

ORIGINAL

No. 65459-4-1

COURT OF APPEALS
STATE OF WASHINGTON
2011 JUN 10 PM 4:39

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

PLUMB SERVE, LLC, a Washington limited liability company, d/b/a
BENJAMIN FRANKLIN PLUMBING,
Plaintiff,

v.

VIOLA M. SCOBY and "JOHN DOE " SCOBY, wife and husband;
and JOHN W. SCOBY AND VIOLA M. SCOBY REVOCABLE
TRUST OF OCTOBER 9, 1995;
Respondents,

v.

PROFIT TWO, LLC, a Washington limited liability company, d/b/a
PLUMB SERVE AND OUTTODAY SERVICE; RODNEY JESSEN,
individually and as part of his martial community; and GARY
JESSEN, individually and as part of his martial community;
Appellants.

BRIEF OF RESPONDENT (CORRECTED)

Yen Lam, #32989
Galvin Realty Law Group, P.S.
Attorney for Respondent

6100 219th Street SW, Suite 560
Mountlake Terrace WA 98043
425.275.9863 (ph)

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESPONSE TO ASSIGNMENT OF ERROR	2
A.	Response to Assignment of Error.	2
III.	STATEMENT OF THE CASE.....	3
A.	Statement of Procedure.....	3
B.	Statement of Facts.....	8
1.	Ms. Scoby’s Transaction with Benjamin Franklin Plumbing.....	8
2.	Ms. Kristjanson’s Interaction with BFP	9
3.	Ms. Kristjanson’s Request for BFP to Examine Property.....	13
4.	Kevin Flynn’s Examination of the Property.....	15
5.	Ms. Todd’s Transaction with Outtoday.....	16
IV.	ARGUMENT.....	20
A.	Standard of Review.....	20
B.	Request for Attorney Fees and Costs on Appeal.....	21
C.	The Trial Court Was Not Biased in Favor of Scoby.....	22
D.	Trial Court During a Bench Trial Explicitly Stated Its Oral Ruling Was Preliminary	25
E.	The Trial Court Did Not Err in Concluding BFP Committed a Consumer Protection Act Violation.....	26
1.	Unfair or Deceptive.....	27
2.	Occurs in Trade or Commerce	32
3.	Affects Public Interest.....	33

4.	Injured in Business or Property	39
5.	Causation.....	41
F.	The Trial Court’s Finding that the Jessens Knowingly Approved of BFP’s Unfair and Deceptive Acts is Supported by Substantial Evidence.....	45
1.	Gary Jessen	46
2.	Rodney Jessen.....	46
G.	The Trial Court’s Award of the Net Sum of \$3,350 as Quantum Meruit is Not an Abuse of Discretion.....	49
H.	The Trial Court’s Did Not Err in Finding that the Award of Quantum Meruit Does Not Make BFP the Prevailing Party	52
1.	Ms. Scoby is the Substantially Prevailing Party and Entitled to Attorney Fees and Costs Pursuant to the Contract.....	53
2.	Ms. Scoby is Prevailing Party under the Lien Statute	54
I.	The Jessens Due Process Rights Were Not Violated	57
1.	Trial Court has Broad Discretion to Consider Additional Evidence After Rendering an Oral Decision and has Broad Discretion in Case Management	57
2.	Judicial Notice and Admission of Party Opponent	60
J.	Personal Liability Under RCW 25.15.303	62
K.	Changes from Oral Ruling and Written Ruling Are Not Drastic	66
V.	CONCLUSION.....	68

TABLE OF AUTHORITIES

Cases

<i>Biehn v. Lyon</i> , 29 Wn.2d 750, 189 P.2d 482 (1948)	26
<i>Cerjance v. Kehres</i> , 26 Wn. App. 436, 441, 613 P.2d 192 (1980).....	57
<i>Chadwick Farms Owners Ass'n v. FHC LLC</i> 166 Wn.2d 178, 202, 207 P.3d 1251 (2009).	5, 63, 65
<i>Croton Chem. Corp. v. Birkenwald, Inc.</i> , 50 Wn.2d 684, 314 P.2d 622 (1957).....	34
<i>DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.</i> , 142 Wn.App. 35, 170 P.3d 592 (2007).....	54
<i>Deep Water Brewing, LLC v. Fairway Resources, Ltd.</i> , 142 Wn. App. 229, 215 P.3d 990 (2007), review denied, 168 Wn.2d 1024 (2009).....	67
<i>Grayson v. Nordic Const. Co., Inc.</i> 92 Wn.2d 548, 554, 599 P.2d 1271 (1979).....	45
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	26, 27, 38, 66
<i>Herzog Aluminum, Inc. v. General American Window Corp.</i> 39 Wn. App. 188, 692 P.2d 867, 872 (1984).....	53
<i>In re Marriage of Harshman</i> , 18 Wn. App. 116, 567 P.2d 667 (1977), <i>overruled on other grounds by In re Marriage of Elam</i> , 97 Wn.2d 811, 650 P.2d 213 (1982)	57
<i>In re Marriage of Zigler and Sidwell</i> , 154 Wn.App. 803, 815, 226 P.3d 202, 208 (2010)	21
<i>In re McGhan</i> , 288 F.3d 1172, 1175 (9th Cir. 2002)	61
<i>In re Pawling</i> , 101 Wn.2d 392, 679 P.2d 916 (1984).....	57
<i>Indoor Billboard v. Integra Telecom</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	41

<i>Kingston Lumber Supply Co. v. High Tech Development Inc.</i> , 52 Wn.App. 864, 765 P.2d 27, 29 (1988).....	56
<i>Krivanek v. Fibreboard Corp.</i> , 72 Wn. App. 632, 636, 865 P.2d 527 (1993), review denied, 124 Wn.2d 1005 (1994).....	49
<i>McRae v. Bolstad</i> , 101 Wn.2d 161, 166, 676 P.2d 496 (1984)	27
<i>Olver v. Fowler</i> , 161 Wn.2d 655, 168 P.3d 348, 353 (2007).....	49
<i>Panag v. Farmer's Insurance Company of Washington</i> , 166 Wn.2d 27, 43, 204 P.3d 885 (2009).....	passim
<i>Pomeroy v. Anderson</i> , 32 Wn. App. 781, 784, 649 P.2d 855, 857 (1982)	51
<i>Pomeroy v. Anderson</i> , 32 Wn. App. 781, 785, 649 P.2d 855 (1982)	51
<i>Pomeroy v. Anderson</i> , 32 Wn. App. 781, 649 P.2d 855 (1982).....	51
<i>Powell v. Kier</i> , 44 Wn.2d 174, 176, 265 P.2d 1059 (1954).....	50
<i>Schmidt v. Cornerstone Invs., Inc.</i> , 115 Wn.2d 148, 164, 795 P.2d 1143 (1990)	52
<i>St. Paul Fire & Marine Insurance Company v. Updegrave</i> , Wn. App. 653, 658, 656 P.2d 1120 (1983).....	39
<i>State v. A.N.W. Seed Corp.</i> , 116 Wn. 2d 39, 50, 802 P.2d 1353, 1359 (1991).....	27
<i>State v. Johnson</i> , 77 Wn.2d 423, 426, 462 P.2d 933 (1969).....	21
<i>Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.</i> , 33 Wn.App. 710, 715, 658 P.2d 679, 682 (1983).....	55
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 176, 4 P.3d 123 (2000)34	
 Statutes	
RCW 19.86.010(2)	32
RCW 19.86.020.....	26

RCW 25.15.030.....	65
RCW 25.15.285.....	64
RCW 25.15.300.....	63, 65
RCW 25.15.303.....	62, 66, 67
RCW 4.84.330.....	53
RCW 60.04.011(2).....	54
RCW 60.04.021.....	54
RCW 60.04.130.....	56
RCW 82.08.05.....	51
RCW 82.08.050.....	51

Rules

ER 201.....	60, 61, 62
ER 801(d)(2)	62

I. INTRODUCTION

The primary basis for Appellants Gary Jessen's and Rodney Jessen's (collectively, "Jessens") arguments for a reversal is that a biased trial judge manipulated the legal system to ensure victory for Viola Scoby and the Charles W. Scoby and Viola M. Scoby Revocable Trust dated October 9, 1995 ("Ms. Scoby"¹). This argument is without merit. Prior to trial, an independent arbitrator found in Ms. Scoby's favor, including the consumer protection act claim, and awarded Ms. Scoby her entire attorney fees incurred through arbitration. In contrast, the trial court only awarded Ms. Scoby a portion of her attorney fees incurred. There is a clear basis in the evidence and the law to find in favor of Ms. Scoby.

The Jessens also allege they were denied their due process of law and the actions of the trial court somehow results in a grievous injury inflicted upon the entire justice system. This statement is tantamount to calling the color "black" as "white." It is a wildly inaccurate. As revealed by the record and discussed in this brief, the Jessens have intentionally abused and gamed the legal system for any advantage they thought they could get way with. This case reveals the arrogance of a business and its

¹ For estate planning purposes, the real property located at 22902 66th Pl. W., Mountlake Terrace WA 98043 is owned by the Charles W. Scoby and Viola M. Scoby Revocable Trust dated October 9, 1995. Charles W. Scoby is deceased. The Respondents will be collectively referred to as Ms. Scoby in this brief.

owners who thought that they would never be held responsible for their actions and their aggressive pursuit of an elderly, confused woman.

The Jessens have a history of opening and shutting down businesses. Ms. Scoby brought her counterclaim, not only on her own behalf, but on behalf of the public. Personal judgment against the Jessens is absolutely necessary and crucial. Sunlight is the best disinfectant² and light needs to be shone on the Jessens for the benefit of the public. They need to be held responsible for their actions. They cannot outrun this personal judgment by opening yet another company.

II. RESPONSE TO ASSIGNMENT OF ERROR

A. Response to Assignment of Error.

The trial court properly granted judgment in favor of Ms. Scoby on her counterclaim for Consumer Protection Act violation, properly found personal liability against Gary and Rodney Jessen for the CPA violations and failure to comply with RCW 25.15.300, and properly exercised its discretion to award Ms. Scoby \$28,516.07 in attorneys fees and costs with an offset of \$3,350 for BFP on its quantum meruit claim.

² A well-known quote from U.S. Supreme Court Justice Louis Brandeis.

III. STATEMENT OF THE CASE

A. *Statement of Procedure.*

On May 18, 2008, Plumb Serve, LLC d/b/a Benjamin Franklin Plumbing (“BFP”) brought suit against Ms. Scoby for breach of contract and to foreclose on its lien in the amount of \$6,655.98. CP 680-96. Ms. Scoby counterclaimed for violations of the Consumer Protection Act. CP 660-664. On October 6, 2008, Ms. Scoby served an offer of settlement on BFP, offering to settle for the amount of \$3,350. CP 464-65. BFP refused.

BFP’s certificate of incorporation expired on October 31, 2008. CP 416. Sometime in 2008, BFP was shut down by the Jessens and the Jessens began operation of Profit Two d/b/a Plumb Serve and Outtoday Service (“Outtoday”). RP I, 97; RP III, 93.

On February 2, 2009, BFP was administratively dissolved by the State. CP 416. BFP and the Jessens did not inform Ms. Scoby that BFP had dissolved. CP 382. Shortly before the first scheduled arbitration, on February 11, 2009, BFP served an offer of settlement, offering to accept \$4,000 from Ms. Scoby to settle the case. CP 467. By this time, Ms. Scoby had incurred substantial attorney fees from the time her offer of settlement dated October 6, 2008 was served.

The first arbitration was held before William Foster on February 24, 2009. CP 382. The arbitration began and Gary Jessen, owner and manager of BFP, failed to disclose it had closed its business and that BFP had dissolved. CP 382. Mr. Foster then recused himself because he discovered he had a conflict of interest with one of the entities operated by Mr. Rodney Jessen. CP 382-83.

The second arbitration was held before Ralph Freese on April 8, 2009. CP 650. BFP and Gary Jessen participated fully in this arbitration. Gary Jessen testified and represented himself as the manager of BFP, and yet failed to mention that BFP had dissolved. CP 383. Ms. Scoby prevailed on all claims, including the claim for a consumer protection act violation. CP 383. She was awarded \$9,731.25, her entire attorney fees and costs incurred. CP 469.

Although BFP had been administratively dissolved in February 2009, BFP filed a Request for Trial De Novo following the April 18, 2009 arbitration. CP 18. Ms. Scoby did not discover BFP had dissolved until May 2009 through the efforts of Jennifer Gillispie, a private investigator. CP 712-736. Ms. Gillispie reviewed the contractor licenses and corporate documents for both Plumb Serve LLC d/b/a Benjamin Franklin Plumbing and Profit Two LLC d/ba/ Plumb Serve and Outtoday Service. CP 712-15 She also called the number for BFP and was told that the number was

bought by Plumb Serve and Heat Serve. CP 715. Ms. Scoby moved to add the Jessens and their successor corporation, Profit Two, LLC d/b/a Plumb Serve and Outtoday as Counterclaim Defendants. CP 649-655.

On October 8, 2009, BFP filed for Chapter 7 Bankruptcy. CP 326, 329-31. The trial originally scheduled for October 21, 2009 was continued to February 10, 2010. Ms. Scoby was granted relief from the bankruptcy stay in order to pursue her CPA claim against BFP and to remove BFP's lien, with the caveat that she would not seek to recover monetary damages from the Debtor, BFP. CP 472.

Trial was held before the Honorable Eric Z. Lucas from February 10-17, 2010. The trial judge made an oral ruling, but expressly stated the decision was preliminary. RP V, 24-25.

On March 2, 2010, as part of Ms. Scoby's Memorandum on Prevailing Party, Attorney Fees, Ms. Scoby filed a Motion for Clarification on Oral Ruling. CP 430-44. At this time, Ms. Scoby cited the recently decided case, *Chadwick Farms Owners Association v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009), which held those who improperly wind up an LLC can face personal liability. CP 436. This personal liability action is separate from the theory of piercing the corporate veil. CP 436. Ms. Scoby alleged that the timing of the dissolution and bankruptcy supports a finding of a failure to properly

wind up the LLC. CP 435. In response, on March 3, 2010, the Jessens filed a Reply to Defendants' Memorandum on Prevailing Party, Attorney Fees, and Motion for Clarification on Oral Ruling. In its Reply, the Jessens specifically discuss *Chadwick* and attach a new document—a corporate record for BFP showing BFP was administratively dissolved. CP 404-409, CP 416. The Jessens also claimed that they were still in the wind-up period because the matter remained within the US Bankruptcy Court's continuing jurisdiction. CP 409. To correct this false statement (BFP's bankruptcy case had closed), Ms. Scoby filed a Supplemental Memorandum on March 4, 2010, which attached the following as exhibits:

Exhibit A: Plaintiff's bankruptcy petition

Exhibit B: Order Rejecting Leases entered on November 30, 2009 (leases not rejected until this date)

Exhibit C: Document history for Plaintiff's bankruptcy case, including a final entry dated February 2, 2010 indicating the case is closed.

Exhibit D: An email from the bankruptcy clerk's office indicating the bankruptcy case was closed on February 2, 2010.

CP 328-378.

On March 5, 2010, the trial judge heard the parties' cross-motions for prevailing party and award of attorney fees and Ms. Scoby's motion for clarification. The trial judge stated he was reconsidering his oral

ruling and directed Ms. Scoby's attorney to prepare two sets of proposed Findings of Fact and Conclusions of Law. RP VI, 25.

On April 18, 2010, in conjunction with the two sets of proposed Findings of Fact and Conclusions of Law, Ms. Scoby filed a Memorandum on Findings of Fact and Conclusions of Law, reattached the bankruptcy documents to the memorandum, and asked the trial court to take judicial notice of the bankruptcy documents. CP 259-63. On April 21, 2010, the Jessens responded by filing Plaintiff [sp] and Third Party Defendants' Memorandum, objecting to the bankruptcy documents. CP 53-55. The final hearing on Ms. Scoby's motion for the court to take judicial notice of the bankruptcy documents and the proposed Findings of Fact and Conclusions of Law was held on May 7, 2010. RP VII, 1. This final hearing date was scheduled by agreement of the parties as the trial court instructed counsel to set a mutual date for the presentation hearing with Mr. Ghassemieh, the law clerk, with written materials due three days before the hearing RP VI, 25-26.

The Judgment and Findings of Fact and Conclusions of Law entered by the trial court are described in Appellants' Brief. Appellants' Brief, pg. 8-9.

B. Statement of Facts.

1. Ms. Scoby's Transaction with Benjamin Franklin Plumbing

Ms. Scoby does not recall much of the details of the transaction with BFP's employee, Alex Shelton. RP I, 92-93. The invoice dated March 25, 2008, lists three (3) distinct charges totaling \$3,094.00 (Exhibit 1).

These charges are listed below:

<u>Service Description</u>	<u>Quantity</u>	<u>Rate</u>
1	G17 Clear Mainline	\$ 499.00
1	G35 Deep repair over 4 ft. to install c/o	\$2,245.00
6	Cable 2 tubs, 1 laundry, 1 k/s line, 2 lavs	\$ 350.00
Total		\$3,094.00

At the bottom of the invoice, the address for BFP is listed as: **13300 SE 30th St. #105, Bellevue WA 98005.** (Exhibit 1).

Mr. Shelton also completed the Additional Notes Form dated March 26, 2008. The Additional Notes Form provided by BFP describes the work to be performed as "To replace 21-25 linear feet of 4' sewer line from edge of garage out approximately 25ft to remove damaged root section with install 2 way c/o and 2 locking ring covers," and lists the amount due as \$6,525.12 + \$580.74 (tax) for a new total of \$7,105.86. (Exhibit 2). BFP's version includes the statement "Customer to have asphalt [sp] patch done" and Ms. Scoby's signature. (Exhibit 2). Ms.

Scoby's copy of the Additional Notes Form dated March 26, 2008 does not have the statement "Customer to have asphalt [sp] patch done" nor does it have her signature. (Exhibit 103).

According to Exhibit 1, Ms. Scoby wrote three checks.

The first was for \$1,684.68. This amount was crossed out and then two other checks were written, one for \$3,552.93, and the second one for \$3,103.05. These checks seemed to reflect the fact that the original scope of work was changed. The cross-outs on Exhibit 1 reflect the same implication.

The first scope of work was \$1,684.68 for which she paid in full and then at some point this was changed and the new scope of work was \$6,655.98.

CP 11, FF 3-4.

2. Ms. Kristjanson's Interaction with BFP

That same day, Ms. Kristjanson received a call in the evening from her shaken and frantic mother. RP IV, 13. Ms. Scoby said the plumber had been there all day and the bill was \$3,000, then \$5,000, and then \$7,000. RP IV, 13. Ms. Kristjanson was concerned because her mother had been taken advantage of before and was talked into replacing her perfectly good security system with a new security system she did not need. RP IV, 13-14. Also, Ms. Scoby's memory and comprehension has been declining in the last few years. RP IV, 15. Ms. Kristjanson called

Mr. Shelton and told him she would be at the house at 9:00 am the next morning. RP IV, 15-16.

The next day, March 26th, Ms. Kristjanson arrived at the property at 9:00 am. She saw Ms. Scoby's phone book open to the page showing the Benjamin Franklin Plumbing ad, which ad indicated that if there's any delay, BFP will pay, a hundred percent satisfaction guaranteed, and membership in the Better Business Bureau. RP IV, 16.

Ms. Kristjanson spoke with Mr. Shelton who explained it cost \$250 to join the club and it gave her mother a ten percent discount off of the bill and free services for heating and electrical. RP IV, 18. Exhibit 1 shows a charge of \$239.40 for the club rewards and a 10% discount of \$652.51, leading to the final price of \$6,655.98.

Ms. Kristjanson looked over the bill and it was so scratched out, it did not make any sense to her. RP IV, 19. She gathered that he spent the first day cleaning out the lines for \$850 (\$499 to snake out the sewer line and \$350 for the inside pipes). RP IV, 19.

She asked Mr. Shelton to show her what he was going to do. RP IV, 19. Mr. Shelton went out to the garage and said he would replace the sewerline, starting at the garage and going to the end of Ms. Scoby's driveway, which was approximately 23 feet. RP IV, 19. She asked him three questions:

What are you going to do? How long is it going to take? And, Is there any alternative? So I asked him those three questions. So it was complete new sewer line on her property, it would take *two-and-a-half days*. And if we didn't do it now, the roots would return in no time and we would just be calling him back.

RP IV, 20 (emphasis added).

Mr. Shelton worked until 3 pm that day (six hours total). RP IV, 20. He called Ms. Kristjanson the next day at 11:30 and said that he was done. He had worked 2.5 hours that day. RP IV, 20. The total time spent on the replacing the sewerline was 8.5 hours, not the two-and-half days he had stated to Ms. Kristjanson. RP IV, 20.

Ms. Kristjanson previously requested an estimate for adding a hose bib to the back of Ms. Scoby's house. RP IV, 21. During the phone call informing Ms. Kristjanson that he had finished the work, Mr. Shelton said he went under the house and measured. RP IV, 21. He indicated it would take 40 feet of pipe to put the hose bib on and the cost would be \$900, which included a \$200 discount. RP IV, 21. Ms. Kristjanson responded that 40 feet was impossible because the plumbing runs right through the middle of Ms. Scoby's house. RP IV, 21. When Mr. Shelton said he had measured and it had to be at least 30 feet, Ms. Kristjanson knew that he had lied. RP IV, 21-22.

Since Mr. Shelton lied to Ms. Kristjanson, she went to measure the back of Ms. Scoby's house, which measured 17 feet from the middle of the house to the corner. RP IV, 22. Later, Ms. Scoby had the hose bib added for a cost of \$125 and about ten feet of pipe was used. RP IV, 22.

Ms. Kristjanson was shocked that Mr. Shelton was done with the job. RP IV, 22. Also, the exposed hole did not go to the end of the driveway, as Mr. Shelton had indicated. RP IV, 22. She measured the hole. RP IV, 22. She later took pictures to send to BFP because they would not come out to the property. RP IV, 23. The pictures show the tape measure and a measurement of 14 feet 7 inches of broken concrete or asphalt. RP IV, 23 (Exhibit 105). Ms. Kristjanson estimated Mr. Shelton had installed 14 feet of sewerline. RP IV, 23.

Ms. Kristjanson had expected the new line to go to end of Ms. Scoby's property. RP IV, 24. The line, however, stopped "right at where the tree root problem was." RP IV, 24. Ms. Kristjanson was concerned the new sewerline was connected to old pipe and the problem could happen all over again. RP IV, 24.

Mr. Shelton also said he would put metal caps on top and cover the hole with plywood because the open hole would be a danger to Ms. Scoby. RP IV, 24, 25. However, he did not place caps on the cleanout pipes—

they simply had duct tape on top of them. RP IV, 24. The caps were left right by the hole. (Exhibit 105).

Also, six weeks before trial Ms. Kristjanson contacted a plumber to take off a toilet and clear out tree roots in the sewerline for her home. It took an hour-an-half and cost \$220, much less than the \$440 charged by BFP. RP IV, 57.

3. Ms. Kristjanson's Request for BFP to Examine Property

Ms. Kristjanson testified she first contacted BFP the next morning after Mr. Shelton had completed his work. RP IV, 26. She spoke with Fred Bosio [sp] twice and Robert Wadleigh five or six times. RP IV, 26. Each time, she asked for an itemized contract, an explanation of the charges, and for someone at BFP to come out and examine the sewerline. RP IV, 26-27. BFP refused. Ms. Kristjanson asked to speak with someone with more authority. RP IV, 28. Ms. Kristjanson finally spoke with Gary Jessen about 7 days after the work was completed and his response was simply that linear feet does not mean in a straight line. RP IV, 28, 60. He explained that the sewerline went down 4 feet, over 14 feet and back up 4 feet. RP IV, 60. These conversations led Ms. Kristjanson to stop the checks. RP IV, 19. She wanted someone to

acknowledge that there was a problem. RP IV, 29. She never intended not to pay BFP. RP IV, 29.

Rodney Jessen reviewed internal BFP documents containing notes of BFP's discussions with Ms. Kristjandson. RP III, 170-172. The Jessens admitted Exhibit 8, which is a memo from Ronica to Fred with additional handwritten notes. The typed portion of the memo is not dated and states:

Invoice number 21920. Wanda Christianson called in for her mother which is Viola Scoby. She said her mother is 82 years old and has been taken advantage of. She was charged 6655.98 for some repipe work. She would like for you to give her call so she can further discuss this matter.

The subsequent handwritten notes are dated 3/31 and 4/1/08, detailing Mr. Fassio's follow-up discussions with Ms. Kristjanson at later dates. (Exhibit 8).

Ms. Kristjanson left the sewerline exposed for three months in the hopes that someone at BFP would come out and examine the sewerline. RP IV, 25. On April 3, 2008, Gary Jessen filed the lien against Ms. Scoby's property and personally served the lien on Ms. Scoby, approximately a week after work was completed. CP 695. The sewerline was still exposed.

Ms. Kristjanson sent letters and photos about the sewerline to BFP. RP IV, 29, 30 (Exhibit 105). She discovered complaints against BFP with the Better Business Bureau. RP IV, 31. BFP continued to refuse to come out to the property and acknowledge that there was a problem. RP IV, 33.

4. Kevin Flynn's Examination of the Property

On May 7, 2008, Kevin Flynn of Raymark Plumbing examined the work performed at Ms. Scoby's property and gave an estimate of \$3,350 plus tax and permit for the work that was done. RP II, 110. The estimate includes "cleanouts to surface." (Exhibit 106). Mr. Flynn testified he always provided "cleanouts to surface" as part of the work involved with the replacement of a sewerline. RP II, 110.

Mr. Flynn returned to Ms. Scoby's property to camera the line and provide a DVD for the court. RP II, 112. Mr. Flynn explained there is an upstream and down stream clean out attached to the sewerline. RP II, 115. He further explained that the length of the cleanout is not included in the length of the sewer line.

A. Okay the first thing we did, we went to the downstream cleanout. We went down and cameraed all the way to the concrete pipe where it reaches the city main and then made a video coming back. And when we got down to the bottom of the cleanout here (indicating), that's when we zeroed the camera, okay? This is the lateral line that needs to be replaced (indicating). So we zeroed the camera when we were in the sewer and then we cameraed down to where the repair finished, made a video, came back, cameraed the other line going back and made a video coming back and zeroed it

again there and located the distance back from where the repair finished to the existing sewer.

Q: And can you just describe in more detail what you mean by zeroed?

A: The camera has a locator on it. You know, when we look at the distances on the camera, we always go into the sewer. This is the sewer here (indicating). The cleanouts, we do not consider part of the sewer, okay, the reason being is if a guy was standing here (indicating) and he wants to know if there's a problem in the sewerline, and when his counter says 20 feet and he puts the camera in from here (indicating), that doesn't tell me it's 20 feet in this direction. He would have to take this distance off of his counter, which doesn't make sense.

RP II, 113-114.

Mr. Flynn played his video and explained his assistant placed the camera down one of the cleanouts and when he reached the bottom, the counter was zeroed and measured ten feet ten inches to the repair spot. RP II, 115-116. Then his assistant pulled the camera out and went into the other cleanout, the upstream cleanout. Once he reached the bottom of the second cleanout, he zeroed the counter and measured the existing pipe towards the house, which was two feet two inches. RP II, 116.

Therefore, the linear measurement of the sewer line replacement is 13 feet (10 feet ten inches plus 2 feet two inches). *See* also RP II, 117, 122.

5. Ms. Todd's Transaction with Outtoday

On December 2, 2008, Michele Todd had a problem with her sink—the glue gave out and the sink fell into the cabinet. RP II, 133, 136.

She submitted a request for a referral through Service Magic, a website that refers contractors. RP II, 133. The first contractor that called said he would come and put the sink back in for about \$180. RP II, 133. Then Victoria Glover of Plumb Serve called. RP II, 133. Ms. Glover indicated there would be an appearance fee of \$89, but the fee would be credited as part of the cost of repair. RP II, 133. The first contractor would not be able to arrive until Thursday and Ms. Todd wanted someone to come that day because she had a newborn. RP II, 136. At that point, Ms. Todd believed if the estimate from Plumb Serve was higher than \$180, she could always go back to the first contractor and would only be out \$89. RP II, 135.

That day, a plumber from Plumb Serve named Chuck arrived at Ms. Todd's home. RP II, 136. The plumber later gave Ms. Todd a business card that identified the company as Plumb Serve and "Outtoday." RP II, 136-137. The plumber said he might have to break apart the granite in the kitchen to get to the sink and went on and on that it was going to be huge job and could cost thousands of dollars, but he would not know the extent of the job until he gave a diagnostic analysis. RP II, 137. He alluded to the fact that the \$261 fee for the diagnostic analysis would override the appearance fee of \$89. RP II, 137. Ms. Todd felt stuck because Chuck was already there and it seemed like the job would be a big

job and she could not go back to the first contractor since he was not a big, huge outfit. RP II, 139. .

After the diagnostic analysis, Chuck quoted a price of \$1,100, which shocked Ms. Todd. RP II, 139. Ms. Todd called her husband and they decided since they were not plumbers, the job was going to take many hours and effort and they were going to have to spend \$1100 to get their sink back. RP II, 139-140. Chuck indicated he would waive the \$89 fee in light of the \$260 diagnostic fee charged and he instructed Ms. Todd to print out a coupon for \$50 from the Outtoday.com website for a discount. RP II, 140.

Ms. Todd signed an invoice dated December 2, 2008 (Exhibit 112). RP II, 140-141. Exhibit 112 shows the address for Plumb Serve / Outtoday as **13300 SE 30th St. #105, Bellevue WA 98005**, and a \$1,015.52 charge (including the \$50 discount). At the time she signed, she was sleep-deprived, having slept two hours in the past 24 hours, and needed to breast-feed her baby. RP II, 157. Chuck, however, did not give Ms. Todd a copy of the invoice. RP II, 140. She did not receive a copy until December 15, 2010. RP II, 140. At the time Ms. Todd signed this “invoice,” she misunderstood and thought she had signed a work estimate. RP II, 144.

Despite Ms. Todd's belief that work would begin that day, Chuck did not have any glue or equipment and left that day. RP II, 141. Chuck returned the next day and took an hour to scrap off the old glue and put the sink up with new glue. RP II, 141. Chuck returned the next day, at the bequest of Victoria Glover, but did not have materials to finish the job. RP II, 142. He returned the next day, Friday afternoon, the 5th, to finish the job. RP II, 142. He worked a total of two and a half hours. RP II, 143.

When Chuck asked for full payment, Ms. Todd "flipped out" because she was mortified about the charge for two and a half hours worth of work. RP II, 143. Ms. Todd was very upset and asked to speak to a supervisor. RP II, 143. Chuck would not give the supervisor's name, but told her to call Ms. Glover. RP II, 143. Chuck would not give her a copy of the invoice until she made payment. RP II, 144. At that point in time, Ms. Todd still did not have a copy of the invoice. RP II, 144.

Ms. Todd spoke with Ms. Glover and explained she felt she was being triple-charged for the work. RP II, 145. She asked for the approximately \$200 charge for the pea-traps installation and \$260 charge for the diagnostic fee to be removed. RP II, 145.

Ms. Glover gave Gary Jessen's email to Ms. Todd. RP II, 145. Ms. Glover also offered a ten percent discount. RP II, 145. Ms. Todd

accepted the discount and paid the remaining cost via credit card for a total cost of \$996.23. RP II, 154 (Exhibit 113).

On December 10, 2008, Ms. Todd emailed her grievances to Gary Jessen, explaining she felt misled and wanted to see if see if Gary Jessen would further reduce the price to make her “fee like I had been treated fairly as a consumer.” RP II, 146. When she did not hear back from Gary Jessen, she submitted a complaint to the Better Business Bureau on December 16, 2010. RP II, 146.

Within an hour Ms. Glover emailed and offered to give a refund of \$261. A few hours later, Ms. Glover retracted the refund because she discovered Ms. Todd had submitted a Better Business Bureau complaint. RP II, 152. Ms. Glover responded to the Better Business that same day. RP II, 148 (Exhibit 115).

Gary Jessen did email Ms. Todd once, but only to send her the invoice after Ms. Todd made final payment. RP II, 155. Despite Ms. Todd’s emails and requests, Gary Jessen never spoke with Ms. Todd about her concerns. RP II, 155. Ms. Todd gave up pursuing the refund but did reply to Outtoday’s response to the Better Business Bureau. RP II, 153.

IV. ARGUMENT

A. Standard of Review.

The standards of appellate review are discussed in Appellants' Brief. *See* Appellants' Brief, pg. 18-19. In addition, the following standards of review are also relevant:

- Whether the trial court erred in awarding damages is reviewed for abuse of discretion. *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 865 P.2d 527 (1993), *review denied*, 124 Wn.2d 1005 (1994).
- Trial judges have wide discretion to manage their courtrooms and conduct trials. *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). The appellate court reviews a trial judge's courtroom management decisions for abuse of discretion. *In re Marriage of Zigler and Sidwell*, 154 Wn.App. 803, 815, 226 P.3d 202, 208 (2010).

B. Request for Attorney Fees and Costs on Appeal.

Ms. Scoby requests an award of reasonable attorney fees and costs on appeal pursuant to the following: RCW 4.84.330 (prevailing party on breach of contract action); RCW 60.04.140 (prevailing party under lien statute); RCW 25.13.300 (personal liability against the Jessens for failure to wind down LLC); RCW 19.86.090 (attorney fees under the Consumer Protection Act); and personal liability for CPA violations.

C. The Trial Court Was Not Biased in Favor of Scoby.

The trial court was not biased in Ms. Scoby's favor. There were many examples during trial where the trial court ruled against Ms. Scoby. For example, the trial court permitted discovery to occur during the first day of trial, granting BFP's motion for an order directing Ms. Scoby to allow an inspection of the sewer line. RP I, 7. Ms. Scoby objected to BFP's motion because BFP had previously requested inspections with less notice than the 30 days required by CR 34(b) and shortly before the discovery deadlines in the first scheduled trial to begin October 21, 2009 and for the second scheduled trial to begin February 10, 2010 and refused to provide an agreement to provide Scoby with the details of the inspection and share the details of the inspection. The objections were detailed as follows:

1.6. I have reviewed Mr. Jones' declaration and it contains inaccuracies and presents the timeline of events in a misleading manner. Unfortunately, this tactic is similar to a number of tactics used by Plaintiffs in this litigation and it is why we refused the original request for inspection unless Plaintiffs would confirm in writing their acceptance of our conditions for inspection. The timeline of events regarding the request for inspection is discussed below.

1.7. Plaintiffs faxed to my office a Notice to Permit Entry Upon Land on August 25, 2009, demanding both response and inspection with less than the 30 days required by CR 34(b). Plaintiff's requested inspection date, September 15, 2009, was the last day for discovery prior to our October 21 trial date. Allowing the inspection without

clear disclosure about the actual tests to be performed and an agreement to share the results would have placed my client in an extremely prejudicial position. Therefore, we agreed to allow the inspection only on the specific conditions in the letter that is Exhibit B to Mr. Jones's declaration.

...

1.12. On October 9, 2009, Plumb Serve LLC filed its Notice of Pendancy of Bankruptcy, but notice was not provided to my office until October 15, 2009. A true and correct copy of the Notice of Pendancy of Bankruptcy is attached as Exhibit 2 and incorporated herein by this reference. Plaintiff Plumb Serve LLC filed for bankruptcy, but the Jessens and their successor corporation did not. Response, pg. 5

1.18. Mr. Jones sent me a letter dated January 24, 2010, again requesting to inspect Mrs. Scoby's property. This letter was sent less than three weeks before trial. Jones Declaration, Exhibit G.

1.19. I denied the request because the cut-off date for discovery, per SCLR 37(h) is 35 days prior to trial (January 6, 2010), and because of the same concerns that applied to the first request.

CP 547-550.

Despite these objections, the trial court permitted the Jessens to enter Mrs. Scoby's property and videotape the sewerline during the first day of trial.

Another example is when counsel for Scoby offered to admit Exhibit 129, a large ad in the Seattle Times placed by Rodney Jessen for

one of Rodney Jessen's businesses, Profit Three d/b/a Outtoday service³, a heating company, which Scoby alleged contained confusing details about the actual price of the services offered. RP III, 96-97, 105. The trial court reserved judgment and ultimately denied admission because it did not consider the ad relevant. CP 19, CL 2. Yet another example is trial court's decision to award an hourly rate of \$112.50 and not the \$225/hour as requested by Ms. Scoby for incurred attorney fees and costs as the prevailing party. CP 36, CL 60.

If the trial judge was so biased in favor of Ms. Scoby, as the Jessens allege, why would he have permitted the Jessens to engage in discovery during the first day of trial? Why would he have denied the admission of Exhibit 129? Why would he have awarded Ms. Scoby only a portion of her incurred attorney fees and costs and not the entire amount? The answer to these questions is that the trial court did not favor either party before him. Simply because the trial judge ultimately found that the Jessens did not provide credible testimony and entered an adverse judgment against them does not mean the trial judge is biased. These examples completely disprove the Jessens' contention that the trial judge wanted to "ensure a victory" for Ms. Scoby. Appellants Brief, pg. 39.

³ This heating company is a separate company from Profit Two, LLC d/b/a/ Plumb Serve and Outtoday Service, plumbing company. **Appellants' footnote 15 on page 49 is**

D. Trial Court During a Bench Trial Explicitly Stated Its

Oral Ruling Was Preliminary

Before the Jessens' attorney, Richard Jones, disclosed the fact that the parties had attended arbitration and an offer of settlement had been made by Ms. Scoby, the trial court ***explicitly*** stated that his oral decision was preliminary. The Jessens' assertion that the trial judge was motivated by subsequent disclosures of offers and settlement is not supported by the record. Appellants Brief, pg. 68.

The court stated as follows:

This decision and Findings of Fact and Conclusions of Law are ***preliminary*** until a final monetary award is determined and final orders are entered. In addition, the parties should also indicate by way of motion any errors or omissions they find in the Court's decision toward a final end of entering final orders.

RP V, 24-25 (emphasis added).

After discussion with counsel, the trial judge reiterated that its decision was preliminary. He further stated:

Preliminary Decision. This decision and the Findings of Fact and Conclusions of Law are preliminary until a final monetary award is determined and final orders entered. In addition to post trial motions on the final monetary award, the parties should also indicate, by way of motion, any

incorrect.

errors or omissions they find in the Court's decision toward a final end of entering final orders.

RP V, 33.

A trial court is at liberty to change its oral ruling at any time prior to the entry of a judgment. *Biehn v. Lyon*, 29 Wn.2d 750, 189 P.2d 482 (1948).

E. The Trial Court Did Not Err in Concluding BFP Committed a Consumer Protection Act Violation.

The Consumer Protection Act (CPA) makes it unlawful to engage in unfair or deceptive acts or practices in trade or commerce. RCW § 19.86.020. Its purpose is to protect the public and foster fair and honest competition, and to that end it is to be *liberally* construed. *See* RCW § 19.86.920. In a private suit, the elements of a CPA claim are: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to [claimant] in his or her business or property; (5) causation. RCW 19.86.020; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). All five elements have been met.

1. Unfair or Deceptive

The term “unfair or deceptive” is not defined in the Consumer Protection Act. By broadly prohibiting “unfair or deceptive acts or practices,” the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct. *Panag v. Farmer’s Insurance Company of Washington*, 166 Wn.2d 27, 43, 204 P.3d 885 (2009). In some situations, a misrepresentation made to only one person has the capacity to deceive many, such as a statement made in a standard form contract or by a sales representative, which is subsequently communicated to many individual buyers. *See Hangman Ridge*, supra, at 790. No intentional deception need be proven, only a tendency or capacity to deceive. *State v. A.N.W. Seed Corp.*, 116 Wn. 2d 39, 50, 802 P.2d 1353, 1359 (1991); *Hangman Ridge*, 105 Wn.2d at 785. For example, “a failure of a salesman to disclose information has long been recognized as the basis for an action under RCW 19.86.” *McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984).

The trial court ruled that “an unfair deceptive act or practice has been shown” related to the “predatory practice of attacking the customer rather than serving the customer.” CP 29, CL 37.

This case has shown a technique of using the superior technical knowledge of the contractor to increase the price of the service. This is what the Court earlier called

overreaching. And it did not really matter whether the customer was someone who was elderly or young the effect was the same.

CP 29, CL 38.

As a result of the overreaching, the customer receives a lesser scope of work than what is represented—representations used to justify an increased price. This is the unfair and deceptive act that occurred with both Ms. Scoby and Ms. Todd. And this is the act that has great potential for repetition. The trial court's conclusion of law is supported by the evidence in the record and the findings of fact.

The Jessens attempt to justify the increased pricing as the result of a change from a repair job to a replacement job. The increased costs were not due simply to the change from a repair job to a replacement job. Ms. Kristjanson testified that she was aghast that the plumber told her he spent all day trying to clear out the line. RP IV, 57. She owns two houses and has personally experienced problems with tree roots. RP IV, 57. Six weeks before trial she had contacted a plumber to take off a toilet and clear out tree roots in the sewer lines. RP IV, 57. It took an hour-an-half and cost \$220, not \$499 as charged by BFP. RP IV, 57. The cost for clearing out the main line, as a stand-alone charge, was also overpriced.

The Jessens also attempt to associate the cost of \$2,245.00 to install cleanouts as separate from the replacement of the sewerline. Mr.

Flynn of Raymark Plumbing provided an estimate of \$3,350⁴ plus tax and permit for the work performed. RP II, 110. According to Mr. Flynn, Raymark always provides “cleanouts to surface” as part of the work involved with the replacement of a sewerline. RP II, 111. His estimate included the installation of these cleanout pipes. (Exhibit 106). He does not include the length of the cleanouts in the length of the sewer line. RP II, 113-114.

Regardless of the issue of the repair versus replacement services, the evidence shows that only approximately 14 feet, not 21-25 feet, as listed on the invoice, was replaced. In addition, the locking rings and covers were never installed. Gary Jessens’ testimony that sewer line could go down four feet, over fourteen feet, and then back up four feet is simply not credible. RP IV, 28. Sewer lines do not go up and down in a u-shape configuration. The DVD taken by Kevin Flynn (Exhibit 135) shows that only 13 feet of sewer line was placed. Despite the Jessens’ attempts to sell

⁴ The Jessens refer to the testimony of Robert Wadleigh, who testified \$6,655.98 was a good price for the work performed, to justify the price charged by BFP. The trial court believed Mr. Flynn’s estimate was a reasonable value of the work performed, not Mr. Wadleigh’s confirmation of the price charged by BFP. Mr. Wadleigh is a former employee of BFP and Ms. Kristjanson testified she spoke with him about her complaints. The trial court found Mr. Wadleigh credible, but the findings of fact entered related only to Mr. Wadleigh’s explanations on how he calculated commission and when he would deviate from the pricing guide. CP CP 16 (FF 32, 33). The Jessens’ attorney, Mr. Jones, was the one that asked Mr. Wadleigh whether he thought \$6,655.98 was a good price. Mr. Jones revealed, for the first time during trial, that he was representing Mr. Wadleigh in Mr. Wadleigh’s divorce.

their “linear feet does not mean in a straight line” story, RP IV, 28, their own videotape (Exhibit 7) shows about 14 feet of sewer line was replaced. The court ruled “[a]s related to the documents, this Court finds that the documents speak for themselves. This includes commentary and interpretive statements with regard to the video presented.” CP 15, FF 28.

It should be noted that the trial court did not find much of Gary Jessens’ testimony to be credible:

25. Gary Jessen testified with regard to the transaction, but his testimony was limited to the documents presented, which the Court feels speak for themselves. Any testimony that he presented unrelated to the documents, with the exception of the service of the lien, this Court did not find to be credible.

26. Gary Jessen is the General Manager/Operations Manger. He testified that he received financial statements on a monthly basis, but could not tell the Court his gross profit, but then indicated that his net profit was ten percent. This was not credible.

27. Gary Jessen did not know his per foot cost for PVC, did not know if they stocked PVC or when they might need to re-buy, yet he testified that he did not calculate costs on a per job basis but on a company-wide basis, which would come under his direct responsibility as general manager. This was not credible. He testified that a journeyman plumber made \$30 an hour, but in this case the worker was paid by commission, but yet Mr. Jessen could not tell the Court the commission rate. In other words, any inquiry that might end in a determination by this Court in a calculation of the actual profit on the job was essentially evaded.

CP 15, FF 25-23.

In Ms. Scoby's case, the misrepresentation involved in quoting for the replacement of "21-25 feet of 4-inch sewerline" and the installation of two locking rings and covers and charging based on that scope of work, when a 14-foot length only was replaced and the locking rings and covers were not installed, is overreaching. In Ms. Todd's case, the misrepresentation involved in quoting for a time-intensive job involving breaking kitchen granite to re-install a sink and charging based on that scope of work when the kitchen sink was simply re-glued in two and half hours, is overreaching.

The Jessens claim Ms. Kristjanson made it clear that her mother's complaint was not about price. Appellants' Brief, pg. 45-47. Specifically, they point to this statement by Ms. Kristjanson: "No, my complaint was not the price. My complaint was the amount of work that was done versus the amount of work that was contracted to be done." RP IV, 52.

The Jessens are taking Ms. Kristjanson's comments completely out of context. First, the question posed to Ms. Kristjanson was: "Your only complaint was the price?" RP IV, 52. Prior to this question, Ms. Kristjanson testified she had many conversations with BFP and claimed that the plumber did half the job in half the time. RP IV, 26. She took pictures that clearly showed the concrete dug out was 14 feet 7 inches, and did not extend to the end of the driveway, as was represented by Mr.

Shelton. RP IV 19, 23. Her comment was made to convey the fact that the finished scope of work did not justify the price of \$6,655.98. If more work would have been done then a higher price would have been justified, but it was not. The price was too high for the services that were actually provided. In essence, the complaint *is* about price.

Perhaps Ms. Kristjanson was not as articulate as she wanted to be, but she was under hostile, aggressive questioning from the Jessens' attorney who asked questions, in a raised voice, such as the following:

Q: But you weren't the contracting party, it was your mother, who's apparently competent. So what's your complaint, and why did you get involved in causing problems between my client and your mother who got the work done for the price that was quoted, and she paid for it? Why would you have any dog in this fight and get involved and create this problem that's now cost your mother lots more money?

RP IV, 50.

The manner of questioning was intended to intimidate Ms. Kristjanson.

2. Occurs in Trade or Commerce

The Consumer Protection Act broadly defines the terms "trade" and "commerce" to include "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). Trade or commerce includes such

activities as providing plumbing and sewer-repair services to Washington residents.

3. Affects Public Interest

The public interest test for private disputes is set forth as follows:

33. To meet the third element and prove the violation of the public interest, claimant must prove either the consumer protection test elements or the private dispute test elements. *See Hangman Ridge v. Safeco Title Insurance*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986).

34. Cases that involve contracts for services tend to come under the private dispute test, because no product is being provided, only a service.

35. Under the private dispute elements of *Hangman Ridge*, the Court makes the following statement, quoting from *Hangman Ridge*: “Ordinarily a breach of private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. . . . However, it is the likelihood that additional Plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.” *Hangman Ridge v. Safeco Title Insurance*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986).

36. Under *Hangman Ridge*, “[f]actors indicating public interest in this context include: (1) Were the alleged acts committed in the course of defendant’s business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the ‘consumer’ and ‘private dispute’ contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.” *Hangman Ridge v. Safeco Title Insurance*, 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986).

CP 28-29 (CL 33-36).

The factors outlined above need not all be met; they represent indicia of an effect on public interest from which a trier-of-fact could reasonably find public interest impact. *Hangman Ridge v. Safeco Title Insurance*, 105 Wn.2d 778, 791, 719 P.2d 531 (1986).

In the present case, the trial judge, as the trier-of-fact, did find a public interest impact. Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 314 P.2d 622 (1957).

This finding of public impact is supported by substantial evidence.

As the trial court explained:

40. Element Three: Affects Public Interest. Element 3 is met because these actions do affect the public interest. The public interest factor test is satisfied as follows: (1) the acts were committed in the court of the defendant's business, (2) the defendants advertised to the public in general, (3) the defendants actively solicited this particular Plaintiff via the advertisement, which indicates the potential solicitation of others, and (4) Plaintiff and Defendant occupy unequal

bargaining positions. The unequal bargaining positions is created in the following manner:

41. A person calls in an emergency and is in need of special knowledge. The Plaintiff's technician is that person. Then they proceed to use that knowledge to enhance the emergency and verify and justify additional dollars. This is how the price gouging has been arrived at.

42. Even in very particular private transactions the court has found a public interest impact. For example, a misrepresentation made during the sale of real estate. *See McRae v. Bolstad*, 101 Wash. 2d 161, 676 P.2d 496 (1984). When a real estate agent did not inform the buyer's lenders' inspectors of the drainage and sewer effluent problems at the property, the court found that there was a public interest because the real-estate listing, which did not disclose the defects, was placed directly before the public. *Id.* at 166.

43. The Consumer Protection Act is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920. In this case, Defendant is representative of bargainers subject to exploitation and unable to protect themselves. Although two examples of price gouging have been shown with vulnerable parties, under *Hangman Ridge*, there is no requirement that Defendant Scoby provide a count of people injured in order to show a pattern. *Hangman Ridge* focuses on the capacity for deception and the potential for repetition. The test is simply the likelihood that additional plaintiffs have been or will be injured. *Hangman Ridge v. Safeco Title Insurance*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986). Plaintiff's actions have the potential for repetition.

44. Additionally, although the Consent Decree cannot be used as evidence itself of a consumer protection act violation, the Consent Decree is evidence that Plaintiff and the Jessens' business entities reach a large number of members of the public. This large outreach takes Plaintiff's acts out of the realm of private transactions. Although none of the *Hangman Ridge* factors are dispositive nor must all of the factors be present, all four elements of the private dispute public interest test have been met. The

Court, as the trier-of-fact, has determined the Plaintiff's acts affect the public interest.

CP 29-31, CL 40-44.

The Jessens claim that the trial court's consideration of evidence involving Ms. Todd and Outtoday to establish a public interest impact is inconsistent with his ruling that "Outtoday LLC . . . was not involved with the Scoby claim." CP 19, CL 2. This ruling is related to an ad that Ms. Scoby's attorney offered for admission into evidence. The ad was designed to generate business for Profit Three dba Outtoday Services, which is a heating company. RP III, 96. The trial court denied admission of the ad because it was not relevant. CP 19, CL 2. The heating company is a separate company from Profit Two, LLC d/b/a/ Plumb Serve and Outtoday Service, the plumbing company. The trial judge did not rule that Ms. Todd's experiences with Outtoday, the plumbing company, was irrelevant.

BFP and Outtoday are small plumbing companies owned, controlled, and managed by Rodney and Gary Jessen. There is overlap between the operation of the two companies. In addition, the invoices for both Ms. Scoby and Ms. Todd show the same company address: **13300 SE 30th St. #105, Bellevue WA 98005** (Exhibits 1 and 112). Both the Scoby incident and Todd incident involve vulnerable parties given a

nominal discount (10% for a club rewards program in Ms. Scoby's case and a \$50 coupon in Ms. Todd's case), a series of increased prices, and ends with a lesser scope of work provided than what was represented to justify the increased price. There is a basis to use Ms. Todd's experiences as an example of the Jessens' businesses using unfair and deceptive practices.

Also, both customer complaints were brought to Gary Jessen's attention. He refused to review the sewerline at Ms. Scoby's property. He also refused to acknowledge that the scope of work was substantially less than what his employees had represented for both Ms. Scoby and Ms. Todd and that a price reduction was appropriate given the lesser scope of work. These actions are consistent with an intent at the beginning to overreach and take advantage of customers. There is strong potential for repetition.

The trial judge explained why he subsequently reversed his oral ruling and determined a pattern exists:

After reflecting on this further—and I thought it was a close question in my original decision – I think that there has been a pattern shown, and rather than looking at two examples, there were actually three examples. The first example is the interaction with Mrs. Scoby related to her sewer line. The other one is the testimony from Ms. Todd related to her sink. But the third one is also related to Ms. Kristjanson's testimony with regard to the price offer

on the –can we call it the lawn faucet, I think that’s what it was.

RP VII, 2-3.

In other words, the \$900 quote (which included a \$200 discount) to install a hose bib with 40 feet of pipe when Ms. Scoby later had the hose bib installed for a cost of \$125 and ten feet of pipe, was yet another example of price gouging. RP IV, 21, 22.

The trial court explained that what these examples have in common “is a person using his superior knowledge and skill to take advantage of the other person in terms of price, with regard to their lesser knowledge and skill. And it’s a technique that I believe the evidence shows has been used repeatedly by this business.” RP VII, 3.

The trial court reviewed the additional memorandum provided by both parties and entered Findings of Fact and Conclusions of Law in favor of Ms. Scoby. In Ms. Scoby’s memorandum, she explained that the public interest test may be met in a variety of ways. *Hangman Ridge* does not require a count of people injured in order to show a pattern. *Hangman Ridge v. Safeco Title Insurance*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986). *Hangman Ridge* focuses on the capacity for deception and the **potential** for repetition. The test is simply the likelihood that additional plaintiffs have been or will be injured. *Id.* Also, although statements

within the Consent Decree cannot be used to establish a CPA violation, the existence of the Consent Decree as a judgment is admissible. The Consent Decree was entered with the Attorney General's Office and is evidence that Plaintiff and the Jessens' business entities reach a large number of members of the public. CP 697-711. The public interest test may be met by a variety of factors.

4. Injured in Business or Property

The injury requirement is met upon proof the CPA Plaintiff's property interest or money is diminished because of the unfair and deceptive practice even if the expenses caused by the violation are minimal. *Panag v. Farmer's Insurance Company of Washington*, 166 Wn.2d 27, 60, 204 P.3d 885 (2009). "Injury is distinct from damages." *Id.* at 60. No specific monetary damages need to be shown to recover under the CPA. *See id.* at 61; *See also St. Paul Fire & Marine Insurance Company v. Updegrave*, Wn. App. 653, 658, 656 P.2d 1120 (1983).

In *Panag*, two uninsured motorists, Rajvir Panag and Michael Stephens, were sent notices by the collection agency retained by the other drivers' insurance companies, demanding payment to recover the amount the insurers had paid on the claim. *Id.* at 34. The uninsured motorists alleged the collection methods violated the CPA because it characterized unadjudicated insurance subrogation claims as a liquidated debt that must

be immediately paid. *Id.* at 65. The cases were consolidated for review. *Id.* at 36.

The Supreme Court held the CPA plaintiff does not need to remand payment to establish injury and “other expenses as a result of the deceptive practice may satisfy the injury element.” *Id.* at 80. Panag’s alleged injuries “included expenses incurred in investigating the true legal status of the alleged debt, including out-of-pocket expenses for driving, parking, postage, and consulting an attorney.” *Id.* at 35. Stephens’ alleged injuries included substantial time away from his business to investigate the collection notices, resulting in loss of business profits. *Id.* at 36. “He also alleged incidental damages, including the cost of purchasing a credit report and a credit monitoring service, parking, wear and tear on his car, and consulting with an attorney to ascertain the legal status of the alleged debt.” *Id.* at 36.

In the present case, the unfair and deceptive act is price gouging (also known as overreaching), the predatory practice of attacking the customer in order to increase the price of services. CP 29, CL 37-38. Ms. Scoby has no need to make payment to BFP to establish the injury element. The BFP employee misled Ms. Scoby about the scope of services that would be included in the final price. Ms. Scoby was left with an open gravel patch. Mr. Flynn testified it is customary in his practice to

cover a sewer line replacement with asphalt. RP II, 111. In addition, the Additional Notes Form clearly specified that two locking ring covers would be installed. (Exhibit 2). Ms. Kristjanson testified that the caps were not installed. RP IV, 24-25. The pictures she took after the plumber left clearly shows the locking ring covers were not installed. (Exhibit 105). Ms. Scoby had to pay a third party to complete the work at the property. RP IV, 25. These incurred expenses are sufficient to meet the injury element.

The refusal of BFP and its owners to acknowledge a price reduction was appropriate is consistent with their intent to overreach from the start. They filed a lien against Ms. Scoby's property to force her to pay the excessive price. The lien, in of itself, diminishes Ms. Scoby's property because it is a slander against title. Separate and apart from the CPA claim, Ms. Scoby had no choice but to defend this lawsuit in order to remove the lien from her property. This is not a case where the litigation costs were solely the result of the pursuit of a CPA claim.

5. Causation

The Jessens' reliance upon *Indoor Billboard v. Integra Telecom*, 162 Wn.2d 59, 170 P.3d 10 (2007) to support its argument that injury was not established is misplaced. In *Panag*, the Supreme Court clarified the

holding regarding the causation element in *Indoor Billboard* and rejected a similar argument set forth by the insurance company.

Farmers reads *Indoor Billboard* as holding a CPA plaintiff cannot establish injury unless he or she remanded payment in reliance on a deceptive demand letter. But *Indoor Billboard* merely holds that when the alleged injury is payment of an amount not actually owed, a plaintiff must prove the deceptive billing practice induced the payment to establish causation. It does not hold that remanding payment is the only legally cognizable injury in a deceptive billing practice case.

Panag, 166 Wn.2d at 59.

In a footnote, the court also elaborated that this was not clear whether the court in *Indoor Billboard* had rejected the defendant's position that proof of reliance is always necessary to establish causation.

Id. at 59 fn.15. It stated:

Depending on the deceptive practice at issue and the relationship between the parties, the plaintiff may need to prove reliance to establish causation, as in *Indoor Billboard*. Most courts have concluded a private right of action under state consumer protection law does not necessarily require proof of reliance, consistently with legislative intent to ease the burden ordinarily applicable in cases of fraud. *See, e.g., Sanders v. Francis*, 277 Or. 593, 561 P.2d 1003 (1977) (proof of reliance necessary in claim alleging false advertising, but not necessary where deceptive act involves material omission). *See generally Cohen*, supra, § 10, at 222 (annotating cases pertaining to reliance in consumer fraud claims); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 745 (1995) ("while the statute does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must

show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm”).

Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 59, 204 P.3d 885, 900 (2009).

In the present case, BFP’s acts were intended to induce Ms. Scoby to sign the contract and the subsequent Additional Forms Note and she did so in reliance upon BFP’s representations. The injury is that Ms. Scoby received substantially less than the benefit of the money charged by BFP and BFP was well aware that the scope of work was less than what it had represented. There is proximate cause.

The Jessens blame Ms. Scoby and her daughter for the Jessen’s filing of the lien, claiming any injury is self-inflicted. Appellants’ Brief, pg. 57. They assert

the causative effects of the conduct of BFP’s plumber Shelton were broken by the actions of Scoby when her daughter stopped payment on the checks that had been given BFP. Rather than negotiate with BFP, rather than mailing BFP copies of the photos showing that only 14 feet of sewerline had been replaced, Scoby precipitated the eventual filing of a lien by canceling all payment to BFP.

Appellants’ Brief, pg. 57.

This is an inaccurate characterization of the events in the case. As stated, the trial court did not find *any* of Gary Jessen's testimony, besides the documents presented and service of the lien, to be credible. CP 15, FF 25.

Ms. Kristjanson first contacted BFP the next morning after Mr. Shelton had completed his work. RP IV, 26. She spoke with Fred Bosio [Fasio] twice and Robert Wadleigh five or six times. RP IV, 26. Each time, she asked for an itemized contract, an explanation of the charges, and for someone at BFP to come out and examine the sewerline. RP IV, 26-27. BFP refused. Ms. Kristjanson asked for someone with authority and was finally referred to Gary Jessen within 7 days of the work being completed. RP IV, 28. His answer was simply that linear feet does not mean in a straight line. RP IV, 28. It was these infuriating conversations that led Ms. Kristjanson to issue a stop payment on the checks. RP IV, 19. She wanted someone to acknowledge that there was a problem. RP IV, 29. She never intended not to pay BFP. RP IV, 29.

Ms. Kristjanson left the sewerline exposed for three months in the hopes that someone at BFP would come out and examine the sewerline. RP IV, 25. On April 3, 2008, Gary Jessen filed the lien against Ms. Scoby's property and personally served the lien on Ms. Scoby, approximately a week after work was completed. CP 695. The sewerline was still exposed. Gary Jessen could have seen with his own eyes that the

caps had not been installed and only 14 feet and 7 inches of asphalt had been removed and therefore there was no possible way to install 21-25 feet of sewerline. Gary Jessen, however, refused to examine the sewerline.

Ms. Kristjanson sent letters and photos about the sewerline to BFP. RP IV, 29 (Exhibit 105). BFP continued to refuse to come out to the property. Instead, BFP and Gary Jessen chose to attend not one, but two arbitrations, and commit fraud upon the tribunal by not disclosing BFP had dissolved. There was never an intention to evaluate Ms. Scoby's complaints on the merits. BFP and the Jessens were solely interested in profit, by any means necessary.

F. The Trial Court's Finding that the Jessens Knowingly Approved of BFP's Unfair and Deceptive Acts is Supported by Substantial Evidence

Rodney Jessen and Gary Jessen are personally liable for violations of the Consumer Protection Act and attorney fees awarded to Ms. Scoby “[i]f a corporate officer participates in wrongful conduct *or* with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties” under the CPA. *Grayson v. Nordic Const. Co., Inc.* 92 Wn.2d 548, 554, 599 P.2d 1271 (1979) (emphasis added). This personal liability is separate, and apart from personal liability

due to piercing the corporate veil. *See id.* at 553-54. The record supports a factual finding that Gary and Rodney Jessen, with knowledge, approved of their employees' "overreaching" tactics.

1. Gary Jessen

The trial court did not find Gary Jessen's testimony credible. Gary Jessen is the general manager of a small plumbing company. As discussed above Ms. Kristjanson repeatedly asked Fred Fazio and Robert Wadleigh to come out to the property. She wanted to speak with someone with more authority and Robert Wadleigh referred her to Gary Jessen. RP IV, 28. Because of the number of times Ms. Kristjanson had spoken with BFP employees and the fact that she was referred to Gary Jessen, himself, there is no possible way he did not know about Ms. Kristjanson's concerns about the scope of work provided and the pricing. In addition, Gary Jessen personally served the lien on Ms. Scoby, yet failed to take the opportunity to inspect the sewerline at the same time.

2. Rodney Jessen

Rodney Jessen testified that he analyzed BFP's financials and watched how his son performed. "I direct him in areas where I want things improved or where I feel that we need to do a better job or, you know, come up with some ideas of how to run the company better, so

forth. So I was directing my day-to-day operations, the general manager, which was my son.” RP III, 116.

Rodney Jessen also testified that for a while, if a Benjamin Franklin customer needed follow-up work, the call would ring in to him, personally. Mr Jessen testified as follows:

. . . It rings to my office. I’m responsible for what happens there.

Q: So it’s – it’s kind of the Benjamin Franklin bat phone and it goes to your office?

A: I have to keep – well, no, yes, I have to keep this number running for a couple more years.

RP III, 137.

Mr. Jessen also testified he worked with his employees on how to use the company pricing systems two days a week, with a focus on new hires. RP III, 147. He also testified there was a company policy to address price complaints, which involved negotiating or talking to one person at a time. RP III, 165. Mr. Jessen testified the company took steps to demonstrate the reasonableness of the price of the sewerline, RP III, 188, and that Ms. Kristjanson’s family’s negotiations with BFP amounted to a “shake down.” RP III, 188. He was emphatic that there were no problems with BFP’s treatment of Ms. Scoby:

How about some respect? We took care of their mother. We did the minimum amount of work. We didn’t try to sell her a whole bunch of goods, we took it incremental. She

was treated like she was my mother, and here is the thing from the son.

RP III, 189.

The relationship between Ms. Scoby's family and BFP was hostile from the start. It is not believable that Rodney Jessen, who is Gary Jessen's father, who testified he trained his employees on pricing, oversees his son's day to day operations, who is familiar with the company's policy on handling customer disputes, who receives BFP calls on follow-up work directly, and who signed BFP's bankruptcy petition shortly before the first trial date, would have no idea about who Ms. Scoby is and her complaints. In addition, despite clear physical evidence that the scope of work was less than what was described in the invoice, including the Jessens' own video of the sewerline, Rodney Jessen reviewed the invoices and internal memos and was adamant that his company provided correct incremental pricing. RP III, 170, 189.

Since the physical evidence is so obvious, the Jessens refusal to view the sewerline or acknowledge a problem exists, supports a finding that there was an intention to overreach from the start and that the Jessens knowingly approved of this unfair and deceptive act.

G. The Trial Court's Award of the Net Sum of \$3,350 as Quantum Meruit is Not an Abuse of Discretion

Whether the trial court erred in awarding damages is reviewed for abuse of discretion. *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 636, 865 P.2d 527 (1993), review denied, 124 Wn.2d 1005 (1994). Abuse of discretion occurs where the trial court's action is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348, 353 (2007) (quoting *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006)). The trial court's decision to set the quantum meruit recovery as the net sum of \$3,350 is not an abuse of discretion.

The court's oral decision was preliminary and Ms. Scoby moved the Court to reduce the oral quantum meruit award to a net sum of \$3,350. CP 432. In Ms. Scoby's motion for clarification, Ms. Scoby stated:

Washington courts award prejudgment interest only "if a claim is liquidated or is for an amount which is determinable by computation with reference to a fixed standard without reliance on opinion or discretion." *Irwin Concrete, Inc. v. Sun Coast Props., Inc.*, 33 Wn.App. 190, 200, 653 P.2d 1331 (1982); *CKP, Inc. v. GRS Const. Co.*, 63 Wash.App. 601, 617, 821 P.2d 63 (1991). Quantum meruit awards are unliquidated as a matter of law because they are discretionary. The Court relied upon the testimony of Defendant's expert witness, Kevin Flynn, to determine the reasonable value of work performed. The Court also invalidated the contract and no interest is due from the contract. Therefore, no pre-judgment interest is due.

The burden is on the plaintiff to prove the reasonable value of the services rendered. *Eaton v. Engelcke Mfg., Inc.*, 37 Wn.App. 677, 680, 681 P.2d 1312 (1984). Plaintiff did not plead quantum meruit or provide any evidence of its costs, materials, or permit costs or the reasonable value of the work performed. Also, the quantum meruit award is an offset and Plaintiff Benjamin Franklin Plumbing will not make any sales tax payment to the State of Washington. Therefore, no sales tax or permit fees should be added to the reasonable value of work.

CP 432-33.

The court stated that the award of prejudgment interest was not proper. RPVI, 4. It is apparent that trial court also agreed with Ms. Scoby's remaining argument above because it entered a written decision to eliminate the permit cost and cost of sales tax. CP 23. CL No. 15. No permit cost was presented by the Jessens, who carried the burden of proof for establishing the reasonable value of services, and the award of sales tax is not appropriate because the quantum meruit award is an offset. Additionally, BFP is a dissolved and bankrupt company. It will never make a sales tax payment to the State of Washington.

The authorities cited by the Jessens are not persuasive. In *Powell v. Kier*, 44 Wn.2d 174, 176, 265 P.2d 1059 (1954), the appellate court affirmed the trial court's decision to accept the plumber's records to establish the value of quantum meruit—the case does not stand for the proposition that sales tax must always be included in a quantum meruit

award by the trial court. In *Pomeroy v. Anderson*, 32 Wn. App. 781, 649 P.2d 855 (1982), the contractor sued to recover the sales tax against the owner in an enforceable contract. The court stated the statutory presumption in RCW 82.08.05 that the buyer pays sales tax was designed precisely for the case before it: where neither party was at fault, the parties did not discuss sales tax and the contract did not clearly provide that the price included sales tax. See *Pomeroy v. Anderson*, 32 Wn. App. 781, 785, 649 P.2d 855 (1982). The Court also stated that the presumption in RCW 82.08.050 does not change prior case law arising before the enactment of the statute if the parties understood that the contract price included sales tax. *Id.* at 784. The Court held that the presumption controls because the parties did not address the question of sales tax during the bidding process and did not enter into a contract stating that the price included sales tax. *Pomeroy v. Anderson*, 32 Wn. App. 781, 784, 649 P.2d 855, 857 (1982). In the present case, we have an ***unenforceable*** contract and an award based on quantum meruit, an equitable remedy.

Lastly, both contractors in *Powell* or *Pomery* were viable businesses, not dissolved and bankrupt like BFP. RCW 82.08.050 simply does not apply in this case because the tax cannot be held in trust by the seller until paid to the state. The seller, BFP, was dissolved and filed for

Chapter 7 bankruptcy prior to trial. There are tenable grounds for the trial court's decision to exclude the cost of the permit and sales tax in the award of quantum meruit. The trial court did not act in an arbitrary or capricious manner and therefore the award of quantum meruit must stand.

H. The Trial Court's Did Not Err in Finding that the Award of Quantum Meruit Does Not Make BFP the Prevailing Party

The trial court did not err in finding that the award of quantum meruit damages does not make BFP the prevailing party under the contract or lien statute and therefore, no attorney fees were awarded to BFP. CP 24, CL No. 16. Unlike the cases cited by the Jessens, this is not a case where extra work was done that was not contracted for and the Court made an award of quantum meruit for the extra work. This case involves breach of contract, bad faith in filing a lien, and consumer protection violations, and the prevailing party issue needs to be examined in this context.

“[A] prevailing party is generally one who receives a judgment in its favor.” *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). “If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the

parties.” *Riss v. Angel*, 131 Wash.2d 612, 633, 934 P.2d 669 (1997) (citing *Marassi v. Lau*, 71 Wash.App. 912, 916, 859 P.2d 605 (1993));

1. **Ms. Scoby is the Substantially Prevailing Party and Entitled to Attorney Fees and Costs Pursuant to the Contract**

RCW 4.84.330 states as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements. . . .

RCW 4.84.330 (emphasis added).

RCW 4.84.330 applies to any action in which it is alleged that a party is liable on a contract, even if no enforceable contract was ever formed. *See Herzog Aluminum, Inc. v. General American Window Corp.* 39 Wn. App. 188, 197, 692 P.2d 867, 872 (1984) (holding Defendant obtained a judgment dismissing Plaintiff's cause of action and was entitled to an award of reasonable attorney fees incurred at trial).

The contract form used included the following attorney fees and cost provision (Exhibit 1): “I shall pay for all associated fees at the posted rates as well as all collection fees and reasonable attorney fees.” The

trial court determined BFP breached the contract and even if non-performance is not seen as a breach, the contract can be voided due to overreaching. CP 22 (CL 12). Ms. Scoby defended against this cause of action and prevailed and is entitled to her reasonable attorney fees and costs.

2. Ms. Scoby is Prevailing Party under the Lien Statute

RCW 60.04.021 states as follows:

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement **for the contract price** of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

(emphasis added).

The “Contract Price” is defined as: “the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor.” RCW 60.04.011(2)

The trial court’s citation to *DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.*, 142 Wn.App. 35, 170 P.3d 592 (2007) (a lien statute is strictly construed to determine whether the lien attaches) is not the sole basis for the trial court’s determination that BFP is not the prevailing party. BFP does not have a valid lien because it is excessive

and filed in bath faith. BFP filed suit to foreclose its claim of lien in the amount of **\$6,655.98**, which it alleged was the contract price. A valid lien can only attach if it is for the amount agreed upon by the parties or, if there is no agreement, the customary or reasonable charge therefore. The sum of \$6,655.98 is neither the amount agreed upon by the parties nor the customary and reasonable charge. BFP breached the contract and even if not seen as a breach, the contract can be voided due to overreaching. CP 22 (CL 12). The trial court awarded quantum meruit in the amount of \$3,350 (almost half of the amount lienied by BFP).

A lien is invalid for an excessive amount if the amount is claimed with an intent to defraud or in **bad faith**. *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn.App. 710, 715, 658 P.2d 679, 682 (1983). Ms. Kristjanson testified that she requested someone from BFP review the work at her mother's property because she felt it was incomplete. RP IV, 26-27. She had taken photos of the sewerline that clearly showed approximately 14 feet of sewerline installed compared to the 21-25 linear feet indicated in the Additional Notes Form. (Exhibit 105). Despite the fact that she spoke with the field supervisor and Gary Jessen himself, no one ever came out to review the work, until Gary Jessen filed the lien. RP IV, 26-27. The failure to review the work prior to filing the lien is

evidence of bad faith. If reviewed, Gary Jessen would have very clearly seen the length of the sewerline pipe was less than 25 feet.

Under the lien statute, the award of costs and attorney fees incurred in filing lien actions pursuant to RCW 60.04.130 is discretionary unless the amount in controversy is \$10,000 or less. *Kingston Lumber Supply Co. v. High Tech Development Inc.*, 52 Wn.App. 864, 867, 765 P.2d 27, 29 (1988). However, even under *Kingston*, the party needs to be the prevailing party in order to recover attorney fees and costs. *Id.* As discussed above, BFP is not the prevailing party. An award of quantum meruit is an equitable remedy. BFP breached the contract and filed an excessive lien in bad faith. “A finding of bad faith would disqualify [BFP] from being the prevailing party just on that basis.” RP VII, 6. Ms. Scoby is the prevailing party under the lien statute.

The trial court entered conclusions of law that stated the lien is invalid because it is clearly excessive, almost double the reasonable value of the work, and claimed in bad faith. CP 24 (CL 20-21). It determined BFP not the prevailing party under the lien statute because of the invalid lien. CP 24 (CL 21). Since BFP is not the prevailing party, it is not entitled to recover any of its attorney fees and costs under any of BFP’s proposed legal theories.

I. The Jessens Due Process Rights Were Not Violated

1. **Trial Court has Broad Discretion to Consider Additional Evidence After Rendering an Oral Decision and has Broad Discretion in Case Management**

During the time period between the oral ruling and formal, written judgment, the formalities for vacation or reconsideration of the judgment or for a new trial do not apply. *See Cerjance v. Kehres*, 26 Wn. App. 436, 441, 613 P.2d 192 (1980) (the restrictions on granting a new trial do not apply when the trial court has not yet rendered a final judgment).

The trial court has broad discretion to give further study to the issues and to consider additional evidence after rendering an oral decision. *In re Marriage of Harshman*, 18 Wn. App. 116, 120, 567 P.2d 667 (1977), *overruled on other grounds by In re Marriage of Elam*, 97 Wn.2d 811, 650 P.2d 213 (1982). In *In re Pawling*, 101 Wn.2d 392, 395, 679 P.2d 916 (1984), the trial court, after issuing an oral ruling, signed an order of continuance and allowed additional testimony. The Supreme Court ruled that the trial court did not violate CR 59 (grant of a new trial after entry of judgment) and CR 15 (leave to amend pleadings freely given) because the trial court did not view the oral hearing as a final adjudication and did not sign a formal written judgment nor findings of fact and conclusions of law. *Id.* at 918.

Additionally, the trial judges have wide discretion to manage their courtrooms and conduct trials. *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). The appellate court reviews a trial judge's courtroom management decisions for abuse of discretion. *In re Marriage of Zigler and Sidwell*, 154 Wn.App. 803, 815, 226 P.3d 202, 208 (2010).

Prior to entry of the Findings of Fact and Conclusions of Law, Ms. Scoby moved the court to take judicial notice of bankruptcy documents. The trial court's decision to treat the submission of the bankruptcy petition as a motion to reopen the record and admit the document into the record, a motion that it granted, should be upheld. RP VII, 6. This decision was not an abuse of discretion. The case was tried as a bench trial and this was not an action that would have been confusing to a jury and was within the case management discretion of the trial court.

The Jessens' assertion that they were "[d]enied any opportunity to defend themselves" is a dramatic statement, but not true. Appellants' Brief, pg. 87. The Jessens had plenty of opportunity to present their own explanation about what the bankruptcy documents mean. They did in fact respond to the bankruptcy documents, but their response was simply that the documents should not be considered. The Jessens never claimed the bankruptcy petition was inaccurate—they were hoping they could delay long enough to avoid providing an explanation.

As discussed above (Section 3A. “Statement of Procedure”), Scoby asserted BFP failed to wind down properly in Defendant’s Memorandum on Prevailing Party, Attorney Fees, and Motion for Clarification on Oral Ruling, which was filed on March 2, 2010. CP 430-444. The Jessens filed responsive pleadings. In Defendant Scoby’s Memorandum on Findings of Fact and Conclusions of Law, Scoby reattached the bankruptcy petition and asked the trial court take judicial notice of bankruptcy petition. CP 259-63. The Jessens also filed responsive pleadings. At the final hearing, the trial judge referenced the fact that “[b]oth parties have presented additional – well, let’s put it this way, sort of find [sp] Findings of Fact and Conclusions of Law supported by legal memorandum.” RP VII, 2.

From March 5, 2010 to May 3, 2010, the Jessens had ample time to respond to the bankruptcy documents, including the petition, and they did. Their response was simply that the petition should not be considered. Counsel for both parties agreed on the date for the final hearing. *See* RP VI, 25-26. If the Jessens had any additional explanation to provide regarding the bankruptcy petition, they had ample time to provide it.

The Jessens never questioned the validity of the petition itself—they simply could not. The petition was signed by Rodney Jessen and

filed with the Western District of Washington United States Bankruptcy Court. Its validity cannot be questioned.

The Jessens were not denied their due process rights. They briefed the issue of the bankruptcy petition. The Jessens also had complete knowledge of the bankruptcy proceedings and the contents of the petition could not have been a surprise to them. Rodney Jessen signed the petition himself.

It is also important to note that the Jessens were allowed to reopen their case so that Gary Jessen could provide additional testimony. RP II, 13. The Jessens also attached a new document to its Reply filed March 3, 2010—a corporate record for BFP showing BFP was administratively dissolved. CP 404-409, CP 416. Ms. Scoby did not object to either action.

2. Judicial Notice and Admission of Party Opponent

Under ER 201, a court may take judicial notice of certain adjudicative facts at any time during the proceedings. ER 201 provides as follows:

(a) Scope of Rule.

This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready

determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary.

A court may take judicial notice, whether requested or not.

(d) When Mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard.

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice.

Judicial notice may be taken at any stage of the proceeding.

ER 201.

The Court may take judicial notice of the petition, orders, and other proceedings in bankruptcy court. In *In re McGhan*, 288 F.3d 1172, 1175 (9th Cir. 2002), the Ninth Circuit held that the state court did not have the authority to modify the bankruptcy court's order discharging a claim and permanently enjoining a party from collecting on a debt. *Id.* at 1175. However, the court specifically noted, “we do not hold that a state court is divested of all jurisdiction to construe or determine the applicability” of a bankruptcy court's order. *Id.* at 1180. The court added, “[i]t plainly was in the power of the state court to take judicial notice of [debtor’s bankruptcy] proceedings.” *Id.*

The trial court had authority to consider the request for judicial notice as motion to reopen the record and admit the bankruptcy petition

since it had not entered a written ruling. After opening the record, it could take judicial notice of the BFP's bankruptcy petition because the facts within this document are a matter of public record, not subject to reasonable dispute, and "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." ER 201(b).

Alternatively, the statements in the bankruptcy may be admitted as admissions by a party opponent. ER 801(d)(2). Rodney Jessen prepared the bankruptcy petition. The statements within the bankruptcy petition are being offered against BFP and is the party opponent's own statement, made by Rodney Jessen in a representative capacity. The statements are BFP's own admission that it was leasing vehicles to Profit 3 LLC for \$3,000 a month. In essence, BFP admitted it was doing business after it had been administratively dissolved on February 2, 2009.

J. Personal Liability Under RCW 25.15.303

Robert Jessen testified he closed down Benjamin Franklin Plumbing and started a new company out of whole-cloth. RP III, 82. The successor corporation Profit Two, LLC d/b/a Plumb Serve and Outtoday was fully operational by December 2, 2008, as that was the date Michelle Todd contracted with Outtoday to repair her sink (Exhibit 112). Outtoday

provides plumbing services. RP III, 95. These are the same services provided by BFP.

There was overlap between BFP and Outtoday. Mr. Jessen testified the lessor of the vehicles, whom he identified as GE Capital, had no interest in taking the vehicles back and gave terms with the new company to make payments. RP III, 83. Subsequently, the vehicles were returned to the lessor because GE Capital did not want to agree to a chattel transfer, transferring the vehicles from one corporation to the next. RP III, 84. Mr. Jessen also testified the two businesses shared the same physical space at the leased premises for a few months and that the businesses also leased equipment. RP III, 84.

On February 2, 2009, Benjamin Franklin Plumbing was administratively dissolved. CP 416. On October 8, 2009 (eight months later), Rodney Jessen filed for Chapter 7 bankruptcy on behalf of BFP. CP 281-320. On February 2, 2010, the bankruptcy case was closed. CP 327-328.

Personal liability to the claimants may result if the persons winding up the company's affairs do not comply with RCW 25.15.300. *Chadwick Farms Owners Association v. FHC LLC*, 166 Wn.2d 178, 201, 207 P.3d 1251 (2009). The Jessens have no explanation for why they filed a Chapter 7 bankruptcy (total liquidation) for a company they had closed in

2008 and let administratively dissolve on February 2, 2009 (about 8 months prior to its bankruptcy filing).

A dissolved corporation may not carry on any business except to wind up and liquidate its business and affairs. RCW 25.15.285(3). The totality of the circumstances indicates BFP carried on business after it closed and was administratively dissolved. The bankruptcy petition includes a statement dated October 8, 2009 from Rodney Jessen that BFP leases four vans to Profit 3, LLC for \$3,000/month, which it pays directly to its creditor, Ford Leasing. CP 300. This statement contradicts Mr. Jessen's testimony that all vehicles were returned to the lessor because the lessor did not want to transfer the vehicles from one corporation to the next. During this time period, the Jessens were operating Outtoday.

The leases and vans should have been returned to the creditors after BFP had closed and definitely by the time it was administratively dissolved on February 2, 2009. It is not credible that the vehicles were not being used, because during this same time period, the Jessens were also operating Outtoday, a successor corporation, providing the same services as BFP provided. The sequence and timing of the closure, dissolution, bankruptcy filing, and continued business operation after dissolution support a finding the Jessens did not properly wind up BFP.

In *Chadwick Farms*, the Supreme Court held that the Owner's Association could pursue individual defendants for improper wind up. In that case, the canceled certificate of formation meant the LLC was no longer in existence and personal liability would allow a valid claim to be paid. The Court stated:

During the wind-up period, FHC did not pay the claims asserted by the Owners Association. If those claims are valid and FHC failed to make provision for paying them, then FHC did not properly wind up its affairs—it clearly knew of the claims at the time it was canceled.

Chadwick Farms Owners Ass'n v. FHC LLC 166 Wn.2d 178, 202, 207 P.3d 1251 (2009).

During the wind-up period, the Jessens knew of Ms. Scoby's civil claims and arbitration award and failed to pay or set aside any funds to pay for the claim. Following the holding in *Chadwick Farms*, personal liability to Ms. Scoby results because Rodney and Gary Jessen, the persons responsible for winding up the company's affairs, did not comply with RCW 25.15.300. BFP is closed and its bankruptcy case is also closed. No distribution was made to creditors. The Jessens, the officers of BFP, did not pay or set aside funds to pay for Ms. Scoby's claim. The trial court properly found personal liability pursuant to RCW 25.15.030. CP 25-27 (CL 26-31).

K. Changes from Oral Ruling and Written Ruling Are Not Drastic

The trial judge is a human being who is tasked with absorbing an enormous amount of information over a few days. Simply because the trial judge changed his mind does not mean the trial judge maneuvered to find the Jessens liable.

The CPA claim was a close call. The trial judge in his preliminary oral ruling on Feb. 23, 2010, *did* find unfair and deceptive acts and two examples of these acts. He originally stated two examples did not show a pattern. However, upon further reflection and analysis of the case law, he stated there were actually three examples and this is sufficient to show a pattern. Under *Hangman Ridge*, however, a count is not even unnecessary. The test is simply the “potential” for repetition. *Hangman Ridge v. Safeco Title Insurance*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986). Also, as briefed above, the CPA is intended to be liberally construed. In addition, the injury, damages, and causation elements are not meant to be stringent requirements under the CPA.

At the preliminary hearing held February 23, 2010, the court found no wrongdoing as it relates to personal liability under the theory of piercing the corporate veil. RP V, 19. It did not address personal liability under the CPA or RCW 25.15.303. Since the trial court reconsidered

BFP's liability under the CPA, it went on to find personal liability for the Jessens under the CPA. Also, the trial court found personal liability under RCW 25.15.303 as well, which was not addressed at the preliminary hearing.

No defendant will ever receive a "perfect" trial. The Jessens were entitled to a fair trial and that is what they received. Lastly, the appellate court may affirm the trial court on any basis established by the record before the trial court. *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, 142 Wn. App. 229, 257, 215 P.3d 990 (2007), *review denied*, 168 Wn.2d 1024 (2009).

V. CONCLUSION

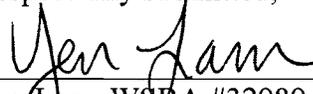
Although Ms. Scoby prevailed at the trial court, it can hardly be said that she has “won” anything. Mrs. Scoby was awarded a portion of her attorney fees and costs incurred. There is no windfall for her. Mrs. Scoby brought her counterclaims to stand up for herself, but equally important, the claims were brought for the benefit of the public. Transparency is the real achievement of this case.

This entire experience has been a grueling one for Ms. Scoby and her family. Instead being focused on Ms. Scoby’s health problems, she and her family has had to deal with the Jessens’ machinations and deceptions for years. Because of these experiences, the grandiose links the Jessens make between their treatment by the trial court, now characterizing themselves as victims, and the entire credibility of the legal system itself—is literally stomach-churning to read.

Why did the Jessens engage in unfair and deceptive business practices? For the simplest of reasons—because they thought they could. And they will no doubt do it again. But at least now the public will be on notice about what it is like to deal with a business run by the Jessens. Perhaps, they will avoid the fate suffered by Ms. Scoby. Ms. Scoby respectfully requests that the Court of Appeals affirm the trial court and award Ms. Scoby her attorney fees and costs on appeal.

DATED this 10th day of June, 2011.

Respectfully submitted,



Yen Lam, WSBA #32989
Galvin Realty Law Group, P.S.
6100 219th Street SW, Suite 560
Mountlake Terrace WA 98043
425.275.9863 (ph)
Attorney for Respondent

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Via ABC Legal Messenger

James E. Lobenz
Carney Badley Spellman, P.S.
701 Fifth Ave., Suite 3600
(206) 622-8020

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of June, 2011, at Mountlake Terrace, WA.



Yen Lam

FILED
COURT OF SUPERIOR
STATE OF WASHINGTON
2011 JUN 10 PM 4:40