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STATE OF WASHINGTON
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NO. 88307-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RODOLFO ANAYA-GOMEZ, as Personal Representative of the Estate of Christina Palma-Anaya, deceased,

Petitioner,

vs.

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

Respondents.

APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Honorable C. James Lust, Judge

ANSWER TO BRIEF OF AMICUS CURIAE WSAJF

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Amicus curiae Washington State Association for Justice Foundation (hereinafter "WSAJ") argues that patient sovereignty and RCW 7.70.050 require disclosure of all preliminary diagnostic test results, no matter how unreliable they may be and regardless of whether other indicators lead the physician to reasonably believe the test is wrong. As will be discussed, WSAJ's position—

- is based on a misreading of Washington case law;
- conflicts with RCW 7.70.050; and
- ignores the practical difficulties inherent in its position.

I. ARGUMENT

"The duty to disclose does not arise until the physician becomes aware of the condition ***by diagnosing it.***" *Gustav v. Seattle Urological Associates,* 90 Wn. App. 785, 790, 954 P.2d 319 (emphasis added), *rev. denied,* 136 Wn.2d 1023 (1998); *accord Bays v. St. Luke's Hospital,* 63 Wn. App. 876, 881, 825 P.2d 319, *rev. denied,* 119 Wn.2d 1008 (1992). The jury found that Dr. Sauerwein acted reasonably in ***not*** diagnosing that the patient here had yeast in her blood.[1] There was no duty to disclose.

---

[1] WSAJ implies there is some material difference between "failing to diagnose" and "misdiagnosing" but never explains what that is or why it is material. Here, Dr. Sauerwein "failed to diagnose" yeast in the blood or misdiagnosed that there was no yeast in the blood, albeit reasonably. This brief will use the terms interchangeably. *See Michigan Ave. Nat'l Bank v. County of Cook,* 191 Ill.2d 493, 514, 732 N.E.2d 528 (2000) (equating "failure to diagnose" with "misdiagnosis").

WSAJ claims that a physician's mere awareness of a test result requires disclosure of that test result, even if it is preliminary and other indicators provide reasonable grounds for believing it invalid. As will be discussed, WSAJ's position is incorrect.

A. WSAJ'S POSITION CONFLICTS WITH WASHINGTON CASE LAW AND RCW 7.70.050.

RCW ch. 7.70 applies only to health care treatment that occurred after June 25, 1976. RCW 7.70.010. Washington case law, whether issued before or after the effective date of RCW ch. 7.70, supports defendants' position, not WSAJ's.

1. Case Law Leading to the Enactment of RCW 7.70.50 Supports Defendants' Position, Not WSAJ's.

The Legislature is presumed to be aware of case law in the area in which it is legislating. *See Price v. Kitsap County,* 125 Wn.2d 456, 463, 886 P.2d 556 (1994). Therefore, an understanding of the principal case law leading to the enactment of RCW 7.70.050 is important.

This Court first addressed informed consent in *ZeBarth v. Swedish Hospital Medical Center,* 81 Wn.2d 12, 499 P.2d 1 (1972). There, plaintiff underwent radiation treatment for his correctly diagnosed Hodgkin's disease. He later became paralyzed. He sued, claiming (among other things) that the doctor had failed to inform him of the risks of radiation.

Affirming a verdict for plaintiff, this Court explained that the doctrine of informed consent was the "principle covering situations where medical ***treatment*** involves a grave risk of ***collateral*** injury and puts the physician under a duty to advise the patient of such risks before initiating ***treatment***." *Id.* at 23 (emphasis added).

Miller v. Kennedy, 11 Wn. App. 272, 522 P.2d 852 (1974), *aff'd per curiam,* 85 Wn.2d 151, 530 P.2d 334 (1975), explained the informed consent doctrine further. In *Miller* defendant doctor had properly diagnosed heart disease, but during a biopsy performed to determine its cause, he damaged a kidney. Plaintiff sued for failure to inform him of the risk to the kidney and of alternative ways to perform the biopsy. Ordering a new trial, the court held that the risk of injury must be "***inherent***" in the proposed treatment. *Id.* at 286, 290 (emphasis added).

Thus, before RCW 7.70.050 was enacted, the informed consent doctrine applied to collateral injury inherent in the proposed treatment—*i.e.,* injury due to the risky nature of the treatment, not of the condition or disease itself. Where, as here, misdiagnosis or the failure to diagnose without more is at issue, the injury is the direct result of the condition or disease, not collateral injury inherent in the proposed treatment.

The case primarily relied upon by WSAJ, *Gates v. Jensen,* 92 Wn.2d 246, 595 P.2d 919 (1979), purported to change this case law. *Gates*

stated that a physician who becomes aware of a bodily abnormality that may indicate risk or danger has a duty to disclose, regardless of whether there is a completed diagnosis. This holding permitted an informed consent claim where the injury was the direct result of the patient's condition or disease, rather than the collateral result inherent in the treatment. (WSAJ Brief 13-15 & n.11) Although RCW 7.70.050 had been enacted, it did not apply to *Gates*, because the treatment involved took place before that statute became effective. *See* RCW 7.70.010.

Gates was short-lived. Just a year later, the 5-justice majority[2] in *Keogan v. Holy Family Hospital,* 95 Wn.2d 306, 622 P.2d 1246 (1980), disapproved *Gates.* WSAJ's claim that *Keogan*'s 5-justice majority agreed with *Gates* is wrong. (WSAJ Amicus Brief 14-15 & n.11)

In *Keogan,* the doctor failed to diagnose heart disease after the patient complained of recurring chest pains. The patient died of a heart attack. The trial court refused to let an informed consent claim go to the jury. Affirming the dismissal of the informed consent claim, the *Keogan* majority *expressly rejected Gates:*

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[2] WSAJ agrees that *Keogan*'s holding on the issue pertinent here is labeled a concurrence/dissent, although it consists of 5 justices, with the lead opinion consisting of only 3 justices. (Brief of Amicus Curiae WSAJ Foundation 14)

> [T]he [lead opinion] seizes upon a suspicion by Dr. Snyder of a possibility that Keogan may have had angina pectoris to decree that the informed consent doctrine as applied in *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979), controls here. In *Gates*, the court held that a physician has a duty of disclosure whenever he becomes aware of a bodily abnormality which may indicate risk or danger, whether or not the diagnosis has been completed.
>
> The Court of Appeals held that no duty to inform had yet arisen in this case because when "there is no diagnosis nor diagnostic procedure involving risk to the patient, there is nothing the doctor can put to the patient in the way of an intelligent and informed choice." Under the circumstances of this case, I agree with the Court of Appeals.

Keogan, 95 Wn.2d at 329-30 (quoting *Keogan v. Holy Family Hospital,* 22 Wn. App. 366, 370, 589 P.2d 310 (1979), *rev'd*, 95 Wn.2d 306, 622 P.2d 1246 (1980)). The *Keogan* majority went on to explain:

> If Dr. Snyder was negligent because he should have discovered Keogan's diseased heart and failed to do so, that is what should be alleged and proved in this case. It was alleged. The jury did not find that it was proved. This court with its benefit of hindsight should not now enter the fray on the plaintiff's side with rulings as a matter of law as to what the doctor should have told the patient.

95 Wn.2d at 331.[3] Thus, WSAJ is simply wrong when it says the *Keogan* majority did not abrogate or at least limit *Gates* to its facts. *See Anaya*

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[3] The 3-justice lead opinion in *Keogan* would have held that the doctor was culpable as a matter of law for failing to inform the plaintiff of material facts. Since the 5-justice majority did not reverse and remand for a new trial on the informed consent claim, the Court's ultimate holding necessarily was that there was no informed consent claim as a matter of law. *See Keogan,* 95 Wn.2d 306 (reporter's case summary).

Gomez v. Sauerwein, 172 Wn. App. 370, 372, 289 P.3d 755 (2012), *rev. granted,* 177 Wn.2d 1008 (2013).

Like *Gates, Keogan* involved treatment that occurred before the effective date of RCW 7.70.050. Hence, even before Washington courts began to apply the statute, there was no Washington decision other than *Gates* (which *Keogan* discredited) that required disclosure of material facts "relating to treatment of conditions which have not been diagnosed by the physician."[4] *Bays v. St. Luke's Hospital,* 63 Wn. App. 876, 881, 825 P.2d 319, *rev. denied,* 119 Wn.2d 1008 (1992).

WSAJ also mistakenly relies on the *Keogan* majority's statement that there is no liability where the doctor "become[s] aware of no bodily abnormality in his patient." 95 Wn.2d at 330 (quoted at WSAJ Amicus Brief at 14). That statement supports defendants' position, not WSAJ's. Becoming aware of a bodily abnormality is not the same as becoming aware of *a preliminary test* that indicates a patient *might possibly* have a bodily abnormality. Dr. Sauerwein was aware of a test result, not of a

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[4] *Miller v. Kennedy,* 11 Wn. App. 272, 522 P.2d 852 (1974), *aff'd per curiam,* 85 Wn.2d 151, 530 P.2d 334 (1975), is not to the contrary. There, the doctor had already diagnosed the patient with heart disease but was performing tests to determine the cause, presumably to aid in determining what treatment might be the most effective. Moreover, unlike *Gates, Miller* involved collateral injury inherent to the procedure performed.

bodily abnormality. Based on all the evidence available to him, he reasonably believed the patient did not have yeast in her blood.

Meeks v. Marx, 15 Wn. App. 571, 550 P.2d 1158 (1976), provides a helpful comparison. There defendant doctor operated twice on plaintiff to connect the broken parts of his leg. Plaintiff came down with an infection and later complained of discomfort in his knee. A nurse observed and noted a pulsatile at his abdomen, but the doctor did not see it. At some point after the second surgery, however, the doctor "suspected" that plaintiff had osteomyelitis.

Defendant performed a third surgery. Lab tests on tissue obtained during this surgery were negative, except that a sinogram report indicated—

> No progressive involvement of bone by osteomyelitis is seen *although chronic low-grade osteomyelitis may certainly be present.*

15 Wn. App. at 573 (emphasis added). A second sinogram was negative.

Plaintiff's condition worsened, and the leg was amputated. He sued defendant for negligence in failing to diagnose osteomyelitis and for not informing plaintiff that he probably had that disease.

A jury returned a defense verdict on the medical negligence claim. The Court of Appeals affirmed the trial court's refusal to send the informed consent claim to the jury. Noting that the informed consent

doctrine applies to a physician's failure to inform of risks of collateral injury reasonably to be expected in undergoing a proposed course of treatment, the court explained:

> [Defendant] was never medically certain plaintiff had osteomyelitis nor did he diagnose an aneurysm [which the abdominal pulsatile had suggested], and there was therefore nothing he could put to the plaintiff in the way of an election [as to the course of treatment to pursue].

15 Wn. App. at 578. Thus, the mere fact that a test result gives rise to the *possibility* of a diagnosis is insufficient to support an informed consent claim if the physician ultimately does not make that diagnosis. That is the situation here.

2. Case Law in Which RCW ch. 7.70 Was Applicable Does Not Support WSAJ's Position.

RCW 7.70.050 did not apply to any of the foregoing cases. It does, of course, apply here. The statute provides:

> (1) The following shall be necessary elements of proof that injury resulted from health care ... 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.
>
> (2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to ***the proposed treatment.***
>
> (3) Material facts under the provisions of this section which must be established by expert testimony shall be either:
>
> (a) The nature and character of ***the treatment*** proposed and administered;
>
> (b) The anticipated results of ***the treatment*** proposed and administered;
>
> (c) The recognized possible alternative forms of ***treatment***; or
>
> (d) The recognized serious possible risks, complications, and anticipated benefits involved in ***the treatment*** administered and in the recognized possible alternative forms of ***treatment***, including nontreatment.
>
> (4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required ***treatment*** will be implied.

(Emphasis added.) Thus, the informed consent statute's focus is ***treatment.*** Unlike informed consent statutes in many other states, not once does the statute mention diagnosis. *See, e.g.*, DEL. CODE ANN. tit. 18, § 6801(6);

GA. CODE ANN. § 31-9.6.1; N.Y. PUB. HEALTH LAW § 2805-d; VT. STATE. ANN. tit. 12, § 1909.

"Treatment" means "'the action or manner of treating a patient medically or surgically'", whereas "diagnosis" means the "'art or act of identifying a disease fro its signs and symptoms.'" *Michigan Avenue National Bank v. County of Cook,* 191 Ill.2d 493, 510, 511-12, 732 N.E.2d 528 (2000) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 622, 2435 (1993). "Treatment" does not include diagnosis. *Michigan Avenue,* 191 Ill.2d at 510-12; *see also Cunningham v. Lowery,* 724 So.2d 176, 180 (Fla. App. 1999).

Furthermore, this Court has recognized that "when 'there is no diagnosis nor diagnostic procedure involving risk to the patient, there is nothing the doctor can put to the patient in the way of an intelligent and informed choice.'" *Keogan,* 95 Wn.2d at 329-30 (quoting *Keogan,* 22 Wn. App. at 370). Even if this Court were to read "treatment" to be broader than its plain, ordinary meaning (for example, to include invasive or otherwise risky diagnostic procedures), the Legislature could not have intended to read it to include misdiagnosis or failure to diagnose without more. This is because the Legislature intended RCW 7.70.050 to follow *Miller,* which specified that informed consent applies to injury or risk "inherent in the treatment"—in that case, a kidney damaged during an

invasive procedure[5] *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 125, 170 P.3d 1151 (2007); *Miller* 11 Wn. App. at 286, 290.

In fact, before RCW ch. 7.70 was enacted, there was ***no*** Washington case on misdiagnosis or failure to diagnose. Consequently, WSAJ has not and cannot cite any authority that the Legislature intended RCW 7.70.050 to apply to a misdiagnosis or failure to diagnose.

Backlund v. University of Washington, 137 Wn.2d 651, 975 P.2d 950 (1999), did involve treatment subject to RCW ch. 7.70. As WSAJ correctly notes, *Backlund* held, among other things:

> 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.***

Id. at 661 (emphasis added).[6]

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[5] WSAJ's claim that there is a dispute on what constitutes the "material fact" under RCW 7.70.050 is irrelevant. Defendants' position is that RCW 7.70.050 does not apply

Moreover, WSAJ cites no authority for its claim that the patient's scheduled office visit somehow qualifies as "treatment" under RCW 7.70.050. (WSAJ Brief 5) If mere office visits constituted "treatment" under RCW 7.50.050, every patient coming in for an office visit would have to be told in advance all "material facts" relating to that visit.

[6] WSAJ correctly admits that this statement is a holding, not dicta, because it was necessary to address the defense claim that whenever there is a finding of no negligence, there can never be an informed consent claim. (WSAJ Amicus Brief 15 n.15)

Nonetheless, citing *Backlund's* statement that a physician must disclose "'[w]henever [he or she] *becomes aware* of a ***condition*** which indicates risk to the patient's health,'"[7] WSAJ claims Dr. Sauerwein was aware of the test result. (Amicus Brief of WSAJ 15, 17) (quoting 137 Wn.2d at 660) (boldface emphasis added). This argument suffers from the same infirmity as WSAJ's misreading of *Keogan.*

WSAJ's reliance on a single preliminary test result is unjustifiable. Being aware of a *test result* is not the same as being "aware of a *condition*," as *Backlund* requires. 137 Wn.2d at 660 (emphasis added). Here, for example, the test result was but one factor Dr. Sauerwein considered. He discussed the test result with a doctor with more experience and training in infectious disease. Patients with yeast in their blood typically become extremely sick. Consequently, the doctors agreed that Dr. Sauerwein should find out what the patient's current status was. If she had a fever or was not feeling well, he would ask her to come to the clinic. If she was feeling better, the test was likely the result of a contaminant. (6/7 RP 58-59; 6/10 RP 77-82)

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[7] Because some abnormal conditions do not indicate risk to a patient's health (*e.g.*, some skin abnormalities), *Backlund* specified that the condition must indicate such risk. 137 Wn.2d at 660 (quoting *Burnet v. Spokane Ambulance,* 54 Wn. App. 162, 168-69, 772 P.2d 1027 (1989), *rev. denied,* 113 Wn.2d 1005 (1989).

The patient reported she had no fever and was feeling better. (6/7 RP 62-63, 65) Accordingly, the jury found Dr. Sauerwein reasonably believed there was no yeast in the patient's blood. Based on the *totality* of the information available to him, he "misdiagnose[d] the patient's condition, and . . . therefore [was] unaware of an appropriate category of treatments or treatment alternatives" within the meaning of the *Backlund* rule. 137 Wn.2d at 661.

Even apart from *Backlund,* interpreting RCW 7.70.050 to require disclosure of the results of diagnostic tests that the physician reasonably believes are invalid is inconsistent with RCW 7.70.050(3). For example, test results alone are not always comprehensible to the lay patient. If the rule that WSAJ promotes were adopted, physicians would also be required to advise patients about what alternative diagnosis or diagnoses the test suggests. Expert testimony would be necessary as such information is not within the common knowledge of lay persons.

But RCW 7.70.050(3) specifies precisely what "material facts" must be proved by expert testimony. Alternative diagnoses are not included. Had the Legislature intended the statute to apply to situations such as this one, surely it would have required expert testimony to explain what alternative diagnoses are possible. *See State v. Veliz,* 176 Wn.2d 849, 862, 298 P.3d 75 (2013). It did not.

WSAJ's position also conflicts with RCW 7.70.060 as it read at the time, (copy in appendix). That statute explained the requirements for a signed consent form that would have constituted prima facie evidence of the patient's informed consent "to the ***treatment administered***" (emphasis added).[8] RCW 7.70.060(1). Like RCW 7.70.050, the consent form prescribed by the Legislature focuses on "the proposed ***treatment***" and "recognized possible alternative forms of ***treatment.***" *Id.* (emphasis added). Nowhere did the statute require the consent form to disclose test results or alternative diagnoses.

Legislative conduct over the years is relevant to determining the legislative intent underlying RCW 7.70.050. The Legislature is presumed to know the common law in the area pertinent to its legislation and to be aware of judicial interpretations of its enactments. *In re Proceedings of King County,* 117 Wn.2d 77, 86, 811 P.2d 945 (1991); *Clemmons v. Fidler,* 58 Wn. App. 32, 36, 791 P.2d 257, *rev. denied,* 115 Wn.2d 1019 (1990). "[I]ts failure to amend a statute following a judicial decision interpreting that statute ... indicate[s] legislative acquiescence in that decision." *City of Federal Way v. Koenig,* 167 Wn.2d 341, 348, 217 P.3d 1172 (2009).

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[8] Those requirements remain in effect today. RCW 7.70.060(1).

For instance, *Koenig* refused to overrule a 23-year old decision construing a statute, as the Legislature had not reacted to the decision by amending the statute. In *Buchanan v. International Brotherhood of Teamsters,* 94 Wn.2d 508, 617 P.2d 1004 (1980), this Court refused to overrule a decision construing a statute where the Legislature had done nothing to address the Court's interpretation of the statute in the 22 legislative sessions since the decision was issued. *Id.* at 511.

In the last 33 years since *Keogan* (21 years since *Bays*), Washington case law has been that misdiagnosis or the failure to diagnose alone cannot give rise to an informed consent claim. *Backlund,* 137 Wn.2d at 661; *Keogan,* 95 Wn.2d at 330-31, *aff'g in pertinent part Keogan,* 22 Wn. App. at 370; *Gustav,* 90 Wn. App. at 790-92; *Thomas v. Wilfac, Inc.,* 65 Wn. App. 255, 260-61, 828 P.2d 597, *rev. denied,* 119 Wn.2d 1020 (1992); *Bays,* 63 Wn. App. at 881-82; *Burnet v. Spokane Ambulance,* 54 Wn. App. 162, 168-69, 772 P.2d 1027 (1989), *rev. denied,* 113 Wn.2d 1005 (1989). In addition, there have been 32 legislative sessions since *Backlund* was decided.[9] Yet, in all that time, despite all those cases and all those legislative sessions, the Legislature has not amended RCW 7.70.050 so that it would apply to cases such as this one.

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[9] http://www.leg.wa.gov/History/Legislative/Documents/2013/LegLength1980-2013.pdf.

The Legislature has had numerous chances to do so, had it been so inclined. It has amended RCW ch. 7.70 in 15 different legislative sessions, sometimes in more than one act per session.[10] It amended RCW 7.70.050 in 2011. 2011 Wash. Laws. ch. 336, § 252. Yet it has chosen not to disturb *Keogan* or its progeny, *Backlund, Gustav, Thomas, Bays,* and *Burnet.*

The Legislature's inaction with respect to these cases must be interpreted as legislative approval of them. *See State v. Kier,* 164 Wn.2d 798, 805, 194 P.3d 212 (2008); *Buchanan,* 94 Wn.2d at 511. Under these circumstances, it is the Legislature, not the courts, that should make the policy decision whether to amend the statute to overrule *Backlund* and *Keogan,* and disapprove of *Gustav, Wilfac, Bays,* and *Burnet. See Riehl v. Foodmaker, Inc.,* 152 Wn.2d 138, 147, 94 P.3d 930 (2004).

Patients are, of course, not without recourse when a physician negligently misdiagnoses a condition. They may sue for medical negligence under RCW 7.70.040. In addition, in certain circumstances,

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[10].2012 Wash. Laws chs. 101, § 1; 2011 Wash. Laws ch. 336, §§ 250-52; 2010 Wash. Laws ch. 286, § 13; 2007 Wash. Laws chs. 119, § 1, 156, § 11; 259, § 3; 2006 Wash. Laws chs. 8, §§ 209, 304, 314-16, 93, § 1; 2005 Wash. Laws ch. 440, § 2; 2003 Wash. Laws ch. 283 §§ 29-30; 1996 Wash. Laws ch. 270, § 1; 1995 Wash. Laws ch. 323, § 3; 1993 Wash. Laws ch. 492, §§ 419-21, 423; 1987 Wash. Laws chs. 162, § 1, 212, § 1201; 1986 Wash. Laws ch. 305, § 905; 1985 Wash. Laws ch. 326, § 27; 1983 Wash. Laws ch. 149, § 2; 1981 Wash. Laws ch. 53, § 1.

they might also have an informed consent claim under RCW 7.70.050. For example, suppose a doctor mistakenly diagnoses stomach cancer when in fact the patient has irritable bowel syndrome, and stomach surgery for the nonexistent cancer results in a severe infection, although the doctor acted nonnegligently. In that event, if the patient had not been informed of the risk of infection, there would be an informed consent claim.

B. WSAJ'S POSITION PRESENTS PRACTICAL PROBLEMS.

WSAJ's proposed rule also presents practical problems. Under WSAJ's proposed rule, the physician must disclose the test result he or she does not believe is valid and explain the alternative diagnosis it suggests, even though the physician believes it is an incorrect diagnosis. At that point, the patient may well demand that the physician provide treatment for an alternative diagnosis, even though the physician reasonably believes such treatment is not medically indicated. "[A] physician should not prescribe a procedure which is not medically indicated simply because the patient desires it." *Vandi v. Permanente Medical Group, Inc.*, 7 Cal. App.4th 1064, 1070-71, 9 Cal. Rptr.2d 463 (1992).

Indeed, it would fly in the face of medical ethics to require a physician to provide treatment he or she, in the exercise of independent medical judgment, does not reasonably believe is medically indicated. T. Hafemeister & R. Gulbrandsen, Jr., *The Fiduciary Obligation of*

Physicians To "Just Say No" If an "Informed" Patient Demands Services That Are Not Medically Indicated, 39 SETON HALL L. REV. 335, 373 (2009) (AMA opinion that doctors are not ethically required to provide care that in their professional judgment would not have reasonable chance of benefiting patient). Moreover, insurance would likely not pay for such treatment Even if it did, WSAJ's proposal would lead to burgeoning unnecessary, costly tests and treatment. *Keogan,* 95 Wn.2d at 331.

In addition, requiring physicians to divulge the result of every diagnostic test, even if other indicators reasonably lead them to believe the test result is invalid, presents risks to patients. For example, suppose that Dr. Sauerwein had been right here—the test result was caused by contamination. If the patient had insisted on being treated with Amphoterecin B, she could have died, since that drug is toxic to the kidneys and hers were already functioning at only 20% due to her uncontrolled diabetes. (6/10 RP 118; 6/13 RP 19)

Under these circumstances, physicians must be able to exercise independent medical judgment to determine whether to disclose a test result to a patient where the physician has reasonable grounds to believe the test result invalid. WSAJ's rule would prevent a physician from doing so. If any additional standards are needed to govern these types of situation, it should be the Legislature, not the courts, that should decide

whether and under what circumstances or conditions, misdiagnosis or failure to diagnose should be included within RCW 7.70.50.[11]

C. THERE WAS NO PROXIMATE CAUSE AS A MATTER OF LAW.

Finally, even if RCW 7.70.050 applied to pure misdiagnosis cases, WSAJ's claim that there is a factual question on proximate cause is baseless. As pages 7-9 of the Supplemental Brief of Respondents explain, plaintiff here failed to show proximate cause as a matter of law.

II. CONCLUSION

WSAJ claims a physician has a duty to disclose a test result that the physician does not believe is valid. Why? So the patient can decide what, if any treatment, to undergo. But in misdiagnosis/failure to diagnose cases, unlike true informed consent cases, the decision is not amongst treatments *for the same diagnosis*. Rather, under WSAJ's proposed rule, it is a decision amongst treatments *for different potential diagnoses*. Thus, what WSAJ is really claiming is that the patient has the right to decide whether the physician has made a correct diagnosis. There is no indication whatsoever that the Legislature intended RCW 7.70.050 to reach that far.

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[11] "'The Legislature is uniquely able to hold hearings, gather crucial information, and learn the full extent of the competing societal interests.'" *Niece v. Elmview Group Home,* 131 Wn.2d 39, 58, 929 P.2d 420 (1997).

"Even with all the advances of medical science, the practice of medicine remains an art." *Coastal Tankships, U.S.A., Inc. v. Anderson,* 87 S.W.3d 591, 604 (Tex. App. 2002). This is especially true with diagnosis. *See Cunningham,* 724 So.2d at 180 ("diagnosis is frequently a process which can be difficult"). In fact, one of plaintiff's experts testified that misdiagnosis is not unusual. (6/7 RP 105)

Thus, it was within the Legislature's purview to determine that whether a correct diagnosis has been made and, if not, whether the physician should be liable for it, presents a medical negligence claim under RCW 7.70.040, not an informed consent claim under RCW 7.70.050. *Backlund,* 137 Wn.2d at 661; *Gustav,* 90 Wn. App. at 790; *Wilfac,* 65 Wn. App. at 260; *Bays,* 63 Wn. App. at 881.

The trial court was thus correct in dismissing the informed consent claim. The Court of Appeals was correct in affirming that dismissal. This Court should affirm.

DATED this 17th day of October, 2013.

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OF THE

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2nd EXTRAORDINARY SESSION
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RICHARD O. WHITE
Code Reviser

APPENDIX A

NEW SECTION. Sec. 11. If a patient while legally competent, or his representative if he is not competent, signs a consent form which sets forth the following, the signed consent form shall constitute prima facie evidence that the patient

gave his informed consent to the treatment administered and the patient has the burden of rebutting this by a preponderance of the evidence:

(1) A description, in language the patient could reasonably be expected to understand, of:

(a) The nature and character of the proposed treatment;

(b) The anticipated results of the proposed treatment;

(c) The recognized possible alternative forms of treatment; and

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment and in the recognized possible alternative forms of treatment, including nontreatment;

(2) Or as an alternative, a statement that the patient elects not to be informed of the elements set forth in subsection (1) of this section.

Failure to use a form shall not be admissible as evidence of failure to obtain informed consent.

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- Answer to Brief of Amicus Curiae WSAJF
- Affidavit of Service

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