COLORADO COURT OF APPEALS 101 West Colfax Ave, Suite 800 Denver, CO 80202 Appeal from Judgment of the District Court, City and County of Denver Civil Action No.: 08CV 9245, Ctrm. 1 Honorable Michael A. Martinez	
Plaintiff-Appellant/Cross-Appellee: Joan L. Holley v. **Defendant-Appellee/Cross-Appellant:** Linda C. Huang, M.D.	**▲ COURT USE ONLY ▲**
Attorneys for Defendant-Appellee/Cross-Appellant Linda C. Huang, M.D.: Elizabeth C. Moran, #16119 David D. Karr, #9791 Scott S. Nixon, #14244 Pryor Johnson Carney Karr Nixon, P.C. 5619 DTC Parkway, Suite 1200 Greenwood Village, Colorado 80111-3061 Phone: (303) 773-3500 Fax: (303) 779-0740 E-mail: emoran@pjckn.com	Case No.: 10CA1187
APPELLEE'S ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

■ It contains 9449 words.

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☐ For the party raising the issue: It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record ®._, p.___), not to an entire document, where the issue was raised and ruled on.

■ For the party responding to the issue: It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Elizabeth C. Moran
Signature of attorney or party

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

I. ISSUES

Plaintiff's statement is serviceable.

II. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff, Joan Holley, claimed that Dr. Linda Huang, a plastic/reconstructive surgeon, failed to obtain Plaintiff's informed consent to breast augmentation surgery. Plaintiff alleged that shortly before surgery, Dr. Huang recommended a different procedure for Plaintiff's right breast – a circumareolar mastopexy to "lift" the breast[1] – in contrast to the inframammary incision performed on the left, and did not adequately inform her of the potential risks and complications of this type of incision. Plaintiff claimed she had spreading of the areola, loss of sensation, and other damages. Holley Apx. 2-5.[2]

Dr. Huang denied Plaintiff's allegations, and asserted Plaintiff was properly informed about the procedures that were done, including the substantial risks and complications. 16-17.

After trial, the jury returned a verdict for Dr. Huang, finding she did not fail

---

[1] Circumareolar incision is an incision around the areola, the area surrounding the nipple. Lifting of the breast is a "mastopexy." An inframammary incision is an incision below the breast.

[2] All references are to the Appendix supplied with Plaintiff's Brief.

to obtain Plaintiff's informed consent, and did not cause Plaintiff's claimed damages. 463.

Plaintiff moved for new trial, asserting numerous errors, to which Dr. Huang responded. 468-98; 615-30. The trial court denied Plaintiff's motion. 451. Plaintiff now appeals, asserting an even longer list of errors.

B. Relevant Facts

Dr. Huang is a Board certified plastic and reconstructive surgeon. 1464:8-16. She is a graduate of Yale (summa cum laude) and Stanford Medical School, with residency and fellowship training at Georgetown, Duke, and University of Louisville. 1460:12-18; 1461:12-1462:22. She performs approximately 120 to 150 breast augmentations yearly, and approximately 60 mastopexies, among other surgeries. 1467:16-1468:11.

Plaintiff came to Dr. Huang in 2006 to discuss breast augmentation surgery. In the preceding two years, Plaintiff had consulted other plastic surgeons, Drs. Goldstein and Grossman, about breast implant surgery, both of whom discussed augmentation and/or mastopexy with Plaintiff, including the procedures that could be used, and the recognized risks and complications of surgery. Exhibits E, G; 1633:23-1635:1; 1737:9-25, 1747:13-1756:1.

Dr. Huang met with Plaintiff on September 29, 2006, examined her and obtained a medical history, and discussed breast augmentation surgery. 1482:13-1483:11, Plaintiff was given a preoperative booklet addressing numerous risks of the surgery, including numbness, loss of sensation, infection, swelling, asymmetry, injury to blood vessels, death, and the possible need for revision surgery. Exhibit 1(2318-45); 1496:19-1500:4. Per her established habit and routine, Dr. Huang would have discussed the different types of procedures, postoperative course, and risks of surgery.[3] 1488:3-1496:2; 1499:11-19; 1503:9-20; 1514:17-1515:7. She discussed different incisions that could be used (axillary, inframammary and circumareolar) and the advantages and disadvantages of each. 1472:1-1473:19. There is a risk of loss of sensation in the nipple and areola with breast augmentation, due to the location of nerve branches deep in breast tissue. 1477:7-1479:1. Based on Dr. Huang's experience, and the medical literature, the risk of loss of sensation is the same regardless of the incision used. 1473:3-12.

On a second visit, October 9, both Dr. Huang and her nurse, Emily Wolgin,

---

[3] While Dr. Huang recalls Plaintiff as a patient, 1469:6-14, she does independently recall all of her interactions with Plaintiff. Some of her testimony was based on her records and her habit and routine acquired in performing hundreds of breast augmentation surgeries.

went over the consent documents with Plaintiff, again discussing risks and answering questions, including Plaintiff's questions about nerve injury and breast sagging. 1500:9-1504:6; 1885:24-1893:22.

Before surgery, Dr. Huang met with Plaintiff in the pre-op area to discuss the surgery, answer questions, and mark incision lines. While marking incisions, Dr. Huang suggested using a circumareolar incision on the right breast, which would lift the breast and nipple slightly (also called "limited mastopexy" or "crescent mastopexy") to make it more symmetrical with the left breast. She showed Plaintiff where the incision would be, and marked it on Plaintiff's breast. 1509:10-20; 1512:13-1514:10. She discussed how surgery would be performed, that there would be a scar around the nipple, a risk of loss of sensation, and that the procedure could change how the nipple and areola looked. 1457:7-1459:16. Otherwise, the risks were the same as those previously disclosed in the preoperative booklet, consent form and discussion. 1514:17-1515:7. Plaintiff agreed with the recommendation, Dr. Huang wrote on the consent form that "incision on right side will be around the nipple," and Plaintiff initialed it. 1512:13-1513:6; 2505.

While Plaintiff claims she was crying, frightened and "out" in the pre-op

area, and unable to understand what she was told, she recalls some of the discussion and agrees she knew the incision would be around the nipple in order to lift the right nipple. 1216:3-1217:22. Dr. Huang and the anesthesiologist, Dr. Haberstroh, both testified Plaintiff would not have been sedated at the time and that they have no recollection of Plaintiff being upset and crying; had that occurred, they would not have proceeded with their preoperative discussions or the surgery. 1506:9-1508:4; 1834:11-20; 1838:1-1843:9.

After being qualified as an expert in plastic surgery, 1468:17-1469:3, Dr. Huang testified that the care and treatment she provided Plaintiff, including her discussions about the surgical procedures and risks, was reasonable and appropriate. 1469:15-1470:3.

III. SUMMARY OF ARGUMENT

Plaintiff appeals a long list of "errors" in the admission and exclusion of evidence and in the form of the instructions given to the jury, all of which are matters committed to the broad discretion of the trial court. Plaintiff has made no effort to explain how any of the rulings constituted legal error or abuse of discretion, and her brief falls far short of what is required by C.A.R. 28(a)(4). Her issues concern nothing more than quibbles over form, irrelevant and duplicative

evidence, and/or propositions that find no support in Colorado law. Moreover, Plaintiff cannot establish that her substantial rights were impaired or that any of these so-called "errors" were reasonably likely to have made any difference in the outcome of this case.

IV. ARGUMENT

A. Plaintiff's Brief Violates C.A.R. 28(a)(4)

Plaintiff has raised at least 30 claims of error, most of which consist of little more than conclusory statements – the court's rulings were "manifestly arbitrary, unfair and unreasonable," and "deprived [her] of a fair trial." Plaintiff provides little factual context or explanation of her claims of error, cites only the most generic legal authorities, and provides no factual or legal support for her contention that these "errors" deprived her of a fair trial.

In short, most of Plaintiff's brief violates C.A.R. 28(a)(4), which requires the brief to set forth "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." *Castillo v. Coppes-Conway,* 148 P.3d 289, 291 (Colo.App. 2006). The Colorado Supreme Court has observed: "It is the task of counsel to inform us, as required by our rules, both as to the specific errors relied

on and the grounds and supporting facts and authorities therefor." *Mauldin v. Lowery,* 255 P.2d 976, 977 (Colo. 1953). "An appealing party bears the burden to provide supporting authority for contentions of error asserted on appeal, and a failure to do so will result in an affirmation of the judgment." *Biel v. Alcott,* 876 P.2d 60, 64 (Colo.App. 1993)

As Plaintiff has not adequately presented her issues on appeal, this Court need not consider her contentions. *Barnett v. Elite Properties of America, Inc.,* __ P.3d __ , 2010 Colo.App. Lexis 689 at *10 (May 27, 2010)("We will not consider a bald legal proposition presented without argument or development.")

Further, Plaintiff must establish not only that error occurred, but that she was substantially prejudiced, by demonstrating a reasonable likelihood that the outcome would have been different had the error not occurred. *See* C.R.C.P. 61; *Schlessman v. Brainard,* 92 P.2d 749, 752 (Colo. 1939). This principle is merely "a recognition of the fact that minor mistakes inevitably occur in the course of a trial since a perfect trial is more often than not a virtual impossibility." *Banek v. Thomas,* 733 P.2d 1171, 1178 (Colo. 1986).

B. The Court Properly Limited Subjective Expert Opinions on "Safer" Procedures

Standard of Review and Preservation of Error. Decisions on the

admissibility and relevance of evidence are reviewed for abuse of discretion. *Wark v. McClellan,* 68 P.3d 574, 578 (Colo. App. 2003). The issue was raised and ruled on as noted in Plaintiff's Brief, p. 8.

Plaintiff argues the court erred in excluding testimony by her experts about their "personal subjective opinion or practice." As noted above, Plaintiff fails to provide factual context, legal authorities or cogent argument to support her claim. Plaintiff does not identify the precluded testimony, explain how the court abused its discretion or applied improper legal standards, or explain how she was prejudiced.

In any event, the ruling was well within the trial court's discretion. Dr. Huang's motion in limine sought to preclude Plaintiff's expert, Dr. Festekjian, from testifying to his personal opinion or practice that he would not perform the same combined augmentation/limited mastopexy procedure performed by Dr. Huang because there are "safer choices." The testimony was properly excluded because, as the trial court concluded, it was irrelevant to any issue in the case and prejudicial. *See* C.R.E. 401, 402, 403.

This was an informed consent case; Plaintiff did not claim Dr. Huang was negligent in performing the surgery or in selecting the surgical technique. No

expert, including Dr. Festekjian, was endorsed to testify that use of circumareolar incision or limited mastopexy on the right breast was negligent or "unsafe." 487-497. The only issue was whether Dr. Huang adequately discussed the procedure and its risks and complications with Plaintiff before obtaining her consent to surgery, not whether there were better procedures that Dr. Huang could have used. Hence, the testimony had no probative value as to "any fact that is of consequence to the determination of the action." C.R.E. 401.

Allowing Dr. Festekjian to opine that he does not use this technique because there are "safer" choices would have misled the jury, improperly suggesting the jury could find Dr. Huang's surgical technique negligent, when Plaintiff had made no such claim and no expert had offered any criticism in that regard. *See Liscio v. Pinson,* 83 P.3d 1149, 1155 (Colo.App. 2003)(holding that evidence of decisions by physician that are not at issue in plaintiff's complaint was properly excluded because it was "unfairly prejudicial. . . and may well have misled. . . the jury regarding the proper and only basis upon which liability could be imposed in this case.")

Plaintiff has not shown how exclusion of this single opinion deprived her of a fair trial, where the testimony did not even relate to her informed consent claim.

The trial court properly allowed the experts to testify at length about the adequacy of Dr. Huang's informed consent disclosure, which was the only issue in the case. Plaintiff's substantial rights could not have been impaired by exclusion of discrete testimony on an irrelevant issue.

B. The Court Properly Excluded Plaintiff's Subjective Testimony as to What She Would Have Done If Properly Informed.

Standard of Review and Preservation of Error. Rulings on the admissibility and relevance of evidence are reviewed for abuse of discretion. *Wark*, 68 P.3d at 578. The issue was raised and ruled on as noted in Plaintiff's Brief, p. 9.

Plaintiff complains the court erred in excluding her subjective testimony as to whether she would have agreed to the procedure with a circumareolar incision had she been "adequately informed." She claims that exclusion of this "highly relevant" evidence deprived her of a fair trial.

Colorado law is clear that if Plaintiff proved Dr. Huang negligently failed to obtain her consent, Plaintiff was then required to prove that "a reasonable person in the same or similar circumstances as the plaintiff would not have consented [to the operation] had she been given the information required for informed consent." CJI 15:10; see Instruction 6, 447.

The standard of proof is an objective, "reasonable person" standard, *see Hamilton v. Hardy*, 549 P.2d 1099, 1105 (1976), and therefore testimony by Plaintiff as to whether she personally would or would not have consented to the operation was irrelevant to the question to be decided by the jury. Hence, this testimony was properly excluded under C.R.E. 401 and 402. In addition, such testimony is "at best, self-serving, speculative, and, of course, subjective." *Hamilton,* 549 P.2d at 1105. Because this speculative testimony would likely confuse and mislead the jury about the objective standard to be applied, the testimony was properly precluded under C.R.E. 403. *See also Bennett v. Greeley Gas Co.*, 969 P.2d 754, 762 (Colo. App. 1998) (trial court has discretion to exclude speculative evidence).

Plaintiff has not shown that exclusion of this limited testimony affected the outcome of trial. First, contrary to her claims (Brief at 9-10), Plaintiff was allowed to testify at length about her "reasoning and motivations" and "goals and objectives" for the surgery, including her desire to minimize scarring, loss of sensation and invasiveness. She testified she never contemplated a procedure that posed different risks and different scars on one breast as compared to the other. 1022:2-1025:5. She testified about her "state of mind" before the surgery, her

"mental condition and ability to comprehend," and whether she was "afforded a reasonable period of time" to contemplate the decision about the incision to be used on her right breast. 1019-21; 1029-1031. The jury heard ample evidence to understand Plaintiff's decision-making process without injecting speculation as to what, in hindsight, she might have decided had she been "adequately informed" (which she had been, as the jury determined).

Second, the jury found Plaintiff failed to prove Dr. Huang was negligent in obtaining Plaintiff's informed consent. 463. Thus, the question of causation –whether a "reasonable person" would not have agreed to the surgery had she been adequately informed – became moot. Because Plaintiff could only recover if she proved every element of her claim, any error in excluding Plaintiff's subjective testimony was harmless. *Cf. Gray v. Houlton,* 671 P.2d 443, 444 (Colo.App. 1983)(where jury finds no liability, any error in evidentiary ruling concerning damages is harmless); *Martin v. Minnard,* 862 P.2d 1014, 1018 (Colo.App. 1993)(error in negligence instruction harmless where jury finds no damages).

C. Expert Testimony About "Negligent Documentation" Was Properly Excluded

Standard of Review and Preservation of Error. Rulings concerning the admissibility of expert testimony are reviewed for abuse of discretion. *Golob v.*

People, 180 P.3d 1006, 1011 (Colo. 2008). Determination of the existence and scope of legal duty, as well as the parameters of tort claims, are questions of law for the court, which are reviewed de novo. *See Keller v. Koca,* 111 P.3d 445, 448 (Colo. 2005); *Metropolitan Gas Repair Service, Inc., v. Kulik,* 621 P.2d 313, 317 (Colo. 1980). The issue was initially raised in Defendant's motion in limine, 174, and ruled on at 436. The issue arose repeatedly during the expert's testimony at trial. *See, e.g.,* 1321:16-1324:19; 1329:2-1332:20; 1377:20-1382:5.

Plaintiff argues the court erred in precluding expert testimony that failure by Dr. Huang to *document in writing* the details of Plaintiff's consent to the circumareolar mastopexy constituted negligence. Plaintiff attempted to elicit testimony from her experts that, to obtain "informed" consent, Dr. Huang was not only required to discuss the procedure and its risks and complications with Plaintiff, but also to "document" the discussion in her records.[4]

The court's ruling was correct. Colorado law does not support Plaintiff's

---

[4] After discussing the limited circumareolar mastopexy with Plaintiff, marking the incision, and obtaining Plaintiff's agreement to this procedure, Dr. Huang wrote on the consent form: "incision on right side will be around the nipple," and Plaintiff initialed it. 1512:13-1513:6; 2505. Dr. Pousti proposed to testify that Dr. Huang was required to "document the informed consent discussion, and, optimally, even write an additional note or dictate a note that an additional procedure was discussed, the risk[s], complications reviewed. . . ." 1376:2-5; see also 491-493 (expert endorsement).

argument that informed consent requires written confirmation. The doctrine of informed consent is based on *disclosure*, and not on the *form* in which disclosure is made or the patient's consent memorialized.

A claim for lack of informed consent is a distinct claim "based on the *information communicated* by a physician to a patient before a particular procedure or treatment is commenced." *Gorab v. Zook,* 943 P.2d 423, 427 (Colo. 1997)(emphasis added). Under Colorado law, the physician must have *informed* the patient of: (1) the nature of the medical condition; (2) the nature of the procedure; (3) the alternative treatments available, if any; and (4) the substantial risks, if any, of the procedure, and the substantial risks, if any, of the alternative treatments. *See* CJI 15:11.

Nothing in Colorado case law or the approved jury instructions requires that the informed consent disclosure be in writing. Indeed, courts considering this argument have rejected it. In *Atamian v. Assadzadeh,* 2002 U.S. Dist. LEXIS 6269 *9 (E. D. Penn. 2002), the court noted that "[e]ffective informed consent may be given orally or in writing." Similarly, the court in *Cooper v. United States*, 903 F. Supp. 953, 956 (D. S.C. 1995), held that informed consent need not be in writing: "[S]o long as the patient is provided sufficient information appropriate

under the circumstances to make an intelligent choice about his or her own health care, the provider has discharged his duty without regard to the form in which such information is conveyed." *Id.* at 957.

Other courts agree that informed consent need not be written to comply with common law or statutory standards of care. *See Patterson v. Van Wiel,* 570 P.2d 931 (N.M. App. 1977)(consent may be oral or written; the only requirement is that it be a "full and frank disclosure… of all pertinent facts relative to the [procedure]."); *Rowe v. Kim,* 824 A.2d 19, 24 (Del. Super. 2003), *aff'd without op.*, 832 A.2d 1252 (Del. 2003)(while statute requires that patient receive "*information* regarding such . . .surgery to the extent customarily given to patients," statute does not require that the information be provided in written form); *Kovacs v. Freeman*, 957 S.W.2d 251, 255 (Ky. 1997)(where informed consent statute refers to "information provided" to the patient, there is no requirement for a written document; rather, "evidence of a valid consent, per Kentucky law, lies in the verbal discussion between physician and patient.")

Because written documentation is not a requirement for informed consent, testimony that Dr. Huang's disclosure was negligent because certain details were not documented in writing would have misled the jury into believing Dr. Huang

was required not only to *discuss* the nature and risks of the procedure with Plaintiff but also to *document* the discussion, when in fact she was not.

Further, mere lack of documentation could not have caused Plaintiff's claimed injuries; if Plaintiff was made aware of the nature and risks of the procedure through oral discussions, the absence of a written memorandum could not have caused to her to be uninformed when she underwent surgery, nor caused her to be injured by an undisclosed risk. *See* CJI 15:10. Even if lack of documentation could be considered "negligent," negligence without causation is not a basis for liability. *See Schultz v. Linden-Alimak, Inc.,* 734 P.2d 146, 149 (Colo.App. 1986). Thus, the court properly precluded testimony that Dr. Huang's *documentation* of the informed consent disclosure– distinct from the disclosure itself – was negligent.

Plaintiff fails to appreciate that the trial court allowed her to address Dr. Huang's documentation in ways other than as a "negligence" issue, for example, by questioning witnesses about what was or was not corroborated or confirmed in the written documentation, and the significance of details Dr. Huang did or did not include in her written documentation. *See, e.g.,* 1330:5-1331:23. However, expert

testimony that Dr. Huang was negligent because her documentation was "negligent" was properly precluded.

The fact that Plaintiff's experts opined that written documentation is required in order to have a valid informed consent does not make their testimony admissible. Expert testimony cannot establish new or additional legal requirements for informed consent, where such requirements are contrary to Colorado law.

Determination of the existence and scope of legal duty, as well as the parameters of tort claims, are questions of law for the court. *See Keller,* 111 P.3d at 448; *Metropolitan Gas Repair,* 621 P.2d at 317. An expert's testimony cannot resolve a question of law, which is the province of the trial court. *See Grogan v. Taylor,* 877 P.2d 1374, 1384 (Colo.App. 1993), *rev'd on other grounds,* 900 P.2d 60 (Colo. 1995); *Specht v. Jensen,* 853 F.2d 805 (10th Cir.1988), *cert. denied,* 488 U.S. 1008 (1989); *Rowe v. Kim,* 824 A.2d at 24 (expert testimony that the standard of care requires written consent is "not pertinent;" "while it may be prudent for a physician to make a written record of the information provided in connection with the consent, such a record is not required by law.").

Thus, the fact that Plaintiff's experts proposed additional duties not required

by Colorado law did not change the law, or make their testimony relevant or admissible.

D. The Court's Other Evidentiary Rulings Were Well Within its Discretion

Standard of Review and Preservation of Issues. Rulings on the admissibility of evidence are subject to review for abuse of discretion. *Clements v. Davies,* 217 P.3d 912, 917 (Colo.App. 2009). The issues were raised and ruled on as stated in Plaintiff's Brief.

Plaintiff presents a laundry list of evidentiary "errors," but makes no effort to explain the rulings, specify the nature of the error, or supply pertinent legal authority. Thus, Plaintiff has not provided the Court with any concrete basis on which to consider her claims. *See Castillo,* 148 P.3d at 291. Moreover, because most of these "errors" concern evidence that was admitted in response to other questions, or through another witness, Plaintiff cannot complain of any harm. *Coffee v. Inman,* 728 P.2d 376, 382 (Colo.App. 1986)(exclusion of testimony harmless where it would have been cumulative to testimony already admitted).

Dr. Pousti's testimony that Plaintiff's injuries "would be expected" from a mastopexy.

Plaintiff attempted to present testimony from Dr Pousti that a larger scar, areolar spreading and loss of sensation–Plaintiff's alleged injuries– are

"complications you would expect" from a mastopexy. However, Dr. Pousti had never been endorsed to testify that Plaintiff's alleged complications were caused by the mastopexy. See 491-93.

This issue was initially raised before Dr. Pousti's testimony, 1324:20-1326:14; 1345:22-1347:3. The court ruled he could not express previously undisclosed opinions about the cause of Plaintiff's injuries, 1347:4-1348:1. This ruling was well within the court's discretion, and Plaintiff has failed to show otherwise. *See* C.R.C.P. 37(c)(1); *D.R. Horton, Inc.-Denver v. Bischoff & Coffman Constr., LLC,* 217 P.2d 1262, 1267-68 (Colo. App. 2009)(holding that court did not abuse discretion in excluding untimely disclosed evidence).

In any event, this limited ruling did not prejudice Plaintiff. Dr. Pousti was allowed to testify generally that a mastopexy is a more complex operation with more potential complications, including a longer scar, areolar spread, and loss of sensation; he simply was not allowed to testify that Plaintiff's complications were the "expected" result of the mastopexy. 1382:18-1383:6; 1414-16. Dr. Festekjian (who *was* endorsed to address causation) testified that circumareolar incision and mastopexy increase the risk of nerve damage and areolar spreading, and that Plaintiff's areolar spreading and loss of nipple tone were probably caused by a

combination of the mastopexy and implants. *See* 1599, 1601-02, 1696-97. Because Plaintiff was able to present the evidence she sought to present, she cannot claim prejudice to her substantial rights.

Dr. Pousti's "Scarring" Testimony

Dr. Pousti was asked on cross-examination whether there was medical literature supporting his opinion that mastopexy and circumareolar incision pose additional risks of scarring. He stated he could not cite any literature, but that his opinion was based on his clinical experience. Because the question called for a "yes" or "no"answer, Defendant's objection and motion to strike were properly granted.

Plaintiff was free to address the issue on redirect, where Dr. Pousti's discussed his "surgical expertise" as the basis for his opinion that there is an increased risk of scarring. *See* 1414-1417. Because the excluded response was later admitted during redirect, there was no error and no prejudice as a result of the ruling. *See Danburg v. Realities, Inc.*, 677 P.2d 439, 443 (Colo.App. 1984).

Dr. Pousti's testimony about whether a reasonable surgeon should advise patient of risk of areolar spreading from mastopexy

Defendant's objection was properly sustained because the question was confined to Dr. Pousti's personal opinion, based on his personal experience. He

testified that he had observed,"in my own practice" that with circumareolar incisions, "the aureola can spread . . . a little more commonly than if you have other means of doing the breast lift. *But again, that's my observation in my practice.*" *1417:4-16 (emphasis added).* The next question – whether "in your practice" a reasonable physician should advise a patient of that risk– was also confined to Dr. Pousti's personal practice, which was not relevant, at least not until he had expressed an opinion that areolar spreading with a circumareolar incision is a generally recognized risk that should be disclosed by reasonable surgeons, and not just a personal observation. *See Wallbank v. Rothenberg,* 74 P.3d 413, 416-17 (Colo.App. 2003)(court may allow personal practice testimony if expert has testified to opinion based on the standard of care).

In any event, Dr. Pousti testified elsewhere that Plaintiff should have been advised of common risks and complications of mastopexy or breast lift, including areolar spreading. *See* 1375. Dr. Festekjian also testified that a patient should be advised of the risk of areolar spreading. *See* 1591, 1584-85, 1593. Sustaining Dr. Huang's objection to a single question focused on Dr. Pousti's personal experience with circumareolar incisions was harmless, as Plaintiff was able to

introduce essentially the same evidence by asking differently phrased questions. *Danburg,* 677 P.2d at 443.

Dr. Festekjian's Testimony About "Reasonable Time" to Contemplate Surgery

Plaintiff complains that Dr. Huang's objection was sustained when her counsel asked Dr. Festekjian: "Do you have an opinion as to why it is important for a patient to have a reasonable period of time to think about and contemplate a procedure such as a mastopexy together with an implant?" 1592:2-17. Although the court's comments in sustaining the objection are not entirely clear, the question was leading and based on improper foundation, in that it states *Plaintiff's counsel's* opinion that "it is important" for a patient to have time to contemplate surgery. Dr. Festekjian had not stated that this was "important."

In any event, Dr. Festekjian was not prevented from expressing his opinion to properly phrased questions. He testified that a patient should be made aware, well in advance of surgery, of risks of mastopexy, including areolar spreading, asymmetry and possible need for additional surgery, so that she can make an informed decision; in his opinion, Plaintiff was not given enough time to understand, ask questions, and make an informed decision. *See* 1584-85; 1590-91; 1714-16. Dr. Pousti stated similar opinions, including the importance of

allowing the patient sufficient time to think about the risks and to ask questions. *See* 1372-74; 1377-78; 1382-84. It is unclear what additional evidence Plaintiff is claiming she was precluded from presenting.

Limitation of Dr. Baker's Cross-Examination

Plaintiff submits an almost unintelligible list of eleven "errors" limiting her cross-examination of Dr. Huang's expert, Dr. Baker. Beyond her bald statement that the rulings were "manifestly arbitrary, unfair and unreasonable," Plaintiff provides no factual background, no argument, no legal authority and no explanation of her prejudice from these rulings. Plaintiff's "argument" borders on the frivolous and groundless.

These rulings were proper responses to Plaintiff's repeated attempts to raise the non-issue of "negligent documentation" as a basis for finding Dr. Huang liable; questions that had been asked and answered; or questions that were argumentative or improperly formed:

- questioning about Dr. Huang's surgical report. Properly excluded as argumentative, suggesting Dr. Huang "falsified" her report, and in violation of the pretrial ruling that "negligent documentation" was not an issue in the case. 1997-1998.

- expressing opinions without personal knowledge of what was discussed preoperatively. Properly excluded as directing the jury to "disregard" Dr. Baker's opinions, inconsistent with the court's instructions to the jury about evidence, credibility, etc.
- documentation of the need for a breast lift and the success of the outcome. Properly excluded based on pretrial ruling that negligent documentation was not a proper claim, and the absence of any claim that Dr. Huang committed surgical negligence or lacked proper medical indications for the breast lift.
- expressing opinions about events at which Dr. Baker was not present. Properly precluded as "asked and answered." *See* 1997-199
- subjects about which Dr. Baker would not express an opinion "as a scientist." Properly precluded as asked and answered. *See* 1997-98.
- exclusion of Exhibit 21, American Society of Plastic Surgery Code of Ethics. Properly excluded because the document states standards for consent documentation that differ from Colorado law, potentially confusing under C.R.E. 403. Also irrelevant, as it was created in 2009, three years after Plaintiff's surgery.

- pre-surgical consent discussions about choice of suture material. Properly precluded because there was no claim, nor expert testimony, that Plaintiff should have been informed and given a choice of suture material.
- providing patient with written consent documentation for mastopexy. Properly precluded because "negligent documentation" not a proper claim.
- requirement for separate mastopexy consent forms. Properly precluded because question went, again, to the non-issue of "negligent documentation."
- expressing opinions about matters that were not documented, *i.e.,* consent discussions. Properly precluded as asked and answered. 1997-99.

Admission of Exhibits

Plaintiff's arguments are devoid of context, argument, and authorities and thus should be disregarded. *Castillo*, 148 P.3d at 291. In any event, there was no prejudicial error in these rulings.

Photos from the UCLA web site. The photos were properly admitted after

they were used to impeach the testimony of Dr. Festekjian, a member of UCLA's Plastic Surgery department, by showing that significant spreading of the areola can and does occur with augmentation surgery, even without mastopexy. Dr. Festekjian admitted these before-and-after photos of a breast augmentation patient show post-surgical enlargement of the areola. 1690-91. The photos were used by Plaintiff's counsel on redirect, 1706-07, and were used in Dr. Baker's direct, 1977-78, where Dr. Baker confirmed the pictures depict significant areolar spreading after breast augmentation surgery.

Plaintiff's sole objection to the photos was that her attorney was uncertain what type of surgery the photos depicted. 1783-86. However, Dr. Festekjian specifically identified the photos as depicting "pre and post breast augmentation" 1691:11.

Photos from Dr. Huang's website. These were pre- and post-op photos, similar to those used in Dr. Festekjian's testimony, illustrating augmentation without mastopexy. They were used only for demonstrative purposes to illustrate Dr. Baker's previous testimony, 1977:7-18, that areolar spreading and nipple asymmetry can result from breast augmentation alone, without mastopexy or circumareolar incision.

Medical article used in Dr. Baker's testimony. The article was an exhibit listed by *Plaintiff,* Exhibit 22. While Dr. Baker stated he does not view the journal in which it was published as "authoritative," because "science is a debatable arena," he agreed the journal is a recognized resource commonly used by plastic surgeons as a source on current topics, that he "absolutely" refers to it from time to time. 1942:22-1945:1. He agreed with the article that one-stage mastopexy is safe and effective and consistent with his own practice and experience–hence, endorsing the reliability of the article's conclusion. 1945:15-1946:20. This is precisely the same opinion he had already stated in his testimony. 1941:13-1942:10. Thus, even if admission of the exhibit was error, it was harmless. *Antolovich v. Brown Group Retail, Inc.,*183 P.3d 582, 598 (Colo.App.2007) (improperly admitted evidence that is cumulative to admissible evidence is harmless).

E. Limiting Use of "Standard of Care" was within the Court's Discretion

Standard of Review and Preservation of Issue. The trial court has broad discretion in regulating the conduct of trial, and in ruling on objections and evidentiary matters. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242, 1251 (Colo. 1994); *Wilkerson v. District Court*, 925 P.2d 1373, 1377 (Colo. 1996). The issue

was raised and ruled on as noted in Plaintiff's brief.

The court did not abuse its discretion in sustaining objections to questions phrased in terms of "the standard of care." Because the jury instructions refer to "negligence," and what "reasonable physicians" would or would not do, use of consistent terminology served the interest of clarity and avoided the possibility that jurors would be confused by different terms referring to the same concepts. *See* CJI 15:3, 15:11, 15:12. Also, the phrase "standard of care" can be misleading, suggesting there is only *one* acceptable method of practice.

Accordingly, sustaining these form objections was within the trial court's discretion, and could not have prejudiced Plaintiff, as she was able to present the testimony she needed simply by re-phrasing her questions. For example, Plaintiff re-asked Dr. Pousti whether Dr. Huang's informed consent process was reasonable and appropriate. He answered "no," and explained that a reasonable surgeon should advise the patient of the nature of the operation, the risks and complications, and then must "document" the informed consent. 1377:13 - 1378:9. The trial court struck only the portion of his testimony relating to the so-called requirement of "documentation," for the reasons addressed above, but allowed the rest of his testimony to stand. 1378:10 - 1382:5.

As for Plaintiff's argument that the court exacerbated the error by giving an "erroneous" instruction that used the phrase "standard of care" (451), Plaintiff did not object to the instruction on that basis, and thus has waived that objection. 2142:23-2145:1; *see* C.R.C.P. 51; *Martin,* 862 P.2d at 1018.

F. The Court Properly Declined Certain Juror Questions

Standard of review and preservation of issue. The court's decision to ask or not ask a juror's question is committed to the court's discretion. C.R.C.P. 47(u); *People v. Zamarripa-Diaz,* 187 P.3d 1120, 1124 (Colo.App. 2008).

Sometime after Dr. Pousti's testimony ended, the court notified counsel that it had received a juror question. The court apologized for not alerting counsel earlier, but stated it had reviewed the question and decided not to ask it. The court stated that counsel could make objections. 1511:6-1512:2. Plaintiff did not object at the time, but waited until the end of the next day, moments before she rested her case. 1788:7-1789:3. Plaintiff did not ask to recall Dr. Pousti, in person or by telephone, and made no offer of proof. Id.

The issues involving the questions for Dr. Festekjian were raised and ruled on at the citations listed in Plaintiff's brief, pp. 25-26. Plaintiff did not make an offer of proof. 1720-1725.

Question to Dr. Pousti.

The question to Dr. Pousti was: "In your experience is it common for the patients to cry in the post op exam room?" 2553, 1511. Aside from the untimeliness of her objection, Plaintiff has not shown the question was appropriate to ask, or that Dr. Pousti's response (whatever it would have been) would have affected the outcome of the case.

C.R.C.P. 47(u) states:

> Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for good cause.

The court is not required to confer with counsel before deciding whether or not to ask a juror question. *Zamarripa-Diaz,* 187 P.3d at 1124 (interpreting similar provisions of Crim. P. 24(g)). Moreover, the court has discretion to prohibit or limit juror questioning for good cause. C.R.C.P. 47(u).

CJI 1:16 cautions that "the rules of evidence or other rules of law may prevent some questions from being asked." The court considered the relevance of the question in light of the evidence, and correctly declined to ask the question. As there was no evidence Plaintiff cried in any "post-op" exam, the question was irrelevant and confusing. The court was not required to re-write the question to

address the "preoperative" time period, or to allow Dr. Pousti to "address the juror's confusion," as either would result in the witness answering a different question than the juror asked. Finally, apart from Plaintiff's generic claim that she was "deprived. . . of a fair trial," Plaintiff does not explain how the failure to ask this single question affected the fairness of trial or impaired her substantial rights.

Question to Dr. Festekjian

The court declined to ask a juror question, submitted before Dr. Festekjian concluded his testimony, about signing of the consent form. 2555. The court properly refused the question, stating the issue had already been addressed in Dr. Festekjian's redirect,[5] and that the question also implicated the "negligent documentation" issue excluded by the court.

However, the court asked, and Dr. Festekjian answered, three similar questions about signing and dating of the consent form:

> "Who should sign a consent form?" "The patient and the doctor."
>
> "Should the consent form be signed before the operating day?" "No. It can be any time before surgery."

---

[5] The court apparently was referring to his testimony about using separate consent forms for augmentation and mastopexy, HA 1714, 1716-17.

> "When the form is signed on operating day, should the doctor witness the patient re-sign and re-date it?" "Yes."

1724:9-1725:1. Neither counsel asked any follow-up questions. 1725:2-8. Again, Plaintiff fails to explain how the court's failure to ask one question –which was largely covered by the other questions and not relevant to the adequacy of Dr. Huang's consent *discussions*– constituted an abuse of discretion or affected the outcome of the case.

G. There Was No Error in the Jury Instructions

Standard of Review. A "trial court has substantial discretion in formulating jury instructions so long as they include correct statements of the law and fairly and adequately cover the issues presented." *Taylor v. Regents of Univ. of Colo.*, 179 P.3d 246, 248 (Colo.App. 2007). The decision to give a particular instruction is reviewed for abuse of discretion. *Tricon Kent Co. v. Lafarge North Am., Inc.*, 186 P.3d 155, 162 (Colo.App. 2008).

When giving jury instructions, "the trial court shall generally use those instructions contained in the Colorado Jury Instructions (CJI-Civ.) that apply to the evidence under the prevailing law." *Fishman v. Kotts*, 179 P.3d 232, 235 (Colo.App. 2007); *see* C.R.C.P. 51.1(1).

Language in a jury instruction is not grounds for reversal unless it

prejudices the substantial rights of a party; prejudicial error exists when the record shows a jury might have answered differently if a proper instruction had been given. *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375, 1377-78 (Colo.App. 1996).

Instruction 7.

Plaintiff complains the jury should not have been instructed that consent may be express or implied, and may be oral or written. Plaintiff admitted at trial, 2139-40, that the Notes on Use for instruction 15:11 expressly permit the court to instruct the jury regarding "express or implied" consent," as set forth in CJI 15:8, which was precisely the language included in Instruction 7.

This instruction was particularly appropriate in light of Plaintiff's repeated attempts to characterize Dr. Huang's written documentation of the consent discussions as "negligent." As the instruction fit the facts of this case and correctly stated the law, Plaintiff has failed to show any error or impact on her substantial rights. Moreover, it would have been wrong to instruct the jury, as Plaintiff suggests, that oral consent is an "affirmative defense with the burden of proof . . . on Dr. Huang." In the context of an informed consent claim, oral consent is simply one permissible form of consent. The burden is on Plaintiff, and remains with her, to prove the consent was uninformed.

Instruction 10.

The *Clayton v. Hepp* instruction has been approved in cases like this, where jurors might be at risk of applying standards or expectations of their own about what a reasonable physician should or should not disclose in obtaining informed consent. *See Spoor v. Serota,* 852 P.2d 1292, 1297 (Colo.App. 1992); *McGraw v. Kerr,* 128 P. 870, 874 (1912). Colorado law is clear that the adequacy of a physician's discussion of the particular risks of surgery is to be determined based upon expert testimony. *Espander v. Cramer,* 903 P.2d 1171, 1174 (Colo.App. 1995).

The fact that the instruction uses the term "standard of care" is not confusing or prejudicial, nor does it suggest the court demonstrated "prejudicial favoritism" toward Dr. Huang. Plaintiff did not object to the instruction on this ground, 2142-46, and therefore has waived this argument. C.R.C.P. 51. In any event, the instruction is not confusing. While the phrase "standard of care" was avoided during the testimony, the instruction merely informs the jury that they are not to set up their own "standard" but are to be guided by the "standard of care of physicians *contained herein*," which refers to the standard defined in Instruction 9, of "a reasonably careful physician acting as such specialist." 450.

Next, Plaintiff argues that the second paragraph of Instruction 10 "was not a correct statement of the law," because, while habit testimony is admissible, the instruction created a "presumption" concerning such testimony.

Again, Plaintiff provides no explanation or authority for her argument. The instruction correctly states the law concerning evidence of habit as stated in *Bloskas v. Murray,* 646 P.2d 907, 911 (Colo. 1982),[6] and was applicable to the facts of this case. As the court noted, this case involved extensive testimony based on habit and routine, particularly the routines of Dr. Huang, Dr. Haberstroh, Nurse Wolgin, and Dr. Goldstein in conducting presurgical discussions with patients. Habit evidence is often required in informed consent cases, which revolve around oral discussions, the details of which a physician is unlikely to recall after hundreds of discussions with other patients. *See Hoffart v. Hodge,* 609 N.W.2d 397, 404 (Neb. 2000) (because a doctor cannot be expected to specifically recall the explanations she gives to each and every patient, "evidence of habit may be the only vehicle available for a doctor to prove that he or she acted in a particular way

[6] "Evidence regarding a person's habit or routine practice traditionally has been admissible as relevant to whether the person acted in conformity with the habit or routine practice. . . . '[I]n case of doubt as to what a person has done, it may be considered more probable that he has done what he has been in the habit of doing, than that he acted otherwise.' *Denver Tramway Co. v. Owens,* 20 Colo. 107, 124, 36 P. 848, 854 (1894)." *Id.* (internal citation omitted).

on a particular occasion, and, therefore, proof of habit may be highly relevant.")

Because the jury would not otherwise know how it may consider "habit" testimony, it was appropriate to instruct the jury about the effect of such evidence. The instruction complements rather than duplicates Instruction 3, the general instruction on evidence, which does not address habit evidence.

The instruction does not create an evidentiary presumption (*cf.,* CJI 3:5, 3:6) or unfairly emphasize habit testimony, but merely informed the jury how it "may. . . consider[ ]" the evidence. The jury was instructed to consider all of the instructions together, to make findings based on probabilities and not speculation, and to evaluate the credibility of witnesses based on numerous factors, including means of knowledge and strength of memory. *See* 441, 444-45.

Instruction 11

This is an appropriate instruction, approved by the Colorado Supreme Court Committee on Jury Instructions, CJI 15:4, and by the Court of Appeals in *Day v. Johnson*, 232 P.3d 175, 181-182 (Colo.App. 2009), *cert granted* (Colo. June 21, 2010). In *Day*, the Court held the pattern instruction "accurately reflects Colorado law." The instruction states that "neither an unsuccessful outcome nor an exercise of judgment that results in an unsuccessful outcome, means, 'by itself,' that a

physician was negligent." As such, the instruction merely "follows the basic tenet of tort law that injury alone is insufficient to warrant liability." *Id; see Brown v. Hughes,* 30 P.2d 259, 262 (Colo. 1934)(physician "'does not undertake to warrant a cure and is not responsible for want of success, unless that want results from failure to exercise ordinary care, or from his want of ordinary skill.'"), *quoting McGraw v. Kerr*, 128 P. at 872-73; *Conrad v. Imatani*, 724 P.2d 89, 91 (Colo.App. 1986) ("[t]he mere fact of a bad or lamentable result is not prima facie evidence of negligence"). Although the Colorado Supreme Court has granted certiorari in *Day*, none of these longstanding cases has been overruled or questioned.

This instruction is as applicable in an informed consent case as in a case alleging negligent treatment. Plaintiff claimed she had an unsuccessful outcome from the breast augmentation surgery. Whether the claim was based on surgical negligence or failure to obtain informed consent, the issue is not whether there was a bad outcome, but whether the physician used reasonable care, in performing the procedure, or here, advising the patient about the surgery and its risks. If the jury found Dr. Huang did not use reasonable care in informing Plaintiff, the jury would have been required, under Instruction Nos. 6-9, to find Dr. Huang negligent regardless of this instruction. However, as the jury found Dr. Huang did not fail to

obtain Plaintiff's informed consent, it was important for the jury to know it could not find Dr. Huang liable simply because the outcome was not as Plaintiff desired.

Verdict Forms and Carrying Instructions

Plaintiff claims the carrying instruction and verdict forms "circumvent Instruction 15:11" (Instruction 7) and do not accurately state the elements of informed consent (Instruction 6, CJI 15:10) by changing the language and meaning of paragraphs 1 and 2. Plaintiff did not object on either of these grounds at trial, and so the Court should not consider her objections on appeal See pp. 2137, 2147, 2150-51; *Martin,* 862 P.2d at 1018. Plaintiff objected only that the pattern instructions should be followed exactly, or, if modified, should include reference to allowing the patient sufficient time to make a decision.

The instruction does not circumvent Instruction 7 (15:11), which merely describes the information the physician must disclose to the patient. It is neither necessary nor desirable for carrying instructions and verdict forms to incorporate every subsidiary instruction on informed consent; rather, the carrying instruction and verdict forms are designed to focus on the essential elements of the claim, so the jury can decide whether these elements have been proven.

Plaintiff doesn't explain how the instruction is "confusing," or how it

"incorrectly summarizes the determination to be made," and didn't make these objections at trial. The instruction and verdict forms are patterned directly from the elements instruction, No. 6 (rephrased into question format), and correctly state the determinations the jury must make.

Her complaint that the instruction "incorrectly" placed the Defendant first (rather than asking "Did Plaintiff have injuries, damages and losses?" as in instruction CJI 15:14) is a complaint about nothing – the instruction follows the logical order of the elements instruction, No. 6. The order of the questions is of no consequence, particularly here, where the jury answered all three questions "No."

Plaintiff argues that the court was required to use pattern forms, CJI 15:14-15. However, the Notes on Use for 15:14, note 9, indicates that the forms are not intended to be all-inclusive and may need to be modified to address specific claims. Informed consent has very specific elements; therefore, the court did not abuse its discretion in using instructions that focused the jury on these discrete elements, rather than the less precise language of the generic forms, CJI 15:14 and 15:15.

Finally, Plaintiff argues that the carrying instruction and verdict forms do not mention the "burden on Dr. Huang pursuant to *Hamilton v. Hardy,"* which

states: "where a plaintiff's evidence shows that she was uninformed due to a failure of disclosure, 'the physician must go forward with evidence establishing that his failure to disclose conformed with community medical standards . . .'" 549 P.2d at 1104-05.

The burden of production is not a proper matter for a jury instruction, but rather is a threshold standard for the court to apply in determining whether to direct a verdict or to instruct the jury regarding a presumption of negligence. *See Stauffer v. Karabin*, 492 P.2d 862, 865 (1971); Notes on Use, CJI 15:13. Moreover, the principle was inapplicable to this case –while Plaintiff claimed she was not informed of increased risks of scarring, areolar spreading, and decreased sensation, Dr. Huang presented ample evidence not only that she *did* inform Plaintiff of these risks, but that these risks are not appreciably greater with a circumareolar mastopexy than with a simple breast augmentation, and that her disclosure met standards of reasonable care. *See, e.g.,* 1474; 1501-03; 1514-15;1946-48; 1957; 1961-64; 1966-67; 1968-69; 1974-79. Because any burden of production was satisfied, there was no basis to instruct the jury on *Hamilton* or to give the CJI 15:13 instruction. The question of whether Dr. Huang adequately informed Plaintiff was simply a disputed issue of fact for the jury.

Theory of the Case Instruction.

Plaintiff complains that the court erred in refusing her CJI 2:1 instruction, and giving an instruction, 442, that did not include "language regarding performing a lift of the right breast as a part of the process."

First, there does not appear to be any tendered instruction in the record containing language about "performing a lift." See 324-357; 2211-2239. In any event, the 2:1 instruction the court gave, as well as other instructions, specifically referred to "mastopexy" on the right breast, and accurately described Plaintiff's claim that Dr. Huang failed to obtain Plaintiff's informed consent to the "mastopexy" and circumareolar incision. *See* 442, 447, 453, 463, 464. Throughout trial, "mastopexy" was used interchangeably with "breast lift," so the jury clearly understood that Dr. Huang "performed a lift of the right breast." 814:16-17; 980:3, 1160:15, 1359:24-25; 1363:4-8, 1365:25-1366:4. 1368:7-16; 1375:5-7; 1394:16-19; 1471:3-6. The instruction, as given, adequately covered Plaintiff's theory of the case.

Further, Plaintiff argues the carrying instruction should have stated that Plaintiff must have been provided reasonable time to consider the revised surgical plan. Again, there is no tendered instruction in the record reflecting this language,

only an instruction with the cryptic handwritten notation: "time is required." 2235. As discussed above, the carrying instruction should state the essential elements of the claim, and need not incorporate every circumstantial nuance or factual argument the parties may wish to make. Through her experts and in closing argument, Plaintiff fully presented her arguments that she could not give an "informed consent" to the mastopexy because she was not provided sufficient information, was emotionally unable to comprehend the information before surgery, and did not have enough time to consider the information and ask questions before surgery. *See, e.g*. 2162-2167.

Causation Instruction

Plaintiff claims the court erred in not including the following paragraph in the causation instruction, No. 19:

> If more than one act or failure to act contributed to the claimed injury, then each actor or failure to act may have been a cause of the injury. A cause does not have to be the only cause or the last or nearest cause. It is enough if the act or failure to act joins in a natural and probably way with some other act or failure to act to cause some or all of the claimed injury.

This paragraph is appropriate when concurrent or succeeding causes are involved. Notes on Use, CJI 9:18, 9:20. The only "cause" at issue was whether Dr. Huang's allegedly inadequate disclosure of risks caused Plaintiff's injuries, in the sense that a reasonable person would have not consented to the mastopexy if

adequately informed. *See* Instruction 6, 447. Plaintiff does not identify any concurrent or successive causes of her injuries, or any other "act or failure to act" that joined with the alleged inadequate disclosure to cause Plaintiff's injuries. As there was no evidence to support this paragraph, the court properly declined Plaintiff's instruction. Again, Plaintiff makes no effort to show how refusal of this instruction impacted the outcome of this case.

Foreseeability Instruction

The court properly refused Plaintiff's "foreseeability" instruction, CJI 9:21. The Notes on Use specifically state: "this instruction should be used 'only when the evidence presents a jury question on whether the injured party was a person within the foreseeable zone of danger created by defendant's negligence and thus was owed a duty by defendant.'" *Id.* There was no jury question on this point, as it was undisputed Plaintiff was in the zone of danger with respect to the surgery, and that Dr. Huang owed Plaintiff a duty of care in obtaining her informed consent for the surgery.

Informed Consent Instruction

Plaintiff claims, without explanation, that the court erred in failing to give her tendered informed consent instruction. The instruction differed markedly from the pattern instruction (CJI 15:10), incorporated language suggesting a battery

claim ("The defendant did a different surgical procedure. . . than the procedure that had been planned. . ."), and contained confusing detail and repetition. Plaintiff fails to explain how the court's refusal of this instruction constituted error or unfairly impacted the outcome of trial.

Indeed, the court ordinarily should follow the standard pattern jury instructions to the extent possible. C.R.C.P. 51.1; *Fishman*, 179 P.3d at 235. Plaintiff has provided no reason why the court should have embellished the instruction to the extent Plaintiff requested.

Instruction Regarding Substantial/Specific Risks

The concept of "substantial risks" is adequately covered in the approved instruction, which the court gave as Instruction No. 8, CJI 15:12. The Colorado Supreme Court rejected an argument similar to Plaintiff's in *Bloskas v. Murray*, 646 P.2d at 912-13, holding that the addition of language about "specific risks" and "general risks" was unnecessary, and was adequately addressed in the standard instruction on "substantial risks."

Thin-Skull Instruction

A thin skull instruction, CJI 6:7, is appropriate when the defendant attempts to "spotlight" the plaintiff's pre-existing frailty to avoid liability for certain damages. *State Farm Mut. Auto. Ins. Co. v. Peiffer*, 955 P.2d 1008, 1010 (Colo.

1998). There was no such argument in this case, nor any evidence to support the instruction. Further, this instruction only concerns damages, a moot issue because the jury found no negligence and no causation. Thus, any error in declining this instruction could not have impacted the outcome of trial. *See Gray v. Houlton*, 671 P.2d at 444.

H. The Court Properly Granted Directed Verdict on Certain Damages

Standard of Review. Granting of a directed verdict is reviewed de novo, with all evidence and reasonable inferences viewed in the light most favorable to the nonmoving party. *Andrews v. Picard,* 199 P.3d 6, 10 (Colo.App. 2007). Where claims of physical injury are beyond the common knowledge of laypersons, expert testimony is ordinarily required to establish the injury. *Smith v. Curran,* 472 P.2d 769, 771 (Colo.App. 1970);(causes of infection); *Williams v. Boyle,* 72 P.3d 392, 398 (Colo.App.2003)(cause of kidney damage)

Defendant's initial motion for directed verdict was made at 1972-76, which was denied at 1806-1809. Defendant renewed the motion at 2127-28, which the court partially granted at 2132 - 33.

Only Dr. Festekjian expressed opinions about the cause of Plaintiff's alleged injuries. He offered no testimony that Plaintiff's right arm pain, right hand numbness/tingling, right shoulder/chest pain, or breast pain were probably caused

by the mastopexy or circumareolar incision. See, e.g., 1596-99, 1601-1611; 1618-1622.

Plaintiff had pain and tingling in her right arm and hand before surgery, for which she had received treatment from chiropractors and others. 1146, 1268. Dr. Festekjian testified that, when he examined Plaintiff in January 2010, she did not report chest, arm, hand or shoulder pain. 1617-18, 1621-1622. She reported no pain in the right nipple/areola, no breast pain, no pain anywhere. 1623, 1679:19-20, 1682:9-22, 1685:8-25. Dr. Festekjian acknowledged he was not offering expert opinions that the surgery caused Plaintiff to have chest, arm, hand or shoulder pain or other symptoms. 1622:13-18.

Absent expert testimony that these conditions were caused by the mastopexy, these alleged damages were properly withheld from the jury. Finally, any error relating to damages was harmless because the jury found no negligence and no causation. *Gray,* 671 P.2d at 444.

V. CONCLUSION

For the reasons stated, the judgment should be affirmed.

PRYOR JOHNSON CARNEY
KARR NIXON, P.C.

By: /s/ Elizabeth C. Moran
Elizabeth C. Moran
David D. Karr, #9791

Scott S. Nixon, #14244
5619 DTC Parkway, Suite 1200
Greenwood Village, Colorado 80111
303.773.3500
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically served via *Lexis/Nexis File and Serve* this 13th day of December, 2010, addressed to the following:

Andrew T. Brake, Esq.
777 East Girard Avenue, Suite 200
Englewood, Colorado 80113

/s/ Laura Buckingham

The original of this document is on file at the offices of Pryor Johnson Carney Karr Nixon, a professional corporation, and will be made available upon the request of the Court or counsel of record.