

No. 72819-9

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION 1

LISA DUNAKIN and MICHAEL DUNAKIN, individually and on behalf
of their marital community,

Appellants,

v.

MAHER M. ANOUS, M.D., F.A.C.S., d/b/a LA PROVENCE ESTHETIC
SURGERY CLINIQUE & MEDICAL SPA,

Respondents.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

REPLY ARGUMENT.....10

- A. The facts presented at trial have no bearing on, and do not reconcile, the jury’s legally inconsistent verdict.....1
- B. The New York case law plaintiffs offer in support is instructive...4
- C. The inconsistent jury verdict is reviewable on appeal regardless of any purported waiver.....8
- D. An inconsistent verdict must be reconciled.....8

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases:

Backlund v. Univ. of Wash.
137 Wn.2d 651, 975 P.2d 950 (1999).....1-2, 6

Dries v. Gregor
72 A.D.2d 231, 424 N.Y.S. 2d 561 (N.Y. App. Div. 1980).....6, 7

Espinoza v. American Commerce, Ins. Co.
184 Wn. App. 176, 336 P.3d 115 (2014).....7

Gomez v. Sauerwein
180 Wn. 2d 610, 331 P.3d 19 (2014).....1

Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.
124 Nev. 1102, 197 P.3d 1032 (2008)8, 11

McRae v. Tahitian, LLC
181 Wn. App. 638, 326 P.3d 821 (2014).....8

Mears v. Bethel School Dist. No. 403
182 Wn. App. 919, 332 P.3d 1077 (2014).....8

Trabal v. Queens Surgi-Center
8 A.D.3d 555, 779 N.Y.S.2d 504 (N.Y. App. Div. 2004).....4-5, 7

Washington Statutes:

CR 49(b)9, 10, 11

CR 59(a)(9).....7, 8

FRCP 49(b).....8, 9, 11

New York Public Health Law § 2805-d.....4, 5

RAP 2.5(a).....8

RCW 7.70.050.....1, 2, 3, 4, 5

REPLY ARGUMENT

A. The facts presented at trial have no bearing on, and do not reconcile, the jury’s legally inconsistent verdict.

The defendants attempt to redirect the court from the primary issue by demonstrating, factually, how the jury could have found that Dr. Anous failed to obtain Lisa Dunakin’s informed consent while also finding that the lack of informed consent did not proximately cause her injuries. If RCW 7.70.050—as set forth in Instruction No. 10— had been worded in a manner as to separate the issue of informed consent from that of proximate cause, the defendants’ argument would be well taken. But RCW 7.70.050 does not provide or allow for a separate determination of proximate cause because “[p]roximate cause is a necessary element of an informed consent claim.” *Gomez v. Sauerwein*, 180 Wn. 2d 610, 624, 331 P.3d 19 (2014) citing RCW 7.70.050(1)(d). A jury must find that a plaintiff has proved each of its four elements *before* finding that there was a failure to obtain informed consent—which is what the jury did here. Thus the issue is not whether the facts supported a finding of proximate cause. The issue is that the question of proximate cause was erroneously before the jury *twice* (with the jury returning conflicting answers).

As explained in *Backlund v. Univ. of Wash.*, claims for lack of informed consent in Washington are established only when a plaintiff

proves each of the four elements comprising RCW 7.70.050, including the fourth element, which expressly asks if “the treatment in question proximately caused injury to the patient.” 137 Wn. 2d 651, 664, 975 P.2d 950 (1999); RCW 7.70.050. Nowhere in Washington law is it stated that a claim for lack of informed consent is established by anything other than a plaintiff proving each element of RCW 7.70.050.

By finding that Dr. Anous did not obtain Lisa Dunakin’s informed consent prior to surgery, the jury necessarily determined that Dr. Anous’ treatment proximately caused Lisa Dunakin’s injuries. This is evident because Instruction No. 10 restates the language of **RCW 7.70.050** and instructs that the jury must decide whether the plaintiff proved *all* of its four elements before determining whether or not informed consent was obtained. Indeed, the jury determined that Dr. Anous did not obtain Lisa Dunkain’s informed consent before she underwent the Mercator abdominoplasty. But after the jury determined that (1) Dr. Anous failed to inform Lisa Dunakin of material facts relating to his Mercator abdominoplasty; (2) Lisa Dunakin consented to a Mercator abdominoplasty without being aware of or fully informed of such material facts; (3) a reasonably prudent patient under Lisa Dunakin’s circumstances would not have consented to a Mercator abdominoplasty if informed of such material facts; **and (4) that Dr. Anous’ Mercator abdominoplasty**

was a proximate cause of injury to Lisa Dunakin—and correspondingly answering “yes” to Question No. 1 on the verdict form—the jury then inconsistently answered “no” to Question No. 2 on the verdict form, which asked: “Was [Dr. Anous’] failure to obtain [Lisa Dunakin’s] informed consent a proximate cause of injury or damage to Lisa Dunakin?”

The jury’s conflicting answers to the two questions encompassing proximate cause are *legally* inconsistent and cannot be reconciled through *factual* evidence. The inconsistency arises because of the duplicative manner in which the questions were posed on the verdict form, such that the question of proximate cause was before the jury twice: once when the jury was asked to determine whether Dr. Anous obtained Lisa Dunakin’s informed consent, i.e., whether the jury found that the plaintiffs proved each of RCW 7.70.050’s four elements, and again when the jury was asked whether the lack of informed consent proximately caused Lisa Dunakin’s injuries. Thus whether “[r]easonable minds could reach different conclusions from the presented evidence” has no effect on the jury’s conflicting answers to the same, albeit duplicative, question. Respondent’s Brief at 3.

Accordingly, the factual evidence presented at trial cannot reconcile the jury’s inconsistent answers on the verdict form and the jury’s

verdict is inconsistent as a matter of law under the express language of RCW 7.70.050.

B. The New York case law plaintiffs offer in support is instructive.

The defendants make much ado about the plaintiffs' reliance on New York case law where inconsistent jury verdicts required new trials. Yet because there do not appear to be any on-point Washington cases addressing the issue of a jury finding a lack of informed consent while also finding no proximate cause, reliance upon out-of-state case law is necessary.

At the outset, the New York statute setting forth the requirements of a malpractice action based on lack of informed consent is consistent with RCW 7.70.050 for purposes of this appeal because, in both New York and Washington, the question of proximate cause is encompassed as an element within the statute. Under New York Public Health Law § 2805-d:

To establish a cause of action for malpractice based on lack of informed consent [in New York], the plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that

a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury.

Trabal v. Queens Surgi-Center, 8 A.D.3d 555, 556, 779 N.Y.S.3d 504 (N.Y. App. Div. 2004) (internal quotation marks and citations omitted); see New York Public Health Law § 2805-d¹.

As to proximate cause, the New York statute differs from RCW 7.70.050 by asking whether “the lack of informed consent is a proximate cause of the injury,” rather than whether “the treatment in question proximately caused injury to the patient.” But the difference is minimal because, as explained in *Trabal*, “[t]he third element [of New York Public Health Law § 2805-d] is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury.” *Trabal* at 556. Thus a New York jury—just like a Washington jury—must determine whether a plaintiff has

¹ Under Public Health Law § 2805-d

(1) Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

* * *

(3) For a cause of action [based on lack of informed consent] . . . it must also be established that a reasonably prudent person in the patient’s position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought.”

proved each of the statute's elements, including the causation element, before finding a lack of informed consent. And in accordance with Washington's objective standard regarding causation in informed consent cases (*see Backlund, supra* at 665), once a New York jury determines there was a lack of informed consent, no further inquiry is required other than to decide the plaintiff's damages.

In *Trabal* and *Dries*, the juries first determined there was a lack of informed consent, but then found that the lack of informed consent did not proximately cause the plaintiff's damages. In both cases, the appellate court reversed and ordered new trials², holding as a matter of law that a finding of lack of informed consent necessarily established causality. In *Trabal*, the appellate court held:

In view of the jury's findings that Dr. Schwartz failed to provide the plaintiff with the appropriate information and that a reasonably prudent person in the plaintiff's position would not have consented to the surgery had he been so advised, the jury's finding that the surgery was not a substantial factor in causing the plaintiff's injury, and its consequent verdict, could not have been reached upon any fair interpretation of the evidence.

Trabal, supra at 557

² In *Trabal*, the new trial was not limited to the issue of damages because the "plaintiff moved to set aside the verdict only on the ground that it was against the weight of the evidence." *Trabal* at 557. In *Dries*, the court ordered "a new trial against the defendant surgeon restricted to the issue of damages alone." *Dries* at 237.

Similarly, in *Dries v. Gregor*, the appellate court held:

In response to Question 6, the jury found a lack of informed consent to the surgery performed. On the basis of the trial court's charge on informed consent, this constituted a finding by the jury that a reasonably prudent person would not have consented to the surgical procedure performed on Mrs. Dries. In other words, causality was established by the jury's affirmative response to Question 6. Question 7 asked the jury to decide whether plaintiffs had proven that the negligence or act of malpractice of Dr. Gregor was a proximate cause of the 'damage'. The jury answered 'no' to his question. Plainly plaintiffs suffered damages and we find that the answer by the jury to Question 7 is, therefore, against the credible weight of the evidence.

72 A.D.2d 231, 237, 424 N.Y.S.2d 561 (N.Y. App. Div. 1980)

The New York appellate court rulings in *Trabal* and *Dries* are instructive here because they demonstrate that, after a jury finds a lack of informed consent, a subsequent conflicting finding of no proximate cause renders the verdict inconsistent, thereby requiring a new trial. An inconsistent verdict in Washington requires similar treatment so that substantial justice may be done. *See* CR 59(a)(9); *Espinoza v. American Commerce, Ins. Co.*, 184 Wn. App. 176, 336 P.3d 115, 125 (2014) (though "[n]one of the grounds listed in CR 59(a) explicitly mentions an inconsistent verdict. . . a court must grant a new trial when verdict

interrogatories render the jury’s resolution of the ultimate issue impossible to determine.”).

C. The inconsistent jury verdict is reviewable on appeal regardless of any purported waiver.

Under RAP 2.5(a), the appellate court has the authority to review any claim of error that was not raised in the trial court. In the case of an inconsistent jury verdict, the appellate court is presented with a stronger basis for exercising this authority because “fundamental notions of justice require a trial court judgment to rest on an unequivocal jury verdict for one party or another, not both.” *McRae v. Tahitian, LLC*, 181 Wn. App. 638, 644, 326 P.3d 821 (2014); *see* CR 59(a)(9). Indeed, the appellate court may “address[] the merits of claims based on inconsistency in a verdict despite the failure to raise the issue prior to the discharge of the jurors.” *Mears v. Bethel School District No. 403*, 183 Wn. App. 919, 928, 332 P.3d 1077 (2014).

D. An inconsistent verdict must be reconciled.

In *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, the Nevada Supreme Court, interpreting FRCP 49(b), found—citing cases from the Second and Seventh Circuits—that a trial court faced with an inconsistent verdict must take action to correct it, even without objection:

[F]ederal circuit courts of appeal have observed that, in circumstances where a party

failed to object to inconsistencies in the verdicts, where the inconsistency in the special interrogatories is so obvious, it would be proper to hold that the trial judge had an independent responsibility to act despite trial counsel's silence. Thus, while the court should give weight to the party's failure to object to such an inconsistency . . . , if the answer and the verdict are logically incompatible, the terms of Rule 49(b) make it the responsibility of a trial judge to resolve the inconsistency even when no objection is made.

124 Nev. 1102, 1112, 197 P.3d 1032 (2008)
(internal quotation marks and citations omitted).

The defendants contend that “*Lehrer* is not helpful because it compares the Federal Rules of Civil Procedure 49(b) with Nevada’s Rules of Civil Procedure 49(b).” Respondent’s Brief at 25. But this is a red herring. *Lehrer* is helpful because FRCP 49(b) essentially parallels CR 49(b).

FRCP 49(b) states:

(1) *In General*. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) *Verdict and Answers Consistent*. When the general verdict and the answers are

consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) *Answers Inconsistent with the Verdict.* When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

- (A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;
- (B) direct the jury to further consider its answers and verdict; or
- (C) order a new trial.

Consistently, CR 49(b) states³:

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to rule 58.

³ The quoted rule has been segmented for ease of comparison.

When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

As is evident, FRCP 49(b) corresponds with CR 49(b) nearly in toto. The most relevant difference is that, in the case of inconsistent jury interrogatory answers, CR 49(b) instructs that the court *shall* return the jury for further consideration or *shall* order a new trial—irrespective of any purported waiver. Thus *Lehrer* is both instructive and supportive because it demonstrates that an inconsistent verdict must be corrected even when no objection is made. See *Lehrer* at 1112.

CONCLUSION

For the reasons stated, it is respectfully requested that the court reverse the trial court's denial of the plaintiffs' motion to vacate, enter judgment in favor of the plaintiffs, finding that Dr. Anous' failure to obtain Lisa Dunakin's informed consent to surgery was a proximate cause

of her damages, and enter an order granting a new trial solely on the issue of damages.

RESPECTFULLY SUBMITTED this 14th day of May, 2015

OTOROWSKI JOHNSON MORROW & GOLDEN, PLLC

A handwritten signature in black ink, appearing to read 'C. Otorowski', written over a horizontal line.

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CERTIFICATE OF SERVICE

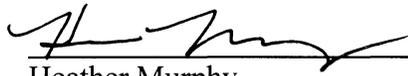
I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the **REPLY BRIEF OF APPELLANTS** to be served this date, in the manner indicated, to the parties listed below:

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Dated this 14th day of May 2015.



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