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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

No. 37577-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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VANCOUVER RADIOLOGISTS, P.C.,

*Appellant,*

v.

THE VANCOUVER CLINIC, INC., P.S.,

*Respondent.*

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**BRIEF OF APPELLANT**

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**I. INTRODUCTION**

This case involves a claim under Washington’s Consumer Protection Act (“CPA”), Chap. 19.86 RCW, brought by Vancouver Radiologists (“VanRad”) against The Vancouver Clinic (“the Clinic”).

VanRad alleges that the Clinic deceived third-party health insurers like Medicare and Medicaid into paying the Clinic for radiology services that VanRad performed for the Clinic’s patients. VanRad claims that it – not the Clinic – had a right to payment for the services and that the Clinic’s conduct constituted an unfair and deceptive business practice.

The issue on appeal is whether VanRad pled – or could plead – any facts sufficient to meet the “public interest” element of a CPA claim.

**II. ASSIGNMENT OF ERROR**

The trial court erred in granting the Clinic’s CR 12(b)(6) motion to dismiss VanRad’s CPA claim with prejudice.

Issues Pertaining to Assignment of Error

1. Did the trial court properly conclude that VanRad had failed to plead facts sufficient to establish the “public interest” element of a CPA claim, such that dismissal of VanRad’s CPA claim was justified under Rule 12(b)(6) of the Superior Court Civil Rules?

2. Did the trial court properly conclude that VanRad could not have alleged any set of facts sufficient to establish the “public interest” element of a CPA claim, such that dismissal was justified with prejudice and without leave to amend?

### **III. STATEMENT OF THE CASE**

#### **A. Background Facts.**

For the Court's reference, except where noted, relevant facts are taken from the allegations in VanRad's Fourth Amended Complaint ("FAC"), a copy of which is designated in the Clerk's Papers as CP 87-94 and attached as Appendix A1.

VanRad is a group of licensed radiologists that provides professional diagnostic imaging services in Vancouver, Washington. (FAC ¶¶ 1.1, 3.1; CP 87-88.) Among other services, VanRad's radiologists interpret digital mammography images (mammograms) on behalf of patients, hospitals, and other medical professional service corporations. (*Id.* ¶¶ 3.2, 3.3; CP 88.)

In 2004, VanRad began interpreting all digital mammograms using computer-aided detection<sup>1</sup> ("CAD") as part of its standard of care. (FAC ¶ 3.3; CP 88.) VanRad recovered the costs of CAD by submitting claims to third party payers – such as private insurers or Medicare/Medicaid – for reimbursement. (*Id.*)

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<sup>1</sup> When a woman has a mammogram, the radiologist can review the digital image with the assistance of a sophisticated algorithm software that analyzes the image and draws the radiologist's attention to potential points of interest. (Barrett Decl. ¶ 2; CP 153-54.) The computer algorithm analysis with the follow-on review by the radiologist is the "CAD service." (*Id.*)

From approximately June 2004 until January 2006, VanRad used CAD in its interpretation of digital mammograms of the Clinic's patients. (FAC ¶ 3.4; CP 88.) The CAD services were performed by VanRad radiologists at VanRad facilities using VanRad-owned CAD equipment. (*Id.* ¶ 3.5.) As a result, VanRad – not the Clinic – was entitled to submit claims for reimbursement to third-party payers to recover the costs of the CAD services. (*Id.* ¶ 4.2.)

Without notifying VanRad, the Clinic began submitting claims for reimbursement to third-party payers for the technical component<sup>2</sup> of the CAD services. (FAC ¶ 3.6; CP 88.) The Clinic submitted those claims, even though it knew that VanRad had performed the CAD services and that VanRad was the party entitled to reimbursement. (*Id.* ¶¶ 3.9.1, 3.9.7-3.9.9; CP 89-90.) Further, the Clinic continued to submit the claims after VanRad had discovered and objected to what the Clinic was doing. (*Id.*)

As a result of its conduct, the Clinic recovered \$145,982.48 from third-party payers for CAD services that it did not provide. (FAC ¶¶ 3.6, 5.4; CP 87, 91.) VanRad, as the provider of the CAD services, brought claims against the Clinic for unjust enrichment and quantum meruit, and

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<sup>2</sup> For purposes of billing the patient or third party insurers, the CAD service has two distinct parts: The “professional” component and the “technical” component. A service provider might perform one or both components. (Barrett Decl. ¶ 3; CP 154.) Here, VanRad's claims are premised on its entitlement to bill for both components. (VanRad Opposition to Motion to Dismiss pg. 3, lines 4-7; CP 110.)

for engaging in an unfair business practice under the CPA. (*Id.* ¶¶ 4.1-6.7; CP 90-92.)

With respect to its CPA claim, VanRad alleged that the Clinic’s conduct, in addition to being deceptive, inequitable, and in bad faith, also violated provisions of the Health Care False Claims Act (“HCFCA”), Chap. 48.80 RCW, which is part of Washington’s Insurance Code. (FAC ¶¶ 6.5.1-6.5.4; CP 92.) For example, VanRad alleged that the Clinic violated HCFCA when the Clinic concealed or failed to disclose facts to obtain a health care payment to which it was not entitled. (FAC ¶ 6.5.3; CP 92) (citing RCW 48.30.030(4)).

**B. Procedural History.**

The Clinic moved to dismiss VanRad’s CPA claim under CR 12(b)(6). (CP 95.) The Clinic characterized the case as a “private business dispute” over CAD payments, and argued that VanRad had not alleged facts sufficient to show that the Clinic’s conduct had the capacity to deceive a substantial portion of the public – *i.e.*, VanRad could not meet the so-called “public interest” element of a CPA claim described in *Hangman Ridge Training Stables, Inc. v. Safeco Ins., Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). (Def’s Memo. in Support of CR 12(b)(6) Motion to Dismiss, pp. 4-7; CP 102-04.)

The Clinic further argued that VanRad could not rely on allegations that the Clinic had violated HCFCA to state a claim, even though violations of the Insurance Code are *per se* violations of the CPA,

because VanRad lacked standing to assert a HCFCA violation itself – *i.e.*, with respect to the CAD services, VanRad was neither the insurer nor the insured. (Def’s Memo. in Support of CR 12(b)(6) Motion to Dismiss, pp. 7-9; CP 104-06.)

The trial court granted the Clinic’s motion by order dated January 9, 2008. (Court’s Ruling, CP 173-177) (attached as Appendix A2). The court agreed with the Clinic that VanRad lacked standing to bring an action against the Clinic under HCFCA and, therefore, that VanRad could not rely on allegations of a HCFCA violation to establish a *per se* CPA violation. (*Id.* at 2:21-4:9; CP 174-76.)

The court also concluded that VanRad had not pled – and could not plead – any facts “which would make this a case affecting the public interest,” because “[n]o member of the public, nor any party to the transactions herein, other than Plaintiff and Defendant, has any interest in whether Plaintiff or Defendant is the proper payee for the CAD services.” (Court’s Ruling, 5:7-12; CP 177.)

On March 31, 2008, the trial court filed a Stipulated Final Judgment of Dismissal. (CP 178-79.) This appeal followed.

#### IV. ARGUMENT

VanRad does not challenge the trial court’s determination that it is unable to state a *per se* claim under the CPA by relying on allegations that the Clinic’s actions violated HCFCA. VanRad does, however, challenge the trial court’s determination that its allegations were insufficient to show

a non-*per se* public interest impact under *Hangman Ridge*. VanRad further challenges the court's ruling that it could allege no facts consistent with its case such that dismissal was warranted with prejudice and without leave to amend.

**A. Standard of Review.**

A trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. *See Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998)).

"Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'" *Kinney*, 159 Wn.2d at 842 (citations omitted). "The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims." *Id.* A motion to dismiss is granted "sparingly and with care" and, as a practical matter, "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.* (citations omitted).

If the court concludes that a plaintiff has failed to plead facts sufficient to state a claim for relief, then dismissal *without* prejudice and with leave to re-plead is the appropriate remedy. *See Parker v. Theubet*, 1 Wn. App. 285, 291, 461 P.2d 9 (1969) (dismissal "with prejudice" appropriately follows only adjudication on merits).

**B. The Trial Court Erred in Concluding that VanRad Had Failed to Plead Facts Sufficient to Establish the “Public Interest” Element of a CPA Claim.**

To state a claim under the CPA, a plaintiff must show five elements: (1) An unfair or deceptive act or practice; (2) in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the party in his business or property; and (5) which injury is causally linked to the unfair or deceptive act. *Hangman Ridge, supra*, 105 Wn.2d at 780.

On the record below, the parties did not dispute that VanRad had alleged facts sufficient to show four of the five elements of a CPA claim – *i.e.*, that the Clinic had engaged in an unfair and deceptive practice in trade or commerce that had caused VanRad injury. *See, e.g., State Farm Fire & Cas. Co. v. Huynh*, 92 Wn. App. 454, 460, 469, 962 P.2d 854 (1998) (doctors who “bill for services that were never provided should fear liability for fraud and under the CPA,” and acts of medical provider “done for the purpose of increasing profits are within the sphere of trade, are commerce, and are subject to the CPA”).

The only question is whether the trial court correctly determined that VanRad failed to allege facts sufficient to show a public interest impact.

1. **The Trial Court Did Not Consider Any Factors Relevant to Public Interest Impact.**

In *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 176-78, 159 P.3d 10 (2007), *rev. granted*, 180 P.3d 1291 (Apr. 1, 2008), the Court of

Appeals, Division One, set out relevant nonexclusive questions that a fact-finder might ask to determine whether alleged conduct impacts the public interest.

Where the acts complained of involve “essentially a consumer transaction,” such as the sale of goods, the following five questions are relevant:

- (1) Were the alleged acts committed in the course of defendant’s business?
- (2) Are the acts part of a pattern or generalized course of conduct?
- (3) Were repeated acts committed prior to the act involving plaintiff?
- (4) Is there a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff?
- (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

*Stephens*, 138 Wn. App. at 177 (quoting *Hangman Ridge*, 105 Wn.2d at 790, 719 P.2d 531).

Where the complaint involves “essentially a private dispute” such as the provision of professional services, different questions may be involved:

- (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?

*Stephens*, 138 Wn. App. at 177 (quoting *Hangman Ridge*, 105 Wn.2d at 790-91, 719 P.3d 531). “No one factor is dispositive, nor is it necessary that all be present.” *Id.*

Sometimes neither set of questions fits the circumstances of the case. In *Stephens*, for example, the Court of Appeals applied the factors used to evaluate consumer transactions to conclude that a non-consumer – an uninsured motorist allegedly at fault – could bring a CPA claim against a collection agency that was sending notices on behalf of an insurance company to recover on its subrogation interests. After ruling that a consumer relationship is not necessary to have standing to bring a CPA claim, the Court of Appeals held that the collection agency’s practices had a “real and substantial potential for repetition” and satisfied the public interest element. 138 Wn. App. at 178, 159 P.3d 10.

Similarly, in *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), the Washington Supreme Court held that the Nordstrom department store could bring a CPA claim against the owner of a beauty salon advertised as “Nostrum” in typeface identical to that of the Nordstrom logo. The court observed that the Court of Appeals, which had found no public interest impact, was correct in concluding that “[t]he thrust of the litigation [was] a private dispute between two parties over trade name infringement.” *Id.* at 742. However, the court found that it was equally true that “the public was integrally involved,” because the trial court had concluded that the defendant’s use of the name Nostrum “tend[ed] to and [did] deceive or mislead persons of ordinary caution into the belief that they [were] dealing with one concern when in fact they [were] dealing with the other.” *Id.* Under those circumstances, the court reasoned that “the public interest element may be satisfied even though a

neat distinction between consumer and private dispute is not workable.”

*Id.*

In this case, the trial court considered none of the relevant questions used to determine whether a consumer or private dispute has a non-*per se* public impact. Instead, it concluded simply that VanRad improperly had relied upon the Insurance Code, RCW 48.01.030 – which provides that “the business of insurance affects the public interest” – for the broad proposition that any alleged conduct involving an insurance company violated the CPA. (CP 176.) The court reasoned that VanRad’s reliance on alleged violations of the Insurance Code was misplaced, because neither party was “engaged in the business of insurance.” *Id.* As described in the next section, that analysis was incorrect.

2. VanRad Alleged Facts Sufficient to Show that the Public Was Integrally Involved in Its Dispute With the Clinic.

As in *Nordstrom* and *Stephens*, this is a case in which a neat distinction between consumer and private disputes is not workable. Although the Clinic characterizes the parties’ dispute as “private,” the public was integrally involved in the Clinic’s deceptive practices – *i.e.*, third-party payers and patients were deceived, hundreds of times, into paying the Clinic for CAD services that were provided by VanRad. (FAC ¶ 3.9.9; CP 90.) Further, the deception occurred in the course of the Clinic’s business and, given the prevalence of health care fraud, it has a “real and substantial potential for repetition.” *Stephens*, 138 Wn. App. at

177. See U.S. Attorneys' Manual 9-44.100 ("Health care fraud is a growing problem across the United States.").<sup>3</sup>

The trial court dismissed the public impact of the Clinic's deception out of hand, assuming that, even if insurers and patients were deceived, "neither [group] were defrauded to their financial detriment," and noting that "[t]here is no claim that [the Clinic] submitted a bill for services not received by the patients, nor that the bill was excessive, nor that the insurers or patients are in danger of paying twice." (CP 175.)

The trial court should not have made any of those assumptions on consideration of a motion to dismiss under CR 12(b)(6). See *Kinney*, 159 Wn.2d at 842 ("The court . . . may consider hypothetical facts *supporting* the plaintiff's claims.") (Emphasis added.) Contrary assumptions, if any, were warranted under the circumstances. Cf. *Huynh*, 92 Wn. App. at 460 (when "a doctor submits patients' bills to an insurance company for payment" and "these bills are fraudulent, the costs are passed on to consumers, who are forced to pay higher premiums"). Further, when the third-party payer was Medicare or Medicaid, all taxpayers potentially were impacted. *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 803, 585 P.2d 1182 (Medicare "is financed by specific taxes on employees' wages, employers' payrolls and income of the self-employed.").

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<sup>3</sup> Available at: [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/44mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/44mcrm.htm).

In any event, none of the trial court's assumptions about whether the insurers and insureds were harmed by the Clinic's deceptive practices was relevant to whether VanRad had stated a claim under the CPA. A plaintiff need only allege facts sufficient to show that a defendant's practice has "the *capacity to deceive* a substantial portion of the public," *Stephens*, 138 Wn. App. at 166 (emphasis added), and the only injury that the plaintiff must allege is to itself, *id.* at 176 (the CPA "does not identify the 'consuming public' as the entity to be protected"). *See also Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 312-13, 858 P.2d 1054 (1993) ("Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods and services, there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods and services.").

In *Nordstrom*, for example, the court cited no evidence that, by using the name "Nostrum" and potentially confusing the public, the defendant hair salon actually had deceived any member of the public to his or her financial detriment. 107 Wn.2d at 211-212. To the contrary, Nordstrom alleged that the defendant's unfair and deceptive practice had harmed *its own* business reputation and goodwill. *Id.* *See also Northwest Airlines, Inc. v. Ticket Exchange, Inc.*, 793 F. Supp. 976, 979 (W.D. Wash. 1992) (holding that airline stated claim under CPA where it alleged that ticket broker's deceptive practices caused injury not to ticket-buying public, but to airline).

Likewise, in this case, even if VanRad was the only party directly harmed by the Clinic’s deception of the third-party payers (a fact that, as noted, should not be assumed), it is able to allege a public interest impact sufficient to state a claim under the CPA. *See Stephens*, 138 Wn. App. at 176 (holding that a consumer relationship is not required to bring claim under CPA and emphasizing that “[a]ny person who is injured in his or her business or property . . . may bring a civil action in the superior court”) (quoting RCW 19.86.090) (emphasis in original).<sup>4</sup>

**C. The Trial Court Erred in Dismissing VanRad’s CPA Claim With Prejudice and Without Leave to Amend.**

If VanRad failed to allege facts sufficient to state a claim under the CPA, the trial court should have granted leave to amend. *See Parker, supra*, 1 Wn. App. at 291 (1969) (dismissal “with prejudice” appropriately follows only adjudication on merits).

Instead, the trial court concluded that VanRad could “prove no facts consistent with its pleading which would make this a case affecting the public interest.” (CP 177.) That conclusion was improper, especially in light of the fact that the trial court *itself* had postulated facts that, if

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<sup>4</sup> *See also Daly v. Unitrin, Inc.*, 2008 WL 2403706, \* 2-3 (E.D. Wash. Jun. 11, 2008) (unpublished) (ruling that, under CPA, plaintiffs who were neither consumers nor insureds had pled facts sufficient to show public interest impact based on defendants’ false representations). The District Court for the Eastern District of Washington permits citations to unpublished decisions filed after January 1, 2007. *See* E.D. Wash. LR 7.1(g)(2).

alleged, apparently would have changed its views – in particular, an allegation that “insurers or patients [were] in danger of paying twice.” (CP 175.) In fact, that danger not only existed, but VanRad is able to allege that double payments ultimately occurred. It should be allowed the opportunity to do so.

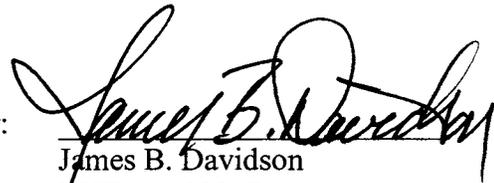
V. **CONCLUSION**

For the foregoing reasons, VanRad respectfully requests that the decision of the Clark County Superior Court dismissing its CPA claim with prejudice be reversed and the matter remanded for further proceedings.

Dated this 24<sup>th</sup> day of July, 2008.

Respectfully submitted,  
ATER WYNNE LLP

By:

  
James B. Davidson  
WSBA # 33847  
Attorney for Respondent

The Honorable Roger A. Bennett

**FILED**

**NOV 02 2006**

**Sherry W. Padon, Clerk, Clark Co**

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF CLARK

VANCOUVER RADIOLOGISTS, P.C., a  
Washington professional service corporation,

Plaintiff,

v.

THE VANCOUVER CLINIC, INC., P.S., a  
Washington professional service corporation,

Defendant.

Case No. 06-2-04065-5

**FOURTH AMENDED COMPLAINT FOR  
UNJUST ENRICHMENT; QUANTUM  
MERUIT; AND UNFAIR AND  
DECEPTIVE TRADE PRACTICE**

COMES NOW the plaintiff and, for its Fourth Amended Complaint against the above-named defendant, states and alleges as follows:

**I. PARTIES**

1.1 Plaintiff Vancouver Radiologists, P.C. (hereafter "VanRad") is a professional service corporation organized under the laws of Washington with its headquarters and principal place of business in Vancouver, Washington.

1.2 Defendant The Vancouver Clinic, Inc., P.S. (hereafter "the Clinic") is a professional service corporation organized under the laws of Washington with its headquarters and principal place of business in Vancouver, Washington.

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FOURTH AMENDED COMPLAINT FOR UNJUST ENRICHMENT;  
QUANTUM MERUIT; AND UNFAIR AND DECEPTIVE TRADE  
PRACTICE - PAGE 1

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0-000000087



1 3.7 The Clinic did not disclose to VanRad that it would submit claims to third-party  
2 payers for the technical component of the CAD Services and made no arrangements with  
3 VanRad for how the CAD Services would be billed.

4 3.8 The Clinic's decision to submit claims to third-party payers to obtain  
5 reimbursement for the CAD Services prevented VanRad from securing reimbursement from  
6 third-party payers and recouping all its costs for the CAD services.

7 3.9 The Clinic's decision to submit claims to third-party payers to obtain  
8 reimbursement for the CAD Services was in bad faith, inequitable, deceptive, dishonest, and  
9 fraudulent for reasons that include, but are not limited to, the following facts:

10 3.9.1 The Clinic has admitted that VanRad performed the CAD Services,  
11 including the technical component of those services;

12 3.9.2 The Clinic has admitted that it did not own or lease the R2 Technology  
13 ImageChecker® used to perform the CAD Services;

14 3.9.3 The Clinic has admitted that it did not own or lease the CAD algorithm  
15 software used to perform the computer algorithm analyses as part of the CAD Services;

16 3.9.4 The Clinic has admitted that it did not conduct any further physician  
17 review for interpretation of computer algorithm analyses as part of the CAD Services;

18 3.9.5 The basis for the Clinic's decision to submit claims to third-party  
19 payers for reimbursement of the technical component of the CAD Services (purchase of a port  
20 connection) is not specified as part of CAD in Healthcare Common Procedure Coding System  
21 ("HPCS") process codes 76082 and 76083;

22 3.9.6 The Clinic personnel responsible for the decision to submit claims to  
23 third-party payers for reimbursement of the technical component of the CAD Services could  
24 cite no authority permitting the Clinic to submit them;

25 ///

1           3.9.7       The Clinic's Executive Director concluded that VanRad was entitled  
2 to submit claims for reimbursement to third-party payers for at least a part of the technical  
3 component of the CAD Services;

4           3.9.8       The Clinic knew that VanRad objected to the Clinic's submission of  
5 claims to third-party payers to obtain reimbursement for the technical component of the CAD  
6 Services; and

7           3.9.9       The Clinic continued to submit claims to third-party payers to obtain  
8 reimbursement for the entire technical component of the CAD Services, even after it knew that  
9 VanRad objected and even after it believed that VanRad was entitled to at least part of the  
10 technical component reimbursement, if not all of it.

11                   **IV.    FIRST CLAIM FOR RELIEF: UNJUST ENRICHMENT**

12           4.1       VanRad realleges and incorporates herein by reference each and every allegation  
13 set forth in Paragraphs 1.1 through 3.9 9, above.

14           4.2       VanRad did not volunteer to provide CAD Services for the Clinic's patients at no  
15 charge; rather, VanRad had a right to recover its costs from third-party payers.

16           4.3       The Clinic has been unjustly enriched in the amount of \$145,982.48 by  
17 wrongfully obtaining reimbursements from third-party payers for CAD Services that it did not  
18 perform. VanRad performed those services, but was not reimbursed for them. It would be  
19 inequitable for the Clinic to retain the reimbursements for the CAD Services.

20                   **V.    SECOND CLAIM FOR RELIEF: QUANTUM MERUIT**

21           5.1       VanRad realleges and incorporates herein by reference each and every allegation  
22 set forth in Paragraphs 1.1 through 4.3, above.

23           5.2       The CAD Services constituted a valuable service that VanRad performed on  
24 behalf of the Clinic for the Clinic's patients.

25    ///

1           5.3    The Clinic accepted the CAD Services under such circumstances as reasonably  
2 notified the Clinic that VanRad, in performing the CAD Services, expected to be paid for those  
3 services.

4           5.4    The Clinic prevented VanRad from recovering payment for the CAD Services  
5 from third-party payers and refuses to pay VanRad itself.

6           5.5    VanRad is entitled to be paid the reasonable value of the CAD Services in an  
7 amount not less than \$145,982.48, plus prejudgment interest of 12% per annum.

8           **VI.    THIRD CLAIM FOR RELIEF: UNFAIR BUSINESS PRACTICES**

9           6.1    VanRad realleges and incorporates herein by reference each and every allegation  
10 set forth in Paragraphs 1.1 through 5.5, above.

11          6.2    The entrepreneurial aspects of the Clinic's medical practice are within the sphere  
12 of trade, are commerce, and are subject to the Consumer Protection Act ("CPA"), RCW  
13 19.86.010 *et seq*

14          6.3    The Washington Legislature has determined that the business of insurance is one  
15 affected by the public interest, requiring that all persons be actuated by good faith, abstain from  
16 deception, and practice honesty and equity in all insurance matters. RCW 48 01.030. "Upon  
17 the insurer, the insured, their providers, and their representatives rests the duty of preserving  
18 inviolate the integrity of insurance." *Id.* Accordingly, violations of the insurance regulations  
19 are expressly subject to the CPA under RCW 19.86.170.

20          6.4    The Clinic's actions in seeking reimbursement from third-party insurance  
21 companies for the CAD Services that VanRad performed, as described in Paragraphs 3.9  
22 through 3.15 9 of this Complaint, related to the business of insurance and constituted an unfair  
23 and deceptive business practice in the conduct of trade or commerce under RCW 19.86.020 in  
24 the following particulars:

25        ///





**CERTIFICATE OF SERVICE**

I hereby certify that I have this 2<sup>nd</sup> day of November, 2007, served a true and correct copy of the foregoing document upon the parties, via the methods noted below, properly addressed as follows:

***Attorney for Defendant The Vancouver Clinic, Inc., P.S.:***

Craig G. Russillo

Schwabe, Williamson & Wyatt, P.C.

1211 S.W. Fifth Avenue

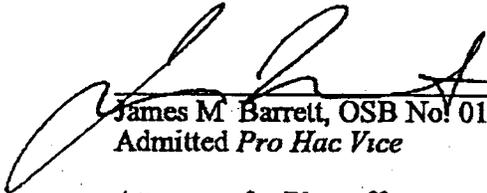
Suite 1900

Portland, OR 97204

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail
- Facsimile (503) 796-2900
- E-Mail crussillo@schwabe.com

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

DATED this 2<sup>nd</sup> day of November, 2007, at Portland, Oregon.

  
 \_\_\_\_\_  
 James M. Barrett, OSB No. 01199,  
 Admitted *Pro Hac Vice*  
 Attorneys for Plaintiff

FILED

JAN 10 2008

Sherry W. Foster, Clerk, Clark Co

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

12	VANCOUVER RADIOLOGISTS, P.C., a )	Case No.: 06-2-04065-5
13	Washington professional service )	
13	corporation,	) RULING ON DEFENDANT'S 12(b)(6)
14	Plaintiff,	) MOTION AS TO CPA CLAIM IN
15		) FOURTH AMENDED COMPLAINT
15	vs.	)
16	THE VANCOUVER CLINIC, INC., )	
17	P.S., a Washington professional )	
18	service corporation,	)
18	Defendant.	)
19		)

Defendant has moved for dismissal of Petitioner's third claim for relief, set out in the fourth amended complaint.

Plaintiff alleges that Defendant's conduct violates the general provisions of Washington's Consumer Protection Act, RCW 18.86, in that such actions were "unfair or deceptive, occurred in the course of trade or commerce, affected the public interest

RULING ON DEFEENDANT'S 12(b)(6) MOTION  
AS TO CPA CLAIM IN FOURTH AMENDED COMPLAINT - 1

71  
0-000000173

1 and caused injury to Plaintiff's" business, under the rule set  
2 out in Hangman Ridge Training Stables, Inc. v. Safeco Insurance  
3 Co., 105 Wn.2d 778, 780, 719 P.2d. 531 (1986).

4 Plaintiff further alleges that the billings were dishonest  
5 and deceptive, and affected the public interest per se, because  
6 they violated the Health Care False Claim Act, RCW 48.80, and  
7 specifically RCW 40.80.030(1), (3), and (4).

8 Plaintiff's claim is premised upon the allegation that  
9 Defendant contracted for Plaintiff to perform Computer Aided  
10 Detection (CAD) services, and then Defendant billed private  
11 insurance companies and Medicare and Medicaid for the services  
12 which were actually rendered by Plaintiff.  
13

14 Defendant argues, in its CR 12(b)(6) motion to dismiss,  
15 that Plaintiff's third claim for relief fails to state a claim  
16 upon which relief can be granted, for two reasons. Defendant  
17 challenges the Plaintiff's standing to bring the claims under  
18 Chapter 48, and challenges whether Plaintiff's allegations,  
19 assuming they are true, establish the public interest element of  
20 an RCW 19.86 claim.

21 I. STANDING UNDER RCW 48.80

22 Plaintiff notes that false health care claims are injurious  
23 to society. Such generality, however, is of no great  
24 significance under the facts pled in this case, however, as the  
25 alleged dishonesty involved is a dispute between medical

1 providers as to who is entitled to payment. There is no claim  
2 that Defendant submitted a bill for services not received by the  
3 patients, nor that the bill was excessive, nor that the insurers  
4 or patients are in any danger of paying twice.

5 Notably, neither the insurers nor insured are parties to  
6 this action - neither were defrauded to their financial  
7 detriment.

8 It is significant that the alleged misrepresentation  
9 consisted of whom to send payment to. While that issue is  
10 certainly material to Plaintiff and Defendant, it is immaterial  
11 to the insurers, Medicare and Medicaid, and the insured, so long  
12 as the services were received, and payment credited.

13 My conclusion is that Plaintiff fails to plead facts  
14 sufficient to establish a per se violation of the CPA, because  
15 Plaintiff lacks standing to bring an action under RCW 48.80, the  
16 False Health Care Claims Act. In those cases where a claim has  
17 been recognized, though brought by a person other than a  
18 consumer, the plaintiff had a special relationship with, and  
19 therefore "stood in the shoes" of the consumer, either as the  
20 doctor of a patient who was defrauded (giving rise to a claim by  
21 the patient against the doctor, See Physicians Ins. Exch. v.  
22 Fisons, 122 Wn.2d 299, 858 P.2d. 1054 (1993), or as the  
23 insurance company payor which suffered the financial loss, in  
24 lieu of the patient, for false bills submitted by a doctor to  
25

1 the insurance company. State Farm Fire & Casualty Co. v. Huynh,  
2 92 Wn. App. 454, 962 P.2d 854 (1998.) Here, Plaintiff is  
3 neither. Plaintiff's loss, assuming there is a valid claim  
4 against Defendant, is not based upon any special relationship  
5 Plaintiff has with consumers or the insurance companies, but  
6 rather is based upon the business relationship between Plaintiff  
7 and Defendant, governed by contract or quasi-contract  
8 principles.

9  
10 II. NON PER SE ARGUMENT CONCERNING THE PUBLIC INTEREST

11 In support of Plaintiff's argument that the complaint  
12 properly pleads a non per se case of public interest, Plaintiff  
13 relies upon the public policy of RCW 48.01.030, for the broad  
14 proposition that any alleged conduct involving an insurance  
15 company affects the public interest. Plaintiff correctly  
16 observes that "the business of insurance affects the public  
17 interest . . ." RCW 48.01.030. Neither party to this action,  
18 however, is engaged in the business of insurance. The primary  
19 thrust of Title 48, the insurance code, is to govern the  
20 insurance industry. Kueckelhan v. Federal Old Line Insurance  
21 CO., 69 Wash.2d 792, 418 P.2d 443 (1966). Notably, every single  
22 case collected in the annotation to RCW 48.01.030, under the  
23 caption "Consumer Protection" involves a suit by or against an  
24 insurance company.  
25

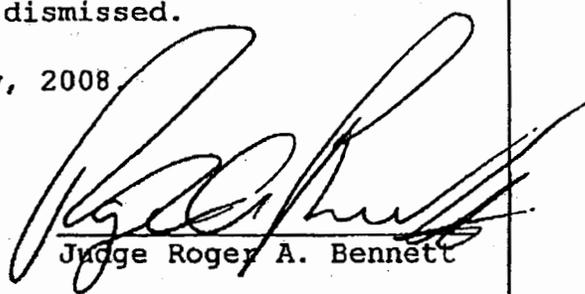
1 Taken to its logical extremes, under Plaintiff's argument a  
2 dispute between a landlord and an insurance company/tenant over  
3 misrepresentations in the lease agreement would be subject to  
4 the CPA. Instead, the factual scenario involved in a case  
5 dictates the applicability of the CPA, in terms of public  
6 interest, rather than the mantra of "insurance."

7  
8 Plaintiff can prove no facts consistent with its pleading  
9 which would make this a case affecting the public interest. No  
10 member of the public, nor any party to the transactions herein,  
11 other than Plaintiff and Defendant, has any interest in whether  
12 Plaintiff or Defendant is the proper payee for the CAD services.

13 III. ORDER

14 Defendant's 12(b)(6) motions is granted. The third claim  
15 for relief, violation of the CPA, is dismissed.

16 DATED this 9 day of January, 2008.

17  
18   
19 Judge Roger A. Bennett  
20  
21  
22  
23  
24  
25

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 24<sup>th</sup> day of July, 2008, caused a true and correct copy of the foregoing **Brief of Appellant**, to be served on the following in the manner indicated below:

***Attorneys for Defendant/Respondent:***

**Craig G. Russillo**  
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 \_\_\_\_\_ Overnight Mail  
 \_\_\_\_\_ Facsimile

FILED  
 COURT OF APPEALS  
 DIVISION II  
 08 JUL 25 AM 9:48  
 STATE OF WASHINGTON  
 BY *[Signature]*

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

DATED this 24<sup>th</sup> day of July, 2008, at Portland, Oregon

*[Signature]*  
 James B. Davidson, WSBA # 33847  
 Attorney for Appellant