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Division I
State of Washington

No. 728199-I

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

LISA DUNAKIN and MICHAEL DUNAKIN, individually and on behalf
of their marital community,

Appellants,

vs.

MAHER M. ANOUS, M.D., F.A.C.S., d/b/a LA PROVENCE ESTHETIC
SURGERY CLINIQUE & MEDICAL SPA

Respondent.

RESPONDENT MAHER M. ANOUS, M.D.'S RESPONSE BRIEF

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I. INTRODUCTION

This appeal arises from a special verdict form that Appellant Mrs. Dunakin proposed; to which the parties agreed; and which the Honorable Laura Gene Middaugh submitted to the jury, in tandem with two, unmodified, Washington Pattern Instructions regarding the definition of informed consent and the burden of proof to establish informed consent.

In this very fact-specific medical malpractice case, the special verdict form first asked if Respondent Dr. Anous failed to secure Mrs. Dunakin's informed consent related to a 2009 surgery. The jury answered "yes." The second question asked whether such failure to obtain informed consent proximately caused her injuries. The jury answered "no." She contends on appeal that these two questions and the jury's answers are irreconcilable and inconsistent.

The two jury answers are consistent and easily harmonized because the jury heard evidence of numerous alleged details that Mrs. Dunakin contends Dr. Anous should have disclosed to her, but that did not, in fact, proximately cause her damages. The jury's verdict after hearing the evidence in a 10-day trial was fair and just. Further, the special verdict form used in this trial is virtually identical to the model verdict form for informed consent

cases that has been recommended in 6B Washington Practice: *Civil Jury Handbook* for at least 15 years.

Respondent Dr. Anous respectfully requests that the Court affirm Hon. Laura Gene Middaugh's denial of Mrs. Dunakin's combined motion to vacate the verdict, enter judgment for her, and for a new trial on damages.

II. RESTATEMENT OF THE ISSUES

1. Did the trial court properly exercise discretion when it denied Dunakin's motion to vacate the jury verdict or for a new trial, after finding that she:

- Proposed the actual pattern instructions and special verdict form that the trial court submitted to the jury;
- Did not object or take exception to the subject pattern instructions and model verdict form before they were given to the jury; and
- Did not challenge the jury's allegedly inconsistent answers on the special verdict form and failed to bring the alleged inconsistencies to the trial court's attention at the time the jury was polled.

2. Did the trial court properly exercise discretion when it denied Ms. Dunakin's motion to vacate the jury verdict or for a new trial, after determining that:

- It could not invade the province of the jury’s fact-finding duties; and
- Reasonable minds could reach different conclusions from the presented evidence—and find that: (1) Dr. Anous failed to secure Mrs. Dunakin’s informed consent; but (2) such failure was not a proximate cause of her injuries.

3. Alternatively, did the trial court correctly rule, under *de novo* review, that the special verdict form, which segregated a failure to secure informed consent from proximate cause was not legally inconsistent.

III. RESTATEMENT OF THE CASE

A. Overview

This medical malpractice case arises out of 46-year-old Appellant Lisa Dunakin’s elective tummy tuck, breast enhancement, and liposuction surgeries performed by Respondent plastic surgeon, Maher Anous, M.D. CP at 361. In securing Mrs. Dunakin’s informed consent, Dr. Anous identified a list of seventeen potential risks and complications associated with these procedures.

Dr. Anous explained that Mrs. Dunakin would need to stop smoking, pre- and post-operation because nicotine in cigarettes causes blood vessels to

decrease in diameter, thereby increasing the risk of complications. CP at 363. One serious risk of smoking before and after the procedures is fat necrosis, where healing tissue dies due to inadequate blood flow to the skin. CP at 363. Mrs. Dunakin did not stop smoking and developed an infection and necrosis after her tummy tuck procedure. She sued Dr. Anous for medical negligence and for failure to obtain her informed consent. CP at 363-64.

With respect to her informed consent claim Mrs. Dunakin submitted evidence that, as part of her treatment, she was not fully informed and did not consent to Dr. Anous donating skin from her tummy tuck procedure to the Musculoskeletal Transplant Foundation (MTF”). CP at 31:1-9. Mrs. Dunakin also alleged numerous “facts” at trial that she argued Dr. Anous should have revealed, such as differing surgery complication rates; that no other type of plastic surgeon allegedly uses the same surgical markings or techniques as Dr. Anous; that he did not adequately explain the consequences and effects of smoking pre- or post-surgery; that he represented that he was double-board certified, although he had let one certification lapse for failure to pay a renewal fee; and that he prescribed antibiotics for Dunakin, but was against pain medication. Verbatim Report of Proceedings (“VRP”) at 18:4-23 (Nov. 14, 2014).

After a ten-day trial, the jury answered the special verdict form, first unanimously finding that: (1) Dr. Anous failed to secure Mrs. Dunakin's informed consent for the tummy tuck procedure; but (2) this failure was not a proximate cause of her injuries. While not the subject of this appeal, the jury also found that Dr. Anous was not negligent for medical malpractice. CP at 262-63.

B. Both Sides Presented Evidence to the Jury on the Issue of Informed Consent.

The 12-member jury heard over a week of trial testimony from both parties, and their parties' experts and fact witnesses. After Mrs. Dunakin rested her case-in-chief, Dr. Anous moved for a directed verdict, but it was denied. CP at 378-85; CP at 407-08.

C. The Court Submitted Mrs. Dunakin's Two Proposed Washington Pattern Instructions (Unmodified) at Issue in this Appeal.

Mrs. Dunakin submitted two Washington pattern instructions addressing informed consent. The parties "agreed" to these instructions, and the trial court submitted them to the jury. Washington Pattern Instruction ("WPI") 105.04, unmodified, is based on RCW 7.70.050 and instructs as follows:

A physician has a duty to inform a patient of all material facts, including risks and alternatives, that a reasonably prudent patient would need in order to make an

informed decision on whether to consent to or reject a proposed course of treatment.

A material fact is one to which a reasonably prudent person in the position of the patient would attach significance in deciding whether or not to submit to the proposed course of treatment.

WPI 105.04. *See* CP at 47 (Dunakin's proposed instruction); CP at 255 (agreed instruction); and CP at 399 (trial court's instruction to the jury).

The elements establishing the burden of proof for informed consent is contained in WPI 105.05, and states as follows:

In connection with the plaintiffs' claim of injury as a result of the failure to obtain the patient's informed consent to the treatment undertaken, the plaintiffs have the burden of proving each of the following propositions:

First, that the defendant failed to inform the patient of a material fact or facts relating to the treatment;

Second, that the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

Third, that a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts; and

Fourth, that the treatment in question was a proximate cause of injury to the patient.

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 defendant on this claim.

WPI 105.05. *See* CP at 48 (Dunakin’s proposed instruction); CP at 256 (agreed instruction); and CP at 400 (trial court’s instruction to the jury). Dunakin did not object or take exception to the trial court submitting WPI 105.04 and WPI 105.05 to the jury. Likewise, on appeal Mrs. Dunakin is not arguing “that Instructions 9 and 10 were given in error or were otherwise inaccurate statements of the law.” *See* Opening Brief at 8; *see also* VRP at 11:16-18 (“We’re not objecting to the instruction. The [informed consent] instruction is an accurate statement of the law.”) Nevertheless, the two instructions form the foundation for the special verdict form that is the subject of this appeal.

D. Both Parties Agreed to the Special Verdict Form, Which Was Only Slightly Different in Wording and Sequence than Mrs. Dunakin’s Proposed Special Verdict Form.

Volume 6, Washington Practice: *Washington Pattern Jury Instructions—Civil* at 393-452 (6th ed) contains model special verdict forms, but none is specific to an informed consent claim. As a default, Mrs. Dunakin proposed a modified version of WPI 45.24. *See* CP at 61, relying on 6 Washington Practice: *Washington Pattern Jury Instructions—Civil* at 435-36 (6th ed).

Mrs. Dunakin's proposed special verdict form separated the question of whether Dr. Anous was negligent from the question of whether such negligence was the proximate cause of her injuries. CP at 59-60. Likewise, she separated the question of whether Dr. Anous failed to secure her informed consent from the question of whether such a failure proximately cause her injuries. CP at 59-60.

Mrs. Dunakin's proposed special verdict form asks the following questions:

Question 1: Was the defendant Dr. Anous negligent?

Answer: Yes ___
 No ___

Question 2: Was such negligence a proximate cause of injury or damage to the plaintiff?

Answer: Yes ___
 No ___

Question 3: Did defendant Dr. Anous fail to inform the plaintiff of material facts that a reasonably prudent person in the position of the patient would attach significance in the deciding [sic] whether or not to submit to the prosed [sic] course of treatment?

Answer: Yes ___
 No ___

Question 4: Was such a failure to inform the plaintiff a proximate cause of injury or damage to the plaintiff?

Answer: Yes ___

No ____

See CP at 59-60. Her verdict form noted that it was a modified version of WPI 45.24. See CP at 61.

The parties agreed to a *slightly revised* special verdict form, which the trial court submitted to the jury—and to which Mrs. Dunakin did not take exception or lodge an objection. The special verdict form¹ states as follows:

Question No. 1: Did Maher M. Anous, M.D. fail to secure Lisa Dunakin's informed consent related to the November 10, 2009 surgery?

Answer: ____ (yes or no) **The jury answered YES.**

(If you answer "no" please skip Question No. 2 and proceed to answer Question No. 3. If you answer "yes," please answer Question No. 2 below)

Question No. 2: Was such failure to obtain informed consent a proximate cause of injury or damage to Lisa Dunakin?

Answer: ____ (yes or no) **The jury answered NO.**

Question No. 3: Was Maher M. Anous, M.D. negligent?

Answer: ____ (yes or no) **The jury answered NO.**

If you answer "yes" please proceed to answer Question No. 4. If you answer "no", skip Question No. 4 and follow the instructions beneath Question No. 4.

Question No. 4: Was such negligence a proximate cause of injury to Lisa Dunakin?

Answer: ____ (yes or no)

¹ A copy of the jury's signed special verdict form is attached hereto in the Appendix.

See CP at 262-63.

E. The Special Verdict Form Submitted to the Jury Is Virtually Identical to the Model Form in 6B Washington Practice: *Civil Jury Instruction Handbook*.

Volume 6B Washington Practice: *Civil Jury Instruction Handbook* (David K. DeWolf, 2013 ed.) “was created as a companion to Volumes 6 & 6A of Washington Practice, Washington Pattern Jury Instructions[.]” CP at 449 (quoting 6B Washington Practice: *Civil Jury Instruction Handbook* at v). Author David DeWolf acknowledges that the “book is designed to assist the practitioner in using the WPI to formulate a proper set of jury instructions.” CP at 449 (quoting *id.*). It offers the following special verdict form *that is virtually identical to the form submitted to the jury here* (and to which both parties agreed):

Question 1: Did the defendants fail to obtain informed consent from the plaintiff?

(Answer “yes” or “no”)

(Instruction: If you answered “yes” to Question 1, answer Question 2. If you answered “no” skip Question 2 and answer Question 3)

Question 2: Was the defendants failure to obtain informed consent a proximate cause of injury or damage to the plaintiff?

(Answer “yes” or “no”)

Question 3: Were the defendants negligent?

(Answer “yes” or “no”)

Question 4: Was such negligence a proximate cause of injury or damage to the plaintiff?

(Answer “yes” or “no”)

CP at 450 (quoting 6B Washington Practice: *Civil Jury Instruction Handbook* §2:7 at 237). Based on the foregoing special model verdict form, a jury could answer “yes” to Question 1, and “no” to Question 2.² This is exactly what happened in this trial. Similarly, a jury could find that the defendant was negligent but not find that the negligent was a proximate cause of the injuries.

This model verdict form has been published in the 2008-09, 2010-11, 2012, and 2013 editions of 6B Washington Practice: *Civil Jury Instruction Handbook*.³ The 2008-09 edition summarizes the case history for this model special verdict form, stating that it was used in September 2005 in a medical malpractice claim in Thurston County before Hon. Gary R. Tabor, which resulted in a defense verdict. CP at 456.

This model special verdict form has been likely used countless times by parties and judges in informed consent cases throughout Washington over

² This special verdict form was used in a plastic surgery case tried before Hon. Sharon S. Armstrong in 2011.

³ The undersigned found that the 2013 edition was the most recently published edition, as of November 2014.

the last 15 years or earlier. Like most special jury verdict forms, it segregates the question of (1) negligence from the question of (2) proximate cause; and the question of (1) informed consent from the question of (2) proximate cause.⁴

F. When the Jury Had a Question about the Burden of Proof on Informed Consent (WPI 105.05) the Court Followed Mrs. Dunakin’s Recommendation.

On October 6, 2014, before rendering a verdict, the jury asked about WPI 105.05 (burden of proof for informed consent). CP at 265. Its inquiry states: “In regards to Instruction No. 10 [WPI 105.05], if one of the four propositions is found as cannot be proved, does that require or dictate an answer of ‘no’ for question one (1) of the verdict sheet?” CP at 265. Mrs. Dunakin recommended that the trial court simply tell the jury to re-review the instructions and not provide any additional new information to the jury. Accordingly, the trial court advised the jury to “[p]lease re-read Instruction No. 10. The answer to your question is contained in that instruction.” CP at 266.

⁴The 2008-09, and 2010-11 editions of Vol. 6B Washington Practice: *Civil Jury Instruction Handbook* published this same special verdict form—all separating the question of the (1) failure to obtain informed consent from the question of (2) proximate causation. See CP at 453-60.

G. After the Jury Read Its Verdict and Was Polled, Mrs. Dunakin Did Not Object or Bring an Alleged Inconsistency to the Court's Attention.

Counsel for both parties was present when the jury returned its verdict. Each juror was separately polled, then the jury was discharged. CP at 106. Mrs. Dunakin did not challenge the jury interrogatories or bring any purported inconsistency in the jury's answers to the trial court's attention.

H. Ten days After the Verdict, Mrs. Dunakin Moved to Vacate It and Requested a New Trial.

Mrs. Dunakin, relying on several cases from New York and the District of Columbia because "there does not appear to be a case directly on point in Washington," moved to (1) vacate the jury verdict; (2) enter judgment for her as a matter of law; and (3) order a new trial to determine damages. CR at 269; 274:25. She argued that under CR 59(a)(7) "there is no evidence or reasonable inference from the evidence to justify the verdict, or that it is contrary to law." CP at 270. Mrs. Dunakin argued that Question No. 2 was "unnecessary and confusing"; produced an inconsistent verdict; and was "patently inconsistent with the law and the jury instructions."⁵ CP at 271:25; CP at 331:12-13. Notably, this last argument is at odds with her

⁵ Her very experienced counsel, who "has handled hundreds of medical negligence and serious injury claims to settlement and verdict along with significant court appellate decisions" argued that Questions 1 and 2 on the verdict form "are inconsistent and *in*

Opening Brief, which states that “Plaintiffs did not contend that Instructions Nos. 9 and 10 were given in error or were otherwise inaccurate statements of the law.” *See* Opening Brief at 8.

At the hearing, Dr. Anous argued—and *Dunakin did not dispute*—that, in this particular case, there were “a lot of allegations against Dr. Anous about what he should have said, things he should have said, that are completely consistent with this jury’s finding. For instance, a lot of time was spent on the MTF, the musculoskeletal foundation, you know, the donation of the patient’s skin, and there was a lot of time taken up arguing that she should have been told that there was a handling fee that went to Dr. Anous’ office” if he donated tissue. VRP at 18:5-12. “[T]he jury may well have determined that, you know, Dr. Anous should have mentioned that, he should have told Lisa Dunakin that fact, but, reasonably prudent patient in same or similar circumstances would not have been deterred and would have continued and gone through with the surgery even under that scenario.” VRP at 18:17-23.

Dr. Anous argued—and *Dunakin did not dispute*—that “[t]here was a big issue about what he should have said in terms of instructions about smoking and whether there was ample discussion about the deleterious

retrospect, Question No. 2 should not have been asked of the jury[.]” CP at 271:20-21

effects on healing and for what period. You know, there were a lot, there were many issues about things Dr. Anous could have said, should have said, according to the plaintiff's scenario.” VRP at 19:1-7.

Dr. Anous also stated that “[t]here was another big issue made about the phrase double-board certified.” VRP at 19:14-15. “But a jury could well have thought, you know, okay, he should have cleaned that up and not said if he hadn't been paying the dues to the one board that he was double-board certified, and a jury may well have concluded, but, you know, a reasonably prudent patient in the same or similar circumstances would have gone forward with the surgery anyway.” VRP at 19:19-25.

I. The Trial Court Denied Mrs. Dunakin's Motion to Vacate.

At the hearing, Hon. Laura Gene Middaugh stated that “the jury could well have found that a material fact was not disclosed, and material being what a reasonably prudent person would have wanted to know, right?” VRP 7:13-17. Both sides proposed a similar special verdict form that separated the element of proximate cause from whether informed consent was secured. “[A]nd evidently the jury found that a reasonably prudent person under the circumstances of the plaintiff would still have gone ahead with the surgery. That it wasn't a proximate cause.” VRP at 7:22-25.

(emphasis added); www.medilaw.com/team-Otorowski.htm.

The trial court explained “I think that when we tell the jury you have to prove -- the plaintiff has to prove four elements [of informed consent], and then we say we want you to specifically address this one [proximate cause] separately, that’s what they did.” VRP at 23:10-13. Judge Middaugh stated that “I don’t think it’s inconsistent to say that she was -- for them to find that she did not receive informed consent; that is, she was not told a material fact, whatever it is, that a reasonable person would want to know. But then the second question being, okay, assuming that you found that, was that a proximate cause, and they said no.” VRP at 23:14-21. Accordingly, “I don’t think that is inconsistent. So I don’t think a new trial is warranted.” VRP at 23:21-23.

The trial court also addressed the issue of waiver. “The time for addressing this was in the jury instruction to raise that issue. This is not a case where the law was misstated. As you clearly agree, the law was stated correctly in the jury instructions.” VRP at 24:8-12. Likewise, “this is the way that pretty much everybody agrees that this question should be asked.” VRP at 24:12-13.

The trial court never opined that the verdict form was confusing or misleading. Instead, the court acknowledged that verdict forms may vary,

and that in the future, plaintiff's counsel may want to "just ask a question about each and every element, or ask one question about informed consent to make it clear[.]" VRP at 24:15-17. Nevertheless, "when we tell the jury, you got to prove four things [like here], and specifically we want a separate answer on this one [proximate cause element], that it was clear what their answer was and what their verdict was." VRP 24:18-21.

Based on the foregoing, "I don't think it is inconsistent. So I'm not going to grant your motion for a new trial. And I do think you waived the issue by not raising it and by proposing the same instruction that—essentially you're now objecting to." VRP at 24:22-25:2.

This appeal followed.

IV. LEGAL ARGUMENT

A. **The Standard of Review Is Abuse of Discretion and Evidence Must Be Interpreted in Dr. Anous's Favor.**

"Except where questions of law are involved, the trial court is invested with broad discretion in granting or denying motions for new trial, and the trial court's determination will not be disturbed on appeal absent an abuse of discretion." *Bunnell v. Barr*, 68 Wn.2d 771, 775, 415 P.2d 640 (1966) (reversing trial court's decision to grant new trial) (emphasis added).

When “considering the issues raised by a motion for new trial the evidence of the nonmoving party must be accepted as true and, together with all reasonable inferences that may be drawn therefrom, be interpreted in a light most favorable to that party. *Id.* Here, the evidence presented by Dr. Anous, the nonmoving party, must be accepted as true and interpreted most favorably to him. This evidence, set forth above, contains only several of the many material facts presented to the jury that Mrs. Dunakin claimed she did not consent to as part of her treatment, but which did not proximately cause her injuries. Conversely, the jury heard testimony that smoking pre- and post-surgery smoking affects the ability of the tissue to heal well. CP at 363:1-9.

B. Application of the Verdict Form’s Legal Effect is Reviewed *De Novo*.

After the trial court ruled that the verdict form did not contain inconsistent answers, it entered judgment for Dr. Anous. Mrs. Dunakin contends that an irreconcilable inconsistency exists between the jury’s answers to Questions 1 and 2, in light of WPI 105.04 and WPI 105.05. Once a jury renders a verdict, the trial court must declare its legal effect. *State v. Evans Engine & Equip. Co.*, 22 Wn. App. 202, 205-06, 589 P.2d 290 (1978), *review denied*, 92 Wn.2d 1010 (1979); *see* CR 49. Because the trial court

based its decision on its view of the special verdict's legal effect, the Court of Appeals applies the *de novo* review standard. *See In re Registration of Elec. Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994) (stating an appellate court applies the *de novo* review standard to a decision upon a legal issue).

A court liberally construes a verdict so as to discern and implement the jury's intent, if consistent with the law. *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 344, 109 P.2d 542 (1941) (citing *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wn. 539, 544, 123 P. 1001 (1912)).

C. Mrs. Dunakin Waived All Challenges to a Purported Conflict in the Jury's Answers.

As a preliminary matter, Mrs. Dunakin did not challenge the jury verdict after the jury was polled, and did not lodge an objection or take exception to the verdict form or jury instructions before they were submitted to the jury. Dr. Anous maintains that she waived her challenges to the verdict form and its allegedly inconsistent questions—and invited the error of which she now complains.

Setting aside the jury verdict or seeking a new trial due to errors in law are guided by CR 59(a)(8) and CR 51(f), which limits a trial court's

discretion in granting a new trial on grounds that erroneous instructions were given to the jury, *if—as here—no exceptions were taken.*

CR 59 provides, in relevant part:

(a) Grounds for New Trial or Reconsideration. The verdict or other decision may be vacated and a new trial granted . . . on the motion of the party aggrieved for any one of the following causes materially affecting the substantial rights of such parties. . . .

(8) Error in law occurring at the trial ***and objected to at the time by the party making the application;***

CR 59(a)(8) (emphasis added). Inadequate or erroneous jury instructions fall into the category of errors in law. CR 59(a)(8) *requires* an aggrieved party to object to deficient jury instructions when the jury is instructed *rather than after the jury returns its verdict.*

CR 51(f) also requires a party to object to an erroneous jury instruction at the appropriate time:

(f) Objections to Instruction. Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

CR 59(a)(8) and CR 51(f) require a party to object to jury instructions with specificity before they are read to the jury. The objecting party must draw the trial court's attention to any potential error so that it may be corrected at the outset. *See Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994) (explaining purpose of CR 51(f)). The object is to avoid the burden and unnecessary expense of successive trials. The Civil Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." CR 1. Here, Mrs. Dunakin did not object to the Washington Pattern Jury Instructions and did not object to the Special Verdict Form—thereby waiving her belated challenges and inviting the error of which she complains.

In *Gjerde v. Ulrich Fritzsche, M.D.*, 55 Wn. App. 387, 777 P.2d 1072 (1989), *review denied*, 113 Wn.2d 1038 (1990), plaintiffs also argued that the answers on the verdict form were irreconcilably contradictory. The Court of Appeals held that plaintiffs "waived the issue below by failing to bring the inconsistency in the answers to the interrogatories to the attention of the court *at the time the jury was polled.*" *Id.* at 393 (emphasis added). Division I asked plaintiffs point blank whether they polled the jury:

Question: Now let me ask you one more question. I understand that the jury was polled, *how if the judge and you and defense counsel were there and polled the jury did*

nobody notice the, what you now think is a fatal inconsistency in the verdict form?

Answer: *Okay, to be honest, I certainly did recognize that there was an inconsistency in the verdict form. My position is that the responsibility to preserve a verdict is on the party that wishes to enforce it. I was not happy with the 45 percent contributory negligence issue. The judge did not ask for a reconciliation of the inconsistencies, the party wishing to enforce the judgment did not ask for a reconciliation.*

Question: *Why didn't somebody say, your Honor send the jury back, tell them that their answers were inconsistent?*

Answer: *That's what should have been done. That was not done.*

Id. (emphasis added).

Similarly, in the case at bar, plaintiffs' counsel, Jane Morrow, appeared by phone to hear the verdict and the polling of the jury. Mrs. Dunakin did not ask for a reconciliation of the jury verdict before the jury was discharged. Here, it was Mrs. Dunakin's responsibility to "send the jury back, tell them that their answers were inconsistent" if she believed that the answers were inconsistent. She did not, and therefore waived the opportunity to challenge the verdict, post-trial.

In *Gjerde*, plaintiffs "contended that the special jury interrogatories were inconsistent and required a new trial." *Id.* at 390. Division I

acknowledged that although an instruction “was not as clear as it could have been, we conclude that it did not confuse the jury and was not error to give it.” *Id.* at 391. The *Gjerde* Court examined CR 49 and acknowledged that no “Washington cases have decided whether the failure to object to inconsistencies in jury interrogatories constitutes a waiver.” *Id.* at 393. The Court of Appeals—with review denied by the Supreme Court—followed the majority of federal courts analyzing the identical provision of Fed. R. Civ. P. 49(b). The leading federal cases “held that the failure to object to inconsistencies in the verdict before the discharge of the jury waives any objection on appeal.” *Id.* at 393-94 (citations omitted).

In conclusion, Division I noted that “*Gjerde's* counsel recognized the inconsistency in the jury interrogatories and yet remained silent, seeking to ‘try his luck with a second jury.’ Such silence in the face of actual knowledge of an inconsistency at a time it could be cured waives the issue on appeal. The situation is analogous to the failure to object to evidence or a jury instruction, which waives the issue for appeal.” *Id.* (citing *In re Penelope B.*; 104 Wn.2d 643, 659, 709 P.2d 1185 (1985). *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988)).

Recently, in *McRae v. Tahitian, LLC*, 181 Wn. App. 638, 326 P.3d 821 (2014), Division III relied on *Gjerde* for the proposition that “[w]here jury verdict answers conflict with each other, a party generally waives any objection by failing to assert it before the trial court discharges the jury.” *See also Dormaier v. Columbia Basin Anesthesia*, 177 Wn. App. 828, 868, 313 P.3d 431 (2013) (harmonizing verdict answers, but stating that “appellants waived their objection to the special verdict answers by failing to assert it before the trial court discharged the jury”).

Mrs. Dunakin distinguishes *Gjerde* by arguing that, unlike plaintiff *Gjerde*, she did not *intentionally* remain silent in order to try her luck “with a second jury.” *See* Opening Brief at 21. In fact, Mrs. Dunakin blames the trial court for failing, *sua sponte*, to correct an alleged inconsistency before the jury was discharged. *See* Opening Brief at 22-23.

Instead of relying on binding and applicable Washington authority, Mrs. Dunakin inexplicably relies on cases from the Second and Seventh Circuits, and Nevada for the proposition that it is the trial court’s responsibility to “act” when a party fails to object to inconsistencies in the verdict. *See* Opening Brief at 22.

Mrs. Dunakin directs the Court to *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1038-39, 197 P.3d 1032 (2008) (which cites cases from the Second and Seventh Circuit). But *Lehrer* is not helpful because it compares the Federal Rules of Civil Procedure 49(b) with Nevada's Rules of Civil Procedure 49(b)—acknowledging that “the two rules differ” such that Nevada's rule states that the court “*may* return the jury for further consideration of its answers and verdict or *may* order a new trial,” while FRCP 49(b) directs that the court “*shall* return the jury for further consideration of its answers and verdict or *shall* order a new trial.”

Mrs. Dunakin also relies on *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629 (2d Cir. 1986) (explaining that a district court errs if it fails to grant a new trial “when jury verdicts are logically incompatible”). However, in *Schaafsma* the Second Circuit concluded that the purported inconsistency in the jury findings was reconcilable. The case at bar compels a similar result. The trial court harmonized the special verdict form, ruling that based on the specific facts in this case, the two jury questions and answers were consistent. Accordingly, even though Mrs. Dunakin waived her right to object, the trial court nevertheless discharged its duty to determine the verdict's legal effect and meaning.

D. The Question of Proximate Cause Was Properly Before the Jury.

Confusingly, Mrs. Dunakin argues that the jury's verdict "is contrary to the evidence" and that under CR 59(a)(9) "substantial justice has not been done." *See* Opening Brief at 19. But the main focus of her appeal is that Questions 1 and 2 of the special verdict form are *legally* inconsistent. Now she apparently argues that there was not substantial evidence to support a finding that that failure to secure informed consent did not proximately cause her injuries. Aside from this double negative, however, the record on appeal does not support her argument.

Nevertheless, the jury is the trier of the facts. Whether a failure to secure informed consent proximately caused Lisa Dunakin's injury must be proved by a preponderance of the evidence, and factual determinations are reposed exclusively in the jury by the constitution and laws of Washington. *See* Const. art. 1, § 21; RCW 4.44.090 ("All questions of fact other than those mentioned in RCW 4.44.080,⁶ shall be decided by the jury, and all evidence thereon addressed to them."). Here, the jury, in performing its

⁶Under RCW 4.40.080, "[a]ll questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it."

constitutional function, found that the alleged negligence (lack of informed consent) of Dr. Anous had not proximately caused Mrs. Dunakin's injuries.

When the trial court earlier denied Dr. Anous's motion for a directed verdict, *it inherently found that there was conflicting evidence. See Bertsch v. Brewer*, 97 Wn.2d 83, 640 P.2d 711 (1982) ("A motion for a directed verdict may be granted only if it can be said, as a matter of law, that no evidence or reasonable inferences existed to sustain a verdict for the party opposing the motion. The evidence must be considered in the light most favorable to the nonmoving party.")

It is well settled that when evidence is in conflict, it is error to grant a directed verdict or judgment notwithstanding the verdict because it invades the province of the jury. Here, for the same reasons that the trial court denied Dr. Anous's motion for a directed verdict, it denied Mrs. Dunakin's motion for a judgment notwithstanding the verdict. *See Butterworth v. Bredemeyer*, 74 Wash. 524, 133 P. 1061, (1913) (it is error to set the verdict aside and determine questions of fact without the aid of the jury). Conversely, when the evidence is conflicting, it is the sole province of the jury to determine the facts. *Holmes v. Toothaker*, 52 Wn.2d 574, 328 P.2d 146 (1958).

At trial, Dunakin submitted evidence that, as part of her treatment, she was not fully informed and did not consent to Dr. Anous donating skin from her abdominal surgery to the Musculoskeletal Transplant Foundation CP at 31:1-9. However, the jury could find that this alleged failure did not proximately cause her necrosis or pain. In fact, the jury could have determined that she was going to have the tummy tuck procedure, regardless of whether Dr. Anous made skin donations to the Foundation.

In a scatter-shot style, Mrs. Dunakin alleged numerous “facts” at trial that she argued Dr. Anous should have revealed, such as differing surgery complication rates; that no other type of plastic surgeon allegedly uses the same surgical markings or techniques as Dr. Anous; that he did not adequately explain the consequences and effects of smoking pre- or post-surgery; that he represented that he was double-board certified, although he had let one certification lapse for failure to pay a renewal fee; and that he prescribed antibiotics for Mrs. Dunakin, but was against pain medication.

The jury found that none of this “treatment” or alleged failure to obtain her informed consent proximately caused her injuries. Nevertheless, when viewing all evidence in Dr. Anous’s favor, the trial court did not abuse its discretion in denying Mrs. Dunakin’s motion for a new trial.

E. The Jury Instructions and Special Verdict Form Are Consistent.

Mrs. Dunakin agrees that WPI 105.04 and WPI 105.05 are correct statements of law, which she plainly states she is not challenging. *See* Opening Brief at 8. Because Mrs. Dunakin's legal arguments have been a moving target, Dr. Anous will briefly address the jury instructions.

All of the jury instructions in this case are correct statements of law. The relevant instructions (WPI 105.04 and WPI 105.05) as well as the definition of "proximate cause" are *classic* unmodified pattern instructions. Moreover, the special verdict form is virtually identical to the verdict form contained in Volume 6B Washington Practice: *Civil Jury Instruction Handbook* for informed consent cases.

In *Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn. App. 572, 585, 187 P.3d 291 (2008), the plaintiff argued that the jury verdict was inconsistent because the evidence did "not support a finding of negligence without an accompanying finding of proximate cause and that the jury's verdict to the contrary was necessarily inconsistent." The Court of Appeals held that "[a] jury verdict finding that a defendant is negligent but that the negligence was not a proximate cause of the plaintiff's injuries is not inconsistent if there is evidence in the record to support a finding of

negligence but also evidence to support a finding that the resulting injury would have occurred regardless of the defendant's actions." *Id.* at 586, citing *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 209, 667 P.2d 78 (1983).

Notably, Mrs. Dunakin also relies on *Stalkup* and *Brashear*, explaining that "a jury finding a defendant negligent, but also finding that the negligence did not proximately cause the plaintiff's injuries 'is not . . . consistent if there is evidence in the record to support a finding that the resulting injury would have occurred regardless of the defendant's actions.'" *See* Opening Brief at 11 (quoting *Stalkup* and citing *Brashear*).

In *Brashear*, "the plaintiff presented evidence and argument supporting four distinct theories as to how the utility company had been negligent." *Id.* at 206. Like the case at bar, the trial court submitted a special verdict form that asked separate questions. The jury found that the defendant was negligent but that its negligence was not a proximate cause of the plaintiff's injuries. *Id.* The Supreme Court "*explicitly found that, although such a verdict appears inconsistent, it is not in fact inconsistent if there is evidence in the record to support a finding of negligence but also evidence*

that the injury would have occurred regardless of the defendant's actions."
Brashear, 100 Wn.2d at 209.

Mrs. Dunakin argues that there was evidence of proximate cause because her expert, Dr. Joseph Rosen, testified to each element of informed consent. Therefore "[t]here was no controverted evidence proffered at trial that the damages suffered by Lisa Dunakin were caused by anything other than her surgery by Dr. Anous." *See* Opening Brief at 20. But "jurors are the sole judges of the credibility of witnesses and are not required to accept the opinion of any expert witness[.]" *Stalkup*, 145 Wn. App. at 590.

Here, the jury could have accepted Dr. Rosen's testimony, simply disbelieved him, or found that Mrs. Dunakin was going to have the tummy tuck procedure regardless of whether Dr. Anous disclosed differing surgery complication rates; or explained that no other type of plastic surgeon allegedly uses the same surgical markings or techniques as Dr. Anous; or that he did not adequately explain the consequences and effects of smoking pre- or post-surgery; or that he represented that he was double-board certified, although he had let one certification lapse for failure to pay a renewal fee; or that he prescribed antibiotics for Mrs. Dunakin, but was against pain medication. This is a highly fact-intensive case.

As the Supreme Court stated in *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994) “[the] court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it.” Accordingly, the “inferences to be drawn from the evidence are for the jury and not for [the] court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.” *Id.*

Relying on cases from New York and the District of Columbia, which are not binding on this Court, Mrs. Dunakin asserts that it is inconsistent for a jury to find lack of informed consent, but not proximate cause. *See* Opening Brief at 15. She first relies on *Tribal v. Queens Surgi-Center*, 8 A.D. 3d 555, 779 N.Y.S.2d 504 (2004). But the *Tribal* Court is applying New York law; there is no evidence of how the special verdict form was worded; and the “facts” that plaintiff alleged the doctor did not tell him specifically related only to the surgery itself.

Likewise, *Tribal* relies on another case cited by Mrs. Dunakin, *Dries v. Gregor*, 72 A.D.2d 231, 424 N.Y.S.2d 561 (1980). But this Court cannot draw any conclusions from the New York decision because we do not know what instructions were given to the jury; the wording on the special verdict form (which contained at least seven questions); and how New York interprets its informed consent laws. For example, *Dries* discusses informed consent in the context of assault and battery. New York relies on Public Health Law § 2805-D, which is substantially different than RCW 7.70.050.

Mrs. Dunakin also relies on an exhausting 25-page discourse from the District of Columbia Circuit in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972). However, the *Canterbury* decision is grounded in case law throughout the East coast, with varying informed consent statutes, and for “purposes of the duty to disclose” distinguished between “the special and general-standard aspects of the physician-patient relationship.” *Id.* at 785. There is no evidence that Washington has adopted any portion of *Tribal*, *Dries*, or *Canterbury*. These cases are unavailing.

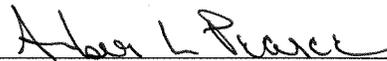
V. CONCLUSION

Based on the foregoing, Respondent Dr. Anous respectfully requests that the Court of Appeals affirm the trial court’s denial of Mrs. Dunakin’s

combined motion to vacate the verdict, enter judgment for her, or for a new trial.

Respectfully submitted this 14 day of April, 2015.

FLOYD, PFLUEGER & RINGER, P.S.



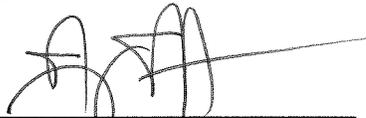
Rebecca S. Ringer, WSBA No. 16842
Amber L. Pearce, WSBA No. 31626
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

Christopher L. Otorowski	<input type="checkbox"/>	Facsimile
Otorowski, Johnston, Morrow & Golden, PLLC	<input type="checkbox"/>	Messenger
298 Winslow Way West	<input checked="" type="checkbox"/>	U.S. Mail
Bainbridge Island, WA 98110	<input type="checkbox"/>	E-Mail

DATED this 14th day of April, 2015.



Sopheary Sanh, Legal Assistant

APPENDIX

FILED
KING COUNTY, WASHINGTON

OCT 17 2014

SUPERIOR COURT CLERK
BY Andrew Havlis
DEPUTY

The Honorable Laura Gene Middaugh

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LISA DUNAKIN and MICHAEL
DUNAKIN, individually and on behalf of
their marital community,

Plaintiffs,

vs.

MAHER M. ANOUS, M.D., F.A.C.S., d/b/a
LA PROVENCE ESTHETIC SURGERY
CLINIQUE & MEDICAL SPA,

Defendant.

NO. 12-2-29275-2 SEA

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Did Maher M. Anous, M.D. fail to secure Lisa Dunakin's informed consent related to the November 10, 2009 surgery?

ANSWER: yes (yes or no)

If you answer "no," please skip Question No. 2 and proceed to answer Question No. 3. If you answer "yes", please answer Question No. 2 below.

ORIGINAL

QUESTION NO. 2: Was such failure to obtain informed consent a proximate cause of injury or damage to Lisa Dunakin?

ANSWER: No (yes or no)

QUESTION NO. 3: Was Maher M. Anous, M.D. negligent?

ANSWER: No (Yes or No)

If you answer "yes", please proceed to answer Question No. 4. If you answer "no", skip Question No. 4 and follow the instructions beneath Question No. 4.

X **QUESTION NO. 4:** Was such negligence a proximate cause of injury to Lisa Dunakin?

ANSWER: _____ (Yes or No)

If you have answered "yes" to Question No. 2 or "yes" to Question No. 4 please proceed to Question No. 5. If you have answered "no" to Question No. 2 and "no" to Question No. 4, or did not answer Question No. 2 and did not answer Question No. 4, skip all remaining questions and sign and return this verdict form.

X **QUESTION NO. 5:** Did Lisa Dunakin fail to mitigate her damages?

ANSWER: _____ (Yes or No)

If you answer "yes" to Question No. 5, please answer Question No. 6. If you answer "no", skip Question No. 6 and proceed to answer Question No. 7.

X

QUESTION NO. 6:

Assume that 100% represents the total combined conduct that proximately caused Lisa Dunakin's injury. What percentage of this 100% is attributable to Lisa Dunakin and what percentage is attributable to Maher Anous, M.D.? Your total must equal 100%.

ANSWER:

Lisa Dunakin _____%

Maher Anous, M.D. _____%

TOTAL: 100%

X

QUESTION NO. 7

What do you find to be the amount of plaintiffs' damages?

ANSWER:

For Lisa Dunakin

Past economic damages \$ _____

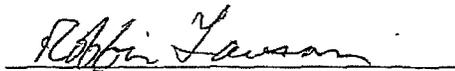
Future economic damages \$ _____

Non-economic damages \$ _____

For Michael Dunakin

Loss of consortium \$ _____

DATED this 17 day of October, 2014.



Presiding Juror