

SUPREME COURT NO. 80665-9
COURT OF APPEALS NO.: 34497-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIGHT NOW! DENTAL, INC., a Washington Corporation,

Petitioner,

vs.

MYSTIE "PATSY" MICHAEL,

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER BRIGHT NOW! DENTAL, INC.

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I. INTRODUCTION

Petitioner Bright Now! Dental, Inc. (“BNDI”) submits this Supplemental Brief, pursuant to RAP 13.7(d), to focus on two reported decisions filed after BNDI submitted its Petition on September 13, 2007: *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482 (2007) and *Ambach v. French*, 141 Wn. App. 782, 173 P.3d 941 (2007).

Ramos and *Ambach* support BNDI’s argument that Division Two of the Washington State Court of Appeals erred when it held that Respondent Mystie “Patsy” Michael (“Michael”) has a sustainable claim against BNDI under the Consumer Protection Act (CPA), RCW 19.86 *et seq.*, as Michael’s claim against BNDI, as presented, is merely a personal injury claim for health care malpractice. The record does not contain any evidence that Dr. Mosquera-Lacy’s (“Dr. Lacy”) use of xenograft in a necessary and successful periodontal procedure was related to an entrepreneurial aspect of Dr. Lacy’s profession. In addition, Michael has not asserted, and the record contains no evidence of, injury to her business or property. Michael’s alleged damages from the use of the xenograft, as described by her, are solely for mental distress, a classic form of personal injury.

The trial court properly dismissed Michael’s CPA claim against BNDI. The Court of Appeals’ decision should be reversed.

II. ARGUMENT

A. Claims for Professional Malpractice Are Not Recoverable Under the CPA.

Division 1 recently discussed the rule that claims for professional negligence are exempt from the CPA because they do not fall within the sphere of trade or commerce. *Ramos*, 141 Wn. App. at 20. There, as here, the plaintiffs' claims attacked the competence of, or strategies adopted by, a professional. There, unlike here, the appellate court properly held that the CPA did not apply.

In *Ramos*, the plaintiffs purchased a home with a noticeably sagging ceiling. The lender's chosen appraiser did not report any apparent defects inside or outside the home. Several days after the plaintiffs moved in, the roof began leaking, resulting in water damage to the roof and ceiling. *Id.* at 15-16. The plaintiffs asserted CPA and other claims against the appraiser, alleging that she committed an unfair and deceptive act by failing to include major defects in her report to keep the paperwork "clean" on the residence and cause the plaintiffs to enter into the purchase and sale agreement. *Id.* at 20.

The court dismissed the plaintiffs' CPA claims on summary judgment. "Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act." *Id.* at 20 (citing *Short v. Demopolis*, 103

Wn.2d 52, 61-62, 691 P.2d 163 (1984)). *Ramos* held that only entrepreneurial aspects of a profession, such as how the cost of services is determined, billed, and collected and the way a professional obtains, retains, and dismisses clients, are subject to the CPA. *Id.*

As discussed in BNDI's Petition at pages 13-16, Michael's claim, if any, is for health care malpractice, not for a violation of the CPA.

Michael attacks Dr. Lacy's exercise of professional judgment in deciding to use a small amount of xenograft to complete the grafting procedure.

(CP 21.) There is no evidence in the record that Dr. Lacy's use of xenograft, as opposed to allograft, involved an entrepreneurial aspect of her profession.

In fact, the record is silent as to BNDI's (or Dr. Lacy's) advertising, marketing, and billing practices. There is no evidence at all of "how the cost of services is determined, billed, and collected and the way a professional obtains, retains, and dismisses clients" with regard to Dr. Lacy, or BNDI.

There is similarly no evidence in the record that Dr. Lacy used xenograft in an effort to increase profits or the volume of patients. There is no evidence that Dr. Lacy, or BNDI, "sold" or marketed allograft grafting procedures and then "downgraded" to xenograft grafting procedures. Indeed, there is no evidence that xenograft is inferior to

allograft in any way. This case falls squarely within the *Ramos* decision, as there is a complete lack of evidence that Dr. Lacy or BNDI economically benefited from the use of the xenograft instead of allograft, as well as a complete lack of evidence as to any entrepreneurial aspect of either Dr. Lacy's or BNDI's operation.

The lack of evidence regarding entrepreneurial activity also distinguishes the case at bar from the recent Division III decision in *Ambach*, 141 Wn. App. 782. In *Ambach*, the plaintiff's shoulder became infected after her doctor performed surgery, and had to be fused. She asserted a CPA claim, alleging that her doctor had a history of making fictitious diagnoses and performing medically unnecessary surgeries for financial gain. In support of the plaintiff's claim, her medical expert stated that the shoulder surgery "was not medically indicated or justified." *Id.* at 786.

The court correctly held that a patient cannot maintain a CPA claim against a medical professional where the patient is injured as a result of a medical provider's negligence. *Id.* at 787-88. However, the court also correctly held that the plaintiff's allegations that the surgery was unnecessary and performed for financial gain implicated the entrepreneurial aspects of her doctor's profession. That is, there was evidence raising a genuine issue of material fact both as to whether the

surgery was performed negligently and as to whether the surgery was performed simply for financial gain.¹ *Id* at 788.

Ambach does not support Michael's claim against BNDI. It is undisputed that Michael's grafting procedure was both necessary and successful. (CP 30, 32, 89.) As noted above, there is no evidence that Dr. Lacy's use of xenograft was motivated by financial gain on the part of either Dr. Lacy or BNDI. Because Michael failed to present any evidence that Dr. Lacy's decision to use xenograft was related to an entrepreneurial aspect of her profession, the trial court properly dismissed Michael's CPA claim against BNDI.

B. Michael's Personal Injury Claim Is Not Recoverable Under the CPA.

The *Ambach* court also considered whether the plaintiff met the explicit requirement of the CPA, RCW 19.86.090, that there be injury to "business or property." *Ambach*, 141 Wn. App. at 789-90. While injury to business or property excludes personal injuries, such as damages for mental pain and suffering, the plaintiff in *Ambach* established injury to business or property because she incurred an economic loss from paying

¹ The hospital where the doctor worked (the analogous party to BNDI) was also dismissed on summary judgment, and then voluntarily dismissed from the appeal. *Ambach*, 141 Wn. App. at 785.

for an unnecessary surgery which cost more than continued conservative treatment. *Id.* at 789-90.

Here, as discussed in BNDI's Petition at pages 7-12, Michael—in characterizing her own damages—alleged only traditional mental distress damages that are not compensable under the CPA. Unlike the plaintiff in *Ambach*, Michael did not present any evidence that she suffered an economic loss due to the successful grafting with xenograft. (CP 30, 32, 89.) She does not challenge the quality of the xenograft. (CP 80.) There is no evidence that xenograft will require repair or replacement that allograft would not, or that xenograft is worth less than or inferior to allograft. In fact, the only reference in the record to injury from the use of the xenograft is that Michael is disgusted and anxious because of its use, a classic form of personal injury. (CP 37.)

The *Ambach* court held that pecuniary losses caused by injury such as mental distress, embarrassment, and inconvenience constitute injury to business or property. *Ambach*, 141 Wn. App. at 789. *Ambach* is difficult to reconcile in this regard with prior decisions holding that allegations of injury to “pseudo-property,” such as medical bills and reimbursement for lost wages arising from personal injuries, are not injuries to business or property. See, e.g., *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989); *Hiner v. Bridgestone/Firestone, Inc.*, 91

Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev'd on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999). To the extent that *Ambach* holds pecuniary damages arising out of personal injuries are injuries to business or property, it is a deviation from precedent and an incorrect statement of law.

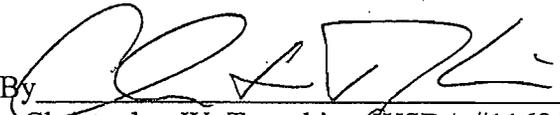
That issue need not detain the Court, however, as the record contains no evidence of any pecuniary losses as a result of the use of xenograft. Therefore, even if *Ambach* is correct in this regard, it does not provide support for Michael's claim, and the Court of Appeals erred.

III. CONCLUSION

Washington courts have consistently held that claims for professional negligence and for personal injury—as asserted by Michael—are not compensable under the CPA. The Court of Appeals erred in holding that Michael presented evidence sufficient to maintain a CPA claim against BNDI. For the reasons set forth in BNDI's Petition for Review and in this Supplemental Brief, BNDI asks this Court to reverse the Court of Appeals' decision.

Respectfully submitted this 3rd day of July, 2008.

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