

No. 81107-5

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiff/Respondents,

vs.

H. GRAEME FRENCH, M.D. and JANE DOE FRENCH, individually
and the marital community composed thereof; THREE FORKS
ORTHOPAEDICS, P.C. et al.,

Defendants/Appellants.

APPELLANTS H. GRAEME FRENCH, M.D.,
AND THREE FORKS ORTHOPAEDICS, P.C.'s ANSWER IN
OPPOSITION TO RESPONDENT'S MOTION TO STRIKE

REED & GIESA, P.S.
D. Roger Reed, WSBA #662
222 N. Wall St., Ste. 410
Spokane, WA 992901
(509) 838-8341
(509) 838-6341 fax

STEPHEN HASKELL LAW OFFICES, PLLC
Stephen Haskell, WSBA#7832
222 N. Wall St., Ste. 402
Spokane, WA 99201
(509) 443-9909
(509) 455-5114 fax

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 DEC 24 AM 11:39
BY RONALD R. CARPENTER
CLERK

FILED AS
ATTACHMENT TO EMAIL

1. Identity of Appellants / Answering Parties

Appellants / Answering Parties are H. Graeme French, M.D., and Three forks Orthopaedics, P.C. (collectively referred to herein as “Dr. French”).

2. Procedural History

At the end of March 2006, pursuant to CR 54(b), the trial court entered final judgments on Defendants Dr. French and Whitman Hospital’s CR 11 sanctions motions relating to Plaintiffs’ assertion of Consumer Protection Act (RCW 19.86 *et seq.*) claims against them.¹ On or about November 27, 2007, the Division III Court of Appeals reversed the trial court’s grant of summary judgment to Dr. French on the Plaintiff’s CPA claim and also reversed the CR 11 sanctions order which had been granted in favor of Dr. French. *See* Published Opinion attached as Appendix A to Dr. French’s Petition for Review; *see also Ambach v. French*, 141 Wn. App. 782 (2007).

Specifically, the Court of Appeals held that the damages alleged by the Plaintiff Teresa Ambach (“Ambach”) (medical expenses, wage loss, loss of earning capacity, and out-of-pocket expenses) were injury to “business or property” for purposes of the CPA (the sole issue that was

¹ While these issues were on appeal, the remaining claims against Dr. French went to a jury trial in March of 2007. The jury found in favor of Dr. French on all claims.

supposed to be before the Court of Appeal on appeal). *Id.* at 789-90. The Court of Appeals also, however, went beyond the issue that was before it and erroneously ruled that if a physician performs an allegedly unnecessary surgery “for financial gain,” that satisfies the “entrepreneurial aspects of the practice of medicine” requirement for purposes of the CPA. *See id.*, pp.787-788.

On December 26, 2007, Dr. French filed a Petition for Review with this Court. In his Petition, Dr. French discussed the Court of Appeals improper reliance upon cases involving the “entrepreneurial aspects” element of the CPA claim. For example, but without limitation, Dr. French argued as follows:

.... Thus, in order to establish a cause of action under the CPA against a medical practitioner, a plaintiff must provide evidence of dishonest and unfair practices that are used to promote the medical practice or to increase profits and the volume of patients, *i.e.*, the claim must exclusively implicate the entrepreneurial practice of medicine and not arise out of health care. *See [Wright v. Jeckle, 104 Wn. App. 478, 484-85 (2001)]; Quimby v. Fine, 45 Wn. App. 175, 180, 724 P.2d 403 (1986).* The alleged conduct must be unrelated to the actual competence of the medical practitioner. *Quimby, 45 Wn. App. at 180.* The entrepreneurial aspects of the practice of medicine include how the price of medical services is determined, billed, and collected; the way a medical practice obtains, retains, and dismisses patients; and the promotion of operations or services to increase profits and the volume of patients. *See id.*

Dr. French’s Petition for Review, p. 2.



Further, in arguing why “Review of the Court of Appeals’ Decision Should Be Granted,” Dr. French urged as follows:

In addition, the [*Ambach*] decision holds tremendous significance and public policy implications to all medical malpractice litigants, as it would essentially deem all medical malpractice claims to be also recoverable under the Consumer Protection Act. This is in direct conflict with the legislative policies enumerated under RCW 7.70, which were intended to provide the sole bases for recovery for medical malpractice claims. Accordingly, review is warranted by the Supreme Court under both RAP 13.4(b)(2) and (4).

Id. at 4 (Emphasis added).

In further discussing why the Court of Appeals erred in addressing the “entrepreneurial aspects” element of the CPA claim, Dr. French argued as follows:

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

Id., p.12.

Ambach opposed Dr. French’s Petition for Review. On September 3, 2008, this Court granted that Petition.

On September 30, 2008, Dr. French moved for an Extension of Time to File a Supplemental Brief and to Solicit/Obtain Amicus Assistance (“Motion for Extension”). Dr. French’s Motion for Extension of Time explicitly requested additional time to, among other things, further address the Court of Appeals’ ruling that an allegedly unnecessary surgery performed for financial gain satisfies the “entrepreneurial aspects” of the practice of medicine. Specifically, Dr. French stated as follows:

Further, a Supplemental Brief is required to address the Court of Appeals’ ruling that if a physician performs allegedly unnecessary surgery “for financial gain” (which surely occurs in 98% of the procedures performed by surgeons), the “entrepreneurial aspects” predicate that extends Consumer Protection jurisdiction to professionals under RCW 19.86.090 is fully applicable. *See id.*, pp.787-788.

Dr. French did not address that issue in the Court of Appeals, because it was not before the Court. Only the “damages element” was properly before the Court of Appeals, but it went well beyond that issue, and articulated this new predicate for Consumer Protection jurisdiction. Dr. French touched upon that issue in his Petition for Review (*e.g.*, pp.1-2, 11-12) but additional briefing is necessary to fully articulate the error of the Court of Appeals on that matter.

The issues in this appeal go far beyond the dispute between Ms. Ambach and Dr. French. These issues affect every physician in the State of Washington. In addition, the Court of Appeals’ determination that conduct performed “for financial gain” brings such conduct within the “entrepreneurial aspects” of a profession could also have far reaching implication for other professionals, such as attorneys.

See Motion for Extension, pp.4-5.

Dr. French's Motion for Extension was granted on the same day it was filed (September 30, 2008). Despite Dr. French specifically requesting additional time to address the Court of Appeals' ruling regarding "entrepreneurial aspects," and that motion being granted, Ambach did not seek to modify that ruling. Ambach was on full notice that Dr. French would address these CPA issues in his Supplemental Brief.

On December 3, 2008, Dr. French filed his Supplemental Brief. As stated in his Motion for Extension (that was granted by this Court), Dr. French addressed the CPA issues (beyond just damages). On December 3, 2008, Ambach also filed her Supplemental Brief. Although Ambach was put on notice that Dr. French would be addressing the non-damages elements of her CPA claim, she chose not to address those issues. She has, however, now addressed them in her Motion to Strike. Specifically, Ambach expends half of her Motion to Strike addressing the merits of Dr. French's Supplemental Brief. *See* Ambach's Motion to Strike, pp. 8-17. Ambach can claim no prejudice.

By Motion dated December 16, 2008, Ambach moved to strike Dr. French's Supplemental Brief and requested attorneys' fees ("Motion to Strike"). Ambach's Motion is made on the basis that Dr. French's

Supplemental Brief allegedly addresses issues beyond the scope of review.

As demonstrated herein, Ambach's Motion to Strike should be denied.

3. **Argument**

a. **Overview**

The matter now before this Court arose because the Court of Appeals made a ruling upon an issue not before it. Ms. Ambach argues that this Court should not even permit argument on this ruling, *i.e.*, that the Court of Appeals pronouncement that CPA jurisdiction can extend to physicians who perform allegedly unnecessary surgeries for "financial gain." This obtains, Ms. Ambach argues, because that "... language is, by any definition, dicta and not entitled to weight..." Ambach's Motion To Strike, p.10.

That argument might be persuasive if the legal processes that formulate law could be boxed and confined to "actual, narrow holding(s)," as Ms Ambach argues. *Id.*, p 11. But American law is an ever dynamic and ever evolving process. So even if the Court of Appeals' opinion that an allegation of an unnecessary surgery for financial gain can trigger CPA jurisdiction is "Obiter dicta," and even if it was unnecessary to the disposition of the Court of Appeals decision, it will surely be directive to trial court judges who will now face that same issue. That is the way law

works: "... yesterday's dicta have become today's decision...." *People vs. Williams*, 788 N.E.2d 1126, 1136 (Ill. 2003).

This is why Dr. French urges this Court to reverse the *dicta/ruling* of the *Ambach* decision. It is necessary because in the course of its reasoning the Court of Appeals greatly expanded the scope of the CPA by extending its reach to unnecessary surgeries claims (*i.e.*, healthcare) that otherwise constitute medical malpractice claims exclusively governed by RCW 7.70 *et seq.* And as explained below, this Court possesses the authority to rule on those issues.

Moreover, as demonstrated above, Dr. French discussed these CPA issues (*e.g.*, entrepreneurial aspects) in his Petition for Review, he specifically requested a Motion for Extension to further address the CPA issues (which was granted by this Court). In short, this Court should review the *Ambach* decision on all of the CPA rulings it made as set forth in Dr. French's Petition for Review and Supplemental Brief.

For the foregoing reasons, as discussed in more detail below, *Ambach's* Motion to Strike (and request for fees) should be denied.

b. Dr. French Properly Raised the Non-Damages CPA Elements in His Supplemental Brief.

As demonstrated above, Dr. French discussed the non-damages CPA elements in his Petition for Review. Also, one of the specific bases

recited in his Motion For Extension of Time was the necessity of this Court to examine the logic and public policy behind the Court of Appeals' interpretation of the reach and scope of the CPA; specifically, its declarations that proof of a "financial gain" motive can support extension of the CPA to a physician whose conduct is also the subject of medical malpractice claim. After reviewing Dr. French's entreaty on that issue, this Court granted his Motion for Extension and permitted additional briefing.

Significantly, even through Ms. Ambach was on full notice that Dr. French was going to address these matters if his request for extension of time and additional briefing was granted, she chose not to address them in her Supplemental Brief, nor did she seek modification of this Court's decision permitting additional briefing. Ms. Ambach has, however, addressed the merits of Dr. French's argument in her Motion to Strike.

c. **Review of the Court of Appeals dicta/ruling extending CPA jurisdiction for claims against physicians is within the authority of this Court**

Even if the Court had not granted such permission, such review is within the discretion of this Court. *E.g., Tuerk v. State*, 123 Wn.2d 120 (1994)(accepting review of the Court of Appeals *dicta* contained in a footnote, but which was not raised in the Petition for Review).

Further, had Dr. French not been granted leave to file a Supplemental Brief, RAP 1.2, nevertheless, gives this Court the discretion “to consider cases and issues on their merits.” *State v. Olson*, 126 Wn.2d 315, 323 (1995).

This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reasons for the appellate court not to exercise its discretion to consider the merits of the case or issue.

Id.

Moreover, this Court even has the discretion to address issues raised for the first time in a supplemental brief. *Shoreline Comm. College Dist. No. 7 v. Employment Security Dep't*, 120 Wn.2d 394 402 (1992).

Although a court will normally decline to consider an issue raised for the first time in a supplemental brief, “the court has inherent authority to consider the issue if such consideration is necessary to reach a proper decision.” *Id.*

Through Ambach’s Motion to Strike, all of these issues have been fully briefed by the parties, and oral argument is not set to occur until the end of March 2009. Even if this Court had not granted Dr. French’s

Motion for Extension, this is a case in which this Court could properly exercise its discretion to rule on these issues of great public import.

In the alternative of denying (or granting) Ambach's Motion to Strike, Dr. French does not oppose allowing Ms. Ambach to file a response brief to his Supplemental Brief (although she has already addressed the merits thereof in her Motion to Strike), if Dr. French is permitted to file a reply brief thereto.

d. **Ambach mischaracterizes Dr. French's argument on RCW 7.70 et seq.**

Ambach also argues that Dr. French's Supplemental Briefing addressing her expert's testimony has never been addressed by any Court. Ambach mischaracterizes Dr. French's position. Specifically, Dr. French cited to testimony from Ambach's expert (which is in the record of this appeal) that demonstrates that Ambach's alleged injury was the result of healthcare, and thus is exclusively governed by RCW 7.70 et seq. See Respondent's Supplemental Brief, p. 11-13. Ambach mischaracterizes Dr. French's position as one addressing the "causation" element of a CPA claim. See Ambach's Motion to Strike, pp.15-16.

Dr. French's argument on this issue is not only proper for all of the foregoing reasons, but it was also specifically identified in his Petition for Review as a public interest issue that should be addressed by this Court

pursuant to RAP 3.4(b)(4)(Considerations Governing Acceptance of Review (at pp.12-14). Further, Ambach specifically addressed this issue in her Supplemental Brief (at pp. 13-15). Ambach's argument on this issue is completely meritless.

e. **Ambach's assertion that public policy does not favor reversal of the Court of Appeals' decision is simply wrong.**

The Ambach decision, including the *dicta* therein, will have a profound impact on physicians in the State of Washington. Contrary to Ambach's assertion, Dr. French is not seeking "immunity under the law" for physicians, rather he is seeking reversal of the *Ambach* court's expansion of CPA law to include, among other things, alleged "unnecessary surgeries for financial gain." The import of the *Ambach* decision is so significant, that Dr. French has obtained a preliminary amicus commitment from the Washington State Medical Association.

f. **Ambach's Motion for Sanctions should be denied.**

As demonstrated above, Ambach's Motion to Strike should be denied, which would also render moot her request for attorneys' fees. But even if this Court is inclined to grant her Motion to Strike, her motion for attorneys' fees should be denied. The premise of Ambach's request for attorneys' fees is that Dr. French allegedly submitted an improper Supplemental Brief.

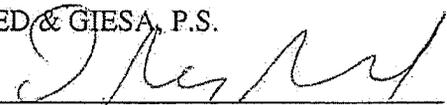
As set forth above, however, Dr. French specifically requested an extension of time to address the CPA issues which were not addressed by the parties, but which were ruled upon by the Court of Appeals. That Motion was granted by this Court. It would be tremendously unfair to Dr. French to sanction him for filing a brief for which he sought and obtained permission from this Court. In addition, this Court has the inherent authority, and authority under RAP 1.2, to consider his Supplemental Brief.

4. Conclusion

For the foregoing reasons, Dr. French respectfully requests that the Court deny Ambach's Motion to Strike and deny her motion for attorneys' fees. In the alternative, Dr. French respectfully requests that the Court allow Ms. Ambach to file a Response to Dr. French's Supplemental Brief, and allow Dr. French to file a Reply thereto.

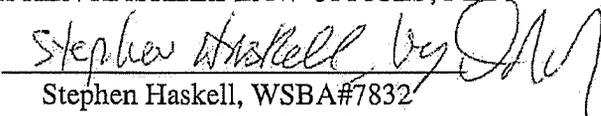
Respectfully submitted this 24th day of December, 2008.

REED & GIESA, P.S.

By 

D. Roger Reed, WSBA #662

STEPHEN HASKELL LAW OFFICES, PLLC

By 

Stephen Haskell, WSBA#7832

Attorneys for Appellants/Petitioners

H. Graeme French, M.D. and

Three Forks Orthopaedics, P.C.

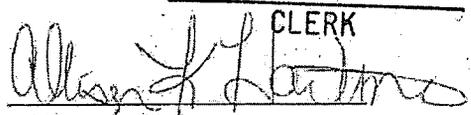
RECEIVED
SUPREME COURT
STATE OF WASHINGTON

CERTIFICATE OF SERVICE

2008 DEC 24 A 11: 24

I hereby certify that on the 24 day of December, 2008, I caused a true and correct copy of the foregoing document to be served upon the parties as indicated below.

BY RONALD R. CARPENTER


CLERK
Allisyn K. Hartman

Patrick K. Fannin
1312 N. Monroe Street
Spokane, Washington 99201-2623
Via First Class U.S. Mail, Postage Prepaid

Kristin M. Houser / James D. Hailey
Schroeter, Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, Washington 98104-1693
Via First Class U.S. Mail, Postage Prepaid