

No. 73692-2-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 1

DAPHNE A TOMCHAK,  
Plaintiff and Appellant

v

CHARLES GREENBERG, aka TRIAD LAW GROUP  
Defendant and Respondent

**OPENING BRIEF OF APPELLANT**

Appeal from the Superior Court of King County,  
Cause # 14-2-30436-6 SEA  
The Honorable Judith Ramseyer

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## **A Introduction**

The Consumer Protection Act provides that consumers of goods or services can seek redress for unfair practices in transactions. The CPA stipulates that legal costs incurred in seeking redress can be awarded to consumers, and that triple damages, up to \$25,000, can also be awarded, so that even seemingly insignificant claims will be heard. <sup>1</sup>

The Washington State Bar Ethics rules delineate general rules attorneys must follow in communication with their clients. <sup>2</sup> The rules for timely disbursement of funds and for bookkeeping, however, are quite specific.

<sup>3</sup>Failure to follow these latter rules constitute a Breach of Fiduciary Duty.

## **B Background of Case**

Plaintiff and Appellant Daphne Tomchak's house was rented by a Hollywood crew to film a movie about marauding raccoons. When Tomchak regained possession of her house, however, it appeared that the crew had been the marauders; the house was substantially damaged and many of her possessions were missing. After 2 years of attempting to deal with the insurance company herself, Tomchak retained Defendant

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<sup>1</sup> RCW 19.86

<sup>2</sup> RPC, Section 1.5

<sup>3</sup> *ibid*

Attorney Charles Greenberg to represent her. They signed an hourly fee agreement. She gave Greenberg a \$5000 retainer. Greenberg agreed she could help in research and drafting of documents; (CP 15) Tomchak informed Greenberg she was unemployed.

10 days after Tomchak drafted and emailed an Arbitration brief to Greenberg, one was sent to her which was inferior and missing vital information. She was told as explanation that “Chuck doesn’t read his email”. (CP 15) She objected to paying for this time. (CP 20) She never saw an invoice after this.

Greenberg said he needed an additional \$3000 for the coming Arbitration, which she sent. (CP 15) She was awarded \$102.5k in Arbitration on November 29, 2012. (This was about half the damage estimate.) (CP 15)

On January 25, 2013, a frustrated Tomchak sent an email to Greenberg entitled “*Where’s my money?*” (CP 15) The body of the email was a citation from the RPC on the timely disbursement of client funds. The email ended “*I have not received any billing from you in months. Nor my money*”. (CP 15)

Greenberg responded with a 'deal' in which he would retain an additional \$500 and send her the balance. (CP 15) She was getting desperate and needed the money, so this felt threatening. She agreed, but noted in the email she still needed to see an invoice. (CP 15) Eventually, Greenberg sent her money, but he retained an additional \$8048.10, not the \$500 they had agreed to. She repeatedly asked for an invoice over the next 13 months, (CP 15,24) but he never sent one. She filed a BAR complaint<sup>4</sup>, and Greenberg still did not send one. Tomchak then filed suit on two grounds- Breach of Fiduciary Duty, and a CPA claim.

Greenberg moved for Summary Judgment. It was granted by the trial court (CP 21) which determined she had not met the threshold for a CPA claim, nor for a Breach claim.

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<sup>4</sup> Tomchak found, when filing her BAR complaint, that Greenberg had already been reprimanded by the BAR for 4 previous instances violating 5.1 and 8.4 (c) *Dishonesty, Fraud, Deceit or Misrepresentation* in billings.

### **C Assignment of Errors/Issues Presented**

- a. Did the trial court err in granting Defendant's Summary Judgment Motion on the CPA claim, by erroneously failing to find all 5 elements of a CPA claim had been met?
- b. Did the trial court err in granting Defendant's Summary Judgment Motion on the Breach of Fiduciary Duty claim, by failing to recognize a breach occurred when Defendant delayed disbursement, did not inform Appellant of status of funds, withheld more than his proposed 'deal', and never provided any accounting, even after a BAR complaint was filed?

### **D Statement of Case**

Tomchak's house was substantially damaged in late 2009 by a Hollywood movie crew, 'Raccoonopolis'. The sewer line was severed, electrical wiring was cut, walls and floors removed, and many personal possessions were missing. She contacted the insurance company, the state insurance commissioner, and then the attorney she was referred to by the insurance company. Ultimately she retained Charles Greenberg to represent her, on an hourly fee basis, and provided him files (in a fat notebook, tabbed and in chronological order) including damage estimates, assessor's reports, correspondence, legal research, expert witnesses, inventories, and many

indexed photos. (CP 15) Tomchak told Greenberg she was unemployed and would like to assist if she could, and he readily agreed. (CP 15) She gave him a \$5000 retainer, and a later payment of \$3000 for the Arbitration. (CP15)

Tomchak composed a Brief for the Arbitration, in legal format and with citations, and emailed it to Greenberg on 11/14/12. 10 days later, on 11/24/2012, she was emailed a different, inferior Brief, missing lots of vital information. (CP15) When she objected hers had not been consulted, she was told “Chuck doesn’t check email.” (CP15) (Hers was ultimately used.) She objected to paying full freight for this. She never saw an invoice after this point, despite repeated requests.

After Arbitration on November 29, 2012, Tomchak grew frustrated and worried about the timely disbursement of her award. On January 25, 2013, two months after Arbitration, she sent Greenberg an email entitled “*Where’s my money?*” It also stated that she had not received an invoice in months. (CP 15)

Greenberg responded by offering her a ‘deal’; he would retain an additional \$500 and send her the remainder. Although this felt like a

threat-- she was worried if she did not agree there would be even more delay, and she still wanted to see an invoice-- she finally agreed. She requested an invoice in her agreement email. (CP 15) She assumed that the 'additional \$500' was additional to what she had already paid, since she had not seen any accounting, and she still believed she was owed a credit for the duplicate work Greenberg had done on the Brief. However, Greenberg ultimately retained an additional \$8048.10, not \$500 as he had offered. She challenged this, and asked for an accounting, as required by their contract and by the Rules of Professional Conduct.

Over the next 13 months, Tomchak sent multiple, additional requests for an invoice, including on 1/30/13, 2/25/13/ and 4/17/14. (CP 15) Greenberg responded, directing his bookkeeper to comply (copying the bookkeeper in several emails) but no invoice was ever sent. (RP, p 16)

In about June 2014, Tomchak filed a BAR complaint against Greenberg for failure to send an invoice or discuss charges. In filing the complaint, she discovered he had been previously reprimanded by the BAR for 4 previous instances of billing fraud. Yet despite the BAR complaint, he

still failed to submit any accounting.<sup>5</sup>(CP 15)

Tomchak subsequently filed suit against Greenberg on 2 causes- a CPA claim, and a Breach of Fiduciary Duty claim. When Greenberg moved for Summary Judgment and provided exhibits, Tomchak finally was given an invoice. She discovered that the monies had been received in 2012, not 2013, when she had received them. (RP p 11). This had tax consequences for her. The delay of disbursement also had negative consequences for her, especially as she was unemployed. (RP p 11)

The trial court accepted Greenberg's contention that his failure to provide an invoice was 'inadvertent', despite that one had been fruitlessly requested repeatedly over 13 months, and that a BAR complaint was filed. (RP p 18)

## **E Argument**

### **a. Standard of Review**

The trial court granted summary judgment against Tomchak's claims for failure to establish claims upon which relief may be granted. This Court

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<sup>5</sup> See WSBA disciplinary website. Also RP p 14

reviews *de novo* a trial court's granting of summary judgment pursuant to CR 56 and RAP 2.4, and will affirm where no set of facts consistent with the complaint can justify recovery. Washington Imagining Services, LLC v Washington State Dept of Revenue 171 Wn.2d 548, 555, 252 P.3d 885

**b. CPA Claim**

A CPA claim has **five basic elements**, as defined in Hangman v Safeco:

"(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation."

The trial court found that the first 2 elements had been met in this case, so they will not be argued here. (RP p 25)

**Public Interest, 3rd element:** The court stated the third element had not been met. (RP p 25) But the conclusion was based on the fact, so stated in the record, that Greenberg had not solicited Tomchak. From the Record of Proceedings:

*"And here, I find that the act alleged, the failure to provide billing statements, doesn't have a public impact element. Again, looking at the case law and the sort of conditions, the non-exhaustive list of*

*the kinds of conditions the courts look to, I don't see any evidence that the defendant solicited the plaintiff here*"<sup>6</sup> (RP p 25-26)

Solicitation of clients would be a breach of ethics for an attorney. Since it is unethical, it would automatically preclude the practice of law from any CPA action. But it has already been determined that certain business aspects of the practice of law fall within the CPA:

In PANAG V FARMERS INS CO. OF WASH, 166 Wn 2d 27 (2009), noted at 58:

.... "See *Michael v Mosquera-Lacy*, 165 Wn. 2d 595, 200 P.3d 695 (2009); Short 103, Wn.2d at 61 (**CPA applies only to entrepreneurial aspects of legal practice such as setting prices of legal services, billing, and collection, and obtaining, retaining, and dismissing clients**). " (*emphasis added*)

Also in Mosquera-Lacy, the court observed:

*"A private plaintiff must show that his lawsuit would serve the public interest. See Lightfoot v. MacDonald, 86 Wn. 2d 331, 544 P2d 88 (1976). For private disputes, "it may be more difficult to show that the public has an interest in the subject matter".*

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<sup>6</sup> The act alleged was both the failure to provide an invoice AND the delay in disbursement of funds, but the court did not address them both here.

*Hangman Ridge, 105 Wn 2d at 790. When a complaint involves a private dispute, such as here, the court evaluates four factors: Id. at 791. None of the factors are dispositive, nor must all of the factors be present. Id. The factors are: (1) whether the alleged acts were committed in the course of the defendant's business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited this particular plaintiff, indicating potential solicitation of others; (4) whether plaintiff and defendant have unequal bargaining positions. Id."*

Again, as solicitation is unethical for attorneys, #3 cannot be dispositive (nor is it required to be). The other elements delineated here are all met, particularly the last one about unequal bargaining positions. Tomchak had a very weak or no bargaining position, in that she wasn't even informed what the charges were or the hours incurred, despite their contract requirements.

The Washington Pattern Jury Instructions define for jurors what constitutes a public interest in a CPA claim:

*"In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish the act or practice is injurious to the public interest because it:  
Violates a statute that incorporates this chapter;*

*Violates a statute that contains a specific legislative declaration of public interest impact; or*

*(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.*

Defendant's actions meet all three of these criteria. He has already injured other persons with his billing, and has been reprimanded by the BAR. He has injured Plaintiff. He certainly has the capacity to continue his injurious billing practices.

The trial court concluded that Defendant was unlikely to injure the public *again*, because he had a bookkeeper to do his billing. In discussing the risk of repeating the unfair behavior, the court stated:

*“The evidence also shows that Mr. Greenberg has a bookkeeper who is responsible for mailing invoices and that is the routine practice for the firm is that his clients be billed monthly....” (RP p 26)*

This conclusion is already demonstrably false, as his bookkeeper was copied on emails to Tomchak and still did not send out invoices.

Moreover, it is the Defendant's responsibility to see that those in his employ conform to ethical standards; he cannot shirk his professional duties by blaming his bookkeeper.

Contrary to the trial court's conclusion, the Public Interest element of the CPA claim has been met.

**Injury to Plaintiff, 4th element:** The trial court concluded Tomchak had not been harmed by Defendant's "admittedly unfair"- in the court's words- actions. Again, Handlin contradicts this finding. On pages 6-7:

*At the outset, we reject On-Site's argument that the complaint was insufficient because it did not specifically allege 'actual damages', a term used in RCW 19.182.150, the section quoted above. The Fair Credit Reporting Act is designed so that violations can be enforced as a consumer protection violation..... "Monetary damages need not be proved; unquantifiable damages may suffice."*

And later on page 7:

*An injury to property occurs when one's right to possess, use, or enjoy a determinate thing has been affected in the slightest degree. Ambach v French, 167 Wn. 2d, 167, 172, 216, P 3d 405 (2009). A sufficient injury is therefore pleaded if a plaintiff alleges she was deprived of the use of her property for even a short amount of time. Sorrel v Eagle Healthcare Inc. Wn App 290, 298-99, 38 P 3d. 1024, review denied, 147, Wn. 2d 1016 (2002)*

In Sorrel, the court did not require the plaintiff to show actual damage—such as lost interest on those funds, or the lost opportunity to spend the funds on some important need. Rather, merely denying the plaintiff “rightful possession of his funds of a period of two weeks” caused a sufficient injury to support a CPA claim.

See Sorrell, 110 Wn. App. at 293-94.

Tomchak was not informed her funds were available in the year 2012. She inquired in January 25, 2013 where her money was, a month after she could have received her funds. She stated she took out a personal loan to cover her until she got the money, but per Sorrel, she is not required to prove this to claim injury.

Although these cited cases refer to RCW 19.182, they deal with consumer issues and damages. In this case, Tomchak was denied the use of her funds for at least a month. For the trial court to conclude this was of no consequence to her and therefore did not rise to the level of injury is specious.

And if nothing else, Tomchak was forced to file a lawsuit to get her

invoice. Just the filing fee for the lawsuit constitutes damages recoverable under the CPA.

**Causation, 5th element:** The trial court also did not find causation. (RP p 27) If there is no injury, there can be no causation, but the trial court also seems to be stating that Tomchak bears responsibility for the lack of invoices and timely disbursement. Tomchak is not sure what else she, as a client, could have done, nor should she have been obligated to hector Greenberg for the disbursement. As stated, she did not even know when the monies were available until the Summary Judgment Motion of Defendant. But suggesting Tomchak bears responsibility for a more timely disbursement again removes Greenberg's culpability for ethical behavior. It should be obvious that Tomchak had no sway over Defendant's actions. Tomchak is the client.

**b. Breach Claim**

On January 25, 2013, two months after Arbitration, Tomchak sent Greenberg the following email:

*"From the Rules of Professional Conduct:*

*(f) Except as stated in this rule, a lawyer must promptly pay or deliver to the client or third person the property which the client or third person is entitled to receive.*

*(g) If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interest, the lawyer must maintain the property in trust until the dispute is resolved. The lawyer must promptly distribute all undisputed portions of the property. The lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds.” (CP 15)*

She had not been informed of the disposition of the funds. (It would seem, once a client is sending citations on fiduciary duty, an attorney has already crossed a line.) Greenberg failed to provide Tomchak notice of the receipt of her award. He failed to provide an accounting of the award or the billing.

In response he told her he would take an additional \$500 for his services and she agreed to that, but he in fact took \$8048.110 and provided no accounting.

The trial court ruled that Greenberg’s actions in failing to provide any invoice were “admittedly unfair”, but the court did not find Greenberg had breached his fiduciary duty. The court acknowledged that Tomchak had a belief that she was overcharged. (RP p 18) Tomchak could not ascertain if that was valid without an invoice.

In Denver,

*“The trial court found that Denver violated the CPR and breached his fiduciary duty to his clients. Disgorgement of fees is a reasonable way to "discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type." In re Eastern Sugar Antitrust Litig., 697 F.2d 524, 533 (3d Cir. 1982). Such an order is within the inherent power of the trial court to fashion judgments. Allen v. American Land Research, 95 Wn.2d 841, 852, 631 P.2d 930 (1981). Therefore, the trial court's order is affirmed.”*

Summary judgment is an error when the Court admits there is a dispute about why there was an admitted delay in disbursement. Summary judgment is also an error when the trial court acknowledges the practice of failing to provide an invoice was 'admittedly unfair', yet then tries to shift the burden to the client by suggesting she should have been even more forceful in trying to get her award, somehow. It is not the client's responsibility (or within her ability) to monitor or force compliance in disbursement and invoicing.

**D Conclusion**

The Court should reverse Summary Judgment and remand for trial, for either or both causes of Action- the CPA claim and the Breach of Fiduciary Duty claim.

Respectfully submitted to the Court this 11th day of January, 2016



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