter 7.70 RCW, the statutes authorizing suit for injuries resulting from health care. The trial court also dismissed Alice Fritz's informed consent claim because Fritz's delayed diagnosis liability theory conflicted with an informed consent claim. Finally, the trial court concluded Dr. Brian Campbell's declaration lacked a factual foundation and contained conclusory statements. Thus, Fritz failed to present an

issue of fact to defeat the motion to dismiss her standard of care or medical malpractice cause of action.

After the trial court entered a summary judgment order dismissing Alice Fritz's suit, Fritz moved for reconsideration based on CR 59(a)(1), (3), (4), and (8). In support of reconsideration, Fritz filed a declaration that included an offer of proof that included Dr. Brian Campbell's curriculum vitae and a declaration clarification of Brian R. Campbell. Alice Fritz also filed a memorandum in support of the motion for reconsideration. Christ Clinic and Danielle Riggs filed a memorandum in opposition to Fritz's motion for reconsideration.

The trial court denied Alice Fritz's motion for reconsideration. The court noted that Fritz did not brief or provide authority for the application of CR 59(a)(1), (a)(3) or (a)(8). The court further noted that Fritz offered no explanation as to why she failed to earlier supply the court with Dr. Brian Campbell's revised testimony.

LAW AND ANALYSIS

On appeal, Alice Fritz does not challenge the trial court's dismissal of her causes of action for breach of fiduciary duty and violation of the professional standard of care. She only assigns error to the dismissal of her informed consent cause of action.

Alice Fritz argues the trial court erred in dismissing her informed consent action because Fritz presented evidence supporting each of the four prongs set forth in RCW 7.70.050(1). Fritz argues she presented sufficient facts to establish that Christ Clinic and Danielle Riggs failed to inform her of the abnormal thyroid condition during her treatment at Christ Clinic from 2007 to 2011, that a reasonable person would want to know of an abnormal thyroid condition, and that Dr. Brian Campbell's testimony showed untreated hypothyroidism aggravated her preexisting psychological condition. We agree with her that she presented such facts, but those facts do not sustain a claim for lack of informed consent.

Chapter 7.70 RCW exclusively governs an action for damages for an injury occurring as a result of health care. RCW 7.70.010; RCW 7.70.030; *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999). RCW 7.70.030 states:

> No award shall be made in any action or arbitration for damages for injury occurring as the result of health care . . . , unless the plaintiff establishes one or more of the following propositions:

> (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
> (2) That a health care provider promised the patient or his or her representative that the injury suffered would not occur;
> (3) That injury resulted from health care to which the patient or his or her representative did not consent.

Subsection (1) of the statute refers to a cause of action for malpractice or medical negligence. Subsection (3) of the statute refers to a cause of action for lack of informed consent.

Informed consent and medical negligence are distinct claims that apply in different situations. *Gomez v. Sauerwein*, 180 Wn.2d 610, 617, 331 P.3d 19 (2014). While the two causes of action sometimes overlap, they remain two different theories of recovery with independent rationales. *Gomez v. Sauerwein*, 180 Wn.2d at 617. Allegations supporting one claim normally will not support the other. *Gustav v. Seattle Urological Associates*, 90 Wn. App. 785, 789, 954 P.2d 319 (1998).

The doctrine of informed consent refers to the requirement that a physician, before obtaining the consent of his or her patient to treatment, inform the patient of the treatment's attendant risks. *Smith v. Shannon*, 100 Wn.2d 26, 29, 666 P.2d 351 (1983). The doctrine is premised on the fundamental principle that every human being of adult years and sound mind has a right to determine what shall be done with his or her own body. *Smith v. Shannon*, 100 Wn.2d at 29.

RCW 7.70.050 codifies the elements of a cause of action for informed consent:

> (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:
> (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.

Note that the statutory cause of action assumes that the health care provider formed a diagnosis, recommended a course of treatment based on the diagnosis, and the patient consented to the recommended treatment. These assumptions are missing when the health care provider fails to make a diagnosis and never recommends a course of treatment.

The Washington Supreme Court announced, in *Backlund v. University of Washington*, 137 Wn.2d 651 (1999), that a claim based on a failure to diagnose or a misdiagnosis does not fall under the rubric of informed consent. The court wrote:

> 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 v. University of Washington, 137 Wn.2d at 661 (footnote omitted). The duty to inform does not arise until the doctor becomes aware of the condition by diagnosing it. *Gustav v. Seattle Urological Associates*, 90 Wn. App. at 790.

Gomez v. Sauerwein, 180 Wn.2d 610 (2014), wherein the high court applied the *Backlund* rule, informs our decision. Christina Palma Anaya presented to a healthcare provider with a suspected urinary tract infection. Urine and blood tests revealed a culture positive for yeast. Although Dr. Mark Sauerwein had concerns about the test result, he decided to wait on further treatment based on a belief of a false positive. Dr. Sauerwein did not tell Anaya about the test result. Days later the lab positively identified cabdida glabrata as the yeast in Anaya's blood. Anaya's condition worsened, treatment came too late to stop the infection from spreading; Anaya developed fungal sepsis, and she perished. Anaya's estate brought an action against Dr. Sauerwein and the clinic for malpractice and failure to obtain informed consent. The defense moved for summary judgment on the informed consent claim. The trial court granted the motion and dismissed the informed consent claim. The Supreme Court affirmed. The Supreme Court observed:

> 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.
>
> In misdiagnosis cases, this rule is necessary to avoid imposing double liability on the provider for the same alleged misconduct.

Gomez v. Sauerwein, 180 Wn.2d at 618.

Gustav v. Seattle Urological Associates, 90 Wn. App. 785 (1998), is also instructive. Robert Gustav sued his physicians both for negligent failure to diagnose his prostate cancer and for failure to obtain informed consent. The physicians moved for summary judgment on the ground that Gustav's informed consent claim was subsumed in his negligent failure to diagnose claim. Robert Gustav alleged that the doctors negligently failed to order diagnostic tests as frequently as appropriate and failed to order completion of a biopsy for the four areas of the prostate gland not tested. Gustav's informed consent claim similarly alleged that the doctors failed to completely inform him of the appropriate frequency of diagnostic testing, the dangers involved in not testing more frequently, and the consequences of not completing the biopsy.

In *Gustav v. Seattle Urological Associates*, the trial court granted summary judgment dismissal of the informed consent claim. On appeal, this court affirmed. This court reasoned:

> Gustav's allegations involved negligence prior to treatment, not informed consent concerning a treatment the doctor proposed to use. These are two distinct causes of action. Allegations supporting one normally will not support the other.

Gustav v. Seattle Urological Associates, 90 Wn. App. at 789. The court noted that both Gustav's negligence claims and his informed consent claim were based on his doctor's failure to diagnose his prostate cancer. The court explained, "[n]othing in these allegations relates to a failure to warn of potential consequences of treating Gustav's cancer, a condition he could not have treated because he failed to diagnose it." *Gustav v. Seattle Urological Associates*, 90 Wn. App. at 790. In so holding, the *Gustav* court noted that the duty to disclose does not arise until the doctor becomes aware of the condition by diagnosing it.

Alice Fritz characterizes her theory of recovery as that of lack of informed consent because Danielle Riggs failed to "inform" her in 2007 that tests showed an abnormal TSH level. Fritz also implies that Riggs formed a diagnosis because the test results established the high levels. With this characterization, Fritz misunderstands the nature of the informed consent claim. The claim redresses the failure of the health care provider to inform the patient, after an accurate diagnosis, of the ramifications of a course of treatment before executing the treatment. Riggs never declared in the records that she discovered the high levels of TSH. Failing to grasp what records show is a failure to

diagnose, not a diagnosis. Riggs never formed a diagnosis of an abnormal TSH level and thus never recommended a course of treatment for the ailment.

Next, Alice Fritz contends that Dr. Svetlana Cox obviously suspected a thyroid abnormality, because she would not have otherwise ordered testing for TSH level. But suspecting a condition exists is not the same as diagnosing the condition.

Alice Fritz faults the trial court for purportedly stating that a patient cannot sustain a cause of action for informed consent and a cause of action for malpractice based on the same conduct or failure to act by the health care provider. We need not decide whether the two causes of action are always mutually exclusive.

In her appellate briefing, Alice Fritz also addresses the trial court's ruling discounting the conclusion in Dr. Brian Campbell's declaration that the negligence of Christ Clinic and Danielle Riggs aggravated Fritz's preexisting psychological conditions. Nevertheless, Fritz assigns no error to the trial court's dismissal of her medical malpractice cause of action. We do not review a claimed error unless the appellant assigns error to it. RAP 10.3(a)(4), 10.3(g); *BC Tire Corp. v. GTE Directories Corp.*, 46 Wn. App. 351, 355, 730 P.2d 726 (1986). Even if the trial court did not discount Dr. Campbell's testimony, the court did not err in dismissing the informed consent cause of action based on the law.

CONCLUSION

We affirm the trial court's dismissal on summary judgment of Alice Fritz's cause of action for lack of informed consent.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, J.

Siddoway, J.

Pennell, C.J.

Pennell, C.J.

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

From Court of Appeals
NO. 36420-8-III

ALICE FRITZ,

Petitioner,

vs.

CHRIST CLINIC and DANIELLE RIGGS,

Respondents.

PETITION FOR DISCRETIONARY REVIEW

Dennis W. Clayton
Clayton Law Firm, PLLC
WSBA #7464
Attorney for Respondents
423 West First Avenue,
Suite 210
(509) 838-4044
dennis@claytonlawfirmpllc.com

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ALICE L. FRITZ, an individual, Appellant, v. ROCKWOOD CLINIC, P.S., a Washington Corporation, Defendant, CHRIST CLINIC/CHRIST KITCHEN, a Washington Corporation; and DANIELLE V. RIGGS, ARNP, an individual, Respondents.	)	No. 36420-8-III UNPUBLISHED OPINION

FEARING, J. — The superior court dismissed, on summary judgment, Alice Fritz's cause of action for lack of informed consent. Because Fritz's cause of action arises from an alleged misdiagnosis, we affirm the dismissal based on the *Backlund* rule. *Backlund v. University of Washington*, 137 Wn.2d 651, 975 P.2d 950 (1999).

FACTS

Plaintiff Alice Fritz received medical care from defendant Christ Clinic/Christ Kitchen (Christ Clinic) in 2007 through 2014. By 2007, Fritz suffered from depression, hepatitis C, hypertension, and Type II diabetes.

CLAYTON LAW FIRM, PLLC

June 18, 2020 - 3:59 PM

Transmittal Information

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