

ORIGINAL

NO. 63973-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

(Whatcom County Cause No. 07-2-02163-5)

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**JENNIFER ROSE ROSS, an individual,**

**Plaintiff/Appellant,**

vs.

**PEACEHEALTH, dba ST. JOSEPH HOSPITAL, ROBERT  
JOHNSON and JANE DOE JOHNSON, JEFFREY RIES and  
JANE DOES RIES**

**Respondents/Defendants.**

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**REPLY BRIEF OF APPELLANT**

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## **I – INTRODUCTION**

PeaceHealth et al have failed to meet their burden of showing that no disputed issues of material fact exist. PeaceHealth et al appear to have fallen back to strained statutory interpretation and argument that its version of the facts is more likely than Ms. Ross's. Of course, the correct standard at summary judgment is not more likely than not. The question is whether reasonable persons could reach only one conclusion from all the evidence.

## **II – RESPONSIVE STATEMENT OF FACT**

### **A. GENUINE ISSUES OF MATERIAL FACT PRESENTED BY MS. ROSS**

Ms. Ross arrived at the emergency room on September 18, 2005, complaining of a respiratory infection and depression. CP 149. The ER was packed, chaotic, and the ER staff appeared overwhelmed. CP 149. The ER staff was impatient and unhappy with her for some reason, perhaps because they were upset with her and/or with other Lummi Tribal Members using the emergency room for non-emergencies. CP 149 – 150, Paragraphs 2 and 8. Likely after PeaceHealth et al determined no emergency existed, Ms. Ross waited for two to three hours without any restrictions on

her movement, and received no treatment. CP 149 – 150  
Paragraphs 4, 6, and 7. When Ms. Ross decided to leave,  
PeaceHealth, et al, without any warning, assaulted and  
permanently injured her. CP 151. Very shortly thereafter, the  
wagons began to circle: Ms. Ross was told with a yell, “We all  
heard you say you going to kill yourself.” CP 151.

**B. INFERENCES IN LIGHT FAVORABLE TO THE MOVING  
PARTIES (PEACEHEALTH, ET AL).**

A key question in this matter is why, after hours of waiting  
without detention, was Ms. Ross assaulted as she walked out the  
front door? PeaceHealth, et al, answer that they were only taking  
'steps necessary to assess the severity of suicide risk Ms. Ross  
posed to herself.'" Brief of Respondents Ries, Page 11. The facts  
presented by PeaceHealth, et al, differ markedly from Ms. Ross's.

According to PeaceHealth, et al, Ms. Ross was a danger to  
herself: PeaceHealth and Johnson state that Ries' "summary  
accurately describes the events leading of to Ms. Ross' attempt to  
**flee** the hospital." Brief of Respondents PeaceHealth and Johnson,  
Page 2 (emphasis added to disputed fact). Ms. Ross was,  
according to the briefs of PeaceHealth, et al,

- "Unemployed." Brief of Respondents Ries, Page 3;
- Married to a man with "sporadic" work history. *Id.*, at 4;
- "homeless," *Id.*;
- Living with "heroin addicts" and "prostitutes." *Id.*;
- Married to a man suspected of "doing methamphetamine." *Id.*;
- Alleged to be "a whore." *Id.*, at 5;
- Known to have "aborted" a "baby." *Id.*

The contempt PeaceHealth, Ries, and Johnson have for Ms. Ross is palpable. The allegation in the chart note created over a day later is that Ms. Ross stated she was "concerned she might hurt herself." CP 366. The insinuation is, with a life like that that, why wouldn't she hurt or kill herself? Consequently, according to PeaceHealth et al, she was warned: "Mr. Johnson was wearing scrubs and stethoscope, and told . . . Ms. Ross that she could not go." Brief of Respondents PeaceHealth and Johnson, Page 2.

Based on disputed fact, PeaceHealth, et al, ask the Court to conclude, Ms. Ross was most likely was going to hurt or kill herself, and PeaceHealth et al were not acting out of contempt, they were acting out of emergent concern for her safety. The likely

motivations of PeaceHealth, et al, cannot and should not be determined on summary judgment. The direct and circumstantial evidence, however, indicates that there was no emergency, and that force was used against her for some other reason.

### **III – ARGUMENT**

#### **A. SUMMARY JUDGMENT STANDARD**

A court will grant summary judgment only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Wilson*, at 437, 656 P.2d 1030. The motion will be granted only if reasonable persons could reach only one conclusion from all of the evidence. *Wilson*, at 437, 656 P.2d 1030.

*Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483, 488 (1992).

"[C]redibility determinations are solely for the trier of fact." *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125, 126 (2003). "The right to have factual questions decided by the jury is crucial to the right to trial by jury." *State v. Montgomery*, 163 Wn. 2d 577, 590, 183 P.3d 267, 273 (2008).

Pre-trial, the trial court, summarily, determined incorrectly that Ms. Ross was not battered, assaulted, falsely imprisoned, and

maliciously prosecuted by PeaceHealth et al. The court may have reasoned that Ms. Ross was injured, in good faith, by mistake. If, in doing so, the trial court missed, or ignored, a material fact Jennifer Ross was deprived of due process and trial by jury. U.S. Const. 7<sup>th</sup>, and 14<sup>th</sup> Am.; Wash.Const. Art. 1, Sec. 21; *Why Summary Judgment is Unconstitutional*, Suja A. Thomas, Virginia Law Review, Vol. 93:139 (2007). These rights are the glue that holds our society together. *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803).

#### **B. RCW 7.70.100 ADDITIONAL NOTICE REQUIREMENT**

Ms. Ross's claims are not based upon professional negligence.

RCW.7.70.100 therefore does not apply:

(1) No action **based upon** a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. . .

RCW 7.70.100 (emphasis added). Clearly, actions based upon claims other than professional negligence (e.g., rape, assault, battery, etc.) fall outside the scope of this statute.

**1. RCW 7.70.100 does not require additional notice for actions not "based upon" professional negligence.**

PeaceHealth, et al, ask this Court to read out, delete, or disregard language in RCW 7.70.100 ("based upon"), and replace it with preferable language. So, the argument goes, "all claims **arising out of** health care must be brought under RCW 7.70." Brief of Respondents PeaceHealth, and Johnson, Page 7 (emphasis added). This Court has correctly rejected this type of statutory construction. *Estate of Sly v. Linville, M.D.*, 75 Wn.App. 431, 433, 878 P.2d 1241 (Div. 1, 1994).

A court's paramount duty in statutory interpretation is to give effect to the Legislature's intent. *Sattler v. Nw. Tissue Ctr.*, 110 Wn.App. 689, 694, 42 P.3d 440, 443 (Div. 1, 2002).

[A] well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." *State ex rel. Schillberg v. Barnett*, 79 Wash.2d 578, 584, 488 P.2d 255 (1971). "[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute." *In re Recall of Pearsall-Stipek*, 141 Wash.2d 756, 767, 10 P.3d 1034 (2000) (quoting *Greenwood v. Dep't of Motor Vehicles*, 13 Wash.App. 624, 628, 536 P.2d 644 (1975)). "[W]e may not delete language from an unambiguous statute: 'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wash.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996))).

*State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196, 201 (2005).

Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms. *State v. Beaver*, 148 Wash.2d 338, 343, 60 P.3d 586 (2002) (“[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended.”); *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wash.2d 139, 160, 3 P.3d 741 (2000) (it is “well established that when ‘different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.’” (quoting *State ex rel. Pub. Disclosure Comm’n v. Rains*, 87 Wash.2d 626, 634, 555 P.2d 1368 (1976))). Here, the legislature chose to use the term “in a reckless manner” in the vehicular homicide and vehicular assault statutes and to use the term “reckless driving” in another. Because the legislature chose different terms, we must recognize that a different meaning was intended by each term.

*State v. Roggenkamp*, 153 Wn.2d at 625-626 (footnotes omitted).

Thus, where the legislature has used both specific qualifying language and general language in the statutory scheme, the specific language in the sections creating the specific requirements are given effect. *Estate of Sly v. Linville, M.D.*, 75 Wn.App. 431, 433, 878 P.2d 1241 (Div. 1, 1994). In *Sly*, a patient’s estate sued the patient’s doctor for misrepresentation. The doctor argued that the suit was time barred because the statements “were made

during the course of the physician/patient relationship, the 8 year maximum statute of limitations in 4.16.350 must be applied to [that] case." *Estate of Sly v. Linville, M.D.*, 75 Wn.App. at 438. This Court held that even though the doctor's misrepresentations were made "during the course of the physician patient relationship," the action based upon the misrepresentations was not barred.

The Court considered the specific language of RCW 4.16.350, which bears marked similarity to RCW 7.70.100:

Any civil action for damages for injury occurring as a result of health care . . . based upon alleged professional negligence shall . . . in no event . . . be commenced more than eight years after said act or omission.

RCW 4.16.350. The Court also considered the doctor's argument that RCW 7.70.010 extended the reach of specific language in RCW 4.16.350:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter [7.70] and in RCW 4.16.350, as now or hereafter amended, 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 which is provided after June 25, 1976.

RCW 4.16.350.

This Court, in *Sly*, rejected the doctor's expansive interpretation of the statute, and affirmed the trial court in favor of the estate. The Court reasoned in its review of out of state jurisprudence that "clearly not every act of negligence toward a patient constitutes medical malpractice." *Id.*, at 439. For example, a doctor's "failure in fulfilling his independent duty not to disclose confidential information without plaintiff's consent," and "a physician's nondisclosure may give rise to an action in fraud independent of malpractice." *Id.*, citing, *Estate of Leach v. Shapiro*, 13 Ohio App.3d 393, 469 N.E.2d 1047 (1984); *Tighe v. Ginsberg*, 146 A.D.2d 268, 540 N.Y.S.2d 99 (1989).

**2. An action that contains no claim of professional negligence cannot be "based upon" professional negligence.**

A civil action must be based upon one or more "claim[s] upon which relief can be granted." CR 12(b)(6). A claim is a statement "showing that the pleader is entitled to relief." CR 8(a). "An action for total lack of consent sounds in battery, while a claim for lack of informed consent is a medical malpractice action

sounding in negligence." *Bundrick v. Stewart*, 128 Wn.App. 11, 17, 114 P.3d 1204, 1208 (Div. 1, 2005).

[In] the enactment of chapter 7.70 RCW, the legislature is presumed to know the existing state of case law, *Price v. Kitsap Transit*, 125 Wash.2d 456, 463, 886 P.2d 556 (1994), and nothing in the statute indicates the legislature intended to eliminate the common law claim. Further, the two causes of action protect entirely different values: informed consent protects the patient's right to know the risks of the decisions she makes about her care, whereas the cause of action for common law battery protects an individual's right to privacy and bodily integrity. *Keogan v. Holy Family Hosp.*, 95 Wash.2d 306, 313-14, 622 P.2d 1246 (1980); Dan B. Dobbs, *The Law of Torts* § 29, at 54 (2000).

*Bundrick v. Stewart*, 128 Wash. App. at 17.

### **C. IMMUNITY**

PeaceHealth et al has not carried its burden in demonstrating that they were, as a matter of law, performing duties in good faith pursuant to RCW 71.05. RCW 71.05.120 provides exemption for officers of private agencies "responsible for detaining a person pursuant to this chapter . . . Provided that such duties were performed in good faith without gross negligence."

**1. PeaceHealth et al failed to present undisputed facts that they acted in an emergency situation pursuant to RCW 71.05.**

RCW 71.05 does not give hospital staff a blank check for the use of force against just anyone who passes through the doors of the hospital. RCW 71.05.050 requires proof of the mental states of PeaceHealth et al. PeaceHealth, et al, however, admit they had not even evaluated Ms. Ross. PeaceHealth and Johnson's Brief, Page 2.

Detention may occur only when PeaceHealth et al regard a person to present "imminent likelihood of serious harm, or is gravely disabled." RCW 71.05.050. PeaceHealth et al appear to argue that, by "imminent," the legislature did not mean "likely to occur at any moment or near at hand." Brief of Respondents Ries, Page 16, Footnote 3. The statutory definition cited, however, the same as the 1993 Random House Webster's Dictionary definition: "likely to occur at any moment."

Ms. Ross was not detained until hours after she arrived. Yet, on the way out the door, after apparently upsetting ER staff, PeaceHealth resorted physical violence to restrain her.

**2. Whether or not PeaceHealth acted in good faith must be determined by a jury based on their conduct, not summarily based on their statements.**

Good faith means an "honest belief, the absence of malice." *Sattler v. Nw. Tissue Ctr.*, 110 Wn. App. 689, 695, 42 P.3d 440, 443 (Div. 1, 2002). Absence of malice, and presence of honest belief may not be resolved summarily against the non-moving party simply because the hospital records support a factual finding of good faith. *Sattler v. Nw. Tissue Ctr.*, 110 Wn. App. 689, 695, 42 P.3d 440, 443 (Div. 1, 2002). In *Sattler*, the Northwest Tissue Center moved for, and was granted, summary judgment based on immunity for good faith use of body parts under Washington's Uniform Anatomical Gift Act:

A hospital, physician, surgeon, coroner, medical examiner, local public health officer, enucleator, technician, or other person, who acts in accordance with RCW 68.50.520 through 68.50.630 and 68.50.901 through 68.50.904 or with the applicable anatomical gift law of another state or a foreign country or attempts in good faith to do so, is not liable for that act in a civil action or criminal proceeding.

RCW 68.50.620(3).

In *Sattler*, Northwest asked the deceased's husband about tissue donation. Northwest made a record of the conversation indicating that the deceased husband agreed to donation of the deceased's "corneas only, not the whole globe." *Sattler v. Nw. Tissue Ctr.*, 110 Wash. App. At 692. The deceased's husband denied that he agreed to donation of any part the deceased's eyes.

After noting that in its survey of the law of good faith that good faith has often been found to exist as a matter of law, the Court held that the plaintiff in *Sattler* had the right to factual determination of good faith by a jury. The Court reasoned, "good faith involves a factual inquiry, and the actor's conduct must be judged in light of all the circumstances then present." *Sattler v. Nw. Tissue Ctr.*, 110 Wn. App. At 697.

If a jury, after hearing the two different versions, finds that Keller did not ask about corneas, one available inference is that Keller did not have an honest belief that Sattler had consented to a cornea donation. The discrepancy is simply not one that can be resolved on summary judgment.

*Sattler v. Nw. Tissue Ctr.*, 110 Wn. App. At 693.

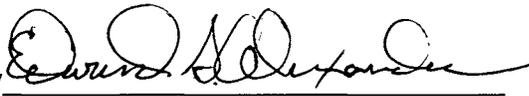
#### **IV - CONCLUSION**

PeaceHealth et al have thrown their weight behind their statutory interpretation and version of the facts. No matter how

much weight they apply, they do not have the power to rewrite the statutes. Ms. Ross's action is not "based upon" professional negligence, and a reasonable jury can disagree with PeaceHealth, et al regarding their state of mind. The trial court's dismissal of Ms. Ross's case should be reversed.

Respectfully submitted this 1st day of March 2010.

SHEPHERD ABBOTT ALEXANDER

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ORIGINAL

COURT OF APPEALS OF THE STATE OF WASHINGTON  
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JENNIFER ROSE ROSS,  
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PEACEHEALTH d.b.a. ST. JOSEPH  
HOSPITAL, a Washington Public  
Benefit Corporation; and ROBERT  
JOHNSON and JANE DOE  
JOHNSON, husband and wife, and  
the marital community composed  
thereof; JEFFREY RIES and JANE  
DOE RIES, husband and wife, and  
the marital community composed  
thereof; JOHN DOE I - IV, and  
JANE DOE I - IV,

Defendants/Respondent.

**Case No. 63973-1-I**

**Whatcom County  
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**Certificate of Service**

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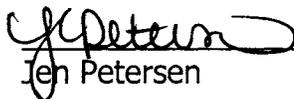
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I, Jen Petersen, certify that on March 1, 2010, I caused to be served a copy of the following document: **Reply Brief of Appellant**; and a copy of this **Certificate of Service** in the above matter, on the following persons, at the following address, in the manner described:

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