

81107-5

No. 247848

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

Teresa and Michael Ambach, Plaintiffs

v.

H. Graeme French, M.D. and Jane Doe French; Kelly Landle, PAC and
John Doe Landle; Three Forks Orthopaedics, P.C.; Whitman County
Public Hospital District No. 3 d/b/a/ Whitman Hospital and Medical
Center; John and Jane Does 1-10; Jonathan P. Keeve, M.D.; Northwest
Orthopaedic Specialists, P.S., and Karlene A. Arguinchona, M.D.,
Defendants/Respondents

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court erred in granting summary judgment dismissal of Consumer Protection Act, (CPA), claims against a doctor and hospital where there was undisputed evidence that the doctor performed an unnecessary shoulder surgery for financial gain and had a history of doing so in other cases, the hospital knew this was going on and, as a result, the patient suffered loss of money and other economic damages.
2. The trial court erred by imposing CR 11 sanctions against an attorney for alleging that a doctor and hospital violated the CPA for routinely performing medically unnecessary shoulder surgeries for financial gain when both the doctor and the hospital conceded triable issues as to all elements of a CPA claim except damages and even as to that element the attorney presented undisputed evidence of damages.

Issues Pertaining to Assignments of Error

1. Did the trial court erroneously grant summary judgment

dismissal of CPA claims against a doctor and hospital where there was undisputed evidence that the doctor performed an unnecessary shoulder surgery for financial gain and had a history of doing so in other cases, the hospital knew this was going on and, as a result, the patient suffered loss of money and other economic damages.

2. Should an attorney face CR 11 sanctions for alleging that a doctor and hospital violated the CPA when, after investigating the allegations, the attorney discovered credible expert and circumstantial evidence that the doctor was performing and the hospital was allowing medically unnecessary procedures for financial gain and both the doctor and the hospital conceded as triable all elements of a CPA claim except damages?

B. Statement of the Case

Background Facts

Teresa Ambach was a 45 year old mother who married to Michael Ambach. (CP 86.) In 1996, she began experiencing neck pain and headaches. (CP 125.) She had no history of shoulder pain or problems.

(CP 86.) In November 2001, she consulted with Dr. French who diagnosed her as having, amongst other things, shoulder instability that required surgical intervention. (CP 125.)

In reality, Ms. Ambach did not need a shoulder surgery. (CP 132-136.) According to Dr. McGillivray, an expert Attorney Keith Douglass retained as part of his investigation into this case, Ms. Ambach's shoulder surgery "was not medically indicated or justified." (CP 135.) French allegedly had a history of fictitiously making the same diagnosis for other, unsuspecting, trusting patients who also did not require shoulder surgery. (CP 154-173.) In the late 1990's, Washington's Medical Quality Assurance Commission, (MQAC), the licensing body for physicians in Washington, asked three doctors to review 19 of French's surgical files. (CP 154.) All three concluded that the files did not support surgical intervention. (CP 154.) Keith Douglass, Ms. Ambach's attorney, conducted a Freedom of Information Act request from MQAC and reviewed these files before filing a CPA claim against French. (CP 621-23.)

There was huge financial motivation for French to perform unnecessary surgeries. For instance, in 2001, the year French advised Ms.

Ambach that she needed a surgery - French performed 458 shoulder surgeries at Whitman Hospital - generating over three million in revenue and accounting for approximately 54% of Whitman's surgery revenue. (CP 174.)

There are only approximately 40,000 people residing in all of Whitman County, (CP 175), which means that, assuming that all of his patients were from Whitman County (although they were not) - in 2001 alone - French operated on the equivalent of one person out of every 100 men, women and children living in all of Whitman County.

French has been such a golden goose for Whitman Hospital, it built a new building to house French on its campus. (CP 176.)

Mr. Douglass investigated all of this and, in fact, represented other patients suing French. (CP 620-641; 709-711; and 717.) In those cases as well, competent experts were also saying that the shoulder surgeries were unnecessary, (CP 160-173).

Unfortunately, Ms. Ambach was unaware of any of this and, to her regret, she followed French's advice to have shoulder surgery to resolve her neck pains. (CP 86.) Neither French or anybody else told her the surgery was unnecessary and thus she consented without being fully

informed. (CP 86.)

The surgical site, *i.e.*, her shoulder joint, became infected. (CP 192-212.) Various physicians, including French, failed to diagnose the problem. (CP 192-212.) The untreated infection eroded her shoulder joint. (CP 192-212.) By the time it was diagnosed by some physicians in Seattle, she had to have her shoulder fused. (CP 192-212.)

As a result of the surgery and subsequent fusion, the Ambachs have suffered various financial losses. Ms. Ambach became unemployed. (CP 86-88.) She used to be a card dealer but having only one fully functioning arm, she obviously cannot do that anymore. (CP 86-88.)

Nor can she help her husband with their family construction business. (CP 86-88.) She and her husband owned Ambach Construction - a fully licensed and bonded construction company. (CP 86-88.) She used to work with him, as her second job, with administering the business and performing physical labor. (CP 86-88.) The business had to hire laborers to replace what she used to do. (CP 86-88.) Losing her income and support has been financially difficult for the Ambachs. They have had to turn to high interest loans to make ends meet. (CP 86-88.)

Of course, there are various domestic services and household

chores that are ill suited for a person with only one fully functioning arm. Driving, in particular, has been hard for Ms. Ambach. (CP 86-88.) She has had to get help from others. (CP 86-88.)

There are other miscellaneous financial damages including her medical bills, and wear and tear on her car driving to Whitman County and Seattle to see medical providers. (CP 86-88.) She has also incurred substantial sums of money in travel expenses going to Seattle for her fusion and for follow-up care. (CP 86-88.)

Procedural History

Ms. Ambach filed and served a complaint on January 28, 2004, alleging, among other legal theories, that French and Whitman Hospital violated the CPA. (CP 1-33.) Regarding French, the allegation was that French performed a medically unnecessary shoulder surgery and that he had a history of doing the same for financial gain. (CP 1-33.) Regarding Whitman Hospital, the allegation was that it knew or should have known that it was providing a place for French to perform medically unnecessary shoulder surgeries for its financial gain. (CP 1-33.)

On May 27, 2004, French moved for summary judgment dismissal of the CPA claim. (CP 45-57.) For purposes of that motion French

conceded all elements of a CPA claim except damages. (CP 233-235.)

The trial court granted his motion, stating that all of Ms. Ambach's damages were "personal injury" damages not recoverable under the CPA. (CP 249-251 & 285-290.) Ms. Ambach sought reconsideration because that ruling seemed contrary to governing authority - as discussed below. (CP 256-267.) The trial court denied the motion to reconsider, again, summarily stating that personal injuries are not recoverable under the CPA. (CP 272-73.)

Ms. Ambach sought discretionary review of that ruling before this Court but the Court denied review. (CP 298-300.) French then moved the trial court to recover attorney fees pursuant to CR 11 for defending against the allegation - including the time it spent responding to the motion for discretionary review before this Court. (CP 676-679 & 727-733.) The trial court ruled in French's favor, sanctioning Keith Douglass and his law firm \$7,194. (CP 768-773.) A portion of the sanctions included attorney time spent before this Court when Ms. Ambach sought discretionary review of the trial court's dismissal of the CPA claims against French.

Whitman Hospital also filed a motion for summary judgment as to the CPA claims against it. (CP 277-79.) It merely referenced French's

briefing and offered no independent argument, authority or briefing. (CP 277-79.) Thus, it too, for purposes of its motion, conceded all elements of a CPA claim except damages. *See* (CP 233-235.) The trial court granted its motion. (CP 290-291.) It too sought recovery of its attorney fees, (CP 522-531), and, again, the trial court awarded \$1,957.00 against Keith Douglass. (CP 737-740.)

Ms. Ambach appealed both sanction award, initially as petitions for discretionary review. The trial court subsequently entered final judgments regarding both sanctions. (CP 778-789.) This Court consolidated both into one appeal.

C. Argument

Scope of Review

When a party files timely notice of appeal from award of sanctions under CR 11 and/or RCW 4.84.185, the underlying judgment which prejudicially affected sanctions award is itself subject to appellate court review pursuant to RAP 2.4(b). *Franz v. Lance*, 119 Wash.2d 780, 836 P.2d 832 (1992). Here, Keith Douglass sought timely review of the sanctions against him and his law firm for alleging CPA claims against French and Whitman Hospital. Because the trial court dismissed those

claims on summary judgment, under *Franz*, the trial court's summary dismissal of the CPA claims is also before this Court.

Standard of Review

Regarding the underlying dismissal of the CPA claims, this Court owes no deference to the trial court. *Duckworth v. Bonney Lake*, 91 Wn. 2d 19, 21-22, 586 P.2d 860 (1978). The entry of summary judgment is subject to complete and independent review and this Court is free to evaluate *de novo* the evidence proffered by both parties to determine whether there are indeed genuine issues of material fact and whether the trial court correctly applied the law. *Marincovich v. Tarabochia*, 114 Wn. 2d 271, 274, 787 P.2d 562 (1990). The facts must be reviewed in the light most favorable to Ms. Ambach as she is the party against whom summary judgment was entered, and all doubts about the evidence must be resolved in her favor. *See id.*

Regarding the award of sanctions - this Court should reverse the trial court upon a finding of "abuse of discretion." *Skimming v. Boxer*, 119 Wash.App. 748, 82 P.3d 707 (2004).

Substantive Argument

I. THE TRIAL COURT ERRED IN DISMISSING AMBACH'S CPA CLAIMS BECAUSE THERE WAS COMPETENT EVIDENCE THAT FRENCH AND WHITMAN PERFORMED UNNECESSARY SURGERIES FOR FINANCIAL GAIN.

When the facts are undisputed, whether a CPA, RCW 19.86.010 *et seq.*, violation has occurred is a question of law. *Leingang v. Pierce County Medical*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997) (gathering cases). However, whether the individual elements comprising a CPA claim are satisfied is a question of fact to be resolved by a jury. *E.g.*, *Quimby v. Fine*, 45 Wn.App. 175, 182, 724 P.2d 403, 406 (1986).

A CPA violation consists of the following 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; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

In this case, for purposes of their underlying summary judgment motion, both French and Whitman conceded that there was an issue of fact as to all CPA elements except the “damage” element. (CP 233-235.) Even their argument concerning damages was not so much that Ms.

Ambach did not suffer damages, but, as a purely legal matter, that the CPA does not allow for the recovery of damages arising out of medical services. (CP 287-289 (verbatim report of the trial court framing the issue at oral argument.)) Thus, that was the only real question before the trial court. (CP 287-289.) The trial court, incorrectly agreed with Respondents' argument. (CP 287-289.) However, because a CPA claim - including the element of damages - can arise from unfair or deceptive medical services, the Court should conclude that not only did the trial court error in dismissing the CPA claims, it compounded the error by then sanctioning the attorney who signed the complaint containing the CPA allegations.

A. A Medical Negligence and CPA Claim Were Both Triggered in this Case Because the Jury Could Decide That French's Decision to Perform the Unnecessary Surgery Was Either Negligent or for Financial Gain.

Medical negligence and CPA claims are different actions with different triggering elements. If a patient suffers harm from a medical provider's negligence - then the proper remedy is a medical negligence action governed by RCW 4.24.290 & 7.70.040. Whereas, if a patient suffer economic harm from a medical provider's unfair or deceptive acts or practices during the scope of the provider's "entrepreneurial enterprise"

- then the proper remedy is under the CPA. *E.g., Quimby*, 45 Wn.App. at 181-182, 724 P.2d at 406.

An easy way to understand this distinction is to consider a particular case in terms of mis- and malfeasance. Misfeasance, such as a professional failing to comply with the standard of care, is a malpractice case outside the CPA's scope. RCW 7.70.040. Malfeasance, such as a professional providing an unnecessary service for financial gain, is within the CPA's scope. *See, e.g., Quimby*, 45 Wn.App. at 181-182, 724 P.2d at 406 (applying this test to determine if CPA claim applied to doctor's decision to perform an alternate surgery); *Wright v. Jenkle*, 104 Wn.App. 478, 16 P.3d 1268 (2001) (applying this test to determine if doctor selling diet pills constituted a tort or CPA claim); *Benoy v. Simons*, 66 Wn. App, 56, 831 P.2d 167 (1992) (applying this test to determine if doctor putting child on respirator gave rise to a CPA claim); *see also Short v. Damopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (applying this test to determine whether attorney conduct triggered CPA or malpractice claim).

In *Quimby*, the doctor was to perform a tubal ligation. 45 Wn.App. at 181-182, 724 P.2d at 406. The doctor performed the operation through an alternative procedure. The plaintiff alleged that the doctor's decision to

perform the operation by an alternative procedure was financially motivated and therefore violated the CPA. The doctor moved to have the allegation dismissed, arguing that the CPA did not apply in medical negligence cases.

The court of appeals explained that if a doctor's decision to perform an operation is primarily financially motivated or arises out of the physician's "entrepreneurial enterprise," then the CPA is triggered. Evidence that suggests a financial motivation includes evidence that the provider "promote[d] an operation or service to increase profits and the volume of patients, then fail[ed] to adequately advise the patient or risks or alternative procedures." *Id.* at 181, 724 P.2d at 406.

Similarly, in *Wright v. Jenkle*, the court found that the CPA claim was valid in a case involving medical services. 104 Wn.App 478, 16 P.3d 1268 (2001). There, the allegation was that the physician was prescribing diet pills from his office for financial gain. Although the pills in that case were ostensibly to fight obesity, that did not preclude the plaintiff from successfully arguing under the CPA that the doctor prescribed the pills for financial gain rather than the patient/plaintiff's well being.

There is nothing wrong with a plaintiff alleging both professional

misfeasance and malfeasance, (a malpractice and CPA claim) - assuming, as in this case, there are underlying facts supporting both legal theories. CR 8(e)(2) (“A party may also state as many separate claims . . . as he has regardless of consistency”) In fact, under the doctrine of *res judicata* or claim preclusion, a plaintiff must normally bring or risk losing all viable claims.

Viewing the facts in the light most favorable to Ms. Ambach, she and her attorney properly alleged both negligence and CPA actions. Ms. Ambach alleged both mis- and malfeasance against French and Whitman Hospital. On one hand, Ms. Ambach alleged that French negligently performed an unnecessary shoulder surgery. Under that allegation, there is no accusation that French’s motivation was financial gain - rather his incompetence, error or negligent oversight was the driving force behind his decision to recommend and perform this surgery. If the jury believes this, then CPA damages will not be available.

However, on the other hand, Plaintiff also alleged that French’s motivation was primarily financial - meaning, despite that French knew that the surgery would not benefit and in fact could harm Ms. Ambach, he recommended and performed the surgery anyway because doing so would

benefit him financially. This theory was supported by numerous undisputed facts: Ms. Ambach's expert said the surgery was unnecessary; other physicians believe that French routinely performs unnecessary shoulder surgeries; Mr. Douglass represents plaintiffs in other cases in which competent experts believe those shoulder surgeries were unnecessary; and there is financial motivation for French to perform and Whitman Hospital to allow unnecessary surgeries.

If the jury believes this allegation, as the trial court had to, then the claim properly arose under the CPA. Accordingly, the Court should find that not only was it improper for the trial court to dismiss on summary judgment the CPA claims - it was doubly improper to impose sanctions against Attorney Douglass for bringing these legally valid claims.

B. Ambach's CPA Claim Did Not Violate the Rule That "Personal Injury Damages" Are Not Recoverable under the CPA.

The general rule is that personal injury damages recoverable in tort are not recoverable under the CPA. *Stevens v. Hyde Athletic*, 54 Wn.App. 366, 773 P.2d 871 (1989), *Washington State Physician's Exchange v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), and *Hiner v. Bridgestone*, 91 Wn.App. 722, 959 P.2d 1158 (1998).

Nonetheless, there is naturally overlap between tort and CPA damages. A tort victim can recover any economic and non-economic damages proximately caused by negligence. Overlapping those tort damages, a CPA plaintiff may recover injury to “business or property.” The types of damage that satisfy this element are extremely broad. *Keyes v. Bollinger*, 31 Wn.App. 286, 294, 640 P.2d 1077 (“[t]he scope of injury to ‘property’ is, however, quite broad and is not restricted to commercial or business injury.”) (citing *Reiter v. Sonotone Corp.*, 442 US 330 (1979)). Any resulting loss of property or money will suffice. *E.g.*, *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990) (gathering citations).

There is no threshold damage amount, thus even nominal economic damage is enough to satisfy the CPA’s damage element. *Id.* Accordingly, courts have found the damage element satisfied in virtually every conceivable type of transaction involving consumers, including real estate transactions; construction projects; insurance disputes; legal services, medical services and collection practices - to name but a few. (See the annotated index to RCW 19.86.020 for a complete list).

However, just because there is overlapping damages does not mean

that CPA victims cannot bring CPA claims whenever some of their economic damages are the type that would also be recoverable in tort. If that were the law, there would rarely, if ever, be a viable CPA claim. Rather, the test for whether a claimant can recover under the CPA is whether the claimant meets all of the CPA elements - including damages. Thus, the question that the trial court should have focused on was not whether Ms. Ambach's damages were "personal injury" damages - but whether she had any damages recoverable under the CPA. *E.g., Quimby v. Fine*, 45 Wn.App. 175, 181-182, 724 P.2d 403, 406 (1986); *Wright v. Jenkle*, 104 Wn.App 478, 16 P.3d 1268 (2001). Ms. Ambach listed her economic damages that she incurred as a result of going through the unnecessary surgery and the Respondents did not refute any of them. They included injury to property and business and thus the trial court should have found in her favor.

The trial court incorrectly reasoned that if a claim for CPA damages could arise from fraudulent medical services, "there would be almost no case involving medical negligence issues, malpractice, and so forth, in which the [CPA] claim could not be brought." (CP 288.) To the contrary, not every medical negligence claim gives rise to a CPA action

and courts have had little difficulty drawing the distinction. In *Benoy v. Simmons*, 66 Wn. App. 56, 831 P.2d 167 (1992), the physician ordered a dying child to be placed on a respirator. There was no evidence that the physician's decision to place the child on a respirator was financially motivated, rather than a good faith effort to save the child, and thus a CPA claim was not applicable.

Likewise, *Stevens v. Hyde Athletic Industries, Inc.*, the principal case relied on by Respondents in their underlying summary judgment motion to dismiss the CPA claim, there was only evidence of misfeasance - a negligently designed shoe, and thus the court correctly held that the plaintiff's claim was a personal injury claim not governed by the CPA. 54 Wn.App. 366, 773 P.2d 871 (1989).

There, the plaintiff alleged various causes of action, including a CPA violation. The underlying factual allegation was that the tread pattern on her shoes was dangerous. She did not allege that the manufacturer intentionally designed the shoe in a dangerous manner for financial gain. Thus, unlike in *Quimby*, there were no facts to distinguish the case from a garden variety tort or product liability case.

Those cases are both distinguishable from this case. Here, the

presumed facts are, as Ms. Ambach's expert stated and other undisputed evidence suggests, French performed a medically unnecessary procedure for financial gain and Whitman Hospital allowed this to happen.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING CR 11 SANCTIONS AGAINST ATTORNEY DOUGLASS FOR ALLEGING A LEGAL THEORY THAT WAS NOT FACTUALLY DISPUTED AND WAS SUPPORTED IN PUBLISHED OPINIONS.

CR 11 has two objectives: 1) that each pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law...."; and, 2) that they are not "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CR 11.

For sanctions to be appropriately imposed under this rule, a complaint **must lack both** a factual or legal basis and a reasonable investigation. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). CR 11 is not meant to "chill an attorney's enthusiasm or creativity" in pursuing a cause of action. *Id.* at 219, 829 P.2d 1099. For this reason, a court must consider both the purpose of CR 11 as well as the potential chilling effect sanctions may cause. *Id.* Sanctions should only be imposed where it is "patently clear that a claim has absolutely no

chance of success.” *Skimming v. Boxer*, 119 Wn.App. 748, 755, 82 P.3d 707, 711 (2004). That interpretation of CR 11 is consistent with general jurisprudence in Washington that disfavors awards of attorney fees. *Id.* (Citing, *In re Eaton*, 48 Wn.App. 806, 814, 740 P.2d 907 (1987)).

Here, the CPA claim was based in law and fact and was made in the pursuit of justice - not for some improper reason. Thus, the trial court’s award of sanctions was flat wrong and should be reversed.

The first step in determining if CR 11 sanctions are appropriate is to assess if the complaint is well grounded in fact and warranted by law. *Bryant*, 119 Wn.2d at 220, 829 P.2d 1099; *Cooke v. Burgner*, 93 Wn.App. 526, 969 P.2d 127 (1999). As argued above - not only were the CPA allegations grounded in both fact and law, it was plain wrong for the trial court to dismiss the claims on summary judgment.

Moreover, before a court may impose CR 11 sanctions, the attorney must **also** have failed to engage in a reasonable investigation of the claim. *Bryant*, 119 Wn.2d 210, 829 P.2d 1099. Neither French or Whitman Hospital has ever alleged that Douglass failed to engage in a reasonable investigation. To the contrary, Respondents conceded that there were triable issues regarding all CPA elements except damages.

Perhaps that was because Ms. Ambach's counsel conducted a reasonable investigation prior to filing suit against French and Whitman. He spoke to Ms. Ambach and her husband, he gathered medical records, made a request for and received records pursuant to a public records request, and consulted a potential expert witness. (CP 709-711 & 620-641.) As Respondents cannot demonstrate that Ambach's counsel signed a complaint lacking in factual or legal basis or that he did so without a reasonable investigation, the trial court abused its discretion by imposing CR 11 sanctions against Douglass and his firm.

CONCLUSION

The trial court incorrectly ignored the case law allowing a CPA claim in cases like this and compounded its error by sanctioning the Appellant. He respectfully prays that this Court will reverse the summary dismissal of the CPA claim and order that the final judgments be vacated. RESPECTFULLY SUBMITTED this 5th day of September, 2006.

KEITH S. DOUGLASS AND ASSOCIATES, L.L.P.



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CERTIFICATE OF SERVICE

On the 5th day of September, 2006, I caused to be served the foregoing: BRIEF OF APPELLANT, as follows:

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

9-5-06 Spokane, WA Kristine A Proszek
Date & Place Signed Kristine Proszek