

NO. 72801-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MICHAN RHODES and KEYSTONE WINDOWS AND
DOORS, INC.,

Appellants.

v.

EMILY SHARP RAINS and MICHAEL RAINS and
RAINS LAW GROUP,

Respondents,

REPLY BRIEF OF APPELLANTS RHODES/KEYSTONE

Law Offices of Dan R. Young
Attorney for Appellant Rhodes/
Keystone
1000 Second Avenue
Suite 3200
Seattle, WA 98104
(206) 292-8181

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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I. RHODES'S AND KEYSTONE'S RESPONSE TO RESPONDENTS' RESTATEMENT OF THE CASE

Attorney Rains states that she “accepts the actual facts cited in appellants’ statement of the case . . .” (BR 3). Those facts establish the basis for the CPA claims of Keystone and Ms. Rhodes.

Attorney Rains tries to deflect scrutiny of her own conduct by pointing to Ms. Rhodes’s own alleged mismanagement: Ms. Rhodes’s alleged failure to meet her fiduciary duties (BR 3); Ms. Rhodes’s “turning a blind eye to the financial aspects of her business” (BR 13); Ms. Rhodes’s being a “bad businessperson” (BR 13); and similar negative comments. While the record before the trial court at the summary judgment motion does not support these allegations, such allegations are nevertheless irrelevant. The CPA cause of action is premised on *Attorney Rains’s* acts and practices, not those of Ms. Rhodes. Arguments of an *ad hominem* nature are not a defense to a CPA claim.

Attorney Rains also argues that “[t]here is no competent evidence in this record that RLG or Rains agreed to work toward any other purpose than is stated in their retainer agreement: to assist Rhodes in winding-up Keystone [footnote omitted]” (BR 4). Section II.A.1 of this Reply amply demonstrates to the contrary.

Several minor inaccuracies in the briefing should also be noted.¹

II. RHODES’S/KEYSTONE’S REPLY RE CPA CLAIMS (BR 9 - 23)

Attorney Rains agrees that the five elements of a CPA claim as set forth in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986), apply to this case (BR 9). She asserts, however, that Ms. Rhodes has failed to establish *any* of the five elements (*id.*). This remarkable argument is without merit.

A. Any Distinction Between (1) Rain Law Group’s (RLG’s) Legal Services and (2) Attorney Rains’s Services as an Employee of Keystone, is Artificial, Lacking Sufficient Factual Support in the Record, and Without Legal Significance.

Attorney Rains claims that Ms. Rhodes/Keystone “consistently elide the distinction between the RLG’s legal services, on one hand, and Rains’ services as a Keystone employee, on the other” (BR 9). Attorney Rains claims that such a distinction is necessary because “different legal rules apply to each under the CPA” (BR 9-10). However, Attorney Rains cites no legal authority in her brief that mentions, applies or supports such a distinction. Ms. Rhodes

¹Attorney Rains mistakenly states that “Keystone stopped paying Rains within just a few months (by September 2011)[,]” referring to CP 84 (BR 6-7). Attorney Rains stopped cashing her checks in September of 2012, not 2011 (CP 236, 566). Appellants’ brief also contains two dating errors: June, 2013 was mentioned instead of June, 2012 (BR 21) and September 8, 2013 was mentioned instead of September 8, 2012 (BR 22).

submitted authority to the contrary (CP 628, ¶ 50).

A respondent must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6); RAP 10.3(b). Arguments that are not supported by any reference to the record or by any citation of authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Griffin v. Department of Social and Health Services*, 91 Wn.2d 616, 630, 590 P.2d 816 (1979) ("Where contentions raised on appeal are not supported by citation of authority [the court] will not consider them unless well taken on their face") (citing *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976)). Nor will the court consider arguments that are inadequately briefed. *Norcom Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011). Therefore, this Court should reject the distinction proffered by Attorney Rains.

1. When Attorney Rains Became an Employee of Keystone is a Disputed Factual Issue.

The relationship between an employer and an employee is based on contract. *Haugen v. Central Lutheran Church*, 58 Wn.2d 166, 168, 361 P.2d 637 (1961). Thus the burden is on the Rains defendants to show when the contractual relationship between

Keystone and Ms. Rains began and ended. The Rains defendants have failed to meet this burden.

On the record before the trial court at the hearing on Attorney Rains's summary judgment motion, it was very unclear when Attorney Rains was hired, when she was working for RLG versus when she was acting as an employee of Keystone, and what her work status was at any given moment.²

For example, Attorney Rains claims in a declaration that she became CFO and general counsel for Keystone on July 5, 2011 (BR 5, CP 83). There is no W-4, employment application, hiring letter or any documentation whatsoever supporting such an assertion.

Indeed, the documented facts are contrary to such assertion. First and foremost, Attorney Rains admitted in her own reply

²It is undisputed that Attorney Rains performed legal work for Ms. Rhodes in the latter's personal capacity, e.g., accompanying Ms. Rhodes to a meeting with Ms. Rhodes's personal bankruptcy attorney (CP 227, ¶ 9); negotiating with the lender on a former personal residence owned by Ms. Rhodes (CP 230, ¶ 20); and advising Ms. Rhodes to put the latter's personal funds into Keystone to keep it going (CP 228, ¶ 12). Of great significance is that Ms. Rhodes reasonably *believed* that Ms. Rains was representing Ms. Rhodes. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (two part test for establishment of an attorney-client relationship: (1) the *subjective* element of whether the client believes that an attorney-client relationship has been formed, and (2) the *objective* element of whether the client's subjective belief is reasonable). In the very least, reasonable minds could differ on the issue of whom Attorney Rains was representing and when, so summary judgment is not appropriate.

declaration that “. . . I do not recall the exact time or date, when Rhodes offered me the position at Keystone” (CP 649). Second, between July 2011 and December 2011, Keystone withheld no federal income tax or social security contributions from payments it made to Attorney Rains (CP 300). Attorney Rains was paid as an independent contractor during this time (CP 301, ¶ 17). From January 2012 to May 2012, Attorney Rains was paid as an employee (CP 300).

In addition, Attorney Rains used her RLG letterhead in written communications with Keystone’s outside counsel and others throughout 2011 and 2012, e.g., on 7-27-11 (CP 351), 8-17-11 (CP 570, 605-6), 8-18-11 (CP 349-50), 2-28-12 (CP 607), 3-20-12 (CP 354), and 5-23-12 (CP 362). Attorney Rains has provided no credible explanation as to why she would be using RLG letterhead if she had closed RLG and was acting solely on behalf of Keystone at the time the above letters were written.³

Moreover, Attorney Rains did not order business cards with her CFO and general counsel titles until December, 2011 (CP 231, ¶ 22). If Attorney Rains had those titles on July 5, 2011, as she claims, why

³Thus on 8-18-11, Attorney Rains may have been giving Ms. Rhodes personal legal advice, and thus representing Ms. Rhodes (CP 230); or acting as an independent contractor on behalf of Keystone as client (CP 570, 605-6); or acting through Rains Law Group (“RLG”) on behalf of Keystone or Ms. Rhodes, or potentially some other client (CP 570, 605-6).

did she wait so long to order business cards reflecting those titles?

Also, RLG billed Keystone for work done on July 5, 2011 (CP 91), the very day Attorney Rains claims she was hired as in-house counsel by Keystone. Attorney Rains provides no explanation for how such a quick transition between operating as RLG and becoming a full-time employee of Keystone arose on the same day.

Finally, the Court of Appeals engages in the same inquiry as the trial court in reviewing a summary judgment order. *Wilson Court Ltd. v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). The appellate court reviews a ruling on a motion for summary judgment based solely on the record before the trial court. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Attorney Rains therefore cannot use the trial court jury instructions or the corresponding jury verdict form to support any factual assertion in her opposition to this appeal of a pre-trial summary judgment order.⁴

⁴Attorney Rains cites the jury instructions (CP 772-73) as referring to two separate periods: (1) the period prior to Emily Rains being hired in-house by Keystone and (2) the period when Emily Rains was employed in-house at Keystone (BR 7). She tries to use the jury instructions and verdict form as the “law of the case” (BR 19). The trial court at the summary judgment hearing did not have before it the jury instructions presented to the jury, nor the jury verdict form. It is therefore improper for the Rains defendants to cite to those jury instructions or verdict form as evidence to support their argument on appeal, which “evidence” was obviously not available to the trial court at the summary judgment hearing.

Accordingly, on the record before the trial court at the summary judgment hearing, there was a material issue of disputed fact regarding the exact time Attorney Rains was acting under RLG and when she was employed by Keystone and in what capacity, e.g., independent contractor or employee.⁵ The trial court should therefore not have made, for summary judgment purposes, any artificial distinction between when Attorney Rains was acting on behalf of RLG and when she was acting as an employee of Keystone.

2. Employees Have No Absolute Exemption from the CPA.

As noted earlier, Attorney Rains's bare assertion that an "employee" is absolutely exempt from the reach of the CPA is without merit. If Attorney Rains's course of conduct was – through deception and unfairness – to *become* an employee of the client without proper disclosures and thereby reap personal gain from her status as a lawyer, surely the law would not cut off liability solely because her conduct was successful and she later achieved the status of an employee. Attorney Rains cites no case holding that employees are exempt from

⁵There is also no evidence that during the time in question RLG was anything other than Emily Rains. "Rains Law Group" sounds impressive, but the name was just another mechanism used to make it appear to unsuspecting potential clients that Attorney Rains had a larger enterprise than she really had.

the reach of the CPA if the five elements of a CPA claim are satisfied. In fact, the legislature intended that “the Consumer Protection Act be liberally construed so that its beneficial purposes may be served. ‘Liberal construction’ is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined.” *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991) (citing *Nucleonics Alliance, Local Union 1-369 v. WPPSS*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984)); RCW 19.86.020. See also, *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (“The CPA, on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in any trade or commerce” [italics added].)

Moreover, the Rains defendants’ claim that because Attorney Rains was privately employed by Keystone for her labor, no CPA claim against her is viable, because RCW 19.86.070 provides that “[t]he labor of a human being is not a commodity or article of commerce.” This claim is without merit. The Rains defendants fail to quote the remainder of RCW 19.86.070, which provides:

Nothing contained in this chapter shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.

RCW 19.86.070. Thus RCW 19.86.070 exempts labor unions from the scope of the CPA. *Ernst Home Center, Inc. v. United Food and Commercial Workers International Union, AFL-CIO, Local 1001*, 77 Wn. App. 33, 46-48, 888 P.2d 1197 (1995); *Brummett v. Washington's Lottery*, 171 Wn. App. 664, 676, fn 16, 288 P.2d 48 (2012), *review denied*, 176 Wn.2d 1022 (2013). The statute does not exempt lawyers or employees of corporations from the reach of the CPA, especially where the lawyer used deceptive means to get hired.

The Rains defendants also overlook the impact of RPC 5.7, which subjects a lawyer to the Rules of Professional Conduct “with respect to the provision of law-related services.” RPC 5.7(a). Examples of law-related services are mentioned in Comment 9 to RPC 5.7 and include “. . . financial planning, accounting, . . . economic analysis . . . tax preparation . . .” Thus all the ethical rules applicable to Attorney Rains and the concerns of the CPA applied when Attorney Rains acted in her role of providing financial services, as well as legal services.

Finally, a person does not have to be a “consumer” to bring an action for violation of the CPA (BR 21). *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 40, 204 P.3d 885 (2009) (it is “not necessary to establish any consumer relationship, express or implied”).

Thus, it was improper for the trial court to grant summary judgment where there were disputed factual issues regarding Attorney Rains's employment and status.

B. Analysis of the Elements of a CPA Claim Shows that the Requirements of all Five Elements Have Been Met.

1. The Rains Defendants Committed Unfair or Deceptive Acts or Practices (BR 9 - 15, 21).

As an initial matter, Rains cites *Lyons v. U.S. Bank NA*, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014) for the proposition that whether conduct is unfair or deceptive is a question of law (BR 11). However, the full quotation from that case is that “Whether *undisputed* conduct is unfair or deceptive is a question of law, not a question of fact” [italics added, citations omitted]. *Lyons*, 181 Wn.2d at 786. Here the conduct alleged to be unfair or deceptive is at least *disputed*; accordingly, whether an unfair or deceptive act or practice occurred is not a legal issue, but a disputed issue of material fact, which precludes the granting of summary judgment on the first element of Ms. Rhodes's CPA claim.⁶

An act or practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. *State v. Pacific Health*

⁶Attorney Rains refers to RLG's “unproven act” (BR 16), but proof is not required in opposing a motion for summary judgment, only admissible evidence giving rise to a reasonable inference that such act occurred.

Center, Inc., 135 Wn. App. 149, 170, 143 P.3d 618, 628 (2006).

Here Ms. Rhodes alleged a number of unfair or deceptive acts or practices: (1) Ms. Rains's advertising and holding herself out as providing expert financial management services, using her status as a lawyer to gain the trust and confidence of Ms. Rhodes, and then using that trust and confidence to the detriment of Keystone and Ms. Rhodes (CP 226, ¶ 6-7; CP 570); (2) Ms Rains's using that trust and confidence to cause Ms. Rhodes to deliver a Keystone check for \$15,000 for legal services, some of which services were never provided, and which were never billed until after this litigation commenced (CP 233-34, ¶ ¶ 29-31); (3) a Rains-controlled company, Rains Strategic Accounting, which later became Rains & Rains, padding bills by creating "duplicate invoices" paid by Keystone (CP 297, ¶ 9); (4) Ms. Rains's promising and advertising expert financial management services, while hiring her sister, a cosmetologist with no experience in accounting, who provided no reports, proper maintenance of financial records or adequate financial management (CP 226, ¶ 7; CP 236, ¶ 26; CP 341, ¶ 6) (Keystone's books were "in a mess"); (CP 340, ¶ 3) (Keystone's financial records were "very poorly maintained") (CP 341, ¶ 6) (no customary and essential reports provided); (5) Ms. Rains' entering into a business transaction with a

client by getting herself hired by Keystone/Ms. Rhodes when representing Ms. Rhodes, and then attempting to take over the company by bravado, bullying and berating others (CP 236-37, ¶ 41; CP 374, ¶ 4); (6) failing to disclose to Keystone/Ms. Rhodes that the company could not afford Ms. Rains's services, nor that of her eponymous companies (CP 233, ¶ 27; CP 299, ¶ 13); (7) Ms. Rains's using the trust and confidence gained through her role as a lawyer to extract from Keystone grossly excessive compensation for herself, her husband and her sister, amounting to nearly a quarter million dollars over a 15-month period (CP 226; CP 228, ¶ 12; CP 300-01, ¶ 16-17; CP 341, ¶ 7); and (8) the failure of Ms. Rains's and the accounting people she hired to inform Keystone/Ms. Rhodes at any relevant time of the financial condition of the company, despite the latter's repeated requests for the company's financial reports, so that Ms. Rhodes could make proper financial decisions (CP 232, ¶ 25-26). All of these allegations were brought to the attention of the trial court ruling on Attorney Rains's motion for partial summary judgment (CP 714).

Attorney Rains claims that "entering 'into a business transaction with a client by getting [yourself] hired' in-house" is "not merely entrepreneurial, but rather [is] integral to practicing law" (BR 12). Not only does Attorney Rains cite no legal authority for such

proposition, but such statement contradicts well-known ethical principles required to be followed by all members of the Washington Bar Association, e.g., RPC 1.8(a); opinion of Ms. Rhodes's expert witness, Mr. Krikorian (CP 624).

Further, Ms. Rhodes's expert witness opined that "[o]nce an attorney-client relationship has been established, the standard for lawyers in Washington is that they are prohibited from participating in business transactions with a client unless the attorney satisfies certain disclosure requirements designed to protect the client's interests. Those requirements are spelled out in RPC 1.8(a)" (CP 625, ¶ 42-43). See also *Rafel Law Grp. PLLC v. Defoor*, 176 Wn. App. 210, 219, 308 P.3d 767, 773 (2013), *review denied*, 179 Wn.2d 1011, 316 P.3d 495 (2014), where this Court observed that RPC 1.8(a) is designed to prevent an attorney, who likely benefits from a considerable advantage when dealing with a client, from exploiting the attorney-client relationship, given that the client should be free to repose a great deal of trust and confidence in the attorney.

Mr. Krikorian further opined that

In the instant case, it is clear that Rains was already the attorney for Ms. Rhodes and Keystone, when she became the "General Counsel" and "CFO" of Keystone. Moreover, the evidence contradicts Rains' contention that she became a salaried employee of Keystone in July of 2011, and "terminated" her practice as an

independent attorney. The inference from the evidence establishes that, at a minimum, Rains wore “two hats” until she became a salaried employee in January of 2012. As such, and in my opinion, Rains owed Ms. Rhodes and Keystone a duty of trust and loyalty well in advance of assuming a position as CFO, General Counsel *and* “part owner” of Keystone, and continued to be an independent lawyer at least until December of 2011. This duty encompassed not seeking to take any advantage over her clients, or exploit the attorney-client relationship of trust.

(CP 624, ¶ 41). A breach of fiduciary duty may constitute a deceptive act under the CPA. *Klem*, 176 Wn.2d at 787; *Walker v. Quality Loan Services Corp. of Washington*, 176 Wn. App. 294, 319-20, 308 P.3d 716 (2013). There was evidence that Attorney Rains breached a number of her ethical obligations (CP 630-31). A reasonable juror would be entitled to accept the above opinions.

a. Attorney Rains’s Padding Her Legal Bill Was Unfair and Deceptive.

Ms. Rhodes asserts that neither she nor Keystone ever received an invoice for the \$15,000 retainer paid to Ms. Rains on Keystone’s account, until after the present lawsuit was filed (CP 233, ¶ 29). That would, of course, explain why Ms. Rhodes did not complain at the time about the amount of fees she was being charged.

Ms. Rhodes further asserts that the \$15,000 invoice (CP 273; BA, App. C) contains hours billed for work which was not done, specifically Ms. Rains’s billing \$2,075 for a five-hour “conference call

with Michan Rhodes” on June 30, 2011, and Ms. Rains’s billing \$3,838.75 for 9.25 hours labeled as “On-site with Michan Rhodes” on July 1, 2011 (CP 234).⁷

Describing these two entries as “bogus,” Ms. Rhodes testified in her declaration that she did “not recall any conference call with Ms. Rains on June 30th, much less one of five hours. At most I spoke with her [Emily Rains] thirty minutes on the phone on that date” (CP 234, ¶ 31). Such testimony directly contradicts Ms. Rains’s assertion that such a five-hour conference call did take place and alleges a sufficient “fact” or “event” or “occurrence” which would have to be accepted as true for summary judgment purposes (BR 14).

Ms. Rhodes also asserted in her declaration that Ms. Rains did not spend 9.25 hours with Ms. Rhodes on July 1st, as claimed by Ms. Rains in the invoice, as “[Ms. Rhodes] was out selling projects and was with a customer, Linda Rodriguez, from 10:00 a.m. to 1:00 p.m. that day, and did not return to the office until 2:00 p.m.” (CP 234, ¶ 31). While Ms. Rains may have been “on-site” on July 1st, Ms. Rains was not “on-site *with Michan Rhodes*” as set forth in the invoice (CP 273) if, as alleged by Ms. Rhodes, Ms. Rhodes was out of the office selling

⁷The complaint alleges that Attorney Rains converted the \$15,000 retainer to her own use (CP 3), contrary to the implied assertion of Attorney Rains (BR 18).

windows that day.

In addition, Attorney Rains has provided no explanation as to why she should be paid for merely being “on-site” on a certain day; she should be paid for doing legal work, and no legal—or any other—work is described in the time entry of 9.25 hours for July 1st.

It is misconduct for a lawyer to engage in conduct involving dishonesty, deceit or misrepresentation. See, RPC 8.4(b) and (d). This prohibition extends to the intentional misrepresentation of information on a client’s bill. *In re Dann*, 136 Wn.2d 67, 77, 80, 960 P.2d 416 (1998) (lawyer disciplined for misrepresenting the identity of lawyers performing the work involved on bills); *In re Haskell*, 136 Wn.2d 300, 306, 962 P.2d 813 (1998) (“initial switching” constituted a violation of Rules of Professional Conduct RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 1.4(b) (lawyer must communicate with client); and RPC 1.5(a) (fee must be reasonable)); see also, *In re Columbia Plastics, Inc.*, 251 B.R. 580, 591 (Bankr. W.D. Wash. 2000) (misrepresentation of non-recoverable staff word-processor time as recoverable paralegal time on bill required disgorgement of all fees).

“For purposes of summary judgment, the facts and reasonable inferences therefrom contained in [the non-moving party’s] affidavit

are accepted as true.” *Aetna Life Insurance Co., v. Boober*, 56 Wn. App. 567, 572, 784 P.2d 186 (1990). It was error for the trial court to conclude otherwise than that there was a disputed issue of material fact regarding whether Attorney Rains billed for services she did not perform.

Finally, Attorney Rains tries to claim that a certain statement made by Ms. Rhodes in the latter’s declaration is false and deceptive (BR 15). This argument fails.

The statement of Ms. Rhodes in question is the following:

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

(CP 233, italics added).⁸

Attorney Rains claims that “[i]t is simply false for Rhodes to assert that she did not know that Rains’ hourly rate was \$415” (BR 15). This claim misrepresents what Ms. Rhodes stated. Ms. Rhodes did not claim she did not know that Rains’s *hourly rate* was \$415 per hour;

⁸The fee agreement provides that “The current [RLG] Associate Attorney hourly rate is \$275.00. The current [RLG] Senior Attorney hourly rate is \$415.00. . . .*You will be assigned to an associate attorney by default unless during review your particular circumstance requires the expertise of a Senior Attorney*” [italics added] (CP 86).

Ms. Rhodes claimed she did not know she was *being charged* \$415 an hour, as “by default” she was to be assigned an associate attorney who billed at \$275 per hour. Ms. Rhodes could reasonably expect that at least some of the work would be done by an associate attorney. Representing that Ms. Rhodes would “by default” be assigned an associate attorney at a lower hourly rate, but then assigning a senior attorney to do all the work at a higher hourly rate, without any explanation or disclosure to the client, is clearly unfair or deceptive.

Attorney Rains also claims that, even if she failed to adequately perform a number of financial services which she promised to perform and which are touted in her web advertising (BA 19-20), “simply failing to perform *as an employee* is not an unfair or deceptive act” [italics added] (BR 20). As noted above in section II.A.2, there is no citation of any legal authority for the assertion that employees are *per se* exempt from the reach of the CPA.

2. Attorney Rains Acted Within the Scope of Trade or Commerce (BR 16, 21).

Attorney Rains concedes, as she must, that “certain entrepreneurial aspects of the practice of law may fall within the ‘trade or commerce’ definition of the CPA[,]” citing *Short v. Demopolis*, 103 Wn.2d 52, 60 (BR 16). “These include, ‘how the price of legal services is *determined, billed, and collected . . .*’ *Id.* at 61” [italics added] (BR

16). Thus Attorney Rains was acting within the scope of trade or commerce when she billed for phantom time for her alleged legal services on the July 20, 2011 invoice.

Attorney Rains was also acting within the scope of trade or commerce when she advertised her services to the public (CP 238, 241, 226), when she obtained Ms. Rhodes as a client through promises of outstanding financial services (CP 226), when she represented Keystone as an independent contractor through the last half of 2011 (CP 301), and when she had her husband send padded accounting bills through Rains Strategic Accounting (CP 297).

It is important to note that Attorney Rains was not always acting in her role as lawyer. She also provided financial services to Keystone and promised financial services which she did not deliver (CP 238). The second element of a CPA claim is therefore met.

3. Acts of the Rains Defendants Injured the Public Interest (BR 16 - 18, 22-23).

RCW 19.86.093(3), including a 2009 amendment to the CPA, provides that

in a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it * * * (3)(a) *Injured* other persons; (b) *had the capacity* to injure other persons; or (c) *has the capacity* to injure other persons.

RCW 19.86.093(3) [italics added]. The legislature is presumed to know of the courts' interpretation of public interest under the CPA. *Hangman Ridge, supra*, 105 Wn.2d at 788. Accordingly, the legislature must have specifically intended to alter that interpretation in enacting the 2009 amendment.

Here Ms. Rains's conduct (1) injured other persons, e.g., Kyle Duce (CP 337), (2) *had* the capacity to injure other persons (through Ms. Rains's advertising and web presence), and (3) *has* the capacity to injure other persons, because Ms. Rains is still out there using her same techniques. RCW 19.86.093(3). She is still an active member of the Washington State Bar Association, #35686.

When possible, an appellate court derives the legislature's intent solely from the statute's plain language, considering the text of the provision at issue, the context of the statute, related provisions, and the statutory scheme as a whole. *Segura v. Cabrera*, ___ Wn.2d ___, 2015 WL 6549175 (citing *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013)). The statutory language is clear here from the face of the statute.

Attorney Rains argues that RCW 19.86.093(3) cannot override the holding in *Hangman Ridge*, because the decision in *Hangman Ridge* embodies the common law (BR 22, fn 8), citing *Price v. Kitsap*

Transit, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). This argument is without merit. First, the legislature is free to modify or overrule *Hangman Ridge*, which it did with the enactment of the 2009 amendment. See, *Roberts v. Dudley*, 92 Wn. App. 652, 655, 966 P.2d 377 (1998) (“By statute, of course, the legislature may negate, revise or confirm any common law determination that we [the court of appeals] make[s].”) The public interest requirement as enunciated in *Hangman Ridge* is not specifically stated in RCW ch. 19.86. Rather, it is a judicially imposed requirement. See, *Comment, Dispensing with the Public Interest Requirement in Private Causes of Action under the Washington Consumer Protection Act*, 29 Seattle U. L. Rev. 205, 215-216 (2005). The 2009 amendment adding RCW19.86.093(3) and addressing the requirements to establish public interest is a clear example of a legislative modification of a leading court decision.

The similarities between what happened to Ms. Rhodes and to Kyle Duce are striking: (1) Attorney Rains was very sure of herself and sounded very trustworthy, and the prospective client trusted her (CP 337, ¶ 1); (2) Attorney Rains held herself as providing professional financial advice, but failed to deliver the services she promised, e.g., by not filing tax returns on time, thus incurring substantial penalties and interest (CP 337, ¶ 1, ¶ 8); (3) Attorney Rains tried to insert herself into the operation of the business (CP 337, ¶ 3); (4) Attorney Rains

got her husband involved in accounting work, in spite of the fact that he had no accounting background (CP 337, ¶ 5); (5) Attorney Rains sent an “exaggerated” bill not reflecting the minimal value she added to the company (CP 337, ¶ 6); (6) Attorney Rains asked for about a twelve percent interest in the company as payment of her \$20,000 invoice (CP 337, ¶ 6), thus proposing a business transaction with an existing client; and (7) Attorney Rains filed documents to the effect that she was a co-owner of the business, without authority (CP 337, ¶ 6).

Kyle Duce was fortunate enough to discharge Attorney Rains before he had exactly the same experience with her as Ms. Rhodes had.

Ultimately, whether an act or practice impacted the public interest is a question of fact. *Hangman Ridge, supra*, 105 Wn.2d 778, 789-90. The declaration of Kyle Duce is sufficient to establish at least a material issue of disputed fact about whether the public interest element of the CPA is met, and it was error for the trial court to dismiss Ms. Rhodes’s CPA claim on that basis.

4. Ms. Rhodes Has Shown Injury (BR 18, 23).

Ms. Rhodes contends that Ms. Rains’s billing \$2,075 for a five-hour “conference call with Michan Rhodes” on June 30, 2011, which never occurred, and Ms. Rains’s billing \$3,838.75 for 9.25 hours

labeled as “On-site with Michan Rhodes” on July 1, 2011 (CP 234), when Ms. Rhodes was not “on-site” most of the day, constitute monetary injury. *Panag, supra*, 166 Wn.2d 27, 57. Attorney Rains cashed the \$15,000 retainer check and kept nearly \$6,000 that she was not entitled to. Loss of use of one’s own money constitutes injury under the CPA. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854-55, 792 P.2d 142 (1990). The failure to provide expert accounting services as advertised and the lapses which caused overdraft fees, tax penalties, etc. also clearly constitutes injury.

Attorney Rains claims that “[a] salary is not an injury” (BR 23), but an excessive salary obtained through deception and failure to disclose that the company cannot afford to pay the salary is an injury under the circumstances of this case, especially where there is a fiduciary duty on the part of an attorney to make full disclosure. The excessive compensation paid to Attorney Rains’s husband and sister for work they were not qualified to perform also constitutes injury.

5. Ms. Rhodes Has Established Causation (BR 19).

If Attorney Rains billed some \$6,000 for time she did not spend working on Ms. Rhodes’s case, as Ms. Rhodes contends, then Ms. Rains’s padding of the bill certainly *caused* the loss of some \$6,000. Ms. Rains’s failure to deliver on the promises of expert financial

services also caused losses in terms of extra bank fees, penalties and interest on untimely paid taxes, etc. (CP 235; 300, ¶ 14). Moreover, Attorney Rains obtained \$31,500 worth of windows from Keystone which she never paid for (CP 231, 272). These are all specific and concrete losses.

6. The CPA Claim Against Michael Rains Was Improperly Dismissed (BR 24).

In her motion for partial summary judgment, Attorney Rains's sole argument to the trial court regarding the lack of liability of her husband on the CPA cause of action was the following:

To the extent that Keystone is asserting a CPA claim against Michael Rains *as an IT professional*, there is, again, no evidence or allegation that Michael Rains made any misrepresentation, and therefore no evidence supporting any unfair or deceptive act or practice by Michael Rains. Keystone can neither show any injury caused to Keystone by the work Michael Rains performed for it, nor any public interest impacted nor any link to any work Michael Rains performed for Keystone and any alleged injury. Accordingly, the CPA claim against Michael Rains fails and must be dismissed [italics added].

(CP 405). The short answer to this argument is that Ms. Rhodes/Keystone were not asserting a CPA claim against Michael Rains *as an IT professional*, but rather as Attorney Rains's spouse acting for the benefit of the marital community, through her working at RLG and for Keystone, and for acting in concert with her (BA 35, CP

222).

Also, since Ms. Rains's argument was not supported by any factual citations or legal authority, and therefore was unsupportable, Ms. Rhodes was not required to respond to it. However, Ms. Rhodes did respond to it by arguing that Michael Rains participated in overbilling for accounting services (CP 222) and was an agent of the Rains defendants. Attorney Rains fails to explain why on the admitted facts before the trial court at the summary judgment hearing, her husband would not be liable for any and all acts she engaged in on behalf of the marital community, including any CPA violations.

The CPA claim against Michael Rains was improperly dismissed.

III. CONCLUSION

The trial court erred in dismissing the CPA claims of Keystone and Ms. Rhodes. For the reasons set forth above, this Court should reverse the order dismissing the CPA claims and should remand for trial on those claims.

RESPECTFULLY SUBMITTED: January 8, 2016.

Law Offices of Dan R. Young

By Dan R. Young
Dan R. Young, WSBA # 12020
Attorney for Appellants Rhodes
and Keystone

DECLARATION OF SERVICE

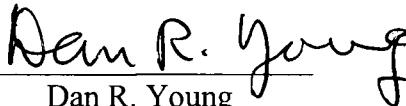
I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the appellants Michan Rhodes and Keystone Windows and Doors, Inc. in this action.

2. On January 11, 2015, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of the foregoing Reply Brief of Appellants Rhodes/Keystone to the following:

Masters Law Group, P.L.L.C.
Kenneth W. Masters, Esq.
241 Madison Avenue N.
Bainbridge Island, WA 98110

Dated: January 11, 2015, at Seattle, Washington.


Dan R. Young