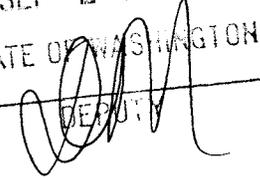


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COURT OF APPEALS
DIVISION II

No. 38849-9-II

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STATE OF WASHINGTON
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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
REPLY BRIEF

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A.
**PLAINTIFF'S COMPLAINT ALTERNATIVELY PLEADS CLAIMS
FOR LACK OF CONSENT, MISREPRESENTATION AND
CONSUMER PROTECTION VIOLATIONS**

Appellee has alleged that the "gravamen" of Appellant's complaint is a standard of care violation. A review of the complaint (CP 1) indicates the contrary. Count two of the complaint alleges Appellant's lack of consent to the procedure performed. Count three alleges breach of contract. Count four alleges misrepresentation. Count five relates to consumer protection violations.

B.
**THE STATUTORY REQUIREMENT OF A CERTIFICATE OF
MERIT SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY**

As noted in Appellant's opening brief, absent contrary legislative intent, statutes are presumed to operate prospectively only. RCW 70.41.304 contains no language indicating that the Legislature intended retroactive application of the statute.

The most recent pronouncement on retroactivity came in *Densley v. Dept. of Ret. Sys.*, 162 Wn.2d 210 (2007). *Densley* involved a complex set of issues relating to the effect of military service on rights under the Public retirement system. The court had to consider whether remedial statutes giving credit for short term military leave would be applied retroactive. Most important in the court's decision was the foundational issue as to whether the statute had explicit provisions regarding retroactivity.

"As a general proposition, courts disfavor retroactivity. *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999) (citing *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997)). "A statute is presumed to operate retrospectively unless the Legislature indicates that it is to operate retroactively." *Id.* (citing *Landgraf v. USI Film Prods.*, 511 U.S.

244, 264-66, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); State v. McClendon, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997); Burns, 131 Wn.2d at 110; Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 30, 864 P.2d 921 (1993); In re Dissolution of Cascade Fixture Co., 8 Wn.2d 263, 272, 111 P.2d 991 (1941)). This presumption can only "be overcome if (1) the Legislature explicitly provides for retroactivity, Landgraf, 511 U.S. at 270, 278; (2) the amendment is 'curative,' In re F.D. Processing, Inc., 119 Wn.2d [452,] 461-62[, 832 P.2d 1303 (1992)]; or (3) the statute is 'remedial,' McClendon, 131 Wn.2d at 861." T.K., 139 Wn.2d at 332." Id. P. 223.

The *Densley* Court held that the short term military credit enactments would not be applied retroactively. Noting:

“Densley wants this amendment applied retroactively precisely *because* it provides him with a new substantive right: it would provide him with service credit to which he was not previously entitled. It would also provide him with credit that public employees working in the 1970s would not have received and cannot now receive, a disparity that the Court of Appeals has previously tried to avoid. *See Strong v. Dep't of Ret. Sys., 61 Wn. App. 457, 461, 810 P.2d 974, review denied, 117 Wn.2d 1021 (1991).*” Id. p.224

As in *Adcox*, cited above, the 2006 amendment seeks to alter the evidentiary environment that Plaintiff's will face in bringing healthcare litigation. The statute requiring the certificate of merit took effect in March of 2006. Had Plaintiff brought suit prior to the effective date of the statute, no certificate would be required. With no provision specifying retroactive application RCW 70.41.304 cannot be retroactively applied. Under *Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 30, 864 P.2d 921 (1993)*, supra. the requirement of a certificate cannot be 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**

Paragraph 19 of Appellant's (Plaintiff's) complaint alleges that "Defendant failed to inform the plaintiff of a material fact or facts relating to the treatment. Plaintiff consented to the treatment without being aware of or fully informed of such material fact or facts." (CP 1).

RCW 7.70.150 requires the filing of a certificate where the actions of the practitioner "violates the accepted standard of care". In cases alleging failure to obtain consent, Plaintiff need only allege:

- (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)

As noted previously 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).

RCW 7.70.150 was intended to require a medical opinion in cases where **professional medical competence** is 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.** This case deals with the unethical practice of promising an expensive high noble crown (in writing) and delivering a cheap substitute with a higher incidence of toxic reactions. This is not an issue of negligence or one calling into question the professional skill of Dr. Savage..

D.
**WASHINGTON'S MALPRACTICE STATUTE OF LIMITATIONS
DOES NOT ENCOMPASS CLAIMS BASED ON FRAUD AND
MISREPRESENTATION.**

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) (emphasis added).

In his responsive brief Appellee argues that, notwithstanding specific language limiting the application of the statute to cases involving “**alleged professional negligence**”, the above state applies to cases involving substantive fraud as part of the tortious conduct. He bases this assertion on

portions of the statute tolling application in cases involving “proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect,”

In *Winbun v. Moore*, 143 Wn.2d 206 (2001) the Supreme Court reviewed the statute to determine its application in a case involving a claim against a physician whose identity was not discovered until the commencement of the discovery process.

“The statute provides two alternative limitations periods. Actions must either be commenced within three years of the alleged injury-causing act or omission, or within one year from the time the plaintiff discovers or reasonably should have discovered that the injury was caused by the act or omission (the discovery rule), whichever is later. Since it is undisputed that Winbun filed her cause of action against Epstein more than three years after Epstein last treated her, the issue before us is whether Winbun satisfied the requirements of the discovery rule provided by RCW 4.16.350. In this case, the statutory discovery rule must be analyzed and applied where a plaintiff was treated by multiple health care providers.” . Id. p. 213

What *Winbun* makes clear in its discussion of the “discovery rule” language in the latter part of RCW 4.16.350 is that rule was intended to create specific time of discovery provisions in “negligence” cases, not expand the statute to include torts beyond negligence that involve fraud or misrepresentation. A review of Washington cases provides no authority for such an interpretation.

E.
**THE PROVISIONS OF RCW 7.70. ET SEQ DO NOT
APPLY TO INTENTIONAL TORTS SUCH AS FRAUD AND
MISREPRESENTATION WHICH GO BEYOND HEALTHCARE**

In his brief Appellee suggests that it was the intent of the legislature in enacting the statutory scheme embodied in RCW 7.70 et seq. to immunize

Healthcare professionals from liability for intentional torts such as fraud. Appellant disagrees.

In *Estate of Sly v. Linville*, 75 Wn. App. 431, 438, 878 P.2d 1241 (1994) the court considered claims by a patient that a physicians misrepresentations regarding another physicians care caused her to miss the statute of limitations with respect to claim against the prior physician. In decision upholding a denial of summary judgment below Division One found that the misrepresentation claim was not governed by RCW 7.70 et seq.

“We find Linville's attempts to distinguish these cases unpersuasive. In addition, Linville's reliance on RCW 7.70.010 is misplaced because under that provision, the claim must still be "for damages for injury occurring as the result of health care "in order to be covered by the act. Here, however, the claim results not from health care but from misrepresentations made by Linville. In other words, Linville's breach of duty did not arise during the process in which he "was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for" Sly, but arose during his discussions with Sly about Nelson. See *Tighe*, at 271. The fact that the misrepresentations were made during the course of the physician/patient relationship does not automatically render them "health care" for purposes of the statute of limitation. Thus, we conclude that the 8-year limitation in RCW 4.16.350 does not apply to this case.” Id. p. 440.

In *Reed v. Anm Health Care*, 148 Wn. App. 264 (2008) the court considered the key question as to when a physician’s conduct goes outside the realm of healthcare.

“The key question in determining whether an injury occurs as a result of health care is whether the injury occurs during the process in which [a medical professional is] utilizing the skills which [the professional has] been taught in examining, diagnosing, treating or caring for" the patient.... Thus, when the conduct complained of is part of the health care provider's efforts to treat and care for a patient's medical needs, the injury occurs as a result of health care and the claim falls under chapter 7.70 RCW.” Id. p. 271.

In *Reed*, supra the issue was whether a doctor acted outside the realm of medicine when he excluded a lesbian domestic partner from the hospital room of a seriously ill patient. The court found that whether the physician had acted improperly was a question of fact to be resoled below.

“Here, the issue is whether Hulley's decision to exclude Reed was part of her efforts to treat and care for Ritchie or whether the exclusion was motivated by something other than her medical judgment. If the exclusion was to address Ritchie's medical needs, then Reed's injuries occurred as a result of health care and her common law tort claims are precluded by RCW 7.70.010 and .030. If the exclusion was not based on Ritchie's medical needs, then Reed's common law tort claims remain viable.” Id. p. 271.

Similar reasoning can be found in *Wright v. Jeckle*, 104 Wn. App. 478 (2001). Wright involved an action against a physician for violation of the Consumer Protection Act and breach of fiduciary duty based on the physician's advertising, marketing, and sale of the diet drug fen-fen. Plaintiff alleged that the sales were part of the entrepreneurial aspects of his medical practice and were, therefore, subject to the Consumer Protection Act. In its decision reversing summary judgment for the doctor, the Court distinguished a prior decision in *Branom v. State*, 94 Wn. App.964, 947 P.2d 335 (1999).

“Chapter 7.70 RCW clearly governs all actions for damages based on injuries resulting from health care. *Branom*, 94 Wn. App. at 969. Entrepreneurial activities, however, are not health care. They do not involve "the process in which [a physician is] utilizing the skills which he [or she] had been taught in examining, diagnosing, treating or caring for the plaintiff as his [or her] patient." Id. at 969-70 (quoting *Linville*, 75 Wn. App. at 439). A plaintiff should, therefore, be allowed to bring an independent action against a doctor alleging that entrepreneurial activities violate the CPA. Whether Dr. Jeckle has in fact engaged in entrepreneurial activities which violate the CPA is a question of fact. reduced to its essence, the plaintiffs' argument here is that Dr. Jeckle was not practicing medicine. He was in the business of selling diet drugs. *Eriks*, 118 Wn.2d at 465 (citing *Quimby*, 45 Wn. App. at 182).” Id p. 484, 485.

Here Appellee made a written promise to install a “high noble crown (gold, platinum or palladium). Instead he installed an inexpensive nickel-chromium crown. The crown was ordered weeks in advance of it being installed in Appellant’s mouth. Documentation regarding the composition of the crown was in the physician’s file prior to his commencement of the installation procedure. In proceedings below Appellee submitted no

evidentiary materials suggesting that there was a medical reason for the substitution or that it was simply a mistake. Dr. Savage's commission of the common law tort of fraud began when he ordered the cheaper crown instead of the expensive one. It began when Ms. Young was not even in his office.

F.
**WASHINGTON RECOGNIZES A CAUSE OF ACTION AGAINST
HEALTHCARE PROVIDERS FOR BREACH OF CONTRACT**

The right to sue a physician based violation of a contract was recently re-affirmed (Subsequent to *Branom*) in *Hansen v. Virginia Mason Med. Ctr.*, 113 Wn. App. 199 (2002). In Hansen the issue was the enforceability of promises made by a physician that a patient was not terminal within the next year. After discussing the history of cases involving contract claims against physician it laid down narrow parameters as to when such a case is viable.

"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. As indicated by the Court in *Carney*, the existence of a contract will not be inferred, where a practitioner merely offers an opinion regarding the effect of a course of treatment." Id. p. 206, 207.

The present case presents just such a "narrow" circumstance where the parties did "specifically contract". Exhibit 1 (CP) the contract between the parties specifically references "crown, porc & high n". It references the list of procedures as a "treatment plan" and states that "we will do our best to keep you informed of changes if they occur". Finally it provides that by signing the "*agreement*" the patient would "agree to pay any and all charges incurred with this treatment plan".

G.
THE SUPREME COURT'S REVERSAL OF "MOSQUERA"
DOES NOT PRECLUDE PLAINTIFF'S CONSUMER
PROTECTION CLAIM

In his brief Appellee argues that the reversal of the Mosquera decision essentially precludes Appellant's consumer protection claim. Appellant disagrees.

It first should be noted that there is a key factual distinction between *Mosquera* and the present action. In *Mosquera* the Supreme Court noted that the use of cow bone (as opposed to the promised human bone) occurred when the peridontist defendant ran out of human bone during a procedure and had to use a small amount of cow bone. There was no allegation that the peridontist deliberately substituted a cheaper material. Here the Appellee installed a pre-manufactured appliance. Prior to the operation he was advised through the accompanying assay certificate that it was not a high noble crown as was promised and represented to Ms. Young. He installed it anyway. Unlike in *Mosquera* there was no medical reason or exigency that necessitated the switch. It was unfair and deceptive for Dr. Savage to sell Appellant an expensive product and deliver a cheap one without making a disclosure.

Mosquera also leaves open the question of whether the substitution of the cheap nickel-chromium crown was part of the trade or business of Dr. Savage. It noted:

"The term 'trade' as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided." *Ramos v. Arnold*, 141 Wn. App. 11, 20, 169 P.3d 482 (2007). The question is whether the claim involves entrepreneurial aspects of the practice or mere negligence claims, which are exempt from the CPA. *Short*, 103 Wn.2d at 61. "Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act." *Ramos*, 141 Wn. App. at 20." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595 (2009) p. 602, 603

Mosquera, supra makes a distinction between CPA claims and those resulting only from negligence. It also excludes from CPA coverage only those claims which are “directed at the competence of and strategies employed by a professional” Here there was suggestion below that the “switch” to the lower cost, lower quality crown was made for any medical reason or “strategy”, nor did Dr. Savage suggest in any of the evidentiary materials that he was unaware of the crown’s composition. He has not contested the fact that his written contract with Appellant required a “high noble” crown.

The *Mosquera* court also distinguished the previous decision in *Wright v. Jeckle*, 104 Wn. App. 478 (2001). Noting that:

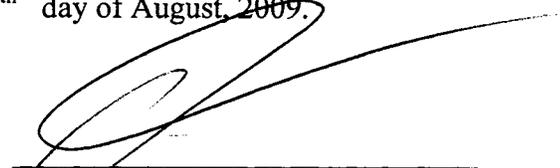
“In *Wright*, 104 Wn. App. at 480, a doctor solicited patients by advertising a weight loss program which used a diet drug that could be purchased only at the doctor’s office. The doctor “was not practicing medicine” but “was in the business of selling diet drugs,” so the court ruled the plaintiff had a valid CPA claim. *Id.* at 485. But here Dr. Mosquera-Lacy was practicing medicine by treating and caring for Michael, not soliciting patients by advertising the use of human bone for bone grafting procedures. She was not in the business of selling cow bone or human bone.” *Id.* p. 603, 604

Here the evidence below was that Dr. Savage extensively used advertisement to market his dental services (CP 16, Ex. 4, 5). His website advertisement specifically states that “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.” (CP 16, Ex. 7). His website goes on to discuss both gold and all ceramic crowns. No mention is made of inexpensive nickel-chromium crowns¹.

¹ In her complaint (CP 1) Appellant alleges that “. 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.” . 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.

Dr. Savages' actions also impact the public interest. In *Mosquera* the court dealt idiosyncratic fact pattern resulting from a peridontist running out of one dental product during a procedure and substituting another. Here the dentist entered into a written contract for a high noble, porcelain capped crown (CP 14, Ex. 1), ordered a nonconforming nickel-chromium crown from the laboratory, received documentation that it was a nickel-chromium crown (CP 14, Ex. 2), and installed it anyway. Because the crown was porcelain capped neither Appellant nor any one else could know of the "switch". Dentist such as Dr. Savage have an ethical responsibility to deliver what they promise. This is particularly so when they use products that are hidden or obscured in a dental procedure. A Dentist who deliberately substitutes inferior, cheaper products in such an instance could cheat hundreds of patients without getting caught. As the *Mosquera* court noted "the purpose of the CPA is to protect the public" (Id. p. 604).

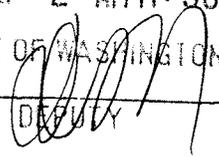
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
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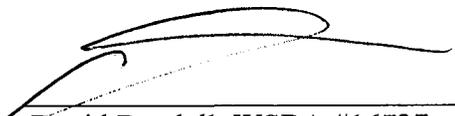
DECLARATION OF SERVICE

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

Lawrence and Versnel
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opposing counsel on the below date.

Dated this 1st day of September 2009.


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