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FILED

COA No. 306887

JAN 27 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**SUPREME COURT
OF THE STATE OF WASHINGTON**

PHYLLIS PAETSCH

Petitioner/Appellant,

v.

**SPOKANE DERMATOLOGY CLINIC, P.S., as a Washington
Corporation; and WILLIAM P. WERSCHLER, MD, Individually,**

Respondents.

PETITION FOR REVIEW

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STATE OF WASHINGTON

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A. IDENTITY OF THE PETITIONER.

Phyllis Paetsch asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION.

Petitioner Paetsch requests that this Supreme Court review the decision of the Division III Court of Appeals in *Paetsch v. Spokane Dermatology Clinic, P.S.*, 30688-7-III, 2013 WL 6843951 (Wash. Ct. App. Dec. 26, 2013). A copy of the decision is in the Appendix at pp. P1 – P6.

C. RELATED CASES.

On January 14, 2014, this Supreme Court heard argument in *Dani Fergen et al v. John D. Sestero M.D.*, #88819-1, joined with *Anil Appukuttan v. Overlake Medical Center, et al.* #89192-3 on a primary issue of law presented here. Both of the former deal with the continuing propriety of the use of WPI 105.08, known as the “exercise of judgment” jury instruction, in a medical negligence case. This petition raises the propriety of the same instruction under more expanded conditions, i.e. with informed consent claims and with misdiagnosis. This Court’s ruling in *Fergen* and *Appukuttan* may have

determinative effect here.

D. ISSUES PRESENTED FOR REVIEW.

1. When a doctor advises and commits a patient to informed consent for cosmetic injection procedures, does a physician/patient relationship arise as a matter of law?

2. When a doctor advises and commits a patient to informed consent for cosmetic injection procedures, is his substitution of his assistant for the procedure without telling the patient a material fact of the ensuing medical treatment under this state's informed consent statute, RCW 7.70.050, as a matter of law?

3. Is an alternative treatment jury instruction, WPI 105.8, properly given in an informed consent case?

4. Is an alternative treatment jury instruction, WPI 105.8, properly given with a misdiagnosis?

E. STATEMENT OF THE CASE.

Petitioner Phyllis Paetsch brought claims against physician William Werschler, M.D. and the Spokane Dermatology Clinic for violation of informed consent, and medical negligence. *CP 17-28*. Her complaint alleges that she sought a physician's care for a cosmetic procedure, and was led to believe by Dr. Werschler and his clinic that

she was being provided with a physician to perform her cosmetic injections. She did not find out until after she had been permanently scarred by a physician's assistant (PA-C) that her provider had not been a physician. She was never provided a physician. Permanent scarring ensued. *CP 19, para. 2.4, 2.9, 2.23, 3.1, 3.4.*

The record includes writings presented by the Clinic to Ms. Paetsch to sign. In her initial patient form, which Ms. Paetsch was required to sign, Dr. Werschler is listed at the top as Ms. Paetsch's "doctor." *Pl. Ex. 22, attached at Appendix P12, stating "Doctor: Wm. Philip Werschler MMD"*). In the form, Ms. Paetsch agrees in writing that she is the doctor's "patient." *Id., "Patient profile."* In her consent form, Dr. Werschler is named as the doctor providing Ms. Paetsch her informed consent. *Pl. Ex. 27, Attached at App. P13 – 14.* The form states, "Dr. Werschler has provided me with this informed consent." *Id.* In the paragraph preceding, it states "Dr. Werschler and/or Dan Rhoads PAC has *also* informed me..." *Id., emphasis added.* The form she was required to sign required Ms. Paetsch to directly release the Clinic and hold "Wm. Philip Werschler M.D. harmless" for the risks described.

*Pl. Ex. 27, p. 2, App. P14.*¹ After Ms. Paetsch signed these forms, Dr. Werschler's office staff told Ms. Paetsch that the "doctor" would be in to see her. *RP 752: 16-17.*

A provider (Dan Rhoads) then appeared, did not advise Ms. Paetsch that he was a physician's assistant, not a doctor, and began performing cosmetic injections on Ms. Paetsch's face. *RP 760-761.*

Ms. Paetsch consented in writing only to procedures that were in conformance to FDA guidelines.² But the assistant began injecting substances into Ms. Paetsch's forehead in a non-FDA approved manner. *RP 445-446.* The use of the substance in the forehead area is a higher risk procedure because of limited blood supply in that area. *RP 1035.* The assistant's procedure occluded the blood supply in Ms. Paetsch's forehead, and created a necrosis. When Ms. Paetsch returned to the clinic with growing damage on her forehead, the same assistant reappeared, misdiagnosed his damage, mistreated it, and left Ms. Paetsch with permanent scarring.

¹ The Clinic's business card identifies "Wm. Philip Werschler, M.D." as the single dermatologist physician of his Spokane Dermatology Clinic. *CP 704, Appendix P15.*

² Paetsch agreed in writing 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, Appendix P14.*

During trial, Ms. Paetsch evidenced the difference between a physician's knowledge and skill level, versus an assistant's level, as to these cosmetic treatments. Her medical doctor expert testified to the difference. *RP 300, 292*. The defense's medical expert testified to the difference. *RP 571, 578*. The difference was demonstrated from the stand. The physicians who testified knew that Restylane was not FDA approved for use in the forehead area. The assistant did not. *RP 1485-1486*. The physicians looked at the photo of Ms. Paetsch's injury the critical day she returned to Dr. Werschler's dermatology office after her procedure, and identified her condition as an evolving necrosis from the Restylane use. *RP 1011; 237*. The assistant looked at the same injury and diagnosed it as an infection. *RP 1416*. All physicians who testified knew that effective treatment for a growing necrotic condition was to inject a dissolving substance into the area and allow the blood flow to be restored. *RP 1306-1307; 618*. The assistant did not.

Dr. William Werschler never appeared to treat Ms. Paetsch, or to care for the complications his assistant caused. *RP 1587*. Because of this, the trial court dismissed him from liability. *Id.* The trial court held that Dr. Werschler was not "involved" in Paetsch's treatment. *RP 1587: 7-24*.

The trial court then instructed the jury that the physician's assistant could not be found 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 assistant exercised reasonable care or skill within his standard of care. *CP 609, Jury Instruction 11, attached at App. P9*. The jury returned a defense verdict. Ms. Paetsch appealed, and Division III upheld the rulings.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

Under RAP 13.4, Division III's rulings on informed consent, on the creation of a physician/patient relationship, and on the use of WPI 105.08 (the exercise of judgment instruction), are in conflict with longstanding Supreme Court precedent, and the statutory protections given patients in this state under RCW 7.70.040 and .050. These rulings also create issues of substantial public interest that should be determined.

1. Division III holds that the formation of a physician/patient relationship does not occur by written contract, but only by a physician's physical involvement with a patient. This is in conflict with longstanding Supreme Court precedent imposing nondelegable duties on a physician, and it is an issue of substantial public interest.

How a physician/patient relationship forms in a private medical

office is one of two determinative legal issues in this appeal. Were the relationship to have formed, it would have ensured Dr. Werschler's personal higher level of skill and standard of care, which would have prevented Ms. Paetsch's injury, or allowed for its remediation.³

Ms. Paetsch argued that the physician/patient relationship formed under the written agreements she was required by Dr. Werschler's clinic to sign, representing Dr. Werschler as her doctor. But Division III holds that "no evidence" supports a finding that Dr. Werschler created a doctor-patient relationship with Ms. Paetsch, or that she contracted with Dr. Werschler to personally perform her cosmetic injections. Division III holds that these contracts were only with "the Clinic," and that because Dr. Werschler never appeared, he cannot be liable. Division III's ruling is akin to saying that a solo law practitioner's staff has authority to sign up a client under the lawyer's contract, but that the lawyer has no responsibility to the client if the lawyer is out of the office at the time of the contract.

³ Plaintiff's medical expert Dr. Jon 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*. Defendant Dr. Werschler acknowledged that, at any time after February 26th, he could have injected Hyaluronidase into Phyllis Paetsch and broken down the offending substance. *RP 1306: 21-25*.

The very forms presented to Ms. Paetsch by Dr. Werschler's private medical clinic confirm that Dr. Werschler is her "doctor," and confirm that Dr. Werschler is actively advising Ms. Paetsch by giving her informed consent. *Pl. Exs. 22 and 27, at App. P13*. That is a direct representation of physician involvement, and direct action by the physician in advising the patient on the procedure to follow. It was uncontested that the clinic staff then told Ms. Paetsch that "the doctor will be in" (before the doctor's assistant walked into the room). *RP 752: 2, 14-17*. Dr. Werschler's clinic, by written form and by clinic procedure, thus represented his *personal* physician care to Ms. Paetsch, and he actively involved himself in Ms. Paetsch's care by giving her advice for her informed consent to consent her to these injections procedures.⁴

This Supreme Court has created a long line of judicial precedent establishing nondelegable duties in the field of medicine. Hospitals, as an example, have a nondelegable duty owed directly to the patient to grant hospital admitting and treating privileges to only competent doctors. *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984).

⁴ Even the trial court referred to this as the use of Dr. Werschler as "the bait." *RP 1585-1586*.

And physicians have a nondelegable duty of care to their patient. *Deaton v. Lawson*, 40 Wn. 486, 490, 82 P. 879 (1905); *Carson v. Fine*, 123 Wn.2d 206, 218, 867 P.2d 610 (1994); *Smith v. Orthopedics Int'l, Ltd., P.S.*, 170 Wn.2d 659, 667, 244 P.3d 939 (2010). The latter duty 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); *Carson v. Fine*, 123 Wn.2d at 218-219. This duty includes the duty of continuing care with complications after a procedure. *Huber v. Hamley*, 122 Wn. 511, 512, 210 P. 769 (1922); *Gray v. Davidson*, 15 Wn.2d 257 at 266-67, and *Prather v. Downs*, 164 Wn. 427, 434 (1931). Adherence to those duties would have protected this patient.

Division III's ruling absolving a named physician of the ensuing duty of patient care after he has accepted the patient's informed consent for a procedure via his own contract is without precedent and should be reviewed.

Division III's ruling is also in conflict with Supreme Court precedent establishing that actual treatment by a physician is not necessary to create a physician/patient relationship. In 1927, this Supreme Court found it already "well settled" that a physician who has

contracted “specially to cure....is liable on his contract for failure.” *Brooks v. Herd*, 144 Wn. 173, 176, 257 P. 238 (1927). That holding is determinative here. This physician contracted to perform procedures for Ms. Paetsch, and failed to do so.

Division III’s ruling is also in conflict with Division I rulings. In *State v. Gibson*, 3 Wn.App. 596, 598, 476 P.2d 727 (1970), Division I holds that “[t]he only requirement for the relationship to arise even by implication is that the patient believes an examination is being made for the purpose of treatment.” Here, all implications by writing and by office staff representation were designed to cause this patient to believe she was to be treated by a doctor.

In *Lam v. Global Medical Systems, Inc., P.S.*, 127 Wn. App. 657, 664 (2005), Division I holds that a doctor’s failure to speak to, advise, or examine a patient is not determinative of the existence of the duty. Dr. Werschler both “spoke to” and “advised” Ms. Paetsch through his personal consent form. He released himself from liability in this same personal contract. This is direct contact between a named physician and a patient for a release of claims for the ensuing procedure within a consent form, and the physician/patient relationship formed. Dr. Werschler’s failure to appear to provide medical treatment does not

absolve him from this contractual relationship he himself formed.

Division III's ruling is in conflict with longstanding Supreme Court precedent, and Division I rulings, and should also be reviewed as such under RAP 13.4 (b)(1) and (2).

2. Division III holds that the formation of a physician/patient relationship is not a material fact of medical treatment under this state's informed consent statute, RCW 7.70.050. This is an issue of substantial public interest with private medical practices.

Division III holds that the skill "class" to which a medical provider belongs, i.e. doctor or staff assistant, is not a material fact of a patient's medical treatment for the purposes of informed consent under RCW 7.70.040 and .050. Even ignoring the contract issue, this ruling conflicts with this Supreme Court's precedent as to the duties attendant to the physician/patient relationship, *supra*, and it is an issue of substantial public interest that should be determined for the protection of the public under RAP 13.4. Moreover, the ruling conflicts with RCW 7.70.050, which holds medical care providers to the standard of care of the class to which they belong. This ruling should be reviewed.

Division III effectively holds that assistants are interchangeable with doctors. It finds "no evidence in the record that would suggest that

a person in February 2007 would have attached significance to (whether they were to be treated by a doctor or assistant) or based their treatment decision on knowledge of them.” But a patient should not have to “evidence” such things in an informed consent claim, because the difference is a difference established as a matter of law. Different standard of care attach to each class of provider by statute. *RCW 7.70.040 (1)*. Different duties attach by precedent. *See Deaton v. Lawson, Carson v. Fine, Smith v. Orthopedics Int’l Ltd., supra*. The trial court itself instructed the jury that different standards of care applied by class of skill. *Jury Instruction 8 and 9* (stating respectively that a defendant must conform to “the applicable standard of care...” and that a health care professional such as a 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 belongs.” *Id., attached at P7 & P8*. Division III’s ruling is in conflict with this law.

Ms. Paetsch *also* evidenced the differing knowledge and skill levels, and differing standards of care, for the two different classes of

providers. Both defense and plaintiffs' experts confirmed the existence of these differences.⁵

Division III holds that the trials court's phrase "dermatology specialist" in its jury instructions makes the providers interchangeable. *Paetsch, Ftnte 2*. But a "specialist" could be anyone who works in a field. A legal secretary, as an example, is a "legal specialist." A dermatology nurse is a "dermatology specialist." A professional may not, e.g. pretend that their staff paralegal is a lawyer for the purpose of the client's trial, and require the client to show the difference to bring a claim for malpractice. Division III's upholding as immaterial the substitution of a professional's assistant for the professional for the medical procedure involved without the knowledge and consent of the patient conflicts with Supreme Court precedent regarding nondelegable duties, and basic professional responsibility. It should be reviewed.

Division III also holds that "Ms. Paetsch's failure to object to having someone who was not Dr. Werschler perform her procedure was an objective manifestation of her intent to accept the clinic's offer to

⁵ Defense expert Dr. Steven Dayan himself testified that a physician's assistant was held only to a physician's assistant standard of care. *RP 571: 11-12*. This standard differed from the standard of care for a physician. *RP 578: 11-16*.

have Mr. Rhoads perform the procedure.” *Paetsch*, p. 2. This reverses the statutory duty of ensuring informed consent. Under RCW 7.70.050, the *health care provider* must inform the *patient* of the material facts of the treatment. *RCW 7.70.050*. By statute, a patient does not accept undisclosed risk by not saying anything when they don’t even know what is happening. Ms. Paetsch could not “agree” to allow a physician’s assistant to substitute for a physician because she had no idea the substitution had occurred. She believed the person who walked through that door was a “doctor.” She was told by Dr. Werschler’s staff that the “doctor” would be in to see her.⁶ Division III’s ruling improperly reverses the law of informed consent, and places the burden on the patient to object to what they do not know, as opposed to being told of what is occurring. Division III’s ruling should be reviewed.

3. Division III expands the use of the exercise of judgment instruction to informed consent and misdiagnosis cases, and this conflicts with Supreme Court precedent limiting the instruction to negligent treatment, and to cases where

⁶ Division III holds that “[t]he record shows that all the material terms of the agreement that Ms. Paetsch had with the clinic were oral, including the identity of Mr. Rhoads as her treatment provider.” Nowhere in the record is there evidence of anyone using the phrase “Mr.” Rhoads with Phyllis Paetsch. *RP 760-761*.

alternative treatments exist for a correctly diagnosed condition.

Petitioner Paetsch submits that the trial court's use of WPI 105.08 overrode her statutory right to informed consent. The trial court instructed the jury that the physician's assistant "is not liable for" exercising his own judgment in accord with his own class skills, as follows:

"A....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....certified physician's assistant exercised reasonable care and skill within the standard of care the....certified physician's assistant was obliged to follow."

Court's jury instruction 11, with "physician" language removed due to dismissal; CP 609 at App. P9, ⁷ emphasis added, implementing WPI 105.08.⁸

⁷ Ms. Paetsch provides Appendix P10 as an illustrative exhibit for this Court showing WPI 105.08 with the non-applicable "physician" language stricken given the physician's dismissal. Appendix P11 is the resultant instruction as the jury would have read it after the physician's dismissal.

⁸ 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 105.08 (6th ed.) in its complete form states as follows:

"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

The jury is thus instructed not to find liability on the part of the physician's assistant if that assistant was choosing between known treatment alternatives. But Ms. Paetschs' claim was one of lack of informed consent. She was not told that this assistant had been substituted for her doctor. She was not told that a non-FDA approved procedure had been substituted for her represented FDA approved procedure. The provider's medical judgment was not the issue—his very presence was the issue. His violation of her consent for certain procedures only was the issue. Whether he was using his professional judgment regarding treatment is irrelevant—he was violating her consent. Division III thus expanded the use of an exercise of judgment instruction to an informed consent case. This is improper, and should be reviewed.

Negligence in treatment is separate and distinct from negligence in the violation of the physician's duty to disclose material facts. *Keogan v. Holy Family Hosp.*, 95 Wn.2d 306, 325, 622 P.2d 1246 (1980). The “error of judgment” instruction first emerged in *Watson v. Hockett*, 107 Wn.2d 158, 164-65, 727 P.2d 669 (1986) as an

physician exercised reasonable care and skill within the standard of care the physician was obliged to follow.”

exculpation related to negligent medical treatment, not for a provider's violation of a patient's informed consent. The Washington Pattern Instruction Committee states that the "exercise of judgment" instruction is not to be used in informed consent cases brought under RCW 7.70.050. *See WPI 105.08, Notes on Use.*⁹ The reasons for this are illustrated here. By instructing the jury that it could not find the physician's assistant liable for selecting one of two or more alternative courses of treatment, the trial court instructed the jury that the assistant was authorized to treat the patient. If the assistant could not be found liable for exercising his judgment over a patient's treatment, then he is properly acting as her provider. The trial court thus determined Ms. Paetsch's informed consent claim as to this assistant provider, not the jury.

As well, Ms. Paetsch claimed she consented only to the injection of Restylane in accordance with FDA guidelines. *Pl. Ex. 27, App. P14*. Off label use of products can be an alternative form of

⁹ The note states: "[t]his instruction may be used only when the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses. The current form of the instruction is intended to respond to the Supreme Court's statement that the instruction is to be used with caution... The instruction does not apply to informed consent claims, only to claims alleging violation of the standard of care under RCW 7.70.040."

treatment.¹⁰ When the trial court instructed the jury that it could not find the physician's assistant liable for selecting one of two or more "alternative courses of treatment," the trial court also directed the jury that it could not find the assistant liable for his choice of this non-FDA approved off-label procedures, even if the patient had not consented to this alternate procedures.

Division III's ruling thus improperly expands the use of this instruction to an informed consent case. Under RAP 13.4 (b), Division III's ruling conflicts with *Watson v Hockett*, 107 Wn.2d at 164-65, and with a longstanding line of precedent which protects a patient's right to make informed choices about medical procedures. *See Backland v. University of Washington*, 137 Wn.2d 651, 663, 975 P.2d 950 (1999); *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 123, 170 P.3d 1151 (2007).

Division III further expanded the use of this instruction to a misdiagnosis. It is uncontroverted that the PA-C misdiagnosed the necrosis injury he caused, believing it to be an infection and treating it as such. Giving an exercise of judgment instruction for a misdiagnosis is a logical incongruity. "Alternative courses of treatment" do not exist

¹⁰ *See RP 445-446.*

for the wrong condition. Any courses of treatment considered for a misdiagnosis is not a treatment for the actual condition.¹¹ This instruction should be held to be improper in a misdiagnosis case. A provider does not properly exercise judgment in selecting alternate treatments when they have entirely missed the actual condition.

The “exercise of judgment” instruction has been progressively rejected in its entirety by states across the United States. *See, e.g. Pleasants v. Alliance Corp.*, 209 W. Va. 39, 48, 543 S.E.2d 320, 329 (2000)(detailing the trend away from instruction); *Peters by Peters v. Vander Kooi*, 494 N.W.2d 708, 712-13 (Iowa 1993)(holding that the instruction is an improper comment on the evidence); *Hirahara v. Tanaka*, 87 Haw. 460, 463, 959 P.2d 830, 833 (1998)(holding that the instruction conflicts with the elements of medical negligence—“if the doctor did not breach the standard of care, he or she by definition has committed no error of judgment.” The use of WPI 105.08 is already under review by this court in *Dani Fergen et al v. John D. Sestero M.D.*, #88819-1, joined with *Anil Appukuttan v. Overlake Medical Center, et al.*, #89192-3.

¹¹ Division III’s ruling splits hairs between “treatment” and “diagnosis” and misses the point. Diagnosis is a part of medical treatment.

Division III's expansion of the use of this instruction to theories not intended is error, and should be reviewed by this Court under RAP 13.4(b)(1) and (4).

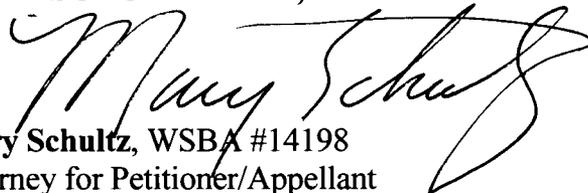
G. CONCLUSION.

The use of physicians' assistants in private medical practices for volume and profit is growing in leaps and bounds. *See RP 534, 575–576.* But private physicians should not be allowed to consent a patient in writing, then delegate the ensuing medical procedure and all patient care to assistants without the knowing consent of the patient.

Petitioner respectfully asks this Court for review per RAP 13.4(b)(1), (2), and (4). She asks that this Court reverse the ruling of Division III, and remand this case for retrial against the physician on his abdication of his physician/patient duty, and on the issue of informed consent, without an exercise of judgment instruction directing the jury on liability.

DATED this 27th day of January, 2014.

MARY SCHULTZ LAW, P.S.



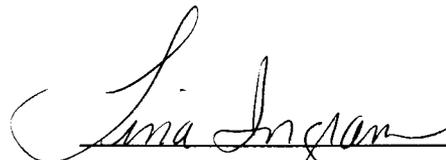
Mary Schultz, WSBA #14198
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of the laws of the State of Washington that she is a person of such age and discretion as to be competent to serve papers, and that on January 27, 2014, the foregoing Petition for Review was delivered to the following persons in the manner indicated:

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Dated this 27th day of January, 2014.



TINA INGRAM

APPENDIX

2013 WL 6843951
Only the Westlaw citation
is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

Phyllis PAETSCH, Appellant,
v.
SPOKANE DERMATOLOGY
CLINIC, P.S., as a Washington
Corporation; and William P. Werschler
M.D., individually, Respondents.

No. 30688–7–III. | Dec. 26, 2013.

Attorneys and Law Firms

Mary Elizabeth Schultz, Mary Schultz Law PS,
Spangle, WA, for Appellant.

William Fredrick Etter, Ronald Anthony Van
Wert, Etter McMahon Lamberson Clary &
Oreskovi, Spokane, WA, Mary H. Spillane,
Williams Kastner & Gibbs, Seattle, WA, for
Respondents.

Opinion

UNPUBLISHED OPINION

*1 KORSMO, C J.

Phyllis Paetsch was injured by cosmetic
injections in her forehead that caused necrosis.
The trial court dismissed part of her claim and
a jury found for the defense on the remainder

of the case. Concluding that there was no
reversible error, we affirm.

FACTS

Ms. Paetsch contacted Spokane Dermatology
Clinic, P.S., for cosmetic services in early
2007. She sought elective cosmetic facial
injections to help her look more rested. The
clinic's receptionist recommended a mix of
Botox and “filler,” and set up an appointment
for her.

On the day of the appointment the clinic
informed Ms. Paetsch that she would be seeing
Dan Rhoads for her procedures. Mr. Rhoads
is a certified physician's assistant (PA–C), but
Ms. Paetsch was not informed of his provider
status. Ms. Paetsch also filled out patient forms
that identified the clinic's owner, Dr. William
Werschler, as her doctor. She admittedly never
had any expectation of seeing Dr. Werschler
and did not know who he was until days after
her injections.

The clinic also gave Ms. Paetsch forms that
were intended to obtain her informed consent
to have Botox and the filler—Restylane—
injected into her face. The Restylane form
mentioned several common complications and
side effects associated with the product,
but did not mention the complication that
Ms. Paetsch eventually suffered: necrosis/
impending necrosis. The Restylane form also
seemed to suggest that the Restylane would
only be put to Federal Drug Administration
(FDA)-approved uses.

The forms made no mention of where Ms. Paetsch would receive the injections. However, the receptionist and Mr. Rhoads led Ms. Paetsch to believe that she would be receiving the Botox in the glabellar region (lower forehead) and the Restylane around her nasolabial folds (laugh lines around the mouth).

When Mr. Rhoads came into the treatment room he answered some questions for Ms. Paetsch about Botox and then started into the procedure. Midway through, Rhoads announced that he had extra Restylane left over and made a decision to inject it into Ms. Paetsch's glabellar region. He did not seek additional permission to use the remaining Restylane in this manner and did not inform Ms. Paetsch of the increased risk of necrosis associated with injecting Restylane into the glabellar region.

Mr. Rhoads did not inform Ms. Paetsch of this additional risk because it was unknown to him at the time and also largely unknown to most providers of cosmetic injections. Mr. Rhoads was also unaware that Restylane was not FDA-approved for use in the glabellar region.¹

¹ Restylane was still fairly new in 2007, but today carries a warning on its label against its use in the glabellar region.

Shortly after returning home she began to experience redness and tightness in her glabellar region. This adverse reaction quickly progressed to blistering sores and green pustules. Ms. Paetsch returned for treatment of this adverse reaction. Mr. Rhoads diagnosed the reaction as an infection and provided follow-up care consistent with treating an infection.

The care did not work and Ms. Paetsch looked elsewhere for treatment. She eventually found a provider who correctly diagnosed the complication as a necrosis. The Restylane had expanded to such a degree that it constricted the only source of blood flowing to the skin on Ms. Paetsch's forehead. By that time the necrosis had left deep scarring and had progressed to the point that it was too late to reduce the scarring.

*2 Ms. Paetsch thereafter sued the clinic and Dr. Werschler for failure to obtain informed consent and for medical negligence by both Dr. Werschler and Mr. Rhoads. Dr. Werschler brought a pretrial CR 56 motion for summary judgment. The motion was denied, but the ruling had the effect of clarifying the claims so that Dr. Werschler was relieved from any direct liability stemming from the cosmetic procedures. Following the presentation of the evidence, Dr. Werschler brought a CR 50 motion for judgment as a matter of law. The court granted the motion. Although the court's ruling precluded the jury from holding Dr. Werschler personally liable, the instructions permitted the jury to hold the clinic liable for any medical negligence by Dr. Werschler.

After ruling on the CR 50 motion, the court selected the jury instructions. Over Ms. Paetsch's objection, the court chose to use the standard of care and exercise of judgment instructions drafted by the clinic.

The court also prohibited any mention of the CR 50 ruling during the parties' closing arguments. Defense counsel failed to abide by this ruling, but the court declined to declare a mistrial based on the error. The jury then entered deliberations and returned a defense

verdict. Afterward, Ms. Paetsch brought a motion for new trial, which the court denied. She then timely appealed to this court.

ANALYSIS

Ms. Paetsch presents a number of issues for review. First, she argues that the trial court erred as a matter of law by releasing Dr. Werschler from the case. Second, she argues that the court erred while instructing the jury on the applicable standard of care. Third, she argues that the court abused its discretion by giving an exercise of judgment instruction. Fourth, she argues the court abused its discretion by not declaring a mistrial after defense counsel violated the order prohibiting mention of Dr. Werschler's release from liability. Fifth, she argues the court abused its discretion by not granting a new trial on the issues of informed consent. We address each of these issues in turn.

CR 50 and 56 Rulings

The superior court dismissed Dr. Werschler from direct liability because Ms. Paetsch failed to establish a legal duty arising from the existence of a doctor-patient relationship. The existence of a physician's duty of care is a question of law that we review de novo. *Lam v. Global Med. Sys., Inc.*, 127 Wn.App. 657, 664, 111 P.3d 1258 (2005). This court also reviews rulings on CR 50 and 56 motions de novo. *Faust v. Albertson*, 167 Wn.2d 531, 539 n. 2, 222 P.3d 1208 (2009).

We agree that there was no evidence to support a finding that Dr. Werschler had a doctor-patient relationship with Ms. Paetsch or that she contracted with him to personally perform her cosmetic injections. The record shows that all the material terms of the agreement that Ms. Paetsch had with the clinic were oral, including the identity of Mr. Rhoads as her treatment provider. All contract negotiations were conducted by clinic staff, not Dr. Werschler. Furthermore, Ms. Paetsch's failure to object to having someone who was not Dr. Werschler perform her procedure was an objective manifestation of her intent to accept the clinic's offer to have Mr. Rhoads perform the procedure.

*3 Ms. Paetsch argues that medical and other professional services contracts are personal and nonassignable; thus, Dr. Werschler could not delegate performance to Mr. Rhoads. *Deaton v. Lawson*, 40 Wash. 486, 490, 82 P. 879 (1905). This argument ignores the fact that Ms. Paetsch contracted with the clinic, not Dr. Werschler. While *Deaton* suggests that a business cannot contract to provide medical services, any argument to that effect was abrogated when the legislature enacted chapter 18.100 RCW. See *Columbia Physical Therapy, Inc., PS v. Benton Franklin Orthopedic Assoc., PLLC*, 168 Wn.2d 421, 430, 228 P.3d 1260 (2010) (observing that the corporate practice of medicine doctrine was abrogated in part by RCW 18.100.030(1)).

Ms. Paetsch also argues that a duty existed for Dr. Werschler to provide Ms. Paetsch with appropriate follow-up care, relying on *Lam*. There a seaman fell ill while underway, but died despite the boat's medical officer's

attempts to assist him. *Lam*, 127 Wn.App. at 660. To help Mr. Lam, the medical officer contacted two physicians employed by Global Medical Systems. *Id.* These physicians gave the medical officer a diagnosis and treatment advice tailored to Lam's ailment—a diagnosis and advice which eventually proved erroneous. *Id.* at 660–61. The doctors later tried to escape liability by arguing that a doctor-patient relationship and resulting duty of care cannot arise when the doctors have never met the patient or provided any direct care. *Id.* at 664. This court disagreed, holding that physical contact is not a prerequisite to triggering a physician's duty of care; it was enough that the doctors had been intimately involved in directing Lam's diagnosis and treatment prior to his death. *Id.* at 665.

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

Standard of Care Instruction

“We review the court's choice of jury instructions for abuse of discretion.” *State*

v. Butler, 165 Wn.App. 820, 835, 269 P.3d 315 (2012). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The legal accuracy of an instruction is reviewed de novo; “an erroneous statement of the law is reversible error where it prejudices a party.” *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010). “Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Id.* (quotation marks omitted).

*4 Because Dr. Werschler did not owe a duty of care the trial court could not have erred by inadequately instructing on a physician's standard of care. Even if the court needed to instruct the jury on a physician's standard of care, instruction 9, patterned off 6 Washington Practice: Washington Pattern Jury Instructions: Civil 105 .02 at 589 (2012) (WPI), adequately informed the jury on the applicable standard of care for both physicians and certified physician's assistants who hold themselves out as dermatology specialists. Although the court's instruction was not as detailed as Ms. Paetsch desired, she does not explain how she was prevented from arguing her theory of the case.² Thus, we have no basis for finding an abuse of discretion.

² Ms. Paetsch also argues that she was denied an instruction on the PA-C standard of care. We disagree. Instruction 9 held both physicians and PA-Cs to the same standard—that of a dermatological specialist. She does not suggest that some lesser standard was appropriate.

Exercise of Judgment Instruction

The court's instruction number 11, patterned off WPI 105.08, informed the jury that a physician or PA-C is not liable for selecting one of two or more alternative *courses of treatments*. Ms. Paetsch argues that this instruction should not have been given because Mr. Rhoads did not have more than one acceptable alternative *diagnosis* for the complication that she suffered. We decline to address this argument because Ms. Paetsch failed to preserve it for review.

The court gave the alternative courses of *treatment* version of the instruction, not the alternative *diagnoses* version. While defense counsel argued in closing as though the instruction given was the alternative diagnoses version, Ms. Paetsch waived this argument because she did not object. *See, e.g., State v. Thompson*, 169 Wn.App. 436, 484–85, 290 P.3d 996 (2012) (holding that a party's failure to object to improper closing argument waives the issue on appeal).

Improper Remarks During Closing

Ms. Paetsch next challenges defense counsel's improper remarks during closing. We agree that defense counsel's reference to the clinic being the only defendant remaining violated the court's prior order prohibiting mention of the CR 50 motion. However, the error was harmless.

The clinic could not have been held responsible for Dr. Werschler's failure to act because as

a matter of law he did not owe her a duty of care. The only way that the jury could have found for Ms. Paetsch was by finding that Mr. Rhoads was negligent, but the fact that Dr. Werschler did not owe her a duty of care had no bearing on whether Mr. Rhoads was negligent. Furthermore, any observant juror would have noticed Dr. Werschler's excusal from the case. Throughout the trial the jurors were told of the negligence of the plural "defendants." When it came time to instruct the jury, the verdict forms referred only to the singular "defendant." Accordingly, the comment could not have had any discernible effect.

Motion for New Trial

Finally, Ms. Paetsch argues that the court erred by not ordering a new trial based on failure to obtain informed consent. We review a court's refusal to grant a new trial for an abuse of discretion. *Riley v. Dep't of Labor & Indus.*, 51 Wn.2d 438, 444, 319 P.2d 549 (1957). However, we review the decision de novo when the order is predicated on a question of law. *Tarabochia v. Johnson Line, Inc.*, 73 Wn.2d 751, 757, 440 P.2d 187 (1968).

*5 Ms. Paetsch's arguments focus on the lack of evidence to support a finding that she gave informed consent to be treated by Mr. Rhoads and to the off label use of Restylane in her glabellar region. Assuming that Ms. Paetsch did not give such consent, her argument still fails. A claim premised on failure to obtain informed consent requires proof that off label use of the product and the identity of her treatment provider as a PA-C versus a physician were material facts that

would have caused a reasonably prudent person under similar circumstances to not consent to the treatment, RCW 7.70.050(1)(a), (c). Ms. Paetsch points to no evidence in the record that would suggest that a person in February 2007 would have attached significance to these facts or based their treatment decision on knowledge of them. Accordingly, the trial court did not err in refusing to grant the motion for new trial.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: BROWN and FEARING, JJ.

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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.

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.

JI 11, CP 609, with strikeout for dismissed physician

A 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 certified physician's assistant exercised reasonable care and skill within the standard of care the certified physician's assistant was obliged to follow.

Jl 11, CP 609, with physician removed and thus as used

Patient Profile

Doctor: Wm Philip Werschler MMD

PATIENT INFORMATION

Name: Phyllis Paetsch

Patient ID #: 29962 Sex: M F

Address: 1411 W. Glass

Date of Birth: 4/26/1958

Social Security #: _____

City, State, Zip: Spokane WA 99205

Email: _____

Phone: (509) 323-9038 Home Work Other

Marital Status: Married Single Divorced

Phone: 509 993-6323 Home Work Other

Referring Physician: _____

PATIENT EMPLOYMENT

Employed Retired Other

EMERGENCY CONTACTS

Phone: _____

Michele Martin

Employer: Self / Madison Street Retreat

509-953-3558

RESPONSIBLE PARTY

Same as Patient

RESPONSIBLE PARTY EMPLOYER INFORMATION

Name: _____

Employer: _____

Address: _____

Phone: _____

City, State, Zip: _____

Phone: _____

Social Security #: _____

Date of Birth: _____

PRIMARY INSURANCE

Same as Patient Same as Guarantor Other

Insured Party: None

Relationship to Patient: _____

Insured Phone: _____

Insured ID: _____

Company: _____

Policy Group: _____

Date of Birth: _____

SECONDARY INSURANCE

Same as Patient Same as Guarantor Other

Insured Party: _____

Relationship to Patient: _____

Insured Phone: _____

Insured ID: _____

Company: _____

Policy Group: _____

Date of Birth: _____

Release of Benefits and Information: I consent for medical treatment and I have verified the insurance listed on this slip and authorize my insurance benefits be paid directly to the doctor. I am financially responsible for any balance due. I authorize the doctor or the insurance company to release any information required for this claim. I understand that I am responsible if my insurance plan requires a referral, to assure that I have a referral for medical treatment. I have read and understand the office insurance/payment policy stated above.

Signed: Phyllis A. Paetsch

Date: 2, 26, 07

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PLTFS. EXHIBIT NO. 22:

02/2007

SPOKANE DERMATOLOGY CLINIC

12615 East Mission Avenue, Suite 300, Spokane, WA 99216

104 West Fifth Avenue, Suite 330-West, Spokane, WA 99204

Aesthetic Image Medical Spa, 524 West Sixth Avenue, Spokane, WA 99204

TELEPHONE: (509) 624-1184 OR (800) 998-DERM

Informed Consent for Restylane®, Restylane Touch®, & Perlane®

Patient Name: Phyllis Paetsch Date: 2.26.07

Medicis Aesthetics products (RESTYLANE®, RESTYLANE TOUCH®, PERLANE®) (the "products") are sterile gels consisting of non-animal, stabilized hyaluronic acid for injection into the skin to correct facial lines, wrinkles, and folds, for lip enhancement and for shaping facial contours.

Dr. Werschler and/or Dan Rhoads MD has also informed me and I understand that depending on the area treated, skin type, and the injection technique, the effect of a treatment with these products can last 4 to 6 months (lips lasting approximately 4 months), but that in some cases duration of the effects can be shorter or longer and can depend on the amount of product used. Touch-up and follow-up treatments may be needed to sustain the desired degree of correction.

The use of an indication for the products have been explained to me, and I have had the opportunity to have all of my questions answered to my satisfaction. Dr. Werschler has provided me with this informed Consent and I have been given the time and opportunity to review it with any other medical counselors of my choice. I have had some of the possible risks involved with using the "Products" explained to me, and have had my questions concerning these risks answered. Some of these possible risks include:

- After the injection(s) some common injection-related reactions might occur, such as swelling, redness, pain, itching, discoloration and tenderness at the injection site. These typically resolve spontaneously within 3 to 4 days after injection into the skin but can last up to 2 weeks especially after injection into the lips.
- Approximately 1 in 2,000 treated patients have experienced localized reactions thought to be of a hypersensitivity nature. These have usually consisted of swelling at the injection site, sometimes affecting the surrounding tissues.
- Redness, tenderness, and rarely, acne like formations have also been reported. These reactions have either started a few days after injection or after a delay of 2 to 4 weeks and have been described as mild to moderate and self-limiting with an average duration of 2 weeks.

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PLTFS. EXHIBIT NO. 27:

- I know that I am not a candidate for the "Products" if I am pregnant or breast feeding, have the history of developing hypertrophic scarring, also past history of streptococic disease, history of allergies to gram positive proteins, or hypersensitivity to hyaluronic acid. The products are also contraindicated for patients with severe allergies manifested by a history of anaphylaxis or history or presence of multiple severe allergies.
- I know that Restylane has been approved by the United States Food and Drug Administration (FDA), but Perlane and Restylane Touch are still pending approval for the treatment of facial lines and wrinkles. Approval has been granted for use of the "Products" for these same indications in Canada and several European countries.

I have received the "Post-Treatment Checklist" setting forth follow-up procedures which I must follow after receiving injections of the products. The contents of this checklist have been reviewed and I agree to follow the procedures and advice given therein.

I have been informed that the following procedures will be followed in order to attempt to achieve the following benefits:

I have been told that I can expect the foregoing benefits from the proposed procedure, but that no results can be guaranteed or assured, and no such guarantees or assurances have been given to me.

By signing this Informed Consent, I agree to being treated with the "Products" as described above, I acknowledge that I understand the procedures and the risks and that it has been explained to me to my satisfaction, and I agree to hold Spokane Dermatology Clinic, Aesthetic Image, and Wm. Philip Werschler, M.D. harmless from the described risks on the condition that the injections of the products are administered in accordance with appropriate guidelines.

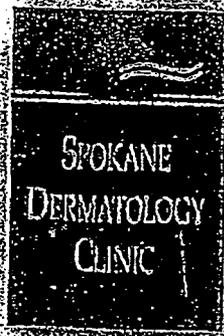
Phyllis Paetsch
Patient/Guardian's Signature

2-26-07
Date

Name: _____

	<input type="checkbox"/> Wm. Phillip Werschler, MD
	<input type="checkbox"/> Julie Taylor Bowen, PA-C
	<input type="checkbox"/> Daniel R. Rhoads, PA-C
	<input type="checkbox"/> Frank J. Alceshu, PA-C
	<input type="checkbox"/> Nurse

Date: _____ Time: _____ AM/PM



DOMINIQUE RICHIE, PA-C

609-62-4111
 toll free 1-800-225-0116
<http://www.spokaneclinic.com>