

No. 39875-3-II

FILED
COURT OF APPEALS
DIVISION II
10 APR 21 PM 4:45
STATE OF WASHINGTON
BY CU
DEPUTY

**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.

APPELLANT'S REPLY BRIEF

THADDEUS P. MARTIN & ASSOCIATES, LLC
Thaddeus P. Martin, WSBA # 28175
Of Attorneys for Appellant

4928 109th St. SW
Lakewood, Washington 98499
(253) 682-3420

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
A. Argument in Reply.....	1
1. Plaintiff’s allegations in her Consumer Protection Act lawsuit do not amount to claim splitting.....	1
2. Dr. Jackson’s eye injury is the type of condition that doctors should be required to disclose to patients.....	2
3. A breach of informed consent is actionable under Washington’s Consumer Protection Act.....	4
B. Conclusion.....	5

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Washington Cases</u>	
<i>Benoy v. Simons</i> , 66 Wn. App. 56, 831 P.2d 167 (1992).....	5
<i>Landry v. Luscher</i> , 95 Wn .App. 779, 976 P.2d 1274 (1999).....	1
<i>Quimby v. Fine</i> , 145 Wn. App. 175, 724 P.2d 403 (1986).....	4
<i>Thomas v. Wilfac, Inc.</i> , 65 Wn. App. 255, 828 P.2d 597, review denied, 119 Wn.2d 1020, 838 P.2d 692 (1992).....	4
<i>Whiteside v. Lukson</i> , 89 Wn. App. 109, 947 P.2d 1263 (1997).....	2, 4
<u>Washington State Statutes</u>	
RCW 19.86.020.....	1
<u>Foreign Cases</u>	
<i>Hidding v. Williams</i> , 578 So.2d 1192 (1991).....	3

A. Argument in Reply

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

Defendants have not addressed the four elements necessary to show that res judicata should apply. “[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.” *Landry v. Luscher*, 95 Wn .App. 779, 783, 976 P.2d 1274 (1999).

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.

The causes of action in these cases are not only not identical, they are separate and distinct. 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. This cause of action relating to the entrepreneurial aspects of Dr. Jackson’s practice is different from her informed consent cause of action relating to

her treatment. 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. The evidence presented to prove the two causes of action would also be very different. The Consumer Protection Act case would involve evidence of 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 – evidence that would be irrelevant to the other case.

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.

2. Dr. Jackson's eye injury is the type of condition that doctors should be required to disclose to patients.

As defendant notes, whether a fact is material such that it must be disclosed to a patient is determined under the objective "reasonable patient" standard. *Whiteside v. Lukson*, 89 Wn. App. 109, 111, 947 P.2d 1263 (1997). Scores of legal principles are based upon this reasonable person standard and courts are quite familiar with applying such a standard. The reasonable person standard is well suited to prevent sliding

down a slippery slope as defendants have in their argument. Of course, defendants' slippery slope argument can go the other way. Should a surgeon have a duty to disclose to a patient that the surgeon is a heroin addict? Should a surgeon have a duty to disclose to a patient that the surgeon will be under the influence of heroin at the time surgery is performed? A reasonable patient would obviously consider these to be material facts related to the patient's treatment. Defendants suggest that patients should have to inquire about these material facts, apparently to protect doctors. However, as defendants note, "Informed consent is intended to assure patients have the information they need to choose how to treat their body." Brief of Respondent Stanley Jackson, M.D. at p. 11. It is unreasonable to require patients to ask their doctors questions about issues that are of such obvious concern.

Defendants cite to numerous cases from other jurisdictions where physicians were not required to disclose their skills or abilities. However, as discussed in plaintiff's opening brief, facts related to statistical success rate, qualifications, experience, education, training, and disciplinary history are quite different from facts related to serious impairments. Washington, like Louisiana, should require disclosure of serious impairments in order to establish informed consent. See *Hidding v. Williams*, 578 So.2d 1192 (1991). *Thomas v. Wilfac, Inc.*, 65 Wn.

App. 255, 828 P.2d 597, *review denied*, 119 Wn.2d 1020, 838 P.2d 692 (1992) and *Whiteside v. Lukson*, 89 Wn. App. 109, 947 P.2d 1263 (1997) have not foreclosed such a requirement.

3. A breach of informed consent is actionable under Washington's Consumer Protection Act.

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 v. Fine*, 145 Wn. App. 175, 181, 724 P.2d 403 (1986). 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.

Plaintiff need not show, as defendants claim, that Dr. Jackson advertised his eyesight as better than his competitors. 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. This situation is not like the situation in *Benoy v. Simons*, 66 Wn. App. 56, 831 P.2d 167 (1992), where the plaintiffs alleged that the physician provided unneeded care to the patient to increase his profits. Here, it is alleged that Dr. Jackson charged rates higher than he could have charged if he had disclosed his injury to patients.

B. Conclusion

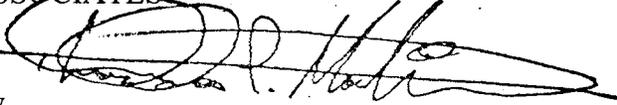
The lower court erred when it dismissed plaintiff's Consumer Protection Act case against defendants. The allegations contained in plaintiff's amended complaint support a valid Consumer Protection Act cause of action premised on allegations of unfair or deceptive acts or practices in the business conduct 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 21st day of April, 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 email followed by U.S. Mail on the 21st day of April, 2010.

Persons served:

Steven Fitzer
Burgess Fitzer PS
1145 Broadway Ste 400
Tacoma, WA 98402-3584

Timothy Gosselin
1901 Jefferson Avenue, Suite 304
Tacoma, WA 98402

Rebecca S. Ringer
Floyd, Pflueger & Ringer, P.S.
300 Trianon Building, 2505 Third Avenue
Seattle, WA 98121-1445

FILED
COURT OF APPEALS
DIVISION I
10 APR 21 PM 4:46
STATE OF WASHINGTON
BY _____
PRP/PTV



Corie Hanson, Paralegal