IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PLUMB SERVE, LLC, a Washington, limited liability company, d/b/a BENJAMIN FRANKLIN PLUMBING, Plaintiffs, v. VIOLA M. SCOBY and JOHN DOE SCOBY, wife and husband, and JOHN W. SCOBY and VIOLA M. SCOBY REVOCABLE TRUST of October 9, 1995, Respondents, v. PROFIT TWO, LLC, a Washington limited liability company, d/b/a PLUMB SERVE AND OUTTODAY SERVICE; RODNEY JESSEN, individually and as part of his marital community; and GARY JESSEN, individually and as part of his marital community, Appellants.	)	NO. 65459-4-I DIVISION ONE UNPUBLISHED OPINION FILED: August 6, 2012

Lau, J. — Plumbing contractors Gary and Rodney Jessen, owners and operators of Plumb Serve LLC doing business under the name Benjamin Franklin Plumbing,[1] appeal a judgment after a bench trial that it violated the Consumer Protection Act (CPA), chapter 19.86 RCW. Because substantial evidence supports the trial court's findings and these findings support the conclusion that BFP violated the CPA, we affirm the trial court's attorney fees and costs award under the CPA incurred by Viola Scoby at trial.[2] We also award Scoby fees and costs on appeal on the same grounds and remand for the trial court to determine the amount under RAP 18.1(i). In addition, we affirm the trial court's order imposing personal liability against Rodney and Gary Jessen and denying BFP's attorney fees request.

FACTS

BFP filed suit against 82-year-old Viola Scoby for breach of contract and to foreclose its mechanic's lien for unpaid sewer installation work. Scoby counterclaimed, alleging CPA violations. During the nearly eight-day bench trial,[3] both parties presented witness testimony, exhibits, and argument.[4] Evidence established the

[1] We refer to the plaintiffs/third-party defendants collectively as "BFP." At the time of the incident in question, Benjamin Franklin Plumbing was a "doing business as" of Plumb Serve LLC, owned and operated by Rodney and Gary Jessen. Plumb Serve LLC was operating under a franchise agreement with Benjamin Franklin Plumbing. Later, the Jessens operated a separate company—Profit Two LLC dba Plumbserve and Outtoday Service.

[2] We refer to the respondents collectively as "Scoby."

[3] An arbitrator previously resolved this dispute by awarding Scoby $9,731.25. BFP requested a trial de novo.

[4] The court admitted 25 exhibits. Scoby, Wanda Kristjanson, Michelle Todd, and

following facts, which are mostly unchallenged on appeal.[5]

Scoby's washing machine backed up and caused a flood in her home. She looked for plumbers in the telephone book and saw the Benjamin Franklin Plumbing advertisement. She selected BFP because the advertisement showed it was a Better Business Bureau member,[6] guaranteed 100 percent customer satisfaction, and it had a good name. She telephoned BFP's office, and they dispatched plumbing technician Alex Shelton to her home. Scoby signed three preprinted form contracts admitted at trial as exhibits 1 through 3.[7] She signed exhibit 1 on March 25, 2008, exhibit 2 on March 26, 2008, and exhibit 3 on March 27, 2008. Shelton also signed each of these agreements as BFP's representative.[8]

Exhibit 1, entitled "invoice," lists charges to "clear mainline" at $499, "deep repair over 4 ft. to install c/o" for $2,245 and "cable 2 tubs, 1 laundry, 1 k/s line, 2 lavs" for $250 totaling $3,094. Below the listed charges is a separate section detailing

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expert witness Kevin Flynn testified for Scoby. Gary and Rodney Jessen, Victoria Glover, and former BFP field supervisor Roger Wadleigh testified for BFP. Alex Shelton did not testify.

[5] Findings 1 through 43 are unchallenged and constitute verities on appeal.

[6] The undisputed evidence shows the Better Business Bureau revoked its accreditation when it learned about the consent decree.

[7] These form contracts are "franchise contract[s]." At the time of this transaction, BFP was a "DBA of Plumb Serve LLC. Plumb Serve LLC was operating under a franchise agreement with Benjamin Franklin Plumbing." Except for the preprinted terms, the franchise contracts contained fill-in-the-blank areas.

[8] The scope of work and dollar amounts are all handwritten, presumably by Shelton.

individual charges and discounts resulting in a total amount due. This section indicates eight amounts that are crossed out, with a total amount due of $6,655.98. Scoby first wrote a check to BFP for $1,684.68 but crossed out this amount and then wrote two other checks, one for $3,552.93 and one for $3,103.05. These checks reflected a change in the original scope of work, with the new scope of work equal to $6,655.98.

The agreement also included an "Additional Notes Form," exhibit 2, reflecting the expanded scope of work totaling $6,655.98. This amount included a 10 percent "Club Rewards" discount, exhibit 3, in exchange for a $260.71 payment from Scoby. The additional notes form describes the scope of work: "To replace 21-25 linear feet of 4" sewer line from edge of garage out approximately 25 ft to remove [root-damaged] section will install two way [cut out] and 2 locking ring and covers." Ex. 2. Scoby, upset and frantic, telephoned her daughter Wanda Kristjanson about the sewer line work. Based on her mother's previous unpleasant experience involving a home security alarm company, Kristjanson was concerned that BFP might take advantage of her elderly mother. Shelton told Kristjanson that he could not repair the line and had to replace it. BFP proceeded with the sewer line replacement.

A video admitted at trial as exhibit 7 shows that the installed sewer line extends only 14 feet from the garage edge rather than 25 feet, as described in the additional notes form's scope of work. BFP also failed to install the two locking ring covers, which were included in the contract price.

"Kristjanson did not feel that the work had been done according to the written scope of work presented in the contract." Finding of Fact (FF) 16. She contacted BFP

employee Fred Fazio.[9] She expressed concerns and requested that BFP review the work. BFP failed to respond to her request.[10] Kristjanson, a signatory on her mother's

[9] Fazio did not testify. The record shows he handled BFP's permitting and customer service, including complaints.

[10] On this issue, Rodney Jessen testified as follows:

"Q. Now, if somebody complained about the price for the work done, are they a hundred percent satisfied?

"A. Globally, no.

"Q. And did you have a policy or a procedure for dealing with that scenario?

"A. Yes.

"Q. And what was that policy?

"A. We would strive to make then a hundred percent satisfied with regards to price, too.

"Q. How would you do that?

"A. The frontline people, well our customer service person is authorized to give up to a certain percentage, if that didn't make the customer satisfied, of course we would do an audit of their particular job, as far as were they charged correctly, were they treated correctly, were they treated correctly within our rules, within our system of doing business, if they are still not satisfied, then it goes up to Gary and Gary has the authority to adjust the job to make them satisfied.

"Q. How do you determine if the work was done correctly and if it was priced correctly?

"A. If the work is inspected, then that's fine, that's one way, another way is to send another set of eyes out, we will send someone out to look at it. If it's priced correctly, the scope is clearly written on the contract, the book is very very complete and we can go right down to the codes and dissect the job.

"Q. So, would you ordinarily send somebody out to the site?

"A. We could.

"Q. You could is that your policy?

"A. It depends on what the customer wants.

"Q. If they asked for somebody to come out and nobody came out, is that following your policy?

"A. I don't know, I don't know about -- it specifically, but it would be our goal to make the customer happy.

We -- that's the whole point is having happy customers." RP (Feb. 16, 2010) at 89-90. The record shows that BFP failed to adhere to its 100 percent satisfaction guarantee.

account, stopped payment on the three checks. No one from BFP visited the Scoby property until Gary Jessen filed and personally served Scoby with a lien for the contract price.[11]

Scoby also presented evidence about repair work involving customer Michelle Todd. "Michelle Todd testified about the repair work done on her sink by Plumb-serve/Out-today.[12] She described a situation where she made a service request answered by the Plaintiffs companies and she felt in the end she was over charged." FF 23. "Michelle Todd's overcharge impression came from her estimation that the work done on her sink took two and a half hours and she was charged $1,000." FF 24.

BFP owners Rodney Jessen and Gary Jessen[13] testified about the Scoby transaction and BFP's operation. The court found their testimony mostly not credible.[14]

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[11] "Ms. Kristjanson also described asking for a quote to get a faucet installed in her mom's back yard. She felt that in giving the quote the plumber misrepresented the length of pipe required to do the job. He quoted her 40 feet and she challenged him on that measure. As an experienced real estate agent she knew the dimensions of her mother's house and knew that this was excessive. When challenged, he lowered it to 30 feet, but this only proved her suspicion of misrepresentation. He quoted her $900 for the work and she was later able to get the work done for $125." FF 17.

[12] Todd hired Profit Two, doing business as both Plumb Serve and Outtoday. Rodney and Gary Jessen were also involved in the management of this company. The court found that Outtoday provided the same plumbing services provided by BFP.

[13] Gary Jessen testified that at the time BFP provided services to Scoby, he owned 10 percent of BFP and Rodney Jessen owned 90 percent. Although Rodney Jessen testified that the company was later owned by a private trust, BFP's briefing refers to Rodney Jessen as a majority owner. Accordingly, we refer to Rodney and Gary Jessen as owners of BFP.

[14] BFP challenges the trial court's reliance on the consent decree. We note, as the trial court did, the existence of a July 11, 2007 consent decree admitted as exhibit 109 between the State of Washington and numerous defendants associated with and including Plumb Serve LLC, Benjamin Franklin Plumbing, and Gary and Rodney

Former BFP employee Robert Wadleigh testified, and the court found his testimony only partially credible.[15] He testified that with regard to these types of jobs, labor—rather than materials—constitutes a significant cost.

Raymark Plumbing's sewer utility manager and registered side sewer installer Kevin Flynn testified for Scoby. The court found him credible. "He rebid the job in question. His bid utilized a time plus material calculation to arrive at a fixed price. He indicated a price of this work for $3,350 plus tax and permit." FF 35.

The court concluded that Scoby proved BFP violated the CPA. The court also found Rodney and Gary Jessen personally liable for the CPA violations. The court awarded Scoby attorney fees under the CPA and denied BFP's attorney fees request.

Jessen. Gary and Rodney Jessen were signatories of the decree. A consent decree is a court judgment. Dep't of Ecology v. Tiger Oil Corp., 166 Wn. App. 720, 772, 271 P.3d 331 (2012). The State alleged CPA violations involving defendants occurring in the course of doing business. The consent decree was signed by the Snohomish County Superior Court and entered about eight months before the events involving Scoby occurred. The consent decree, among other remedies, suspends imposition of substantial civil monetary penalties for a period of three years from entry of the consent decree upon full compliance with its terms. The consent decree also contains numerous injunctive provisions that "permanently enjoined and restrained [defendants] from directly or indirectly engaging in [certain enumerated] acts or practices in sales to Washington consumers." The consent decree's enforcement provisions mandate that violations of any of the injunctions "shall" subject defendants to $25,000 per violation and "shall constitute a CPA violation. BFP's counsel told the court that BFP "has no problem with the Court looking at the Consent Decree as a historical document to support the admission that the BBB made a determination in August of 2007 to remove plaintiff as an affiliate member." RP (Feb. 10, 2010) at 12-13. On appeal, BFP assigns no error to conclusion of law (CL) 3, the court's ruling admitting the consent decree. The trial court was well within its discretion to consider the existence of the judgment when it assessed the Jessens' testimony and concluded it was mostly not credible.

[15] The trial court accepted Flynn's testimony about the reasonable value of the work--$3350—over Wadleigh's testimony on the same point.

The court awarded BFP a $3,350 offset for the reasonable value of its work based on Flynn's testimony about the reasonable value of the sewer work. BFP appeals.

Standard of Review

When the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "'Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'" Brin, 89 Wn. App. at 824 (quoting Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992)). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Fisher Props., Inc. v. Arden–Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). And an appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. Goodman v. Boeing Co., 75 Wn. App. 60, 82-83, 877 P.2d 703 (1994). "The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party." Lewis v. Dep't of Licensing, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006). Unchallenged findings of fact are verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); see

also RAP 10.3(g). "[A] finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact." Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

A trial court's findings may be supplemented or clarified by its oral opinion. In re Marriage of Griffin, 114 Wn.2d 772, 777, 791 P.2d 519 (1990); In re Marriage of Rockwell, 141 Wn. App. 235, 240 n.2, 170 P.3d 572 (2007).

Numerous cases have held that where the trial court fails to make a finding necessary to appellate review, the court may look to the trial court's oral opinion and to the record below and need not remand where the opinion or the record is clear. Pepper v. King County, 61 Wn. App. 339, 350-51, 810 P.2d 527 (1991). Where the language of the finding is equivocal but is susceptible of a construction that will support the judgment, the court will adopt that construction. See Lincoln Shiloh Assocs., Ltd. v. Mukilteo Water Dist., 45 Wn. App. 123, 724 P.2d 1083, 742 P.2d 177 (1986) (findings construed so as to comport with trial court's conclusions). The judgment is supported by the findings even if the findings are inconsistent, if one or more of the findings adequately support the judgment. See Lloyd's of Yakima Floor Center v. Dep't of Labor & Indus., 33 Wn. App. 745, 662 P.2d 391 (1982). We review legal issues de novo. Goodman v. Goodman, 128 Wn.2d 366, 373, 907 P.2d 290 (1995).

ANALYSIS

Bias

BFP asserts that the trial court demonstrated sympathetic bias in Scoby's favor based on the sole fact that the court changed its mind after its oral ruling. Scoby

responds that the record demonstrates no bias. We reject BFP's bias claim as unsupported in law and in fact and raised for the first time in this appeal. A trial court is presumed to perform its functions regularly and properly without bias or prejudice. In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). To show bias, "[e]vidence of a judge's actual or potential bias is required." Meredith, 148 Wn. App. at 903. "A trial court's oral opinion is only an indication of the court's views or thinking, and does not become final until or unless it is incorporated in written findings or conclusions of law." Johnson v. Whitman, 1 Wn. App. 540, 541, 463 P.2d 207 (1969). Parties cannot use statements contained in the trial court's oral decision to impeach the written findings. Sweeten v. Kauzlarich, 38 Wn. App. 163, 169, 684 P.2d 789 (1984).

Under RAP 2.5(a), we may "refuse to review any claim of error which was not raised in the trial court." "The doctrine of waiver applies to bias and appearance of fairness claims."[16] State v. Morgensen, 148 Wn. App. 81, 91, 197 P.3d 715 (2008). The record shows, and BFP acknowledged at oral argument to this court, that it failed to raise its bias claim below. The claim is waived. RAP 2.5(a). Even if properly preserved, BFP cites no controlling authority or record facts to establish its unwarranted judicial bias claim. To accept such a claim subjects every successful reconsideration motion to a charge of judicial bias. This claim is entirely frivolous.

Consumer Protection Act

BFP argues Scoby failed to prove the first, third, fourth, and fifth elements of a

[16] BFP makes no argument that this bias was manifest error affecting a constitutional right, an exception to RAP 2.5(a).

CPA claim. Scoby counters that substantial evidence supports the court's findings and that the findings support the conclusions of law. After a multiple days bench trial, the trial court entered a 29-page set of 43 findings and 67 conclusions, comprehensively summarizing the evidence, resolving factual disputes, and setting forth the legal analysis used.

To prevail in a private action based on a CPA violation, a party must establish five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff's business or property, and (5) causation. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). We must construe the CPA liberally to serve its purposes "in order to protect the public and foster fair and honest competition." RCW 19.86.920. Whether a particular action gives rise to a CPA violation is reviewed as a question of law. Keyes v. Bollinger, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982). In contrast, we review whether a party committed a particular act under the substantial evidence test. Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 560-61, 825 P.2d 714 (1992).

Unfair or Deceptive Act or Practice

"The [Consumer Protection Act] does not define 'unfair or deceptive act or practice.'" Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006). To establish the first element, a plaintiff "need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public." Hangman Ridge, 105 Wn.2d at 785. "The

purpose of the capacity to deceive test is to deter deceptive conduct before injury occurs." Hangman Ridge, 105 Wn.2d at 785. Numerous unchallenged findings of fact support this element:

> 2. On March 25th, 2008, Viola Scoby's washing machine backed up causing a flood in her home. She looked in the yellow pages for help and found a firm called Benjamin Franklin Plumbing ("BFP"). She chose BFP, because it was a member of the Better Business Bureau, because it had a good name, and because it indicated that one hundred percent satisfaction was guaranteed.
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> . . . .
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> 4. The first scope of work was $1,684.68 for which [Scoby] paid in full and then at some point this was changed and the new scope of work was $6,655.98.
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> 5. At the time of Exhibit 1, Benjamin Franklin Plumbing was a DBA of Plumb Serve LLC. Plumb Serve LLC was operating under a franchise agreement with Benjamin Franklin Plumbing. The contract form used was a franchise contract except for the areas where you fill in the blanks. The terms of the contract were pre-printed.
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> 6. Exhibit number 2 was also part of the agreement. However, this is a document entitled "Additional Notes Form." Plaintiffs testified that this was the detail form that was used to expand the scope of work to the $6,655.98 figure. It states: "To replace 21-25 linear feet of four inch sewer line from edge of garage out approximately 25 feet to remove [root-damaged] section will install two way cut out and two locking ring and covers."
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> 7. There is a dispute about whether this work was ever completed. There is no dispute that the draining problem was fixed. But Exhibit Number 7 video of the side sewer work shows that the installed sewer line does not extend 25 feet from the edge of the garage. It only extends out 14 feet approximately.
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> 8. This is not consistent with the scope of work described in Exhibit Number 2. Also, the locking ring and covers were not installed as described in Exhibit Number 2.
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> . . . .
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> 12. Ms. Kristjanson's mom gave her the plumber's name and she called him. He informed her that he was not able to repair the line and had to replace it. This testimony is not consistent with the idea of a choice.
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> 13. Ms. Kristjanson went to her mom's house the next day and spoke with the plumber. At that point Ms. Kristjanson was concerned about the expense, but also was concerned that the problem be solved. It was her impression from the conversation that the plumber had two more full days of work to perform and believed this was consistent with Exhibit Number 2.
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> 14. The plumber started work at 10:00 a.m. and at some point after that she left and returned at 3:00 p.m. to discover the plumber on his way out. He

> told her he would be back tomorrow and she intended to contact him the next day, but this did not happen.
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> 15. The next day the plumber arrived, finished the job from his perspective, received a check, and left. Ms. Kristjanson contacted her mom's house and he was gone by 11:30 that day.
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> 16. Ms. Kristjanson felt that this was not the work planned that had been described to her. The ditch was left open and she measured it. It also did not measure 21 to 25 feet from the garage edge as described in the scope of work. Ms. Kristjanson did not feel that the work had been done according to the written scope of work presented in the contract.
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> . . . .
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> 20. [Kristjanson] described her problem with the work as the plumber having done "half the job in half the time."

These findings are verities on appeal. The court's unchallenged conclusion of law 7 also states that the written contract was not performed. Expert witness Kevin Flynn also testified that based on a time plus material calculation, the reasonable value of the work performed was $3,350, plus tax and permit, approximately half the contract price. Flynn also testified that BFP installed only 14 feet of pipe, significantly less than the amount promised in the contract.

BFP challenges the following conclusions of law:

> 37. In the instant case, this Court believes that element one is met because an unfair deceptive act or practice has been shown. This is not related to the advertising, but rather to the predatory practice of attacking the customer rather than serving the customer.
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> 38. This case has shown a technique of using the superior technical knowledge of the contractor to increase the price of the service. This is what the Court earlier called overreaching. And it did not really matter whether the customer was someone who was elderly or young, the effect was the same. [17]

The trial court's findings show that BFP's plumbing technician, Alex Shelton,

[17] BFP assigns error to conclusions of law 10 and 41, but given our disposition, we need not address these assignments of error.

misrepresented the scope of work to Scoby.[18] She signed the contracts after he told her he needed "to replace 21-25 linear feet of 4" sewer line from edge of garage out approximately 25 ft to remove [root-damaged] section, will install 2 way c/o [clean out] and 2 locking ring and covers" for the total amount due of $6,655.98. Exs. 1, 2. But in fact, Shelton installed only 14 feet of pipe rather than 21 to 25 feet as provided for in the contract and failed to install the locking ring and covers as required by the additional notes form.[19] BFP failed to disclose to Scoby that it installed only half of the pipe it promised would be installed and failed to install the locking ring and covers. BFP immediately filed a mechanic's lien against the real property and then sued Scoby for breach of contract and to foreclose the lien for the full $6,655.98. This evidence, as found by the trial court, indicates that BFP's plumbing technician engaged in a deceptive act.[20]

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[18] While the trial court's expression of its findings and conclusions might be unartful, when read in the context of the trial record and its oral ruling, substantial evidence supports the findings and the findings support the conclusions.

[19] Misrepresenting the quantity of pipe installed alone indicates that BFP's representative engaged in a deceptive act. See footnote 19.

[20] See, e.g., Sign-O-Lite Signs, 64 Wn. App. at 561-62 (holding that company's representative engaged in a deceptive act when it induced a woman to sign a contract that obligated her to pay $22,000 for a $4,000 product, where woman told representative she was unable to read the contract without her glasses and representative assured her that it merely authorized commencement of work); Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 212, 194 P.3d 280 (2008) (issue of fact whether affirmative representations of quality followed by construction deficiencies met first element of CPA claim); Keyes v. Bollinger, 31 Wn. App. 286, 291, 640 P.2d 1077 (1982) (contractor who induces customer to contract by providing estimated repair date but knows it is reasonably foreseeable contractor will not meet that date engages in deceptive conduct).

BFP's reliance on Robinson v. Avis Rent A Car Sys., Inc., 106 Wn. App. 104, 22 P.3d 818 (2001), is inapposite. There, we reasoned that if a rental car agency failed to disclose to customers a concession fee in addition to the rental charge, the practice would have a tendency to mislead consumers. Robinson, 106 Wn. App. at 115-16. But we affirmed dismissal of the plaintiffs' claims on summary judgment because plaintiffs testified they could not remember whether the rental companies disclosed the additional fees. Robinson, 106 Wn. App. at 116-18. BFP argues that because Scoby similarly could not remember whether Shelton described price changes to her that increased the original scope of work, Scoby failed to prove a deceptive act. This contention is unpersuasive for reasons discussed above and because BFP mischaracterizes the nature of the deceptive conduct. We conclude the deceptive act element is clearly established here.

Public Interest

BFP argues Scoby failed to prove its conduct impacted the public interest.

> 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. However, it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.

Hangman Ridge, 105 Wn.2d at 790 (citations omitted). When a private dispute is the basis of the CPA claim, four factors—none of which is dispositive and not all of which need to be present—indicate whether the public interest is affected.[21] "These factors . .

[21] Neither side disputes the court's characterization of this dispute as a private one, rather than a "consumer transaction."

. represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact." Hangman, 105 Wn.2d at 791. The factors are:

> (1) whether the alleged acts were committed in the course of 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 the plaintiff and defendant have unequal bargaining positions.

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 605, 200 P.3d 695 (2009).

The first two factors are undisputed. The transaction between BFP and Scoby clearly occurred within the course of BFP's business. And the court's unchallenged finding of fact 2 quoted above states that Scoby found BFP through an advertisement in the phone directory yellow pages.[22] Eifler v. Shurgard Capital Mgmt. Corp., 71 Wn. App. 684, 697, 861 P.2d 1071 (1993) (holding that evidence was sufficient to satisfy the "public interest impact" element of a consumer protection claim where a storage unit company disseminated to the public its company name, yellow pages advertisement, and fliers). The court also found factor four established. The parties have unequal bargaining positions because BFP used its superior knowledge to induce Scoby to sign a contract for a scope of work it never completely performed. We conclude that the public interest element is clearly met here: the deceptive act was committed in the course of BFP's business, BFP advertises to the public in general, and BFP and Scoby occupied unequal bargaining positions. See Hangman Ridge, 105 Wn.2d at 790. Accordingly, we need not address BFP's challenge to the Todd and Kristjanson

[22] Rodney Jessen also testified that at the time of Scoby's work, BFP had "twenty different ads" running. RP (Feb. 16, 2010) at 168.

evidence to establish a likelihood that "additional plaintiffs have been or will be injured in exactly the same fashion . . . ." Hangman Ridge, 105 Wn.2d at 790.

Injury and Causation

BFP next asserts that because Scoby never paid BFP for the work, she establishes neither injury nor causation. "'Injury' is distinct from 'damages.'" Panag v. Farmers Ins. Co., 166 Wn.2d 27, 58, 204 P.3d 885 (2009) (quoting Nordstrom v. Tampourlos, 107 Wn.2d 735, 740, 733 P.2d 208 (1987)). A plaintiff shows injury when his or her "property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal."[23] Mason v. Mortgage Am., Inc., 114 Wn.2d 842 854, 792 P.2d 142 (1990). "A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 84, 170 P.3d 10 (2007). "Proximate cause is a factual question to be decided by the trier of fact." Indoor Billboard, 162 Wn.2d at 83.

Panag is instructive. There, the defendant argued that because Panag made no payment, she could not show that unlawful collection practices caused her injury. Our

[23] WPI 310.06's definition of "injury to business or property" states:

"(Insert name of plaintiff) has suffered an 'injury' if [his] [her] [its] business or property has been injured to any degree. Under the Consumer Protection Act, (name of plaintiff) has the burden of proving that [he] [she] [it] has been injured, but no monetary amount need be proved and proof of any injury is sufficient, even if expenses or losses caused by the violation are minimal.

"[Injuries to business or property do not include physical injury to a person's body, or pain and suffering.]

"[Injuries to business or property include financial loss.]"

Supreme Court rejected the argument. "Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a [Consumer Protection Act] claim. Although the latter is insufficient to show injury to business or property, the former is not." Panag, 166 Wn.2d at 62 (citations omitted).[24]

BFP assigns error to conclusion of law 46. This conclusion of law is really a finding of fact:

> 46. Mrs. Scoby received incomplete work from Plumb Serve/Benjamin Franklin Plumbing, leaving her with an open gravel patch and loose sewer caps that had to be fixed by another contractor. Then, when she sought an accounting and explanation, Benjamin Franklin Plumbing filed a lien against the Scoby property and filed suit to foreclose the lien, creating a slander on her title and putting her at risk to lose her home. To remove the lien, Mrs. Scoby is forced to expend substantial sums of money either defending a foreclosure or paying off the excessive lien.

We conclude substantial evidence supports this finding.[25] BFP's deceptive act forced Scoby to expend substantial attorney fees and costs to defend a lawsuit instituted by BFP. We conclude the findings support the conclusion that Scoby proved injury and causation.

All of the elements necessary to find a CPA violation are established by

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[24] See also Stephens v. Omni Ins. Co., 138 Wn. App. 151, 180-81, 159 P.3d 10 (2007) (holding that even though CPA plaintiffs never paid defendants, loss of time and expense of investigating validity of claim were sufficient to satisfy injury requirement).

[25] BFP argues that the filing of its lien was protected First Amendment activity. BFP cites no authority for this contention. Beal for Martinez v. City of Seattle, 134 Wn.2d 769, 777 n.2, 954 P.2d 237 (1998) ("The City cites no authority for this proposition and, thus, it is not properly before us.") (citing RAP 10.3(a)(5)). BFP also argues the court faulted it for not completing work that was outside the scope of the contract. But even if we assumed that argument were true, Scoby still demonstrated a deceptive act, as discussed above, and that deception caused injury.

substantial evidence, and the evidence supports the conclusions. The trial court did not err in finding BFP violated the CPA.

Personal Liability

BFP challenges the court's ruling imposing personal liability against Gary and Rodney Jessen. It is a well-settled principle that under the CPA, "[i]f a corporate officer participates in the wrongful conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties." State v. Ralph Williams' N. W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 322, 553 P.2d 423 (1976); Johnson v. Harrigan-Peach Land Dev. Co., 79 Wn.2d 745, 489 P.2d 923 (1971); Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wn. App. 80, 18 P.3d 1144 (2001).

In Ralph Williams, the court considered a deceptive practice in violation of the consumer protection act to be a type of wrongful conduct that justified imposing personal liability on a participating corporate officer. See also Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 599 P.2d 1271 (1979) (imposing personal liability on contractor who affirmatively misrepresented his ability to provide financing in order to win business). Corporate officers cannot use the corporate form to shield themselves from individual liability. Harrigan-Peach, 79 Wn.2d at 752. BFP does not challenge the court's consideration of this personal liability principle. Instead, it challenges the sufficiency of the evidence to support the court's conclusion that Gary and Rodney Jessen are individually liable.

The record supports the trial court finding that Gary and Rodney Jessen were personally responsible for the deceptive act here. The record clearly supports

unchallenged finding 38: "Rodney Jessen testified that his role at Benjamin Franklin Plumbing involved analyzing the financials of the company and overseeing his son, the general manager, performing day-to-day operations. He examined the paperwork for Ms. Scoby and approved of the incremental nature of the pricing." It is a verity on appeal.

He trained employees about the company's pricing systems. He and Gary were both involved in BFP's operation. He testified extensively about its operation, organization, pricing structure, customer complaint policies, and consumer practices. As discussed above, at the time of the Scoby transaction, both he and Gary were legal owners of Plumb Serve LLC d/b/a Benjamin Franklin Plumbing. He knew about the consent decree that enjoined enumerated unfair and deceptive acts. Although he denied knowledge about Scoby's side sewer work, the court found his testimony, with limited exception, not credible.

As to Gary Jessen's personal liability, in addition to the findings noted above, the records shows Gary was the general manager in charge of BFP's day to day operations. He completed and signed the claim of lien soon after Kristjanson stopped payment on the checks. Unchallenged finding 26 shows Gary "is the General Manager/ Operations Manager. He testified that he received financial statements on a monthly basis, but could not tell the Court his gross profit . . . ." The court found "[t]his was not credible." The court also concluded that Gary "evaded" any questions about BFP's actual profit on the job.

Evidence may be either direct or circumstantial. "Direct evidence" is evidence

given by a witness who has directly perceived something at issue in a case. "Circumstantial evidence," on the other hand, is evidence from which, based on common sense and experience, something may reasonably be inferred. The law gives equal weight or value to direct and circumstantial evidence in the fact-finding process. Washington Pattern Instruction 1.03. The record here contains ample direct and circumstantial evidence to support the trial court's personal liability determination.

RCW 25.15.300

BFP challenges the court's alternative ground for imposing personal liability—improper wind-up of a limited liability corporation under RCW 25.15.300—on the basis that the court violated its due process rights. BFP argues the court considered evidence not submitted at trial without providing an opportunity to respond.[26] "Though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Post v. City of Tacoma, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009).[27]

BFP fails to demonstrate a due process violation for several reasons. First, BFP responded to Scoby's posttrial submission of the bankruptcy petition with detailed briefing. Second, BFP knew about the personal liability issue and briefed the issue

[26] On appeal, BFP makes no argument on the merits that the court improperly imposed personal liability on this ground. Its argument is purely procedural.

[27] It has long been recognized that in a bench trial, the court has the authority to change its own findings of fact. See, e.g., Liming v. Teel, 46 Wn.2d 762, 284 P.2d 1110 (1955).

before trial. Rodney Jessen also testified about the bankruptcy at trial. Jessen knew about the bankruptcy because BFP filed the bankruptcy petition. In arguing against admission of the bankruptcy documents posttrial, BFP wrote, "All of the documents now offered by Defendants were known to exist at the time of trial . . . ." BFP and the Jessens fail to show they lacked notice or an opportunity to be heard. BFP briefed the issues and stated objections on the record. BFP also clearly knew personal liability would be an issue at trial since it briefed the issue pretrial and had the opportunity to present evidence. This argument fails.

To the extent BFP separately challenges the court's decision to consider new evidence, the claim also fails. The decision whether to reopen a case for additional evidence is within a court's discretion. In re Welfare of Ott, 37 Wn. App. 234, 240, 679 P.2d 372 (1984). Here, the only objections below to the bankruptcy documents were the tardiness of their submission, that BFP had an insufficient opportunity to respond, and that they had not been authenticated. As discussed above, BFP had an opportunity to address personal liability during the trial and submitted briefing in response to this posttrial evidence. BFP abandons the authentication argument on appeal. BFP also shows no prejudice by the late submission of the evidence. BFP demonstrates no abuse of discretion.

Award of Attorney Fees and Costs to Scoby

BFP assigns error to the court's award of attorney fees and costs to Scoby based on the alleged failure to prove her CPA claim. Given our resolution of this issue in Scoby's favor, we affirm the trial court's award of fees and costs[28] to Scoby under the

CPA.[29]

BFP is Not Entitled to an Award of Attorney Fees and Costs

BFP argues the court erred by awarding it no attorney fees under the mechanic's lien statute, chapter 60.04 RCW, and the small claims statute, chapter 4.84 RCW. BFP argues that although attorney fees under the mechanic's lien statute are generally discretionary, when read in harmony with chapter 4.84 RCW, it is entitled to mandatory attorney fees because its claim was for less than $10,000 and it was the prevailing party under chapter 4.84 RCW. Scoby responds that BFP is entitled to no fees because it breached the contract, filed a lien in bad faith, and violated the CPA.

BFP's claim that it was entitled to attorney fees fails on several grounds. First, BFP is not the prevailing party under chapter 4.84 RCW. "RCW 4.84.250-.300, encourages parties to settle before going to court in cases where the amount in controversy is $10,000 or less." Williams v. Tilaye, 174 Wn.2d 57, 58, 272 P.3d 235 (2012). RCW 4.84.250 mandates an attorney fee award to the prevailing party, "as hereinafter defined," in a suit where less than $10,000 is pleaded.[30] "The plaintiff, or

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[28] BFP does not challenge the reasonableness of the amount of fees and costs awarded to Scoby.

[29] Under MAR 7.3, "[t]he court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo." Because BFP failed to improve its position at trial, the trial court was authorized to assess fees and costs against BFP in favor of Scoby. See CL 57.

[30] "Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1,

party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280." RCW 4.84.260 (emphasis added).

BFP argues that the court erred by awarding it no tax or permit fees, and that if the court had awarded these amounts, BFP would have been the prevailing party under chapter 4.84 RCW.[31] But even if the court had awarded taxes and permit fees, BFP is not the prevailing party under chapter 4.84 RCW. Both parties made an offer of settlement under chapter 4.84 RCW. Prior to arbitration, Scoby made an offer to settle BFP's claims against her for $3,350. This offer was not accepted. On February 11, 2009, 13 days before arbitration was scheduled, BFP offered to settle its claims against Scoby for $4,000. This offer also was not accepted.

At trial, the court awarded BFP a $3,350 offset for the value of its work. But even if the court awarded tax and permit fees, this would have totaled less than plaintiff BFP's $4,000 offer of settlement. BFP mistakenly argues that it needed only to recover more than the $3,350 defendant Scoby offered in settlement to become the prevailing party. This contradicts the plain meaning of the statute, which defines whether the

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1985, the maximum amount of the pleading under this section shall be ten thousand dollars." RCW 4.84.250.

[31] BFP makes an unsubstantiated claim that the trial court "was able to jigger" the amount of its offset so that it was not the prevailing party under chapter 4.84 RCW. Appellant's Br. at 69. As with its bias claim discussed above, BFP's argument is frivolous and was not raised below.

plaintiff is the prevailing party by reference to the plaintiff's offer.[32] BFP's claim that it is entitled to attorney fees under chapter 4.84 RCW fails.

Because BFP's argument that it is entitled to fees under the mechanic's lien statute, chapter 60.04 RCW, is dependent on its argument that it is entitled to fees under chapter 4.84 RCW, its mechanic's lien fees argument also fails. BFP relies on Kingston Lumber Supply Co. v. High Tech Dev. Inc., 52 Wn. App. 864, 765 P.2d 27 (1988), which construed the mechanic's lien statute in connection with chapter 4.84 RCW. We held, "Under RCW 60.04.130, a trial court in lien cases has the discretion to award attorney's fees, but if the amount in controversy is $10,000 or less, RCW 4.84.250 mandates fees to a prevailing party." Kingston Lumber, 52 Wn. App. at 867. Because BFP is not the prevailing party under chapter 4.84 RCW, any fees under the mechanic's lien statute would be discretionary. Therefore, even if we assumed BFP was the prevailing party on its mechanic's lien, it is not entitled to fees. Rather, an award of such fees is subject to the trial court's discretion. BFP makes no argument that the court abused its discretion by not awarding fees.

BFP's claim also fails because it is not the prevailing party under the mechanic's lien statute. BFP asserts that because the court awarded it an offset for the reasonable value of its services, it was the prevailing party under the mechanic's lien statute.[33] But

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[32] RCW 4.84.270 defines when defendant is the prevailing party.

[33] BFP cites RCW 60.04.011(2), which defines the contract price for which a contractor is entitled to a lien on real property: "'Contract price' means the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor." BFP, in accord with the court's findings of fact and conclusions of law, refers to its award as quantum meruit. From context,

the court concluded that BFP breached the contract. BFP assigns no error to this ruling.[34] The court also determined that BFP filed its lien in bad faith. "A materialman's lien will be declared invalid for an excessive amount only if the amount is claimed with an intent to defraud or in bad faith." Structurals Nw., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 715, 658 P.2d 679 (1983). Although BFP assigned error to the court's bad faith conclusions of law, BFP's brief provides no argument in support of these assignments of error. We therefore do not address them. See Cowiche Canyon, 118 Wn.2d at 809 (plaintiffs who assigned error to finding of fact but presented "no argument in their opening brief on any claimed assignment" waived that assignment of error.). Even if we assumed that a contractor would be entitled to a lien for the reasonable value of its work in some circumstances, BFP cites no authority supporting its contention that even though it breached the contract, filed its lien in bad faith, and violated the CPA, it is the prevailing party under the mechanic's lien statute.[35] We therefore reject the argument.

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however, the court found a contract implied in law, not a contract implied in fact (quantum meruit is a contract implied in fact). Young v. Young, 164 Wn.2d 477, 484-86, 191 P.3d 1258 (2008). A contract implied in law is founded on notions of justice and equity while a contract in fact is founded in contract law. Young, 164 Wn.2d at 486. It is clear that the court did not provide BFP contract damages because it found BFP breached the contract, but rather provided BFP an offset because justice required some compensation. This further undermines BFP's claim that it was due attorney fees based on a lien for the "contract price" of its services.

[34] BFP assigns error to "[t]he dismissal of BFP's claims against Scoby." Appellant Br. at 3. But BFP provides no argument that it actually completed the contract. Accordingly, we decline to address any assertion that BFP fulfilled the contract. See Cowiche Canyon, 118 Wn.2d at 809 (plaintiffs who assigned error to finding of fact but presented "no argument in their opening brief on any claimed assignment" waived that assignment of error.).

[35] Because BFP is not entitled to attorney fees for the reasons already

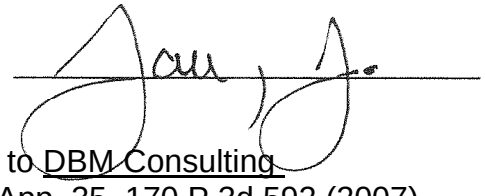
[36] Beal for Martinez v. City of Seattle, 134 Wn.2d 769, 777 n.2, 954 P.2d 237 (1998) ("The City cites no authority for this proposition and, thus, it is not properly before us.") (citing RAP 10.3(a)(5)); Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 166, 795 P.2d 1143 (1990)). BFP is not entitled to its attorney fees under any theory.[37]

Appellate Attorney Fees

Both parties request attorney fees on appeal. Scoby is entitled to attorney fees on appeal under the CPA. RCW 19.86.090; RAP 18.1; Svendsen v. Stock, 143 Wn.2d 546, 560, 23 P.3d 455 (2001) (attorney fees recoverable under CPA at both trial and on appeal). BFP establishes no grounds for attorney fees on appeal.

CONCLUSION[38]

Because substantial evidence supports the court's findings of fact and those findings support the conclusions of law, we affirm the judgment and the award to Scoby of trial fees and costs. We remand to the trial court for a determination of the amount of Scoby's fees and costs on appeal. RAP 18.1(i). The trial court properly denied fees and costs to BFP.



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discussed, we need not address BFP's argument relating to DBM Consulting Engineers, Inc. v. U.S. Fidelity & Guaranty Co., 142 Wn. App. 35, 170 P.3d 592 (2007).

[36] Accordingly, we reject the challenges to conclusions of law 16 and 19.

[37] Accordingly, we reject the challenges to conclusions of law 56 and 65.

[38] We conclude that BFP's remaining contentions are meritless.

WE CONCUR:

Appelwick, J.

Cox, J.