

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2007 DEC 27 A 9:50

BY RONALD R. CARPENTER

FILED

81107-5

JAN 02 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Supreme Court No.
By (Court of Appeals Case Nos. 24784-8 Consolidated with 25007-5)

SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

TERESA AMBACH and MICHAEL AMBACH, wife and husband,
individually, and the marital community composed thereof,

Plaintiffs/Appellants,

vs.

H. GRAEME FRENCH, M.D. and JANE DOE FRENCH,
individually and the marital community composed thereof; KELLY
LANDLE, PAC and JOHN DOE LANDLE, individually and the
marital community composed thereof; THREE FORKS
ORTHOPAEDICS, P.C., a Washington professional corporation;
WHITMAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 3 d/b/a
WHITMAN HOSPITAL AND MEDICAL CENTER; JOHN and
JANE DOES 1-10; JONATHAN P. KEEVE, M.D.; NORTHWEST
ORTHOPAEDIC SPECIALISTS, P.S., a Washington professional
services corporation; and KARLENE A. ARGUINCHONA, M.D.,

Defendants/Respondents.

PETITION FOR REVIEW BY
DEFENDANTS/RESPONDENTS H. GRAEME FRENCH, M.D.
AND THREE FORKS ORTHOPAEDICS, P.C.

KINGMAN RINGER & HORNE, P.S.
Lisa M. Hammel, WSBA #26069
505 Madison Street, Suite 300
Seattle, WA 98104
(206) 622-1264
*Attorney for Petitioners French and
Three Forks Orthopaedics, P.C.*

ORIGINAL

FILED
JAN 16 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. IDENTITY OF PETITIONERS	1
II. CITATION TO COURT OF APPEALS DECISION	1
III. SUMMARY OF ARGUMENT THAT REVIEW SHOULD BE GRANTED	1
A. Washington’s Consume Protection Act, RCW 19.86, et seq.....	1
B. Consumer Protection Act Recover Against Medical Practitioners	1
C. Ambach’s Damage Allegations Against Dr. French.....	2
D. Procedural History on Plaintiff’s Consumer Protection Act Claim.....	3
E. Review of the Court of Appeals’ Decision Should Be Granted ...	4
IV. ISSUES PRESENTED FOR REVIEW	5
V. STATEMENT OF THE CASE	5
VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	7
A. THE APPELLATE COURT’S DECISION CONFLICTS WITH PRIOR OPINIONS OF DIVISIONS II AND III AND CALLS FOR REVIEW PURSUANT TO RAP 13.4(b)(2).....	7
B. THE ISSUES PRESENTED BY THIS APPEAL ARE OF SUBSTANTIAL PUBLIC INTEREST AND IMPORTANCE AND SHOULD BE ADDRESSED BY THE SUPREME COURT PURSUANT TO RAP 13.4(b)(4)	12

VII. CONCLUSION.....16

TABLE OF AUTHORITIES

	<u>Page</u>
WASHINGTON CASES	
<u>Berger v. Sonneland</u> , 144 Wn.2d 91, 105, 26 P.3d 257 (2001).....	14
<u>Branom v. State</u> , 94 Wn. App 964, 969, 974 P.2d 335, <i>review denied</i> , 138 Wn.2d 749, 755, 881 P.2d 216 (1994).....	13
<u>Fisher v. Dept. of Health</u> , 125 Wn. App. 869, 875, 106 P.3d 836 (2005).....	14
<u>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</u> , 105 Wn.2d 778, 780, 719 P.2d 531 (1986).....	1, 11
<u>Hiner v. Bridgestone/Firestone, Inc.</u> , 91 Wn. App. 722, 730, 959 P.2d 1158 (Div. III 1998), <i>rev'd on other grounds</i> , 138 Wn.2d 248 (1999).....	4, 5, 6, 8, 9
<u>Leingang v. Pierce Cty. Med. Bureau</u> , 131 Wn.2d 133, 157-58, 930 P.2d 288 (1997)	9
<u>Michael v. Mosquera-Lacy</u> , 140 Wn. App. 139, 165 P.3d 43 (Div. II 2007)	5, 10
<u>Physicians Ins. Exch. v. Fisons Corp.</u> , 122 Wn.2d 299, 318, 858 P.2d 1054 (1993).....	4, 6, 8, 9, 12, 14
<u>Podiatry Ins. Co. v. Isham</u> , 65 Wn. App. 266, 268, 828 P.2d 59 (1992).....	10, 11, 12
<u>Quimby v. Fine</u> , 45 Wn. App. 175, 180, 724 P.2d 403 (1986).....	2, 11, 12
<u>Rozner v. City of Bellevue</u> , 116 Wn.2d 342, 347, 804 P.2d 24 (1991).....	14

<u>Stevens v. Hyde Athletic Industries, Inc.,</u> 54 Wn. App. 366, 370, 773 P.2d 871 (Div. III 1989).....	5, 7, 8, 9, 12
<u>Tallmadge v. Aurora Chrysler Plymouth, Inc.,</u> 25 Wn. App. 90, 93-94, 605 P.2d 1275 (1979)	10
<u>White River Estates v. Hiltbruner,</u> 134 Wn.2d 761, 765 n. 1, 953 P.2d 796 (1998).....	8
<u>Wright v. Jeckle,</u> 104 Wn. App. 478, 484, 16 P.3d 1268 (2001).....	1, 2, 11, 12, 14

OTHER CASES

<u>Beerman v. Toro Mfg. Corp.,</u> 615 P.2d 749 (Haw. 1980).....	8
<u>Gross-Haentjens v. Leckenby,</u> 589 P.2d 1209 (ore. 1979)	8
<u>Hamman v. United States,</u> 267 F. Supp. 420, 432 (D. Mont. 1967).....	7

STATUTES AND COURT RULES

RAP 13.4(b)	1, 16
RAP 13.4(b)(2)	4, 5
RAP 13.4(b)(4)	4, 5, 12
RCW 7.70	1, 4, 13, 15
RCW 7.70.010	13
RCW 7.70.030	13

RCW 19.86	1, 3, 4, 6, 8, 13, 15, 16
RCW 19.86.090	14

I. IDENTITIES OF PETITIONERS

This petition for review is filed by H. Graeme French, M.D., and Three Forks Orthopaedics, P.C. (collectively “Dr. French”).

II. CITATION TO COURT OF APPEALS DECISION

Dr. French seeks discretionary review under RAP 13.4(b) of the opinion of Division III of the Court of Appeals filed November 27, 2007, reported at 24784-8, and attached as Appendix A.

III. SUMMARY OF ARGUMENT THAT REVIEW SHOULD BE GRANTED

A. Washington’s Consumer Protection Act, RCW 19.86 et. seq.

To establish a *prima facie* case under Washington’s Consumer Protection Act, RCW 19.86 et. seq., a consumer must satisfy five discrete elements: “(1) [A]n unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest...(4) a showing of injury to plaintiff in his or her business or property...[and] (5) a causal link...between the unfair or deceptive act complained of and the injury suffered.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

B. Consumer Protection Act Recovery Against Medical Practitioners

Any action for damages resulting from health care is governed exclusively by RCW 7.70. *Wright v. Jeckle*, 104 Wn. App. 478, 484, 16

P.3d 1268 (2001). Thus, in order to establish a cause of action under the CPA against a medical practitioner, a plaintiff must provide evidence of dishonest and unfair practices that are used to promote the medical practice or to increase profits and the volume of patients, *i.e.* the claim must exclusively implicate the entrepreneurial practice of medicine and not arise out of health care. *See Id.* at 484-85; *Quimby v. Fine*, 45 Wn. App 175, 180, 724 P.2d 403 (1986). The alleged conduct must be unrelated to the actual competence of the medical practitioner. *Quimby*, 45 Wn. App at 180. The entrepreneurial aspects of the practice of medicine include how the price of medical services is determined, billed, and collected; the way a medical practice obtains, retains, and dismisses patients; and the promotion of operations or services to increase profits and the volume of patients. *See Id.*

C. Ambach's Damage Allegations Against Dr. French

Plaintiff Teresa Ambach presented to Dr. French on 11/16/01 with neck pain and left arm numbness. CP 5. On 02/12/02, Dr. French performed surgery on her left shoulder. *Id.* She later developed an infection that went undiagnosed by all defendants and subsequently required a fusion. CPs 6-9.

Ms. Ambach and her husband, former plaintiff Michael Ambach (whose claims were dismissed with prejudice on 08/01/06, CPs 790-792), filed a complaint for medical malpractice, which included allegations that

that Dr. French and others engaged in unfair or deceptive acts or practices in violation of Washington's Consumer Protection Act, RCW 19.86 ("CPA"). CPs 21-23. Plaintiffs Ambach argued that they were entitled to bring a Consumer Protection Act claim against Dr. French for performing an allegedly unnecessary shoulder surgery, arguing that medical expenses, wage loss, loss of earning capacity and out of pocket expenses constituted "damages" to business or property element under the Act.

D. Procedural History on Plaintiff's Consumer Protection Act Claim

Dr. French moved for partial summary judgment, arguing that none of Ms. Ambach's garden-variety personal injury damages satisfied the "injury to...business or property" requirement under the CPA. CPs 45-56. The trial court agreed, holding that the personal injury damages alleged did not qualify as injury to business or property, and summarily dismissed the plaintiff's CPA claim:

[I]f the claim for damages as requested by the plaintiff could be upheld in this case, there would be almost no case involving medical negligence issues, malpractice, and so forth, in which the claims could not be brought.

CPs 249-51; RP (07/09/04) at 4.

Ms. Ambach moved for reconsideration, which the trial court denied on 07/29/04:

"The basic issue here is that in the context of a CPA claim, a traditional, classic personal injury claim for

damages does not constitute a claim for damages for injuries to business or property under the CPA.” CP 272.

Ms. Ambach appealed, and Division III overruled the trial court’s decision, finding that the medical expenses, wage loss, and loss of earning capacity were damages sufficient to meet the “injury to business or property” requirement under the CPA.¹

E. Review of the Court of Appeals’ Decision Should Be Granted

The Court of Appeals’ decision conflicts with decisions from both Divisions II and III, which conclude that personal injury damages do not qualify as damages to business or property under the CPA. In addition, the decision holds tremendous significance and public policy implications to all medical malpractice litigants, as it would essentially deem all medical malpractice claims to be also recoverable under the Consumer Protection Act. This is in direct conflict with the legislative policies enumerated under RCW 7.70, which were intended to provide the sole bases for recovery for medical malpractice claims. Accordingly, review is warranted by the Supreme Court under both RAP 13.4(b) (2) and (4).

¹ Trial on the merits of the remaining issues concluded with the jury rendering a defense verdict on all of Ms. Ambach’s claims against Dr. French. The verdict was rendered on March 22, 2007.

IV. ISSUES PRESENTED FOR REVIEW

A. In the context of a medical malpractice action, do personal injury damages such as medical expenses satisfy the CPA's "injury to...business or property" requirement?

B. Should discretionary review be granted under RAP 13.4(b)(2) because the decision of the Court of Appeals finding such expenses as sufficient to satisfy the CPA element conflicts with other decision of the Court of Appeals, including *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (Div. III 1989), *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (Div. III 1998), and *Michael v. Mosquera-Lacy*, 140 Wn. App. 139, 165 P.3d 43 (Div. II 2007)?

C. Should discretionary review be granted under RAP 13.4(b)(4) because the issue as to whether personal injury damages in the context of a medical malpractice action is one of substantial public interest that should be decided by the Supreme Court?

V. STATEMENT OF THE CASE

Plaintiff Teresa Ambach presented to Dr. French on 11/16/01 with neck pain and left arm numbness. CP 5. On 02/12/02, Dr. French performed surgery on her left shoulder. *Id.* She later developed an infection that required a shoulder fusion. CPs 6-9.

Ms. Ambach and her husband, former plaintiff Michael Ambach (whose claims were dismissed with prejudice on 08/01/06, CPs 790-792), filed a complaint asserting variety of medical malpractice theories against Dr. French and others, including an allegation that Dr. French engaged in unfair or deceptive acts or practices in violation of the CPA by recommending and performing an allegedly unnecessary shoulder surgery. CPs 1-31.

Dr. French moved for partial summary judgment, arguing that none of Ms. Ambach's garden-variety personal injury damages satisfies the CPA's "injury to...business or property" requirement under the CPA. CPs 45-56. The trial court agreed and summarily dismissed the CPA claim against Dr. French. CPs 249-51.

Ms. Ambach moved for reconsideration, which the trial court denied on 07/29/04: "The basic issue here is that in the context of a CPA claim, a traditional, classic personal injury claim for damages does not constitute a claim for damages for injuries to business or property under the CPA." CP 272. Ms. Ambach appealed, and Division III found 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. Appendix A. (Court of Appeals Opinion at 8).

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THE APPELLATE COURT'S DECISION CONFLICTS WITH PRIOR OPINIONS OF DIVISIONS II AND III AND CALLS FOR REVIEW PURSUANT TO RAP 13.4(b)(2).

The decision of the Court of Appeals cannot be reconciled with *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (Div. III 1989). In *Stevens*, Helen Stevens sustained personal injuries in a softball game while sliding into home plate wearing defective shoes. *Stevens*, 54 Wn. App. at 367. The shoe manufacturer sought summary dismissal of her CPA claim, arguing that her personal injury damages did not satisfy the CPA's "injury to...business or property" requirement. *Id.* In opposition to summary judgment, Ms. Stevens attempted to meet the requirement "by classifying her personal injury damages into a pseudo-property structure." *Id.* at 370. She argued that her "special damages such as hospital, physician, and rehabilitative expenses, constitute property and economic interests." *Id.* This Court rejected her re-characterization as "unconvincing" and affirmed the order granting summary dismissal. *Id.*

This Court's *Stevens* decision also cited to decisions in other jurisdictions which similarly defined what constitutes compensable damages under the CPA: "The term 'business or property' is used in the ordinary sense and denotes a commercial venture or enterprise." *Hamman v. United States*, 267 F. Supp. 420, 432 (D. Mont. 1967); *Stevens*, 54 Wn.

App. at 370. See also, *Id.* (citing *Beerman v. Toro Mfg. Corp.*, 615 P.2d 749 (Haw. 1980); *Gross-Haentjens v. Leckenby*, 589 P.2d 1209 (Ore. 1979)).

With that broad consensus of authorities in mind, the *Stevens* Court held that personal injury actions are not cognizable under the CPA:

“We hold actions for personal injury do not fall within the coverage of the CPA.” *Id.*

Four years later, Washington’s Supreme Court approved the *Stevens* holding:

The *Stevens* court...concluded that had our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her “business or property.” We agree. Personal injuries are not compensable under the CPA.

Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 318, 858 P.2d 1054 (1993) (citing *Stevens*).

Stevens has thus been the law of this state since 1993, and it has since been repeatedly and unanimously reaffirmed. See *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 n. 1, 953 P.2d 796 (1998) (citing *Stevens* and *Fisons* in dictum: “damages for pain mental pain and suffering are not recoverable for a violation of the CPA because the statute, by its terms, allows recovery only for harm to ‘business or property’”); *Hiner v. Bridgestone/Firestone Inc.*, 91 Wn. App. 722, 730,

959 P.2d 1158 (Div. III 1998), *rev'd on other grounds*, 138 Wn.2d 248 (1999) (citing *Fisons*: “personal injuries are not recoverable under the CPA”); *Leingang v. Pierce Cty. Med. Bureau*, 131 Wn.2d 133, 157-58, 930 P.2d 288 (1997) (citing *Fisons*: “we have held that personal injuries, including mental pain and suffering, are not compensable under the Consumer Protection Act”).

In *Hiner*, Division III elaborated on the “business or property” damage requirement, holding that “damages...aris[ing] from personal injuries...and commonly awarded in personal injury actions” cannot be simply recast as “business or property” losses for the purpose of supporting a companion CPA claim. *Hiner*, 91 Wn. App. at 730 (citing *Fisons* and *Stevens*). The *Hiner* court cited several examples, “including reimbursement for lost wages and earning capacity, medical expenses and damage to her car...” *Id.* (Emphasis added). None of these are cognizable under the CPA if they arise from personal injury.

Accordingly, the Court of Appeals’ decision here, finding that Ms. Ambach’s medical expenses and wage loss qualify as damages to “business or property” simply cannot be reconciled with other Division III cases, particularly those of *Stevens* and *Hiner*, given that those other decisions specifically held that those very same damages were not compensable under the CPA.

Likewise, the decision of the Court of Appeals cannot be reconciled with the legal analysis in a very recent Division II decision, *Michael v. Mosquerra-Lacy*, 140 Wn.App. 139, 165 P.3d 43 (Division II, 2007). There, the plaintiff sued her periodontist for using cow bone as a grafting material after she specifically requested that no animal products be used. In this case, the court found that the claim was viable under the CPA only because the plaintiff was “sold” a different product than what was represented to her. *Id.* at 148. The Court specifically stated:

“If her only injury was gum swelling or complications from the bone grafting surgery, then the CPA would not apply. Here, as in *Tallmadge*², Michael thought she was purchasing one product, but was given another.”
Id.

The Court of Appeals decision in *Ambach* simply cannot be reconciled with *Michael*, given that Ms. Ambach’s damages were strictly limited to personal injury damages alleged as a result of her shoulder surgery. Unlike the situation in both *Michael* and *Tallmadge*, there was no “bait and switch” involved where Ms. Ambach purchased a product which was different than what was represented to her.

The Appellate Court’s reliance on *Podiatry Ins. Co. v. Isham*, 65 Wn. App. 266, 268, 828 P.2d 59 (1992) is misplaced, as the issue as to

² *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 93-94, 605 P.2d 1275 (1979) (CPA claim available to plaintiff who purchased a car which was advertised as new but later discovered that it was a used car that had been damaged and repainted).

what constitutes damage to business or property was never decided by the *Isham* court on appeal. Instead, the opinion only mentioned what decision was made at the trial court level on *Isham's* motion to dismiss the plaintiff's CPA claims. See, *Id.* That decision was never reviewed or reviewed on by the Appellate court in *Isham*, and therefore it provides no basis for support of the Court's decision in this instant matter.

In addition, the Appellate Court's citation to *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986), and *Wright v. Jeckle*, 104 Wn. App. 478, 16 P.3d 1268 (2001), are misplaced, as neither case addressed the question of what damages qualify as "business or property" under the CPA.

In fact, both *Quimby* and *Wright* were decided under an entirely different element of the *Hangman Ridge* test, to wit: Whether the "entrepreneurial aspects" of a physician's practice can constitute an "unfair or deceptive act or practice" under the CPA. In *Quimby*, a plaintiff alleged a CPA violation against her physician who substituted one sterilization procedure for another without her consent. 45 Wn. App. At 176-177. The *Quimby* court made no mention of the nature of damages the Quimbys had suffered; it focused solely on the "unfair or deceptive act or practice" element. The court held that the ineffective sterilization procedure medical negligence claim was not subject to the CPA because it

related only to the doctor's negligence, and not to any "entrepreneurial aspects" of the profession. *Id.* at 179.

Nor was the damage element considered by the *Wright* court, whose 2001 decision remains conspicuously silent on *Stevens* and *Fisons*. In *Wright*, the Court found that a physician's advertising, sale, and marketing of diet drugs was subject to the CPA because it implicated the "entrepreneurial aspects" of his medical practice. *Wright*, 104 Wn. App. At 482-83.

That element was not at issue before the trial court in Ms. Ambach's case, as dismissal of Ms. Ambach's CPA claim was based solely upon the basis of her claimed damages resulting from her shoulder surgery. RP (07/09/04) at 3-5. The Appellate Court's improper reliance on *Isham*, and its citations to *Quimby* and *Wright* are not analogous to the present case, which only highlights the fact that the opinion lacks support in case law elsewhere and cannot be reconciled with existing precedent found in the decisions of Divisions II and III of the Court of Appeals discussed above.

B. THE ISSUES PRESENTED BY THIS APPEAL ARE OF SUBSTANTIAL PUBLIC INTEREST AND IMPORTANCE AND SHOULD BE ADDRESSED BY THE SUPREME COURT PURSUANT TO RAP 13.4(b)(4).

Review by the Washington Supreme Court is also appropriate and necessary to address the Appellate Court's wholesale expansion of the

damage element to include personal injury damages which have previously been excluded from CPA claims in decisions made by other Appellate Courts in the State of Washington. Under the Court of Appeals' decision in *Ambach*, all medical malpractice actions would also be actionable under the Consumer Protection Act. The trial court correctly recognized this improper reach of the scope of the CPA in its ruling during the summary judgment proceedings:

It seems to me that the types of economic damages which are under discussion here -- areas of time loss of work, transportation costs, medical bills, various limitations on activities -- are exactly the traditional types of damages that flow from negligence from the ordinary types of tort claims which have always been present.

It does not appear to this court within the structure of existing law, pending some significant expansion which I do not see at the present time under the existing precedential cases, that these kinds of damages can be pressed in the cause of action designated as a Consumer Protection Act claim.

RP (07/09/04) at 4.

Indeed, the Court of Appeals' approach turns the State's medical negligence statute, RCW 7.70³, et. seq., on its head, as it would negate the statute's edict of providing for the exclusive basis for damage remedies

³ "Reading RCW 7.70.010 and .030 together, we conclude that whenever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70." *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335, review denied, 138 Wn.2d 749, 755, 881 P.2d 216 (1994) (noting that the legislature's declaration of policy in section .010 "sweeps broadly").

resulting from health care. *Wright v. Jeckle*, 104 Wn. App. 478, 484, 16 P.3d 1268 (2001).

In addition, the Court of Appeals' decision erroneously renders meaningless the words "injured in his or her business or property" in RCW 19.86.090. The legislature clearly meant *something* by this restrictive phrase. *See Fisons*, 122 Wn.2d at 318 ("had our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her 'business or property'"). The only permissible interpretation of a statute is that which gives effect to its plain language; in other words, "we assume the legislature means exactly what it says." *Fisher v. Dept. of Health*, 125 Wn. App. 869, 875, 106 P.3d 836 (2005) (citing *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001); *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)).

The trial court's reasoning in its decision to dismiss Ms. Ambach's CPA claim properly emphasized the important public policy behind limiting the scope of applicability of CPA claims in the medical negligence context:

[I]f the claim for damages as requested by the plaintiff could be upheld in this case, there would be almost no case involving medical negligence issues, malpractice, and so forth, in which the claims could not be brought.

RP (07/09/04) at 4.

If it were possible to sidestep the CPA's requirement of "injury to...business or property" (and corollary prohibition against personal injury damages) then virtually any medical malpractice plaintiff could maintain an adjunct CPA claim. Such a result would do violence to the legislative intents of both RCW 7.70 and RCW 19.86.

In addition, there is a very practical reason for this Court to limit the reach of the Court of Appeals' rulings: the risk that the courts of Washington would be overwhelmed by medical malpractice litigants asserting companion claims under the Consumer Protection Act.

This is hardly a speculative concern. The Consumer Protection Act affords a litigant a significant remedy which is not currently available under RCW 7.70, Washington's medical negligence statute: recovery of attorney's fees. As there would be no bright-line that would enable the segregation of prosecution of claims under a medical negligence theory from those asserted pursuant to the Consumer Protection Act, all successful litigants would be entitled to full recovery of all attorneys fees expended in prosecuting the entire breadth of their claim. It is not a stretch of the imagination to expect that the sheer volume of malpractice lawsuits would rise substantially, as there would be virtually no cost to a litigant for pursuing such a claim. And the immediate impact will undoubtedly cause the already exorbitant cost of malpractice insurance to rise exponentially. This in turn would only add to the growing and real

problem of more physicians abandoning their practices in Washington State, as they will no longer be able to afford the increased cost of insurance required to maintain their practices. In the end, the citizens of Washington State will be the ones who will suffer the consequences of increased costs of health care, and decreased choices in health care providers.

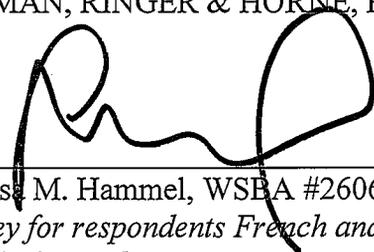
Expanding the scope of the Consumer Protection Act to encompass all garden-variety personal injury damages is a fundamental shift in medical malpractice law, and thus represents a matter of substantial public interest warranting review by the Supreme Court.

VII. CONCLUSION

For the foregoing reasons, Petitioner Dr. French respectfully requests that this Court accept review of the issues set forth herein under RAP 13.4(b), vacate the decision of the Court of Appeals, and reinstate the Superior Court's judgment in Dr. French's favor.

RESPECTFULLY SUBMITTED this 26th day of December, 2007.

KINGMAN, RINGER & HORNE, P.S.

By: 

Lisa M. Hammel, WSEA #26069

*Attorney for respondents French and Three
Forks Orthopaedics*

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that, on the date specified below, I served a true and correct copy of the foregoing pleading, by the means specified, to the following persons:

Patrick K. Fannin
1312 N. Monroe Street
Spokane, Washington 99201-2623
Via overnight mail

Kristin M. Houser / James D. Hailey
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104-1693
Via overnight mail

DATED at Seattle, Washington, this 26th day of December, 2007.



Sharon K. Hendricks,
Assistant to Lisa M. Hammel

4417/P/A/Brief - skh.doc

Appendix A

RECEIVED
NOV 30 2007

KINGMAN PEABODY FITZHARRIS
& RINGER

FILED

NOV 27 2007

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERESA AMBACH,)	No. 24784-8-III
)	Consolidated with
Appellant,)	No. 25007-5-III
)	
v.)	Division Three
)	
H. GRAEME FRENCH, M.D. and)	
JANE DOE FRENCH, individually)	
and the marital community composed)	
thereof; THREE FORKS)	
ORTHOPAEDICS, P.C., a Washington)	PUBLISHED OPINION
professional corporation,)	
)	
Respondents,)	
)	
JONATHAN P. KEEVE, M.D.;)	
NORTHWEST ORTHOPAEDIC)	
SPECIALISTS, P.S., a Washington)	
professional service corporation,)	
)	
Defendants.)	

KULIK, J.—Dr. H. Graeme French performed surgery on Teresa Ambach’s shoulder. The shoulder became infected and had to be fused. Ms. Ambach and her husband, Michael Ambach, filed a complaint that included claims against Dr. French for professional negligence and against Dr. French and Whitman Hospital for violations of

the Consumer Protection Act (CPA), ch. 19.86 RCW.¹ As part of her CPA claim, Ms. Ambach alleged that Dr. French performed medically unnecessary surgeries for financial gain. Dr. French filed a motion for summary judgment, arguing that the personal injury damages requested by Ms. Ambach were not recoverable under the CPA. The trial court agreed, and imposed CR 11 sanctions against Ms. Ambach's attorneys. Ms. Ambach appeals, challenging the court's decision to grant summary judgment and the imposition of sanctions. We conclude that Ms. Ambach made a prima facie case under the CPA. We reverse the summary judgment and the CR 11 sanctions.

FACTS

Ms. Ambach began experiencing neck pain and headaches in 1996. She saw Dr. French in 2001 and had shoulder surgery in 2002. Later, the surgical site became infected, and Ms. Ambach's shoulder had to be fused.

In her complaint, Ms. Ambach alleged that she did not need the shoulder surgery. Her expert, Dr. John MacGillivray, stated that the shoulder surgery "was not medically indicated or justified." Clerk's Papers at 135. Neither Dr. French nor anybody else told her that the surgery was unnecessary. As a result, Ms. Ambach consented, without being

¹ Mr. Ambach's claims were dismissed with prejudice. Whitman County Hospital was voluntarily dismissed from this appeal.

fully informed. Ms. Ambach also alleged that Dr. French had a history of making fictitious diagnoses for patients who did not need shoulder surgery.

Ms. Ambach filed her complaint in January 2004. Among other theories, she alleged that Dr. French and the Hospital violated the CPA by performing medically unnecessary shoulder surgeries for financial gain.

Dr. French moved for summary judgment, arguing that Ms. Ambach's request for damages did not satisfy the CPA's requirement of injury to "business or property." The Hospital also sought summary judgment dismissing Ms. Ambach's CPA claims. The court granted the summary judgment motion, concluding that personal injury damages were not recoverable under the CPA. The court denied Ms. Ambach's motion for reconsideration.

Dr. French requested CR 11 sanctions. The court sanctioned Ms. Ambach's attorneys in the amount of \$7,194. Ms. Ambach next sought discretionary review, which was denied. The trial court entered final judgments regarding the sanctions. Ms. Ambach appealed.

ANALYSIS

When a party seeks review of an award of CR 11 sanctions, the underlying judgment resulting in the sanctions is also subject to review pursuant to RAP 2.4(b). The

No. 24784-8-III; No. 25007-5-III
Ambach v. French

sanctions here were awarded in connection with the trial court's order on summary judgment, which we also review. When reviewing an order of summary judgment, this court engages in the same inquiry as the trial court. *Syrovoy v. Alpine Res., Inc.*, 122 Wn.2d 544, 548 n.3, 859 P.2d 51 (1993). This court will affirm summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and inferences are considered in the light most favorable to the nonmoving party. *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992).

When the facts are undisputed, the question of whether a CPA violation occurred is a question of law, reviewable de novo. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). This court reviews an award of sanctions for an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

On summary judgment, Dr. French argued that Ms. Ambach could not establish a prima facie case under the CPA. To establish a prima facie CPA claim, a consumer must satisfy five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*

No. 24784-8-III; No. 25007-5-III
Ambach v. French

Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Dr. French challenged Ms. Ambach's ability to prove injury to "business or property."

A plaintiff may bring a claim under the CPA for a medical provider's conduct related to the entrepreneurial aspects of a medical practice. *Quimby v. Fine*, 45 Wn. App. 175, 180-81, 724 P.2d 403 (1986); *see also Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984). However, a claim against a medical provider cannot be made under the CPA if it relates to the competence of the medical practitioner. *Quimby*, 45 Wn. App. at 180. When a patient is injured as a result of a medical provider's negligence, the patient has a remedy under RCW 4.24.290 and RCW 7.70.040 for medical negligence. Ms. Ambach argues that Dr. French performed unnecessary surgeries for financial gain that triggered both a negligence claim and a CPA claim because the jury could decide whether the surgeries were either negligent or for financial gain.

In *Quimby*, a patient brought claims for negligence and lack of informed consent, and also alleged a violation of the CPA. *Quimby*, 45 Wn. App. at 179, 181. The court held that a lack of informed consent claim may come within the scope of the CPA if the claim was based on unfair practices used to advance the entrepreneurial aspects of the defendant's medical practice. *Id.* at 181.

In *Wright v. Jeckle*, 104 Wn. App. 478, 482, 16 P.3d 1268 (2001), the court determined that Dr. Jeckle's sale of diet pills implicated the entrepreneurial aspects of medicine. The court concluded that Mr. Wright's claim against Dr. Jeckle could be prosecuted as a CPA claim because his conduct related to the business of selling diet drugs, not the practice of medicine. *Id.* at 485.

These cases demonstrate that the entrepreneurial aspects of health care can form the foundation of a CPA claim. As in *Quimby* and *Wright*, the alleged conduct here fell within the entrepreneurial aspects of Dr. French's practice.

Injury to Trade or Commerce. Under the CPA, a plaintiff may recover injuries to his or her "business or property." RCW 19.86.090. Washington has adopted the rule that personal injuries are not recoverable under the CPA. *Fisons*, 122 Wn.2d at 318; *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989).

Under RCW 19.86.920, the legislature expressed its intent that Washington courts should be guided by federal decisions and the orders of the federal trade commission when construing the CPA. As a result, *Fisons* relies on *Stevens* which adopted the reasoning of *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). In *Reiter*, the court explained the difference between the words "business" and

“property” in the context of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15.² *Id.* at 339.

The court explained that because a consumer acquires goods and services, and is not in “business,” the consumer is “injured” in his or her “property” when he or she pays artificially-inflated prices. *Id.* The court concluded that the phrase “business or property” was a limitation on damages that would exclude personal injuries. *Id.*

On summary judgment, Dr. French asserted that Ms. Ambach could not make a prima facie case under the CPA because she had not suffered “injury” under *Stevens*. For purposes of the underlying motion, Dr. French conceded that other prongs of the *Hangman* test were met. We must consider whether the damages alleged by Ms. Ambach constitute injury to “business or property” recoverable under the CPA.

In *Keyes v. Bollinger*, 31 Wn. App. 286, 640 P.2d 1077 (1982), the court determined that pecuniary losses may be claimed if they are caused by injury such as mental distress, embarrassment, and inconvenience, even if non-pecuniary damages could not be recovered. Discussing the scope of injury to “business or property,” the court stated:

² The Clayton Act, 15 U.S.C. § 15(a) reads in part: “[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court.”

But the reasoning of the federal decisions and the language of RCW 19.86.090 persuade us that “mental distress, embarrassment, and convenience” without more, are not compensable under the [CPA]. Should “mental distress, embarrassment, and inconvenience” in fact entail pecuniary loss, we discern no reason under the act to exclude such damages.

Id. at 296.

The damages alleged by Ms. Ambach fit into four categories: medical expenses, wage loss, loss of earning capacity, and out-of-pocket expenses. There is clear guidance as to what damages constitute injury under the CPA. Damages for mental pain and suffering are not recoverable under the CPA. *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 n.1, 953 P.2d 796 (1998). However, allegations of economic loss due to the increased cost of surgery over the cost of more conservative treatment are sufficient to satisfy the damages requirement. *Podiatry Ins. Co. v. Isham*, 65 Wn. App. 266, 268, 828 P.2d 59 (1992). Hence, Ms. Ambach’s CPA action can move forward based on economic loss due to the cost of the surgery and any claim for pecuniary damages. *See id.* We conclude the trial court erred by granting summary judgment.

CR 11 Sanctions. The decision of a court concluding that an attorney has violated CR 11 is reviewed for an abuse of discretion. *Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. 332, 341, 798 P.2d 1155 (1990). Discretion is abused when a decision is based on untenable grounds or exercised for untenable reasons. *State ex rel. Carroll v. Junker*, 79

Wn.2d 12, 26, 482 P.2d 775 (1971). To impose sanctions, the court must determine that the complaint lacks a legal and a factual basis, and that the attorney who signed the pleading failed to conduct a reasonable and competent inquiry. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). The reasonableness of the attorney's investigation is examined under an objective standard, applying a standard of "reasonableness under the circumstances." *Id.* (citing Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 198).

The trial court found that Ms. Ambach's CPA claim had no legal basis and that Ms. Ambach's attorneys' inquiry into the CPA claim was not objectively reasonable. However, as explained above, Ms. Ambach's claim is not without legal bases so the imposition of sanctions was an abuse of discretion. When a court orders sanctions based on an erroneous view of the law, the court abuses its discretion because the order is manifestly unreasonable or is based on untenable grounds. *Fisons*, 122 Wn.2d at 338-39.

Motion to Supplement the Record. Dr. French seeks to supplement the record, pursuant to RAP 9.6(a), with documents from the trial on Ms. Ambach's other claims. Specifically, Dr. French seeks to add to the record: Ms. Ambach's trial brief, the jury instructions and verdict form, and the judgment. We decline to do so. A party may not supplement the record on appeal of a motion for summary judgment with materials not

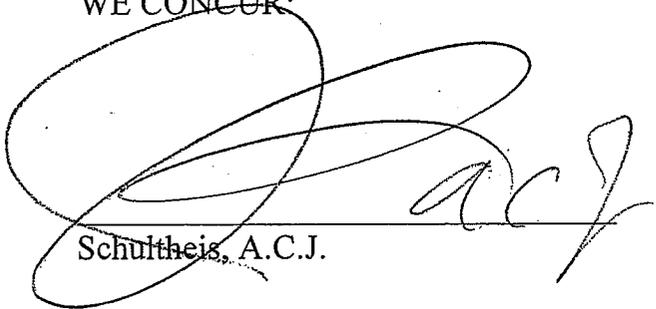
No. 24784-8-III; No. 25007-5-III
Ambach v. French

presented to the trial court. RAP 9.12. We consider only the evidence and issues considered by the trial court. *Whatcom County v. State*, 99 Wn. App. 237, 246 n.25, 993 P.2d 273 (2000).

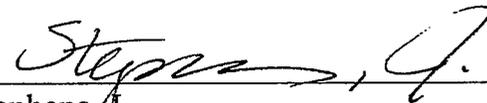
We reverse the summary judgment and imposition of sanctions.



Kulik, J.

WE CONCUR:


Schultheis, A.C.J.



Stephens, J.