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SUPREME COURT
STATE OF WASHINGTON
2009 MAR 20 P 12:54

NO. 81107-5 BY RONALD R. CARPENTER
(Formerly Court of Appeals No. 24784-8-III & 25007-5-III)
CLERK
SUPREME COURT OF THE STATE OF WASHINGTON

THERESA AMBACH,
Respondent,

v.

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

Petitioners.

**RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION TO
MODIFY ORDER STRIKING PORTIONS OF THEIR
SUPPLEMENTAL BRIEF**

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As the Court already determined, no compelling circumstances exist to cast aside the Rules of Appellate Procedure and open wide the scope of review for Petitioner/Defendant Dr. Graeme French¹ to assert new issues for the first time in his supplemental brief. At this stage of the appeal, two court days before oral argument, Respondent/Plaintiff Terri Ambach does not wish to exhaust more judicial resources on a matter that the Court has already decided. As such, she does not repeat here the discussion and caselaw set forth in her motion to strike and reply brief filed in support thereof.

Ms. Ambach does, however, wish to respond briefly to Dr. French's contention in the instant motion that she will suffer no prejudice should the Court consider such newly raised issues. Mot. to Modify at 7, 11, 15. Although unclear at first,² Dr. French clarifies in his motion that he seeks the Court's consideration of whether Ms. Ambach's allegations

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

² Dr. French's briefing on the issues has been a moving target and only further underscores the unfairness that results to Ms. Ambach should the Court consider any of the extraneous material in his supplemental brief. Initially, Ms. Ambach understood Dr. French to be raising new issues regarding two additional elements of her claim: the "causation" and "unfair or deceptive acts" elements. Mot. to Strike at 2. In response to her motion to strike, he argued that he sought review over the "entrepreneurial aspects" of her CPA claim, which goes primarily to the "trade or commerce" element. One is left to conclude that, whatever it is Dr. French seeks, he is not concerned with procedural fairness.

implicate the entrepreneurial aspects of Dr. French's practice (i.e., whether Dr. French engaged "in trade or commerce."). *Id.* at 11-12.³ No court *to date* has adjudicated the "in trade or commerce" element of Ms. Ambach's Consumer Protection Act ("CPA") claim – or any other element of her claim, save for "injury," the sole issue before the Court. What is more, Dr. French effectively sealed the record from further development on the "entrepreneurial aspects" issue when he withdrew it as a basis on which he sought summary judgment. CP 58-60.⁴ Dr. French went further and successfully moved the Court of Appeals to strike from the background section of Ms. Ambach's opening brief any discussion that arguably related to the entrepreneurial aspects of his practice.

Dr. French's contention that Ms. Ambach would "certainly" suffer no prejudice if the Court were to consider the "merits" of her claim on this new basis is absurd. Mot. to Modify at 11. As Ms. Ambach has stated many times over, she is prepared to show at trial that Dr. French was engaged, not in health care, but in a pattern of dishonest and deceptive acts used to promote the entrepreneurial aspects of his practice. But it is a

³ Dr. French suggests that this "entrepreneurial aspect" of Ms. Ambach's claim is a "predicate" to her asserting a CPA claim against a doctor in the first place. Mot. to Modify at 7. Not only is this issue not properly presented in his Petition for Review, but Ms. Ambach is unaware of any caselaw stating as much.

⁴ Nowhere in his briefing does Dr. French dispute this account of the procedural history.

perversion of both the Rules of Appellate Procedure and the principles those Rules are designed to protect for Dr. French to suggest that Ms. Ambach should face what amounts to a dispositive motion before the highest court without the possibility of discovery.

Further, Dr. French's bald statement that Ms. Ambach faces no prejudice cannot be squared with the fact that she already has. First, Dr. French submitted his newly raised issues simultaneous to Ms. Ambach's filing of her supplemental brief, such that only with a motion to strike could she avoid Dr. French's ex parte contact with the Court on the extraneous material. Second, she abbreviated her reply to the defense amici curiae based on the Court's order granting her motion to strike. Reply to Amici at 1-2 (confining the discussion to the issues properly presented). Thus, should the Court reconsider its order striking the portions of Dr. French's non-conforming brief, Ms. Ambach will have lost an opportunity to respond to large portions of the amici briefs that portray Dr. French as nothing more than an ordinary physician.

At bottom, Dr. French and his allies seek full-blown review of CPA claims against doctors generally, notwithstanding the narrow scope of review this case presents. Dr. French's attempt to leverage an undeveloped record on which to do so is patently unfair. The Court

should decline to reverse its decision to strike the newly presented issues that no court below has had an opportunity to consider; Ms. Ambach deserves her opportunity to prove *all* aspects of her CPA claim in the appropriate forum.

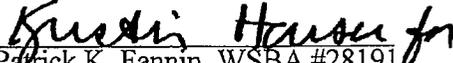
RESPECTFULLY SUBMITTED this **20th** day of **March, 2009**.

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CERTIFICATE OF SERVICE RONALD R. CARPENTER

I certify under penalty of perjury under the laws of the State of _____
Washington that on the 20th day of March 2009, a true and correct ^{CLERK} copy of
the forgoing **RESPONDENT'S OPPOSITION TO PETITIONERS'
MOTION TO MODIFY ORDER STRIKING PORTIONS OF
THEIR SUPPLEMENTAL BRIEF** was served on the persons
hereinafter named by depositing said copies in the United States mail,
postage prepaid, addressed as follows:

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OFFICE RECEPTIONIST, CLERK

To: O'Neil, Ann
Subject: RE: Filing: Teresa Ambach v. H. Graeme French, et ux, et al., No.81107-5

Rec. 3-20-09

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Sent: Friday, March 20, 2009 12:58 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: RE: Filing: Teresa Ambach v. H. Graeme French, et ux, et al., No.81107-5

Dear Clerk of the Court,

Attached below for filing, please find the following:

- **RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION TO MODIFY ORDER STRIKING PORTIONS OF THEIR SUPPLEMENTAL BRIEF**

E-mailed for filing with the Court by Ann O'Neil, for attorneys:

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<<Respondent's Opp. to Mt. to Modify Order.pdf>>

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