

FILED

NOV 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 306887

**IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

PHYLLIS PAETSCH,

Appellant,

v.

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

Respondents.

APPELLANT'S OPENING BRIEF

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I. ISSUES PRESENTED FOR REVIEW.

1. Where a patient contracts with a private physician at his office to perform a specific medical procedure, a physician patient relationship is formed.

2. Where a patient consents in writing to a physician performing an invasive cosmetic procedure on their face, consent is to the physician, not the physician's assistant.

3. Where a patient consents in writing to a United States Food and Drug Administration (FDA) approved use of a product, consent is not given for "off label" use.

4. Where a patient consents in writing to a physician performing a lower risk procedure under FDA approval, consent is not given to a PA-C's decision to perform a higher risk, off-label procedure during the treatment.

5. An "exercise of judgment" instruction should not be given when a physician's assistant is not the medical provider to whom a patient has consented, when the assistant is the one who caused the condition needing to be diagnosed and when the assistant refuses to get a physician and misdiagnoses his own damage.

II. ASSIGNMENTS OF ERROR.

1. The trial court erred in dismissing defendant Dr. Philip Werschler from liability.
2. The trial court erred in instructing the jury that Ms. Paetsch was entitled only to a PA-C standard of care.
3. The trial court erred in granting an “exercise of judgment” instruction to a physician’s assistant who stepped in without consent to perform a procedure and damaged the patient.
4. The trial court erred in failing to grant a motion for a new trial on the issue of informed consent.

III. SUMMARY OF APPEAL.

Elective cosmetic medical procedures are a rapidly growing area of dermatology. Some physicians use medical assistants to perform the procedures, and their ranks are growing. This is medicine for commercialized purposes, not for healing. The issues presented here surround the protection of a patient submitting themselves to a physician’s sale of elective cosmetic enhancement procedures, ostensibly to be performed by him. It involves a process whereby the patient’s consent to the physician to perform the

procedure is secured in writing, the physician simultaneously releases himself from liability in the same form, and the physician's assistant then walks into the patient's treatment room and performs the procedure. After the assistant damages the patient, the physician never appears. The trial court noted that the physician was "the bait."¹ But it then dismissed the physician from liability and denied to Ms. Paetsch a physician's duty of care because this physician never saw his patient. Bait and switch process in private medical care deprive a patient of informed consent and of the proper standard of care of the physician contracted to the patient. This court should so hold, reverse the directed verdict in favor of Defendant Werschler, and the verdict entered, and remand for retrial.

IV. STATEMENT OF THE CASE.

Phyllis Paetsch filed an amended complaint of medical negligence against Defendant physician dermatologist William Werschler, and his wholly-owned Defendant Spokane Dermatology Clinic. *CP 17-28*. Her complaint alleged that she desired a physician's care for a cosmetic procedure, believed she was treated by a physician at the defendant's clinic, and did not

¹ *RP 1586:1*.

know until after she had been damaged that it was a physician's assistant (PA-C) who had performed her procedure. *CP 19, para. 2.4, 2.9, 2.23, 3.1, 3.4.* Trial commenced on October 3, 2011.

This trial revolved around an injectable "filler" known as Restylane. Fillers differ from injectables such as e.g., Botox. *RP 256: 21 – RP 257: 19; RP 262: 7-12.* Botox is the consistency of water, and misinjections of Botox will not have serious detrimental effect on the skin. *RP 257: 9-12; 25 – RP 258: 10.* But fillers like Restylane are gels, with a consistency of tooth whitening gel. *RP 253: 7 – RP 254: 7; RP 258: 3-8.* Once under the skin, Restylane draws in water and expands. *RP 245: 19-25.* Restylane is designed to expand to "plump up" the area injected, and is thus used in lips and nasolabial folds around the mouth to "plump" these areas. *RP 578: 17 – RP 579: 6.* The expansion of Restylane occurs over a period of several days. *RP 246: 3-10.* But as the skin is very tight, it doesn't accommodate expansion well, and if Restylane is placed too superficially in the skin, the expansion can compress the blood supply to the skin and the skin tissues will die, or "necrose." *RP 250: 23-24; RP 245: 12-25.* The expansion component of Restylane is the recognized risk of the product. *RP 593: 10-16.* Improper use

of Restylane in the glabellar region of the forehead, in particular, carries a known risk of necrosis in the forehead, as the glabellar area has a unique and limited blood supply; injecting into the glabellar region is a recognized higher risk procedure. *RP 1035: 20-22.*²

Restylane is not approved by the United States Food and Drug Administration (FDA) for use in the glabellar region of the forehead. *RP 445: 13-15; RP 580: 11-13; RP 1231: 24 – RP 1232: 2.* Its safety and effectiveness in this region of the forehead is not established. *RP 445: 8-12.* Physicians use Restylane in the glabellar region, but those who do, do so “off label.” *RP 445: 16 – RP 446: 3.*

Many cosmetic dermatologists are now aggressively using assistants to perform cosmetic injections. Defense expert Dr. Steven Dayan, a facial plastic surgeon from Chicago, refers to “extended medical providers”—nurses, ARNPs, and PA-Cs—as the “fastest-growing segment of people who are now doing these treatments.” *RP 534: 9-15.* Dayan testified that physicians are

² The “glabellar” area of the forehead is known as a “watershed area.” *RP 546: 2-3.* In this region of the forehead, vessels supply blood to the upper portion of the forehead as they exit the skull, so the vessels are particularly susceptible at that region. *RP 585: 23 – RP 586: 2.* If the blood vessels are impacted in the glabellar region, circulation is impacted vertically up the forehead. *RP 586: 8-13.*² If an occlusion of the artery occurs in this lower forehead area, a necrosis results. *RP 546: 13-20.*

using such assistants to such a degree that he wouldn't be surprised "if the majority of providers soon are going to be PAs and nurse practitioners very soon. If it hasn't already happened, it's going to happen." *RP 575: 24 – RP 576: 1-10.*

Defendant William Philip Werschler is a dermatologist, and the sole owner of the Spokane Dermatology Clinic. *CP 4, para. 1.4; CP 30, admitting para. 1.4.* His clinic is housed in a medical building complex with other physicians' offices. *RP 747: 23 – RP 748: 12.* The Clinic's business card identifies "Wm. Philip Werschler, M.D." as the single dermatologist physician of Spokane Dermatology Clinic. *CP 704 (showing the back of Dan Rhoads's business card).*

At age 48, plaintiff Phyllis Paetsch wanted Botox cosmetic injections to her face "just to feel younger," and to honor a brother who had died at age 49. *RP 730: 6-12.* Paetsch is a hairdresser, and thus "tries to represent beauty and fashion." *RP 728: 19-23.* Paetsch contacted her dermatologist physician to perform Botox injections. *RP 730: 13-23.* He did not do such procedures, and referred her to the defendant Spokane Dermatology Clinic. *RP 730: 22-25.* Paetsch called Spokane Dermatology, talked to a receptionist, and requested

Botox. *RP 732: 11-13*. The receptionist steered Paetsch to a filler: “Oh, no – you would use Botox on your forehead, and a filler-type filler on your mouth.” *RP 737: 8-23*. Paetsch did not know what a filler was. *RP 737: 24-25*. She agreed to be scheduled for the filler around her mouth (nasolabial folds), and Botox in the forehead. *RP 737-738*. There was no dispute that Paetsch was scheduled to receive Restylane only in her lower face area—the Clinic’s records confirm that Paetsch was scheduled for the injection of Restylane into her nasolabial folds. *Plaintiff’s Exhibit 39 at p. 1 (2:00 p.m.)*(“restylane to nasolabial folds, poss botox/kk.”). PA-C Dan Rhoads agreed that Paetsch was scheduled for Restylane injections around her mouth. *RP 1458: 10-14*. Dr. Werschler also agreed that Paetsch was scheduled for Restylane around her mouth. *RP 1225: 3-23*.

Paetsch arrived at the Spokane Dermatology Clinic on February 26, 2007—a Monday. *RP 747: 18-22*. In the waiting room, Paetsch filled out and signed her patient profile. *RP 749: 25 – RP 750: 7, referencing Pl. Ex. 22*. The profile is a consent form. It states, “I consent for medical treatment ... and authorize my insurance benefits to be paid directly to *the doctor* ...” *Pl. Ex. -22, emphasis added*. This is the doctor: “Doctor: Wm. Philip Werschler,

M.M.D.” *See Pl. Ex. 22.* The only medical provider indicated is “Dr. Werschler.” Another form provided Paetsch—an acknowledgment of receipt of privacy practices form—tells her that her doctor would oversee her care: “[Y]ou have the right to look at, and get a copy of information in our record, unless *the doctor* has indicated this would be harmful to you or someone else ...” *See Pl. Ex. 23 at Bates 219, emphasis added; RP 860 – RP 861.*

Paetsch was then taken back to another room by a medical assistant. *RP 749: 18-24.* Paetsch was given three information sheets on Botox and Restylane, and told to read them. *RP 751: 5 – RP 752.*³ Paetsch was told “the doctor” would come in if she had questions. *RP 752: 2.* “[T]he doctor” would come in and explain more. *RP 752: 14-15.* The word “doctor” was specifically used. *RP 752: 16-17.*

Under the extensive informed consent agreement for Restylane, Paetsch agrees that: “Dr. Werschler has provided me with this informed Consent...” *See Pl. Ex. 27, Bates 225, para. 3.* In the same form, Paetsch consents to being treated with Restylane “as described above.” *Pl. Ex. 27 at Bates 226.*

³ The forms are as follows:

1) Pl. Ex. 25 – a Botox procedure consent form; 2) Pl. Ex. 26 – a consent form for Restylane treatment; and 3) Pl. Ex. 27 – an informed consent for Restylane.

Described above is Paetsch's acknowledgement that Restylane is FDA approved for her treatment. *Pl. Ex. 27, Bates 226*. The form thus limits the use of Restylane to FDA-approved areas. *Id.* Per Dr. Werschler, this paragraph exists specifically to assure the patient that Restylane is "U.S. FDA-approved for the treatments that we're doing..." *RP 1232: 19-23*. Restylane is *not* approved by the FDA for injection into the glabellar region of the forehead. *RP 445; RP 580; RP 1231 – RP 1232*. Ms. Paetsch thus consents only to the FDA-approved use of Restylane: "I agree to be treated with the 'Products' as described above." *Pl. Ex. 27, Bates 226, emphasis added*. And in this consent, she releases "Wm. Philip Werschler, M.D." and his clinic directly from liability for "the injections of the products...administered in accordance with appropriate guidelines." *Pl. Ex. 27 at Bates 226, last paragraph*.

As to the blank Restylane treatment plan, Paetsch believed that when the "doctor" came in, "we would probably go through all of that." *RP 757: 17-20*. Paetsch signed both the Restylane consent forms. *RP 754: 23-25*.

Only one reference is made to a PA-C in any consent form. In her Restylane consent, "Dan Rhoads, PAC" is listed as someone who, either in conjunction with Dr. Werschler or alone, informs Paetsch of the duration of

the effects of her treatment. *Pl. Ex. 27 at Bates 225*. Rhoads is not identified as the provider to be performing Paetsch's procedure. Nothing in the consent form gives a PA-C consent to perform a procedure. *Id.*

Paetsch understood that Restylane would be injected only around her mouth, because that's what the receptionist had told her. *RP 758: 4-21; 762: 4-9*. Paetsch paid \$680 for her treatment. *RP 764: 1-4*.

After her written consent was given, PA-C Dan Rhoads entered Paetsch's room, and stated, "Hi, I'm Dan." *RP 760: 22*. As to what Rhoads intended to do, he said, "[A]re you ready? Let's go." *RP 761: 15-18*. Rhoads did not tell Paetsch he was a PA-C. *RP 760: 22 – RP 761: 1*. Rhoads does not introduce himself to a patient as a PA-C. *RP 1483: 4-5*. Rhoads did not go through either a treatment plan or the Restylane form with Paetsch. *RP 1460-61, referencing Pl. Ex. 27*. Rhoads does not tell a patient how many injections he will perform, because he doesn't know. *RP 1494: 17-22; RP 1495: 20 – RP 1496*. Rhoads testified: "Yeah, you kind of play it as it comes." *RP 1496: 6-12*. The medical assistant just marks "x's" on the office notes facial diagram while Rhoads injects. *RP 1494: 4-11*. Rhoads interprets the blank treatment plan in Paetsch's Restylane consent form to authorize him to decide where to

inject. *RP 1462:20 – RP 1463: 3*. Rhoads stated, “[T]he patient has the ability to ‘yes’ or ‘no.’” *Id.* Paetsch got into the exam chair, the chair was positioned, and Rhoads began injecting Botox into her face. *RP 761: 18-20*.

The decision that damaged Paetsch was Rhoads’ decision to inject Restylane into Paetsch’s forehead. This was a decision he made during the procedure. *RP 1492: 5-8*. Restylane product was left over from the injections into Paetsch’s nasolabial folds. *RP 1490: 6-25; RP 1492: 5-13; RP 1496: 25; RP 1497: 1*. Since Paetsch had already paid for the Restylane; the decision had to be made “whether to discard the product; or, perhaps, inject other lines.” *RP 1490: 6-14*. Rhoads made the decision to inject Restylane into Paetsch’s glabellar region. *RP 1492: 5-8*. His procedure for consent is this: he hands the patient a mirror and tells them he has product left over, and asks if there are “any other lines that you may want to touch up.” *RP 1490: 22-25*. Rhoads didn’t know that Restylane was not approved by the FDA for injection into the forehead—he mistakenly believed, and believes to this date, that it is approved. *RP 1485-1486*. Rhoads didn’t know that the glabellar area was an area of higher risk for Restylane use. *RP 1486-1487*. He thus never explained either to Paetsch. *Id.*

Paetsch testified that she never gave Rhoads consent to put Restylane in her forehead. *RP 767: 2-7; 14-17*. Paetsch remembered Rhoads saying: “This is your lucky day—I have extra Restylane that I can’t sell, so you get it.” *RP 762: 25 – RP 763: 2*. Paetsch was not told that injecting Restylane into her glabellar region was higher risk. *RP 769: 25 – RP 770: 1*. She did not stop the procedure because she believed Rhoads was a doctor: “If I’m in a doctor’s office who does this as a referral ... I trusted exactly what he was doing. I’m in an M.D.’s office who has done ... this is what they do ... I just trusted that he knew what he was doing.” *RP 767: 21 – RP 768: 1*.⁴

Rhoads did not believe there to be any maximum number of sites into which he could inject Restylane into Paetsch’s forehead. *RP 1493: 2-6*. He injected numerous times into Paetsch’s glabellar region near her eyebrows and on her forehead. *RP 768: 15-24*. Rhoads stopped injecting when he told Paetsch: “I think we’re done with the Resterol (sic), because it’s sliding out of your face. I think it’s took as much as it’s going to.” *RP 770: 15-18*. Rhoads

⁴ The only consent Dr. Werschler could find for Restylane injections into Paetsch’s forehead was a chart note done *after* the proceeding reflecting actions occurring while Phyllis Paetsch was in the chair, and while “the nurse is writing down on a stick-on note where he’s injecting the Restylane.” *RP 1228: 3-16*.

was laughing because/e Restylane was coming out of her skin. *RP 770:20-23.*

Paetsch stated, “He thought that was kinda funny.” *RP 770: 20-21.*

That night, Paetsch felt tightness and developed a headache that got progressively worse. *RP 778: 11; RP 779: 15-18.* By Thursday, one of her eyes was nearly swollen shut. *RP 781: 3.* She called Rhoads. *RP 781: 5.* He told her he was not concerned. She should lay back and ice it. *RP 781: 12.* On Friday morning, Paetsch woke up with very swollen eyes and a “green sheen over the majority of my forehead.” *RP 781: 16-17.* She called Rhoads and told him, “There is something seriously wrong. I have a green sheen on my forehead.” *RP 781: 20-22.* Rhoads had her come in to the office. *RP 782: 3-4.* Plaintiff’s Exhibit 57 is the photograph of how Paetsch looked on March 2nd (that Friday). *Pl. Ex. 57; RP 782: 5-7.* Paetsch still believed Rhoads was a doctor. *RP 785: 6-9.* Rhoads still did not tell Paetsch that he was a PA-C. *RP 785: 16-17.*

Rhoads entered the exam room on Friday, March 2nd, and, Paetsch stated: “He stared at me—he just *stared* at me.” *RP 784: 4.* He seemed afraid. *RP 785: 1-2.* Rhoads diagnosed Paetsch with “an infection.” *RP 1416: 8-9.* Defense expert Henry Arguinchona testified that the March 2nd photograph of

Phyllis Paetsch does not depict an infection; instead, it shows a vascular compromise in progress—a progressing skin necrosis on Paetsch’s forehead from her Restylane injections in that area.⁵ *RP 1011: 8-21*. Plaintiff’s expert Dr. Wilensky testified that the photos depicted a necrosis process. *RP 237: 18-25; RP 287: 14 – RP 288: 6*. Necrosis is a gradual process. *RP 288: 21 – RP 289: 1*. The skin will not survive absent proper intervention and/or management. *RP 288: 9-15*. The process is the same no matter where on the body necrosis occurs. *RP 238: 4-13*. Rhoads gave Paetsch samples of Omnicef, an antibiotic, for an infection. *RP 1420: 6-10; 23-25*. Paetsch first became aware that Rhoads was a PA-C, not a physician, on March 2nd, when she left the clinic. The Clinic booked her for another appointment with Rhoads the following Tuesday, and handed her a card as she left—it said: “Dan Rhoads, PA-C.” *RP 796: 4-25*.

On Saturday, March 3, Paetsch received a voice mail from Rhoads the next morning: “I’m checking in on you.” *RP 790: 24 – RP 791: 2*. Paetsch called Rhoads back, leaving a voice mail. The pain was significant—“please, please

⁵ Defense expert Dr. Dayan testified that Paetsch’s complication was a “textbook example” of the necrosis process. *RP 557: 17*. Dr. Werschler testified that Paetsch’s injury was an occlusion of the arteries leading to a vascular necrosis. *RP 1115: 8-10*.

call me back.” *RP 792: 1-3*. Rhoads didn’t return the call. *RP 792: 6-9*. Paetsch stated, “I don’t think he knew what was happening.” *RP 800: 25 – RP 801: 2*. Her condition was worsening. *RP 792: 20*. Paetsch believed that Rhoads did not treat her condition as being serious; she went to an Emergency Room, where another PA-C also misdiagnosed her condition as a staph infection. *RP 793: 22 – RP 794: 3 RP 799: 23-25*.

Paetsch returned to Dr. Werschler’s clinic the following Tuesday, March 8. Again, she was met by PA-C Rhoads. *RP 801: 3-8*. Plaintiff’s Exhibit 62 depicts the condition of Paetsch’s forehead on March 8th. *RP 808: 6-11*. Rhoads acknowledged that a culture he had taken on March 2nd showed no infection. *RP 1426: 11-23*. He continued to treat her for an infection. *RP 1426: 24 – RP 1427: 5*. Rhoads now also attempted to sell Paetsch corrective laser treatment procedure, which could also address her acne, he said. *RP 804: 25 – RP 805:4-9*. He would do the procedure himself. *Id.*

The Clinic made another appointment for Paetsch with PA-C Rhoads. *RP 807: 8-11*. Paetsch did not go back. *RP 807: 22*. She had lost all trust in Rhoads. *RP 801: 15*. The Clinic had no plan of action, they didn’t know what had happened, or how to treat it, or how they were going to fix it. She felt

dismissed. *RP 858: 8-17*. No physician ever contacted her. *RP 858: 18-25*. Paetsch cancelled her appointment for March 15th, and told the Clinic she would be going to see her regular doctor. *RP 862: 18-24*.

The Physician's Duty of Care and Its Outcome.

Paetsch's expert, San Diego plastic surgeon Jon Wilensky, testified that the standard of care was violated even before Rhoads caused the damage, i.e., from start to finish, because Paetsch was never seen by a physician at all. The PA-C was practicing as a physician without any supervision. *RP 300: 10-14*. Rhoads's injection was performed in a negligent fashion and caused damage. *RP 237, 265*. But after Rhoads damaged Paetsch, the standard of care required that Paetsch's wound be evaluated by a physician. *RP 292: 1-13*. Dr. Werschler's inaction fell below the standard of care even before March 2nd. Dr. Werschler failed to act on behalf of his patient, and his inaction created a negative cascade of events, and caused damage. *RP 323: 3-10; RP 325: 23 – RP 326: 1*. Dr. Wilensky stated: "[t]he PA-C only knows what he knows. He *doesn't* know what he doesn't know." *RP 300: 18-25*. A physician must be available to take care of their office's patients, he testified—where invasive procedures are performed in an office, "there will always be complications."

RP 298: 13-16.

Dr. Wilensky testified that a physician could have mitigated the damage, e.g., meaningfully intervened, evaluated, and used adjunctive agents to improve blood flow to the area. *RP 292: 13 – RP 293: 23.* Remedies were available to halt the necrosis process by improving blood flow to the affected area. *RP 294: 1-5.* One available blood flow restoration agent was nitroglycerine, in the form of nitro paste. *RP 294: 3-5.* The issue is complicated, and specialists needed to be involved in dealing with such complex open wounds. *RP 292: 13-24.* The failure of the physician to come into the picture was a violation of the standard of care. *RP 311: 7-10.*

Defendant Dr. Werschler acknowledged that, at any time after February 26th, he could have injected Hyaluronidase into Phyllis Paetsch and broken down the Restylane. *RP 1306: 21-25.*⁶ Also available were infectious disease specialists and pharmacists – people in the community who could have said,

⁶ Dr. Werschler agreed that Nitropaste was available in 2007, and had been available for decades. *RP 1303: 14-15.* Compounding products were also available in 2007 from a pharmacist. *RP 1303: 23-25; RP 1305: 6-7.* Hyaluronidase was available. *RP 1305: 8-9.* By 2007, Hyaluronidase had been established in the literature as being something that could be injected into a Restylane overfill to dissolve the Restylane. *RP 1305: 10-14.* Literature dating back to 2004 discussed the use of Hyaluronidase in dissolving Restylane. *RP 1305: 15-18.* Hyaluronidase was known as “an eraser.” *RP 1336: 8-14.* It’s an enzyme that breaks down hyaluronic acid, and Restylane is a hyaluronic acid. *RP 1336: 14-16.* It could be used to melt or soften Restylane from overfill. *RP 1336: 19-24.*

“[W]e can break this substance down.” *RP 1307: 12-16.*⁷ But, Dr. Werschler testified, he did not expect his PA-C to bring Paetsch’s condition to his attention because, “[T]hat was a judgment call.” *RP 1156: 5-9.* Rhoads “used his judgment.” *RP 1156: 23 – RP 1157.* Rhoads “made the judgment to take care of the wound as an infection.” *RP 1338: 24 – RP 1339: 1.* “If you know what to do, then you wouldn’t call somebody.” *RP 1339: 2-3.*

Defense expert Steven Dayan agreed that, in 2007, ways to mitigate the necrosis existed. *RP 618: 7-12.* But, he testified, Rhoads was held only to a PA-C (physician assistant) standard of care. *RP 571: 11-12.* This standard differed from the standard of care for a physician. *RP 578: 11-16.* Rhoads did not violate the standard of care when he failed to bring Paetsch’s complication to the attention of a physician in the office because: “Mr. Rhoads was using his best judgment, and he felt comfortable with the situation at the time.” *RP 568: 8-13.* Rhoads did not violate the standard of care because, “[Y]ou have to trust your PAs, and when you hire them, you make sure you hire ones that you trust.” *RP 568: 14-17.* If a complication such as this occurred with a PA-

⁷ Dr. Werschler is well versed in, and has taught and published on, the topic of injectible toxins and fillers, referring to the area as: “Sort of my area in the little dermatology world.” *RP 1095.*

C, then a “PA would make the clinical judgment call.” *RP 626: 2-3*. “They have to make a judgment call. If they feel like they’re comfortable with it, I have to trust them.” *RP 626: 10-12*.⁸

PA-C Rhoads testified that he did not talk with Werschler on March 2nd because “I know how to treat infections.” *RP 1429: 10-15*.

Rhoads then recalled discussing Paetsch’s condition with Dr. Werschler following either Paetsch’s March 2nd or 6th visit. *RP 1521: 1-3*. He believed this discussion was in person—Dr. Werschler was “there at the time when I wanted to discuss it.” *RP 1522: 10-11; RP 1521: 1-3*. Dr. Werschler was in Spokane on March 2nd, and through the ensuing weekend. *RP 1215: 6-15*. He was not in Spokane on March 6th, as he left on Monday, March 5th for Hawaii. *RP 1215: 6-15*. When Dr. Werschler heard about the complications—green pustules, a phenomena that was not usual—he did not intervene, nor contact Paetsch. *RP 1229: 6 – RP 1230: 23*.

The grotesque appearance of Paetsch’s forehead wound existed for months thereafter and adversely impacted her income as a hairdresser. *Pl. Ex. 57-92; RP 868: 17 – RP 869: 12*. People began leaving. *RP 870: 4-8*. She

⁸ Dr. Dayan is a published advocate of using PA-Cs in a cosmetic practice. *See, e.g., RP 642-44*.

ultimately lost over half of her business. *RP 872: 9-10*. Dr. Alphonse Oliva, a plastic surgeon, testified that Paetsch's forehead scar could not be surgically restored. *RP 171: 7-19*.

Trial court procedure.

Following the evidence presented, the court dismissed Dr. Werschler from liability. The court stated "Dr. Werschler just wasn't involved in it ... as an individual, Dr. Werschler wasn't a player in this." *RP 1587: 14-16*. The court concluded that, as a matter of law, no physician duty existed. *RP 1587: 25 – RP 1588: 3*. The trial court declined to instruct the jury on a physician's duty of care. Its instructions told the jury that a PA-C was to be held only to a PA-C standard of care. *CP 606, 606, 609, 610, at Appendix 1-4*.

The jury returned a defense verdict finding that the Defendant Clinic did not engage in negligence, nor fail to obtain informed consent. *CP 623-24*.

The Court denied Paetsch's motion for a new trial on physician patient duty and on informed consent. *RP 746-47*.

V. ARGUMENT.

1. Where a patient contracts with a private physician at his office to perform a specific medical procedure, a physician patient relationship is formed.

a. Standard of review.

The trial court's grant of a directed verdict in favor of Dr. Werschler is reviewed de novo. *CR 50(a); Sing v. John L. Scott*, 134 Wn.2d 24, 29-30, 948 P.2d 816 (1997). The existence of a contract to perform services is an important part of determining the existence of a physician/patient relationship. *Lam v. Global Medical Systems, Inc., P.S.*, 127 Wn.App. 657, 664 (2005). Whether a professional contract for a physician exists is a question of fact. *See Brooks v. Herd*, 144 Wn. 173, 176 (1927). The existence of a physician patient duty, with or without that contract, is then a question of law. *Lam v. Global*, 127 Wn.App. at 664. Questions of law are reviewed de novo. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845, 851 (2008).

b. Phyllis Paetsch evidenced that she contracted with Dr. Werschler in writing to provide her Restylane injections.

The creation of a contract was critical to the outcome of this case.

Contracts for an individual professional's services are non-assignable. *Deaton v. Lawson*, 40 Wn. 486, 490, 82 P. 879 (1905). The physician patient relationship is a fiduciary relationship of the highest degree. See *Carson v Fine*, 123 Wn.2d 206, 218, 867 P.2d 610 (1994); and see *Smith v. Orthopedics Int'l, Ltd., P.S.*, 170 Wn.2d 659, 667, 244 P.3d 939 (2010).

Under *Lam v. Global*, the first issue then presented is whether a contract existed between Phyllis Paetsch and Dr. Werschler for individualized services. *Lam v. Global*, 127 Wn.App. at 664. This is an issue of fact. *Brooks v. Herd*, 144 Wn. at 176. The trial court must view the evidence in a light most favorable to Ms. Paetsch as the nonmoving party, and must be able to say, as a matter of law, that no substantial evidence or reasonable inference from the evidence presented exists to sustain a verdict for Ms. Paetsch. The court must draw all favorable inferences that may be reasonably evinced in favor of Ms. Paetsch. *Sing*, 134 Wn.2d at 29-30.

The trial court dismissed Dr. Werschler from liability on the grounds that insufficient evidence existed to show that Dr. Werschler was "involved" in Paetsch's treatment. *RP 1587:7-24*. But a doctor's failure to speak to, advise, or examine a patient is not determinative of the existence of the duty.

Lam v. Global, 127 Wn.App. at 664. Substantial evidence supported that, whether or not “involved,” Ms. Paetsch contracted with Dr. Werschler for Restylane injections.

In Washington, a formal contract is held to exist, even without mutual signatures, where (1) the subject matter has been agreed upon, (2) the terms are all stated in the (informal) writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Morris v. Maks*, 69 Wn.App. 865, 869, 850 P.2d 1357, 1359 (1993) *Id.* All elements were evidenced here.

The first line of the patient consent form given Ms. Paetsch states: “Doctor: Wm. Philip Werschler, M.M.D.” *See Pl. Ex. 22.* Thereunder is “Patient.” And at the bottom, the form states as follows: “*I consent for medical treatment ... and authorize my insurance benefits to be paid directly to the doctor ... I authorize the doctor ... to release any information required for this claim ...*” *Pl. Ex.22, emphasis added.* This is evidence of Dr. Werschler’s offer to accept Ms. Paetsch as a patient, and to perform her medical treatment, and of Ms. Paetsch’s acceptance of Dr. Werschler as her physician for her medical treatment. Ms. Paetsch could only consent to

treatment from the only medical provider identified—Dr. Werschler. *Id.* No other provider is listed. In the form, she also agrees to pay Dr. Werschler directly: “I ... authorize my insurance benefits to be paid *directly to the doctor*. I am financially responsible for any balance due.” *Id.*, *Consent para.*, *emphasis added*.⁹

The Restylane procedure consent forms are also specific. When consenting to Restylane injections, Ms. Paetsch’s agreement is this: “Dr. Werschler has provided me with this informed Consent...” *See Pl. Ex. 27, Bates 225, para. 3*. In consenting to Restylane injections, Ms. Paetsch agrees to release “Wm. Philip Werschler, M.D.” directly from liability for “the injections of the products.” *Pl. Ex. 27 at Bates 226*. In this release, Ms. Paetsch consents to being treated with Restylane “as described above.” *Pl. Ex. 27 at 226*. This is evidence of Ms. Paetsch giving consent to Dr. Werschler to perform the Restylane injections, and releasing Dr. Werschler for his actions as a result.

Consent forms are statutorily recognized as prima facie evidence that

⁹ Dr. Werschler’s representation as Paetsch’s doctor is intentional, and is done to provide financial benefit to Dr. Werschler. *RP 1120-21*. A specific doctor for a patient is required to be identified for the doctor to be paid by insurance companies. *RP 1120-21*.

the patient gave her informed consent “to the treatment administered.” *RCW 7.70.060*. This evidence, and all favorable inferences from this evidence construed in favor of Ms. Paetsch, are prima facie evidence of, and support her contract with, and consent to medical treatment from, Dr. Werschler, and confirm her agreement to pay him directly for that treatment. It was error to dismiss Dr. Werschler.

This evidence is not alone. Other forms provided Ms. Paetsch reassure her of a *doctor’s* care. In her acknowledgment of receipt of privacy practices, Ms. Paetsch is told: “You have the right to look at, and get a copy of information in our record, unless *the doctor* has indicated this would be harmful to you or someone else ...” *See Pl. Ex. 23 at Bates 219, emphasis added*.

These forms evidence the creation of a contract between a patient and a doctor. All elements are present. Paetsch accepts her status as a new “patient” of “Wm. Philip Werschler MMD,” discloses her private medical information, consents to his informed consent, consents to his injecting Restylane in accordance with approved guidelines, agrees to pay him, and releases him from liability for the procedure. Evidence of each element of a contractual

relationship exists under *Morris v. Maks*, 69 Wn.App. at 869.

Paetsch presented sufficient evidence of the formation of a contract for Restylane injections to be provided her by Dr. Werschler, and her consent to those services. Dr. Werschler was not entitled to a directed verdict of dismissal because he failed to appear to render the services to which Paetsch consented.

- c. Phyllis Paetsch evidenced a contract implied in fact and implied in law with Dr. Werschler to provide her Restylane injections.

The same consent agreements and the circumstances evidenced also support the existence of implied contracts for the same care of Dr. Werschler for Paetsch's Restylane injections. Two classes of implied contracts exist—those implied in fact, and those implied in law. In *Young v. Young*, 164 Wn.2d 477, 483-84, 191 P.3d 1258 (2008). Both exist here.

A contract implied in fact arises from facts and circumstances showing a mutual consent and intention to contract. The elements of a contract implied in fact are: (1) the plaintiff requests work, (2) the defendant expects payment for the work, and (3) the plaintiff knows the defendant expects payment for the work. *Young*, 164 Wn.2d at 485-86. Dr. Werschler's forms establish all

elements. *Pl. Ex.22; Pl. Ex.27*. In the forms, Paetsch requests and consents to work from Dr. Werschler, and agrees to pay him directly. Had nothing gone wrong, Paetsch would have left Dr. Werschler's Clinic under the mistaken belief that she had been treated by a physician. No one told her otherwise until after she had reappeared with complications.

Sufficient evidence also exists of a contract implied in law. *Young*, 164 Wn.2d at 484-85. "Quasi" contracts arise from an implied legal duty or obligation, and thus need not be based on a written contract between the parties, or upon any mutual consent or agreement. *Id.* The elements of a contract implied in law are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Id.* All exist here. Dr. Werschler was paid for a procedure he never performed. He was paid for care he never provided.

The contracts and circumstances here sufficiently evidenced both implied contracts in fact, and in law, between Dr. Werschler and Ms. Paetsch for her Restylane injections. It was error for the trial court to dismiss Dr. Werschler.

Ms. Paetsch was entitled to have the jury decide whether a contract was created for these injections between Ms. Paetsch and Dr. Werschler.

- d. The contracts specifically created the physician/patient relationship.

Whether the contracts and circumstances created a physician/patient relationship is an issue of law reviewed de novo. *Lam v. Global Medical Systems*, 127 Wn.App. at 664. Direct interaction between a physician and a patient is not necessary to create the physician/patient duty. *Id.*, 127 Wn.App. at 664. Written contracts may create the duty. The contract in *Lam* was not a contract directly with an individual provider—it was a contract only with a physician’s group. As a result, direct contact between the doctor and the physician was deemed necessary to create the physician patient/relationship. *Lam*, 127 Wn.App. at 665. This situation differs.

Here, the written consents created not just the contractual relationship, but the physician patient relationship for the specific medical procedure to which Paetsch consented—Restylane injections. *Pl. Ex. 22; Pl. Ex. 27*. The physician/patient relationship formed as to Restylane injections here because that relationship was *contracted* to form, and was *represented* as formed. *See*

Pl. Ex. 22; Pl. Ex. 27. The fact that Dr. Werschler never showed up to perform the procedures after releasing himself from liability for his procedure does not relieve Dr. Werschler of the physician/patient relationship he created. *Lam, supra.*

The court's dismissal of Dr. Werschler on the grounds that no physician/patient relationship existed because Dr. Werschler baited the procedure, then switched the care and never appeared at all, is error.¹⁰

- e. Once created by contract and circumstance, a physician/patient obligation protects a patient, and the jury should have been so instructed.

The court erred not just by dismissing Dr. Werschler from liability altogether, but by failing to impose the physician/patient relationship on the Defendant Clinic in jury instructions. As noted above, if the physician patient relationship formed, the duty was non-delegable.¹¹ The trial court's theory of dismissal of Dr. Werschler improperly led to a verdict based on a PA-C standard of care for determining negligence against the Clinic, because the

¹⁰ The trial court itself raised the term "bait" in its colloquy. *RP 1585: 23 – RP 1586: 2.*

¹¹ *Deaton v. Lawson*, 40 Wn. at 490; *Carson v Fine*, 123 Wn.2d at 218; *Smith v. Orthopedics Int'l, Ltd., P.S.*, 170 Wn.2d at 667.

court refused to instruct as to the Clinic physician's duty of care, and instead instructed the jury to apply a PA-C standard of care to this treatment. *CP 606, 607, 609, and 610, at appendix A1-A4*. By failing to instruct on the physician/patient duty, the jury instructions were misleading.

Jury instructions are to be considered in their entirety. *Easley v. Sea-Land, Serv., Inc.*, 99 Wn.App. 459, 467, 994 P.2d 271 (2000). Instructions are not erroneous if: 1) they permit both parties to argue their theory of the case; 2) they are not misleading; and 3) when read as a whole, they properly inform the trier of fact of the applicable law. *Id.* Instructions that omit the controlling law are misleading. Each party to a lawsuit is entitled to have its theories presented to the jury if such theories are supported by the evidence. *Hizey v. Carpenter*, 119 Wn.2d 251, 266, 830 P.2d 646, 655 (1992); *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 616, 707 P.2d 685 (1985); *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Instructions which fail to specify the proper duty of a medical provider, such as a hospital institution in a negligence, are reversible error. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

Here, Paetsch argued that she was entitled to a physician's care, and all

of the protections that went along with that standard. She offered instructions that identified two different standards of care, *see CP 374*, (addressing both a PA-C or a physician); but she also provided instructions to comport with her theory that if the jury found that she was entitled to a physician's care, then certain duties applied. *CP370-372, 375-377; and see argument at RP 1579 – 1581*. The instructions accurately state the law of physician/patient duty. *Id.*, *citing e.g. Carson v Fine, Lam v Global, Gregoire v City of Oak Harbor*. The formation of a physician/patient relationship provides safety because, once formed, the physician/patient relationship includes the duty of continuing medical care. *Gray v. Davidson*, 15 Wn.2d 257, 266-67; 130 P.2d 341 (1942) *on reh'g*, 15 Wn.2d 257, 136 P.2d 187 (1943); and see *Carson v. Fine*, 123 Wn.2d at 218-219. A physician must in particular provide continuing care with complications after a procedure. *Huber v. Hamley*, 122 Wn. 511-12 (1922); *Gray v. Davidson*, 15 Wn.2d 257 at 266-67, and *Prather v. Downs*, 164 Wn. 427, 434 (1931)(holding that where an operation resulted in an infection which became "virulent," and necessitated further treatment, negligence was held to exist because of the lack of proper care accorded to the patient after the operation). The physician/patient duty is sufficiently

protective that even where a patient does not return to the physician for further treatment, it is for the jury to determine whether the cause of that failure to return was due to “willful absence from treatment,” or to some other cause. *Brooks v. Herd*, 144 Wn. at 178; and see *Williams v. Werdemann*, 71 Wn. 390, 392-93. If being improperly treated, a patient is at liberty to quit at any time and may hold the physician liable for injury suffered because of the improper treatment. 71 Wn. at 393.

The trial court rejected Paetsch’s theory and instructions of physician involvement and duty. *CP 370-72; CP 375-77*. Instead, it instructed that a PA-C was to be held to a PA-C standard of care. *CP 606, 607, 609 and 610 (A1-A4)*. Its decision was based on its holding that Dr. Werschler was not involved. *RP 1585-1588; RP 1621: 22-24*. These instructions now control both negligence, and informed consent. These instructions individually, and together, tell the jury that a PA-C is to be judged on his own PA-C standard of care, which differs from that of a physician. A reasonable jury could only conclude, and did, that, as a PA-C “only knows what he knows,” and can’t be negligent for not knowing what he doesn’t know. As a result, because PA-C Rhoads didn’t know of a higher risk of Restylane injections in the forehead,

and mistakenly believed that Restylane was FDA approved in that area, RP 1485-1487, then he couldn't be negligent, and he couldn't be responsible for not fully informing the patient of the risks of what he was proposing. *CP 607, 609, and 610*. This allows the Clinic to improperly avoid the written consent, and it removes the protection of that consent. Ms. Paetsch was thus denied the right to argue that her contract had formed with Dr. Werschler, that she was entitled to a physician standard of care and proper information about this procedure, and that the Clinic's failure to provide such was negligence.

In *Easley*, a trial court's similar refusal to instruct on a legal concept in disability law resulted in the appellate court vacating a judgment and remanding for a new trial. *Easley*, 99 Wn.App. at 472. Because the concept was discussed, but no instruction was given, the jury had no guidance as to the relevance of this evidence. 99 Wn.App. at 469. The same applied in *Gregoire v. City of Oak Harbor*, 170 Wn.2d at 635. In the latter, the duty of the institution was not specified. The same applies here. Paetsch argued that she was entitled to instructions defining the physician's duty of care so the *jury* could decide. But the court's instructions did not allow this. It removed the physician standard of care from the equation, and omitted the controlling law

of physician/patient duty. Ms. Paetsch was deprived of her entitlement to those instructions. *Stiley v. Block*, 130 Wn.2d at 498; *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628. Further prejudice resulted. In closing arguments, defense counsel for Spokane Dermatology Clinic then rose and told the jury, in violation of an order in limine, that the Defendant Clinic was the “only defendant left in this case...” *RP 1730: 24*.¹² Defense counsel highlighted the case caption on the verdict form, where Dr. Werschler had been removed as a defendant. *RP 1730: 21 – RP 1731: 3*. Paetsch immediately requested a mistrial, but was denied. *RP 1731: 11-24*.

A reasonable jury could only have concluded that the trial court itself rebuked Ms. Paetsch’s theory *and* Dr. Wilensky’s expert testimony about Dr. Werschler’s duty of care (a conclusion which was, in fact, the case). The ensuing verdict should be vacated and the matter remanded for retrial. *Easley*,

¹² The court prohibited defense counsel from mentioning its dismissal of Dr. Werschler to the jury. Were such remark to occur, Paetsch’s counsel argued, “it would be essentially telling the jury that the court has determined Dr. Werschler has no liability ...” *See RP 1588: 13-19*. Lead defense counsel agreed. The inference that “somebody is out,” would be a comment on the remaining defendant, and would not be appropriate. *RP 1591: 21 – RP 1592: 2*. The trial court agreed, and excluded the concept. *RP 1593: 15-20*. The order was methodically implemented to prevent prejudice. The case caption on the verdict form and cover sheet were changed to remove the plurality of Defendants, and to remove Dr. Werschler. *CP 599, 623*. As the court noted, “[I]t’s amazing how jurors will pick up on what you just don’t even think about—some little kind of thing that would create from the jury when we’re not going to have to deal with it.” *RP 1593: 23 – RP 1594: 3*.

99 Wn.App. at 467.

2. **An “exercise of judgment” instruction should not be given when a physician’s assistant is not the medical provider to whom a patient has consented, and when that assistant causes the damage needing to be diagnosed, and then misdiagnoses his own damage.**

The trial court gave an “exercise of judgment” instruction. *CP 609 at App.3, implementing WPI 105.08*. Ms. Paetsch took exception. *RP 1619*. But the court instructed the jury that a PA-C would not be liable for “selecting one or two or more alternate courses of treatment,” if that PA-C exercised reasonable care and skill within the standard of care “the physician or certified physician’s assistant was obliged to follow.” *RP 609*.¹³ Again, this instruction improperly gives the PA-C control of Ms. Paetsch’s treatment entirely, even after he damaged her. This is not a proper use of the instruction.

The “exercise of judgment” instruction has been applied to assistants

¹³ The pattern instruction states:

“WPI 105.08 Exercise of Judgment

A physician is not liable for selecting one of two or more alternative [*courses of treatment*][*diagnoses*], if, in arriving at the judgment to [*follow the particular course of treatment*] [*make the particular diagnosis*], the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow.”

such as nurses. See *Gerard v. Sacred Heart Medical Center*, 86 Wn.App. 387, 937 P.2d 1104 (1997). But the use of WPI 105.08 has been criticized, and remains limited. *WPI 105.08 comments*. Appellate courts have repeatedly urged caution in the use of the instruction. And nowhere has the instruction been used with a bait-and-switch medical practice, where an assistant damages the patient, misdiagnoses the damage, and then fails to get the physician. Such use is improper.

By its terms, WPI 105.08 may be used “only when a doctor is “confronted with a choice among ... medical diagnoses.” *WPI 105.08 note*. First, it is error to use this instruction when the PA-C is not the doctor authorized, nor consented to, for the purpose of making any medical diagnosis in the first place. *Pl. Ex. 22; Pl. Ex. 27*. The instruction implicitly confirms the PA-C’s right to diagnose the patient, when Ms. Paetsch had contracted with a physician. This is improper as a matter of law.

Second, the instruction should not apply where a physician’s assistant damages a healthy patient to cause the need for diagnosis. The instruction grants license to an assistant to deprive a patient of a proper medical diagnosis for the damage the assistant causes.

Finally, the instruction is designed for use with “choices” among diagnoses. “Choices” implies one or two proper diagnoses. A misdiagnosis is not a competing choice. A misdiagnosis is not an “alternative” medical diagnosis. It is a misdiagnosis. Physicians testified that Ms. Paetsch’s condition as depicted on March 2 was a vascular compromise, not an infection. Culture results obtained by Rhoads himself showed him that no infection was present. Rhoads did not choose between “alternative” medical diagnoses; he misdiagnosed the damage he caused.

This court should define the limits of this instruction accordingly. It should not be used where its effect is to confirmed a PA-C’s control of *all* of Ms. Paetsch’s medical care, including post-procedure medical diagnosis of the damage the PA-C caused, when that is a fact in issue, and where the instruction relegates her permanently to the lesser care of the offending physician’s assistant. Nor should it be used to allow a substitute to claim his misdiagnosis of his damage was an “alternative diagnosis.” This is not a proper use for the instruction.

3. **The court erred in denying Paetsch a new trial.**

a. Standard of review—denial of motion for new trial.

Paetsch brought a motion for a new trial alleging error of law as to both physician/patient duty and informed consent. *CP 684, citing CR 59(a) (7), (8), and (9)*. When the trial court's basis for denying or granting a motion for a new trial is based on questions of law, the standard of review is de novo. *Ramey v. Knorr*, 130 Wn.App. 672, 686, 124 P.3d 314 (2005). When the trial court's basis for denying or granting a motion for a new trial is based on questions of fact, the ruling will not be disturbed absent a manifest abuse of discretion. *Id.* Ms. Paetsch's issues implicate both issues of law and of fact.

Paetsch first argued that she was denied substantial justice because of trial court error in granting a directed verdict and refusing to instruct the jury on the physician's duty of care. *CP 684*. The error in such is addressed above. Accumulation of error should require a new trial. See, e.g., *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

As a matter of law, it was error to deny her a new trial.

The second basis for a new trial involved the issue of informed consent. Paetsch argued that informed consent could not exist as a matter of law. *CP 684*, citing *CR 59(a)(7)(9)*. She was improperly denied a new trial, as no evidence of informed consent existed as to the material aspects of this treatment.

- b. Switching the identity of the provider, the approval status of the procedure, and the area to be treated, after written informed consent is given is not informed consent.

This state's law of informed consent mandates patient sovereignty—any medical treatment provider must accede to an adult's right to sovereignty over medical decisions about their own body. *Backlund v. Univ. of Washington*, 137 Wn.2d 651, 663, 975 P.2d 950, 956-57 (1999); *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 123, 170 P.3d 1151, 1155 (2007), and *Brown v. Dahl*, 41 Wn.App. 565, 569-570, 705 P.2d 781 (1985). The right of sovereignty is sufficiently critical that a health care provider may be liable to an injured patient for breaching this duty even if the treatment otherwise meets the standard of care. RCW 7.70.050; *Backlund*, 137 Wn.2d at 668; *Stewart-Graves v. Vaughn*, 162 Wn.2d at 123.

The defense argues that patient sovereignty can be properly exercised after written consent is given by having a PA-C show up instead of a doctor, ignore the written consents, start injecting, hand a patient a mirror in the middle of his procedure, and change the procedure to one contrary to the consent form. Paetsch disagrees. The *material* facts of this procedure were given in writing in advance of PA-C Rhoads walking into the room. Ms. Paetsch's consent to this procedure was in writing. And the written consent controls.

In order for a patient to properly exercise sovereignty over medical decisions, a doctor is under a legal duty to disclose to a patient "material facts" relating to the treatment *before* consent is given to the proposed treatment. This must be sufficient information to make an *intelligent* decision. *Brown v. Dahl*, 41 Wn.App. at 570, *emphasis in original*, referencing *Smith v. Shannon*, 100 Wn.2d 26, 29, 666 P.2d 351 (1983). Materiality is an objective test. If a reasonable person in the patient's position probably would attach significance to a specific risk in deciding on treatment, the risk is material. *Brown*, 41 Wn.App. at 571; *Backlund*, 137 Wn.2d at 666.

Here, the material facts of the procedure were disclosed to Ms. Paetsch in writing, and agreed to in writing, as follows:

- i) Where a patient consents to a physician performing an invasive cosmetic procedure on their face, consent is to the physician, not the assistant.

The *identity* of Ms. Paetsch's physician provider was disclosed and consented to in writing. The identity and status of a person about to inject substances into one's face is a material fact of a medical injection procedure. The standards of care as to each level of provider differ. *RP 571: 11-12; RP 578: 11-16*. The protection given the patient materially differs. *Id.* Dr. Werschler's forms reinforce the concept that his name and status are material to consenting the patient into the procedure. His name and status are mandatory to his collecting payment from the insurer. *Pl. Ex. 22*. Evidence is uncontroverted that in signing her Restylane consent form, Ms. Paetsch consented to Dr. Werschler. *Pl. Ex. 22; Pl. Ex. 27*. She was led to believe by staff that "the doctor" was on his way. *RP 752*. No informed consent can exist here as a matter of law, because the material fact of the post consent "switch" from a physician to a PA-C is nowhere disclosed until the PAC appeared and took over the process.

This switch became critical to the existence of informed consent.

- ii) Where a patient consents to a United States Food and Drug Administration (FDA) approved administration of a product, consent is not given for “off label” use.

The FDA approval for the procedure intended was also guaranteed to Ms. Paetsch in writing.¹⁴ As the forms thus disclose, the FDA status of the procedure is material to the patient’s consent. *Pl. Ex. 27*. Ms. Paetsch consented only to the injection of Restylane in accordance with FDA guidelines. *Pl. Ex. 22, 27*. No evidence exists in the record that Ms. Paetsch was ever told that Restylane injections to her forehead were an off-label proceeding after she had specifically approved only FDA approved treatments. *Pl. Ex. 27*. Where a patient consents to a United States Food and Drug Administration (FDA) approved use of a product, consent does not exist as to “off label” use.

- iii) Where a patient consents to a physician performing a lower risk procedure under FDA approval, consent is not given to a PA-C’s decision to perform a higher risk, off-label procedure during the treatment.

¹⁴ Paetsch agreed as follows: “I know that Restylane has been approved by the USDA (FDA)...” and then: “ I agree to treatment with the ‘Products’ as described above.” *Pl. Ex. 27 at 226*.

Although left entirely blank, the proposed treatment is material to consent. *Pl. Ex. 27*. If Restylane “plumps” areas, then a patient is entitled to know what the provider intends to “plump” *before* she signs her consent. It is uncontroverted that Ms. Paetsch understood from the receptionist in scheduling her appointment that Restylane was to be injected only around her mouth, that she would be injected only around her mouth area. Ms. Paetsch was scheduled for this procedure, and expected it. She consented only to an FDA approved procedure. It is uncontroverted that the decision to inject Restylane into her forehead did not arise until *during* the procedure, and after it was determined product was left over from the expected procedure around her mouth. *See RP 1490, 92*. The only exception to the physician’s duty of informed consent prior to a procedure is the exception given to emergency medicine. *RCW 7.70 050(5)*; and see *Stewart-Graves v. Vaughn*, 162 Wn.2d at 123-24.¹⁵ This was no emergency. And this is why the written informed consent is critical here. It limited the procedure to FDA approved areas. It

¹⁵ Per RCW 7.70.050(4), if a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required treatment will be implied. RCW § 7.70.050.

protected her from precisely what occurred—which was being given a PA-C who did not know the status nor the risk of a Restylane procedure he intended to give away. This was an elective procedure under written consent. The provider’s decision during the procedure to perform a higher risk procedure, in a different area of the face, by handing her a mirror and telling her she had product left over, is not a procedure performed under informed consent.

In sum, all material information regarding this procedure, by whom, where and why, was provided to Ms. Paetsch before she signed her written consent. That written consent imposed limits—physician care, and FDA approved Restylane procedures. The Clinic’s ensuing change-up in provider and procedure was done without informed consent, because those changes were the exact opposite of what she had agreed to.

Patient sovereignty is a standard set by law, not by physicians; the law does not leave the choice up to physicians, who may or may not impose patient sovereignty standards upon themselves. *Miller v. Kennedy*, 11 Wn.App. 272, 283, 522 P.2d 852, 861 (1974) *aff’d*, 85 Wn.2d 151, 530 P.2d 334 (1975), citing *Canterbury v. Spence*, 150 U.S. App. D.C. 263, 464 F.2d 772, 781, 782, 786 (1972). In *Miller*, the court was direct—it is not for the

medical profession to decide what doctors feel the patient should be told. The existence of the risk is the patient's business. 11 Wn.App. at 285-86. It is the patient's right to evaluate these risks of treatment; the physician's only role is to provide the patient with information as to what those risks are. *Brown v. Dahl*, 11 Wn.App. at 570; citing *Shannon*, 100 Wn.2d at 31, quoting *Miller*, 11 Wn.App. at 287.

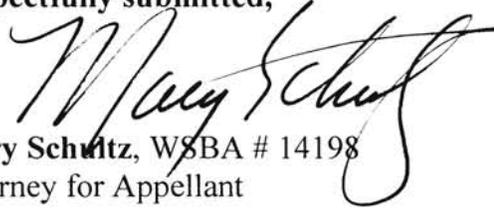
The written consents in this record cannot support informed consent to the Restylane injections given Ms. Paestch during her procedure as a matter of law, and this court should so hold. A new trial should be granted under the proper law.

VI. CONCLUSION.

The trial court's directed verdict in favor of Dr. Werschler should be vacated. The jury's verdict exonerating the Clinic as to both negligence and informed consent, should be likewise vacated, and the matter remanded for retrial.

DATED this 15 day of November, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mary Schultz". The signature is written in a cursive style with a large, looping initial "M".

Mary Schultz, WSBA # 14198
Attorney for Appellant

Appendix

INSTRUCTION NO. 8

In connection with the plaintiff's claim of medical negligence, the plaintiff has the burden of proving each of the following propositions:

First, that defendant failed to follow the applicable standard of care and was therefore negligent;

Second, that the plaintiff was injured;

Third, that the negligence of defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 9

A health care professional such as a physician or certified physician's assistant owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.

A physician or certified physician's assistant who holds himself out as a specialist in dermatology has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent dermatology specialist in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

INSTRUCTION NO. 11

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.

INSTRUCTION NO. 12

Dr. Werschler and Daniel Rhoads were health care providers and employees of Spokane Dermatology Clinic.

The question of whether or not a health care provider exercised reasonable care and skill is to be determined by reference to what those providers knew or in the exercise of reasonable prudence, should have known at the time of diagnosis and treatment.

INSTRUCTION NO. 14

A health care provider has a duty to inform a patient of all material facts, including risks and alternatives, that a reasonably prudent patient would need in order to make an informed decision on whether to consent to or reject a proposed course of treatment.

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

INSTRUCTION NO. 15

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

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

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

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

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

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant on this claim.