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NO. 89866-9

SUPREME COURT OF THE STATE OF WASHINGTON

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PHYLLIS PAETSCH,

Appellant,

v.

SPOKANE DERMATOLOGY CLINIC, P.S., a Washington corporation;  
and WILLIAM P. WERSCHLER, M.D., individually,

Respondents.

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SUPPLEMENTAL BRIEF OF RESPONDENTS

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## I. ISSUES PRESENTED

1. To the extent Ms. Paetsch has not waived her claim of error, did the trial court properly dismiss Dr. Werschler from individual liability under CR 56 (relating to the Restylane injections) and CR 50 ruling (relating to treatment of her post-injection complications) because there was no evidence that Dr. Werschler had a doctor-patient relationship with Ms. Paetsch or that she contracted with him personally to perform her cosmetic injections or post-injection care?

2. To the extent Ms. Paetsch has not waived her claim of error, was the trial court's giving of an "exercise of judgment" instruction a proper exercise of its discretion and harmless in any event?

## II. FACTS RELEVANT TO SUPPLEMENTAL BRIEF ISSUES

### A. Ms. Paetsch's Treatment at Spokane Dermatology Clinic.

Before her 49<sup>th</sup> birthday, Phyllis Paetsch decided she wanted to have some frown lines smoothed out, called her dermatologist's office to ask if they did Botox injections, and was told that her dermatologist's office did not do them, but that Spokane Dermatology Clinic did. RP 729-30, 732, 891. Ms. Paetsch previously had never heard of Spokane Dermatology Clinic. RP 730. She looked in the phone book, got the number for the Clinic, and called to make an appointment. RP 732. When the receptionist asked if she knew who she would like to see, Ms. Paetsch

said that she had not been there before and had no preference. RP 738, 894-95. She was told she would be seeing Dan Rhoads and an appointment was made for February 26, 2007. RP 747, 750, 894-95.

In February 2007, the Clinic had two dermatologists, Dr. William Philip Werschler and Dr. Scott Smith. RP 1100, 1157; CP 39-41, 96-97. Dan Rhoads, PA-C, was one of the Clinic's physician assistants with extensive experience performing cosmetic injections. RP 1101, 1105-10, 1142-45, 1148-51, 1390-93, 1446-47, 1525. Dr. Smith was Rhoads' WAC Ch. 246-918 supervising physician. RP 1157; CP 40-41, 96-97. Dr. Werschler was Rhoads' alternate supervisor, responsible for reviewing his work only in Dr. Smith's absence. RP 1157-58; WAC 246-918-140(4).

Ms. Paetsch did no research on Spokane Dermatology Clinic or its providers before she called the Clinic or kept her appointment with Dan Rhoads. RP 891. She knew that Dan Rhoads would be doing her injections. RP 898. She admittedly had no expectation of seeing Dr. Werschler or having him perform her injections, and in fact had never heard of him before. RP 895, 898. She never sought any care specifically from Dr. Werschler and he never provided treatment to her. RP 939.

When Ms. Paetsch arrived for her February 27, 2007 appointment with Dan Rhoads, she was given a medical history form, Ex. P24, and a patient profile form, Ex. P22, to complete and sign. RP 748-50. The

Patient Profile has, at the top, a line that says "Doctor:", followed by "Wm. Philip Werschler MMD," Ex. P22, which is a computer-generated default entry that would have been entered regardless of who the patient was actually going to see in case the Clinic bills a procedure to an insurer, RP 1120-21. Ms. Paetsch did not claim that she had seen or relied on Dr. Werschler's name appearing on that or any other form she signed;<sup>1</sup> she admitted she had not heard of, and had no expectation of seeing, Dr. Werschler. RP 895-96. Ms. Paetsch first heard of Dr. Werschler after she was treated by Dan Rhoads, RP 939, when, on March 4, 2007, a nurse in the emergency room at Holy Family Hospital told her that Dr. Werschler was the owner of Spokane Dermatology Clinic. RP 802, 919.

At the visit on February 27, 2007, Mr. Rhoads administered injections of Botox and Restylane to smooth out wrinkles around Ms. Paetsch's mouth and forehead. RP 764-70, 898, 1392-93, 1405-07, 1410-11, 1529-30. Ms. Paetsch left the Clinic very pleased with the results. RP 904-05, 1243, 1412. On March 1, 2007, however, she called the Clinic and told Mr. Rhoads that her eye was swollen shut and he told her to put

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<sup>1</sup> Ms. Paetsch signed three consent forms, one for Botox, Ex. P25, and two for Restylane, Exs. P26 and P27. One of the Restylane forms, Ex. P27, contains a typewritten reference to "Dr. Werschler and/or" followed by a handwritten reference to "Dan Rhoads PAC" in stating that "Dr. Werschler and/or Dan Rhoads PAC has also informed me . . .," and two other typewritten references to "Dr. Werschler": (1) "Dr. Werschler has provided me with this informed Consent . . .;" and (2) "I agree to hold Spokane Dermatology Clinic, Aesthetic Image, and Wm. Philip Werschler, M.D. harmless . . .".

ice on it. RP 780-81. On March 2, when Ms. Paetsch again called the Clinic complaining of swelling and a “green sheen” on her forehead, Mr. Rhodes had her come in for examination, and diagnosed a probable infection, but had a secondary concern about the possibility of necrosis. RP 781, 783-84, 1416, 1419-20. He gave her some antibiotic samples, prescribed a pain reliever, and had her schedule a follow-up visit on Tuesday, March 6, 2007. RP 788-89, 796, 909, 1420-21, 1506-07.

On the Sunday before the March 6 appointment, Ms. Paetsch went to the Holy Family Hospital emergency room, where her forehead wound was debrided and she was given a different antibiotic and pain medication.<sup>2</sup> RP 797, 800, 802. She kept her March 6 appointment with Mr. Rhoads, RP 801, and did not ask to see Dr. Werschler or Dr. Smith, RP 918. Mr. Rhoads thought Ms. Paetsch appeared to be improving, and gave her a tube of Biafine, which speeds healing, to apply to her forehead. RP 920, 1171-72, 1426-28. Ms. Paetsch scheduled an appointment to see Mr. Rhoads the next week, but never returned and instead sought care from an ARNP at Christ Clinic. RP 807, 922, 1430.

No one contended that Ms. Paetsch’s forehead necrosis could have been mitigated after March 2, 2007, and the uncontroverted evidence established that Dr. Werschler was not at the Clinic from February 28

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<sup>2</sup> It was at this emergency room visit that Ms. Paetsch first heard of Dr. Werschler and learned from a nurse that he owned Spokane Dermatology Clinic. RP 919.

through March 11, 2007. RP 1130. He was teaching at the UW Medical School from February 28 until March 2, spent the weekend (March 3-4) at home in Spokane, and then flew to Hawaii from March 5-11 to teach at conferences, and he received no phone calls about Ms. Paetsch during that time. RP 1134-38, 1185-87, 1325. He thus was not asked and had no reason or opportunity to become involved in Ms. Paetsch's care when she presented with her post-injection complications. RP 1137-38.

Mr. Rhoads recalls telling Dr. Werschler about Ms. Paetsch at some point in time, but he did so in person, and the conversation would not have occurred while Dr. Werschler was in Hawaii, and may have occurred after Ms. Paetsch had discontinued treatment at the Clinic. RP 1428, 1520, 1524-25. Dr. Werschler recalls that, sometime after he returned to Spokane, Mr. Rhoads told him in an informal way about a patient who had green pustules on her forehead that were improving on antibiotics. RP 1136-37. Mr. Rhoads did not ask him to see the patient or provide treatment advice. RP 1137. Mr. Rhoads does not recall speaking with Dr. Smith about Ms. Paetsch, and he probably would not have consulted either physician because he was "confident about what the patient needed." RP 1429, 1521-22.

Dr. Smith, not Dr. Werschler, was Mr. Rhoads' supervising physician. Physician assistants' chart entries must be reviewed and initialed by

a supervising physician within seven days, and Mr. Rhoads' entries reflecting Ms. Paetsch's three visits to him at the Clinic bear Dr. Smith's, not Dr. Werschler's, initials. RP 1189-90; CP 136, 152, 155, 158.

B. The CR 56 and CR 50 Dismissals of Ms. Paetsch's Claims Against Dr. Werschler.

Ms. Paetsch sued the Clinic and Dr. Werschler, not Mr. Rhoads or Dr. Smith. CP 17-27. Dr. Werschler moved for summary judgment, CP 39-101, arguing that he could not be held liable vicariously or for negligent supervision of Mr. Rhoads because the Clinic, not he, was Mr. Rhoads' employer, and Dr. Smith, not he, was Mr. Rhoads' supervisor, CP 91-97. In response, Ms. Paetsch argued (1) that "an assistant's medical treatment is medical treatment of the physician," CP 129-30, and (2) that Dr. Werschler had been "directly accessed for Dan Rhoads's treatment of [her]," when Mr. Rhoads allegedly "went to [him] directly" for assistance but he "declined" to assist Mr. Rhoads, CP 130. She did not argue that she had "contracted" with Dr. Werschler, personally, for any health care.

The trial court denied Dr. Werschler's motion in part, finding "an issue of fact as to whether a patient/physician relationship arose between Dr. Werschler and Ms. Paetsch establishing a duty for Dr. Werschler to provide follow up care of Ms. Paetsch." CP 176. The ruling preserving that issue for trial was based on Mr. Rhoads' deposition testimony about

having a conversation with Dr. Werschler at some unspecified time about Ms. Paetsch's post-injection presentation. CP 112-13.

Ms. Paetsch moved for reconsideration of that portion of the order that she acknowledged "reliev[ed] Dr. William Werschler from the liability relative to the actions of PA-C Daniel Rhoads with respect to the cosmetic injection itself." CP 183. Ms. Paetsch's counsel asserted that Ms. Paetsch had gone to the Clinic "with the understanding that she would be treated by Dr. Werschler, as she understood it to be his clinic," CP 184, something Ms. Paetsch herself expressly disclaimed at trial, RP 895-96; *see also* RP 898, 915, 919, 939. Her motion for reconsideration was denied. CP 329-30. Ms. Paetsch did not mention or assign error to either the summary judgment order or the order denying reconsideration in her opening appellate brief.

After the close of the evidence at trial, Dr. Werschler moved under CR 50(a) to dismiss the claim that had survived summary judgment – that he negligently failed to provide care to Ms. Paetsch for her post-injection complication. RP 1576-81. The trial court granted that motion because there was no evidence or inference from the evidence that Mr. Rhoads had contacted Dr. Werschler, or that Dr. Werschler had, but declined, an opportunity to involve himself in Ms. Paetsch's care while a chance still existed that her necrosis could have been mitigated. RP 1586-88.

C. Ms. Paetsch's Exception to the "Exercise of Judgment" Instruction.

The trial court gave an "exercise of judgment" instruction that said:

A physician or certified physician's assistant is not liable for selecting one of two or more alternative courses of treatment, if, in arriving at the judgment to follow the particular course of treatment, the physician or certified physician's assistant exercised reasonable care and skill within the standard of care the physician or certified physician's assistant was obliged to follow.

In excepting to the "exercise of judgment" instruction at trial, Ms. Paetsch argued only that the instruction cannot be given in a case of misdiagnosis.<sup>3</sup>

III. ARGUMENT

A. The Trial Court Properly Dismissed Dr. Werschler from Individual Liability As There Was No Evidence that He Had a Doctor-Patient Relationship with Ms. Paetsch or that She Contracted with Him Personally to Perform Her Cosmetic Injections or Follow-up Care.

Because Mr. Rhoads was practicing as a Clinic employee under Dr. Smith's primary supervision, and Dr. Werschler had no contact with Ms. Paetsch on or before February 26, 2007, *see* CP 135-37, the trial court dismissed on summary judgment Ms. Paetsch's claim that Dr. Werschler had individual liability for her cosmetic injections, *see* CP 176. As Ms. Paetsch acknowledged in her motion for reconsideration of the summary

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<sup>3</sup> RP 1600-01 ("[T]he instruction] is not appropriate for this case because this [is] a case of misdiagnosis ... There is no evidence that Mr. Rhoads properly diagnosed the condition and ... set out to address two or more alternative courses of treatment for that condition."); RP 1619 ("I take exception to the Court's [decision] to give that two alternative forms of treatment instruction [b]ecause [it] is basically setting ... up ... to the jury that Mr. Rhoads had the proper option to determine between two alternative courses of treatment when he completely misdiagnosed the issues. And that's not proper [because its' telling the jury that his misdiagnosis is okay]").

judgment order, CP 183, that order, CP 176, dismissed any claim that Dr. Werschler was liable “relative to the actions of PA-C Daniel Rhoads with respect to the cosmetic injection itself” on February 26, and left for trial only her claim that Dr. Werschler refused to involve himself in her care after learning from Mr. Rhoads of her post-injection presentation.

In her opening appellate brief, Ms. Paetsch did not assign error to, or mention, the trial court’s summary judgment or reconsideration orders. Nor did she cite anything from the record on those motions establishing error in those rulings. She thus waived any claim of error with respect to those rulings. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) (“failure to assign error to or provide argument and citation to authority in support of an assignment of error ... precludes appellate consideration of an alleged error”).

Despite that waiver, Ms. Paetsch has asserted on appeal that she personally contracted with Dr. Werschler not only to perform her cosmetic injections,<sup>4</sup> but also to provide post-injection care. The testimony adduced at trial, including Ms. Paetsch’s own testimony, belies any such assertion.

Ms. Paetsch’s dermatologist’s office referred her to Spokane Dermatology Clinic, not Dr. Werschler. RP 729-30, 732, 891. She called

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<sup>4</sup> Because she did not make such argument in response to Dr. Werschler’s summary judgment motion, this Court should not consider it. RAP 9.12 (“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court”).

the Spokane Dermatology Clinic, not Dr. Werschler, to schedule an appointment. RP 730, 732. She expressed no preference as to whom she wanted to see and was given an appointment with Dan Rhoads for February 26, 2007. RP 738, 747, 750, 894-95. She did no research on the Clinic or its providers. RP 891. She knew she would be seeing Dan Rhoads and that he would be doing her injections. RP 898. She had not heard of Dr. Werschler when she scheduled her appointment or saw Mr. Rhoads for her cosmetic injections. RP 895-96. She admittedly had no expectation of seeing Dr. Werschler or having him perform her injections. RP 894, 898. She did not hear of Dr. Werschler until after she saw Mr. Rhoads for her cosmetic injections, RP 939, and when, on March 4, 2007, a nurse at the emergency room at Holy Family Hospital told her that Dr. Werschler owned Spokane Dermatology Clinic. RP 802, 919. Ms. Paetsch never sought any care specifically from Dr. Werschler and he never provided any care to her. RP 939.

Despite Ms. Paetsch's own concessions that she had no expectation of seeing Dr. Werschler or of having him perform her cosmetic injections, and that she had never heard of him until well after Mr. Rhoads performed the injections, Ms. Paetsch's counsel asserts that, because Dr. Werschler's name appears pre-printed on certain forms Ms. Paetsch signed at her appointment with Mr. Rhoads on February 26, 2007, Ms. Paetsch had a

doctor-patient relationship with Dr. Werschler and contracted with him to personally perform her injections. That assertion does not bear scrutiny.

First, the mere fact that Dr. Werschler's name was included as a computer-generated default entry on the Patient Profile form Ms. Paetsch signed, *see* RP 1120-21; Ex. P22, or was pre-printed on one of the Restylane consent forms, Ex. P27, is insufficient to establish the formation of a doctor-patient relationship. *See* *Mixon v. Cason*, 622 So. 2d 918, 920 (Ala. 1993) (fact that physician's name was placed on charts of all patients who presented to hospital's emergency room did not create a physician-patient relationship with the plaintiff for whom the physician never rendered any care, never prescribed, and never undertook any course of treatment). Indeed, Ms. Paetsch has never testified that she had seen or relied on Dr. Werschler's name appearing on any form she signed, as she admittedly had not heard of, and had no expectation of seeing Dr. Werschler or having him perform her injections. RP 895-96.

Second, as a general rule, "the physician-patient relationship is a consensual relationship in which the patient knowingly seeks the physician's assistance and in which the physician knowingly accepts the person as a patient." *E.g., Smith v. Pavlovich*, 394 Ill. App. 3d 458, 466, 914 N.E.2d 1258 (2009). Here, notwithstanding the fact that Ms. Paetsch reviewed and signed the forms at issue before Mr. Rhoads performed the

cosmetic injections, Ms. Paetsch has admittedly disclaimed having known of Dr. Werschler, or having any expectation that he would be treating her or would be performing her injections. Thus, by her own admission, she did not knowingly seek Dr. Werschler's (as opposed to Mr. Rhoads' or the Clinic's) assistance. Nor is there any evidence that Dr. Werschler (as opposed to Mr. Rhoads or the Clinic) knowingly accepted her as his patient.

Third, even with respect to the existence of an attorney-client relationship, whether such a relationship exists depends upon whether the putative client subjectively believes that it exists and whether that subjective belief is reasonably formed based on the attending circumstances, including the attorney's words or actions. *E.g., In re Discipline of Haley*, 157 Wn.2d 398, 408, 138 P.3d 1044 (2006); *Dietz v. John Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997). Here, Ms. Paetsch admittedly had no subjective belief or expectation that Dr. Werschler personally would be treating her.

Thus, the Court of Appeals correctly concluded, *Paetsch v. Spokane Dermatology Clinic, P.S.*, No. 30688-7-III, 2013 Wash. App. LEXIS 2903, at \*6 (Wash. App. Dec. 6, 2013), that "there was no evidence to support a finding that Dr. Werschler had a doctor-patient

relationship with Ms. Paetsch or that she contracted with him to personally perform her cosmetic injections.”

Nor was there any evidence that Dr. Werschler was asked or had any reason or opportunity to become involved in Paetsch’s care when she presented with her post-injection complications on March 2 or March 6, 2007. Indeed, no one contended at trial that Ms. Paetsch’s forehead necrosis could have been mitigated after March 2, 2007, and the uncontroverted evidence established that Dr. Werschler was not at the Clinic from February 28 through March 11, 2007. RP 1130. He was teaching at the UW Medical School from February 28 until March 2, spent the weekend (March 3-4) at home in Spokane, and then flew to Hawaii from March 5-11 to teach at conferences, and he received no phone calls about Ms. Paetsch during that time. RP 1134-38, 1185-87, 1325. He thus was not asked and had no reason or opportunity to become involved in Ms. Paetsch’s post-injection care. RP 1137-38.

Although Ms. Paetsch has relied on *Lam v. Global Med. Sys.*, 127 Wn. App. 657, 664, 111 P.3d 1258 (2005), to argue that a duty existed for Dr. Werschler to provide her with appropriate follow-up care, the Court of Appeals correctly concluded, *Paetsch*, 2013 Wash. App. LEXIS 2903, at \*7-8, that this case is unlike *Lam*. Unlike the physicians employed by Global Medical Systems who were contacted by a boat’s medical officer

in *Lam* and who gave the medical officer a diagnosis and treatment advice tailored to a seaman's ailment, here as the Court of Appeals correctly recognized, *Paetsch*, 2013 Wash. App. LEXIS 2903, at \*8:

Dr. Werschler never provided Mr. Rhoads with a diagnosis, treatment advice, or any other consultation relating to Ms. Paetsch's care. The record shows that at some point during the follow-up period Mr. Rhoads made a remark to Dr. Werschler about the strange case he had in Ms. Paetsch, but nothing else. There is nothing to suggest that Dr. Werschler gave any response to the comment or otherwise involved himself in a way that would have triggered a legal duty on his part. Furthermore, Dr. Werschler had no supervisory responsibility over Mr. Rhoads. That duty belonged to Dr. Smith who was never made a party to this case.

Because Ms. Paetsch failed to establish that she had a doctor-patient relationship with Dr. Werschler or that she contracted with him to personally perform her cosmetic injections or provide her post-injection follow-up care, the trial court correctly dismissed Ms. Paetsch's claims of individual liability against Dr. Werschler and the Court of Appeals properly affirmed.

B. The Giving of the Exercise of Judgment Instruction Was a Proper Exercise of Discretion and Was Harmless in Any Event.

Ms. Paetsch's sole exception at trial to the giving of the "exercise of judgment" instruction was her erroneous assertion that it could not properly be given in a case of misdiagnosis or when there is no evidence

that the provider properly diagnosed the condition and “set out to address two or more alternative courses of treatment for that condition.”<sup>5</sup>

In her opening appellate brief, however, Ms. Paetsch argued something different. Quoting from the Note on Use to WPI 105.08, but ellipsing out the words “*competing therapeutic techniques or,*” Ms. Paetsch argued on appeal, *App. Br. at 36*, that “WPI 105.08 may be used ‘only when a doctor is confronted with a choice among ... medical diagnoses,’” and asserted, *App. Br. at 37*, that Mr. Rhoads “did not choose between ‘alternative’ medical diagnoses; he misdiagnosed the damages he caused.” The Court of Appeals correctly declined to address that argument because Ms. Paetsch failed to preserve it for review. *Paetsch*, 2013 Wash. App. LEXIS 2903, at \*10. “An appellate court may consider a claimed error in a jury instruction only if the appellant raised the specific issue by exception at trial.” *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993) (citations omitted); *see also Nord v. Shoreline Sav. Ass’n*, 116 Wn.2d 477, 486, 805 P.2d 800 (1991) (party who failed to except to instruction on basis asserted on appeal, failed to apprise trial court of claimed error, and failed to preserve the claim of error for review).<sup>6</sup>

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<sup>5</sup> See footnote 3, *supra*, and accompanying text.

<sup>6</sup> To the extent Ms. Paetsch alluded in her opening appellate brief, *App. Br. at 35*, to there being some problem with the “exercise of judgment” instruction “when a physician’s

In her petition for review, *Pet. at 14-18*, Ms. Paetsch argues that the Court of Appeals improperly expanded the use of the “exercise of judgment” instruction to informed consent and misdiagnosis cases. Any issue of whether an “exercise of judgment” instruction may properly be given in a medical malpractice case where a plaintiff claims not only medical negligence but also lack of informed consent is not one Ms. Paetsch preserved for review, as she did not except to the giving of the instruction on that basis in the trial court.<sup>7</sup> Moreover, the Court of Appeals’ decision says nothing about such an issue. To the extent that Ms. Paetsch is now arguing that it is *per se* error to give an “exercise of judgment” instruction in a case that combines both a malpractice claim and informed consent claim, she is wrong. Indeed, she cites no authority that holds it is an abuse of discretion to give an “exercise of judgment” instruction in a misdiagnosis or wrong-choice-of-treatment case just because the plaintiff is also making an informed consent claim.

To the extent that Ms. Paetsch is arguing that an “exercise of judgment” instruction cannot properly be given in a misdiagnosis case, she

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assistant is not the medical provider to whom a patient has consented,” that argument too is one she failed to preserve for review as it was not one she raised in the trial court.

<sup>7</sup> Ms. Paetsch also did not argue in the trial court, and thus has failed to preserve for review any argument, that the “exercise of judgment” instruction is always confusing, or is inconsistent with RCW 7.70.040, or should not have been given for reasons appellants and their supporting *amici* advanced in *Fergen v. Sestero*, Supreme Court No. 88819-1 and/or *Appukuttan v. Overlake Med. Ctr.*, Supreme Court No. 89192-3, which Ms. Paetsch has cited in her petition for review.

is also wrong. Indeed, as the Note on Use to WPI 105.08 itself makes clear, the “exercise of judgment” instruction “may be used only when the doctor is confronted with a choice among *competing therapeutic techniques or among medical diagnoses* [emphasis added].” Thus, the instruction may appropriately be given in malpractice cases that are based on an alleged choice of wrong diagnosis (misdiagnosis) and/or on an alleged choice of wrong treatment.

Ms. Paetsch claimed at trial (and was afforded the opportunity to persuade the jury) that Mr. Rhoads was negligent both in choosing among treatment techniques and choosing among diagnoses. She claimed at trial that Mr. Rhoads had negligently chosen to inject Restylane too shallowly in her skin, RP 244-25, 249-50, 255-56, 375, had negligently injected too little Restylane, RP 283-87, and had negligently failed to have Ms. Paetsch seen and treated by a physician on March 2, 2007, for what proved to be impending necrosis, RP 292-93, 296, 300, 304, 321-22, 458, and that he negligently misdiagnosed her post-injection necrosis as an infection and then treated it, inappropriately and ineffectually, with antibiotics,<sup>8</sup> allowing it to worsen.

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<sup>8</sup> Mr. Rhoads also had to choose between advising Ms. Paetsch to apply ice to her swelling or to come into the Clinic to be examined on March 1, and had to choose between topical treatments for the skin on her forehead, and between treating her himself or calling in a physician or sending her to a specialist, on March 2. On March 2 and March 6, he had to choose between a diagnosis of infection or a diagnosis of necrosis, both of which he considered, but landed on the former.

Because Mr. Rhoads was confronted with choices among treatment techniques, and there was evidence that, in arriving at the choices he made, he exercised reasonable care and skill within the standard of care he was obliged to follow, the trial court properly exercised its discretion in giving the exercise of judgment instruction that it gave. *E.g., Watson v. Hockett*, 107 Wn.2d 158, 165, 727 P.2d 669 (1986). Because Mr. Rhoads was also confronted with a choice among medical diagnoses, and there was evidence that, in arriving at his infection diagnosis, he exercised reasonable care and skill within the standard of care he was obliged to follow, the trial court could properly have exercised its discretion to give an “exercise of judgment” instruction as to both diagnosis and treatment.

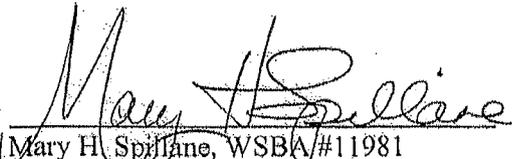
If any party was prejudiced by the more limited form of “exercise of judgment” instruction the trial court actually gave, it was the defendant, not Ms. Paetsch, because the court’s instruction applied only to choice of treatment. Indeed, Ms. Paetsch has not shown how the “exercise of judgment” instruction prejudiced her case. The party challenging an instruction bears the burden of establishing prejudice. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001). An erroneous instruction is reversible error only if it prejudices a party. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

IV. CONCLUSION

For the foregoing reasons and those set forth in the Brief of Respondent and the Answer to Petition for Review, this Court should affirm the decision of the Court of Appeals and the trial court's entry of judgment on the jury's defense verdict and denial of Ms. Paetsch's motion for new trial.

RESPECTFULLY SUBMITTED this 7th day of July, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By   
Mary H. Spillane, WSBA #11981  
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 7th day of July, 2014, I caused a true and correct copy of the foregoing document, "Supplemental Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 7th day of July, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Carrie A. Custer, Legal Assistant

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My apologies, I sent the email below before adding the attachment. Please see attached Supplemental Brief of Respondents.

Respectfully submitted,

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Dear Clerk of Court,

Attached for filing in .pdf format is the Supplemental Brief of Respondents in *Paetsch v. Spokane Dermatology Clinic, P.S. and Dr. Werschler*, Supreme Court Cause No. 89866-9. The attorney filing this brief is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: [mspillane@williamskastner.com](mailto:mspillane@williamskastner.com).

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