97132-3

NO. 50662-9-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DENISE REAGAN

Appellant,

v.

ST. ELMO NEWTON III, M.D.,

Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE DEREK VANDERWOOD

PETITION FOR REVIEW

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IDENTITY OF PETITIONER

This Petition for Review is filed on behalf of Denise Reagan, the Appellant.

COURT OF APPEALS DECISIONS

Ms. Reagan seeks review of the decision of the Court of Appeals in this matter filed on March 5, 2019. Ms. Reagan filed a motion to reconsider a portion of the Court's decision on March 22, 2019. This motion was denied by order dated March 29, 2019. The appendix contains copies of the decision of the Court of Appeals and the Order Denying Motion for Reconsideration.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Did a physician-patient relationship exist between Dr. Newton and Ms. Reagan?

2. Was Dr. Newton providing "health care", as that term has been defined by Washington's appellate courts, when Ms. Reagan was injured?

3. Should the Court determine if a physician-patient relationship is required to bring a claim under RCW 7.70?

4. Does *Dyer v. Trachtman* control in determining if a claim based on a forensic examiner's negligence is governed by RCW 7.70?

STATEMENT OF THE CASE

On June 13, 2013, Appellant Denise Reagan was injured in the course of her employment at Chuck's Produce in Vancouver, Washington. CP 11. A claim for workers compensation benefits was filed with the Department of Labor and Industries (hereinafter "the Department"). The claim was accepted.

The Department directed Ms. Reagan to attend a medical examination pursuant to RCW 51.36.070. The examination was conducted on May 13, 2014 in Tacoma. CP 131. The examination was a "panel" exam conducted by Respondent St. Elmo Newton, M.D. (an orthopedist) and a neurologist named Dennis Chong. CP 97-98; CP 131. Pursuant to WAC 296-23-362, Ms. Reagan's sister-in-law Lisa Wilson was present during the examination. CP 111-114; CP 136. After the examination was conducted, a 10-page report was written and signed by both physicians. CP 140.

The report signed by Dr. Newton stated that Appellant was instructed

> not to engage in any physical maneuvers beyond what she was able to tolerate or which she believed were beyond her limits or which could cause harm or injury. The examinee was instructed that the evaluation could be stopped at any time and not to allow the evaluation to continue if it caused pain.

CP 131.

Dr, Newton testified that both examiners, as well as an employee of the company that arranges the exam, tell examinees to inform the examiners if the exam gets painful. CP 89. Prior to the start of the examination, Ms. Reagan was given a two-page form to fill out. CP 96. She indicated she had had a surgery on her left hip. She informed Dr. Chong during the pre-examination interview that the surgery occurred in 2008. CP 98; see also, CP 133. Ms. Reagan also informed the examiners she was experiencing pain to the area of her left hip that day. CP 116.

Ms. Reagan took Dr. Newton's discovery deposition on July 21, 2016. CP 24. After he had examined Ms. Reagan's back, Dr. Newton asked Dr. Chong if there was anything else Dr. Newton needed to do. Dr. Chong responded that Dr. Newton needed to examine Ms. Reagan's lower extremities. Ms. Reagan was instructed to lie down on the examination table. CP 110.

Dr. Newton asked Ms. Reagan to lift her left leg as high as she could, and Ms. Reagan complied. She testified Respondent asked

> "Is that as far as you can go?" I said, "Yes. I have a previous injury. It limits my movement in my hip. [Dr. Newton] said, "If you take your own hand and pull your knee up can you go any further?" And I said, "No."

CP 110.

Ms. Reagan testified that Dr. Newton then

> Turned my leg out with his hand to the side, and he took it as far as it would – I could go, and I said, "That's as far as I can go. I have a previous injury. I can't go any farther than that." And then he pushed my leg all the way down, and I screamed. And he said, "That was the reaction I was looking for."

CP 110.

The examiners announced the exam was over and left the room. CP 110.

Within two weeks of the incident, Lisa Wilson wrote a statement of what she observed. CP 111. She wrote that after Ms. Reagan lay down on the exam table, Dr. Newton raised Ms. Reagan's knee toward her chest. CP 113. He then extended Ms. Reagan's knee

> Out to the left while still bent upward, and again [Ms. Reagan] said "That's as far as it goes" and *that he was hurting her.*

CP 113-114 (emphasis added).

Ms. Wilson wrote that Dr. Newton then "yanked" Ms. Reagan's knee hard and that Appellant yelled in agony. CP 114.

On January 21, 2015, Ms. Reagan underwent a subsequent medical examination ordered by the Department. CP 121. The examination was conducted by Bruce Blackstone, MD. *Id.* Dr. Blackstone wrote a report of his findings, his examination, as well as his

review of Ms. Reagan's medical records. CP 121-127. On page 6 of his report, Dr. Blackstone wrote that he

> agrees with [Ms. Reagan's] treating physicians, who have stated that her acute onset of left hip that occurred during the IME of May 13, 2014, was an aggravation of pre-existing arthritis . . .

CP 126.

Mark Colville, MD, was one of Ms. Reagan's treating physicians. In a chart note dated August 22, 2014, Dr. Colville wrote that the acute onset of pain to Appellant's left hip was due to Dr. Newton's manipulation, and the manipulation aggravated her preexisting osteoarthritic condition in the hip. CP 142.

In his discovery deposition, Dr. Newton testified to the following regarding his role as a physician performing independent medical examinations:

> **Q:** When you do these exams, can you just take me through what it is you say to an examinee? Explain the procedure.
>
> **A:** Okay. The examinee is placed into the examining room by someone who works for Examworks, explains to them what's going to happen, explains that these doctors are not your doctors. You don't have any relationship with them.

CP 88.

. . .

Q: And do you talk about – do you explain the examination process to the examinee?

A: Yes. I explain why I'm there, what is happening, we're not your doctors, we're here for usually it's claim closure, and we have to take measurements.

CP 91.

. . .

Q: And in terms of explaining how this examination differs from a personal doctor's visit as it says in the highlighted part, can you walk me through what you say then?

A: We are not your treating doctors.

Q: And from your perspective, what's the purpose of telling the examinee that?

A: I want them to know that, that we're there as people who take measurements, observe, report.

Q: Do you advise examinees that what's going to occur during the examination is not medical treatment?

[Respondent's counsel]: I'm going to object to the form of the question.

A: We don't offer treatment.

Q: (By Mr. Colven) Right. So my question is, do you tell the examinees that, that you're not there to offer treatment?

A: We tell them what we are there for.

> **Q:** So you may not specifically mention that you are not there to offer treatment. Am I hearing that right?
>
> **A:** It's implied certainly and inferred I think, because tell them why we're there. It does not include anything about treatment.

CP 92.

Dr. Chong testified concerning his role as a physician performing medical examinations:

> **A:** So my typical practice is to let the examinee know that although I do see patients like him or her, this is a request for a one-time evaluation and because it is a one-time evaluation I am not permitted to be his or her treating physician and therefore this is a specific examination as requested by whoever referred him or her and the purpose is to respond to questions from the referral source.
>
> **Q:** And again in your personal experience conducting these exams, do you consider that when you're conducting one of these exams that you are establishing a physician/patient relationship with the examinee?
>
> **A:** Absolutely not. And I also then complete my preamble by informing them that I apologize that because I'm not permitted to be their treating physician, I'm not permitted to provide any diagnosis or treatment recommendations.

CP 105-106.

Dr. Newton also testified regarding statements made to Ms. Reagan concerning pain she might experience during the examination:

Q: When you do these exams, can you just take me through what it is you say to an examine? Explain the procedure.

A: Okay. The examinee is placed into the examining room by someone who works for Examworks, explains to them what's going to happen, explains that these doctors are not your doctors. You don't have any relationship with them. Tell them if it's hurting.

CP 88.

. . .

Q: So the first part where you're talking about explaining that you're not the examinee's doctor and there's no relationship and say if something is hurting, is that something – I want to make sure I understand – that you typically tell the examinee or somebody else does?

A: Well, both of us do. The first person tells them, if this gets painful tell them. And then we tell them also.

CP 89.

. . .

Q: And to the best of your ability can you just pretend I'm an examinee and just tell me what you would say to me with respect to explaining the process.

A: You're here for me to examine you about an injury you had, and give a date. And I'm going to do a lot of measurements, make a report. It takes two weeks for the report to get in. I go over again don't do anything that hurts. That's typically what happens.

CP 91-92.

When asked if the admonitions to examinees were given to Ms. Reagan, Dr. Newton referenced the first page of his report, which read in relevant part as follows:

> The Claimant was asked at the time of the examination not to engage in any physical maneuvers beyond what she was able to tolerate or which she believed were beyond her limits or which could cause injury. The examinee was instructed that the evaluation could be stopped at any time and not to allow the evaluation to continue if it caused pain.

CP 90; see also CP 131.

ARGUMENT

I. Introduction.

The Court of Appeals held that Dr. Newton's examination was "health care" under RCW 7.70.010, et. seq., the medical malpractice statute. The Court of Appeals also held that Ms. Reagan was Dr. Newton's patient. Both decisions are contrary to the testimony of Dr. Newton and Dr. Chong, the only medical witnesses whose testimony is in the record. The decision that Ms. Reagan was Dr. Newton's patient is contrary to the arguments advanced by both parties. The decision that Dr. Newton was rendering "health care" is contrary to the long-used definition and interpretation of that term, as used by the appellate courts of Washington in analyzing the medical malpractice statute. The decision erroneously

decides an unresolved question posed by this court, namely whether a "physician-patient relationship is required to give rise to a claim for medical malpractice." *Paetsch v. Spokane Dermatology Clinic, PS,* 182 Wn.2d 842, 850, 348 P.3d 389 (2015). Both decisions conflict with decisions of the Supreme Court and the Court of Appeals. The issue of whether a physician-patient relationship is required to give rise to claims for medical malpractice involves a matter of substantial public interest that should be determined by this Court. The Supreme Court should therefore grant review. RAP 13.4(b)(1), (2) and (4).

II. No Physician-Patient Relationship Existed Between Ms. Reagan and Dr. Newton.

The parties agreed that no physician-patient relationship existed between Ms. Reagan and Dr. Newton. The evidence supported that conclusion. Ms. Reagan was sent to the examination pursuant to a statute that allows the Department of Labor and Industries to send a worker to a medical provider of its choice. When the Department so directs the worker, the worker "shall" attend. RCW 51.32.110(1). Unlike what transpires when "health care" is rendered, no "health care provider" refers a worker to an RCW 51.32.110(1) examination. In a state-funded Washington workers compensation claim, the referral is made by a claims' manager – a non-health care provider -- who works for the Department.

The claims manager, and not a health care provider, decides who the examiner will be. RCW 51.32.055(4). No doctor-patient privilege exists. RCW 51.04.050. The relationship between examiner and examinee is often adversarial. See, e.g., *Dyer v. Trachtman*, 470 Mich. 45, 51, 679 NW2d 311 (2004).

The medical evidence before the Court of Appeals regarding whether a doctor-patient relationship exists when conducting a medical examination from Dr. Newton and Dr. Chong. Dr. Newton and Dr. Chong are practicing physicians; Dr. Newton has practiced medicine for "47, 48 years." CP 203.

A. "We are not your doctors". Dr. Newton, CP 91
B. "We are not your treating doctors." Dr. Newton, CP 92
C. "We don't offer treatment". Dr. Newton, CP 92
D. "It [the fact treatment is not being rendered] is implied certainly and inferred . . . It [the examination] does not include anything about treatment." Dr. Newton, CP 92
E. "I am not permitted to be his or her treating physician." Dr. Chong, CP 105
F. I am "absolutely not" . . . establishing a physician/patient relationship with the examinee. Dr. Chong, CP 106
G. "I'm not permitted to provide any diagnosis or treatment recommendations." Dr. Chong, CP 106
H. "You don't have any relationship with" the examiners. Dr. Chong, CP 88

The record clearly established that Dr. Newton was not Ms. Reagan's doctor, and that she was not his patient. Accordingly, no doctor-patient relationship existed between the two.

III. Dr. Newton Was Not Providing Health Care When Ms Reagan

Was Injured.

Enacted in 1976, Washington's medical malpractice statute "pre-empted" all tort and contract claims related to health care. RCW 7.70.010. The legislative intent described in RCW 7.70.010 was to modify "certain substantive and procedural aspects of all civil actions and causes of actions . . . for damages for injury occurring *as a result of health care* . . ." (emphasis added). "Statutes such as the medical malpractice act that are in derogation of the common law must be construed narrowly." *Sherman v. Kissinger,* 146 Wn.App. 855, 865-66, 195 P.3d 539 (2008). The words of a statute must be construed in accordance with their ordinary and common meaning unless they have acquired technical meaning or unless a definite meaning in apparent or indicated by the context of the words. *State v. Rice*, 116 Wn.App. 96, 100, 64 P.3d 651 (2003).

The statute does not define "health care". *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001). When no statutory definition is provided, words in a statute should be given their common meaning, which may be determined by referring to a dictionary. *Smith, Inc. v. City of Walla Walla*, 148 Wn.2d. 835, 842-43, 64 P.3d 15 (2003). (citations omitted). The long-adopted definition of "health care" has remained unchanged since *Estate of Sly* v. *Linville,* 75 Wn.App. 431, 878 P.2d 1241 (1994):

> The Court of Appeals has defined the term to mean " 'the process in which [the physician] was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff *as his patient.*' " *Estate of Sly v. Linville*, 75 Wn.App. 431, 439, 878 P.2d 1241 (1994) (*quoting Tighe v. Ginsberg*, 146 A.D. 268, 271, 540 N.Y.S. 99 (1989)). This is consistent with a common dictionary definition. *Berger v. Sonneland,* 144 Wn.2d 91, 109, 26 P.3d 257 (2001) (quoting The American Heritage Dictionary 833 (3d ed. 1992)).

Beggs v. Dept. of Social & Health Services, 171 Wn.2d. 69, 79, 247 P.3d 421 (2011) (emphasis added).

RCW 7.70.020(1) lists the types of health care providers covered by the medical malpractice statute. This "broad definition" of providers is evidence of the "legislature's intent to impose liability beyond the context of a physician-patient relationship." *Daly v. United States*, 946 F.2d. 1467, 1469-70 (1991). Each of those providers must be a person "licensed by this state to *provide health care or related services* . . ." RCW 7.70.020(1) (emphasis added). The dictionary definition of "provide" in this context is "supply something for sustenance or support." Webster's Third New International Dictionary 1827 (2002). The dictionary definition of service or services in this context is "an act done for the benefit . . . of another." Webster's Third New International Dictionary 2075 (2002). These are common-sense definitions in the context of medical care. They are consistent with a health care provider-health care recipient relationship.

For a claim brought under RCW 7.70 et. seq., a "traditional" health care provider–health care recipient relationship is not required so long as the health care provider is rendering treatment/health care in the delivery of health care services when the negligence occurs. This is the key distinction missed by the Court of Appeals. See page 12 of Court of Appeals' decision. Ms. Reagan was not a "patient" of Dr. Newton's because (a) there was no doctor-patient relationship, and (b) he – by his and Dr. Chong's testimony – was not providing "health care" as that term has been defined by our appellate courts and the dictionary definition relied upon by this Court.[1] In contrast, while health care providers such as opticians, pharmacists, and paramedics (a) do not have patients, they are (b) providing "health care" to the individuals to whom they serve, within each of those individuals' network of care.

The Court of Appeals has recognized that regardless of a health care provider's area of practice, health care is something that is provided for the benefit of the patient. "When the conduct complained of is part of the *health care provider's efforts to treat and care for a patient's needs*, the injury occurs as a result of health care and the claim falls under chapter 7.70 RCW." *Reed v. AMN Health Care*, 148 Wn.App. 264, 269, 225 P.3d

[1] "[t]he prevention, treatment, management of illness and the preservation of mental and physical well-being through the services offered by the medical and allied health professions." *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001).

1012 (2008). (emphasis added). A health care provider's area of practice does not change what constitutes "health care". Health care is provided for the benefit of the health care recipient, to address the needs of that recipient. The evidence in the record contains nothing to suggest Dr. Newton provided health care to Ms. Reagan.

For 25 years, Washington appellate courts have adhered to the same definition of "health care" in interpreting the medical malpractice statute. That definition has consistently been one requiring that the care be directed toward and be for the benefit of the patient. That health care is directed to and for the benefit for a patient is consistent with the "common meaning" of the term. *Smith, Inc. v. City of Walla Walla, supra* 148 Wn.2d. at 842-43, 64 P.3d 15 (2003). The definition is also consistent with the dictionary definition of care: "responsibility for or attention to safety and well-being (under a doctor's ~)" Webster's Third New International Dictionary 338 (3rd ed. 1966).

In pointing out that some health care providers under RCW 7.70.020(1) do not establish physician-patient relationships (i.e., opticians, pharmacists, and paramedics), the Court of Appeals noted that those providers nonetheless "serve" the people to whom they provide health care. *Eelbode v. Chec.Med.Ctrs., Inc.*, 97 Wn.App. 462, 467, 984 P.2d 436 (1999). Service is the essence of what any health care provider gives when

he or she provides health care. Dr. Newton was not serving Ms. Reagan during the examination. He was serving the Department of Labor and Industries.

The service provided by a worker's compensation examiner is explicitly and exclusively for the benefit of the entity that hired the examiner. There is nothing therapeutic about the actions of the examiner. The fact the examiner might very well testify against the interests of the examinee in a future hearing or trial underscores the examination is forensic in nature, not for the purposes of health care. The Court of Appeals' decision that an independent medical examination is "health care" conflicts with every Supreme Court and Court of Appeals' decision that has analyzed the issue. See, e.g., *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001); *Reed v. AMN Health Care*, 148 Wn.App. 264, 269, 225 P.3d 1012 (2008), and *Branom v. State*, 94 Wn.App. 964, 974 P.2d 335 (1999)

IV. This Court Should Consider Determining If a Physician-Patient Relationship is Required to Bring a Claim under RCW 7.70

In *Paetsch v. Spokane Dermatology Clinic, PS,* 182 Wn.2d 842, 850, 348 P.3d 389 (2015), this Court pointed out that it has not yet decided the issue of whether a doctor-patient relationship is required to bring a cause of action for medical malpractice. In so doing, it expressed no

opinion as to the Court of Appeals decision in *Eelbode v. Chec.Med.Ctrs., Inc.*, 97 Wn.App. 462, 984 P.2d 436 (1999). *Paetsch.* 182 Wn.2d at 850, footnote 6.

In *Eelbode,* a physical therapist performed a pre-employment physical for an individual seeking work with Travelers Inn. The plaintiff alleged the physical therapist improperly administered a lifting test, causing the plaintiff injuries. The Court of Appeals held the plaintiff established a cause of action under RCW 7.70.030(1). The Court relied upon a Ninth Circuit Court of Appeals holding that an allegation of medical malpractice against a physician performing a pre-employment examination was cognizable under RCW 7.70. *Eelbode*, 97 Wn.App. at 468 (citing *Daly v. United States*, 946 F.2d 1467, 1469 (1991)).

Ms. Reagan submits the issue of whether a doctor-patient relationship is required under RCW 7.70 involves an issue of substantial public interest that should be determined by this Court. Therefore, the Court should accept review under RAP 13.4(b)(4). In addition, to the extent the Court of Appeals decision in *Eelbode* could be in conflict with the Supreme Court, Ms. Reagan asks the Court to accept review under RAP 13.4(b)(1).

V. *Dyer v. Trachtman* is Not Controlling in Determining If a Claim Based on a Forensic Exaniner's Negligence is Governed by RCW 7.70.

The Court of Appeals relied upon *Dyer v. Trachtman*, 470 Mich. 45, 679 N.W.2d 311 (2004), for the proposition that a "limited" doctor-patient relationship exists in the context of forensic examination such as the one conducted in this case. The opinion is not helpful to an analysis of a forensic examiner's liability under Washington's medical malpractice statute. The court in *Dyer* framed the issue as whether a person injured during a forensic examination has a cause of action in ordinary negligence or medical malpractice. The court held that because the actions of the physician conducting the exam raised issues of medical judgment, the claim was one of medical malpractice.

The holding of *Dyer* that a limited relationship exists between examiner and examinee is of little help in this case. The opinion does not state that Michigan has enacted a statute that pre-empts common law medical malpractice claims. A review of Michigan statutes indicates that no such enactment has occurred. MCL § 600.2912a.- h. Furthermore, since *Dyer*, the Michigan Court of Appeals has rejected the notion that an independent medical examiner provides "care" to an examinee. In *Paul v. Glendale Neurological Associates*, 304 Mich.App. 357, 848 N.W.2d 400

(2014), the plaintiff sued under Michigan's Medical Records Act to obtain records obtained by an examiner in connection with the plaintiff's workers compensation medical examination. The plaintiff argued that because the examiner participated in her "care", she was entitled to the records. The Court disagreed:

> [w]e do not find "the process of caring for the the patient's health" to be consistent with the limited nature of a physician's duty in an IME context. . . We decline to adopt plaintiff's proposed definition of "caring for the patient's health" as meaning, essentially, any situation where a patient, for whatever reason, undergoes an examination by a medical professional. Read in context, it is clear that this phrase refers to records maintained in the course of providing some sort of diagnostic or treatment service for the treatment and betterment of the patient.

Paul, 304 Mich.App. at 365-66, 848 N.W.2d at 404-05 (citations omitted).

The Court of Appeals failed to take into account that Michigan medical malpractice claims have not been pre-empted by a statute that must be strictly construed. See, *Sherman v. Kissinger, supra,* 146 Wn.App. at 865-66 (2008). Appellate cases that have interpreted Washington's medical malpractice statute have consistently defined health care as being for the benefit of the patient. Furthermore, the Court of Appeals did not note that Michigan's Court of Appeals has interpreted "health care" in precisely the manner Ms. Reagan contends is consistent

with both RCW 7.70 and how our courts have defined that term. Accordingly, the Court of Appeals' reliance on *Dyer* was erroneous.

CONCLUSION

The Supreme Court should take review of this matter. It should then reverse the decision of the Court of Appeals, and hold there is no doctor-patient relationship in an independent medical examination, and that such an examination is not "health care" under Washington's medical malpractice statute. The Court should also hold that Ms. Reagan's claim is cognizable as she originally pled it, as one for ordinary negligence, and remand the matter to the Superior Court for proceedings consistent with the decision.

DATED this 29th day of April, 2019.

BRUCE COLVEN WSB #18708
Of Attorneys for Denise Reagan

APPENDICES

Court of Appeals Decision, filed March 5, 2019.

Order Denying Motion for Reconsideration, filed March 29, 2019.

Filed
Washington State
Court of Appeals
Division Two

March 5, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DENISE REAGAN, Appellant, v. ST. ELMO NEWTON, III, M.D., Respondent.	No. 50662-9-II PUBLISHED OPINION

MAXA, C.J. – Denise Reagan appeals the trial court's dismissal on summary judgment of a medical malpractice lawsuit she filed against Dr. St. Elmo Newton. Reagan alleges that Dr. Newton injured her while conducting an independent medical examination (IME) on her. The trial court granted summary judgment in favor of Dr. Newton because Reagan did not present expert testimony that Dr. Newton violated the standard of care as required to maintain a medical malpractice action under chapter 7.70 RCW. The court also disregarded without comment Reagan's medical battery claim that she had not pleaded but had raised in opposition to summary judgment.

RCW 7.70.010 states that the substantive and procedural requirements of chapter 7.70 RCW, the medical malpractice statute, apply to actions regarding injuries "occurring as a result of health care." RCW 7.70.030, which establishes the grounds for a medical malpractice claim, also applies to injuries "occurring as the result of health care." The primary question here is whether a physical examination during an IME that causes injury to the person being examined

constitutes "health care" governed by chapter 7.70 RCW. In addition, a question exists whether a person injured during an IME also can maintain a common law medical battery claim against the IME physician.

We hold that (1) a physical examination during an IME that causes injury to the person being examined constitutes "health care" under RCW 7.70.010 and therefore Reagan was required to present expert testimony regarding breach of the standard of care, (2) the trial court properly dismissed Reagan's medical malpractice claim against Dr. Newton because she did not present expert testimony addressing the applicable standard of care or whether Dr. Newton had breached that standard of care, and (3) Reagan can maintain a claim for medical battery under CR 15(b) even though she did not plead that claim and Reagan presented evidence in opposition to summary judgment that created a genuine issue of material fact regarding Dr. Newton's liability for medical battery.

Accordingly, we affirm the trial court's dismissal of Reagan's medical malpractice claim, but we reverse the trial court's dismissal of Reagan's medical battery claim and remand for further proceedings.

FACTS

In June 2013, Reagan injured her back while in the course of her employment. She filed a workers' compensation claim with the Department of Labor and Industries (DLI). DLI accepted Reagan's claim for injuries to her thoracic and cervical regions.

DLI subsequently requested that Reagan undergo an IME. The IME's purpose was to determine Reagan's current work restrictions, if she could return to work, if her treatment had concluded, and whether she had a permanent impairment as a result of the injury. DLI also requested that the IME provider make treatment recommendations, including stating whether

treatment was curative or rehabilitative, the goals of treatment, and the estimated length and prognosis of treatment.

In May 2014, Dr. Newton, an orthopedic physician, and Dr. Dennis Chong, a physiatrist, performed Reagan's IME. Reagan's sister-in-law, Lisa Wilson, accompanied her to the examination and remained in the room throughout the exam.

Reagan told Dr. Newton that she had a previous injury to her left hip. During his physical examination, Dr. Newton had Reagan lie on her back. He then bent her left knee toward her chest and rotated her bent knee from the hip joint. Reagan told Dr. Newton that her hip would not rotate any further because of her previous injury, but Dr. Newton pushed her leg all the way down. Reagan screamed in pain, and Dr. Newton stated, "That was the reaction I was looking for." Clerk's Papers (CP) at 110. Wilson also recalls Reagan telling Dr. Newton "that's as far as it goes" before he "yanked" on her leg, Regan crying out in pain, and Dr. Newton commenting about Reagan's reaction. CP at 113-114. As a result of this maneuver, Reagan experienced excruciating pain in her hip. Wilson, who drove Reagan home, stated that Reagan continued to experience pain and discomfort after the IME concluded.

Reagan subsequently filed a lawsuit against Dr. Newton in which she alleged that his negligence in manipulating her hip during the IME caused her injury. The complaint requested a judgment against Dr. Newton for damages suffered as a result of his negligence. The complaint did not assert a claim for medical battery.

Dr. Newton moved for summary judgment on liability. Specifically, he claimed that Reagan had failed to present expert testimony required to support a claim under RCW 7.70.030(1) that he had breached the appropriate standard of care during his examination of Reagan.

Reagan opposed the summary judgment motion, claiming that chapter 7.70 RCW did not apply to her claim because Dr. Newton was not providing "heath care" during the IME. She also asserted in her brief that she could recover under a theory of medical battery.

Reagan submitted declarations from Dr. Bruce Blackstone, who saw her for a subsequent IME in January 2015, and from Dr. Mark Colville, who performed her original hip surgery. Dr. Blackstone characterized Reagan's "acute onset of left hip pain that occurred during the IME of May 13, 2014" as "an aggravation of pre-existing arthritis, which is actually attributable to her work-related injury suffered back in 2008." CP at 127-28. Dr. Colville also attributed the left hip pain to "the manipulation performed during her independent medical exam [of May 2014]," finding that it had "aggravated a preexisting osteoarthritic condition of the left hip." CP at 142. But neither physician offered any opinion regarding the appropriate standard of care or whether Dr. Newton followed that standard of care during the IME.

Dr. Newton's reply brief did not mention medical battery. But the parties addressed the claim on the merits during oral argument, and Dr. Newton did not argue that the trial court should not consider the medical battery claim because it had not been pleaded. The court did not address medical battery during argument or in its summary judgment order.

The trial court granted summary judgment in favor of Dr. Newton and dismissed Reagan's claims. Reagan appeals the trial court's summary judgment order.

ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Our review of a dismissal on summary judgment is de novo. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231, 393 P.3d 776 (2017). We review all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358,

368, 357 P.3d 1080 (2015). We may affirm an order granting summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 370; CR 56(c). A genuine issue of material fact exists if reasonable minds could disagree on the facts controlling the outcome of the case. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 864-65, 324 P.3d 763 (2014).

The party moving for summary judgment has the initial burden to show there is no genuine issue of material fact. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183, 401 P.3d 468 (2017). A moving defendant can meet this burden by showing that there is an absence of evidence to support the plaintiff's claim. *Id.* Once the defendant has made such a showing, the burden shifts to the plaintiff to present specific facts that show a genuine issue of material fact. *Id.* Summary judgment is appropriate if a plaintiff fails to show sufficient evidence to establish the existence of an essential element on which he or she will have the burden of proof at trial. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 179, 313 P.3d 408 (2013).

B. APPLICABILITY OF MEDICAL MALPRACTICE STATUTE

Reagan argues that the medical malpractice statute, chapter 7.70 RCW, does not apply here because an IME does not involve "health care." We disagree.

1. Legal Background

Chapter 7.70 RCW modified "certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring *as a result of health care*." RCW 7.70.010 (emphasis added). Chapter 7.70 RCW exclusively governs any action for damages based on an injury resulting from health care. *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 34, 384 P.3d 232 (2016).

Chapter 7.70 RCW does not define the phrase "health care." *Beggs v. Dept. of Soc. & Health Servs.*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011). RCW 7.70.020 defines "health care provider" to include not only physicians but also a wide variety of persons "licensed by this state to provide health care or related services." RCW 7.70.020(1).

To recover damages for "injury occurring *as the result of health care*," a plaintiff must establish at least one of three propositions:

> (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
> (2) That a health care provider promised the patient or his or her representative that the injury suffered would not occur;
> (3) That injury resulted from health care to which the patient or his or her representative did not consent.

RCW 7.70.030 (emphasis added).

For a damages claim based on a health care provider's failure to follow the accepted standard of care under RCW 7.70.030(1), a plaintiff must prove both that the health care provider "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider" and that such failure was a proximate cause of the plaintiff's injuries. RCW 7.70.040(1).

In a medical malpractice action, the applicable standard of care generally must be established by expert testimony. *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018). The expert testimony must establish what a reasonable medical provider would or would not have done under the circumstances, that the defendant failed to act in that manner, and that this failure caused the plaintiff's injuries. *Keck*, 184 Wn.2d at 371. If the plaintiff lacks expert testimony regarding one of the required elements, the defendant is entitled to summary judgment on liability. *Reyes*, 191 Wn.2d at 86.

2. IME as "Health Care"

The provisions of the medical malpractice statute apply only to injuries occurring as the result of "health care." RCW 7.70.010; RCW 7.70.030. The question here is whether a physician's physical examination during an IME that causes injury to the person being examined constitutes "health care."

a. Definition of "Health Care"

As noted above, chapter 7.70 RCW does not define the term "health care." *Beggs*, 171 Wn.2d at 79. Normally, we would engage in a statutory interpretation analysis to determine and give effect to the legislature's intent. *See Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014). However, the Supreme Court and several Court of Appeals decisions have adopted the following definition of "health care" for purposes of the medical malpractice statute: " '[T]he process in which [the physician] was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient.' " *Beggs*, 171 Wn.2d at 79 (second alteration in original) (quoting *Estate of Sly v. Linville*, 75 Wn. App. 431, 439, 878 P.2d 1241 (1994)); *see also Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001); *Branom v. State*, 94 Wn. App. 964, 969-70, 974 P.2d 335 (1999).

This definition is consistent with one dictionary's definition of "health care" as " '[t]he prevention, treatment, management of illness and the preservation of mental and physical well-being through the services offered by the medical and allied health professions.' " *Berger*, 144 Wn.2d at 109 (alteration in original) (quoting THE AMERICAN HERITAGE DICTIONARY 833 (3d ed. 1992)); *see also Beggs*, 171 Wn.2d at 79 (stating that the definition of "health care" the court adopted is consistent with "a common dictionary definition").

Courts have interpreted "injuries resulting from health care" under RCW 7.70.010 to encompass scenarios not involving traditional patient care. *Berger*, 144 Wn.2d at 110 (a physician's unauthorized disclosure of confidential patient information to the patient's ex-husband); *Branom*, 94 Wn. App. at 970-71 (financial and emotional distress injuries to parents arising from a physician's alleged failure to inform them of their infant's medical condition even though the physician did not treat the parents).

On the other hand, courts have declined to hold that other types of claims against physicians involved "injuries resulting from health care." *Young v. Savidge*, 155 Wn. App. 806, 821-23, 230 P.3d 222 (2010) (dentist's intentional misrepresentation regarding the composition of a crown he installed); *Estate of Sly*, 75 Wn. App. at 440 (physician's misrepresentation to a patient regarding his opinion of the quality of the care the patient had previously received from the physician's colleague).

b. Examining and Diagnosing

The first part of the definition of "health care" requires that the physician utilize his or her learned skills regarding examination, diagnosis, treatment, or care. *Beggs*, 171 Wn.2d at 79. Here, Dr. Newton was utilizing his medical skills to examine Reagan. His alleged negligence occurred during his physical examination of Reagan's hip. A physician's physical examination, even during an IME, falls squarely within the first part of the "health care" definition.

Reagan argues that an IME does not meet the definition of "health care" because an IME physician does not provide treatment or any services to the person undergoing the IME. Instead, the physician performs the IME on behalf of and for the benefit of DLI. Reagan points out that the interests of the worker and the IME examiner often are adversarial because the physician's duty is to DLI, not to the worker. However, providing treatment and patient care are only two of

the disjunctive aspects of "health care." Dr. Newton was engaged in another aspect – examination.

Reagan also argues that the medical malpractice statute is in derogation of the common law and must be construed narrowly, citing *Sherman v. Kissinger*, 146 Wn. App. 855, 865-66, 195 P.3d 539 (2008). But as noted above, we do not need to engage in statutory construction because the Supreme Court has adopted a definition of "health care." *Beggs*, 171 Wn.2d at 79.

We conclude that Dr. Newton's physical examination of Reagan during the IME satisfied the first part of the definition of "health care" under the medical malpractice statute.

c. Physician-Patient Relationship

The second part of the definition of "health care" requires that the physician's skillful services be provided to the plaintiff "as [the physician's] patient." *Beggs*, 171 Wn.2d at 79. Based on this language, Reagan argues that physician's conduct constitutes "health care" only if the person injured was the physician's patient. Because the parties acknowledge that Dr. Newton and Reagan had no traditional physician-patient relationship, Reagan claims that the medical malpractice statute is inapplicable to injuries occurring during the IME.

Reagan's interpretation of the phrase "as the [physician's] patient" in the definition of "health care" as requiring a "full" physician-patient relationship is inconsistent with case law applying RCW 7.70.030(1) to situations not involving such a relationship.

In *Eelbode v. Chec Medical Centers, Inc.*, the plaintiff filed a medical malpractice action against a physical therapist who allegedly injured him while conducting a pre-employment physical. 97 Wn. App. 462, 464-65, 984 P.2d 436 (1999). The defendant argued that a physician-patient relationship was required to subject a health-care practitioner to liability under the medical malpractice statute. *Id.* at 467. This court disagreed, holding that a claim of failure

to follow the accepted standard of care under RCW 7.70.030(1) does not require a physician-patient relationship. *Id.* The court noted that the weight of authority in other jurisdictions supported this conclusion. *Id.* at 468-69.

The court in *Eelbode* relied on a case from the Ninth Circuit Court of Appeals that applied Washington law, *Daly v. United States*, 946 F.2d 1467 (9th Cir. 1991). Like *Eelbode*, *Daly* involved a pre-employment physical examination. 946 F.2d at 1468. The issue was whether the examining physician had a duty to inform the plaintiff of abnormalities discovered during the examination in the absence of a physician-client relationship. *Id.* The court held that although the injured person must be a patient to assert a claim under RCW 7.70.030(2) and (3), there was no such requirement for a general negligence claim under RCW 7.70.030(1). *Id.* at 1469-70. The court refused to assume that Washington courts would create an exception to RCW 7.70.030(1) liability for pre-employment physicals.[1] *Id.* at 1470.

In *Judy v. Hanford Environmental Health Foundation*, Division Three of this court agreed with *Eelbode* and *Daly* and stated that the medical malpractice statute "extends malpractice liability beyond traditional physician-patient relationships." 106 Wn. App. 26, 37, 22 P.3d 810 (2001).

However, *Judy* demonstrates that there must be *some* type of direct connection between a physician and an injured person for RCW 7.70.030(1) liability to attach. In that case, an employer retained a physician to determine an employee's physical capacity to work in her position based on a functional capacity evaluation performed by another person. *Judy*, 106 Wn.

[1] Here, the issue is whether an IME physician is subject to the medical malpractice statute for injuries caused during an IME, and our holding is limited to that issue. We do not address whether an IME physician who fails to inform the person being examined of abnormalities discovered during the examination is subject to medical malpractice liability and we express no opinion on whether *Daly* was decided properly.

App. at 30. The employee filed a medical malpractice claim against the physician because he failed to advise her that he believed she lacked the physical capacity to work in her position. *Id.* at 31.

After noting the rule that no physician-patient relationship was required for RCW 7.70.030(1) liability, the court declined to impose medical malpractice liability on the physician because he did not conduct an examination or have any contact with the plaintiff. *Id.* at 37-39. The court stated:

> There can be no malpractice when there is not only no doctor-patient relationship, but no contact, no intent to diagnose, treat or otherwise benefit the patient, *no injury directly caused by the examination*, no failure to diagnose or notify the patient of an illness disclosed by the examination, and no dispute as to the accuracy of the reported results.

Id. at 39 (emphasis added).

Here, the IME was similar to the pre-employment physicals in *Eelbode* and *Daly*. As in those cases, the absence of a traditional physician-patient relationship between Dr. Newton and Reagan does not preclude the application of RCW 7.70.030(1). And unlike in *Judy*, Dr. Newton did have a connection with Reagan – he allegedly injured her during his examination.

Some courts in other jurisdictions have held that despite the absence of a traditional physician-patient relationship, an IME physician conducting an IME owes a duty not to injure the person being examined in the actual conduct of the physical examination and is subject to medical malpractice liability for such an injury. *E.g.*, *Dyer v. Trachtman*, 470 Mich. 45, 679 N.W.2d 311, 314-17 (2004); *Bazakos v. Lewis*, 12 N.Y.3d 631, 911 N.E.2d 847, 849-50 (2009); *Harris v. Kreutzer*, 271 Va. 188, 624 S.E.2d 24, 31-32 (2006).

The Michigan Supreme Court stated in *Dyer* that the relationship between the IME physician and the person being examined "is not the traditional one." 679 N.W.2d at 314. The court elaborated:

> It is a limited relationship. It does not involve the full panoply of the physician's typical responsibilities to diagnose and treat the examinee for medical conditions. . . . The limited relationship that we recognize imposes a duty on the IME physician to perform the examination in a manner not to cause physical harm to the examinee.

Id. at 314-15. We agree with this characterization and hold that a person being examined in an IME is the IME physician's "patient" with regard to injuries sustained in the physician examination.

Reagan makes several arguments against the rule stated in *Eelbode* that a physician-patient relationship is not required to assert a claim under RCW 7.70.030(1). First, she argues that the definition of "health care" clearly states that the plaintiff must be the physician's patient, and the meaning of "patient" as one in a physician-patient relationship is unambiguous. However, "patient" can have a generic meaning as someone who has an interaction with a health care provider without forming a traditional physician-patient relationship. *See* RCW 70.02.010(32) (defining "patient" for purposes of another statute as a person who receives heath care).

This generic meaning appears to be the way the term is used in the medical malpractice statute. As the court in *Eelbode* pointed out, the definition of "health care provider" in RCW 7.70.020(1) includes service providers that do not have formal relationships with the patient, including opticians, pharmacists, and paramedics. 97 Wn. App. at 467. Those providers would not be subject to liability under the medical malpractice statute under Reagan's position, making their inclusion in the definition of "health care provider" superfluous.

Second, Reagan argues that *Eelbode* is not controlling because the court did not expressly address the definition of "health care." However, the court unequivocally held that no physician-patient relationship was required for liability under RCW 7.70.030(1). *Id.* Because RCW 7.70.030 applies only to injuries caused by health care, the court necessarily held that "health care" does not require a physician-patient relationship.

Third, Reagan relies on *Paetsch v. Spokane Dermatology Clinic. PS*, 182 Wn.2d 842, 348 P.3d 389 (2015), and *Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016). In *Paetsch*, the Supreme Court noted that at common law, a plaintiff could not assert a medical malpractice claim absent a physician-patient relationship. 182 Wn.2d at 850. The court stated that some courts had "opined that the physician-patient relationship is no longer an element required to establish medical malpractice," citing *Eelbode* and *Judy*. *Id.* at 850 n.6. But the court stated that it did not need to decide the issue under the facts of that case. *Id.* at 850.

In *Volk*, the court again noted the common law rule and stated that a medical malpractice duty is owed to the physician's patient. 187 Wn.2d at 254. The court stated that in *Paetsch*, the court "previously declined to adopt the view that medical malpractice suits are available to nonpatient third parties against physicians." *Id.*

However, *Paetsch* and *Volk* involved a different issue than the one presented here. In *Paetsch*, the defendant was a doctor who had no contact with the plaintiff when she received treatment at a clinic that he owned. 182 Wn.2d at 845-47. In *Volk*, the plaintiffs were persons who filed a lawsuit against a psychiatrist to whom they had no connection for injuries and death caused by the psychiatrist's patient. 187 Wn.2d at 246, 250. The court in *Judy* held that a physician who had no contact with or connection to the plaintiff could not be liable under the medical malpractice statute. 106 Wn. App. at 39. But in *Eelbode*, *Daly*, and this case, the

plaintiffs actually were examined by the defendant even though no physician-patient relationship was formed.

Fourth, Reagan argues that an IME should not be considered "health care" because (1) there is no physician-patient confidentiality between the IME physician and an injured worker, (2) the physician sends his or her report to DLI and not to the worker's other health care providers, and (3) the physician may later testify against the interests of the worker. However, these factors demonstrate only that there is no physician-patient relationship between an IME physician and the person being examined. They do not answer whether a physician-patient relationship is necessary to assert a claim under RCW 7.70.030(1).

Reagan's arguments are not persuasive. In addition, her position would be detrimental to persons undergoing IMEs. As noted above, under the common law a person has no medical malpractice claim absent a physician-patient relationship. *Volk*, 187 Wn.2d at 254. Therefore, if the medical malpractice statute was inapplicable to IMEs, a person negligently injured by an IME physician's malpractice would have no remedy.

3. Summary

Dr. Newton utilized his medical skills to examine Reagan. Although Dr. Newton did not have a traditional physician-patient relationship with Reagan, Reagan was Dr. Newton's "patient" in the generic sense that he interacted with and examined her. And he had a limited relationship with her in that he had a duty not to injure her during his examination. Accordingly, we hold that Dr. Newton's IME involved "health care" and therefore that RCW 7.70.030(1) governed his liability.

C. SUFFICIENCY OF EXPERT TESTIMONY

Because the medical malpractice statute applies here, Reagan had the burden in opposition to summary judgment to present evidence establishing a genuine issue of fact that Dr. Newton failed to follow the accepted standard of care under RCW 7.70.030(1).[2] In addition, Reagan was required to present evidence regarding the accepted standard of care. *See* RCW 7.70.040(1); *Reyes*, 191 Wn.2d at 86. Reagan argues that the expert medical testimony from Dr. Blackstone and Dr. Colville was sufficient to avoid summary judgment. We disagree.

As noted above, breach of the applicable standard of care generally must be established through expert testimony. *Reyes*, 191 Wn.2d at 86. Both Dr. Blackstone and Dr. Colville opined that the acute onset of Reagan's left hip pain occurred as a result of Dr. Newton's manipulation of the hip during her May 2014 IME. But these opinions focused only on causation. Neither physician offered any opinion regarding the appropriate standard of care or whether Dr. Newton followed that standard of care during the IME. Therefore, Reagan's evidence was insufficient to sustain a claim under RCW 7.70.030(1) and RCW 7.70.040(1).

Accordingly, we hold that the trial court did not err in granting summary judgment to Dr. Newton under RCW 7.70.030(1) because Reagan did not provide the required expert testimony that Dr. Newton violated the accepted standard of care.

D. MEDICAL BATTERY CLAIM

Reagan argues that the trial court erred in dismissing her claim for medical battery because she presented sufficient evidence to support that claim. Dr. Newton argues that

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[2] In the trial court, Reagan argued that Dr. Newton also could be liable under RCW 7.70.030(2) and (3). However, she does not assign error to the trial court's dismissal of claims under those subsections and she does not argue on appeal that she has valid claims under those subsections. Therefore, we do not address such claims.

summary judgment was appropriate because Reagan did not plead battery or any intentional conduct in her complaint and because the statute of limitations bars the claim. We reject Dr. Newton's procedural arguments, and hold that Reagan presented evidence in opposition to summary judgment that created a genuine issue of material fact regarding Dr. Newton's liability for medical battery.

1. Legal Principles

Under existing case law, the medical malpractice statute does not supersede the common law cause of action for medical battery. *Bundrick v. Stewart*, 128 Wn. App. 11, 16-17, 114 P.3d 1204 (2005); *see also Young*, 155 Wn. App. at 821-23.[3] A battery is an intentional harmful or offensive bodily contact with another person. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 504, 325 P.3d 193 (2014). A person is liable for battery if he or she intends to cause a harmful or offensive contact and such a contact directly or indirectly results. *Id.* The intent element is satisfied if a defendant knows to a substantial certainty that his or her actions will result in the contact. In other words, the requisite intent for battery is to cause an offensive contact, not an injury. *Sutton*, 180 Wn. App. at 866.

A person commits battery only if the person receiving the contact has not consented. *See Kumar*, 180 Wn.2d at 505. Therefore, consent is a defense. *Morinaga v. Vue*, 85 Wn. App. 822,

[3] The holding in *Bundrick*, which this court cited with approval in *Young*, seems inconsistent with the language of RCW 7.70.010. That statute states that the medical malpractice statute applies to "all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care." The Supreme Court has stated, " '[W]henever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70.' " *Fast*, 187 Wn.2d at 34 (alteration in original) (quoting *Branom*, 94 Wn. App. at 969). These cases suggest that medical battery would fall within the medical malpractice statute if the claim arose from health care. But Dr. Newton does not argue that medical battery is not a viable claim apart from chapter 7.70 RCW. Therefore, we do not address this issue.

834, 935 P.2d 637 (1997). However, where the plaintiff consents to a medical procedure, limitations on that consent will be effective if the plaintiff communicates those limitations. *Bundrick*, 128 Wn. App. at 18.

2. Failure to Assert Claim in Complaint

Dr. Newton initially argues that Reagan's complaint failed to assert a medical battery claim. We agree.

Under CR 8(a), a complaint must contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader deems the pleader is entitled." This rule allows "notice pleading." *See Champagne v. Thurston County*, 163 Wn.2d 69, 84-87, 178 P.3d 936 (2008). However, the complaint still must adequately inform the defendant of the nature of the plaintiff's claims as well as the legal grounds upon which those claims rest. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469-70, 98 P.3d 827 (2004).

Here, Reagan's complaint alleged that "[d]uring the course of the examination, [Dr. Newton] manipulated plaintiff's hip in a manner that subsequently caused injury." CP at 2. The complaint requested a "judgment against [Dr. Newton] for all general and special damages suffered as a result of [his] *negligence*." CP at 2 (emphasis added). The complaint did not assert a claim for battery or any other intentional tort.

Reagan claims that the allegations in her complaint were sufficient to assert medical battery because the allegations were consistent with that claim. However, notice pleading under CR 8 does not allow a plaintiff to allege only the factual basis in its pleading, leaving the plaintiff unrestricted as to any particular legal theory. *See Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006); *Trask v. Butler*, 123 Wn.2d 835, 846, 872

P.2d 1080 (1994). A complaint is insufficient if it fails to give the defendant fair notice of the claims asserted. *Pac. Nw.*, 158 Wn.2d at 352.

Reagan asserted only a negligence claim in her complaint. We hold that the complaint language was insufficient to assert a medical battery claim.

3. Application of CR 15(b)

Reagan argues that even if she did not plead a medical battery claim, the battery claim was argued by consent of the parties and therefore should be treated under CR 15(b) as if the claim was raised in her complaint. We agree.

CR 15(b) states, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In determining whether the parties impliedly tried an issue, we consider the record as a whole, including whether the issue was mentioned before trial, and the legal and factual support for the trial court's conclusions regarding the issue. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). However, "[a] party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Id.*

a. Case Law

Several cases have addressed situations where a plaintiff raised an unpleaded claim for the first time in opposition to summary judgment. In *Reichelt v. Johns-Manville Corp.*, the plaintiff raised a new negligence claim. 107 Wn.2d 761, 767, 733 P.2d 530 (1987). However, the parties addressed negligence in their briefs and argued the merits of the issue at the summary judgment hearing, and the trial court ruled on the issue. *Id.* at 767. The Supreme Court held that

under CR 15(b), the inadequacies of the plaintiff's complaint did not preclude an appellate court from considering the issue. *Id.* at 768.

In *Denny's Restaurants Inc. v. Security Union Title Insurance*, the plaintiff raised a new mutual mistake claim. 71 Wn. App. 194, 213-14, 859 P.2d 619 (1993). The defendant responded to the claim on the merits in its reply. *Id.* at 213. The trial court also heard oral argument on the issue, although the defendant did point out at that time that the new issue had not been raised in the complaint. *Id.* at 214. On these facts, Division One of this court held that, "[i]t appears from the record that this issue was essentially litigated before the trial court," and therefore the trial court had abused its discretion by not allowing for an amendment of the complaint under CR 15(b). *Id.*

In *Dewey*, the plaintiff argued for the first time in response to the defense's motion to dismiss that termination of his employment violated the First Amendment. 95 Wn. App. at 26. The defendant's reply brief did not mention the First Amendment claim, although during oral argument the defendant argued that the plaintiff had failed to plead that theory of recovery. *Id.* The court held that the trial court did not err in ruling that the First Amendment claim was not tried by implication. *Id.* The court stated that the defendant's argument that the plaintiff had failed to plead a First Amendment theory of recovery did not constitute a trial of the issue. *Id.*

In *Kirby*, the plaintiff raised a new First Amendment claim in opposition to summary judgment. 124 Wn. App. at 469. The defendant argued at the summary judgment hearing that the plaintiff had failed to plead a First Amendment theory of recovery. *Id.* at 471. Only after this argument did the defendant "hesitantly" argue the claim's merits. *Id.* This court refused to apply CR 15(b). *See id.* at 470-72. Citing *Dewey*, the court stated that a defendant's argument that the plaintiff failed to plead a claim did not constitute a trial of the issue under CR 15(b).

Kirby, 124 Wn. App. at 471. Further, the defendant "should not be penalized for attempting a defense for which it was ill prepared as a result of [the plaintiff's] procedural failures." *Id.* Finally, the court quoted with approval a Seventh Circuit case: " 'A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.' " *Id.* at 472 (quoting *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996).

b. Analysis

Here, Reagan raised medical battery for the first time in her response to Dr. Newton's summary judgment motion. She noted that battery involves a nonconsensual touching and stated that she did not consent to the manipulation of her hip. Dr. Newton did not address medical battery in his reply brief.

At oral argument on the summary judgment motion, Dr. Newton did not object to Reagan's medical battery claim on the basis that it had not been raised in her complaint. Instead, he discussed applicable case law and argued that the medical battery theory did not apply to the facts because Reagan had consented to Dr. Newton's performance of the IME. Reagan responded that there was "clearly a question of fact in terms of whether or not there's a medical battery here." Report of Proceedings (RP) at 21. Reagan also pointed out "that the defense raised nothing in its reply with respect to the medical battery." RP at 23. In response, Dr. Newton briefly argued again that there could be no medical battery claim because Reagan had consented to the IME.

It is unclear whether or not the trial court considered the medical battery claim. The court asked no questions during oral argument, took the matter under advisement, and did not issue an oral ruling. The court later issued a written summary judgment order that dismissed without comment "[t]he claims asserted by the Plaintiff." CP at 216.

Under *Dewey* and *Kirby*, Dr. Newton's argument on the merits at the summary judgment hearing does not necessarily preclude him from asserting that CR 15(b) is inapplicable. As this court noted in *Kirby*, a defendant should not be penalized for attempting a defense to an unpleaded claim where the defendant's lack of preparation is the result of the plaintiff's procedural failures. 124 Wn. App. at 471. However, in both of those cases the defendant argued at the summary judgment hearing that the new claim had not been pleaded in the complaint. *Id.*; *Dewey*, 95 Wn. App. at 26. Even the defendant in *Denny's* raised the plaintiff's failure to plead the new claim. 71 Wn. App. at 214. Here, Dr. Newton made no such argument and never objected to addressing the medical battery claim on the merits.

Based on Dr. Newton's failure to object to Reagan asserting the medical battery claim and arguing that claim on the merits, we hold that the summary judgment proceedings amounted to a trial of the claim by implication under CR 15(b). Accordingly, we apply CR 15(b) and treat the medical battery claim as if it had been raised in the complaint.

4. Statute of Limitations

Dr. Newton argues that even if we can consider Reagan's medical battery claim under CR 15(b), that claim is barred by the statute of limitations. We disagree.

The statute of limitations for common law battery claims is two years. RCW 4.16.100(1). Reagan alleges that she was injured on May 13, 2014. She filed her lawsuit against Dr. Newton on December 14, 2015, well within the statute of limitations. But Dr. Newton points out that Reagan did not raise the medical battery claim until she filed her summary judgment response on June 12, 2017, which was more than two years after she filed suit.

However, CR 15(b) states that if issues are tried by express or implied consent, the issues "shall be treated *in all respects* as if they had been raised in the pleadings." (Emphasis added.)

"In all respects" necessarily includes treating the issue as pleaded at the time of the original complaint for statute of limitations purposes. *See Reichelt*, 107 Wn.2d at 766-73. Therefore, we reject Dr. Newton's statute of limitations argument.

5. Summary Judgment on Medical Battery Claim

Because Reagan's medical battery claim must be treated as if the claim was raised in the complaint, we address whether Reagan provided sufficient evidence to avoid summary judgment. We hold that the trial court erred in dismissing the medical battery claim on summary judgment.

Reagan cited her own deposition and Wilson's declaration to support the conclusion that Dr. Newton intentionally "yanked," CP at 114, on Reagan's leg after she withdrew her consent to be touched further. Both remember Reagan telling Dr. Newton "that's as far as it goes" before he further rotated her leg from the hip, causing Regan to cry out in pain. CP at 114. Both also recall Dr. Newton then saying something to the effect of, "That's the response I was looking for." CP at 110, 114. This testimony is sufficient to create genuine issues of fact regarding the existence of an offensive contact, Dr. Newton's intent to cause that contact, and Reagan's withdrawal of any consent to further rotate her hip.

Dr. Newton raises three brief arguments on the merits of the medical battery claim. First, he argues that Reagan relies only on her own self-serving testimony that he intentionally injured her. But a party's declaration is enough to create a question of fact where her deposition testimony was based on her personal observations of the defendant's conduct. *Sutton*, 180 Wn. App. at 866. On a summary judgment motion brought by the opposing party, we must treat the plaintiff's eyewitness testimony as true, even if it is self-serving. *Id.*

Second, Dr. Newton argues that Reagan consented to the IME and did not show that she did not consent to his touching of her as required in *Bundrick*, 128 Wn. App. at 18. But viewed in the light most favorable to Reagan, both her testimony and Wilson's testimony support an inference that Reagan asked Dr. Newton to stop pushing on her hip and thereby withdrew her consent to that maneuver.

Third, Dr. Newton argues that Reagan submitted no admissible evidence that he intended to cause her harm. But both Reagan and Wilson testified that after Reagan cried out in pain, Dr. Newton stated that he was looking for that response. And as noted above, the requisite intent for battery is to cause the offensive contact, not the actual harm. *Kumar*, 180 Wn.2d at 504-05; *Sutton*, 180 Wn. App. at 865-66.

Genuine issues of material fact existed regarding Dr. Newton's liability for medical battery. Accordingly, we hold that that the medical battery claim should not have been dismissed.

CONCLUSION

We affirm the trial court's dismissal of Reagan's medical malpractice claim, but we reverse the trial court's dismissal of Reagan's medical battery claim and remand for further proceedings.

Maxa, C.J.
MAXA, C.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.

Filed
Washington State
Court of Appeals
Division Two

March 29, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DENISE REAGAN, Appellant, v. ST. ELMO NEWTON, III, M.D., Respondent.	No. 50662-9-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the court's March 5, 2019 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Melnick, Sutton

FOR THE COURT:

Maxa, C.J.

MAXA, C.J.

CARON, COLVEN, ROBISON & SHAFTON PS

April 29, 2019 - 3:49 PM

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