

81107-5

Nos. 247848, 250075

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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

**Appellants,**

**vs.**

**H. GRAEME FRENCH, M.D. and JANE DOE FRENCH,  
individually and the marital community composed thereof; KELLY  
LANDLE, PAC and JOHN DOE LANDLE, individually and the  
marital community composed thereof; THREE FORKS  
ORTHOPAEDICS, P.C., a Washington professional corporation;  
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., a Washington professional  
services corporation; and KARLENE A. ARGUINCHONA, M.D.,**

**Respondents.**

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**BRIEF OF RESPONDENTS FRENCH AND  
THREE FORKS ORTHOPAEDICS**

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## **I. IDENTITIES OF THE RESPONDENTS**

H. Graeme French, M.D., and Three Forks Orthopaedics, P.C. (collectively “Dr. French”), defendants below, respectfully submit this brief of respondent pursuant to RAP 10.2(b).

## **II. COUNTERSTATEMENT OF THE ISSUES**

First, did the trial court err by holding appellant’s personal injury damages cannot satisfy the CPA’s “injury to...business or property” requirement?

Second, did the trial court err by holding appellant cannot sidestep the *Stevens* rule by merely alleging an ill motive?

Third, did the trial court err by holding appellant cannot satisfy the CPA’s damage requirement by recasting her personal injury damages in a “pseudo-property” structure?

Fourth, did the trial court err by holding Ambach Construction’s losses allegedly arising from appellant’s personal injuries cannot satisfy the CPA’s damage requirement?

Fifth, did the trial court adopt a view “no reasonable person would take” by holding counsel’s legally baseless CPA claim lacked an objectively reasonable injury?

### III. COUNTERSTATEMENT OF THE CASE

According to her complaint below, appellant Teresa Ambach presented to Dr. French on 11/16/01 with neck pain and left arm numbness. CP 5. On 02/12/02, Dr. French performed surgery on her left shoulder. *Id.* She later developed an infection that went undiagnosed by all defendants. CPs 6-9.

Ms. Ambach and her husband, former plaintiff Michael Ambach (whose claims were dismissed with prejudice on 08/01/06, CPs 790-792), filed a complaint on 01/28/04 asserting a dizzying number and variety of medical malpractice theories against six health care providers, including Dr. French. CPs 1-31. Additionally, her complaint alleged that Dr. French and others engaged in unfair or deceptive acts or practices in violation of Washington's Consumer Protection Act, RCW 19.86 ("CPA"). CPs 21-23.

Dr. French moved for partial summary judgment on 05/28/04, challenging appellant's proof of an "injury to...business or property" as required under the CPA. CPs 45-56. In response, appellant filed a declaration detailing her husband's and her own "various financial losses." CPs 85-88. These alleged damages can be grouped into four broad categories:

- *Medical expenses* (“I have incurred approximately \$81,000.00 in medical bills so far”), CP 87;
- *Out-of-pocket expenses arising from her injury* (“Losing income and increased expenses has been financially difficult for me ...We have had to turn to high interest loans to make ends meet...I have often had to get help from others which is an additional expense...travel expense and wear and tear on my car”), *id.*;
- *Wage loss* (“I still have not returned to work... My husband owns and operates Ambach Construction...the business has had to hire laborers to replace what I used to do”), CPs 86-87; and
- *Loss of earning capacity* (“I used to be a card dealer but having only one fully functioning arm, I obviously cannot do that anymore”), CP 86.

On summary judgment, Dr. French argued that none of Ms. Ambach’s garden-variety personal injury damages satisfies the CPA’s “injury to...business or property” requirement. The trial court agreed and, on 07/09/04, summarily dismissed the CPA claim against Dr. French. CPs 249-51.

Ms. Ambach moved for reconsideration, which the trial court denied on 07/29/04: “The basic issue here is that in the context of a CPA claim, a traditional, classic personal injury claim for damages does not constitute a claim for damages for injuries to business or property under the CPA.” CP 272 (citing *Fisons, Hiner*).

Ms. Ambach next sought discretionary review in this Court. CPs 274-75. Commissioner Slak denied that motion, finding that she had not satisfied the requirements of RAP 2.2(d) and CR 54(b). CPs 298-99.

Meanwhile, co-defendant Whitman Hospital also sought summary dismissal, initially only of the CPA claim against it, then later of all remaining claims against it. The trial court granted those motions. CPs 291-92, 438-43. As with Dr. French, Ms. Ambach sought reconsideration of the summary judgments in favor of Whitman. The trial court declined reconsideration on 08/30/05. CP 517.

The trial court subsequently granted Whitman's and Dr. French's requests for CR 11 sanctions. CPs 672-75, 758-61. This appeal follows entry of final judgments on those sanction awards. *See* CPs 778-80, 786-88.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DID NOT ERR BY HOLDING APPELLANT'S PERSONAL INJURY DAMAGES CANNOT SATISFY THE CPA'S "INJURY TO...BUSINESS OR PROPERTY" REQUIREMENT.**

On summary judgment, Dr. French disputed whether appellant could make out a *prima facie* case under Washington's Consumer Protection Act. To establish a *prima facie* CPA claim, a consumer must satisfy five discrete elements: "(1) [A]n unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest...(4) a showing of injury to plaintiff in his or her business or property...[and] (5) a causal link...between the unfair or deceptive act

complained of and the injury suffered.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). In his motion, Dr. French focused on the “injury...to business or property” element, which derives from the plain language of the statute: “Any person who is injured in his or her business or property...may bring a civil action...” RCW 19.86.090; *see also White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 n. 1, 953 P.2d 796 (1998) (“the statute, by its terms, allows recovery only for harm to ‘business or property’”).

**i. Stevens Remains the Law of Washington.**

Seventeen years ago, this Division first took up the question of whether personal injuries are cognizable under the CPA. *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (Div. III 1989). This Court looked to federal law as directed in RCW 19.86.920<sup>1</sup> and quoted the U.S. Supreme Court’s holding in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 60 L. Ed.2d 931, 99 S. Ct. 2326 (1979), which considered the phrase “injured in his business or property” in federal antitrust laws. The *Reiter* court explained:

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<sup>1</sup> RCW 19.86.920 provides in pertinent part: “It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters...”

The phrase “business or property” also retains restrictive significance. It would, for example, exclude personal injuries suffered. Congress must have intended to exclude some class of injuries by the phrase “business or property.”

*Reiter*, 442 U.S. at 339 (citations omitted).

This Court’s *Stevens* decision also quoted *Hamman v. United States*, 267 F. Supp. 420, 432 (D. Mont. 1967): “The term ‘business or property’ is used in the ordinary sense and denotes a commercial venture or enterprise.” *Stevens*, 54 Wn. App. at 370. The *Stevens* court also cited cases from “our sister states” of Hawaii and Oregon reaching the same result. *Id.* (citing *Beerman v. Toro Mfg. Corp.*, 615 P.2d 749 (Haw. 1980); *Gross-Haentjens v. Leckenby*, 589 P.2d 1209 (Ore. 1979)).

With that broad consensus of authorities in mind, this Court announced in *Stevens* that personal injury actions are not cognizable under the CPA: “We hold actions for personal injury do not fall within the coverage of the CPA.” *Id.* Four years later, Washington’s Supreme Court approved the *Stevens* holding:

The *Stevens* court...concluded that had our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her “business or property.” We agree. Personal injuries are not compensable under the CPA.

*Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993) (citing *Stevens*).

*Stevens* has thus been the law of this state since 1993, and it has since been repeatedly and unanimously reaffirmed. See *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 n. 1, 953 P.2d 796 (1998) (citing *Stevens* and *Fisons* in dictum: “damages for pain 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’”); *Hiner v. Bridgestone/Firestone Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (Div. III 1998), *rev’d on other grounds*, 138 Wn.2d 248 (1999) (citing *Fisons*: “personal injuries are not recoverable under the CPA”); *Leingang v. Pierce Cty. Med. Bureau*, 131 Wn.2d 133, 157-58, 930 P.2d 288 (1997) (citing *Fisons*: “we have held that personal injuries, including mental pain and suffering, are not compensable under the Consumer Protection Act”).

**ii. *Quimby* and *Jeckle* Are Silent on the Issue of Damages.**

There can be no question that *Stevens* remains the law of Washington today. Appellant cites *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986), and *Wright v. Jeckle*, 104 Wn. App. 478, 16 P.3d 1268 (2001), as support for her position that she incurred “damages recoverable under the CPA.” Brief of Appellant at 17. But her reliance on *Quimby* and *Wright* is misplaced. Neither case addressed the question of damages.

Both *Quimby* and *Wright* were decided under an entirely different element of the *Hangman Ridge* test, to wit: Whether the “entrepreneurial aspects” of a physician’s practice can constitute an “unfair or deceptive act or practice” under the CPA. That element is not at issue in the instant case; the trial court here granted summary dismissal solely on the basis of damages. RP (07/09/04) at 3-5.

*Quimby* was decided in 1986, three years before the *Stevens* court interpreted the “injury to...business or property” requirement as a matter of first impression. The *Quimby* court made no mention of the nature of damages the Quimbys had suffered; it focused solely on the “unfair or deceptive act or practice” element: “[W]hether Dr. Fine’s conduct meets the other prongs of the *Hangman* test is a question of fact to be resolved at the trial level.” *Quimby*, 45 Wn. App. at 182.

Nor was the damage element considered by the *Wright* court, whose 2001 decision remains conspicuously silent on *Stevens* and *Fisons*. Like *Quimby*, *Wright* was decided solely on the “unfair or deceptive act or practice” element. In short, nothing whatsoever in the *Quimby* and *Wright* cases bears on the question raised below: Whether Teresa Ambach suffered an “injury to...business or property” cognizable under the CPA.

**B. THE TRIAL COURT DID NOT ERR BY HOLDING APPELLANT CANNOT SIDESTEP THE STEVENS RULE BY MERELY ALLEGING AN ILL MOTIVE.**

Below, Ms. Ambach invited the trial court to rule, in effect, that the nature of her liability evidence -- alleged fraud ("malfeasance"), as opposed to mere negligence ("misfeasance") -- somehow trumps or abrogates *Stevens*' prohibition against personal injury damages under the CPA. CP 75. Appellant now extends the same invitation to this Court. Brief of Appellant at 16-19. Her premise finds no support whatsoever in *Quimby*, nor elsewhere in Washington law. The trial court correctly declined her invitation to ignore the bright line separating CPA damages from personal injury damages, recognizing that any such exception would swallow the rule:

[I]f the claim for damages as requested by the plaintiff could be upheld in this case, there would be almost no case involving medical negligence issues, malpractice, and so forth, in which the claims could not be brought.

RP (07/09/04) at 4.

Virtually all doctors treat patients for money. It is their livelihood. If it were possible to sidestep the CPA's requirement of "injury to...business or property" (and corollary prohibition against personal injury damages) by simply alleging an ill motive, then virtually any medical malpractice plaintiff could maintain an adjunct CPA claim. Such

a result would do violence to the legislative intents of both RCW 7.70<sup>2</sup> and RCW 19.86.

This Court should decline appellant's invitation to render meaningless the words "injured in his or her business or property" in RCW 19.86.090. The legislature clearly meant *something* by this restrictive phrase. *See Fisons*, 122 Wn.2d at 318 ("had our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her 'business or property'"). The only permissible interpretation of a statute is that which gives effect to its plain language; in other words, "we assume the legislature means exactly what it says." *Fisher v. Dep't of Health*, 125 Wn. App. 869, 875, 106 P.3d 836 (2005) (citing *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001); *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)).

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<sup>2</sup> "Reading RCW 7.70.010 and .030 together, we conclude that whenever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70." *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335, *review denied*, 138 Wn.2d 749, 755, 881 P.2d 216 (1994) (noting that the legislature's declaration of policy in section .010 "sweeps broadly").

**C. THE TRIAL COURT DID NOT ERR BY HOLDING APPELLANT CANNOT SATISFY THE CPA'S DAMAGE REQUIREMENT BY RECASTING HER PERSONAL INJURY DAMAGES IN A "PSEUDO-PROPERTY" STRUCTURE.**

In *Stevens*, Helen Stevens sustained personal injuries in a softball game while sliding into home plate wearing defective shoes. *Stevens*, 54 Wn. App. at 367. The shoe manufacturer sought summary dismissal of her CPA claim, arguing that her personal injury damages did not satisfy the CPA's "injury to...business or property" requirement. *Id.* In opposition to summary judgment, Ms. Stevens attempted to meet the requirement "by classifying her personal injury damages into a pseudo-property structure." *Id.* at 370. She argued that her "special damages such as hospital, physician, and rehabilitative expenses, constitute property and economic interests." *Id.* This Court rejected her recharacterization as "unconvincing" and affirmed the order granting summary dismissal. *Id.*

In *Hiner*, this Division elaborated, holding that "damages...aris[ing] from personal injuries...and commonly awarded in personal injury actions" cannot be simply recast as "business or property" losses for the purpose of supporting a companion CPA claim. *Hiner*, 91 Wn. App. at 730 (citing *Fisons* and *Stevens*). The *Hiner* court cited several examples, "including reimbursement for lost wages and earning

capacity, medical expenses and damage to her car..." *Id.* None of these is cognizable under the CPA if it arises from personal injury.

Turning to the facts below, it was obvious to the trial court that Ms. Ambach's alleged medical expenses, out-of-pocket expenses, wage loss (including losses allegedly suffered by Ambach Construction, *infra*), and loss of earning capacity are garden-variety personal injury damages:

It seems to me that the types of economic damages which are under discussion here -- areas of time loss of work, transportation costs, medical bills, various limitations on activities -- are exactly the traditional types of damages that flow from negligence from the ordinary types of tort claims which have always been present.

It does not appear to this court within the structure of existing law, pending some significant expansion which I do not see at the present time under the existing precedential cases, that these kinds of damages can be pressed in the cause of action designated as a Consumer Protection Act claim.

RP (07/09/04) at 4.

All of Teresa Ambach's damages "are commonly awarded in personal injury actions." *See Hiner*, 91 Wn. App. at 730 (citing *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 500-01, 722 P.2d 1343 (1986)). None becomes compensable under the CPA simply because a plaintiff has artfully recast them "into a pseudo-property structure." *See Stevens*, 54 Wn. App. at 370.

This Court should recognize appellant's garden-variety personal injury damages for what they are.

**D. THE TRIAL COURT DID NOT ERR BY HOLDING AMBACH CONSTRUCTION'S LOSSES ALLEGEDLY ARISING FROM APPELLANT'S PERSONAL INJURIES CANNOT SATISFY THE CPA'S DAMAGE REQUIREMENT.**

Appellant argues “[s]he and her husband owned Ambach Construction,” which she claims suffered business losses as a result of her personal injuries. Brief of Appellant at 5 (citing CPs 86-88). For at least three reasons, the alleged losses of Ambach Construction do not rescue appellant’s doomed CPA claim.

First, insofar as Ms. Ambach contends her injuries impaired her ability to earn money working for Ambach Construction, her claim is nothing more than an artfully recast claim for loss of her own wages. Wage loss is a garden-variety species of personal injury damage. *See Hiner, supra*. Where it arises from personal injury, wage loss is simply not compensable under the CPA.

Second, insofar as Ms. Ambach contends her inability to work impaired the profitability of the company, any actual downturn in the company’s profits is hopelessly remote. The factors bearing on a construction company’s profitability are innumerable but would certainly include changes in demand (*i.e.*, the local economy), changes in competition (*i.e.*, the local construction marketplace), and changes in costs

(e.g., supplies, labor, taxes, permitting). Appellant cannot establish an adequate proximate nexus between Dr. French's diagnosis and Ambach Construction's business losses.

Third, Teresa Ambach's sworn declaration -- the only evidence regarding Ambach Construction in the appellate record -- identifies her husband, former plaintiff Michael Ambach, as the *sole* owner of the business: "My husband owns and operates Ambach Construction..." CP 86. Ambach Construction, which was formed some nine years before their marriage, is not a party to this lawsuit. Michael Ambach's claims were dismissed with prejudice on 08/01/06. CPs 790-792. Property acquired before marriage is presumptively separate property. *E.g., Stokes v. Polley*, 145 Wn.2d 341, 348, 37 P.3d 1211 (2001).

For all of these reasons, any loss of profitability suffered by Ambach Construction allegedly resulting from Teresa Ambach's personal injuries do not give rise to a CPA claim.

**E. THE TRIAL COURT DID NOT ADOPT A VIEW "NO REASONABLE PERSON WOULD TAKE" BY HOLDING COUNSEL'S LEGALLY BASELESS CPA CLAIM LACKED AN OBJECTIVELY REASONABLE INQUIRY.**

Civil Rule 11(a) provides in pertinent part:

The signature of...an attorney constitutes a certificate...that to the best of the...attorney's knowledge, information, and belief, formed after inquiry reasonable under the circumstances...[the pleading] is

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of a new law....[and] it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation...

Rule 11(a) authorizes the trial court to sanction an attorney for signing a legally baseless pleading:

If a pleading...is signed in violation of this rule, the court...may impose upon the person who signed it...an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading...including a reasonable attorney fee.

“The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system.” *Bryant v. Joseph Tree*, 119 Wn.2d 210, 219, 829 P.2d 210 (1992). Whether an attorney has violated CR 11 rests within the sound discretion of the trial court. *E.g., Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. 332, 340, 798 P.2d 1155 (1990), *review denied*, 124 Wn.2d 1010 (1994), *cert. denied*, 513 U.S. 1017 (1994). A trial court’s exercise of discretion will not be disturbed “unless the appellant or petitioner makes a clear showing that the trial court’s discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). In other words, an abuse of discretion occurs only when “no reasonable person would take the view adopted by the trial court.” *In re Guardianship of Johnson*, 112 Wn. App. 384, 388, 48 P.3d 1029 (2002);

*see also Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000).

An attorney may be sanctioned under CR 11 for pursuing a cause of action that is (1) legally baseless and (2) lacking an objectively reasonable inquiry:

Under the rule, an action lacks a factual or legal basis if it is both “baseless” and signed without reasonable inquiry. A filing is, in turn, “baseless” if (a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law. This court uses an objective standard to determine whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.

*Madden v. Foley*, 83 Wn. App. 385, 389-390, 922 P.2d 1364 (1996)

(citations omitted). Here, the trial court entered both requisite findings on 02/10/06. First, it found that appellant’s CPA claim was legally baseless:

The allegations set forth in the Complaint that H. Graeme French, M.D. engaged in unfair and deceptive methods of business, in violation of the Washington State Consumer Protection Act, were not well grounded in fact and warranted by existing law, or a good faith argument for the extension or modification or reversal of the existing law.

CP 759.

Second, the trial court found<sup>3</sup> that counsel’s inquiry into the merits

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<sup>3</sup> Appellant misstates that Dr. French “[n]ever alleged that Douglass failed to engage in a reasonable investigation.” Brief of Appellant at 20. In fact, Dr. French argued on 12/14/05 that an objectively “reasonable investigation would have revealed that under the Consumer Protection Act, the damages sustained by a plaintiff did not satisfy the damages to property or business...” CP 724.

of the CPA claim was not objectively reasonable:

The Consumer Protection Act precludes parties from claiming violations of the Act in cases where injuries are claimed to have resulted from medical negligence, as those are personal injuries. The serious nature of the Consumer Protection Act allegation, when coupled with the clear case law, makes a monetary sanction appropriate.

CPs 759-60.

The trial court reached these findings after careful consideration, including three attorney declarations and five legal briefs, CP 759, as well as the parties' two oral arguments, on 12/16/05 and 01/20/06, respectively. The trial court also had in mind co-defendant Whitman Hospital's recent motion for CR 11 sanctions, which had involved six attorney declarations and two briefs, CP 673, as well as extensive oral argument on 10/21/05.

The instant case closely parallels *Rhinehart, supra*, where, as here, the arguments raised by the recalcitrant attorney had ignored long-settled precepts of Washington law:

Most of the issues in this case have been raised and rejected in at least two prior cases. The remaining issues are not debatable. The case is so devoid of merit that there was no reasonable possibility of success. The trial court did not abuse its discretion in awarding fees under...CR 11.

*Rhinehart*, 59 Wn. App. at 341.

Here, counsel's pursuit of legally baseless CPA claims, and his ongoing refusal to take no for an answer, have substantially increased all parties' litigation expenses. All told, Dr. French and Whitman Hospital

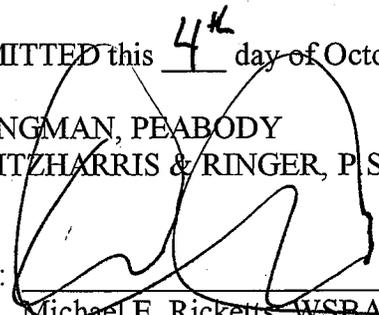
were needlessly forced to file a combined twenty-four pleadings (at least) and participate in a combined five hearings in order to obtain partial summary judgments, defeat reconsiderations, defeat discretionary review, and secure sanction awards. The undue prejudice only grows with the instant appeal. Appellant does not allege that the trial court failed to consider lesser penalties. Nor does she allege that the trial court erred in the methodology by which it calculated the sanctions. In short, the court below made every requisite finding and exercised sound discretion in its award of sanctions. This Court should not disturb its discretionary determination.

#### V. CONCLUSION

The trial court correctly dismissed Petitioners' Consumer Protection Act claim against Dr. French. It did not abuse its discretion by awarding sanctions to Dr. French. Those rulings should be affirmed.

RESPECTFULLY SUBMITTED this <sup>4<sup>th</sup></sup> day of October, 2006.

KINGMAN, PEABODY  
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By: 

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that, on the date specified below, I served a true and correct copy of the foregoing pleading, by the means specified, to the following persons:

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