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No. 35372-9-III

SUPREME COURT
OF THE STATE OF WASHINGTON

CONNELL OIL,

Respondent,

v.

ERIK McCONNELL JOHNSON and
JACKIE McCONNELL JOHNSON,

Petitioners.

CONNELL OIL'S ANSWER OPPOSING PETITION FOR REVIEW

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I. RESTATEMENT OF THE ISSUES

1. Is the cardlock issued by Connell Oil, Inc. (hereinafter "Connell Oil") a "credit card" under TILA and Regulation Z?

2. Is the express language of TILA and Regulation Z supplemented by federal staff commentaries pertaining to certain cards, keys, plates, or other devices that are "used in order to obtain petroleum product for business purposes from a wholesale distribution facility or to gain access to that facility, and [are] required to be used without regard to payment terms"? 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B).

3. If the express language of TILA and Regulation Z is supplemented by federal staff commentaries, does the cardlock issued by Connell Oil meet the exclusion stated in 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B)?

4. If the cardlock issued by Connell Oil is not a "credit card" under TILA, are the cardholders in this case entitled to limitations on liability for their stolen cardlock under 12 CFR § 226.12(b)(1)(ii) and disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii)?

5. If the cardlock issued by Connell Oil is a "credit card" under TILA, and if the cardholders in this case are entitled to limitations on liability for their stolen cardlock under 12 CFR § 226.12(b)(1)(ii) and

disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii), is Connell Oil nonetheless immune from civil liability pursuant to 15 U.S.C. § 1640(f) for its good faith reliance on the Federal Reserve Board's official interpretation of the definition of "credit card" under TILA and Regulation Z contained in the Federal Reserve Board's Official Commentary?

II. RESTATEMENT OF THE CASE

Connell Oil, Inc. ("Connell Oil") is in the business of selling and distributing wholesale fuel for commercial purposes. CP 410. It contracts with qualified applicants to provide them access to a select number of fueling stations that are not operated or overseen by full time employees. *Id.* These stations are recognized as Pacific Pride Stations and are commonly used by police, fire, transit, and school districts. *Id.*

Approved applicants use a device known as a "cardlock" to gain access to fuel pumps. *Id.* Through a magnetic strip, the cardlock communicates to the computer the account number of the customer and what type of fuel the customer is permitted to access. *Id.* For security, the customer must enter in an acess code, or pin number, before the pump is activated. *Id.* In addition, the customer is prompted to disclose other information such as their vehicle's mileage. CP 410. For further security, customers are provided locations for cardlock stations, pin numbers, and

instructions to keep the pin number separate from the cardlock. *Id.* Once the customer completes fueling, an invoice is generated for the specific amount of fuel purchased and sent to the customer for payment. Customers are required to pay that invoice in full. *Id.*

Qualified applicants must be approved before gaining access to fuel. Invoices are sent to the customer on the 15th and the end of a given month. CP 411. The invoices are due in full and, without making specific arrangements, a customer must pay the total amount due or risk having their cardlock access denied. *Id.*

Appellants, Erik Johnson and Jackie Johnson (hereinafter the "Johnsons") were partners who owned and operated an agricultural business in Eltopia, Washington. *Id.* Under that capacity, the Johnsons entered into a contract for access to the cardlock system. In fact, multiple contracts for access into the cardlock system were executed since 2009. CP 411—12, 415—20. The Johnsons each had a cardlock and also assigned a cardlock to employees. CP 326, 374—94.

The Johnsons agreed to the terms of the contract which include, "I hereby request that Connell Oil, Inc. issue me / my company the following cardlock cards. I accept responsibility for payment of all charges applied to these cards." CP 411—12, 415—20. They further agreed that "If a card is lost or stolen, I understand that I am responsible for payment of all

charges for 24 hours after I inform Connell Oil, Inc. **in writing** to invalidate the card." *Id.* The language of the contract makes it a point to bold the text, **"in writing."** *Id.*

The Johnsons claim that on or about July 27, 2014, Mr. Johnson's wallet was stolen from his truck. CP 412. Contained within the wallet was a Connell Oil cardlock with the accompanying pin number. *Id.* Mr. Johnson claimed he contacted Connell Oil by phone on July 31, 2014 to request the stolen cardlock to be shut off. *Id.* However, according to Connell Oil, the context of the conversation was to request new cardlocks.[1] *Id.* In response, Connell Oil sent the proper form to request new cardlock cards. *Id.* On the bottom of this request is a section where the customer can request a cardlock to be invalidated. CP 412—13, 423—24. The form was never returned to Connell Oil. In fact, it is undisputed that the Johnsons never requested to have the stolen cardlock invalidated in writing. CP 413.

On or about September 8, 2014, Connell Oil was alerted by Banner Fuel of suspicious activity on one of the Johnsons' cardlocks. *Id.* In response, Connell Oil contacted the Johnsons and the cardlock was deactivated. *Id.* During that time, the cardlock was used to access fuel distribution centers. *Id.* Due to the fact that the cardlock was accompanied

[1] This is contrary to the facts that the Johnsons state.

with the pin number, the fuel obtained was invoiced under the Johnsons' account. *Id.* In all, $34,649.68 was invoiced. *Id.* While the fuel was being accessed, Connell Oil continued to invoice the Johnsons in its usual course. *Id.* Even so, the Johnsons never alerted Connell Oil or requested to have the card deactivated in writing. *Id.*

Connell Oil demanded payment and the Johnsons objected. CP 413. The Johnsons initiated an investigation by complaint to the Attorney General of Washington State, Consumer Protection Division. CP 414. After conclusion of their investigation into a violation of the Consumer Protection Act, the Johnsons' complaint was closed without penalty or assessment. CP 414, 427—33. Connell Oil again demanded payment.

Suit was filed by Connell Oil for breach of contract. CP 1—5. The Johnsons answered and asserted an affirmative defense that Connell Oil's claim was barred by operation of the Truth and Lending Act (TILA), 15 U.S.C. § 1601 *et. seq.* CP 6—11.

On April 10, 2017, the lower court heard the parties' cross motion for summary judgment and correctly ruled that TILA and Regulation Z did not apply in this case because Connell Oil's cardlocks do not meet the TILA definition of "credit card." RP 1, 36—37; CP 278. The Johnsons subsequently filed their appeal.

On October 25, 2018, the Court of Appeals, Division III, published its opinion affirming the lower court. Specifically, the Court of Appeals found the following: (1) that Congress did not directly speak to the precise question of whether cardlocks used to access fuel pumps at unmanned stations are credit cards; (2) that the Federal Reserve Board's (hereinafter "Board") commentary at 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B) (hereinafter "Exclusion") was not arbitrary, capricious, or manifestly contrary to TILA and was therefore binding; and (3) because the cardlocks fell into the Exclusion, the cardlocks were not subject to the provisions of TILA. *Connell Oil, Inc. v. Johnson*, 429 P.3d 1, 6 (2018).

After the Court of Appeals issued its ruling, the Johnsons filed the pending motion seeking discretionary review.

III. ARGUMENT

The Johnsons advance two arguments for discretionary review. First, they argue that the implications of the Court of Appeals' decision involves an issue of substantial public interest that warrants review pursuant to RAP 13.4(b)(4). The Johnsons then argue that "the lower courts' rulings conflict with established state laws and federal policies" and that this implicates review under RAP 13.4(b)(1) and RAP 13.4(b)(2).

Each of the Johnsons' arguments is unpersuasive. As such, the Court should deny review.

A. The issue of whether a cardlock is a credit card under TILA is not of substantial public interest.

Under RAP 13.4(b)(4), a petition for review will be accepted by the Supreme Court *only* "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." "A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In re Pers. Restraint of Flippo*, 380 P.3d 413, 414—15 (2016) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903(2005)).

In *State v. Watson* the Court of Appeals made a sua sponte ruling that a memorandum a prosecuting attorney circulated to all Pierce County Superior Court Judges constituted improper ex parte communication with the trial court. Although this ruling was ultimately germane to the outcome of the case, the State sought discretionary review of the Court of Appeals' determination on the improper ex parte communication, citing RAP 13.4(b)(4) as grounds for review.

The Supreme Court granted review of the decision because of its "sweeping implications". *State v. Watson*, 155 Wn.2d at 578. Specifically,

the decision presented a "prime example of an issue of substantial public interest" because "the court's treatment of communications as ex parte in later proceedings ha[d] the potential to chill policy actions taken by both attorneys and judges" and had "the potential to affect every sentencing proceeding in Pierce County". *Id.* at 577.

Here, the Johnson's contend that the issue of whether a cardlock is a credit card under TILA is of substantial public interest because there are a lot of credit card accounts in the United States. *See* Petition pp. 6—7. As a preliminary matter, this argument relies upon materials not part of the record on review. *Id.* As such, pursuant to RAP 10.3(a)(8), the Court should refuse to review Johnsons' Appendix B and C.

Second, unlike *State v. Watson*, the issues advanced by the Johnson's do not have "sweeping implications" and do not have the "potential to affect a number of proceedings in the lower courts" so as to warrant review in the hopes of "avoid[ing] unnecessary litigation and confusion on a common issue." *In re Pers. Restraint of Flippo*, 380 P.3d 413, 414—15 (2016). As the Johnson's aptly pointed out, there are no other court decisions, in any state or federal jurisdiction, concerning the specific issue of whether cardlocks are governed by TILA. *See* Petition pp. 8, 12. Furthermore, the Johnsons presented no arguments to suggest that

there are or will be an abundance of cases concerning the same narrow issue.

The issues the Johnsons have presented to this Court simply are not common and additional review will not help to avoid unnecessary litigation or provide new protections to the public at large. As such, the Court should deny the Johnsons' request for review.

B. The Court of Appeals' ruling does not conflict with a decision of the Supreme Court or a published decision of the Court of Appeals.

Under RAP 13.4(b)(1) and 13.4(b)(2), the Court may accept a petition for review of a decision of the Court of Appeals *only* if that decision "is in conflict with a decision of the Supreme Court," or "is in conflict with a published decision of the Court of Appeals." Here, as the Johnsons conceded, there is no decision, published or otherwise, from this Court or the Court of Appeals that concerns the narrow issues petitioned for review. *See* Petition pp. 8, 12. Thus, under the plain language of RAP 13.4(b)(1)—(2), the Court should not accept review because the issues the Johnsons presented are not in conflict with *any* decision rendered in *any* court of the State of Washington, let alone any other state or federal jurisdiction.

C. The Court of Appeals' ruling does not contradict the language of TILA or undermine TILA's fundamental purpose.

The Johnson's maintain that grounds for review exist under RAP 13.4(b)(1)—(2) because the Court of Appeals decision is contrary to the express language and purpose of TILA. Again, this argument and basis for review does not satisfy any of the circumstances under RAP 13.4(b)(1) or (b)(2) and should alone serve as basis for the Court to deny review.

The Johnsons rely upon the decision in *Telco Communications Group, Inc. v. Race Rock* to support this contention. 57 F. Supp. 2d 340 (E.D. Va. 1999) (hereinafter "*Telco*"). Specifically, the Johnsons argue that because the court in *Telco* found that telephone calling cards met TILA's definition of credit card, then the Court of Appeals decision that cardlock cards are excluded from the TILA definition is contrary to the express language of the statute. *See* Petition pp. 9—11.

However, *Telco* is distinct from the case before the Court for two reasons. First, in *Telco* the court was faced with determining whether telephone calling cards were credit cards under TILA. *Id.* at 343. The substance of cardlock cards and telephone calling cards is distinct.

Second, the court in *Telco* relied upon and applied the TILA definition of credit card because the Commentary did not contain any guidance on telephone calling cards. *Id.* Here, the Court of Appeals did

have guidance with the Exclusion and found that because the cardlocks in question met they Exclusion, they were not included in TILA's definition of credit card.

The distinctions between the present case and *Telco* perhaps prompted the Court of Appeals to apply the long-standing *Chevron* deference test in reaching its decision. *See Connell Oil*, 429 P.3d at 6. To determine if the Board's regulations and/ or interpretations of TILA are binding, courts are "faced with only two questions." *Household Credit Servs. v. Pfennig,* 541 U.S. 232, 239, 124 S. Ct. 1741 (2004). First, the court must ask if "Congress has directly spoken to the precise question at issue." *Id.* (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778 (1984)).

Second, if "Congress has 'explicitly left a gap for the agency to fill,' the agency's regulation is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (citing *Chevron*, 467 U.S. at 843—44 (1984)). Said otherwise, the Board's regulations and official interpretations are dispositive unless they are "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 564, 100 S. Ct. 790 (1980). In analyzing TILA claims, a court—

> "looks to the language of the statute, the implementing regulation, and the relevant [Board] Commentary. Congress has expressly delegated to the [Board] the authority to prescribe regulations –

> including "Regulation Z," 12 C.F.R. § 226.1, *et seq.* – to effectuate the purpose of TILA. The Court must "pay particular heed" to the Board's Official Commentary when interpreting TILA, and '[u]nless demonstrably irrational, [the Board's] staff opinion construing [TILA] or Regulation should be dispositive.'"

Swanson v. Bank of Am., N.A., 566 F. Supp.2d 821 (N.D. Ill. 2008) (citing *Household*, 541 U.S. at 238) (quoting *Hamm v. Ameriquest Mortg. Co.*, 506 F.3d 525, 528 (7th Cir. 2007)).

Here, the Court of Appeals first found that the TILA, and therefore Congress, did not directly speak to the precise question of whether cardlock cards used to access fuel pumps at unmanned stations are credit cards. *Connell Oil, Inc. v. Johnson*, 429 P.3d 1, 6 (2018). Next, the Court of Appeals found that the Exclusion under the Commentary was not arbitrary, capricious, or manifestly contrary to TILA and was therefore binding. *Id.* Finally, the Court of Appeals found that under the Exclusion, the cardlocks were excluded from and not subject to the provisions of TILA. *Id.*

Contrary to the Johnsons' arguments, the Court of Appeals' decision and reliance upon the Exclusion is not contrary to the clear and express language of TILA. If Congress had intended for cardlocks to be included in the definition of TILA, Congress would have amended the statutory provisions to state that the Exclusion was inapplicable. The Court of Appeals echoed this position in finding that with the Exclusion,

the Board "reasonably concluded that Congress had no more desire to regulate a cardlock than it had to regulate a keylock or an optical-lock device." *Connell Oil*, 429 P.3d at 6. Because the Court of Appeals decision does not contradict TILA, the Court should deny the Johnsons' request for review. The Court should also deny review because this ground for review does not qualify as any of the circumstances justifying review under RAP 13.4(b)(1) or (b)(2).

D. The Court of Appeals' ruling does not contradict analogous authorities.

The Johnsons maintain that a ground for review exists under RAP 13.4(b)(1)—(2) because the Court of Appeals decision is contrary to analogous state authorities concerning protections for victims of lost or stolen credit cards. *See* Petition pp. 11—12. Again, this argument and basis for review does not satisfy any of the circumstances under RAP 13.4(b)(1) or (b)(2) and should alone serve as basis for the Court to deny review.

The Johnsons specifically identify that no exemption exists for a device that meets the definition of credit card under RCW 9A.56.280(3) and also unlocks a fuel pump. *Id.* According to the Johnsons, it makes no sense to have a criminal statue in Washington that considers a cardlock to be a credit card for purposes of prosecuting a thief, but not for the

purposes of TILA. *Id.* at 12. As such, the Johnsons argue that the Court should grant review to resolve this purported conflict between federal and state authorities.

Contrary to the Johnsons' argument, the different definitions for credit card under TILA and RCW 9A.56.280(3) do not create a contradiction or a basis for review. It is perfectly logical for a criminal statute that determines criminal liability to have fewer exemptions, and thus fewer opportunities to escape criminal liability, than a civil remedial statute like TILA that only provides civil protections to consumers. Because there is no contradiction to be resolved and because this ground for review does not met the criteria outlined in RAP 13.4(b)(1)—(2), the Court should deny the Johnsons' request for review.

IV. CONCLUSION

The Johnsons failed to raise a single ground for review that satisfies any of the circumstances that would allow the Court to grant discretionary review under RAP 13.4(b). As such, Connell Oil respectfully requests that the Court deny the Johnsons' petition for review.

Respectfully submitted this the 26th day of December, 2018.

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CERTIFICATE OF SERVICE

On December 26th, 2018, I served the foregoing pleading via Regular U.S Mail, postage pre-paid to:

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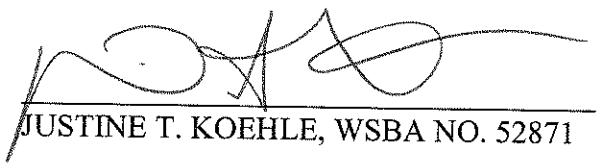

JUSTINE T. KOEHLE, WSBA NO. 52871

LEAVY SCHULTZ DAVIS, P.S.

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