NO. 89866-9

SUPREME COURT OF THE STATE OF WASHINGTON

PHYLLIS PAETSCH,

Petitioner,
v.

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

Respondents.

ANSWER TO PETITION FOR REVIEW

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Respondents William Werschler, M.D., and Spokane Dermatology Clinic, P.S., ask the Court to deny Phyllis Paetsch's petition for review of the Court of Appeals' unpublished decision filed December 26, 2013.

II. COUNTERSTATEMENT OF ISSUES PRESENTED

1. Does Ms. Paetsch demonstrate any conflict between the Court of Appeals' unpublished decision and any Supreme Court or Court of Appeals' decision so as to warrant review under RAP 13.4(b)(1) or (2)?

2. Does Ms. Paetsch articulate any issue of substantial public interest raised by the Court of Appeals' unpublished decision that should be determined by this Court so as to warrant review under RAP 13.4(b)(4)?

III. COUNTERSTATEMENT OF THE CASE

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

Phyllis Paetsch decided to have some facial wrinkles smoothed out and telephoned Spokane Dermatology Clinic to make an appointment for cosmetic injections.[1] She kept her appointment. Dan Rhoads, a certified physician assistant (PA-C) with extensive experience making such injections, injected Botox and Restylane on February 26, 2007.[2] Ms. Paetsch

[1] RP 729-32, 736-37.

[2] RP 748-50, 752, 765-70, 895, 897-98, 1101, 1105-10, 1123, 1143-45, 1150-51, 1390-95, 1406-08, 1411, 1446-47, 1525, 1529-30.

left the clinic that day liking the result, but on March 2 called the Clinic and told Mr. Rhoads she had swelling on her forehead, and when Mr. examined her later that day, he diagnosed an infection, and gave her an antibiotic.[3] Ms. Paetsch's skin became necrotic, leaving a scar when it healed. RP 161-62.

Ms. Paetsch never saw or communicated, even indirectly, with William Werschler, M.D., one of the Clinic's two dermatologists.[4]

B. Ms. Paetsch's Lawsuit and Trial.

Ms. Paetsch sued the Clinic and Dr. Werschler. CP 17-27. She alleged both that Dr. Werschler was somehow liable to her for malpractice, and that the Clinic was liable to her for malpractice by Mr. Rhoads and for lack of informed consent because she allegedly consented to the Restylane injections without having been informed of the following: that a PA-C, rather than an M.D., would perform the injections; that injection of Restylane into the glabellar (lower middle) region of the forehead carries a risk of skin necrosis; and that Restylane was not FDA-approved for injection in the glabellar region, making Mr. Rhoads's use of it in her case "off-label."[5]

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[3] RP 781, 788-89, 904-05, 909, 1416, 1420-21, 1506-07.

[4] Ms. Paetsch did not claim to have seen or relied on Dr. Werschler's name appearing on a Patient Profile form she signed before being injected, Ex. P22; RP 1120-21. Ms. Paetsch first heard Dr. Werschler's name after she had been injected. RP 895, 939.

[5] CP 19-21, 24-25, 284-85, 687-88; RP 99-101. The "off-label" use argument has been a

Before trial, the court summarily dismissed Ms. Paetsch's claim that Dr. Werschler was liable for malpractice for the choice of Restylane for her forehead injection and the manner in which it was injected on February 26, 2007. CP 176. The summary judgment ruling left for trial her claim that Dr. Werschler provided negligent advice to Mr. Rhoads concerning her post-injection complaint,[6] *id.*, as well as her claim against the Clinic based on Mr. Rhoads' alleged negligence and alleged failure to obtain her informed consent for injection of Restylane into her forehead.

At trial, Ms. Paetsch's medical expert conceded that there is nothing wrong with a qualified physician assistant giving the types of injections that Ms. Paetsch received, RP 335-36, 353; that the consent forms she signed adequately stated the recognized risks, RP 338-39; and that it was permissible to make "off label" use of Restylane, RP 445-46. Ms. Paetsch's expert opined that Mr. Rhoads had injected the Restylane too shallowly in Ms. Paetsch's skin,[7] injected too little Restylane, RP 283-

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red herring. Ms. Paetsch did not present any evidence at trial that "off-label" use of a drug is unlawful or contrary to good dermatological practice. Her medical expert testified that Restylane is safe and that practitioners in 2007 had discretion to make "off-label" use by injecting it into the glabellar region. RP 324, 445-46. And, as the court observed in *United States v. Bader*, 678 F.3d 858, 875 n. 10 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 355 (2012), off-label uses of most drugs "are entirely legal, and physicians may proceed to prescribe the drug for [nonapproved] purposes."

[6]The trial court so ruled because the trial court felt that certain deposition testimony by Mr. Rhoads might imply that Mr. Rhoads had apprised Dr. Werschler of Ms. Paetsch's post-injection complaints before it became too late to mitigate her necrosis. *See* CP 109, 111-13, 176.

[7] RP 244-45, 249-50, 255-56, 375.

87, and should have had Ms. Paetsch examined by a physician on March 2, when Mr. Rhoads diagnosed her impending skin necrosis as an infection.[8]

Ms. Paetsch testified that references in the consent forms she signed to scabbing, shedding, and shallow scarring being risks of Restylane injection did not concern her because she thought such risks were very unlikely to occur. RP 902. It was undisputed at trial that the risk of necrosis from injecting Restylane into the glabellar region of the forehead is one in 50,000, RP 324, 574, and that even that risk was generally unrecognized until after February 2007, RP 553, 556-58.

Dr. Werschler testified, based partly on airline ticket records, that he had been away from the Clinic entirely and mostly out of town from February 28 to March 11, 2007, and had not been consulted during that time by phone concerning Ms. Paetsch or any unnamed patient with her post-injection complaint.[9] No evidence rebutted that testimony. The trial court granted his CR 50(a) motion to dismiss the "negligent follow-up care" claim that had survived summary judgment. RP 1586-87.

Ms. Paetsch's claims against the clinic based on Mr. Rhoads'

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[8] RP 292-93, 296, 300, 304, 321-22, 458.

[9] RP 1130, 1134-38, 1186-87, 1325. Dr. Smith, the Clinic's other dermatologist, was at the Clinic on March 2 but Mr. Rhoads did not consult him about Ms. Paetsch, either. RP 1156-57. Ms. Paetsch did not sue Dr. Smith, and did not make a claim against the Clinic based on claimed malpractice by Dr. Smith.

alleged negligence and failure to obtain her "informed consent" were submitted to the jury. Her counsel disclaimed any exception to the court's instructions, CP 612-13, on her "informed consent" claim. RP 1602-04.[10]

Ms. Paetsch's sole exception to the trial court's giving of WPI (Civ.) 105.08, the "exercise of judgment" instruction, was that it "is not appropriate for this case because this as [*sic*, is] a case of misdiagnosis." RP 1600-01, 1619. She did not argue at trial – or on appeal – that the "exercise of judgment" is always improper or confusing or misleading and prejudicial to a plaintiff, or that it is inconsistent with RCW 7.70.040.

C. Defense Verdict; Denial of New Trial Motion; Appeal.

The jury found against Ms. Paetsch on both her malpractice and "informed consent" claims. CP 623-24. The trial court entered judgment on the defense verdict, CP 636-37, and denied Ms. Paetsch's motion for a new trial of her "informed consent" claim, CP 746-49, in which she argued that there had been no evidence that she gave informed consent to injection of Restylane into the glabellar region of the forehead. CP 644-49. Ms. Paetsch appealed. CP 734-45. The Court of Appeals affirmed.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Although it is difficult to decipher the hodgepodge of arguments Ms. Paetsch attempts to make concerning concepts of standards of care,

[10] The instructions were pattern instructions, WPI (Civ.) 105.04 and 105.05.

duties and delegation thereof, "skill levels," legal relationships, informed consent, and overriding of rights, it appears that she is arguing that the Court of Appeals' unpublished decision "conflicts" with one or more decisions of this Court or the Court of Appeals and/or somehow misstates Washington health care liability law on points of substantial public interest. Ms. Paetsch is wrong in both respects.

A. The Court of Appeals' Unpublished Decision Does Not Conflict with Any Supreme Court or Court of Appeals Decision

Ms. Paetsch argues, *Pet. at 6*, that the Court of Appeals' rejection of her argument that she had a physician-patient relationship with Dr. Werschler conflicts with RCW 7.70.040 and .050. Not only is conflict with a *statute* not a ground for review under RAP 13.4(b), but also there is no such "conflict."[11]

Ms. Paetsch claims, *Pet. at 6-11*, that she had formed a physician-patient relationship with Dr. Werschler on February 26 (even though she never saw or communicated, even indirectly, with him and first heard his name after receiving her injections) and that he thus owed her a nondelegable "continuing" duty of care, exposing him to personal liability if the care she received on and after March 2 was negligent. She then argues

[11] Neither RCW 7.70.040 nor RCW 7.70.050 provides criteria for determining when a physician-patient relationship comes into existence or for determining when one exists between particular people. Thus, neither statute establishes that Dr. Werschler and Ms. Paetsch had any physician-patient or other relationship.

from that claim that the Court of Appeals' affirmance of the CR 50(a) dismissal of her "negligent follow-up care" claim against Dr. Werschler[12] is somehow in conflict with decisions of this Court or the Court of Appeals. Yet, none of the decisions she cites gives rise to any conflict with the Court of Appeals' treatment of her "relationship" argument.

First, *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984), one of the decisions Ms. Paetsch cites for her "nondelegable duty" argument, *Pet. at 8*, pertains to hospitals, not physicians, and says nothing that gives rise to any inference that Ms. Paetsch and Dr. Werschler had a provider-patient relationship on or before (or after) March 2, 2007.

Second, to the extent the remaining decisions that Ms. Paetsch cites for her "nondelegable duty" or "duty of continuing care" arguments – *Deaton v. Lawson,* 40 Wash. 486, 82 P. 879 (1905), *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994), *Smith v. Orthopedics Int'l, Ltd., P.S.*, 170 Wn.2d 659, 244 P.3d 939 (2010), *Gray v. Davidson*, 15 Wn.2d 257, 136 P.2d 187 (1943), *Huber v. Hamley*, 122 Wash. 511, 210 P. 769 (1922), or *Prather v. Downs*, 164 Wash. 427, 2 P.2d 709 (1931), *Pet. at 9* – say anything about *nondelegable* or *continuing* duties that physicians may owe patients in various situations, they do so in situations where a

[12] Ms. Paetsch did not assign error on appeal to the summary judgment dismissal of her malpractice claim against Dr. Werschler for the injections of Restylane.

provider-patient relationship has been established. None of those decisions is germane to the question of whether such a relationship was in fact established between Ms. Paetsch and Dr. Werschler. Thus, they are not decisions with which the Court of Appeals' decision is in "conflict."

Third, Ms. Paetsch's claim that *Brooks v. Herd*, 144 Wash. 173, 257 P. 238 (1927), is "determinative here" because it held a physician who had contracted "specially to cure ... liable on his contract for failure," *Pet. at 10*, is nonsense. Dr. Werschler did not contract to cure Ms. Paetsch (nor did Mr. Rhoads), and she has never contended until now that he did.

Fourth, although *State v. Gibson*, 3 Wn. App. 596, 476 P.2d 727 (1970), *rev. denied*, 78 Wn.2d 996 (1971), which Ms. Paetsch cites, *Pet. at 10*, did at least address the issue of whether a physician-patient relationship existed, it did not do so in a way that is pertinent here. The issue in *Gibson* was whether the physician-patient privilege protected an incriminating statement that a jail inmate made to a jail physician who examined, but did not treat, burns on the inmate's hand, if a third person (a guard) was present. The State offered several arguments against application of the privilege, including that the physician had not been acting as such because he did not provide treatment. The court rejected that argument, holding that "[a]ctual treatment is not necessary; the only requirement for the relationship to arise by implication is that the patient

believe the examination is being made for the purpose of treatment." *Gibson*, 3 Wn. App. at 598. The Court of Appeals' decision in this case does not conflict with *Gibson* because Ms. Paetsch never was examined by Dr. Werschler (and never spoke to, saw, or met him before she sued him) and could not have believed he was examining her in order to provide treatment.

Finally, *Lam v. Global Med. Sys., Inc.*, 127 Wn. App. 657, 111 P.3d 1258 (2005), which Ms. Paetsch cites, *Pet. at 10-11*, held that, because two defendant doctors received information about a patient's symptoms and condition while he was on a ship at sea, and made treatment recommendations over the phone, they had been providers of health care to the patient and were therefore subject to liability for malpractice even though they did not personally examine or treat the patient. Here, Dr. Werschler did *not* see, speak to, examine, treat, or recommend treatment for Ms. Paetsch.[13] Thus, *Lam* thus does not support an argument that Dr. Werschler was Ms. Rhoads' doctor before, on, or after February 26, 2007, when she sought post-injection follow-up care at the clinic (from which Dr. Werschler was absent until March 11, 2007). The Court of Appeals correctly explained why this case is unlike *Lam*. There is no

[13] The evidence at trial at most permitted an inference that Mr. Rhoads mentioned having a patient with Ms. Paetsch's post-injection complaints to Dr. Werschler sometime *after* March 2, 2007, the latest date when any medical expert contended her necrosis could have been mitigated. RP 287-90, 322-23, 405-07.

conflict between the Court of Appeals' decision and *Lam*.

Because the Court of Appeals' unpublished decision does not conflict with any decision Ms. Paetsch cites as "physician-patient relationship" decisions, review is not warranted under RAP 13.4(b)(1) or (2).

B. Ms. Paetsch Has Not Identified Any Issue of Public Interest that Warrants Supreme Court Review of the Court of Appeals' Unpublished Decision.

Ms. Paetsch invokes "issue of substantial public interest" several times in her petition, but leaves unclear which issues she contends are issues of substantial public interest. Based on her statement of the "Issues Presented for Review," *Pet. at 2*, it appears that those issues are, or may be, whether it is a "material fact" for purposes of RCW 7.70.050 that the person who is about to perform a cosmetic injection is a physician assistant rather than a physician; whether WPI (Civ.) 105.08, the "exercise of judgment" instruction, may be given "in an informed consent case"; and whether WPI (Civ.) 105.08 may be given "with a misdiagnosis."

With respect to the first of these three issues, Ms. Paetsch argues, *Pet. at 11*, that the Court of Appeals' decision holds that "the 'skill' class to which a medical provider belongs, *i.e.*, doctor or staff assistant, is not a material fact ... for purposes of informed consent under RCW 7.70.040 and .050," and thus presents "an issue of substantial public interest...." She then, *Pet. at 11-13*, goes on to assert that "the ruling conflicts with

RCW 7.70.050, which holds medical care providers to the standard of care of the class to which they belong," re-cites *Deaton, Carson,* and *Smith*, and makes various assertions about different standards of care, Court's Instruction Nos. 8 and 9 (CP 606-07), and legal secretaries and paralegals, and concludes that "the Court of Appeals' informed-consent holding "conflicts with [unspecified] Supreme Court precedent regarding nondelegable duties, and basic professional responsibility."

Although the point of that series of assertions is far from clear, respondents nonetheless attempt to address them.

First, Ms. Paetsch mischaracterizes the statutes with which she contends the Court of Appeals' "informed consent" holding conflicts. RCW 7.70.040 is the malpractice statute, not the "informed consent" statute. The standard of care that applies to a defendant is material for purposes of a malpractice claim, but is legally immaterial – indeed, it is not even admissible – for purposes of a RCW 7.70.050 "informed consent" claim. RCW 4.24.290[14]; *compare* WPI (Civ.) 105.03 (elements of malpractice claim) with WPI (Civ.) 105.05 (elements of informed

[14] RCW 4.24.290 provides in pertinent part that "[i]n any civil action for damages based on professional negligence against a hospital which is licensed by the state of Washington or against the personnel of any such hospital, or against a member of the healing arts ... the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages, ***but in no event shall the provisions of this section apply to an action based on the failure to obtain the informed consent of a patient*** [emphasis added]."

consent claim). Ms. Paetsch's mistaken assertions of law do not give rise to any issue of substantial public interest. Moreover, even if the Court of Appeals' decision conflicted with a statute, that would not be grounds for review under RAP 13.4(b)(1) or (2). Nor would it automatically be grounds for review under RAP 13.4(b)(4).

Second, although Ms. Paetsch refers to Court's Instruction Nos. 8 and 9 on standard of care, she did not assign error to either instruction.

Third, Ms. Paetsch's counsel disclaimed any exception to the trial court's pattern "informed consent" instructions, RP 1602-04, and did not assign error to them on appeal, either. Thus, there is no basis for an argument that the Court of Appeals' decision presents issues of substantial public interest concerning "informed consent" law when pattern instructions were given and no exception was taken to them.

Fourth, with respect to Ms. Paetsch's arguments about "substituting" a physician assistant for a doctor, *Pet. at 13*, Ms. Paetsch wholly ignores decisions cited in the Brief of Respondent at pages 44-45,[15] which hold that a health care provider's qualifications do not constitute "material facts" as defined by RCW 7.70.050(3). The Court of Appeals' decision does not conflict, but rather is in accord, with those decisions. Moreover,

[15] *Housel v. James*, 141 Wn. App. 748, 756, 172 P.3d 712 (2007); *Whiteside v. Lukson*, 89 Wn. App. 109, 112, 947 P.2d 1263 (1997), *rev. denied*, 135 Wn.2d 1007 (1998); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 260, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992).

Ms. Paetsch can hardly argue that the Court of Appeals' decision raises a "provider qualifications" issue of substantial public interest when (1) her own expert testified that there is nothing wrong with a physician assistant giving the types of injections Ms. Paetsch received and may do so without a doctor being present, RP 335-36, 353, and (2) she offered no evidence that Dr. Werschler or dermatologists in general are more likely than Mr. Rhoads or physician assistants in general to inject Restylane safely, or that the risk of necrosis from injecting Restylane into the glabellar region of the forehead is almost infinitesimally small (one in 50,000 cases) only when physicians, not physician assistants, do the injecting. Because there was no *evidentiary* basis for a jury finding that Mr. Rhoads' status as a physician assistant was a "material fact," or that a reasonably prudent patient would not have consented to a physician assistant performing the Restylane injections, no issue of substantial public interest is raised by the Court of Appeals' affirmance of the trial court's refusal to give Ms. Paetsch a second bite of the apple on her "informed consent" claim.

Fifth, Ms. Paetsch's apparent argument that the trial court should have instructed on a physician's – and not just a physician's assistant's – standard of care lacks merit for multiple reasons: (1) it assumes Dr. Werschler, personally, had a duty to Ms. Paetsch that he, personally, did not have (see above); (2) Ms. Paetsch did not preserve any such objection

in the trial court and did not properly present such arguments to the Court of Appeals (*see Brief of Respondent at 30-32*); (3) the trial court gave pattern instructions on the standard of care that Ms. Paetsch did not argue on appeal were inapplicable or incomplete (*see* Brief of Respondent at 32). But, most decisively, what Ms. Paetsch asserts is just not true: the trial court *did* instruct on a *physician's* standard of care (*see* Brief of Respondent at 32 and CP 607, 609, 610), even though it had dismissed Ms. Paetsch's claim against Dr. Werschler. The court thereby committed error potentially prejudicial to Dr. Werschler but not to Ms. Paetsch.

Finally, Ms. Paetsch fails to acknowledge (as the Court of Appeals decision notes) that what Ms. Paetsch argued on appeal was that she should have a new trial on informed consent because there was no evidence that she gave informed consent to being injected by Mr. Rhoads or to "off label" use of Restylane in her glabellar region. The Court of Appeals rejected those arguments because Ms. Paetsch pointed to no evidence supporting findings in her favor on the first and third – RCW 7.70.050(1)(a) and (c) – elements of her "informed consent" claim.

The Court of Appeals could also have rejected Ms. Paetsch's new trial arguments on multiple other grounds that respondents pointed out in the Brief of Respondent at pages 39-50 of their brief below. Among those grounds are:

1. The defense bore no burden of production or persuasion. The jury considered, but simply was not persuaded by, Ms. Paetsch's testimony and arguments that she did not give informed consent for the reasons she cites in her petition.

2. Ms. Paetsch's own medical expert testified that there is nothing wrong with a physician's assistant making the types of injections Ms. Paetsch received without a doctor present, RP 335-36, 353, and that the consent forms she signed before being injected adequately stated the attendant benefits and risks of Restylane injection, RP 338-39.

3. Uncontroverted trial testimony established that the risk of necrosis from injection of Restylane into the glabellar region was not recognized in 2007. RP 557-58. By moving for a new trial under CR 59(a)(7), Ms. Paetsch conceded the truth of that testimony. *Bremerton v. Shreeve*, 55 Wn. App. 334, 341-42, 777 P.2d 568 (1989). As a matter of law the necrosis risk therefore was *im*material. The defense, however, did not request, and the trial court did not make, a ruling preventing the jury from finding otherwise. The jury evidently recognized the immateriality of the risk on its own.

4. The same is true with respect to uncontroverted trial testimony that the risk of necrosis is on the order of 1 in 50,000 (0.002%). RP 574. *See, e.g., Ruffer v. St. Francis Cabrini Hosp.*, 56 Wn. App. 625,

632-33, 784 P.2d 1288, *rev. denied*, 114 Wn.2d 1023 (1990) (one-in-20,000 to one-in-50,000, or 0.002% to 0.005%, chance of colon perforation during sigmoidoscopy too remote to be material for "informed consent" claim purposes).

Thus, even if everything Ms. Paetsch's petition argues about "informed consent" were legally correct (and none of it is), and even if she had preserved it all for appeal (which she did not), there still would be no basis for reversing the trial court's ruling denying her motion for a new trial on her "informed consent" claim. The Court of Appeals' unpublished decision includes no holding about "informed consent" that warrants review or correction by this Court.

C. All the Court of Appeals Held with Regard to the "Exercise of Judgment" Instruction Is that Ms. Paetsch Failed to Preserve for Review the Argument She Made on Appeal. That Holding Does Not Raise an Issue Warranting Review.

The "exercise of judgment" instruction that the trial court gave, CP 609, used the "treatment" language from the pattern instruction, WPI (Civ.) 105.08, but not the "diagnosis" language. In the trial court, Ms. Paetsch excepted to it as "not appropriate for this case because this as [*sic*, is] a case of misdiagnosis." RP 1600-01, 1619.[16]

[16] Ms. Paetsch did not argue either in the trial court or in the Court of Appeals 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 advanced by plaintiff/appellants or their supporting *amicus curiae* in *Fergen v. Sestero,* Washington Supreme Court No.

The Court of Appeals understood Ms. Paetsch's argument on appeal to be that the instruction should not have been given "because Mr. Rhoads did not have more than one acceptable alternative *diagnosis* [italics by the Court of Appeals] for the complication she suffered," and declined to address that argument because Ms. Paetsch had not preserved it for review. *Op. at 8.* Nowhere in her Petition does Ms. Paetsch deny or attempt to refute the Court of Appeals' "waiver" conclusion.

Because the Court of Appeals' unpublished decision says nothing whatsoever about the *merits* of Ms. Paetsch's argument concerning use of an "exercise of judgment" pattern instruction in a malpractice/informed consent case like hers, the decision hardly raises an issue of law that is of substantial public interest. And, if Ms. Paetsch is arguing in her petition, as she seems to be, *Pet. at 15-16*, that when an "informed consent" claim is in play in a given lawsuit, it is *per se* error to give the "exercise of judgment" instruction even if a malpractice claim also is in play (as it was in this case), Ms. Paetsch is wrong and the question is not one of substantial public importance warranting review of the Court of Appeals' unpublished decision.[17] The "exercise of judgment" instruction is

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88819-1 and/or *Appukuttan v. Overlake Med Ctr.*, Washington Supreme Court No. 89192-3, which were argued on January 14, 2014.

[17] Although Ms. Paetsch seems to characterize her theory at trial as having been only that Mr. Rhoads chose negligently between diagnoses, Ms. Paetsch also claimed (as noted at page 3 above) at trial that Mr. Rhoads had negligently chosen to inject Restylane too

appropriate in malpractice cases based on alleged misdiagnosis and/or based on alleged choice of the wrong treatment, and it is so worded. *Housel*, 141 Wn. App. 748, 760, 172 P.3d 712 (2007) (The instruction "is to be used ... when there is evidence that the defendant physician was confronted with a choice among competing ***diagnoses or techniques***, and [that] in arriving at the judgment, the physician exercised reasonable care and skill within the standard of care he was obliged to follow"). No decision holds that it becomes an abuse of discretion for a trial judge to give the "exercise of judgment" instruction in a misdiagnosis or wrong-choice-of-treatment case just because the plaintiff also is making a RCW 7.70.050 "informed consent" claim. Although Ms. Paetsch arguably would have been entitled, had she so requested, to have the court's "exercise of judgment" instruction prefaced with "For purposes solely of plaintiff's claim(s) based of violation of the applicable standard of care" (or other similar limiting language), she did not so request.

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shallowly in her skin; had negligently used too *little* Restylane; and had negligently failed to have Ms. Paetsch seen and treated by a physician on March 2 for what proved to be impending necrosis, as well as that he misdiagnosed her post-injection necrosis as an infection and then treated it, inappropriately and ineffectually, with antibiotics, allowing her necrosis to worsen. Thus, Ms. Paetsch was claiming (and was afforded the opportunity to persuade the jury of) malpractice by Mr. Rhoads both in choice of treatment(s) and choice among diagnoses. It was thus within the trial court's discretion to give an "exercise of judgment" instruction with respect to both diagnosis and treatment, or either. If any party was prejudiced by the more limited form of "exercise of judgment" instruction the court actually gave, it was the defendant, not Ms. Paetsch, because the court's instruction applied only to choice of treatment.

Ms. Paetsch argues for the first time, *Pet. at 18*, that the "exercise of judgment" instruction "directed the jury that it could not find [Mr. Rhoads] liable for his choice of this non-FDA approved off-label procedures [sic], even if the patient had not consented to this alternative procedures." Even ignoring the fact that Ms. Paetsch did not so argue in the trial court, her characterization of the instruction's effect is patently inaccurate and she ignores the fact that her own expert scuttled her "off label use" theory of "uninformed consent" by opining that Restylane is safe and specifically *defended* its "off label" use to treat forehead wrinkles. RP 324, 445-46.[18]

The Court of Appeals' decision does not contain any holding concerning the interplay of "exercise of judgment" and "informed consent" law and thus does not raise any issue in that regard that warrants review or clarification by this Court.

V. CONCLUSION

Ms. Paetsch has not identified any errors by the trial court that the Court of Appeals even arguably erred in not correcting, and fails to identify any conflicts between the Court of Appeals' decision and any

[18] *And see United States v. Bader*, cited in footnote 5 above, and *Planned Parenthood Southwest Ohio Region v. Dewine*, 696 F.3d 490, 496 n. 4 (6th Cir. 2012) (noting that "[t]he FDA regulates the marketing and distribution of drugs by manufacturers, not the practice of physicians in treating patients").

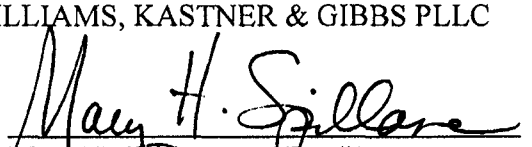
Washington appellate decision. Review is not warranted under RAP 13.4(b)(1) or (2).

Because the trial court gave pattern instructions and the Court of Appeals applied standard preservation/waiver analysis and *followed* Washington health care liability decisions, Ms. Paetsch's "issue of substantial public importance" argument reduces to one of dissatisfaction on her part with the Court of Appeals' decision. Ms. Paetsch may wish the law and outcome of her lawsuit were different, but that is not enough to warrant review under RAP 13.4(b)(4).

Ms. Paetsch's petition for review should be denied.

RESPECTFULLY SUBMITTED this 26th day of February, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 26th day of February, 2014, I caused a true and correct copy of the foregoing "Answer to Petition for Review," to be delivered as indicated below to the following counsel of record:

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DATED this 26th day of February, 2014, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

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Attachments: WKG-#4655604-v1-Answer_to_Petition_for_Review.PDF

Dear Clerk of Court,

Attached for filing in .pdf format is an Answer to Petition for Review in *Paetsch v. Spokane Dermatology Clinic, P.S. and Dr. Werschler*, Supreme Court Cause No. 89866-9. The attorney filing this answer is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com.

Respectfully submitted,

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