

No. 70353-6-1

COURT OF APPEALS  
DIVISION 1  
OF THE STATE OF WASHINGTON

ELAINE and CALVIN VINICK,  
HUSBAND AND WIFE,  
and their marital community,

Appellants,

v.

MARK ELIOT WHIPPLE, MD  
and JANE DOE WHIPPLE,  
his wife and their marital community,

Respondents.

6/12/19  
10:18 AM  
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OPENING BRIEF OF APPELLANTS

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ORIGINAL

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## I. INTRODUCTION

This is a medical negligence action. On June 15, 2008, Plaintiff/appellant Elaine Vinick was walking on a sidewalk in downtown Seattle with her husband, Plaintiff/appellant Calvin Vinick, her adult son Seth Vinick, his wife Debra Vinick and Plaintiffs/appellants' adult son Russ Vinick. The Vinicks had brought all of their children and Seth's wife Debra to Seattle to embark upon a cruise to Alaska. Mrs. Vinick tripped on a raise in the concrete sidewalk. Because she was walking with her hands clasped behind her back, when she fell, she hit her jaw fracturing it in several places and pushing several teeth up through her gums.

Mrs. Vinick was taken by emergency vehicle to Harborview Medical Center where she was diagnosed with a moderately displaced parasymphysial fracture, a comminuted left subcondylar fracture with medial dislocation and severe angulation of the left condyle, a mildly displaced and medially angulated right subcondylar fracture and a comminuted left ramus fracture. She was admitted to the hospital that same day, June 15, 2008.

Mrs. Vinick was in the hospital for two days before having surgery. During that time she was reassured several times that she was in good hands because Harborview had the “best oral surgeons” in the area. Mrs. Vinick was familiar with oral surgeons because she had consulted one briefly a year earlier in her home state of Connecticut.

She was provided with an informed consent interview by a first year otolaryngologist head and neck surgeon (“ENT”) resident, Lynn Chiu, MD. During that interview no one mentioned the possible need for an open reduction and internal fixation (“ORIF”) of either of her fractured subcondylar fractures so she did not know this was an important option. No one mentioned what would happen if this procedure was not performed. It is clear this did not even come up.

Dr. Chiu did not say that Mrs. Vinick could end up with an open bite if they did not perform an ORIF of one of the condyle fractures or, in terms Mrs. Vinick might understand, opening the fracture and applying a plate and screws to hold the bones together so they would heal properly. Dr. Chiu did not say that if we do not do this you will end up with an open bite. This turned out to be a crucial omission because that is exactly what happened. Mrs.

Vinick ended up with an open bite.

Mrs. Vinick proceeded to surgery on June 17, 2008.

Dr. Whipple, who claimed to be an expert in maxillofacial trauma surgery, performed surgery on Mrs. Vinick. He performed ORIF of the parasymphysial and ramus fractures, closed reduction of the subcondylar fractures and subluxed condylar head. He then placed Mrs. Vinick in mandibulomaxillary fixation (MMF) which was too loose to maintain her mouth in a fixed position. Dr. Whipple did not make any attempt to perform ORIF of either subcondylar fracture. This turned out to be disastrous to Mrs. Vinick.

Mrs. Vinick developed a significant open bite because the subcondylar fractures were not properly repaired by Dr. Whipple. Her rear teeth banged together. Her front teeth did not meet. Her mouth would not close. Since that time in hundreds of hours of follow-up treatment. She has had to have all of her molars pulled out and all of her other teeth altered in an attempt to obtain a better fit in her mouth. During that time she has been in substantial pain. She has had to be on a liquid and pureed food diet for the past 5 years. She cannot sleep well because she is so uncomfortable, in constant pain and since her mouth does not close well, her mouth is always dry. The dental specialists she is seeing have proposed

to have temporary then permanent crowns placed on all of her teeth.

The Vinicks filed this action against Dr. Whipple, Dr. Yoo and Harborview Medical Center. The action alleged professional negligence and malpractice, loss go a chance of a better outcome, common law negligence, lack of informed consent, negligent failure to appropriately evaluate, intervene and timely treat Plaintiff/Appellant Elaine Vinick. (CP 1) Plaintiffs dismissed Dr. Yoo because it appears he was under the direction of Dr. Whipple. Defendant Harborview was dismissed during the trial.

During the trial, defense counsel repeatedly asked Mr. and Mrs. Vinick about claims for the same damages from collateral sources in a prior lawsuit against the owner of the premises where the accident occurred and the City of Seattle. Plaintiffs/appellants' counsel objected to this line of questioning based upon *Diaz v. State*, 175 Wn.2d 457, 285 P.3d, 873 (2012).

Also during trial defense counsel repeatedly asked Mr. and Mrs. Vinick about prior unrelated falls of Mrs. Vinick Plaintiff/appellant presented a Motion in Limine to exclude evidence of unrelated falls which the Court denied.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

Appellants assign error to the following actions by the trial court:

1. The trial court erred by dismissing

Plaintiffs/appellants' claims for failure to obtain an informed consent in its order dated April 8, 2013 when a) the physician who reviewed the informed consent with Mrs. Vinick failed to inform the Mrs. Vinick of a material fact relating to treatment, ORIF of the condyle fracture; (b) Mrs. Vinick consented to treatment without being aware of that fact; (c) a reasonably prudent patient under similar circumstances would not have consented given such information; and (d) the treatment in question proximately caused in jury to Mrs. Vinick.

2. The trial court erred in denying Plaintiffs/appellants' motion in limine, in its Joint Order on Motions in Limine dated March 28, 2013, to exclude all evidence of fault by non-parties, and other evidence of compensation from collateral sources covered by the trial court's written order dated March 15, 2013 related to settlement in the prior case involving prior the sidewalk injury.

3. The trial court erred in failing to instruct the jury on the standard of care for a health care professional who holds himself out as a specialist, under WPI 105.02, namely Mark Whipple, who

held himself out as a specialist in maxillofacial surgery.

4. The trial court erred in denying Plaintiffs/appellants' motion in limine, in its Joint Order on Motions in Limine dated March 28, 2013, to exclude all evidence of unrelated falls of plaintiff/appellant Elaine Vinick in this surgical medical malpractice case.

5. The trial court erred in failing to instruct the jury on Plaintiffs/appellants' claim of a loss of a chance of a better surgery outcome had the surgeon performed an ORIF of one of Mrs. Vinick's condyle fractures as had been testified to on a more probable than not basis by Plaintiffs/appellants' expert Darlene Chan, DDS.

#### **B. Issues Pertaining to Assignments of Error**

1. Was it error for the trial court to dismiss Plaintiff/appellants' claims for failure to obtain an informed consent for the surgery to be performed when the physician who obtained the informed consent form failed to inform the patient of a material fact related to the surgery which neither the patient nor a reasonably prudent patient would have consented to if they had known and the failure to perform that procedure proximately harmed the patient?

(Assignment of Error No. 1)

2. Was it error for the trial court to deny Plaintiff/appellant's Motion in Limine to exclude all evidence of the fault non-parties when Plaintiffs/appellants had propounded written discovery requests to Defendants asking for any evidence indicating fault by non-parties, Defendants never provided any such evidence in response to those requests, such evidence included compensation from collateral sources and would be in violation of *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012)? (Assignment of Error No. 2)

3. Was it error for the trial court when instructing the jury on the standard of care of a health care professional under WPI 105.02 that defendant Mark Whipple who repeatedly held himself out as a specialist in maxillofacial surgery should be held to the standard of a reasonably prudent maxillofacial surgeon? (Assignment of Error No. 3)

4. Was it error for the trial court to deny Plaintiffs/appellants' Motion in Limine to exclude all evidence of unrelated falls of plaintiff/appellant Elaine Vinick when the only damages in this case were from the fall on the sidewalk on June 15, 2008 and the surgery by defendant Mark Whipple? (Assignment of Error No. 4)

5. Was it error for the trial court to fail to instruct the jury on Plaintiffs/appellants' claim of a loss of a chance of a better surgical

outcome under *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011) when Plaintiffs/appellants' expert testified that Plaintiff/appellant would have had a chance of a better outcome on a more probable than not basis if Dr. Whipple had performed an ORIF on one of Mrs. Vinick's condyle fractures? (Assignment of Error No. 5)

### III. STATEMENT OF THE CASE

#### **A. The Plaintiffs/appellants and Their Family Travel to Seattle to Take a Cruise to Alaska**

On June 14, 2008 Plaintiffs/appellants (hereinafter "Vinicks", their adult children and the spouses of their adult children traveled to Seattle to start a cruise to Alaska. (RP Volume 5, pg. 40). (Hereinafter Report of Proceedings citations are referred to by RP, then V for volume, the volume number and page number. The forgoing cite would be "RP, V5, 40).

#### **B. Mrs. Vinick Trips and Falls on Sidewalk Injuring Jaw; Taken to Harborview**

On June 15, 2008, the family was walking on a sidewalk in downtown Seattle when Plaintiff/appellant Elaine Vinick (hereinafter "Mrs. Vinick") tripped on a broken sidewalk, fell and broke her jaw. (RP, V5, 42). She was taken by emergency vehicle to Harborview Medical Center (Hereinafter "HMC"). (RP, V5, 50). She was seen

in the emergency room and admitted to HMC. (RP, V5, 50). Mrs. Vinick was concerned about how she would be treated at HMC and was reassured that HMC had the best oral surgeons in the country. (RP, V5, 53).

**C. An Intern in the Otolaryngology Department Goes Over the Informed Consent Form with Mrs. Vinick But Fails to Inform Her of a Critical Surgical Option**

Mrs. Vinick remembered the informed consent interview. Although she did not know who the woman was who performed the interview, she remembered there was no talk about plates or screws on the fractures on the side of her face, no talk about the risks or benefits of such a procedure, no talk about the procedure at all. Mrs. Vinick's testimony on the issue was that she was asked to sign some papers marked "Special Consent for Procedural Treatment." She did sign them. They told her she had broken bones and would need surgery. They told her there were risks such as bleeding, infection, anesthesia, possible nerve damage and possible TMJ. No one mentioned Dr. Whipple. The form mentioned mandibular fixation open reduction internal fixation mandible, but no one told her what those words meant. No one told her she could end up with an open bite. During the informed consent discussion a woman doctor did not say they would do any

sort of operation or plating or screws or anything on either the sides of her face? They told her they would put her back together the way she was before her injury. (RP, V5, 54-56).

This testimony establishes that Mrs. Vinick was not informed of the risks and benefits of an open reduction and internal fixation of one of her condylar fractures.

**D. Plaintiff's Expert Darlene Chan, DDS Testified the Procedure Which the HMC Intern Failed to Inform Mrs. Vinick was Significant and the Failure to Perform the Procedure Caused the Injury, an Open Bite**

Dr. Chan's testimony made it clear that information was a material fact, that the failure to perform this procedure would leave Mrs. Vinick with an open bite and that Mrs. Vinick did end up with an open bite because Dr. Whipple failed to perform that procedure. Any reasonable patient would not consent to the surgery if she had been advised of these facts.

Dr. Chan addressed the materiality of this information, the scientific nature of the risk, the nature of the harm and the certainty of the outcome:

"Q. Could you perhaps demonstrate how those muscles -- those work on the skull?

A. Well, this blue rubber band was sort of to give the idea that the muscle attaches from the lower jaw to the cheek bone and from the -- and from the coronoid to the side of the

skull. In any case, the pull is up and shortening of this area. So when the condyle no longer has a good connection to the rest of the jaw, then that's what happens. This movement occurs and you get --

\* \* \*

A. Is you get what's called an anterior open bite because -- and that's the problem with these fractures, they need to be - - have wires or plates and screws to hold them in place because they'll tip, they'll get out of position.

Anyway, that's what happens. This whole thing shortens, this angle increases, and this area in the front opens up.

Q. So that jaw rotates up; is that right?

A. Rotates it, rotates up.

Q. And that's what -- is that referred to as what is that loss of?

A. Vertical dimension. This is vertical up and down, and this dimension here between the head of the condyle where it would fit to the angle of the jaw is a -- you can make a measurement, and when that shortens, we call it a loss of vertical dimension.

Q. And is that a known problem when that occurs with those types of fractures?

A. Yes, this is.

Q. Okay.

A. This is an expected outcome of a bilateral subcondylar fracture where at least one side is not having a plate and screws to hold it where it's supposed to go."

(RP, V2, 37-38).

Dr. Chan further explains based upon her training and experience

why the outcome of not performing the procedure was material:

"A. Because the -- my training and experience, as well as extensive literature review shows that the indications for an open reduction were met here, and it was not done, and a fixation.

That is, if you have a bilateral fracture, and you have poor teeth to stabilize things, or a lack of teeth, you have to have internal fixation because you don't have external fixation. Therefore, at least one side needs to be open.

Independent of that, if one side of the condylar fracture is totally out of the fossa, in other words, dislocated out of the fossa, as it was here, and the other side is displaced, and you have poor teeth, or you have better-than-poor teeth, you still need to fix one side.

And the reason is because this posterior area shortens, and it can shorten over the next few days even, and what that will do is create the open bite.”

(RP, V2, 59-60)

And finally after saying that she looked at 370 articles and text books and found 40 of those articles and text books dated from the 1953 through 2012 addressing open reduction and internal fixation of condyle fractures, she concluded:

“A. My opinion is that an open reduction internal fixation of one condyle, preferably initially, the one that was dislocated out of the fossa, that being the left condyle, should have been done since there was no way to provide adequate external fixation in this case, given that she was missing teeth and had intruded teeth.” (RP, V2, 75-76)

Evidence of informed consent has been presented.

Mrs. Vinick was not informed of the risks and benefits of ORIF of one of her condyle fractures, a material fact. The failure to perform that procedure resulted in a known risk, an open bite. No reasonable patient would have consented to the surgery if she had known this.

**E. The Trial Court Denied Plaintiffs/Appellants’  
Motion in Limine to Exclude All Evidence of Fault  
of Non-Parties Even Though Defendants Failed to  
Respond to Written Discovery Requests About**

**Such Evidence and Such Evidence Included  
Implied Claims of Compensation from Collateral  
Sources and in Violation of *Diaz v. State*.**

Plaintiffs/Appellants timely presented a motion in limine to exclude all evidence of the fault of non-parties. In its answer to the Complaint, Defendants alleged the affirmative defense of:

**“Apportionment of fault to other entities or persons.** This is an alternative pleading asserting the right to apportionment in the event a jury rejects the defenses asserted by these defendants concerning a lack of fault. To the extent that any entity or person contributed to plaintiffs’ injuries, and was at fault in doing so, then these defendants request that liability of these defendants, if any, be apportioned to such persons or entities according to the percentage of fault in accordance with RCW 4.22, and that any verdict or judgment should be reduced consistent with the provisions of RCW 4.22.” (CP 24, Ex. A)

In Plaintiffs’ First Interrogatories and First Requests for Production to Defendants February 2, 2012, Interrogatory No. 2 asked:

“Do you allege that plaintiff Elaine Vinick’s jaw disability was caused by or contributed to by individuals, entities, or factors other than plaintiff Elaine Vinick? If so, please identify:  
1) Each such individual, entity, or factor;  
2) The specific facts and reasons upon which you base your allegation that they caused or contributed to plaintiff Elaine Vinick’s jaw disability.”

Defendants responded to that Interrogatory that they did not have such knowledge as follows:

“Defendants pled apportionment of fault under RCW 4.22 as an affirmative defense. This is a statement of law. But as to apportionment, it is presently unknown at this time and discovery is continuing. Defendants pled the defense of apportionment of fault because answers and affirmative defenses must be filed so early in the process, before significant discovery has taken place. Defendants pled this defense to preserve it and will modify or withdraw it as warranted by the evidence.

Defendants never supplemented their answer to this interrogatory answer. Nonetheless, the trial court denied Plaintiffs/Appellants’ motion in limine to exclude evidence of fault of non-parties. The only allegation of fault of nonparties Defendants have alleged is in their Motion regarding setoff filed just 16 days before trial and long after the discovery cutoff date. The trial court entered a vague Order relating to the possible fault of nonparties for Mrs. Vinick’s sidewalk fall indicating the court would deal with the fault of non-parties via special verdict forms, which never occurred because the defense withdrew its claim that non-parties might be at fault after the close of testimony.

In the meantime, the trial court allowed the Defendants/Appellees’ attorney, over the objection of Plaintiffs/Appellants’ counsel to question the Vinicks extensively about claims for monetary and nonmonetary damage they made in

a prior lawsuit against the City of Seattle and the owner of the property where Mrs. Vinick fell on the sidewalk to demonstrate the fault of non-parties.

It has always been Plaintiffs' position that the damages suffered in the sidewalk fall do not require evidence other than that it happened and that the fall caused the injuries which necessitated the surgery performed by Dr. Whipple.

**F. The Trial Court Did Not Instruct the Jury that Defendant Mark Whipple, MD Who Repeatedly Held Himself Out to be a Specialist in Maxillofacial Trauma Surgery Had a Duty to Exercise the Degree of Skill, Care, and Learning Expected of a Reasonably Prudent Maxillofacial Surgeon in the State of Washington Acting in the Same or Similar Circumstances Under WPI 105.02**

During the trial, defendant/appellee Mark Whipple, MD was consistently held out to be a reasonably prudent and qualified maxillofacial surgeon. Examples of these representations from Dr. Whipple himself included:

"But a big part of my - - practice at Harborview, of course is craniomaxillofacial trauma surgery. (RP, V6, 146: 9-11).  
In residency did a lot of mandible fracture surgeries. (RP, V6, 147: 7-10).  
Several hundred mandible surgeries (RP, V6, 147: 24-25).  
In residency learned to do open reduction and internal fixation of maxillomandible fixation with fractures such as Mrs. Vinick (RP, V6, 149: 10-13).  
Done mandible, condyle surgeries throughout my career (RP, V6, 150: 14-19).

Out of about 350 mandible fractures that come to HMC each year, about 10% are my patients. (RP, V6, 161: 16-20).

80% - 90% of those mandible patients I do surgery on. (RP, V. 6, 162, lines 2-4).

About half involve condyle fractures like in this lawsuit. (RP, V6, 163 11-16).

Despite these repeated representations of the expertise of Dr.

Whipple as a specialist in maxillofacial trauma surgery, the trial

court refused to give Plaintiffs'/Appellants' proposed jury instruction

based upon WPI 105.02 which provided that health care

professionals who hold themselves out as specialists in a particular

field should be held to the standard of a reasonably prudent

specialist in similar circumstances. (CP 45, Instruction No. 4).

**G. The Court Denied Plaintiffs/Appellants' Motion in Limine and Admitted Evidence of Unrelated Falls by Elaine Vinick, the Sole Purpose of Which was to Prejudice Plaintiffs/Appellants**

The Vinicks timely brought a Motion in Limine to exclude all evidence of unrelated falls of Elaine Vinick. (CP 28, pgs. 255-256).

HMC records and records of other providers made reference to other falls suffered by Mrs. Vinick. These falls did not contribute to Mrs. Vinick's injuries or damages in this case. Any reference to such falls would only serve to infer some sort of fault, clumsiness or character trait on Mrs. Vinick's part with no purpose or relevance in this case. The trial court denied Plaintiffs' motion in limine to

exclude this evidence and allowed the defense attorney to examine Mrs. Vinick at length about these completely irrelevant and prejudicial events. (RP, V5, 79-106). Plaintiff's counsel asked Mrs. Vinick to explain the falls only because the court allowed evidence of them.

**H. The Trial Court Refused to Instruct the Jury on Plaintiffs/Appellants' Theory that Mrs. Vinick Lost a Chance at a Better Surgical Outcome Because Dr. Whipple Did Not Perform ORIF on One of Her Condyle Fractures**

During trial, Plaintiffs/Defendants' expert Darlene Chan, DDS, repeatedly explained the Mrs. Vinick would, on a more probable than not basis, have had a chance of a better surgical outcome if Dr. Whipple had performed a open reduction internal fixation a/k/a ORIF on one of Mrs. Vinick's condyle fractures, preferably the left condyle fracture which was dislocated and displaced.

Dr. Chan explained why Dr. Whipple should have performed in ORIF on the left condyle fracture and why it was a breach of the standard of care for a surgeon performing this surgery in the State of Washington to not perform that ORIF. (RP, V2, 59-61).

Dr. Chan explained why Dr. Whipple again failed to meet the standard of care by only placing Mrs. Vinick in mandibular maxillary

fixation with guiding elastics because it would not immobilize the teeth. (RP, V2, 63).

Dr. Chan explains that in her opinion the applicable medical literature indicates that an ORIF should have been performed by Dr. Whipple on the left condyle fracture which was dislocated out of the fossa. (RP, V2, 75-76).

Dr. Chan again explains that Mrs. Vinick was going to end up with an open bite even though she had adequate occlusion and both condyles were seated in the fossa because Dr. Whipple did not do an ORIF on one of the condyle fractures. (RP, V2, 122-123).

Plaintiffs/Appellants offered the following instruction on loss of a better surgical outcome based upon Dr. Chan's repeated testimony that such an adverse outcome was inevitable without the ORIF on one of the condyle fractures:

**"PLAINTIFFS' PROPOSED INSTRUCTION NO. 8**

In connection with the Plaintiff Elaine Vinick's claims of injury resulting from negligence by failing to provide Plaintiff Elaine Vinick with chance of a better surgery outcome, the Plaintiffs have the burden of proving each of the following propositions:

First, that by failing to perform an open reduction and internal fixation of one of Plaintiff Elaine Vinick's bilateral subcondylar fractures Plaintiff Elaine Vinick lost a chance of better outcome in her surgery;

Second that the by failing to perform that procedure Defendant Mark Eliot Whipple failed to follow the applicable standard of care and was therefore negligent

Third, that the failure to perform that procedure was a substantial factor in causing Plaintiff Elaine Vinick's injury; and

Fourth, that the negligence of the Defendant Mark Eliot Whipple was a proximate cause of the injury to the Plaintiffs.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the Plaintiffs. On the other hand, if any of these propositions has not been proved, your verdict should be for the Defendants as to this claim.

WPI 105.09 Loss of a Chance of Survival (Better Outcome)  
(No instruction, commentary only)

The trial judge explained that she would not instruct on the loss of a better surgical outcome but said Plaintiff could argue it to the jury. (RP, V7, 80-86).

#### **IV. SUMMARY OF ARGUMENT**

A. In a medical malpractice case, the theory of failure to obtain informed consent for a medical procedure should be submitted to the jury when, as in this case, the physician fails to inform the patient of a material fact relating to her treatment, the patient consents to the treatment without that knowledge, a reasonable patient would not have given consent if she had such information and the treatment caused injury to the patient.

B. A trial court should not allow evidence of the fault of non-parties when the opposing party was asked and refused to provide any evidence of such fault during the discovery process. It is even more critical to exclude such evidence when that evidence includes evidence which strongly implies the plaintiff received compensation from a collateral source.

C. When a health care professional repeatedly holds himself out as a specialist in a certain field and performs professional services in that field, the jury should be instructed that the professional should be held to the standard of a reasonably prudent professional in similar circumstances.

D. In a medical malpractice case which involved surgery for injuries suffered in a fall, a trial court should exclude irrelevant evidence of other falls which have no impact on the cause of the fall in the present case or the injuries suffered in the present case.

E. In a medical malpractice case in which there is clear evidence that a surgical patient would have had a substantial chance of a better surgical outcome if a different surgical procedure had been followed, the jury should be instructed of the chance of a better surgical outcome.

## **V. ARGUMENT**

### **A. Standard of Review**

This court reviews the trial court's interpretation of statutes and evidentiary rules *de novo*. *State v. Foxhoven*, 161 Wn.2d 168, 174 (2007). A trial court's decision to admit evidence (under a correctly interpreted rule) is reviewed for abuse of discretion. *Doe v. Gonzaga Univ.* 99 Wn.App. 338, 363 (2000). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *State v. Thang*, 145 Wn.2d 630, 642 (2002). "Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609 (2001).

### **B. Discussion of Assignments of Error**

- 1. Plaintiffs/Defendants presented evidence that Defendant/Appellee failed to obtain an informed consent from Elaine Vinick but the Trial Court Dismissed the Claim.**

*Bays v. St. Lukes Hospital*, 63 Wn. App. 876, 880-881, 825 P.2d 319 (1992) sets out the law for proof of a claim for failure of informed consent for a medical procedure:

"To impose liability on a physician for violation of RCW 7.70.030(3), the plaintiff must prove pursuant to RCW 7.70.050(1): (a) the physician failed to inform the patient of a material fact relating to treatment; (b) the patient consented to treatment without being aware of that fact; (c) a reasonably prudent patient under similar circumstances would not have consented given such information; and (d) the treatment in question proximately caused in jury to the

patient. Bertsch v. Brewer, 97 Wn.2d 83, 640 P.2d 711 (1982).

A material fact is defined by RCW 7.70.050(2) as one to which significance would be attached in deciding whether or not to submit to the proposed treatment and has been defined by case law to mean a possible risk of a serious nature. Ruffer v. St. Frances Cabrini Hosp., 56 Wn. App. 625, 630, 784 P.2d 1288, review denied, 114 Wn.2d 1023 (1990). Smith v. Shannon, 100 Wn.2d 26, 33, 666 P.2d 351 (1983) enunciated the working rule for disclosure of a given risk as a 2-step process:

**Initially, the scientific nature of the risk must be ascertained, i.e., the nature of the harm which may result and the probability of occurrence. The trier of fact must then decide whether that probability of that type of harm is a risk which a reasonable patient would consider in deciding on treatment.**

(Citations omitted.) Expert testimony is required to establish the first step in the process: to prove the existence of a risk, its likelihood of occurrence, and the type of harm in question; the second step requires no expert testimony. Smith, at 33-34." (emphasis added)

The first issue is whether Dr. Whipple, or those he supervised, failed to inform Mrs. Vinick of a material fact related to treatment. Mrs. Vinick remembered the informed consent interview. Although she did not know who the woman was who performed the interview, she remembered there was no talk about plates or screws on the fractures on the side of her face, no talk about the risks or benefits of such a procedure, no talk about the procedure at all. Mrs. Vinick's testimony on the issue was as follows:

Q. You said they had you sign some papers the next day?

A. The next morning, they had me sign some papers.

Q. Let me show you this, which is pages 101 and 102 of exhibit 1, which has already been admitted, ask if that is what you're referring to?

A. Um-hum, yeah, I remember signing this. That's my signature.

Q. Okay, thank you. What does it say at the top of the form, the name of it?

A. Says Special -- Special Consent for Procedural Treatment.

Q. Thank you. Do you remember discussing the surgery with the doctor then when this form was presented to you?

A. Well, I remember them telling me that they -- I had broken bones, and that they were going to have to do surgery to put them back together, and that there was a risk of bleeding, infection, anesthesia problems, anesthesia problems, nerve damage, possibly. That was what I was told, from what I remember.

Q. Put up the first page of this exhibit and ask you a question about that. It says at the top: I give permission to M. Whipple. Did you know who M. Whipple was at that time?

A. No, I did not.

Q. Did anybody tell you who M. Whipple was at that time?

A. No, no, no nobody mentioned his name at that point.

Q. Was he -- was there anybody there named Whipple that you knew of?

A. Not that I knew of.

Q. Okay. It says -- then it goes on to say to perform on Elaine Vinick, that's you, and it says mandibular fixation open reduction internal fixation mandible. Do you remember them using those words?

A. If they had said it, I wouldn't have known what it meant. I don't remember them saying it but ...

Q. To the best of your recollection, when was the first time that you met Doctor Whipple?

A. I think he came into my room after the surgery was the first time that I think I met him.

Q. Do you remember during that discussion whether or not they said anything about that they would do any sort of

operation or plating or screws or anything on either the sides of your face?

A. Not that I recall.

Q. Do you remember them mentioning anything about you ending up with an open bite?

A. Not that I recall.

Q. Do you remember them saying anything about what might problems you might end up with after the surgery?

A. Well, as I say, just anesthesia problems or bleeding or general things, infection.

Q. What about any problems with your jaw?

A. Somebody said T.M.J., I do remember somebody said I might have T.M.J.

Q. All right. What was your understanding after that meeting with the doctor -- Was the doctor a woman or a man, by the way?

A. Was a woman doctor.

Q. Do you remember her name?

A. Only from what I've learned since, I really --

Q. Don't remember, independent recollection, okay. So what was your understanding after meeting with the woman doctor at the time you signed the form as to what the results of the surgery would be?

A. I assumed that I would have the surgery, they would put everything back where it was, and my mouth would be pretty much the same as it was before the surgery.

Q. Did they say anything that indicated that it might not be, other than the T.M.J.?

A. The T.M.J., she thought I would have T.M.J."

(RP, V5, 54-56).

This testimony establishes that Mrs. Vinick was not informed of the risks and benefits of an open reduction and internal fixation of one of her condylar fractures. Dr. Chan's testimony makes it clear that information was a material fact, that the failure to perform this procedure would leave Mrs. Vinick with an open bite and that Mrs.

Vinick did end up with an open bite because Dr. Whipple failed to perform that procedure. Any reasonable patient would not consent to the surgery if she had been advised of these facts.

Dr. Chan addressed the materiality of this information, the scientific nature of the risk, the nature of the harm and the certainty of the outcome:

“Q. Could you perhaps demonstrate how those muscles -- those work on the skull?

A. Well, this blue rubber band was sort of to give the idea that the muscle attaches from the lower jaw to the cheek bone and from the -- and from the coronoid to the side of the skull. In any case, the pull is up and shortening of this area. So when the condyle no longer has a good connection to the rest of the jaw, then that's what happens. This movement occurs and you get --

\* \* \*

A. Is you get what's called an anterior open bite because -- and that's the problem with these fractures, they need to be - have wires or plates and screws to hold them in place because they'll tip, they'll get out of position.

Anyway, that's what happens. This whole thing shortens, this angle increases, and this area in the front opens up.

Q. So that jaw rotates up; is that right?

A. Rotates it, rotates up.

Q. And that's what -- is that referred to as what is that loss of?

A. Vertical dimension. This is vertical up and down, and this dimension here between the head of the condyle where it would fit to the angle of the jaw is a -- you can make a measurement, and when that shortens, we call it a loss of vertical dimension.

Q. And is that a known problem when that occurs with those types of fractures?

A. Yes, this is.

Q. Okay.

A. This is an expected outcome of a bilateral subcondylar fracture where at least one side is not having a plate and screws to hold it where it's supposed to go."  
(RP, V2, 37-38).

"A. Because the -- my training and experience, as well as extensive literature review shows that the indications for an open reduction were met here, and it was not done, and a fixation.

That is, if you have a bilateral fracture, and you have poor teeth to stabilize things, or a lack of teeth, you have to have internal fixation because you don't have external fixation. Therefore, at least one side needs to be open.

Independent of that, if one side of the condylar fracture is totally out of the fossa, in other words, dislocated out of the fossa, as it was here, and the other side is displaced, and you have poor teeth, or you have better-than-poor teeth, you still need to fix one side.

And the reason is because this posterior area shortens, and it can shorten over the next few days even, and what that will do is create the open bite."  
(RP, V2, 59-60)

And finally after saying that she looked at 370 articles and text books and found 40 of those articles and text books dated from the 1953 through 2012 addressing open reduction and internal fixation of condyle fractures, she concluded:

"A. My opinion is that an open reduction internal fixation of one condyle, preferably initially, the one that was dislocated out of the fossa, that being the left condyle, should have been done since there was no way to provide adequate external fixation in this case, given that she was missing teeth and had intruded teeth."  
(RP, V2, 75-76)

Evidence of informed consent which conformed to the law as set forth in *Bays v. St. Lukes Hospital* was presented at trial.

Mrs. Vinick was not informed of the risks and benefits of ORIF of one of her condyle fractures, a material fact. The failure to perform that procedure resulted in a known risk, an open bite. No reasonable patient would have consented to the surgery if she had known this. It was error to dismiss this claim without submitting it to the jury.

**2. The Trial Court Allowed Defense to Submit Evidence of the Fault of Non-Parties Even Though the Defense Refused to Respond to Discovery Requests About Such Evidence. That Same Evidence Strongly Implied Compensation from Collateral Sources Contrary to *Diaz v. v. State*, 175 Wn.2d 457, 285 P..3d 873 (2012).**

During cross examination of plaintiffs/appellants, over the objection of their attorney, defense counsel repeatedly questioned both plaintiffs about claims for compensation from collateral sources. During the cross examination of Calvin Vinick, defense counsel made the following inquiries and received the noted responses from Mr. Vinick:

Q. So then we get back to the medical bills, the claim. This is not the first time that you have claimed — made a claim for those same medical bills, is it? Didn't you make that claim against the City of Seattle and the Paramount Hotel?

MR. WALLSTROM: Your Honor, sorry, I have to object based upon the Court's earlier ruling (inaudible) matter.

THE COURT: I think it's permissible. I'm going to give you one or two questions.

MR. FAIN: Yes, ma'am.

THE COURT: I know, I know, you're —

MR. FAIN: -- where I'm not supposed to go.

THE COURT: It's overruled.

MR. FAIN: All right.

Q. Isn't it true that you brought a claim, and actually filed a lawsuit against the City of Seattle and the Paramount Hotel involving the sidewalk where your wife tripped?

A. That is correct.

Q. And isn't it true that, in that lawsuit, you claimed as damages, as injuries, you claimed the same injuries, you claimed your wife's jaw was broken and fractured; isn't that true? Isn't it true?

A. I don't understand what I'm answering to.

Q. In your lawsuit against the City of Seattle, isn't it true that you claimed that your wife's jaw was fractured, and she needed medical treatment; isn't that true?

A. The fact that she had surgery was the proof of its — of its own.

\* \* \*

THE CLERK: Exhibit 134 is marked.

THE COURT: Are you withdrawing 133?

MR. FAIN: Yes, ma'am.

THE COURT: All right, so 133 is withdrawn. You'll be looking at 134, just for the record.

(Discussions between counsel not reported)

MR. FAIN: Here's a copy for the Court.

Q. Mr. Vinick —

MR. WALLSTROM: Your Honor --

BY MR. FAIN:

Q. —I'm going to hand you what the clerk has marked as exhibit number 134 in this case.

MR. WALLSTROM: Your Honor, I'm sorry, I have the same objection based upon the —

THE COURT: He hasn't offered it yet. I don't know if he's going to offer it.

MR. WALLSTROM: Thank you.

MR. FAIN: May not need to offer it if it refreshes his recollection.

THE COURT: I understand.

BY MR. FAIN:

Q. What we're looking at is a pleading in that lawsuit; is that correct? (Witness reviewing document)

Q. An amended complaint; we call it a pleading in the law.

A. A lawsuit, is that —

Q. A lawsuit, yes.

A. Is that another word?

Q. Yes, sir; is that correct?

A. Correct.

Q. And in your lawsuit, it was against — First of all, it involved the fall of your wife on June 15th, 2008, did it not?

A. That is correct.

Q. And it was against the City of Seattle and the Paramount Hotel; is that correct?

A. That's correct.

Q. And you claimed as a result of the — that fall that your wife — and I'm looking at page three. Does this jog your recollection? Do you remember claiming that Mrs. Vinick had suffered significant monetary losses?

\* \* \*

Q. Do you remember claiming that, because of that fall, that you and Elaine had expended and would be compelled to expend significant amounts of money for medical, hospital and related medical services in an effort to regain Ms. Vinick's health, et cetera; do you remember that now?

A. I do.

Q. Okay. And the medical bills that you were seeking were the same medical bills you just talked to this jury about, weren't they?

A. I don't think I was talking about medical bills at all. You were asking a question were they paid, and I responded that they were.

Q. Okay. Let's go to paragraph — the next page, paragraph 6.3.

And isn't it true, and you — and do you remember that you were claiming that, because of the fall, not because of your treatment at Harborview, but because of the fall, that Elaine had suffered, because of the City and the hotel, that you would incur past and future medical expenses? Paragraph 6.3; remember that?

A. That's correct.

Q. And do you remember claiming that, because of her fall, that, under paragraph 6.5, Elaine had had a decrease in the quality of life that she was experiencing and would experience in the future?

A. That is correct.

Q. And it affected her social activities; isn't that what you say in that paragraph?

A. Correct.

Q. And you also indicated that there was a loss of consortium, correct?

A. Absolutely.

Q. So you do remember those things now, true?

A. Hearing the wording that you're giving to me now, yes, I do.

Q. All right.

\* \* \*

Q. Mr. Vinick, I'm going to now hand you what the clerk has marked as exhibit number 135.

A. Thank you.

Q. Thank you, sir. Let's see if this jogs your memory. And, in particular — well, number one, you're reviewing what was a claim that your lawyer filed on your behalf with the City of Seattle, correct? Is that what it says?

A. Correct.

Q. All right. And it was by Mr. Wallstrom, correct?

A. Correct.

Q. All right. Now, if you'll turn to page seven of your claim against the City of Seattle, do you remember claiming that, because of the fall, that you had suffered \$99,600.11 in damages that were the Harborview medical bills, first — first line on page seven; do you remember that now?

A. I do.

Q. And then the third line discusses the medical bills from the physicians, and do you remember claiming that, because of the fall, that you had been damaged \$7,826.20 for the physician bills?

A. It was the cost of the surgery and the physicians not the fall per se.

Q. It's the -- Well, you were claiming that the City was — it's because of the sidewalk that she fell, true? That's what you're suing them for, true?

A. We were suing for out-of-pocket claim.

Q. Well, when you talk about things like pain and suffering and quality of life, those really aren't out-of-pocket type things, are they?

A. No, they are not.

Q. Okay. But with respect to the two dollar amounts that you just gave on direct examination to this jury, isn't it true that both of those amounts were included in your claim in the exact same amounts against the City of Seattle and the Paramount Hotel; isn't that true?

A. That is true.

Q. And your lawsuit against the City of Seattle and the Paramount Hotel had nothing to do with alleged medical malpractice. Instead, it had to do with the condition of the sidewalk; isn't that true?

A. I don't know how to answer that at the moment.

Q. Okay. The claim against the City of Seattle, exhibit 135, was dated January 15th, 2009; is that correct?

A. Correct."

RP, V5, 23-31)

And defense counsel proceeded to ask Mrs. Vinick similar questions about the liability of non-parties and to strongly imply the Vinicks had already been compensated from collateral sources.

(RP, V5, 128-132).

**a. Defense Should Not have been Allowed to Present Evidence of the Fault of Non-Parties They Refused to Disclose in Discovery.**

On December 28, 2011, Defendants filed their Answer and Affirmative Defenses to the Complaint in this lawsuit. In that Answer and Affirmative Defenses, Defendants pled an affirmative defense of apportionment of fault to other entities or persons but did not name other entities as required by CR 12(i). Declaration of Paul Wallstrom in Opposition to Motion to Amend at 2. (CP 24)

Defendants responded to an interrogatory from Plaintiffs as follows:

**"INTERROGATORY NO.3:** Do you allege that plaintiff Elaine Vinick's jaw disability was caused by or contributed to by individuals, entities, or factors other than plaintiff Elaine Vinick? If so,

please identify:

- 1) Each such individual, entity, or factor;
- 2) The specific facts and reasons upon which you base your allegation that they caused or contributed to plaintiff Elaine Vinick's jaw disability.

**ANSWER:**

*Defendants pled apportionment of fault under RCW 4.22 as an affirmative defense. This is a statement of law. But as to apportionment, it is presently unknown at this time and discovery is continuing. Defendants pled the defense of apportionment of fault because answers and affirmative defenses must be filed so early in the process, before significant discovery has taken place. Defendants pled this defense to preserve it and will modify or withdraw it as warranted by the evidence.” Id. (CP 24, Ex. B)*

On September 20, 2012, the Washington State Supreme Court decided the case of *Diaz v. State*, 175 Wn. 2d 457, 285 P.3d 873 (2012). *Id.* at 3. (CP 24, Ex. D).

On January 23, 2013, Defendants served Plaintiffs with a Supplemental Answer of Defendants in which they claimed a setoff for the amount of Plaintiffs' settlement with the property owner and City of Seattle for injuries Plaintiff Elaine Vinick suffered when she fell and hit her head on a sidewalk in downtown Seattle. Defendants claimed the setoff right involved the “same injury and the same claim for damages.” *Id.* (CP 24, Ex. C).

On January 28, 2013, counsel for Plaintiff sent Thomas Fain, as counsel for Defendants, a letter advising him that in the opinion of counsel for Plaintiffs, *Diaz v. State*, eliminated the right to claim a setoff for a settlement of the sidewalk case under RCW 7.70.080. *Id.* (CP 24, Ex. D).

On February 11, 2013, the discovery cutoff date in this case passed. *Id.* at 3-4. (CP 24). Defendants/Appellants never supplemented their discovery responses noted above requesting facts supporting fault of non-parties. They should not have been allowed to offer evidence of the fault of non-parties when they refused to respond to discovery about that issue.

**b. Defense Questions Implying Payments from Prior Sources Violates *Diaz v. State***

*Diaz v. Sate*, 175 Wn. 2d 457, 285 P.3d. 873 (2012) eliminated the right to introduce evidence of payments from collateral sources in medical malpractice cases. In *Diaz*, the Court stated:

“If settlement evidence was admissible under RCW 7.70.080, as the trial court ruled, there would be yet another conflict because settlement evidence is inadmissible under ER 408 and applying the statute and applying the evidence rule would produce contrary results, raising separation of powers concerns. *Putman v. Wenatchee Valley Med. Ctr.*, PS, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). Under our separation of powers

jurisprudence, when a statute appears to conflict with one of our evidence rules and they cannot be harmonized, the statute must yield to the rule on a procedural issue such as the admissibility of evidence. *Id.* Given the conflict between ER 408 and the trial court's interpretation of RCW 7.70.080, the statute should have yielded to the evidence rule. Thus, the trial court erred by admitting the evidence." 175 Wn.2d at 471.

Although the above is dicta, the reasoning is sound. The extensive evidence of claims and implied payments from collateral sources introduced by defense counsel should never have been admitted and strongly prejudiced plaintiffs/appellants.

**3. The Trial Court Should have Instructed the Jury that Defendant Mark Whipple, MD Who Repeatedly Held Himself Out to be a Specialist in Maxillofacial Trauma Surgery Had a Duty to Exercise the Degree of Skill, Care, and Learning Expected of a Reasonably Prudent Maxillofacial Surgeon in the State of Washington Acting in the Same or Similar Circumstances Under WPI 105.02**

During the trial, defendant/appellee Mark Whipple, MD was consistently held out to be a reasonably prudent and qualified maxillofacial surgeon. Examples of these representations from Dr. Whipple himself included:

- But a big part of my - - practice at Harborview, of course is craniomaxillofacial trauma surgery. (RP, V6, 146: 9-11).
- In residency did a lot of mandible fracture surgeries. (RP, V6, 147: 7-10).
- Several hundred mandible surgeries (RP, V6, 147: 24-25).

- In residency learned to do open reduction and internal fixation of maxillomandible fixation with fractures such as Mrs. Vinick (RP, V6, 149: 10-13).
- Done mandible, condyle surgeries throughout my career (RP, V6, 150: 14-19).
- Out of about 350 mandible fractures that come to HMC each year, about 10% are my patients. (RP, V6, 161: 16-20).
- 80% - 90% of those mandible patients I do surgery on. (RP, V. 6, 162, lines 2-4).
- About half involve condyle fractures like in this lawsuit. (RP, V6, 163 11-16).

Despite these repeated representations of the expertise of Dr.

Whipple as a specialist in maxillofacial trauma surgery, the trial

court refused to give Plaintiffs'/Appellants' proposed jury instruction

based upon WPI 105.02 which read:

**"PLAINTIFFS' PROPOSED INSTRUCTION NO. 4**

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.

An otolaryngologist head and neck surgeon who holds himself or herself out as a specialist in maxillofacial surgery assumes the care or treatment of a condition that is ordinarily treated by a maxillofacial surgeon has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent maxillofacial surgeon 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.

WPI 105.02 Negligence—Health Care Provider—Specialist”

In the present case, such an instruction could have had a substantial impact on the jury because Plaintiff's/Appellants' expert, Darlene Chan, DDS, was a board certified oral maxillofacial surgeon. The type of surgery performed here, of which Dr. Whipple claimed to be a specialist, was the specific area of expertise of Dr. Chan.

**4. The Court Should have Granted  
Plaintiffs/Appellants' Motion in Limine to  
Exclude Evidence of Unrelated Falls by Elaine  
Vinick**

The Vinicks timely brought a Motion in Limine to exclude all evidence of unrelated falls of Elaine Vinick. (CP 28, pgs. 255-256).

HMC records and records of other providers made reference to other falls suffered by Mrs. Vinick. These falls did not contribute to Mrs. Vinick's injuries or damages in this case. References to such falls only serves to infer some sort of fault, clumsiness or character trait on Mrs. Vinick's part with no purpose or relevance in this case. ER 401-403; ER 404. The trial court denied Plaintiffs' motion in limine to exclude this evidence and allowed the defense attorney to examine both Mrs. Vinick at length about these completely

irrelevant and prejudicial events. (RP, V5, 79-106). Plaintiff's counsel asked Mrs. Vinick to explain the falls only because the court allowed evidence of them.

**5. The Trial Court Should have Instructed the Jury that Mrs. Vinick Lost a Chance at a Better Surgical Outcome Because Dr. Whipple Did Not Perform ORIF on One of Her Condyle Fractures**

As stated in *Mohr v. Grantham*, 172 Wn.2d 844, 850, 262 P.3d 490 (2011):

“The medical malpractice statute requires the same elements of proof as traditional tort elements of proof: duty, breach, injury, and proximate cause. RCW 7.70.040. Whether there is a cause of action for a lost chance of a better outcome in the medical malpractice context is a question of law, which we review de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).”

*Mohr* followed and extended the opinion in *Herkovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 606, 664 P.2d 474 (1983) which first recognized the lost chance doctrine in a survival action. As the *Mohr* court pointed out, the plurality opinion in *Herkovitz*, 99 Wn.2d at 634 stated: “The best solution of the issue before us is to recognize the loss of a less than even chance as an actionable injury.”

Regarding the degree of loss of chance, the *Mohr* case held:

“In particular, the *Herskovits* plurality adopted a proportional damages approach, holding that, if the loss was a 40 percent chance of survival, the plaintiff could recover only 40 percent of what would be compensable under the ultimate harm of death or disability (i.e., 40 percent of traditional tort recovery), such as lost earnings. *Herskovits*, 99 Wn.2d at 635 (Pearson, J., plurality opinion) (citing King *supra*, 90 YALE L.J. at 1382). This percentage of loss is a question of fact for the jury and will relate to the scientific measures

available, likely as presented through experts. Where appropriate, it may otherwise be discounted for margins of error to further reflect the uncertainty of outcome even with a nonnegligent standard of care. See King, *supra*, 28 U. MEM. L. REV. at 554-57 (“conjunction principle”).

We find that the *Herskovits* plurality has withstood the broad policy criticisms raised against it and comports with the medical malpractice statute. We find no meaningful basis to distinguish permanent disability from death for the purposes of raising a loss of chance claim. Accordingly, we hold that *Herskovits* applies to medical malpractice cases that result in harm short of death and formally adopt the rationale of the plurality opinion that the injury is the lost chance. For the reasons discussed next, as it relates to the facts of this case, we reverse the order of summary judgment.” *Mohr*, 172 Wn.2d 858-859.

During trial, Plaintiffs/Defendants’ expert Darlene Chan, DDS, repeatedly explained the Mrs. Vinick would, on a more probable than not basis, have had a chance of a better surgical outcome if Dr. Whipple had performed an open reduction internal fixation a/k/a ORIF on one of Mrs. Vinick’s condyle fractures, preferably the left condyle fracture which was dislocated and displaced.

Dr. Chan explained why Dr. Whipple should have performed in ORIF on the left condyle fracture and why it was a breach of the standard of care for a surgeon performing this surgery in the State of Washington to not perform that ORIF. (RP, V2, 59-61).

Dr. Chan explained why Dr. Whipple again failed to meet the standard of care by only placing Mrs. Vinick in mandibular maxillary

fixation with guiding elastics because it would not immobilize the teeth. (RP, V2, 63).

Dr. Chan explains that in her opinion the applicable medical literature indicates that an ORIF should have been performed by Dr. Whipple on the left condyle fracture which was dislocated out of the fossa. (RP, V2, 75-76).

Dr. Chan again explains that Mrs. Vinick was going to end up with an open bite even though she had adequate occlusion and both condyles were seated in the fossa because Dr. Whipple did not do an ORIF on one of the condyle fractures. (RP, V2, 122-123).

Plaintiffs/Appellants offered the following instruction on loss of a better surgical outcome based upon Dr. Chan's repeated testimony that such an adverse outcome was inevitable without the ORIF on one of the condyle fractures:

**"PLAINTIFFS' PROPOSED INSTRUCTION NO. 8**

**(Cited Version)**

In connection with the Plaintiff Elaine Vinick's claims of injury resulting from negligence by failing to provide Plaintiff Elaine Vinick with chance of a better surgery outcome, the Plaintiffs have the burden of proving each of the following propositions:

First, that by failing to perform an open reduction and internal fixation of one of Plaintiff Elaine Vinick's bilateral

subcondylar fractures Plaintiff Elaine Vinick lost a chance of better outcome in her surgery;

Second that the by failing to perform that procedure Defendant Mark Eliot Whipple failed to follow the applicable standard of care and was therefore negligent

Third, that the failure to perform that procedure was a substantial factor in causing Plaintiff Elaine Vinick's injury; and

Fourth, that the negligence of the Defendant Mark Eliot Whipple was a proximate cause of the injury to the Plaintiffs.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the Plaintiffs. On the other hand, if any of these propositions has not been proved, your verdict should be for the Defendants as to this claim.

WPI 105.09 Loss of a Chance of Survival (Better Outcome)  
(No instruction, commentary only)

*Mohr v. Grantham*, 172 Wn.2d 844, 857, 262 P.3d 490 (2011): "We hold that *Herskovits* applies to lost chance claims where the ultimate harm is some serious injury short of death. We also formally adopt the reasoning of the *Herskovits* plurality. Under this formulation, a plaintiff bears the burden to prove duty, breach, and that such breach of duty proximately caused a loss of chance of a better outcome."

There is no question that the proof at trial met the standards set by *Mohr*. The trial court should have given the foregoing instruction.

## VI. CONCLUSION

This Court should order a new trial with instructions to the trial court to:

- Submit the informed consent claim to the jury;
- Exclude all evidence of the fault of nonparties and all evidence implying payments from collateral sources;
- Instruct the jury that defendant Mark Whipple, an otolaryngologist head and neck surgeon who holds himself or herself out as a specialist in maxillofacial surgery assumes the care or treatment of a condition that is ordinarily treated by a maxillofacial surgeon has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent maxillofacial surgeon 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;
- Exclude all evidence of any falls other than the one which injured Elaine Vinick and required surgery at Harborview; and
- Instruct the jury on Plaintiffs/Appellants' theory of liability of loss of a chance of a better surgical outcome because Dr. Whipple failed to perform an open reduction and internal fixation on one of Elaine Vinick's condyle fractures.

RESPECTFULLY SUBMITTED this 18th day of November 2013.

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CERTIFICATE OF SERVICE

I HEREBY DECLARE under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am Plaintiffs/Appellants attorney in this matter.
2. At all material times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.
3. On the dates set forth below I served in the manner noted the: Opening Brief of Appellants, copies of the complete transcripts of the trial proceedings and this Certificate of Service on the following persons:

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4. And that on November 18, 2013 I filed the original and one copy of the Opening Brief of Appellants on:

The Court of Appeals of the State of Washington  
Division I  
One Union Square  
Seattle, WA  
98101-4170

DATED this 18th day of November, 2013.

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