

TABLE OF CONTENTS

	Page
I. Introduction.....	1
II. Issues on Appeal	2
III. Statement of the Case.....	3
IV. Argument	6
A. This Appeal Is Not Justiciable	6
1. The CPA Claim Is Moot Because of the Missing Element of Injury	6
2. Attorney’s Fees and Damage Enhancement Cannot Satisfy the Injury Element.	8
B. Standard of Review.....	11
C. The Trial Court Correctly Dismissed the CPA Claim	13
1. VanRad Failed To Present or Allege Facts Sufficient to Establish “Deceptive Act”	13
2. VanRad Failed to Present or Allege Facts Sufficient to Establish “Public Interest”	15
3. The Claim Was Decided on the Merits Under CR 56.	17
4. This Court Should Affirm Dismissal Under CR 12(b)(6).....	19
V. Conclusion	20

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Bell v. Hood</i> , 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946).....	19
<i>Little v. Bowers</i> , 134 U.S. 547, 10 S. Ct. 620, 33 L. Ed. 1016 (1890).....	10
<i>Washington Market Co. v. District of Columbia</i> , 137 U.S. 62, 11 S. Ct. 4, 34 L. Ed. 572 (1890).....	10
STATE CASES	
<i>Aubrey's R.V. Center, Inc. v. Tandy Corp.</i> , 46 Wn. App. 595, 609, 731 P.2d 1124 (1987).....	13-14
<i>Barber Asphalt Paving Company v. Hamilton</i> , 80 Wash. 51, 141 P. 199 (1914).....	9
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	13
<i>Brown v. Suburban Obstetrics & Gynecology, P.S.</i> , 35 Wn. App. 880, 670 P.2d 1077 (1983).....	9
<i>Citizens v. City of Port Angeles</i> , 137 Wn. App. 214, 151 P.3d 1079 (2007).....	18
<i>Dombrosky v. Farmers Ins. Co.</i> , 84 Wn. App. 245, 928 P.2d 1127, rev. den., 131 Wn. 2d 1018 (1997).....	11
<i>Hangman Ridge Training Stables, Inc. v. Safeco Ins., Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	7, 8, 13, 15, 16, 17
<i>Harold Meyer Drug v. Hurd</i> , 23 Wn. App. 683, 598 P.2d 404 (1979).....	9-10

<i>Hoffer v. State</i> , 110 Wn.2d 415, 755 P.2d 781 (1988).....	12
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989), <i>cert den.</i> , 493 U.S. 814 (1989).....	12, 14
<i>Leingang v. Pierce County Medical Bureau</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	14
<i>Mason v. Mortgage Am.</i> , 114 Wn.2d 842, 855, 792 P.2d 142 (1990)	10
<i>Manteufel v. Safeco Insurance Co. of Am.</i> , 117 Wn. App. 168, 68 P.3d 1093 (2003), <i>rev. den.</i> , 150 Wn. 2d 1021 (2003).....	13
<i>Meyer v. Dempcy</i> , 48 Wn. App. 798, 740 P.2d 383 (1987).....	11-12, 17
<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788, 64 P.3d 22 (2003).....	12
<i>Morgan v. PeaceHealth, Inc.</i> , 101 Wn. App. 750, 14 P.3d 773 (2000).....	13
<i>Nissen v. Obde</i> , 58 Wn.2d 638, 364 P.2d 513 (1961).....	8
<i>Sign-O-Lite Signs, Inc. v. Delaurenti Florists</i> , 64 Wn. App. 553, 561, 825 P.2d 714 (1992), <i>rev den.</i> 120 Wn.2d 1002 (1992)	13
<i>Sing v. John L. Scott</i> , 134 Wn.2d 24, 30, 948 P.2d 816 (1997)	13
<i>St. Yves v. Mid State Bank</i> , 111 Wn.2d 374, 757 P.2d 1384 (1988).....	11, 17
<i>State v. McCormack</i> , 117 Wn.2d 141, 812 P.2d 483 (1991), <i>cert den.</i> 502 U.S. 1111 (1992).....	11

<i>State Farm Fire & Cas. Co. v. Huynh</i> , 92 Wn. App. 454, 962 P.2d 854 (1998).....	11, 15, 20
<i>Stephens v. Omni Ins. Co.</i> , 138 Wn. App. 151, 159 P.3d 10 (2007).....	16, 17
<i>Suleiman v. Lasher</i> , 48 Wn. App. 373, 739 P.2d 712 (1987), <i>rev. den.</i> , 109 Wn. 2d 1005 (1987).....	11, 17
<i>Tallmadge v. Aurora Chrysler Plymouth, Inc.</i> , 25 Wn. App. 90, 605 P.2d 1275 (1979).....	8
<i>Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.</i> , 81 Wn.2d 528, 503 P.2d 108 (1972).....	12

STATE STATUTES

RCW 4.84.290	9
RCW 19.86 <i>et seq.</i>	1
RCW 19.86.020	10
RCW 19.86.090	8, 10
RCW 19.86.920	10, 15
RCW 49.48.030	9

MISCELLANEOUS

CR 12(b)(6).....	3, 4, 11, 12, 13, 19, 20
CR 56	3, 11, 12, 13, 17, 18, 20
CR 56(c).....	12
CR 56(f)	13, 18
RAP 7.3.....	6

I. INTRODUCTION

This private dispute does not concern Washington's Consumer Protection Act ("CPA"), RCW 19.86 *et seq.* The trial court twice dismissed the CPA claim, recognizing that this unique business dispute between two commercial entities did not implicate the CPA. Appellant VanRad's CPA claim is an effort to shoehorn a commercial dispute into the CPA for the sole purpose of recovering attorneys' fees. VanRad has admitted as much. RP 18-19. This Court should reject VanRad's effort and should uphold the dismissal of the CPA claim. The claim is now moot because VanRad was already paid its alleged injury.

Before this Court are business partners. They disagree on which party had the right to bill for a certain medial procedure provided to patients of Respondent The Clinic. According to the parties' business relationship, VanRad provided radiologic interpretation upon images (e.g., x-ray, MRI, mammography, etc.) acquired by The Clinic. The business dispute centers on who had the right to bill for a portion of the charge for Computer Aided Detection ("CAD") that was applied to mammography images acquired and sent by The Clinic to VanRad. Contrary to what VanRad would like this Court to believe, this dispute is not about patients being billed for services never received -- no party has billed for medical services never received by The Clinic's patients. Through the advancement of its CPA claim VanRad seeks not to protect any consumers, but only to protect its bottom line. The Court should not allow the CPA to be used to achieve these purely commercial goals.

The CPA is not at issue in this case because the billings themselves were not deceptive, not having the capacity to deceive a substantial portion of the public. The billings also did not impact the public interest because there is no likelihood that additional plaintiffs have or will be injured in exactly the same fashion. The trial court saw VanRad's efforts for what they were and dismissed the CPA claim.

After The Clinic's first successful motion to dismiss the CPA claim, the trial court gave VanRad leave to amend. CP 84-86. Even the following amendments were insufficient to state a claim. Perhaps recognizing the deficiencies in its pleadings, to defend the second motion to dismiss VanRad submitted materials outside the pleadings (i.e., Declaration of Mr. Barrett). CP 153-54. The motion was therefore converted to one for summary judgment. *See* CP 163-164 (portion of the Clinic's Reply Brief asserting that submission of matters outside the pleadings converts motion to summary judgment motion). Dismissal on the merits was therefore appropriate and should be affirmed.

VanRad was made whole through resolution of its other theories for relief; it was paid the amount it asserts as its injury under the CPA. The element of injury necessary to advance a CPA claim is therefore missing. The CPA claim is moot. No justiciable controversy exists.

II. ISSUES ON APPEAL

The issues on appeal are:

1. Whether this controversy is justiciable where VanRad received payment for its alleged injury.

2. Whether as a matter of law VanRad alleged and/or established conduct actionable under the CPA.
3. Whether dismissal should be affirmed on the merits under CR 56.
4. Whether dismissal with prejudice pursuant to CR 12(b)(6) should be affirmed.

III. STATEMENT OF THE CASE

For many years, ending in January 2006, VanRad and The Clinic were business partners. CP 88. The Clinic provides health care services to its patients. CP 87-88. Under the parties' business arrangements, VanRad, a radiology clinic, "interpreted digital mammography images of the Clinic's patients using CAD [computer aided detection]." CP 88. CAD assisted VanRad's radiologists with interpreting the mammography images. CP 88; CP 153-154.

The Clinic billed third party payers for acquiring and sending the mammography images to VanRad; VanRad billed for reading those images. VanRad makes no claim that those billings were in any way improper. In dispute is who between VanRad and The Clinic was entitled to bill for a portion of the CAD services applied to The Clinic's mammography images. CP 88; CP 153-154.

When The Clinic and VanRad were unable to resolve their dispute, VanRad filed this action. CP 88; CP 3. VanRad asserted that it was entitled to payments that third party payers had made to The Clinic related to The Clinic's CAD billings. CP 87-93. The trial court dismissed

VanRad's CPA claim premised on these facts. CP 173-178. This Court reviews that dismissal.

VanRad initiated this action in Clark County Superior Court on August 2, 2006, by filing its Complaint for Declaratory Judgment, Breach of Contract (4 counts), and Unjust Enrichment. CP 1-16. Less than one month later, VanRad amended its Complaint, removing and clarifying claims. CP 17-25. On March 13, 2007, VanRad for the second time amended its Complaint to add in claims of Quantum Meruit, Fraud, and Negligent Misrepresentation. CP 26-33. A few months later, on May 14, 2007, VanRad filed its Third Amended Complaint to allege two violations of the CPA. CP 34-43.

VanRad alleged that The Clinic's "actions in seeking reimbursement from third-party payers for CAD services performed by VanRad constituted an unfair and deceptive practice" and "caused VanRad damages in an amount not less than \$145,982.48." CP 40 at ¶¶ 11.3-11.4. VanRad concedes no *per se* violation of the CPA under the Health Care False Claims Act exists – contrary to its position before the trial court. *Opening Brief*, p. 3. Thus, whether VanRad's allegations support a non-*per se* violation of the CPA is solely at issue.

The Clinic filed its first CR 12(b)(6) Motion to Dismiss on May 23, 2007, moving to dismiss VanRad's claims of Fraud, Negligent Misrepresentation, and violation of the CPA as alleged in the Third Amended Complaint. CP 44-60. VanRad voluntarily dismissed one count of its CPA claim in response to The Clinic's Motion to Dismiss. CP 70.

The Clinic's motion was successfully granted without prejudice on September 28, 2007. CP 84-86. **Judge Roger A. Bennett afforded VanRad the opportunity to amend to re-allege the claims.** CP 86.

VanRad filed its Fourth Amended Complaint alleging claims of Unjust Enrichment, Quantum Meruit, and Unfair and Deceptive Trade Practice (CPA claim) on November 2, 2007. CP 87-94. The Clinic filed its second CR 12(b)(6) motion to dismiss VanRad's CPA claim on December 4, 2007. CP 95-107. VanRad filed its opposition on December 18, 2007, CP 108-161, including a declaration from James M. Barrett, counsel for VanRad. CP 153-154. This declaration provided additional detail regarding the mammogram reading service provided by VanRad to The Clinic and information on how such services are allegedly billed to third party payers. *Id.* The Clinic moved to strike the Declaration of Mr. Barrett, CP 163-164, and pointed out that consideration of the declaration would transform the motion to one for summary judgment. CP 163-164. The trial court did not exclude Mr. Barrett's declaration.

At oral argument, VanRad acknowledged that despite its other theories for relief, only the CPA claim might afford attorneys' fees cost recovery. RP 18-19 ("[T]his particular [remedy, i.e. the CPA claim,] is – provides attorney's fees as well. . . . And so it is important as opposed to the quantum meruit unjust enrichment claims.").

The trial court granted dismissal on January 9, 2008, this time without designating that the dismissal was without prejudice. CP 173-178.

Subsequently, the Clinic paid VanRad the portion of amounts billed to third party payers that VanRad claimed. *Declaration of Craig Russillo Regarding Justiciability Issue*, ¶ 2. The Clinic paid VanRad \$146,989.10, the amount that VanRad represented was the amount of its claim arising from the Clinic's billings, inclusive of prejudgment interest. *Id.* On April 1, 2008, the parties filed a Stipulated Final Judgment of Dismissal dismissing VanRad's Unjust Enrichment and Quantum Meruit claims from its Fourth Amended Complaint with prejudice. CP 178-179. No claims remained.

VanRad filed its Notice of Appeal on April 4, 2008, seeking review of the trial court's dismissal of the CPA claim. While VanRad has already received the money it asserts as its injury under the CPA, VanRad pursues this appeal to attempt to collect its attorneys' fees under the CPA.

IV. ARGUMENT

A. This Appeal Is Not Justiciable

The Clinic moves for dismissal of the appeal. VanRad pursues this appeal to recover costs of litigation. VanRad has already recovered for its alleged injury. It wishes reinstatement of its CPA claim purely to recover attorneys' fees that it will incur in seeking its CPA relief. Such litigation is subject to dismissal for lack of justiciability.

1. The CPA Claim Is Moot Because of the Missing Element of Injury

"The appellate court has the authority to determine whether a matter is properly before it" RAP 7.3. Here, the appeal is not

justiciable because VanRad has already been paid its alleged damages from The Clinic. *Declaration of Craig Russillo Regarding Justiciability Issue*, ¶ 2. Without injury at issue, the controversy is extinguished.

VanRad alleges, “Third-party payers paid the Clinic \$145,982.48 for the CAD services performed by VanRad.” CP 36, ¶ 4.6. As the basis of its CPA claim, VanRad alleges that The Clinic’s “actions in seeking reimbursement from third-party payers for CAD services performed by VanRad constituted an unfair and deceptive practice” and “caused VanRad damages in an amount not less than \$145,982.48.” CP 40 at ¶¶ 11.3-11.4. VanRad prayed only for relief in this amount on its CPA claim. CP 41. Its appellate brief suggests no other injury. This is the same alleged damage that VanRad asserted in multiple theories for relief, i.e. quantum meruit, CP 38, fraud, CP 38, and negligent misrepresentation, CP 39, for the same claimed damages. This is also the alleged damage that VanRad recovered from The Clinic subsequent to the trial court’s dismissal of the CPA claim. *Decl. of Russillo*, ¶ 2. The payment included prejudgment interest. *Id.* Because VanRad no longer has any outstanding injury, VanRad cannot establish an essential element of a CPA claim. Having already received the amount it asserts as injury, VanRad is not entitled to any judgment under the CPA. The CPA claim is moot.

In *Hangman Ridge*, the Supreme Court described a “successful plaintiff” as “one who establishes *all* five elements of a private CPA action.” *Hangman Ridge Training Stables, Inc. v. Safeco Ins., Co.*, 105

Wn.2d 778, 795, 719 P.2d 531 (1986) (emphasis added). The five elements are:

(1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to plaintiff; and (5) a causal link be established between the unfair or deceptive act complained of and the injury suffered.

Id. at 784-85, citing RCW 19.86.090. VanRad has been made whole. It cannot establish the fourth element, injury. While a plaintiff's injury under the CPA need not be pecuniary, *see Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979), the element of injury is necessary. VanRad has only alleged a pecuniary injury. That injury has been satisfied. "All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies. . . ." *Nissen v. Obde*, 58 Wn.2d 638, 641, 364 P.2d 513 (1961). VanRad cannot be a successful plaintiff on its CPA claim because it has no outstanding injury.

2. Attorney's Fees and Damage Enhancement Cannot Satisfy the Injury Element.

The attorneys' fees and trebling provisions of the CPA do not establish VanRad's right to proceed. These amounts are derivative of the relief afforded by the CPA. They require that a valid CPA claim—including actual injury—first be established. VanRad no longer has an actual injury. It cannot benefit from the cost and trebling provisions.

Attorney's fees under the CPA are not a separate element of damages. Whether attorney's fees are an element of damages depends on

the statute. *Brown v. Suburban Obstetrics & Gynecology, P.S.*, 35 Wn. App. 880, 884-85, 670 P.2d 1077 (Div. II 1983); *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683, 686-87, 598 P.2d 404 (Div. II 1979). In *Brown*, this Court stated that the award of attorneys' fees under RCW 49.48.030 was additional damages because the statute did not expressly state that attorneys' fees were costs and the Court declined to read the word "costs" into the statute. This Court reached a similar result in *Harold Meyer Drug v. Hurd, supra*, where the body of the text of RCW 4.84.290 also did not use the word "costs."

Unlike in *Brown* and *Hurd*, the CPA statute expressly provides that attorneys' fees are to be awarded as costs only and not additional damages, stating,

Any person who is injured in his or her business or property by a violation of RCW 19.86.020...may bring a civil action in the 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....**

RCW 19.86.090 (emphasis added). The statute is absolutely clear: attorneys' fees are included in costs, not an element of damage.

Washington state and federal appellate courts uniformly hold that an appellate court will not "entertain jurisdiction of an appeal for the sole purpose of determining a question of costs." *Barber Asphalt Paving Company v. Hamilton*, 80 Wash. 51, 57, 141 P. 199 (1914). *See also*

Harold Meyer Drug v. Hurd, *supra*, 23 Wn. App. at 686; *Washington Market Co. v. District of Columbia*, 137 U.S. 62, 11 S. Ct. 4, 34 L. Ed. 572 (1890); *Little v. Bowers*, 134 U.S. 547, 10 S. Ct. 620, 33 L. Ed. 1016 (1890). This appeal, which seeks only to establish a right to costs, cannot survive.

The damage enhancement provision of RCW 19.86.090 also does not confer justiciability. VanRad has no actual damages to be enhanced. Under the CPA, when a plaintiff establishes a right to a damage award, “the court may in its discretion, increase the award of damages 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 ten thousand dollars.” RCW 19.86.090. The enhancement up to \$10,000 is derivative of a right to actual damages in the first place. Failure to show actual monetary damages precludes the recovery of treble damages under the CPA. *Mason v. Mortgage Am.*, 114 Wn.2d 842, 855, 792 P.2d 142 (1990). Remanding this case would be pointless because VanRad has no right to any damage award as it has already received all its alleged actual damages. Because there can be no award of actual damages, there can be no enhancement -- zero times three remains zero.

Whether VanRad’s allegations once stated a CPA claim has become academic. A key element, injury, is now missing. The CPA claim is no longer justiciable. VanRad’s sole purpose in appealing the trial court’s dismissal of its CPA claim is to resolve the question of costs.

Because VanRad cannot prevail on its CPA claim because it has no outstanding injury, it will not be entitled to costs or damage enhancement. The CPA claim is moot. This Court should dismiss the appeal.

B. Standard of Review

The question whether an act or practice is actionable under the Consumer Protection Act is a question of law. *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn. App. 454, 458, 962 P.2d 854 (1998), *citing Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 260, 928 P.2d 1127, *rev. den.*, 131 Wn.2d 1018 (1997). Questions of law are reviewed *de novo*. *Id.*, *citing State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991).

The Clinic moved for dismissal under CR 12(b)(6). CP 95-107. In opposing dismissal, VanRad submitted matters outside the pleadings in the Declaration of Mr. Barrett. CP 153-154. This Court, therefore, should apply the same standard as a motion for summary judgment under CR 56. CR 12(b)(6); *Suleiman v. Lasher*, 48 Wn. App. 373, 376-77, 739 P.2d 712 (1987), *rev. den.*, 109 Wn.2d 1005 (1987) (appellate court review should treat the trial court's granting of the motion to dismiss as one for summary judgment where matters outside the pleadings are submitted); *St. Yves v. Mid State Bank*, 111 Wn. 2d 374, 377, 757 P.2d 1384 (1988) (trial court dismissed action under CR (12)(b)(6) but did not exclude affidavits; on review Supreme Court treated it as a summary judgment); *Meyer v. Dempsy*, 48 Wn. App. 798, 740 P.2d 383 (1987) (If the court considers matters outside the pleadings, the motion to dismiss is considered a motion

for summary judgment.). The Clinic advised the trial court in its Reply Brief that submission of the matters outside the pleadings requires the Court to treat the motion as one for summary judgment. CP 163-64.

Because CR 12(b)(6) does not apply, VanRad is not entitled to the benefit of hypothetical facts to support its claims. *Cf. Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) (under CR 12(b)(6) a court may consider hypothetical facts not part of the formal record). For review concerning CR 56, “the reviewing court engages in the same inquiry as the trial court,” reviewing the same facts presented to the trial court. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22, (2003). CR 56(c) reads in pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

CR 56(c). The court must consider the evidence in the light most favorable to the nonmoving party. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 503 P.2d 108 (1972). If the nonmoving party does not come forward with evidence sufficient to establish each of the elements of his or her claim that are put at issue by the moving party’s opening papers, summary judgment is properly granted. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. den.*, 493 U.S. 814 (1989).

A trial court decision whether to continue a summary judgment hearing under CR 56(f) is reviewed for a manifest abuse of discretion. *Morgan v. PeaceHealth, Inc.*, 101 Wn. App. 750, 774, 14 P.3d 773 (2000). Such discretion is not abused if the requesting party does not offer a good reason for the delay, does not state what evidence would be established, or does not demonstrate that the desired evidence will not raise an issue of material fact. *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 175, 68 P.3d 1093 (2003), *rev. den.*, 150 Wn.2d 1021 (2003). VanRad never requested a continuance and the circumstances do not support one.

If this Court were to review the dismissal under a CR 12(b)(6) standard instead of the triggered CR 56 standard, VanRad still fails to state a claim. Review under either CR 56 or CR 12(b)(6) should result in affirmance.

C. The Trial Court Correctly Dismissed the CPA Claim

1. VanRad Failed To Present or Allege Facts Sufficient to Establish “Deceptive Act”

Although the CPA does not define an unfair or deceptive act or practice, Washington cases provide that an act may be unfair or deceptive if it “has the capacity to deceive a substantial portion of the public.” *Sing v. John L. Scott*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997), *citing Hangman Ridge, supra*, 105 Wn.2d at 785. *See also Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 592, 675 P.2d 193 (1983); *Sign-O-Lite Signs, Inc. v. Delaurenti Florists*, 64 Wn. App. 553, 561, 825 P.2d 714 (1992), *rev den.* 120 Wn.2d 1002 (1992); *Aubrey’s R.V. Center, Inc. v. Tandy*

Corp., 46 Wn. App. 595, 609, 731 P.2d 1124 (1987). Whether particular actions are deceptive is reviewable as a question of law. *Leingang v. Pierce County Med. Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

This Court can sustain the dismissal on any legal basis supported by the record. *LaMon v. Butler, supra*. In its moving papers, the Clinic challenged whether the allegations of VanRad established a deceptive act, stating that, “For conduct to be an unfair or deceptive practice under the CPA, ‘it must have the capacity to deceive a substantial portion of the public.’”. CP 102-103 (emphasis added). The Clinic then argued that the conduct alleged by VanRad did not satisfy this standard. The Clinic argued that “plaintiff’s Fourth Amended Complaint fails to allege that the Clinic was not entitled to receive payments from the third-party payers or that the Clinic knowingly submitted a false claim for reimbursement.” CP 103, lines 16-18. The Clinic argued that VanRad failed to “allege that the Clinic knowingly submitted a false claim for reimbursement” and that “the plaintiff fails to allege exactly what false statement of material fact or material representation the Clinic allegedly made to a health care payer.” CP 103, line 22 to 104, line 2. The motion put at issue whether the allegations established a deceptive practice. This Court can affirm the dismissal on the basis that the alleged facts do not establish a deceptive act.

The Clinic’s billings were not deceptive. The Clinic was the provider of services to its patients and billed for the services provided. The billings included services that were *actually received* by The Clinic’s

patients. The billings do not contain false information and are not deceptive. That VanRad claimed the right to portions of the payments made by the third party payers based on its business relationship with The Clinic and/or quantum meruit does not make the billings deceptive.

The situation is distinguishable from that in *State Farm v. Huynh*, a case on which VanRad attempts to rely. In *State Farm v. Huynh*, a chiropractor was shown to have both created false injury reports and submitted fraudulent billings for services that were *never received*. *State Farm v. Huynh, supra*, 92 Wn. App. at 469. The billings were “phony,” i.e. “billed for services that he did not perform.” *Id.* In this case, the Clinic’s billings were not phony. They represented actual services rendered to the Clinic’s patients as part of the Clinic’s service to its patients. That subcontractor VanRad later angled for a portion of the resulting payments does not render the billings fraudulent.

VanRad never established a deceptive act. Dismissal was proper.

2. VanRad Failed to Present or Allege Facts Sufficient to Establish “Public Interest”

The dispute is private. The public interest element is unmet by VanRad’s allegations and/or evidence. “Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest.” *Hangman Ridge, supra*, 105 Wn.2d at 790.

A private plaintiff must “show the acts complained of affect the public interest.” *Hangman Ridge*, 105 Wn.2d at 788, citing RCW

19.86.920. Where a complaint involves “essentially a private dispute,” courts examine these factors to determine if the public interest element is satisfied:

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

Stephens v. Omni Ins. Co., 138 Wn. App. 151, 159 P.3d 10 (2007), citing *Hangman Ridge*, 105 Wn.2d at 790-91. The factors are meant to elucidate this primary question: Is there a likelihood that additional plaintiffs have or will be injured in exactly the same fashion? *Hangman Ridge*, at 790-91.

The Clinic billed the third party payers in the course of its business. The Clinic made no advertisements or representations to the public in general regarding how it would bill for services performed by subcontractors. The Clinic entered a unique business relationship with VanRad for the subcontracted service, and did not generally solicit other subcontractors. The Clinic and VanRad were both sophisticated medical providers of equal bargaining position. Their resulting dispute did not affect the public interest.

There is no likelihood that additional plaintiffs have or will be injured in exactly the same fashion. The situation is unique, resulting from the special business relationship between VanRad and The Clinic.

This is not a case that is susceptible to repetition to the general public, or to any other party for that matter.

“[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.” *Stephens, supra*, 138 Wn. App. at 178, *citing Hangman Ridge*, 105 Wn.2d at 790. Here, there is little likelihood that additional plaintiffs will be injured in exactly the same fashion. The unique circumstances of this dispute between two businesses are unlikely to recur. The Court should reject VanRad’s attempts to cast this purely private dispute between commercial entities into a dispute affecting the “public interest.”

3. The Claim Was Decided on the Merits Under CR 56.

This Court should affirm dismissal under CR 56. Because VanRad defended dismissal by submitting matters outside the pleadings, the dismissal is evaluated under CR 56. *Suleiman v. Lasher, supra*, 48 Wn. App. at 376-77. *See also St. Yves v. Mid State Bank, supra; Meyer v. Dempsy, supra*. Dismissal on summary judgment is an appropriate result in such circumstances. *Id.* CR 56. The decision is considered one on the merits, and new evidence is not considered on appeal. *Id.*

Here, VanRad submitted a declaration that detailed the CAD services at issue. CP 153-54. It also explained purported billing standards for CAD services. CP 154. These details bore directly on the issues submitted to the trial court for determination whether a claim was legally

supportable. In instances where the submitted testimony is considered unnecessary to the dismissal, appellate courts may decline to conduct CR 56 review. *See Citizens v. City of Port Angeles*, 137 Wn. App. 214, 226-27, 151 P.3d 1079 (2007). This testimony cannot be considered unnecessary to the Court's dismissal because the testimony relates directly to the billings at issue and VanRad's assertion that The Clinic violated the CPA by billing for the technical component of the CAD services. It relates directly to the issues at hand. VanRad presents the content of the declaration to this Court. *Opening Brief*, p. 2, note 1.

VanRad's argument against dismissal with prejudice fails because it is premised on CR 12(b)(6). *See Opening Brief*, IV.C, pp. 13-14. Instead, the matter should be considered decided on the merits under CR 56.

VanRad offered insufficient allegations and proof that it could sustain a CPA claim. VanRad did not request additional time to produce other theories, allegations, or evidence under CR 56(f). At oral argument, VanRad did not request additional time, nor suggest that it had alternate evidence or additional allegations to add to its Complaint. RP 2-23.¹ The trial court specifically asked VanRad for "any reply" at the conclusion of argument, and VanRad summarized its position but made no suggestion that it could rectify or supplement its pleading and evidence. RP 22, line

¹ VanRad's closing comment that it is "able to allege that double payments ultimately occurred," *see Opening Brief*, p 14, is irrelevant if this Court reviews the dismissal under CR 56. VanRad was obligated to come forward with its allegations and evidence in December 2007.

13, to RP 23, line 1. This was the second time that VanRad faced dismissal of its CPA claim; the trial court had already dismissed the CPA claim three months earlier in September 2007 without prejudice and had granted VanRad leave to amend. VanRad made no suggestion that any additional facts could support its claim. Dismissal was proper.

4. This Court Should Affirm Dismissal Under CR 12(b)(6).

VanRad still fails to establish a deceptive act or public interest even with a new hypothetical fact. This Court should also affirm if it considers under a CR 12(b)(6) standard of review VanRad's newest allegation that double billings occurred. Dismissal for failure to state a claim calls for a judgment on the merits. *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

VanRad suggests in its appellate brief that double billings occurred: i.e. that VanRad billed third party payers directly for the same CAD services that The Clinic billed. An act of deception remains missing from the allegations. The Clinic billed for services actually rendered to its patients. The parties had no understanding to the contrary. The billings were not phony. That VanRad alleged a right to portions of the payments does not establish that the billings contained any false information. The billings did not contain false information. VanRad's objection to the billings does not establish deceptiveness.

Further, the situation remains unlikely to recur. Whether double billings occurred does not change the conclusion that the situation is not

likely to recur given the unique circumstances of these parties' relationship and their dispute.

V. CONCLUSION

This appeal is not justiciable. VanRad's alleged injury no longer exists, The Clinic having paid VanRad. This Court has no jurisdiction to continue to review the controversy just so VanRad can recover costs of litigation. The controversy was extinguished.

If the Court accepts the appeal, it should affirm dismissal of the CPA claim on the merits. Dismissal on the merits was appropriate under CR 56 because VanRad submitted material testimony outside of the pleadings and did not ask for additional time or raise its ability to bring new evidence and allegations in support of a CPA claim. The declarative testimony of VanRad's counsel was material to the trial court's determination, and cannot be shown to have been unnecessary as it related directly to the billings at issue.

Alternatively, this Court should affirm dismissal under CR 12(b)(6). VanRad's allegations do not establish a public interest because the billings were for services actually received, unlike in *State Farm v. Huynh*. The issue of which of the two commercial entities was entitled to the remuneration only concerns the two parties, not the public who is the cornerstone of any CPA claim. The situation is unlikely to recur. The

allegations and/or evidence do not establish a deceptive act or a public interest. This is true even if the Court considers VanRad's new allegation that double billing resulted.

RESPECTFULLY submitted this 25th day of August, 2008.

SCHWABE WILLIAMSON & WYATT, P.C.

By: Averil B. Rothrock

Averil B. Rothrock, WSBA #24248

Craig Russillo, WSBA #27998

Phillip J. Haberthur, WSBA #38038

Attorneys for Respondent The Vancouver
Clinic, Inc., P.S.

CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on the 25th day of August, 2008, I caused to be served by ABC Legal Messenger Service the Respondent's Brief and Declaration of Craig Russillo Regarding Justiciability Issue In Support of Respondent's Brief on the following parties at the following addresses:

James B. Davidson
James M. Barrett
ATER WYNNE LLP
222 SW Columbia, Suite 1800
Portland, OR 97201-6618

DATED this 25th day of August 2008.

SCHWABE WILLIAMSON & WYATT

By: Averil Rothrock
Averil Rothrock, WSBA #24248

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 AUG 25 PM 3:57

FILED
COURT OF APPEALS
DIVISION II

08 AUG 27 AM 11:31

STATE OF WASHINGTON
BY _____
DEPUTY

No. 37577-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Vancouver Radiologists, P.C.,

Appellant

v.

The Vancouver Clinic, Inc., P.S.,

Respondent

DECLARATION OF CRAIG RUSSILLO
REGARDING JUSTICIABILITY ISSUE
IN SUPPORT OF RESPONDENT'S BRIEF

Averil Rothrock, WSBA #24248
Craig Russillo, WSBA #27998
Phillip J. Haberthur, WSBA #38038
Attorneys for Respondent The Vancouver Clinic, Inc., P.S.
Schwabe Williamson & Wyatt, P.C.
1420 Fifth Ave., Ste. 3010
Seattle, WA 98101
Telephone: (206) 622-1711

ORIGINAL

FILED
COURT OF APPEALS DIV
STATE OF WASHINGTON
2008 AUG 25 PM 3:4

I Craig Russillo, declare and state as follows:

1. I am one of the attorneys for Respondent The Vancouver Clinic. I have represented The Clinic on this matter since the inception of the dispute between the two parties.

2. Subsequent to the trial court's January 9, 2008, dismissal of the Consumer Protection Act claim, the parties resolved VanRad's claim that portions of the amounts billed to third party payers for Computer Aided Detection (i.e. "CAD") services were due to VanRad. The Clinic paid VanRad \$146,989.10, which Van Rad represented was the amount of its claim arising from The Clinic's CAD billings, inclusive of prejudgment interest. Attached as Exhibit A is a true and correct copy of the check dated March 11, 2008, from The Clinic to VanRad for this amount.

3. As a result of the payment, on April 1, 2008, the parties filed a Stipulated Final Judgment of Dismissal dismissing VanRad's Unjust Enrichment and Quantum Meruit claims from its Fourth Amended Complaint with prejudice.

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

Signed this 25 day of August 2008 at Portland, Oregon.

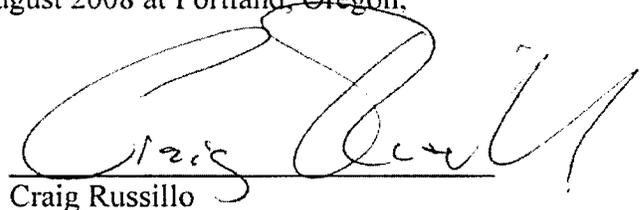

Craig Russillo

EXHIBIT A



700 NE 87TH AVENUE
VANCOUVER, WA 98664-4896



Portland, OR

VENDOR ID: VANRAD
CHECK DATE: 3/11/2008
CHECK #: 816703
24-22/1230

AMOUNT
\$146,989.10

PAY TO THE ORDER OF VANCOUVER RADIOLOGISTS PC
One Hundred Forty Six Thousand Nine Hundred Eighty Nine Dollars And 10 Cents

THE VANCOUVER CLINIC, INC.P.S.

[Signature]
[Signature]
TWO SIGNATURES REQUIRED FOR OVER \$10,000.00

⑆ 8 16 703 ⑆ ⑆ 23000220⑆ 153655315544⑆