72801-6

NO. 72801-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
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Court of Appeals
Division I
State of Washington

MICHAN RHODES, an individual; KEYSTONE WINDOWS AND DOORS, a Washington corporation,

Appellants,

v.

EMILY SHARP RAINS and MICHAEL RAINS, individually and their marital community; RAINS LAW GROUP, a Professional Limited Liability Company,

Respondents.

BRIEF OF RESPONDENTS

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INTRODUCTION

Michan Rhodes and Keystone Windows and Doors, Inc. (Appellants) retained Rains Law Group (RLG) to assist it with corporate liquidation, dissolution, back taxes, and bankruptcy. Rhodes' mismanagement had brought Keystone to the brink of failure. Emily Rains and RLG came in to wind-up Keystone.

But within two weeks of meeting Rains, Rhodes decided to try to save Keystone. Keystone therefore hired Rains as CFO and General Counsel. But Rhodes continued her long (and disastrous) practice of ignoring the financial aspects of her business.

Despite her best efforts, Rains could not save Keystone. She lost confidence in Rhodes' ability to run the company. After Keystone stopped paying her, Rains eventually resigned. Keystone later failed.

After Rains brought a claim for unpaid wages, Appellants sued Rains and RLG, pleading legal malpractice, breach of fiduciary duty, and Consumer Protection Act (CPA). The trial court dismissed their malpractice and CPA claims, and a jury found for Appellants on their fiduciary breach claim, but for Rains on her wage claim.

Appellants appealed the CPA summary judgment, and Rains cross-appealed. Rains dismisses her cross appeal, and there is no legal basis for the CPA claim. This Court should affirm.

RESTATEMENT OF ISSUES

1. Did appellants fail to establish the required elements for a CPA claim arising out of RLG's two-week engagement as counsel, where lawyers' competence and strategy are exempt from the CPA?

2. As to the entrepreneurial aspects of RLG's practice of law, did appellants fail to establish facts – an event, an occurrence, or something that exists in reality – regarding an unfair or deceptive act or practice, rather than just speculating?

3. Did the trial court properly dismiss Keystone's CPA claim against its former company officer, where the Legislature has determined that the "labor of a human being is not a commodity or article of commerce"?

4. Did Keystone fail to establish the required elements for a CPA claim arising out of Emily Rains' employment, where she was not a commodity, her salary was not an injury, her legal work was exempt from the CPA, and Keystone started failing before hiring Rains, and finished failing after she resigned?

5. Should this Court deny an attorney fee award, where Appellants' legal claims are baseless?

RESTATEMENT OF THE CASE

Despite its wholly one-sided nature (relying almost entirely upon Rhodes' self-serving declaration) Rains accepts the actual facts cited in appellants' statement of the case; but she must reject their many arguments, hyperbole, and derogatory mis-characterizations, posing as facts. The key facts – which establish that Appellants have no CPA claim – are briefly summarized here, and discussed in greater detail in the argument. Rains also sets forth a few key undisputed facts that Appellants omit.

A. Appellants admit that Rhodes failed to meet her fiduciary duties as the President of Keystone prior to hiring Rains, bringing Keystone to the brink of financial disaster.

The first salient facts Appellants mention explain that Rhodes failed to properly oversee financial matters at her solely-owned company long before she hired Rains (BA 2-3):

- After Keystone leased its own space [in 2005,] Ms. Rhodes hired accountants and bookkeepers to manage financial matters (CP 225).
- By July of 2010, with no one really at Keystone's financial controls, Keystone began to slide into debt (*id.*).
- In June, 2011, the Keystone accountant at that time was not controlling cash flows nor giving Ms. Rhodes accurate reports (*id.*).
- The accountant told Ms. Rhodes that there was a very serious problem and Ms. Rhodes needed help (*id.*).

With Rhodes at the helm, Keystone faced financial disaster. CP 225.

B. Rhodes retained Rains Law Group to assist Rhodes in winding-up the failing Keystone, including corporate liquidation, dissolution, taxes, and bankruptcy support.

The Small Business Administration referred Rhodes to Rains. CP 225. They first met on June 20, 2011. CP 226. RLG began work on June 22, 2011. CP 91.[1] And Rhodes omits that on June 27, 2011, she signed a retainer agreement with RLG for legal advice on "Corporate liquidation, dissolution, Washington State tax analysis, and bankruptcy support." CP 82, 86-89.[2]

As Rains explained, RLG assisted Keystone in commencing actions to liquidate Keystone and in preparation for bankruptcy. CP 82. Indeed, Rhodes admits that she met with a bankruptcy attorney. CP 227, 244. Keystone paid RLG a $15,000 retainer, and RLG did a substantial amount of work toward dissolving the corporation. CP 82, 91, 244-50. There is no competent evidence in this record that RLG or Rains agreed to work toward any other purpose than is stated in their retainer agreement: to assist Rhodes in winding-up Keystone.[3]

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[1] This RLG invoice for the work performed is attached as App. B.

[2] CP 86-89 is the RLG retainer agreement that Rhodes initialed on every page and signed at the end. A copy is attached as Appendix A.

[3] Rhodes claimed that she believed Rains could "help me personally with all of my problems," (CP 226) but this vague assertion is insufficient, and her false belief was formed before she signed the retainer agreement.

Indeed, on the day after RLG was retained, June 28, 2011, the Department of Revenue took $65,310.37 from Keystone's bank account to pay Keystone's overdue back taxes. BA 3 (citing CP 227). This withdraw covered the arrearages, but left Keystone with little operating cash. BA 3-4 (citing CP 227). Rhodes and Rains discussed and began working toward a possible sale of the company. CP 227-28, 247-48. Neither Keystone nor Rhodes expressed any dissatisfaction with RLG's work. CP 82.

C. Rhodes instead decided to try to save Keystone, hiring Rains as an officer of Keystone in July 2011, and hiring Michael Rains to provide IT assistance.

Rhodes then decided against bankruptcy. CP 82, 227-28. Rhodes says she made this decision at Rains' recommendation. CP 228. They discussed forming a partnership, but Rains did not become a shareholder or director of Keystone. CP 83, 228.

Rather, Rhodes offered Rains a position as an officer of Keystone. CP 83. Rains became CFO and General Counsel for Keystone on July 5, 2011. *Id.* They agreed that Rains would draw the same salary as Rhodes. CP 228. From this time forward, RLG received no further fees. *Id.* Rains then closed RLG and allowed her professional liability insurance to lapse. CP 83.

Rains turned to trying to save the company. Also in early July, 2011, Rhodes infused $65,000 of her own cash into Keystone to keep it operating. CP 228, 229. Although Rains was brought in to oversee and manage the massive tax and vendor liabilities plaguing Keystone, her duties soon devolved into handling everyday operations. CP 83. As a Keystone Officer, Rains had authority to hire, and she did hire a bookkeeper named Heather Christensen. *Id.*

Contrary to Rhodes' hyperbolic mischaracterizations, Rains did not hire her husband, Michael Rains, to work for Keystone. CP 83, 174. Rather, Rhodes hired him to provide IT assistance. CP 83-84. While Rhodes says, "Reluctantly, I let Michael come on board as the IT person," she did so Keystone's President, thus hiring him. CP 228-29. But as discussed *infra*, this is much ado about nothing.[4]

D. Rains lost confidence in Rhodes, Keystone stopped paying Rains, and she resigned in October 2012.

After becoming Keystone's employee, Rains lost confidence in Rhodes' ability to run the company. CP 84. Keystone stopped

[4] Appellants mischaracterize and argue at length about various alleged incidents that occurred during Rains' employment at Keystone. BA 4-8. As discussed *infra*, this is irrelevant because appellants cannot sue their employee for alleged CPA violations.

paying Rains within just a few months (by September 2011). *Id.* Rains resigned on October 17, 2012. CP 84, 234.

E. Procedural History.

In December 2012, Appellants sued the Rains and RGL under theories of legal malpractice, breach of fiduciary duties, and CPA violations. CP 1-13. Rains countersued for nonpayment of wages and other things.[5] CP 23-32. The trial court dismissed appellants' malpractice and CPA claims on summary judgment. CP 701-04.

A jury found for Appellants on the breach of fiduciary claim "***During Period Prior to Emily Rains Being Hired In-house by Keystone***," awarding $7,685.29. CP 772-73.[6] The jury also found for Appellants on the breach of fiduciary duty claim "***During Period When Emily Rains Was Employed In-house at Keystone***," awarding $88,764.38. CP 773.

The jury found for Rains on her wage claim, awarding her $18,780.08. CP 774. The jury found that Rhodes willfully and deliberately withheld those wages, entitling Rains to double

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[5] The other claims had to do with Rhodes' boyfriend's alleged malfeasance in working on the Rains' home. Those issues are irrelevant here.

[6] A copy of the Verdict Form is attached as App. C.

damages and attorney fees. 774, 1145. The trial court offset the awards, leaving a $40,162.89 judgment for Appellants. CP 1145.

Appellants appealed on the CPA, and Rains cross-appealed. CP 1139-40. With this brief, Rains is filing a motion to dismiss her cross-appeal and to withdraw the transcript. Trial issues are now moot.

ARGUMENT

A. The standard of review is *de novo*.

Appellants correctly state the standard of review.

B. Appellants failed to establish a *prima facie* CPA claim regarding RLG's legal services.

To prevail on a CPA claim alleging an unfair or deceptive act or practice, the plaintiff must establish that

> (1) the defendant has engaged in an unfair or deceptive act or practice
>
> (2) in trade or commerce
>
> (3) that impacts the public interest,
>
> (4) the plaintiff has suffered injury in his or her business or property, and
>
> (5) a causal link exists between the unfair or deceptive act and the injury suffered.

Courchaine v. Commonwealth Land Title Ins. Co., 174 Wn. App. 27, 44-45, 296 P.3d 913 (2012) (paragraphing altered) (citing ***Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.***, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). Appellants failed to establish any of these elements in the trial court.

As an initial matter, Appellants consistently elide the distinction between the RLG's legal services, on one hand, and Rains' services as a Keystone employee, on the other. But it is legally and logically necessary to analyze them separately, as different legal

rules apply to each under the CPA. As explained *supra*, RLG provided substantial legal services to Appellants under a $15,000 retainer during the roughly two weeks between June 22 and July 5, 2011, when Rains became Keystones' CFO and General Counsel. CP 82-83, 86-89 (App. A), 91 (App. B). The first question is whether Appellants established a CPA violation during that representation.

1. *Appellants failed to show that RLG committed any unfair or deceptive act or practice.*

An unfair trade practice may be established *per se*, where a defendant engages in an act or practice the Legislature declares an unfair or deceptive act in trade or commerce. ***Hangman Ridge***, 105 Wn.2d at 786. Appellants did not allege a *per se* violation.

Where no *per se* violation exists, a plaintiff may still establish an unfair or deceptive act or practice, where a practice has the capacity to deceive a substantial portion of the public. ***Hangman Ridge***, 105 Wn.2d at 785. The CPA does not define "deceptive," but courts have held that "implicit in that term is 'the understanding that the actor *misrepresented* something of material importance.'" ***Stephens v. Omni Ins. Co.***, 138 Wn. App. 151, 166, 159 P.3d 10 (2007) (emphasis original) (quoting ***Hiner v. Bridgestone/ Firestone, Inc.***, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev'd*

in part on other grounds, 138 Wn.2d 248, 264, 978 P.2d 505 (1999)), *aff'd sub nom.* ***Panag v. Farmers Ins. Co. of Wash.***, 166 Wn.2d 27, 204 P.3d 885 (2009). Whether conduct is unfair or deceptive is a question of law, reviewed *de novo. See, e.g.*, ***Lyons v. U.S. Bank NA***, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014) (citing, *e.g.*, ***Panag***, 166 Wn.2d at 47).

In the trial court, appellants argued that Rains (1) used "her role as a lawyer to gain Ms. Rhodes's trust and confidence"; and (2) entered "into a business transaction with a client by getting herself hired by Keystone." CP 218-19.[7] Appellants cited no case permitting a CPA action based on such vague and innocuous allegations. *Id.* None exists. Appellants failed to establish an unfair act or practice.

Moreover, the Supreme Court has held that only the entrepreneurial aspects of the practice of law are subject to the CPA. ***Short v. Demopolis***, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984) (claims "directed to the competence of and strategy employed by plaintiffs' lawyers . . . amount to allegations of negligence or

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[7] These assertions are in Rhodes' response to Rains' first motion for summary judgment, which Rhodes incorporated by reference in her response to the second summary judgment motion. CP 560. Rhodes' remaining allegations pertaining to the time that Rains was Keystone's employee are addressed *infra*.

malpractice and are exempt from the CPA"); ***Eriks v. Denver***, 118 Wn.2d 451, 824 P.2d 1207 (1992) (same). Using your "role as a lawyer to gain [your client's] trust and confidence," and entering "into a business transaction with a client by getting [yourself] hired" in-house, are not merely entrepreneurial, but rather are integral to practicing law. Appellants failed to state a CPA claim below.

On appeal, Appellants allege three unfair or deceptive acts: (1) "falsely promising expert financial services"; (2) "preying on vulnerable, financially unsophisticated people who put their trust in her"; and (3) "padding an invoice for legal services." BA 18-24. The latter two were not asserted below. *See* CP 218-19, 560. Under RAP 9.12, this Court will not consider them.

Even if the Court did reach them, however, only those two allegations might pertain to RLG's legal services. *See* BA 18-20 (discussing only Rains' work as an employee); BA 20-22 (mentioning using lawyer role to gain trust and confidence at BA 21, but otherwise discussing Rains' work as an employee); BA 22-25 (discussing legal services). The first allegation is addressed *infra*.

As for "preying on vulnerable, financially unsophisticated people," Rhodes was the President and sole owner of Keystone when she retained RLG. While it is true that she made a practice –

over many years – of turning a blind eye to the financial aspects of her business, that does not support an allegation that she was vulnerable or unsophisticated. Being a bad businessperson does not make you vulnerable, it just makes you unsuccessful.

Be that as it may, it is not an unfair or deceptive act or practice for a lawyer to gain the trust and confidence of her client. BA 21. Rather, that is integral to the practice of law, and is not subject to the CPA. ***Short***, 103 Wn.2d at 61-62. Appellants' remaining allegations regarding this issue pertain solely to Rains' work as Keystone's employee. BA 21-22. Those issues are discussed *infra*.

As for "padding an invoice for legal services," this is simply a private fee dispute. BA 22-25. Appellants mention (a) RLG charging a $15,000 retainer without sending a bill; (b) speculation that two invoice entries may be "padded"; and (c) a false allegation that the retainer agreement does not mention Rains' hourly rate. BA 22-23.

On the first point, it is undisputed that Keystone agreed to and did pay the retainer. CP 82. Merely charging for the legal services you performed is neither unfair nor deceptive. Keystone made no contemporaneous objections about RLG's work, and RLG performed all of the work it was engaged to perform. CP 82. There is no evidence to the contrary. Nothing unfair or deceptive occurred.

On the second point, Rhodes just speculated about RLG's invoice, essentially claiming that she did "not recall any conference call with Ms. Rains on June 30th" and that she was not at Keystone on July 1, 2011, when RLG's invoice says "On-site with Michan Rhodes." CP 233-34. None of this twaddle showed that RLG failed to perform the services for which Keystone paid, much less a full-blown CPA violation. *See, e.g.*, ***Stephens***, 138 Wn. App. at 166 (claimant must at least show a material misrepresentation).

Moreover, Rhodes' assertion that she does not recall the June 30th phone conference does not contradict RLG's assertion that the conference occurred. Nor does Rhodes' claim that *she* was not onsite on July 1, contradict RLG's assertion that *Rains* was onsite that day. A plaintiff resisting summary judgment must allege

> "material facts creating a genuine issue for trial": does the affidavit state material facts, and, if so, would those facts be admissible in evidence at trial? If the contents of an affidavit do not satisfy both standards, the affidavit fails to raise a genuine issue for trial, and summary judgment is appropriate.
>
> A fact is an event, an occurrence, or something that exists in reality. *Webster's Third New International Dictionary* 813 (1976). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. 35 C.J.S. *Fact* 489 (1960). The "facts" required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. *See* ***Hatch v. Bush***, 215 Cal. App. 2d 692, 30 Cal. Rptr. 397 (1963). Likewise, conclusory statements of fact will not suffice. ***American Linen***

> ***Supply Co. v. Nursing Home Bldg. Corp.***, 15 Wn. App. 757, 767, 551 P.2d 1038 (1976).

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Rhodes' conclusory speculations about two invoice entries are neither material, nor do they assert an act or an incident. Appellants failed to raise a genuine issue of material fact.

Finally, Rhodes deceptively claimed – under oath – as follows:

> After I saw the July 20, 2011 invoice, I was shocked. **I did not know that I was being charged $415 an hour**. I recall thinking that Ms. Rains had other attorneys at her law firm who billed at a lower rate. The fee agreement states that the "Rains Law Group Associate Attorney hourly rate is $275.00." There are no charges from any other attorneys except herself at $415 an hour.

CP 233 (emphasis added). Rhodes' sworn statement is false and misleading because it ignores the relevant language of the retainer agreement that she signed and initialed (CP 86, emphasis added):

> The current [RLG] Associate Attorney hourly rate is $275.00. **The current [RLG] Senior Attorney hourly rate is $415.00**. . . . You will be assigned to an associate attorney by default **unless during review your particular circumstance requires the expertise of a Senior Attorney**.

Rhodes dealt solely with Rains, and the disaster that Rhodes' inattention had created required Rains' expertise to triage. It is simply false for Rhodes to assert she did not know that Rains' hourly rate was $415. Appellants' CPA claim fails.

2. *Appellants failed to show that RLG acted in the scope of trade or commerce.*

As to RLG, Appellants argue only that "padding" a bill involves the entrepreneurial aspects of the practice of law. BA 25 (citing ***Short***, 103 Wn.2d at 65; ***Eriks***, 118 Wn.2d at 464-64 [*sic*]). As a result, Appellants have failed to argue or establish that the other allegedly unfair practices raised above fall within the scope of trade or commerce. Since every element must be proved, those other issues are now moot. *See, e.g.*, ***Hangman Ridge***, 105 Wn.2d at 780.

"[C]ertain entrepreneurial aspects of the practice of law may fall within the 'trade or commerce' definition of the CPA." ***Short***, 103 Wn.2d at 60. These include, "how the price of legal services is determined, billed, and collected . . . ." *Id.* at 61. As explained above, Rhodes' vague speculations about the invoice failed to raise a genuine issue of material fact. While billing practices may fall within trade or commerce, Appellants simply failed to raise a genuine issue of material fact regarding them. Their CPA claim against RLG fails.

3. *Appellants failed to show that RLG's unproven act impacted the public interest.*

As noted above, as to RLG Appellants argue only that the immaterial "padding" allegation meets the trade or commerce element, so only that issue is live as to impacting the public interest.

On that element, Appellants argue that "padding" has the capacity to injure other people and that RLG's conduct "injured persons other than plaintiffs." BA 29-30. Neither allegation is sufficient.

Again, Rhodes' immaterial and vague suppositions are insufficient to establish as a *fact* that "padding" occurred, so no genuine issue of material fact exists. ***Grimwood***, 110 Wn.2d at 359-60. There is no reasonable inference that the alleged acts even occurred, much less that they impacted the public interest.

As to injuring others, Appellants make two more false assertions:

1. BA 28: "Ms. Rains got a 12% interest in another small business by exaggerating her invoice and doing work of minimal value." (CP 337).

2. BA 29-30: "The Rains defendants' conduct injured persons other than plaintiffs; i.e., other small business owners with whom the Rains defendants used the same tactics. See, the Declaration of Kyle Duce (CP 337), who was another small business owner victimized by Ms. Rains."

Mr. Duce's declaration is attached as Appendix D. As the Court will see, it does not pertain to RLG.

More importantly, while Duce – obviously a disgruntled former customer of Rains – says that she "asked for about a twelve percent interest in the company as payment of her $20,000 invoice," he does

not say that she "got a 12% interest." CP 337. On the contrary, he says that he "terminated her services." CP 338.

And indeed, Duce nowhere says that he was harmed by "the same tactics" Rhodes alleges. *See* App. D. His company could not afford to pay Rains' bill, so it does not appear that he paid it. *Id.* at CP 337 (¶ 6). In any event, Duce makes no specific factual allegations, vaguely alluding that "her bill was exaggerated," whatever that means. CP 337. Duce also says that *his* "business is currently successful." CP 338.

Duce's claims are no stronger, no more material, and no more factual, than Rhodes' vague allegations. Again, the CPA claim fails.

4. Appellants failed to show that they were injured by RLG's unproven acts.

In one sentence, Appellants claim that "Ms. Rhodes also had Keystone pay [RLG] $15,000," which RGL "used up by padding [its] invoice." BA 32 (citing CP 233-34). As noted above, Rhodes failed to raise a genuine issue of material fact on "padding." Overstating that unproven claim (*i.e.*, falsely suggesting that those two entries alone "used up" the entire $15,000) does not improve it. Keystone paid for the legal services that RLG rendered. Rhodes never proved – or even alleged – to the contrary. The CPA claim fails.

5. Appellants failed to prove causation as to RLG.

Rhodes' "padding" speculation was not sufficient to raise a genuine issue of material fact, so causation necessarily fails. Appellants simply failed to prove that RLG committed a CPA violation that caused any loss. The trial court properly dismissed the CPA claims against RLG.

C. Keystone failed to establish a CPA claim based on Rains' employment.

It is the law of the case that Keystone employed Emily Rains. *See, e.g.*, CP 772-73 (Verdict form, distinguishing between RLG's outside work, on one hand, and Rains' in-house work, on the other). It is undisputed that Rains began her employment at Keystone in July 2011. *See, e.g.*, CP 83, 929 (Jury Inst. 5, stating that "Ms. Rhodes claims that Emily Rains was acting as Ms. Rhodes's attorney ***before Ms. Rains began working full time at Keystone in July, 2011***" (emphasis added)). It is similarly undisputed that her employment ended in October 2012. CP 84, 234.

1. Keystone failed to provide authority permitting it to sue its own employee under the CPA.

Rains' straightforward claim throughout this case has been that an employer is not a "consumer" under the CPA, and the "labor of a human being is not a commodity or article of commerce." *See,*

e.g., CP 405 (quoting RCW 19.86.070). No authority permits an employer to sue its former employee for a CPA violation based on work the employee did (or did not do) for the employer. Keystone has never cited a single case that would permit this improper application of the CPA. This alone justified dismissing the CPA claim.

2. *Keystone failed to show that Rains committed any unfair or deceptive act or practice.*

The truth of the fundamental impropriety of Keystone's CPA claim based on Rains' employment is verified by its own assertions on appeal: "as self-appointed chief financial officer and general counsel of Keystone, Ms. Rains failed to deliver on those promises" made in her online advertising, etc. BA 19. There follows two laundry lists of Rains' alleged failures to perform ***as an employee***. BA 19-20 (*e.g.*, Rains allegedly failed to timely renew Keystones' auto insurance, to properly file business tax forms, to timely deposit checks, etc.). Even assuming for the sake of summary judgment that Rains did or did not do these things, simply failing to perform as an employee is not an unfair or deceptive act. No case holds otherwise.

Keystone successfully sought recompense for Rains' alleged breaches of fiduciary duty as its employee. That was an applicable cause of action. The CPA does not apply.

3. *Keystone failed to show that Rains acted within the scope of trade or commerce.*

Again, an employer is not a consumer, and an employee is not a commodity. The CPA does not apply here. Keystone's trial court argument on this element was wholly inadequate. CP 219-20. The trial court properly dismissed the CPA claim.

As in the trial court, Keystone's only argument here (setting aside the vague and immaterial fee dispute discussed above) has to do with Rains' advertising. BA 25. But Keystone ***hired*** Rains, making this a purely private transaction between them. Private transactions like this one are not in trade or commerce.

For instance in ***Short***, the Supreme Court held that only the entrepreneurial aspects of the practice of law are within the scope of trade or commerce. 103 Wn.2d at 61-62 (claims "directed to the competence of and strategy employed by plaintiffs' lawyers . . . amount to allegations of negligence or malpractice and are exempt from the CPA"). Keystone's broad and vague allegations encompass actions Rains allegedly took (or did not take) as Keystone's General Counsel. Keystone failed (and fails) to identify any specific actions that fell within trade or commerce. BA 25. The CPA claim thus failed.

4. Keystone failed to show that Rains' actions as its employee impacted the public interest.

Keystone tacitly conceded in the trial court, as it does here, that this is a private dispute, not a consumer transaction, arguing the four ***Hangman Ridge*** factors for determining whether a private dispute impacts the public interest (BA 26-27; CP 220):[8]

> (1) Were the alleged acts committed in the course of defendant's business?
>
> (2) Did defendant advertise to the public in general?
>
> (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?
>
> (4) Did plaintiff and defendant occupy unequal bargaining positions?

Hangman Ridge, 105 Wn.2d at 790-91.

The ***Hangman Ridge*** factors were not met here: (1) the alleged acts were ***not*** committed in the course of "defendant's business," but rather in the course of ***Keystone***'s business; (2) Rains did not advertise to the public in general ***as an employee of***

---

[8] Similarly, Keystone cursorily mentioned the three statutory factors for a private action under RCW 19.86.093(3). CP 220; BA 27-28. Keystone may believe that those three statutory factors are sufficient, but it has failed to argue that this statute overruled or otherwise superseded ***Hangman Ridge***'s four factors. *Id.* This Court will not assume that the Legislature intended to overrule controlling precedent. *See, e.g.*, ***Price v. Kitsap Transit***, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) (courts presume the Legislature knows the law, "and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it"). ***Hangman Ridge*** is controlling.

Keystone; (3) Rains did not actively solicit Keystone, but rather accepted a job offer; and (4) Keystone and Rains did not occupy unequal bargaining positions, where Keystone ***employed*** Rains. Simply put, the absurdity applying those four factors to these facts demonstrates the absurdity of Keystone's CPA claim.

5. Keystone failed to show that it was injured by Rains.

Keystone had to prove that, "but for the defendant's unfair or deceptive practice," it would not have suffered injury. ***Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash.***, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). As to Rains' acts as Keystone's employee, that is not possible. Working as an employee – however competently – is not an unfair or deceptive practice. A salary is not an injury. And Keystone started failing before hiring Rains, and finished failing after she resigned. There is no evidence that Rains caused Keystone's failure.

Keystone failed (and fails) to cite a single case in which an employer was permitted to sue its former employee under the CPA. There was no genuine issue of material fact regarding this claim. The trial court properly dismissed it. The Court should affirm.

D. Keystone failed to show facts or authority regarding Michael Rains, so its CPA claim was properly dismissed.

Keystone's entire argument regarding Michael Rains, who was hired as an IT consultant, was (and is) as follows (CP 222):

> The Rains defendants claim that Michael Rains did nothing wrong, but he participated in the overbilling and was an agent of the Rains defendants. He is also liable as Ms. Rains's spouse while she was acting to benefit the marital community.

BA 35. No factual citations. No legal authority. No nothing.

This argument is frivolous. The trial court properly dismissed the CPA claim against Michael Rains. This Court should affirm.

E. Appellants are not entitled to attorney fees.

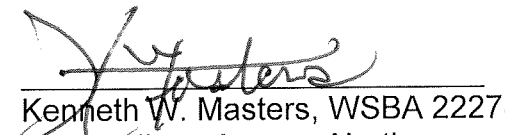
Only a prevailing plaintiff may receive an award of attorney fees. RCW 19.86.090. Appellants should not prevail. They are not entitled to a fee award.

CONCLUSION

For the reasons stated, this Court should affirm.

RESPECTFULLY SUBMITTED this 9th day of December 2015.

MASTERS LAW GROUP, P.L.L.C.



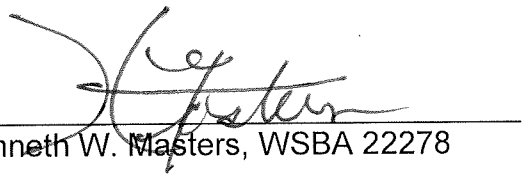
Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENTS** postage prepaid, via U.S. mail on the 9th day of December 2015, to the following counsel of record at the following addresses:

Counsel for Appellants

Dan R. Young
Law Offices of Dan R. Young
1000 Second Avenue, #3200
Seattle, WA 98104



Kenneth W. Masters, WSBA 22278

RAINS LAW GROUP
3518 Fremont Ave N #382
Seattle WA 98103
www.rainslawgroup.com
office@rainslawgroup.com
206-283-5993 (T) 206-260-3114 (F)

6/23/2011
ATTN: Michan Rhodes
2215 4th Ave So.
Seattle, WA 98134

Dear Michan Rhodes:

Thank you for selecting Rains Law Group, PLLC (RLG) to provide the following services:

Corporate liquidation, dissolution, Washington State tax analysis, and bankruptcy support

Emily Sharp Rains, Senior Attorney, will provide the services detailed above.

Please carefully review all the information contained in this letter as the language in this letter constitutes the terms of our engagement. In this engagement letter we will refer to you as the "Client" and Rains Law Group, PLLC as "RLG" or the "Firm." In this letter, the words "you" and "your" refer to the Client, and the words "we", "us", and "our" refer to the Firm.

Fees and Billing Matters

The current Rains Law Group Associate Attorney hourly rate is $275.00. The current Rains Law Group Senior Attorney hourly rate is $415.00. The current Rains Law Group legal clerk hourly rate is $125.00. You will be assigned to an associate attorney by default unless during review your particular circumstance requires the expertise of a Senior Attorney. We record our time in units of quarters of an hour. The hourly rates are determined under guidelines set out in the ethics rules that govern our practice, and are reviewed periodically (usually on an annual basis) to reflect current levels of legal experience, changes in overhead costs and other factors.

In some cases, RLG may require a retainer to be deposited into a trust account until earned by RLG. All trust deposits we receive from you, including advance fee deposits and retainers, will be placed in a client trust account for your benefit. By court rule, your deposit must be placed in a pooled account if it is not expected to earn a net return, taking into consideration the size and anticipated duration of the deposit and the transaction costs. Other trust deposits will also be placed in the pooled account. By court rule, interest earned on the pooled account is payable to a charitable foundation established by the Washington Supreme Court.

You agree to make payment within 30 days of receiving our bill. Unpaid fees and costs accrue at an interest rate of 1.8% per month. Costs are all expenses incurred by the Firm and its attorneys to provide you legal services. In the event that Client requests copies of Client's file, costs of copies and administrative expenses must be paid for by client.

If we are doing work for you on the basis of an advance fee deposit or retainer, we will give you prompt notice if your account becomes delinquent, and you agree to bring the account, advance fee deposit or the retainer deposit current. If the delinquency continues and you do not arrange satisfactory payment terms, we retain the right, subject to the applicable rules to cease performing legal services, to terminate our legal representation and commence collection proceedings for which you will be responsible for the Firm's reasonable attorneys' fees and costs incurred.

MR
Client initials

RAINS LAW GROUP
3118 Fremont Ave N #382
Seattle, WA 98103
www.rainslawgroup.com
office@rainslawgroup.com
206-285-5993 (T) 206-260-3114 (F)

Costs and Expenses Separately Billed

We typically incur and pay on behalf of our clients a variety of costs and expenses arising in connection with our legal services. These costs include, but are not limited to, state filing fees, court filing fees, special messenger fees, courier and delivery charges, travel expenses and computer legal research costs. Whenever such costs are incurred, we will either forward such charges to you for direct payment or we will itemize and bill them to you, at the Firm's discretion.

We also incur costs such as long distance telephone charges, printing and reproduction costs, photocopy charges, postage expenses, fax transmission fees, and similar routine expenses. In lieu of individually tracking of such costs, many of which are small expenditures, we simply add an "administrative expense" charge of 3% to the amount of legal fees charged.

Our experience has shown that the three percent charge approximates the actual expenses attributable to any given client's account over time. Our three percent administrative expense charge saves us the hassle of keeping track of small expenses; it saves you the hassle of dealing with expenses on your bill for telephone calls and other minor day-to-day costs we incurred on your behalf. We reserve the discretionary right to bill for individual expenses or to apply the "three percent administrative fixed expenses" fee, outlined above, to your bill when we deem it appropriate.

Your signature on the engagement letter will constitute consent to application of the "three percent administrative fixed expenses" fee in lieu of itemized billing if we so choose to apply it to your bill. If you do not so agree, do not sign the engagement letter and contact us immediately to discuss alternatives.

Client initials

Termination of Services

You have the right to terminate our relationship at will. We may cease performing services and terminate representation if (a) you fail to pay our invoices when due; (b) you are in breach of some other provision of our engagement with you; or (c) termination is appropriate under applicable law, court rules or the ethical guidelines that govern our relationship with clients. In the unlikely event we terminate representation of you; we will take reasonable steps to avoid any foreseeable prejudice to your rights.

Client initials

Assigned Attorneys and Personnel Staffing Assignments

Our attorneys, paralegals, clerks and other staff typically work as a team, assisting each other as circumstances warrant. We reserve the right to assign attorneys and other personnel to your matters based on their experience and expertise, the nature of the matter, the issues involved, and any time or costs constraints that may apply.

Client initials

Arbitration

We anticipate a harmonious and satisfactory attorney-client relationship. In the unlikely event that a dispute should

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arise out of the services rendered to you, you agree to resolve the dispute informally. If you and RLG are not able to resolve the dispute informally, then you agree to participate fully in binding arbitration, excluding claims by RLG for non-payment of fees. If you do not wish to agree to binding arbitration, you should not sign this engagement letter. Unless we both agree otherwise in writing, your signature on this engagement letter constitutes consent to binding arbitration under the provisions below.

All arbitration will be conducted under the Commercial Arbitration Rules of the American Arbitration Association (AAA) unless the parties agree to another arbitration forum in writing. The exclusive venue for arbitration shall be in King County, Washington. The parties shall be entitled to full discovery in accordance with the Federal Rules of Civil Procedure (and the applicable local Federal Rules) for a period of ninety (90) days after service of the demand for arbitration. The prevailing party will be entitled to an additional award from the arbitrator for reasonable attorney's fees, costs (taxable and nontaxable) and expenses incurred in those proceedings. Arbitration is a process we believe is well suited to resolving disputes, rather than either party taking the other to court. There are important differences between litigation and arbitration.

MR
Client initials

Choice of Law

The laws of the State of Washington shall apply in interpreting or enforcing the terms of this engagement letter. Any proceedings relating to this engagement letter shall be filed and heard in King County, Washington exclusively.

MR
Client initials

Cancellation Policy

If you schedule an appointment with your attorney and later need to cancel your appointment, RLG requires that Clients cancel their scheduled appointment a minimum of twenty-four (24) hours in advance of their scheduled appointment. If you do not cancel your scheduled appointments within twenty-four you will billed, in accordance with the rates listed under "Fees and Billing matters," for the missed appointment time, the time the attorney spent preparing for your appointment, and all work performed by the attorney.

Your signature on the engagement letter will constitute your understanding and consent to the above described cancellation policy. If you do not so agree, do not sign the engagement letter and contact us immediately to discuss alternatives.

MR
Client initials

We look forward to serving you. If you have any questions about this engagement letter please call or email us. Once you have properly signed, initialed and dated this engagement letter please return it to us by mail at the address provided above.

By signing, dating and initialing each section of this engagement letter you agree that you understand that this engagement letter is a binding contract and knowingly and willingly agree to all the terms and provisions contained herein.

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Very truly yours,

_____
Emily Sharp Rains, Senior Attorney
Rains Law Group, PLLC

ACCEPTED AND AGREED:

By: _____
Michan Rhodes

Date: 6/27/2011

RLG

7/20/2011

Keystone Windows and Doors
2215 4th ave S
Seattle, WA 98134

Date	Desc	Duration	Rate	Amount	Total
6/22/2011	Meeting with Bankruptcy attny and Michan, post meeting disucssion with Michan Rhodes	2.25	$415.00	$933.75	$933.75
6/23/2011	Review financial statements from Michan	0.75	$415.00	$311.25	$1,245.00
6/23/2011	Telephone Call from Michan Rhodes	0.5	$415.00	$207.50	$1,452.50
6/23/2011	Call from Michan Rhodes and Lauren Timko	0.5	$415.00	$207.50	$1,660.00
6/23/2011	Email to Gloria Nagler	0.25	$415.00	$103.75	$1,763.75
6/23/2011	Call with Gloria Nagler to discuss strategy	0.75	$415.00	$311.25	$2,075.00
6/23/2011	Follow up with Michan Rhodes and Lauren Timko	0.5	$415.00	$207.50	$2,282.50
6/24/2011	Call from Michan Rhodes	0.25	$415.00	$103.75	$2,386.25
6/24/2011	Call from Michan Rhodes re income and means test analysis	0.25	$415.00	$103.75	$2,490.00
6/27/2011	Call from Michan re summary of activities over the weekend	0.5	$415.00	$207.50	$2,697.50
6/28/2011	On-site: Asset list, review assets with Mike, review list of employees to be paid and those to be terminated, identify and discuss next steps	7.75	$415.00	$3,216.25	$5,913.75
6/29/2011	Call from Michan Rhodes	0.15	$415.00	$62.25	$5,976.00
6/29/2011	Calls with Michan Rhodes, Tahnia Mustoe, Rob Yarbrough and then again with Michan Rhodes to discuss ongoing changes with the business	1	$415.00	$415.00	$6,391.00
6/29/2011	Prepare timeline and list of executables to sell business to Mike Gilge	3.75	$415.00	$1,556.25	$7,947.25
6/30/2011	Call from Michan Rhodes	0.25	$415.00	$103.75	$8,051.00
6/30/2011	Conference call with Michan Rhodes	5	$415.00	$2,075.00	$10,126.00
7/1/2011	Call from Michan Rhodes	0.25	$415.00	$103.75	$10,229.75
7/1/2011	On-site with Michan Rhodes	9.25	$415.00	$3,838.75	$14,068.50
7/5/2011	Discussion re: other potential buyers, prep NDA for Gustav Swanson	1.5	$415.00	$622.50	$14,691.00
7/5/2011	Several Calls from Michan Rhodes	1.25	$415.00	$518.75	$15,209.75
7/1/2011	Retainer Deposit				-$15,000.00
	Outstanding Balance				**$209.75**

3518 Fremont Ave N. #382 Seattle WA 98103
206-283-5593 - office@rainslawgroup.com

Honorable Samuel Chung

FILED
KING COUNTY WASHINGTON
SEP 02 2014
SUPERIOR COURT CLERK
BY Janet Llapitan
DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

MICHAN RHODES; KEYSTONE WINDOWS AND DOORS, Plaintiffs, v. EMILY SHARP RAINS et. al., Defendants. EMILY SHARP RAINS and MICHAEL RAINS, Third-Party Plaintiffs, v. TONY DAVIS, Third-Party Defendant.	No. 12-2-40707-0 SEA **SPECIAL VERDICT FORM**

We, the jury, make the following answers to the questions submitted by the court:

PLAINTIFFS' CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST DEFENDANT EMILY RAINS

A. During Period Prior to Emily Rains Being Hired In-house by Keystone Windows and Doors

Question No. 1
Did Plaintiff prove a breach of fiduciary duty by Defendant Emily Rains when Emily Rains was engaged through her law firm, Rains Law Group, to act as an outside attorney to Ms. Rhodes or Keystone?

Answer: Yes (Yes or No)

If your answer is yes, then answer Question No. 2. If your answer is no, then skip question No. 2 and No. 3 and answer Question No. 4.

Question No. 2

Did Plaintiff prove that damages proximately resulted from a breach of fiduciary duty when Emily Rains was engaged through her law firm, Rains Law Group, to act as an outside attorney to Ms. Rhodes or Keystone?

Answer: Yes (Yes or No)

If your answer is yes, then answer Question No. 3. If your answer is no, then skip question No. 3 and answer Question No. 4.

Question No. 3
What amount of damage do you find to have proximately resulted from a breach of fiduciary duty when Emily Rains was engaged through her law firm, Rains Law Group, to act as an outside attorney to Ms. Rhodes or Keystone?

Answer: $ 7,685.29 (Insert dollar amount)

B. During Period When Emily Rains was Employed In-house at Keystone Windows and Doors as General Counsel and CFO

Question No. 4
Did Plaintiff prove a breach of fiduciary duty by Defendant Emily Rains during the period of time when Emily Rains was employed in-house as an officer of Keystone?

Answer: Yes (Yes or No)

If your answer is yes, then answer Question No. 5. If your answer is no, then skip question No. 5 and No. 6 and answer Question No. 7.

Question No. 5
Did Plaintiff prove that damages proximately resulted from a breach of fiduciary duty during the time period when Emily Rains was employed in-house as an officer of Keystone?

Answer: Yes (Yes or No)

If your answer is yes, then answer Question No. 6. If your answer is no, then skip question No. 6 and answer Question No. 7.

Question No. 6
What amount of damage do you find to have proximately resulted from a breach of fiduciary duty during the time period when Emily Rains was employed in-house as an officer of Keystone?

Answer: $88,769.38 (Insert dollar amount)

DEFENDANT EMILY RAINS'S CLAIM FOR FAILURE TO PAY WAGES AGAINST PLAINTIFF KEYSTONE WINDOWS AND DOORS

Question No. 7
Did Defendant Emily Rains prove that Plaintiff withheld wages?

Answer: Yes (Yes or No)

If your answer is yes, then answer Question No. 8. If you answer is no, skip Question No. 8 and No. 9 and answer Question No. 10.

Question No. 8
What amount of damages resulted from Plaintiff withholding wages?

Answer: $18,780.08 (Insert dollar amount)

Question No. 9
Did Plaintiff willfully withhold wages?

Answer: Yes (Yes or No)

THIRD PARTY PLAINTIFFS MICHAEL AND EMILY RAINS'S CLAIM FOR BREACH OF CONTRACT AGAINST THIRD PARTY DEFENDANT TONY DAVIS

Question 10
Was there a contract between Emily and Michcael Raines and Tony Davis?

Answer: Yes (Yes or No)

If yes, go to question 11. If your answer is no proceed to direction for signing this form

Question No. 11
Did Defendant Tony Davis breach his contract with Emily and Michael Rains regarding construction services?

Answer: No (Yes or No)

If your answer is yes, then answer Question No. 12. If your answer is no, then skip Question No. 12 and proceed to the direction and signing of this form.

Question No. 12

What amount of damages resulted from the breach of contract by Tony Davis regarding construction services?

Answer: _____(Insert Dollar Amount)

(DIRECTION: Sign this verdict form and notify the bailiff.)

Presiding Juror

FILED
14 MAR 12 AM 9:00

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 12-2-40707-0 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

MICHAN RHODES, an individual; KEYSTONE WINDOWS AND DOORS, a Washington corporation, Plaintiffs, v. EMILY SHARP RAINS and MICHAEL RAINS, individually and their marital community; RAINS LAW GROUP, a Professional Limited Liability Company, Defendants. EMILY SHARP RAINS and MICHAEL RAINS, individually and their marital community, Third-Party Plaintiffs, v. TONY DAVIS, Third-Party Defendant. v. AMERICAN CONTRACTORS INDEMNITY COMPANY, Third-Party Defendant, v. RLI INSURANCE COMPANY, Third-Party Defendant.	NO. 12-2-40707-0 SEA DECLARATION OF KYLE DUCE

I, Kyle Duce, declare to be true under penalty of perjury under the laws of the State of

LAW OFFICES OF DAN R. YOUNG
ATTORNEY AT LAW
1000 SECOND AVENUE, SUITE 3200
SEATTLE, WASHINGTON 98104
(206) 292-8161
(206) 621-6443 (fax)

Washington as follows:

1. In approximately October, 2010, I was planning to open a restaurant in West Seattle with some investors. There were some promissory notes we wanted to convert to equity, and we wanted some financial management advice. A good friend of mine told me about Emily Rains, so I met with her in about October, 2010, to discuss these issues of concern. Emily told me that she had a big accounting office in Fremont; she could provide accurate financial statements; she could offer advice from a cash flow perspective; she was an expert tax attorney who had helped hundreds of start-up businesses; and she could even advise us about cutting food costs and implementing inventory programs. She sounded very sure of herself and very trustworthy, so we decided to have her do some work for us. I trusted her.

2. We opened the restaurant in January, 2011. It was called Locöl and was located on 35th Avenue SW in Seattle. During the few months that she provided financial services, she did not file a single tax return on time. Her failure to file payroll and sales tax returns on time cost the company substantial amounts in interest and penalties.

3. She wanted to be an operating owner and asked to make business decisions. I said, "No."

4. When I went to deliver something to the address Emily gave me for the location of her accounting office, it was nothing but a place with mail boxes. She had no office there.

5. She got her husband, Michael, involved in doing some of the accounting work. It seemed inappropriate to have him involved, as I do not believe he was an accountant or a person having a financial background.

6. We got her statement for services rendered, and it was $20,000. I was flabbergasted. She had never mentioned that she was charging $400 per hour, and had never given an estimate of the dollar amounts involved. This was a lot of money for a small business, and her bill was exaggerated and did not reflect the minimal value she added to the company. We could not afford to pay the bill. She had talked earlier about trading services for equity in the company, but she and I had never agreed as to what that would look like or signed any agreement to that effect. She asked for about a twelve percent interest in the company as payment of her $20,000 invoice. She even put in the tax documents she prepared that she was a co-owner of the business.

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(206) 621-8443 (fax)

7. It was in May or June of 2011 that we decided to terminate her services. I went to her house to pick up the company's books, and she told me that my company was not likely to make it. The business is currently successful.

8. Emily was slick, and I bought the talk. She did not come close to delivering what she promised. She preys on people who put their trust in her.

Dated: February 2nd, 2014, at Montrose, Colorado.

Kyle Duce

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ATTORNEY AT LAW
1000 SECOND AVENUE, SUITE 3200
SEATTLE, WASHINGTON 98104
(206) 292-8181
(206) 621-6443 (fax)

RCW 19.86.070

Labor not an article of commerce—Chapter not to affect mutual, nonprofit organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in this chapter shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.

[1961 c 216 § 7.]

RCW 19.86.090

Civil action for damages—Treble damages authorized—Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2009 c 371 § 1; 2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

RCW 19.86.093

Civil action—Unfair or deceptive act or practice—Claim elements.

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

(1) Violates a statute that incorporates this chapter;

(2) Violates a statute that contains a specific legislative declaration of public interest impact; or

(3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

[2009 c 371 § 2.]