

Note: Portions of this brief have been redacted pursuant to the 3-11-09 ruling entered by the Deputy Clerk (at the direction of the assignment justice)

Supreme Court No. 81107-5

SUPREME COURT OF THE STATE OF WASHINGTON

TERESA and MICHAEL AMBACH,

Respondents,

v.

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

Petitioners.

PETITIONERS' SUPPLEMENTAL BRIEF

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D. Assuming, *Arguendo*, That the Court Finds That Ms. Ambach Has a Viable CPA Claim Against Dr. French, and that RCW 7.70 Does Not Accord the Exclusive Remedy for Actions Premised Negligent Provision of Health Care, She Still is Precluded from Asserting a CPA Claim Because Ms. Ambach Did Not Suffer Any Injuries to Her "Business or Property" 13

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Statutes

RCW 19.86.020	7, 8
RCW 19.86.090	2, 8, 9, 13, 15
RCW 19.86.920	6, 9-11, 16

RCW 7.70 *et seq.* 1, 3, 11-13, 15, 16
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Other Authorities

Random House Dictionary of the English Language, 3d Ed. 10
Webster's New World Dictionary, 3d Ed. 9

I. IDENTITY OF PETITIONERS

Dr. Graeme French and Three Forks Orthopaedics, P.C. are the petitioners in this Court, were the respondents in the appellate court, and were the defendants in the trial court.

II. CITATION TO COURT OF APPEALS DECISION

Teresa Ambach, Appellant, v. H. Graeme French, M.D., et al., Defendants, 141 Wn. App. 782, 173 P.3d 941 (2007).

III. ISSUES PRESENTED FOR REVIEW

REDACTED

D. Whether alleged damages incurred as a result of negligent health care can constitute an injury to "business or property," as required by the CPA?

IV. SUMMARY OF ARGUMENT

REDACTED

REDACTED

V. STATEMENT OF THE CASE

REDACTED

REDACTED

VI. ARGUMENT

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

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REDACTED

- D. Assuming, *Arguendo*, That the Court Finds That Ms. Ambach Has a Viable CPA Claim Against Dr. French, and that RCW 7.70 Does Not Accord the Exclusive Remedy for Actions Premised Negligent Provision of Health Care, She Still is Precluded from Asserting a CPA Claim Because Ms. Ambach Did Not Suffer Any Injuries to Her "Business or Property"**

As earlier noted, RCW 19.86.090 limits Ms. Ambach's Consumer Protection Act damages to injuries she sustained to her "business or

property." This statutory limitation is much more restrictive than the mere expenses related to her alleged unnecessary surgeries (which the Court of Appeals ruled satisfied the CPA's "damage requirement"). *Ambach*, at 790.

As the Court noted in *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn.App. 366, 370 (1989):

Had the Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive term than "business or property."

Ms. Stevens' attempts to come within this analysis by classifying her personal injury damages into a pseudo-property structure, *i.e.*, special damages such as hospital, physician, rehabilitative expenses, constitute property and economic interest. This argument is unconvincing. (Emphasis added.)

Similarly, in *Washington State Physicians Ins. Exchange and Assoc. v. Fisons Corp.*, 122 Wn.2d 299 (1993), this Court reiterated the above holding from *Stevens*, while at the same time finding that damage to business reputation and loss of good will are compensable damages under the CPA. The Court stated:

The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered.

Fisons, 122 Wn.2d at 318 (emphasis added).

These principles were reiterated and clarified further in *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn.App. 722 (1998). Citing *Stevens* and the *Physicians Insurance* decisions with approval, the Court stated:

Additionally, personal injuries are not recoverable under the CPA . . . These damages, including reimbursement for lost wages and earning capacity, medical expenses and damage to her car, arise from personal injuries and are commonly awarded in personal injury actions . . . They are not injuries to "business or property" as contemplated by the CPA . . . (Emphasis added.)

Hiner, at 730 (citations omitted).

Moreover, given the fact that, as earlier explained, all of Ms. Ambach's alleged injuries "occurred as a result of health care" (and by definition those injuries can only be civilly prosecuted under the aegis of RCW 7.70), her claims cannot constitute "injuries to her business or property," as separately provided for in RCW 19.86.090.

VII. CONCLUSION

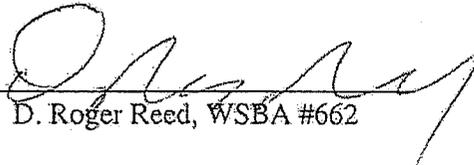
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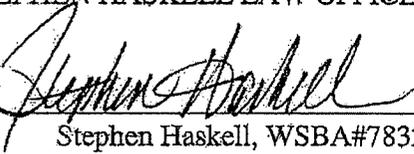
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Respectfully submitted this 3rd day of December, 2008.

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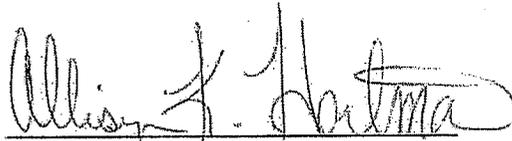
I, the undersigned, certify that on the 3rd day of December, 2008, I caused a true and correct copy of the foregoing to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following persons:

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Allisyn K. Hartman

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

TERESA AMBACH
Plaintiff,

vs.

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

NO. 04-2-00396-7

VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1 (a) Were the defendants negligent?

ANSWER: YES NO

QUESTION 1(b) Did the defendants fail to obtain informed consent?

ANSWER: YES NO

(INSTRUCTION: If you answered "no" as to each part of Question 1, sign this verdict form. If you answered "yes" as to either claim, answer Question 2)

QUESTION 2: Was such negligence or failure to obtain informed consent a proximate cause of damage to the plaintiff?

ANSWER: YES NO

(INSTRUCTION: If you answered "no" sign this verdict form. If you answered "yes" answer Question 3.)

Exhibit A

QUESTION 3: What do you find to be the plaintiff's amount of damages?

ANSWER:

- 1.) For past economic damages: \$ _____
- 2.) For future economic damages: \$ _____
- 3.) For past and future non-economic damages: \$ _____

Dated this 21st day of March, 2007

C. P. [Signature]
Presiding Juror