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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT REPORTER

No. 39875-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DALIEN, DENISE, individually,
and as a Class Representative,

Appellant,

v.

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

Respondents.

CO-RESPONDENT DR. KIERNEY'S RESPONSE BRIEF

Rebecca S. Ringer, WSBA #16842
David J. Corey, WSBA #26683
Amber L. Pearce, WSBA #31626
Floyd, Pflueger & Ringer, P.S.
2505 Third Avenue, Suite 300
Seattle, WA 98121
206-441-4455

Attorneys for Respondent Phillip
C. Kierney, M.D., P.S.

ORIGINAL

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STATUTES

RCW 7.70.504

RCW 19.86.0202, 3

I. INTRODUCTION

Respondent Philip C. Kierney, M.D., P.S. was a practice partner with co-respondent Dr. Stanley Jackson and is one step removed from this case. Dr. Kierney, a third party, did not treat or consult with Appellant Denise Dalien. Nevertheless, Dalien sued him, contending that: (1) Dr. Kierney owed her a duty under the informed consent doctrine to disclose his practice partner's physical "condition" to her; and (2) Dr. Kierney's failure to disclose his colleague's "condition" directly to her constitutes a violation of the Consumer Protection Act.

No case or statute in the state of Washington supports Dalien's novel application of the informed consent doctrine, which explains why she heavily relies on extra-judicial authority. Further, as recently as September 2009, the state Supreme Court reiterated its longstanding disapproval of consumer protection actions by patients against doctors. The Court held that "[w]here increased costs are incurred as a result of personal injury, we hold that the monetary injury cannot be separated from the personal injury and a claim under the CPA cannot be maintained." *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). In this case, the trial court correctly dismissed Dalien's lawsuit against Dr. Kierney.

II. COUNTER-STATEMENT OF THE FACTS

Respondent Dr. Kierney joins in and incorporates by reference co-respondent Stanley Jackson, M.D.'s statement of facts as if fully set forth herein.

Dr. Kierney was a colleague and business partner of Dr. Jackson and worked in the same office with him. On June 10, 2009, Dalien filed an Amended Complaint, wherein she added Dr. Kierney as a co-defendant with Dr. Jackson. (CP 152-56) The sole claim against Dr. Kierney was that he violated Washington's Consumer Protection Act. (CP 152-56)

The Amended Complaint did not allege that Dalien was ever a patient of Dr. Kierney or that Dr. Kierney treated her. Rather, her second tier allegations against Dr. Kierney stemmed from the alleged acts or omissions of his colleague, Dr. Jackson, who performed breast augmentation surgery on Dalien. (CP 65, 152) Her allegations against Dr. Kierney that formed the basis for a statutory violation of Washington's Consumer Protection Act were as follows:

- "Dr. Jackson engaged in unfair or deceptive acts or practices in the business conduct of his medical practice in violation of RCW 19.86.020 of

which Dr. Kierney knew or should have known and from which Dr. Kierney benefitted.” (CP 152)

- Dr. Kierney “knew or should have known” of Dr. Jackson’s alleged vision impairment and “any negative impact it had on his ability to perform surgery.” (CP 154); and
- Dr. Kierney “did not inform any of Dr. Jackson’s current or potential patients of any negative impact Dr. Jackson [alleged vision impairment] had on Dr. Jackson’s ability to perform surgery.” (CP 154).

Accordingly, “[i]n violation of RCW 19.86.020, Defendants engaged in unfair and/or deceptive actions in commerce which affect the public interest and caused injury to Plaintiffs.” (CP 155)

The Amended Complaint did not allege privity or a commercial relationship between Dalien and Dr. Kierney, nor did it describe any unfair or deceptive act or practice by Dr. Kierney occurring in trade or commerce. Moreover, the Amended Complaint did not allege that Dalien was ever a patient of Dr. Kierney or that Dr. Kierney treated her.

On July 17, 2009, the Pierce County Superior Court fully dismissed, with prejudice, Dalien’s CPA claim against co-respondent Dr. Jackson (403-04). Likewise, on September 25, 2009, it fully dismissed, with prejudice,

Dalien's CPA claim against co-respondent Dr. Kierney. (CP 689-91) The trial court denied reconsideration. Dalien is appealing the dismissal of the CPA claim that she asserted against Dr. Jackson and Dr. Kierney. (CP 692-704)

III. COUNTER-STATEMENT OF THE ISSUES

- (1) Does Washington law impose a duty on Dr. Kierney, under RCW 7.70.50, to affirmatively disclose Dr. Jackson's alleged physical, emotional, educational or other condition to Dr. Jackson's patients?
- (2) Is Dr. Kierney's failure to disclose an alleged physical, emotional, educational or other condition of Dr. Jackson to Dr. Jackson's patients an entrepreneurial activity actionable under Washington's Consumer Protection Act?

IV. ARGUMENT

A. Standard of Review

Co-respondent Dr. Kierney joins in and incorporates by reference co-respondent Dr. Jackson's standard of review as if fully set forth herein, which is a *de novo* review of summary judgment dismissal.

B. There Is No Duty Requiring a Doctor to Affirmatively Disclose to Patients the Physical, Emotional, Educational, or Other Condition of Another Doctor.

Co-respondent Dr. Kierney joins in and incorporates by reference co-respondent Dr. Jackson's legal arguments as if fully set forth herein. As a preliminary matter, Dr. Kierney is one step removed from this case. He was merely a practice partner with Dr. Jackson during various times when Dr.

Jackson was treating Dalien. (VRP 4:10-12 (Dec. 4, 2009)) Dr. Kierney did not treat Dalien.

Dalien readily acknowledges and admits that there is no cause of action in Washington for lack of informed consent based on a doctor's credentials or competency. (VRP 8:21-25; 9:1-2; 9:22-24) (Dec. 4, 2009)) In an effort to change the statute in Washington, Dalien first ignores the well-settled law in this jurisdiction. The focus and centerpiece of Dalien's argument in support of expanding the informed consent statute is a 1991 Louisiana case. (See App. Br. at 20-22). In *Hidding v. Williams*, 578 So.2d 1192 (La. 1991), the trial court there concluded, "[b]ased on both fact and expert testimony," that Dr. Williams' chronic alcohol abuse presented a material risk of injury to the patient, which Dr. Williams – the patient's treating surgeon – was obliged to disclose.

Here, even if Dalien's unsubstantiated claims of Dr. Jackson's visual impairment imposed a duty on Dr. Jackson to disclose the same to Dalien, she is unable to cite any case or statute in the United States that imposes a duty on a third-party colleague, such as Dr. Kierney—who was not involved in Dalien's treatment—to disclose another doctor's physical, emotional, education, or other conditions to that doctor's patient.

The doctrine of informed consent arises from the principle of patient sovereignty and the inviolate decision-making relationship between the doctor and patient. It is axiomatic that informed consent is the non-delegable duty of the treating physician.

Washington courts have consistently held that bystander hospitals and bystander nurse owe no informed consent obligation. *See, e.g., Howell v. Blood Bank*, 114 Wn.2d 42, 56, 785 P.2d 815 (1990) (bystander nurse); *Silves v. King*, 93 Wn. App. 873, 883, 970 P.2d 790 (1999) (“The duty to ascertain and warn of material risks belongs to the physician...It is not ordinarily an independent duty of the nurse”); *Alexander v. Gonser*, 42 Wn. App. 234, 239, 711 P.2d 347 (1985) (rejecting claim that a hospital has an independent duty to inform a patient of test results administered at the request of the treating physician).

While Dr. Jackson owed a non-delegable duty to assure that Dalien had given her informed consent (to receive medical care), Dr. Kierney did not. If Dr. Kierney had a duty to disclose one physical condition, such as Dr. Jackson’s alleged visual impairment, must Dr. Kierney disclose all conditions? Does informed consent include not only a review of the hazards of the procedure and the patient’s various options, but a run-down by a third-

party doctor of another doctor's own personal, emotional, physical and general life conditions to the patient?

Any informed consent claim against Dr. Kierney fails as a matter of law. To impose any informed consent obligation on a non-treating bystander doctor, such as Dr. Kierney here, would violate the well-settled law and policy of the state of Washington. The trial court correctly dismissed Dalien's claim against Dr. Kierney.

C. The Consumer Protection Act Does Not Apply to This Case.

Co-respondent Dr. Kierney joins in and incorporates by reference co-respondent Dr. Jackson's legal arguments as if fully set forth herein.

Even if Washington law imposed a duty on third-party Dr. Kierney to affirmatively disclose the physical, emotional, education or other condition of Dr. Jackson to Dr. Jackson's patients, the breach of that duty is not actionable under the Consumer Protection Act because it was not entrepreneurial.

In *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604, 200 P.3d 695 (2009), the Supreme Court held that no CPA claim could be had where the claim relates to the doctor's "judgment and treatment of a patient" and the claimant fails to submit evidence that the injurious procedure was "advertised or marketed." Dalien does not assert that Dr. Kierney used Dr. Jackson's

eyesight in advertising, marketing, or as a method to attract new patients. Dalien does not allege that Dr. Kierney advertised Dr. Jackson's eyesight as better than his competitors, or that it conferred on Dr. Jackson some special skill or ability that his competitors did not possess.

CPA claims against doctors must intersect with breaches of duties in entrepreneurial activities. *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986) (holding a lack of informed consent *may* be within the scope of the CPA if it relates to the entrepreneurial aspects of the medical practice). Because Dalien has not alleged facts, and cannot show, that Dr. Kierney had a legal duty to disclose Dr. Jackson's physical "condition" to Dr. Jackson's patients or that failing to disclose was an entrepreneurial activity, the law does not recognize her claim.

Finally, in September 2009, the state Supreme Court reiterated its longstanding disapproval of consumer protection actions by patients against doctors. The Court held that "[w]here increased costs are incurred as a result of personal injury, we hold that the monetary injury cannot be separated from the personal injury and a claim under the CPA cannot be maintained." *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). The trial court

correctly dismissed of Dalien's CPA claim against Dr. Kierney as a matter of law.

V. CONCLUSION

Washington law does not require a third party, such as Dr. Kierney to disclose the condition of Dr. Jackson's eyesight to Dr. Jackson's patients. Even if it did, his failure is not actionable under the CPA because it was not, among other limitations, an entrepreneurial activity. For these reasons, respondent Dr. Kierney respectfully requests that the Court affirm the trial court's dismissal of the CPA claim against Dr. Kierney.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.



Rebecca S. Ringer, WSBA #16842
David J. Corey, WSBA #26683
Amber L. Pearce, WSBA #31626
Attorneys for Respondent Phillip C.
Kierney, M.D., P.S.

Floyd, Pflueger & Ringer, P.S.
2505 Third Avenue, Suite 300
Seattle, WA 98121
206-441-4455

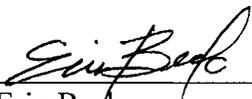
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, under penalty of perjury under the laws of the State of Washington, that on the 22nd day of March, 2010, I caused to be served a true and correct copy of the foregoing via legal messenger, email and/or fax, addressed to the following:

Thaddeus P. Martin
Attorney at Law
4002 Tacoma Mall Boulevard, Suite 102
Tacoma, WA 98409

Steven F. Fitzer
Sally B. Leighton
Burgess Fitzer, P.S.
1145 Broadway, Suite 400
Tacoma, WA 98402-3584

Timothy R. Gosselin
Gosselin Law Office, PLLC
1901 Jefferson Avenue, Suite 304
Tacoma, WA 98402


Erin Beck
Legal Assistant

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