

No. 74978-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

THE MANDATORY POSTER AGENCY, INC., d/b/a  
CORPORATE RECORDS SERVICE, THE WASHINGTON LABOR  
LAW POSTER SERVICE, WASHINGTON FOOD SERVICE  
COMPLIANCE CENTER, and STEVEN J. FATA, THOMAS FATA,  
AND JOSEPH FATA, individually and their corporate capacity,

Petitioners.

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REPLY ON  
PETITION FOR REVIEW

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A. INTRODUCTION<sup>1</sup>

The State of Washington (“State”) filed an answer to the petition for review of Mandatory Poster Agency, Inc. d/b/a Corporate Records Service (“CRS”) that contains a cross-petition for review of Division I’s opinion in this case. Consequently, under RAP 13.4(d), CRS provides this reply.

Applying this Court’s well-established authority, Division I held that the trial court’s costs award to the State in this Consumer Protection Act, RCW 19.86 (“CPA”) beyond those costs authorized in RCW 4.84.010 was improper. Not only did the Court of Appeals correctly apply the CPA, it necessarily avoided a constitutional argument that is present should the State’s misapplication of the CPA be adopted.

This Court should deny review on the State’s cross-petition issue.

B. STATEMENT OF THE CASE

The State’s factual recitation in its answer is replete with misstatements and omissions of salient facts such as the critical testimony of CRS’s well-qualified experts, Professors Dwight Drake of the

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<sup>1</sup> It is noteworthy that the State cross-appealed in the Court of Appeals on the amount of the CPA penalty to which it was entitled. Division I rejected its argument. Op. at 18. The State has not cross-petitioned to this Court on that issue, thereby waiving any claim of error. RAP 13.7(b); *Estate of Jordan by Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 496, 844 P.2d 403 (1993).

University of Washington,<sup>2</sup> and Seattle University's Professor Carol Obermiller, whose testimony raised questions of fact.

For purposes of this reply, however, the only factual point is that the trial court, in its zeal to punish CRS for what is perceived to be CPA violations, allowed the State to recover costs exceeding those permitted by RCW 4.84.010. This Court has clearly held to the contrary. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 693-94, 132 P.3d 115 (2006); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987).

C. ARGUMENT WHY CROSS-REVIEW SHOULD BE DENIED

The State asserts in its answer at 17-19 that review on this costs issue should be granted because the Court of Appeals' opinion contradicts this Court's authority, RAP 13.4(b)(1), and the costs issue is one of substantial public importance, meriting this Court's attention. RAP 13.4(b)(4).<sup>3</sup>

The State's central contention is that RCW 19.86.080 and RCW 19.86.090 are different in their direction as to costs so that the State should

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<sup>2</sup> Despite asserting that the "deceptive" quality of CRS's mailings was their format that allegedly resembled those of mailings from a government agency, answer at 1, the State continues to insist that the content of the mailings misrepresented Washington corporate law, answer at 4, an error fully dispelled *repeatedly* by Dr. Drake, and ultimately *conceded* by the State's own counsel in his June 18, 2015 letter. CP 867-68.

<sup>3</sup> The State sees no irony in its opposition to review sought by CRS on the key substantive CPA issue in this case and its attempt to secure review on a minor procedural point. Were the Court to conclude that review is necessary on the State's issue, that only reinforces the need for this Court to grant review in the entire case.

be treated specially on costs when it brings CPA claims. The State's initial premise is flawed.

RCW 19.86.080 merely authorizes the Attorney General to bring CPA actions on the State's behalf. RCW 19.86.080(1) states:

(1) The attorney general may bring an action in the name of the state, or as *parens patriae* on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

The statute provides for an award of costs and is *silent* on any special treatment of the State as to costs. The State offers no legislative history of that statute stating otherwise.

RCW 19.86.090 actually addresses relief when CPA actions are brought, *either* by private parties or by the State:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to acceded to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED

FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purposes of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

Like RCW 19.86.080, it simply makes references to costs. It does not address any expanded authority of the State to recover costs beyond those set forth in RCW 4.84.010.

The only authority offered by the State in support of its position is this Court's 1976 decision in *State v. Ralph Williams' North West Chrysler Plymouth*, 87 Wn.2d 298, 553 P.2d 423 (1976), a case in which this Court spent exactly one very brief paragraph of a very lengthy CPA opinion addressing costs under RCW 19.86.080 and discussing costs under RCW 4.84.090. After that decision was filed, the Legislature addressed costs in 1983 (Laws of 1983, 1st ex. sess. c. 45, § 7) and 1984 (Laws of 1984, c. 258, § 92) in RCW 4.84.010. This is the cost provision

regularly employed by Washington courts and referenced in both *Nordstrom* and *Mayer*.

In sum, the prevailing standard on the award of costs in CPA cases was articulated by this Court in *Nordstorm* and *Mayer*. RCW 19.86.090 addresses the recovery of costs by private parties *or* by the State in CPA actions. The Court of Appeals correctly applied the law on costs in CPA actions. Review is not merited under RAP 13.4(b)(1).

An additional reason supports CRS's position here. The State's statutory interpretation implicates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. There is no rational basis for treating the recovery of costs in CPA actions by the State and non-governmental plaintiffs differently.

This Court has routinely provided that the differential treatment of government in litigation offends the 14<sup>th</sup> Amendment.<sup>4</sup> As long ago as, *Hunter v. North Mason High School*, 85 Wn.2d 810, 539 P.2d 845 (1975), this Court held that nonclaim statutes affording special limitations periods to actions against the government were unconstitutional:

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<sup>4</sup> This Court has also regularly held that special treatment of particular favored classes of litigants offends equal protection principles in any event. *E.g.*, *Johnson v. Tradewell Stores, Inc.* 95 Wn.2d 739, 630 P.2d 441 (1981) (no rational basis for differentiating between claimants who were employed by self-insured employers and all other employees in recovering fees and costs); *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998) (medical negligence statute or repose).



Any policy of placing roadblocks in the way of potential claimants against the state having been abandoned, we cannot uphold statutes simply because they serve to protect the public treasury. Absent that justification, there is no basis, substantial or even rational, on which their discrimination between governmental plaintiffs and others can be supported. They thus cannot stand under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

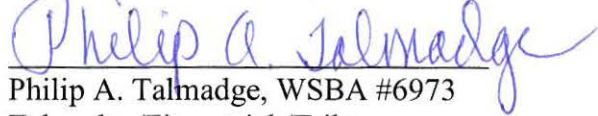
*Id.* at 818-19. It is no different if governmental litigants are afforded a special benefit for recovery of costs in litigation. There is simply no rational basis for treating the State and private litigants differently in the recovery of costs under RCW 19.86.090. This Court should construe RCW 19.86.090 to avoid the constitutional infirmity the State proposes. *State v. Williams*, 171 Wn.2d 474, 251 P.3d 877 (2011) (Court interprets statutes to preserve their constitutionality).

D. CONCLUSION

For the foregoing reasons, this Court should deny the State's cross-petition for review on costs in a CPA action. RAP 13.4(b).

DATED this 31st day of August, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Reply on Petition for Review* in Court of Appeals Cause No. 74978-1-I to the following:

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Court of Appeals, Division I  
Clerk's Office

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

DATED: August 31, 2017, at Seattle, Washington.



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**TALMADGE FITZPATRICK TRIBE**

**August 31, 2017 - 1:13 PM**

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