

No. 38849-9-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LINDA YOUNG,

Appellant

v.

EDWARD P. SAVIDGE,

Respondent

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
BY  DEPENDENT
COURT OF APPEALS
DIVISION II

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A. IDENTITY OF RESPONDENT

Edward P. Savidge, DDS was the defendant in a Jefferson County Superior Court case, bearing Cause No. 08-2-00195-3.

B. DECISION

Respondent requests that this Court AFFIRM the following trial court ruling:

1. The trial court's Order Granting Defendant's Motion for Summary Judgment Dismissal, entered January 5, 2009. Clerk's Papers (CP) 99-100.

C. STATEMENT OF THE CASE

1. Factual Background

On April 19, 2005, Dr. Savidge performed a dental exam for Ms. Young. CP 1. At this appointment, Dr. Savidge recommended Ms. Young have a porcelain fused to high noble metal crown placed. CP 1. Ms. Young was presented with a treatment plan that listed the recommended treatment with the fees for each. CP 5. Ms. Young returned on April 20, 2005 to have the tooth prepared for the crown; the tooth was prepared, a temporary crown was placed, and the impression was sent to the lab for the crown to be fabricated. On June 1, 2006, Ms. Young returned and Dr. Savidge cemented the crown he received from the lab. Ms. Young received no further treatment from Dr. Savidge. CP 2.

On March 6, 2008, Dr. Savidge received a letter from plaintiff's counsel stating that shortly after Ms. Young's crown was cemented, she began experiencing burning sensations in her head, confusion, depression, and tiredness. CP 93. The letter also advised Dr. Savidge that Ms. Young's subsequent dentist had requested a laboratory analysis of the crown that Dr. Savidge cemented, and that the analysis showed the metal base of the crown was composed of nickel-chromium, not "high noble." *Id.* The letter advised Dr. Savidge that Ms. Young had authorized plaintiff's counsel to bring an action for malpractice, misrepresentation and violation of the Washington Consumer Protection Act. The letter concluded with: "Please consider this letter a demand for reparations to the White's in the amount of \$150,000. In the event that this sum is not tendered on or before the 30th day of February 2008 suit will be brought against you." CP 93. Dr. Savidge forwarded this letter to his insurance carrier, who attempted to clear the confusion of the typographical errors in the letter and confirm the receipt of a 90-day letter of intent to sue. CP 96.

On or about June 13, 2008, Dr. Savidge received a complaint and summons for the underlying action. CP 1.

2. Procedural Background.

On March 6, 2008, Ms. Young's counsel mailed Dr. Savidge a letter stating that Ms. Young had authorized the law offices of David Bendell to bring an action against him for malpractice, misrepresentation, and violation of the Washington Consumer Protection Act. CP 93.

On June 13, 2008 Ms. Young filed her complaint with the Jefferson County Superior Court. CP 1. The Complaint alleged: medical malpractice, failing to inform/obtain consent, breach of contract, violation of the Consumer Protection Act (CPA), and misrepresentation. *Id.* The complaint was filed without a Certificate of Merit. CP 19.

On October 9, 2008, Dr. Savidge filed a Motion for Summary Judgment Dismissal of all Ms. Young's claims. CP 6-18.

Ms. Young responded on October 23, 2008, with a cross-motion; a Motion for Partial Summary Judgment for the breach of contract and informed consent claims. CP 27-32.

The Jefferson County Superior Court heard oral argument of both motions on January 5, 2009 and granted Dr. Savidge's Motion for Summary Judgment, dismissing all claims. CP 99-100. Ms. Young's Motion for Partial Summary Judgment was denied. CP 101-102.

D. ARGUMENT

1. The standard of review for summary judgment is *de novo*.

Ms. Young brings this appeal pursuant to the authority granted in RAP 2.2(a)(1) permitting for appellate review of the final judgment of any action or proceeding. The Appellate Court reviews the trial court's ruling on summary judgment *de novo*. *Allen v. State of Washington*, 118 Wn.2d 753, 757, 826 P.2d 200 (1992). The Appellate Court, like the trial court before it, analyzes whether any genuine issues of material fact exist and whether one party is entitled to judgment as a matter of law. *Id.* Mere existence of factual questions are insufficient to warrant denial of summary judgment, instead, denial of summary judgment on the basis that factual issues remain is only appropriate where the factual questions are material to resolving the legal issue at stake. *Id.*; *see also, Lewis v. Bell*, 45 Wn. App. 192, 95, 724 P.2d 425 (1986); *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) (material fact is one upon which the outcome of the litigation depends).

Here, upon the facts presented by Ms. Young, the trial court correctly held Ms. Young failed to file a Certificate of Merit with her complaint, and further, that she failed to commence her action against Dr.

Savidge within the three year statute of limitations and thus properly dismissed her claims.

2. The court properly applied the statutory requirement for a Certificate of Merit to Ms. Young's case.

The trial court correctly dismissed Ms. Young's case because she failed to file a Certificate of Merit at the time she commenced the action against Dr. Savidge. As of June, 7, 2006, all cases filed in Washington State that allege personal injury as the result of health care, must be accompanied by a Certificate of Merit, or the case may be dismissed.

RCW 7.70.150.

a. Ms. Young failed to file a Certificate of Merit with her Complaint.

The statutory requirement of a Certificate of Merit is applicable to Ms. Young's case, regardless of the individual allegations within the Complaint. The Washington State legislature set forth certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages of injury occurring as a result of health care which is provided after June 25, 1976. RCW 7.70.010 (emphasis added). As such, Ms. Young's case is governed by RCW 7.70 *et. seq.*, wherein a Certificate of Merit must be filed with the Complaint.

This requirement was one of the many procedural provisions created by the Health Care Liability Reform of 2006.

Ms. Young's argument that there is no Certificate of Merit requirement for her informed consent or CPA claims directly conflicts with the plain language of the statute and further conflicts with the intent of the legislature to streamline the judicial system and reduce the number of medical malpractice claims in Washington courts. *See* Laws of 2006 c 8 § 1. All of Ms. Young's alleged injuries arise from health care provided by Dr. Savidge, and as such, her case falls squarely within the medical malpractice statute.

Ms. Young contends that she is not claiming negligence, and therefore, was not required to file a Certificate of Merit. This contention directly conflicts with the pleadings. Ms. Young's Complaint clearly sets out her allegation of "count I: Medical Malpractice." CP 2. Even if this Court applies the statute narrowly, as Ms. Young suggests, then it follows that the trial court was correct in dismissing Ms. Young's case.

RCW 7.70.150(5)(a): Failure to file a certificate of merit that complies with the requirements of this section is grounds for *dismissal of the case*. (emphasis added).

Ms. Young has failed to bring forth any evidence that she complied with Washington law which requires that she file a Certificate of Merit

with her complaint against Dr. Savidge. Accordingly, the trial court appropriately dismissed her case, and the dismissal should be affirmed.

b. The trial court did not apply RCW 7.70.150 retroactively.

The court properly applied RCW 7.70.150 (which requires the filing of a Certificate of Merit with the complaint) prospectively. Generally, statutes are presumed to apply prospectively, unless there is some legislative indication to the contrary. *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). On a practical level, we consider a statute to be retroactive if the “triggering event” for its application happened before the effective date of the statute. *State v. Pillatos*, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007)(citing *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 559 (1992)). A statute does not operate retrospectively merely because it applies to conduct that predated its effective date. *Id.* Instead, “[a] statute operates prospectively when the *precipitating event* for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment.” *In re Estate of Burns*, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997).

Here, the statute unequivocally identifies the “triggering event:” the commencement of the action. The statute, on its face, is clear: “...the plaintiff must file a certificate of merit at the time of commencing the action.” RCW 7.70.150(1)(emphasis added). Regardless of when Ms. Young alleges Dr. Savidge injured her, she commenced her action on June 13, 2008. The statute was effective on June 7, 2006, long before Ms. Young’s complaint was filed.

Further, the *Adcox* case cited by Ms. Young does not stand for the proposition that application of a statute to any existing cause of action is deemed retrospective and improper. In *Adcox v. Children’s Orthopedic Hospital and Medical Center*, 123 Wn.2d 15, 864 P.2d 921 (1993), the court held that a statute, which provided certain documents special protection from discovery, did not apply to internal investigation documents that were created prior to the statute’s enactment. The court’s holding did not, as Ms. Young suggests, turn on the fact that the *cause of action* existed prior to the effective date of the statute, but that the *documents were created* prior to the enactment of the statute. *Id.* at 30.

Adcox is distinguishable from this case even by analogy. The *Adcox* court addressed whether a statute that gave special protection to certain documents was applicable to a hospital’s internal investigation

documents that were created before the statute was effective. *Adcox* is more properly applied to cases involving issues of discovery of documents created by the parties, and admissibility thereof. *Adcox* is not applicable to this case, and fails to support the proposition that Ms. Young was not required to file a Certificate of Merit with her Complaint against Dr. Savidge.

3. The Medical Malpractice Statute of Limitations expired prior to the filing of Ms. Young's action.

Ms. Young commenced her action on June 13, 2008, twelve days after the applicable statute of limitations expired on June 1, 2008. In an action for injuries arising from health care, a patient must commence his or her action within three years of the alleged act that caused the injury, or one year from when the patient discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later. RCW 4.16.350(3).

Ms. Young's first visit with Dr. Savidge was on April 4, 2005. CP

1. The crown at issue was cemented by Dr. Savidge on June 1, 2005. CP
2. Ms. Young did not return to see Dr. Savidge after the crown was cemented. Because Ms. Young is alleging that her injury and subsequent

damages arise from the crown placed on June 1, 2005, the statute began to run on that day.

The trial court correctly applied the medical malpractice statute of limitations (RCW 4.16.350) to Ms. Young's case. This statute provides that the plaintiff must commence his or her lawsuit within 3 years of the alleged act or omission that caused the damages; or 1 year after the plaintiff discovered, or should have discovered, her injury. Ms. Young incorrectly argues that the statute did not begin to run until Dr. Savidge sent his final bill to Ms. Young on January 12, 2006; therefore, the statute did not expire until January 12, 2009, resulting in a timely filing of her suit. This is incorrect. Ms. Young cites to *Rivas v. Eastside Radiology*, 134 Wn. App. 921, 143 P.3d 330 (2006) to assert that the courts have ruled that the general statute of limitations (RCW 4.16.080) begins to run from the last "act or omission" by the defendant. *Appellant's Brief at 7*. However, *Rivas* does not analyze RCW 4.16.080, but discusses the running of the statute of limitations designated in RCW 4.16.350 (the medical malpractice statute of limitations), and therefore does not support Ms. Young's argument.

The court in *Rivas* does hold that the 3 year statute of limitations designated in RCW 4.16.350 begins to run from the last act or omission

alleged to have caused the injury or condition. *Id.* at 925 (emphasis added).

The statute began the day Dr. Savidge cemented the crown, June 1, 2005, the latest possible date that Dr. Savidge's conduct could have caused Ms. Young any damage. However, Ms. Young failed to file her complaint within 3 years of this act. Dr. Savidge's mailing of an invoice did not cause the harm that Ms. Young alleges; the materials of which the crown was composed allegedly caused Ms. Young injury.

Further, the discovery rule does not toll the statute in this case.

Although Ms. Young may not have discovered her alleged injuries on the date Dr. Savidge cemented the crown, she knew or should have known of her injuries when the crown was removed. Ms. Young alleges that she began feeling symptoms of burning, confusion, and tiredness shortly after Dr. Savidge cemented the crown, and when Dr. Johnson later removed that crown in February 2006, her symptoms diminished substantially. CP 63. Even if, as a matter of law, Ms. Young did not discover the source of her alleged injuries until the crown was removed by Dr. Johnson, the statute would have expired in February of 2007, one year after Ms. Young's discovery in February 2008. CP 93. The medical malpractice statute sets expiration of the statute of limitations to which ever period expires later; in this case the statute expired on June 1, 2008.

The trial court properly dismissed Ms. Young's case because the complaint was filed on June 13, 2008, twelve days after the running of the statute of limitations.

4. Ms. Young's action was commenced after the date in which the Statute of Limitations was tolled by the 90-day letter of intent to sue.

Although Ms. Young mailed a letter of intent to sue, tolling the statute of limitations, she filed her complaint after the tolled statute had expired. The medical malpractice statute requires a potential plaintiff to mail a notice of suit to the health care provider at least 90 days prior to commencing an action. RCW 7.70.100(1). The statute also provides that if the notice is mailed within 90 days of the expiration of the statute of limitations, the time for commencement of the action is extended by 90 days *from the date the notice was mailed, plus and additional 5 court days*. *Id.*(emphasis added).

Ms. Young's notice to sue was mailed to Dr. Savidge on March 6, 2008. CP 93. Since the statute of limitations was to expire on June 1, 2008, sending the notice tolled the statute 90 days from the date of mailing. The trial court correctly calculated that 90 days, plus 5 court days, from March 6, 2008 was June 11, 2008. The complaint was filed on June 13, 2008, two days after the statute of limitations had expired.

The Washington Court of Appeals has held that summary judgment dismissal of a claim is appropriate when the plaintiff fails to strictly comply with RCW 7.70.100(1). *See Bennett v. Seattle Mental Health*, 208 P.3d 578 (Wash. 2009).¹ In that case, the court affirmed the trial court's grant of summary judgment in favor of the defendant health care providers when the plaintiff failed to strictly comply with the statute. In *Bennett*, the plaintiff mailed a notice of intent to sue, and then filed her complaint on the 90th day. The court held that the statute specifically requires that a defendant health care provider must be given *at least* 90 days notice before the commencement of an action. Although the action was commenced just one day before the statute allowed, the court dismissed the case due to non-compliance. Here, the same statute is at issue, and Ms. Young failed to comply with the statute and file her complaint before the statute of limitations designated by 7.70.100 had expired. The trial court correctly calculated the tolling of the statute of limitations and properly dismissed Ms. Young's case.

¹ This case has been published in the Washington Appellate Reporter per the court's website at:
http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&file_name=618113MAJ

5. The 2006 amendment to the medical malpractice statute did not affect the statute of limitations as it pertains to a claim for fraud.

The trial court appropriately disregarded Ms. Young's retroactive statutory application argument. Ms. Young argues that the trial court erred by applying the 2006 amendment to RCW 4.16.350 retroactively. The 2006 amendment addressed the statute of repose, not allegations of fraud.

Currently, the statute provides that upon proof of fraud, the time for commencement of an action is tolled, and the patient has one year from the date of the actual knowledge in which to commence a civil action for damages. The statute was amended in 1998 to include this provision. Laws of 1998, c 147 § 1 in subsection (3). In 2006, the legislature amended this statute again stating that the purpose of the section was to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998), by expressly stating the legislature's rationale for the eight year statute of repose. Laws of 2006 c 8 §§301 and 302. The portion of the statute that applies to fraud remained unchanged in 2006.

6. The statute of limitations set forth in RCW 4.16.080 for actions alleging fraud is not applicable to Ms. Young's case.

Ms. Young's claims against Dr. Savidge arise from health care, and are governed by RCW 7.70 *et. seq.*, which sets forth the statute of limitations designated in RCW 4.16.350. Accordingly, the trial court correctly held that the statute of limitations set forth in RCW 4.16.080 is not applicable to Ms. Young's case.

Any suit seeking damages for an injury occurring as a result of health care is controlled exclusively by RCW 7.70 *et. seq.*, regardless of how the action is characterized. *Branom v. State*, 94 Wn. App. 964, 947 P.2d 335 (1999), *review denied*, 138 Wn.2d 1023, 989 P.2d 1136; *Wright v. Jeckle*, 104 Wn. App. 478, 481, 16 P.3d 1268 (2001) (emphasis added).

RCW 7.70 limits claims arising out of health care to three circumstances:

- (1) That the 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 representative that the injury suffered would not occur;
- (3) That injury resulted from health care to which the patient or his representative did not consent.

Even though the recommendation of a "high noble" crown does not, at first blush, appear to amount to the type of conduct (ie. "health

care”) that RCW 7.70 certainly controls, the courts have held that “health care” as it pertains to RCW 7.70 is “the process in which [a physician is] utilizing the skills which he [or she] had been taught in examining, diagnosing, treating or caring for the plaintiff as his [or her] patient.” *Wright*, 104 Wn. App. at 481. This is further supported by Washington’s Supreme Court in *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001). In that case, the court held that a medical doctor’s conduct of disclosing a patient’s personal information to a 3rd party constituted “health care” and therefore fell under RCW 7.70. *Id.* at 101. When Dr. Savidge recommended a high noble crown to Ms. Young, and later cemented a crown with a different material make-up, he was treating and caring for Ms. Young in his capacity as a licensed dentist. Dr. Savidge’s conduct falls squarely within RCW 7.70, and is thus, controlled by the statutory scheme, including the designated statute of limitations.

Accordingly, it was appropriate for the trial court to dismiss any claims that were neither contemplated nor permitted by the statute. Therefore, as an independent claim for fraud is not cognizable under RCW 7.70, the statute of limitations applicable to such an action is not relevant or applicable.

7. The statute of limitations set forth in RCW 4.16.40 for actions alleging breach of contract is not applicable to Ms. Young's case.

As previously discussed, Ms. Young's claims against Dr. Savidge arise from health care, and are exclusively governed by RCW 7.70 *et. seq.*, which sets forth the statute of limitations designated in RCW 4.16.350. Accordingly, the trial court correctly held that the statute of limitations set forth in RCW 4.16.040 is not applicable to Ms. Young's case.

Ms. Young's claim for breach of contract fails for two reasons: (1) Dr. Savidge did not promise that Ms. Young would not have any negative reactions to the materials in the crown he cemented; and (2) an independent claim for breach of contract is not cognizable under RCW 7.70 *et. seq.*

a. Dr. Savidge did not promise Ms. Young that she would not have a negative reaction to the materials in the crown he cemented.

Ms. Young's allegations do not support a claim provided under the statute for a breach of promise. Unlike a claim for fraud, RCW 7.70 does provide a cause of action for a breach of promise by a health care provider; however, it is limited to circumstances in which the health care provider promised that the injury the patient suffered would not occur. RCW 7.70.030(2).

Here, Ms. Young alleges that Dr. Savidge cemented a crown made of materials that are different than what the treatment plan described. CP 2. Ms. Young has failed to allege or produce any evidence that Dr. Savidge made any promise that Ms. Young would not suffer a negative reaction to the materials in the crown he cemented. The circumstances in this case simply do not fall within the statutory requirements, and as such, Ms. Young does not have a claim for breach of promise under RCW 7.70. Even if, *arguendo*, Ms. Young could successfully allege a breach of promise within the controlling statutory scheme, the statute of limitations applicable to RCW 7.70 actions had already expired prior to Ms. Young commencing her lawsuit.

b. An independent claim for breach of contract is not cognizable under RCW 7.70 *et seq.*

Ms. Young's independent claim for breach of contract was correctly dismissed by the trial court because it is not cognizable under RCW 7.70. Again, any suit seeking damages for an injury occurring as a result of health care is controlled exclusively by RCW 7.70 *et seq.*, regardless of how the action is characterized. *Branom v. State*, 94 Wn. App. 964, 947 P.2d 335 (1999), *review denied*, 138 Wn.2d 1023, 989 P.2d 1136; *Wright v. Jeckle*, 104 Wn. App. 478, 481, 16 P.3d 1268 (2001).

Ms. Young's reliance on *Hansen* to support her argument for an independent claim for breach of contract is misplaced. In *Hansen v. Virginia Mason Medical Center*, 113 Wn. App. 199, 53 P.3d 60 (2002), a personal representative of a deceased patient brought an action against a physician and hospital alleging breach of promise. As Ms. Young suggests, the court in *Hansen* does look to common law regarding the essential elements of a breach of contract claim; however, the purpose of the inquiry was to analyze RCW 7.70.030(2), it was not to consider an independent cause of action outside of the statute. In fact, the court of appeals reversed the trial court's grant of the plaintiff's motion for summary judgment, holding that the promise made by the physician to the deceased patient was not a legally enforceable promise under RCW 7.70.030(2). The court reasoned that because the health care provider defendant did not expressly undertake or commit to obtain certain results or cure, the promise was not legally enforceable. *Id.* at 208.

Not only does *Hansen* not stand for the proposition that a patient alleging injury from health care may have an independent breach of contract claim, the case supports Dr. Savidge's position that not all promises made by a health care provider are legally enforceable. A cause of action under RCW 7.70.030(2) requires an express undertaking or

promise to obtain a specific result or cure through a procedure or course of treatment. *Id.* Even more compelling, the *Hansen* court not only reversed the trial court's order granting the plaintiff's motion for summary judgment, but further directed entry of summary judgment in favor of the defendant health care providers on remand. *Id.*

8. Ms. Young did not establish a right to recovery under the Consumer Protection Act.

The trial court correctly dismissed Ms. Young's claim for violation of the CPA because she failed to prove the essential requirements for a CPA claim. To establish a CPA violation, the plaintiff must prove five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) causes injury to the plaintiff in her business or property, and (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Specifically, Ms. Young failed to present any evidence that Dr. Savidge's conduct involved the entrepreneurial aspects of his dental practice, that her private dispute affects the public interest, or that her business or property was damaged.

Whether a particular action gives rise to a CPA claim is a question of law and is therefore appropriate for summary judgment. *Seattle Pump*

Co., Inc. v. Traders and General Ins. Co., 93 Wn. App. 743, 752, 970 P.2d 361 (1999). A private party may bring an action for damages under the Consumer Protection Act, RCW 19.86.090, if the conduct complained of is unfair or consists of deceptive acts in the sphere of trade or commerce, it impacts the public interest, and it causes the plaintiff damage. *Hangman Ridge*, 105 Wn.2d at 785-91. The failure to meet any one of the five elements is fatal to a CPA claim. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). The term ‘trade’ as used by the CPA includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided. *Ramos v. Arnold*, 141 Wn. App. 11, 20, 169 P.3d 482 (2007). The definition of entrepreneurial aspects of learned professions, including medical professionals, are limited to aspects such as billing and obtaining patients. *Id.* at 20. Entrepreneurial aspects do not include a doctor’s skills in examining, diagnosing, treating, or caring for a patient. *Wright v. Jeckle*, 104 Wn. App. 478, 485, 16 P.3d 1268 (2001).

a. Dr. Savidge’s conduct was not entrepreneurial.

Ms. Young failed to present evidence to the trial court that when Dr. Savidge cemented the crown with difference materials than initially planned, that he did so with entrepreneurial motive. As Ms. Young states

in her briefing, *Michael v. Mosquera-Lacy*, 140 Wn. App. 139, 165 P.3d 43 (2007), is factually analogous to the case here. In *Michael*, the plaintiff dental patient requested that only human bone, and no animal bone, be used in the bone grafting procedure to be performed by the defendant doctor. When the patient later learned that cow bone had been used in the procedure, she brought claims of medical malpractice and violation of the Consumer Protection Act. The Appellate Court reversed the trial court's granting of the defendant's motion for summary judgment, holding that there was a genuine issue of material fact whether the alleged acts involved entrepreneurial aspects of the periodontist's profession. However, the Supreme Court has since overruled the Appellate Court's decision relied upon by Ms. Young. See *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009). The Supreme Court affirmed the trial court's granting of summary judgment to the defendants, holding that, as a matter of law, the conduct of using a different material in a dental procedure than previously promised, did not involve the entrepreneurial aspects of the periodontist's practice, and further, that the conduct did not impact the public interest. *Id.* at 605-06.

The court in *Michael* reversed the lower court's decision based upon three analyses: (1) the nature of the defendant dentist's advertising

for her services; (2) whether the conduct was entrepreneurial in nature; and (3) whether the private dispute between the patient and doctor affected the public interest. *Id.* at 603-05.

i. Dr. Savidge did not advertise porcelain fused to high noble metal crowns.

Just as in *Michael*, there is no evidence that Dr. Savidge advertised or marketed the availability or use of the particular dental material that the plaintiff subsequently failed to receive. In *Michael*, the court found that the defendant doctor did not advertise or market the availability of human bone for bone grafting procedures, nor did the practice solicit patients based upon the availability of human bone. *Id.* at 603. The court found it relevant that the defendant dentist did not tell the plaintiff patient that she could use human bone until *after* the plaintiff became a patient of the practice *Id.*

Similarly, there is no evidence that Dr. Savidge advertised the availability of high noble metal based porcelain crowns; there is also no evidence that Dr. Savidge solicited patients based upon the availability of the same. The only evidence presented to the trial court regarding Dr. Savidge's advertising of crowns is a copy of Dr. Savidge's professional website. CP 61. The website simply states that the office offers three types of crowns, stainless steel, porcelain crowns that are built on a metal

base, and full porcelain crowns. *Id.* There is no evidence that Dr. Savidge advertised the availability of porcelain fused to “high noble” metal crowns. The advertisement simply states “metal” with no indication of the type of metal he uses for his crowns.

Further, just as in *Michael*, Dr. Savidge did not tell Ms. Young (via the treatment plan) that he could use high noble metal under the porcelain crown until after she became a patient.

ii. There is no evidence that Dr. Savidge’s conduct was for the purpose of increasing profits.

The Plaintiff has failed to meet her burden to show that when Dr. Savidge cemented Ms. Young’s crown, he did so for the purpose of increasing profits. Although Plaintiff refers to Dr. Savidge’s entrepreneurial motive, she has failed to produce any evidence beyond self-serving statements to show any such motive. *W.G. Platts, Inc. v. Guess*, 56 Wn.2d 143, 147, 351 P.2d 515 (1960)(self-serving statements are inadmissible); CR 56(e). Entrepreneurial aspects do not include a doctor’s skills in examining, diagnosing, treating, or caring for a patient. *Wright v. Jeckle*, 104 Wn. App. 478, 485, 16 P.3d 1268 (2001). In *Michael*, the court found that the plaintiff failed to show the doctor’s use of an alternative material was entrepreneurial, reasoning that there was no evidence that the use of cow bone was used to increase profits or the

number of patients. *Michael*, 165 Wn.2d. at 604. Similarly, Ms. Young has failed to provide any evidence to the court that when Dr. Savidge, in his professional judgment, decided to cement the nickel-chromium based crown, that he did so to increase profits. Even more compelling, Ms. Young never presented any evidence to the court that Dr. Savidge, did indeed, increase his profits by cementing the nickel-chromium based crown. .

As Ms. Young appeals from the trial court's grant of summary judgment, the Appellate Court may consider only evidence and documents called to the attention of the trial court prior to entry of the dismissal order. RAP 9.12; *see also, Potter v. Washington State Patrol*, 161 Wn.2d 335, 166 P.3d 684 (2007). Ms. Young has repeatedly alleged that the crown that Dr. Savidge cemented had a lower pecuniary value than the crown listed on the treatment plan; however, she has completely failed to provide any evidence of such. Further, the self-serving allegations that the quality of the crown Dr. Savidge cemented was inferior to the crown listed on the treatment plan, are completely unsupported by any expert testimony.

At summary judgment, the trial court was presented with Ms. Young's self-serving allegations of inferior materials, and absolutely no

expert testimony to support these allegations. Accordingly, the trial court dismissed her CPA claim.

iii. The private dispute between Ms. Young and Dr. Savidge does not affect the public interest.

Ms. Young's lawsuit against Dr. Savidge would not serve the public interest. The purpose of the CPA is to "protect the public." RCW 19.86.920. "[i]t is the likelihood that additional plaintiffs have been or will be injured in the exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Hangman Ridge*, 105 Wn.2d at 790. There must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated. *Eastlake Construction Co. Inc. v. Hess*, 102 Wn.2d 30, 52, 686 P.2d 456 (1984). A party's offer of proof to support a finding that this dispute was not an isolated incident (which would not impact the public interest), but part of a protracted course of conduct would establish the potential for repetition. *Id.*

Ms. Young offered no evidence to the trial court that Dr. Savidge's conduct was a "protracted course of conduct." There was no offer of proof that Dr. Savidge deceptively cemented crowns on other patients that were of a different material than originally planned. There is an absence of any

proof that the type of injury Ms. Young alleges (burning sensation in her head, confusion, depression, and tiredness.” CP 93) could potentially be suffered by patients in the future if she did not bring the claim.

Accordingly, Ms. Young failed to establish that her private dispute is one of public interest, and may be brought in a CPA claim.

b. There is no evidence that Ms. Young’s property or business was damaged.

Ms. Young may not assert a claim for violation of the CPA when her allegations are for personal injury. The Washington Court of Appeals addressed this issue in *Stevens v. Hyde Athletic Industries, Inc.*, and squarely determined that the provisions of the CPA do not include actions for personal injury. 54 Wn. App. 366, 773 P.2d 871 (1989). In *Stevens*, the plaintiff brought a personal injury action against the seller of her athletic shoes, alleging violation of the CPA. Upon reviewing the provisions of the CPA, the Court entered summary judgment in favor of the seller. The Court looked to RCW 19.86.090, which outlines the relevant parameters of the CPA:

“Any person who is injured in his or her *business or property*...may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including reasonable attorney’s fees, and the court may in its discretion, increase the award of damages to an

amount not to exceed three times the actual damages sustained...” (Emphasis added.)

As Washington courts had not yet decided whether personal injury claims were within the parameters of the CPA, the court looked to federal law for guidance. The *Stevens* court noted that the U.S. Supreme Court had considered the phrase “injured in his business or property” under the antitrust laws. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S.Ct. 2326 (1979). There, the Court determined that the phrase ‘business or property’ retains restrictive significance, finding that “it would, for example, exclude personal injuries suffered.” *Id.* at 339. The *Stevens* court further looked to *Hamman v. United States* for guidance. 267 F.Supp. 420 (D.C.Mont. 1967). *Hammon* held that “the term ‘business or property’ is used in the ordinary sense and denotes a commercial venture or enterprise.” *Id.* at 432.

Accordingly, the *Stevens* court concluded “[h]ad the legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than ‘business or property.’” *Stevens*, 54 Wn. App. at 370.

Ms. Young also attempts to rely on *Ambach v. French*, 141 Wn. App. 782, 173 P.3d 941 (2007) for the proposition that a CPA claim falls outside of RCW 7.70. The *Ambach* case considered circumstances

distinguishable from the instant case. In *Ambach*, expert testimony was presented to the trial court that the defendant medical doctor performed unnecessary surgery on the plaintiff patient. *Id.* at 786. The court held that the plaintiff may have a CPA claim independent of the RCW 7.70 lack of informed consent claim because there was no question of whether the plaintiff suffered economic loss, as there was no question that the cost of surgery was certainly more than the cost of more conservative treatment. *Id.* at 790. Here, Ms. Young has failed to present any evidence, in the form of expert testimony or otherwise, that Dr. Savidge performed unnecessary procedures, or that the procedures he did perform resulted in a pecuniary loss to Ms. Young. Further, it may be significant that the Supreme Court has granted review of *Ambach*, and Ms. Young is relying on a case that may be overturned. *Ambach v. French*, 164 Wn.2d 1007, 195 P.3d 87 (Wash. Sept. 3, 2008).

In this case, Ms. Young has alleged that she has incurred pecuniary losses for remedial dental and medical care, pain and suffering, loss of income, and loss of enjoyment of life. However, Ms. Young has failed to present any expert testimony, or evidence at all, that Ms. Young suffered economic loss due to the cementation of a crown with a nickel-chromium base rather than a high noble metal base. The trial court was presented

only with the limited evidence that Dr. Savidge cemented a crown that was of different material than what was listed on the treatment plan. Ms. Young's allegations fall squarely within a claim for personal injury; and thus, fall outside the coverage of the CPA.

The trial court correctly dismissed Ms. Young's CPA claims. Ms. Young failed to present to the trial court any evidence of entrepreneurial motive on the part of Dr. Savidge, or that Ms. Young's business or property were injured as a result. Accordingly, the only evidence presented to the court was the facts and circumstances of the *health care* Dr. Savidge provided to Ms. Young, and the alleged personal injuries that arose from that health care. Accordingly, the court correctly determined that Ms. Young was precluded from bringing a claim for violation of the Consumer Protection Act.

E. CONCLUSION

The trial court properly dismissed Ms. Young's case because she failed to file a Certificate of Merit along with her Complaint against Dr. Savidge, she commenced the suit after the applicable Statute of Limitations had expired, and she failed to establish a right to recovery under the Consumer Protection Act.

The Healthcare Liability Reform Act requires that a Certificate of Merit be filed with all claims for injury due to health care. Ms. Young failed to file this statutorily required document. The statute specifically addressing the Certificate of Merit provides that failure to comply with the requirement may result in dismissal of the case. The trial court correctly applied the statute and dismissed Ms. Young's case.

In addition to the failure to file a Certificate of Merit, Ms. Young commenced her action after the Statute of Limitations had expired. Claims for medical (dental) malpractice are governed exclusively by RCW 7.70, which provides that malpractice claims are to be filed within 3 years of the conduct that caused the plaintiff's alleged injury, or one year from when the plaintiff knew, or should have known, of her injury. Again, Ms. Young failed to adhere to statutory requirements, and commenced her action after the 3 year statute had expired. The trial court correctly calculated the date the Statute of Limitations expired, including taking into consideration the tolling of the statute with the 90-day intent to sue letter.

The trial court correctly dismissed the CPA claim, as Ms. Young: (1) failed to present to the trial court any evidence that Dr. Savidge advertised the use of the particular type of crown Ms. Young was expecting to receive; (2) she failed to show that Dr. Savidge's conduct was

entrepreneurial; and, (3) she did not produce any evidence that she was injured in her business or property when she failed to produce any expert testimony or other evidence that the crown she received was of a lesser value, and as such, suffered pecuniary loss.

Due to the aforementioned reasons, Dr. Savidge respectfully requests that this court find that (1) Ms. Young failed to file the requisite Certificate of Merit; (2) Ms. Young failed to timely file her suit; and (3) Ms. Young did not present a prima facie case for violation of the Consumer Protection Act. Dr. Savidge further requests that this court affirm the trial court's dismissal of Ms. Young's case.

Respectfully submitted this 5th day of August, 2009.

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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

LINDA YOUNG,)
)
 Appellant,)
)
 v.)
)
 EDWARD P. SAVIDGE,)
)
 Respondent.)
 _____)

DECLARATION OF SERVICE

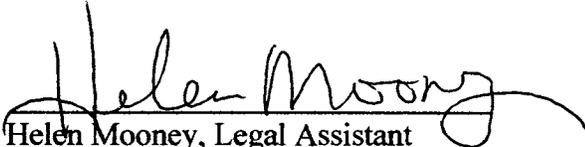
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COURT OF APPEALS
DIVISION II

I declare under penalty of perjury under the laws in the state of Washington that the following is true and correct:

I served a true and correct copy of **Brief of Respondent** by Certified Mail, and facsimile on the following parties to above captioned matter:

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Dated this 5th day of August, 2009, at Seattle, Washington.


Helen Mooney, Legal Assistant