

DA 08-0170

IN THE SUPREME COURT OF THE STATE OF MONTANA

2009 MT 215N

CAROL CODE,

Plaintiff, Appellee and Cross-Appellant,

v.

BIG SKY COSMETIC SURGERY, P.C.,
HUGH HETHERINGTON, M.D., FERN
HOOLAN and BARBARA SEABURY,

Defendants and Appellants.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV 03-418
Honorable Holly Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

John J. Russell, Lisa A. Speare; Brown Law Firm,
Billings, Montana

For Appellee:

Geoffrey C. Angel; Angel Law Firm Bozeman, Montana

Submitted on Briefs: May 28, 2009

Decided: June 23, 2009

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d)(v), Montana Supreme Court 1996 Internal Operating Rules, as amended in 2003, the following memorandum decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and its case title, Supreme Court cause number and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Code sued Dr. Hetherington and two of his employees, Hoolan and Seabury, alleging professional negligence in failing to timely diagnose her skin cancer. She also sued Hetherington's business, Big Sky Cosmetic Surgery, P.C., for violations of the Consumer Protection Act, §§ 30-14-101 through -143, MCA. The jury found that Hetherington was negligent but that his negligence was not a cause of Code's injury, and that Hoolan and Seabury were not negligent. The jury also found that Big Sky engaged in unfair and deceptive practices proscribed by the CPA and awarded Code \$250,000 in damages. After trial, the District Court added attorney fees in the amount of \$84,833, for a total judgment of \$333,378 in favor of Code and against Big Sky. Big Sky appealed the CPA verdict and judgment and Code filed a precautionary cross-appeal. We affirm.

¶3 Code's cross-appeal raises issues that she argues should be addressed if there be a retrial of the case. However, since we affirm the judgment below there is no reason to reach those issues. Similarly there is no reason to address issues raised by Big Sky concerning the professional negligence claim because the defendants prevailed on that claim at trial and the individual defendants did not appeal.

¶4 We have reviewed the parties' arguments concerning the CPA verdict and judgment and find no reason to disturb the result below. Code presented separate factual and legal grounds for the CPA claim from those she relied upon in support of the professional negligence claim. There was sufficient evidence presented to support Code's CPA damage recovery, and the verdicts were not inconsistent. The jury instructions given by the District Court were consistent with Montana law.

¶5 We have determined to decide this case pursuant to Section I, Paragraph 3(d) of our 1996 Internal Operating Rules, as amended in 2003, which provides for memorandum opinions. It is manifest on the face of the briefs and the record that there is sufficient evidence to support the jury's verdict and the judgment entered by the District Court.

¶6 Affirmed.

/S/ MIKE McGRATH

We concur:

/S/ W. WILLIAM LEAPHART
/S/ JIM RICE
/S/ PATRICIA COTTER
/S/ JAMES C. NELSON