

NO. 68110-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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ELVIRA WILLIAMS,

Appellant,

v.

SCIENTIFIC IMAGE CENTER MANAGEMENT, INC., a foreign  
corporation, d/b/a LIFESTYLE LIFT; and SEATTLE PLASTIC  
SURGERY ASSOCIATES, P.C., a domestic corporation,

Respondents.

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BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUE .....1

II. COUNTERSTATEMENT OF THE CASE .....1

    A. Nature of the Case .....1

    B. The Motion to Dismiss Ms. Williams’ CPA Claim .....2

    C. Ms. Williams’ Response to the Motion to Dismiss her  
        CPA Claim .....5

        1. Claim of “bait and switch” .....5

        2. Ms. Williams’ “injury to business or property”  
            argument .....7

    D. Court’s Ruling Granting Partial Summary Judgment and  
        Dismissing the CPA Claim .....8

    E. Jury Finding of No Malpractice and No Failure to  
        Obtain Informed Consent .....9

    F. Ms. Williams’ Appeal from Only the Dismissal of her  
        CPA Claim .....10

III. ARGUMENT .....10

    A. The CPA Does Not Authorize Buyer’s Remorse  
        Damages .....10

    B. Under *Ambach v. French*, the Trial Court Was Required  
        to Dismiss Ms. Williams’ CPA Claim .....11

    C. Ms. Williams’ Reliance on *Young* and *Wright* Is  
        Misplaced Because Those Cases Concerned an Element  
        of a CPA Claim Other than the “Injury to Business or  
        Property” Element .....13

    D. *Stevens v. Hyde Athletic Indus.* and *Hiner v.*  
        *Bridgestone/Firestone* Are Inapposite as Well .....18

E.	Ms. Williams Is Not Entitled to Seek “Judicial Notice” of the Argumentative Assertions She Offers as Fact in Support of Policy Arguments.....	19
F.	The Jury’s Finding on Ms. Williams “Informed Consent” Claim Would Preclude Her from (Re)litigating the Issue of Whether She Was Misled into Consenting to the Lifestyle Lift®.....	21
IV.	CONCLUSION.....	24

TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>STATE CASES</b>	
<i>1000 Virginia Ltd. P'ship v. Vertecs Corp.</i> , 158 Wn.2d 566, 146 P.3d 423 (2006).....	13
<i>Ambach v. French</i> , 167 Wn.2d 167, 216 P.3d 405 (2009).....	passim
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	3, 11
<i>Hiner v. Bridgestone/Firestone, Inc.</i> , 91 Wn. App. 722, 959 P.2d 1158 (1998).....	18
<i>King County v. Central Puget Sound Growth Mgmt. Hearings Bd.</i> , 142 Wn.2d 543, 14 P.3d 133 (2000).....	19-20
<i>Lord v. Pierce County</i> , 166 Wn.App. 812, 271 P.3d 944 (2012).....	20
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91, 829 P.2d 746 (1992).....	22
<i>Michael v. Mosquera-Lacy</i> , 165 Wn.2d 595, 200 P.3d 695 (2009).....	15
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003).....	22
<i>Ramos v. Arnold</i> , 141 Wn. App. 11, 169 P.3d 482 (2007).....	15
<i>State v. Harrison</i> , 148 Wn.2d 550, 61 P.3d 1104 (2003).....	22-23
<i>Stevens v. Hyde Ath. Indus., Inc.</i> , 54 Wn. App. 366, 773 P.2d 871 (1989).....	18

<i>Tincani v. Inland Empire Zoological Soc.</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	21
<i>Wright v. Jeckle</i> , 104 Wn. App. 478, 16 P.3d 1268, <i>rev. denied</i> , 144 Wn.2d 1011 (2001).....	13, 14, 15, 17
<i>Young v. Savidge</i> , 155 Wn. App. 806, 230 P.3d 222 (2010).....	13, 14, 15, 16

**FEDERAL CASES**

<i>Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.</i> , 241 F.3d 696 (9 <sup>th</sup> Cir. 2001) .....	18-19
<i>Christianson v. Colt Indus. Operating Corp.</i> , 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988).....	23

**STATE STATUTES**

RCW 4.16.350 .....	16
Chapter 7.70 RCW.....	16
RCW 7.70.050 .....	22
RCW 7.70.050(1)(a) .....	21
RCW 7.70.050(1)(b) .....	21
RCW 7.70.050(2).....	21
RCW 19.86.090 .....	11

**RULES**

ER 201 .....	20
--------------	----

ER 201(b)(1) .....	20
ER 201(b)(2) .....	20
RAP 9.11 .....	19, 20
RAP 10.3(a)(6).....	20

**OTHER AUTHORITIES**

1B James Wm. Moore, et al., <i>Moore's Federal Practice</i> , ¶ 0.404[1], at 118 (1984) .....	23
WPI (Civ) 105.04.....	10, 21
WPI (Civ) 105.05.....	10, 21

## I. COUNTERSTATEMENT OF THE ISSUE

Is the cost of a medical procedure that allegedly caused personal injury an “injury to business or property” recoverable under the Consumer Protection Act?

## II. COUNTERSTATEMENT OF THE CASE

### A. Nature of the Case.

Elvira Williams sued her plastic surgeon and several entities, including respondents Scientific Image Center Management (“SICM”), which she chooses to refer to in her opening appellate brief as “Lifestyle Lift® Management,” and Seattle Plastic Surgery Associates, P.C. (“SPSA”), which she chooses to refer to in her opening appellate brief as “Lifestyle Lift® Seattle.” CP 4-19. In her complaint, Ms. Williams alleged that the defendants deceived her into paying for and undergoing a Lifestyle Lift® cosmetic facelift procedure. CP 9-10, 15. She alleged, among other things, that the defendants were negligent, that plastic surgeon, Dr. David Q. Santos, performed the procedure negligently, and that defendants failed to her obtain her informed consent.<sup>1</sup> CP 10-11 and 13. She alleged injuries consisting of mental anguish, concern about

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<sup>1</sup> In her complaint, Ms. Williams did not make clear exactly which defendants she was asserting the “informed consent” and malpractice claims against, but ultimately those claims were tried only as to SPSA and Dr. Santos. Ms. Williams has not appealed from the judgment on jury verdict in favor of SPSA and Dr. Santos on those claims. Her appeal concerns only the summary judgment dismissal of her CPA claims against SPSA and SICM.

future problems with her facial appearance, CP 12, “severe and permanent injuries from the surgery . . . which include injuries to the mind and body and other injuries,” CP 15-16, lost income, expenses, other (unspecified) economic losses, additional medical expenses, pain, discomfort, injuries “permanent, progressive and disabling in nature,” CP 16, emotional distress, embarrassment, fear or apprehension of injury or death, loss of enjoyment of life, loss of function, and increased likelihood of injury or disability, CP 17.

Ms. Williams sought to recover her alleged damages not only under theories of medical malpractice and failure to obtain informed consent, CP 12-13, but also under the Consumer Protection Act, CP 15. Ultimately, she limited the damages she sought under the CPA to either \$4,600 (consisting of the \$4,000 she paid for the Lifestyle Lift® procedure and the \$300 she paid for each of the two aspiration lipectomies performed the same day on her chin and neck), CP 212; *App. Br. at 10*, or to the \$4,000 she paid for the Lifestyle Lift® alone, CP 242.

B. The Motion to Dismiss Ms. Williams’ CPA Claim.

SICM and SPSA moved for partial summary judgment as to the CPA claims.<sup>2</sup> CP 42-57. Without conceding that Ms. Williams could

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<sup>2</sup> A third defendant at the time, Lifestyle Lift Holding, Inc., joined in bringing the partial summary judgment motion, but Ms. Williams agreed to dismiss any claims against that entity, and a separate stipulated order of dismissal was entered, such that Lifestyle Lift

prove other CPA claim elements, CP 50 (lines 6-7), SICM and SPSA based their motion solely on the contention that the refund she was seeking on the CPA claim did not constitute damages for “injury to business or property” as a matter of law. CP 48-53. In so arguing, SICM and SPSA relied on *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009), and *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). CP 49-50.

As background for their partial summary judgment motion, SICM and SPSA presented admissions that Ms. Williams had made in her deposition and pre-surgery consent forms. Ms. Williams had called a toll free phone number after seeing a TV advertisement for the Lifestyle Lift® and was given the name and phone number of SPSA as a local provider. CP 107-08. She made an appointment at SPSA for March 3, 2007, kept it, and was shown a video explaining “what exactly they do.” CP 109. Dr. Santos then saw her and spent 20 to 25 minutes asking about her cosmetic concerns and goals, and explaining what he could do. Dr. Santos offered Ms. Williams liposuction procedures to reduce fatty tissue on her neck, cheek, and eyelids, as well as the Lifestyle Lift®. CP 109-11. Ms. Williams elected to undergo the liposuctions on her neck and cheek and

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Holding, Inc., was not party to the order entered on the summary judgment motion. CP 596-98.

the Lifestyle Lift®, but not the liposuctions on her eyelids, CP 111, 143-50.

That same day, March 3, Ms. Williams scheduled the cosmetic procedures for March 17, 2007, *App. Br. at 8*, and signed a document entitled “Understanding the Lifestyle Lift Procedure,” CP 141. By signing the document, Ms. Williams acknowledged that:

-- The Lifestyle Lift® is a surgical procedure. Some people may need extra healing time and may not be able to return to work or normal activities for an extended period of time.

-- You will have a scar.

-- [A]bnormal scars might occur.

-- [M]otor and sensory nerves could be injured during the surgery.

-- Normal symptoms during the recovery period: swelling and bruising, discomfort and some pain; itching; and redness.

-- Individual results will vary.

-- MY RESULTS AND RECOVERY WILL VARY AND MAY NOT BE SIMILAR TO THE RESULTS AND RECOVERY OF THAT OF OTHER PATIENTS INCLUDING THOSE DEPICTED IN THE LIFESTYLE LIFT ADVERTISING.

-- I AM AWARE THAT THE PRACTICE OF MEDICINE IS NOT AN EXACT SCIENCE AND ACKNOWLEDGE THAT NO GUARANTEES OR PROMISES HAVE BEEN MADE TO ME ABOUT THE RESULTS OF THE PROCEDURE.

C. Ms. Williams' Response to the Motion to Dismiss her CPA Claim.

1. Claim of "bait and switch".

Ms. Williams opposed SICM's and SPSA's motion to dismiss her CPA claim, focusing on what she contended was an "entrepreneurial" wrong done to "trick" her with hard-sell sales practices, CP 490-91, claiming she received something different from what she had been sold and thus was a victim of a "bait and switch," CP 488. She argued that she thought she was buying a breakthrough medical procedure that would take about an hour under local anesthesia, that would leave her with minimal bruising or swelling, and that would allow her to return to work more quickly than "traditional procedures" would, CP 490, but that what she got instead was "a facelift" performed "at the physician's discretion," CP 491 and 499, under sedating medication that made her groggy, CP 572, which took more than three hours, and that left her "bruised and bandaged" and "bloated from cheek to cheek," CP 492, 573. Ms. Williams did not identify anything in the video that she had been shown on March 3, 2007, or anything in Dr. Santos' descriptions of the anticipated procedures, or anything in the "Understanding the Lifestyle Lift Procedure" document that she had signed on March 3, that differed from what she actually experienced with that Lifestyle Lift procedure and the two aspiration lipectomies that she underwent on March 17, 2007.

Ms. Williams' submissions in opposition to the motion for partial summary judgment included a Lifestyle Lift® promotional brochure featuring before/after pictures and testimonials. CP 540-55. That brochure included a disclaimer, at CP 554, which stated:

Your consultation and doctor will provide additional information. Ask your Lifestyle Lift® physician about your individual case. The Lifestyle Lift® is a medical procedure and all medical procedures involve a certain amount of risk. As an alternative to the traditional procedure, bruising and discomfort may occur although usually not as severe as traditional procedures. The Lifestyle Lift® procedure takes approximately one hour to complete under local anesthesia, but may require slightly more time to achieve best possible results. Some people may need extra healing time. Individual results vary. All photographs are actual Lifestyle Lift® clients. Testimonial statements and photographs of Lifestyle Lift® patients do not constitute a warranty or prediction of the outcome of your individual procedure.<sup>3</sup>

Ms. Williams did not attempt to distinguish between the LifeStyle Lift® and the aspiration lipectomies as causes of her claimed injuries. She neither expressly blamed all of her claimed injuries on the Lifestyle Lift® nor expressly absolved the aspiration lipectomies of blame. She did not offer any evidence comparing what she had paid for the procedures Dr. Santos performed, or for the procedures she claimed she expected to

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<sup>3</sup> The evidence before the court on the motion to dismiss the CPA claim also included a copy of the Surgery Agreement, in which Ms. Williams agreed to undergo and pay \$4,000 for a Lifestyle Lift® and \$600 for two liposuctions, CP 556-57, and two separate Informed Consent forms, signed by Ms. Williams, one for the chin/neck aspiration lipectomies, CP 143-45, and the other for the LifeStyle Lift®, CP 147-50.

undergo, with what other cosmetic surgeons charged for the same or similar cosmetic procedures.

2. Ms. Williams' "injury to business or property" argument.

Mrs. Williams' response to the actual basis of SICM's and SPSA's motion to dismiss Ms. Williams' CPA claim, which was that she could not prove the "injury to business or property" element of that claim, can be found at CP 499-506. The gist of her argument was that the injury to her property was "the money that she paid for a product that did not exist as advertised and sold, the Lifestyle Lift®," which was "at least \$4,000, possibly \$4,600," and that that monetary loss "is independent of any claim of medical malpractice," because it is what she paid to the defendants "because of their misrepresentation." CP 500. Ms. Williams then argued that *Ambach v. French* did not require dismissal of her CPA claim because the plaintiff's CPA claim in *Ambach* "depended entirely on [the] fact that her surgeon had committed medical malpractice," but her CPA claim did not, because she "could imagine a set of facts where Dr. Santos did everything right and she would still have a [CPA] claim because of the way the Lifestyle Lift® was sold to her and to the public." CP 501. Ms. Williams then made substantially the same arguments she makes at pages 15-25 of her opening brief on appeal. CP 502-06.

D. Court's Ruling Granting Partial Summary Judgment and Dismissing the CPA Claim.

Although the trial court initially denied the motion for summary judgment, CP 223-25, the trial court the next morning sent an e-mail to the parties indicating that it felt it had erred, and *sua sponte* requesting supplemental briefing on certain questions, CP 487, *see also* CP 270, which the parties provided, CP 227-39, 240-45, 246-50, 251-55. Thereafter, the trial court vacated its prior order denying the motion for partial summary judgment, granted the motion for partial summary judgment, and dismissed Ms. Williams' CPA claims, CP 269-72, interlineating on defendants' proposed form of order the following explanation of its reasoning:

If this were about billing practices, setting and collection of fees or how the defendants retained, obtained, and dismissed patients, this might involve the entrepreneurial aspect (see Short [v. Demopolis], 103 Wn.2d 92). Or if this was about a doctor/clinic that "prescribed unnecessary or unnecessarily expensive surgeries as part of a business strategy" (Chambers, Ambach, 167 Wn.2d at 180); then again, this might involve the entrepreneurial aspect of medical practice actionable under the CPA. For the purposes of the summary judgment motion Dr. French admitted that prescribing the operation was entrepreneurial.

¶ 2. Here, the advertising of Lifestyle Lift is clearly entrepreneurial and indeed may be deceptive. And that gives the plaintiff a leg up on Ambach and Michael [v. Mosquera-Lacy], 165 Wn.2d 595, 200 P.3d 695 (2009).

¶ 3. However, this CPA aspect of this case wouldn't be before this court, but for the alleged med-mal and lack of informed consent claims. Surely, if everything had gone

well for the Plaintiff, she would be making no claim. ¶ 4. The Legislature did not intend to include actions for personal injury within the coverage of the CPA. Personal injury damages are not compensable [sic] under the CPA (Fisons) and do not constitute injury to “business or property” (Fisons). ¶ 5. The cost of surgery is a traditional damage in a medical malpractice claim. The alleged deceptive advertising is entrepreneurial, but it is not the but for of this case. Plaintiff Williams['] CPA injury is payment for surgery from which personal injury arose, just like Ambach. And the holding in Ambach is “because Ambach’s purported CPA injury is payment for a surgery from which personal injury also arose, she has failed to state a prima facie CPA claim.”

CP 272. The trial court denied reconsideration. CP 278-84, CP 287.

E. Jury Finding of No Malpractice and No Failure to Obtain Informed Consent.

Ms. Williams’ malpractice and informed consent claims against SPSA and Dr. Santos were tried to a jury. On the informed consent claim, the jury was instructed that Ms. Williams had the burden of proving by a preponderance of the evidence (among other propositions) that “the defendant failed to inform [Ms. Williams] of a material fact or facts relating to the treatment; . . . that [Ms. Williams] consented to the treatment without being aware of or fully informed of such material fact or facts; . . . [and] that the treatment in question was a proximate cause of injury to [Ms. Williams].” CP 646. The jury was further instructed that “[a] material fact is one to which a reasonably prudent person in the

position of the patient would attach significance in deciding whether or not to submit to the proposed course of treatment.”<sup>4</sup> CP 644.

The jury found that Ms. Williams had not proved either that the defendants failed to obtain her informed consent, or that the defendants were negligent. CP 651-52. The jury did not reach the separately asked questions of whether any failure to obtain informed consent or any negligence by the defendants was a proximate cause of injury or damage to Ms. Williams. *Id.*

F. Ms. Williams’ Appeal from Only the Dismissal of her CPA Claim.

Ms. Williams appealed. CP 288-93. She has assigned error only to the pre-trial dismissal of her CPA claims against SPSA and SICM, and the denial of reconsideration of that dismissal. *See App. Br. at 2-3.*

III. ARGUMENT

A. The CPA Does Not Authorize Buyer’s Remorse Damages.

Ms. Williams asserts, *App. Br. at 14*, that the CPA is supposed to be “liberally construed [so] that its beneficial purposes may be served.” She further asserts that her CPA claim “was based on the way the Lifestyle Lift® was sold to her, regardless of the outcome of the procedure . . . ,” *App. Br. at 13*, that it is “important that a CPA claim meet the public interest requirement,” *App. Br. at 26*, and that her CPA claim

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<sup>4</sup> Both of those instructions were standard pattern jury instructions, WPI (Civ.) 105.04 and 105.05, that Ms. Williams’ counsel had proposed, *see* CP 621, 622.

“at its heart is the claim of someone who was fooled by a merchant and now wants a refund,” *App. Br. at 26*.

No matter how liberally Ms. Williams might want the CPA to be construed, it does not provide a damages remedy for buyer’s remorse. Nor does it license private plaintiffs to police commercial practices, no matter how imbued with “public interest” they deem themselves to be. The CPA provides a private remedy to someone who can plead and prove all the requisite elements of a CPA claim, one of which is “public interest impact,” but another of which is “injury to ‘business or property.’” RCW 19.86.090; *Hangman Ridge*, 105 Wn.2d at 780.<sup>5</sup> If the \$4,000 or \$4,600 refund that Ms. Williams claimed under the CPA did not constitute injury to her “business or property,” she did not have a legally viable CPA claim and the trial court properly dismissed it, even if her pleading and evidence would have supported the “public interest” or other elements of a CPA claim.

B. Under *Ambach v. French*, the Trial Court Was Required to Dismiss Ms. Williams’ CPA Claim.

Ms. Williams’ \$4,000 or \$4,600 CPA claim was correctly dismissed before trial. In *Ambach*, the Supreme Court held in 2009, by a

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<sup>5</sup> The requisite elements of a CPA claim are: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to the plaintiff’s business or property, and (5) causation. *Hangman Ridge*, 105 Wn.2d at 780.

margin of at least eight to one, that recovery cannot be had under the CPA for the cost of a medical procedure that the plaintiff alleges caused her both personal injury and economic harm consisting of paying for the procedure: “We hold that [when a plaintiff’s] purported CPA injury is payment for a surgery from which personal injury [allegedly] also arose, [the plaintiff] has failed to state a *prima facie* CPA claim.” *Ambach*, 167 Wn.2d at 179.<sup>6</sup>

In connection with her CPA claim, Ms. Williams sought a refund of the cost of the LifeStyle Lift® that she alleged defendants deceptively promoted and of the two aspiration lipectomies that she agreed Dr. Santos would perform in addition to the lift. Ms. Williams claimed those procedures caused her personal injury and emotional harm as well as economic harm. CP 15-17. Because Ms. Williams sought recovery under the CPA for the cost of a medical procedure that she alleged caused her personal injury as well as economic harm, *Ambach* required the trial court to dismiss the CPA claims. Just as this Court is bound by a decision of the

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<sup>6</sup> Earlier in its opinion, the *Ambach* court noted that the legislature’s use of the phrase “business or property” in the CPA “is restrictive of other categories of injury and is ‘used in the ordinary sense [to] to denote[ ] a commercial venture or enterprise.’” *Ambach*, 167 Wn.2d at 172 (internal quotations omitted). Thus, the injuries that satisfy the “business or property” element of a CPA claim include the “loss of professional or business reputation, loss of goodwill, or inability to tend to a business establishment.” *Id.* at 173 (internal quotations omitted). Accordingly, it concluded that a plaintiff cannot satisfy the “injury to business or property” element of a CPA claim when her “purported CPA injury is payment for a surgery from which personal injury also arose.” *Id.* at 179.

Supreme Court, the trial court, too, was obliged to follow *Ambach*, not to make new law. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). That is what the trial court did. For that reason alone, the trial court's ruling should be affirmed.

C. Ms. Williams' Reliance on *Young* and *Wright* Is Misplaced Because Those Cases Concerned an Element of a CPA Claim Other than the "Injury to Business or Property" Element.

Ms. Williams argues, *App. Br. at 15*, that a CPA claim and a claim for personal injury can be "parallel and independent."<sup>7</sup> She asserts that *Young v. Savidge*, 155 Wn. App. 806, 230 P.3d 222 (2010), stands for the proposition that "a medical professional must not mislead his or her prospective customers when advertising his or her products," *App. Br. at 16*; that *Young and Wright v. Jeckle*, 104 Wn. App. 478, 485, 16 P.3d 1268, *rev. denied*, 144 Wn.2d 1011 (2001), together "show that it is

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<sup>7</sup> In so doing, she cites initially, *see App. Br. at 15*, Justice Chambers' concurring opinion in *Ambach*, a concurring opinion in which no other member of the court joined. In that concurring opinion, Justice Chambers agreed with the result the majority reached and its holding, but sought to stress his view that "there is nothing in our jurisprudence that should prevent a patient from bringing a CPA claim against a doctor who falsely and deceptively prescribed unnecessary or unnecessarily expensive surgeries as part of a business strategy" and that the issue of whether a plaintiff must allege "that the doctor advertised a procedure or solicited patients . . . is not presented, and [that] it would be premature to reach it." *Ambach*, 167 Wn.2d at 179-80. The points Justice Chambers expressed in his concurrence, however, have no more applicability here than they did in the *Ambach* case. Here, whether Dr. Santos "advertised a procedure or solicited patients" is not before this Court any more than it was in *Ambach*. All that is at issue here is whether Ms. Williams failed to establish the "injury to business or property" element of a CPA claim, when her only purported CPA injury is the cost of surgery that she also alleges caused her personal injury. Ms. Williams has never claimed that her cosmetic surgery was *unnecessary*. Nor has she ever claimed (much less offered evidence to prove) that her cosmetic surgery was unnecessarily expensive. Her claim was that the outcome was unsatisfactory, so she should not have had to pay for it.

possible to have a CPA claim and a personal injury claim coexist with each other, as long as the two claims are independent of each other,” *App. Br. at 17*; and that her case can be “analogized to *Wright* and *Young*,” *App. Br. at 18*. She then goes on to offer rhetoric about how the Lifestyle Lift® was promoted and to assert that she did not get what she paid for. *App. Br. at 18-20*.<sup>8</sup>

Yet, it is not at all clear what point Ms. Williams is trying to make in the context of the “injury to business or property” element of her CPA claim. *Young* and *Wright* addressed the “occurring in trade or commerce” element of CPA claims, not the “injury to business or property” element, which was the element on which Ms. Williams’ CPA claim foundered because of *Ambach*. What *Ambach* does is make it clear that, whether or not a plaintiff can plead and prove that the injury for which she claims damages under the CPA was the result of “entrepreneurial” activity rather than professional services, so as to establish the “occurring in trade or

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<sup>8</sup> Ms. Williams characterizes the Lifestyle Lift® procedure as “simply a trademark used to make high volume referrals to plastic surgeons in exchange for 85% of the revenues.” *App. Br. at 18*. Ms. Williams offers no legal authority or reasoned argument that her characterization, if accurate, would render either SPSA or SICM liable under the CPA. Using trademarks to make high volume referrals is not *per se* unfair or deceptive, nor is splitting fees 15%-85%, particularly when Ms. Williams conspicuously failed to argue (much less offer evidence tending to prove) that she could have had, for less money, the same procedure that, or a better procedure than, Dr. Santos performed using the name Lifestyle Lift®. Put another way, Ms. Williams argued “bait and switch” but without offering evidence or even reasoned argument that what she was “switched” to was a lower-value procedure. Ms. Williams simply was disappointed with the results of her cosmetic surgery and, accordingly, regrets her decision to undergo and pay for it.

commerce” element, plaintiff nonetheless fails to state a claim under the “injury to business or property” element of a CPA claim, if the plaintiff’s CPA injury is the payment plaintiff made for a surgery from which personal injury allegedly arose.

In *Young*, the sole CPA issue framed by the parties, according to the Court of Appeals, was whether the defendant dentist had arguably engaged in “entrepreneurial” activity, rather than the practice of dentistry, by advertising that he used porcelain dental crowns capped with precious metals, when he allegedly used nickel-capped crowns. *Young*, 155 Wn. App. at 825-27. That question mattered in *Young* because, if the conduct was arguably “entrepreneurial,” *Young* had adequately pled the single element of a CPA claim – “occurring in trade or commerce” – that the Court of Appeals focused on to the exclusion of any other.<sup>9</sup> Thus, the pertinent CPA-related holding of *Young* is only that an issue of fact, not resolvable on summary judgment, existed as to whether the defendant dentist’s alleged conduct was “entrepreneurial” as opposed to professional:

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<sup>9</sup> See, e.g., *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602-03, 200 P.3d 695 (2009) (“The term ‘trade’ as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided” (quoting *Ramos v. Arnold*, 141 Wn. App. 11, 20, 169 P.3d 482 (2007), and “[e]ntrepreneurial aspects [of a doctor’s practice] do not include a doctor’s skills in examining, diagnosing, treating, or caring for a patient” (citing *Wright v. Jeckle*, 104 Wn. App. 478, 485, 16 P.3d 1268, rev. denied, 144 Wn.2d 1011 (2001))).

Savidge argues that Young failed to state a CPA claim because his conduct was not “entrepreneurial.” Br. of Resp’t at 21. Young argues that . . . Savidge’s conduct was ‘entrepreneurial.’” Br. of Appellant at 11. We hold that whether Young’s CPA claim falls under chapter 7.70 RCW and former RCW 4.16.350 is a genuine issue of material fact.

*Young*, 155 Wn. App. at 825.<sup>10</sup> The *Young* court did not decide (or indicate that it had even considered) whether the injury for which Ms. Young sought CPA damages was an “injury to business or property.” The Court of Appeals in *Young* did not purport to recognize an exception to what the Supreme Court held in *Ambach*. Nor did it hold or suggest that *Ambach* leaves room for recovery of CPA damages for the cost of *some* medical procedures that also allegedly caused personal injury, even though the CPA did not permit recovery for the cost of Ms. Ambach’s medical procedure.<sup>11</sup> *Young* provides no support for Ms. Williams’ appeal from the dismissal of her CPA claim based on her failure to establish injury to “business or property.”

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<sup>10</sup> The quotation refers to chapter 7.70 RCW and RCW 4.16.350 because RCW 4.16.350, the health care malpractice statute of limitations, applied if the dentist’s alleged conduct was professional rather than entrepreneurial, and Ms. Young’s claim was barred by both the three-year and one-year statutes of limitations applicable to RCW chapter 7.70 health care injury claims under RCW 4.16.350. If the dentist’s conduct was entrepreneurial, then Ms. Young’s allegations adequately pled the one CPA element with which the Court of Appeals was concerned, and she had sued within the CPA’s four-year limitations period.

<sup>11</sup> *Young* also differs from *Ambach* in that the plaintiff in *Young* claimed that she had received a different and objectively less valuable *thing* than she had been led to believe she would get, *i.e.*, a nickel crown instead of a gold crown. Here, like the plaintiff in *Ambach*, Ms. Williams claimed physical injury and offered no evidence or argument that she could have obtained the same or a superior facelift procedure for a lower price.

Nor does *Wright* provide any support for Ms. Williams' appeal. *Wright* also concerned a CPA element different from the one addressed in *Ambach*, and is a decision of less recent vintage and of a lower court. The Court of Appeals in *Wright* held, essentially, that the "trade or commerce" element does not preclude suing a doctor under the CPA for what he or she did wearing an "entrepreneurial" hat, as opposed to what he or she did in practicing medicine. Because the defendant doctor in *Wright* allegedly promoted and made direct sales of diet drugs instead of writing prescriptions that would be filled by pharmacies, the court held that a jury could find that he had engaged in "entrepreneurial" rather than professional activity. The *Wright* decision contains no holding or even dictum as to what kinds of injuries are recoverable under a CPA claim against a doctor based on his or her "entrepreneurial" activities. The Supreme Court's decision in *Ambach* not only concerns a different CPA element – injury to "business or property" – but also is a more recent decision of a higher court than the Court of Appeals decision in *Wright*. *Wright* has no application to this appeal; *Ambach* controls.<sup>12</sup>

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<sup>12</sup> Ms. Williams argues, *App. Br. at 21*, that the result in *Ambach* was due at least in part to the lack of evidence of advertising to the general public. As the *Ambach* decision makes clear, however, the sole issue before the Supreme Court in that case was whether Ms. Ambach's CPA claim had properly been dismissed for failure to allege a cognizable injury to business or property. *Ambach*, 167 Wn.2d at 178-79 ("Ambach's case is before us only on the issue of whether her injury is to "business or property," and "[w]e hold that because Ambach's purported CPA injury is payment for a surgery from which personal injury also arose, she has failed to state a prima facie CPA claim").

D. *Stevens v. Hyde Athletic Indus. and Hiner v. Bridgestone/Firestone*  
Are Inapposite as Well.

Ms. Williams seems to argue, *App. Br. at 23*, that the holding in *Stevens v. Hyde Ath. Indus., Inc.*, 54 Wn. App. 366, 773 P.2d 871 (1989), was that the plaintiff had no CPA claim because she could not have sought even a refund for the cost of softball shoes that she bought on the premise that they were leather when they actually were imitation leather, because she suffered injury while wearing the shoes. Such an argument is way off base.

As the decision in *Stevens* clearly indicates, the plaintiff sought the same damages under the CPA that she sought under her several other causes of action, including a product liability claim, and the *Stevens* court did not say anything about whether CPA damages could be recovered for the shoes' purchase price or other out of pocket expense claims. Furthermore, *Stevens* was not about medical procedures, and predates *Ambach*. There is no way to derive from *Stevens* any lesson that supports Ms. Williams' appeal. Ms. Williams' citation to and discussion of *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 959 P.2d 1158 (1998), *App. Br. at 23-24*, likewise gains no traction, for the same reasons except that it involved snow tires rather than softball shoes.<sup>13</sup>

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<sup>13</sup> Respondents have no idea what point(s) helpful to her appeal Ms. Williams is trying to make with her citation to *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241

E. Ms. Williams Is Not Entitled to Seek “Judicial Notice” of the Argumentative Assertions She Offers as Fact in Support of Policy Arguments.

Ms. Williams, *App. Br. at 27-32*, makes multiple pronouncements about public policy, moral hazard and unscrupulous merchants. She asks this Court to take judicial notice of what she baldly (not to mention hyperbolically) asserts is “the fact that nowadays elective surgical procedures are sold to the masses by merchants armed with three tools: a registered trademark, savvy marketing, and trained sales consultants,” *App. Br. at 28*, and that “the local medical community finds itself outcompeted by these high volume, low cost, well-marketed operations,” *App. Br. at 29*.

Policy arguments about trademark-wielding merchants are more appropriately addressed to the Legislature. The Supreme Court has interpreted the CPA. In 2009 it held that, as a matter of law under the CPA, injury to “business or property” does not consist of or include paying for a health care procedure that allegedly also caused personal injury. *Ambach*, 167 Wn.2d at 179.

Ms. Williams supports her request for the taking of judicial notice with no citation to legal authority, ignoring RAP 9.11 and *King County. v.*

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F.3d 696 (9<sup>th</sup> Cir. 2001). *Br. at 24-25*. The court upheld the dismissal of CPA claims based not only on lack of proximate causation but because of Washington law barring recovery under the CPA of damages predicated on personal injuries, even though the plaintiff hospital districts were not personal injury plaintiffs. 241 F.3d at 705-06.

*Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n.6, 14 P.3d 133 (2000) (“[e]ven though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review”).<sup>14</sup> The Court may and should ignore Ms. Williams’ judicial notice request. RAP 10.3(a)(6); *Lord v. Pierce County*, 166 Wn. App. 812, 827, 271 P.3d 944, (2012) (“we do not consider arguments unsupported by citation to relevant authority”). Ms. Williams also fails to cite any evidence supporting the putative facts of which she asks this Court to take judicial notice, and they hardly would qualify, even if ER 201 applied on appeal, as ones “generally known within the territorial jurisdiction of the . . . court,” or as ones “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b)(1) and (2).

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<sup>14</sup> Rule 9.11 provides:

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party’s failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(b) Where Taken. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

F. The Jury's Finding on Ms. Williams "Informed Consent" Claim Would Preclude Her from (Re)litigating the Issue of Whether She Was Misled into Consenting to the Lifestyle Lift®.

Even if the trial court had erred in dismissing the CPA claim before trial based on *Ambach*, Ms. Williams would not be entitled to a trial of her CPA claim in light of the jury's verdict.

As required by RCW 7.70.050(1)(a) and (b), and WPI 105.05, the jury was instructed on Ms. Williams' informed consent claim that she bore the burden of proving, among other things, that "the defendant failed to inform [her] of a material fact or facts relating to the treatment; . . . that [she] consented to the treatment without being aware of or fully informed of such material fact or facts; . . . [and] that the treatment in question was a proximate cause of injury to [her]." CP 646. As required by RCW 7.70.050(2) and WPI (Civ.) 105.04, the jury also was instructed that "[a] material fact is one to which a reasonably prudent person in the position of the patient would attach significance in deciding whether or not to submit to the proposed course of treatment." CP 644. The jury answered "no" to the question "Did the defendants fail to obtain informed consent from the plaintiff?" CP 651. The jury presumably followed both instructions. *E.g., Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 136, 875 P.2d 621 (1994). In light of the instructions the jury was given, the jury's special verdict finding establishes that Ms. Williams did not consent to a

medical procedure without having been informed of a material fact or facts.<sup>15</sup> In other words, she consented having been adequately informed of all material facts.

Where, as here, the jury found in connection with Ms. Williams' RCW 7.70.050 informed consent claim that she had been adequately informed of all material facts relating to the surgery she underwent, it can hardly be said that she was nevertheless affirmatively deceived, misled, or "tricked" into paying for that surgery. Although the trial court did not predicate its summary judgment dismissal of Ms. Williams' CPA claims on CPA elements other than "injury to business or property," an appellate court may affirm a trial court's grant of summary judgment on any ground supported by the record, within the pleadings and proof, and on which the appellant had a full and fair opportunity to develop relevant facts. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003). The record, in the wake of trial, compels the conclusion that Ms. Williams was not deceived.

Collateral estoppel "prevents the relitigation of an issue or determination of fact after the party sought to be estopped has had a full and fair opportunity to present his or her case." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 114, 829 P.2d 746 (1992). It can apply within the context of the same case. *See State v. Harrison*, 148 Wn.2d

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<sup>15</sup> Because the jury did not reach the separately-asked question about causation, we know that it did not find against Ms. Williams solely on the issue of causation.

550, 560-61, 61 P.3d 1104 (2003). Similarly, the “law of the case” doctrine “serves to ‘promote[ ] the finality and efficiency of the judicial process by ‘protecting against the agitation of settled issues’,” . . . and is applied “in order ‘to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue . . .’” *Id.* at 562 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988), and 1B James Wm. Moore, et al., *Moore’s Federal Practice*, ¶ 0.404[1], at 118 (1984)).

Ms. Williams had a full and fair opportunity to litigate the issue of whether she consented to the Lifestyle Lift® procedure without having been informed of a material fact or facts. Letting her litigate the issue of whether she was affirmatively *deceived* as to facts of which the jury’s verdict means she was *adequately informed* would “agitat[e] settled issues” and raise at least the theoretical possibility of “inconsistent results in the same litigation.” *State v. Harrison*, 148 Wn.2d at 562. It thus would be inconsistent with collateral estoppel and with the law of the case doctrine. It also would violate the CPA-specific principle, recognized by the *Ambach* opinion in which eight justices joined (and from which no justice dissented), that “the CPA was not designed to give personal injury claimants . . . backdoor access to compensation they were denied in their

personal injury suits.” *Ambach*, 167 Wn.2d at 179 n.6. If, as *Ambach* holds, a CPA claim for the cost of *allegedly* negligent health care is precluded, surely a CPA claim based on allegations of causal deception cannot be reinstated once the health care has been *adjudged* not to have been negligent and once it is the law of the case that the plaintiff was *not* inadequately informed of material facts relating to the health care.

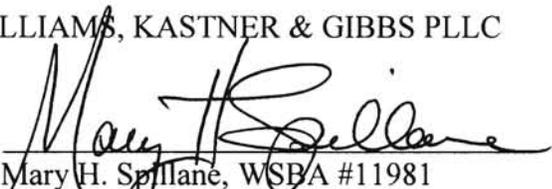
#### IV. CONCLUSION

Under *Ambach*, the payment for a surgery from which Ms. Williams claimed to have suffered personal injury is not an injury to business or property for purposes of a CPA claim. Because Ms. Williams failed to establish any injury to business or property, the trial court properly dismissed her CPA claims against SICM and SPSA. For all the foregoing reasons, the trial court’s summary judgment dismissal of Ms. Williams’ CPA claims should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of June, 2012.

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By

  
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 13th day of June, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondents Seattle Plastic Surgery Associates, P.C., Lifestyle Lift Holding, Inc., and Scientific Image Center Management, Inc.," to be delivered in the manner indicated below to the following counsel of record:

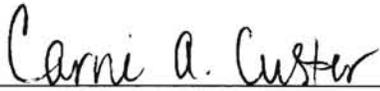
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DATED this 13th day of June, 2012, at Seattle, Washington.

  
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Carrie A. Custer, Legal Assistant