

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.

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STATE OF WASHINGTON
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**RESPONDENT'S REPLY
TO BRIEFS OF AMICI CURIAE WASHINGTON DEFENSE
TRIAL LAWYERS, WASHINGTON STATE MEDICAL
ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AND
PHYSICIANS INSURANCE A MUTUAL COMPANY**

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**I. LARGE PORTIONS OF THE AMICUS CURIAE'S
ARGUMENTS ARE BEYOND THE ISSUE
PRESENTED, AND THEREFORE DO NOT ASSIST
THE COURT**

In granting Respondent/Plaintiff Terri Ambach's motion to strike, the Court confirmed there is but one issue on appeal: whether Ms. Ambach alleges an "injury to . . . business or property" cognizable under the Consumer Protection Act ("CPA"). As the Court is now aware, this limitation on judicial review is born out of Petitioner/Defendant Dr. Graeme French's¹ withdrawal of all issues at summary judgment, save for the "injury" element of Ms. Ambach's CPA claim (or, her damages). CP 59. As a result of Dr. French's stipulation, the record before the Court is, naturally, somewhat limited and contains little evidence of Dr. French's misconduct.

Nevertheless, at a stage of the litigation when the record is *closed*, amici curiae have joined Dr. French in an effort to turn this appeal into a broader policy discussion about the CPA's application to doctors, albeit without the inconvenience of facts that might otherwise stand in their way. To the extent that the amici's arguments touch on the "entrepreneurial aspects" of Dr. French's practice (i.e., the "trade and commerce" element

of a CPA claim), Ms. Ambach respectfully submits that, consistent with the Court's order granting her motion to strike, the amici's arguments have no place in this proceeding. *E.g.* Medical Ass'ns/Insurance Co. Br. at 5-11, 15-18. Again, whether the entrepreneurial aspect of Dr. French's medical practice is implicated is not on review; Ms. Ambach awaits the opportunity to present that portion of her claim to the jury.

The remaining issues raised by amici curiae Washington Defense Trial Lawyers ("WDTL") and the Washington Medical Association, American Medical Association, and Physicians Insurance (together, "Medical Ass'ns/Insurance Co.") arguably touch on subjects within the scope of review, including whether the CPA covers Ms. Ambach's damages, whether the CPA can *ever* apply to doctors in their provision of services, and policy issues related thereto. Ms. Ambach addresses these items below.

¹ For ease, Respondent refers to Petitioners/Defendants Dr. French, Jane Doe French and Three Forks Orthopedics, collectively as "Dr. French."

II. AMICI'S ARGUMENTS RELATED TO MEDICAL MALPRACTICE INSURANCE ARE NOT SUPPORTED BY EVIDENCE, AND DO NOT JUSTIFY A DEPARTURE FROM PROTECTING CONSUMERS IN THIS STATE

The defense amici would like the Court to view this case in the context of a crisis regarding pressures on the medical profession— a profession whose laudable mission is, in general, to care for sick people. The primary pressure, according to the amici: medical malpractice insurance. *E.g.* WDTL Br. at 2-3; Medical Ass'ns/Insurance Co. Br. at 4.

Yet, in support of their policy arguments, the defense amici's factual assertions stand without any citation to the record, or for that matter, anything other than the argument of counsel. For example:

- “The [medical malpractice] crisis has continued.” WDTL Br. at 3.
- “WDTL member attorneys often receive questions from consulting expert physicians in other states about why any physician would practice medicine in Washington.” *Id.*
- “[A]fter publication of the Court of Appeals decision, defense attorneys have reported an increased number of medical practice [sic] cases that include CPA claims. This is not a hypothetical risk. It is happening.” *Id.* at 16.
- “If a claim is settled on behalf of a physician, there is a near certainty that the Department of Health will investigate.” *Id.* at 19.
- “As *Isham* recognizes, medical malpractice insurance policies typically do not provide defense or indemnity coverage for claims

based on allegations other than malpractice.”² Medical Ass’ns/Insurance Co. Br. at 16.³

What the amici fail to mention is the CPA’s public policy interest in regulating doctors on the fringe of the profession, doctors who are using a medical license to exploit patients for profit. The amici ignore such grim topics and portray CPA claims against doctors as nothing more than a pleading device of clever plaintiffs’ lawyers, sure to bankrupt the healthcare system. Medical Ass’ns/Insurance Co. Br. at 12. In one sense, they have a great advantage in doing so, as Ms. Ambach has a limited record from which to draw upon to show that much more is at stake here than the cost of an unnecessary surgery.

² As discussed in Ms. Ambach’s motion to strike, the court in *Podiatry Ins. of Am. Co. v. Isham*, 65 Wn. App. 266, 268, 828 P.2d 59 (1992) says nothing about the “typical” insurance policy for physicians, but rather interprets *one* physician’s policy, which did contain an exclusion for CPA claims.

³ Portrayal of the “insurance crisis” as one brought on by lawsuits against doctors (without citation) is particularly disingenuous when it is at best, over-simplistic, and at worst, incorrect. See Anderson, Jenny, *Study Says Malpractice Payouts Aren’t Rising*, NEW YORK TIMES, July 7, 2005; Treaster, Seph B., Brikley, Joel, *Behind Those Medical Malpractice Rates*, NEW YORK TIMES, Feb 22, 2005 (noting that more important factors than lawsuits to insurance rates are declining investment earnings of insurance companies; “when the markets turned sour and the reserves of insurers shriveled, companies began to double and triple the costs for doctors.”)

On the other hand, what Ms. Ambach alleges could not be more serious: Dr. French had a history of performing surgeries, not to heal his patients, but to line his pocket. The defense amici – including the medical associations, who put patient welfare chief among their concerns⁴ – still call for no further CPA inquiry; no further development of the record. It remains a question whether the amici would rush to Dr. French’s defense had the adjudication below and the scope of review on appeal allowed for evidence of Dr. French’s harmful conduct that Ms. Ambach has marshaled to date, e.g. CP 154, 627, 628,⁵ and what she anticipates developing on remand.

In any case, what remains undisputed is the principle favoring the protection of consumers articulated in *Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163 (1984). There, the Court soundly rejected an invitation to exempt lawyers from the CPA, which would thereby leave the

⁴ “Physician Driven – Patient Focused” is the motto at the top of every page of the website of the Washington Medical Association. www.wsma.org. The mission of the American Medical Association is “[t]o promote the art and science of medicine and the betterment of public health.” www.ama-assn.org.

⁵ The clerk’s papers contain a summary of an investigation into 19 of Dr. French’s surgeries conducted by the Washington State Medical Quality Assurance Commission, triggered by the suspension of Dr. French’s privileges at Pullman Hospital, one of the hospitals where he practiced. CP 154. The clerk’s papers also contain a statement of revenues generated by Dr. French’s surgeries as compared to other surgeons where he practiced, at Whitman Hospital. CP 627, 628.

regulation of the practice of law solely to the bar association. The public policy interest in enforcing the CPA to protect consumers of Washington State has not changed. Ms. Ambach should not have to wait for the medical associations to discipline Dr. French; she is entitled to have a jury hear her story.

**III. MS. AMBACH'S ALLEGATION OF DAMAGES
IN SUPPORT OF HER CPA INJURY IS
CONSISTENT WITH THE CASELAW, AND
PRESENTS NO DOCTRINAL CHALLENGE FOR
THE COURTS**

Defense amici argue that Ms. Ambach's allegation of damages (e.g. the cost of an unnecessary surgery) cannot be distinguished from personal injury damages. First and foremost, amici neglect to mention the *other* four elements a plaintiff must satisfy to make out a CPA claim against a physician that would render such a claim entirely distinct from an ordinary medical malpractice claim. But perhaps more importantly, what underlies their contention is mistrust in Washington courts' ability to differentiate between damages that, alone, satisfy the "injury" element of the CPA claim and those that arise solely from medical malpractice. Notwithstanding their concern, Washington courts have had no trouble in this regard.

For example, in *Podiatry Ins. Co. v. Isham*, 65 Wn. App. 266, 828 P.2d 59 (1992), the appellate court *rejected* the patient's argument that the CPA injury alleged (the economic loss due to "the increased cost of surgery versus more conservative treatment") was essentially the same as that arising out of her malpractice claim. In reasoning that the patient's CPA claim fell outside the scope of coverage, the court was forced to draw a distinction between claims of personal and bodily injury and those under the rubric of the CPA (i.e., the unnecessary surgery). The Medical Ass'ns/Insurance Co.'s attempt to distinguish *Podiatry Insurance* and render it inapplicable to Ms. Ambach's claim on the ground that the holding "did not depend on the CPA claim being viable," is therefore mistaken. Medical Ass'ns/Insurance Co.'s Br. at 15. Indeed, the *Podiatry Insurance* court was asked to do precisely what the amici argue this Court should do: conflate the CPA claim with the personal and bodily injury claims (in this case, to render CPA claims meaningless). The *Podiatry Insurance* court declined to do so because the damages claimed there, as here, were distinct.⁶

⁶ To be sure, the court of appeal's language relying on *Podiatry Insurance* is not a model of clarity as it merges the concepts of injury and damages in its holding. *Ambach v. French*, 141 Wn. App. 782, 790, 173 P.2d 941 (2007). However, this is of no moment in this case, since both the injury

The defense amici charge Ms. Ambach and her counsel with disguising a personal injury claim as a CPA claim when it is, in fact, the defense amici that “recast” Ms. Ambach’s damages in an attempt to place them beyond the CPA’s reach. WDTL Br. at 8; Medical Ass’ns/Insurance Co. Br. at 12, 13. With a broad brush, the WDTL simply *rewrites* Ms. Ambach’s allegation of damages as, “medical expenses, loss of earnings, loss of use of property, cost of repair, loss of employment and loss of business or employment opportunities.”⁷ As Dr. French does, the amici then rely on cases such as *Stevens v. Hyde Ath. Ind. Inc.*, 54 Wn. App. 366, 773 P.2d 871 (1989), and *Hiner v. Bridgestone/Firestone*, 91 Wn. App. 722, 959 P.2d 1158 (1998) to state the noncontroversial notion that personal injury damages are not recoverable under the CPA.

Again, Ms. Ambach does not seek damages for pain and suffering, or the wage loss resulting from the post-surgical infection she suffered, nor does she seek the ongoing cost of her treatment. She seeks only those damages that flow directly from the conduct by Dr. French that runs afoul of the Consumer Protection Act. She alleges damages that include the

alleged and Ms. Ambach’s damages flowing from that injury involve the same loss.

⁷ “These personal injury damages are precisely the type of damages Ms. Ambach sought in this case.” WDTL Br. at 8.

cost of the surgery over the cost of more conservative treatment; the cost of travel to Colfax from Spokane for the surgery; and the wage loss Ms. Ambach sustained as a result of having surgery instead of going to physical therapy. Of course, the jury will have the final word on what damages Dr. French's deceptive acts or practice caused (a separate element of Ms. Ambach's claim).

Assuredly, there is overlap in the limited damages Ms. Ambach seeks here under the Consumer Protection Act and the losses she sustained as a result of the malpractice. However, it does not undermine the validity of the CPA claim, as amici suggest nor is it anything unusual in the law. In *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986), cited with approval by *Michael v. Mosquera-Lacy*, No. 80665-9, 2009 LEXIS 73 at *9 (Wash. Feb. 5, 2009), the Court held that performing a surgery without properly informing the patient of all the material risks could be a violation of the CPA, if motivated by financial considerations, as well as a personal injury claim for lack of informed consent. *Quimby*, 45 Wn. App. at 180-82. In either case, the plaintiffs would be entitled to recover the cost of the surgery if they prevailed. Of course, the personal injury portion of the claim would also entitle them to seek general damages as well; the CPA claim would not.

Short v. Demopolis, 103 Wn. 2d at 52, the seminal case on the application of the Consumer Protection Act to professionals presents a similar scenario of different claims giving rise to complementary remedies that theoretically overlap. In that case, a client claimed that his lawyer did a “bait and switch” by promising to do his legal work and then handing his case off to less experienced and less capable attorneys at his firm. *Id.* at 53. He also held “numerous grievances” with the quality of representation. *Id.* at 54. Both causes of action arose as counterclaims to an action by the firm against the client for payment of fees owed. While each cause of action may have resulted in additional damages, in both claims, the damages would have included a reduction in the fees owing to the law firm.

Such overlap in the damages is not uncommon when one transaction gives rise to several causes of action. For example, claims for malpractice and assault arising out of treatment by a medical provider will have overlapping damages, as will claims for wrongful discharge and discrimination against an employer. Similarly, here, the fact that the cost of an unnecessary surgery is a damage potentially recoverable in a medical malpractice action as well as through a CPA claim should not trouble the Court.

**IV. THE COURT OF APPEALS DECISION IS IN
ACCORD WITH CONTROLLING PRECEDENT,
INCLUDING THIS COURT'S RECENT DECISION
IN *MICHAEL V. MOSQUERA-LACY***

This Court's recent holding in *Michael v. Mosquera-Lacy*, No. 80665-9, 2009 Wash. LEXIS 73 (Wash. Feb. 9, 2009), does not address the question of injury under the CPA, the sole issue on this appeal. Still, both amici cite *Michael* in support of their contention that conduct such as that of Dr. French is beyond the reach of the CPA because it "arises out of health care." See Medical Ass'ns/Insurance Co. Br. at 6, 8, 10; WDTL Br. at 10. Said another way, both amici appear to contend that, even if proven, Ms. Ambach's claim fails as a matter of law because the CPA *never* applies in instances where the doctor has performed a surgery. To the extent this issue is properly before the Court, it nevertheless misses the mark as it ignores a key statement in in *Michael*:

Michael failed to show that Dr. Mosquera-Lacy's use of cow bone is entrepreneurial. It does not relate to billing or obtaining patients. It simply relates to Dr. Mosquera-Lacy's judgment and treatment of a patient. ***There is no evidence that cow bone was used to increase profits or the number of patients.***

Id. at *10 (emphasis added).

The implication of the highlighted sentence is that the result would have been different if the patient had been able to show that the physician

used cow bone for the purpose of increasing profits or patients. This is precisely Ms. Ambach's allegation here, i.e., that Dr. French told people like her, with normal shoulders, that they needed shoulder surgery so as to increase his number of surgical patients and, in turn, his profits. If one were to substitute "shoulder stabilization surgery" for "cow bone," Ms. Ambach's case would fall within the rubric of the kind of misconduct that this Court contemplated could give rise to a CPA claim. Thus, contrary to amici's claims, there is no inconsistency between the Court of Appeal's decision in the present case and this Court's decision in *Michael*.

To state it plainly, it is not "health care" to operate on a normal shoulder, and to do so on many patients. It is something very different. The fact that it was done in a health care setting (a hospital) does not make it "health care," or conduct arising out of health care. The authority the Medical Ass'ns/Insurance Co. cites, *Sly v. Linville*, 75 Wn.App. 431, 878 P.2d 1241 (1994), only undermines the amici's position, and confirms Ms. Ambach's CPA claim. There, the court held that a doctor's conduct did not arise out of health care when he misrepresented the cause of the patient's condition in telling the patient that it had not been caused by the previous doctor's care. *Id.* at 440. Likewise, Dr. French's opinion that

Ms. Ambach had an abnormal shoulder when she did not, and his decision to operate on her and others like her, did not arise out of health care.

Again, because of Dr. French's stipulation withdrawing the issue, the question of whether his conduct arose out of the entrepreneurial aspects of his practice as opposed to health care was not the issue at either the trial court or the Court of Appeals. As a result, the record on Dr. French's pattern of conduct is not fully developed. Even so, the Court should be aware that evidence exists in the record to support the grievous nature of what is alleged. *E.g.* CP 154 (indicating independent review by three separate physicians pursuant to Medical Quality Assurance Commission investigation, revealing that 19 cases showed a lack of medical support for the surgery performed).

Remarkably, the Medical Ass'ns/Insurance Co. brief acknowledges that the CPA covers the kind of conduct Dr. French engaged in, even though it occurred in a traditional health care setting. In their brief, they state that:

[w]hen, as here, an allegedly negligent surgeon did not solicit the plaintiff as a patient by making some promise or representation concerning the treatment at issue . . . a negligently performed procedure does not implicate the entrepreneurial aspect of the surgeon's practice . . . so as to make the claim cognizable under the CPA.

Br. at 11. The situation they describe *is* what the plaintiff is alleging happened here: Dr. French solicited Ms. Ambach as a patient for surgery by representing to her that she had something structurally wrong with her shoulder, when she did not, and proceeded to operate on her. Ms. Ambach did not bring the CPA claim on the basis of one act of negligently misdiagnosing shoulder pathology that did not exist. As required by the CPA, she alleged – and was prepared to prove – that Dr. French engaged in a pattern of making fictitious diagnoses so that he could perform surgery for a profit. This is not health care; this is being in business to perform shoulder surgeries.

The Medical Ass'ns/Insurance Co.'s reliance on *Wright v. Jeckle* 104 Wn. App. 478, 16 P.3d 1268 (2001) is misplaced, as the case is not to the contrary of the decision below. As in *Wright*, which involved a physician's sale of diet drugs, Ms. Ambach alleges that Dr. French is in business to sell a commodity (shoulder surgery), rather than providing health care. The amici's attempt to distinguish *Wright* solely on the basis that the physician advertised his services and the drugs to non-patients,⁹ is problematic, since physicians have a First Amendment right to advertise. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1102 (9th Cir. 2004)

(applying First Amendment protection to state regulation on physician advertisement). What is more, Washington appellate courts have not hesitated to apply the CPA to the paying clients or patients of a professional. *See, e.g., Eriks v. Denver*, 118 Wn.2d 451, 464-66, 824 P.2d 1207 (1992); *Short*, 103 Wn.2d at 62; *Quimby*, 45 Wn. App. at 180-82. Thus, there is no logical basis from which to conclude that the *Wright* court described the physician's advertising for any other reason than to demonstrate the scope of Dr. Jeckle's business activities. The amici's suggestion that the CPA is spatially limited to cover only those acts that occurs outside the confines of an exam room is simply not supported in the caselaw.

Ms. Ambach does not repeat here the careful discussion outlined in the Washington State Association for Justice ("WSAJ") Foundation's amicus brief explaining why Ch. 7.70 RCW does not provide the exclusive remedy for wrongs committed by physicians in a health care setting. WSAJ Br. at 9-17. Included in that discussion is an analogy of "health care" claims under RCW 7.70 to the Industrial Insurance Act ("IAA"). As the Court is aware, the IAA purports to be the exclusive remedy for workers against their employers, yet does not preclude claims

⁹ Medical Ass'ns/Insurance Co. Br. at 8-10, n 4.

against employers for discrimination. The analogy applies here. Perhaps an example in the health care field would further assist in the analysis:

- A physician prescribes valium for depression to a patient he is attracted to;
- The patient becomes addicted to valium and returns to the physician repeatedly for prescriptions of valium;
- The physician sexually assaults the patient during her appointments at his office.

In this example, the physician may be negligent for prescribing an addictive medication. There should be no question that the physician would *also* be liable for the assault, even though it occurred in a health care setting (his office) and involved the provision of health care services (prescribing drugs). Similarly, in this case, RCW 7.70 does not preclude Ms. Ambach from pursuing a claim under the CPA for an action by a physician that took place in a health care setting, but was motivated by something other than her medical needs.

IV. THE LAW OF OTHER JURISDICTIONS CITED BY WDTL DOES NOT AID IN THE RESOLUTION OF THE INJURY ISSUE BEFORE THIS COURT

WDTL's discussion of law from other jurisdictions is not helpful in analyzing the question of what constitutes sufficient injury under Washington's CPA. The first case it cites, *Haynes v. New-Haven*

Hospital, 699 A.2d 964 (Conn. 1997), only confirms a principle already settled in this jurisdiction. That is, in *Haynes*, the Connecticut Supreme Court ruled on an issue of first impression for that state: whether allegations concerning medical competence could be brought under Connecticut's consumer protection act statute. *Id.* at 972-74. Washington courts resolved the issue as applied under its CPA over two decades ago. *See, e.g., Quimby*, 45 Wash. App. at 180-81.

Although WDTL correctly notes that the *Haynes* court likewise considered claims arising out of medical competence beyond the reach of the Connecticut CPA, WDTL fails to mention that the court went on to cite *Quimby* for the proposition that consumer claims against physicians stand if such claims implicate the entrepreneurial aspects of the practice. *Haynes*, 699 A.2d at 973 (citing *Quimby*, 45 Wash. App. at 180); accord *Nelson v. Ho*, 564 N.W. 482, 486 (Mich. App. 1997). WDTL also neglects to mention that the Connecticut court rejected the hospital-defendant's invitation to dole out a blanket exemption to the medical profession from consumer protection legislation, stating that doing so would be "a dangerous form of elitism." *Haynes*, 699 A.2d at 974 (quoting *United States v. National Society of Professional Engineers*, 389 F.Supp. 1193, 1198 (D.D.C. 1974)).

WDTL also cites a case interpreting Florida's consumer protection act, *Gorran v. Atkins Nutritionals, Inc.*, 464 F.Supp. 2d 315 (S.D.N.Y. 2006). WDTL Br. at 14. WDTL does nothing to reconcile the material differences between the two statutes, the legislative history or the decisional authority in the respective states. With Washington as a pioneer in the area of consumer protection, the amici's analogy to out-of-state authority does not hold.

Ms. Ambach respectfully submits that the defense amici do not submit compelling justifications for departing from Washington's long tradition of protecting consumers from unfair and deceptive practices. This is particularly so where the amici attempt here to make broad-reaching changes in the law on the narrowest of issues, with a correspondingly truncated record. Ms. Ambach awaits her opportunity to argue her case to the jury.

RESPECTFULLY SUBMITTED this 13 day of March, 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 13rd day of March 2009, a true and correct copy of the forgoing **RESPONDENTS' REPLY TO BRIEFS OF AMICI CURIAE WASHINGTON DEFENSE TRIAL LAWYERS, WASHINGTON STATE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AND PHYSICIANS INSURANCE A MUTUAL COMPANY** 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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