

No. 73692-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Daphne A. Tomchak,

Appellant,

v.

Charles Greenberg AKA Triad Law Group

Respondent.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Ms. Tomchak has now embarked on phase three of her effort to assert a series of frivolous claims and once again abuse the judicial process in this matter.

First, she filed the underlying lawsuit against Mr. Greenberg suggesting – among other things – that Triad Law Group’s inadvertent failure to provide certain billings to her somehow damaged her (to this day she has never offered any cognizable evidence substantiating any damage.)¹

Second, Mr. Greenberg, while the matter was pending before the trial court, an order on summary judgment was entered and later Ms. Tomchak’s subsequent motion for reconsideration was denied as well.

Third, Ms. Tomchak chose to continue wasting further resources by appealing the Trial Court’s dismissal of her claims. She had no prima facie case then and she has no prima facie case now.

Frankly, this is an abuse of process.

Among the substantive issues she raises, Ms. Tomchak complains about being billed for Triad preparing her mediation brief, when – according to her, she had prepared a perfectly functional brief. As will be

¹ Respondent will admit – only for the purposes of this pleading – that Appellant is truthful in asserting that she did not receive Triad billings; for all other purposes Respondent denies this assertion.

demonstrated herein, the so-called brief she prepared – other than presenting some salient factual material – was simply not adequate.

As such, Triad appropriately prepared the mediation brief.

Another issue: Ms. Tomchak also suggests that she was deceived because she did not get some/all of her monthly billings².

Last, she complains that the settlement funds that were obtained at mediation were not disbursed to her in a timely fashion. In this brief, we present a detailed timeline that clearly demonstrates that her late disbursement claim – like her other claims – is nonsense. Ms. Tomchak got her money as early as reasonably possible and while there was a short delay in January, it was caused entirely by Ms. Tomchak’s own lack of responsiveness and nothing else.

Given the so-called flaws described above, Ms. Tomchak suggests that Defendants’ actions amounted to a breach of the Consumer Protection Act (“CPA”), RCW 19.86 et seq. Even if her facts were correct – which they are not – she can’t demonstrate a violation of at least three of the five required prongs of the Act. Because she cannot meet most of the CPA prongs, her CPA claim is not grounded in good faith, i.e. her claims are hopeless. (All five CPA elements must be met.)

² Ms. Tomchak sometimes states that she never received any Triad billings and at other times she states that she received some of the bills. In one email, which is quoted herein, she states that she received bills through October, 2012.

Because she clearly can't establish most of the five elements of the Act, there is no CPA claim.

It is true that little is required by way of establishment of damages. Here however, Ms. Tomchak offers no reasonable proof of damages.

Also without any legal justification, Ms. Tomchak also claims that Mr. Greenberg breached his duty as a fiduciary, thus, causing appellant to be damaged.

Given the fact that there are no such breach allegations contained in her complaint, she does not – as a technical matter – preserve the right to present such an argument. (Under CR 8, a short and plain statement is required describing the complaining party's claims and issues.) The court is asked to review the complaint – which demonstrates on its face that she never articulated such a claim and therefore doesn't meet the requirements of CR 8.

Therefore, this claim must be dismissed as well.

Even assuming – for the sake of argument that she had presented such a claim – it wouldn't make any difference – there was no breach of fiduciary duty.

For these reasons, Ms. Tomchak's claim should be dismissed.

II. TOMCHAK ASSIGNMENT OF ERRORS

In her brief, Ms. Tomchak raises the following issues:

1. Did the trial court incorrectly find that one or more of the five elements of the Consumer Protection Act were not violated by Defendant such that Ms. Tomchak has no CPA claim?
2. Was the trial court correct in finding that there was no breach of fiduciary duty on the part of Greenberg/Triad or alternatively, that Ms. Tomchak has failed to present such a claim?

III. STATEMENT OF THE CASE

A. MISSTATEMENTS

There are some glaring misstatements in the rendition of the facts presented by Ms. Tomchak. As a result, to get the record straight, a number of pertinent facts in this matter are revisited here.

Ms. Tomchak retained Triad Law Group in August of 2012. The retainer agreement itself clearly dispenses with any suggestion that Ms. Tomchak did not know that Mr. Foreman would be participating in this case. CP 117-118.

The retainer agreement makes it clear that Mr. Foreman would be assisting in this matter and that Triad would be billing and invoicing for his services on an hourly basis. (Said differently, Greenberg suggested that – to the extent that it was appropriate to do so – Triad would accept

help from Tomchak in preparing the brief in this matter. It was ultimately up to Triad however – and not Ms. Tomchak – to determine the extent of Triad’s reliance and incorporation of Ms. Tomchak’s work product. Indeed, under the rules, Triad was obligated to do this. RPC 1.2(a); see e.g. *State v. Wilkinson*, Wn. App, 522, 526 (1975). CP 117-118.

There is no disputing that Ms. Tomchak would be permitted to assist with the preparation of the brief to the extent that she was able to contribute in a meaningful way.

That is not to say that Triad was obligated to rely on or use her work. No one told Ms. Tomchak that she would be the decisionmaker. It clearly would violate the RPC’s for Triad to use her material where not appropriate to do so. RPC 1.2(a). Mr. Greenberg only committed to use Tomchak’s input where – after review and evaluation – it was determined to be reasonably helpful to do so.

Her complaint about the quality of the brief that was ultimately used makes little sense. Her brief was not suitable and the brief prepared by Mr. Foreman was sufficient and helpful. Indeed, Ms. Tomchak was happy with the final brief. CP 130-131.

Ms. Tomchak's so-called brief was usable only in that it provided some of the basic facts that were incorporated into Triad's brief; the rest of her brief was deficient and was not usable.

Perhaps this explains why Ms. Tomchak never submitted to the court a copy of the brief that she submitted to Triad.

Without candy-coating the matter, the brief that Ms. Tomchak prepared was subpar. Case closed. CP 120.

Also, the retainer agreement that had been executed to by the parties permitted Triad to bill by the hour. In keeping with this, Ms. Tomchak was invoiced for reasonable time spent preparing the brief and preparing for and participating in mediation because to do these things was reasonable necessary and was expressly agreed to by Ms. Tomchak³. CP 133-135.

Ms. Tomchak was never told what the final billing would be. She was asked to pay in \$3,000 to replenish her retainer. She was never told that that was the extent of her billing.

³ Additionally, as the court well knows, this is in keeping with counsel's responsibility to develop the most appropriate case strategy. Counsel would have been remiss under the Rules of Professional Responsibility had he acted as Ms. Tomchak had suggested. See Declaration of Charles M. Greenberg supplying WSBA letter rejecting Ms. Tomchak's Bar complaint against him.

B. PROGRESS BILLINGS⁴

On the initial billing statement dated September 1, 2012, Ms. Tomchak was billed \$950 for some preparatory work that was undertaken during August of 2012, including fact development and insurance issues. CP 149.

On the next statement – dated October 10, 2012 – Ms. Tomchak was billed \$3,726 for work undertaken during September – complaint preparation, legal research re: “California issues,” etc. Given the above-referenced billings, by mid-October, Ms. Tomchak’s \$5,000 retainer was virtually 100% consumed. (She must have known this because she seems to acknowledge receiving the early Triad bills.) CP 150-151.

During October, 2012 – Triad, recognizing that the retainer was running low – made numerous calls and sent numerous emails to Ms. Tomchak to ask her to replenish the retainer. CP 120.

The November billing was considerably larger than the two prior billings because November billing included almost all of the time spent to prepare a persuasive mediation brief containing facts, appropriate legal authority and discussion. This billing also included

⁴ Triad’s practice is to send out its bills for a given calendar month shortly after the end of that month. The income that eventually generated, as a result is what is used to handle payroll and allows Triad to pay its bills.

some but not all of meetings which took place that included Ms. Tomchak and Messrs. Foreman and Greenberg.⁵ CP 152-153, 119-122.

As time for mediation drew near, preparations were especially intense and Mr. Foreman was extensively involved. Ms. Tomchak knew full well that Mr. Foreman was completely involved in mediation preparation⁶. CP 130-131, 119-121.

C. SETTLEMENT

The underlying matter was ultimately settled at the mediation which took place on November 29, 2012. CP 121.

The matter took most of that day and ultimately was settled based on the mediator's recommendations.

The ultimate number agreed to by Defendant made Ms. Tomchak quite happy. She immediately started talking about getting her settlement amount divided and issue via a number of equal checks. CP 121.

⁵ The fact that there were numerous meetings and teleconferences during these times greatly undermines Ms. Tomchak's suggestion that she thought that Mr. Foreman was no longer involved.

⁶Ms. Tomchak now says that she was overbilled because two attorneys participated in the mediation. Notably, she said nothing prior to or during the nearly day long mediation about her "shock" that Mr. Foreman was present or about the billing which includes Mr. Foreman's time. Assuming that she did not know about Mr. Foreman's involvement in mediation —why did she not complain on the day of the mediation or even in December when she had the opportunity to make a credible statement? If this was so objectionable to her, human nature would suggest that she would have said something right then and there.

Ultimately, Ms. Tomchak's primary concern was the amount of Triad's fees.

Fee disputes are generally private matters between the parties. Here, we "can use the RPC's as a guide to determine whether the underlying conduct violated the RPC's, and here, we conclude that it did not."

It is true that under RPC 1.5(a) a fee must be reasonable.

The Tomchak matter ultimately settled for \$102,500 and when all things were considered, Triad's total fees (billed hourly) came to approximately \$13,500, roughly 13 percent of the settlement. Given the time pressures posed by the statute of limitations, jurisdictional issues involved and the necessity of researching and applying California law, the total fee on its face did not appear to be unreasonable.⁷ CP 121.

Second, to the extent that Ms. Tomchak faulted Mr. Greenberg's relying on his associate, Mr. Foreman to perform some of the duties in preparing her case, the billing and Mr. Foreman's involvement does not appear to have been unforeseen, excessive, or inappropriate under the circumstances. As is discussed above, the fee agreement –executed by Ms. Tomchak before Triad began work – made clear that Mr. Foreman would be involved and it was anticipated and

⁷ This is particularly true when one considers that contingency lawyer typically charge clients 33%.

his hourly rate was clearly disclosed. See RPC 1.5(a)(9) and (b). Also the fact that billing was hourly and not subject to any limits or ceiling was expressly made clear on the face of the retainer agreement. CP 133-135.

Third, under the RPC's, prosecuting this case was the responsibility of Messrs. Greenberg and Foreman.

As noted previously, it is not disputed that Ms. Tomchak provided some factual information that was used in presenting her case. Regardless however, Mr. Greenberg and Mr. Foreman had a professional obligation to research the applicable law in both California and Washington, ensure that the eventual presentation of the facts complied with the law and court rules, and they also had to ensure that such presentation was supported by appropriate, persuasive legal authority. Against these standards, it was clear that Ms. Tomchak – who chose not to submit her brief to the court – her materials were not suitable for the purposes intended. CP 171-172.

As Ms. Tomchak's counsel, it was up to Messrs. Greenberg and Foreman to decide what portions of Ms. Tomchak's work product were usable and helpful so as to not compromise Ms. Tomchak's claims. CP 54-56, 169-172.

D. MEDIATION

Although Ms. Tomchak may have believed that it was unnecessary to have two lawyers present at mediation, under the RPC's, it was clearly Mr. Greenberg's strategic decision to do so, given that Mr. Foreman had a better grasp of the more nuanced details of the evidence and Mr. Greenberg was able to complement Mr. Foreman's efforts because he was more experienced in the mediation process and before tribunals. CP 169-172.

Decisions on preparation and presentation of a case are largely within the professional judgment and expertise of a lawyer, and legal authorities generally agree that a lawyer has the right to control the tactics and procedural elements of a case. RPC 1.2(a); see, e.g., *State v. Wilkinson*, 12 Wn.App. 522, 526 (1975).

Clearly, given the fees charged and given the results obtained; getting assistance from Mr. Foreman in bringing this matter to a successful conclusion was reasonable.⁸

⁸ It is also notable that – despite the fact – that she had more than ample opportunity to do so – Ms. Tomchak made one or two comments about Messrs. Foreman and Greenberg jointly preparing for and participating in mediation in November, 2012. She made no specific request and issued no directive.

E. DELAYED DISBURSEMENT OF FUNDS

Regarding disbursement of settlement proceeds, Ms. Tomchak claims that Mr. Greenberg delayed sending the funds and that she was somehow “leveraged.”

A close look at the facts shows straightforwardly what really happened here.

First, as is demonstrated herein, Triad did not retain Ms. Tomchak’s funds any longer than was necessary to comply with Ms. Tomchak’s wishes. Along those lines, what would the motive be for not disbursing funds right away? Said differently, what good did it do for Triad to hold onto Ms. Tomchak’s funds – the funds that were in the Triad Law Group trust account? So that Ms. Tomchak could be extorted from? This notion is completely contrived and makes no sense for any lawyer who does not want to be immediately disbarred.⁹

Almost twenty years ago, Charles M. Greenberg was reprimanded primarily because he did not step forward and implicate his then partners – where to do so was required under the RPC’s. He learned that his partners were engaged in a pattern of initial switching. CP 60-61. In the intervening 20 years there have been no transgressions

⁹ Because Ms. Tomchak has no support for her arguments, she largely suggests that Mr. Greenberg is acting consistently with his behavior of almost twenty years ago where he received a reprimand from the Bar Association. The fact that no such disciplining action has taken place in the last almost year speaks volumes.

suitable for Ms. Tomchak to raise. Instead, she uses an extremely “broad brush” approach. Ms. Tomchak simply argues that this 20-year old reprimand on a subject that is dissimilar to the one at hand, explains why Mr. Greenberg treated Ms. Tomchak the way he did. CP 60-61.

In May 2015, Ms. Tomchak filed a declaration in court stating she had never seen Mr. Greenberg’s billing until he filed his summary judgment motion in April 2015. This is inconsistent with an email she sent him after she received her settlement funds from the YTD in January, 2013 where she stated that she had received bills through October 2012. CP 59.

Additionally, when Mr. Greenberg responded to her grievance, he included copies of all her invoices and the Bar Association forwarded them to her on or about August 26, 2014.

In essence if she needed to build her case she had all of the necessary materials.

In any event, Mr. Greenberg has stated that it was the practice of his office staff to send clients bills periodically and, as far as he knew at the time, they had done so in Ms. Tomchak’s case (as the firm does in all other client cases) and any failure to do so would have been inadvertent.

Along these lines, Mr. Greenberg has stated under oath that there was no scheme in place to take Ms. Tomchak's money. Additionally, there is no logical reason for Triad to sit on Ms. Tomchak's funds which were sitting in Triad's trust account.¹⁰

F. IMPROPER DELAYS

Finally, it is necessary to address – in some detail – Ms. Tomchak's claim that Mr. Greenberg improperly delayed sending her the funds from her settlement.

First, consider the following chronology of significant dates and events:¹¹

8/22/2012	Retainer agreement signed by Tomchak and Greenberg (\$5,000 retainer fee) billing by the hour, no maximum;
9/11/2012	Lawsuit filed against YTD-prepared by Triad, not Tomchak;
10/2012	Parties agree to mediate-suggested by Triad;
10/2012	Work begins on Tomchak mediation brief –use limited portions of Tomchak's factual material because of nonsuitability;
11/8/2012	Replenishment of retainer fee received after weeks of badgering Ms. Tomchak – initial retainer virtually consumed in October, add-on not paid until November;
11/29/2012	Matter settled at mediation – \$102,500.00. Greenberg and Foreman both present; no complaints;
11/30/2012	Email received from Ms. Tomchak “Thank you for your work”; email addressed to Messrs. Foreman and

¹⁰ A preview of the papers, Triad makes it clear that the money sat in trust until it was disbursed.

¹¹ Events depicted are present in Mr. Greenberg's Declaration filed as part of the summary judgment brought in 2015.

Greenberg.

12/10/2012	Ms. Tomchak signs the release – return to Defendant;
12/18/2012	Insurance Company issues settlement check;
12/21/2012	Settlement check received by Triad, deposited into trust account – on hold during holidays;
12/31/2012	Tomchak requests four-five checks of equal size ¹² ;
1/2/2013	Triad receives mediator’s bill. Ask for Tomchak’s approval to pay mediator;
1/7/2013	Tomchak starts complaining about mediator and Triad;
1/8/2013	Greenberg offers to reduce billing by \$500 or keep \$1,000 in trust;
1/25/2013	Tomchak responded to email – take \$500.

The chronology indicates that the mediation took place on November 29, 2012 and the mediator issued a release on December 7, 2012. Ms. Tomchak signed the release on December 10, 2012 and returned it to Mr. Greenberg, who quickly forwarded it to opposing counsel. YTD then issued the settlement check of \$102,500 on December 18, 2012. Mr. Greenberg received the check on December 21, 2012 and the check was deposited it into his trust account that same day.

(While RPC 1.15(f) requires a lawyer to promptly pay a client the property which the client is entitled to receive, RPC 1.15(h)(7) prohibits a lawyer from disbursing funds from a check deposited into a trust account until the check has cleared the banking process and the

¹² Ms. Tomchak was notified that the money were received, although funds could not be disbursed.

funds have been collected from the institution upon which the check was written.) CP 124-128.

Given that the December 18, 2012 settlement check was drawn on an out-of-state bank, was deposited on a Friday (December 21, 2012) and 6 of the following 11 days were either weekend days or bank holidays, the RPC required Mr. Greenberg to wait before disbursing any of the funds. Additionally, the mediator's bill was still pending as late as January 7, 2013, when Ms. Tomchak expressly questioned paying the bill because Ms. Tomchak felt the mediator was "padding/rounding his hours;" and Ms. Tomchak had also asked Mr. Greenberg to reduce his bill. CP 58-59, 124-128.

As demonstrated above, there were absolutely no inappropriate actions taken by Triad. On January 8, 2013 – not knowing that Ms. Tomchak was alleging that she hadn't been receiving Triad's bills – Mr. Greenberg offered to deduct \$500 from his bill or alternatively he agreed keep \$1,000 in trust until the exact amount due was resolved.

Undermining Ms. Tomchak's statement that Triad stalled the distribution of funds, it was indeed Ms. Tomchak herself that slowed down the process. Ms. Tomchak did not answer Mr. Greenberg's January 8th email-and his follow-on email for literally weeks. CP 124-128, 140-143.

On January 25, 2013 – for the first time in 2.5 weeks – Ms. Tomchak finally contacted Mr. Greenberg asking “where’s my money?” and where she made reference to the RPC’s suggesting that it was Mr. Greenberg that was derelict. He replied within hours and asked whether she agreed to the suggested arrangement that has been made in his January 8th email. CP 124-128- 140-143.

Ms. Tomchak finally emailed her apologies and her assent to Mr. Greenberg’s proposal on January 29, 2013. There is no dispute that at the conclusion of the November mediation, Ms. Tomchak had informed Mr. Greenberg that she wished for her funds to be distributed in four or five separate checks of about equal size. Ultimately, four checks totaling \$94,451.90 were written to her from Mr. Greenberg’s trust account on January 31, 2013 immediately after express instructions were received from Ms. Tomchak. The Triad bank statement shows that the checks were negotiated the following week. CP 124-128.

Ms. Tomchak argues that Mr. Greenberg leveraged her.

Triad’s handling of Ms. Tomchak’s settlement funds was completely consistent with the requirements of the RPC and the slow timing of the final payment was caused solely by her delay in approving the planned distribution that had first been suggested on

January 8th. (Additionally, Triad's fees and approval of the mediator's invoice was necessary.)

Under the circumstances, it is baseless and frankly, it is ridiculous to suggest "Mr. Greenberg eventually stole the money."

Had she simply said on January 8th what she wanted, her wishes would have been accommodated by January 10th or 11th and money could have been disbursed more quickly. Triad did nothing wrong.

Notably, Ms. Tomchak received her money in late January, 2013 and she said nothing at the time about having been shorted or having been treated unfairly.

IV. ARGUMENT

Consumer Protection Act

The Consumer Protection Act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. In order to prevail on a Consumer Protection Act claim, a plaintiff must establish all of the following five elements (hereinafter referred to as the "*Hangman Ridge* elements"): (1) that the defendant engaged in an unfair or deceptive act or practice, (2) that the act occurred in trade or commerce, (3) that the act impacts the

public interest, (4) that the plaintiff suffered injury to his or her business or property, and (5) that the injury was causally related to the unfair or deceptive act. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009); see also, *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

To survive a motion for summary judgment brought by a defendant on a CPA claim, a plaintiff asserting a Consumer Protection Act claim must make a *prima facie* showing of all five elements. *Griffith v. Centex Real Estate Corp.*, 93 Wn.App. 202, 214, 969 P.2d 486 (1998). A failure to meet any one of these elements is fatal to the claim. *Hangman Ridge*, 105 Wn.2d at 793.

Ms. Tomchak's Consumer Protection Act claim fails because she cannot make a *prima facie* showing with respect to the first, third, fourth and fifth *Hangman Ridge* elements.

Initially, Ms. Tomchak was tickled with the result that Triad had obtained in this matter. Indeed, at the conclusion of the mediation, Ms.

Tomchak indicated that she wanted four or five checks in roughly equal amounts.

The next day she thanked Messrs. Greenberg and Foreman for their efforts. CP 144-145.

As laid out in Ms. Tomchak's brief, the Consumer Protection Act contains five basic requirements – each of which must be met before such a claim can be sustained.

Ms. Tomchak simply cannot meet three of the five requirements.

The fourth and fifth requirements are injury and causation, respectively. The trial court concluded correctly here that to the extent that Mr. Greenberg inadvertently failed to get billing to Ms. Tomchak, she had not been harmed by Mr. Greenberg's actions.¹³

Consider the third, fourth and fifth elements as presented in Ms. Tomchak's brief.

Public interest impact

The third element is “public interest impact.” The court correctly reasoned that this third element had not been met by Ms. Tomchak.

¹³The court is asked to be mindful that Mr. Greenberg does not concede that Ms. Tomchak didn't receive the invoices in question. A number of facts are confused. Ms. Tomchak appears to be saying two things regarding her receipt of the invoices. Nevertheless, for the purposes of this brief, Triad accepts Ms. Tomchak's contention.

First, Judge Ramseyer correctly noted that Plaintiff did not solicit defendant. (Indeed, it was the other way around.)

Appellant argues based on the reasoning contained in *Michael v. Mosquera-Lacey*, 165 Wn.2d 595, 200 P.3d 695 (2009).

Ms. Tomchak then refers to the Washington Pattern Jury Instructions which define for jurors what constitutes a public interest in a CPA claim as follows:

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 injured other persons, or had the capacity to injure other persons; or has the capacity to injure other persons.

Ms. Tomchak then argues on page 15 of her brief as follows:

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...(transcript, page 26)

The conclusion is already demonstrably false, as his bookkeeper was copied on emails to Tomchak.

Ms. Tomchak had to show that Triad's actions injured other persons or that it had the capacity to injure other persons as that others were injured. There has been no showing whatsoever of any other injuries to anyone else.

This is purely a private matter.

There is no suggestion that Greenberg's practice – assuming the worst – injured other persons.

Based on the evidence presented to it, the trial court correctly concluded that the routine practice is that all clients be billed monthly. Rather than develop proof to the contrary, Plaintiff relies on a nearly 20-year old reprimand for issues relating to things other than Mr. Greenberg's billing practices.

The fact that this violation is the only one – and that the fact that it is almost 20 years old, speaks volume to Ms. Tomchak's desperation.¹⁴

¹⁴ Clearly, Ms. Tomchak could have propounded discovery to more accurately and comprehensively flesh out the details or she could have taken Ms. Madsen's deposition to further "flesh out" the facts. Regarding why – if what she is saying is true – she did not get bills, Ms. Tomchak could have filed a CR 56(e) motion to continue the matter until she could obtain more information. She did none of these things. Instead, she comes before the court with a brief riddled with supposition, guesses and referenced to a 20 year-old reprimand based on unrelated to issues.

The public interest was not impacted

To meet the "public interest" element, a private plaintiff must show "not only that a defendant's practices affect the private plaintiff but that they also have the potential to affect the public interest." Here is what the Supreme Court said in 2007 in *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10:

Where the transaction was essentially a private dispute rather than essentially a consumer transaction, it may be more difficult to show that the public has an interest in the subject matter. *Hangman Ridge*, 105 Wn.2d at 790, 719 P.3d 531. Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. . . . 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*, 105 Wn.2d at 791. *Behnke ex rel. G.W. Skinner Children's Trust v. Ahrens*, 169 Wn. App. 360, 372, 280 P.3d 496 (2012).

Here, Ms. Tomchak alleges that Mr. Greenberg and Triad breached the parties' written contract by refusing to give her an invoice. Because any failure by Triad to provide Ms. Tomchak with an invoice was an inadvertent deviation from the firm's standard practice, there is no

likelihood that additional plaintiffs will be injured in exactly the same fashion as Ms. Tomchak claims to have been injured. This is a private dispute and Ms. Tomchak therefore fails to meet the third *Hangman Ridge* element.

Perhaps the most glaring deficiency in Appellants argument is the injury prong.

First, let's consider the CPA in a bit more detail.

There was no unfair or deceptive act or practice

To meet the "unfair or deceptive act or practice" element, a plaintiff "must show that the alleged act had the capacity to deceive a substantial portion of the public." *Hangman Ridge*, 105 Wash.2d at 785.

"The definition of 'unfair' and 'deceptive' must be objective otherwise every consumer complaint will become a triable violation of the act."

Behnke v. Ahrens, 172 Wn. App. 281, 293, 294 P.3d 729 (2012).

In determining whether an alleged deceptive act has the capacity to deceive a substantial portion of the public, "the concern of Washington courts has been to rule out those deceptive acts and practices that are

unique to the relationship between plaintiff and defendant.” *Behnke v. Ahrens*, 172 Wn. App. 281, 292-93, 294 P.3d 729 (2012), citing *Burns v. McClinton*, 135 Wn. App. 285, 303-06, 143 P.3d 630 (2006), review denied, 161 Wn.2d 1005, 166 P.3d 718 (2007) and *Brown v. Brown*, 157 Wn. App. 803, 815-17, 239 P.3d 602 (2010).

In *Burns*, the Court of Appeals reversed the trial court’s conclusion that the defendant accountant’s failure to disclose monthly fee increases to the plaintiff client violated the Consumer Protection Act. Because no evidence showed that the accountant had failed to disclose fee increases to his other clients or that any deception of the plaintiff was capable of being replicated, the plaintiff failed to prove the first element of his Consumer Protection Act claim. 135 Wn.App. at 305. Even if the accountant’s breach of the parties’ fee agreement was proven to be deceptive, there was no evidence to establish a practice with the potential to deceive other members of the public. *Id.*

The situation is identical here. Ms. Tomchak cannot produce any evidence that Mr. Greenberg’s failure to produce a billing (assuming that

Ms. Tomchak is correct) was repeated. This is not evidence of a practice with the potential to deceive other members of the public.

Similarly, in *Brown*, the defendant obtained a reverse mortgage on his 93 year-old mother's condominium using a power of attorney and then misappropriated the loan proceeds. The mother's guardian sued the son and the bank, claiming *inter alia* that the son's "withdrawal of almost all of the equity from [the mother's] home" and the bank's "complicity in allowing him to do so, to its own profit, was an unfair or deceptive act under Washington's CPA." The *Brown* court found that there was no evidence showing that other consumers were injured by the bank's lending practices and dismissed the CPA claim because it failed on the first element. *Brown*, 157 Wn. App. at 816-17.

As in *Brown*, there is no evidence of a systematic failure of Mr. Greenberg, clearly establishing that other clients were injured.

In the instant case, any failure to provide Ms. Tomchak with the invoicing for the work performed by Triad was the result of administrative inadvertence. It is Triad's routine practice, and obviously also in Triad's

best financial interests, to send invoices to all its clients on a monthly basis. During the litigation, Mr. Greenberg believed that Ms. Tomchak – like every single other client – had received the monthly invoices generated by Triad’s billing system when he was trying to resolve Ms. Tomchak’s complaints about the time spent by the firm working on her behalf.

She said nothing about having received a bill until after the case was complete and after she had agreed to a \$500 adjustment in Triad’s billing.

Ms. Tomchak’s claim – assuming it is true – is unique to the relationship between the plaintiff and the defendant and does not have the capacity to deceive a substantial portion of the public.¹⁵ Her CPA claim should be dismissed because it fails to meet the first *Hangman Ridge* element.

¹⁵ For purposes of this summary judgment motion only and for no other reason, defendants assume *arguendo* that Ms. Tomchak did not receive any invoices from Triad. Defendants note that: (1) Ms. Tomchak has apparently admitted receiving the October 2012 invoice; and (2) that Mr. Greenberg believed that Triad had sent Ms. Tomchak the December 2012 invoice.

(Ultimately, there was no effort by Ms. Tomchak to “flesh out” whether this had happened to any of Triad’s other clients.)

There was no injury

An “injury” under the Consumer Protection Act is distinct from “damages.” *Panag*, 166 Wn.2 at 58. Injury is shown where a plaintiff’s “property interest or money is diminished because of the unlawful conduct.” *Mason v. Mortgage American, Inc.*, 114 W.2d 842, 854, 792 P.2d 42 (1990).

Ms. Tomchak did not suffer a diminishment of property or money as a result of not receiving an invoice from Triad. Mr. Greenberg and Mr. Foreman accurately entered their time into Triad’s billing system contemporaneously with the performance of the work and the billing system multiplied the hours worked by each lawyer by the lawyer’s contractual billing rate. CP 169- 170.

Therefore, Ms. Tomchak cannot say that her interests were affected by improper billing.

Ms. Tomchak's obligation to pay the legal bills generated over the 4 months of representation provided by Triad did not disappear if and when she did not physically receive billing statements until after she agreed to the amount to be paid.¹⁶ The bills existed in the computer billing system, even if Ms. Tomchak did not receive them until after she paid what she owed to Triad. Even if she did not get the bills, there was no "injury" cognizable by the Consumer Protection Act and Ms. Tomchak fails to meet the fourth *Hangman Ridge* element.

When the offer was posed to her, Ms. Tomchak could have said "I don't want to pay the final amount due until I have all of my bills." Instead, she said "I agree to a reduction in my billing."

She was not injured.

¹⁶ On January 30, 2013 – well after the case was concluded, after she had twice agreed to Mr. Greenberg's disbursement proposal, Ms. Tomchak asked him for "an accounting of what I have paid, total this amount was no secret. Defendants note that after receiving her 4 checks from Triad, Ms. Tomchak could have easily calculated the total amount of legal fees and costs that Triad charged her using simple arithmetic. She knew that Triad had received a total of \$110,500.00 on her account, comprised of her 2 personal payments to Triad in the total amount of \$8,000.00 and the \$102,500.00 settlement to which she agreed. Ms. Tomchak knew that her share of the mediator bill was \$2,550.00 and that she had received 4 checks in the amount of \$94,451.90 as her share of the settlement plus the additional \$500.00 that Mr. Greenberg gave her. A simple equation using these values yields the total amount of attorney's fees and costs charged by Triad: $(\$110,500.00) - (\$94,451.90) - (\$2,550.00) = \mathbf{\$13,498.10}$.

Any failure to provide an invoice did not cause injury

"A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury."

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

Ms. Tomchak would still have owed Triad \$13,498.10 for the attorney's fees and costs she incurred regardless of whether she received monthly invoices. Any failure by Triad to provide her with an invoice did not cause Ms. Tomchak injury and she therefore fails to meet the fifth *Hangman Ridge* element.

Said differently, even had Triad inadvertently failed to get her an invoice, Ms. Tomchak should have asked for billing before funds were disbursed and regardless of a mistake, she owed the money.

Failure to Provide an Invoice Did Not Cause Damage

"A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to

the claimant.” *Northwest Independent Forest Manufacturers v. Dept. of L & I*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

Ms. Tomchak admits in her complaint that her fee contract with Triad was for hourly services. The lawyers at Triad accurately billed Ms. Tomchak on an hourly basis for the professional time they spent working on her case.

Even if Ms. Tomchak’s alleged failure to receive an invoice for the legal services that were provided to her by Triad from August to December 2012 can be said to be a breach of the parties’ contract, under the circumstances, the breach was not a proximate cause of damage to her.

She had not established any damages whatsoever.

Breach of fiduciary duty

In addition to her CPA claim, Ms. Tomchak is asserting a Breach of Fiduciary Duty claim.

Importantly, a review of the complaint filed in this matter particularly – Section IV Relief Requested – reveals that she is seeking reimbursement and that she is claiming CPA violations.

She said nothing about any violation of fiduciary duty in her complaint.

As such, this court should strike Ms. Tomchak's breach of fiduciary duty claim as a matter of law. The only potential issue here is the allegation that Triad did not provide a billing to Ms. Tomchak.

Ms. Tomchak cites *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) as support for her agreement. That case provides truly enraging facts.

The Court premised its ruling as follows:

The trial court ordered Denver to return all of the fees, plus prejudgment interest, paid by his investor clients. Denver maintains that the court's order is in error absent a finding of damages and causation. The only Washington case Denver cites for the proposition that the court must find damage and causation before ordering return of fees is *Sherry v. Diercks*, 29 Wash.App. 433, 628 P.2d 1336, review denied, 96 Wash.2d 1003 (1981). However, *Diercks* only holds that causation and damage must be shown to establish a *legal malpractice* claim against an attorney. 29 Wash.Ap.. at 437-38, 628 P.2d 1336.

The trial court did not decide that Denver committed malpractice. The trial court ruled as matter of law that, because of the conflict of interest, Denver could not adequately represent both investors and promoters. The malpractice and negligence issues were reserved for phase two of the trial. Thus, Denver's reliance on malpractice cases is misplaced.

Where [an attorney]... was serving more than one master or was subject to conflicting interest, he would be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted...

... a fiduciary who represents [multiple parties] ... may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well... only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries “at a level higher than that trodden by the crowd.” See Mr. Justice Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464; 164 N.E. 545 [(1928)].

In this case, you had a lawyer representing two clients whose interests were opposed. This lawyer – under the circumstances – acted in egregious disregard of this fact. This is a completely different case than the instant case here.

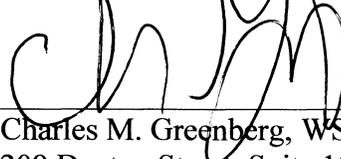
Ms. Tomchak is simply trying to find a nugget for the court to latch unto. Her claim should be dismissed.

V. CONCLUSION

The trial court’s decision should be sustained.

Respectfully submitted this 10th day of March, 2016.

TRIAD LAW GROUP



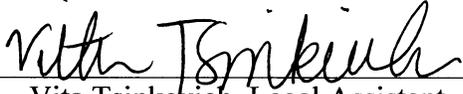
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Respondent in Pro- Se

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the March 10, 2016, I caused the attached RESPONDENT'S BRIEF to be emailed and delivered to the following:

Daphne Tomchak.
1759 26th Avenue East
Seattle, WA 98112
daphnetomchak@hotmail.com

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



Vita Tsinkevich, Legal Assistant