

FILED

JAN 22 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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NO. 30688-7-III

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PHYLLIS PAETSCH,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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Daniel W. Ferm, WSBA #11466
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I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Has Ms. Paetsch waived any claim of error as to the summary judgment ruling that Dr. Werschler owed no duty, personally, to her on or before the day she received her Restylane injections?

2. In dismissing Ms. Paetsch's malpractice claims against Dr. Werschler at the close of the evidence, did the trial court properly conclude that no evidentiary basis existed for finding Dr. Werschler responsible for not personally addressing the post-injection complaint with which Ms. Paetsch presented on March 2, 2007?

3. Has Ms. Paetsch failed to show that any claimed error in dismissing her malpractice claims against Dr. Werschler was prejudicial, especially given the jury's finding of no negligence on the part of Spokane Dermatology Clinic (based on conduct of Dan Rhoads, PA-C and/or Dr. Werschler)?

4. Has Ms. Paetsch failed to cite sufficient pertinent authority to warrant consideration of her challenge to the trial court's decision to give the "exercise of judgment" instruction?

5. Did the trial court properly exercise its discretion in giving the "exercise of judgment" instruction, CP 609, that it gave?

6. Has Ms. Paetsch failed to show that any alleged error in the giving of the "exercise of judgment" instruction, CP 609, was prejudicial?

7. Did the trial court properly deny Ms. Paetsch's motion for new trial on her informed consent claim?

II. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

Before turning age 49, Phyllis Paetsch, a hairdresser, contacted her dermatologist about Botox treatment for her face. RP 718, 730. Her dermatologist suggested that she contact Spokane Dermatology Clinic, which she had never heard of before. RP 730.

1. Ms. Paetsch's initial call to Spokane Dermatology Clinic.

In February 2007, Ms. Paetsch called Spokane Dermatology Clinic¹ on her own initiative to make an appointment to get cosmetic injections for "frown lines" on her forehead and around her mouth. RP 730-32, 736-37. According to Ms. Paetsch, the receptionist told her that Botox probably would work for her forehead but that a "filler" would go around her mouth, RP 737-38, and quoted an estimated fee of \$680 for injections of both, RP 763-64. Ms. Paetsch does not recall if the receptionist referred to the filler as Restylane.² RP 895. She made an

¹ Dr. William Philip Werschler, a board-certified dermatologist and clinical professor of dermatology at the University of Washington Medical School, RP 1094-95, owned Spokane Dermatology Clinic, P.S., the clinic corporation, CP 40 (¶2); *see App. Br. at 3, 6, 15*. Ms. Paetsch has never made any "veil-piercing" allegations that Dr. Werschler neglected to observe the formalities of the clinic's corporate form. *See* CP 3-13, 17-27. Thus, the fact that he owned the corporation is of no legal significance.

² Ms. Paetsch claimed that she expected, based on her phone conversation with the receptionist, that the "filler" would go around her mouth, RP 762, but admitted that she

appointment for February 26, 2007, RP 747, and the receptionist told her she would be seeing “Dan Rhoads.” RP 895.

In February 2007, Spokane Dermatology Clinic had two dermatologists, Dr. William Philip Werschler and Dr. Scott Smith. RP 1100, 1157; CP 40-41, 96. Dan Rhoads, PA-C, was one of the Clinic’s physician assistants and Dr. Smith was his WAC Ch. 246-918 supervising physician. CP 40-41, 96-97. Dr. Werschler, as Mr. Rhoads’ alternate supervisor, was responsible for reviewing his work only if and when Dr. Smith was absent. RP 1158; WAC 246-918-140(4).

2. Ms. Paetsch’s February 26, 2007 appointment with Dan Rhoads, PA-C at the Clinic.

On February 26, 2007, carrying \$700 in cash, RP 763, Ms. Paetsch presented at the Clinic for her cosmetic injection appointment with Dan Rhoads. She was given and filled out and signed a medical history form, Ex. P24, and a patient profile form, Ex. P22. RP 748-50. The Patient Profile has, at the top, a line that says “Doctor:”, followed by “Wm. Philip Werschler MMD,” Ex. P22, which is a computer-generated default entry in case the clinic bills a procedure to an insurer, and that default entry would have been entered regardless of who the patient was actually going to see at the Clinic. RP 1120-21. Ms. Paetsch did not have insurance. Ex.

had heard the receptionist say “more that Botox doesn’t go below,” not that “Restylane goes below, Botox goes above,” just that “Botox doesn’t go below.” RP 768.

P22. Ms. Paetsch admittedly had not heard of, and had no expectation of seeing, Dr. Werschler. RP 895-96. She evidently did not notice his name on the Patient Profile form because she testified that she first heard his name after she had been injected. RP 939.

Ms. Paetsch testified that a medical assistant escorted her to an exam room, gave her some information sheets on Botox and Restylane to read, and told her “the doctor would come in if I had any questions.” RP 749-51. Two of the sheets, Exs. P26, P27, were consent forms for Restylane treatment. RP 751-52.³

The FDA approved Restylane in 2003, RP 1145-46, for injection into facial lines, folds, and wrinkles, such as nasolabial folds. RP 1230-31, 1408. By 2007, it was commonly being injected into facial lines, folds, and wrinkles in the forehead and its glabellar region (between the eyebrows, RP 610). RP 1231-32, 1409-10. Ms. Paetsch’s expert, Dr. Wilensky, agreed that Restylane could be used “off-label” by injecting it into the glabellar region or other areas. RP 445-46.⁴ Injections in the

³ The other was a Botox Procedure Consent Form, Ex. P25, RP 751. Ms. Paetsch has no complaints about her Botox injections. Her expert, Dr. Wilensky, agreed that Botox did not figure into her outcome and could be “set aside” for purposes of the case. RP 393.

⁴ Over defendant’s objection, plaintiff was allowed to elicit testimony from Dr. Wilensky, based on a 2007 (not 2003) Restylane “package insert” that was not admitted in evidence, that Restylane is “contraindicated” for injection into the glabellar region of the forehead.” Nonetheless, Dr. Wilensky admitted that it is permissible to make “off label” use of Restylane at the provider’s discretion. RP 445-46. Defense expert Dr. Dayan noted that “botulinum toxin, the most popular treatment in the world that we use cosmetically is only FDA approved for the glabellar area, however, it’s very commonly placed into the

glabellar region carry a slightly higher risk than cosmetic injections generally, RP 1036-37, 1146, 1152-53, because that area has one main blood supply source which, if compromised, can lead to necrosis and scarring, RP 546, 549, 552, 556-57. Nonetheless, the glabellar region (and the sides of the nose and lips) routinely have been injected for cosmetic treatments. RP 325, 545, 554, 1154.

When Dan Rhoads entered the room, he introduced himself to Ms. Paetsch as “Dan,” not as a doctor. RP 752, 897-98. He wore “scrubs” bearing his name and identifying him as a physician’s assistant. RP 1123, 1394-95. He had worked with Dr. Werschler since 2003, RP 1101, and was trained and experienced in injecting Restylane into facial tissues, RP 1105-10, 1143-45, 1150-51, 1446-47, including the glabellar region, RP 1109, 1146-47. He had done more than 550 Restylane injections, RP 1393, 1525, usually making multiple injections per patient, RP 1392.

By the time Mr. Rhoads arrived in the room to meet Ms. Paetsch, she had signed all three consent forms, RP 754, 757, 759, and admits no one rushed her to sign them. RP 896. She understood Mr. Rhoads would be giving her the Botox and Restylane injections. RP 898. She had only one question, about Botox, which Mr. Rhoads answered. RP 761; 896-97,

crow’s feet and ... all over the forehead as well,” and that, since the clinical introduction of Restylane in 2003, “the standard of care is to use it throughout the face.” RP 580-81.

899. She asked no questions about Restylane or the contents of the Restylane consent forms, RP 900-04, which listed bleeding, infection, scabbing, shedding, shallow scarring, allergic reactions, contour problems such as compressed scarring as risks, and stated that no guarantee could be made regarding injection results. Exs. P26, P27. According to Ms. Paetsch's expert, Dr. Wilensky, the Restylane consent forms she signed "adequately reflect the potential complications of a properly performed Restylane injection." RP 339. Ms. Paetsch admits the references to scabbing, shedding, and shallow scarring were not of concern to her, because she thought that they were very unlikely to occur. RP 902.

Mr. Rhoads assessed Ms. Paetsch, RP 1397, 1400-03, and, following his standard procedure, discussed with her which facial wrinkles she wanted to have injected and the benefits and risks of injecting Restylane. RP 1398-1400, 1402-04, 1408, 1463-65, 1487-92, 1494-96, 1529. He did not just go ahead and inject what the receptionist had written down when making the appointment. RP 1396-97. He specifically noted in his chart entry that "[patient] understands there's a risk of necrosis with Restylane." RP 1405. He cannot remember from whom or when he had learned of that risk, RP 1405, but he had never had a patient develop necrosis from a Restylane injection, RP 1508, and considered such an outcome very rare, in any area of the face, RP 1524. It is unlikely that he advised Ms. Paetsch

that the risk of Restylane injection into the glabellar area is higher than the risk of its injection elsewhere in the face, because he did not know that then. RP 1486-87, 1524. Mr. Rhoads acknowledged that Botox was more commonly injected in the glabellar region than Restylane, and could have been injected there in Ms. Paetsch's case. RP 1489-91.

Mr. Rhoads had a single one milliliter (ml.) – one cubic centimeter (cc.) – syringe of Restylane to use for Ms. Paetsch's injections. RP 1126, 1128-29, 1411, 1529. He started making the injections into the wrinkle lines that were most concerning to her, including the forehead area. RP 765-70. Mr. Rhoads made a total of eight to 15 injections using the 1 ml. syringe, RP 1392-93, all into the deep dermis. RP 1406-07. According to Mr. Rhoads, he would have gotten Ms. Paetsch's approval before making injections anywhere on her face, RP 1408, 1411, 1529-30, and he probably proposed to use Restylane in the glabellar area because in his judgment Botox would be less likely to resolve the lines she had there, RP 1529.

Ms. Paetsch claims Mr. Rhoads, after making injections around her mouth, RP 766, told her he had extra Restylane and proceeded to inject it into her eyebrows and forehead, RP 764, 766-68. She does not claim to have objected or questioned. She surmised that "maybe someone prior to me didn't need as much and I get it just as a bonus." RP 763. But, as Mr.

Rhoads explained, RP 1410-11, an incompletely emptied syringe cannot be reused on another patient, and:

In terms of the Restylane that we used, we had a one CC syringe and you can't use one and a half or one and a quarter. You only get the option to use one CC or less. This patient, from what it looks like, had several lines that she may have interested in treating so I would have started with the lines that bothered her the most to make sure we tackled those lines first. As we proceeded through the treatment, if we still had some product left, at that point I may have handed her the mirror again and said, you know, what's next? Which line would you like treated next, there may be a little bit of product left.

Using remaining Restylane on lines in her glabellar region after injecting lines on her lower face is something he would have discussed with Ms. Paetsch, RP 1491-92, including which specific facial lines to treat, but not how many injections that would entail. RP 1496.

Before leaving the Clinic on February 26, Ms. Paetsch paid cash for the injections, RP 776, and took some of Mr. Rhoads' business cards to hand out to get him referrals, RP 905. She did not read the cards, but admits they identify Mr. Rhoads as a "PA-C." RP 905-06. She was pleased with how she looked, RP 904-05, 1244, 1412, and told Mr. Rhoads "I love it; this is amazing," RP 904-05.

3. Ms. Paetsch's March 1, 2007 call to Mr. Rhodes.

On Thursday, March 1, Ms. Paetsch called and told Mr. Rhoads her eye was swollen shut. He told her to put ice on it. RP 780-81.

4. Ms. Paetsch's March 2, 2007 clinic visit with Mr. Rhoads.

On Friday, March 2, Ms. Paetsch called Mr. Rhoads complaining of swelling and a "green sheen" over her forehead. RP 781. He had Ms. Paetsch come to the Clinic, looked at her, and seemed to her to "[be] looking at something he was unfamiliar with." RP 784. Mr. Rhoads diagnosed a probable infection, RP 1416, but secondarily was concerned about the possibility of necrosis because the center of the apparently infected area looked relatively severe, RP 1419-20. According to Ms. Paetsch, Mr. Rhoads told her he was not too concerned about the edema but thought her skin was dying. RP 788. Mr. Rhoads gave her some antibiotics samples for which she did not have insurance and did not have to pay, RP 788, 909, 1420-21, 1506-07, and a pain reliever prescription, RP 789, 909, 1420, 1507. A follow-up appointment was scheduled for the following Tuesday (March 6) with "Dan Rhoads, PA-C." RP 796.

On the Sunday before the March 6 appointment, Ms. Paetsch went to an emergency room, RP 797-98, 915, where she was seen by a physician's assistant and given another kind of antibiotic, RP 915-17, 940-41.

5. Ms. Paetsch's March 6, 2007 clinic visit with Mr. Rhoads.

Ms. Paetsch kept her Tuesday, March 6 appointment with Mr. Rhoads. RP 801. She admits she did not ask to see Dr. Werschler or Dr. Smith. RP 918. Mr. Rhoads thought Ms. Paetsch appeared to be

improving, RP 1426, and gave her a tube of Biafine, which speeds healing, RP 1171-72, to put on her forehead twice a day, RP 804-05, 920, 1426-28, but which Ms. Paetsch admittedly did not use, RP 921. According to Ms. Paetsch, either at her Tuesday (March 6) or the prior Friday (March 2) visit, Mr. Rhoads mentioned a possibility of necrosis. RP 804.

6. Ms. Paetsch's discontinuance of care at the clinic.

At the end of the March 6 visit, Ms. Paetsch was given an appointment to see Mr. Rhoads the following week, RP 807, but she did not ever return to the Clinic. RP 807-08, 922, 1430. She sought care from Danielle Riggs, ARNP, at Christ Clinic. RP 807.

7. Dr. Werschler's non-involvement in Ms. Paetsch's care.

Dr. Werschler testified, based on his recollection and office and airline ticket records, that he was not at the Clinic from February 28 through March 11, 2007. RP 1130. He was in Seattle teaching at the UW Medical School, RP 1094-95, from February 28 until March 2, spent the weekend (March 3-4) at home in Spokane, and then flew to Hawaii on March 5 to teach at dermatology conferences, and flew back on March 11, and received no phone calls about Ms. Paetsch during that time. RP 1134-38, 1185-87, 1325. He thus was not asked and had no reason or opportunity to become involved in Ms. Paetsch's care when she presented with post-injection complications. RP 1137-38.

Although Mr. Rhoads recalls telling Dr. Werschler about Ms. Paetsch at some point in time, he did so in person, and the conversation would not have occurred while Dr. Werschler was in Hawaii, and may have occurred after Ms. Paetsch discontinued treatment at the clinic by not keeping her March 15 appointment. RP 1428, 1520, 1524-25. Mr. Rhoads does not recall speaking with (nor is there any evidence that he spoke with) Dr. Smith about Ms. Paetsch,⁵ and he probably would not have consulted either physician because he was “confident about what the patient needed.” RP 1429, 1522.

8. Ms. Paetsch’s outcome.

The defense admitted that Ms. Paetsch suffered a vascular compromise that led to necrosis and scarring on her forehead. RP 1115-16, 1217-18, 1508. Her forehead wound healed but left scarring. RP 305-08, 410. Ms. Paetsch claimed income loss and psychological harm, *see* RP 662-63, 871-72, 875-80, for which her counsel asked the jury to award more than \$20,000 and \$340,000, respectively, RP 1690-91, 1694-95.

B. Proceedings Below.

Ms. Paetsch contacted an attorney in April 2007, RP 863, served an RCW 7.70.100 notice in February 2010, and filed suit in May 2010, CP

⁵ Physician assistants’ chart entries must be reviewed and initialed by a supervising physician within seven days; Mr. Rhoads’ entries reflecting Ms. Paetsch’s three visits to him bear Dr. Smith’s initials. RP 1189-90; CP 136, 152, 155, 158.

3-4. The case was tried to a jury before Judge Jerome J. Leveque beginning on October 3, 2011. RP 3.

1. Pre-trial summary judgment ruling as to Dr. Werschler.

Before trial, Dr. Werschler moved for summary judgment, CP 39-101, arguing that he could not be held liable vicariously or for negligent supervision of Mr. Rhoads because the Clinic, not he, had been Mr. Rhoads' employer and because Dr. Smith, not he, had been Mr. Rhoads' supervisor, CP 91-96. Opposing the motion, Ms. Paetsch insisted that her claim against Dr. Werschler was for "medical negligence," CP 129, not negligent supervision or vicarious liability, *see* CP 235, arguing two things. First, but citing no supporting legal authority, she argued that "an assistant's medical treatment *is* medical treatment of the physician." CP 129-30. Second, she argued that Dr. Werschler had been involved in her care because he had been "directly accessed for Dan Rhoads' treatment of [her]," when Mr. Rhoads "went to [him] directly" for assistance but he "declined" to assist Mr. Rhoads. CP 130. She did not argue that she had "contracted" with Dr. Werschler, personally, for any health care.

The trial court denied the summary judgment motion in part, finding "an issue of fact as to whether a patient/physician relationship arose between Dr. Werschler and Ms. Paetsch establishing a duty for Dr. Werschler to provide follow up care of Ms. Paetsch," but ordering that

“the only cause of action against Dr. Werschler is one of direct medical negligence consistent with the above findings.” CP 176. The ruling preserving for trial only Ms. Paetsch’s claim against Dr. Werschler as to her follow-up care was based on Mr. Rhoads’ deposition testimony that he had not asked Dr. Werschler to see Ms. Paetsch, but had had a conversation with him in which he described a patient’s post-injection presentation, how he had addressed it, that the patient seemed to be improving (reflecting the impression Mr. Rhoads noted on March 6) and was going to follow up (which Ms. Paetsch never did), and to which Dr. Werschler replied that it sounded like Mr. Rhoads had done everything he should have done. CP 112. At the summary judgment stage, the evidence left it unclear when that conversation occurred.

Ms. Paetsch moved for reconsideration of the dismissal part of the court’s order, acknowledging that the order had “reliev[ed] Dr. Werschler from the liability relative to the actions of PA-C Daniel Rhoads with respect to the cosmetic injection itself.” CP 183. In support of that motion, Ms. Paetsch’s counsel asserted that Ms. Paetsch had gone to the Clinic “with the understanding that she would be treated by Dr. Werschler, as she understood it to be his clinic,” CP 184 – something Ms. Paetsch herself expressly disclaimed at trial, RP 895-96. Ms. Paetsch did not argue that she had “contracted” with Dr. Werschler. The motion for

reconsideration was denied. CP 329-30. In her opening appellate brief, Ms. Paetsch does not assign error to, or even mention, the summary judgment order or the order denying reconsideration.

2. Plaintiff's expert medical testimony.

Ms. Paetsch called one standard-of-care expert, Dr. Wilensky, a plastic surgeon, who faulted the clinic for allowing a physician's assistant to decide to treat Ms. Paetsch's wrinkles with Restylane. RP 315. Reasoning backward from what he described as "below the standard of care for an acceptable outcome," RP 237, he opined that Mr. Rhoads violated the standard of care for Restylane injection by making injections into Ms. Paetsch's epidermis and thus too superficially, RP 244-45, 249-50, 255-56, 375, resulting in vascular compromise and skin necrosis developing over several days, RP 249, 251, 265-66. Dr. Wilensky also faulted Mr. Rhoads for using only 1 ml. of Restylane on Ms. Paetsch,⁶ RP 283-84, 285-87, and for not having a physician evaluate her on March 2, RP 292-93, 296, 300, 304, 321-22, 458.

Dr. Wilensky acknowledged that a photograph taken at the Clinic on "Friday" (*i.e.*, March 2), shows healthy skin and skin "that looks like it's in trouble," RP 287, and that "clear[ly] is not going to survive," RP

⁶ Dr. Wilensky acknowledged that cosmetic surgeons and dermatologists, including himself, charge by the syringe for Restylane, and charge twice as much for using two syringes as for using one. RP 361.

288, and that the process could be characterized as impending or subacute necrosis because it is gradual, whereas “acute” necrosis would have occurred more immediately, RP 288-89. He acknowledged that Mr. Rhoads’ chart entry for March 2 indicates appropriate concern for both infection and necrosis, RP 289-90, and opined that “[t]here may [have been] an opportunity still to intervene but I think it’s pretty apparent that at least in this central portion [of Ms. Paetsch’s forehead] that that tissue is going to be lost,” but that “there’s an opportunity to evaluate it and see if maybe some of the surface tissue is only involved or if it’s going to be the full thickness of the skin that’s involved,” RP 293. He explained that Nitropaste can be used to dilate blood vessels and enhance microcirculation, and the patient can be told to stop smoking to mitigate blood-flow impairment, RP 294-95, but that Mr. Rhoads managed Ms. Paetsch’s wound correctly, RP 299.

Dr. Wilensky was reluctant to express an opinion that, by March 2, anything could have been done to change the outcome for Ms. Paetsch, RP 292-97, 300, 311, 321, 323, but finally decided to “go ahead and say that because I do believe it,” RP 405-07, 458-59. He never explained how the outcome would have been different.

He also testified that: (1) Restylane is safe and he has never seen the type of reaction Ms. Paetsch had from it, RP 324; (2) an adequately

trained nurse or physician's assistant may make cosmetic injections of Restylane without a supervising doctor being present, RP 335-36, 353, (3) the consent forms Ms. Paetsch signed "adequately reflect the potential complications of a properly performed Restylane injection," RP 339; (4) practitioners had discretion whether to make "off label" use of Restylane and inject it into the glabellar region, RP 445-46; and (5) Dr. Werschler acted appropriately if, during his absence from the Clinic, another dermatologist was available for physician's assistants to consult, RP 413.

3. The defense expert medical testimony.

Dr. Werschler testified that, in his opinion, Mr. Rhoads had made a "judgment call" in treating Ms. Paetsch's symptoms as he did on March 2, instead of having Dr. Smith, who was there that day, see her. RP 1156-57. He defended Mr. Rhoads' treatment decisions as appropriate, RP 1173, and would not have done anything differently, RP 1157, 1338-39.

The defense called Dr. Arguinchona, an infectious disease expert, who opined that Ms. Paetsch's forehead necrosis was due to vascular compromise – an interruption of the blood supply to the affected tissue – and not an infectious process, RP 1009-12, 1018-20, 1035-36, 1075, and could have been the result of Restylane expanding in the skin and constricting blood flow to the glabellar area, RP 1038-40. He testified that

the follow-up care Mr. Rhoads provided on March 2 had been appropriate and not below the standard of care. RP 1021.

Defense expert Dr. Dayan, a facial plastic surgeon, RP 527, who has personally treated 20,000 patients with injectables, RP 534, and also uses physician's assistants to perform injections, RP 535, 571, disagreed with Dr. Wilensky that Mr. Rhoads had injected Restylane too superficially, RP 541, 546-49, 560-61, 593, and opined that Mr. Rhoads had injected the Restylane properly and provided proper follow-up care, RP 563-64, 566-69, 571, and complied with the applicable standard of care, RP 571. He explained that using 1 ml. of Restylane per patient is conservative and "the norm," RP 559, and that injecting it into the epidermal layer would produce a bleb or bubble in the skin, RP 560-61, and could not possibly cause the kind of necrotic injury Ms. Paetsch had, RP 541-42. He further opined that as Restylane expanded following injection, it probably gradually occluded the main artery feeding the glabellar region, which has one main blood supply source, resulting, within about four or five days, in loss of circulation and impending necrosis, RP 545-46, 552-57, 593, a concept that had been unknown in early 2007, RP 553, 556, that was not a foreseeable risk then, RP 557-58, and that since has been

estimated to occur in one out of 50,000 cases or less frequently, RP 574.⁷

4. CR 50(a) dismissal of claim against Dr. Wechsler for failing to provide post-injection care.

After the close of evidence, Dr. Werschler moved under CR 50(a) to dismiss the malpractice claim against him that had survived summary judgment, *i.e.*, that he negligently failed to provide care to Ms. Paetsch for her post-injection complication. RP 1569-76. Plaintiff's counsel opposed the motion. RP 1576-81. The court granted the motion, explaining that:

[T]he only issue that I see that would involve Dr. Werschler is if he was, if the evidence or an inference from the evidence [was that] he was contacted on March 2nd and asked to consult on this matter because of a result that was from the procedure that was causing issues that Mr. Rhoads couldn't handle.... Dr. Werschler was in town on the 2nd but there's no evidence he was in the clinic and there's a denial by all the individuals that there was telephone contact so it didn't happen then. And then he's off on the 5th to Hawaii and there's no evidence they ever discussed this case. The evidence is whenever they did, it was more of a comment about what was going on in the time he was gone.... Mr. Rhoads never testified that he had sought out consultation or the need for such. His testimony was he had it under control. Right or wrong, he never sought out help because he never needed it in his mind.

So Dr. Werschler just wasn't involved in it.... [A]s an individual, Dr. Werschler wasn't a player in this. It was the clinic and Mr. Rhoads, and whoever the supervisor was or was not, but it certainly wasn't Dr. Werschler at the time. It was Dr. Smith who was there and he was never contacted.

⁷ No witness testified that a reaction like Ms. Paetsch's occurs more frequently than 1 in 50,000 cases or that impending or gradual necrosis was, in 2007, a recognized risk of injections of Restylane into the glabellar region or elsewhere.

I don't see how a jury could reach a conclusion that Dr. Werschler, even if he at some point somehow could be inferred to be the physician, breached any duty under the circumstances of the facts as they have been admitted here.

RP 1586-88. An order reflecting that ruling was entered, CP 738-40, and the case proceeded to verdict on Ms. Paetsch's malpractice and "informed consent" claims against the Clinic.

5. Jury instructions and counsel's exceptions to them.

The parties took exceptions to jury instructions on October 18, RP 1598-1641, after which the jury was instructed, RP 1641-54; CP 596-622.

Ms. Paetsch's counsel excepted to what became Court's Instruction 9 (standard of care), CP 607, *see* RP 1599-1600,⁸ which was taken verbatim from WPI (Civ.) 105.02, except for the addition of the words bolded below and the filling in of blanks with the words underlined below:

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 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 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.

⁸ The record of exceptions to instructions is confusing because the instruction numbers referenced by counsel often do not correspond to the instruction numbers contained in the final set of instructions that the court read to the jury and filed. CP 596-622.

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.

CP 607. Although not clearly stated, it appears that she was excepting not to WPI 105.02 being given, but to the failure to add language to it, based on *Adair v. Weinberg*, 79 Wn. App. 197, 202, 901 P.2d 340 (1995), that she had proposed at CP 365. See RP 1599-60. Ms. Paetsch has not assigned error to the court's failure to give any part of CP 365.

Ms. Paetsch's counsel also excepted to what became Court's Instruction 11 (exercise of judgment), CP 609, arguing only that such an instruction is not proper in a case of misdiagnosis, which she argued this case was. RP 1600-01, 1619.

Ms. Paetsch's counsel also excepted, RP 1600, to what became Court's Instruction 10 (poor medical result), CP 608, but Ms. Paetsch has not assigned error to the giving of it. She also excepted to an instruction "13," the text of which the transcript does not disclose, but which the trial court reworded, on the record, to say basically what Court's Instruction 12, CP 610, says. RP 1601-02. After hearing the rewording of the instruction, Ms. Paetsch's counsel said "That's better," and "Don't like it but it's better," RP 1602, but did not specify what she didn't like about it.

To the extent Ms. Paetsch's counsel objected to any informed

consent instructions, it was to instructions that were withdrawn and never given to the jury that related to the rebuttable presumption of informed consent that may arise under RCW 7.70.060(1) when the patient has signed a consent form. With regard to the giving of what became Court's Instructions 14 and 15 (CP 612-13), on informed consent, which were the pattern jury instructions WPI (Civ.) 105.04 and 105.05, Ms. Paetsch's counsel stated that she had no objection. RP 1602-04.⁹

6. The verdict, the judgment, and the denial of Ms. Paetsch's motion for new trial.

On October 19, 2011, the jury returned a verdict finding no negligence by Spokane Dermatology Clinic, CP 623, and no failure to obtain Ms. Paetsch's informed consent, CP 624. Judgment was entered on the verdict. CP 636-37. Ms. Paetsch moved for a new trial, CP 640-77, arguing that no evidence supported the jury's "informed consent" finding, CP 644-49, and that it was error to dismiss Dr. Werschler because he owed Ms. Paetsch a "duty to render aid," CP 650-56.¹⁰ After the trial

⁹ Her remaining exceptions concerned instructions on damages, RP 1604-09, not pertinent to this appeal, and to the failure to give certain of her proposed instructions, RP 1610-22, to which Ms. Paetsch has not assigned any error on appeal.

¹⁰ In her new trial motion, Ms. Paetsch also argued, as she did in moving for a mistrial after defense counsel's closing argument, that defense counsel committed misconduct by stating in closing argument that "the only defendant left in this case is Spokane Dermatology Clinic." CP 656-58; *see* RP 1731-32. Ms. Paetsch has not assigned error to the denial of her motion for mistrial, and mentions the motion and its denial in a single sentence on page 34 of her opening brief. In moving for a mistrial, she did not request any type of corrective instruction, and the trial court's ruling on the motion for mistrial

court orally denied the new trial motion, *see* CP 734, CP 746, Ms. Paetsch appealed, CP 734-45. After entry of orders denying the new trial motion, CP 746-47, 748-49, she filed an amended notice of appeal, CP 751-64.

III. ARGUMENT

A. The Trial Court Correctly Dismissed the Malpractice Claims Ms. Paetsch Asserted Against Dr. Werschler Personally and Limited Her to a Claim Against Spokane Dermatology Clinic.

1. Standard of review.

Orders granting summary judgment order are reviewed *de novo*; the test is whether there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Annechino v. Worthy*, 175 Wn.2d 630, 635, ___ P.3d ___ (2012). Orders granting a defendant's CR 50(a) are also reviewed *de novo*; the test is whether there was no competent and substantial evidence to support a verdict for the plaintiff. *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009).

2. No basis exists for reinstating and trying Ms. Paetsch's claim, dismissed on motion for summary judgment, that Dr. Werschler is personally liable for the Restylane injection.

As Ms. Paetsch acknowledged in her motion for reconsideration, CP 183, the trial court's pre-trial summary judgment orders, CP 176, 329-30, dismissed any claim that Dr. Werschler was liable "relative to the actions of PA-C Daniel Rhoads with respect to the cosmetic injection

reflects its view that what defense counsel said during closing argument was not something the court had ruled he could not say. *See* RP 1732.

itself” that Ms. Paetsch received on February 26, 2007,¹¹ and left for trial solely her claim that Dr. Werschler refused to involve himself in her care after learning from Mr. Rhoads of her post-injection presentation. Ms. Paetsch has not specifically assigned error to either the summary judgment order or the order denying reconsideration, does not mention either order in her brief, and fails to cite anything from the record on the summary judgment motion or the motion for reconsideration to substantiate any claim that the trial court erred in its summary judgment rulings. “It is well settled that a party’s failure to assign error or to provide argument and citation to authority in support of an assignment of error ... precludes appellate consideration of an alleged error.” *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003). An issue that is not raised in appellant’s opening brief is waived and cannot be raised for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Thus, Ms. Paetsch has waived any claim of error as to the summary judgment ruling dismissing any claim that Dr. Werschler was personally liable with respect to the injections Ms. Paetsch received on February 26, 2007.

Even if this Court were to ignore Ms. Paetsch’s failure to assign

¹¹ The trial court dismissed that claim based on Dr. Werschler’s showing that Mr. Rhoads was practicing as a *Clinic* employee under *Dr. Smith*’s primary supervision and that Dr. Werschler had no contact with Ms. Paetsch on or before February 26. CP 135-37.

error to, cite, or present argument concerning the summary judgment ruling, the jury's finding of no negligence on the part of Spokane Dermatology Clinic (and thus of Mr. Rhoads) in Ms. Paetsch's care and treatment renders moot any argument that Dr. Werschler owed her and breached a duty on February 26, 2007. Ms. Paetsch relied at trial on expert standard of care testimony from Dr. Wilensky criticizing the way Mr. Rhoads injected the Restylane, not the decisions to inject Restylane rather than Botox, or to inject Restylane into the glabellar area, or to let a physician's assistant perform the injections (provided he was properly trained). RP 250, 255-56, 325-26, 335-36, 354, 359. Even if the summary judgment order had not been entered, such that Dr. Werschler had potential liability for the injections if Mr. Rhoads had performed them negligently, the jury's verdict absolves Mr. Rhoads (and Spokane Dermatology Clinic) of any negligence, including negligence in the way Mr. Rhoads performed the Restylane injections. Dr. Werschler cannot be held liable for allegedly negligent injections that the jury found were not negligent.

3. The malpractice claim against Dr. Werschler that survived summary judgment – failure to provide post-injection or “follow up” care – was properly dismissed at trial.

At the summary judgment stage, the trial court left pending Ms. Paetsch's claim that Dr. Werschler negligently failed to provide *follow-up* care on or after March 2, 2007. CP 176. The court did so because of

evidence indicating that Mr. Rhoads might have mentioned Ms. Paetsch's complication to Dr. Werschler when there was still time to mitigate the extent of necrosis. CP 109, 111-13.

At trial, no one contended that mitigation of Ms. Paetsch's necrosis had been possible after March 2, 2007, and the uncontroverted evidence established that Dr. Werschler was away from the Clinic from February 28 through March 11; that Mr. Rhoads did not call him during that time; and that, when Mr. Rhoads told Dr. Werschler of his experience with Ms. Paetsch, he did so in person, which had to have been at least nine days after the last day on which anyone contended something could have been done to mitigate Ms. Paetsch's necrosis. RP 1094-95, 1130, 1134-38, 1186-87, 1325. Thus, the trial court correctly concluded that an evidentiary basis did not exist for finding that Dr. Werschler had, but declined, the opportunity to involve himself in Ms. Paetsch's care while a chance still existed that her necrosis could have been mitigated.

4. Even if the dismissal of Ms. Paetsch's "failure to give follow-up care" claim against Dr. Werschler had been error, the trial court's liability instructions rendered it harmless.

Despite the dismissal of malpractice claims against Dr. Werschler personally, the trial court's instructions (Nos. 3, 4, 9, 11, 12, 15, and 17; CP 601-02, 607, 609-10, 613, 615) permitted the jury to find the Clinic liable for a breach of the standard of care by Mr. Rhoads *or by Dr.*

Werschler.¹² Having dismissed claims against Dr. Werschler personally due to lack of evidence that he had any opportunity to commit malpractice, the court should not have given – but did give – instructions that allowed the jury to find the Clinic liable if it found any negligence by Dr. Werschler or Mr. Rhoads. The jury found no such negligence.

Because, under the instructions, the jury would have had to return a verdict for Ms. Paetsch if it found Dr. Werschler had been negligent in some respect, any claimed error in dismissing her claim of negligence against him personally could have been prejudicial only if (1) the jury made a finding of negligence, and (2) the Clinic lacked the resources or insurance coverage to pay a judgment against it. Because the jury did not make a finding of negligence, there was no prejudice. Because there was no prejudice to Ms. Paetsch, it makes no difference whether the dismissal of her claims against Dr. Werschler personally were properly dismissed. “[E]rror without prejudice is not grounds for reversal.” *Brown v. Spokane Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

¹² The trial court instructed the jury (1) that Dr. Wechsler and Mr. Rhoads were employees and agents of the defendant Clinic, CP 602 and 610; (2) that any act of Dr. Werschler or Mr. Rhoads was an act of the Clinic, CP 602; (3) that Dr. Werschler and Mr. Rhoads were both health care providers. CP 607 and 610; and (4) that a health care professional “such as a physician or certified physician’s assistant” owes a duty to comply with the standard of care applicable to the profession or class to which he or she belongs, and that 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,” and that failure to exercise such care is negligence, CP 607.

5. Ms. Paetsch’s “contracted duty” arguments lack merit even if the unappealed-from summary judgment order does not preclude her from making them.

Ms. Paetsch argues, *App. Br. at 21-34*, that it was error to dismiss her claim against Dr. Werschler for negligent follow-up care because she *contracted* to have him, personally, administer her cosmetic injections. Even if she were entitled to make new “contracted duty” arguments, her arguments are without merit.

Ms. Paetsch argues, *App. Br. at 28*, that, under *Lam v. Global Med. Sys., Inc., P.S.*, 127 Wn. App. 657, 111 P.3d 1258 (2005), a doctor need not have personal contact with a patient in order to create a physician-patient relationship. Her reliance on *Lam* is misplaced. Besides muddling concepts of vicarious and direct liability, she misreads *Lam*. It does not hold that a doctor affiliated with a medical corporation is personally liable for care rendered to a patient he does not meet as long as a contract exists to provide health care to the patient. *Lam* held only that the two individual physician employees of the defendant corporation, owed duties of care to a patient whom they had not met – a seaman aboard a vessel in the Bering Sea – because they personally gave patient-care instructions over the telephone. *Lam*, 127 Wn. App. at 665.

Ms. Paetsch asserts, *App. Br. at 22*, that, “[u]nder *Lam v. Global*, the first issue ... is whether a contract existed between [her] and Dr.

Werschler for individualized services.” She is wrong; whether there was a contract was not an issue in *Lam*. The existence of a contract was not a factor in *Lam*, much less a determinative one, for purposes of deciding whether the individual physicians owed the ailing seaman a duty of care. Their employer had a contract with the seaman’s employer to provide health care, but it was not the employer’s contract that imposed a duty of care on the doctors individually; it was the fact that the doctors, personally, had been involved in providing health care to the seaman.

Here, the Clinic admits that Ms. Paetsch had a provider-patient relationship with *it*. The issue is whether Dr. Werschler personally, and not just Mr. Rhoads and the Clinic, owed Ms. Paetsch a duty of care, and *Lam* confirms that Dr. Werschler owed no such duty simply because Ms. Paetsch made an appointment to get injections at a clinic corporation that he owned. All one can say based on *Lam* is that, if Dr. Werschler had involved himself in Ms. Paetsch’s care in some respect – if he been asked for and given her or Mr. Rhoads instructions about how to address her post-injection complaints on March 2 – then he, personally, would have owed her a duty to render that care within the applicable professional standard. Because Dr. Werschler not only never met Ms. Paetsch, but also had no involvement *whatsoever* in any of the care she received from

Spokane Dermatology Clinic, he can have no personal liability.¹³ The unappealed-from summary judgment ruling establishes that Dr. Werschler is not liable for Mr. Rhoads' actions on February 26, 2007, under theories of negligent supervision or vicarious liability¹⁴ (or any other theory). Based on the principles implicitly recognized and applied in *Lam*, he also has no liability for "failing" to provide follow-up care in March, 2007.

The "quasi contract/contract implied in law" argument Ms. Paetsch makes, *App. Br. at 26-28*, was not made below and thus was not preserved for review¹⁵ and, in any event is without legal merit. Implied contract is a way of imposing liability in order to enable someone who has done work for another's benefit to get paid. *Young v. Young*, 164 Wn.2d 477, 484-86,

¹³ The Clinic's receptionist gave Ms. Paetsch an appointment with Dan Rhoads, not Dr. Werschler. RP 895. Ms. Paetsch admitted at trial that she did not expect to see Dr. Werschler at her injections appointment, RP 895-96, and *had never heard of him* until after the injections were made. RP 895-96, 939. She knew the person injecting her was named Dan Rhoads. RP 752, 897-98. Although she claims she thought Mr. Rhoads was a doctor, that hardly supports an argument that she thought she had "contracted" to receive cosmetic injections from a different doctor named Werschler. The fact that Dr. Werschler's name appears on the Patient Profile form the receptionist gave her when she showed up for her appointment, Ex. P22, and appears (along with that of Mr. Rhoads, separated by "and/or") on the Restylane consent form, Ex. P 26, does not make *Lam* applicable or controlling. *Lam* has nothing to say about liability being based on forms a receptionist provides. And what Ms. Paetsch may or may not have believed on February 26 is wholly irrelevant to her Ms. Paetsch's claim that Dr. Werschler "failed" to provide follow-up care on March 2.

¹⁴ Ms. Paetsch acknowledged in responding to Dr. Werschler's CR 50(a) motion that a vicarious liability situation did not exist. RP 1577.

¹⁵ Ms. Paetsch did not make such an argument in opposing Dr. Werschler's motion for summary judgment, *see* CP 128-31, in her motion for reconsideration, CP 183-84, or in opposition to Dr. Werschler's CR 50(a) motion, RP 1576-81. Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

191 P.3d 1258 (2008). None of the decisions Ms. Paetsch cites recognizes implied contract as a vehicle for creating a tort duty in order to impose personal injury liability.

6. Ms. Paetsch's argument about *failure* to instruct on physician/patient duty was not properly preserved for appeal and is without merit.

Ms. Paetsch, *App. Br. at 30 (lines 3-4)*, makes passing reference to a failure by the trial court "to instruct on the physician/patient duty." She asserts, *App. Br. at 31*, that she offered instructions "that identified two different standards of care," citing CP 374, and "to comport with her theory that if the jury found that she was entitled to a physician's care, then certain duties applied," citing CP 370-372, 375-77 and RP 1579-81. RAP 10.3(g) requires that she include in her brief a separate assignment of error for each instruction she contends was improperly refused, but Ms. Paetsch has not done so with respect to any of her proposed instructions. RAP 10.4(c) requires that material portions of the text of any refused jury instruction at issue be included in the text of a brief or in an appendix, but Ms. Paetsch has not complied with that rule either.

Referring to them only as "CP 374" and "CP 370-372, 375-77," Ms. Paetsch argues, *App. Br. at 31*, that the trial court erred in not giving her proposed "physician duty" instructions. But, Ms. Paetsch fails to show that she excepted to the court's failure to give any of those proposed

instructions, much less that she did so with the specificity required by CR 51(f).¹⁶ Failure to except properly to a trial court's failure to give a proposed instruction waives any claim of error. *Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 194, 72 P.3d 1122 (2003), *rev. denied*, 151 Wn.2d 1011 (2004). As explained in *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 338-39, 878 P.2d 1208 (1994), the purposes of CR 51(f) are to clarify the points of law and reasons for counsel's claim of error about a particular instruction so that the trial court can correct any mistakes in time to avoid the expense of a second trial:

“If an exception is inadequate to apprise the judge of certain points of law, ‘those points will not be considered on appeal.’” ... Instructional defects which are not brought to the attention of the trial court *in some manner* may not serve as the basis for a new trial. [Italics in original; citation omitted.]

In reviewing a claim of instructional error, an appellate court considers the objection made at trial and the context in which it was made, but does not consider statements made in motions for a new trial or reconsideration.

Postema, 118 Wn. App. at 194. Ms. Paetsch's stated exceptions at RP

¹⁶ CR 51(f) provides: “Before instructing the jury, the court shall supply counsel with copies of its proposed instructions Counsel shall then be afforded an opportunity ... to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.” The only proposed instruction referenced in plaintiff's counsel's exceptions for which respondents' counsel have been able to discern a correspondence to a specific “CP” page is CP 365. See RP 1600, where plaintiff's counsel excepted to the trial court not including unspecified “additional language,” in Court's Instruction 9, which was WPI (Civ.) 105.02, CP 607.

1579-81 did not suffice to apprise the trial court of the objections to its failure to give “CP 370-372, and/or CP 375-77.” she now makes.¹⁷

In any event, “CP 372” was her purported *Lam*-based “duty formation” instruction, which was properly refused for reasons explained above, and her proposed non-pattern “physician duty” instructions at “CP 370 and 371,” and the proposed patient-abandonment instructions at “CP 375-76 and 377” all assumed, incorrectly, that *Lam* required the court to impose a contracted-for duty on Dr. Werschler.

The trial court’s refusal to give Ms. Paetsch’s proposed “physician duty” instructions in addition to, or instead of, the pattern instructions it did give, were neither error nor prejudicial to Ms. Paetsch. The court gave what one would expect a trial court to give in a medical malpractice case, *i.e.*, WPI (Civ.) 105.02 (CP 607) and 105.03 (CP 606). Ms. Paetsch does not argue that those pattern instructions were inapplicable or incomplete. Although she asserts, *App. Br. at 32*, that the court gave no instruction on a physician’s – as opposed to a physician’s assistant’s – duty of care, *App. Br. at 31, 32*, that is not true. *See* Court’s Instructions 9 (CP 607), 11 (CP 609), and 12 (CP 610). As noted above, although the court should not

¹⁷ As for “CP 374,” that was Ms. Paetsch’s proposed modification of WPI (Civ.) 105.02 (standard of care applicable to a health care specialist). She fails to explain how the trial court erred in giving its own, slightly different modified version of that same pattern instruction as Court’s Instruction 9, CP 607, or how the trial court’s instruction prevented her from arguing some legitimate theory of her case.

have given any instruction on a *physician's* duty of care, it did give one. Thus, Ms. Paetsch's contrary protestations aside, she was not deprived of an instruction on a physician's duty of care that correctly stated the law.

7. Ms. Paetsch has not properly raised any claim of error in the trial court's denial of her motion for mistrial.

Ms. Paetsch makes a single-sentence reference to a request she made for a mistrial that the trial court denied after defense counsel stated in closing (accurately) that the Clinic was the only defendant left in the case. *App. Br. at 34*. She assigns no error to the denial of her motion for mistrial, and cites no authority on motions for mistrial or the standard of review applicable to denials of such motions, which is abuse of discretion. *Smith v. Orthopedics, Int'l, Ltd., P.S.*, 149 Wn. App. 337, 341, 203 P.3d 1066 (2009), *aff'd*, 170 Wn.2d 659 (2010). So perfunctory a reference is inadequate to warrant this Court's attention, much less its consideration.

B. The Trial Court Did Not Err, Much Less Prejudicially Err, in Giving the "Exercise of Judgment" Pattern Jury Instruction.

1. Standard of review.

Jury instructions are reviewed *de novo* for errors of law, and are sufficient if they allow the parties to argue their theories of the case, are not misleading, and when read as whole properly inform the jury of the applicable law. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) When a jury instruction correctly states the

law, a trial court's decision to give it will not be disturbed absent an abuse of discretion. *Micro Enhancement Intern'l, Inc. v. Coopers & Lybrand, L.L.P.*, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002).

An erroneous instruction is reversible error only if it prejudices a party. *Anfinson*, 174 Wn.2d at 860. Prejudice is presumed only if an instruction contains a clear misstatement of the law; prejudice must be demonstrated if an instruction is merely misleading. *Id.*; *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). The party challenging an instruction bears the burden of establishing prejudice. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001).

2. The “exercise of judgment” instruction was properly given because PA-C Rhoads was confronted with a choice of alternative treatments and there was evidence that, in exercising his judgment, he exercised reasonable care and skill within the standard of care he was obliged to follow.

Washington courts have long held that the giving of an “error of judgment” or, as it is now titled in WPI (Civ.) 105.08, an “exercise of judgment” instruction is proper and within the trial court's discretion in medical malpractice cases where there is evidence that the defendant was “confronted with a choice among competing therapeutic techniques or among medical diagnoses,” and there is evidence that in arriving at a judgment, the defendant “exercised reasonable care and skill, within the standard of care he [or she] was obliged to follow.” *Watson v. Hockett*,

107 Wn.2d 158, 165, 727 P.2d 669 (1986).¹⁸

Notwithstanding this long line of precedent, Ms. Paetsch asserts, *App. Br. at 36*, that the “exercise of judgment” instruction may be used only when a doctor “is confronted with a choice among ... medical *diagnoses* [emphasis added], citing WPI (Civ.) 105.08 and quoting from its Note on Use.”¹⁹ That is the only argument Ms. Paetsch makes about the giving of the “exercise of judgment instruction for which she cites any authority.”²⁰ And, quoting from the Note on Use to WPI (Civ.) 105.08, Ms.

¹⁸ See also *Christensen v. Munsen*, 123 Wn.2d 234, 248-49, 867 P.2d 626 (1994); *Housel v. James*, 141 Wn. App. 748, 760, 172 P.3d 712 (2007); *Ezell v. Hutson*, 105 Wn. App. 485, 488-92, 20 P.3d 975, *rev. denied*, 144 Wn.2d 1011 (2001); *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn. App. 387, 388-89, 937 P.2d 1104, *rev. denied*, 133 Wn.2d 1017 (1997); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 260, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992); *Vasquez v. Markin*, 46 Wn. App. 480, 487-89, 731 P.2d 510 (1986), *rev. denied*, 108 Wn.2d 1021 (1987); *Miller v. Kennedy*, 91 Wn.2d 155, 160-61 588 P.2d 734 (1978).

¹⁹ Ms. Paetsch repeats the assertion that the instruction applies only in cases involving choices between diagnoses, *App. Br. at 37*, but her argument then becomes even less accurate and even more incoherent.

²⁰ Because her other arguments and assertions concerning the giving of the “exercise of judgment” instruction are not supported by authority, such as her rather incomprehensible claims, *App. Br. at 35*, that the instruction “improperly gives the PA-C control of Ms. Paetsch’s treatment entirely, even after he damaged her,” or *App. Br. at 36*, that the instruction improperly “implicitly confirms the PA-C’s right to diagnose the patient, when Ms. Paetsch had contracted with a physician had contracted with a physician,” or the other bald argumentative assertions that she makes in the last paragraph of page 36 and on page 37 of her opening brief, this Court should not consider them. *E.g., State v. Groom*, 133 Wn.2d 679, 691, 947 P.2d 240 (1997) (appellate court may decline to consider arguments that are unsupported by authority); *Grant County v. Bohne*, 89 Wn. 2d 953, 958, 577 P.2d 138 (1978) (“Where no authorities are cited, the court may assume that counsel, after diligent search, has found none”). Moreover, because Ms. Paetsch failed to except to the giving of the “exercise of judgment” on any of those grounds, *see* RP 1600-01, 1619, she failed to preserve any claim of error on those grounds. *E.g., Nord v. Shoreline Sav. Ass’n*, 116 Wn.2d 477, 486, 805 P.2d 800 (1991) (party who failed to except to instruction on basis asserted on appeal, failed to apprise trial court of claimed error, and failed to preserve the claim of error for review). The only exception Ms.

Paetsch conveniently uses ellipses to delete out the words “competing therapeutic techniques.”

The Note on Use to WPI (Civ.) 105.08 does not say that the instruction may be used only when a doctor “is confronted with a choice among ... medical diagnoses.” It says that the instruction “may be used only when the doctor is confronted with a choice among *competing therapeutic techniques or among medical diagnoses* [emphasis added].” Thus, for the single assertion about the “exercise of judgment” instruction for which Ms. Paetsch cites any authority at all, she misstates what the authority says. If an appellate court may decline to consider an argument unsupported by authority, *see* fn. 25, *supra*, surely it may decline to consider an argument that inaccurately quotes legal authority.

In excepting to the “exercise of judgment” instruction, Ms. Paetsch argued at trial only that the instruction cannot be given in a case where the defendant simply misdiagnosed the patient’s condition, and that Mr. Rhoads misdiagnosed impending necrosis as an infection.²¹ Such an

Paetsch took to the giving of the “exercise of judgment” instruction was that the instruction was not proper in a case of misdiagnosis. RP 1600-01, 1619.

²¹ RP 1600-01 (“[T]he instruction] is not appropriate for this case because this is a case of misdiagnosis.... There is no evidence that Ms. Rhoads properly diagnosed the condition and ... set out to address two or more alternative courses of treatment for that condition”); RP 1619 (“I take exception to the Court’s [decision] to give that two alternative forms of treatment instruction [b]ecause [it] is basically setting ... up ... to the jury that Mr. Rhoads had the proper option to determine between two alternative courses of treatment when he completely misdiagnosed the issue. And that’s not proper [because] it’s telling the jury that his misdiagnosis is okay”).

argument overlooks the fact that Ms. Paetsch was claiming not just that Mr. Rhoads negligently diagnosed her on March 2 and 6, but also that he negligently recommended Restylane rather than Botox to treat her glabellar wrinkles on February 26.²² RP 1666-69. By claiming negligence in choosing to provide Restylane over Botox treatment, Ms. Paetsch made it appropriate for the court to give the “exercise of judgment” instruction, CP 609, which referenced the “selecting of two or more alternative courses of treatment,” and said nothing about choosing among competing diagnoses. Because Mr. Rhoads, under Ms. Paetsch’s own claims of negligence, was confronted with a choice among treatments (Restylane or Botox),²³ and because, contrary to what Ms. Paetsch asserts, WPI 105.08, both according to its wording and its unellipsized Note on Use, applies to cases involving choices between treatments (“therapeutic techniques”) *and/or* between diagnoses,²⁴ the trial court properly exercised its discretion in giving the “exercise of judgment” instruction.

²² Her argument also ignores the fact that the “exercise of judgment” instruction, CP 609, concerned a physician or certified physician assistant’s “selecting one of two or more alternative courses of treatment,” and not the choosing among medical diagnoses.

²³ Mr. Rhoades also had to choose between advising Ms. Paetsch to apply ice to her swelling or to come to the Clinic to be examined on March 1, and had to choose among topical treatments for the skin on her forehead and between treating her himself or calling in a physician or sending her to a specialist on March 2.

²⁴ Even if the trial court had given an “exercise of judgment” instruction concerning a “choice between medical diagnoses,” that instruction also would have been proper, as Mr. Rhoads also was confronted with a choice between diagnoses. On March 2 and again on March 6, he had to choose between a diagnosing infection or what turned out to be impending necrosis.

3. Ms. Paetsch does not even attempt to explain how the “exercise of judgment” instruction prejudiced her case.

As the party challenging one of the court’s instructions, Ms. Paetsch bears the burden of establishing prejudice. *Griffin* 143 Wn.2d at 91; *Miller v. Yates*, 67 Wn. App. 120, 125, 834 P.2d 36 (1992). One cannot carry one’s burden of establishing prejudice by failing to mention prejudice at all. Ms. Paetsch nowhere argues that the “exercise of judgment” instruction, Court’s Instruction 11, CP 609, prejudiced her case. Her assertions, App. Br. at 36, that the instruction “implicitly confirms the PA-C’s right to diagnose the patient [although she] had contracted with a physician,” and “grants license to an assistant to deprive the patient of a proper medical diagnosis for the damage the assistant causes,” are not only incoherent as claims of prejudice, but also are unworthy of consideration because they erroneously assume that her “contracted duty” arguments have merit. And she did not raise those arguments in taking exception to the giving of the “exercise of judgment” instruction. *See* fn. 20 and fn. 21, *supra*.

C. The Trial Court Properly Denied Ms. Paetsch’s Motion for a New Trial of Her Informed Consent Claim.

1. Standard of review.

Orders denying motions for new trial are reviewed for abuse of discretion. *Alcoa v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 537, 998

P.2d 856 (2000).

2. Ms. Paetsch is not entitled to a new trial of her “informed consent” claim.

Apparently seeking relief under CR 59(a)(8) (error in law occurring at trial and objected to at the time), Ms. Paetsch asserts, *App. Br. at 45*, that “a new trial [of her “informed consent” claim] should be granted under the proper law.” Yet, nowhere in her brief does Ms. Paetsch identify any respect in which the trial court failed to apply “the proper law” to her “informed consent” claim. She does not assign error to, or offer argument concerning, the court’s refusal to give any “informed consent” claim jury instruction she tendered. Nor does she assign error to, or offer argument about, either of the pattern “informed consent” instructions the court gave, *i.e.*, WPI (Civ.) 105.04 and .05, CP 612-13, as to which she took no exception, *see* RP 1602-04. She also does not assign error to, or offer argument about, any evidentiary ruling the court made concerning “informed consent” issues. She says nothing in her opening brief that even hints at any error in the “informed consent” law that the jury was instructed to apply to the facts. Thus, no basis exists for granting a new trial under CR 59(a)(8).

3. There did not have to be evidence “of” informed consent, but there was.

Apparently seeking relief under CR 59(a)(7) (no evidence or

reasonable inference to justify the verdict), Ms. Paetsch asserts, *App. Br. at 39*, that “[s]he was improperly denied a new trial, as no evidence of informed consent existed as to the material aspects of [Restylane] treatment.” Her assertion is without merit. First, there did not have to be “evidence *of* informed consent” because the Clinic did not bear the burden of persuading the jury that Ms. Paetsch gave informed consent within the meaning of RCW 7.70.050. Ms. Paetsch bore the burden of proving and persuading the jury of all four elements of an informed consent claim listed in RCW 7.70.050(1) and Court’s Instruction 15, CP 613.

Second, even if “evidence *of* informed consent,” were needed, there was such evidence. Ms. Paetsch signed two Restylane consent forms, Exs. P26 and P27, and had the opportunity to ask any questions she wished, RP 896-97, 899. Mr. Rhoads testified to discussing with Ms. Paetsch the risks and benefits of Restylane injection, including the risk of necrosis, and found out from her which facial wrinkles she wanted treated. RP 1398-1405, 1408, 1463-65, 1487-96, 1529. Ms. Paetsch loved the results until the one-in-50,000 chance of necrosis began to materialize four days later. RP 904-05.

Third, not only was there “evidence *of* informed consent,” but also Ms. Paetsch’s CR 59(a)(7) challenge to the sufficiency of the evidence to support the jury’s “no” answer to Question 3 on the verdict form (“Did

Spokane Dermatology Clinic fail to obtain the informed consent of [Ms. Paetsch]?”), concedes the truth of the evidence the Clinic presented and requires that all the evidence and inferences therefrom be construed “most strongly” against her and in the Clinic’s favor.²⁵ Thus, Mr. Rhoads’ testimony that he discussed the risks and benefits of Restylane injections, along with other exhibits and trial testimony consistent with the verdict, must be taken as true and amply support the jury’s verdict.

Nevertheless, in challenging the sufficiency of the evidence of informed consent, Ms. Paetsch relies primarily on her trial testimony and her subjective beliefs and expectations based on what she claims a Clinic receptionist told her when she made her initial appointment. But, presenting such a one-sided self-serving view of the evidence is not enough to establish that there was insufficient evidence to sustain the jury’s verdict so as to warrant a new trial under CR 59(a)(7).²⁶

²⁵ *Bremerton v. Shreeve*, 55 Wn. App. 334, 341-42, 777 P.2d 568 (1989) (“A challenge to the sufficiency of the evidence ... or a motion for judgment notwithstanding the verdict admits for the purpose of ruling on the motion the truth of the nonmoving party’s evidence and all reasonable inferences drawn therefrom [and] requires that all evidence be interpreted in a light most favorable to the party against whom the motion is made and most strongly against the moving party. [citations omitted]”).

²⁶ Although Ms. Paetsch also apparently claims that a new trial should be granted under CR 59(a)(9) because substantial justice has not been done, *see App. Br. at 38*, she offers no reason why if grounds for granting a new trial under CR 59(a)(7) and CR 59(a)(8) do not exist. “[G]ranteeing new trials under CR 59(a)(9) for ‘lack of substantial justice’ should be rare because of the other broad grounds for relief under CR 59(a).” *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011).

4. “Patient sovereignty” is a value that “informed consent” law expresses, not a term that trumps a jury’s finding that there was no failure to obtain informed consent.

Ms. Paetsch offers, *App. Br. at 39-40*, platitudinous statements about “patient sovereignty.” She does not claim that she proposed any instruction on “patient sovereignty.” Nor do the pattern “informed consent” jury instructions refer to “patient sovereignty.” That principle is given legal expression through the wording of RCW 7.70.050 and the pattern instructions the court gave. CP 612, WPI (Civ.) 105.04, and CP 613, WPI (Civ.) 105.05. What Ms. Paetsch says about “patient sovereignty” provides no basis for granting her a new trial on informed consent.

5. There is no legal basis for Ms. Paetsch’s argument that she was informed only of facts stated on her consent forms.

Ms. Paetsch asserts, *App. Br. at 40, 44*, that “[t]he *material* facts of this procedure were given in writing in advance of PA-C Rhoads walking into the room [and that her] consent to this procedure was in writing [and] the written consent controls.” Because Ms. Paetsch cites no legal authority for that assertion, this Court may and should ignore it. *State v. Groom*, 133 Wn.2d at 691. The assertion is also without legal merit.

To the extent Ms. Paetsch argues that only what is stated on a consent form is admissible to prove what information a patient was given, she is simply wrong. RCW 7.70.060 makes consent forms *prima facie* evidence that informed consent was given, but does not preclude

testimony that information not reflected in a consent form was conveyed. Moreover, Ms. Paetsch's own expert, Dr. Wilensky, testified that the consent forms Ms. Paetsch signed adequately stated the benefits and risks of a properly administered Restylane injection. RP 339. The jury was entitled to credit that testimony which, standing alone, was sufficient to support the jury's finding of no failure to obtain informed consent, CP 624, even if Ms. Paetsch was informed only of what the consent forms say.

Additionally, there was evidence – which Ms. Paetsch's CR 59(a) motion requires the court to treat as true, *Bremerton v. Shreeve*, 55 Wn. App. at 341-42 – that Mr. Rhoads orally informed Ms. Paetsch of the risks before injecting Restylane into her forehead. RP 1398-1405, 1408, 1463-65, 1487-96, 1529. Finally, under RCW 7.70.050(1) and Court's Instruction 15, CP 613, WPI (Civ.) 105.05, it was for the jury, to decide whether any fact about which Ms. Paetsch claimed to be uninformed when she consented to the Restylane injections was “material” as that term is defined by RCW 7.70.050(2), and whether a reasonably prudent patient would not have consented to the injections if informed of that fact.

6. Mr. Rhoads' "identity and status" was not legally material; nor was the jury was obligated to decide that that a reasonably prudent patient would not have consented to being injected with Restylane by a physician's assistant.

Ms. Paetsch argues, *App. Br. at 41*, that Mr. Rhoads' "identity and status" was material when he was about to inject her and that "[n]o 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 [was] nowhere disclosed until [Mr. Rhoads] appeared and took over the process." Again, Ms. Paetsch is wrong. No "switch" of providers was made; she initiated contact with the Clinic, RP 732-37, and admits that she was told that she would be seeing "Dan Rhoads" for her injections, RP 895, and had no expectation of seeing Dr. Werschler on February 26 and had never heard of him before she was injected, RP 895-96.

As Ms. Paetsch's own expert, Dr. Wilensky acknowledged, there was nothing wrong with a physician's assistant making cosmetic injections of the type Ms. Paetsch received on February 26, 2007. RP 335-36, 353. The statutory duty under RCW 7.70.050 to disclose material facts is limited to *treatment*-related facts, which generally does not include the provider's qualifications. *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). Thus, even if Ms. Paetsch was uninformed that Mr. Rhoads was not a physician, that fact as a matter of law was not a “material” fact for purposes of Ms. Paetsch’s “informed consent” claim. Even if it could be material in a particular “informed consent” case that a physician’s assistant was inexperienced in providing the health care at issue, *see Housel*, 141 Wn. App. at 756, the uncontroverted testimony was that Mr. Rhoads had made thousands of injections during his career, RP 1355, including more than 550 injections of Restylane, RP 1393, 1525, and Ms. Paetsch does not cite his experience or lack thereof (as opposed to him not having been a physician) as a material fact of which she was uninformed.

Ultimately, as is true for all of Ms. Paetsch’s “informed consent” contentions, even if it were “material” that Mr. Rhoads was a physician’s assistant, the jury’s “no” answer to Question 3 on the verdict form must be taken as a finding that Ms. Paetsch failed to persuade it that she did not know he was, despite the consent form she signed, Ex. P27, that identified him as a “PAC,” or that a reasonably prudent patient in the same circumstances would have refused to be injected if informed that he was.²⁷

²⁷ Both Dr. Wilensky, RP 335-36, 353, and other nonparty physician witnesses, RP 185-86 (Dr. Oliva, treating physician) and RP 534-35 (Dr. Dayan, defense expert), agreed that it is, and was in 2007, acceptable and a common practice for physician’s assistants to administer cosmetic injections, including injections of Restylane. Based on such testimony, the jury was entitled to conclude that a reasonably prudent patient seeking

7. The jury also was not obligated to find that a reasonably prudent patient would not have consented to being injected with Restylane if informed of its FDA approval status.

Ms. Paetsch asserts, *App. Br. at 42*, that there is no evidence she was informed that Restylane was not specifically approved for cosmetic use for lines and wrinkles in the glabellar region, and, without citation to authority, that “[w]here a patient consents to [an FDA] approved use of a product, consent does not exist to ‘off label’ use.” She argues that, apparently as a matter of law, she consented “only to injection of Restylane in accordance with FDA guidelines,” even though no “FDA guidelines” were introduced in evidence at trial or alluded to by any medical expert.

Insofar as Ms. Paetsch is suggesting that “off label” use of a product, as a matter of law, must be a “material” fact, because such use is wrong, illegal, ethically questionable, dangerous, or contrary to standards of proper medical care, she is incorrect.

Generally, a new drug must be approved by the FDA for specific uses – *i.e.*, to treat certain conditions. Any use of the drug other than that in the approved labeling is considered an “off label” use of the drug.... For most drugs, these off-label uses are entirely legal, and physicians may proceed to prescribe the drug for other purposes.

United States v. Bader, 678 F.3d 858, 875 (10th Cir. 2012). Indeed, “[i]t is standard medical practice in the United States for physicians to pre-

cosmetic injections in February 2007 probably would not have withheld consent if told that the person who was about to give the injections was a physician’s assistant.

scribe FDA-approved drugs in dosages and for medical indications that were not specifically approved – or even contemplated – by the FDA. . .” *Planned Parenthood Southwest Ohio Region v. Dewine*, 696 F.3d 490, 496 (6th Cir. 2012) (noting, at n.4, that “[t]he FDA regulates the marketing and distribution of drugs by *manufacturers*, not the practices of *physicians* in treating patients [*italics added*]”).

Ms. Paetsch offered no evidence that the “FDA approval” status of Restylane reflected anyone’s assessment that injecting it into the glabellar region of the forehead posed any particular risk, and thus hardly proved that it constituted a material fact as a matter of law. Given the expert testimony that “off-label” use of Restylane was common and acceptable in 2007, RP 325, 445-46, 545, 554, 1154, the jury was entitled to find against Ms. Paetsch to the extent her “informed consent” claim was based on Restylane’s “FDA approval” status. And, in light of the uncontroverted expert testimony quantifying the risk of necrosis at two thousandths of one percent, the jury was entitled to find that a reasonably prudent patient would not have refused consent if informed that injection of Restylane into the glabellar region was an “off label” use of the product.

8. The jury was entitled to find that the risk of skin necrosis was too remote to be material.

Ms. Paetsch, *App. Br. at 44*, refers to the injection of Restylane

into her forehead as a “higher risk procedure.” To the extent she is arguing that she should have a new “informed consent” trial because of something having to do with the degree of risk associated with Restylane injection into the glabellar region, the Court should reject that argument for several reasons. First, the “informed consent” statute, RCW 7.70.050(1), requires a plaintiff to prove, among other things, “[t]hat the health care provider failed to inform the patient of a material fact or facts relating to the treatment.” RCW 7.70.050(1)(a), and RCW 7.70.050(2) defines a “material” fact as one to which a reasonably prudent patient would attach significance in deciding whether or not to submit to proposed treatment. The test for materiality is an objective one; “the test is not whether [the patient herself] would have chosen a different course of treatment, but whether a reasonably prudent patient in [her] position would have chosen a different course of treatment.” *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 665-66, 975 P.2d 950 (1999) (citation omitted). Thus, “the trier of fact must determine from the evidence taken as a whole whether a reasonably prudent person in the patient’s position would have chosen a different treatment than received.” *Id.* at 667.

Second, any “recognized serious possible risks [and] complications” of Restylane injection had to be established through expert testimony, RCW 7.70.050(3)(d), and the uncontroverted expert testimony in

this case quantified the risk of necrosis from injection of Restylane as 1 in 50,000+, RP 574, which is less than .002%, or one two thousandth of one percent, a level of risk that as a matter of law is too remote to be material for purposes of an informed consent claim. *Mason v. Ellsworth*, 3 Wn. App. 298, 474 P.2d 909 (1970) (0.75% risk of esophagus perforation from esophagoscopy too remote to be material); *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 (.005%) chance of colon perforation during sigmoidoscopy is too remote to be material).²⁸

Even though the trial court's instructions permitted the jury to find that the .002% risk of skin necrosis *was* a material fact of which Ms. Paetsch had not been informed and that a reasonably prudent patient would not have consented if informed of a .002% risk of skin necrosis, the jury was not obligated to so find, and obviously did not so find.

Third, in order to be "material," a risk must be "recognized" as well as "serious" and "possible." RCW 7.70.050(3)(d). Restylane was

²⁸ Ms. Paetsch may argue that the 1 in 50,000+ testimony related to the risk of necrosis from injecting Restylane generally, and that there was testimony that the risk is higher when Restylane is injected into the glabellar area. Respondents do not agree that the 1 in 50,000 figure did not relate to glabellar region injections, but, if it did, (a) there was no testimony quantifying the risk of glabellar region necrosis as substantially lower than 1 in 50,000+, and (b) there was testimony that injecting Restylane into the glabellar region is only slightly more risky than injecting it elsewhere. *see* RP 1036-37, 1146, 1152-53. Absent medical testimony that the risk of necrosis from injection of Restylane into the glabellar region is higher than one in 130 (*Mason*) or 20,000 (*Ruffer*) the risk Ms. Paetsch faced was, as a matter of law, still too remote to be material.

approved for cosmetic use in 2003, RP 1145-46, and as of February 2007, impending necrosis as a risk of such use was not recognized, RP 557-58.²⁹ Thus, the fact that that the risk of impending necrosis was unrecognized in 2007 made it immaterial as a matter of law.

9. Any battery claim was not pled, asserted, or preserved.

To the extent Ms. Paetsch is arguing that she gave no consent *at all* to being injected with Restylane in the forehead, she is not describing an “informed consent” claim; she is describing a claim of intentional battery. *Young v. Savidge*, 155 Wn. App. 806, 822, 230 P.3d 222 (2010); *Bundrick v. Stewart*, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005). Battery and informed consent “causes of action protect entirely different values,” *Bundrick*, 128 Wn. App. at 17, and have different elements.³⁰ Ms. Paetsch asserted no battery claim, proposed no battery jury instructions, and makes no argument about battery in her opening brief. A claim that she gave no

²⁹ Mr. Rhoads knew necrosis was a risk, and so informed Ms. Paetsch, RP 1405, but he was aware that necrosis was a risk because it might follow an *infection*, not that it could develop slowly, in the absence of infection, due to Restylane expanding under the skin and strangling blood supply to a tissue over a period of days post-injection.

³⁰ A battery is “[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent.” *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000) (citation omitted).

consent at all to have Restylane injected into her forehead has thus not been preserved for appeal or adequately briefed.³¹

IV. CONCLUSION

For the foregoing reasons, the trial court's judgment and order denying Ms. Paetsch's motion for a new trial were correctly entered and should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of January, 2013.

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By



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Attorneys for Respondents

³¹ Any such contention also is inconsistent with the pleasure Ms. Paetsch expressed over her results before she paid \$680 cash for her injections and left the Clinic. RP 904-05, 1244, 1214.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 17th day of January, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 17th day of January, 2013, at Seattle, Washington.



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