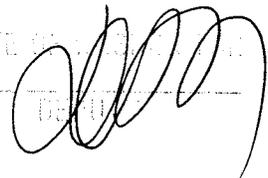


COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 38849-9-II

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STATE OF WASHINGTON
BY _____



COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

JEFFERSON COUNTY SUPERIOR COURT NO. 08-2-00195-3

LINDA YOUNG

Appellant

vs.

EDWARD F SAVAGE

Appellee

APPELLANT'S
OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR
AND ISSUES

The trial court erred in granting Defendant/Appellee's motion for summary judgment based on expiration of the three year statute of limitations. This presents the following issues to the Court of Appeals.

1. Did the trial court err in finding that suit was not filed within the applicable statute of limitations for each of the claims presented.

2. Did the trial court err in applying 2006 amendments to the Healthcare Liability Reform Act applicable retroactively to a 2005 claim.

3. Did the court err in applying the medical malpractice statute of limitations applicable to the intentional tort of fraud.

4. Did the trial court err in finding that the requirement of a duty of care certificate was applicable to claims for failure to obtain consent to treatment under the Healthcare Liability Reform Act of 2006.

5. Did the trial court err in finding that the statutory requirement of a certificate of merit under RCW 7.70.304 was applicable to cases involving intentional conduct.

II
STATEMENT OF THE CASE

On or about the 4th day of April, 2005 Plaintiff/Appellant was examined by Defendant at his office in Port Townsend,

Washington. DR. Edward P.Savage had a dental practice in Port Townsend and advertised extensively in the local phone directory and through a website (Clerks Papers, 16, Appendix A-exhibits 4, 5 7). As a result of the examination Defendant recommended the installation of a crown on her upper first left molar (Clerks Papers, 13).

The parties entered into a written agreement for the installation of the crown. A copy of this agreement is attached as (Clerks Papers, 14, Appendix A-exhibit 1). Under the terms of this agreement defendant was to install a porcelain capped, high noble crown. A high noble crown is one made of gold, platinum or palladium. The crown was pre-fabricated at an outside dental laboratory.

On June 1, 2005 Plaintiff underwent the crown installation procedure at Defendant's office. At this time Plaintiff (Mrs. Young) also paid defendant the final installment of the agreed price for the procedure (Clerks Papers, 13).

In the months that followed Appellant began to experience a burning sensation in her head, confusion, depression and tiredness. She also experienced discoloration of the upper gums (Clerks Papers 13, 16). The pain continued for six months during which period Plaintiff continued to receive statements from Dr. Savage showing a credit balance and describing the crown as "high noble" (Clerks Papers 14, Appendix ex. 3).

Appellant's symptoms continued until February 4th, 2006, when she was examined by her new dentist, Runar Johnson. Johnson requested a copy of the alloy report from Dr. Savidge's

office. The report showed that the metal portion of the crown was made of nickel-chromium and that it was not a high noble crown (Clerks Papers, 16). Nickel chromium crowns are an inexpensive substitute for noble metals. Nickel has a significantly higher incidence of adverse allergic reactions than noble metals, particularly in women, and is disfavored as a material for the manufacture of crowns.

Johnson removed the crown and Plaintiff's symptoms diminished substantially (Clerks Papers, 13, 16).

Because the crown installed by Defendant was porcelain capped (to appear like a real tooth) Appellant had not previously been aware that it was not a high noble crown (Clerks Papers, 13).

On March 3, 2006 Governor Gregoire signed into law House Bill 2292 which substantially altered the rights of claimants in malpractice actions. Among these:

1. It modified the statute of limitations in cases involving concealment of a cause of action due to "fraud, intentional concealment or the presence of a foreign body".

2. It added a new statute requiring a "certificate of merit" as a pre-requisite to filing an action alleging injury as a result of a violation of a medical providers standard of care.

Prior to filing her action on March 5, 2008, Plaintiff sent a demand letter to Defendant pursuant to RCW 7.70.100 (Clerks Papers, 24, Appendix Ex.10). Suit was filed on June 12, 2008. In proceedings below both parties moved for summary judgment. Plaintiff moved for summary judgment based on Defendant's breach of contract and his failure to obtain consent to the

substitution. The factual basis of Plaintiff's motion was a series of Requests For Admission in which Dr. Savage admitted most of the operative facts (Clerks Papers, 14, Appendix ex. 5). In response to Appellant's motion Defendant filed no responsive declaration denying his substitution of the cheaper material. On January 5th the lower court granted Appellee's motion.

III ARGUMENT

PART I

A.

RCW 4.18.350 OF THE 1986 HEALTHCARE LIABILITY REFORM ACT DOES NOT APPLY TO INTENTIONAL TORTS

A review of Plaintiff/Appellant's complaint reveals that the gravamen of the action is that Appellee deliberately substituted the cheaper nickel chromium crown for the high noble crown promised in the written contract. The complaint alleges both fraud and the intentional violation of the Consumer protection statute. In its decision below the lower court applied RCW 4.16.350, which states that any action:

substitution. The factual basis of Plaintiff's motion was a series of Requests For Admission in which Dr. Savage admitted most of the operative facts (CLERKS PAPERS 14, Apendix ex. 5). In response to Appellant's motion Defendant filed no responsive declaration denying his substitution of the cheaper material. On January 5th the lower court granted Appellee's motion.

III ARGUMENT

PART I

A.

RCW 4.18.350 OF THE 1986 HEALTHCARE LIABILITY REFORM ACT DOES NOT APPLY TO INTENTIONAL TORTS

A review of Plaintiff/Appellant's complaint reveals that the gravamen of the action is that Appellee deliberately substituted the cheaper nickel chromium crown for the high noble crown promised in the written contract. The complaint alleges both fraud and the intentional violation of the Consumer protection statute. In its decision below the lower court applied RCW 4.16.350, which states that any action:

“based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action or damages.”
(emphasis added)

As noted above, RCW 4.16.350 applies to “alleged professional negligence”. The present case does not deal with “negligence”. It deals with Appellee’s substitution of a cheap substitute product for an expensive “high noble” crown.

The distinction between liability based on intentional versus negligent conduct is discussed in *Doe v. Finch*, 133 Wn.2d 96, 942 P.2d 359 (1997). There the Supreme Court dealt with dual claims of outrage and malpractice. Before discussing the application of then general malpractice statute to a case of sexual misconduct by a therapist, the court noted that the intentional tort of outrage was not governed by the statute of limitations applicable to malpractice claims.

“Although the Court of Appeals grouped together Doe's malpractice and outrage claims, as did both

parties in their briefs, our disposition of the medical malpractice issue requires a separate analysis of the outrage claim. While the Legislature's special treatment of malpractice actions under RCW 4.16.350 saves Doe's malpractice claim from summary judgment on the timeliness issue, Doe's outrage claim is still governed by the general statutes of limitation." Id. p. 100

See also *Bundrick v. Stewart*, 128 Wn. App. 11 (2005).

There the plaintiff brought action based on lack of consent where a resident/trainee was used in an operation without the consent of a minor, patient's parents.

“ 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 "The performance of an operation without first obtaining any consent thereto may fall within the concepts of assault and battery as an intentional tort, but the failure to tell the patient about the perils he faces is the breach of a duty and is appropriately considered under negligence concepts." *Miller v. Kennedy*, 11 Wn. App. 272, 281-82, 522 P.2d 852 (1974). While *Miller* preceded the enactment of chapter 7.70 RCW, the legislature is presumed to know the existing state of case law, *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994), and nothing in the statute indicates the legislature intended to eliminate the common law claim. Further, the two causes of action protect entirely different values: informed consent protects the patient's right to know the risks of the decisions she makes about her care, whereas the cause of action for common law battery protects an individual's right to privacy and bodily integrity. *Keogan v. Holy Family Hosp.*, 95 Wn.2d 306, 313-14, 622 P.2d 1246 (1980); DAN B. DOBBS, *THE LAW OF TORTS* § 29, at 54 (2000). "[A] surgical operation is a technical battery, regardless of its results, and is excusable only when there is express or implied

consent." *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). Chapter 7.70 RCW preserves actions for failure to obtain consent (common law medical battery) where a health care provider fails to obtain any consent, or where the patient refuses care by a particular provider." Id p.17

The distinction discussed in *Bundrick* is particularly material here. Appellee did not merely fail to give "informed" consent. He performed a dental procedure on Mrs. Young based on a deliberate misrepresentation of what would be installed in her mouth. Under the general statute of limitations (RCW 4.16.080) the statute begins to run from the last "act or omission by" by the defendant, *Rivas v. Eastside Radiology*, 134 Wn. App. 921 (2006). A review of the complaint indicates that Defendant misrepresented the composition of the crown that was installed in Plaintiff/Appellant's's mouth and failed to disclose the presence of nickel-chromium. Plaintiff's claim is based on misrepresentation and non-disclosure. The first misrepresentation occurred when Plaintiff signed the treatment proposal on April 19, 2005. It was made again on 6/1/05 when the crown was installed, and on 1/12/2006 when she was sent her last statement, reiterating the fact that the crown was "high noble." This final misrepresentation was the "last act" or misrepresentation by defendant. Plaintiff did not find out about then actual substitution until February 4th.

Moreover Courts interpreting the general statute have consistently found that the time limit begins to run when the Plaintiff discovers his or her injury, *Reichelt v. Johns-Manville Corporation*, 107 Wn.2d 761, 733 P.2d 530 (1987). In *Reichelt* an

asbestos worker and his wife brought action for personal injuries and for loss of consortium. The lower court had granted the asbestos manufacturer's motion for summary judgment based on the statute of limitations. The court of appeals affirmed. In its review the Supreme Court upheld the lower courts dismissal of the husband's injury claim based on his knowledge of his injuries more than three years prior to the filing of the action. The Court reversed the lower court judgment dismissing the wife's claim for consortium.

“Since Lois Reichelt's claim for loss of consortium is a separate cause of action in Washington, it logically follows that the statute of limitations governing her claim should begin to run when she experienced her injury, not when her husband knew of his injury. Based on the foregoing, we conclude that a deprived spouse's loss of consortium claim is not necessarily determined by the timeliness of the impaired spouse's claim.” Id. p. 776

The court went on to remand the case to the lower court to make factual findings to determine when Mrs. Reichelt first “discovered” her injuries. As noted in *In re Estates of Hibbard*, 118 Wash.2d 737, 826 P.2d 690 (1992):

“Application of the rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant. Application of the rule is extended to claims in which plaintiffs *could not immediately know of the cause of their injuries.*” Id. p. 749,750.

B.
**THE MEDICAL MALPRACTICE STATUTE OF
LIMITATIONS DOES NOT APPLY TO APPELLEE'S
CONTRACT, FRAUD AND CONSUMER PROTECTION
CLAIMS**

The liability of a healthcare provider under principles of contract is extensively discussed and explained in *Hansen v. Virginia Mason Med. Ctr.*, 113 Wn. App. 199 (2002).

“The legislative history provides no indication that the Legislature intended to alter the scope of the pre-existing common law cause of action. The only legislative history which specifically relates to the breach of promise claim is that the Legislature considered and eventually rejected a proposal to require that a contract in the health care context be in writing. The parties agree that the pre-statute common law cause of action was based on contract liability. The parties also agree that the statute codifies the cause of action that existed at common law. The Legislature is presumed to be aware of the common law, and a statute "will not be construed in derogation of the common law unless the legislature has clearly expressed that purpose." *Staats v. Brown*, 139 Wn.2d 757, 766, 991 P.2d 615 (2000). It is necessary therefore, to examine the nature of the common law cause of action as it existed prior to the enactment of the statute.” *Id.* p.204, 205

The court also noted:

“These common law cases demonstrate the existence of a contract cause of action when medical practitioners expressly promise to obtain a specific result or cure through a course of treatment or a procedure. The viability of the contract theory was briefly called into question in *Yeager*, but

subsequently reaffirmed in *Carpenter*. But the cause of action as it existed was narrow; the health care provider had to expressly and specially contract and guarantee particular results.” *Id* p. 206 (Emphasis added).”

As to Appellant’s consumer protection claims *Michael v. Mmosquera-Lacy*, 140 Wn. App. 139 (2007) is virtually on point. *Michael* presents another “bait and switch” by a dentist similar to the fraud perpetrated on Plaintiff. There a dentist substituted cow bone for the promised, real human bone in a dental prosthetic. The court’s decision is quoted at length below:

“Historically, the "learned professions," such as law or medicine, were not considered within the sphere of "trade or commerce" and not subject to the CPA. *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986). In *Short* our Supreme Court held that the "entrepreneurial aspects" of a legal practice are within the sphere of trade or commerce and are subject to the CPA. *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984); *Quimby*, 45 Wn. App. at 180. The court explained that "entrepreneurial aspects" of a practice include how the price of services is determined, billed, and collected and the manner in which a firm obtains, retains, and dismisses clients. *Quimby*, 45 Wn. App. at 180 (citing *Short*, 103 Wn.2d at 61). However, CPA claims that relate to the competence and performance of a profession do not fall within the sphere of trade or commerce and are thus not subject to the CPA. *Jaramillo v. Morris*, 50 Wn. App. 822, 750 P.2d 1301 (1988). "Entrepreneurial activities" do not include the processes in which a physician uses her learned skills in examining, diagnosing, treating, or caring for a patient. *Wright v. Jeckle*, 104 Wn. App. 478, 484-85, 16 P.3d 1268 (2001). The inquiry here is to determine if Dr. Lacy's

material choice for Michael's procedure is an entrepreneurial activity...

A material issue of fact exists on whether the use of cow bone and Dr. Lacy's representations that cow bone would not be used were "entrepreneurial aspects" of her profession. Here Bright Now has not met its burden of showing that, as a matter of law, Dr. Lacy's representations and use of cow bone were not "entrepreneurial activities." We therefore hold that summary judgment was not proper on this issue. It is possible that a jury could determine that Dr. Lacy's representations and use of the cow bone related to the manner in which Bright Now obtains, retains, and dismisses clients and is therefore an entrepreneurial aspect of her practice. However, there is insufficient evidence here for us to make that determination as a matter of law. The parties dispute whether Dr. Lacy's use of cow bone relates to her competence and performance as a dentist and exempt from the CPA or if it was an "entrepreneurial aspect" of her profession. We remand for a jury to make this determination..."Id pp 9-15¹

Appellant would note that while *Michael*, supra presents facts strikingly similar to the case at bar, here a finding of an "entrepreneurial" activity IS EVEN MORE COMPELLING. In *Michael* the bone appliance made from cow bone was fabricated during the dental procedure and may have been necessitated by the dentist running out of the preferred human bone material. In the present case the dental appliance was fabricated by an outside

¹ While *Michael* states that no advertising is necessary to establish a consumer protection violation, attached as exhibits 4 and 5 are yellow page ads published by Dr. Savidge. Attached as exhibit 6 is an excerpt from Dr. Savidge's extensive website in which he states that "our crowns are most often made of gold or porcelin".

laboratory weeks before the procedure. There is no suggestion of any discretionary professional decision or medical exigency necessitating a last minute substitution.

Actions for fraud are governed by RCW 4.16.080. This provision states that:

“The following actions shall be commenced within three years:

“(1) An action for waste or trespass upon real property;

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

(4) An action for relief upon **the ground of fraud**, the cause of action in such case not to be deemed to have accrued **until the discovery by the aggrieved party** of the facts constituting the fraud;

Similarly Consumer Protection claims are governed by RCW 19.86.090.

“Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within **four years** after the cause of action accrues: PROVIDED, That whenever any action is brought by the attorney general for a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, except actions for the recovery of a civil penalty for violation of

an injunction or actions under RCW 19.86.090, the running of the foregoing statute of limitations, with respect to every private right of action for damages under RCW 19.86.090 which is based in whole or part on any matter complained of in said action by the attorney general, shall be suspended during the pendency thereof.” (emphasis added)

Finally claims for breach of a written contract are governed by RCW 4.16.040.

“The following actions shall be commenced within **six years**:

(1) An action upon a **contract in writing**, or liability express or implied arising out of a written agreement.

(2) An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of the claimant's business or profession, whether arising from one or more transactions and whether or not earned by performance.

(3) An action for the rents and profits or for the use and occupation of real estate.” (emphasis added).

C.

ASSUMING ARGUENDO THE APPLICABILITY OF RCW 4.16.350 TO THE CASE AT BAR, THE COURT BELOW DID NOT PROPERLY INTERPRET THE STATUTE EXTENDING THE STATUTE OF LIMITATIONS

RCW 7.70.100 provides that:

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

The statute further states that:

“If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.”

In the present action such demand for suit was sent to Defendant on March 6, 2006 (Appendix 1,ex 9.). In response, 4 days later Plaintiff’s counsel received correspondence by fax from Defendant’s insurance carrier. This letter acknowledged receipt of the notice and requested additional information, including a medical release from Plaintiff. Under the above statute the limitations period was extended until September 4, 2008.

“Unlike in *Hunter*, former RCW 7.70.100's notice requirement had no effect on the statute of limitations for medical negligence claimants compared with nonmedical negligence claimants. For example, when a claimant gives the required notice to the medical professional within 90 days of the expiration of the statute of limitations, that notice **tolls the statute of limitations** for 90 days from the date of giving notice.[fn2] Former RCW 7.70.100(1). Thus, at least for purposes of the statute of limitations, former RCW 7.70.100 complied with *Hunter* by treating all medical negligence claimants the same, giving all such claimants the same window of time in which to pursue an action.” *Waples v. Yi*, 36211-2-II (Wash.App. 8-5-2008) pp 5,6.(emphasis added).

D.
**ASSUMING *ARGUENDO* THE APPLICABILITY OF RCW
4.16.350 TO THE CASE AT BAR, THE COURT SHOULD
NOT HAVE RETROACTIVELY APPLIED 2006
AMENDMENTS THAT REVERSED THE TOLLING OF
THE STATUTE OF LIMITATIONS IN CASES INVOLVING
FRAUD.**

Prior to 2006 RCW 4.16.350 provided that an action for
medical malpractice:

“...shall be commenced within three years of the
act or omission alleged to have caused the injury
or condition, or one year of the time the patient
or his representative discovered or reasonably
should have discovered that the injury or
condition was caused by said act or omission,
whichever period expires later, except that in no
event shall an action be commenced more than
eight years after said act or omission:
PROVIDED, That the time for commencement of
an action is tolled upon proof of fraud [or]
intentional concealment. . .”

Under the above statute the statute of limitations tolled in
cases where there was “fraud [or] intentional concealment” of a
cause of action. In March of 2006 Washington’s medical
malpractice statute of limitations was amended to provide that any
action:

“...based upon alleged professional negligence
shall be commenced within three years of the act
or omission alleged to have caused the injury or
condition, or one year of the time the patient or his
representative discovered or reasonably should
have discovered that the injury or condition was
caused by said act or omission, whichever period

expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action or damages. (See RCW 4.16.350)

The above statute was signed by the governor on March 3, 2006, approximately one month after Ms. Young discovered Dr. Savages' unauthorized substitution of the cheaper crown. Under the prior statute **the statute had already tolled for seven months.**

Under Washington Law "The time limit for bringing a claim under a new statute begins to run upon pre-existing claims only on the effective date of the statute". *O'Donoghue v. State*, 66 Wn.2d 787, 791-92, 405 P.2d 258 (1965); *Earle v. Froedtert Grain & Malting Co.*, 197 Wn. 341, 344-45, 85 P.2d 264 (1938); *Hanford v. King Cy.*, 112 Wn. 659, 661, 192 P. 1013 (1920); *King Cy. Boundary Review Bd. V Auburn*, 45 Wn. App. 363, 366-67, 725 P.2d 451 (1986); *Torkelson v. Roerick*, 24 Wn. App. 877, 879-80, 604 P.2d 1310 (1979).

" It has been broadly stated that statutes of limitations are to be given prospective application only. However, the matter is not that simple. An examination of the opinions show that statutes of limitations are acknowledged to be procedural and are retroactively applied, but are given special treatment. More accurately stated, *the rule is that the new limitations law operates retroactively on*

causes of action which accrued prior to the change in law, but the new period of limitations starts to run from the effective date of the statute which makes the change.

The same principle has been applied to tolling statutes. Thus, when, after the cause of action accrued, the tolling statute was amended to reduce to eighteen the age during which tolling would be operative; the plaintiff in a tort case had only three years after the effective date of the amendatory statute to file or serve her suit when she was eighteen years of age prior to the amendment.” *Merrigan v. Epstein*, 112 Wn.2d 709, 773 P.2d 78 (1989) Emphasis added.

At the time of the passage of the revised statute in March of 2006 the limitations period had already been tolled for seven months. Under Washington law passage of the new statute could not undo the tolling that had already occurred. The three year statute would not run until February of 2009, three years from Appellant’s discovery of the substitution.

PART II

A

THE PROVISIONS OF RCW 7.70.050 DO NOT APPLY TO INTENTIONAL TORTS SUCH AS FRAUD AND MISREPRESENTATION

An underlying assumption of the trial court in its granting of summary judgment was the applicability of RCW 7.70 et seq. However a careful analysis of the Medical Malpractice statutory scheme makes clear that it was not the statutory intent to encompass injuries caused by intentional conduct such as fraud.

The liability of a medical professional for violation of a statutory “duty of care” is described in RCW 7.70.040. Which states:

"(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was the proximate cause of the injury complained of.”

The above statute presents elements that “are particularized expressions of the four traditional elements of **negligence**: duty, breach, proximate cause, and damage or injury.” *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001), (emphasis added).

Similarly RCW 7.70.050 describes the elements of cases involving informed consent states that its provisions are only applicable in cases involving “civil negligence”. The statutory duty of informed consent is based on a healthcare provider’s “fiduciary duty to disclose relevant facts about the patient's condition and the proposed course of treatment so that the patient may exercise the right to make an informed health care decision.” *Miller v. Kennedy*, 11 Wn. App. 272, 282, 522 P.2d 852 (1974), *aff'd*.

“A health care provider may be liable to an injured patient for breaching this duty even if the treatment otherwise meets the standard of care. RCW 7.70.050; *Keogan v. Holy Family Hosp.*, 95 Wn.2d 306, 313, 622 P.2d 1246 (1980). The doctrine of informed consent is based on “the individual's right to ultimately control what happens to his body.” *Id.* at 313-14. This court first recognized the doctrine in *ZeBarth v. Swedish*

Hospital Medical Center, 81 Wn.2d 12, 499 P.2d 1 (1972). The legislature subsequently codified the prima facie elements of an informed consent claim in RCW 7.70.050. LAWS OF 1975-76, 2d Ex. Sess., ch. 56, § 10; Edwin Rauzi, *Informed Consent in Washington: Expanded Scope of Material Facts That the Physician Must Disclose to His Patient*, 55 WASH. L.REV. 655 (1980).” *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, p124, 170 P.3d 1151 (2007).

The definitional section of the chapter also indicates its intended applicability only to negligence cases RCW 7.70. 140 defines malpractice with reference to RCW 48.40.010 which states that "Medical malpractice" means an actual or alleged negligent act, error, or omission in providing or failing to provide health care services that are actionable under chapter 7.70 RCW”.

Finally the court should take notice of the RCW 4.16.350, Washington’s specific “medical malpractice” statute of limitations. This provision states that it is only applicable to cases involving “alleged professional negligence”.

B.
ASSUMING ARGUENDO THE APPLICABILITY OF RCW 7.70.304 TO THE CASE AT BAR, THE STATUTORY REQUIREMENT OF A CERTIFICATE OF MERIT SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY

As part of the Healthcare Liability Reform Act the legislature passed RCW 7.70.304 This provision became effective on March 3, 2006 and provides that:

“(1) In an action against an individual health care provider under this chapter for personal injury or

wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. . . .

(2) The certificate of merit must be executed by a health care provider who meets the qualifications of an expert in the action. If there is more than one defendant in the action, the person commencing the action must file a certificate of merit for each defendant.

(3) The certificate of merit must contain a statement that the person executing the certificate of merit believes, based on the information known at the time of executing the certificate of merit, that there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant. . . .

(5)(a) Failure to file a certificate of merit that complies with the requirements of this section is grounds for dismissal of the case.”

Absent contrary legislative intent, statutes are presumed to operate prospectively only. *Washington Waste Sys., Inc. v. Clark Cy.*, 115 Wn.2d 74, 794 P.2d 508 (1990). A review of RCW 70.41.304 reveals no language indicating that the Legislature intended retroactive application of the statute.

Appellant’s position is supported by *Adcox v. Ahildren's Orthopedic Hosp.*, 123 Wn.2d 15, 864 P.2d 921 (1993). In *Adcox*, a hospital was sued based on alleged malpractice committed during a child’s cardiac procedure. Defendants’ appealed the trial court’s admission of supposed internal investigation documents. A key issue was application of a new

statute, passes after the alleged incident, giving discovery protection to hospital internal investigatory documents relating to malpractice incidents. In its decision the Supreme Court found the new provision inapplicable to already existing causes of action.

“We conclude, however, this statute does not apply to the internal investigation documents which were created in 1984, 2 years prior to the statute's enactment. *See* Laws of 1986, ch. 300, § 4. Absent contrary legislative intent, statutes are presumed to operate prospectively only. *Washington Waste Sys., Inc. v. Clark Cy.*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990). The Legislature has not expressed any intent for retroactive application of RCW 70.41.200.” *Id.* P 30.

The statute requiring the certificate of merit took effect in March of 2006. Absent a provision specifying retroactive application it cannot be retroactively applied. Under *Adcox*, *supra*. the requirement of a certificate cannot be applied retroactively applied to a 2005 claim.

C.
ASSUMING ARGUNDO THE APPLICABILITY OF RCW
7.70.150 TO THE CASE AT BAR, THERE IS NO
REQUIREMENT OF A CERTIFICATE IN
CASES ALLEGING A FAILURE TO OBTAIN CONSENT
TO TREATMENT

As noted previously, RCW 7.70.150 requires the filing of a certificate where the actions of the practitioner “violates the accepted standard of care”. However, there is no such requirement in cases involving the failure to obtain informed consent. 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).

The gravaman of Appellant's claim is defendant's deliberate misrepresentation and failure to obtain consent to treatment. RCW 7.70.050 defines the standards of liability in so-called “informed consent cases. This provision provides that:

“(1) The following shall be necessary elements of proof that injury resulted from health care in a **civil negligence** case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;” (emphasis added)

Appellee misapprehends Ms. Young's claims against him. Appellant does not suggest that Dr. Savage failed to follow an appropriate standard of care in the **manner in which the crown was installed**. Rather, defendant failed to comply with ethical standards in the dental profession by substituting a crown made of nickel-chromium for the gold crown that was contracted for. Section 5 of the Standard of Ethics of the American Dental Association (adopted by the Washington State Dental Association)² provides that :

SECTION5— Principle: Veracity ("truthfulness")

The dentist has a duty to communicate truthfully. This principle expresses the concept that professionals have a duty to be **honest and trustworthy** in their dealings with people. Under this principle, the dentist's primary obligations include respecting the position of trust inherent in the dentist-patient relationship, communicating truthfully and **without deception**, and maintaining intellectual integrity.

5.A. Representation of Care. Dentists shall not represent the care being rendered in a **false or misleading manner.**"

A reading of RCW 7.70.150 clearly indicates that it was intended to require a medical opinion in cases where there is a standard of care violation and **professional medical competence** is

² In another excerpt from Dr. Savidge's website (ex.7) he advertises his membership in both the American Dental Association and the Washington State Dental Association.

called into question. Such is not the case here. Installation of nickel-chromium crowns, while frowned on by many dental professionals, is still within the standard of care of the dental profession **if appropriate disclosure is made to the patient and consent to treatment is obtained.** What is not within the standard of care is the unethical practice of promising an expensive high noble crown and delivering a cheap substitute with a higher incidence of toxic reactions. This is not an issue of negligence. This is conduct involving deliberate scienter and is conduct not covered by the medical malpractice statutory scheme embodied in RCW 7.70 et seq.

“ A plaintiff may bring a claim under the CPA for a medical provider's conduct related to the entrepreneurial aspects of a medical practice. *Quimby v. Fine*, 45 Wn. App. 175, 180-81, 724 P.2d 403 (1986); *see also Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984). However, a claim against a medical provider cannot be made under the CPA if it relates to the competence of the medical practitioner. *Quimby*, 45 Wn. App. at 180. When a patient is injured as a result of a medical provider's negligence, the patient has a remedy under RCW 4.24.290 and RCW 7.70.040 for medical negligence. Ms. Ambach argues that Dr. French performed unnecessary surgeries for financial gain that triggered both a negligence claim and a CPA claim because the jury could decide whether the surgeries were either negligent or for financial gain.

In *Quimby*, a patient brought claims for negligence and lack of informed consent, and also alleged a violation of the CPA. *Quimby*, 45 Wn. App. at 179, 181. The court held that a lack of informed consent claim may come within the scope of the CPA if the claim was based on unfair practices used to advance the entrepreneurial

aspects of the defendant's medical practice”
Ambach v. French, 141 Wn. App. 782, 173 P.3d
941 (2007), pp. 787, 788.

PART III

V. APPELLEE IS LIABLE TO PLAINTIFF ON PRINCIPLES OF CONTRACT

As previously noted the liability of a healthcare provider under principles of contract is extensively discussed and explained in *Hansen v. Virginia Mason Med. Ctr.*, 113 Wn. App. 199 (2002).

Under Washington Law “summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992); CR 56(c). The facts, and reasonable inferences from the facts, are considered in the light most favorable to the nonmoving party. *Taggart*, 118 Wn.2d at 199. Questions of law are reviewed de novo. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Existence of a duty is a

question of law. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

In the present action there was no cognizable reason for summary judgment not to be granted based on principles of contract liability. Prior to the summary judgment proceedings Defendant acknowledged the following facts via Requests for Admission.

1. The written agreement between the parties specifically provides that the Defendant was to provide a “high noble crown” (See requests for admission 1 and 6, exhibits 1 and 3).

2. The assay certificate for the crown indicates that it was not a high noble crown (See requests for admission 2 and 3, exhibit 2).

3. That the crown that was installed in Plaintiff’s mouth is not a high noble crown (See requests for admission 5).

4.. That Plaintiff paid in full in advance for the installation of a high noble crown (See requests for admission 7, exhibit 3)

Defendant interposed no responsive declaration denying or explaining his substitution of the cheaper crown material.

Summary judgment should have been granted to Plaintiff/Appellant.

CONCLUSION

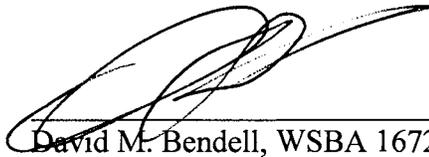
In the present action the lower court incorrectly applied the statutory scheme of RCW 7.70 *et seq.* to cases involving intentional fraudulent conduct. As part of this fundamental error it applied the “professional negligence” statute of limitations contained in RCW 4.16.350 to a case involving intentional

wrongdoing. This allowed the Appellee improperly benefit from the special “malpractice” discovery rule afforded under that statute. The court also improperly gave retroactive application to amendments to the statute passed after the incident. As part of this error the court ignored statutes of limitations applicable to fraud, contract and the Consumer Protection statute.

The lower court similarly erred in enforcing the requirement of a certificate of merit under RCW 7.70.304. This statute only applies in cases where the plaintiff alleges a negligent “duty of care violation”. It has no applicability to intentional fraudulent conduct such as alleged by Appellant. The court also erred in applying the statute retroactively to an incident that occurred a year prior to the effective date of the statute.

Finally, the lower court should have granted Mrs. Young’s motion for summary judgment on the issue of Appellee’s liability in contract. The exhibits presented for the hearing showed that there was not genuine issue of fact with regard to the service/appliance agreed upon. No dispute as to the amount paid. In proceedings below Appellee interposed no responsive affidavit or declaration explaining his breach or asserting any defense other than the statute of limitations under RFCW 4.16.350, which is inapplicable to contract claims.

Dated this 2nd day of July, 2009.



David M. Bendell, WSBA 16727
Attorney for Appellant

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APPENDIX A

EXHIBITS

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YELLOW PAGE AD 2-CP 16.....EXHIBIT 5
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DEMAND LETTER-CP 24.....EXHIBIT 9

EX. 1

Edward P. Savidge, D.D.S., P.C.
600 Cliff Street
Port Townsend, WA 98368
360-385-7003

The fees in this proposal are valid until 06-18-05. After that, fees may increase.

Visit #1

Code	Description	T#	Surface	Fee	You pay
02750	Crown, porc & high	14		835.00	835.00
02950	Core buildup, inci pin	14		240.00	240.00
00140	Limited oral evaluat			58.00	58.00
00270	Bitewing, single			20.00	20.00
00220	Periapical single, first			21.00	21.00
00230	Periapical, each add			16.00	16.00
	Sub-total:			1,190.00	1,190.00

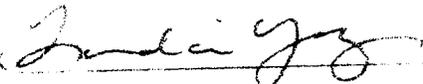
Visit #2

Code	Description	T#	Surface	Fee	You pay
02750	Crown, porc & high	2		835.00	835.00
02950	Core buildup, inci pin	2		240.00	240.00
	Sub-total:			1,075.00	1,075.00

Visit #3

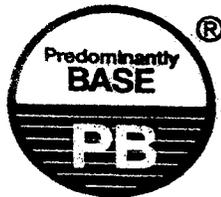
Code	Description	T#	Surface	Fee	You pay
03330	Root canal, molar	14		910.00	910.00
	Sub-total:			910.00	910.00
	TOTAL			3,175.00	3,175.00

The treatment listed above is an estimate of work we have discussed. In some cases, the fee may change due to circumstances beyond our control. We will do our best to keep you informed of changes if they occur. By signing this agreement, you agree to pay any and all charges incurred with this treatment plan.

Patient signature: X  Date: 4.19.05

EX. 2

IDENTALLOY® CERTIFICATE



The manufacturer certifies that the dental casting alloy provided to the laboratory with this certificate is a Predominantly Base alloy (contains less than 25% (total) Gold, Palladium and Platinum).

The laboratory certifies that Predominantly Base alloy was used to fabricate this prosthesis.

Alloy	Manufacturer	Composition
TALLADIUM TILITE® METALS	Talladium Inc.	Ni 60-76% Cr 12-21% Mo 4-14% Ti 4-6%

DENTIST CERTIFICATE (attach to patient record)

IDENTALLOY® CERTIFICATE



17056

ALLOY TALLADIUM TILITE® METALS
MANUFACTURER Talladium Inc.
COMPOSITION Ni 60-76% Cr 12-21% Mo 4-14% Ti 4-6%

LAB COPY

EX. 3

Edward P. Savidge, D.D.S., P.C.
 600 Cliff Street
 Port Townsend, WA 98368

Office Phone: 360-385-7003

Linda Young
 531 Saddle Dr
 Port Townsend, WA 98368

Account history for 01-01-05 to 01-12-06, printed on 01-12-06

Date	Patient	Description	Amount	Balance
		Balance as of 01-01-05:	0.00	0.00
4-19-05	Linda	Limited oral evaluation:	58.00	58.00
4-19-05	Linda	Periapical single, first	21.00	79.00
4-19-05	Linda	Bitewing, single	20.00	99.00
4-20-05	Linda	Crown, porc & high noble (2714	835.00	934.00
4-20-05	Linda	Core buildup, incl pins (8114	240.00	1,174.00
4-20-05	Linda	Periapical, each addition:	16.00	1,190.00
5-17-05	Account	Mail stmt prepared	0.00	1,190.00
5-01-05	Account	Care Credit	-1,190.00	0.00
5-01-05	Linda	Crown/Bridge Seat Date (2714	0.00	0.00
-12-06		Ending balance		0.00

Patient	Charges	Ins Pmts	Patient Pmts	Net Adj
Linda	90.00	0.00	0.00	0.00
Account	0.00	0.00	1,190.00	0.00
Totals	1,190.00	0.00	1,190.00	0.00

EX. 4

LABORATORIES

- aboratory Inc 452-8259
- Denture Studio
- Denturists
- Port Hadlock 385-1459
- Sequim 681-7089
- aboratory 385-0090
- ories Of Dental Art
- oce St Sequim 683-3254
- aboratory 513 E 8th St 457-0695

SERVICE PLANS

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Insurance
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VIDGE, D.D.S., PC**

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PATIENTS WELCOME

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385-7003

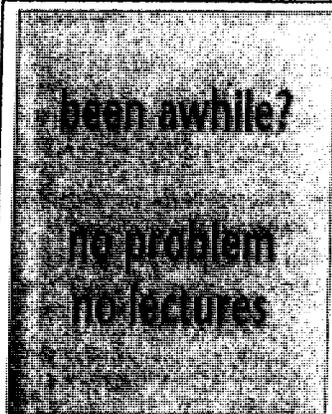
Y DENTAL CENTER

f St
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nsend 385-7003

See Ad Page 55

E Dr
ington Sequim 683-5500

JOHN D DDS



Admiralty Dental

Ed Savidge, D.D.S., P.C.

"Emphasis on Preventive Family Dentistry"

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- Family Oriented Financial Plans
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- Wisdom Teeth Extractions
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360-457-3669

832 E. 8th St. Port Angeles

DENTISTS (CONT'D)

RICH GREGORY L DDS

11 Columbia St
Port Angeles 457-3183
Donald R 806 E 8th St 452-7666

HEIDI C

Heidi C. Brandt
D.M.D., M.P.H., M.S.D

SPECIALIST IN:
Orthodontics &

Todd D. Haworth D.D.S.

Fellow of the Academy of General Dentistry

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- Enjoy our caring, relaxed treatment

1 Block East of New Library @

422 E Lauridsen Blvd

EX. 5

EX. 6

1 David M. Bendell
2 622 E. Runnion Rd.
3 Sequim, Washington 98382
4 (360)-683-5788
5
6

7 **IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON**
8 **COUNTY OF JEFFERSON**
9

10 LINDA YOUNG,)
11)
12 Plaintiff,) CASE NO. 08-2-00195-3
13) **REQUEST FOR ADMISSIONS**
14 v.) **PURSUANT TO CR 36**
15)
16 EDWARD P. SAVIDGE, a single)
17 man,)
18)
19 Defendants,)
20 _____)
21)

22 COMES NOW the Plaintiff, by and through counsel, and requests that Defendant admit
23 the following:
24

25 1. That the document attached as exhibit 1 is a true and accurate copy of the treatment
26 proposal prepared for Linda Young with respect to the crown installation referred to in
27 Plaintiff's complaint.
28

29
30 2. That the document attached as exhibit 2 is a true and accurate copy of the Identallooy
31 "Dentist Certificate" received by the Edward Savidge Dental Office from the crown
32 manufacturer with respect to the crown installed in Plaintiff's mouth, which is the subject of
33 Plaintiff's complaint.
34
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37

1 3. That the crown which is described in the Dentist certificate attached as exhibit 2 is not
2 a high noble, porcelain/metal crown.

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6 4. That in order for a metal/porcelain crown to be considered a "high noble crown" the
7 metal portion of the crown must be composed of at least 75% gold, platinum or palladium.

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11 5. That the crown which is described in the Dentist certificate attached as exhibit 2 is the
12 crown that was installed in Plaintiff's mouth in June of 2005.

13
14
15
16 6. That attached as exhibit 3 is a true and accurate copy of an "account history" provided
17 to Plaintiff from the Dental Offices of Edward Savidge with respect to dental charges in the
18 years 2005 and 2006.

19
20
21
22 7. That the account history attached as exhibit 3 describes the crown installed in
23 Plaintiff's mouth in June of 2005 as "high noble".

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27 8. That the treatment proposal attached as exhibit 1 describes the crown installed in
28 Plaintiff's mouth in June of 2005 as "high n".
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Dated this 12th day of July 2008.

David M. Bendell
Attorney for Plaintiff
WSBA #16727

DECLARATION OF SERVICE
UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
STATE OF WA I HEREBY DECLARE THAT THIS PLEADING WAS
SENT TO COUNSEL OF RECORD
DATE: 8/13/08 FAX _____ MAIL

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SUPERIOR COURT OF WASHINGTON FOR JEFFERSON COUNTY

LINDA YOUNG,

Plaintiff,

vs.

EDWARD P. SAVIDGE, a single man,

Defendant.

NO. 08-2-00195-3

DEFENDANT'S ANSWERS TO
PLAINTIFF'S REQUESTS FOR
ADMISSION

TO: THE CLERK OF THE COURT; and
TO: DAVID M. BENDELL, Attorney for Plaintiff; and

- 1. In answer to Paragraph 1 of Plaintiff's Requests for Admission, Defendant Admits.
- 2. In answer to Paragraph 2 of Plaintiff's Requests for Admission, Defendant Admits.
- 3. In answer to Paragraph 3 of Plaintiff's Requests for Admission, Defendant Admits.
- 4. In answer to Paragraph 4 of Plaintiff's Requests for Admission, Defendant Admits.
- 5. In answer to Paragraph 5 of Plaintiff's Requests for Admission, Defendant Admits.
- 6. In answer to Paragraph 6 of Plaintiff's Requests for Admission, Defendant Admits.
- 7. In answer to Paragraph 7 of Plaintiff's Requests for Admission, Defendant Admits.

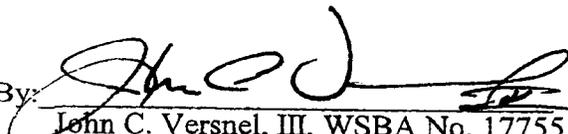
DEFENDANT'S ANSWERS TO PLAINTIFF'S
REQUESTS FOR ADMISSION - 1

LAWRENCE & VERSNEL PLLC
3030 TWO UNION SQUARE
601 UNION STREET
SEATTLE, WASHINGTON 98101
(206) 624-0200 FACSIMILE (206) 903-8552

8. In answer to Paragraph 8 of Plaintiff's Requests for Admission, Defendant Admits.

Dated this 25 day of August 2008

LAWRENCE & VERSNEL PLLC

By: 
John C. Versnel, III, WSBA No. 17755
Of Attorneys for Defendant Savidge

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EX. 7

Port Townsend Dentist

Admiralty Dental Center

Family Dentistry



Selected Topics

Edward P Savidge DDS

600 Cliff Street • Port Townsend WA • 98368 • (360) 385-7003

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[Appointments](#)

[What we offer](#)

[Ask the dentist](#)

[Meet the dentist](#)

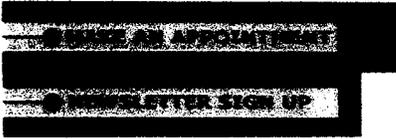
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Make-up of dental crowns



At Admiralty Dental Center our dental crowns are most often made of gold or porcelain. Crowns also can be made of stainless steel, but those crowns are often temporary and not designed for long-term wear.

Porcelain crowns usually are built on a metal base, which fits snugly over the natural tooth. We will choose a porcelain that matches the color of your natural teeth.

Porcelain crowns usually are so carefully matched in color, they cannot be distinguished from your natural teeth. Many people choose porcelain crowns for their cosmetic appearance and the confidence it gives them.

New materials are now available that allow the use of "all-ceramic" crowns in some cases. They have a beautiful life-like appearance and short-term studies support their success, with long-term trials ongoing.

Crowns also can be made of all gold. Some people prefer not to use gold because it stands out from the other teeth in appearance. At the same time, if the crown is on a back molar, some people feel the cosmetic issue is not a big one. At Admiralty Dental Center we will discuss the types of materials available if we recommend a crown.

Call us at (360) 385-7003 for a complete evaluation of your cosmetic needs.



EX. 8

RUNAR D. JOHNSON, D.D.S.
Location: 321 North Sequim Avenue #C
Mailing: 609 W. Washington St. #11-31
Sequim, Washington 98382
Phone: 360-683-3892

February 16, 2006

To Whom It May Concern:

Re: Linda Young

Linda Young presented at the dental office on January 14, 2006. Her chief complaint at that time was that she had a burning sensation in her head; and she complained of confusion, depression, and tiredness. She also said her mouth felt like it was burning, and that all of this started after her last dental work was done by her previous dentist when he took out some mercury fillings and placed a crown on the upper first left molar. She feels the mercury poisoned her when the work was done, and that there was something wrong with the crown on the upper left first molar.

During her last dental appointments Linda stated that she feels like her brain is burning, and that she can't think straight. She says that when she looks at her gum tissue around her tooth, they are a brownish color, darker than they should be and they never looked that way before she had her work done by her previous dentist.

Linda said after her visit to her previous dentist who took fillings out of her mouth, her mouth and tongue burned and she has been taking a type of mouthwash that is supposed to chelate mercury out of her tissues.

Linda wanted very much to have her mercury fillings removed properly and a crown on the upper right first molar replaced which had metal of an undetermined kind, and a crown on the upper left first molar removed which she feels started a lot of her aggravated symptoms. She said that after the crown was put in she noticed her gums did not look right. She felt a lot of fatigue and seemed to have a lot of confusion.

We began her treatment on February 4, 2006 by taking a crown off tooth #3 and taking the mercury out of #13 and #20. She returned on February 10, 2006, and said she was feeling much better, but felt the crown on the upper left was still bothering her. She called her previous dentist's office and they sent an assay chart of types of metals on the base materials on tooth #14, and the metal contains approximately 80% nickel, 20% chromium and small amounts of molybdenum and titanium. Nickel is known to be a toxic metal. The crown was removed on that day, and her gum tissue was noticeably different exhibiting a lighter pinkish tone that is a more normal color and texture for gum tissue. After this appointment, Linda said she was more relaxed and in a better mood.

Sincerely,



Runar D. Johnson, D.D.S.

EX. 9

DAVID M. BENDELL
ATTORNEY AT LAW
622 E. RUNNION RD.
SEQUIM, WASHINGTON 98382
(360) 683-5788
FAX (360) 683-0961

March 6, 2008

Edward Savidge DDS.
600 Cliff Street
Port Townsend, Washington

Re: Linda Young

Dear Dr. Savidge:

The Law offices of David M. Bendell represents Linda Young. In April of 2005 Ms. Young had a dental examination at your offices. As a result of the examination you recommended the installation of a crown on her upper first left molar.

Based on the recommendation Ms. Young contracted with your office for the installation of the crown. A copy of this agreement is attached as exhibit 1. Under the terms of this agreement you were to install a porcelain capped, high noble crown.

The crown was installed on June 1. Within a short time Ms. Young began experiencing a burning sensation in her head, confusion, depression and tiredness. She also suffered discoloration of the gum area adjacent to the installed crown.

In February of 2006 the crown was removed. Upon removal Ms Young's symptoms diminished substantially (but not completely). After the removal Ms. Young's new dentist obtain a copy of the laboratory analysis and certification for the crown from your offices. The analysis showed that the crown was not of a high noble character. The crown was a less expensive nickel-chromium crown.

Ms. Young has authorized this firm to bring action you for malpractice, misrepresentation and for violation of the Washington Consumer Protection Act.

As a result of the faulty installation Ms. Young has experienced months of discomfort, loss of earnings and diminishment of her quality of life.

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 the before the 30th day of February 2008 suit will be brought against you and the attached complaint will be filed in Jefferson County Superior Court.

Your immediate attention to this letter is advised.

Very truly yours,

David Bendell

A handwritten signature in black ink, appearing to read "David Bendell", with a stylized flourish at the end.

Young/savid1

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EX. 1

Revised Code of Washington

- ☐ Revised Code of Washington
- ☐ TITLE 4 CIVIL PROCEDURE
- ☐ CHAPTER 4.16 LIMITATION OF ACTIONS

RCW 4.16.350 Any civil action for damages for injury occurring as a result of health....

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

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

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, 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 employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

For purposes of this section, notwithstanding RCW **4.16.190**, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW **4.16.340**(5).

[2006 chap. **8** sec. 302. Prior: 1998 chap. 147 sec. 1; 1988 chap. 144 sec. 2; 1987 chap. 212 sec. 1401; 1986 chap. 305 sec. 502; 1975-'76 2nd Ex.Sess. chap. 56 sec. 1; 1971 chap. 80 sec. 1.]

NOTES:

Purpose - Findings - Intent - 2006 chap. 8 secs. 301 and 302: "The purpose of this section and section 302, chapter **8**, Laws of 2006 is to respond to the court's decision in *DeYoung v. Providence Medical Center*, **136 Wn.2d 136** (1998), by expressly stating the legislature's rationale for the eight-year statute of repose in Wash. Rev. Code **4.16.350**.

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.

In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.

The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.

The legislature intends to reenact Wash. Rev. Code **4.16.350** with respect to the eight-year statute of repose and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the eight-year statute of repose reenacted by section 302, chapter **8**, Laws of 2006 be applied to actions commenced on or after June 7, 2006." [2006 chap. **8** sec. 301.]

Findings - Intent - Part headings and subheadings not law - Severability - 2006 chap. 8: See notes following Wash. Rev. Code **5.64.010**.

Application - 1998 chap. 147: "This act applies to any cause of action filed on or after June 11, 1998." [1998 chap. 147 sec. 2.]

Application - 1988 chap. 144: See note following Wash. Rev. Code **4.16.340**.

Preamble - Report to legislature - Applicability - Severability - 1986 chap. 305: See notes following Wash. Rev. Code **4.16.160**.

Severability - 1975-'76 2nd Ex.Sess. chap. 56: "If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not

EX. 2

Revised Code of Washington

- Revised Code of Washington
- TITLE 4 CIVIL PROCEDURE
- CHAPTER 4.16 LIMITATION OF ACTIONS

RCW 4.16.080 The following actions shall be commenced within three years:

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW **4.16.040**(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

[1989 chap. 38 sec. 2; 1937 chap. 127 sec. 1; 1923 chap. 28 sec. 1; Code 1881 sec. 28; 1869 p 8 sec. 28; 1854 p 363 sec. 4; RRS sec. 159.]

NOTES:

Reviser's note: Transitional proviso omitted from subsection (6). The proviso reads: "PROVIDED, FURTHER, That no action heretofore barred under the provisions of this paragraph shall be commenced after ninety days from the time this act becomes effective;".

EX. 3

Revised Code of Washington

- Revised Code of Washington**
- TITLE 19 BUSINESS REGULATIONS — MISCELLANEOUS** **Update notice: A new chapter has been added to this title by Chapter 374, Laws of 2009
- CHAPTER 19.86 UNFAIR BUSINESS PRACTICES — CONSUMER PROTECTION**
**Update notice: A new section has been added to this chapter by Chapter 371, Laws of 2009

RCW 19.86.090 Any person who is injured in his or her business or property by a....

****Update notice:** This section has been amended by **Chapter 371, Laws of 2009**

Any person who is injured in his or her business or property by a violation of RCW **19.86.020**, **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, 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 a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW **19.86.020** may not exceed ten thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW **3.66.020**, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed the amount specified in RCW **3.66.020**. For the purpose of this section, "person" shall include the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, it may sue therefor in the superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2007 chap. **66** sec. 2; 1987 chap. 202 sec. 187; 1983 chap. 288 sec. 3; 1970 Ex.Sess. chap. 26 sec. 2; 1961 chap. 216 sec. 9.]

NOTES:

Effective date — 2007 chap. **66**: See note following Wash. Rev. Code **19.86.080**.

Intent — 1987 chap. 202: See note following Wash. Rev. Code **2.04.190**.

Short title — Purposes — 1983 chap. 288: "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter **19.86** Wash. Rev. Code, and to repeal the unfair practices act, chapter 19.90 Wash. Rev. Code, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter **19.86** Wash. Rev. Code. In repealing chapter 19.90 Wash. Rev. Code, it is the intent of the legislature that chapter **19.86**

Wash. Rev. Code should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law." [1983 chap. 288 sec. 1.]

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EX. 4

Revised Code of Washington

- Revised Code of Washington**
- TITLE 4 CIVIL PROCEDURE**
- CHAPTER 4.16 LIMITATION OF ACTIONS**

RCW 4.16.040 The following actions shall be commenced within six years:

The following actions shall be commenced within six years:

(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

(2) An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of the claimant's business or profession, whether arising from one or more transactions and whether or not earned by performance.

(3) An action for the rents and profits or for the use and occupation of real estate.

[2007 chap. **124** sec. 1; 1989 chap. 38 sec. 1; 1980 chap. 105 sec. 2; 1927 chap. 137 sec. 1; Code 1881 sec. 27; 1854 p 363 sec. 3; RRS sec. 157.]

NOTES:

Application – 2007 chap. 124: "This act applies to all causes of action on accounts receivable, whether commenced before or after July 22, 2007." [2007 chap. **124** sec. 2.]

Application – 1980 chap. 105: See note following Wash. Rev. Code **4.16.020**.

EX. 5

Revised Code of Washington

- 📁 Revised Code of Washington
- 📁 TITLE 7 SPECIAL PROCEEDINGS AND ACTIONS
- 📁 CHAPTER 7.70 ACTIONS FOR INJURIES RESULTING FROM HEALTH CARE

RCW 7.70.100 (1) No action based upon a health care provider's professional negligence....

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. The notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW **7.70.020**(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW **4.96.020**(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial except as provided in subsection (6) of this section.

(4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The implementation contemplates the adoption of rules by the supreme court which will require mandatory mediation without exception unless subsection (6) of this section applies. The rules on mandatory mediation shall address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

(b) Appropriate limits on the amount or manner of compensation of mediators;

(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

(e) The number of days following the selection of a mediator within which a mediation conference must be held;

(f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and

(g) Any other matters deemed necessary by the court.

(5) Mediators shall not impose discovery schedules upon the parties.

(6) The mandatory mediation requirement of subsection (4) of this section does not apply to an action subject to mandatory arbitration under chapter **7.06** RCW or to an action in which the parties have agreed, subsequent to the arising of the claim, to submit the claim to arbitration under chapter **7.04A** or **7.70A** RCW.

(7) The implementation also contemplates the adoption of a rule by the supreme court for procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

[2007 chap. **119** sec. 1; 2006 chap. **8** sec. 314; 1993 chap. 492 sec. 419.]

NOTES:

Findings -- Intent -- Part headings and subheadings not law -- Severability -- 2006 chap. 8: See notes following Wash. Rev. Code **5.64.010**.

Medical malpractice review -- 1993 chap. 492: "(1) The administrator for the courts shall coordinate a collaborative effort to develop a voluntary system for review of medical malpractice claims by health services experts prior to the filing of a cause of action under chapter **7.70** Wash. Rev. Code.

(2) The system shall have at least the following components:

(a) Review would be initiated, by agreement of the injured claimant and the health care provider, at the point at which a medical malpractice claim is submitted to a malpractice insurer or a self-insured health care provider.

(b) By agreement of the parties, an expert would be chosen from a pool of health services experts who have agreed to review claims on a voluntary basis.

(c) The mutually agreed upon expert would conduct an impartial review of the claim and provide his or her opinion to the parties.

(d) A pool of available experts would be established and maintained for each category of health care practitioner by the corresponding practitioner association, such as the Washington state medical association and the Washington state nurses association.

(3) The administrator for the courts shall seek to involve at least the following organizations in a collaborative effort to develop the informal review system described in subsection (2) of this section:

EX. 6

Revised Code of Washington

- 📁 **Revised Code of Washington**
- 📁 **TITLE 7 SPECIAL PROCEEDINGS AND ACTIONS**
- 📁 **CHAPTER 7.70 ACTIONS FOR INJURIES RESULTING FROM HEALTH CARE**

RCW 7.70.040 The following shall be necessary elements of proof that injury resulted....

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

[1983 chap. 149 sec. 2; 1975-'76 2nd Ex.Sess. chap. 56 sec. 9.]

NOTES:

Severability – 1975-'76 2nd Ex.Sess. chap. 56: See note following Wash. Rev. Code **4.16.350**.

EX. 7

Revised Code of Washington

- Revised Code of Washington**
- TITLE 7 SPECIAL PROCEEDINGS AND ACTIONS**
- CHAPTER 7.70 ACTIONS FOR INJURIES RESULTING FROM HEALTH CARE**

RCW 7.70.050 (1) The following shall be necessary elements of proof that injury....

(1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

(a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;

(c) The recognized possible alternative forms of treatment; or

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his consent to required treatment will be implied.

[1975-'76 2nd Ex.Sess. chap. 56 sec. 10.]

NOTES:

Severability – 1975-'76 2nd Ex.Sess. chap. 56: See note following Wash. Rev. Code 4.16.350.

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EX. 8

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EX. 9

COURT OF APPEALS
DIVISION II

03 JUL -6 AM 9:02

STATE OF WASHINGTON
BY: 

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Sequim, Washington 98382
Attorney for Appellant
Tel. 360-683-5788
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

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

Ct. App. No. 38849-9-II

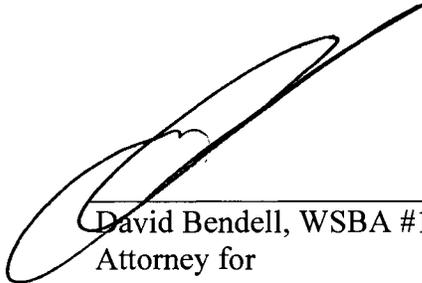
DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that Appellants Opening Brief pleading was mailed by first class mail to:

Lawrence and Versnel
3030 Two Union Square
Seattle, Wa. 98101,

opposing counsel on the below date.

Dated this 2nd day of July 2009



David Bendell, WSBA #16727
Attorney for