

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

REVISED REPLY BRIEF OF APPELLANT

Patrick K. Fannin, WSBA #28191
Kristin Houser, WSBA #7286
James D. Hailey, WSBA#7639
Attorneys for Petitioner

KEITH S. DOUGLASS and ASSOCIATES, L.L.P.
1321 W. Broadway
Spokane, WA 99201
(509) 326-8200

SCHROETER, GOLDMARK & BENDER
500 Central Building
810 Third Avenue
Seattle, WA 98104
(206) 622-8000

TABLE OF CONTENTS

TABLE OF AUTHORITIES i-iii

I. Summary of Reply 1-2

II. Argument 3-19

A. Quimby is still good law 2-9

1. *Citation by the Washington State Supreme Court* 3-4

2. *Wright confirms that a patient may bring a damage claim under the CPA for a physician’s deceitful actions in promoting an unnecessary treatment* 4-5

3. *Stevens cites Quimby and distinguishes a Quimby informed consent CPA claim from “personal injury claims”* 5-9

B. Teri Ambach’s CPA claim here is exactly the kind of CPA claim contemplated by Quimby and Wright 9-10

C. Quimby and Wright did not ignore the element of damages in holding physicians could be sued under the CPA . 10-12

D. The proper scope of damages in a CPA claim against a physician includes direct pecuniary losses and may include other consequential pecuniary losses 12-18

E. Reversing the Granting of Summary Judgment does not open Pandora’s Box 18

F. Sanctions were based on a misunderstanding of the law and must be reversed 19

III. Conclusion 19-20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Washington Cases

Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980) . . . 6

Branom v. State, 94 Wn. App. 964, 969-70, 974 P.2d 335, review denied, 138 Wn.2d 1023, 989 P.2d 1136 (1999) 9

Eriks v. Denver, 118 Wn.2d 451, 464-465 (Wash. 1992) 3

Estate of Sly v. Linville, 75 Wn. App. 431, 439, 878 P.2d 1241 (1994) 9

Holbrook v. Weyerhaeuser Co., 118 Wash. 2d 306, 315, 822 P.2d 271 (1992) 19

Howell v. Spokane & Inland Empire Blood Bank, 114 Wn.2d 42, 57-58 (Wash. 1990) 3

Keyes v. Bollinger, 31 Wn. App. 286, 296 (1982) 13, 14, 15

Podiatry Ins. Co. v. Isham, 65 Wn.App. 266, 268 (1992) 8

Quimby v. Fine, 45 Wn.App. 175, 724 P.2d 403 (1986) 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 18, 19, 20

Short v. Demopolis, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984) 2, 6, 9, 12, 16

Stevens v. Hyde Athletic Industries, Inc., 54 Wn.App. 366, 773 P.2d 871 (1989) 1, 5, 6, 7, 8, 9, 16, 17, 19

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339 (1993) 14, 17, 19

Watson v. Maier, 64 Wash. App. 889, 896, 827 P.2d 311, review denied, 120 Wash. 2d 1015, 844 P.2d 436 (1992) 19

White River Estates v. Hiltbruner, 134 Wn.2d 761, 765, n.1 (1998) 14, 17

Wright v. Jenkle, 104 Wn.App 478, 16 P.3d 1268
(2001) 1, 4, 5, 7, 9, 10, 11, 12, 14, 18, 19, 20

Federal Cases

Cooter & Gell, 496 U.S. at 405 20

Hamman v. United States, 267 F. Supp. 420, 432
(D. Mont, 1967) 13

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 13, 14

Statutes

RCW 7.70 4

RCW 7.70.010 *passim*

RCW 19.86.010, *et seq.* *passim*

RCW 19.86.090 11, 15

Other Authorities

Court Rule 11 20

I. Summary of Reply

Dr. French contends that he cannot be held accountable under the Consumer Protection Act for any lies or misrepresentations he made to Teri Ambach to induce her to undergo an unnecessary shoulder surgery because, he argues, she has no recoverable CPA damages. He characterizes her damages from undergoing this unnecessary surgery as “personal injury damages” and then proceeds to argue that such damages are not covered under the CPA as a matter of law, citing *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989). To make this argument, however, he exaggerates the holding of *Stevens* and wrongly dismisses as irrelevant the two leading cases establishing physician liability under the CPA, *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986), *review denied*, 107 Wn.2d 1032 (1987) and *Wright v. Jeckle*, 104 Wn.App. 478, 482-485 (2001). He also ignores both federal and Washington decisions confirming that a consumer’s loss of money is a pecuniary damage that qualifies as an injury to property.

Dr. French’s argument reaches far beyond Ms. Ambach’s claim here. His contention, if properly understood, is that *Stevens* has effectively closed the door not only on this claim but on all similar claims as well, including the claims allowed by the holdings in *Quimby* and *Wright*. For a host of reasons, including this court’s reaffirmation of *Quimby* in *Wright* some 12 years after *Stevens* was decided, this contention is dead wrong. Washington law is clear that doctors who make

false statements promoting a treatment with the motive of making money rather than providing health care are liable under the CPA for pecuniary losses to consumers, including, specifically, the cost of the treatment.

II. Argument

A. Quimby is still good law.

Defendant's Response suggests *Quimby* is no longer good law. That is not the case. Although Dr. French did not raise the issue of whether his actions violated the CPA in regard to his treatment of Teri Ambach in the motion that is the subject of this appeal, his Response does argue that no claim for damages survives under such circumstances. In order to understand that a *Quimby*-type claim for damages under the CPA still exists, it is necessary to review the development of damage claims under the CPA against professionals in general and physicians in particular.

Quimby was first case in Washington to address the potential liability of a doctor under the Consumer Protection Act. Two years earlier, the Washington Supreme Court had decided the seminal case of *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984). *Short v. Demopolis* involved a variety of claims by a client against his attorney and law firm and was the first Washington case addressing the question of whether an attorney or other professional could be held liable for damages under the CPA for unfair or deceptive practices in "trade or commerce." The Supreme Court held attorneys could be held liable under the CPA.

Quimby held that doctors were similarly covered by the CPA's requirements where the doctor is acting as an entrepreneur, for example in providing deceptive information to clients to induce them to undergo treatment with them.

1. Citation by the Washington State Supreme Court

The Washington State Supreme Court has cited *Quimby* with approval in two cases. First, *Eriks v. Denver*, 118 Wn.2d 451, 464-465 (Wash. 1992) involved a class action against an attorney and other promoters of a tax shelter scheme. The *Eriks* court cited *Quimby* extensively in its opinion, demonstrating the continued vitality of *Quimby's* holding that professionals can be held liable for damages under the CPA for certain conduct.

Second, in *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 57-58 (Wash. 1990), also decided after *Stevens*, the court endorsed the *Quimby* court's holding that a CPA claim may be made by a patient when it arises out of the physician's duty to provide informed consent. However, since a hospital has no duty to provide informed consent, *Howell* concluded the Hospital had no potential liability under a CPA claim based on informed consent. Since this appeal involves only the treating physician, not the hospital, *Howell's* limitation does not apply.

Dr. French's motion for summary judgment below did not contest liability for violation of the CPA—only whether there were claimable damages. Therefore, plaintiff Teri Ambach is entitled to the conclusive presumption in this appeal that Dr. French, motivated by a desire for profit, convinced her she needed a shoulder surgery that was neither medically indicated nor appropriate. Under *Quimby*, this means she is entitled to damages under the CPA. The extent and scope of those damages is addressed below.

2. *Wright* confirms that a patient may bring a damage claim under the CPA for a physician's deceitful actions in promoting an unnecessary treatment.

Quimby's holding also has been reaffirmed more recently in the Washington State Court of Appeals by Division III's decision in *Wright v. Jeckle, supra*, in 2001. The *Stevens* decision also came out of Division III. *Wright* confirms *Quimby* is still good law and explains in greater depth how a physician promoting medical care in order to make money acts as an "entrepreneur" and not as a "health care" provider, thus subjecting himself to a claim for damages under the CPA for violations based upon conduct outside the exclusivity of RCW 7.70.

Dr. Jeckle prescribed diet drugs for his patients and then required them to buy the drugs through his office. A class of patients sought an order forcing him to disgorge the money he

received from the sale of diet drugs. *Id.* at 480-81. Interestingly, Dr. Jeckle's main defense was that he did not violate a duty of informed consent, so no CPA claim could be made against him. *Id.* at 483. The *Wright* court allowed plaintiffs case to go forward in their claim for money damages for the cost of the drugs, holding that entrepreneurial activities could include other actions than informed consent and also be subject to coverage under the CPA.

3. *Stevens* cites *Quimby* and distinguishes a *Quimby* informed consent CPA claim from "personal injury claims".

Stevens clearly did not overrule *Quimby*, nor did *Wright* overrule *Stevens*. All three decisions are still good law. Dr. French relies heavily on *Stevens*, but avoids examining the decision in detail. Such examination shows that *Stevens*' conclusion, that "personal injury claims" were not covered under the CPA, was not intended to overrule or even modify *Quimby*.

Stevens was decided three years after *Quimby*. *Stevens* was reviewing a lower court decision that actions for personal injury did not fall within the CPA. The plaintiff in *Stevens* claimed she had been sold a defective athletic shoe and been injured thereby.

The *Stevens* court was acutely aware of the *Quimby* decision. *Stevens* noted that the trial court focused on interpretation of *Quimby* and the distinction *Quimby* drew between the entrepreneurial aspects of the medical profession and the actual

competence of the practitioner, with the latter not falling within the coverage of the CPA. *Id.* at 369.¹ That lower court concluded that this distinction meant that personal injury claims like those in *Stevens* could not be brought under the CPA. *Id.* It is important to note that *Stevens* never identifies the price paid by the consumer for the shoe as a damage at issue in the case. Obviously, the loss of such money was *de minimus*. The apparent purpose of the plaintiff's lawsuit was not to recover the cost of the shoe, but the damages related to the injuries caused by the allegedly defective shoe.

Since there were no previous decisions determining whether personal injury actions like those presented in *Stevens* also could support CPA claims, *Stevens* looked to federal law for guidance. *Stevens* did not criticize either *Quimby* or *Short*. There is a key difference between *Quimby* and *Short* and the kind of product liability action *Stevens* was analyzing. Both *Quimby* and *Short* were concerned with a professional, whether doctor or lawyer, who stops being a professional and becomes something else, an entrepreneur. The defendant in *Stevens* was a business and by definition already an entrepreneur. *Short* and *Quimby* both stand for the principle that when a professional ignores their primary duty as a professional and acts instead from a motive for

¹ *Stevens* noted that *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) drew the same distinction for the legal profession.

profit, they then must be subject to the CPA. No such problem confronted the *Stevens* court.

Stevens, like the trial court before it, determined that the CPA was not intended to include “actions for personal injury”. It is important to note that *Stevens* was determining whether there was a possible CPA claim at all and used the “injury” to “business or property” element to reach its conclusion that “actions for personal injury do not fall within the coverage of the CPA.” *Id.* 370.

Since *Stevens* did not purport to overrule or modify *Quimby* while being quite aware of the decision and citing it, the only reasonable conclusion is that *Stevens* believed the two holdings were not in conflict with each other. *Stevens* does not directly address how its facts are distinguishable from the *Quimby* facts, but there are two reasonable explanations.

First, if the *Stevens* court saw the cost of the item or services as the only “property” claimable under the CPA, then it would have concluded that such a damage may have been claimed in the *Quimby* CPA claim without conflicting with the *Stevens* opinion. *Wright*, decided 12 years after *Stevens*, would be consistent with this analysis since the specific damage alleged there was the loss of money paid for the prescription drugs, not the personal injuries caused by the medication (phen-fen) itself.

Podiatry Ins. Co. v. Isham, 65 Wn. App. 266, 268 (1992)

can be read as supporting this interpretation of the *Stevens* decision. In *Isham*, the court found the cost of an unnecessary surgery was a damage that met the *Stevens* holding requiring CPA damages to be injury to business or property:

“PICA, Dr. Isham's malpractice insurance carrier, is defending the Ishams against Ms. Mattson's claims under a reservation of rights. Following this court's decision in *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989), which held a personal injury does not constitute an injury to "business or property" for purposes of the CPA, the Ishams moved for dismissal of the CPA claim. The court denied the motion, finding the *Stevens* requirement that something more than "personal injury" type damages be alleged in a CPA action was met by Ms. Mattson's claim of economic loss due to the increased cost of surgery versus more conservative treatment.”

Teri Ambach has claimed the cost of the French surgery as a damage and there is no evidence in the record that any other treatment was actually needed for her shoulder. Presumably, Dr. French would be able to argue on remand that the loss to Ms. Ambach from the unnecessary surgery is less than the total cost of the surgery because other alternative treatment would have been necessary. That, however, is a matter for trial, not summary judgment.

Alternatively, if *Stevens* was focused on the type of claim (“personal injury claim”) and damages associated with that particular type of claim (“personal injury damages”), it may have

been that Stevens did not consider the *Quimby* informed consent claim to be a “personal injury claim.” Rather, the “personal injury claim” in *Quimby* was the medical negligence claim already determined by the *Quimby* court to be excluded from coverage under the CPA. Id. at 369. Under this analysis, damages from a *Quimby*-type CPA claim could include consequential pecuniary damages—in other words, damages beyond the payment for the medical service or product that had been deceptively promoted by the doctor for the primary purpose of making money.

Under either analysis, however, Teri Ambach’s CPA claim against Dr. French is not precluded by *Stevens*. At a minimum, her CPA claims could go forward with the alleged injury to property of the cost of the deceptively promoted surgery.

B. Teri Ambach’s CPA claim here is exactly the kind of potential CPA claim contemplated by *Quimby* and *Wright*.

The plaintiff’s allegations in *Quimby* can be accurately characterized as including both medical malpractice and informed consent claims. *Quimby* involved a claim for wrongful birth. In addition to the medical malpractice and informed consent claims, however, it was alleged that the doctor crossed another statutory line and violated the Consumer Protection Act.

Echoing the Washington Supreme Court’s recent decision in *Short v. Demopolis*, supra, *Quimby* ruled this CPA line crossing could not occur as a matter of law on medical negligence issues. Such issues relate to the

doctor's competence and skill, not to his honesty. *Quimby* concluded the CPA did apply to situations in which the doctor not only fails to provide adequate informed consent, but steps out of his role as health care provider and promotes a treatment primarily for profit. If the doctor's "decision to perform a particular operation was influenced by any entrepreneurial motives", the consent to the operation may be related to the entrepreneurial aspect of the doctor's practice and thus actionable under the CPA. 181-182

Stated another way by the same court, a proper CPA claim is alleged if "a lack of informed consent claim can be based on dishonest and unfair practices used to promote the entrepreneurial aspects of a doctor's practice, *such as when the doctor promotes an operation or service to increase profits and the volume of patients...*" *Id.* at 181 (*emphasis added*).

C. *Quimby* and *Wright* did not ignore the element of damages in holding physicians could be sued under the CPA.

Dr. French argues that *Quimby* should be disregarded by this court because it does not identify what property damages may be claimed by such a patient. This argument assumes the *Quimby* court was either ignorant of the law or failed to consider whether there were any possible CPA damages. He repeats the same arguments against the *Wright* *opinion*.

The *Quimby* court was not ignorant of the element of damages in a CPA claim. It recited the required elements of a CPA claim before concluding the plaintiff there had a potential CPA claim:

“A private party may bring an action for damages under the Consumer Protection Act, RCW 19.86.090, if the conduct complained of is unfair or consists of deceptive acts in the sphere of trade or commerce, it impacts the public interest, *and it causes the plaintiff damage*. [citation omitted].

Id at 179-180, *emphasis added*.

The court further concluded that a lack of informed consent claim “may be within the scope of the Consumer Protection Act if it relates to the entrepreneurial aspects of the medical practice”. Id. at 181. The court then cited the elements of lack of informed consent at footnote n5, including subsection (d) “That the treatment in question proximately caused injury to the patient.” Id.

The only reasonable conclusion is that the *Quimby* court believed there were claimable damages arising out of such claim. If all damages from medical treatment were unrecoverable under the CPA as a matter of law—even expenses of treatment wrongfully promoted in violation of the CPA—then the *Quimby* court would have ruled for the doctor and thrown out the CPA claim. Instead, it upheld denial of summary judgment and remanded for further inquiry into questions of fact—not resolution as a matter of law. Id. 182.

Dr. French also is wrong in claiming that *Wright* says nothing about damages. In *Wright*, the plaintiff asked for an order requiring Dr.

Jeckle to disgorge the money he received from the sale of fen-phen. *Wright*, supra at 480-481. Although this Court's opinion focused mainly on the application of the CPA to learned professions, its decision allowed a class action claim for these damages to go forward.

Such pecuniary damage is the most obvious property damage in such a claim—a damage which would be present in every legitimate CPA claim against a physician for deceptively and dishonestly promoting an unnecessary drug or surgery. The patient had to pay for something they did not need. At a minimum, that is true for Teri Ambach here, who has claimed the cost of the surgery as a damage.

Does paying money for something you do not need satisfy the “injury” to “business or property” under the CPA? Of course it does. One could credibly argue that protection against being deceitfully talked into buying something you do not need is the very essence of “Consumer Protection”.

D. The proper scope of damages in a CPA claim against a physician includes direct pecuniary losses and may include other consequential pecuniary losses.

Dr. French wrongly argues that injury to “business or property” cannot include even the cost a patient pays for the alleged deceptively promoted surgical procedure. If his limited definition were indeed Washington law, neither *Quimby* nor *Wright* nor *Short v. Demopolis* nor any similar CPA claims against professionals would ever survive

summary judgment. Pecuniary loss is not limited to commercial or business losses.²

Keyes v. Bollinger, 31 Wn. App. 286, 296 (1982), held that Washington follows the federal rule that a consumer who loses money has been injured in their "property":

"The scope of injury to "property" is, however, quite broad and is not restricted to commercial or business injury. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979). "A consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property' within the meaning of [15 U.S.C. § 15]." *Reiter v. Sonotone Corp.*, supra at 339. *Accord*, *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 51 L. Ed. 241, 27 S. Ct. 65 (1906). See generally *L. Sullivan, Antitrust § 247* (1977)."

Reiter, supra, did hold that "personal injuries" were not claimable as "injury to business or property." However, that limitation was stated in the same paragraph as the pecuniary loss of money by a consumer was confirmed as a "property" injury:

"The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered. e.g., *Hamman v. United States*, 267 F.Supp. 420, 432 (Mont. 1967). Congress must have intended to exclude some class of injuries by the phrase "business or property." **But it taxes the ordinary meaning of common terms to argue, as respondents do, that a consumer's monetary injury arising directly out of a retail purchase is not comprehended by the natural and usual meaning of the phrase "business or property." We simply give the word "property" the independent**

² Oddly, Dr. French repeats the *Stevens* citation to *Hamman* for the proposition that the phrase injury to business or property denotes only "commercial" ventures. French Response at p. 6. *Reiter*, supra, makes it unequivocally clear that the phrase "or property" allows consumers to claim injury in the form of diminished money.

significance to which it is entitled in this context. A consumer whose money has been diminished by reason of an antitrust violation has been injured "in his . . . property" within the meaning of § 4."

Reiter, 442 U.S. at 339. (emphasis supplied)

Allowing some direct pecuniary loss is not inconsistent with the intent of the legislature in limiting CPA damages to injury to business or property. Rather, allowing some pecuniary loss and disallowing other damages fulfills the purpose of the Consumer Protection Act to protect consumers from being unfairly and deceptively parted from their hard-earned money by a less-than-scrupulous entrepreneur. One must read the limitation on damages contained in the Consumer Protection Act with this understanding of property damage or *Quimby* and *Wright* make no sense. This does not mean that allowing someone like Teri Ambach to claim pecuniary loss for the cost of the allegedly unnecessary shoulder surgery makes the limitation on injury to business or property meaningless.

There are clear limitations on CPA damages. For example, one cannot claim mental distress, embarrassment, and inconvenience. *Keyes v. Bollinger*, *supra* at 295-297.³ One cannot claim pain and suffering. See *Wash. State Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wn.2d 299, 317-318 (1993). One cannot claim emotional distress. *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 (1998). None of these are injury to property—a loss of money.

³ However, *Keyes* also stated the following: "Should mental distress, embarrassment, and inconvenience' in fact entail pecuniary loss, we discern no reason under the act to exclude such damages...."

However, while it is clear that the pecuniary loss of the payment for the surgery or drug is a claimable damage and that non-pecuniary losses like pain and suffering and emotional distress are not, there is no such clarity on the availability of pecuniary damages beyond the initial payment for product or services where additional pecuniary losses are directly caused by the deceptively promoted drug or procedure.

Keyes v. Bollinger, supra, for example, suggests that CPA pecuniary losses may be claimable where they are caused by "injury" such as mental distress, embarrassment, and inconvenience even though those non-pecuniary damages themselves cannot be claimed:

"The breadth of injury to one's "business or property" compensable under the Consumer Protection Act is demonstrated by the many appellate court decisions construing the act. But the reasoning of the federal decisions and the language of RCW 19.86.090 persuade us that "mental distress, embarrassment, and inconvenience," without more, are not compensable under the Consumer Protection Act. **Should "mental distress, embarrassment, and inconvenience" in fact entail pecuniary loss, we discern no reason under the act to exclude such damages.** Thus, we find no inconsistency between this opinion and the language in *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, [*297] 605 P.2d 1275 (1979), wherein we stated that inconvenience may be compensable under the Consumer Protection Act. Applying these principles to the "contingent" findings here, we conclude that judgment under the Consumer Protection Act may be entered for all damages supported by the "contingent" findings except for damages due to "mental distress, embarrassment, and inconvenience."

Keyes v. Bollinger, supra at 296-297 (1982). (emphasis supplied.)

Another example can be taken from dicta in a concurring opinion by Justice Dore in the seminal *Short v. Demopolis* case which established the right to sue a professional for violation of the CPA. Justice Dore was concerned with lawyer advertising, but his reasoning is equally applicable to in-office marketing by a physician who has a pattern and practice of promoting unnecessary surgery as a money-making scheme:

“There is at least one circumstance, however, where the CPA should not be limited solely to the business practice of lawyers. That circumstance exists when lawyers engage in deceptive advertising....Advertising poses a special problem. On the one hand, it can provide information so consumers can make an informed choice in selecting an attorney. On the other, it has the potential for deceiving a large number of people and resultant damage. To insure that consumers can rely on all attorney advertising, an effective penalty should be imposed for deceptive advertising which causes damage. I believe that damage to a client resulting from deceptive advertising should be compensable through the CPA. An example: A lawyer advertises that he charges an hourly fee of \$ 20 an hour. However, such a fee is only for the initial consultation and the lawyer charges \$ 80 an hour thereafter but he fails to mention this in his advertisements. Another example would be if the deceptive-advertising lawyer, through his negligence, mishandles the client's case in such a way as to cause the client a loss. Normally the latter loss would not fall within the purview of the CPA since it goes to the competence of an attorney. In this example, however, it should be subject to the CPA since the loss was a direct result of the initial advertising deception. This position is fair, in that the client would not have suffered the loss but for the deceptive advertisement.

Short v. Demopolis, 103 Wn.2d 52, 67-68 (1984).

The above reasoning clearly conflicts with an interpretation of injury to business or property that would exclude even pecuniary losses if they resulted from personal injuries. *Stevens* stands as the case that

imposes the most stringent limitations on such damages. However, it is very important to note that *Stevens* has not been universally understood to limit pecuniary as well as non-pecuniary losses caused by CPA violations.

For example, in *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 (1998), the Supreme Court appears to view *Stevens* in a far more limited way—citing it in a footnote for the proposition that “mental pain and suffering” are not recoverable for a violation of the CPA:

Although Hiltbruner's Consumer Protection Act (CPA) claim is no longer at issue, we note that emotional distress damages are not available for a violation of the CPA. See *Washington State Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993) (damages for mental pain and suffering are not recoverable for a violation of the CPA because the statute, by its terms, allows recovery only for harm to "business or property"); *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989) (same); *Keyes v. Bollinger*, 31 Wn. App. 286, 296, 640 P.2d 1077 (1982) (same).”

While this question is both interesting and relevant to the full extent of damages claimable under the CPA by Teri Ambach in this case, the question is not important to the specific issue of whether her CPA claim should have been dismissed below. That dismissal occurred because the trial judge accepted Dr. French's argument that there were no possible damages that could be claimed where a physician violates the CPA in promoting an unnecessary P.2 surgery. At a minimum, Ms. Ambach has the indisputable claim for money paid for the alleged deceptively promoted and unnecessary surgery. The existence of that damage meant

summary judgment here, which was stipulated by Dr. French to be limited to that issue alone, should have been denied.

E. Reversing the Granting of Summary Judgment does not open Pandora's Box.

Dr. French suggests that since every doctor charges for his or her services, defining the payment for services deceptively and unfairly promoted by the doctor as "property" would open Pandora's box and make every informed consent case a CPA case. However, a CPA claim does not automatically follow where there is a claim involving informed consent. The plaintiff must prove the doctor has stepped out of his role as health care provider and unfairly and deceptively induced him or her to have a surgery or take a drug the patient did not need. In addition, the physician's conduct must rise to such a level as to implicate the public interest. Dr. French has chosen not to contest plaintiff's allegations regarding his conduct in this motion and therefore in this appeal. Fortunately, it is rare to find a physician who goes so far beyond informed consent and becomes an entrepreneur and promotes treatment for profit rather than for the patient's benefit. This is, however, what is alleged here and which this Court must accept as fact in deciding this appeal.

This claim only seeks to proceed under the parameters already approved in *Quimby* and *Wright*. Reversing the granting of summary judgment below will simply be an affirmation of current Washington law.

F. Sanctions were based on a misunderstanding of the law and must be reversed

Although sanctions are always reviewed under an “abuse of discretion” standard, where the sanctions are administered for pursuit of a legal claim, “abuse of discretion” is narrowly defined. Where the judge misunderstands the applicable law and orders sanctions as a result, those sanctions should be overturned on appeal. As the Washington Supreme Court stated in *Wash. State Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wn.2d 299, 339 (1993):

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.⁴ A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.⁵

III. Conclusion

Why does Dr. French work so hard to have the court disregard *Quimby* and *Wright*? Because understanding those decisions are still good law means Dr. French is wrong about the impact of *Stevens*. If he were right, there would be no *Wright v. Jeckle*. If he were right, *Quimby v. Fine* would not be cited repeatedly for the proposition that a patient can sue a doctor for a surgery promoted by deceit for money.

⁴ *Holbrook v. Weyerhaeuser Co.*, 118 Wash. 2d 306, 315, 822 P.2d 271 (1992)

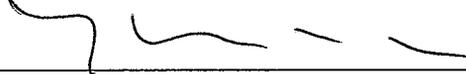
⁵ *Watson v. Maier*, 64 Wash. App. 889, 896, 827 P.2d 311, review denied, 120 Wash. 2d 1015, 844 P.2d 436 (1992); See *Cooter & Gell*, 496 U.S. at 405.

Those decisions established and then reaffirmed that CPA claims against physicians in Washington may be based on dishonest and unfair entrepreneurial promotion of an operation or other treatment. *Quimby*, supra at 181; *Wright* supra at 483. Both decisions hold that where a doctor's motive in promoting a procedure or drug is the motive of making money, not providing health care, he can be sued under the CPA. When that line is crossed, the doctor has become an "entrepreneur" more than a physician. Such a claim is not about the doctor's competence as a physician, but rather about his honesty as an entrepreneur. The Washington Supreme Court and the Courts of Appeal have not affirmed the principle of liability for such conduct and then denied such claims based upon lack of damages as Dr. French asserts here. The obvious damage of paying Dr. French for unnecessary treatment is claimable and is present here. There were consequential pecuniary damages as well that should be considered as well. However, even the cost of unnecessary treatment alone is sufficient to reverse the court's order below.

The lower court's misunderstanding of the law led it to sanction the Keith Douglas law firm under CR 11 for alleging a CPA claim against Dr. French and his orthopedic practice. When such a misunderstanding is the basis for a CR 11 sanction, that sanction must be lifted by the appellate court reviewing the decision.

RESPECTFULLY SUBMITTED this 9th day of February, 2007.

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

Patrick Fannin by
 13951

PATRICK K. FANNIN, WSBA #28191
Attorney for Appellants/Cross Respondents/Plaintiffs
1321 West Broadway
Spokane, WA 99201
509-326-8200

CERTIFICATE OF SERVICE

On the 9 day of February, 2007, I caused to be served the foregoing: Revised Reply Brief of Appellant, as follows:

U.S. Mail Michael Ricketts/David Corey/Lisa Hammel
 Hand Delivered Kingman, Peabody, Fitzharris, & Ringer
 Overnight Mail 505 Madison Street, Ste. 300
 Telecopy (Fax) Seattle, WA 98104
Counsel for Defendants French, Landle, and Three Forks Orthopaedics

U.S. Mail Stephen M. Lamberson/Susan Troppmann
 Hand Delivered Etter, McMahon, Lamberson & Clary, P.C.
 Overnight Mail 421 West Riverside Avenue, Ste. 1600
 Telecopy (Fax) Spokane, WA 99201
Counsel for Defendant Whitman Hospital

U.S. Mail David A. Thorner
 Hand Delivered Thorner, Kennedy & Gano, P.S.
 Overnight Mail P.O. Box 1410
 Telecopy (Fax) Yakima, WA 98907
Counsel for Defendants Keeve and NW Orthopaedic Specialists

U.S. Mail Timothy Esser
 Hand Delivered Libey, Ensley, Esser & Nelson
 Overnight Mail 520 East Main
 Telecopy (Fax) Pullman, WA 99163
Counsel for Defendant Whitman Hospital

U.S. Mail Kristin Houser/James Hailey
 Hand Delivered Schroeter, Goldmark and Bender
 Overnight Mail 500 Central Building
 Telecopy (Fax) 810 Third Avenue
Seattle, WA 98104
Counsel for Plaintiffs & Petitioner

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



Kristine A. Proszek
Signed in Spokane, Washington