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No. 64113-1
STATE OF WASHINGTON COURT OF APPEALS
DIVISION ONE

RIDGETOP ASSOCIATES, LLC,

Appellant,

and

PERKINS COIE, LLP,

Respondent.

On Appeal From King County Superior Court
Honorable Dean Lum;
Honorable Regina Cahan; and
Honorable John Erlick

Appellant's Opening Brief

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A. Assignments of Error

1. The trial court erred when it dismissed Appellant Ridgetop Associates, LLC's ("Ridgetop") consumer protection act claim on summary judgment because genuine fact issues needed to be tried regarding Respondent Perkins Coie, L.L.P.'s ("Perkins") admitted rate changes and its overcharging Ridgetop as well as Perkins' failure to notify Ridgetop that Perkins changed its rates during the representation from the rates set forth in Perkins' fee contract.

2. The trial court erred when it failed to require Perkins to segregate its attorney fee request between its successful breach of contract claim, for which it was legally entitled to attorney fees, and its successful consumer protection act defense, for which Perkins was not legally entitled to attorney fees.

3. The trial court erred when it awarded Perkins its attorney fees for successfully defending Ridgetop's consumer protection act claim.

4. The trial court erred when it failed to require Perkins to segregate its attorney fee request between its successful breach of contract claim, for which it was legally entitled to attorney fees, and

its unsuccessful account stated claim, for which it was not legally entitled to attorney fees.

5. The trial court erred when it failed to offset Perkins' attorney fee award with Ridgetop's attorney fees for Ridgetop's successfully defending Perkins' account stated claim that resulted in a dismissal with prejudice.

6. The trial court's conclusion that Ridgetop's counterclaims, including Ridgetop's CPA counterclaim, were inextricably intertwined with each other and with the collection claims as well – as were the legal services provided to the parties in connection with the collection claims, defenses and counterclaims was erroneous and is not supported by substantial evidence.

7. The trial court erroneously concluded that segregation of fees among legal issues is not required in this case because the totality of Ridgetop's side of the case (including defense arguments and counterclaims) was in defense of the collection action initiated by Perkins Coie.

8. The trial court erroneously concluded that segregation of fees is improper under the contract, pursuant to which Perkins Coie may recover fees in connection with its prosecution of the collection action.

9. The trial court's finding that the CPA counterclaim, for instance, claimed that Perkins Coie...unfairly or deceptively filed its collection claim after the statute of limitations on Ridgetop's alleged counterclaim expired is not supported by substantial evidence.

Issues Pertaining to Assignments of Error

1. Whether the trial court erroneously dismissed Ridgetop's consumer protection act claim on summary judgment when Perkins admitted it changed its rates without notifying Ridgetop and, thus, overcharged Ridgetop.

2. Whether the trial court was required to segregate the time Perkins spent on its successful breach of contract claim, for which fees are legally recoverable, from its successful consumer protection act defense, for which fees are not recoverable.

3. Whether the trial court erred in awarding Perkins its attorney fees in successfully defending itself against Ridgetop's consumer protection act claim because Ridgetop's consumer protection act claim was based on Perkins breaching a duty imposed by a statute independent of the parties' contract and the act Ridgetop complained about was not a breach of a specific contract term.

4. Whether the trial court was required to segregate the time Perkins spent on its successful breach of contract claim, for which

fees are legally recoverable, from its unsuccessful account stated claim, for which fees are not recoverable.

5. Whether Ridgetop is entitled to attorney fees on its successful account stated defense because its defense resulted in Perkins' account stated claim being dismissed with prejudice.

B. Statement of Facts¹

1. Introduction

Appellant Ridgetop, the defendant, appeals the trial court's having summarily dismissed Ridgetop's consumer protection act counterclaim. Respondent Perkins, the plaintiff, sued Ridgetop for unpaid legal fees and Ridgetop asserted a consumer protection act counterclaim. The trial court summarily dismissed Ridgetop's consumer protection act counterclaim prior to trial and Ridgetop appeals.

Perkins had previously represented Ridgetop. While Perkins was representing Ridgetop, Perkins had Ridgetop sign Perkins' standard form written contract regarding fees and costs ("Contract"). Perkins' Contract told Ridgetop the rates for the partner in charge (Mr. Lutz) and gave rate ranges for other personnel. The Contract also allowed Perkins to change its

¹ Verbatim Report of Proceedings dated January 28, 2008 is 1RP; the VRP dated January 28-29, 2008 is 2RP; and the VRP dated January 29, 2008 is 3RP.

timekeepers' rates, but did not require Perkins to notify its clients about any rate changes.

Perkins represented Ridgetop for about 9 months. During the representation, Perkins invoiced Ridgetop using its most common invoice. That invoice did not show each timekeeper's hourly rate or provide a line-item charge so that a timekeeper's rate could be determined by looking at the invoice. Relying on Perkins' invoicing, Ridgetop actually paid Perkins' invoices in full for months. About 6 months after the representation began, Ridgetop stopped paying Perkins' invoices in full because Ridgetop believed the total legal fees it was being charged were too high. All in all, Ridgetop paid Perkins \$145,505 for Perkins' 9 months work and Perkins claimed it was entitled to \$200,000. Immediately after more than 3 years passed after Perkins sent Ridgetop a final statement, Perkins sued Ridgetop for just over \$54,000 for what it believed were unpaid fees and costs, alleging a contract breach and an account stated claim.

In response to Perkins having sued Ridgetop, Ridgetop hired and paid an attorney to defend Ridgetop. Ridgetop filed an answer and then amended its answer to include a consumer protection act claim. Ridgetop then paid its attorney to immediately conduct discovery to figure out why Perkins' invoices were so high. During

this initial discovery, Ridgetop first learned that Perkins changed its rate for the partner in charge from the rate set forth in Perkins' Contract, and Perkins also changed the rate range for another attorney who worked on the case. It was undisputed that Perkins did not notify Ridgetop about the rate changes and that it was impossible to detect the rate changes by looking at Perkins' invoices. It was also undisputed that Ridgetop had paid Perkins the most of these changed rates prior to Ridgetop not paying Perkins' invoices in full.

After learning this information, Ridgetop brought a partial summary judgment motion regarding the overbilling caused by the changed rates and Perkins' account stated claim. In response, Perkins admitted it had changed its rates and charged Ridgetop hourly rates that exceeded the rates stated in Perkins' Contract. Perkins then unilaterally decided it would remedy its rate changes and overcharging by only reducing Perkins' claim in the lawsuit by the difference between the amounts Perkins overbilled Ridgetop and by adjusting its interest claim related to the overbilling. Perkins also agreed to dismiss its account stated claim with prejudice. Perkins made no further concessions.

In subsequent discovery, Perkins admitted it routinely changed its timekeepers' rates without notifying its clients about the changed rates. Perkins admitted it routinely changed its timekeepers' rates at least once per year. It also admitted it used an invoice format that made it impossible for its clients to determine how much Perkins' timekeepers were charging. Perkins' partner also admitted he did not otherwise notify his clients when a timekeeper's rate had changed.

Despite this, the individual calendar judge, Judge Regina Cahan, granted Perkins' partial summary judgment motion and summarily dismissed Ridgetop's consumer protection act claim. Perkins challenged Ridgetop's consumer protection act claim on two grounds: "the absence of an unfair or deceptive act or practice and the absence of cognizable injury." Over Ridgetop's objection and opposition the individual calendar judge erred and dismissed Ridgetop's consumer protection act claim.

The trial judge, Judge John Erlick, then compounded Judge Cahan's error and awarded Perkins fees for Perkins' successfully defending Ridgetop's consumer protection act claim. After the jury returned a verdict for Perkins on Perkins' contract claim, Perkins requested all its attorney fees for the underlying litigation, including

the work it had performed to have Ridgetop's consumer protection act claim dismissed. Ridgetop objected and requested the trial judge order Perkins to segregate its fees between Perkins' successful contract claim, its consumer protection act defense, and its unsuccessful account stated claim. The trial judge did not require Perkins to segregate its fees and did not diminish Perkins' award by the efforts it spent defending Ridgetop's statutory consumer protection act claim. Instead, the trial judge concluded Ridgetop's defenses and counterclaims were "inextricably intertwined."

Ridgetop assigns error to this conclusion because there is clear record evidence showing it is not true. For instance, Ridgetop propounded discovery related solely to its consumer protection act claim's public interest element (identifying other Washington clients who had their rates changed without notice and using the same invoice format). Perkins objected to this discovery. Ridgetop filed a motion to compel. Perkins filed a motion for protective order. This discovery and motion practice was irrelevant to Perkins' contract claim. It was only relevant to Ridgetop's consumer protection act claim. Despite this, the trial judge did not segregate

Perkins fees between the claims and awarded Perkins all but \$1,900 it was claiming.

2. Substantive Facts

a. Perkins First Became Ridgetop's Attorneys.

Ridgetop's principals, Dale and Helene Behar and Sol Amon (Helene's father), had previously dealt with Perkins. Specifically, Mr. Amon and his affiliated entities had hired Mr. Gerard "Jerry" Lutz, a Perkins partner, to handle various matters. The Behars worked with Mr. Lutz on Mr. Amon's entities' matters and both liked and trusted Mr. Lutz.² Naturally, Ridgetop sought Mr. Lutz's and Perkins' representation when it was involved in a commercial lease dispute.

Ridgetop owns a big box retail outlet in Silverdale, Washington. In 2003, the major tenant for this outlet was the Good Guys. The Good Guys hired Brad Thoreson at Short, Cressman & Burgess PLLC to represent its interests and on January 27, 2003 Mr. Thoreson sent a letter to Ridgetop claiming Ridgetop defaulted on the lease by escalating the rent pursuant to a lease provision that tied rent escalation to the Seattle Metropolitan Area Consumer

² CP at 23, ¶3.

Price Index, and no such index existed.³ On February 4, 2003, Ridgetop met with Mr. Lutz at Perkins' offices and looked to him for advice and he gave them advice.⁴ The attorney client relationship was formed.

Perkins testified the attorney-client relationship was formed on or before February 4, 2003. Mr. Lutz was deposed and had previously testified that the Behars had called him with specific questions about the Good Guys' default letter.⁵ In response, Mr. Lutz took information from the Behars, did research and called the Behars back with substantive advice and explained the differences between the case cited in the default letter and the Good Guys' situation.⁶ Then Mr. Lutz set up a meeting with the Behars on or before February 4, 2003.⁷ The Behars met with Mr. Lutz and they brought in Ridgetop's file regarding the Good Guys' lease, and the Behars and Mr. Lutz discussed the CPI issue and other problems with the lease like unattached exhibits and potential violations of a retail-use-only clause.⁸ As Mr. Lutz summarized the meeting: "I believe that we had a pretty broad discussion of a pretty broad suite

³ CP at 23, ¶4, 31–32, and 336, ln 20–23.

⁴ CP at 23, ¶4 and at 34.

⁵ CP at 1849:18 – 1850:21.

⁶ CP at 1850:22 – 1852: 24.

⁷ CP at 1852:25 – 1853:20.

⁸ CP at 1854:3 – 1855:23.

of issues in our first meeting.”⁹ Mr. Lutz believes the meeting lasted longer than .75 hours, but he charged Ridgetop only .75 hours probably because he only charged Ridgetop for the conversations involving substantive legal advice.¹⁰ Mr. Lutz specifically testified he understood he gave Ridgetop substantive advice at this meeting and he understood the Behars came to Perkins on that day looking to Perkins and Mr. Lutz for substantive advice.¹¹

Mr. Lutz confirmed the attorney client relationship’s formation during his trial testimony. He testified that Mr. Behar had called him in early January or late February 2003 explaining the Good Guys’ default letter.¹² He said he reviewed the relevant case, called Mr. Behar back and rendered substantive legal advice.¹³ He said that the Behars had come to his office on February 4, 2003 looking for substantive legal advice, that he rendered substantive legal advice to the Behars and that the attorney-client relationship had formed at that time.¹⁴

b. *Then The Parties Signed Perkins’ Contract Regarding Fees.* After the Perkins-Ridgetop attorney-client relationship was

⁹ CP at 1855: 21–23.

¹⁰ CP 1856:13 – 1857:1; and CP 34 (Perkins’ 2/4/03 time entry).

¹¹ CP at 1857: 6–15.

¹² VRP Trial Testimony, Vol.II, 209:16–20.

¹³ VRP Trial Testimony, Vol.II, 209:21 – 210:2.

¹⁴ VRP Trial Testimony, Vol.II, 210:3–21.

formed, Perkins drafted an engagement letter on or about February 5, 2003 and sent it to Ridgetop and attached a document titled "Information for Clients" (collectively the "Contract").¹⁵ Mr. Lutz and his secretary drafted the engagement letter based on a template the firm used, and the Information for Clients document is Perkins' standard form contract.¹⁶ Ridgetop signed the Contract on February 10, 2003, at least 6 days after the attorney-client relationship was formed.¹⁷

c. Perkins' Contract Stated Hourly Rates and Ranges, But Also Allowed Perkins to Unilaterally Change its Rates Without Notifying its Clients. The Contract specified Mr. Lutz's hourly rate and provided a rate range for other attorneys and timekeepers. The engagement letter that Mr. Lutz drafted stated Mr. Lutz's time would be charged at \$340 per hour and it stated the rate for other attorneys and timekeepers working on the case would not exceed \$410 per hour. The engagement letter also stated the hourly rate for the "most junior associates" was only \$110.¹⁸

The Contract also allowed Perkins' to routinely change its timekeepers' hourly rates. It stated each attorney and timekeeper

¹⁵ CP at 64–68.

¹⁶ CP at 1862:3 – 13.

¹⁷ Perkins admitted it and the Client entered into the Contract. CP 9, ¶7.4 and 15, ¶7.4.

¹⁸ CP 126.

is assigned a billing rate that is reviewed and “changed at least annually” (usually in January) and that “[s]ervices performed after the effective date of the new rates will be charged at the new rates.”¹⁹

There is nothing in the Contract that required Perkins to notify Ridgetop and its other clients if and when Perkins changed the rate for any timekeepers working on their case; rather, the Contract allows Perkins to change the timekeepers’ rates at its discretion without any obligation to notify the client.

d. Perkins Changed its Rates From the Rates set Forth in the Contract. Perkins unilaterally and without notice to Ridgetop changed Mr. Lutz’s rate and charged Ridgetop \$345 per hour for Mr. Lutz’s time and changed the rate ranges and charged \$440 per hour for Ron Berenstain’s time.²⁰ Mr. Lutz explained Perkins’ overcharging Ridgetop for his time by testifying that the engagement letter used his 2002 rate.²¹ In other words, the engagement letter set forth his 2002 rate and his rate changed on January 1, 2003. Mr. Lutz did not know whether the overcharging for Mr. Berenstain’s time was because he used an engagement

¹⁹ CP 128, “Basis for Fees” (third full paragraph).

²⁰ CP 118; 921–22.

²¹ CP 1863:21 – 1864:25.

letter template that contained 2002 rates or because Mr.

Berenstain's rates were higher since he was in the Seattle office, or both.²²

e. Perkins Routinely Changed its Hourly Rates, but Did not Notify its Clients About the Rate Changes. Perkins admitted it routinely changed its timekeepers' rates at least annually. Mr. Lutz testified that Perkins changed its timekeepers' rates at least annually.²³ Further, Mr. Lutz and Perkins repeatedly represent clients over multiple years.²⁴

Despite changing its rates at least once per year and representing clients over multiple years, Perkins did not communicate its timekeepers' rate changes to its clients, including Ridgetop. First, Perkins' invoices do not notify its clients about rate changes. The invoices Perkins used to bill Ridgetop are at CP 33–63. The invoices, however, did not show the hourly rates for the attorney or a line-item charge for each service performed. The

²² CP 1865:10 – 1869:11.

²³ CP 1867:7 – 21.

²⁴ CP 1915:9–17.

invoices merely have the date work was performed, the timekeeper performing the work, the number of hours the timekeeper charged and a description of the services. At the end of the invoice there is a lump sum charge for all the timekeepers' services.²⁵ Perkins' admits there is no way to determine each timekeeper's hourly rate.²⁶

This is a serious matter because Perkins typically uses this invoice format when billing its clients. Perkins generates prebills and the prebills show the invoice format by code.²⁷ The Ridgetop prebills show Perkins used invoice format "4C" when billing Ridgetop, which is the billing format that does not disclose the hourly rate each timekeeper charges or a line-item charge for each service provided.²⁸ This 4C billing format is "the most frequently used bill format at Perkins" or at least "one of several that are the most prevalent," but Mr. Lutz believes "it's actually the most prevalent."²⁹ Perkins still uses this 4C invoice format regularly and Perkins understands it does not disclose what each timekeeper's hourly rate is and it does not have a line item charge for each

²⁵ CP 33-63 and CP 117:10-13.

²⁶ CP 1905:8-21; and VRP Trial Testimony, Vol.II, 217:15 - 218:23.

²⁷ CP 1901:19 - 1902:17; and Deposition Exhibit 38, CP 1987-94.

²⁸ CP 1902:14-17; and VRP, Trial Testimony, Vol. II, 217:15 - 218:20.

²⁹ CP 1904:13-16; and VRP, Trial Testimony, Vol. VI, 625:9 - 626:18.

service provided.³⁰ Mr. Lutz and Perkins admit it would be relatively easy to change the invoice format to disclose each timekeeper's hourly rate.³¹

Second, Perkins did not take any other steps to notify its clients about rate changes. For instance, Mr. Lutz and Perkins did not notify its clients about its timekeepers' individual rates or send its clients an hourly rate sheet, unless asked to do so by the client;³² Mr. Lutz did not have a standard practice in place to notify his clients about rate charges or increases;³³ and Mr. Lutz is unaware whether Perkins had or has a standard practice in place to notify its clients about rate changes.³⁴

Ridgetop was no exception to this practice. Not only did Perkins change Mr. Lutz's rate from the \$340 per hour stated in Perkins' contract to \$345 per hour and changed Mr. Berenstain's rate from the \$410 per hour upper limit in the contract to \$440 without notifying Ridgetop, but it also changed timekeepers Nick Gellert's

³⁰ CP 1904:25 – 1905:17.

³¹ CP 1914:16 – 1915:4; and VRP, Trial Testimony, Vol. VI, 625:9 – 24.

³² CP 1867:22 – 1868:13.

³³ CP 1869:12–19.

³⁴ CP 1868:21–25.

and Sally Morgan's rates between 2003 and 2004.³⁵ Perkins did not notify Ridgetop about these changes.³⁶

f. Perkins Admitted Several Other Facts Relevant to Ridgetop's CPA Claim. In addition to the facts referenced above, Perkins, in its Reply to Ridgetop's Counterclaim, also admitted the following facts:

- Perkins provided legal services to Ridgetop.³⁷
- Perkins is in the business of providing legal services.³⁸
- The billing of legal services is considered "entrepreneurial" under Washington's Consumer Protection Act.³⁹
- Perkins' billing practices were committed in the course of its business.⁴⁰
- Perkins advertises to the public in general and holds itself out as a legal services provider.⁴¹
- Perkins agreed to provide legal services to Ridgetop.⁴²

³⁵ CP 921-22.

³⁶ VRP, Trial Testimony, Vol. VI, 624:16 – 625:8.

³⁷ CP 14, ¶7.1.

³⁸ CP 14, ¶7.2.

³⁹ CP 17, ¶9.2.

⁴⁰ CP 17, ¶9.3.

⁴¹ CP 17, ¶9.4.

⁴² CP 18, ¶9.5.

3. Procedural Facts

Perkins waited over three years after issuing its final statement of account to Ridgetop before it sued Ridgetop for \$54,192.73 in alleged unpaid fees and costs, plus late charges.⁴³

Ridgetop answered Perkins' complaint and then moved to amend its answer and counterclaim to add, among other things, a consumer protection act counterclaim.⁴⁴ The amendment was allowed and Ridgetop's Amended Answer and Counterclaim asserted nine affirmative defenses and a counterclaim: (1) estoppel; (2) waiver; (3) compromise and settlement; (4) accord and satisfaction; (5) substituted agreement; (6) recoupment based on unreasonable fees; (7) public policy violations and unconscionability; (8) statute of limitation; and (9) laches. Ridgetop also asserted a counterclaim against Perkins for: (1) fee forfeiture and disgorgement/equitable tolling; and (2) violating Washington's Consumer Protection Act (CPA).⁴⁵

Ridgetop then engaged in discovery and first learned that Perkins had changed its timekeepers' rates. Ridgetop propounded written discovery and Perkins supplied its answers on April 30,

⁴³ CP 5, ¶5.1.

⁴⁴ CP 899 – 903.

⁴⁵ CP at 9 – 11.

2008.⁴⁶ Interrogatory No.3 asked Perkins to state each timekeeper's rate, any change to those rates; and the dates any change occurred.⁴⁷ After stating its objection to the interrogatory, Perkins answered the interrogatory and disclosed for the first time that it had billed \$345 per hour for Mr. Lutz's time;⁴⁸ \$440 per hour for Mr. Berenstain's time;⁴⁹ and that it changed Mr. Gellert's hourly rate and Ms. Morgan's hourly rate between 2003 and 2004.⁵⁰

Ridgetop then brought a partial summary judgment motion regarding Perkins' changing its rates and to have Perkins' account stated claim dismissed.⁵¹ Perkins opposed Ridgetop's partial summary judgment motion and, in its opposition, re-characterized its obvious rate changes and said, "invoices sent to Ridgetop were calculated using hourly rates for two attorneys (Jerry Lutz and Ron Berenstain) that were not consistent with the written contract."⁵² Perkins then "corrected" Ridgetop's account after Perkins had charged Ridgetop using the changed rates; Ridgetop had fully paid invoices based on the changed rates; and Perkins had commenced litigation that sought to collect unpaid fees based on the changed

⁴⁶ CP 920 – 926.

⁴⁷ CP 920.

⁴⁸ CP 922.

⁴⁹ CP 921.

⁵⁰ CP 921 – 922.

⁵¹ CP 932 – 955.

⁵² CP 957:4 – 7; and CP 966:16 – 967:20.

rates.⁵³ In doing so, Perkins admitted Ridgetop had fully paid invoices that used the changed rates.⁵⁴ Perkins then argued it did not have to disclose its rate changes for its timekeepers' time unless requested by the client.⁵⁵ Perkins supported its argument by quoting only the third sentence of RPC 1.5(b). In making this argument, Perkins totally ignored the second sentence of RPC 1.5(b) that expressly requires attorneys to notify their clients about changes in billing rates ("Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.") Perkins' opposition also argued extensively that there was no consumer protection act violation.⁵⁶ Perkins also agreed to "amend its complaint to drop its account stated claim."⁵⁷ Finally, Perkins brought a cross motion for summary judgment that sought, among other things, to summarily dismiss Ridgetop's consumer protection act counterclaim and argued that these rate changes without notification were an isolated incident and Ridgetop could not,

⁵³ CP 957:7 – 9; and CP 967:20 – 968:9.

⁵⁴ CP 968:1 – 3 ("The invoicing mistakes resulted in charges of \$1263.00 over the contract on those invoices that Ridgetop has paid in full...").

⁵⁵ CP 958: 9–12 ("Under the express terms of RPC 1.5(b), the detail that Ridgetop claims was necessary is only required upon request of the client."); and CP 972:1 – 973:13.

⁵⁶ CP 974 – 978.

⁵⁷ CP 978.

therefore, meet the public interest element of a consumer protection act violation.⁵⁸

Ridgetop replied and withdrew its summary judgment motion on its consumer protection act counterclaim so it could be heard together with Perkins' cross motion.⁵⁹ In its reply, Ridgetop admitted, as it must, that Perkins' Contract gave Perkins the unfettered right to change its billing rates and that there was no concomitant requirement that Perkins notify its clients about any rate change.⁶⁰ Ridgetop also implored the then individual calendar judge, Judge Dean Lum, to grant partial summary judgment as to the amounts charged using the changed rates, and Ridgetop argued that Perkins' offer to correct its error after a summary judgment motion had been filed was too late.⁶¹

Moreover, Ridgetop argued it was also entitled to partial summary judgment on Perkins' account stated claim and that Perkins' offer to amend its complaint and drop the account stated claim was unavailing. First, Ridgetop argued any dropping of the account stated claim would be without prejudice and Ridgetop was

⁵⁸ CP 985 – 1008.

⁵⁹ CP 1237:21 – 24.

⁶⁰ CP 1242:18 – 1243:13.

⁶¹ CP 1243:14 – 1244: 10.

entitled to a dismissal with prejudice.⁶² Second, Ridgetop argued it would be the prevailing party on Perkins' account stated claim and would be ultimately entitled to fees for having had Perkins' account stated claim dismissed with prejudice.⁶³

Judge Lum denied Ridgetop's partial summary judgment motion.⁶⁴ Despite denying Ridgetop's partial summary judgment motion, Judge Lum's order dismissed Perkins' account stated claim with prejudice.⁶⁵ It also incorporated Perkins' unilateral "stipulation" that it would reduce its claim by the amounts it charged Ridgetop using the changed rates.⁶⁶ Judge Lum then concluded the terms of the Contract and the basis of the rate of the fee were fairly and reasonably disclosed to Ridgetop within the meaning of RPC 1.5(a) and (b).⁶⁷ Judge Lum did not, however, conclude Perkins' conduct in not notifying Ridgetop about changes in rates after the Contract was entered into comported with RPC 1.5(b).⁶⁸

Ridgetop then propounded written discovery to Perkins seeking evidence that was only relevant to support its consumer protection act claim and was totally irrelevant to Perkins' contract claim. On

⁶² CP 1247:22 – 1248:7.

⁶³ CP 1248:8 – 18.

⁶⁴ CP 165 – 167.

⁶⁵ CP 166, ¶2.

⁶⁶ CP 166, ¶3.

⁶⁷ CP 166 – 167, ¶4.

⁶⁸ CP 166 – 167.

July 18, 2008, Ridgetop propounded its third set of written discovery to Perkins and sought to discover what clients Perkins serviced in Washington where it changed its fees during the representation, but did not notify the client about the rate change.⁶⁹ Perkins responded and refused to answer any interrogatory or produce any document responsive to Ridgetop's discovery requests.⁷⁰

On January 12, 2009 the individual calendar judge was changed from Judge Dean Lum to Judge Regina Cahan.⁷¹

After the individual calendar judge was changed, Ridgetop brought a motion to compel responses to its third discovery request because Perkins did not answer a single interrogatory or produce a single document that was responsive.⁷² Perkins not only opposed Ridgetop's motion to compel, but Perkins also brought a cross motion for protective order.⁷³ Ridgetop replied and strenuously asserted Ridgetop was entitled to this discovery because Perkins asserted in its cross motion for summary judgment that its rate changes in the Ridgetop matter without Ridgetop having been

⁶⁹ CP 1347 – 1356.

⁷⁰ CP 1358 – 1367.

⁷¹ CP 1256.

⁷² CP 1294 – 1370.

⁷³ CP 1485 – 1497.

notified was an isolated case and, therefore, Ridgetop could not meet its burden to show a public interest element essential to its consumer protection act counterclaim.⁷⁴ Perkins also filed a reply supporting its motion for protective order.⁷⁵ The new individual calendar judge deferred ruling until after she decided Perkins' partial summary judgment motion seeking to summarily dismiss Ridgetop's consumer protection act claim, but prevented Perkins from arguing the public interest element in its partial summary judgment motion.⁷⁶

Perkins then immediately filed a renewed partial summary judgment motion seeking to dismiss Ridgetop's counterclaims.⁷⁷ Consistent with Judge Cahan's ruling, Perkins' arguments related to Ridgetop's consumer protection act counterclaim were focused "on the absence of an unfair or deceptive act or practice and the absence of cognizable injury."⁷⁸ Judge Cahan granted partial summary judgment and involuntarily and summarily dismissed Ridgetop's consumer protection act counterclaim.⁷⁹

⁷⁴ CP 1512 – 1516.

⁷⁵ CP 1517 – 1521.

⁷⁶ CP 1522 – 1523.

⁷⁷ CP 1524 – 1547.

⁷⁸ CP 1542:18–21.

⁷⁹ CP 1668 – 1670, *See* CP 1669, ¶3.

Since Perkins' account stated claim was dismissed with prejudice and Ridgetop's counterclaims were dismissed with prejudice, the only matter that was tried to the jury was Perkins' contract claim. Perkins prevailed on the contract action and was awarded \$50,864.23.⁸⁰ This amount was after Perkins reduced its claim by the amount it charged Ridgetop based on the rate changes to Mr. Lutz's and Mr. Berenstain's time. The trial judge reserved judgment on interest, attorneys' fees, and costs.⁸¹

Perkins moved for an attorney fee and cost award pursuant to a prevailing party provision in the Contract.⁸² Ridgetop filed a response opposing Plaintiff's fee and cost request, and it argued Perkins needed to segregate its fee request between its successful contract claim, its unsuccessful account stated claim, and Ridgetop's consumer protection act claim that does not provide for fees for a successful defense and then to offset Perkins' fee request with Ridgetop's fees for having successfully defended Perkins' account stated claim.⁸³ Ridgetop then filed its own motion for attorney fees on Plaintiff's unsuccessful account stated claim seeking \$10,524 in attorney fees and costs for prevailing on

⁸⁰ CP 2163-65

⁸¹ CP 2163-65.

⁸² CP 2150-58.

⁸³ CP 2166-78; *See* CP 2166 - 2177, ¶2,

Plaintiff's account stated claim based on the Contract's attorney fee provision that allowed fees on any collection action.⁸⁴ The trial judge refused to entertain Ridgetop's request that Perkins segregate its attorney fees on the respective claims.⁸⁵

Ultimately the trial judge awarded all Perkins' fees for the underlying litigation, except \$1,900. This decision awarded Perkins all its fees for defending Ridgetop's consumer protection act claim. The trial judge entered findings of fact and conclusions of law that found "the defenses and counterclaims were inextricably intertwined with each other and with the collection claims as well — as were the legal services provided to the parties in connection with the collection claims, defenses, and counterclaims."⁸⁶ It then found that Perkins' entire fees, including its resisting discovery related solely to Ridgetop's consumer protection act claim and its summary judgment motions directed toward Ridgetop's consumer protection act counterclaim, were reasonable and awarded all but \$1,900 to Perkins.⁸⁷ The court denied Ridgetop's motion for attorney fees on Perkins' account stated claim.⁸⁸ Ridgetop timely appealed.

⁸⁴ CP 2273–81.

⁸⁵ CP at 2315.

⁸⁶ CP 2405:7–10.

⁸⁷ CP 2409 – 2410.

⁸⁸ CP at 2399 – 2400.

C. Argument

1. Standards of review.

The proceedings challenged below involve only Ridgetop's consumer protection act claim, namely the trial court erred when it: (A) summarily dismissed Ridgetop's consumer protection act claim on summary judgment; and (B) awarded Perkins' all its attorney fees after trial without segregating fees for Ridgetop's consumer protection act claim, for which Perkins was not entitled to fees and for Perkins' unsuccessful account stated claim. As such, there are different review standards.

First, appellate courts review orders granting summary judgment *de novo* taking all facts and inferences in the light most favorable to the nonmoving party.⁸⁹ This Court must, therefore, review the trial court's order granting Perkins' partial summary judgment that summarily dismissed Ridgetop's consumer protection act claim *de novo* and must take all facts and draw all inferences in Ridgetop's favor.

Second, a party's entitlement to attorney fees is a legal issue reviewed *de novo*.⁹⁰ Here, there are three attorney fee entitlement

⁸⁹ *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (2009).

⁹⁰ *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009).

issues that should be reviewed *de novo*: (A) Perkins' entitlement to attorney fees for its successful consumer protection act defense; (B) Perkins' entitlement to attorney fees on its unsuccessful account stated claim; and (C) Ridgetop's entitlement to attorney fees for its successful defense to Perkins' account stated claim.

Third, attorney fee amounts are discretionary and are reversed only if the trial court abuses its discretion in determining the amount.⁹¹ A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds, or if no reasonable person would take the position adopted by the trial court.⁹² Here, this Court should review the attorney fee amount awarded under an abuse of discretion standard.

Finally, the trial court also found facts and made legal conclusions when it entered its fee award. Appellate courts reverse trial court findings if the findings are not supported by substantial evidence in the record.⁹³ Legal conclusions are reviewed *de novo*.⁹⁴ Legal conclusions are conclusions that follow, through the process of legal reasoning, when the law as applied to the facts as

⁹¹ *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000).

⁹² *Mayer*, 102 Wn. App. at 79.

⁹³ *Miles v. Miles*, 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005).

⁹⁴ *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

found by the court.⁹⁵ Findings of fact that appear in the conclusions of law, and vice-versa, are mislabeled and will be analyzed under the standard appropriate to the correct label.⁹⁶ Findings of fact that have legal ramifications are conclusions of law and are reviewed *de novo*.⁹⁷ Here, the trial court's findings should be reviewed under the substantial evidence standard and its legal conclusion reviewed *de novo*.

2. The trial court erred when it dismissed Ridgetop's consumer protection act claim on summary judgment because genuine fact issues needed to be tried regarding Perkins' admitted rate changes Ridgetop and Perkins' failure to notify Ridgetop that Perkins changed its rates.

The trial court erred when it dismissed Ridgetop's consumer protection act claim on summary judgment because genuine fact issues needed to be tried regarding Perkins' admitted rate changes and its failure to notify Ridgetop about the rate changes. In order to succeed on a consumer protection act claim, a plaintiff needs to show (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a

⁹⁵ *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986) (“[i]f the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.”).

⁹⁶ *Winans v. Ross*, 35 Wn. App. 238, 240 n. 1, 666 P.2d 908 (1983); *Miles* at 70.

⁹⁷ *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).

person's business or property, and (5) causation.⁹⁸ Perkins' summary judgment motion moved to dismiss Ridgetop's consumer protection act claim on only two grounds: "the absence of an unfair or deceptive act or practice and the absence of cognizable injury."⁹⁹ To be sure these were the only two grounds upon which Perkins challenged Ridgetop's consumer protection act claim, the trial court explicitly ruled Perkins could not argue the public interest element in its summary judgment motion because the trial court had a pending discovery motion that needed to be decided before that element could be decided.¹⁰⁰ Moreover, Perkins admitted in its answer that Perkins was in the business of providing legal services;¹⁰¹ that its billing for legal services was entrepreneurial;¹⁰² that Perkins' billing practices were committed in the course of its business;¹⁰³ and that Perkins advertises to the public in general and holds itself out as a legal services provider.¹⁰⁴ Because there were genuine fact issues that needed to be decided on both these challenged consumer protection act elements, summary judgment was inappropriate and should be reversed.

⁹⁸ *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009).

⁹⁹ CP 1542:20–21.

¹⁰⁰ CP 1522–23.

¹⁰¹ CP at 14, ¶7.2.

¹⁰² CP at 17, ¶9.2.

¹⁰³ CP at 17, ¶9.3.

¹⁰⁴ CP at 17, ¶9.4.

a. Perkins' changing its rates without notifying its clients coupled with Perkins invoices that render it impossible for Perkins' clients to detect rate changes is an unfair and deceptive act or practice

First, there were fact issues whether Perkins' regular rate changes coupled with its invoices that hid any rate changes or overbilling from its clients, including Ridgetop, had the capacity to deceive a substantial portion of the public. "An act or practice is unfair or deceptive for purposes of the CPA if it has the capacity to deceive a substantial portion of the public."¹⁰⁵ A plaintiff does not have to show the defendant intended to deceive, only that it had the capacity to deceive a substantial portion of the public.¹⁰⁶

Perkins' billing practices were unfair and deceptive because they concealed rate changes and overbilling. Lawyers are required to communicate any rate changes to their clients¹⁰⁷ Perkins used a standard form contract that explicitly gave it the ability to change its timekeepers' rates, and the Contract does not require Perkins to notify its clients about any rate changes. Perkins admitted it routinely changed its timekeepers' rates at least once every year and admitted it represents many clients over multiple years.

¹⁰⁵ *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 845, 942 P.2d 1072 (1997).

¹⁰⁶ *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

¹⁰⁷ RPC 1.5(b).

Perkins also admitted its most common invoice format produces invoices that make it impossible for a client to determine the individual timekeeper's rates and, therefore, whether the rates changed. The invoices, therefore, do not notify the clients about any rate changes. Moreover, Perkins had no other practice in place to notify its clients when a timekeeper's rate changed. Perkins' billing practices, therefore, concealed each individual timekeeper's hourly rates and made any overcharging or rate change undetectable by Perkins' clients.

Viewing the facts and reasonable inferences in the light most favorable to Ridgetop, a reasonable person could conclude that Perkins' acts and practices – routinely changing its timekeepers' rates and using invoices that make it impossible for the client to detect the rate changes - had the capacity to deceive a substantial portion of the public.

b. Ridgetop suffered cognizable damages that were proximately caused by Perkins' unfair and deceptive act and practice

Ridgetop has suffered cognizable injury to its business and property that was caused by Perkins' unfair and deceptive billing practices. Washington's CPA requires a plaintiff to show the unfair or

deceptive practice caused “injury.”¹⁰⁸ “Injury’ is distinct from ‘damages.’”¹⁰⁹ “Monetary damages need not be proved; unquantifiable damages may suffice.”¹¹⁰ Causation entails a proximate cause analysis that “is a fact question to be decided by the trier of fact.”¹¹¹ The claimant must prove “that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.”¹¹² Paying an invoice “may be considered with all other relevant evidence on the issue of proximate cause.”¹¹³ Attorney fees expended or incurred as well as business disruption can also constitute injury.¹¹⁴

Ridgetop established causation. Helene Behar’s Declaration Opposing Perkins’ Summary Judgment Motions made clear that Ridgetop would not have paid Perkins’ invoices at the rates it was charging had Perkins notified Ridgetop that Perkins had changed its rates or had Perkins formatted its invoices to make it apparent that it had changed its rates.¹¹⁵

Ridgetop also established injury to its property or business. First, Ridgetop actually paid Perkins’ invoices.¹¹⁶ Second, Perkins’ invoices

¹⁰⁸ *Panag*, 204 P.3d at 899.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 900.

¹¹¹ *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007).

¹¹² *Panag*, 204 P.3d at 900; *citing Indoor Billboard*, 162 Wn.2d at 84.

¹¹³ *Indoor Billboard*, 162 Wn.2d at 84.

¹¹⁴ *Panag*, 204 P.3d at 902.

¹¹⁵ CP 350 – 352, ¶¶ 3 and 5.

¹¹⁶ CP 968:1 – 3 (“The invoicing mistakes resulted in charges of \$1263.00 over the contract on those invoices that Ridgetop has paid in full...”).

provided they were due upon receipt and for onerous consequences if not timely paid.¹¹⁷ For example, Perkins could withdraw and late charges could accrue at 12% per annum from the invoice date.¹¹⁸ Ridgetop paid these invoices because Perkins never notified Ridgetop it had changed its rates and concealed the rate changes by the way it formatted its invoices. Paying these invoices constitutes injury to Ridgetop's property. Third, Ridgetop has to expend attorney fees to discover Perkins' overcharging and to get Perkins to correct it¹¹⁹ Finally, Ridgetop has had opportunity costs and lost resources and profits resulting from Perkins' unfair and deceptive actions.¹²⁰

3. The trial court erred when it failed to require Perkins to segregate its attorney fee request between its successful breach of contract claim, for which attorney fees were legally awardable, and its successful consumer protection act defense, for which attorney fees were not legally awardable.

a. Perkins is only entitled to attorney fees for its successful contract action.

Perkins is entitled to attorney fees only for its successful contract action. This is a fee entitlement issue and is reviewed *de novo*.¹²¹ In a contract action, the prevailing party is entitled to attorney fees if the contract provides for such an award.¹²²

¹¹⁷ CP 351 - 352, ¶3

¹¹⁸ CP 351 - 352, ¶3 (a) - (c); and CP 68.

¹¹⁹ CP 352, ¶ 6

¹²⁰ CP 352, ¶ 8.

¹²¹ *Boguch v. The Landover Corporation*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009).

¹²² RCW 4.84.330

Ridgetop concedes, as it must, Perkins was entitled to attorney fees for its successful contract action against Ridgetop.

b. Perkins is not entitled to attorney fees for its successful consumer protection act defense.

Just because Perkins was entitled to attorney fees for its successful contract action does not end the relevant inquiry because Perkins was not entitled to attorney fees for its consumer protection act defense. Even when different legal theories have an interrelationship between their basic facts, a trial court is still required to “separate the time spent on those theories essential to the CPA and the time spent on legal theories relating to the other causes of action.”¹²³ Here, there was no separation. “The amount awarded for attorney fees must be remanded for further consideration by the trial court.”¹²⁴

i. There is no basis to award a party attorney fees for a successful consumer protection act defense.

There is no basis to award a successful defendant attorney fees under the consumer protection act. Attorney fees under the consumer protection act are statutory.¹²⁵ The statute is clear that

¹²³ *Travis v. Washington Horse Breeders Association, Inc.*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988).

¹²⁴ *Travis*, 111 Wn.2d at 411.

¹²⁵ RCW 19.86.090

“only the claimant is authorized to recover attorney’s fees.”¹²⁶

Perkins is not the claimant under the consumer protection act statute. Ridgetop is the claimant. Perkins was not, therefore, entitled to attorney fees for its defending Ridgetop’s consumer protection act counterclaim.

ii. Ridgetop’s consumer protection act claim was not on the contract because it did not allege Perkins breached a specific contract provision; rather it alleged Perkins breached a duty imposed by a statute that was external to the contract.

Ridgetop’s consumer protect act claim was not on the contract because it did not allege Perkins breached a specific contract provision; rather, it alleged Perkins breached a duty imposed by a statute that was external to the contract.

A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue herein only if a party brings a “claim on the contract,” that is, only if a party seeks to recover under a specific contractual provision. If a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship. (Citations omitted).

“[A]n action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute.” Stated differently, an action “sounds in contract when the act

¹²⁶ *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603, 681 P.2d 242 (1984); *see, also, Travis*, 111 Wn.2d at 409 (“Only a successful plaintiff is entitled to fees under the statute.”).

complained of is a breach of a specific term of the contract, without reference to the legal duties imposed by law on that relationship.” (Citations omitted). “If the tortious breach of a duty, rather than a breach of a contract, gives rise to the cause of action, the claim is *not* properly characterized as breach of contract” (emphasis in original). (Citations omitted).¹²⁷

Here, Ridgetop’s consumer protection act counterclaim was not an action on Perkins’ Contract; rather, it was based on an independent statutory duty under the consumer protection act. Ridgetop’s consumer protection act claim alleges Perkins changed its rates for Mr. Lutz’s and Mr. Berenstain’s time, as well as Mr. Gellert’s and Ms. Morgan’s time, without notifying Ridgetop. Moreover, Perkins’ invoices were formatted in a manner that made rate changes impossible to detect. Ridgetop concedes, as it conceded many times before the trial court, that Perkins’ Contract entitled Perkins to change its rates without notifying Ridgetop or Perkins’ other clients.¹²⁸ Perkins’ Contract also did not require Perkins to disclose its hourly rates to its clients. Ridgetop’s consumer protection act allegations, therefore, do not allege Perkins breached a specific provision in Perkins’ Contract; rather, it alleges Perkins actions, while allowed by Perkins’ Contract, were

¹²⁷ *Boguch*, 153 Wn. App. at 615–16 (citations omitted).

¹²⁸ CP 128, “Basis for Fees” (third full paragraph) entitling Perkins to change its rates, but there is no contract provision requiring Perkins to notify its clients about any rate change.

nonetheless unfair and deceptive and violated the consumer protection act. Since Ridgetop's consumer protection act allegations are based on a statutory duty external to the Perkins' Contract, Ridgetop's consumer protection act claim cannot be based on the Perkins' Contract and Perkins is not entitled to its attorney fees for defending Ridgetop's consumer protection act counterclaim

c. The trial court erred when it failed to require Perkins to segregate its time between its successful contract action and its consumer protection act defense.

Since Ridgetop's action is not based on Perkins' Contract, the trial court erred when it failed to require Perkins to segregate its time between its successful contract action and its consumer protection act defense.

"If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues." This is true even if the claims overlap or are interrelated. (Citations omitted).The burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such fees." (Citations omitted).¹²⁹

Here, the trial court erred in failing to require Perkins, the party who had the burden to establish its entitlement to attorney fees, to

¹²⁹ *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004).

segregate its time between its successful contract claim, for which it was entitled to fees, and its consumer protection act defense, for which it was not entitled to fees.

- 4. The trial court's conclusion that Ridgetop's counterclaims, including Ridgetop's CPA counterclaim, were inextricably intertwined and that segregation is not required is erroneous and not supported by substantial evidence.**
 - a. The trial court erroneously concluded Ridgetop's counterclaims were inextricably intertwined with each other and with the collection claims as well—as were the legal services provided to the parties in connection with the collection claims, defenses and counterclaims.**

The trial court erroneously concluded that Ridgetop's counterclaims, including Ridgetop's CPA counterclaim, were inextricably intertwined with each other and with the collection claims as well. There is a narrow exception to the rule that segregation is required, but only if “no reasonable segregation... can be made.” It is unjust not to require segregation and allow a party to recover virtually all its attorney fees because segregation would be complex.¹³⁰ This inquiry has been previously

¹³⁰ *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 850, 726 P.2d 8 (1986).

characterized as a conclusion.¹³¹ It is, therefore, subject to *de novo* review.

Here, contrary to the trial court's conclusions, the record is clear that Perkins spent substantial time defending Ridgetop's consumer protection act claim and that such defense was totally independent from Perkins' contract action. For instance, Perkins filed an initial summary judgment motion on May 27, 2008 that devoted several pages to arguing Ridgetop's consumer protection act counterclaim should be dismissed.¹³² Ridgetop then undertook discovery related solely to the consumer protection act's public interest element.¹³³ Specifically, this discovery related to other Perkins' clients who had their rates changed, were invoiced using the same invoices Perkins used to invoice Ridgetop, and who were otherwise not notified by Perkins about rates having been changed. This discovery was totally unrelated to Perkins' contract action and related solely to Ridgetop's consumer protection act counterclaim. Perkins resisted Ridgetop's discovery.¹³⁴ Ridgetop brought a motion to compel and Perkins brought a cross-motion for

¹³¹ *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 344, 54 F.3d 665 (2002) ("Behr also challenges the trial court's *conclusion* that the claims were too intertwined to segregate the time spent on the CPA claims from other claims." (emphasis added))

¹³² CP 1005 – 1008.

¹³³ CP 1347 – 1356.

¹³⁴ CP 1358 – 1367.

protective order.¹³⁵ The trial court ruled on Ridgetop's motion to compel and Perkins' cross motion for protective order.¹³⁶ Perkins also filed a subsequent partial summary judgment motion and in both its moving brief and reply spent substantial time arguing Ridgetop's consumer protection act claim should be dismissed because Ridgetop could not prove an unfair or deceptive practice or legally recognized injury proximately caused by Perkins' act or practice.¹³⁷ These fees relate solely to Ridgetop's consumer protection act claim and could be segregated.

b. The trial court erroneously concluded that segregation of fees among legal issues is not required in this case because the totality of Ridgetop's side of the case (including defense arguments and counterclaims) was in defense of the collection action initiated by Perkins Coie.

For the same reasons as those expressed in the immediately preceding subsection, the trial court erroneously concluded that fee segregation among legal theories was not required in this case because Ridgetop's entire case defended Perkins' contract action.

c. Fee segregation in this case should be required in order to promote the public policy behind the consumer protection act.

¹³⁵ CP1294 – 1370; 1485 – 1497; and 1512 – 1521.

¹³⁶ CP 1522 – 1523.

¹³⁷ CP 1542 – 1547; and 1643 – 1645.

Fee segregation in this case should be required in order to promote the consumer protection act's policy. The policy behind the fee shifting provisions in the consumer protection act reflects a legislative purpose to ensure adequate representations for aggrieved claimants.¹³⁸ The policy is "aimed at helping the victim file the suit and ultimately serves to protect the public from further violations."¹³⁹ To promote this important public policy it is critical that trial courts do not expressly or impliedly award attorney's fees to a successful defendant in a consumer protection act suit. In a similar situation and to promote the same policy, this Court refused to allow a developer who successfully defended some Condominium Act claims to offset its attorney fees for its successful defense against the attorney fees awarded to the condominium owner's association.¹⁴⁰

5. The trial court abused its discretion when it awarded Perkins attorney fees related solely to discovery regarding the consumer protection act's public interest element.

The trial court abused its discretion when it awarded Perkins attorney fees related solely to discovery regarding Ridgetop's

¹³⁸ *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 595, 675 P.2d 193 (1983).

¹³⁹ *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 568, 825 P.2d 714 (1992).

¹⁴⁰ *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 713, 9 P.3d 898 (2000).

consumer protection act's public interest element. A court abuses its discretion when it awards a prevailing party attorney fees for discovery that relates solely to an issue for which there is no attorney fee entitlement.¹⁴¹ Here, Ridgetop's third written discovery requests to Perkins related solely to Ridgetop's consumer protection act's public interest element. It focused entirely on other Washington clients who had their rates changed without having been notified.¹⁴² Because this discovery related solely to Ridgetop's consumer protection act claim, and Perkins was not entitled to attorney fees for defending Ridgetop's consumer protection act claim, the trial court abused its discretion in awarding Perkins its attorney fees for this discovery.

6. The trial court erred when it failed to require Perkins to segregate its attorney fee request between its successful breach of contract claim, for which attorney fees were legally awardable, and its unsuccessful account stated claim, for which attorney fees were not legally awardable.

a. Perkins was not entitled to attorney fees for its unsuccessful account stated claim.

Perkins was not entitled to attorney fees for its unsuccessful account stated claim. When determining reasonable attorney fees

¹⁴¹ *Mayer v. City of Seattle*, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000) (holding a trial court abused its discretion in awarding the prevailing party attorney fees related solely to fault apportionment when the only basis to award fees was the Model Toxic Control Act (MTCA) and fault apportionment was irrelevant to the MTCA claim).

¹⁴² CP 1347 – 1356.

the trial court is required to “limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims...”¹⁴³ Moreover, the contract fee-shifting provision was a unilateral fee provision that only allowed fees to be awarded to Perkins.¹⁴⁴ RCW 4.84.330 transformed this fee-shifting provision into a prevailing party fee provision. Perkins did not prevail on its account stated claim because it was dismissed with prejudice. The trial court, therefore, was required to discount Perkins’ time for unsuccessfully pursuing its account stated claim that was ultimately dismissed with prejudice.

b. The trial court erred when it failed to require Perkins to segregate its time between its successful contract action and its unsuccessful account stated claim.

Since Perkins was not entitled to attorney fees on its unsuccessful account stated claim, the trial court should have segregated the time Perkins’ spent on its unsuccessful account stated claim. Segregation is required between fees spent on successful and unsuccessful claims.¹⁴⁵ The trial court erred in not

¹⁴³ *Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

¹⁴⁴ CP 129.

¹⁴⁵ *Loeffelholz*, 119 Wn. App. at 690.

having Perkins segregate, and in not segregating, the time Perkins spent on its unsuccessful account stated claim.

7. The trial court erred when it failed to offset Perkins' attorney fee award with Ridgetop's attorney fees for Ridgetop's successfully defending Perkins' account stated claim that resulted in a dismissal with prejudice.

Ridgetop was entitled to attorney fees for its successfully defending Perkins' account stated claim. A party is the prevailing party and entitled to attorney fees when they cause another party's claim to be dismissed *with prejudice*.¹⁴⁶ Here, Perkins brought an account stated claim in order to collect its allegedly unpaid fees.¹⁴⁷ Perkins' Contract provided for fees in any action to collect fees or disbursements.¹⁴⁸ RCW 4.84.330 converts this provision into a prevailing party fee provision. Because Ridgetop prevailed on the account stated claim, it was entitled to offset its fees it spent on successfully defending Perkins' account stated collection action against Perkins' fee award for its successful contract action.¹⁴⁹

8. The trial court's finding that the CPA counterclaim, for instance, claimed that Perkins Coie...unfairly or deceptively filed its collection claim after the statute of limitations on Ridgetop's alleged counterclaim expired is not supported by substantial evidence.

¹⁴⁶ *Western Stud Welding, Inc. v. Omark Industries, Inc.*, 43 Wn. App. 293, 295, 716 P.2d 959 (1986).

¹⁴⁷ CP 4, ¶4.2.

¹⁴⁸ CP 129.

¹⁴⁹ *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 772, 115 P.3d 349 (2005); and *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 219-20, 130 P.3d 892 (2006).

The trial court's finding that Ridgetop's consumer protection act counterclaim was solely based on Perkins filing its collection action after Ridgetop's statute of limitation had passed is not supported by the evidence. The evidence has shown that Ridgetop based its consumer protection act counterclaim on Perkins changing its fee without notifying the client.

C. Ridgetop is Entitled to Attorney Fees and Costs under RCW 19.86.090.

Ridgetop is entitled to its attorney fees and costs on appeal pursuant to RAP 18.1, which allows appellate attorney fees if allowed by statute. RCW 19.86.090 requires a court to award a prevailing consumer protection act claimant its attorney fees. Here, Ridgetop brings this appeal to challenge two things: First, the trial court's error in summarily dismissing Ridgetop's consumer protection act counterclaim; and, second, the trial court's error in awarding Perkins its attorney fees for defending Ridgetop's consumer protection act counterclaim. Since the issues in this appeal relate solely to Ridgetop's consumer protection act counterclaim, attorney fees should be awarded to Ridgetop if it prevails on appeal.¹⁵⁰

¹⁵⁰ *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 856, 792 P.2d 142 (1990).

Alternatively, this Court should allow Ridgetop a provisional attorney fee award if it prevails on its consumer protection act counterclaim after remand.

Arguably, the small portion of this brief attributable to the fees for the account stated claim are awardable pursuant to RCW 4.84.330 and the Perkins' Contract that, read together, require a court to award attorney fees to the prevailing party of the account stated claim.

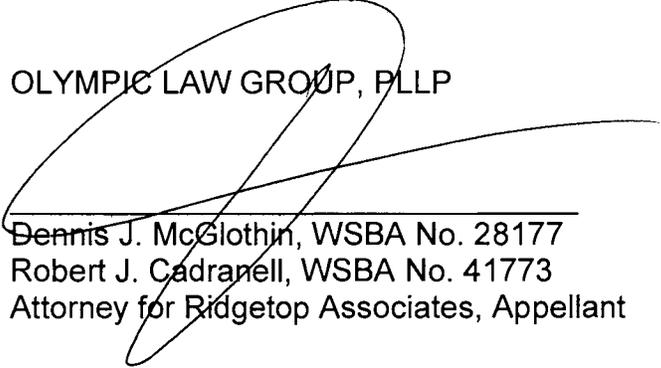
D. Conclusion

The trial court erred in summarily dismissing Ridgetop's consumer protection act counterclaim and in awarding Perkins its fees for defending Ridgetop's consumer protection act counterclaim. Due to these errors, this Court should reverse the trial court's decisions, reinstate Ridgetop's consumer protection act counterclaim, vacate the Findings of Fact and Conclusions of law as well as the Judgment awarding attorney fees and costs, and remand this matter back to the trial court for a trial on Ridgetop's consumer protection act counterclaim as well as a proper segregation of fees related to Perkins' contract claim and its account stated claim and Ridgetop's consumer protection act

counterclaim. Finally, this Court should award Ridgetop its fees and costs pursuant to RAP 18.1 and RCW 19.86.090.

Dated this 26th day of April 2010.

OLYMPIC LAW GROUP, PLLP



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Attorney for Ridgetop Associates, Appellant

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed or caused delivery of a true copy of the foregoing to

Isaac Ruiz

at the regular office or residence thereof

**Dated this 26th day of April, 2010 at
Seattle, Washington.**

Rebecca F. Trevino