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SUPREME COURT
STATE OF WASHINGTON
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NO. 81107-5 BY RONALD R. CARPENTER
(Formerly Court of Appeals No. 24784-8-III & 25007-5-III)
SUPREME COURT OF THE STATE OF WASHINGTON CLERK *RJC*

THERESA AMBACH,

Respondent,

v.

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

Petitioners.

**RESPONDENT'S REPLY IN SUPPORT
OF MOTION TO STRIKE**

KRISTIN HOUSER, WSBA #7286
JAMES D. HAILEY, WSBA #7639
PATRICK K. FANNIN, WSBA #28191
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I. INTRODUCTION

Dr. French's response to Ms. Ambach's Motion to Strike does not – and could not – avoid the reality that his petition for review did not identify the newly presented issue of which he now seeks consideration. Dr. French nevertheless urges the Court to determine whether the Court of Appeals' opinion incorrectly states that providing health care for financial gain is sufficient to establish a CPA violation. First, the Court of Appeals did not issue such a ruling, and any language in the court's opinion related to other CPA elements that touch on the "entrepreneurial aspects" of medical practice are, by Dr. French's own admission, dicta. Dr. French's attempt to broaden the lower court's ruling in order to obtain defense-favorable changes in CPA law on issues that are not properly before this Court should be soundly rejected.

Further, in his petition's statement of issues, Dr. French failed to raise any questions with respect to CPA elements related to the "entrepreneurial aspects" of medicine as required by Rule of Appellate Procedure ("RAP") 13.4 (c)(5). Instead, he points to vague and disparate references to the subject in three excerpts from the body of his petition and in his motion for extension of time to file a supplemental brief, as if these references were sufficient to place the matter before the Court. As the

Court is aware, this is not the way to present the Court with an issue for decision. RAP 13.4(c)(5) requires the petitioner to include all issues presented in a concise statement of issues, and RAP 13.7(b) defines the scope of review based on that submission, *unless the Court orders otherwise*. The issue Dr. French is now attempting to bring before this Court is not so presented, and he should be precluded from raising it.

II. ARGUMENT

A. **General Discussion Of A Topic In The Argument Section Of A Petition For Review Does Not Suffice To Identify A Question For This Court To Decide.**

This Court has made it clear that questions not identified in RAP 13(4)(c)(5)'s statement of issues are not properly before it, and has rejected the notion that discussing the issue in the argument section of a petition for review somehow cures the omission. For example, in *State v. Collins*, 121 Wn.2d 168, 178, 847 P.2d 919 (1993), this Court refused to consider a constitutional issue raised for the first time in the argument section of a petition for review, noting that "[f]rom the issue section alone . . . it is impossible to tell that the right to bear arms is implicated in this case." See also *State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006); *State v. Coria*, 146 Wn.2d 631, 655 n.9, 48 P.3d 980 (2002).

Similarly, in the present case it would have been impossible to tell from Dr. French's statement of issues that he sought review of the Court of Appeals' statements regarding the "entrepreneurial aspects" part of a CPA claim. Dr. French apparently concedes that he failed to comply with RAP 13(4)(c)(5), and instead urges the Court to troll through the argument section of his petition for review for references to the issue that is now the focus of his challenge to the decision below.

Even Dr. French's various references to the topic of "entrepreneurial aspects" in the body of his petition do not identify any particular problem with the Court of Appeals' decision in that regard. For example, in the first of three excerpts from his petition, Dr. French merely explains the concept of "entrepreneurial aspects" of a medical practice and cites the same cases the Court of Appeals does. Resp. at 3 (quoting Pet. at 2 (citing *Wright v. Jeckle*, 104 Wn. App. 478, 484-85, 16 P.3d 1268 (2001) and *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986))). There is no hint in that discussion that he is presenting an argument in opposition to a statement in the Court of Appeals' opinion, or that he is urging a major change to CPA law in Washington State regarding its coverage of professionals, as he does now.

The second excerpt from his petition that he includes in his response is similarly unhelpful to his cause. He quotes the following portion of a paragraph:

In addition, the [*Ambach*] decision holds tremendous significance and public policy implications to all medical malpractice litigants, as it would essentially deem 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 recover for medical malpractice claims. Accordingly, review is warranted by the Supreme Court under both RAP 13.4(b)(2) and (4).

Resp. at 4 (citing Pet. at 4). Significantly, he leaves out the very first sentence of that paragraph:

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.*

Pet. at 4 (emphasis added). This lead-in to the discussion of the policy reasons for taking review gives no clue to this Court or Ms. Ambach that he means anything other than exactly what he says in his omitted topic sentence: that allowing consumers to recover what he calls "personal injury damages" would conflate two kinds of claims and create a threat of CPA litigation in all personal injury cases against physicians. This topic sentence makes it clear that the above-quoted policy discussion relates to

the sole question presented to this Court on damages and a CPA “injury”; it does not refer or even mention any other element of a CPA claim.

The final and third excerpt from his petition for review on which Dr. French relies is at best inapposite, and at worst, misleading. Resp. at 4. With this excerpt, Dr. French simply inserts the blocked text “entrepreneurial aspects” into a paragraph – without any explanation – in an attempt to change the meaning of an entire section of his original petition. In fact, the section of his petition to which he refers supports the *opposite* conclusion that he now claims he intended. That is, in his petition, Dr. French took issue with the Court of Appeals’ decision because it relied on cases that he urged did *not* involve a CPA “injury” and the question of damages, but rather implicated the entrepreneurial aspects of medicine. Pet. at 12 (“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 of practice” under the CPA.”). His point was that *Quimby* and *Wright* were *irrelevant* to a decision of the sole issue on review: damages. Pet. at 11-12.

It is disingenuous at best to claim now that this paragraph was supposed to signal to the reader that Dr. French had an issue with the

Court of Appeals' discussion of the "entrepreneurial aspects" part of a CPA claim. This is particularly so when there is not a single reference in the entire petition, let alone in this section, to the Court of Appeals' language of which he now seeks review regarding Ms. Ambach's assertion that Dr. French performed surgery on her for "financial gain."

B. The Cases Cited By Dr. French Are Distinguishable.

Dr. French urges the Court to overlook his contravention of RAPs 13.4(c) and 13.7(b), and exercise its discretion to consider matters not presented in the petition for review's statement of issues. In support of this argument, Dr. French cites three cases, all of which arose under entirely different circumstances.

In *State v. Olson*, for example, this Court affirmed the Court of Appeals' exercise of discretion to accept review of a suppression order, despite the appellant's failure to appeal directly from the adverse trial decision. 126 Wn. 2d 315, 317-18, 893 P.2d 629 (1993). The procedural error, the Court reasoned, was a mere technical misstep resulting in no prejudice to the opposing party because the appellant (a) appealed from the order of dismissal, which clearly stated it was based on the suppression ruling (b) attached the suppression order to the notice of appeal, and (c) assigned error to the suppression order and argued for the validity of the

warrant in the opening brief. *Id.* at 317-18. In other words, “the nature of the [appellant’s] challenge is clear,” and there was no question from the onset what issues were before the reviewing court.

Here, by stark contrast to *Olson*, it is not at all apparent from French’s petition for review that he was challenging the discussion in the Court of Appeals opinion at pages 787 and 788 regarding the entrepreneurial conduct that subjects a physician to the Consumer Protection Act. To the contrary, the petition for review fails to even mention the issue Dr. French is now asking the Court to decide.

Significantly, in deciding whether a violation of the Rules of Appellate Procedure would bar consideration of an issue, both the Court of Appeals and Supreme Court in *Olson* looked to whether the opposing party had suffered any prejudice as a result of the violation. *Id.* at 323; *State v. Olson*, 74 Wn. App. 126, 129, 872 P.2d 64 (1994). Finding none, both courts deemed it appropriate to exercise their discretion to reach the issue raised. Again, that is far from the case here. In both her answer to Dr. French’s petition for review and her supplemental brief, Ms. Ambach addressed only the issues identified in Dr. French’s statement of “Issues Presented for Review.” *See generally* Ans. to Pet.; Resp’t Supp. Br. Contrary to Dr. French’s assertions, Ms. Ambach did not address the

substance of his argument regarding what conduct by a physician will invoke jurisdiction of the CPA. Rather, Ms. Ambach's directed her motion to strike at the limited nature of the scope of review, the Court of Appeal's holding, and Dr. French's mischaracterizations of that holding. Further, substantive issues for this Court's decision are not typically addressed in motions to strike and responses thereto, but in the body of the substantive briefing of the questions properly presented for review.

Dr. French's reliance on the other two cases he cites is similarly misplaced. Dr. French cites *Tuerk v. State of Washington*, 123 Wn.2d 120, 864 P.2d 1382 (1994), and *Shoreline Community College v. Employment Sec. Dep't*, 120 Wn.2d 394, 842 P.2d 938 (1992) for the general proposition that this Court may exercise its discretion to conduct review of issues improperly raised. While Ms. Ambach does not disagree with the general concept that the Court has inherent authority to determine its own scope of review, Dr. French's application of the caselaw here is wholly inapposite. Both *Tuerk* and *Shoreline* involved complex regulatory and statutory schemes; and the outcome of those cases depended upon particular provisions that the parties neglected to properly present for consideration. *Tuerk*, 123 Wn.2d at 124 (considering regulation regarding real estate licensing as part of scope of review as "necessary to reach a

proper decision”); *Shoreline*, 120 Wn.2d at 402 (considering regulation involving unemployment benefits to “serve the ends of justice”). In both instances, the Court could not resolve the parties’ dispute without consideration of the statutory framework as a whole.

There is simply no analogy to draw here. In contrast to the circumstances in *Tuerk* and *Shoreline*, nothing about the entrepreneurial aspects of Dr. French’s practice is implicated in a decision about whether Ms. Ambach’s alleged damages (e.g., the cost of an unnecessary surgery) constitute a cognizable injury under the Act. Rather, Dr. French attempts to capture an entirely new aspect of a CPA claim that the parties *expressly* stipulated was not ripe for summary judgment, was never adjudicated by the trial court, and not the subject of the Court of Appeals’ holding. At most, the Court of Appeals’ discussion regarding the entrepreneurial aspects of a medical practice is dicta (a point that Dr. French concedes), and is not necessary to this Court’s resolution of the sole question presented.

C. An Order From the Deputy Clerk On A Motion For An Extension Of Time Does Not Expand The Scope Of Review On Appeal.

Dr. French has cited no authority for his argument that the Clerk’s one-page letter granting his motion for an extension of time somehow

allowed him to proceed as though the scope of review had been expanded beyond those presented in his petition and Ms. Ambach's answer. Nor could he. The Rules of Appellate Procedure expressly limit review to "only the questions raised in . . . the petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition." RAP 13.7(b). This Court did not "order otherwise" upon granting the motion; thus, there is no authority for expanding review beyond questions identified in Dr. French's petition and Ms. Ambach's answer.

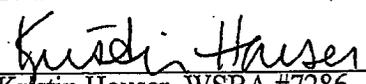
Dr. French's suggestion that the Clerk's Order was the equivalent of "this Court's decision allowing additional briefing" is preposterous. Resp. at 9. The Clerk simply allowed the Petitioner more time to write his brief, nothing more. Summary disposition of a motion by a clerk, without waiting for a response from the opposing party, cannot change the scope of review. Dr. French's contention to the contrary not only flies in the face of the Rules, but of due process to a party at an important juncture in her lawsuit.

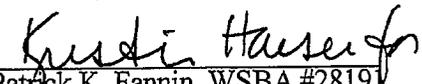
III. CONCLUSION

Ms. Ambach respectfully requests that the Court strike the portions of Dr. French's Supplemental Brief that go beyond the scope of review on

appeal and therefore contravene RAP 13.7(b): Sections IV.A, B, and C, and portions at pp. 4-5, 15-16. Ms. Ambach seeks recovery of her reasonable attorneys' fees and costs associated with the filing of her motion and reply. *See* Houser Decl.

RESPECTFULLY SUBMITTED this 2 day of **January**,
2009.

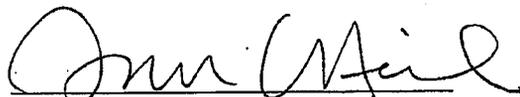
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 2nd day of January 2009, true and correct copies of the forgoing Respondent's Reply in Support of Motion to Strike were served on the persons hereinafter named by depositing said copies in the United States mail, postage prepaid, addressed as follows:

Stephen Craig Haskell	<input checked="" type="checkbox"/>	U.S. Mail
Stephen Haskell Law Offices PLLC	<input type="checkbox"/>	Hand Delivered
222 N Wall Street, Ste., 402	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201-0813	<input type="checkbox"/>	Facsimile
Patrick K. Fannin	<input checked="" type="checkbox"/>	U.S./E-Mail
Fannin Litigation Group, LLC	<input type="checkbox"/>	Hand Delivered
1312 North Monroe	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201	<input type="checkbox"/>	Facsimile
D. Roger Reed	<input checked="" type="checkbox"/>	U.S. Mail
Reed & Giesa, PS	<input type="checkbox"/>	Hand Delivered
222 N Wall Street, Ste., 410	<input type="checkbox"/>	Overnight Mail
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ANN O'NEIL
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Schroeter Goldmark & Bender

NO. 81107-5

(Formerly Court of Appeals No. 24784-8-III & 25007-5-III)

SUPREME COURT OF THE STATE OF WASHINGTON

THERESA AMBACH,

Respondent,

v.

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

Petitioners.

**AMENDED DECLARATION OF KRISTIN HOUSER
IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE**

KRISTIN HOUSER, WSBA #7286
JAMES D. HAILEY, WSBA #7639
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1. I, Kristin Houser, am one of the attorneys representing Respondent in this matter. I make this declaration based upon personal knowledge. I am competent to testify to the matters set forth herein.

2. Having reviewed the Petitioners' pleadings, read relevant case law, conferred with counsel on tactical and factual aspects of the appeal, and having spent time writing this motion, I am seeking reasonable attorneys' fees associated with filing this motion.

3. I obtained my B.A. degree from Yale University in 1971 and my law degree from the University of Pennsylvania in 1974. I began my career working in legal services programs representing low-income residents of Oregon and Washington. In the 1980s, I litigated statewide class actions challenging cuts in disability benefits and food stamps. I began working at Schroeter Goldmark & Bender in 1983, primarily in asbestos litigation. Since then, my practice areas have grown to include medical malpractice, products liability, and other serious personal injury cases. I have been admitted to practice before the Washington Supreme Court; United States District Court for the Western and Eastern Districts of Washington; the Ninth Circuit Court of Appeals; and the United States Supreme Court.

4. I amend this declaration to reflect the total number of hours, including this reply, which Lindsay Halm and I have worked on this motion.

5. Although I primarily work on contingency, other attorneys at my firm at a similar level of practice charge in the range of \$390 to \$450 per hour. For this motion and reply, I am requesting reimbursement of \$400 per hour. I have spent a total of 5.7 hours working on this motion and reply, which totals \$2,280.00.

6. Lindsay Halm is an associate at Schroeter Goldmark and Bender. I have supervised Ms. Halm's work on this motion and reply. Ms. Halm obtained her undergraduate degree from Bowdoin College in 1998 and her law degree in 2005 from the University of Washington. Prior to joining Schroeter Goldmark and Bender in 2007, Ms. Halm served as a law clerk to the Honorable James L. Robart in the United States District Court for the Western District of Washington. She is a member of the Washington State Bar and has been admitted to practice before the United States District Court for the Western and Eastern Districts of Washington, and the Ninth Circuit Court of Appeals.

7. Ms. Halm's time is billed at \$185. She has spent 30.5 hours working on this motion and reply, which totals \$5,642.50.

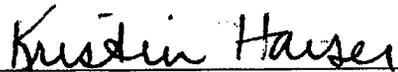
8. The total amount of fees associated with this motion and reply is \$7,922.50.

9. The total amount of costs associated with this motion and reply is estimated at \$20.00.

10. The combined request of attorneys' fees and costs is \$7,942.50.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 2nd day of January 2009.


KRISTIN HOUSER, WSBA #7286

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 2nd day of January 2009, a true and correct copy of the forgoing Amended Declaration of Kristin Houser was served on the persons hereinafter named by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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Paralegal
Schroeter Goldmark & Bender

OFFICE RECEPTIONIST, CLERK

To: O'Neil, Ann
Subject: RE: Filing: Teresa Ambach v. H. Graeme French, et ux, et al., No.81107-5

Rec. 1-2-09

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: O'Neil, Ann [mailto:oneil@sgb-law.com]
Sent: Friday, January 02, 2009 4:59 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: RE: Filing: Teresa Ambach v. H. Graeme French, et ux, et al., No.81107-5

Dear Clerk of the Court,

Attached for filing please find the following:

- Respondent's Reply in Support of Motion to Strike;
- Amended Declaration of Kristin Houser.

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

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<<Amended Houser Dec in Support of Motion to Strike.pdf>>

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