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COURT OF APPEALS NO. 24784-8-III & 25007-5-III

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SUPREME COURT OF THE STATE OF WASHINGTON

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THERESA and MICHAEL AMBACH,

Appellants,

v.

H. GRAEME FRENCH, M.D. and JANE DOE FRENCH;  
THREE FORKS ORTHOPAEDICS, P.C.; et al.,

Respondents.

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**APPELLANTS' ANSWER TO PETITION**

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## **I. IDENTITY OF RESPONDENT**

Ms. Teri Ambach is the respondent and was the plaintiff in the trial court.

## **II. ISSUES PRESENTED FOR REVIEW**

- A. Should this Court accept review of a Court of Appeals decision that applied settled case law in the context of reviewing an award of sanctions following a summary judgment order where the trial court had incorrectly interpreted Washington law?
- B. Is there any public interest in reviewing a decision that did not expand upon or deviate from existing law, including expressly affirming that Washington law does not permit recovery of personal injury damages in a Consumer Protection Act case?

## **III. STATEMENT OF THE CASE**

The Court of Appeals below reversed a summary dismissal of the Consumer Protection Act claim made by Teri Ambach against Dr. H. Graeme French. The claim alleged that, for entrepreneurial reasons, Dr. French had promoted an expensive surgery on Ms. Ambach's shoulder

instead of sending her to physical therapy.<sup>1</sup> CP 3-33. Plaintiff further alleged that Dr. French had engaged in a pattern and practice of deceiving patients into undergoing unnecessary shoulder reconstruction surgeries. CP 3-33. The surgery was performed and billed. CP 215. Complications, arguably from the surgery, arose after the surgery. CP 204-208.

The issue before the trial court was a very limited one. Dr. French expressly raised only one issue on summary judgment: whether there were any damages at all that could be claimed under the CPA for the alleged violation. The trial court ruled there were no CPA damages, even assuming Dr. French violated the CPA in recommending, performing, and billing for the surgery. CP 285-290. The trial court apparently believed no damages could ever result from such a CPA violation and therefore sanctioned plaintiff's counsel at the time, Keith Douglas, for bringing the claim. CP 758-760.

The Court of Appeals held that the increased cost of the surgery over alternative treatment was an injury to business or property under the CPA. Based on its ruling that the damages requirement of the Consumer Protection Act had been met, the Court of Appeals reversed the award of sanctions against Ambach's attorneys. At the same time, the Court also

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<sup>1</sup> Claims related to medical negligence also were made in the Complaint.

followed a clear line of prior appellate decisions, specifically including *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993) and *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989) to the effect that personal injury damages are not recoverable under the CPA.

**IV. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED**

**A. There Is No Conflict Between The Court Of Appeals Decision In This Case And Prior Appellate Decisions Interpreting The Consumer Protection Act.**

The defendant is seeking review of a ruling that the Court of Appeals did not make. The Court of Appeals did not rule that personal injury damages are recoverable in this case. In fact, the Court noted at the outset of its legal analysis that “Washington has adopted the rule that personal injuries are not recoverable under the CPA. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993); *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989).”

The two cases relied on by the Court of Appeals, *Stevens* and *Fisons*, are clear that personal injury general and special damages are not available under the CPA. The *Stevens* court identified the damages that arose from the personal injury caused by the defective softball shoes – the

“hospital, physician, and rehabilitative expenses” – as damages Ms. Stevens could not recover through a CPA claim. *Id.* at 370. As noted by Dr. French, the later Court of Appeals decision in *Hiner v. Firestone*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *reversed on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999) is to the same effect: “lost wages, and earning capacity, medical expenses and damage to her car, arise from personal injuries” and are not recoverable in a consumer protection claim.

Dr. French states in his brief that the Court of Appeals decision held that “medical expenses, wage loss and loss of earning capacity were damages sufficient to meet the ‘injury to business or property’ requirement under the CPA.” [Footnote omitted.] *French Brief* at 4. Defendant’s characterization is a gross misreading of the Court of Appeals decision. In referring to these damages, the court was only summarizing the damages alleged by Ms. Ambach:

The damages alleged by Ms. Ambach fit into four categories: medical expenses, wage loss, loss of earning capacity, and out-of-pocket expenses.

*Ambach v. French*, Court of Appeals Case No. 24784-8 III (Op. at 8).

This summary of alleged damages is obviously not a holding of the Court of Appeals on what damages may be awarded under Ms. Ambach’s CPA claim. Before turning to the specifics of the damage allegations in this

case, the Court of Appeals re-affirmed the principle that personal injury damages are not recoverable in a CPA claim. *Id.* at 8. Stated another way, even pecuniary damages are limited to those caused by the deceptive transaction, not those resulting from an ensuing personal injury.

A proper reading of the Court of Appeals decision and an understanding of the facts in this case demonstrate that the court below did not intend any change in the law of CPA damages as defendant suggests, nor did it so hold. The one clear damage found by the Court of Appeals to be available under the CPA was the economic loss related to the cost of surgery:

[a]llegations of economic loss due to the increased cost of surgery over the cost of more conservative treatment are sufficient to satisfy the damages requirement [of the CPA]. *Podiatry Ins. Co. v. Isham*, 65 Wn. App. 266, 268, 828 P.2d 59 (1992). Hence, Ms. Ambach's CPA claim can move forward based on economic loss due to the cost of the surgery and any claim for pecuniary damages. *See id.*

*Ambach v. French et al.*, *supra*, Op. at 8. This ruling is entirely consistent with previous appellate jurisprudence on the scope of CPA damages in the context of claims involving the entrepreneurial conduct of a medical provider.

In *Podiatry Ins. Co. v. Isham*, 65 Wn. App. 266, 268, 828 P.2d 59 (1992), cited by the Court of Appeals, the court accepted the trial court's

ruling that the plaintiff's allegation of economic loss from the cost of surgery met the damages requirement of the CPA. The Court of Appeals' ruling in *Wright v. Jeckle*, 104 Wn. App. 478, 480-81, 16 P.3d 1268 (2001) a class action seeking disgorgement of revenue received by Dr. Jeckle for promoting a diet drug in violation of the CPA, is to similar effect. By allowing the suit to go forward, the Court recognized that the price of a medical item that is the subject of an alleged deceptive transaction – in *Wright*, the cost of the diet drug -- is recoverable under the CPA. *See also, Quimby v. Fine*, 45 Wn.App. 175, 180-81, 724 P.2d 403 (1986) (allegations that a doctor promoted an operation to increase profits, without adequately informing patients of risks or alternative treatment made out a CPA claim).

The *Stevens* court did reject an attempt to claim personal injury damages, and specifically medical expenses, under the Consumer Protection Act. In *Stevens*, where the deceptive transaction involved a sale of shoes that were wrong for the sport Ms. Stevens played, there was an obvious distinction between damages she suffered as a consumer, and those she suffered from the ensuing personal injury. In a CPA case arising from a transaction with a medical provider, medical expenses are necessarily involved. Not to allow recovery of any medical expenses in

that context would eliminate all CPA claims against health care providers, a result in direct conflict with controlling law. *See, e.g., Quimby v. Fine*, 145 Wn. App. at 180-81; *Wright v. Jeckle*, 104 Wn. App. 480-81.

Plaintiff here is seeking the increased cost of surgery over more conservative treatment options such as physical therapy. Although a medical expense, it is the financial consequence of the deceptive medical transaction she was involved in. She is not seeking medical expenses or other damages flowing from personal injuries resulting from the surgery. The law is clear that personal injury damages are only recoverable through a personal injury claim and the damages plaintiff is seeking are consistent with that law.

In addition to the cost of the surgery, the decision in this case also allowed recovery for “pecuniary damages.” This has to be read in conjunction with the court’s statement that “personal injuries are not recoverable under the CPA.” [Citations omitted.] *Ambach v. French et al., supra*, Op. at 6. The Court’s holding is further limited by its citation for this proposition to *Podiatry Insurance v. Isham*, 65 Wn. App. at 268. In that case, personal injury damages were expressly not allowed. The Court of Appeals opinion cannot not be read as rendering previous case

law meaningless, particularly when such case law is cited and relied upon. *In re Hews*, 108 Wn.2d 579, 590, 741 P.2d 983 (1987).

Thus, “pecuniary damages” as the term was used by the Court of Appeals are necessarily limited to those pecuniary damages that flow directly from the deceptive transaction – the promotion of a surgery for entrepreneurial reasons. The Court’s ruling is consistent with the recent decision in *Michael v. Mosquera-Lacy*, 140 Wn. App. 139, 165 P.3d 43 (2007). The Court in that case accepted as sufficient damages for CPA purposes the “inconvenience” from the loss and enjoyment of property resulting from the plaintiff’s having a cow bone graft in her jaw following a dental procedure, rather than a graft made of human bone, as promised. Although cited by Dr. French, it actually supports Ms. Ambach’s position that all damages flowing directly from a deceptive act are recoverable under the CPA.

As to pecuniary damages other than the increased cost of surgery, the record below has not been fully developed because the issues underlying this appeal were originally raised in a summary judgment motion brought at an early stage of the litigation and because the issue was limited to whether there was any CPA damage that could be claimed. CP 45-57, 249-251. The Court of Appeals was correct in leaving open the

possibility that such proof may be developed at trial. For example, a CPA violation may delay someone's return to work, causing wage loss, a pecuniary loss that may be a recoverable damage. See, e.g., *Ethridge v. Hwang*, 105 Wn.App. 447, 454-455 (2001) (lost wages and other economic consequences of delay found recoverable under CPA); See also *Fisons, supra*, (loss of reputation found recoverable as a pecuniary damage under the CPA); *Anderson v. State Farm*, 101 Wn.App. 323, 331 (2000) (financial penalties attributable to a delay in claim approval held sufficient to raise issue of fact as to economic harm). As another example, in addition to lost wages from time off from work for surgery, Ms. Ambach may be able to claim travel expenses from Spokane to Colfax since alternative conservative treatment such as physical therapy would have been available in Spokane. Such pecuniary loss could only be recovered if shown to result from the CPA violation and not from personal injury.

The only damages allowed by the Court of Appeals decision and the only damages sought by the plaintiff are the economic losses directly attributable to Dr. French's deceptive practices. By incorrectly representing the scope of the Court of Appeals decision in this case as allowing personal injury damages for a CPA claim, the defendant has set up a straw man it is asking this Court to knock down. This Court should

decline the invitation to involve itself, at this preliminary stage of the litigation, when there is clarity in the case law and no conflict between the decision below and that case law.

**B. The Issues Presented Are Not Of Substantial Public Interest.**

In seeking review, Dr. French asserts that the Court of Appeals decision made new law on damages in Consumer Protection claims against physicians and, because attorney fees are available to successful litigants in CPA cases, the floodgates are now open to requests for attorney fees in all medical malpractice cases. This in turn would, supposedly, lead to an increase in medical malpractice filings, which would increase insurance rates for doctors, and Washington citizens would end up losing their doctors.

In truth, nothing of the kind will happen because the Court of Appeals did not expand existing law. It was confronted with a trial court order granting sanctions against a plaintiff for bringing a CPA claim in conjunction with a medical malpractice claim. In that context, the Court of Appeals dealt with the merits of the CPA claim in order to determine the appropriateness of the sanctions. It overturned the sanctions and, in so doing, reiterated and applied the following accepted principles of consumer protection law in Washington:

1. A Consumer Protection Act claim may be brought against a physician if it involves the entrepreneurial aspects of his practice, such as promoting a surgery for profit, rather than medical necessity. *Quimby v. Fine*, 145 Wn. App. at 180-81; *Wright v. Jeckle*, 104 Wn. App. 480-81.

2. Allegations of economic loss, such as the increased cost of surgery over more conservative treatment and pecuniary damages resulting from the deceptive transaction itself, are recoverable under the CPA. *Wright v. Jeckle*; *Podiatry Insurance v. Isham*, 65 Wn. App. at 268; *Keyes v. Bollinger*, 31 Wn. App. 286, 294-95, 644 P.2d 1077 (1982).

3. Economic damages available under the CPA do *not* include damages from any resulting personal injury, including medical treatment and wage loss caused by personal injury. *Hiner v. Firestone*, 91 Wn. App. at 730; *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. at 370.

French raises the specter of many more CPA claims being filed against doctors if the categories of damages are expanded, because of the potential for recovering attorney fees under the Act. As discussed at greater length above, the Court of Appeals did not change existing law on the damages available in CPA claims against health care providers. Further, the reason that CPA claims are not often filed in conjunction with medical malpractice claims has nothing to do with damages.

Damages are already available even when the pecuniary loss is “slight” and “unquantifiable,” so it is not difficult to satisfy the damages element of a CPA claim. *Michael v. Mosquera-Lacy*, 140 Wn. App. at 148-49. CPA claims against medical providers are not common because it is unusual for evidence to exist that, for the sake of profit, a health care provider has deceived a patient into undergoing treatment that s/he doesn’t want or need. The Court of Appeals decision will not change this.

The Court of Appeals correctly ruled that economic damages flowing from a claimant’s unwitting participation in a deceptive transaction, rather than from any ensuing personal injury, are recoverable. There is no public interest in reviewing a decision that approved only those claims for damages allowed by existing law.

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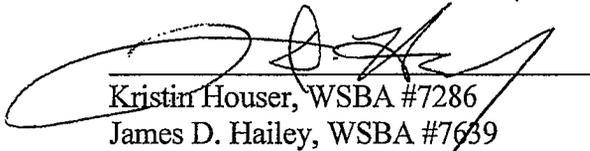
**V. CONCLUSION**

Ms. Ambach requests that the Supreme Court not take review of the Court of Appeals decision in her case.

DATED this 24<sup>th</sup> day of **January, 2008**.

Respectfully submitted,

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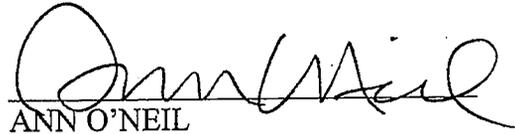
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Attached for filing please find Ambach's Answer to Petition.

E-mailed for filing with the Court, by Ann O'Neil for attorneys:

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