

No. 81107-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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THERESA AMBACH,

Plaintiff/Respondent,

vs.

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

Defendants/Petitioners.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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George M. Ahrend  
WSBA #25160  
P.O. Box 2149  
Moses Lake, WA 98837  
(509) 764-8426

Bryan P. Harnetiaux  
WSBA #5169  
517 E. 17<sup>th</sup> Avenue  
Spokane, WA 99203  
(509) 624-3890

On Behalf of  
Washington State Association for Justice Foundation

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in proper interpretation and application of Ch. 7.70 RCW and the Consumer Protection Act (CPA), Ch. 19.86 RCW.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves the interface of two statutory schemes, Ch. 7.70 RCW and the CPA, and interpretation of the “injury” element in private CPA actions. Theresa Ambach (Ambach) brought an action against Dr. H. Graeme French (French) and others for professional negligence under Ch. 7.70 RCW and for deceptive acts and practices under the CPA. The underlying facts are drawn from the Court of Appeals opinion and briefing of the parties. *See Ambach v. French*, 141 Wn.App. 782, 173 P.3d 941 (2007), *review granted*, 164 Wn.2d 1007 (2008); Ambach Br. at 2-8; French Br. at 2-4; French Pet. for Rev. at 5-6 & 13-14;

Ambach Ans. to Pet. for Rev. at 1-3; French Supp. Br. at 4-6; Ambach Supp. Br. at 1.

For purposes of this brief, the following facts are relevant: Ambach consulted French for neck pain and headaches and ultimately agreed to shoulder surgery. The surgical site became infected and Ambach's shoulder had to be fused. In addition to claiming professional negligence under Ch. 7.70 RCW, Ambach claimed French was liable under the CPA because he deceived her into undergoing a medically unnecessary surgery for his own financial gain.

Before trial French moved for summary judgment on the CPA claim, arguing that Ambach could not establish an injury to business or property, one of the elements required to establish CPA liability under Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). See Ambach, 141 Wn.App. at 786-87. For purposes of summary judgment, French conceded that the remaining elements of CPA liability are met. Ambach argued that the cost of the unnecessary surgery constituted injury under the CPA. French countered that such economic loss was mere personal injury damages. The superior court granted French's motion and dismissed the CPA claim.

Ambach appealed dismissal of the CPA claim to the Court of Appeals, which reversed. The court held that the cost of unnecessary surgery qualified as an injury to business or property, and that Ambach could proceed with her CPA action. The court concluded that Ambach's

claim related to the “entrepreneurial aspects” of French’s medical practice, and that the cost of unnecessary surgery was sufficient under the CPA “to satisfy the damages requirement.” Ambach, 141 Wn.App. at 790.

French sought review in this Court on whether “personal injury damages such as medical expenses satisfy the CPA’s ‘injury to...business or property’ requirement?” French Pet. for Rev. at 5. In response, Ambach contended that the Court of Appeals had correctly distinguished the CPA claim from a professional negligence claim, and properly found the cost of unnecessary surgery qualified as injury or damage to property under the CPA. See Ambach Ans. to Pet. for Rev. at 5-7.

In his supplemental briefing, French argued that Ch. 7.70 RCW is the exclusive remedy for civil actions against health care providers, and that it does not contemplate or allow for CPA liability. See French Supp. Br. at 1, 11-13. In response, Ambach moved to strike portions of the supplemental brief raising this issue. See Ambach Motion to Strike at 1-3. French countered that the exclusivity issue is a natural consequence of the Court of Appeals’ analysis below. See French Ans. in Opp. to Motion to Strike at 7-8. The Court has not ruled upon the motion to strike.<sup>1</sup>

### III. ISSUES PRESENTED

1. Whether Ch. 7.70 RCW is the exclusive remedy against health care providers, foreclosing a private CPA action by a patient against a physician?
2. If a private CPA action may be pursued against a health care provider, whether the cost of an unnecessary surgery satisfies the

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<sup>1</sup> In the absence of a ruling, it is assumed for purposes of this brief that this exclusivity issue may be addressed by the Court.

element of injury to “business or property” required for a prima facie case of liability under the CPA?

#### IV. SUMMARY OF ARGUMENT

Ch. 7.70 RCW and the CPA serve separate and distinct purposes, remedy separate and distinct injuries, and are entirely compatible. Ch. 7.70 RCW does not expressly or impliedly foreclose a private CPA claim against a health care provider, when properly grounded in the Hangman Ridge elements for a prima facie case of liability. Any contrary interpretation would frustrate the purposes of the CPA as to health care providers.

Under Hangman Ridge, the injury to business or property element bears on proof of CPA *liability* rather than *damages*. Injury involves an identifiable harm to the consumer causally linked to an unfair or deceptive act or practice, perhaps consisting of something as simple as inconvenience to the consumer. Injury may also consist of evidence of a monetary loss cognizable as actual damages under the CPA, such as the cost of unnecessary surgery causally linked to an unfair or deceptive act or practice.

#### V. ARGUMENT

Ambach contends that the cost of surgery causally linked to French’s entrepreneurially-based deceptive acts constitutes injury to “business or property” under the CPA. See Ambach Supp. Br. at 5-7,

9-10.<sup>2</sup> French contends the cost of unnecessary surgery is not injury to “business or property” because: (1) Ch. 7.70 RCW limits recovery to those claims codified in the chapter, which do not include CPA liability, see French Supp. at 11-13; and (2) the cost of unnecessary surgery is a specie of personal injury damages not recoverable under the CPA, see id. at 13.<sup>3</sup> As this appeal involves the interplay between the CPA and Ch. 7.70 RCW, a brief overview of each statutory scheme is necessary.

**A. Overview of the Consumer Protection Act, and Claims Against Health Care Providers Under Ch. 7.70 RCW.**

In 1961, the Washington Legislature enacted the CPA in order to protect the public against unfair or deceptive acts or practices, and to foster fair and honest competition. See 1961 Laws Ch. 216 (codified at Ch. 19.86 RCW); Hangman Ridge, 105 Wn.2d at 783-84. The act provides for few exemptions, and requires liberal construction to further its purposes. See RCW 19.86.170 (listing exemptions); RCW 19.86.920 (describing purposes and mandating liberal construction).

While initially the CPA was only enforceable by the Attorney General, in 1970 it was amended to provide consumers with a private

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<sup>2</sup> At times, Ambach describes the issue in terms of whether the cost of surgery under the CPA is a proper element of damages, treating injury and damages interchangeably. See Ambach Supp. Br. at 1, 9-10. French does the same thing. See French Supp. Br. at 3-4. The Court of Appeals appears to have done this, too. See Ambach, 141 Wn.App. at 790 (concluding “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”).

<sup>3</sup> French also argues that the Court of Appeals erred in finding a basis for CPA liability because French was motivated by mere financial gain, whether deceptive or not. See French Supp. Br. at 6-11. To the contrary, the Court of Appeals assumed for purposes of discussion of the injury element that all other elements of Hangman Ridge had been met. See Ambach, 141 Wn.App. at 789. Consequently, this argument is not addressed in this brief.

cause of action. See 1970 Laws, Ex. Sess., Ch. 26 §2 (codified at RCW 19.86.090).<sup>4</sup> This provision is designed to encourage individual citizens to bring suit to enforce the CPA. See Hangman Ridge, 105 Wn.2d at 784. Any person who is injured in his or her business or property by unfair or deceptive acts or practices in trade or commerce may recover actual damages, treble damages, attorney fees and costs, and, when appropriate, obtain injunctive relief. See RCW 19.86.090.

In Hangman Ridge, this Court recognized that considerable confusion existed regarding the proof requirements for a private CPA action. See 105 Wn.2d at 783-84. The case involved a request for injunctive relief; attorney fees, witness fees and costs—no claim for “actual damages” was included. See id. at 780, 783, 794-95. To resolve the confusion surrounding the statutory elements for CPA *liability*, the Court held:

[T]o prevail in a private CPA action and therefore be entitled to attorney fees, a plaintiff must establish five distinct elements: (1) 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; (5) causation.

Id. at 780.

Under Hangman Ridge, the fourth element, injury to business or property, requires proof of “harm,” which “need not be great.” Id. at 792. The Court has explained that there is a difference between “injury” and “damages,” holding that *for liability purposes* injury may be established

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<sup>4</sup> The current versions of RCW 19.86.020, .090, .170 & .920 are reproduced in the Appendix.

without proof of specific monetary damages. See Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); Mason v. Mortgage America, Inc., 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

Of particular importance here, private CPA actions may be pursued against members of learned professions, such as lawyers and physicians, when the unfair or deceptive act or practice relates to the “entrepreneurial aspects” of the profession. See Short v. Demopolis, 103 Wn.2d 57, 691 P.2d 163 (1994) (lead & concurring opinions) (lawyers); Michael v. Mosquera-Lacy, 165 Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 281064 (2009) (periodontist). Entrepreneurial aspects involve billing practices, obtaining or retaining clients/patients, and other conduct involving “trade or commerce.” See Short, 103 Wn.2d at 61; Michael, 2009 WL 281064 at \*3. Claims focusing on the standards of practice of the particular profession (i.e., professional negligence) fall outside the ambit of the CPA, as not involving “trade or commerce.” See Short at 61. In a somewhat similar vein, personal injury actions generally fall outside of the CPA, although here it is said that the type of non-economic damages recoverable do not involve injury to “business or property.” See generally Washington Phys. Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 318, 858 P.2d 1054 (1993).

These legal precepts regarding private CPA actions intersect in this case, because Ambach seeks a CPA remedy against a health care provider whose civil liability is also subject to Ch. 7.70 RCW.

In 1976, the Washington Legislature passed an act modifying substantive and procedural aspects of civil actions against health care providers. See 1975-76 Laws, 2nd Ex. Sess., Ch. 56. These provisions are now codified primarily in Ch. 7.70 RCW, relating to “Actions for Injuries Resulting from Health Care.” RCW 7.70.010 sets forth the legislative intent to modify existing law regarding health care providers:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects *of all civil actions and causes of action*, whether based on tort, contract, or otherwise, for damages for injury occurring *as a result of health care* which is provided after June 25, 1976.

(Emphasis added.) To this end, RCW 7.70.030, .040 and .050 establish the proof requirements for negligence and informed consent claims resulting from “health care.”<sup>5</sup> No statute in Ch. 7.70 RCW defines the phrase “health care,” nor explains what is meant by “as a result of health care,” or similar phraseology. Nor does Ch. 7.70 RCW indicate whether the Legislature intended that private CPA actions against health care providers would be foreclosed by enactment of Ch. 7.70 RCW. Compare Ch. 7.70 RCW with Washington Product Liability Act, Ch. 7.72 RCW & RCW 7.72.010(4) (excluding CPA claims from the definition of “product liability claim”), and Uniform Health Care Information Act, Ch. 70.02 RCW & RCW 70.02.170(4) (precluding recovery under the CPA for violations of the act).

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<sup>5</sup> The current versions of RCW 7.70.030-.050 are reproduced in the Appendix.

This Court has recently defined “health care” under Ch. 7.70 RCW as involving a physician’s use of skills he or she has been taught in examining, diagnosing, treating or caring for a patient. See Berger v. Sonneland, 144 Wn.2d 91, 109, 26 P.3d 257 (2001) (concluding disclosure of confidential information involved health care because it related to diagnosis and treatment); see also Michael, 2009 WL 281064 at \*3-\*4 (implicitly recognizing periodontist’s selection of materials for use in bone graft procedure involved “health care,” rather than the entrepreneurial aspects of practice, thereby denying CPA recovery). In Michael, the Court distinguished Wright v. Jeckle, 104 Wn.App. 478, 16 P.3d 1268, *review denied*, 144 Wn.2d 1011 (2001), which held that a CPA claim fell outside of Ch. 7.70 RCW because the physician’s sale of diet pills was not “health care” under the chapter. See Michael at \*3.

Against this backdrop, the Court is confronted with French’s arguments that (1) no CPA claim may be pursued here because any deceptive acts or practices necessarily result from health care; and (2) damages that may be recoverable under Ch. 7.70 RCW, such as medical costs, cannot also qualify as an injury to business or property under the CPA.

**B. Ch. 7.70 RCW is Not the Exclusive Remedy Against Health Care Providers, and Does Not Foreclose a Private CPA Action Based Upon the Entrepreneurial Aspects of the Provider’s Practice.**

Legislative enactments that serve separate and distinct purposes and remedy separate and distinct injuries should both be given full effect.

Reese v. Sears, Roebuck & Co., 107 Wn.2d 563, 568, 731 P.2d 497 (1987), *overruled on other grounds*, Phillips v. Seattle, 111 Wn.2d 903, 766 P.2d 1099 (1989); Goodman v. The Boeing Co., 127 Wn.2d 401, 404-06, 899 P.2d 1265 (1995). This is true even if one of the enactments purports to be “exclusive.” Thus, in Reese this Court held that the exclusive remedy provisions of the Industrial Insurance Act (IIA), Title 51 RCW, did not prevent injured workers from bringing disability discrimination claims under the Washington Law Against Discrimination (LAD), Ch. 49.60 RCW, even though the disabilities arose from a workplace injury. See 107 Wn.2d at 571-72. Subsequently, in Goodman, the Court clarified that the worker could bring claims for aggravation of a prior workplace injury/disability based on a separate violation of the LAD. See 127 Wn.2d at 405.<sup>6</sup>

As an initial matter, it should be noted that French’s claim of “exclusivity” for Ch. 7.70 RCW is far weaker than that made in Reese and Goodman. In these cases, the IIA generally *abolishes* the jurisdiction of the courts over workplace injuries. See RCW 51.04.010; Reese, 107 Wn.2d at 568-69. In this case, the domain of Ch. 7.70 RCW is limited to “health care.” See RCW 7.70.010 & Appendix. This Court has recognized, as discussed more fully below, that CPA claims against health care providers, by definition, do not result from “health care.” See infra at

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<sup>6</sup> In finding the IIA and LAD both enforceable, the Court also addressed the issue of overlapping damages by requiring an offset of IIA compensation in the LAD action “wherever necessary to prevent double recovery.” Reese, 107 Wn.2d at 574; accord Goodman, 127 Wn.2d at 405.

12-17. The Court has also recognized, without expressly holding, that Ch. 7.70 RCW is not exclusive, even with respect to claims that *do* result from health care. See Berger, 144 Wn.2d at 108-10 (suggesting claims for unauthorized disclosure of confidential information can proceed under either Ch. 7.70 RCW or the Uniform Health Care Information Act, Ch. 70.02 RCW).

In any event, Ch. 7.70 RCW and the CPA serve separate and distinct purposes within the meaning of Reese and Goodman. The purposes of the IIA and LAD were discerned in those cases from legislative declarations. Reese, 107 Wn.2d at 568-69 (quoting RCW 51.04.010 & RCW 49.60.010). Separate and distinct purposes are also discernible from the legislatively declared purposes of Ch. 7.70 RCW and the CPA. The purpose of Ch. 7.70 RCW is to “modify certain substantive and procedural aspects” of the law of professional negligence, RCW 7.70.010; whereas the purpose of the CPA is “to protect the public and foster fair and honest competition,” RCW 19.86.920.

Moreover, Ch. 7.70 RCW and the CPA remedy separate and distinct injuries within the meaning of Reese and Goodman. The focus of the injury analysis is on both the *cause* and the *nature* of the injury. Reese at 574; Goodman at 405. The “injury” remedied by the IIA is causally related to the “failure to provide a safe and healthful workplace.” Goodman at 406. The injury remedied by the LAD claim is causally related to “violation of the right to be free from discrimination.” Id. at 405.

The teaching of Reese and Goodman is that the focus of the injury analysis cannot be on the nature of the injury in isolation from its cause, because the nature of the injury may appear to be the same in a particular case. For example, Goodman recognizes that the nature of the injury may be “physical” for both the IIA and LAD claims. 127 Wn.2d at 405-06.<sup>7</sup>

Considered in light of Reese and Goodman, the injuries remedied by Ch. 7.70 RCW consist of those causally related to health care. Cf. Estate of Sly v. Linville, 75 Wn.App. 431, 439-40, 878 P.2d 1241 (1994) (emphasizing that claim under Ch. 7.70 RCW must “result from” health care). In contrast, the injuries remedied by the CPA consist of those causally related to unfair or deceptive acts or practices in trade or commerce. Cf. Hangman Ridge, 105 Wn.2d at 780 (requiring causal link between injury and unfair or deceptive act or practice).

Because Ch. 7.70 RCW and the CPA serve separate and distinct purposes and remedy separate and distinct injuries, there is no conflict that prevents both statutory schemes from being given full effect. Even if there were a seeming conflict between Ch. 7.70 RCW and the CPA, they should be harmonized. See Reese, 107 Wn.2d at 572-73.

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<sup>7</sup> Reese and Goodman also discuss the timing of the injury, as well as the cause and nature of the injury. See Reese, 107 Wn.2d at 405; Goodman, 127 Wn.2d at 405. The timing analysis may be specific to the context of Reese and Goodman because the workplace injuries that led to the disabilities occurred before they served as the basis for failure-to-accommodate discrimination claims. Thus, Reese and Goodman noted that IIA and LAD injuries “must arise at different times in the employee’s work history.” Goodman, 127 Wn.2d at 405 (quoting Reese). In this way, timing seems to be related to causation.

Chapter 7.70 RCW and the CPA can readily be harmonized because health care does not include everything a physician does, nor does it include everything that occurs within a physician/patient relationship. For example, in Sly, 75 Wn.App. at 440, the Court of Appeals held that misrepresentations made by a physician to his patient about another physician's competency in treating the patient were not "health care" within the meaning of RCW 7.70.010. The physician's "breach of duty did not arise during the process in which he was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for [the patient], but arose during his discussions with [the patient] about [the other physician]." Sly, 75 Wn.App. at 440.

Similarly, CPA claims do not result from "health care" simply because they involve a health care provider. CPA claims must arise from trade or commerce. Hangman Ridge, 105 Wn.2d at 780. As defined by the CPA, trade and commerce include "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). This definition limits the reach of the CPA to entrepreneurial aspects of services rendered by health care providers. See Michael, 2009 WL 281064 at \*3.

For CPA purposes, the entrepreneurial aspects of health care professions include "billing and obtaining and retaining patients," as well as other acts "to increase profits or the number of patients." Id. at \*3-\*4. The "[e]ntrepreneurial aspects do not include a doctor's skills in

examining, diagnosing, treating or caring for a patient,” nor “the substantive quality of services provided.” Id. at \*3. As a result, “mere negligence claims” which are “directed at the competence of and strategies employed by” a health care provider “are exempt from the CPA.” Id.

The distinction under the CPA between entrepreneurial aspects and substantive quality of the services provided corresponds to the distinction courts have drawn under Ch. 7.70 RCW between health care and non-health care. By definition, in a private CPA action against a physician, the entrepreneurial aspects of the services provided are not health care, so as to trigger application of Ch. 7.70 RCW. See Michael, 2009 WL 281064 at \*3 (stating entrepreneurial aspects do not include a doctor’s skills in examining, diagnosing, treating or caring for patients).

Under the foregoing analysis, health care providers are properly subject to CPA claims grounded in the entrepreneurial aspects of their profession. Whether these entrepreneurial aspects are implicated in a given case is a question of fact. See Eriks v. Denver, 118 Wn.2d 451, 465, 824 P.2d 1207 (1992); Wright v. Jeckle, 104 Wn.App. 478, 482, 16 P.3d 1268 (2001) (citing Eriks). In some instances, a particular type of conduct may be inherently entrepreneurial, posing no conceptual overlap with Ch. 7.70 RCW. For example, in Wright, *supra*, cited with approval in Michael, 2009 WL 281064 at \*3, the Court of Appeals held that a physician was subject to potential CPA liability because he was in “the business or selling diet drugs” rather than “practicing medicine.”

However, the entrepreneurial aspects of professional conduct may be more subtle in some instances, grounded in the health care provider's *motive* for recommending or performing services. Thus, in Michael, this Court held that the CPA was not implicated because there was no evidence that the health care provider's manner of performing oral surgery—implanting part animal bone in the patient's jaw—was influenced by any entrepreneurial motive or “was used to increase profits or the number of patients.” 2009 WL 281064 at \*4. If an entrepreneurial motive had been found, the clear implication is that the Court would have concluded that the CPA applied. See also Benoy v. Simons, 66 Wn.App. 56, 65, 831 P.2d 167 (holding CPA not implicated in the absence of evidence that the physician's decision to place his patient on a ventilator was “influenced by any entrepreneurial motives,” and recognizing the patient's ability to maintain a CPA claim for “dishonest and unfair practices motivated by financial gain”), *review denied*, 120 Wn.2d 1014 (1992).

If, as alleged, French performed surgery for entrepreneurial motives, this conduct implicates the CPA. In Quimby v. Fine, 45 Wn.App. 175, 181-82, 724 P.2d 403 (1986), *review denied*, 107 Wn.2d 1032 (1987), cited with approval in Michael, 2009 WL 281064 at \*3, the Court of Appeals held that a physician's decision to perform one type of procedure instead of another implicated the CPA as long as the patient could produce evidence that the procedure “related to some entrepreneurial aspect” of the

physician's practice. The court remanded the case for discovery to determine whether the doctor promoted the procedure "to increase profits and the volume of patients." Id. Quimby controls here if there is injury to "business or property," because French has conceded the remaining elements of a CPA claim for summary judgment purposes.

Without the CPA, health care providers will have immunity from liability for unfair or deceptive acts or practices as to the entrepreneurial aspects of their professions. Ch. 7.70 RCW does not contain any mechanism to address such unfair or deceptive acts or practices in billing, obtaining and retaining patients, or in connection with other conduct motivated by entrepreneurial concerns. As recognized by the three-Justice lead opinion in Short, which applied the CPA to lawyers:

Current remedies available to the victims of professional malpractice or misconduct have shortcomings. Most actions are expensive and difficult to prove. The injured client can take little comfort from the fact that the wrongdoer has been reprimanded or suspended or stripped of the right to practice his [or her] profession. In some actions, only the prospects of attorney fees and potential treble damages provide a complete remedy. The CPA should be available as an efficient and effective method of filling the gaps left vacant by the existing common law[.]

103 Wn.2d at 62 (citations and quotations omitted); see Michael, 2009 WL 281064 at \*3 (following Short with respect to health care providers). Short and Michael confirm the separate and distinct purposes served and injuries remedied by the CPA, as compared to Ch. 7.70 RCW, and highlight the importance of preserving the availability of CPA claims

against health care providers. Giving Ch. 7.70 RCW exclusive effect would completely frustrate the purposes of the CPA.

**C. The Cost of Unnecessary Surgery May Constitute Injury to “Business or Property” Under the CPA, Even Though it May Also Qualify as Economic Damages Under a Ch. 7.70 RCW Professional Negligence Claim.**

Injury to business or property is considered an element of a prima facie case of *liability* under the CPA rather as bearing on *damages*. See supra § A. RCW 19.86.090 uses the term “‘injured’ rather than suffering damages.” Nordstrom, 107 Wn.2d at 740. “This distinction makes it clear that no monetary damages need be proven” to establish injury in a private CPA action. Id.; Mason, 114 Wn.2d at 855. This “clearly implies” and “bolsters the conclusion” that “injury without specific monetary damages will suffice.” Nordstrom at 740; Mason at 854. The landmark Hangman Ridge case, which formalized the elements of a CPA claim, did not involve a claim for damages. See 105 Wn.2d at 780, 788, 794-95.

The scope of the CPA injury element is “quite broad.” Keyes v. Bollinger, 31 Wn.App. 286, 296, 640 P.2d 1077 (1982). CPA injury does not have to be monetary or even “quantifiable.” Mason at 854. It includes such non-monetary, non-quantifiable injuries as loss of “goodwill,” Nordstrom at 741; “loss of reputation,” Fisons, 122 Wn.2d at 318; and “inconvenience” resulting from temporary deprivation of the use or enjoyment of property, Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wn.App. 90, 605 P.2d 1275 (1979); Mason at 854 & n.19 (citing Tallmadge with approval). However, as Mason also explains, “[t]he injury

element will be met if the consumer's property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." 114 Wn.2d at 854. See generally 6A, Wash. Prac., Washington Pattern Jury Instructions – Civil, WPI 310.06 (5th ed. 2005) (setting forth pattern instruction regarding “injury” under CPA).<sup>8</sup> The cost of an unnecessary surgery unquestionably diminishes the patient's money, and thus meets the injury element. The cost of an unnecessary surgery would also qualify as “actual damages,” once CPA liability is proven.

Because CPA injury is limited to “business or property,” it excludes personal injuries such as physical or mental pain and suffering. See Fisons at 318; Leingang v. Pierce County Med. Bur., Inc., 131 Wn.2d 133, 930 P.2d 288 (1997). French attempts to expand this limitation on the nature of CPA injury into a much broader notion that injury cannot be established under the CPA if the same monetary loss could conceivably be recovered as damages in a professional negligence claim. See French Pet. for Rev. at 5. This focus is at odds with the injury inquiry under Hangman Ridge, Nordstrom and Mason, and obscures the difference between CPA and non-CPA injury. It should make no difference that the same kinds of damages can be “actual damages” in a private CPA action and also constitute economic damages in a professional negligence claim under Ch. 7.70 RCW.

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<sup>8</sup> The current version of WPI 310.06 with the Comment, is reproduced in the Appendix.

Ultimately, the distinction between CPA and non-CPA injury hinges on causation rather than the nature of the damages flowing therefrom. Hangman Ridge requires a causal link between the injury and the unfair or deceptive act or practice in order to establish CPA liability. See 105 Wn.2d at 793; see also Mason at 854. The existence of this causal link is a question of fact. Indoor Billboard/Wash., Inc., v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 80-85, 170 P.3d 10 (2007):

If the injury is caused solely by professional negligence (i.e., from the competence of or strategies employed by a health care provider, see Michael, 2009 WL 281064 at \*3), then the injury is not cognizable under the CPA even if it involves monetary loss. See 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, 959 P.2d 1158 (1998), *reversed on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999). A professional-negligence plaintiff cannot simply recast “personal injury damages into a pseudo-property structure, i.e., special damages such as hospital, physician, and rehabilitative expenses.” Stevens, 54 Wn.App. at 370.

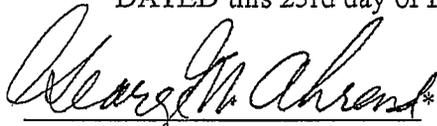
However, if the injury to business or property is “causally related to an unfair or deceptive act or practice” in the entrepreneurial aspects of the provider’s practice—including health care advice and treatment motivated by entrepreneurial concerns—then the injury is cognizable under the CPA. See Mason at 854. In this case, causation, along with the

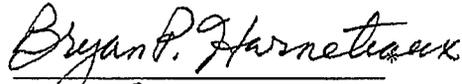
other elements of a private CPA action, has been conceded for purposes of the summary judgment motion that is the subject of the appeal. As a result, the cost of an unnecessary surgery is a cognizable injury, and the private CPA action should be allowed to proceed.

## VI. CONCLUSION

The Court should adopt the analysis set forth in this brief and resolve this appeal accordingly.

DATED this 23rd day of February, 2009.

  
GEORGE M. AHREND

  
BRYAN P. HARNETIAUX

On behalf of WSAJ Foundation

By:   
*per authority*

\*Brief transmitted for filing by email; signed original retained by counsel.

## Appendix

### RCW 19.86.020

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[1961 c 216 § 2.]

### RCW 19.86.090

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed the amount specified in RCW 3.66.020. For the purpose of this section, "person" shall include the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in the superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

### RCW 19.86.170

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and

transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020: PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW: PROVIDED, FURTHER, That this chapter shall apply to actions and transactions in connection with the disposition of human remains.

RCW 9A.20.010(2) shall not be applicable to the terms of this chapter and no penalty or remedy shall result from a violation of this chapter except as expressly provided herein.

[1977 c 49 § 1; 1974 ex.s. c 158 § 1; 1967 c 147 § 1; 1961 c 216 § 17.]

#### **RCW 19.86.920**

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

[1985 c 401 § 1; 1983 c 288 § 4; 1983 c 3 § 25; 1961 c 216 § 20.]

### **RCW 7.70.030**

No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:

- (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
- (2) That a health care provider promised the patient or his representative that the injury suffered would not occur;
- (3) That injury resulted from health care to which the patient or his representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

[1975-'76 2nd ex.s. c 56 § 8.]

### **RCW 7.70.040**

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
- (2) Such failure was a proximate cause of the injury complained of.

[1983 c 149 § 2; 1975-'76 2nd ex.s. c 56 § 9.]

### **RCW 7.70.050**

- (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his representatives against a health care provider:

- (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
  - (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
  - (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
  - (d) That the treatment in question proximately caused injury to the patient.
- (2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his representative would attach significance to it deciding whether or not to submit to the proposed treatment.
- (3) Material facts under the provisions of this section which must be established by expert testimony shall be either:
- (a) The nature and character of the treatment proposed and administered;
  - (b) The anticipated results of the treatment proposed and administered;
  - (c) The recognized possible alternative forms of treatment; or
  - (d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.
- (4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his consent to required treatment will be implied.

[1975-'76 2nd ex.s. c 56 § 10.]

#### **WPI 310.06 Injury in Consumer Protection Act Claim**

\_\_\_\_\_ has suffered an "injury" if *[his] [her] [its]* business or property has been injured to any degree. Under the Consumer Protection Act, \_\_\_\_\_ has the burden of proving that *[he] [she] [it]* has been

injured, but no monetary amount need be proved and proof of any injury is sufficient, even if expenses or losses caused by the violation are minimal.

*[Injuries to business or property do not include physical injury to a person's body, or pain and suffering.]*

*[Injuries to business or property include financial loss.]*

#### **Note on Use**

This is an optional instruction to be used when the jury would benefit from a supplemental instruction on the definition of "injury to business or property." Add the bracketed language of the second and third paragraphs if appropriate and necessary.

#### **Comment**

In Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 792, 719 P.2d 531 (1986), the court discussed the nature of injury to "business or property." See RCW 19.86.020. Non-quantifiable injuries such as loss of good will are sufficient to establish the required injury; even minimal damages are sufficient. Mason v. Mortgage America, Inc., 114 Wn.2d 842, 792 P.2d 142 (1990) (injury as result of loss of use of property); Sorrel v. Eagle Healthcare, 110 Wn.App. 290, 298, 38 P.3d 1024 (2002) (injury by delay in refund of money).

Pain and suffering are "personal injuries" as opposed to injuries to "business or property." Personal injuries are not compensable damages under the Consumer Protection Act. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 318, 858 P.2d 1054 (1993); White River Estates v. Hiltbrunner, 134 Wn.2d 761, 765 n.1, 953 P.2d 796 (1998).

The court has the discretion to treble the plaintiff's actual damages in an amount up to \$10,000 per violation. RCW 19.86.090.

*[Current as of April 2004]*