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I. INTRODUCTION

The only issue presented for review is what damages are available against a professional such as a doctor or lawyer for violations of the Consumer Protection Act (“CPA”) when the other elements of a CPA claim are met. Pet. at 6. Indeed, Petitioner/Defendant Dr. Graeme French stipulated in the trial court that there were genuine issues of material fact with regard to every element of a CPA claim, except damages. CP 58-60.

The Court of Appeals held that Respondent/Plaintiff Teri Ambach satisfied the “injury” element of a prima facie case under Washington’s Consumer Protection Act because she suffered damages, i.e., the cost of an unnecessary surgery sold and performed by Dr. French. *Ambach v. French*, 141 Wn. App. 782, 790, 173 P.2d 941 (2007). That is, Ms. Ambach sought to recover the direct and specific cost of a surgery Dr. French convinced her to have that she did not need.¹ It is a basic premise of the Consumer Protection Act that a consumer should be able to recover the purchase price of a product he or she bought as a result of deception or fraud. *See Mason v. Mortgage Am.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). As such, the Court of Appeals determined that Ms. Ambach stated

¹ All facts regarding Dr. French’s conduct were assumed to be true for purposes of the motion for summary judgment and, thus, for this appeal. CP 58-60.

a viable CPA claim when she sought a refund for the money she spent on a product (here, the surgery) that Dr. French sold her under false pretenses.

In his Petition, Dr. French argues that recovery of the cost of an unnecessary medical procedure should never be permitted even if such services are procured by fraud and deceit, for the purpose of financial gain. In support of this argument, Dr. French relies on cases that stand for the general proposition that a plaintiff cannot bring a personal injury action under the guise of a CPA claim. While Dr. French is correct in the most generic sense that “personal injuries are not compensable under the CPA,” *Physicians Ins. Exch v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993), the caselaw demands a closer reading than that which Dr. French offers. Appellate decisions in claims against professionals – including the Court of Appeals decision in the present case – have carefully circumscribed the damages available under the Consumer Protection Act, as opposed to the malpractice statute. Indeed, what Ms. Ambach alleges here is not an injury that is necessarily derivative of a personal injury action. What she claims, and what the Court of Appeals decision would allow her to pursue, is redress for an injury to her business or property that is directly caused by Dr. French’s deceptive practice.

If Ms. Ambach's specific and limited damages sought cannot be recovered, the protection that the CPA affords consumers against deceptive practices by professionals, such as doctors and lawyers, would be eviscerated. The consumer would be forced to absorb the cost of a product, or service, even though acquired due to fraud or deception. Such a result would be inconsistent with a long line of jurisprudence in this State, beginning with this Court's decision in *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1982), and continuing with such cases as *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984), *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), which ensure that the reach of the CPA extends to "every person who conducts unfair or deceptive acts or practices in any trade or commerce." *Short*, 103 Wn.2d at 61 (emphasis original). To reverse this line of cases would be a particularly unfortunate outcome in the law of a state hailed for having "long served as a model for the development of consumer protection legislation." *Hall v. Walter*, 969 P.2d 224, 233 (Colo. 1998).

The Court of Appeals decision allows damages that are narrowly tailored to serve the purposes of the Consumer Protection Act; it does not encompass personal injury damages. As such, it is consistent with prior

case law providing a remedy for injuries suffered as a result of a physician's deceptive marketing of unnecessary medical services for money. The decision should be affirmed.

II. ARGUMENT

A. **There Should Be No De Facto Exception to the CPA for the Learned Professions By Eliminating Even Minimal Remedies**

The logic of Dr. French's position is that no patient can ever recover damages against her doctor or health care provider under the CPA. He objects to the Court of Appeals' decision despite the court's careful analysis, which limits the damages recoverable on Ms. Ambach's CPA claim to the economic cost of the product sold and related damages. Tellingly, Dr. French fails to put forth a single example of an injury to a patient's "business or property" that *would* be, in his view, compensable under the Act. Not surprisingly, he also fails to acknowledge that, under the appellate jurisprudence of this State, Ms. Ambach's claim of damages (the cost of surgery) is an entirely appropriate remedy for the CPA violation alleged (an unnecessary surgery).

To adopt Dr. French's position would be a significant blow to the effort pioneered by this Court and the Courts of Appeals of this State to ensure equity in the application of consumer protection laws to *all* persons engaged in trade and commerce. In *Short v. Demopolis*, this Court

rejected any such notions of immunity for certain “learned professions,” calling it “totally contrary to the legislative directive that the CPA be construed liberally.” 103 Wn.2d at 61. In its discussion, the Court cited numerous federal cases rejecting similar attempts to carve out exceptions from antitrust laws for certain professionals, including doctors, lawyers, pharmacists, dentists, and architects. *Id.* at 58 (citing *e.g.*, *United States v. Nat’l Soc’y of Prof’l Eng’rs*, 389 F. Supp. 1193, 1198 (D.D.C. 1974) (“It would be a dangerous form of elitism, indeed, to dole out exemptions to our [consumer protection] laws merely on the basis of the educational level needed to practice a given profession . . . ”)).

The lawyers in *Short* made a similar effort to that by Dr. French, attempting to prevent the application of the CPA to a case in which claims of negligence were also raised. This Court drew a bright line distinction between claims that were related to the entrepreneurial aspects of the profession, and those that arose from the lawyers’ alleged negligent handling of the legal work. The Court explained that “how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients” are part of the business of the practice of law and thus covered by the CPA. 103 Wn.2d at 61. By contrast, claims that the lawyers failed to enter into a settlement in a

timely manner or to pursue claims involving valuable rights sound in negligence and thus could not be brought under the CPA. *Id.* at 61-62. The *Short* court pointed out that the CPA provides an important remedy, filling some of the gaps in common law remedies for misconduct by professionals. *Id.* at 62.

Just as courts have held lawyers accountable under the CPA for misconduct in the entrepreneurial aspects of their practice, so should there be a remedy under the CPA for unfair trade practices committed by doctors. If, for example, a physician made deceptive claims that certain vitamins would prevent cancer and sold a patient \$5,000 worth of those vitamins, there should be no dispute that the patient could bring an action under the CPA to recover the cost of the vitamins, the product deceptively marketed. Yet despite the clear holding of this Court in *Short*, Dr. French is attempting to evade accountability for doctors by depriving plaintiffs of even the minimal remedy of recovering the cost of the product deceptively sold to the patient.

The wisdom of the policy choice to apply the CPA to all professionals cannot be doubted given the nature of the relationship between professionals and consumers of their services. Typically, patients or clients are dependent on the learning and skill of another for the

performance of services about which they have little understanding, yet involve significant interests. In a medical context, the patient is entrusting the physician with some measure of control over the health and integrity of his or her body. In the legal setting, clients entrust lawyers with family relationships, property, businesses, and future income should they become disabled. Both clients and patients must trust the professional to recommend a course of action based on what is best for the client or patient, rather than what will be the most profitable for the lawyer or doctor. When professionals' decision-making becomes distorted by the profit motive, the CPA provides recourse to the consumers of such deceptive practices. Indeed, affording protection to consumers under the Act is arguably *more* important when such significant interests are at stake than when, for example, an older car is deceptively marketed as an almost new one. As such, the Court should reject Dr. French's self-serving attempt to gain a court-made exemption from the CPA for doctors, thereby rendering meaningless the equities achieved in *Short* and its progeny, *Quimby*, *Wright*, *Podiatry Insurance*, and *Sly v. Linville*, 75 Wn. App. 431, 878 P.2d 1241 (1994).

Dr. French urges the Court to confine the CPA's reach when applied to professionals, with the effect that the purchaser of a car that is

advertised in a misleading way can seek redress, see *Tallmadge v. Aurora Chrysler Plymouth Inc.*, 25 Wn. App. 90, 93-95, 605 P.2d 1275 (1979),² but not the purchaser of an unnecessary surgery. Yet the plain language of the statute mandates a different approach: the act is to be “liberally construed that its beneficial purposes may be served.” RCW 19.86.920. In the area of damages, Washington case law has carried out that mandate. For example, even where expenses arising out of a statutory violation are “minimal,” a consumer satisfies the injury to “business or property” element of a CPA claim. *Mason*, 114 Wn.2d at 854 (reasoning that plaintiff’s temporary loss of title to real estate was cognizable as an injury to “business or property” despite no monetary harm because it was causally related to lender’s deceptive practice); *Michael v. Mosquera-Lacy*, 140 Wn. App. 139, 148, 165 P.3d 43 (2007) (stating that “the CPA injury does not have to be great, or even quantifiable,” and allowing a CPA claim to go forward against a doctor who substituted a cow bone for human bone in a grafting procedure); *Sign-O-Lite Signs v. Delaurenti Florists*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992) (reasoning that

² Indeed, plaintiff’s damages in *Talmage* are not altogether clear. It was enough under the CPA, simply, that he was “inconvenienced, deprived of the use and enjoyment of his property, and received an automobile with defects needing repair.” *Tallmadge*, 25 Wn. App. at 94.

plaintiff presented sufficient evidence of an injury to “her business or property” because the defendant’s deceptive practices required her to leave her business for a few hours each month).

The alleged deceptive practices of Dr. French in this case are extremely serious: he engaged in a pattern of recommending surgeries, with all of their attendant risks, to patients who did not need them, including Ms. Ambach, for financial reasons. CP 3-33. If Ms. Ambach proves these claims, Dr. French’s proposed construction of the CPA and his proffered court-made exemption for physicians, would mean that a jury could not award Ms. Ambach damages for the cost of the unnecessary surgery. In this way, the CPA would become a toothless admonition against unfair practices without a remedy for misconduct that elevates profit over patient need. Given the vulnerability of patients and their necessary reliance on physicians to recommend medical treatment for medical reasons, such a result would be contrary to the beneficial purposes for which the Consumer Protection Act was enacted.

B. Dr. French’s Petition Misrepresents the Holding of the Court of Appeals

Dr. French significantly misrepresents the Court of Appeals’ holding when he states that the court “found that medical expenses, wage

loss, and loss of earning capacity were damages sufficient to meet the ‘injury to business or property’ requirement under the CPA.” Pet’r Br. at 6. The court’s *actual* reference to these items of damages – and the only reference to them – is a list of damages originally alleged by Ms. Ambach:

The damages *alleged by Ms. Ambach* fit into four categories: medical expenses, wage loss, loss of earning capacity, and out-of-pocket expenses.

Ambach, 141 Wn. App. at 790 (emphasis added).

The court’s mere summary of Plaintiff’s *allegations* is an entirely separate matter than the court’s determination of what the law actually allows. The full passage of the court’s holding demonstrates the difference:

The damages alleged by Ms. Ambach fit into four categories: medical expenses, wage loss, loss of earning capacity, and out-of-pocket expenses. There is clear guidance as to what damages constitute injury under the CPA. Damages for mental pain and suffering are not recoverable under the CPA. (citation omitted). ***However, allegations of economic loss due to the increased cost of surgery over the cost of more conservative treatment are sufficient to satisfy the damages requirement.*** *Podiatry Ins. of Am. v. Isham*, 65 Wn. App. 266, 268, 828 P.2d 59 (1992). Ms. Ambach’s CPA action can move forward based on economic loss due to the cost of surgery and any claim for pecuniary damages.³ *See id.*

Id. (Emphasis added.)

³ The Court of Appeals’ language “and any claim for pecuniary damages” is discussed at page 14 of this brief.

Somewhat confusingly, Dr. French attempts here to broaden the court's holding in an attempt to portray it as contrary to precedent, when the court's holding is, in fact, narrow and consistent with *Short, Quimby* and their progeny. Indeed, the first and only court to cite the *Ambach* decision had no trouble discerning the court's narrow holding –and with it, the difference between the *allegations* of damages and the *scope* of damages cognizable under the Act. See *Sadler v. State Farm Auto. Ins. Co.*, Case No. C07-995, 2008 U.S. Dist. LEXIS 71665, *23 (W.D. Wash. 2008).

In *Sadler*, the United States District Court for the Western District of Washington dismissed an injured driver's claim under the CPA because she alleged negligent processing of an insurance claim and resulting personal injury damages, rather than deceptive insurance practices and damages flowing from those practices. *Id.* at *23. The district court characterized the *Ambach* decision as follows:

In *Ambach*, the plaintiff's injury was viewed as affecting business or property *because she paid the increased cost of unneeded surgery* instead of the lower cost of more conservative treatment. 141 Wn.App. at 790.

Id. Thus, notwithstanding Dr. French's misreading of the court's holding, the decision is not confusing or ambiguous in its guidance to other courts.

In fact, the first court to rely on it properly applied the holding to limit the scope of a cognizable CPA “injury.”

C. The Court of Appeals’ Determination Regarding Ms. Ambach’s Injury is Consistent with the Purpose of the CPA and Washington Caselaw

Dr. French argues that “the Appellate Court’s reliance on *Podiatry Ins. Co. v. Isham*, 65 Wn. App. 266, 268, 828 P.2d 59 (1992) . . . is misplaced.” Pet’r Br. at 10. Yet, *Podiatry Insurance* actually reiterates the noncontroversial principle that traditional personal injury damages are not recoverable under the CPA.

What Dr. French neglects to mention is the other critical holding in *Podiatry Insurance*, namely, the court’s determination that the damage alleged (as here, the “cost of surgery versus more conservative treatment”) was a CPA damage and thus not covered under the doctor’s malpractice policy. *Id.* at 268. The *Podiatry Insurance* court reasoned that, because the policy only covered claims for malpractice causing bodily or mental injury, the patient’s economic injury arising from the physician’s deceptive practice “necessarily” removed the CPA claim from coverage. *Id.* at 269. In other words, the *Podiatry Insurance* court drew a bright line distinction between damages caused by personal injuries and those caused by the unfair economic transaction. The Court of Appeals in this case

carefully applied the *Podiatry Insurance* court's reasoning and held that Ms. Ambach had alleged damages distinct from her personal injury claims and separately cognizable under the CPA, just as the plaintiff in *Podiatry Insurance* had.

The court below also analyzed the issue of what constitutes a CPA injury consistent with principles enunciated in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), an antitrust case in which the United States Supreme Court construed the term "injury to business or property." There, the Supreme Court held that "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property'" *Id.* at 339. The damages the Court of Appeals considered cognizable under the CPA in the present case fall squarely into this definition of injury: the cost of the surgery is the diminution of money that Ms. Ambach incurred when she paid for a surgery that she purchased due to Dr. French's deceptive conduct.⁴

D. The Court of Appeals' Language "Any Other Claim for Pecuniary Damages" Is Necessarily Limited By the Requirement that a CPA Claimant Show Causation, and In Any Event Can be Clarified by This Court

A central contention in Dr. French's Petition is that the Court of

⁴ The cost of the surgery was approximately \$17,600. CP at 215.

Appeals greatly expanded the scope of CPA damages to include garden-variety personal injury damages when it states that Ms. Ambach may pursue “any other claim for pecuniary damages” on remand. *Ambach*, 141 Wn. App. at 790.

Because the Court of Appeals uses the phrase “other pecuniary damages” after carefully delineating those damages (e.g., mental pain and suffering) that are *not* cognizable under the CPA, Ms. Ambach reads the holding to limit damages to those directly resulting from Dr. French’s deceptive practices. Here, for example, other CPA-related damages would be limited to such items as (a) lost wages for the time Ms. Ambach missed work from having the unnecessary surgery, as opposed to the lesser amount of wage loss she would have incurred from attending more conservative treatment of physical therapy, or (b) the cost of driving to Colfax for surgery, rather than having physical therapy in Spokane, where she lives. Such reasoning is consonant with principles articulated by this Court in *Mason v. Mortgage America*:

A loss of use of property which is causally related to an unfair or deceptive act or practice is sufficient injury to constitute the fourth element of a Consumer Protection Act violation. The injury element will be met if the consumer’s property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.

114 Wn.2d at 854; *see also Tallmadge*, 25 Wn. App. at 94 (“the record indicates he suffered injuries for purposes of the Consumer Protection Act in that he was inconvenienced, deprived of the use and enjoyment of his property, and received an automobile with defects needing repair.”).

To the extent this Court finds the Court of Appeals’ language “other pecuniary damages” ambiguous or unclear, Ms. Ambach respectfully requests that the Court clarify that – just as with any other CPA claim – damages must be causally related to the unfair or deceptive act. On remand, it would then be left to the court or trier of fact to determine what lost moneys and inconvenience were causally related to the economic transaction between Ms. Ambach and Dr. French.

E. Cases Involving Recovery for “Pure” Medical Expenses are Inapposite to Ms. Ambach’s CPA Claim for the Cost of an Unnecessary Procedure Procured by Unfair or Deceptive Acts

Dr. French makes much of language in *Stevens v. Hyde Athletic Indust., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989), and *Hiner v. Bridgestone/Firestone Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), to the effect that the CPA does not allow recovery for medical expenses and wages. Pet.’r Br. at 8-9. However, both opinions deal only with medical expenses and wage loss resulting directly from personal injuries. Here, the only “medical expense” Ms. Ambach seeks is the cost of the

product that Dr. French unfairly induced her to buy – the surgery itself. *Stevens* and *Hiner* are inapposite because the cases do not address this kind of “medical” expense, and neither decision concerns a consumer’s transaction with a physician. As the Court of Appeals recognized, *Podiatry Insurance* is more closely analogous to Ms. Ambach’s claim, because the plaintiff in that case also sought compensation for a surgery that was deceptively promoted to her. *Ambach*, 141 Wn. App. at 790.

Similarly, neither *Stevens* nor *Hiner* addressed other elements of purely economic harm such as time off work necessitated by the time it takes to undergo surgery as opposed to physical therapy visits. In *Stevens*, the plaintiff was not alleging as CPA damages the cost of her shoes or the time it would take her to buy new ones; rather, she (unsuccessfully) attempted to recoup payment for medical bills caused by her personal injuries. 54 Wn. App. at 370. Likewise, the plaintiff in *Hiner* was not seeking reimbursement of the cost of the tire deceptively marketed to her, but rather broad personal injury damages resulting from an accident caused by the tire. 91 Wn. App. at 730. These cases do not assist in the analysis of the issue before this court.

A common thread runs through all of Dr. French’s arguments and is summarized at the end of his Petition: “[the Court of Appeals]

expand[ed] the scope of the Consumer Protection Act to encompass all garden-variety personal injury damages.” Pet’r Br. at 16. This is simply not true. The Court of Appeals decision restricts Ms. Ambach’s CPA damages to the loss of money proximately caused by her purchase of surgery from Dr. French. As noted above, this limited holding was recognized and relied on by a recent decision from the United States District Court in the Western District of Washington. *Sadler*, 2008 U.S. Dist. LEXIS 71665, *23. The Court of Appeals’ decision did not effect the broad expansion of CPA remedies that Dr. French claims and thus should not be overturned.

F. Allowing Patients Redress for Injury to Their Business or Property Has Not “Flooded” the Courts With Claims Against Doctors, Nor Will it in the Future

Dr. French asserts in his Petition that the courts will be “overwhelmed” by CPA claims against doctors, suggesting that allowing recovery of damages in these circumstances will result in CPA claims being brought whenever medical malpractice claims are made. Pet’r Br. at 15. As pointed out in Ms. Ambach’s Response to Petition for Review, this argument ignores the other elements of a CPA claim that must be proved, such as deceptive trade practices, which do not typically occur in association with negligent health care. Courts have had no difficulty

rejecting CPA claims against physicians where those elements are not met. *See, e.g., Benoy v. Simons*, 66 Wn. App. 56, 65, 831 P.2d 167 (1992) (upholding trial court's dismissal of CPA claim where patient failed to show an entrepreneurial motive on the part of a physician who retained the patient in his practice although nothing could be done for him); *Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 166-67, 772 P.2d 1027 (1989) (upholding trial court's dismissal of CPA claim where patient's claim encompassed negligence only, and where patient failed to show reliance on the doctor's status as a board-certified physician), *rev'd on other grounds by*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Nothing about Ms. Ambach's case changes the requirement that a claimant must make out each element of his or her CPA claim, or the court's role in dismissing such claims where plaintiffs fail to do so.

According to Dr. French, the real evil of CPA claims is that they offer a "significant remedy" not available in medical malpractice claims: attorney fees. Pet'r Br. at 15. However, attorney fees are not the threat to the public interest that Dr. French suggests. As the Court of Appeals explained in *Sign-O-Lite Signs*, "[t]he policy behind the statutory award of fees is aimed at helping the victim file the suit and ultimately serves to protect the public from further violations." 64 Wn. App. at 568; *see also*

Short, 103 Wn.2d at 62 (“In some actions, only the prospects of attorney fees and potential treble damages provide a complete remedy.”). In this setting, the importance of the remedy is clear: without fees, deceptive and unfair conduct by physicians could go unchecked, particularly in situations where the individual’s damages under the CPA are not substantial, but the potential harm to the public’s reliance on physicians to care for patients on the basis of medical need is substantial. The same is true for other professionals: the CPA is one mechanism for ensuring the accountability of, for example, attorneys, to ensure that unfair business practices are not allowed to overtake the attorney’s obligation to represent the interests of the clients.

The appellate courts have laid out clear guidelines for the assessment of attorney fees in CPA cases. In *Bowers v. Transamerica Title*, 100 Wn.2d 581, 597-601, 675 P.2d 193 (1983), this Court set out the factors that go into a determination of a reasonable attorney fee award. One of those factors is the “amount involved and the results obtained.” *Id.* at 696 (quoting *Copeland v. Marshall*, 641 F.2d 880, 889 (D.C. Cir. 1980)). This suggests that a “rule of reason” applies to an award of fees relative to the amount of CPA damages. Trial courts have also been instructed to conduct an inquiry into fees claimed under the CPA to ensure

to the degree possible that fees are awarded only for work necessary to the CPA claim and not to other related, but distinct claims. *Travis v. Horse Breeders*, 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988); *Nordstrom v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). With these and other protections in place, there is no basis for Dr. French's concern that the floodgates will open and numerous CPA claims with associated attorney fee requests will flow if this Court upholds the narrow holding of the Court of Appeals.

III. CONCLUSION

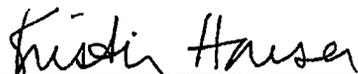
Ms. Ambach requests that the Supreme Court affirm the decision of the Court of Appeals decision in her case.

DATED this **3rd** day of **December, 2008**.

Respectfully submitted,

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BY RONN CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 3rd day of December 2008, true and correct copies of the forgoing Supplemental Brief were served on the persons hereinafter named by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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