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Division II  
State of Washington  
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NO. 50662-9  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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DENISE REAGAN,

Appellant,

vs.

ST. ELMO NEWTON, III. M.D.,

Respondent.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE DEREK VANDERWOOD

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AMENDED BRIEF OF APPELLANT

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**Table of Contents**

Assignment of Error.....1

Issues Pertaining to Assignments of Error.....1

Statement of Case.....1

Summary of Argument.....9

    I. The Trial Court Erred in Finding that an Examination  
        Conducted Pursuant to RCW 51.32.110 is “Health Care”,  
        As that Term has Been Defined by the Legislature and the  
        Appellate Courts of this State.....9

    II. The Trial Court Erred in Ruling that Appellant had not  
        Established the Prima Facie Elements of Battery or Assault..9

Argument .....9

    I. The Trial Court Erred in Finding that an Examination  
        Conducted Pursuant to RCW 51.32.110 is “Health Care”,  
        As that Term has been Defined by the Legislature and the  
        Appellate Courts of this State.....9

        A. An Independent Medical Examination is not Health  
            Care.....14

        B. The Medical Malpractice Statute is in Derogation of  
            Common Law and Must be Strictly Construed.....17

    II. The Trial Court Erred in Ruling that Appellant Had Not  
        Established the Prima Facie Elements of Battery or  
        Assault.....23

        A. RCW 7.70 Does Not Preempt Appellant’s Claims  
            For Medical Battery, Battery, or for Assault.....23

        B. Appellant Established the Prima Facie Elements of  
            Medical Battery, Battery and Assault.....23

Conclusion.....26

**Table of Authorities**

**Cases:**

*Beggs v. DSHS*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011).....12

*Berger v. Sonneland*, 144 Wn.App. 91, 109, 26 P.3d 257  
(2001).....12, 18

*Branom v. State*, 94 Wn.App. 464, 468, 974 P.2d 335 (1999) .....12, 17

*Branom v. State*, 94 Wn.App. 464, 470, 974 P.2d 335 (1999).....12

*Bundrick v. Stewart*, 128 Wn.App. 11, 17, 114 P.3d 1204 (2005) .....23

*Daly v. United States*, 946 F.2d 1467 (9<sup>th</sup> Cir. 1991).....11,13

*Eelbode v. Chec.Med.Ctrs., Inc.*, 97 Wn.App. 462, 467, 984  
P.2d 436 (1999).....11, 13, 14, 16

*E.g., Riste v. General Electric Co.*, 47 Wn.2d 680, 289 P.2d 339  
(1955).....10

*Estate of Sly v. Linville*, 75 Wn.App. 431, 439, 878 P.2d 1241  
(1994).....13

*King v. Garfield County Public Hospital District*, 17 Fed. Supp.3d 1060,  
1071 (2014) (*reversed on other grounds*), 641 Fed.Appx. 696  
(2015) .....14

*McKinney v. City of Tukwila*, 103 Wn. App. 391, 408 13P.3d  
641 (2001).....24

Conclusion.....26

**Table of Authorities**

**Cases:**

*Beggs v. DSHS*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011).....12

*Berger v. Sonneland*, 144 Wn.App. 91, 109, 26 P.3d 257  
(2001).....12, 18

*Branom v. State*, 94 Wn.App. 464, 468, 974 P.2d 335 (1999) .....12, 17

*Branom v. State*, 94 Wn.App. 464, 470, 974 P.2d 335 (1999).....12

*Bundrick v. Stewart*, 128 Wn.App. 11, 17, 114 P.3d 1204 (2005) .....23

*Daly v. United States*, 946 F.2d 1467 (9<sup>th</sup> Cir. 1991).....11,13

*Eelbode v. Chec.Med.Ctrs., Inc.*, 97 Wn.App. 462, 467, 984  
P.2d 436 (1999).....11, 13, 14, 16

*E.g., Riste v. General Electric Co.*, 47 Wn.2d 680, 289 P.2d 339  
(1955).....10

*Estate of Sly v. Linville*, 75 Wn.App. 431, 439, 878 P.2d 1241  
(1994).....13

*King v. Garfield County Public Hospital District*, 17 Fed. Supp.3d 1060,  
1071 (2014) (*reversed on other grounds*), 641 Fed.Appx. 696  
(2015) .....14

*McKinney v. City of Tukwila*, 103 Wn. App. 391, 408 13P.3d  
641 (2001).....24

<i>Sherman v. Kissinger</i> , 146 Wn.App 855, 855-56, 195 P.3d 539 (2008).....	17
<i>Wright v. Jeckle</i> , 104 Wn.App. 478, 481, 16 P.3d 1268 (2001) .....	23
<i>Young v. Savidge</i> , 155 Wn.App. 806, 822, 230 P.3d 222 (2010) ....	23, 25

**Washington Statutes:**

RCW 7.70.....	1, 12, 20, 23
RCW 7.70.010.....	10, 12, 17, 20
RCW 7.70.020.....	11
RCW 7.70.020(1).....	11, 16
RCW 7.70.030.....	10, 12, 21
RCW 7.70.030(1).....	11
RCW 51.04.050.....	16
RCW 51.32.055(4).....	15
RCW 51.32.110.....	1, 9, 14, 22
RCW 51.32.110(1).....	14
RCW 51.32.110(2) .....	15
RCW 51.36.070.....	2
RCW 70.02.010 .....	13
RCW 70.02.010(4).....	14
RCW 70.02.010(5).....	18
RCW 70.02.010(5)(a).....	19

RCW 70.70.065(3).....18, 19

**Washington Regulations:**

WAC 296-23-357 .....16

WAC 296-23-362 .....2, 16

**Washington Pattern Jury Instructions Comments:**

WPIC 105.06 (2013).....12

**ASSIGNMENT OF ERROR**

1. The trial court erred in entering its Order dated June 29, 2017, granting Respondent’s Motion for Summary Judgment and dismissing Appellant’s claims against Respondent.

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is providing health care an element of any claim brought under RCW 7.70, *et seq.*, the medical malpractice statute? Did Respondent provide health care when conducting an independent medical examination of Appellant pursuant to RCW 51.32.110? Did Appellant establish a prima facie claim for battery or assault against Respondent?

**STATEMENT OF CASE**

On June 13, 2013, Appellant Denise Reagan was injured in the course of her employment at Chuck’s Produce in Vancouver, Washington. CP 11. A claim for workers compensation benefits was filed with the Department of Labor and Industries (hereinafter “the Department”). The claim was accepted for the following medical conditions: Thoracic sprain, non-allopathic lesion of the cervical region and non-allopathic lesion of the thoracic spine. CP 138.

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

The report signed by Respondent stated that Appellant was instructed to

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

CP 131.

Respondent testified that both examiners, as well as an employee of the company that arranges the exam, tell the examinee to inform the examiners if the exam gets painful. CP 89.

Prior to the start of the examination, Respondent was given a two-page form to fill out. CP 96. She indicated she had had a surgery on her left hip. During the interview with Dr. Chong, she informed him the

surgery had occurred in 2008. CP 98; see also, CP 133. Appellant also informed the examiners that she was experiencing pain to the area of her left hip. CP 116.

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

Respondent asked Appellant to lift her left leg as high as she could, and Appellant did so. Appellant testified Respondent asked

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

CP 110.

Appellant testified that Respondent then

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

CP 110.

Immediately after that, the examiners announced the exam was over and left the room. CP 110.

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

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

CP 113-114 (emphasis added).

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

On January 21, 2015, Appellant underwent an independent medical examination under the same claim number as the examination conducted by Respondent. CP 121. The examination was conducted by Bruce Blackstone, MD. *Id.* Dr. Blackstone wrote a report of his findings, his examination, as well as his review of Appellant's medical records. CP 121-127. On page 6 of his report, Dr. Blackstone wrote that he

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

CP 126.

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

Respondent testified in a discovery deposition. His testimony included the following regarding his role as a physician performing independent medical examinations:

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

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

CP 88.

. . .

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

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

CP 91.

...

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

**A:** We are not your treating doctors.

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

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

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

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

**A:** We don't offer treatment.

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

**A:** We tell them what we are there for.

**Q:** So you may not specifically mention that you are not there to offer treatment. Am I hearing that right?

**A:** It's implied certainly and inferred I think, because tell them why we're there. It does not include anything about treatment.

CP 92.

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

**A:** So my typical practice is to let the examinee know that although I do see patients like him or her, this is a request for a one-time evaluation and because it is a one-time evaluation I am not permitted to be his or her treating physician and therefore this is a specific examination as requested by whoever referred him or her and the purpose is to respond to questions from the referral source.

**Q:** And again in your personal experience conducting these exams, do you consider that when you're conducting one of these exams that you are establishing a physician/patient relationship with the examinee?

**A:** Absolutely not. And I also then complete my preamble by informing them that I apologize that because I'm not permitted to be their treating physician, I'm not permitted to provide any diagnosis or treatment recommendations.

CP 105-106.

Respondent also testified regarding statements made to Appellant concerning pain she might experience during the examination:

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

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

CP 88.

...

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

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

CP 89.

...

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

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

CP 91-92.

When asked if the admonitions to examinees were given to Appellant, Respondent referenced the first page of his report, which read in relevant part as follows:

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

CP 90; see also CP 131.

### **SUMMARY OF ARGUMENT**

**I. THE TRIAL COURT ERRED IN FINDING THAT AN EXAMINATION CONDUCTED PURSUANT TO RCW 51.32.110 IS “HEALTH CARE”, AS THAT TERM HAS BEEN DEFINED BY THE LEGISLATURE AND THE APPELLATE COURTS OF THIS STATE.**

**II. THE TRIAL COURT ERRED IN RULING THAT APPELLANT HAD NOT ESTABLISHED THE PRIMA FACIE ELEMENTS OF BATTERY OR ASSAULT.**

### **ARGUMENT**

**I. THE TRIAL COURT ERRED IN FINDING THAT AN EXAMINATION CONDUCTED PURSUANT TO RCW 51.32.110 IS “HEALTH CARE”, AS THAT TERM HAS BEEN DEFINED BY**

**THE LEGISLATURE AND THE APPELLATE COURTS OF THIS STATE.**

Enacted in 1976, Washington’s medical malpractice statute “pre-empted” all tort and contract claims related to health care. RCW 7.70.010. The title of the Legislature’s declaration of modification of health care cases reads as follows:

Declaration of modification of actions  
for damages based upon injuries  
*resulting from health care.*

RCW 7.70.010 (emphasis added).

The statute requires that claims brought against health care providers must establish “one or more of the following propositions”:

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

RCW 7.70.030.

Under common law, medical malpractice liability arose only in the context of a physician-patient relationship. *E.g., Riste v. General Electric Co.*, 47 Wn.2d 680, 289 P.2d 339 (1955). The intent of the legislature in

passing the medical malpractice act in 1976 was to relax that requirement. *Daly v. United States*, 946 F.2d 1467, 1469 (1991). Physical therapists, as well as opticians, pharmacists, and paramedics are included under the statutory definition of “health care provider” in RCW 7.70.020(1). *Eelbode v. Chec.Med.Ctrs., Inc.*, 97 Wn.App. 462, 467, 984 P.2d 436 (1999). Under most circumstances, the latter three professionals do not establish physician-patient relationships with the people *they serve*. *Eelbode, id.*, (citing *Daly v. United States, supra*). (emphasis added). Including these professionals as health care providers under the statute supports a legislative intent “to impose liability beyond the context of a physician-patient relationship.” *Eelbode, id.* (quoting, *Daly v. United States*, 946 F.2d at 1469).

The Ninth Circuit in *Daly* held that an action brought under RCW 7.70.030(1) -- breach of the accepted standard of care -- does not require a physician-patient relationship. The holding is a recognition that subsection (1) does not contain the word “patient”, as well as of the Legislature’s expansion of the fields of health care providers to whom liability could be ascribed in the course of giving “health care”. See also RCW 7.70.020<sup>1</sup>. At the risk of stating the obvious, physicians come

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<sup>1</sup> “Health care provider” means either:

(1) A person licensed by this state to provide health care or related services including, but not limited to, an East Asian medicine practitioner, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric

under the definition of a “health care provider”, meaning physicians can be sued under any one of the three causes of actions under RCW 7.70.030.

The Washington Supreme Court Committee on Jury Instructions summarizes the applicability of RCW 7.70 *et seq.* as follows:

The court in *Branom v. State*, 94 Wn.App. 964, 974 P.2d 335 (1999), held that, under RCW 7.70.010 and RCW 7.70.030, “whenever an injury occurs *as a result of health care*, the action for damages for that injury is governed exclusively by RCW 7.70,” and to be actionable must fit within one of the three causes of action defined in RCW 7.70.030. Whether the action is one “for damages occurring as the result of health care” depends upon whether the injuries arose during the process in which the health care provider “*was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for*” a patient.

*Comment*, WPIC 105.06 (2013) (emphasis added).

What the statute does not define is “health care”. *Berger v. Sonneland*, 144 Wn.App. 91, 109, 26 P.3d 257 (2001). Several Washington cases<sup>2</sup> have utilized a definition that first appeared in

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physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician assistant, midwife, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

(2) An employee or agent of a person described in part (1) above, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative.

<sup>2</sup> See, e.g., *Branom v. State*, 94 Wn.App. 464, 470, 974 P.2d 335 (1999); *Wright v. Jeckle*, 104 Wn.App. 478, 481, 16 P.3d 1268 (2001); *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001); *Beggs v. DSHS*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011).

Washington in *Estate of Sly v. Linville*, 75 Wn.App. 431, 439, 878 P.2d 1241 (1994).

The process in which [a physician is] utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff *as his patient.*"

(emphasis added).

In *Berger v. Sonneland*, the Supreme Court pointed out that under the Health Care Disclosure Act, health care is defined as:

**70.02.010 Definitions.** As used in this chapter, unless the context otherwise requires:

.....

- (4) "Health care" means any care, service, or procedure provided by a health care provider:
- (a) To diagnose, treat, or maintain a *patient's* physical or mental condition; or
  - (b) That affects the structure or any function of the human body.

*Sonneland*, 144 Wn.2d at 109, fn. 89. (emphasis added).

*Eelbode v. Chec Med Centers, Inc.*, 97 Wn.App. 462, 984 P.2d 436 (1999) and *Daly v. United States*, 946 F.2d 1467 (9<sup>th</sup> Cir. 1991) both involved plaintiffs who underwent pre-employment physicals examination by health care providers (a physical therapist in *Eelbode*, and a medical doctor in *Daly*). The issue in each case was not whether either provider

was providing “health care” at the time each plaintiff claimed they were injured. Rather, the claims were whether a physician-patient relationship existed at the time of injury<sup>3</sup> and whether Washington law requires a physician-patient relationship in a claim for failure to follow the accepted standard of care<sup>4</sup>.

Neither *Eelbode* or *Daly* dealt with the issue of whether pre-employment physicals constitute “health care” under the statute. *King v. Garfield County Public Hospital District*, 17 Fed. Supp.3d 1060, 1071 (2014) (*reversed on other grounds*), 641 Fed.Appx. 696 (2015). No Washington case has addressed if an examination ordered pursuant to RCW 51.32.110 constitutes health care.

**A. An Independent Medical Examination is not Health Care.**

The examination at which Appellant was injured was ordered by the Department of Labor and Industries. CP 30 of original document. A worker with an open workers compensation claim “shall submit . . . herself for a medical examination” when one is requested by the Department. RCW 51.32.110(1). Unless good cause exists, the

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<sup>3</sup> In *Eelbode*, the defendants argued because no such relationship existed, the physical therapist owed no duty of care to the plaintiff; the Court of Appeals rejected that argument.

<sup>4</sup> The Ninth Circuit in *Daly* held that RCW 7.70.030(1) does not require a physician-patient relationship.

Department may suspend action on the workers claim and payment of benefits if the worker does not attend. RCW 51.32.110(2). The Department selects the examiner(s) who will examine the worker. RCW 51.32.055(4).

As pointed out by Respondent and Dr. Chong, examiners hired by the Department do not provide treatment. They are not the worker's doctors. The workers are not their patients. There is "absolutely not" a physician/patient relationship between the examiner and the worker. Doctors "don't have any relationship with" workers. Doctors are "not permitted to provide any diagnoses or treatment recommendations." Doctors "don't offer treatment." Respondent testified he tells examinees "we are not your treating doctors." Respondent tells examinees that the doctors are "there as people who take measurements, observe, report."

The circumstances under which an examinee comes before a workers compensation examining physician does not resemble "health care" as that term as been defined by the appellate courts of this state, the Legislature in RCW 70.02.010(4) or in the ordinary meaning of the term. The selection of the physician(s) to conduct the examination is made by the agency, insurer or administrator paying the worker's benefits. The Department pays the examiner to conduct the examination. The worker is not referred to the examiner by another physician. The interests of the

worker and that of the examiners are often adversarial. The worker must attend the examination with the examiner chosen by the examiner under threat of losing benefits. The Department can restrict the person(s) who can attend the examination with the worker. WAC 296-23-362.

Once at the examination, what a health care provider provides is not health care. Doctors cannot and do not offer treatment. WAC 296-23-357. They cannot make treatment recommendations. They cannot provide diagnoses. They absolutely may not establish a physician-patient relationship. There is no patient-physician privilege. RCW 51.04.050. The result of the examination is a report to the third party who hired the examiner, not to the examinee or their treating doctor. The examiners are simply “people who take measurements, observe, report.”

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

In contrast, the service provided by a workers compensation examiner is explicitly and exclusively for the benefit of the entity that

hired the examiner. There is nothing therapeutic about the actions of the examiner. The fact the examiner might very well testify against the interests of the examinee in a future hearing or trial underscores the examination is forensic in nature, not for the purposes of health care.

**B. The Medical Malpractice Statute is in Derogation of  
Common Law and Must be Strictly Construed.**

In *Sherman v. Kissinger*, 146 Wn.App 855, 855-56, 195 P.3d 539 (2008), Division 1 stated the following regarding the medical malpractice statute:

[t]he objective of statutory interpretation is to ascertain and carry out legislative intent. If the meaning of a statute is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. Each provision of a statute should be read together with other provisions to achieve a harmonious and unified statutory scheme. Statutes such as the medical malpractice act that are in derogation of the common law must be construed narrowly.

(citations omitted).

The legislative intent described in RCW 7.70.010 was to modify “certain substantive and procedural aspects of all civil actions and causes of actions . . . for damages for injury occurring *as a result of health care* . . .”(emphasis added). This section “sweeps broadly”. *Branom v. State*, 94 Wn.App. 464, 468, 974 P.2d 335 (1999). However, *Branom* also instructs that “health care” is the process

by which [a health care provider] is utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff *as his patient.*"

*Branom*, 94 Wn.App at 969-70. (emphasis added). In addition, RCW 70.70.065(3) expressly adopts the definition of "health care" set forth in RCW 70.02.010(5), which defines health care as any "care, service, or procedure provided by a health care provider"

(a) To diagnose, treat, or maintain *a patient's* physical or mental condition; or

(b) That affects the structure or any function of the human body.

In *Berger v. Sonneland*, *supra*, the Supreme Court summarized the tenets of statutory construction

Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is unambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. The courts are not obliged to discern an ambiguity by imagining a variety of alternative interpretations.

144 Wn.App. at 105. (citations and quotations omitted).

It is inescapable the statute requires that “health care” must be provided to “a patient”, or “the patient” of the health care provider. These are plain and unambiguous words. The meaning of “health care” and “patient” are easily understood. The fact that both the Legislature and our appellate courts have defined health care as a service provided to patients of health care providers could not be more telling.

The statutory definitions of health care make clear Respondent did not provide health care to Appellant. A health care provider provides health care when he “diagnose[s], treat[s], or maintain[s] a patient's physical . . . condition.” RCW 70.02.010(5)(a) and RCW 70.70.065(3) According to Dr. Chong, an examiner neither diagnoses or treats an examinee and in fact is “*not permitted*” to do so. (emphasis added). There is no colorable argument that Respondent was “maintaining” Appellant’s physical condition at any point during the examination.

Every appellate opinion in Washington since *Estate of Sly v. Linville, supra* has confirmed that health care requires the health care provider to be utilizing skills in the “diagnosing, treating, and caring of the plaintiff as his patient.” Each court has had the opportunity to modify that definition to eliminate the words “as his patient.” The absence of those final three words would arguably bring an examiner within the scope of

RCW 7.70, *et seq.* The consistent inclusion of those words establishes that our Courts' interpretation of the meaning of "health care" embodies the common sense view that it occurs when a provider is treating a patient.

Both Respondent and Dr. Chong's acknowledged that what they provided to Respondent was not health care. Both were adamant that Respondent was not a patient of either examiner. Those two facts are undisputed or uncontroverted. For the statute to apply to these facts, a health care provider must provide health care to his patient. Respondent did not provide health care and Appellant was not his patient. Those facts remove Appellant's claims for injury and damages from the "broad sweep" of RCW 7.70.010.

At the trial court Respondent argued – and will in this Court – that the mere fact Appellant was not Respondent's patient brought Appellant's claim under the umbrella of RCW 7.70. The argument is contrary to the plain language of a statute which is to be strictly construed. A health care provider may be sued under any one of the three causes of action enumerated in RCW 7.70.030. When a health care provider provides health care to someone who is not his patient, the lone cause of action available to the injured person is for the health care provider's breach of the standard of care. However, regardless of whether the injured person is

a patient of the health care provider, an overriding element in any cause of action brought under RCW 7.70.030 is that the health care provider was providing health care to the injured person at the time of the alleged injury.

The absence of a physician-patient relationship is merely one aspect of the encounter between an independent medical examiner and an injured worker which renders the encounter as something other than health care. The lack of confidentiality between the health care provider and the injured worker means anything the worker says in the encounter will be read by a claims manager and any employee at Labor and Industries who has access to the IME report. The absence of the physician-patient relationship means that an administrative law judge, the Board of Industrial Insurance Appeals, a Superior Court judge or jury will hear any admissible statement the worker made in the encounter. The report is not sent to the worker's actual health care providers who provide health care for the purpose of suggesting treatment options. The health care provider who conducted the examination may later testify against the interests of the worker regarding the encounter, and that fact is known before the worker ever meets the provider performing the examination. The examiners do not provide treatment to the worker. None of these elements

are a part of an appointment involving a health care provider providing health care to his patient. Taken as a whole, the elements paint a picture of an encounter that is not close to “health care”.

The significance of Respondent’s and Dr. Chong’s testimony about Appellant not being a patient is that it reinforced the fact they were not providing health care. They testified they do not provide treatment to a worker and they do not make treatment recommendations. In other words, they provide nothing in the way of health care. Their view that Appellant is not their patient is consistent with the admonitions given to a worker that they are not providing health care.

Respondent’s argument and the trial court’s ruling are supportable only if there is a finding that Respondent provided health care to Appellant. No testimony or evidence was presented on that point. In fact, both Respondent and Dr. Chong disavowed they provide health care to workers in examinations conducted under RCW 51.32.110. Because Respondent did not provide health care, Appellant’s claim is outside the umbrella of RCW 7.70.

**II. THE TRIAL COURT ERRED IN RULING THAT APPELLANT HAD NOT ESTABLISHED THE PRIMA FACIE ELEMENTS OF BATTERY OR ASSAULT.**

**A. RCW 7.70 Does Not Preempt Appellant’s Claims for Medical Battery, Battery, or for Assault.**

In *Bundrick v. Stewart*, 128 Wn.App. 11, 17, 114 P.3d 1204 (2005), Division One held that RCW 7.70 *et.seq.* did not eliminate the common law cause of action for medical battery. An “action for total lack of consent sounds in battery, while a claim for lack of informed consent is a medical malpractice action sounding in negligence.” *Id.* Division Three has stated that to analyze a plaintiff’s claims “under the umbrella of chapter 7.70 RCW,” the claim must fit within one of the three statutorily prescribed causes of action – negligence, contract or lack of consent.” *Wright v. Jeckle*, 104 Wn.App 478, 481, 16 P.3d 1268 (2001). Conspicuously absent from the prescribed causes of action is intentional tort. *Young v. Savidge*, 155 Wn.App. 806, 822, 230 P.3d 222 (2010).

**B. Appellant Established the Prima Facie Elements of Medical Battery, Battery and Assault.**

A battery is "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." An assault is any act of such a nature that causes apprehension of a battery. *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408 13P.3d 641 (2001). (citations omitted).

Here, Appellant reported to Respondent and Dr. Chong that she had a prior hip injury that required surgery. Near the end of the examination, Respondent began manipulating Appellant's hip. Appellant reminded Respondent that her hip had previously been injured and had been surgically repaired. When Respondent did not stop, Appellant informed Respondent that his manipulations pushed her hip to the limits of what she felt she was capable.

Appellant had been specifically instructed prior to the examination to not engage in any maneuvers that caused her pain, that were beyond what she was able to tolerate or which she believed were beyond her limits, or which could cause her injury. She informed Respondent that he was hurting her. Respondent then pushed on Appellant's hip, and Appellant yelled out in pain. Respondent immediately stated "that was the reaction I was looking for." Appellant established a prima facie case of

civil assault and battery. See *Young, supra*, 155 Wn.App. at 822. The trial court erred in granting summary judgment and dismissing those claims.

It is uncontroverted that Appellant informed Respondent prior to him injuring her that he was hurting her. She had been told prior to the examination to not do anything that caused her pain; however, it was Respondent who was causing her pain and who would not stop despite Appellant's statements. Instead of stopping he applied more pressure and injured her. His statement immediately after she cried out demonstrates that the action he performed on Appellant's hip was deliberate and intentional. Appellant's statement to Respondent that he was hurting her and that her hip could go no further sufficiently informed Respondent that she was not consenting to any further pressure being applied to her hip. Respondent disregarded Appellant's request and injured Respondent.

The facts presented at summary judgment state a claim for medical battery. The trial court erred in granting summary judgment and dismissing that claim.

**CONCLUSION**

For the reasons stated in this Brief, Appellant respectfully requests this court to reverse the trial court's granting of summary judgment to Respondent, as well as the dismissal of her claims against him. Appellant also respectfully requests the case be remanded back to the trial court for further proceedings.

Dated this 14<sup>th</sup> day of December, 2017.

Respectfully submitted,



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**CARON, COLVEN, ROBISON & SHAFTON PS**

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