

<p>Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver, CO 80202</p>	
<p>Denver District Court The Honorable Michael A. Martinez 2008CV9245</p>	
<p>Plaintiff-Appellant/Cross-Appellee:</p> <p>Joan L. Holley.</p> <p>v.</p> <p>Defendant-Appellee/Cross- Appellant:</p> <p>Linda C. Huang, MD.</p>	<p>COURT USE ONLY</p>
<p>Attorney or Plaintiff-Appellant/Cross-Appellee Joan L. Holley:</p> <p>Andrew T. Brake, Reg. Andrew T. Brake, P.C. 777 E. Girard Ave., Suite 200 Englewood, CO 80113 Phone Number: (303)806-9000 Fax: (888) 236-7709 E-mail: atbrake@gmail.com Registration No: 12021</p>	<p>Case Number: 2010CA1187</p>
<p style="text-align: center;">REPLY BRIEF</p>	

Comes now Joan L. Holley (“Ms. Holley”) and for her Reply Brief states:

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INTRODUCTION

Pre-trial motions rulings precluded Ms. Holley from presenting key evidence, including negligent documentation testimony (436¹), and that she would not have agreed to the procedure had she been appropriately informed of the risks. (436). The Court prohibited cross² relating to deficiencies in the admitted medical records.

Dr. Huang Testimony

Dr. Huang first testified at trial when cross examined in Ms. Holley's case in chief. 1425 L. 8-9. Dr. Huang then had no recollection whatsoever regarding the morning of surgery, nor of any discussions with Ms. Holley about the right breast surgical change. 1439 L. 18 –1441 L. 1.

Dr. Huang failed to document any informed consent discussions with Ms. Holley about the change, when Dr. Huang decided to perform much more invasive surgery.

In her surgical report Dr. Huang wrote:

I decided it was [sic] look more symmetrical if she had a circumareolar approach on the right and an inframammary approach on the left.”

2269.

¹ Page References are to the previously submitted Appendix.

² “Cross” hereafter refers to “cross examination”.

In her brief, Dr. Huang contends that she discussed scarring, sensation loss, and change in appearance of the nipple and areola. In fact, the Court permitted her counsel to ask leading questions which elicited largely yes and no responses from Dr. Huang. Ms. Holley's "leading" objection was overruled. 1457 L. Further objection to such questions would have been futile, and would have only highlighted the **predictable** responses.

Erroneous Evidentiary Rulings

During trial, Ms. Holley was deprived of a fair trial by the Judge consistently ruling against her at nearly every opportunity, and forcing Ms. Holley's counsel to try to find back door or circuitous ways of presenting evidence. It was not a matter of "minor mistakes" as contended by Dr. Huang. Rather the Judge time and again ruled for Dr. Huang, even when Dr. Huang sought inconsistent rulings.

"Standard of Care" Prohibitions

The phrase "standard of care" was prohibited by Ms. Holley's witnesses. Initially, Dr. Pousti was permitted to testify that he was familiar with the applicable standard of care, 1357 L. 21-24, 1372 L. 9-13. When Ms. Holley asked Dr. Pousti about the informed consent standard of care, 1374 L.

7 – 10, Dr. Huang repeatedly successfully objected largely based upon form, and erroneously claimed:

. . . it's impermissible to ask a question of standard of care because that presumes that everybody does things the same way or gives a false impression, when, in fact, there is a variety of care that can be reasonable, acceptable, and appropriate.

1376 L. 18-24.

Thereafter, the phrase “standard of care” was not allowed. See for example Dr. Pousti testimony at P.1374 L. L. 7-14; at P.1375 L. 14-22); ((P.1375 L. 23 to 1376 L. 2), (Dr. Pousti testimony stricken, P.1377 L. 9-12.) However, when Dr. Huang requested a non-stock instruction utilizing the prohibited phrase, it was given, over objection.³ In contrast, when Dr. Huang used the phrase “standard of care” and Ms. Holley similarly objected based upon form, the Court overruled the objection, 1968 L. 17-24, demonstrating the Court’s double standard. Ultimately, defense counsel offered to rephrase on his own. 1967 L. 17 – 1968 L. 2.

Ms. Holley was deprived of effective cross. Erroneous pre-trial rulings proscribed cross concerning the medical records admitted into evidence.

³ “Standard of care” is an appropriate term, 2143 L. 9-15. Ms. Holley objected on other grounds of duplicative, misleading, and there was another instruction on the subject. 2143 L. 16-22. 2143 L. 23 - 2145 L. 15.

Cross Exam Consent Documentation Deficiency Prohibitions

During cross, the Judge erroneously prohibited all cross relating to consent documentation deficiencies. For example, Dr. Baker testified as Dr. Huang's plastic surgery expert. When asked what he would expect a reasonable and careful surgeon to document when having discussions with a patient about breast surgery, the cross was prohibited. 1996 L. 13-18.

Similarly the Court sustained an objection and precluded questioning to the effect that an expert should not rely upon what a physician later claims about alleged discussions the physician admits to having no recollection of, and which the physician failed to document. 1996 L. 19-25. When Dr. Baker was asked if he accepted as true a portion of the surgical report wherein Dr. Huang wrote "I decided" (referring to the more invasive surgery), or if he thought Dr. Huang falsified her surgical report, the Court sustained the objection "Object to form. It's argumentative." 1997 L. 24 – 1998 L. 5. The Court thereby deprived Ms. Holley of a fair trial by not permitting important cross. Similarly, when Dr. Baker was asked if a reasonable and careful surgeon should have a truthful surgical report, cross of Dr. Baker was prohibited, based upon the pretrial documentation ruling. 1998 L. 11-17.

During his cross, Dr. Baker admitted that he did not know if Dr. Huang had any recollection of the key time segment when the surgical change was brought up by Dr. Huang in the pre-op holding area. 1999 L. 8-13. Dr. Baker testified that he would not want to express an opinion until he knows whether or not Dr. Huang recalled the preop holding area events. 1999 L. 14-17. The Court then sustained the objection “Objection, Your Honor, to form.” 1999 L. 22-24, to the question that any opinion of his relating thereto should be disregarded by the jury from a scientific standpoint, as he really did not know if Dr. Huang recalled the discussions.⁴ Cross exam of Dr. Baker was prohibited about whether or not a physician should document mastopexy. 228 L. 2 – 230 L. 8. At 2043 L. 19-22, Ms. Holley was prohibited from asking Dr. Baker if a reasonable and careful surgeon should include mastopexy consent forms. Dr. Baker ultimately admitted that he did not have enough evidence to express an opinion about whether or not Dr. Huang acted as a reasonable and careful surgeon. 2044 L. 20 – 2045 L. 1.

Jury Instruction Errors

In ruling upon jury instructions, the Judge again prejudicially favored Dr. Huang, all but giving every instruction sought by Dr. Huang, including

⁴ Dr. Baker testified on direct that Dr. Huang’s care met the standard of care. 1975 L. 23 – 1976 L. 9.

non-stock and modified stock instructions, with the most minor, or no modifications.

Dr. Huang Contradictory Testimony

Dr. Huang contends that based upon her experience and the medical literature the risk of sensation loss “is the same regardless of the incision used. 1473:3-12.”. This admission demonstrates that it was unlikely that Dr. Huang obtained Ms. Holley’s informed consent for changing to the more invasive and higher risk procedures on her right breast, as Dr. Huang probably told Ms. Holley that the risks were the same. By contrast, Dr. Huang’s only retained expert, Dr. Baker, admitted on cross that the periareolar incision had a higher risk of loss of sensation around the nipple or areola, and that a reasonable and careful plastic surgeon should tell this to the patient. Obviously, and by her own admission, Dr. Huang did not believe this to be true, and more likely than not failed to so inform Ms. Holley.

ARGUMENT

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

In her brief, Ms. Holley fairly and reasonably sets forth the errors, the relevant record references, as well as the grounds relied upon and the supporting authorities, within existing limitations including page limit parameters.

Expert Testimony Limitations

The purpose of expert testimony is to provide the jury “specialized knowledge” that will assist the jury “to understand the evidence or to determine a fact in issue” and experts may testify “in the form of an opinion or otherwise”. C.R.E. 702. As a part of the educational process, it was appropriate for the jury to understand the nature of the surgical procedures, and the pros and cons, or the benefits, detriments and risks of the procedures performed separately or in conjunction with one another.

In *Wallbank v. Rothenberg*, 74 3d 413 (Colo. App. 2003) the Colorado Court of Appeals held that testimony concerning an expert’s personal practices was of some relevance, where the expert also testified concerning the applicable standard of care. *Id.* at 416. It may help the jurors understand why the standard of care is followed by that expert and others, it may either impeach or bolster the expert’s credibility, and cross thereon was proper. *Id.* at 416-417.

In this case, Ms. Holley was erroneously deprived of the important opportunity to have her experts explain why they would not perform the procedures performed by Dr. Huang, and what they would have done and why. This was important to educate the jury concerning the nature of the

surgery, anatomical characteristics, and the effects of the multiple procedures in causing disfigurement. It would have demonstrated the importance of a surgical patient such as Ms. Holley understanding the options and alternatives so that an informed decision could be made. This testimony would have bolstered and added credibility to their testimony, and it would have explained the basis for Ms. Holley's expert's **informed** consent negligence opinions. It would also have helped explain the cause of the disfigurement, and the attendant risks of the right breast surgery.

Exclusion of Ms. Holley's Testimony of What She Would Have Done If Properly Informed.

Where as here the physician has no recollection of the consent discussion that occurred in the preop holding area, 1439 L. 18 – 1441 L. 1, it was important for the fact finder to determine what was said. Ms. Holley's testimony that she would not have agreed to the last minute surgical change if she had been appropriately informed is probative of what was discussed during that last few minutes prior to surgery, and of Ms. Holley's comprehension capacity under the circumstances. Dr. Huang's "speculation" argument misses the point. Ms. Holley's testimony was relevant and probative of an element of proof of negligence, as relating to what was

discussed, and would have assisted the trier of fact in determining if informed consent was appropriately obtained.

Rule 401, C.R.E. only requires minimal logical relevance and marginal probative value can suffice when relevant. Evidence having any tendency to make the existence of any fact more probable or less probable is admissible. *People v. Kenny*, 30 P.3d 734, 740 (Colo.App.2000). The Colorado and Federal Rules of Evidence strongly favor the admission of evidence. *People v. Lowe*, 660 P.2d 1261, 1264 (Colo.1983).

Dr. Huang's reliance on *Gray v. Houlton*, 671 P.2d 443, 444 (Colo.Ap1983) is incorrect. In *Gray*, the alleged error related solely to damages, and in no way impacted liability, as in this case. In her argument Dr. Huang, at page 12 of her brief, manifests confusion relative to proving negligence, in trying to argue that what a "reasonable person" who was adequately informed would have done "became moot". In fact, what a reasonable person would have done is the third element that Ms. Holley was required to prove in the Informed consent negligence instruction, CJI-Civ. 15:10 (CLE ed. 2010), par. 3. Similarly, the reliance upon *Bennett v. Greeley Gas Co.*, 969 P.2d 754, 762 (Colo. Ap1998) is misplaced. In

Bennet, Id at 762, the excluded testimony was both “speculative and tangential” and the Bennett court’s decision is not persuasive nor applicable.

Dr. Huang’s reliance upon *Hamilton v. Hardy*, 549 P.2d 1099, 1105 (1976) is incorrect. In *Hamilton*, the Defendant doctor argued that the plaintiff’s failure to testify that she would not have taken a contraceptive drug had she been advised of the risks was fatal to her informed consent claim, thereby presuming admissibility of such testimony. *Hamilton, Id.* That is the opposite of this case. Here Dr. Huang argued, and the Court ruled, that Ms. Holley was prohibited from testifying about what she would or would not have agreed to if she had been informed of the risks.

As to admissibility of what a person would have done, or probably would have done, such testimony is probative of what a reasonable person would have done under the circumstances. In *Hamilton, Id.*, at 1103-4, the physicians Drs. Hardy and Gottesfeld were permitted to testify concerning what they would have done under particular circumstances.

Thus the exclusion of Ms. Holley’s testimony prevented her from providing testimony (i) relevant to what a reasonable person would have done under her particular set of circumstances, and (ii) that was both relevant

and probative of what was or was not said or discussed in the preop holding area.

Dr. Huang testified repeatedly in deposition and at trial that she had no recollection of discussions in the preop holding area, 1439 L. 18 – 1441 L. 1. Thereafter when her counsel was permitted to ask her “yes” or “no” leading questions, she in effect testified to the opposite. The testimony of Ms. Holley regarding what she would have done had she been advised of the true risks was relevant, and probative of what was indeed discussed in the preop holding area, and admissible under C.R.E. 401, as tending to prove that Dr. Huang did not inform her of the risks. Thus the ruling erroneously deprived Ms. Holley from providing important evidence tending to prove the elements of her informed consent claim, contrary to C.R. E. 401. The ruling excluding the evidence was unreasonable and unfair. *People v. Czemerynski*, 786 P.2d 1100 (Colo.1990).

Expert Testimony Relating to Relevant Information Contained in Medical Records Was Erroneously Prohibited

Dr. Huang essentially argues that since neither CJI 15: 11 nor Colorado case law requires that informed consent disclosure be in writing, expert testimony cannot include documentation related negligence testimony.

This hollow and erroneous argument ignores the rules of evidence (C.R.E. 401 et. seq. and C.R.E. 702), established case law, and ignores the literal language of CJI 15:11, which provides in part:

A physician must inform a patient of the above (*insert number*) items **to the extent a reasonable physician practicing in the same field of practice** (as a general practitioner in the same or similar locality) (as a specialist), **at the same time, would have under the same or similar circumstances.** The failure to do so is negligence.

[Emphasis Added].

CJI 15:11 requires that the physician inform a patient of the substantial risks and of alternative treatments “**to the extent a reasonable physician**” practicing as a plastic surgeon at the time “**would have under the same or similar circumstances.**” Here, where the surgical change was at the last minute, the Court wrongfully deprived Ms. Holley from providing important expert testimony of what Dr. Huang should have done in order to have obtained Ms. Holley’s informed consent. Ms. Holley’s experts were prohibited from explaining the process, including the necessary and appropriate consent forms and other documentation related steps that a reasonable surgeon would have taken under the circumstances to obtain Ms. Holley’s informed consent.

It does not follow, and is untenable to maintain, that where informed consent disclosure is disputed, established standards of care cannot be testified to, and evidence establishing the absence of documentation in conformance with the standard of care established by a profession cannot be presented at trial. Not only was the lack of documentation relevant to deviations from the standard of care, but it was also relevant to showing what was or was not discussed during the key time period.

The question of whether or not the law requires that consent disclosure be in writing is a different issue than whether or not consent disclosure occurred. Evidence and testimony about consent disclosure related documentation in this case was probative of whether or not the disputed disclosures took place, and refusing to permit this relevant evidence prohibited Ms. Holley from demonstrating to the Jury what Dr. Huang should have done in accordance with established standards of care.

In her argument, Dr. Huang ignores the relevant evidentiary rules relating to the admissibility of evidence. Rule 401, C.R.E. provides for the admission of relevant evidence, and C.R.E. 611(b) addresses the right to cross. A key factual dispute is whether or not Dr. Huang provided the

information necessary in order for Ms. Holley to have provided informed consent for the surgical change to the more invasive right breast surgery.

In that Dr. Huang had no recollection of any discussions of the surgical change, 1439 L. 18 – 1441 L. 1, Dr. Huang’s documentation in the medical records was important evidence of what took place. The hospital medical records containing Dr. Huang’s relevant charting were admitted as Plaintiff’s Trial Exhibit 2, 2346 - 2505. Ms. Holley was erroneously prohibited from vital direct and cross of witnesses relating to the content of Plaintiff’s Trial Exhibit 2, charting by Dr. Huang concerning the surgical change, related consent discussions, what took place, and Dr. Huang’s veracity.

The reliance placed upon *Golob v. People*, 180 P.3d 1006, 1011 (Colo. 2008) is misplaced. In *Golab* the judge’s rulings preventing an expert from testifying about “sole impressions” in a civil case were overturned. The Colorado Supreme Court emphasized the importance of the trial court applying the principles in *People v. Shreck*, 22 P.3d 68, 77-78 (Colo.2001) and *People v. Ramirez*, 155 P.3d 371, 380 (Colo.2007), and undertaking a C.R.E. 702 and 403 analyses.

The argument that a “mere lack of documentation could not have caused Plaintiff’s claimed injuries” is untenable, and manifests a

misunderstanding of applicable law. Pursuant to C.J.I. 15:13, where injuries, damages or losses result from a procedure because of a risk associated with the procedure that the patient was not informed of, the jury **must** find the physician “negligently failed to obtain the plaintiff’s informed consent.”

Expert testimony explaining what a reasonable physician at the same time, would have done under the same or similar circumstances, was vitally important and was precluded by the Court’s In Limine order, and trial rulings. As a result, Ms. Holley was unfairly prohibited from presenting her expert testimony concerning negligence.

Other Evidentiary Rulings

Dr. Pousti’s Testimony

Prior to testifying, the Judge ruled that Dr. Pousti would be permitted to testify consistent with his deposition testimony, to the extent not included within the parameters of his endorsement. 1347 L. 4-11, 22-23. Dr. Pousti’s deposition transcript included testimony that both written and verbal consents were required under the circumstances, that there was greater risk of sensation loss with the mastopexy, and he discussed the various risks associated with the surgery performed by Dr. Huang including greater risk of sensation loss. 1335 L. 1- 1338 L. 20. Thus precluding testimony by Dr.

Pousti that he had been examined about during his deposition was inappropriate, and unduly prejudicial to Ms. Holley.

The Court striking Dr. Pousti's testimony about scarring because he did not give a yes or no answer was not harmless. Dr. Pousti explained his answer, indicating that he was relying upon his experience and not medical literature. Striking his responsive testimony led the jury to believe that expert testimony based upon experience was not proper, and that he was uncooperative, to the detriment of Ms. Holley. The cumulative argument is hardly appropriate, as is apparent from a reading of the subsequent re-direct.

As to mastopexy and areolar spreading, Dr. Pousti had earlier testified about the standard of care, 1374 L. 7 –1376 L. 2.⁵ Pursuant to Wallbank, Id. at 416-417 (Colo. Ap2003), Dr. Pousti's personal practice testimony, which came later, 1417 L. 1-22, was admissible, contrary to Dr. Huang's assertion.

Dr. Festekjian's Testimony

The Court similarly limited Dr. Festekjian's testimony by sustaining objections to Ms. Holley's questions of Dr. Festekjian, as with Dr. Pousti, thereby prejudicially limiting and adversely affecting his expert opinions.

⁵ The standard of care testimony was stricken. 1377 L. 9-12.

During re-direct Ms. Holley was prohibited from asking Dr. Festekjian opinion questions using the terminology “reasonable and careful” (1712 L. 6 – 1713 L. 7) regarding consent forms used by Dr. Festekjian (Exhibits EEE (inadvertently referred to as DDD) and FFF) about which he was cross examined, and had been admitted into evidence. 1658 L. 16-21, and 1661 L. 4-11. Dr. Festekjian was extensively cross examined about both consent forms, and his practices. Ms. Holley was prohibited from asking if consent forms for both mastopexy and augmentation should be utilized. At 1714 L. 6-9:

Q. And in a patient who had the surgery on the right breast, as Ms. Holley did, should both of these forms be utilized?

A. Yes. That's correct.

MR. NIXON: Your Honor, same objection with respect to standard of care.⁶

THE COURT: Sustained.

The objection was sustained based upon the question calling for a standard of care opinion. Proscribing all opinion questions regarding these matters constitutes error. 1712 L. 19 – 1713 L. 7. These rulings deprived Ms. Holley of a fair opportunity to conduct re-direct, were confusing regarding the “standard of care” terminology being allowed to be used by defense counsel

⁶ See 1712 L. 6 – 1713 L. 7, wherein the Court prohibited Ms. Holley’s counsel from asking opinion questions.

when objecting (even though the question did not include the term “standard of care”), deprived Ms. Holley from asking negligence related questions, and from presenting key evidence directly relevant to her burden of proof.

Dr. Baker’s Cross

Ms. Holley was prohibited from effectively cross examining Dr. Baker about informed consent, relevant documentation, and the applicable standard of care. Drs. Festekjian and Pousti were both of the opinion that Dr. Huang was negligent in not obtaining informed consent, included failing to use the appropriate consent forms, an integral part of obtaining a patient’s informed consent. The prejudicial prohibitions imposed on the cross of Dr. Baker deprived Ms. Holley of imperative cross, and of a fair trial.

The American Society of Plastic Surgery (“ASPS”) Code of Ethics (Exhibit 21) was first utilized by Dr. Huang in the cross of Dr. Festekjian. 1628 L. 10-15. By Dr. Huang using it during the cross of Dr Festekjian relative to the ethical testimony issues, any objection to the publication date was waived. Dr. Baker could have testified that Exhibit 21 was not applicable to the relevant time period, if that were the case.

Exhibit 21 describes required ethical behavior for plastic surgeons, 2019 L. 12-25. During Dr. Baker’s cross, objection was initially made on the

sole grounds of relevance, 2020 L. 4-9, which was sustained prior to any objection as to the date, after Dr. Baker testified that it was a statement of the code of ethics of the ASPS, 2019 L. 21-25, and includes principles of informed consent at page 10.

Ms. Holley was wrongfully deprived of cross thereon. When Dr. Baker testified that the principle of informed consent in Exhibit 21 would be applicable to a reasonable careful plastic surgeon, 2021 L. 16-21, a bench conference was held at the request of Dr. Huang and resulted in the sustaining of the **untimely** objection to the question and response, 2024 , L. 19-20. The Court required that the inquiry be rephrased, 2024 L. 19-20. Although untimely and inappropriate, the consent related documentation prohibition was a basis therefore. Ms. Holley showed the Court that Exhibit 21 was appropriate for cross, including that a consent form should be signed pre-surgery. 2022 L. 7- 2023 L. 5. The Court's ruling continues at 2023 L. 6- 2024 L. 20.

Errors in Admitting Exhibits

The previously undisclosed UCLA website photos were first seen by Ms. Holley's counsel while Dr. Festekjian was testifying, 2560 L. 20-2561 L. 9. No foundation was laid concerning the nature of the surgeries nor the

patient goals or expectations, and admission was inappropriate due to the lack of foundation and prior disclosure.

It is common practice to include documents in exhibit notebooks for convenience sake, and not for purposes of admission. That does not make such materials admissible. The admission of the medical information from a Journal that the same expert said was not a reliable authority, 1944 L. 9-14, was error. Dr. Baker did not state that he relied upon the journal in this case. The requirements of 803(18), C.R.E. were not satisfied.

“Standard of Care” Phrase Prohibition Was Error

The Court both prohibited Ms. Holley from using the phrase “standard of care”, and struck expert testimony mentioning the phrase “standard of care”. The argument that the phrase “can be” misleading is bogus at best. The argument is controverted by Dr. Huang’s including it in a specially crafted jury instruction. It is a well known, widely utilized and accepted term. Usage of the phrase “standard of care” is not objectionable. Prohibiting its use and striking testimony utilizing it was an abuse of discretion, and undermined expert testimony and credibility.

Juror Questions Improperly Declined

Dr. Pousti flew in from California, and it would have been extremely difficult, and certainly impractical to have recalled him. The Court would not have allowed further testimony by Dr. Pousti in any event. As to Dr. Festekjian, an offer of proof would have been to no avail.

Jury Instruction Errors

Instruction 7

An unsuccessful attempt to present negligence in documentation evidence hardly justifies an inappropriate instruction. A battery claim was not tried, and the evidence did not justify a battery affirmative defense instruction. Whether “express” or “implied” consent was given was **not** in issue.

Rather whether or not the consent given was an “informed” consent was the issue. Dr. Huang confused and misled the jury by insisting on an inappropriate instruction, and misconstrued the applicable law. The instruction error was compounded by the Court reading the erroneous “express or implied” instruction to the jury during trial, Monday morning of the second week of trial the court permitted counsel to make mini statements of what the evidence had shown. The defense objected and moved for a

mistrial, 1821 – L. 2 - to 1824 L. 11, as a result of Ms. Holley’s statement that there should have been a written informed consent. 1816 L. 22-24. The Court then referred to the statements by Ms. Holley and erroneously instructed the jury using the battery affirmative defense language, 1825 L. 13-21, thereby exacerbating the error, undermining the effectiveness of Ms. Holley’s counsel by criticizing the statement made by her counsel which was supported by expert testimony, to the prejudice of Ms. Holley.

Instruction 10

During trial, when Ms. Holley’s counsel or experts used the phrase “**standard of care**”, the Court either sustained an objection or struck testimony, to the significant prejudice of Ms. Holley. Using the phrase in an instruction (proffered by Dr. Huang) proves the error, and could only have confused the jury as to what is meant by it when experts were not allowed to use or define it, and the jury instructions did not define it. Dr. Huang disregards her own objection, that it was misleading, gave a false impression, and a variety of care can be reasonable, acceptable and appropriate. 1376 L. 18-24.

The second paragraph of Instruction 10 inappropriately created an evidentiary presumption, and highlighted and emphasized “habit” testimony, without any basis in law therefore.

Instruction 11

An informed consent determination must be based upon communications leading to obtaining patient consent, irrespective of surgical outcome. The issue is not whether CJI 15:4 correctly states the law relative to other types of negligence. Rather, where an undisclosed risk associated with a procedure occurs, then the jury “**must find that the defendant negligently failed to obtain the plaintiff’s informed consent.**” CJI 15:13.

Pursuant to *Blades v. Defoe* 666 2d 1126, 1129, 1130 (Colo. Ap1983)(rev’d on other grounds, 704 P.2d 317(Colo. 1985), once the plaintiff presents evidence of a defendant’s failure to inform of inherent risks, then “the burden shifts to the physician to show that his failure to disclose conformed with community standards.” *Id.* at 1130. In this case, CJI 15:13 should have been given, as Dr. Huang herself had no recollection of any discussions with Ms. Holley the morning of surgery, 1439 L. 18 – 1441 L. 1. The only expert she called at trial, Dr. Baker, admitted that he did not know if Dr. Huang had any recollection of the key time segment when the surgical

change was brought up by Dr. Huang in the pre-op holding area. 1999 L. 8-13. 8-13. Dr. Baker testified that he would not want to express an opinion until he knows whether or not Dr. Huang recalled the preop holding area events. 1999 L. 14-17. He testified that he **did not** have enough evidence to express an opinion about whether or not Dr. Huang acted as a reasonable and careful surgeon. 2044 L. 20 – 2045 L. 1.

Unfortunately, Ms. Holley's cross was otherwise prejudicially limited by the Court. See for example 1999 L 18-24, 2006 L. 15-20.

Verdict Forms and Carrying Instructions

The trial Court is required to use stock instructions. *Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.* 117 P.3d 60, 70 (Colo. Ap2004). Dr. Huang has failed to show any valid reason for changing the pattern language. The pattern language objectively and appropriately set forth the jury's task. The verdict forms and carrying instructions attempted to summarize the issues in a way that was favorable to Dr. Huang, instead of serving their intended objective purpose. If Dr. Huang had not thought that these modifications would be favorable to her, she would not have gone to the substantial effort to modify them. The language artfully crafted by Dr. Huang focused the jury on the language crafted by Dr. Huang, instead of

requiring consideration all of the instructions in arriving at a verdict. The language further misstates applicable law, including as set forth in CJI 15:13 which was tendered by Ms. Holley, (324-351) at 338. The modified language circumvented the jury from considering all of the jury instructions in arriving at its verdict, and the burden shifting requirement as set forth in *Blades, Id.* at 1129, 1130. In a last ditch effort, Ms. Holley unsuccessfully attempted to seek an addition to the language, knowing that the Court was most certainly going to give those tendered by Dr. Huang, by adding that Ms. Holley should have been given a reasonable period of time to consider the procedure. 2137 L. 7-18.

As to 15:13, Dr. Baker testified that the periareolar approach (used by Dr. Huang on the right breast)⁷ is associated with the highest rates nipple sensation changes, 2012 L. 20- 2013 L. 1. Dr. Baker testified that the risk of permanent alteration in nipple sensitivity with the inframammary approach was 3 percent (left breast procedure), but with the periareolar approach (right breast procedure) it increased to 5 percent, a 66 percent increase in the risk of permanent nipple sensitivity. P. 2014 L. 9 – 2016 L. 2. Dr. Baker

⁷ The right breast incision was both circum and peri areolar, the latter being deeper. 2013 L. 12-23.

did not know what happened in this case relative to tissue removal. 2017 L. 5-13.

Dr. Baker testified that a reasonable and careful plastic surgeon should tell a patient considering a periareolar incision that the incision has a higher risk of loss of sensation around the nipple or areola. 2019 L. 1-11. At 2024 L.21 - 2027 L.10; 2030 L. 3- 21. (Reasonable and careful physician should tell a patient that by placing an implant when performing a mastopexy there is greater risk of areola spreading, a well known complication). There is no evidence in this case that Dr. Huang so informed Ms. Holley. Dr. Huang claimed that the risk of sensation loss “is the same regardless of the incision used. 1473:3-12.” Brief P. 3 (See 1473 L. 20 – P. 1474 L. 12). Most probably, Ms. Holley was so informed. Thus in all probability Dr. Huang failed to advise Ms. Holley of the increased risk as a reasonable and careful surgeon should have, and as her own expert Dr. Baker indicated a surgeon should do. Dr. Huang thus failed to satisfy the burden of production and CJI 15:13 should have been given as tendered by Ms. Holley.

Theory of the Case Instruction

Ms. Holley first tendered her statement or theory of the case language on March 10, 2010. 326. Ms. Holley's statement of her case was then again submitted as part of the instructions on which the parties could not agree. 431.

Instruction 2:1 given by the Court was essentially Dr. Huang's version of Ms. Holley's theory of the case.⁸ It referred to a "mastopexy" and to "mastopexy incision". It refers to the mastopexy as including an incision being made around the areola used to place an implant for augmentation, and makes no reference to a lift. 442.

The instruction given, as drafted by Dr. Huang, failed to appropriately address Ms. Holley not understanding the greater risks and complications, including of areola spreading, nerve damage, and sensation loss.

Causation Instruction

Dr. Huang denied that the more invasive right breast surgery created any greater risk of harm, thereby contending that the right breast complications were unrelated to the changed surgery. This implicated other

⁸ The Court modified the damages statement at 805, L. 3-13. The instruction read to the jury at the start of trial differed from that. See 818-819.

causes of the complications, and the causation instruction given was inadequate.

Foreseeability Instruction

Ms. Holley was within the zone of danger of increased complications caused by the changed surgery on her right breast, and this instruction should have been given.

Informed Consent Instruction

The tendered instruction more specifically describes the surgical procedures performed, and the differences on the right breast from the earlier consented procedure, and addresses the issues relative to the change in procedure and the reasonableness of different procedures. It should have been given instead of the instruction prepared by Dr. Huang. 453

Instruction Regarding Substantial/Specific Risks

The tendered instruction was particularly important as Dr. Huang testified that the risks of the surgery performed on the right breast were the same as for the planned procedure, contrary to her own expert's opinions.

Thin Skull Instruction

Dr. Huang raised issues about Ms. Holley's pre-existing frailties, ergo splayed ribs, 1742 L. 4-11, her right breast was a little droopier, and her right

nipple was a little larger than her left, 981 L. 17-20,. Thus CJI 6:7 was necessary.

Directing a Verdict on Certain Damages

Ms. Holley's testimony that she experienced symptoms on her right side not experienced on her left was sufficient to overcome a directed verdict, pursuant to C.R.E. 701 and C.J.I. 15:3.

CONCLUSION

Ms. Holley was erroneously deprived of a fair trial. The verdict should be vacated, and a new trial ordered.

Respectfully submitted this 10th day of January, 2011.

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<p>Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver, CO 80202</p>	
<p>Denver District Court The Honorable Michael A. Martinez 2008CV9245</p>	
<p>Plaintiff-Appellant/Cross-Appellee:</p> <p>Joan L. Holley.</p> <p>v.</p> <p>Defendant-Appellee/Cross-Appellant:</p> <p>Linda C. Huang, MD.</p>	

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<p>CERTIFICATE OF COMPLIANCE</p>	

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:

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s/Andrew T. Brake
Signature of attorney or party

CERTIFICATE OF SERVICE

I hereby certify that on the date hereof, a true and correct copy of

the foregoing pleading was to be served *via* Lexis/Nexis as indicated below, on the following, was to be electronically or otherwise served upon counsel named below; and a copy of this Reply Brief to be placed on a CD was to be delivered to the Clerk of this Court within the next few days, as the undersigned is out of state.

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