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STATE OF WASHINGTON
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**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

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

vs.

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

OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iii-iv
A. Introduction.....	1
B. Assignments of Error and Issues Pertaining Thereeto.....	3
1. Assignment of Error No. 1.....	3
2. Assignment of Error No. 2.....	3
3. Issues Pertaining To Assignment of Error No. 1.....	3
4. Issues Pertaining To Assignment of Error No. 2.....	4
C. Statement of the Case.....	4
D. Statement of Facts.....	5
E. Argument.....	7
1. Motion to Dismiss – Generally.....	7
2. Plaintiff’s allegations in her Consumer Protection Act lawsuit do not amount to claim splitting.....	8
a. Persons and Parties.....	9
b. Causes of Action.....	10
i. No impairment of rights or interests.....	11
ii. The evidence presented is not substantially the same.....	11
iii. The suits do not involve Infringement of the same right.....	12
iv. The suits do not arise out of the same nucleus of facts.....	13

c. Subject Matter.....	14
d. Quality of the persons for or against whom the claim is made.....	14
3. Plaintiff’s allegations support a valid Consumer Protection Act claim against defendants.....	15
a. Plaintiff’s allegations support a valid Consumer Protection Act claim against defendants without alleging a lack of informed consent.....	15
b. Plaintiff’s allegations support a valid Consumer Protection Act claim against defendants based upon a lack of informed consent.....	18
F. Conclusion.....	29

TABLE OF AUTHORITIES

Page

Washington Cases

Backlund v. Univ. of Wash., 137 Wn.2d 651,
975 P.2d 950 (1999).....12

Champagne v. Thurston County, 163 Wn.2d 69,
178 P.3d 936 (2008).....19

Cutler v. Phillips Petroleum Co., 124 Wn.2d 749,
881 P.2d 216 (1994).....7, 8

Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988),
aff'd on reh'g, 113 Wn.2d 148, 776 P.2d 963 (1989).....7

Landry v. Luscher, 95 Wn .App. 779,
976 P.2d 1274 (1999).....8, 9, 10, 11, 13, 14

Michael v. Mosquera-Lacy, 165 Wn.2d 595,
200 P.3d 695 (2009).....15

Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP,
110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).....17

Quimby v. Fine, 145 Wn. App. 175, 724 P.2d 403 (1986).....15, 16

Reid v. Pierce County, 136 Wn.2d 195,
961 P.2d 333 (1998).....7, 8

Sprague v. Adams, 139 Wash. 510, 515, 247 P. 960 (1926)).....8, 9

State ex rel. Evergreen Freedom Found, v. Wash. Educ. Ass'n,
140 Wn.2d 615, 999 P.2d 602 (2000).....7

Thomas v. Wilfac, Inc., 65 Wn. App. 255,
828 P.2d 597, review denied, 119 Wn.2d 1020,
838 P.2d 692 (1992).....23, 25, 27, 28

Whiteside v. Lukson, 89 Wn. App. 109,
947 P.2d 1263 (1997).....23, 24, 25, 27, 28

Wright v. Jeckle, 104 Wn. App. 478, 16 P.3d 1268 (2001).....16

Washington State Statutes

RCW 7.70.050.....1, 18, 19, 20, 21, 26

RCW 19.86.020.....2, 3, 4, 11, 12, 15, 29

Washington State Rules

CR 8(a).....19

CR 12(b).....2, 3, 7, 8

Foreign Cases

Barriocanal v. Gibbs, 697 A.2d 1169 (Del. 1997).....22

Degennaro v. Tandon, 89 Conn.App. 183,
873 A.2d 191 (2005).....22, 26, 27

Dingle v. Belin, 358 Md. 354, 749 A.2d 157 (2000).....22

Duffy v. Flagg, 279 Conn. 682, 905 A.2d 15 (2006).....25, 27

Hidding v. Williams, 578 So.2d 1192 (1991).....20, 21, 22, 28, 29

*Howard v. University of Medicine & Dentistry
of New Jersey*, 172 N.J. 537, 800 A.2d 73 (2002).....23

Johnson v. Kokemoor, 199 Wis.2d 615, 545 N.W.2d 495 (1996).....22

A. Introduction

This appeal concerns the issues of: (1) whether a surgeon's failure to inform his patients of an eye injury he sustained, that caused vision problems and eventually left Dr. Jackson almost completely blind in his left eye, can form the basis for a cause of action under the Washington Consumer Protection Act when it is alleged that the failure to inform the patients was a deceptive act done to increase the doctor's profits and his volume of patients; (2) whether a surgeon's failure to inform his patients of an eye injury he sustained can form the basis for a lack of informed consent cause of action under RCW 7.70.050; (3) whether a claim of lack of informed consent based upon the failure of a surgeon to inform his patients of an eye injury may be maintained in a Consumer Protection Act action separate from a previously filed medical malpractice lawsuit containing a cause of action for lack of informed consent but not mentioning injury to the surgeon's eye; (4) whether a surgeon's medical practice partner's failure to inform the surgeon's patients of an eye injury the surgeon sustained can form the basis for a cause of action under the Washington Consumer Protection Act when it is alleged that the failure to inform the patients was a deceptive act done to increase the doctors' profits and their volume of patients; and (5) whether a surgeon's medical practice partner's failure to inform the surgeon's patients of an eye injury

the surgeon sustained can form the basis for a lack of informed consent cause of action under RCW 7.70.050.

Plaintiff, Denise Dalien, was a patient of defendant Dr. Stanley Jackson whose partner in his medical practice was Dr. Philip Kierney. Plaintiff filed a medical malpractice lawsuit against Dr. Jackson for breach of the standard of care and lack of informed consent. Plaintiff later filed a class action lawsuit against Dr. Jackson and Dr. Kierney under the Washington Consumer Protection Act alleging that Dr. Jackson and Dr. Kierney engaged in unfair or deceptive acts or practices in the business conduct of their medical practice in violation of RCW 19.86.020. Specifically, plaintiff alleged that Dr. Kierney, in cooperation with Dr. Jackson, advertised and marketed high priced breast augmentations and other surgeries and Dr. Jackson performed those surgeries while neither doctor informed their patients that Dr. Jackson had suffered an eye injury that caused vision problems and eventually left Dr. Jackson almost completely blind in his left eye.

Both Dr. Jackson and Dr. Kierney moved to dismiss plaintiff's complaint pursuant to CR 12(b). The lower court dismissed plaintiff's complaints against both doctors, holding that plaintiff's allegations constituted claims for lack of informed consent and that plaintiff's second lawsuit amounted to "claim splitting." The court further held that the

failure to inform clients of this type of provider specific information could not properly form the basis for a lack of informed consent cause of action under Washington law.

B. Assignments of Error and Issues Pertaining Thereto

1. Assignment of Error No. 1

The lower court erred in granting defendant Jackson's motion to dismiss pursuant to CR 12(b).

2. Assignment of Error No. 2

The lower court erred in granting defendant Kierney's motion to dismiss pursuant to CR 12(b).

3. Issues Pertaining To Assignment of Error No. 1

Did the lower court err in finding that plaintiff's allegations against Dr. Jackson would not support a cause of action under the Washington Consumer Protection Act where plaintiff alleged that Dr. Jackson's failure to inform patients of an eye injury was an unfair or deceptive act or practice in the business conduct of his medical practice in violation of RCW 19.86.020?

Did the lower court err in finding that plaintiff's allegations against Dr. Jackson amounted to "claim splitting"?

Did the lower court err in finding that plaintiff's allegations against Dr. Jackson would not support a cause of action for lack of informed consent?

4. Issues Pertaining To Assignment of Error No. 2

Did the lower court err in finding that plaintiff's allegations against Dr. Kierney would not support a cause of action under the Washington Consumer Protection Act where plaintiff alleged that Dr. Kierney's failure to inform patients of Dr. Jackson's eye injury was an unfair or deceptive act or practice in the business conduct of his medical practice in violation of RCW 19.86.020?

Did the lower court err in finding that plaintiff's allegations against Dr. Jackson amounted to "claim splitting"?

Did the lower court err in finding that plaintiff's allegations against Dr. Kierney would not support a cause of action for lack of informed consent?

C. Statement of the Case

This is an appeal from the lower court's order of July 17, 2009, CP 403-4, granting Defendant Jackson's Motion to Dismiss and the lower court's order of September 25, 2009, CP 689-91, granting Defendant Kierney's Motion to Dismiss.

D. Statement of Facts

Plaintiff filed her Complaint for Damages against defendant Jackson on February 12, 2009. CP 1-5. Plaintiff filed her Amended Complaint for Damages on June 10, 2009 adding Philip C. Kierney, M.D. and Philip C. Kierney, M.D., P.S. as defendants. CP 152-6. Plaintiff made the following factual allegations in her Amended Complaint for Damages:

5.1.1 This claim arises from unfair and/or deceptive acts or practices engaged in by Stanley Jackson, M.D. in the business conduct of his medical practice.

5.1.2 During all relevant times, Dr. Jackson was a board certified plastic surgeon practicing in the State of Washington associated in practice with Dr. Kierney.

5.1.3 In July of 1999 Dr. Jackson's left eye was injured when it was struck by a bungee cord. The injury to Dr. Jackson's eye caused vision problems and eventually left Dr. Jackson almost completely blind in his left eye.

5.1.4 From the time of Dr. Jackson's injury until his retirement in August of 2006, Dr. Kierney knew or should have known of Dr. Jackson's injury and any negative impact it had on his ability to perform surgery.

5.1.5 From the time of his injury until his retirement in August of 2006, Dr. Jackson continued to take new patients and continued to perform surgery on patients. Dr. Jackson did not inform any of his then current or potential patients of any negative impact his eye injury had on his ability to perform surgery. Dr. Jackson's failure to obtain informed consent was used to promote the entrepreneurial aspects of his practice. He promoted operations and/or services to increase his profits and the volume of patients and then failed to adequately advise the patients of risks or alternative procedures.

5.1.6 Dr. Kierney did not inform any of Dr. Jackson's current or potential patients of any negative

impact Dr. Jackson's eye injury had on Dr. Jackson's ability to perform surgery.

CP 153-4. The sole cause of action contained is plaintiff's Amended Complaint for Damages is for violation of the Washington Consumer Protection Act:

8.1.1 Plaintiff re-alleges and incorporates herein the preceding paragraphs of this Complaint as set forth in full.

8.1.2 In violation of RCW 19.86.020, Defendants engaged in unfair and/or deceptive actions in commerce which affect the public interest and caused injury to Plaintiffs.

8.1.2 As a result of these actions, Plaintiffs sustained both general and special damages in amounts to be proven at trial.

8.1.3 Plaintiffs requests treble damages and an award of attorneys' fees and costs for this conduct.

CP 155-6. Plaintiff further alleged damage to her business and/or property – damages recoverable under the Consumer Protection Act. *Id.*

Prior to filing her Consumer Protection Act action against defendants, plaintiff filed a separate medical malpractice action against Defendant Dr. Jackson on July 14, 2008. *Dalien v. Jackson*, Pierce County Superior Court No. 08-2-10303-5 (2008). CP 312-16. Along with a cause of action for breach of the standard of care, plaintiff alleged a lack of informed consent:

7.2 Defendants failed to properly advise Denise Dalien of the risks associated with her condition, the alternative care, treatment, tests or evaluations which should have been

undertaken or could have been undertaken to properly diagnose, treat and care for Denise Dalien.

CP 315. Plaintiff made no allegations regarding injury to Dr. Jackson's eye or whether or not Dr. Jackson informed plaintiff of the injury to his eye. *Id.*

E. Argument

1. Motion to Dismiss - Generally

Whether or not dismissal of a plaintiff's claim was appropriate under CR 12(b)(6) is a question of law that appellate courts review de novo. *State ex rel. Evergreen Freedom Found, v. Wash. Educ. Ass'n*, 140 Wn.2d 615, 629, 999 P.2d 602 (2000).

“CR 12(b)(6) motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which [a] plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’” (*Emphasis added*). *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994) (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *aff'd on reh'g*, 113 Wn.2d 148, 776 P.2d 963 (1989)).

Under CR 12(b)(6), Washington's courts are required to accept as true all of the allegations in plaintiff's complaint and all reasonable inferences from those allegations. *Reid v. Pierce County*, 136 Wn.2d 195,

201, 961 P.2d 333 (1998). In ruling on a defense of failure to state a claim, the trial court must construe the complaint in the manner most favorable to the pleader, *Reid v. Pierce County*, 136 Wn.2d at 201, in this case Ms. Dalien and not defendants. And dismissal, pursuant to CR 12(b)(6), is appropriate only if the complaint alleges no facts that would justify recovery. *Reid v. Pierce County*, 136 Wn.2d at 200-1.

Courts should dismiss under this rule only when it appears beyond a reasonable doubt that no facts justifying recovery exist. (***Emphasis added***). *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d at 755. “[A] complaint survives a CR 12(b)(6) motion if any set of facts, ‘including hypothetical facts not part of the formal record’, could exist that would justify recovery.” *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d at 755. *Hoffer v. State*, 110 Wn.2d at 420.

2. Plaintiff’s allegations in her Consumer Protection Act lawsuit do not amount to claim splitting

Plaintiff’s Consumer Protection Act action is based on events and facts distinct from those relied upon for her medical negligence action.

Generally, a plaintiff in Washington may not file two lawsuits based upon the same event. *Landry v. Luscher*, 95 Wn .App. 779, 780, 976 P.2d 1274 (1999) (citing *Sprague v. Adams*, 139 Wash. 510, 515, 247 P. 960 (1926)). The prohibition on “claim splitting” is based upon the

principles that bringing an action for part of a claim precludes bringing a second action for the remainder of the claim and the merger and bar components of res judicata. *Landry* at 782. “[D]ismissal on the basis of res judicata is appropriate where the subsequent action is *identical* with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” Id. at p. 783 (emphasis added).

In both *Landry* and *Sprague*, the plaintiffs were involved in automobile collisions with the defendants and first sued for property damage, secured judgments against their respective defendants, and later sued again for personal injuries suffered in the same collisions. *Landry* at 781-82; *Sprague* at 510-12. These cases are easily distinguishable from Ms. Dalien’s cases against Dr. Jackson which are not based upon the same facts and events.

Application of the facts in this case to the elements of a claim of res judicata shows that plaintiff has not engaged in “claim splitting.”

a. Persons and Parties

“[W]hile a party does not have to be identical in both suits, there must be at least privity between a party to the first suit and the party to the second suit.” *Landry* at 783-84. Ms. Dalien and Dr. Jackson are parties to both suits. However, there is no privity between the proposed class

members and Dr. Jackson and Dr. Kierney because the proposed class members are not parties to Ms. Dalien's medical negligence case against Dr. Jackson.

b. Causes of Action

To determine whether the causes of action are identical a court is to consider: “(1) Would the second action destroy or impair rights or interests established in the first judgment? (2) Is the evidence presented in the two actions substantially the same? (3) Do the two suits involve infringement of the same right? (4) Do the two suits arise out of the same nucleus of facts?” *Landry* at 784. The causes of action in these cases are not only not identical, they are wholly separate and distinct.

Ms. Dalien's informed consent cause of action in her medical negligence case is based upon Dr. Jackson's failure to properly advise her of the risks associated with her condition, the alternative care, treatment, tests or evaluations which should have been undertaken or could have been undertaken to properly diagnose, treat and care for her. Nowhere in plaintiff's medical negligence amended complaint for damages does Ms. Dalien allege that Dr. Jackson's failure to disclose his eye injury to her constituted a basis for her informed consent cause of action. In fact, Ms. Dalien does not mention Dr. Jackson's failure to disclose his eye injury anywhere in her medical negligence amended complaint for damages.

In contrast, Ms. Dalien's Consumer Protection Act claim against Dr. Jackson is based upon his failure to inform her about his eye injury and any negative impact it could have on her treatment, which is alleged to be an unfair or deceptive act or practice in the business conduct of his medical practice in violation of RCW 19.86.020. Applying the test from *Landry*, it is clear that these causes of action are not identical.

i. No impairment of rights or interests

Ms. Dalien's Consumer Protection Act case could not destroy or impair rights or interests established in a judgment in her medical negligence case (notwithstanding Dr. Jackson's admission of liability and causation for negligence in that action). A jury could find for Ms. Dalien in her Consumer Protection Act case even if a jury found against her on the informed consent cause of action in her medical negligence case. These would not be inconsistent judgments.

ii. The evidence presented is not substantially the same

The evidence Ms. Dalien would have presented to support her informed consent cause of action in her medical negligence case would have involved the risks involved in breast augmentation surgery, how different techniques and products would impact these risks, what alternatives she had, and what discussions, if any, Dr. Jackson had with

her on these subjects. Ms Dalien will present much different evidence in support of her Consumer Protection Act case. In the Consumer Protection Act case Ms. Dalien will present evidence relating to Dr. Jackson's eye injury, his advertising, his billing rates, the billing rates of other uninjured plastic surgeons, and whether Dr. Jackson ever discussed his eye injury with her or informed her that he was charging the same or higher rates as an uninjured and unimpaired surgeon.

iii. The suits do not involve infringement of the same right

The basis for a claim of lack of informed consent is that a patient has the right to make decisions about his or her medical treatment. *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 663, 975 P.2d 950 (1999). RCW 19.86.020 provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The statute therefore recognizes a right to be free from unfair or deceptive acts or practices in the conduct of any trade. These are two very different rights. Dr. Jackson infringed Ms. Dalien's right to make decisions about her medical treatment when he failed to properly advise her of the risks associated with her condition, the alternative care, treatment, tests or evaluations which should have been undertaken or could have been undertaken to properly diagnose, treat and

care for her. He also infringed upon her right to be free from unfair or deceptive acts in the conduct of his trade when he advertised and billed for his services at the same or higher rate as uninjured and unimpaired surgeons without informing Ms. Dalien that he had, in fact, suffered a serious eye injury.

iv. The suits do not arise out of the same nucleus of facts

Ms. Dalien's informed consent claim in her medical negligence case arises out of a nucleus of facts involving her consultation with Dr. Jackson regarding the risks and alternatives related to her medical treatment, the treatment itself, and the outcome of the treatment. The nucleus of facts out of which her Consumer Protection Act case arises is different, involving Dr. Jackson's advertising and representations made regarding his skill and experience and the basis for his billing rates and his deceptive act of failing to inform Ms. Dalien of facts that, if disclosed, would have forced Dr. Jackson to charge less for his services due to market forces. Had Ms. Dalien and other patients known of Dr. Jackson's injury and impairment they would have retained the services of an unimpaired surgeon at the same rate or Dr. Jackson would have had to lower his rates to attract and retain customers.

c. Subject Matter

The subject matter inquiry is similar to the cause of action inquiry. “[T]he critical factors for subject matter are the nature of the claim or cause of action and the parties.” *Landry* at 785. As explained above, the subject matter of the Consumer Protection Act case is Dr. Jackson’s deceptive act of not disclosing his injury and impairment, which would have forced him to charge less for his services. The subject matter of the informed consent claim in the medical negligence case is Dr. Jackson’s failure to inform Ms. Dalien regarding the risks and alternatives related to her medical treatment, the treatment itself, and the outcome of the treatment.

d. Quality of the persons for or against whom the claim is made

Ms. Dalien is a plaintiff in both cases and Dr. Jackson is a defendant in both cases, so they are adversarial in both cases. Therefore there is “identity in the quality of the persons for or against whom the claim is made.” *Landry* at 785. It should be noted, however, that the members of the proposed class share no such identity in the quality of the persons because they are not parties to Ms. Dalien’s medical negligence case.

The lower court erred in finding that plaintiff's Consumer Protection Act case amounted to claim splitting. The two cases are not identical with respect to cause of action and subject matter and, with respect to the members of the proposed class, the persons and parties are not identical.

3. Plaintiff's allegations support a valid Consumer Protection Act claim against defendants

a. Plaintiff's allegations support a valid Consumer Protection Act claim against defendants without alleging a lack of informed consent

RCW 19.86.020 provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The Consumer Protection Act is to be liberally construed. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009).

Members of the learned professions are subject to the Consumer Protection Act. *Quimby v. Fine*, 145 Wn. App. 175, 180, 724 P.2d 403 (1986). The entrepreneurial or commercial aspects of professional services, including medical services, are subject to the Consumer Protection Act. *Mosquera-Lacy* at 603.

In a legal practice entrepreneurial aspects include how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses

clients . . . In *Quimby*, the court found no reason to distinguish the legal practice from the medical practice for CPA claims . . . Other cases follow the same principles established in *Short* to define the entrepreneurial aspects of learned professions, including medical professionals, as billing and obtaining and retaining patients.

Mosquera-Lacy at 603 (internal citations and quotations omitted).

A claim of lack of informed consent against a doctor may support a Consumer Protection Act claim if the claim of lack of informed consent, “relates to the entrepreneurial aspects of the medical practice.”

Quimby at 181. However, a claim of lack of informed consent is not required to make a Consumer Protection Act claim against a doctor.

Wright v. Jeckle, 104 Wn. App. 478, 484-85, 16 P.3d 1268 (2001). A plaintiff may bring a valid Consumer Protection Act claim against a doctor by alleging that the doctor’s entrepreneurial activities, independent of informed consent, violate the Consumer Protection Act. ***Wright*** at 485.

Ms. Dalien has alleged that Dr. Kierney and Dr. Jackson engaged in unfair and/or deceptive acts or practices in the business conduct of their medical practice. CP 155. The unfair and/or deceptive acts or practices relate to Dr. Kierney’s participation in Dr. Jackson’s practice of billing and obtaining and retaining patients. Ms. Dalien has alleged that Dr. Kierney and Dr. Jackson promoted operations and/or services to increase their profits and the volume of patients without informing Dr. Jackson’s

potential and current patients of his eye injury. CP 154. Dr. Kierney participated in deceiving Dr. Jackson's patients to obtain and retain them so that Dr. Jackson could bill them at a rate higher than he would be able to charge if he informed his patients of his eye injury because market forces would have dictated that he charge a lower rate in order to retain and obtain patients. It is a given that, presented with the choice between two plastic surgeons who charge the same amount for their services, the vast majority of (if not all) patients will choose the surgeon who has not suffered a debilitating eye injury that led to blindness.

The defendants asked the lower court if doctors must disclose a number of things, including whether they are under a doctor's care or have trouble standing for long periods. This case does not involve such trivial matters. This case involves a surgeon who suffered such a serious eye injury that it caused vision problems and eventually left the surgeon almost completely blind in his left eye. This is precisely the sort of information that should be disclosed to patients, especially if the surgeon intends to continue to charge the same rates for services that he charged prior to his injury. This is particularly true in the doctor/patient context where a fiduciary relationship arises as a matter of law. *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002). "In a fiduciary relationship one party

occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for..." *Id.* at 433 (internal quotes omitted).

b. Plaintiff's allegations support a valid Consumer Protection Act claim against defendants based upon a lack of informed consent

Lack of informed consent claims are governed by RCW 7.70.050, which provides, in pertinent part:

(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.

RCW 7.70.050(1)-(3). Dr. Jackson and Dr. Kierney failed to inform Ms. Dalien of a material fact relating to her treatment – Dr. Jackson’s eye injury and its impact on her surgery. Ms. Dalien consented to surgery without being aware of Dr. Jackson’s eye injury. A reasonably prudent patient would not have consented to the surgery if she knew the surgeon was going blind. Ms. Dalien suffered injury as a result of Dr. Jackson’s treatment. Ms. Dalien has clearly pled a lack of informed consent claim related to the entrepreneurial aspects of Dr. Kierney’s medical practice in association with Dr. Jackson to support her Consumer Protection Act claim, particularly in this notice pleading state, where all that is required is a “short and plain statement of the claim showing that the pleader is

entitled to relief.” *Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008); CR 8(a)(1).

There are numerous cases from other jurisdictions that require doctors to disclose “provider specific” information in order to obtain informed consent. The Louisiana case of *Hidding v. Williams*, 578 So.2d 1192 (1991) is directly on point. In *Hidding* a patient brought suit against his doctor for medical malpractice alleging, among other things, that the doctor did not obtain informed consent. *Hidding* at 1194. Specifically, the patient alleged that the doctor was suffering from alcohol abuse at the time of the surgery and should have made his condition known to the patient. *Id.* The district judge found that the doctor did not obtain informed consent because he did not disclose his alcohol abuse and the doctor appealed. *Id.*

The Court of Appeal of Louisiana first explained the informed consent doctrine.

The informed consent doctrine is based on the principle that every human being of adult years and sound mind has a right to determine what shall be done to his own body. A doctor is required to provide his patient with sufficient information to permit the patient himself to make an informed and intelligent decision on whether to submit to a proposed course of treatment. Where circumstances permit, the patient should be told the nature of the pertinent ailment or condition, the general nature of the proposed treatment or procedure, the risks involved in the proposed treatment or procedure, the prospects of success, the risks of failing to

undergo any treatment or procedure at all, and the risks of any alternative method of treatment.

Id. (internal citations omitted). The facts which must be disclosed to obtain informed consent in Louisiana are quite similar to those contained in Washington's informed consent statute, RCW 7.70.050:

(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.

RCW 7.70.050(3)(a)-(d).

In *Hidding*, the Court of Appeal of Louisiana stated:

[T]he district judge found that Dr. Williams' failure to disclose his chronic alcohol abuse to Mr. and Mrs. Hidding vitiated their consent to surgery. Because ***this condition creates a material risk associated with the surgeon's ability to perform, which if disclosed would have obliged the patient to have elected another course of treatment,*** the fact-finder's conclusion that non-disclosure is a violation of the informed consent doctrine is entirely correct.

Hidding at 1196 (emphasis added). A doctor testified during the trial: "I certainly think that if a physician or anybody in a position of life and death

over someone knows that they're suffering from this condition, they should at least let this person know that they have these problems.” *Id.* The Court of Appeal concluded that the trier of fact was correct in concluding that the defendant doctor had breached the informed consent doctrine.

Based on both fact and expert testimony the court concluded that this condition presented a material risk to the patient, the increased potential for injury during surgery, that was not disclosed. Had the risk been disclosed, Mr. and Mrs. Hidding would have selected another course of treatment. Thus by failing to disclose his chronic alcohol abuse Dr. Williams violated the informed consent doctrine.

Id.

Numerous courts across the country have held that a claim of lack of informed consent can be predicated upon a doctor’s failure to disclose his or her experience or qualifications. *See, e.g., Degennaro v. Tandon*, 89 Conn.App. 183, 873 A.2d 191 (2005) (dentist had duty to inform patient of her lack of experience in using drilling equipment, that her office was not officially open, and that procedure was usually performed with dental assistant); *Johnson v. Kokemoor*, 199 Wis.2d 615, 545 N.W.2d 495 (1996) (doctor overstated his rather limited experience with the particular type of aneurysm surgery involved); *Barriocanal v. Gibbs*, 697 A.2d 1169 (Del. 1997) (surgeon failed to inform patient of the

surgeon's lack of recent aneurysm surgery and of the difference in hospital staffing on a holiday and of the option of transfer to a teaching institution); *Dingle v. Belin*, 358 Md. 354, 749 A.2d 157 (2000) (without informing plaintiff, during gallbladder removal surgery resident did the cutting, clamping and stapling, rather than the surgeon retained by the plaintiff); and *Howard v. University of Medicine & Dentistry of New Jersey*, 172 N.J. 537, 800 A.2d 73 (2002) (surgeon misrepresented his credentials and experience to plaintiff).

Thus far, Division 3 of the Washington Court of Appeals has chosen not to allow a lack of informed consent claim to be predicated upon a doctor's failure to disclose his or her *qualifications* or *lack of experience*. In *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 828 P.2d 597, *review denied*, 119 Wn.2d 1020, 838 P.2d 692 (1992) the plaintiff claimed a lack of informed consent based upon, among other things, a doctor's failure to tell her he was not an emergency medicine specialist. *Thomas* at 259. The court held, without analysis or explanation, that "RCW 7.70.050(1) requires disclosure of material facts relating to treatment, not disclosure of a physician's *qualifications*." *Thomas* at 261 (emphasis added).

In *Whiteside v. Lukson*, 89 Wn. App. 109, 947 P.2d 1263 (1997) the court framed the issue before it: "The sole issue in this case is whether,

in securing an informed consent, a physician has a duty to disclose to the patient information about the physician's experience in providing a proposed treatment." *Whiteside* at 110. In *Whiteside*, at the time he obtained plaintiff's consent, the surgeon had never before performed the planned surgery on a human being. *Id.* By the time the surgery was performed on the plaintiff, the surgeon had performed the surgery on two human patients. *Id.* at 110-11. The plaintiff was injured during the surgery and sued the surgeon for negligence and for failure to obtain informed consent by not informing the plaintiff of his lack of experience with the procedure. *Id.* at 111. The jury found for the plaintiff on the lack of informed consent claim but the trial court granted the defendant's motion for judgment notwithstanding the verdict, determining that a health care provider's experience is not a material fact of which a patient must be informed. *Id.*

The *Whiteside* court noted that some jurisdictions have found that a physician's lack of experience or competence can qualify as a material fact relevant to an informed consent determination. *Id.* at 111-12. However, the court, citing *Thomas, supra*, stated, "Washington courts have not yet adopted the more expansive construction of the physician's duty to disclose." The court held that, "a surgeon's *lack of experience* in performing a particular surgical procedure is not a material fact for

purposes of finding liability predicated on failure to secure an informed consent.” *Whiteside* at 112 (emphasis added).

Whiteside and *Thomas* are distinguishable from the instant case. Neither case dealt with the issue of an injured and allegedly visually impaired surgeon performing surgery without informing his patient of his visual disability. Instead they involved allegations of a lack of experience and a lack of proper qualifications. No Washington appellate court has faced the precise issue raised in the instant case.

The fact that a surgeon suffered from an eye injury that eventually led to blindness is a serious possible risk involved in the treatment administered. It is analogous to a surgeon who is under the influence of alcohol or drugs and a far greater risk than a surgeon who simply has not performed a particular surgery often. This Court can find that plaintiff’s Consumer Protection Act claim is valid without conflicting with the *Whiteside* and *Thomas* opinions because in those cases the physicians’ experience and qualifications had no bearing on the risks to the plaintiffs. The Connecticut Supreme Court has made just such a distinction.

In *Duffy v. Flagg*, 279 Conn. 682, 905 A.2d 15 (2006) the Connecticut Supreme Court was faced with the issue of whether evidence of a physician’s failure to disclose her prior experience with a procedure

was admissible to support a claim of lack of informed consent. *Duffy* at 688-89. The court laid out the four factors required in order to obtain valid informed consent in Connecticut: disclosure of (1) the nature of the procedure; (2) the risks and hazards of the procedure; (3) the alternatives to the procedure; and (4) the anticipated benefits of the procedure. *Id.* at 692. These factors are the same as those contained in RCW 7.70.050. The court explained that the physician's experience had no bearing on any of the four factors.

Before granting the defendants' motion in limine, the trial court in the present case carefully ascertained that the plaintiff did not claim, and was not offering any evidence that, [the doctor's] prior experience with [the procedure] increased the risks or hazards of that procedure for the plaintiff. The evidence therefore had no relevance to any of the four established elements of informed consent in this state.

Duffy at 693. The court noted that the case before it was distinguishable from an Appellate Court of Connecticut case where provider specific information supported a claim of lack of informed consent. *Duffy* at 695. In *Degennaro v. Tandon*, 89 Conn.App. 183, 873 A.2d 191 (2005) the plaintiff sought to base a lack of informed consent claim upon a dentist's failure to disclose her lack of experience with the equipment she used on the plaintiff, her lack of readiness to treat the plaintiff, and her lack of staff to aid her in the procedure. *Degennaro* at 188. The Appellate Court held

that the failure to disclose this information supported a lack of informed consent claim and concluded:

[I]f the facts and circumstances of a specific case indicate that provider specific information would be material to a reasonable patient in deciding whether to embark on a course of therapy, a provider has a duty to disclose that information to the patient in order to obtain that patient's informed consent.

Degennaro at 197. The *Duffy* court found that there was no conflict between the two cases.

The evidence in *DeGennaro*, however, is distinctly different from the evidence at issue in the present case. In *DeGennaro*, the provider specific information was related to “the risks posed by the circumstances under which the defendant performed the procedure” and was therefore relevant to one of the four established elements of informed consent in this state. Conversely, in the present case, there was absolutely no evidence that [the doctor’s] prior experience with [the procedure] had any bearing on the risks to the plaintiff from the procedure or that it was otherwise relevant to any of the four established elements of informed consent. Accordingly, the Appellate Court's conclusion in *DeGennaro* does not conflict with our conclusion in the present case.

Duffy at 695-96 (internal citation omitted).

Degennaro is to *Duffy* as Ms. Dalien’s case is to *Thomas* and *Whiteside*: distinguishable and not in conflict. In *Thomas* the plaintiff worked with the pesticide Malathion. *Thomas, supra*, at 258. She became ill and saw the defendant doctor at a medical clinic. *Id.* The doctor was a resident in radiology with experience in emergency

medicine. *Id.* The doctor did not inform the plaintiff that he was not an emergency medicine specialist. *Id.* at 259. The doctor ruled out pesticide poisoning and diagnosed the plaintiff with asthma. *Id.* at 258. The plaintiff then consulted her family physician who diagnosed her with Malathion poisoning and admitted her to the hospital. *Id.* At the hospital another doctor examined the plaintiff and diagnosed her with asthma. *Id.* at 258-59. She was treated for asthma and improved. *Id.* at 259. These facts illustrate that, just as in *Duffy*, there was absolutely no evidence that the doctor's qualifications had any bearing on the risks to the plaintiff from the procedure or that his qualifications were otherwise relevant to any of the four elements of informed consent.

Similarly, in *Whiteside* there is no indication that there was any evidence that the doctor's inexperience with the procedure had any bearing on the risks to the plaintiff from the procedure. Indeed, the jury found for the defendant doctor on the plaintiff's negligence claim. *Whiteside* at 111. If the doctor was not negligent then he must have performed the procedure in accordance with the standard of care just as an experienced doctor would be expected to do.

In contrast, Ms. Dalien's allegation that Dr. Kierney and Dr. Jackson failed to inform her and other patients that Dr. Jackson suffered an eye injury that eventually led to blindness bears directly on the risks to

Ms. Dalien and other surgical patients from the procedures Dr. Jackson performed while allegedly suffering from a visual disability. Put bluntly, a surgeon's inability to see increases the risk that a patient will be harmed by a procedure performed by that surgeon. This reasoning is supported by the holding in *Hidding, supra*, where the defendant doctor's ex-wife testified that the doctor, "was drunk a large portion of the time when he was home. His former wife testified that her husband's performance along with his ability to function, was affected by his alcohol abuse. She testified that his condition was deteriorating and getting progressively worse." *Hidding* at 1197. The court found that this condition presented a material risk to the patient – the increased potential for injury during surgery – that was not disclosed. *Id.* at 1196.

If "Washington courts have not yet adopted the more expansive construction of the physician's duty to disclose" it is high time that they did. Washington law should not allow an allegedly visually impaired surgeon to continue to perform surgeries without requiring the surgeon or his partner to inform clients of the impairment, increasing the doctors' profits.

F. Conclusion

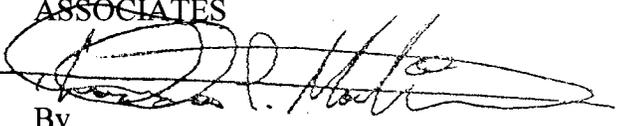
The lower court erred when it dismissed plaintiff's Consumer Protection Act case against defendants. The allegations contained in

plaintiff's amended complaint support a valid Consumer Protection Act cause of action premised on allegations of unfair or deceptive acts or practices in the business conduct of defendants' medical practice in violation of RCW 19.86.020 and also under the theory of lack of informed consent. Washington courts have not foreclosed lack of informed consent causes of action based upon the type of provider specific information that plaintiff alleged in her amended complaint. The court further erred in finding that plaintiff's two separate lawsuits amounted to claim splitting. Plaintiff's lack of informed consent causes of action are separate and distinct and should be allowed to proceed separately.

For the reasons stated above, defendants' motions to dismiss should have been denied. The Court of Appeals should reverse the lower court and remand this matter for a jury trial.

RESPECTFULLY SUBMITTED this 19th day of February, 2010.

THADDEUS P. MARTIN &
ASSOCIATES

By 

Thaddeus P. Martin, WSBA 28175
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I am not a party to this action and that I placed for service on counsel of record the foregoing document via legal messenger on the 19th day of February, 2010.

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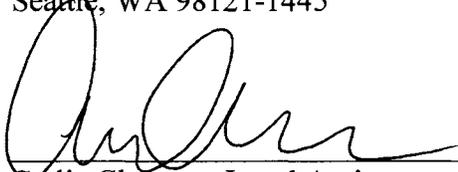
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And

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STATE OF WASHINGTON
BY _____
DEPUTY

I hereby certify that I am not a party to this action and that I placed for service on counsel of record the foregoing document via email followed by regular mail on the 19th day of February, 2010 consistent with a prior agreement of the parties.

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