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I. INTRODUCTION

The Clinic does not focus on the substantive merits of VanRad's appeal. Instead, it attempts to introduce evidence outside the record and tries to convince the Court that the appeal is no longer "justiciable." Alternatively, the Clinic argues that it achieved summary judgment below, instead of a dismissal, and that the trial court's ruling should be reviewed under CR 56. Neither position of the Clinic is supported by law.

As for defending the substance of the trial court's ruling, the Clinic raises arguments for the first time on appeal and, ultimately, fails to distinguish any of the case law that VanRad cites in its opening brief that supports its claim of error. Instead, the Clinic asserts its innocence of any wrongdoing, or, conversely, argues that the Clinic was uniquely dishonest, such that its misconduct should not be redressed under the CPA. None of that is relevant to an examination of VanRad's contrary allegations, which are more than sufficient to state a claim and withstand a motion to dismiss under CR 12(b)(6) .

II. ARGUMENT

A. This Appeal Is "Justiciable."

The Clinic attempts to argue that the appeal is no longer "justiciable," because VanRad "has been made whole." (Resp. Br. pg. 8.) That is not correct.

The Clinic's argument is based on the Declaration of Craig Russillo, who states – outside the record – that, on April 1, 2008, the

Clinic paid VanRad \$146,989.10, “which VanRad represented was the amount of its claim arising from the Clinic’s CAD billings, inclusive of prejudgment interest.” (Russillo Decl. ¶ 2.) According to the Clinic, VanRad’s acceptance of the payment means that it can no longer prove injury under the CPA and, further, that it cannot proceed with an appeal to reinstate the CPA claim simply so that it can recover its attorney fees and treble damages. (Resp. Br. pg. 9-10.)

The Clinic’s arguments miss the mark. Put aside, for the moment, the fact that its attempt to supplement the trial record with the Russillo Declaration is improper. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (“reviewing court will not consider matters outside the trial record”). The Clinic essentially suggests that, after it refused to admit any wrongdoing and forced VanRad to file suit and litigate for a year-and-a-half, it can avoid (and has avoided) the full measure of liability under the CPA – *i.e.*, attorneys fees and treble damages – simply by tendering a check to satisfy the underlying damage claim immediately before trial and appeal. Of course, it is not that easy. *See, e.g., Condo Owners v. Coy*, 102 Wn. App. 697, 709, 9 P.3d 898 (2000) (“It would be a substantial disincentive to making [claims with a right to attorney fees] if the defendant could disable the plaintiff from recovering attorney fees simply by waiting until the eve of trial to offer what the claim is worth.”)

Moreover, whenever a plaintiff retains *any* “monetary stake” in a case – even if it is only establishing a right to recover attorney fees – there is a justiciable controversy and an appeal is not moot. *See, e.g., Kuehn v.*

Renton School Dist., 103 Wn.2d 594, 597, 694 P.2d 1078 (1985) (appeal of 42 U.S.C. 1983 claim was not moot where plaintiff still had claim for nominal damages and attorney fees); *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 882-83, 91 P.3d 897 (2004) (case “obviously not moot” where “awardability of fees both below and on appeal remains at issue”); *Yacobellis v. Bellingham*, 55 Wn. App. 706, 710, 780 P.2d 272 (1989) (appeal of claim under RCW 42.17 not moot where “questions of costs, attorney fees, and the \$25 per day statutory award remain”).

For this appeal to lack a justiciable issue, the Court must be unable to provide any effective relief, and all issues must be “purely academic.” *Kuehn*, 103 Wn.2d at 597 (quoting *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)). That plainly is not true here. The issue on appeal – whether the trial court properly dismissed VanRad’s CPA claim under Rule 12(b)(6) – bears directly on VanRad’s ability to proceed to trial, prove its case, and recover its attorney fees and treble damages. It should be allowed to do that. *See Allstate*, 121 Wn. App. at 881-882.

None of the authority cited by the Clinic supports a contrary result. Plaintiff points to *Barber Asphalt Paving Co. v. Hamilton*, 80 Wn.2d 51, 57, 141 P. 199 (1914), among other cases, for the proposition that “an appellate court will not ‘entertain jurisdiction of an appeal for the sole purpose of determining a question of costs.’” (Resp. Br. pg. 9-10.) Those cases are inapposite, as each addresses circumstances under which a court of appeals will review, as the sole issue on appeal, a trial court’s decision to award or deny attorney fees. *See, e.g., Brown v. Suburban Obstetrics*,

35 Wn. App. 880, 883-84, 670 P.2d 1077 (1983). There is no decision awarding or denying attorney fees or costs on appeal here. Rather, the Court is being asked to determine whether the trial court correctly dismissed VanRad's CPA claim under Rule 12(b)(6).

Likewise, the Clinic's suggestion that VanRad has been "made whole" is incorrect and ignores reality. Although the Clinic finally tendered the wrongfully obtained CAD reimbursements to VanRad in full, it did so only after forcing VanRad to hire attorneys and press its case in litigation for a year-and-a-half.¹ VanRad can still show injury, if only because the Clinic inconvenienced VanRad and deprived it of the rightful use of its property for so long. *See Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 180, 159 P.3d 10 (2007), *rev. granted*, 180 P.3d 1291 (Apr. 1, 2008) ("When a misrepresentation causes inconvenience that deprives the claimant of the use and enjoyment of his property, the injury element is satisfied[,] and even "[c]osts incurred in investigating the effect of an unfair or deceptive act are sufficient to establish injury."); *St. Paul Ins. Co. v. Updegrave*, 33 Wn. App. 653, 659, 656 P.2d 1130 (1983) (damages under CPA can include "inconvenience, financial considerations such as loss of time in helping prepare the case, actual time spent in court, and litigation costs for attorney's fees, filing fees, investigative expenses, and expert witness fees").

¹ The initial complaint was filed on August 2, 2006. (*See* CP 7.)

In sum, this appeal is justiciable: The issues are not academic, and VanRad has a monetary stake in having its CPA claim reinstated below and obtaining the full relief to which it is entitled. *See Allstate*, 121 Wn. App. at 881-882.

B. The Proper Standard of Review Is the One Used for a Rule 12(b)(6) Motion to Dismiss.

The Clinic takes issue with the standard of review in the hope of having this Court declare that it received a favorable judgment below on the merits. Although the trial court dismissed VanRad’s CPA claim under CR 12(b)(6) for failure to state a claim, the Clinic argues that this Court should review that dismissal as if the trial court had granted summary judgment under CR 56. (Resp. pg. 11.)

The Clinic’s argument is based on the fact that VanRad “submitted matters outside the pleadings” to the trial court – namely, the Barrett Declaration – in opposition to the Clinic’s motion to dismiss. (Resp. pg. 11) (citing Barrett Declaration, CP 153-154.) According to the Clinic, that submission converted the motion to one for summary judgment, and the trial court’s ruling therefore should be treated as having decided all issues on the merits and subject to a CR 56 standard of review. *See* CR 12(b) (“If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56[.]”).

However, the Barrett Declaration was not introduced to remedy “deficiencies in [the] pleading,” nor did it contain any details that “bore

directly on the issues submitted to the trial court for determination,” as the Clinic contends. (*See Resp.* pg. 2, 17.) It contains no allegations directed at the Clinic and no facts that the Clinic has ever disputed. It merely provides contextual information that a judge who is unfamiliar with medical terminology used in the Complaint would find helpful – specifically, a more detailed definition of the “CAD service” and its “technical” and “professional” components. VanRad provided the same information in footnotes in its opening brief to this Court for the same reason. (*See Br.* pp. 2 n. 1, 3 n. 2.)

Not only is it clear on the face of the Barrett Declaration that it has no bearing on any issue contested by the parties, it is also clear that the trial court did not rely on the declaration in its ruling. Indeed, the trial court dismissed VanRad’s CPA claim because it concluded that “Plaintiff can *prove no facts consistent with its pleading* which would make this a case affecting the public interest.” (CP 177) (emphasis added). As explained in *Haberman v. WPPSS*, 109 Wn.2d 107, 744 P.2d 1032 (1987), that means there was no conversion to a motion for summary judgment, because, to the extent that the trial court considered any extraneous matters, it viewed them as immaterial:

While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, *if the court can say that no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief, the motion remains one under CR 12(b)(6).*

Id. at 121 (emphasis added) (citing *Loger v. Washington Timber Prods., Inc.*, 8 Wn. App. 921, 924, 509 P.2d 1009 (1973)). See also *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 226-27, 151 P.3d 1079 (2007) (no conversion to Rule 56 where court’s ruling on motion to dismiss did not require it “to consider any disputed facts but, rather, entailed interpreting relevant statutes and applying the undisputed facts in the [] record”).

There is no evidence that the trial court considered the Barrett Declaration, nor is there any need for this Court to consider it. The trial court made clear that *no* facts submitted by VanRad were material to its ruling. Under those circumstances, *Haberman* and *Loger* directly refute the Clinic’s contention that a “conversion” of its motion to one for summary judgment occurred or should occur. The proper standard of review in this appeal remains the one used for motions under Rule 12(b)(6): “Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery.” *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (quotations, citations omitted).

C. **VanRad Adequately Alleged a “Deceptive Act” under the CPA.**

Turning to the substantive merits of the issue on appeal, the Clinic argues, for the first time, that VanRad failed to plead a deceptive act. (Resp. Br. pg. 13.) The Clinic tacitly acknowledges that the trial court did not fault VanRad in this respect, but contends that this Court “can sustain

the dismissal on any legal basis supported by the record.” (*Id.* pg. 14) (citing *LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989)).

As a threshold matter, the Court should decline to reach an issue that was not contested below. *See* RAP 2.5(a); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (“Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.”). Contrary to the Clinic’s assertion that it had “put at issue whether the allegations established a deceptive practice,” (Resp. Br. pg. 14), in its briefing, it argued only that VanRad had failed to allege facts satisfying the CPA’s public interest element (*i.e.*, element 3 of *Hangman Ridge*) and that VanRad lacked standing to assert a *per se* CPA violation under the Insurance Code. (*See* CP 107, lines 1-7; CP 169, lines 9-13) (summarizing the Clinic’s arguments). In fact, the Clinic explicitly proceeded on the assumption, “*arguendo*, that [VanRad] has sufficiently alleged that the Clinic committed an unfair or deceptive act occurring in trade or commerce and that [VanRad] suffered injury in its business (elements 1, 2, 4, and 5).” (CP 164, lines 18-20) (internal footnote omitted).²

But even if this Court decides to exercise its discretion and entertain the issue, VanRad clearly has alleged a “deceptive act” for

² In a footnote, the Clinic told the trial court that, apart from the public interest element, it disputed only that VanRad had sufficiently alleged “how it was injured in its business,” a contention it apparently has now abandoned. (CP 164 n. 8.)

purposes of the CPA. A “deceptive act” is conduct that “has the capacity to deceive a substantial portion of the public.” *Stephens*, 138 Wn. App. at 166. “[N]either intent to deceive nor actual deception is required.” *Id.* Further, “[a] defendant need not affirmatively state an untrue fact to have committed a deceptive practice.” *Id.*

The Clinic, in its briefing before the trial court, did not contest that VanRad has sufficiently alleged a deceptive act. (*See, e.g.*, CP 100, lines 13-15) (“[VanRad] alleges that the Clinic knowingly made or presented a false statement or false representation of material fact to a health care payer involving a claim for a health care payment in violation of RCW 48.80.030(1) and (3)”) (citing FAC 6.5.1, 6.5.2; CP 92).

In its briefing before *this* Court, however, the Clinic now argues that its billings for CAD services “[did] not contain false information and [were] not deceptive,” because they “represented actual services rendered to the Clinic’s patients as part of the Clinic’s service to its patients.” (Resp. Br. pg. 15.) Of course, VanRad’s allegation, as the Clinic accurately acknowledged below, is that the Clinic’s billings falsely represented *who* provided the CAD service, identifying the Clinic (which did not provide the service), instead of VanRad (which did), so that the Clinic could “obtain a health payment to which it was not entitled.”³ (FAC ¶ 6.5.3; CP 92.) That was deceptive.

³ The Clinic ignores this distinction in attempting to distinguish *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn. App. 454, 460 (1998), in

Moreover, even if VanRad had not alleged in paragraph 6.5 of the FAC that the Clinic’s representations to third party payers were knowingly false – indeed, even if VanRad had not alleged that the Clinic’s billing submissions contained false statements at all – it is enough that VanRad alleged that third party payers were deceived into paying the Clinic for CAD services when they should have paid VanRad. (See FAC ¶¶ 3.6, 3.9, 4.2, 4.3); *Stephens*, 138 Wn. App. at 166 (neither deceptive intent nor an affirmative statement of untrue fact is required for an act to be deceptive under the CPA).

D. VanRad Adequately Alleged a Public Interest Impact.

As described in VanRad’s opening brief, the trial court concluded that VanRad had not pled – and could not plead – any facts “which would make this a case affecting the public interest,” because “[n]o member of the public, nor any party to the transactions herein, other than Plaintiff and Defendant, has any interest in whether Plaintiff or Defendant is the proper payee of the CAD services.” (Court’s Ruling, 5:7-12; CP 177.)

In so holding, the trial court analyzed none of the factors identified in *Hangman Ridge* as relevant to the public interest element of a consumer

which the court observed that “[d]octors who . . . bill for services that were never provided should fear liability for fraud and under the CPA.” The Clinic protests that, here, unlike in *Huynh*, the services “were *actually received*.” (Resp. Br. pg. 14) (emphasis by Clinic). However, the allegation is that the Clinic falsely billed for CAD services by claiming that it performed them, when, in fact, *VanRad* did. (FAC ¶ 3.9, CP 89.) That is no less a deceptive act than the false billings described in *Huynh*.

or private dispute. *See Hangman Ridge Training Stables, Inc. v. Safeco Ins., Co.*, 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986). Further, the trial court failed to properly consider the fact that the public was integrally involved in the Clinic's deceptive practices – *i.e.*, third-party payers and patients were deceived, hundreds of times, into paying the Clinic for CAD services that were provided by VanRad. (FAC ¶ 3.9.9; CP 90); *compare Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 742, 733 P.2d 208 (1987) (“public was integrally involved” in beauty salon's deceptive use of the name “Nostrum”). The trial court's view of the Clinic's deception was, in effect, so what? No harm, no foul (to the public) if there was no allegation that the Clinic had “submitted a bill for services not received,” or an “excessive” bill, or that third-party payers were “in any danger of paying twice.” (Court's Ruling, 3:1-4, CP 175.)

The trial court's fundamental error was an assumption that, to show a public interest impact, the party that suffered the primary injury (VanRad) needed to have an interest identical to that of the wider public deceived by the Clinic's false billings (the third-party insurers and patients). As explained in VanRad's opening brief, that is not the law. *See Stephens*, 138 Wn. App. at 176 (emphasizing that RCW 19.86.090 provides: “*Any person* who is injured in his or her business or property by a violation . . . may bring a civil action in the superior court”).

In its response brief, the Clinic does not confront the trial court's fundamental error, nor does it attempt to distinguish any of the cases on which VanRad relies that support a showing of sufficient public interest

impact under the CPA. *See Nordstrom, Inc., supra*, 107 Wn.2d 735; *Northwest Airlines, Inc. v. Ticket Exchange, Inc.*, 793 F. Supp. 976, 979 (W.D. Wash. 1992); *Daly v. Unitrin, Inc.*, 2008 WL 2403706 (E.D. Wash. Jun. 11, 2008) (discussed in VanRad’s opening brief at pp. 9-13).

Instead, drawing on a few factors identified in *Hangman Ridge*, the Clinic characterizes the parties’ dispute as a unique, private affair, with “little likelihood that additional plaintiffs will be injured in exactly the same fashion.” (Resp. Br. pg. 17.) However, there is no basis for that bald, self-serving assertion. The Clinic does not and cannot seriously dispute that health care fraud is a problem with a real and substantial potential for repetition. *See* U.S. Attorneys’ Manual 9-44.100 (“Health care fraud is a growing problem across the United States.”).

The bottom line is that the question whether the public has an interest is “an issue to be determined by the trier of fact.” *Stephens*, 138 Wn. App. at 177. At a minimum, VanRad has alleged facts showing a public interest sufficient to meet the Rule 12(b)(6) standard of review. *See Kinney*, 159 Wn.2d at 842 (A motion to dismiss is granted “sparingly and with care” and, as a practical matter, “only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.”) This Court should reverse the trial court and allow VanRad’s CPA claim to proceed.

E. Even if VanRad’s Allegations Are Deficient, It Should Have Been Granted Leave to Amend.

VanRad pointed out that the trial court had postulated facts that, if alleged and proven, apparently would have changed its view on whether the public interest element of a CPA claim had been met in this case – in particular, an allegation that “insurers or patients [were] in danger of paying twice.” (Court’s Ruling, 3:1-4; CP 175.) The trial court’s ability to postulate hypothetical facts that, in its view, *would have* permitted VanRad to state a claim is one clear indication that it *should have* permitted the claim to proceed, or, at least, that it should have granted leave to amend. *See Kinney*, 159 Wn.2d at 842 (“The court presumes all facts alleged in the plaintiff’s complaint are true and may consider hypothetical facts supporting the plaintiff’s claims.”).

Indeed, VanRad can allege that double payments occurred in this case – *i.e.*, that not only were insurers and patients “in danger of paying twice,” but that, in fact, some *did* pay twice. *See Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (“[C]ourt may consider a hypothetical situation asserted by the complaining party, not part of the formal record, *including facts alleged for the first time on appellate review* of a dismissal under [CR 12(b)(6)].” (Emphasis in original)).

A double-payment was made, for example, when VanRad submitted a claim for CAD to an insurer identifying itself (correctly) as the provider of the service, and then the Clinic submitted a duplicate claim for the same CAD identifying itself (falsely) as the provider of the service.

The Clinic does not deny that this occurred, nor could it. Instead, the Clinic argues that, even if the trial court had permitted VanRad to amend its complaint to include this allegation, dismissal would still be warranted, because the “billings were not phony,” and double billings “is not likely to recur.” (Resp. Br. pp. 19-20.)

The Clinic’s protests of innocence are mystifying in the face of contrary allegations – and, indeed, in light of its tendering payment of the CAD reimbursements to VanRad immediately before this appeal. The Clinic’s claims for reimbursement for CAD were absolutely “phony,” because they misidentified the Clinic as the provider of the service and caused the third party payers to reimburse the wrong party. (FAC ¶ 3.9; CP 89.) More egregiously, sometimes that happened after the third parties already had reimbursed VanRad. As for the Clinic’s self-serving assertion that, in the future, it is “not likely” to cause third parties to double pay for services that it did not provide, the Court should ignore it. *See Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998) (under Rule 12(b)(6), all reasonable inferences are drawn in favor of *plaintiff*).

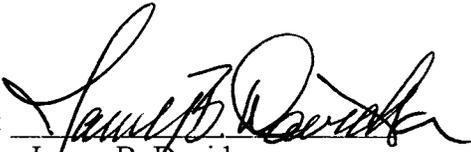
III. CONCLUSION

For the foregoing reasons, VanRad respectfully requests that the decision of the Clark County Superior Court dismissing its CPA claim with prejudice be reversed and the matter remanded for further proceedings.

Dated this 23rd day of September, 2008.

Respectfully submitted,

ATER WYNNE LLP

By: 

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Attorneys for Appellant

CERTIFICATE OF SERVICE 08 SEP 24 AM 9:45

I hereby certify that I have this 23rd day of September, 2008, in the State of Washington caused a true and correct copy of the foregoing ~~Reply of Appellant, to be~~ served on the following in the manner indicated below: DEPUTY

Attorneys for Defendant/Respondent:

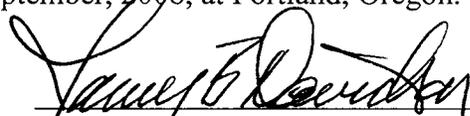
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of September, 2008, at Portland, Oregon.



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