

No. 81107-5

SUPREME COURT OF THE STATE OF WASHINGTON

TERESA AMBACH and MICHAEL AMBACH,

Respondents,

v.

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

Petitioners.

AMICUS CURIAE BRIEF OF WASHINGTON STATE MEDICAL
ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AND
PHYSICIANS INSURANCE A MUTUAL COMPANY

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC

Attorneys for Amicus Curiae
Washington State Medical Association,
American Medical Association, and
Physicians Insurance A Mutual Company

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101-2389
(206) 628-6600

TABLE OF CONTENTS

I. ARGUMENT1

 A. The Court of Appeals’ Gratuitous Analysis of the “*in trade or commerce*” Element of a CPA Claim Should Be Repudiated and Its Conclusion that an Allegation that a Physician Performed an Unnecessary Treatment on the Patient for Financial Gain Implicates the Entrepreneurial Aspects of the Physician’s Practice so as to Satisfy the “*in trade or commerce*” Element Should Be Reversed5

 B. Because the Ambachs’ Claimed Damages Are for, or Were Incurred Because of, Personal Injury, This Court Should Reverse the Court of Appeals’ Decision and Reinstate the Superior Court’s Summary Judgment Dismissal of the Ambach’s CPA Claim Because they Failed to Satisfy the “Injury to Business or Property” Element of that Claim11

 C. Contrary to the Legislature’s Intent in Enacting RCW ch. 7.70 and Other Health Care Liability Reform Measures, The Court of Appeals’ Decision, if Allowed to Stand, Will Effectively Allow Virtually Any Allegedly Unnecessary Treatment Claim to Be Converted into a CPA Claim15

II. CONCLUSION.....19

TABLE OF AUTHORITIES

CASES

Ambach v. French,
141 Wn. App. 782, 173 P.3d 941 (2007).....1, 5, 11, 14, 15

Branom v. State,
94 Wn. App. 964, 974 P.2d 335, rev. denied,
138 Wn.2d 1023 (1999).....7, 8, 17

Celotex Corp. v. Catrett,
477 U.S. 317, 322-23 (1986)14

Hall v. Sacred Heart Medical Ctr.,
100 Wn. App. 53, 995 P.2d 621 (2000).....7

Hamman v. U. S.,
267 F. Supp. 420 (D. Mont. 1967)].....13

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,
105 Wn.2d 778, 780, 719 P.2d 531 (1986).....1

Howell v. Spokane & Inland Empire Blood Bank,
117 Wn.2d 619, 818 P.2d 1056 (1991).....13

Jaramillo v. Morris,
50 Wn. App. 822, 827, 750 P.2d 1301, rev. denied,
110 Wn.2d 1040 (1988).....10

Michael v. Mosquera-Lacy,
No. 80665-9, ___ Wn.2d ___, ___ P.3d ___,
2009 WL 281064 (Feb. 5, 2009).....2, 6, 8, 10

Podiatry Insurance Co. of America v. Isham,
65 Wn. App. 266, 828 P.2d 59 (1992).....3, 12, 14, 15, 16

Ramos v. Arnold,
141 Wn. App. 11, 20, 169 P.3d 482 (2007).....10

Estate of Sly v. Linville,
75 Wn. App. 431, 878 P.2d 1241 (1994).....8, 9

Stevens v. Hyde Ath. Industrial, Inc.,
54 Wn. App. 366, 773 P.2d 871 (1989).....3, 12, 14, 15

<u>Tighe v. Ginsberg</u> , 540 N.Y.S.2d 99, 146 A.2d 268 (1989).....	8
<u>Wright v. Jeckle</u> , 104 Wn. App. 478, 16 P.3d 1268, <u>rev. denied</u> , 144 Wn.2d 1011 (2001).....	8, 9, 10

STATUTES

Consumer Protection Act.....	<i>passim</i>
RCW 4.16.350	17
RCW 4.24.290	18
RCW ch. 7.70.....	<i>passim</i>
RCW 7.70.010	7, 17
RCW 7.70.030	3, 6, 7, 8, 9, 17
RCW 7.70.030	1
RCW 7.70.080	18
RCW 7.70.100	18
RCW 7.70.150	18
RCW 19.86.120	18

OTHER AUTHORITIES

Laws of 1986, ch. 305, § 100.....	16
Laws of 2006, ch. 8, § 1.....	16, 17

I. ARGUMENT

In its published decision in this case, Ambach v. French, 141 Wn. App. 782, 173 P.3d 941 (2007), the Court of Appeals has held that: (1) where a plaintiff alleges that a surgeon performed an unnecessary surgery for financial gain, the entrepreneurial aspects of the surgeon's practice are implicated, and plaintiff satisfies the "in trade or commerce" element of a Consumer Protection Act (CPA) claim, such that plaintiff's claim for damages is cognizable not only under RCW 7.70.030 (providing the exclusive bases for actions for damages for damages occurring as a result of health care), but also under the CPA; and (2) where that same plaintiff alleges economic loss due to the increased cost of the surgery over the cost of more conservative treatment, that increased cost is not just an element of plaintiff's damages for personal injury, but also constitutes an "injury to business or property" recoverable under the CPA.¹ The Court of Appeals decision, which at best is confusing, should be reversed by this Court for any number of reasons.

¹ The Court of Appeals correctly stated the five requisite elements of a prima facie case under the CPA: "(1) an unfair or deceptive act or practice (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation." Ambach, 141 Wn. App. at 787 (citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). Unfortunately, however, the Court of Appeals incorrectly analyzed the two elements it addressed in its decision – the "in trade or commerce" element and the "injury to business or property" element.

First, the Court of Appeals' confusing, inaccurate, and gratuitous explication of how plaintiff's unnecessary surgery claim implicates the entrepreneurial aspects of the surgeon's practice and satisfies the "in trade or commerce" element of a CPA claim goes well beyond the narrow issue presented by the trial court's summary judgment ruling, which was that Ms. Ambach's claim was one for personal injuries, not one for "injury to business or property" recoverable under the CPA.

Second, the Court of Appeals' conclusion that, with simply an allegation that a physician's treatment recommendation was motivated by "financial gain," a plaintiff's claim of unnecessary or improper treatment gives rise to both a medical malpractice claim and a CPA claim is inconsistent with this Court's decision in Michael v. Mosquera-Lacy, No. 80665-9, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 281064 (Feb. 5, 2009), and other Court of Appeals' decisions which elucidate what is and is not included in the "entrepreneurial aspects" of a physician's or other professional's practice so as to satisfy the "in trade or commerce" element of a CPA claim.

Third, the Court of Appeals' gratuitous pronouncements about when judgments made, or treatments recommended and performed, by physicians providing health care to their patients can be characterized as "entrepreneurial" are contrary to what the legislature intended by enacting

RCW 7.70.030 and the CPA, and are inconsistent with well-established case law distinguishing what constitutes “health care” giving rise to an action exclusively governed by RCW ch. 7.70 and what constitutes something other than health care which may give rise to an action against a health care provider under a theory of recovery not encompassed in RCW 7.70.030.

Fourth, the Court of Appeals’ conclusion that a patient’s allegation that she sustained an economic loss because the treatment or surgery the physician performed cost more than the treatment or surgery the plaintiff claims she should have received removes such loss from the realm of damages for personal injuries, and instead constitutes an “injury to business or property” recoverable under the CPA, is inconsistent with Stevens v. Hyde Ath. Indus., Inc., 54 Wn. App. 366, 773 P.2d 871 (1989), which makes clear that a plaintiff cannot transform damages that flow from a personal injury into damages for “injury to business or property” by classifying the damages “into a pseudo-property structure.” The Court of Appeals’ conclusion that the increased cost of an allegedly unnecessary surgery constitutes an “injury to business or property” is not, as the Court of Appeals maintains, warranted by Podiatry Ins. Co. of America v. Isham, 65 Wn. App. 266, 828 P.2d 59 (1992).

Finally, if the Court of Appeals' published, and therefore precedential, decision is allowed to stand, then virtually every plaintiff who brings a malpractice action under RCW ch. 7.70 against a for-profit health care provider will also be able to avail himself or herself of a CPA action, simply by alleging that the health care provider did something that the plaintiff now believes was not necessary and did so to reap a financial gain or profit. The consequences of so easily converting every medical malpractice action into a CPA action should give this Court pause. Forcing health care providers to defend not only medical malpractice claims cognizable under RCW ch. 7.70, but also claims under the CPA, arising out of their provision of health care to their patients, is inconsistent with the legislative intent expressed in the enactment of RCW ch. 7.70 and subsequent health care liability reform measures, and will only serve to exacerbate the legitimate public policy concerns over the availability and affordability of health care and medical malpractice insurance that prompted such legislative enactments.

As explained more fully below, for any or all of these reasons, this Court should reverse the Court of Appeals' published decision and make clear that an action based on a claim that a physician provided his or her patient with unnecessary treatment (regardless of whether the physician made more or less money from furnishing that treatment than the

physician would have made from furnishing the treatment plaintiff claims she should have received), is an action for damages for injury occurring as a result of health care cognizable only under RCW ch. 7.70, and does not involve the entrepreneurial aspects of the practice of medicine so as to satisfy the “in trade or commerce” of a CPA claim. This Court should also make clear that the increased cost of allegedly unnecessary treatment over the cost of some less expensive treatment that plaintiff claims she should have received is part and parcel of the plaintiff’s personal injury damages, and is not a claim for “injury to business or property” for which damages are recoverable under the CPA.

A. The Court of Appeals’ Gratuitous Analysis of the “in trade or commerce” Element of a CPA Claim Should Be Repudiated and Its Conclusion that an Allegation that a Physician Performed an Unnecessary Treatment on the Patient for Financial Gain Implicates the Entrepreneurial Aspects of the Physician’s Practice so as to Satisfy the “in trade or commerce” Element Should Be Reversed.

The Court of Appeals was not called upon to address the “trade or commerce” element of the Ambachs’ CPA claim because that element was not a basis for the trial court’s summary judgment ruling. The Court of Appeals acknowledged that the basis for Dr. French’s summary judgment motion was a challenge to the Ambachs’ ability to prove “injury to business or property,” not any other element of a CPA claim. Ambach, 141 Wn. App. at 787, 789. Despite that limited issue, the Court of

Appeals issued a published decision holding that, by alleging that an operation was “unnecessary” and that the surgeon profited from performing it, a plaintiff can avoid summary judgment dismissal of a CPA claim, and proceed to trial on both a CPA claim and a claim under RCW 7.70.030. Such a conclusion, however, not only ignores the fact that an action against a surgeon that is premised on a claim of unnecessary surgery is an action for damages for injury occurring as a result of health care governed exclusively by RCW ch. 7.70, but also is inconsistent with this Court’s recent decision in Michael v. Mosquera-Lacy, supra, and other Court of Appeals decisions, elucidating what do and do not constitute the entrepreneurial aspects of a physician’s or other professional’s practice so as to satisfy the “in trade or commerce” element of a CPA claim.

By enacting RCW 7.70.030, the Legislature limited to three the theories under which damages may be recovered for injuries occurring as a result of health care: medical negligence; failure to obtain informed consent; and breach of promise that the injury would not occur.² The

² RCW 7.70.030 provides:

No award shall be made in any action or arbitration for damages for injury occurring as a result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:

(1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;

Legislature's declaration of policy in enacting RCW ch. 7.70 sweeps broadly and requires plaintiffs to proceed under RCW ch. 7.70 if seeking recovery for "injuries resulting from health care," regardless of whether the cause of action is based in "tort; contract, or otherwise." RCW 7.70.010.³ Thus, our courts have thwarted efforts to expand the theories available in suits brought against health care providers for damages for injury occurring as a result of health care, and have held that, whenever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW ch. 7.70. Branom v. State, 94 Wn. App. 964, 974 P.2d 335, rev. denied, 138 Wn.2d 1023 (1999); Hall v. Sacred Heart Med. Ctr., 100 Wn. App. 53, 995 P.2d 621 (2000).

When courts *have* allowed suits against a physician on a theory of recovery other than the three enumerated in RCW 7.70.030, they have done so because the physician's alleged breach of duty "did not arise"

(2) That a health care provider promised the patient or his representative that the injury suffered would not occur;

(3) That injury resulted from health care to which the patient or his representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

³ RCW 7.70.010 provides:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976.

from “health care,” *i.e.*, “the process in which [the physician] ‘was utilizing the skills which he [or she] had been taught in examining, diagnosing, treating or caring for’ the plaintiff as his or her patient. Estate of Sly v. Linville, 75 Wn. App. 431, 440, 878 P.2d 1241 (1994) (quoting Tighe v. Ginsberg, 540 N.Y.S.2d 99, 101, 146 A.2d 268, 271 (1989)).

The use of the definition of “health care” set forth in Estate of Sly as a method of distinguishing between alleged conduct that exposes a physician to liability under the CPA (or a common law cause of action not enumerated in RCW 7.70.030) and alleged conduct given rise to a medical malpractice cause of action governed exclusively by RCW 7.70.030, has gained acceptance not only in the Court of Appeals, see Branom, 94 Wn. App. at 969-971, and Wright v. Jeckle, 104 Wn. App. 478, 481, 16 P.3d 1268, rev. denied, 144 Wn.2d 1011 (2001), but also in this Court’s recent decision in Michael v. Mosquera-Lacy, No. 80665-9, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 281064 *3 (Feb. 5, 2009) (“Entrepreneurial aspects [of a medical practice] do not include a doctor’s skills in diagnosing, examining, treating, or caring for a patient”). Thus, a physician may be subject to liability for misrepresentations made to a patient if he falsely characterizes as good the quality of care provided by another physician, Estate of Sly, and may be subject to CPA liability for soliciting customers

for diet pills through newspaper advertisements, Wright v. Jeckle,⁴ because the harm that results from such activity did not occur as “a result of health care” within the meaning of RCW 7.70.030.

Here, however, Mrs. Ambach’s allegation that Dr. French performed surgery on her that was unnecessary for the problems for which she consulted Dr. French was not something unrelated to the “process in which [Dr. French] ‘was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for’ the plaintiff as his patient.” Estate of Sly, 75 Wn. App. at 440. It was “health care” pure and simple. Mrs. Ambach consulted Dr. French, Dr. French diagnosed her as having, among other things, shoulder instability, and Dr. French exercised his judgment and skills in determining what treatment he should recommend

⁴ According to the decision in Wright:

Dr. Jeckle advertised the “Dr. Jeckle’s Fen Phen Medical Weight Loss Program” in the *Nickel Nik* and *Spokesman Review*. The advertisements solicited patients for the use of fen-phen. Dr. Jeckle advertised fen-phen as “safe.” The drugs were not approved for concomitant use by the Federal Drug Administration. He also set up a system of free drawings for fen-phen and distributed a newsletter. The newsletter included testimonials from fen-phen users and encouraged the use of fen-phen. Dr. Jeckle required that his patients purchase fen-phen directly from his office. Patients were not allowed to purchase fen-phen from independent pharmacists. And, Dr. Jeckle directly profited from the sale of fen-phen.

Wright, 104 Wn. App. at 480. Wright also was a class action, in which no class member sought personal injury damages. By clear implication, had it been alleged in Wright that Dr. Jeckle had prescribed fen-phen inappropriately or needlessly to paying patients, rather than sold it to nonpatients whose business he solicited through newspaper advertisements and who suffered personal injury, he *would* have been practicing medicine, albeit perhaps in violation of the standard of care, and there would have been no basis for suing him under the CPA because of the proscriptions of RCW 7.70.030.

and perform. His decision that Mrs. Ambach should undergo the shoulder surgery he performed, rather than more conservative treatment, is “health care,” such that any action for damages based upon a claim that the surgery was not necessary is an action for damages for injury occurring as a result of “health care” and is governed exclusively by RCW ch. 7.70.

As this Court recently made clear, “[t]he 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.” Michael v. Mosquera-Lacy, 2009 WL 281064 *3 (quoting Ramos v. Arnold, 141 Wn. App. 11, 20, 169 P.3d 482 (2007)). “Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act.” Id. at *3 (quoting Ramos, 141 Wn. App. at 20) “Entrepreneurial aspects do not include a doctor’s skills in examining, diagnosing, treating, or caring for a patient.” Id. at *3 (citing Wright, 104 Wn. App. at 485. Rather, the entrepreneurial aspects of the learned professions, including medical professionals, involve such things as “billing and obtaining and retaining patients.” Id. at *3 (citing Ramos, 141 Wn. App. at 20; Jaramillo v. Morris, 50 Wn. App. 822, 827, 750 P.2d 1301, rev. denied, 110 Wn.2d 1040 (1988)).

Deciding what surgery should be performed and performing that surgery on a patient does not implicate the “entrepreneurial” aspects of a physician’s practice merely because the surgeon charges for or profits from the surgery or because the patient can find a lawyer skilled enough to draft a complaint alleging that an allegedly better course of treatment would have cost less. When, as here, an allegedly negligent surgeon did not solicit the plaintiff as a patient by making some promise or representation concerning the treatment at issue, and did not advertise the procedure at issue, a negligently chosen or performed procedure does not implicate the “entrepreneurial” aspect of the surgeon’s practice, and for that reason does not occur in “trade or commerce” so as to make the claim cognizable under the CPA. This Court should reverse the Court of Appeals’ conclusion to the contrary

B. Because the Ambachs’ Claimed Damages Are for, or Were Incurred Because of, Personal Injury, This Court Should Reverse the Court of Appeals’ Decision and Reinstate the Superior Court’s Summary Judgment Dismissal of the Ambach’s CPA Claim Because they Failed to Satisfy the “Injury to Business or Property” Element of that Claim.

Under the confusing heading “*Injury to Trade or Commerce*,” Ambach, 141 Wn. App. at 788, the Court of Appeals has concluded that “allegations of economic loss due to the increased cost of surgery over the cost of more conservative treatment are sufficient to satisfy the [CPA’s

“injury to business or property’] damages requirement,” id. at 790, such that ‘Ms. Ambach’s CPA action can move forward based on economic loss due to the cost of the surgery and any claim for pecuniary damages,” id. The Court of Appeals conclusion in that regard is inconsistent with Stevens v. Hyde Ath. Indus., Inc., 54 Wn. App. 366, 773 P.2d 871 (1989), and is not warranted by Podiatry Ins. Co. of Am. Isham, 65 Wn. App. 266, 828 P.2d 59 (1992), upon which the Court of Appeals relied.

All of the claimed losses for which the Ambachs sought damages are losses incidental to, or consequences of, the personal injuries that Dr. French allegedly inflicted negligently on Teresa Ambach. The CPA simply does not apply to claims for those kinds of damages, no matter how insistently and/or creatively plaintiffs’ lawyers profess otherwise. As the Stevens court held, a plaintiff cannot bring her damages claims within the rubric “injury to business or property” under the CPA by “classifying her personal injury damages into a pseudo-property structure, *i.e.*, special damages such as hospital, physician, and rehabilitative expenses, that [she contends] constitute property and economic interests.” Stevens, 54 Wn. App. at 370. That is because the CPA speaks to harm done to a person’s (or entity’s) business or property, not to harm done directly to a person’s body or psyche. As the court explained in Stevens:

“The term “business or property” is used in the ordinary sense and denotes a commercial venture or enterprise.” [quoting Hamman v. U. S., 267 F. Supp. 420, 432 (D. Mont. 1967)] . . . Had the Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than “business or property”.

Id.

Any alleged economic losses the Ambachs incurred, whether lost income or expenses, were incurred because of the injury to Mrs. Ambach’s shoulder they claim resulted from the allegedly unnecessary surgery Dr. French performed, not because of the prices Dr. French or the hospital charged in connection with the surgery. Even the alleged increased cost of the surgery Dr. French performed over the cost of the more conservative treatment the Ambachs claim he should have provided are part and parcel of the damages recoverable on account of Mrs. Ambach’s alleged personal injury.

The trial court correctly ruled that the Ambachs’ claimed damages were damages for personal injury, and its ruling dismissing the CPA claim because the Ambachs’ alleged damages did not establish the “*injury to business or property*” element of a CPA claim should be reinstated. See Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624-25, 818 P.2d 1056 (1991) (For summary judgment purposes, “a complete failure of proof concerning an essential element of the nonmoving party’s

case necessarily renders all other facts immaterial,” and warrants dismissal of the case on summary judgment) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

Nothing in Podiatry Ins. Co. of Am. v. Isham dictates a different result. The Court of Appeals cited Isham for the proposition that “allegations of economic loss due to the increased cost of surgery over the cost of more conservative treatment are sufficient to satisfy the [“injury to business or property”] requirement [of a CPA claim].” Ambach, 141 Wn. App. at 790. But that statement grossly misreads what Isham held.

Isham was an appeal from a declaratory ruling in favor of a surgeon’s malpractice insurer, which the Court of Appeals *affirmed*. The declaratory ruling was issued in a lawsuit separate from one in which the insured surgeon was being sued by a patient. The Court of Appeals noted, but did not address the correctness of, a ruling by *the trial court in the separate malpractice lawsuit* (a ruling not before it on appeal in the coverage lawsuit) denying the surgeon’s motion for summary judgment dismissal of plaintiff’s CPA claim on the ground that (as the Court of Appeals in the coverage appeal characterized it) the plaintiff, by claiming “economic loss due to increased cost of surgery versus more conservative treatment,” had “met” the requirement imposed by Stevens, that “something more than ‘personal injury’ type damages be alleged.” Isham,

65 Wn. App. at 268. The holding in Isham, that the surgeon had coverage only for malpractice, and that it did not have to defend him against the CPA claim, did not depend on the CPA claim being viable. Thus, it is not true that Isham establishes that “allegations of economic loss due to the increased cost of surgery over the cost of more conservative treatment are sufficient to satisfy the [CPA’s ‘injury to business or property’] requirement.” Ambach, 141 Wn. App. at 790. What *is* the law is established by Stevens, 54 Wn. App. at 370: one cannot transform damages that flow from a personal injury into damages due to “injury to business or property” by focusing on the fact that they correspond to amounts of money that the plaintiff paid after and because of a personal injury.

C. Contrary to the Legislature’s Intent in Enacting RCW ch. 7.70 and Other Health Care Liability Reform Measures, The Court of Appeals’ Decision, if Allowed to Stand, Will Effectively Allow Virtually Any Allegedly Unnecessary Treatment Claim to Be Converted into a CPA Claim.

If the Court of Appeals’ published (and therefore precedential) decision is not reversed, then virtually every plaintiff who has a medical malpractice claim under RCW ch. 7.70 against a for-profit health care provider will also be able to bring that claim as a CPA claim, simply by alleging that defendant engaged in the alleged malpractice for financial gain. Such a result should not be allowed to occur.

To allow patients who are unhappy with the result of the medical or surgical treatment they received to force their physicians to defend against uninsured CPA claims as well as (or even instead of) insured malpractice claims simply by alleging that their physicians received higher pay for doing what they did than they would have received had they done what their patients in hindsight believe should have been done would have implications that should give this Court pause. As Isham recognizes, medical malpractice insurance policies typically do not provide defense or indemnity coverage for claims based on allegations other than malpractice.

Enabling plaintiffs suing for malpractice to force defendant physicians to pay out of their own pockets for a portion of defense costs or pay premiums for CPA liability coverage (if it is even available) can only contribute to the flight of physicians from the state or the profession, the practice of more defensive medicine, higher health care costs, and decreased availability and affordability of health care, none of which will serve the public interest well or efficiently as the Legislature has recognized in enacting various health care liability reform measures. See, e.g., Laws of 1986, ch. 305, § 100;⁵ Laws of 2006, ch. 8, § 1.⁶

⁵ In Laws of 1986, ch. 305, § 100, the Legislature made the following findings:

Tort law in this state has generally been developed on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of

As previously noted, by enacting RCW 7.70.030, the Legislature limited to three the theories under which a plaintiff may bring an action for damages for injuries occurring as a result of health care.⁷ The Legislature further made clear that such actions are exclusively governed by RCW ch. 7.70. RCW 7.70.010; Branom, 94 Wn. App. at 969. The Legislature also has enacted a special statute of limitations, see RCW 4.16.350 (actions must be brought within the later of three-year from act or omission or one-year from discovery, but not later than eight years from act or omission), and various other special provisions (including pre-filing

this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

* * *

The legislature also finds comparable cost increases [to those governmental entities face from increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage] professional liability insurance. Escalating malpractice premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. . . .

* * *

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.

⁶ In Laws of 2006, ch. 8, § 1, the Legislature made the following findings:

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all participants.

⁷ See footnote 2, supra.

notice of intent to sue, RCW 7.70.100, certificate of merit, RCW 7.70.150, and mandatory mediation, RCW 7.70.100, requirements, partial abrogation of the collateral source rule, RCW 7.70.080, and evidentiary and proof requirements, RCW 4.24.290, to name a few) applicable to such claims which do not apply to CPA claims.

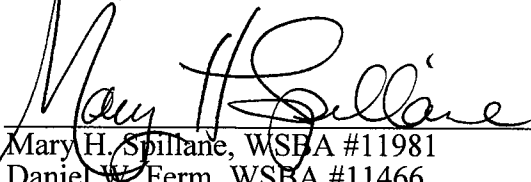
Thus, to allow a plaintiff to pursue an action under the CPA based on the same allegations that give rise to an action under RCW ch. 7.70, as the Court of Appeals' decision allows the Ambachs to do here, would effectively undermine, if not eviscerate, public policy choices that the Legislature has made in its comprehensive enactments concerning health care liability actions. Allowing a duplicate cause of action for medical malpractice under the CPA would allow plaintiffs to circumvent or avoid both the statute of limitations applicable to medical malpractice actions (the CPA has a 4-year statute of limitations, RCW 19.86.120), as well as all of the other special provisions that the Legislature has enacted for actions for damages for injury occurring as a result of health care, and defeat the Legislature's intent that RCW ch. 7.70 exclusively govern such actions. To avoid such an incongruous result, this Court should reverse the Court of Appeals decision, repudiate the Court of Appeals' erroneous CPA analysis, and reinstate the trial court's summary judgment dismissal of the Ambachs' CPA claim.

II. CONCLUSION

For all the foregoing reasons, Amicus Curiae Washington State Medical Association, American Medical Association, and Physicians Insurance respectfully urge this Court to reverse the Court of Appeals, reinstate the trial court's dismissal of the Ambachs' CPA claims on summary judgment, and repudiate the Court of Appeals' analysis of "in trade or commerce" and "injury to business or property" elements of a CPA claim.

RESPECTFULLY SUBMITTED this 23rd day of February, 2009.

WILLIAMS, KASTNER & GIBBS PLLC

By 
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466

Attorneys for Amicus Curiae Washington State Medical Association, American Medical Association, and Physicians Insurance A Mutual Company

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2009, I caused a true and correct copy of the foregoing document, "Amicus Curiae Brief of Washington State Medical Association, American Medical Association, and Physicians Insurance A Mutual Company" to be delivered via U.S. Mail, postage prepaid, to the following counsel of record:

Counsel for Respondent:

Kristin M. Houser, WSBA #07286
James D. Hailey, WSBA # 07639
Lindsay L. Halm, WSBA #37141
SCHROETER GOLDMARK BENDER
500 Central Bldg
810 3rd Ave
Seattle WA 98104-1693

Patrick K. Fannin, WSBA # 28191
ATTORNEY AT LAW
1312 N Monroe St
Spokane WA 99201-2623

Counsel for Petitioners:

Stephen C. Haskell, WSBA #07832
STEPHEN HASKELL LAW OFFICES PLLC
222 N Wall St Ste 402
Spokane WA 99201-0813

D. Roger Reed, WSBA #00662
REED & GIESA
222 N Wall St Ste 410
Spokane WA 99201-0873

Counsel for Amicus Curiae Washington Defense Trial Lawyers

Stewart A. Estes, WSBA #15535
KEATING, BUCKLIN & McCORMACK, INC., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

Counsel for Amicus Curiae Washington State Association
for Justice Foundation:

Bryan P. Harnetiaux, WSBA #05169

ATTORNEY AT LAW

517 E 17th Ave

Spokane, WA 99203-2210

Dated this 23rd day of February, 2009 at Seattle, Washington.



Carrie A. Custer