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DIVISION II

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STATE OF WASHINGTON

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No. 39875-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DENISE DALIEN, individually and as class representative

Appellant,

vs.

STANLEY JACKSON, M.D.; PHILLIP C. KIERNEY, M.D., P.S.

Respondents.

BRIEF OF RESPONDENT STANLEY JACKSON, M.D.

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NATURE OF THE CASE

In 1999 Dr. Stanley Jackson injured his eye. In 2000 he performed breast augmentation surgery on Denise Dalien. She was happy with the outcome. In August, 2005, at Dalien's request, Dr. Jackson revised that augmentation. Dalien was not happy with that outcome.

Dalien filed a malpractice suit. Seven months later she filed a separate, class action lawsuit. In the second suit she claimed Dr. Jackson had failed to inform her and other patients of his 1999 eye injury. She did not allege that she or any of the class members suffered physical injury at Dr. Jackson's hands. The only injury she alleged was that she and the other class members were deprived of information about Dr. Jackson's injury when making their decision to treat with him.

Dr. Jackson immediately moved to dismiss the class action on two grounds: Dalien could not file two separate lawsuits arising out of the same treatment, and she did not have a Consumer Protection Act claim based on the conduct she alleged in her complaint. The trial court agreed with both grounds, dismissed her lawsuit, and denied reconsideration. Dalien appeals those orders.

COUNTER-STATEMENT OF THE CASE

Stanley Jackson was a board certified plastic surgeon who practiced

in Tacoma between 1984 and August, 2006. (CP 49) In July, 1999, he injured his left eye when it was struck by a bunge cord. (CP 102) He received treatment, including surgery, and was off work for four weeks. Thereafter he regularly saw an ophthalmologist. (CP 102)

The injury did not affect his ability to perform surgery until July, 2006. (CP 50, 102) At that time, Dr. Jackson experienced a change in his vision. Testing revealed increased intra-ocular pressure. When his physician referred him for surgery, he stopped working. (CP 50, 102) He retired in October, 2006. (CP 284) Following the surgery and his retirement, Dr. Jackson lost most of the vision in that eye. (CP102)

From 1999 until his retirement, Dr. Jackson performed about 1000 office procedures per year and 200 hospital procedures per year. (CP 285) Of these, he performed about 400 to 500 breast implants per year. (CP285)

In 2000, Dr. Jackson performed breast augmentation surgery on Denise Dalien using saline implants. (CP 65) In August, 2005, after she lost weight due to diet and exercise, Dalien returned and asked Dr. Jackson to adjust the appearance of her breasts to conform with her weight loss. At the same time, Dr. Jackson replaced the plaintiff's saline implants with gel implants. (CP 253-54) Dalien was unhappy with the result and Dr. Jackson performed additional revision procedures between 2005 and April, 2006. (CP 254)

On July 14, 2008, Dalien filed a medical malpractice lawsuit against Dr. Jackson. (CP 242-46) She amended her complaint on February 23, 2009. (CP 252- 56) Part of her claim was that she did not give informed consent to the procedures. (CP 255)

On February 12, 2009, Dalien filed a second, separate lawsuit against Dr. Jackson as a class action. (CP 1-5). As the sole class representative, she asserted a single claim: violation of Washington's Consumer Protection Act. (CP 4) She contended Dr. Jackson had a duty to inform every one of his actual and potential patients about his 1999 eye injury but did not, and this amounted to a failure to obtain informed consent. (CP 2) She claimed: "Dr. Jackson's failure to obtain informed consent was used to promote the entrepreneurial aspects of his practice" and "he promoted operations and/or services to increase his profits and the volume of patients and then failed to adequately advise the patients of risks or alternative procedures." (CP 2-3) She did not allege that as a consequence of the injury Dr. Jackson ever improperly performed a medical procedure, or that the eye injury actually impaired Dr. Jackson's ability to practice medicine during any of the time he remained in practice. She also did not allege that she or any of the class members suffered physical injury at Dr. Jackson's hands because of the injury.

Three additional facts are important. First, Dalien's malpractice claim

is not based on injuries due to Dr. Jackson's allegedly impaired vision. Rather, her malpractice claims are grounded in Dr. Jackson's exercise of medical judgment: she claims Dr. Jackson violated the standard of care by performing too many revision surgeries. (CP 244, 254)

Second, the informed consent claim Dalien asserts in her malpractice action is based solely on Dr. Jackson's failure to inform her of the alleged vision impairment. She contends she either would not have undergone the revisions or would have sought treatment elsewhere if Dr. Jackson had told her about his injury. (CP 235-39) She does not claim Dr. Jackson did not inform her of the risks and alternatives to treatment.

Third, no evidence was presented that Dr. Jackson used his vision in the promotion of his practice. The evidence in the record is to the contrary. (CP 195-96)

COUNTER- STATEMENT OF ISSUES

1. Was Dalien's second lawsuit (the class action lawsuit) properly dismissed because it improperly split her claims?
2. Does Washington's duty to provide informed consent require doctors to tell patients of the doctor's physical, emotional, educational or other condition or quality?
3. If Dr. Jackson was required to disclose his eye injury , is his failure to disclose an entrepreneurial activity actionable under Washington's Consumer Protection Act?

ARGUMENT

A. Standard of Review

As they pertain to Dr. Jackson, the orders appealed from were entered following Dr. Jackson's Motion to Dismiss, brought under CR 12(b)(6). However, in deciding the motions, the trial court considered evidence outside the pleadings. When the parties present matters outside the pleadings that the trial court accepts on a motion under CR 12(b)(6), the court treats the motion as one for summary judgment and disposes of it accordingly. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 227, 151 P.3d 1079 (2007).

Appellate courts review orders granting summary judgment de novo, engaging in the same inquiry as the trial court. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). On review of any pleadings, depositions, answers to interrogatories, admissions, and affidavits on file, a court may grant summary judgment if there are no genuine issues as to any material fact, thus entitling the moving party to judgment as a matter of law. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); CR 56(c). The court considers the evidence in the light most favorable to the nonmoving party. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997). When reasonable persons could reach but one conclusion, summary judgment should be granted. *Hansen v.*

Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

B. The trial court properly dismissed Dalien's second lawsuit because it improperly split her claims.

Filing two separate lawsuits based on the same event – claim splitting – is prohibited in Washington. *Landry v. Luscher*, 95 Wn. App. 779, 780, 976 P.2d 1274 (1999).

A claimant may not split a single cause of action or claim. Such a practice would lead to duplicitous suits and force a defendant to incur the cost and effort of defending multiple suits. An injured party is limited to one lawsuit for property and/or personal injury damage resulting from a single tort alleged against the wrongdoer. This is in accord with the general rule that if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim.

Id. at 782. In *Landry*, the plaintiff filed suit in district court for property damage arising from a car accident. Then she filed a separate action in superior court for personal injury from the same accident. The court dismissed the second action. Accord *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 987 P.2d 634(1999)(claim splitting prevents parents from filing separate suit for injury to child).

Claim-splitting is an offshoot of res judicata. Res judicata prevents a plaintiff who has sued to judgment once from recasting his claim under a different theory to sue again and obtain a second judgment. *Babcock v. State*, 112 Wn.2d 83, 93, 768 P.2d 481 (1989). Res judicata prevents a

plaintiff from obtaining multiple judgments from consecutive lawsuits. Claim-splitting prevents obtaining multiple judgments from simultaneous lawsuits.

Here, Dalien has filed a medical malpractice action based on Dr. Jackson's care and treatment of her. That care pertained to her breast augmentation and subsequent revisions. Those procedures were the only basis for her contact with Dr. Jackson. Then Dalien filed a second action based on the same care and treatment. In the first, she alleges she did not give informed consent. In the second, she claims Dr. Jackson's failure to disclose to his patients that he had suffered an eye injury in July, 1999 deprived her of her right to informed consent and was an unfair or deceptive trade practice under Washington's Consumer Protection Act. Her claims in both actions arise from the same nucleus of alleged acts: her breast augmentation procedures. Claim-splitting bars Dalien's second lawsuit.

While Dalien goes to considerable effort to disavow the obvious connection between the two lawsuits and the fact that both arise out of the same treatment and nucleus of facts, in the end she is caught in her own machinations. That the two suits are inextricably intertwined is shown by her own arguments. For example, in attempting to convince this Court that it should recognize a cause of action for Dr. Jackson's failure to inform, Dalien contends: "The fact that a surgeon suffered from a serious eye injury that

eventually led to blindness *is a serious possible risk involved in the treatment administered.*” Brief of Appellant at 25 (Emphasis added). Later she adds: “Ms. Dalien’s allegation that Dr. Kierney and Dr. Jackson failed to inform her and other patients that Dr. Jackson suffered an eye injury that eventually led to his blindness *bears directly on the risks to Ms. Dalien and other surgical patients from the procedures Dr. Jackson performed . . .*” Brief of Appellant at 28-29 (Emphasis added). In the trial court, she described her claim the same way:

Dr. Jackson failed to inform Ms. Dalien of a material fact relating to her treatment – his eye injury and its impact on her surgery. Ms. Dalien consented to surgery without being aware of Dr. Jackson’s eye injury. A reasonably prudent patient would not have consented to eye surgery if she knew the surgeon was going blind. Ms. Dalien suffered injury as a result of Dr. Jackson’s treatments.

(CP 297) These statements show clearly that her claim of lack of informed consent in her second lawsuit relates directly to the treatment she received from Dr. Jackson, which is the basis for her first lawsuit. Her parsing of the uniquenesses of the two suits does not change that fact. The trial court properly dismissed the second lawsuit.

C. A physician’s duty under Washington law to provide informed consent does not require doctors to tell patients of the doctor’s physical, emotional, educational or other condition or quality.

A physician is liable for injuries resulting from health care to which the patient did not consent. RCW 7.70.030(3). A patient may recover for a

doctor's failure to provide informed consent even if the medical diagnosis or treatment was not negligent. *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 663, 975 P.2d 950 (1999). The basis for such a claim is that patients have the right to make decisions about their medical treatment. *Id.*; see also *Smith v. Shannon*, 100 Wn.2d 26, 29, 666 P.2d 351 (1983).

In securing the patient's informed consent, a physician must advise the patient of material facts relating to the proposed treatment. RCW 7.70.050(1)(a). The standard for determining whether a fact is material is the objective "reasonable patient" standard: the physician must disclose those facts a reasonable person would consider in deciding whether to consent to the proposed treatment. *Whiteside v. Lukson*, 89 Wn. App. 109, 111, 947 P.2d 1263 (1997), *rev. denied* 135 Wn.2d 1007 (1998). Those facts include the foreseeable risks of the proposed treatment and availability and risks of alternative treatment or no treatment at all. *Holt v. Nelson*, 11 Wn. App. 230, 523 P.2d 211, *review denied*, 84 Wn.2d 1008 (1974).

Washington courts have repeatedly refused to extend the duty of informed consent to require disclosure of characteristics or attributes personal to the doctor. Our courts recognize that characteristics or attributes personal to the doctor are not material facts relating to treatment. In *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020, 838 P.2d 692 (1992), the court rejected plaintiff's argument that RCW

7.70.050(1) requires a physician to inform a patient of his qualifications. In *Housel v. James*, 141 Wn. App. 748, 172 P.3d 712 (2007), the plaintiff argued the doctor's lack of operative experience should have been disclosed as a material fact necessary to informed consent. The court disagreed. In *Whiteside v. Lukson*, *supra*, the court similarly rejected the argument that the physician should have disclosed his lack of experience with a particular surgical procedure. In doing so, the court devoted significant discussion to the issue.

The traditional view is that material facts are those which relate to the proposed treatment. Some jurisdictions, however, have held that collateral facts relating to the physician's competency may be material.

The broader construction of the term "material fact" has included the physician's conflicts of interest, physical impairment, and lack of experience. Under this expansive approach, facts such as the physician's statistical success rate, or history of malpractice claims, could also be considered material. In theory, the physician's own health, financial situation, even medical school grades, could be considered material facts a patient would want to consider in consenting to treatment by that physician.

Washington courts have not yet adopted the more expansive construction of the physician's duty to disclose. Construing RCW 7.70.050(1), *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 828 P.2d 597, *review denied*, 119 Wn.2d 1020 (1992) limited the statutory duty to disclosure of treatment-related facts, expressly excluding the physician's qualifications. Following this traditional approach, we conclude that a surgeon's lack of experience in performing a particular surgical procedure is not a material fact for purposes of finding liability predicated on failure to secure an informed consent.

89 Wn. App. at 111-12 (citations omitted).

These decisions are consistent with the purpose of informed consent. Informed consent is intended to assure patients have the information they need to choose how to treat their body. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 349, 3 P.3d 211 (2000); *Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 168-69, 772 P.2d 1027, *rev. denied*, 113 Wn.2d 1005, 777 P.2d 1050 (1989)(“Informed consent focuses on the patient's right to know his bodily condition and to decide what should be done.”). Its purpose is not to facilitate choosing a doctor.

Dalien’s efforts to distinguish these decisions lack substance. Regardless of the fine factual distinctions she attempts to draw, a central fact remains: Those courts held that the statutory duty to obtain informed consent extends only to treatment-related facts. *Whiteside*, 89 Wn. App. at 112.

Washington courts are not out of step. Many jurisdictions refuse to recognize a claim for violation of informed consent based on a physician’s failure to disclose some aspect of their skill or ability. See, e.g., *Wlosinski v. Cohn M.D.*, 269 Mich. App. 303, 713 N.W.2d 16 (2005)(informed consent does not require physician to disclose his statistical success rate); *Ditto v. McCurdy*, 86 Haw. 84, 947 P.2d 952 (1997) (declining "to hold that a physician has a duty to affirmatively disclose his or her qualifications or the lack thereof to a patient" where patient disfigured as result of breast surgery

performed by provider lacking appropriate board qualifications); **Foard v. Jarman**, 326 N.C. 24, 387 S.E.2d 162 (1990) (no affirmative duty for health care provider to discuss his or her experience where provider perforated patient's stomach wall while performing gastroplasty, resulting in severe complications, including renal failure); **Duttry v. Patterson**, 565 Pa. 130, 771 A.2d 1255 (2001) (fact that defendant indicated to patient that he had performed procedure approximately once a month when defendant in fact had performed procedure nine times previously is "evidence of a physician's personal characteristics and experience [that] is irrelevant to an informed consent claim" where leak at surgical site became rupture and resulted in plaintiff suffering from adult respiratory disease syndrome and permanent lung damage); **Abram by Abram v. Children's Hospital of Buffalo**, 151 A.D.2d 972, 542 N.Y.S.2d 418, 419 (N.Y.App.Div.1989) (holding that under the statute governing informed consent there was no breach of duty to disclose the experience of the personnel administering the medical care); **Curran v. Buser**, 271 Neb. 332, 711 N.W.2d 562 (2006)(doctrine of informed consent did not require physician to disclose disciplinary history). The fact that Dalien could unearth a few decisions from other jurisdictions where a duty to disclose was found does nothing to assist this court's decision in this jurisdiction.

More importantly, Washington courts have good reason to reject the

rule Dalien proposes: it is a recipe for disaster. The informed consent doctrine is based on the premise that if patients are fully informed they may make different health care decisions. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 349, 3 P.3d 211 (2000). The doctrine is not premised on either a breach of the standard of care or negligence in the provision of care. Thus, a claim for informed consent may arise even when the medical procedure is properly performed or when an adverse consequence is a recognized risk of the procedure. *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 659-61, 975 P.2d 950 (1999). Because the doctrine allows a claim for damages even for a properly performed procedure, and because virtually every procedure carries some risk of adverse consequences even if properly performed, it is appropriate to apply the informed consent doctrine narrowly. The more broadly the doctrine is applied, the more often medical professionals are held accountable for known risks of medical procedures. Broadening informed consent to include the myriad of possible personal details in a doctor's life which a patient may consider important to their health care decision (i.e., "personally relevant information" as opposed to legally relevant information) opens a pandora's box of opportunities for patients to recover for adverse consequences of a medical procedure even if they were fully aware of the risk, and the doctor acted entirely within the standard of care. Patients could always find some detail which, with the benefit of hindsight and knowledge

of the relative success of the treatment, they could claim would have caused them to make a different decision: a doctor's education relative to other's in the community, a doctor's statistical rate of success with a given procedure, personal details within the doctor's life, the doctor's familiarity with the facilities in which the procedure is performed, the doctor's familiarity with staff who assists the procedure, the training and personal details of the staff, and many other such intangibles. As the threat of such liability for known risks increases, the cost of health care increases, the willingness of doctors to perform higher risk procedures decreases, and the pool of available doctors to perform higher risk procedures declines. It is very appropriate that Washington courts limit informed consent to disclosure of treatment-related facts.

This does not leave patients without a remedy, nor free doctors to practice while incompetent. Medical disciplinary procedures are available to remove doctors who practice when they should not. See Uniform Disciplinary Act, RCW ch. 18.130; *Nguyen v. Washington State Health Dept. Medical Quality Health Assurance Com'n*, 144 Wn.2d 516, 29 P.3d 689 (2001). And, if the doctor's particular quality or condition actually causes an adverse result in breach of the standard of care, patients may recover for the doctor's negligence wholly separate from informed consent. See *Backlund v. Univ. of Wash.*, *supra*, 137 Wn.2d at 661 ("A physician

who misdiagnoses the patient's condition, and is therefore unaware of an appropriate category of treatments or treatment alternatives, may properly be subject to a negligence action where such misdiagnosis breaches the standard of care, but may not be subject to an action based on failure to secure informed consent.”)

Many other reasons also support rejecting the duty Dalien proposes. For example, requiring doctors to disclose personal details of their lives makes them second-class citizens with regard to personal privacy. Laws like the federal Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C.A. § 1320d-6, and Washington’s Uniform Health Care Information Act and physician/patient privilege, , RCW ch. 7.02 and RCW 5.60.060 respectively, protect citizens from public disclosure of personally sensitive information without regard to their occupation. Yet, Dalien asks this Court to compel doctors to open their personal histories to all who inquire about their services as a condition of practicing medicine. The law imposes no such duty on other professions. See *State v. Wise*, 148 Wn. App. 425, 200 P.3d 266 (2009)(Prospective jurors not required to disclose persona health information protected under HIPAA and Washington Constitution).

Moreover, the rule is unnecessary. To the extent patients base their decision on “personally relevant information” not encompassed within informed consent, they still are free to raise their concern and ask about

particular qualities that matter to them. Thus, patients may protect themselves without a legal duty of disclosure on physicians.

Nor is the burden on patients great. *Treatment related information* is peculiarly within the physician's training and expertise. Patients do not have that training and cannot reasonably be expected even to know what to ask. The law properly places an affirmative duty to provide that information on the physician. *Personally relevant information* such as the doctors' physical health, family life, sexual orientation, etc., however, is not knowledge obtained by training and expertise. Patients can reasonably be expected to know their particular concerns and express them. To the extent such information is relevant to a particular patient, the patient is just as able to inquire as the physician is to disclose.

And, putting responsibility on patients to inquire about personally relevant information has the added benefit of revealing information which may affect the physician's decision to treat the patient. For example, a physician may choose not to disclose private information, or decline to treat a patient for whom the doctor's race, religion or educational background is personally relevant. Likewise, a doctor may choose to decline to treat a patient whose inquiries reveal a hypersensitivity to matters extraneous to the treatment itself. Placing responsibility on the patient to inquire about personally relevant information allows doctors to know and respond to

matters of particular interest to patients, while at the same time giving doctors information to help them decide whether to accept the individual as a patient for the particular treatment.

Another reason is that the duty Dalien seeks elevates form over substance. Because physicians are humans, every one of them has some impairment or limitation. Indeed, with the advent of advanced medical technology, doctors often must look to external enhancements to carry out procedures their human body alone cannot perform. Those include enhancements to strength, dexterity, vision and even endurance. While interesting in the abstract, none of these limitations or infirmities prevent the physician from performing at and beyond their professional standard of care. That is true here. There is no evidence, and not even the allegation, that Dr. Jackson's eyesight played any role in the outcome of Dalien's treatment. Indeed, Dalien herself concedes, her claim is not based at all on the outcome of her treatment or the treatment of any of the putative class members. She claims to have a cause of action even if every one of Dr. Jackson's patients was fully satisfied with the outcome of treatment.

A final reason is that the breadth of "personally relevant information" is simply too broad to impose a legal duty of affirmative disclosure. Reasonable questions illustrate the point. If doctors must disclose a prior eye injury to patients, must they also disclose simple poor vision whether or not

it is corrected? Must they disclose a prior concussion or heart attack, that they have arthritis, medications they are taking, whether they are under a doctor's care, that they wear a pacemaker, or that they have difficulty standing for long periods? Must doctors notify patients if they attended a non-accredited medical school, or that their grades in medical school were not at the top of the class? Must they tell patients they have been subject to professional discipline or criminal charges? Do they have an affirmative duty to disclose how many of the particular procedures they have performed and how their training compares with other doctors? Will they have to disclose the equipment they will use to enhance their physical limitations in vision, strength or dexterity? Since it may affect a patient's decision to treat with a particular doctor, must doctors inform prospective patients of their racial background, nationality, religious or political views? Must they disclose their sexual proclivities or orientation so the patient can decide whether the doctor presents a risk of transmission of HIV or other diseases that is unacceptable to the patient? Would the rule extend only to long term conditions, or would it include short term conditions which, in theory could affect a doctor's performance on a given day? Must doctors disclose whether they consumed alcohol the night before they performed surgery, that they are involved in messy divorce proceedings or their child has just run away or been hurt? Should they disclose acrimonious business relationships with their partners,

that they are experiencing financial difficulties or have filed for bankruptcy?

There is no reasonable end if informed consent includes not only a review of the hazards of the procedure and the patient's treatment options, but a run-down on the doctor's own personal, emotional, physical and general life conditions. The list of possible conditions and qualities that may be of interest to prospective patients is endless. All physicians possess different qualities of eyesight, different strength in limbs, different emotional states, different levels of professional skill. They come in every race, religion and nationality. From time to time, they may be tired or alert, angry or happy, in pain or pain free, preoccupied or focused, agitated or calm, or multiples of any range of physical and mental states. However, those conditions should be relevant only if they lead to a breach of the standard of care in the provision of care and treatment. They should not be included in the duty of informed consent.

No Washington case has ever held that a doctor's failure to disclose some physical or mental infirmity or limitation itself gives rise to a cause of action, irrespective of whether the infirmity or limitation made it easier or more difficult for the doctor to practice medicine. Each time our courts have been asked to do so, they have refused. Compelling reasons support that result. The trial court correctly declined to recognize a duty in this case.

D. Even if Washington law imposes a duty on doctors to inform patients of the doctor's physical or other condition as part of the duty to give informed consent, the breach of that duty is not actionable under Washington's Consumer Protection Act.

To support a Consumer protection act claim , a 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) and 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). A plaintiff alleging injury under the CPA must establish all five elements. *Id.*

Members of the learned professions are covered under the CPA. *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986). However, our courts have roundly rejected subjecting professional negligence claims to the CPA. *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984); *Quimby*, 45 Wn. App. at 180. "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); accord *Short v. Demopolis*, 103 Wn.2d at 61 (Claims regarding "the competence of and strategy employed by plaintiffs' lawyers, . . . amount to allegations of negligence or malpractice and are exempt from the CPA.")

Several decisions have addressed CPA claims based on medical

services. In *Wright v. Jeckle*, 104 Wn. App. 478, 16 P.3d 1268 (2001), for example, a doctor solicited patients by advertising a weight loss program which used a diet drug that could be purchased only at the doctor's office. The doctor "was not practicing medicine" but "was in the business of selling diet drugs," so the court ruled the plaintiff had a valid CPA claim. *Id.* at 485. In contrast, in *Benoy v. Simons*, 66 Wn. App. 56, 831 P.2d 167 (1992), the Benoys claimed a doctor was "deceptive and unfair in retaining [their son] as a patient" because he "led them to believe the care given to [their son] was required when it actually had no beneficial value." The court found there was "no showing Dr. Simon's decision to maintain [their son] on the ventilator was influenced by any entrepreneurial motives on his part." *Id.* at 65. In *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604, 200 P.3d 695 (2009), the Court refused to allow a CPA claim against a periodontist who substituted cow bone for human bone during a grafting procedure, stating:

Michael failed to show that Dr. Mosquera-Lacy's use of cow bone is entrepreneurial. It does not relate to billing or obtaining and retaining patients. It simply relates to Dr. Mosquera-Lacy's judgment and treatment of a patient. There is no evidence that cow bone was used to increase profits or the number of patients. When the supply of human bone ran out during the procedure, Dr. Mosquera-Lacy used her judgment and skills as a periodontist to finish the procedure. This is not actionable under the CPA.

Id. at 604.

Dr. Jackson agrees he did not disclose his 1999 injury to Dalien or

any of his patients. Why would he, the injury did not impair his care or treatment of Dalien or any other patient? But for her CPA claim to survive, Dalien must show Dr. Jackson's actions were entrepreneurial.

In that, she failed. Dalien did not claim, nor could she, that Dr. Jackson used his eyesight in advertising or as way to recruit new patients. (See CP 195-96) Thus, she did not, nor could she, claim that Dr. Jackson advertised his eyesight as better than his competitors, or that it conferred on him some special skill or ability his competitors did not possess. Unlike the doctor in *Wright v. Jeckle*, Dr. Jackson was not in the business of advertising or selling his eyesight.

Dalien cannot claim, nor has she, that Dr. Jackson did not possess the education, licensing, skill, and ability to perform plastic surgery despite his eyesight. He did. Thus, this is not a case where a person has advertised or represented himself as qualified when he was not.

Dalien has not claimed, nor could she show, that Dr. Jackson's vision impacted his billing or any aspect of the administration of his medical office. It did not.

Instead, Dalien merely argues that since the quality of Dr. Jackson's eyesight might have affected a patient's decision to treat with him, failure to disclose had a business consequence and therefore is entrepreneurial. This is the same argument made and rejected in *Benoy v. Simons, supra*: That the

doctor recommended treatment to make more money. But, literally every professional decision has a business consequence. As the holdings in *Benoy v. Simons*, *supra* and *Michael v. Mosquera-Lacy*, *supra*, make clear, business consequences are not enough.

CPA claims against doctors must rest upon breaches of duties in entrepreneurial activities. Because Dalien has not alleged facts, and cannot show, that even if the duty of informed consent required Dr. Jackson to disclose his 1999 injury, failing to disclose was an entrepreneurial activity, she does not have a claim under Washington's Consumer Protection Act. The trial court properly dismissed her claim.

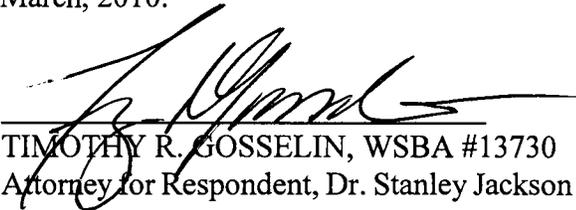
CONCLUSION

Filing her claim as a class action gives Dalien no greater substantive rights than she has as an individual. It does not make her claim more significant, valid or deserving of deference. It does not relieve her of any burden of proof or free her from any valid defense.

Dalien could not bring her second lawsuit because she was already pursuing a lawsuit based on the same facts and treatment. Her second suit violated Washington's prohibition against claims-splitting. Even if it did not, Dalien did not have a claim against Dr. Jackson. Washington law does not require Dr. Jackson to disclose the condition of his eyesight to his patients. Even if it did, his failure is not actionable under the CPA because it was not

an entrepreneurial activity. For these reasons, Dr. Jackson asks the Court to affirm the trial court's orders dismissing this lawsuit.

Dated this 22nd day of March, 2010.



TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Respondent, Dr. Stanley Jackson

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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DENISE DALIEN, individually
and as class representative

Appellant,

vs.

STANLEY JACKSON, M.D.;
PHILLIP C. KIERNEY, M.D.,
P.S.

Respondents.

NO. 39875-3-II

DECLARATION OF
SERVICE OF BRIEF
OF RESPONDENT
STANLEY JACKSON, M.D.

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 22nd day of March, 2010, I did place in the United States Mail, first class postage affixed, the BRIEF OF RESPONDENT STANLEY JACKSON, M.D. and this declaration directed to and to be delivered to:

Clerk's Office
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Thaddeus P. Martin
THADDEUS P. MARTIN LLC
4928 109th Street SW
Lakewood, WA 98499

DECLARATION OF
SERVICE OF BRIEF
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I declare and state under the penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

Signed this 22nd day of March, 2010 at Tacoma, Washington.


TIMOTHY R. GOSSELIN
Gosselin Law Office, PLLC