

**FILED**

OCT 11 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 317102

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION NO. III

TABRINA MCBRIDE

Respondent/Plaintiff

vs.

THOMAS WEILER, DDS, et al.,

Appellants/Defendant

---

**BRIEF OF APPELLANT**

---

Christopher J. Kerley, WSBA #16489  
Evans, Craven & Lackie, P.S.  
818 W. Riverside, Suite 250  
Spokane, WA 99201-0916  
(509) 455-5200 phone  
(509) 455-3632 fax  
Attorneys for Appellants

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	2
A. Assignments Of Error. ....	2
B. Issues Presented. ....	3
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT .....	9
A. The Jury's Verdict on Informed Consent was Supported by Substantial Evidence .....	9
1. Standards Governing Motion for New Trial Based on Alleged Insufficiency of Evidence.....	9
2. Applicable Law Re: Informed Consent .....	10
3. "Materiality" Like "Reasonable Care" is an Issue of Fact for the Jury .....	12
4. The Trial Court Erred by Ordering a New Trial Based, in part, on its Determination that the Jury was Confused .....	17
V. CONCLUSION.....	19

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Archer v. Galbraith</i> , 18 Wn.App. 369, 567 P.2d 1155 (1977).....	13, 14
<i>Backland v. University of Washington</i> , 137 Wn.2d 651, 975 P.2d 950 (1999).....	16
<i>Bays v. St. Luke's Hospital</i> , 63 Wn.App. 876, 825 P.2d 319, review denied, 119 Wn.2d 1008, 833 P.2d 387 (1992).....	16
<i>Brown v. Dahl</i> , 41 Wn.App. 565, 705 P.2d 781 91985) .....	13
<i>Burnett v. Spokane Ambulance</i> , 54 Wn.App. 162, 772 P.2d 1027, review denied, 113 Wn.2d 1005, 777 P.2d 1050 (1989).....	16
<i>Gustav v. Seattle Urological Associates</i> , 90 Wn.App. 785, 954 P.2d 319 (1998).....	16
<i>Housel v. James</i> , 141 Wn.App. 748, 172 P.3d 712 (2007).....	13
<i>Estate of Lapping v. Group Health Co-op.</i> , 77 Wn.App. 612, 892 P.2d 1116 (1995).....	12, 14
<i>Seybold v. Neu</i> , 105 Wn.App. 666, 19 P.3d 1068 (2001).....	11
<i>Smith v. Shannon</i> , 100 Wash.2d 26, 666 P.2d 351 (1983).....	11, 12
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	13
<i>State v. Marks</i> , 90 Wn.App. 980, 955 P.2d 406 (1998).....	17, 18, 19

<i>Thomas v. Wilfac, Inc.</i> , 65 Wn.App. 255, 828 P.2d 597, <i>review denied</i> , 119 Wn.2d 1020, 838 P.2d 692 (1992).....	12, 16
<i>Thompson v. Gray's Harbor Community Hospital</i> , 36 Wn.App. 300, 675 P.2d 239 (1983).....	9
<i>Vasquez v. Markin</i> , 46 Wn.App. 480, 731 P.2d 510 (1987).....	13, 14
<i>Villanueva v. Harrington</i> , 80 Wn.App. 36, 906 P.2d 374 (1995).....	11
<i>ZeBarth v. Swedish Hosp. Medical Ctr.</i> , 81 Wn.2d 12, 499 P.2d 1 (1972).....	12
<b>Statutes</b>	
RCW 7.70.050 .....	10, 11
RCW 7.70.050(2).....	12
<b>Other Authorities</b>	
CR 50 .....	9
CR 59 .....	9, 10

## I. INTRODUCTION

This is a dental malpractice case. The Appellants and Defendants below, are Thomas Weiler, D.D.S. and his professional corporation, Associated Dentists (hereinafter collectively referred to as Dr. Weiler). The Respondent, and Plaintiff below, is Tabrina McBride (hereinafter referred to as Ms. McBride). Generally, this case arises from a single tooth root canal procedure Dr. Weiler performed on Ms. McBride on March 15 and 29, 2006.

Toward the end of the procedure on March 29, as Dr. Weiler was using a small metal rotary file to shape the canal, the file broke off inside the canal. Ms. McBride was informed of this and the decision was made to leave the broken file in place, rather than attempt to remove it, with the inert metal file acting as the root canal filling material.<sup>1</sup> During subsequent visits, Dr. Weiler crowned the tooth and instructed Ms. McBride to contact him if she experienced any problems.

---

<sup>1</sup> The trial court granted Ms. McBride's motion for a new trial because of the jury's verdict on informed consent, not standard of care. Thus, the standard of care evidence adduced at trial, and the jury's verdict in favor of Dr. Weiler on the standard of care, are not the focus of this appeal. Nevertheless, the court should be aware that both sides' expert witnesses agreed it is not necessarily a standard of care violation to break a file during a root canal, or leave the broken file in place as fill material. All dentists who testified, both experts and treating dentists, acknowledged they had broken a file inside the tooth during a root canal procedure, and left the file in place. Ms. McBride's expert, Dr. Grossman, testified that, with respect to the standard of care, he was not critical of Dr. Weiler for the file having broken inside the tooth.

Over two years later, an abscess developed in the tooth. Rather than contact or return to Dr. Weiler, Ms. McBride saw another general dentist. He, in turn, referred her to an endodontist who, using special equipment, removed the broken file and re-did the root canal.

Ms. McBride brought suit against Dr. Weiler, alleging both failure to comply with the standard of care and lack of informed consent.

The jury returned a unanimous verdict for Dr. Weiler, finding there was no violation of the standard of care, and no failure to obtain Ms. McBride's informed consent.

Ms. McBride moved for a new trial, arguing that the jury's verdict on informed consent was not supported by the evidence. Her essential argument was that, once the file broke off in the tooth, Dr. Weiler failed to give her adequate informed consent regarding risks presented by the broken file and her treatment options.

The trial court granted the motion, finding the jury was confused and that its verdict on informed consent was not supported by substantial evidence. This appeal followed.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments Of Error.**

1. The trial court erred by concluding that the jury's verdict on informed consent was not supported by sufficient evidence.

2. The trial court erred by ordering a new trial based, in part, on its finding of jury confusion.

**B. Issues Presented.**

1. Construing the Evidence in the light most favorable to Dr. Weiler, was it error for the trial court to conclude the jury's verdict on informed consent was not supported by the evidence?
2. Was it error for the trial court to inquire into the thought processes of the jury and conclude the jury was confused?

**III. STATEMENT OF THE CASE**

On March 15, 2006, Dr. Weiler diagnosed Ms. McBride as having pulpitis in tooth #7<sup>2</sup> (RP Vol. I, 27) and recommended a root canal. (See RP Vol. I, 17). Dr. Weiler did not inform Ms. McBride about the risk of a file breaking off during the procedure because that is "extremely rare." (RP Vol. I, 112-113). Likewise, he did not talk to her about the risk of the tooth reabscessing and reinfecting because that is very rare and root canals are usually successful. (RP Vol. I, 113).

To initiate the root canal procedure on March 15, Dr. Weiler opened and broached the tooth. (RP Vol. I, 17). "Broach" is a term used to describe cleaning out the necrotic or bad tissue. (RP Vol. I, 25). Because broaching does not remove 100% of the material, the process also involves putting a chemical, formocresol, into the space, which

---

<sup>2</sup> Tooth #7 is the incisor located on the upper right.

mummifies any remaining tissue and sterilizes the canal. (RP Vol. I, 26; 29).

After Dr. Weiler placed formocresol inside the canal, he sealed it with cavit, a temporary filling material. (RP Vol. I, 28-29).

On March 29, 2006, McBride returned for the second part of the procedure, which involved instrumentation and shaping of the canal. (RP Vol. I, 29). Again, Dr. Weiler did not inform Ms. McBride about any risks associated with the root canal because he did not think there were any. (RP Vol. I, 29-30).

To instrument and shape the canal, Dr. Weiler first used a small file to establish the working length of the canal. (RP Vol. I, 30). An x-ray was taken showing Dr. Weiler's hand file at the end of the canal, confirming the working length of the tooth. (RP Vol. I, 92, Image C of Exhibit 143). The hand piece (file and drill) he uses to do the root canals, has a feature that measures the depth of the canal. (RP Vol. I, 82-83). Typically root canals are filled to a half a millimeter from the end of the apex. (RP Vol. I, 83-84). As the file is moved into the tooth, the hand piece generates an electrical impulse, and when the file is a half a millimeter from the end of the apex, the handpiece emits an audible tone. (RP Vol. I, 83-84). The rotary files have a movable rubber gauge used to measure the file's penetration into the canal. After establishing the

working length of the canal as 25 millimeters, Dr. Weiler set the rubber gauge on his files to 25. (RP Vol. I, 92). The rubber gauge is simply another failsafe to indicate when the file is at working length. (RP Vol. I, 93).

Thus, Dr. Weiler confirmed he was at the end of the canal – the apex of the tooth – in three ways: (1) by feel, with a metal probe and x-ray (RP Vol. I, 93); (2) by use of 25 millimeter depth gauges on the rotary files; and (3) with the sensor on the hand piece. (RP Vol. I, 94).

After Dr. Weiler established the working length of the canal, he proceeded to clean the canal, shape it, and get it ready for final filling. (RP Vol. I, 35). In the canal cleaning and shaping process, he progressed through size 15, 20, and 25 files. (RP Vol. I, 38). Throughout this process, his assistant irrigated the tooth with water. (RP Vol. 1, 43).

Eventually Dr. Weiler progressed to a size 30 file. When this file was all the way to the end of his working length (25 mm), the file separated, or broke, at the shank. (RP Vol. I, 40). At this point, Dr. Weiler was no longer cleaning the canal, but was shaping it for the final filling material. (RP Vol. I, 110-11).

After the file broke, Dr. Weiler took an x-ray, and confirmed that the end of the broken file was to its working length, that is, at the apex or end of the canal, occupying the space that would normally be filled with a

rubber material. (RP Vol. I, 51). Dr. Weiler's clinical judgment, his x-rays, and his rotary instrument all confirmed that he was at the apex of the tooth when the file broke. (RP Vol. I, 105).

Dr. Weiler showed Ms. McBride the x-ray of the broken file and told her he was confident that because it had broken off at the working length of the tooth, was "friction gripped" into the tooth, (RP Vol. I, 57-58), and because he felt confident he had cleaned the tooth adequately and removed the bacteria, there were no risks presented by the broken file. (RP Vol. I, 52; 60).

Dr. Weiler also explained to Ms. McBride that when he went to school dentists actually used metal "silver points" to fill root canal teeth, that the metal file was to the end of the canal, and that he thus felt comfortable leaving it as it was. (RP Vol. I, 54-55).

Despite this, Dr. Weiler knew there were specialists who had instruments that could be used to remove a broken file. He informed Ms. McBride that if she wanted the file removed, she would have to see a specialist. (RP Vol. I, 53; 67).

At the end of the appointment on March 29, 2006, the canal, in Dr. Weiler's opinion, was filled and sealed with the metal file. (RP Vol. I, 117). Dr. Weiler did not tell Ms. McBride there was a risk the root canal would fail. (RP Vol. I, 116). He felt comfortable the file had separated in

a position in the tooth where it was at working length, and that he had cleaned the canal. (RP Vol. I, 116). More specifically, when he opened and broached the canal on March 15, he treated the canal with a disinfectant. (RP Vol. I, 17, 25-26). During the second treatment on March 29, as he was instrumenting the tooth, he felt comfortable that he had cleaned it to working length and that there was no bacteria left inside the tooth. (RP Vol. I, 116-17). In Dr. Weiler's clinical judgment, when the file broke off on March 29, 2006, there was no tissue left inside the canal and he had either killed or removed all of the bacteria in the tooth. (RP Vol. I, 117, 181).

Dr. Tataryn, an endodontist (dentist who specializes in root canals), was called as an expert witness by Dr. Weiler. He testified that if Ms. McBride had come to him about the file having broken off in the tooth, he would not have removed it but would, instead, have left it in place and told Ms. McBride to return if she had any symptoms. (RP Vol. IV, 19). Ms. McBride's expert, Dr. Jay Grossman, testified that, with respect to file breakage, if a file is put all the way to the apex of the tooth after the pathology has been removed, that "could be a perfectly good seal and an acceptable root canal." (RP Vol. III, 55.).

Dr. Tataryn also testified that based upon the x-rays taken by Dr. Weiler, the file was separated at the "radiographic apex of the tooth" or the

working length of the tooth. (RP Vol. IV, 15-16). He also testified that when a file breaks off at the working length of the tooth, it "is about as ideal as you could ask for" because "you're not leaving any untreated canal space or undisinfected canal space or unfilled canal space, so to speak, when it goes all the way to the root end like that." (RP Vol. IV, 18). Additionally, Dr. Tataryn testified that in such a situation, he would leave the instrument in the tooth to act as a filler because if removal was attempted, it could cause more damage to the tooth. (RP Vol. IV, 20). Dr. Tataryn also testified that peer review journals<sup>3</sup> supported the conclusion that if a file breaks off in a tooth during a root canal procedure and is left in place, the broken file does not reduce the chance of a successful outcome. (RP Vol. IV, 10-11, 20). In other words, there is no increased risk to the patient by leaving the file in place after a separation at the working length of the tooth. Finally, Dr. Tataryn testified that file breakage can occur even if the root canal procedure is performed exactly how it is supposed to be performed. (RP Vol. IV, 8). He identified the risk of file breakage as .1 to .2 percent. (RP Vol. IV, 8).

---

<sup>3</sup> The American Association of Endodontists and the International Journal of Endodontics.

#### IV. ARGUMENT

##### A. The Jury's Verdict on Informed Consent was Supported by Substantial Evidence

###### 1. Standards Governing Motion for New Trial Based on Alleged Insufficiency of Evidence

The test for sufficiency of the evidence to support a verdict under CR 59 (motion for new trial) is the same as under CR 50 (motion for judgment as matter of law). 4 Wash. Prac. CR 59. *See also Thompson v. Gray's Harbor Community Hospital*, 36 Wn.App. 300, 309, 675 P.2d 239 (1983). Washington Practice explains this as follows:

Since the 1950s, however, the test [for sufficiency of the evidence in context of motion for new trial] has been the same as the test for whether the evidence is sufficient to send the case to the jury in the first place; i.e., whether the evidence is sufficient to get past a motion for a directed verdict under CR 50 (now called a motion for judgment as a matter of law). Under CR 50, no element of discretion is involved, and the Court does not weigh the evidence. The motion to take the case from the jury is denied unless there is no evidence or reasonable inference from the evidence that would sustain a verdict in favor of the non-moving party, considering the evidence most favorably to the non-moving party. (citation omitted). This point is discussed in greater detail in the author's comments following CR 50.

This same approach is now taken under CR 59(a)(7). The trial court has no discretion and does not weight the evidence. The jury, and the jury alone, weighs the evidence. When there is simply no conflict in the evidence, and all the relevant evidence favors the moving party, the court will not hesitate to authorize a new trial. (citation omitted). But if the motion under CR 50 would require any weighing of conflicting evidence, the motion should be denied. (citation omitted).

4 Wash. Prac. CR 59 (West 2013) (emphasis added).

Here, the trial court's new trial order must be reversed if there was any evidence or reasonable inference therefrom to sustain the jury's verdict, construing the evidence in the light most favorable to Dr. Weiler.

2. Applicable Law Re: Informed Consent

RCW 7.70.050 governs informed consent claims. It states in pertinent part:

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

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

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

(b) The anticipated results of the treatment proposed and administered;

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

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

[...]

RCW 7.70.050 (emphasis added).

"The rule governing the necessity to disclose a given risk is the test of materiality." *Seybold v. Neu*, 105 Wn.App. 666, 681, 19 P.3d 1068, 1076 (2001). Determination of materiality is a 2-step process: (1) initially, the scientific nature of the risk must be ascertained, i.e., the nature of the harm which may result and the probability of its occurrence and (2) 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. *Id.* (quoting *Smith v. Shannon*, 100 Wash.2d 26, 31, 666 P.2d 351 (1983)). "The test for materiality is an objective one." *Villanueva v. Harrington*, 80 Wn.App. 36, 38, 906 P.2d 374, 376 (1995).

A fact is material if "a reasonably prudent person in the position of the patient or his representative would attach significance to it deciding whether or not to submit to the proposed treatment." RCW 7.70.050(2); *Smith v. Shannon*, 100 Wn.2d 26, 30-31, 666 P.2d 351 (1983) ("informed consent doctrine 'does not place upon the physician a duty to elucidate upon all of the possible risks, but only those of a serious nature'") (quoting *ZeBarth v. Swedish Hosp. Medical Ctr.*, 81 Wn.2d 12, 25, 499 P.2d 1 (1972)); *Estate of Lapping v. Group Health Co-op.*, 77 Wn.App. 612, 623, 892 P.2d 1116 (1995) (Washington follows a reasonable patient standard, as opposed to a professional medical standard); *Thomas v. Wilfac, Inc.*, 65 Wn.App. 255, 260, 828 P.2d 597 ("[a] physician does not have a duty to explain all risks, only those of a material nature"), *review denied*, 119 Wn.2d 1020, 838 P.2d 692 (1992).

3. "Materiality" Like "Reasonable Care" is an Issue of Fact for the Jury

"Materiality presents a jury question if any rational trier of fact could find, based on a preponderance of evidence, that a reasonably prudent person in the position of the patient, when deciding whether to submit to the proposed treatment, would have attached significance to the fact in issue." *Estate of Lapping v. Group Health Co-op. of Puget Sound*, 77 Wn.App. 612, 624, 892 P.2d 1116, 1122 (1995) (citing *Brown v. Dahl*,

41 Wn.App. 565, 574, 705 P.2d 781 (1985); *Archer v. Galbraith*, 18 Wn.App. 369, 376, 567 P.2d 1155 (1977)). Whether a physician breached his/her informed consent responsibilities is a question of fact. *Housel v. James*, 141 Wn.App. 748, 757, 172 P.3d 712, 716 (2007). Credibility determinations are likewise for the finder of fact. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Consistent with the above, multiple reported Washington cases emphasize that whether a physician should have informed a patient of the availability of a particular diagnostic procedure, treatment alternative, or abnormal lab result, is a question of fact for the jury. Representative is *Vasquez v. Markin*, 46 Wn.App. 480, 731 P.2d 510 (1987). There, the defendant failed to inform the patient, prior to surgery, of an abnormal blood test indicating that the oxygen carrying capacity of the patient's blood was below normal. The patient moved for a directed verdict on informed consent. In holding that the trial court properly denied the plaintiff's motion, the court stated:

Mr. and Mrs. Vasquez claimed the court erred in refusing to grant a directed verdict on the informed consent issue. "A motion for 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." (citation omitted). Moreover, the evidence must be considered in the light most favorable to the non-movant. (citation omitted). Here the materiality of Ms. Vasquez's blood test result was disputed at trial; the

court properly refused to direct a verdict on this issue.  
(citations omitted).

*Vasquez*, 46 Wn.App. at 487 (emphasis added).

Also instructive is *Estate of Lapping v. Group Health Cooperative*, 77 Wn.App. 612, 892 P.2d 1116 (1995). There, the plaintiff argued the defendant had the obligation to inform the patient that the procedure at issue could have been performed at a hospital on an outpatient basis, instead of at the defendant's clinic. The trial court directed a verdict on the informed consent claim in favor of the defense. In reversing, the Court of Appeals stated:

The question here is whether a rational trier of fact could have found, by a preponderance of evidence, that a reasonably prudent person in Lapping's position would have attached significance to the fact that the endometrial biopsy could have done in a hospital with more equipment and greater precautions than were available in the clinic. In our view, the answer is yes. Lapping was not a normal patient; she had a history of seizures and was taking dilanten.

...

We hold the trial court erred by not submitting to the jury the plaintiff's cause of action for informed consent.

*Lapping*, 77 Wn.App. at 625-26 (emphasis added).

In accord is *Archer v. Galbraith*, 18 Wn.App. 369, 567 P.2d 1155 (1977), review denied, 90 Wn.2d 1010 (1978). There, a surgeon failed to advise the patient of various risks associated with a hemithyroidectomy.

He also failed to advise of the possibility of observing the affected gland, without surgery, to see if it changed over time. The trial court removed informed consent from the jury's consideration. Division I reversed, in effect holding that a rational trier of fact could have found that a reasonable person in the patient's shoes would have attached significant to the omitted information.

These cases make it abundantly clear that the issue of materiality – whether a reasonable patient in the plaintiff's position would have assigned significance to the information at issue in making his/her treatment choice(s) – is for the jury.<sup>4</sup>

In the instant case, in addition to speculating about jury confusion, the trial court seemed to base its new trial order on the supposition that Dr. Weiler had not removed all of the bacteria from the canal at the time the file broke and that, accordingly, he should have informed Ms. McBride there was an increased risk the root canal would fail and the tooth re-abscess. But all of Dr. Weiler's evidence was that the bacteria in the canal had been removed or sterilized at the time the file broke and that, accordingly, there was no increased risk of re-abscess or root canal failure.

---

<sup>4</sup> Dr. Weiler has been unable to locate a single reported Washington case where, after a verdict in favor of the defendant on the issue of informed consent, an appellate court determined that the jury's verdict was unsupported by the evidence.

The jury was entitled to accept Dr. Weiler's evidence over Ms. McBride's on this pivotal issue.

Dr. Weiler testified at length about how, at the time the file broke, he believed he had cleaned all of the bacteria out of the canal, and that, accordingly, there was no risk associated with leaving the file in place. The trial court, however, determined Dr. Weiler had not adequately cleaned the canal at the time of breakage. In effect, the trial court imposed a duty on Dr. Weiler to inform Ms. McBride of a risk associated with a condition Dr. Weiler did not diagnose or otherwise believe to exist. A health care provider, however, has no such duty. *See Backlund v. University of Washington*, 137 Wn.2d 651, 661, 975 P.2d 950 (1999); *Burnett v. Spokane Ambulance*, 54 Wn.App. 162, 772 P.2d 1027, review denied, 113 Wn.2d 1005, 777 P.2d 1050 (1989); *Bays v. St. Luke's Hospital*, 63 Wn.App. 876, 88, 825 P.2d 319, review denied, 119 Wn.2d 1008, 833 P.2d 387 (1992); *Gustav v. Seattle Urological Associates*, 90 Wn.App. 785, 790, 954 P.2d 319 (1998). *See also Thomas v. Wilfac*, 65 Wn.App. 255, 261, 828 P.2d 597 (1992).

Ms. McBride, in her motion for new trial, also challenged the sufficiency of the information conveyed to her by Dr. Weiler regarding the prospect of removing the file. After telling her the file broke and showing her an x-ray depicting the broken file and its position, Dr. Weiler did tell

Ms. McBride that, if the file were to be removed, it would have to be done by a specialist, with special tools he did not have. The jury was entitled to conclude that this was a sufficient disclosure of Ms. McBride's treatment options at this point.

With regard to the adequacy of Dr. Weiler's pre-procedure disclosure of risk(s), such as the risk of file breakage or root canal failure in general, the jury was entitled to conclude these risks were not material, either because of their rarity, or because a reasonable person in Ms. McBride's situation (significant and persistent dental pain) would not attach significance to the information in deciding whether to proceed with the root canal procedure.

4. The Trial Court Erred by Ordering a New Trial Based, in part, on its Determination that the Jury was Confused

The trial court, in passing on a motion for new trial, may not speculate about the jury's thought processes or the manner in which the jury considered or construed the evidence. *See State v. Marks*, 90 Wn.App. 980, 955 P.2d 406 (1998). In *Marks* the trial court granted the defendant's motion for a new trial on the grounds of irregularity in the proceedings and failure of substantial justice because the trial court concluded the jury was confused by the court's instructions. In reversing, the Court of Appeals held that the trial court's conclusion regarding jury confusion was

an impermissible inquiry into the thought processes of the jury, and that, accordingly the trial court's reliance on supposed jury confusion was an abuse of discretion. In so holding, the court first commented on the role of the trial court and jury as follows:

First, decisions granting or denying a motion for new trial usually rest on questions of law and the application of a rule of law, rather than the trial judge's assessment of the evidence or the impact of that evidence on jury. The latter functions are constitutionally reserved for the jury. The trial judge is not a "13<sup>th</sup> juror." *State v. Williams*, 96 Wn.2d 215, 221-22, 634 P.2d 868 (1981). Second, a cursory review of appellate decisions between 1974 and 1996 shows that 14 trial court orders granting a new trial were appealed. Six, or 42.9% were reversed. During the same period, 49 denials of a new trial were reviewed, with only 14, or 28.6 being reversed.

90 Wn.App. at 984-85 (emphasis added).

On the appropriateness of the trial court concluding the jury was confused by the instructions, the court stated:

But here, whether the jury was misled is a question of fact, which can only be determined by recourse to jury comments. The instruction given was correct. How the jury applied that instruction can be discovered only by probing behind the verdict, and into the jurors' mental processes. This is forbidden. Whether this jury applied the instruction to witnesses other than Mr. Steve cannot be known without probing these mental processes. Those mental processes inhere in the verdict and are therefore inaccessible to subsequent inquiry. (citation omitted).

...

We conclude then that the trial court's discretionary decision granting new trial in this case is not based on

tenable grounds or for tenable reasons and must be reversed. (citations omitted).

90 Wn.App. at 986-87.

Here the trial court based its new trial order in part, on the finding the jury was "likely confused" by the evidence because of the multiple references to file breakage alone not being a violation of the standard of care (CP 104). Clearly this was an impermissible inquiry into, and speculation about, the thought processes of the jury and, like in *Marks, supra*, an abuse of discretion.

#### V. CONCLUSION

This is a case where the trial court appears to have substituted its own feelings and beliefs about the case for the judgment of the jury. This is evinced by the trial court having based its ruling, in part, on rank speculation about jury confusion and how the jury must have considered the evidence.

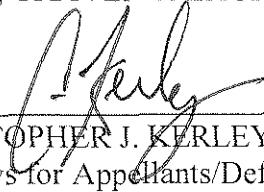
Considered it the light most favorable to Dr. Weiler, there was ample evidence to support the jury's verdict on informed consent, more specifically that Dr. Weiler informed Ms. McBride of all material risks before and after the file broke.

Accordingly, Dr. Weiler respectfully requests that the trial court's order granting Ms. McBride's Motion for new trial be reversed.

RESPECTFULLY SUBMITTED this 11 day of October, 2013.

EVANS, CRAVEN & LACKIE, P.S.

By

  
CHRISTOPHER J. KERLEY, #16489  
Attorneys for Appellants/Defendants

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 10 day of October, 2013, the foregoing was delivered to the following persons in the manner indicated:

Marcia M. Meade  
Dawson & Meade  
1310 W Dean  
Spokane, WA 99201-2015

VIA REGULAR MAIL [ ]  
VIA CERTIFIED MAIL [ ]  
VIA FACSIMILE [ ]  
HAND DELIVERED

10/11/13 / Spokane, WA  
(Date/Place)

  
\_\_\_\_\_