

70353-6  
FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 FEB 11 PM 2:43

70353-6

No. 70353-6-1

COURT OF APPEALS  
DIVISION 1  
OF THE STATE OF WASHINGTON

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ELAINE and CALVIN VINICK,  
HUSBAND AND WIFE,  
and their marital community,

Appellants,

v.

MARK ELIOT WHIPPLE, MD  
and JANE DOE WHIPPLE,  
his wife and their marital community,

Respondents.

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REPLY BRIEF OF APPELLANTS

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ORIGINAL

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## I. SUMMARY OF REPLY

Contrary to Respondent's contention, Ms. Vinick's informed consent claim was not the same as her medical malpractice claim. Her informed consent claim was based upon failure to warn of potential consequences of not plating one of her bilateral condyle fractures. Dr. Whipple did not perform or attempt to perform that procedure. His attempt to correct the condyle fractures failed which is the basis of Ms. Vinick's malpractice claim. Her expert quantified the likelihood of failure of the surgery unless the procedure of which Ms. Vinick was not advised was performed as not only more probable than not but as an expected outcome. The trial court erred in dismissing the informed consent claim.

The trial court erred in not giving Ms. Vinick's requested instruction on "loss of chance" of a better outcome because contrary to Respondent's contentions her expert did quantify the loss of chance as not only more probable than not but as an expected outcome. Further, Ms. Vinick submitted a "loss of chance" instruction then asked the trial court to include the

language from the “loss of chance” instruction as an alternative theory of liability in her medical malpractice claim instruction since both claims rely on standard tort elements of duty, breach and breach of duty proximately causing the injury.

The trial court should have instructed the jury that Dr. Whipple should have been held to the standard of an oral maxillofacial surgeon. Harborview represented to Ms. Vinick that it had the best oral surgeons in the country when she asked who would perform her surgery and Dr. Whipple repeatedly represented to the jury that he was an expert in oral maxillofacial surgery.

The trial court erred in allowing the admission of a massive amount of evidence of claims against other parties for the same damages. Contrary to the *Diaz* case, where no actual evidence of prior claims was admitted, the claims were only mentioned once during trial and the trial court instructed the jury not to consider the prior claims on the issue of liability, the trial court in this case failed to exclude the actual evidence and did not instruct the jury to disregard that evidence in considering the liability of Dr. Whipple.

The trial court erred in admitting irrelevant evidence of prior falls suffered by Ms. Vinick in which she was either not injured or suffered no injury to her jaw or teeth.

## II. REPLY

### A. The Trial Court Erred in Dismissing Ms. Vinick's Informed Consent Claim Because That Claim Was Not the Same as Her Medical Negligence Claim and Her Expert Did Quantify the Probability of the Undisclosed Risk

#### 1. Ms. Vinick's Informed Consent Claim Did Not Repeat Her Medical Negligence Claim

Respondent correctly states that a trial court does not err by dismissing an informed consent claim that in fact alleges a medical malpractice claim citing *Gustav v. Seattle Urological Associates*, 90 Wn. App. 785, 789, 954 P.2d 319, *rev. denied*, 136 Wn.2d 1023 (1998). However, Respondent's reliance on *Gustav* is misplaced.

As stated by the court in *Gustav* at 789-790:

“ . . . Gustav's allegations involved negligence prior to treatment, not informed consent concerning a treatment the doctor proposed to use. These are two distinct causes of action. Allegations supporting one normally will not support the other. Both Gustav's negligence claims and his informed consent claim were based on Dr. Gottesman's failure to diagnose his prostate cancer. . . . Nothing in these allegations relates to a failure to warn of potential consequences of treating Gustav's cancer, a condition he could not have treated because he failed to diagnose it.”

In this case, Ms. Vinick's informed consent claim **was** based upon failure to warn of potential consequences of treating Ms. Vinick's bilateral condyle fractures without plating one of those

fractures. The consequence was that Ms. Vinick would end up with an open bite without that procedure which is exactly what happened.

Respondent's reliance on ***Bays v. St. Luke's Hosp.***, 63 Wn. App. 876, 882, 825 P.2d 319, *rev. denied*, 119 Wn.2d 1008 (1992) is likewise misplaced. In ***Bays***, the Plaintiff alleged the physician's failure to diagnose a condition was a violation of the duty to inform the patient. ***Bays*** at 881-882. It was undisputed that the physician failed to diagnose Plaintiff's condition and the Court of Appeals correctly held that such a claim of failure to diagnose was a claim of medical negligence not a violation of the duty to inform.

Ms. Vinick did not claim that Dr. Whipple failed to diagnose her bilateral condyle fractures. Dr. Whipple did diagnose the fractures. She claimed he failed to advise her of the risk of not plating at least one of the fractures. This was a violation of the duty to inform not a claim of medical negligence.

**2. Ms. Vinick's Expert Did Quantify the Probability of the Risk She Would Develop an Open Bite If the Undisclosed Procedure Was Not Used**

Plaintiffs' expert, Dr. Chan testified repeatedly about the likeliness of Ms. Vinick developing an open bite if at least one of her bilateral condyle fractures was not plated. In direct examination

she testified:

"A. Is you get what's called an anterior open bite because -- and that's the problem with these fractures, they need to be -- have wires or plates and screws to hold them in place because they'll tip, they'll get out of position. Anyway, that's what happens. This whole thing shortens, this angle increases, and this area in the front opens up.

\* \* \*

Q. And is that a known problem when that occurs with those types of fractures?

A. Yes, this is.

Q. Okay.

A. **This is an expected outcome of a bilateral subcondylar fracture where at least one side is not having a plate and screws to hold it where it's supposed to go.**" (Emphasis added) (4/2/13 Butler RP 37-38.)<sup>1</sup>

On redirect, Dr. Chan testified:

Q. "In your opinion, **on a more-probable-than-not basis, would Mrs. Vinick still have developed an open bite**, even though both condyles were in the fossa, and at the close of the surgery by Doctor Vinick -- by Doctor Whipple, excuse me?

A. Yes, she would have because the condyle was not fixed. It did not have a plate or screws to secure it, therefore, they're going to tip.

When they tip, there's going to be shortening of the posterior ramus that results in the lower jaw shifting down and the anterior open bite.

\* \* \*

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<sup>1</sup> As noted by Respondent in his brief at page 3, the report of proceedings of the trial was not sequentially paginated. For this brief, Appellants adopt Respondent's report of proceedings citations format. Citations to the trial transcript are by date and, where applicable, the name of the court reporter, e.g., "4/3/13 Rawlins RP 8."

So that's why the indications are, when you can't get good occlusion and you have multiple fractures, and you have a dislocated condyle, you must do an open reduction on one side." (Emphasis added) (4/2/13 Butler RP 122-123.)

Dr. Chan quantified the probability of the risk Ms. Vinick would develop an open bite if at least one of the bilateral condyle fractures was not plated twice. She said that not only would it occur on a more probable than not basis, i.e. greater than 50%, but that it was actually an "expected outcome."

**B. The Trial Court Did Abuse Its Discretion by Failing to Give a "Loss of Chance" Instruction Because Ms. Vinick's Expert Presented Testimony on the Probability of the "Loss of Chance" and Ms. Vinick Orally Asked the Court to Modify Her Medical Malpractice Instruction with the Language from Ms. Vinick's "Loss of Chance" Instruction" as an Alternative Theory of Malpractice**

**1. Ms. Vinick's Expert Presented Evidence on the Probability of Loss of Chance of a Better Outcome Because Dr. Whipple Failed to Perform the Proper Procedure**

As noted in the preceding informed consent section on quantifying the probability of the failure to perform the procedure in question, Dr. Chan quantified the probability of the risk Ms. Vinick would develop an open bite if at least one of the bilateral condyle fractures was not plated twice. She said that not only would it occur on a more probable than not basis, i.e. greater than 50%, but

that it was actually an “expected outcome.” This is the same percentage which should have been applied to Ms. Vinick’s “loss of chance” of a better outcome argument but the trial court failed to give a “loss of chance” instruction depriving Ms. Vinick of the right to present that theory to the jury.

**2. Ms. Vinick Orally Asked the Court to Modify Her Medical Malpractice Instruction with the Language from Ms. Vinick’s “Loss of Chance” Instruction” as an Alternative Theory of Malpractice**

It is important to note at the outset that at the time of the trial in this case, there was no WPI instruction for a claim of loss of chance of a better outcome in a medical malpractice action. It is also important to note that Ms. Vinick submitted an instruction on the elements of a claim for loss of chance as Plaintiffs’ Proposed Instruction No. 8. (CP 45.) as well as an instruction on the elements of medical malpractice in general as Plaintiffs’ Proposed Instruction No. 7. (CP 45.)

The 2 instructions used the same type of elements. Both rely on standard tort theory of duty, breach and proximate cause. As stated in ***Mohr v. Grantham***, 172 Wn.2d 844, 857, 262 P.3d. 490 (2011):

“We hold that *Herskovits* applies to

lost chance claims where the ultimate harm is some serious injury short of death. We also formally adopt the reasoning of the *Herskovits* plurality. Under this formulation, a plaintiff bears the burden to prove duty, breach, and that such breach of duty proximately caused a loss of chance of a better outcome.”

While arguing and taking exceptions to the jury instructions, Ms. Vinick’s counsel requested the court insert the loss of chance language as an alternative theory of liability in her general malpractice instruction, Plaintiffs’ Proposed Instruction No. 7. (4/9/13 Girgus RP 60-61.) The trial court did not rule against that request but did not submit such a combined instruction to the jury. There was no reason for not submitting that combined instruction. Ms. Vinick submitted the language for the instruction and the evidence supported the claim. It was error to not submit the combined instruction.

**C. The Trial Court Did Abuse Its Discretion by Failing to Give a Specialist Instruction**

In their initial brief, Appellants cited the many times during trial Dr. Whipple represented himself to be a specialist in maxillofacial surgery. We will not repeat them here.

Additional evidence which supported a specialist instruction is that Ms. Vinick testified she specifically asked for an oral surgeon and Harborview represented to Ms. Vinick that they had the best

oral surgeons in the country. (4/4/13 Butler RP 53.):

“Q. Do you recall anything else that happened the day after you were admitted to the hospital?

A. I was very concerned as to what was going to happen to me and what they were going to do to me, and I was hopeful that they had oral surgeons in the hospital.

Q. Okay.

A. And I was I had understood that Harborview had the best oral surgeons in the country there and so I felt a little hopeful that things would turn out okay.

Therefore when she finally met him after the surgery she had the right to expect that Dr. Whipple must be an oral surgeon. The trial court should have instructed the jury that Dr. Whipple should be held to that standard.

**D. The Trial Court Did Abuse Its Discretion by Admitting Evidence of Ms. Vinick’s Claims Against Other Parties and of Other Falls Which Did Not Injure Her Jaw**

**1. Prejudicial Evidence of Claims Against Other Parties**

Respondent argues that the evidence Ms. Vinick complains about, i.e. claims against other parties and unrelated falls was minor and unrelated to the sole issue of whether Dr. Whipple violated the standard of care i.e. liability. Respondent relies upon ***Diaz v. State***, 175 Wn.2d 457, 285 P3d 873 (2012) for this argument. However, the evidence in ***Diaz*** was far different than in this case.

In ***Diaz*** evidence of prior claims came up only twice and *no*

*evidence of those claims was presented to the jury.*

“Further, the settlement evidence was such a minor feature of the trial that it could scarcely have impacted the jury’s determination of nonliability. The settlement came up only twice during the trial. First, Diaz’s counsel mentioned it in opening statement, apparently anticipating that the defense would introduce settlement evidence at some point during trial (it did not). Although the record does not reflect precisely what was said in opening statement, it is undisputed that this was the only mention of settlement evidence to the jury by either attorney. Second, despite the fact that no settlement evidence was ever admitted, Diaz’s counsel asked for, and received, the following curative instruction:

You have heard evidence that the University of Washington and Dr. Neal Futran were once parties to this litigation and later entered into a settlement with the plaintiffs, paying the plaintiffs \$ 400,000. **This evidence should not be used to either (a) assume the University of Washington or Dr. Futran acted negligently to cause damage to the plaintiffs, (b) excuse any liability you find on the part of Dr. Kini or MCL, or (c) reduce the amount of any damages you find were caused by Dr. Kini or MCL.** By giving you this instruction, the court does not mean to instruct you for which party your verdict should be rendered.” (Emphasis added)

***Diaz*** at 473.

In this case, defense counsel asked Mr. Vinick 28 questions about the nature, amount and details of those prior claims.

Defense counsel asked Ms. Vinick 39 questions about the nature, amount and details of those prior claims. He even had Ms. Vinick read about the prior claims from pleadings from the prior lawsuit.

This strongly implied she received compensation from other parties. This had to have a huge impact on the jury. The jury had to wonder if the Vinicks believed Dr. Whipple had any fault whatsoever given the detail of their claims of fault by nonparties.

The **Diaz** court concluded that the extremely limited mention of the prior claims did not affect the jury on the issue of liability because the trial court gave a curative instruction that the jury should not consider the mention of the prior claims on the issue of liability:

“ . . . Second, the evidence could have affected the outcome if the jury used it to change its assessment of liability. But as a matter of law, this did not occur either. Washington courts have, for years, firmly presumed that jurors follow the court’s instructions.” (Citations omitted).

**Diaz** at 474.

In this case there was no curative instruction and the immense amount of evidence admitted here had to have created doubt in the jurors’ minds about the liability of Dr. Whipple.

## **2. The Trial Court Erroneously Admitted Evidence About Falls Totally Unrelated to Ms. Vinick’s Injuries**

Respondent argues that evidence of Ms. Vinick’s falls were relevant to whether Dr. Whipple caused her injuries. Defense counsel spent a huge amount of time on cross-examination of Ms.

Vinick covering 27 pages of trial transcript asking her about multiple falls. (4/4/13 Butler RP 79-106). In the vast majority of these falls she was either not injured or did not hit her mouth or teeth. Since the only injuries relevant to this case were injuries to Ms. Vinick's mouth and teeth, evidence of the other falls was completely irrelevant. They only served to create a prejudicial image of Ms. Vinick as clumsy.

### **III. CONCLUSION**

The trial court must be reversed because it:

- Failed to submit the informed consent claim to the jury even though Ms. Vinick presented evidence of failure to inform of a significant procedure, her expert quantified the risk of not performing that procedure as not only more likely than not (greater than 50%) but as an expected outcome and her failure to inform claim was not the same as her malpractice claim because Dr. Whipple did not perform that procedure;
- Failed to give a "loss of chance" instruction even though her expert quantified the loss of chance as not only more likely than not, but as an expected outcome; she submitted an instruction for "loss of chance" and requested the court include that language as an alternative theory of liability in her malpractice

instruction because both required the standard tort elements of duty, breach and breach of duty proximately causing injury;

- Failed to instruct the jury that Dr. Whipple should have been held to the standard of an oral maxillofacial surgeon because Harborview represented her surgery would be performed by a highly qualified oral surgeon and Dr. Whipple repeatedly represented to the jury that he was a qualified oral maxillofacial surgeon;
- Allowed the admission of massive amount of evidence of claims against other parties for the same damages and failed to instruct the jury that it should not consider that evidence on the issue of Dr. Whipple's liability; and
- Admitted evidence of other falls suffered by Ms. Vinick which were totally irrelevant because she was either not injured in those falls or did not injure her jaw or teeth which were the only injuries in this case.

Appellants are entitled to a new trial.

RESPECTFULLY SUBMITTED this 11th day of February 2014.

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CERTIFICATE OF SERVICE

I HEREBY DECLARE under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am Appellants attorney in this matter.
2. At all material times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.
3. On the dates set forth below I served in the manner noted the Reply Brief of Appellants and this Certificate of Service on the following persons:

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4. And that on February 12, 2014 I filed the original and one copy of the

Reply Brief of Appellants with:

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