

No. 70353-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

STATE OF WASHINGTON dba HARBORVIEW MEDICAL  
CENTER, MARK ELIOT WHIPPLE, MD and JANE DOE  
WHIPPLE, his wife, and their marital community,

Respondents.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

After six days of trial, a jury rejected appellant Elaine Vinick's allegation that respondent Dr. Mark Whipple committed medical malpractice when he operated to repair jaw fractures Ms. Vinick sustained after falling in downtown Seattle. The trial court correctly dismissed Ms. Vinick's informed consent claim that, unsupported by expert testimony quantifying the probability of the allegedly undisclosed risk, simply repeated her allegations of malpractice. Ms. Vinick cannot establish any prejudice from the trial court's other challenged decisions, including its jury instructions on causation and whether to admit or exclude causation evidence, given the fact that the jury did not even reach the issue of causation under a special verdict finding that Dr. Whipple did not breach the standard of care. In any event, the trial court did not abuse its discretion in its instructional and evidentiary decisions. This court should affirm.

## **II. RESTATEMENT OF ISSUES**

1. Did the trial court properly dismiss Ms. Vinick's informed consent claim, which she based on the same allegations as her medical negligence claim and which she failed to support with

expert testimony quantifying the probability of the allegedly undisclosed risk?

2. Were Ms. Vinick's alleged instructional and evidentiary errors relating to causation, damages, and "fault of nonparties" harmless given the jury's verdict finding Dr. Whipple was not negligent and Dr. Whipple's withdrawal of affirmative defenses asserting fault of others?

3. Did the trial court abuse its discretion by not giving Ms. Vinick's instruction alleging she "lost a chance of better outcome in her surgery" after Ms. Vinick withdrew that instruction, alleged that Dr. Whipple caused her injuries on a "more probable than not" basis, and did not present any expert evidence establishing a specific percentage chance "lost" as a result of the alleged malpractice?

4. Did the trial court abuse its discretion by refusing to instruct the jury that Dr. Whipple was a specialist in "maxillofacial surgery" when he never held himself out as one, but instead consistently testified that he practiced as an otolaryngologist – a surgeon who treated all ailments and injuries of the head and neck?

5. Did the trial court abuse its discretion by allowing Dr. Whipple's counsel to question Ms. Vinick about her history of falls, including falls in which she hit her head and damaged her teeth?

6. Did the trial court abuse its discretion in admitting evidence that the Vinicks had made a claim for the identical injury and damages against the City and property owner where she fell?

### III. STATEMENT OF FACTS

#### A. Factual Background

- 1. Dr. Mark Whipple heads the Otolaryngology Department at Harborview Medical Center, where he treats all manner of head and neck injuries and conditions.**

Dr. Mark Whipple is the head of the Otolaryngology Department at Harborview. (4/8 RP 144-45)<sup>1</sup> Otolaryngologists such as Dr. Whipple treat all diseases and disorders of the head and neck. (4/2 RP 26; 4/8 RP 5, 145; 4/9 RP 49) Dr. Whipple performs head and neck surgery, including ear surgery, nose surgery, sinus surgery, cancer surgery, as well as facial trauma surgery. (4/8 RP 145; 4/9 RP 49) Dr. Whipple has treated fractures of all facial bones, including the jaw bones (the mandible and maxilla), and the

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<sup>1</sup>The report of proceedings of the trial was not sequentially paginated. Citations to the trial are by date and, where applicable, the name of the court reporter, *e.g.*, "4/3 Rawlins RP 8."

eye sockets and sinuses. (4/8 RP 146-47) In contrast to otolaryngologists, oral maxillofacial surgeons focus on jaw bone surgery. (4/2 RP 28; 4/3 Rawlins RP 17)

**2. After falling and fracturing her jaw in June 2008, plaintiff Elaine Vinick was taken to Harborview, where Dr. Whipple performed surgery to repair her jaw fractures.**

Plaintiff Elaine Vinick lives in Manchester, Connecticut. (4/4 RP 35) Ms. Vinick and her family visited Seattle in June 2008 to take a cruise to Alaska. (4/4 RP 5, 40) On June 15, 2008, while preparing to leave for the cruise, Ms. Vinick tripped on a sidewalk in downtown Seattle, fracturing her jaw in several places. (4/4 RP 6, 41-43) Ms. Vinick was taken to Harborview Medical Center for treatment. (4/4 RP 6-7, 50)

After arriving at Harborview, the on-call resident physician evaluated Ms. Vinick's injuries. (4/8 RP 11) In conjunction with the resident physicians, Dr. Whipple devised a treatment plan for Ms. Vinick that included surgery to repair her jaw fractures, which included bilateral subcondylar fractures, a right parasymphysial fracture, and a fractured ramus. (4/8 RP 11, 19, 31, 181; 4/9 RP 9-10, 14; *see also* CP 416) Prior to the surgery, Harborview resident physicians fully evaluated Ms. Vinick and explained her injuries and

the likely surgical procedure they would use to repair her jaw fractures. (4/8 RP 14) Dr. Whipple also discussed the surgical plan with Ms. Vinick prior to the surgery. (4/8 RP 181) Ms. Vinick signed an informed consent form giving Harborview surgeons permission to perform “maxillomandibular fixation, open reduction internal fixation mandible.” (Ex. 1 at 101-02)

On June 17, Dr. Whipple performed surgery on Ms. Vinick. (4/8 RP 25; Ex. 1 at 3) Dr. Whipple performed an “open reduction” on Ms. Vinick’s left condylar fracture, exposing the bone and returning it to its normal position.<sup>2</sup> (4/9 RP 12) Dr. Whipple chose not to “internally fixate” Ms. Vinick’s condylar fractures by installing a plate to hold the bone fragments together because doing so posed significant risks, including facial paralysis and compromising blood supply to the bone, which can cause the bone to die. (4/8 RP 154-56) Dr. Whipple did however, position plates on Ms. Vinick’s fractured parasymphysis and ramus. (4/8 RP 29-32; 4/9 RP 14-17) Dr. Whipple also placed arch bars on her upper and lower jaw to which he attached elastic bands to keep Ms.

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<sup>2</sup> “Reduction” means to put the bone back into its normal position. (4/9 RP 12) An “open” reduction involves making an incision to expose the bone. (4/8 RP 57; 4/9 RP 12) A “closed” reduction involves externally manipulating bones back into their normal position without exposing them. (4/8 RP 57)

Vinick's jaw in the proper position as it healed – a technique called maxillomandibular fixation. (4/8 RP 29-32; 4/9 RP 11, 17, 46-47) At the end of the surgery, Dr. Whipple took a CT scan to confirm that Ms. Vinick's condyles were in the proper position and that her teeth lined up correctly. (4/9 RP 19-21)

Harborview discharged Ms. Vinick two days after surgery, on June 19, 2008. (4/9 RP 28-29) Ms. Vinick saw physician Joel Rosenlicht in Connecticut to manage her post-operative care. (4/4 RP 114) At the time of her first visit with Dr. Rosenlicht on June 24, 2008, Ms. Vinick's teeth lined up correctly and she could fully close her jaw. (4/3 Rawlins RP 103-07) On July 28, 2008, six weeks after her surgery, Dr. Rosenlicht removed Ms. Vinick's maxillomandibular fixation – the arch bar and constraints that held her jaw in proper position after surgery. (4/3 Rawlins RP 108, 120, 128) Ms. Vinick subsequently developed an "open bite," meaning she could not fully close her mouth. (4/8 RP 106-07; 4/3 Rawlins RP 120)

## **B. Procedural History**

- 1. Ms. Vinick sued Dr. Whipple and Harborview Medical Center after settling her negligence litigation against the City of Seattle and the owner of the property adjoining the sidewalk where she fell.**

On October 13, 2011, Ms. Vinick and her husband, Calvin Vinick, sued Dr. Whipple and Harborview asserting claims for malpractice, failure to obtain informed consent, and loss of consortium. (CP 1-10) Ms. Vinick had already settled negligence claims for her injuries caused by the fall against the City of Seattle and the owner of the property adjoining the sidewalk where she fell. (CP 34) Dr. Whipple and Harborview answered Ms. Vinick's complaint asserting the right to a setoff in the amount of Ms. Vinick's settlement under RCW 7.70.080, which allows a medical malpractice defendant to present evidence that a plaintiff had already been compensated for her injuries. (CP 27-30, 34-35)

On March 6, 2013, Dr. Whipple and Harborview moved to amend their answer in response to the Washington Supreme Court's decision in *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012). (CP 55-60, 102-07) *Diaz* held that RCW 7.70.080 had been superseded by the Tort Reform Act, RCW 4.22.060 and RCW 4.22.070, and that evidence that a plaintiff received compensation

for her injuries from a settlement was no longer admissible. 175 Wn.2d at 470, ¶¶ 30-31. As permitted by *Diaz*, Dr. Whipple's and Harborview's motion to amend sought the right to a set-off under RCW 4.22.060, including medical bills for which Ms. Vinick had already been compensated, or alternatively to assert that the City and property owner were at fault for Ms. Vinick's injuries. (CP 55-60, 102-07) The trial court denied Dr. Whipple and Harborview's request to present witnesses regarding the "sidewalk issue," but entered an order stating that it would use a special verdict form "regarding damages caused by the fall versus damages caused by the alleged malpractice and determine an appropriate set-off, if any." (CP 244-45)

**2. A jury rejected Ms. Vinick's malpractice claim against Dr. Whipple following a six day trial.**

Before jury trial on plaintiffs' claims, the trial court denied Ms. Vinick's motion in limine to exclude any "suggestion of fault by [Ms.] Vinick in the fall that caused her injury." (CP 390) During trial, defense counsel questioned Ms. Vinick about her history of falls and whether she had hit her head or damaged her jaw in any of her previous falls. (4/4 RP 79-98, 101-6) Defense counsel also asked Ms. Vinick and her husband whether they had asserted

claims against the City and property owner for the identical injury and damages. (4/4 RP 24-30, 128-32) Defense counsel did not mention the settlement and the trial court refused to admit as exhibits Ms. Vinick's claim against the City or her complaint against the City and property owner. (CP 413, 773-74; Ex. 134-135)

At the close of Ms. Vinick's evidence, the trial court granted Harborview's motion to be dismissed from the case because no evidence supported its liability. (CP 664-67; 4/4 RP 146) Ms. Vinick did not oppose that ruling, and it is not an issue on appeal. (CP 705; 4/4 RP 146) The trial court also granted Dr. Whipple's motion to dismiss Ms. Vinick's informed consent claim. (CP 665-67, 705-06, 707-11)

The trial court refused Ms. Vinick's request for an instruction stating that Dr. Whipple "held himself . . . out as a specialist in maxillofacial surgery" and thus "has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent maxillofacial surgeon." (4/8 RP 186-90; 4/10 RP 95; CP 591) Instead, based on WPI 105.01, the trial court instructed the jury that "[a]n otolaryngology head and neck surgeon has a duty to exercise the degree of skill, care, and learning expected of a

reasonably prudent otolaryngology head and neck surgeon . . . .”  
(CP 733)

Ms. Vinick’s proposed instruction No. 8 initially sought to assert a separate “loss of chance” claim based on her “claims of injury resulting from negligence by failing to provide Plaintiff Elaine Vinick with chance of a better surgery outcome.” (CP 595) During discussions regarding jury instructions, Ms. Vinick’s counsel withdrew proposed instruction No. 8, stating “I had originally suggested this was a separate claim. I don’t think it’s actually a separate claim.” (4/9 RP 60-61, 80-81) Instead, Ms. Vinick’s counsel suggested including a “loss of chance” provision in the trial court’s instruction setting forth the elements of her negligence claim. (4/9 RP 60-61, 80-81; *see* WPI 105.03; CP 732) The trial court noted that Ms. Vinick had withdrawn her proposed instruction No. 8, refused to include any “loss of chance” language in the instructions, and instead gave WPI 105.03 without any additional language, as instruction No. 6. (4/9 RP 83, 88; CP 732) Ms. Vinick excepted to the failure to include in the court’s instruction No. 6 “a provision . . . that talks about the loss of a chance of a better outcome,” but did not except to the failure to give her proposed instruction No. 8. (4/10 RP 95)

Before the jury was instructed, Dr. Whipple withdrew his defense that Ms. Vinick's damages were caused by the fault of others, including that of Ms. Vinick. (CP 410, 480, 483; 4/9 RP 58) Accordingly, the special verdict form submitted to the jury asked if Dr. Whipple had been negligent, and if so, whether his negligence was a proximate cause of Ms. Vinick's injuries. (CP 768) The jury found that Dr. Whipple had not been negligent and did not reach the questions of proximate cause or the amount of Ms. Vinick's damages. (CP 768) The trial court entered judgment on the jury's verdict. (CP 788-91) Ms. Vinick appeals. (CP 792-818)

#### IV. ARGUMENT

**A. The trial court properly dismissed the informed consent claim because it duplicated Ms. Vinick's negligence claim and because Ms. Vinick failed to provide expert testimony quantifying the probability of a "material" risk of which she was not informed.**

**1. The trial court correctly dismissed Ms. Vinick's informed consent claim, which simply repeated her medical malpractice claim.**

Informed consent and medical negligence are distinct causes of action with distinct elements. Where, as here, a plaintiff alleges that a defendant physician failed to "inform" her that he would use a treatment option that fell below the standard of care – a claim subsumed in her cause of action alleging that the treatment itself

was negligence – a trial court properly dismisses that “informed consent” claim as duplicative of the plaintiff’s medical negligence claim.

A trial court does not err by dismissing an informed consent claim that in fact alleges a medical malpractice claim. ***Gustav v. Seattle Urological Associates***, 90 Wn. App. 785, 789, 954 P.2d 319, *rev. denied*, 136 Wn.2d 1023 (1998). In ***Gustav***, the Court of Appeals affirmed the trial court’s summary judgment dismissal of a plaintiff’s informed consent claim because his allegation that the defendant physician failed to inform him of the “appropriate frequency of diagnostic testing” was identical to his allegation that the defendant negligently failed “to order diagnostic tests as frequently as appropriate.” 90 Wn. App. at 789-90; *see also* ***Bays v. St. Lukes Hosp.***, 63 Wn. App. 876, 882, 825 P.2d 319 (affirming trial court’s directed verdict dismissing plaintiff’s informed consent claim because it was “a transparent attempt to disguise a negligence issue as a failure to obtain an informed consent”) (discussed App. Br. 27-33), *rev. denied*, 119 Wn.2d 1008 (1992).

Ms. Vinick’s informed consent theory alleged a claim for medical negligence. Ms. Vinick asserts that Dr. Whipple should

have “informed” her that the preferred treatment option was to internally fixate one her condyle fractures with a plate, and “that the failure to perform this procedure would leave Mrs. Vinick with an open bite.” (App. Br. 30) Ms. Vinick cites to her expert’s opinion that “the indications for an open reduction were met here” and that an “open reduction internal fixation of one condyle . . . should have been done.” (App. Br. 32)

This testimony supports a claim for violation of the standard of care, not a lack of informed consent. The jury rejected the claim of a violation of the standard of care and the trial court correctly dismissed Ms. Vinick’s informed consent claim that duplicated her claim for breach of the standard of care.

**2. Ms. Vinick’s informed consent claim failed because she did not provide any expert testimony quantifying the probability of the risk she would develop an open bite.**

This court should affirm the dismissal of Ms. Vinick’s informed consent claim on the alternative ground that she failed to prove by expert testimony the materiality of the allegedly undisclosed facts relating to her treatment, as required by RCW 7.70.050.

RCW 7.70.050 requires a plaintiff to prove four “necessary elements” to establish a claim for lack of informed consent, including that the plaintiff was not informed of a “material fact”:

(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.

A fact is “material” “if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment.” RCW 7.70.050(2). A plaintiff must submit expert testimony to establish certain material facts, including “[t]he recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.” RCW 7.70.050(3)(d).

As Ms. Vinick concedes, expert testimony is required to prove not only the existence of a risk, but the “probability of [its] occurrence.” (App. Br. 28 quoting *Bays*, 63 Wn. App. at 881) “[U]nless expert testimony can establish its existence, nature, and *likelihood of occurrence*, the presence of the risk, as a matter of law, is not material and no duty of disclosure manifests in the health care provider.” *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 632-34, 784 P.2d 1288 (affirming summary judgment dismissal of informed consent claim because “the doctrine of informed consent required the appellant to present expert testimony establishing the probability of [the risk]. It was not for the trial court to give the unmeasured ‘greater’ risk a value.”), *rev. denied*, 114 Wn.2d 1023 (1990); *Smith v. Shannon*, 100 Wn.2d 26, 33, 35-36, 666 P.2d 351 (1983) (“Only a physician (or other qualified expert) is capable of judging what risks exist and their likelihood of occurrence.”; affirming trial court’s judgment for defendant physician because plaintiff failed to prove by expert testimony that risk was material).

Ms. Vinick presented no expert evidence quantifying the probability she would develop an open bite under either Dr. Whipple’s surgical approach or her proposed alternative. The jury

could not judge the “materiality” of the risk of an open bite without expert testimony establishing the specific probability of that risk under both Dr. Whipple’s treatment and Ms. Vinick’s alternative. Ms. Vinick provides a lengthy block quotation of her expert’s testimony, which fails to establish with any specificity the likelihood that she would develop an open bite, but instead simply repeats her allegation that Dr. Whipple violated the standard of care. (App. Br. 31-32 (“My opinion is that an open reduction internal fixation . . . should have been done”)) The trial court did not err by dismissing Ms. Vinick’s informed consent claim.

**B. Ms. Vinick’s other assertions of error are harmless given the jury’s finding that Dr. Whipple was not negligent and Dr. Whipple’s withdrawal of his affirmative defense.**

Ms. Vinick’s remaining allegations of error relate either to causation, damages, or “fault of nonparties.”<sup>3</sup> Any error (which Dr. Whipple does not concede) is harmless given the jury’s verdict that Dr. Whipple was not negligent and Dr. Whipple’s withdrawal of his affirmative defense that others were at fault for Ms. Vinick’s

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<sup>3</sup> The sole exception is Ms. Vinick’s argument that the trial court erred by not giving an instruction that Dr. Whipple was a “specialist in maxillofacial surgery,” addressed in § IV.C.2, *infra*.

injuries. *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012) (App. Br. 33-40).

In *Diaz*, the trial court admitted evidence that two codefendants in a medical malpractice suit had settled for \$400,000 prior to trial. After the jury found that the defendants were not negligent, the plaintiff appealed, arguing the trial court erroneously admitted the settlement evidence. The Supreme Court agreed, but refused to reverse the jury's verdict because the plaintiff suffered no prejudice. The Court explained that the error did not affect the outcome of the trial because the settlement evidence "would have had almost no bearing on the jury's task" of resolving the "sole issue at trial . . . whether [defendant physician] met the standard of care." *Diaz*, 175 Wn.2d at 472-73 and n. 4, ¶¶ 36-37. Because the jury resolved that sole issue in the physician's favor, it never reached the issues of causation or damages. *Diaz*, 175 Wn.2d at 472, ¶ 36 n. 4.

As in *Diaz*, Ms. Vinick did not suffer any prejudice from her remaining allegations of error. Ms. Vinick complains that the trial court admitted evidence "implying" compensation from nonparties, evidence regarding "fault of nonparties," and evidence regarding her history of prior falls. (App. Br. 33-40, 42-43) But this evidence

related to causation, damages, and Dr. Whipple's affirmative defense regarding fault of others – issues the jury never reached because it found Dr. Whipple was not negligent and because it was never asked to attribute fault to anyone other than Dr. Whipple. As in **Diaz**, Ms. Vinick could not have been prejudiced by errors relating to issues the jury never reached. *See also Ford v. Chaplin*, 61 Wn. App. 896, 901, 812 P.2d 532 (any error in giving contributory negligence instruction was harmless because jury found defendant not negligent and thus “never needed to reach the issue of contributory negligence”), *rev. denied*, 117 Wn.2d 1026 (1991).

Moreover, this evidence was even more of “a minor feature” of this lengthy trial, than the settlement evidence at issue in **Diaz**. As in **Diaz**, the sole issue was whether the defendant physician met the standard of care, as established by a “battle of the experts.” 175 Wn.2d at 472-73, ¶¶ 36, 38. The jury heard days of expert medical testimony concerning the standard of care and whether Dr. Whipple breached that standard when he operated on Ms. Vinick. (4/2 RP 5-125 (testimony of Ms. Vinick's expert Darlene Chan), 4/3 Rawlins RP 9-187 (video perpetuation depositions of Ms. Vinick's subsequent treating physicians); 4/8 RP 3-40 (testimony of

surgeon who assisted Dr. Whipple in Ms. Vinick's surgery); 4/8 RP 41-144 (Dr. Whipple's expert); 4/8 RP 144-82; (testimony of Dr. Whipple); 4/9 RP 6-55 (continued testimony of Dr. Whipple)) In contrast, all of the evidence Ms. Vinick complains of was minor and unrelated to the "sole issue" decided by the jury – whether Dr. Whipple violated the standard of care. (4/4 RP 24-30, 128-32 ("implied" compensation and "fault of nonparties" evidence), 4/4 RP 79-106 (falls)) But in contrast to *Diaz*, the jury heard no evidence that Ms. Vinick had in fact settled any claim or received any compensation in any amount from anyone. (*See, infra*, § IV.D.2)

Nor could Ms. Vinick have been prejudiced by the trial court's failure to give her proposed "loss of chance" instruction, which affords plaintiff an alternative method for proving proximate cause outside of traditional tort principles. (§ IV.C.1, *infra*) Any error in failing to instruct the jury on the loss of chance theory of causation was harmless because the jury never reached causation given its finding that Dr. Whipple was not negligent. *Cf. Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 89, 18 P.3d 558 (2001) (alleged error in duty instruction was harmless where jury found that defendant's conduct was not a proximate cause of plaintiff's harm).

Ms. Vinick's alleged evidentiary and instructional errors are all unrelated to the sole issue decided by the jury at trial – that Dr. Whipple did not violate the standard of care. Ms. Vinick cannot establish prejudicial error.

**C. The trial court did not abuse its discretion by failing to give Ms. Vinick's proposed instructions, which did not accurately state the law and were not supported by the evidence.**

The trial court's instructions correctly stated the law and allowed Ms. Vinick to argue her theory of the case. “[T]he decision whether to give a particular instruction to the jury is a matter within the discretion of the trial court.” *Ethridge v. Hwang*, 105 Wn. App. 447, 456, 20 P.3d 958 (2001). A trial court does not abuse its discretion where its instructions allow each party to argue his or her theory of the case. *Jaeger v. Cleaver Const., Inc.*, 148 Wn. App. 698, 716, ¶ 55, 201 P.3d 1028, *rev. denied*, 166 Wn.2d 1020 (2009). “A court is not required to give an instruction that is erroneous in any respect” or unsupported by evidence. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 90, ¶ 54, 248 P.3d 1067 (2011). The trial court did not abuse its discretion in instructing the jury.

**1. The trial court did not abuse its discretion by refusing to give a “loss of chance” instruction that Ms. Vinick withdrew.**

Ms. Vinick waived any error in not giving a “loss of chance” instruction by withdrawing her proposed instruction No. 8 and then failing to submit a proper substitute instruction. Moreover, Ms. Vinick’s oral request to include a “provision” regarding loss of chance in the trial court’s negligence instruction misstated the law and Ms. Vinick failed to present evidence that would support any “loss of chance” instruction.

**a. Ms. Vinick waived any error relating to a “loss of chance” instruction because she withdrew her proposed instruction and failed to submit a new instruction.**

Ms. Vinick withdrew her proposed “loss of chance” instruction (No. 8) after concluding that loss of chance was not a “separate claim,” but rather an “additional element” of her negligence claim. (4/9 RP 60-61, 80-81, 88) Ms. Vinick excepted only to the trial court’s refusal to include in its instruction No. 6 “a provision . . . that talks about the loss of a chance of a better outcome.” (4/10 RP 95)

Ms. Vinick cannot complain on appeal that the trial court failed to give an instruction she withdrew. ***Casper v. Esteb***

**Enterprises, Inc.**, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004) (“Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal.”) (citation and quotation omitted). Nor can Ms. Vinick complain that the trial court refused her vague request to include a “provision” regarding loss of chance when she failed to submit an instruction that included such a provision. **Hoglund v. Raymark Industries, Inc.**, 50 Wn. App. 360, 368, 749 P.2d 164 (1987) (“If a party does not propose an appropriate instruction, it cannot complain about the court’s failure to give it.”), *rev. denied*, 110 Wn.2d 1008 (1988); *see also* CR 51(e) (trial court may disregard instructions that do not comply with rule’s requirement that proposed instructions be submitted in writing).

**b. Ms. Vinick’s “loss of chance provision” was not supported by the law or facts.**

Ms. Vinick’s verbal request (4/10 RP 95) conflated loss of chance and traditional “but/for” causation principles in a single instruction and was unsupported by any Washington law. Moreover, the loss of chance theory was inapplicable under any instruction because Ms. Vinick asserted that Dr. Whipple’s negligence more probably than not caused her damages.

The Washington Supreme Court established the “loss of chance” doctrine in ***Herskovits v. Group Health Cooperative of Puget Sound***, 99 Wn.2d 609, 664 P.2d 474 (1983). There, a plurality of the Court recognized a “medical patient’s lost chance of survival as an actionable injury under the wrongful death statute.” ***Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.***, \_\_\_ Wn. App. \_\_\_, ¶ 17, 313 P.3d 431 (2013). In ***Mohr v. Grantham***, 172 Wn.2d 844, 262 P.3d 490 (2011), the “Supreme Court formally adopted the ***Herskovits*** plurality’s reasoning and extended it to a lost chance of a better outcome under the medical malpractice statutes, chapter 7.70 RCW.” ***Dormaier***, \_\_\_ Wn. App. at ¶ 18.

The “loss of chance” doctrine modifies traditional tort principles by allowing a plaintiff to recover even where she could not “prove proximate cause by a ‘probably’ or ‘more likely than not’ standard.” ***Dormaier***, \_\_\_ Wn. App. at ¶ 20. To prove a “loss of chance” claim, a plaintiff must establish with expert testimony the percentage chance of a better outcome that was “lost.” ***Dormaier***, \_\_\_ Wn. App. at ¶ 34. For example, the plaintiff’s expert in ***Herskovits*** opined that “the defendant’s negligence reduced the decedent’s chance of survival from 39 to 25 percent.” ***Dormaier***,

\_\_\_ Wn. App. at ¶ 17 (citing *Herskovits*, 99 Wn.2d at 621-22). In *Mohr*, the plaintiff's expert opined that "if the defendants had followed the applicable standard of care, the patient probably would have had a 50 to 60 percent chance of less or no disability" following a stroke. *Dormaier*, \_\_\_ Wn. App. at ¶ 18 (citing *Mohr*, 172 Wn.2d at 849, 859-60).

A plaintiff may argue a lost chance theory only where the evidence – as established by expert testimony – "shows the defendant's negligence reduced the decedent's chance of survival by less than or equal to 50 percent." *Dormaier*, \_\_\_ Wn. App. at ¶¶ 24-36. In *Dormaier*, for instance, the plaintiff's expert opined that the defendant's malpractice decreased the plaintiff's chance of survival between 50 and 70 percent. On appeal, the defendant argued that the trial court erred by instructing the jury on loss of chance. Noting that a "trial court's decision on whether evidence supports a jury instruction" is reviewed for abuse of discretion, Division Three rejected that argument because the jury could have found based on the expert's testimony that the defendant decreased the plaintiff's chance of survival by 50 percent – less than the "balance of probabilities" required under traditional tort principles. \_\_\_ Wn. App. at ¶¶ 32, 36.

Here, the trial court did not abuse its discretion by refusing to include a “provision” regarding loss of chance in its general negligence instruction to the jury. (CP 732) Such a provision would have improperly conflated traditional negligence principles and loss of chance, which “is fundamentally an alternative manner of proving” causation in medical malpractice and wrongful death cases. *Dormaier*, \_\_\_ Wn. App. at ¶ 40. The trial court correctly refused Ms. Vinick’s incorrect statement of the law. *Columbia Park*, 160 Wn. App. at 90, ¶ 54.

Moreover, the evidence failed to support any loss of chance instruction. As *Dormaier* held, a loss of chance instruction is appropriate only where the plaintiff provides expert testimony alleging a specific percentage loss of chance, of less than fifty percent. \_\_\_ Wn. App. at ¶¶ 24-36. Here, Ms. Vinick failed to provide any expert testimony establishing the specific percentage chance she “lost” as a result of Dr. Whipple’s alleged malpractice.

In attempting to overcome this lack of evidence, Ms. Vinick’s counsel argued below that “[m]ore probable than not is a percentage. More than 50 percent that it’s going to happen.” (4/9 RP 83) Ms. Vinick repeats this argument on appeal, asserting “expert Darlene Chan, DDS, repeatedly explained th[at] Mrs. Vinick

would, *on a more probable than not basis*, have had a chance of a better surgical outcome . . . .” (App. Br. 44) (emphasis added) That evidence could support causation under traditional negligence principles, not the loss of chance theory. \_\_\_ Wn. App. at ¶ 29 (“As a matter of law, a greater than 50 percent reduction in the decedent’s chance of survival is the same as proximate cause of the decedent’s death under traditional tort principles.”). The trial court correctly refused to give any “loss of chance” instruction that was unsupported by law and fact.

**2. The trial court did not abuse its discretion by failing to give a specialist instruction when Dr. Whipple never held himself out as a specialist in maxillofacial surgery.**

Ms. Vinick cites no authority for the proposition that the trial court abused its discretion by refusing to instruct the jury that Dr. Whipple was a “maxillofacial surgery specialist.” This court should reject her unsupported argument and defer to the trial court’s discretion in deciding that the evidence did not support Ms. Vinick’s instruction. *Dormaier*, \_\_\_ Wn. App. at ¶ 23 (decision “whether to give a requested jury instruction” is reviewed for abuse of discretion when “based on the trial court’s view of the facts”).

Ms. Vinick cites no evidence that Dr. Whipple ever held himself out to be a “specialist in maxillofacial surgery.” (CP 591) Instead, Ms. Vinick cites evidence that Dr. Whipple’s otolaryngology practice included facial trauma surgery. (App. Br. 40-41) By performing facial trauma surgery, Dr. Whipple did not hold himself out as a specialist in maxillofacial surgery.

To the contrary, Dr. Whipple consistently testified that he practices as an otolaryngologist – a head and neck surgeon. (4/8 RP 144-45) Dr. Whipple testified that his “practice is much of the range of otolaryngology head and neck surgery,” including ear surgery, nose surgery, sinus surgery, and cancer surgery. (4/8 RP 145; 4/9 RP 49) Ms. Vinick’s own expert confirmed that otolaryngologists such as Dr. Whipple treat a much broader area than maxillofacial surgeons who focus on jawbone surgery. (4/2 RP 26 (“maxillofacial surgeons are specialists in the jaw bones . . . . Otolaryngology head/neck surgery is also interested in the diseases and disorders . . . of the head and the neck. So their interest is perhaps more focused on the ears, nose and throat related issues”); *see also* 4/3 Rawlins RP 17; 4/8 RP 5 (“full range” of otolaryngology “includes ear surgery, ear, sinus surgery, head and neck, cancer surgery, facial trauma, facial plastic”)) Otolaryngology and

maxillofacial surgery are distinct practice areas. The trial court did not abuse its discretion by rejecting Ms. Vinick's attempt to conflate the two.

The evidence did not support Ms. Vinick's proposed specialist instruction for a second reason – Ms. Vinick provided no evidence on the standard of care for a “specialist in maxillofacial surgery.” Ms. Vinick's expert testified that the standard of care for a “reasonable surgeon” required that Dr. Whipple “internally fixate” one of her condyle fractures, but she provided no testimony on the standard of care required of a “specialist in maxillofacial surgery.” (4/2 RP 59, 63)

In any event, the court's instruction fully allowed Ms. Vinick to argue her theory of the case – that Dr. Whipple should have “internally fixated” one of her condyle fracture with a plate and screws. The trial court's instruction, patterned from WPI 105.01, stated that “[a]n otolaryngology head and neck surgeon has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent otolaryngology head and neck surgeon.” (CP 733) Ms. Vinick was free to argue, and did argue, that a “reasonable surgeon” would have plated one of her condyle fractures as her expert testified. (4/2 RP 59) See *Hizey v. Carpenter*, 119 Wn.2d

251, 267-68, 830 P.2d 646 (1992) (failure to give “specialist” instruction in legal malpractice case was not abuse of discretion).

The trial court did not abuse its discretion by refusing Ms. Vinick’s requested specialist instruction. Its instruction allowed Ms. Vinick to argue her theory of the case.

**D. The trial court did not abuse its discretion by admitting evidence of Ms. Vinick’s previous falls or her assertion of claims against other parties.**

As Ms. Vinick concedes (App. Br. 27), this court reviews a trial court’s decision to admit or exclude evidence for an abuse of discretion. *Parrott-Horjes v. Rice*, 168 Wn. App. 438, 445, ¶ 12, 276 P.3d 376, *rev. denied*, 176 Wn.2d 1008 (2012). The trial court did not abuse its discretion by admitting evidence of Ms. Vinick’s preexisting injuries or her claims against the City and the owner of the property where she fell.

**1. Ms. Vinick’s previous falls were relevant to whether Dr. Whipple caused her alleged injuries.**

The trial court did not abuse its discretion by admitting evidence of Ms. Vinick’s previous falls – a decision that ultimately caused Ms. Vinick no prejudice. (§ IV.B, *supra*) Under ER 402 “[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by

these rules, or by other rules or regulations applicable in the courts of this state.” Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Whether relevant evidence should be excluded under ER 403 because “its probative value is substantially outweighed by the danger of unfair prejudice” is a decision vested to the discretion of the trial court. **Torno v. Hayek**, 133 Wn. App. 244, 251, ¶ 14, 135 P.3d 536 (2006). Evidence that a plaintiff has previously suffered injuries similar to those alleged to have been caused by defendant is relevant and admissible. **Torno**, 133 Wn. App. at 251, ¶ 14 (trial court did not abuse its discretion in admitting evidence of a plaintiff’s previous car accident and preexisting injuries because they were “highly relevant” to defense theory that plaintiff’s injuries were caused by previous accident, not accidents with defendants).

Ms. Vinick’s history of falls was relevant to whether her damages were caused by Dr. Whipple’s alleged malpractice or preexisting injuries. In cross examination, Ms. Vinick admitted she had hit and damaged her teeth during one of her previous falls. (4/4 RP 105) Dr. Whipple also testified that Ms. Vinick had a

preexisting jaw condition, temporal mandibular joint disease. (4/9 RP 14, 36; *see also* 4/8 RP 79-80) Had the jury reached the issue of causation, it could have reasonably concluded that the damages Ms. Vinick alleged were not caused by Dr. Whipple's purported negligence but were in fact caused, at least in part, by her preexisting injuries.

**2. The trial court did not admit collateral source or "fault of non-parties" evidence.**

Ms. Vinick misrepresents the record in asserting the trial court admitted evidence that "strongly impl[ied] the Vinicks had already been compensated from collateral sources" and that nonparties were at fault. (App. Br. 33-40) Ms. Vinick's allegations of prejudicial error fall flat given the trial court's actual decision to exclude this evidence. (§ IV.B, *supra*)

The jury never heard any evidence that "implied" the Vinicks were compensated from a "collateral source." To the contrary, the trial court allowed defense counsel to briefly examine Ms. Vinick and her husband about their previous claims for the identical injury and damages against the City and property owner, which was relevant to Dr. Whipple's defense that Ms. Vinick's damages were caused by her fall, not his alleged malpractice. (4/4 RP 24-30, 128-

32) The Vinicks never testified that they had settled their claims or that they had received compensation for them in any fashion. Moreover, the trial court refused to admit as exhibits the Vinicks' complaint and claim against the City. (CP 413, 773-74; Ex. 134-135)

The trial court also ruled that Dr. Whipple could *not* submit the testimony of witnesses alleging that the City and property owner were at fault for Ms. Vinick's injuries. (CP 245) The trial court instead ruled that it would use questions on the special verdict form to determine whether Ms. Vinick's damages were caused by Dr. Whipple's alleged malpractice or by Ms. Vinick's fall. (CP 245) Dr. Whipple ultimately declined to submit a proposed verdict form with these questions because he believed that the jury would find he did not violate the standard of care. (CP 410, 480, 483; 4/9 RP 58) The trial court did not abuse its discretion by allowing limited questioning regarding Ms. Vinick's prior claims for her injuries.

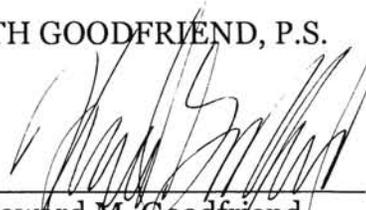
## **V. CONCLUSION**

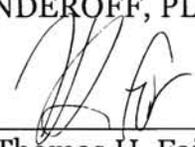
This court should affirm the trial court in its entirety.

Dated this 14<sup>th</sup> day of January, 2014.

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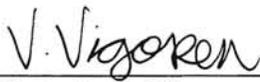
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 14, 2014, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 14th day of January,  
2014.

  
\_\_\_\_\_  
Victoria K. Vigoren