Supreme Court No. 96853-5

Court of Appeals No. 34918-7-III

SUPREME COURT OF THE STATE OF WASHINGTON

Fireside Bank fka Fireside Thrift Co., a California corporation,

Plaintiffs/Respondents,

v.

John W. Askins and Lisa D. Askins,

Defendants/Appellants.

PETITION FOR DISCRETIONARY REVIEW

Scott M. Kinkley, WSBA # 42434
NORTHWEST JUSTICE PROJECT
1702 W. Broadway
Spokane, WA 99201
Tel. (509) 324-9128
Attorneys for Defendants/Petitioners
John Askins and Lisa Askins

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I. IDENTITY OF PETITIONERS

Petitioners, John Askins and Lisa Askins, are the judgment debtor-defendants/respondents below. Respondents, Fireside Bank fka Fireside Thrift Co., a California corporation, judgment creditor-plaintiff/appellees below. On September 11, 2012, Fireside sold and assigned its judgment to Cavalry Investments, a debt buyer.

II. COURT OF APPEALS' DECISION

On December 6, 2018, the Court of Appeals, Division III, issued a published opinion reversing the trial court's decision and remanding for further proceedings. On January 17, 2019, the Court of Appeals denied the Askins' Motion for Reconsideration.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals (Division III) err by finding that a trial court lacks a procedural process to enforce the regulatory protections of the Collection Agency Act (CAA), where a "collection agency" "collected and attempted to collect, through writs of garnishment," inflated judgment balances?
2. Did the Court of Appeals err in finding that Civil Rule 60(b) was a procedurally inappropriate means for the trial court to apply the regulatory protections of the

CAA, where the trial court did not rely on CR 60(b), no CR 60(b) motion was before the court, and no proper procedural instructions were provided on remand?

3. Did the Court of Appeals err by modifying RCW 19.16.250(21) -- which prohibits "collecting or attempting to collect" unlawful amounts -- to include a "communication" element without first finding the plain meaning of that statute to be vague or ambiguous?

4. Did the Court of Appeals err by holding that communications in an attempt to collect can never violate the CAA if the "communication" was directed at a consumer's attorneys?

5. Did the Court of Appeals err by applying de novo review of the trial court's findings of fact "that [Cavalry] not only attempted to collect, but did collect, unlawful and unauthorized collection costs" and attorney fees through garnishments?

IV. STATEMENT OF THE CASE

This case of first impression involves whether post-judgment violations of the Collection Agency Act, RCW 19.16.250, occurring in

garnishment, can be remedied in the same case and by the same trial court which issued the violative writs of garnishment.

Cavalry is a debt buyer who purchases defaulted debt for significantly less than its face value, and profits by collecting a greater sum than the purchase price. *See Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 336, 334 P.3d 14, 17 (2014). Cavalry is also a "collection agency" and regulated by the Collection Agency Act, RCW 19.16, *et seq.* (CAA). The CAA prohibits collection agencies from engaging in a number of prohibited practices, one of which is "collecting or attempting to collect" any amount of money greater than what is permitted by law or contract. RCW 19.16.250(21). Under the CAA, if a collection agency violates any one of the prohibited practices, the underlying debt is permanently reduced to no more than the principal balance. RCW 19.16.450.

The Askins are a low income family who, in 2004, purchased a used car and, unhappy with the car, later returned it to the bank without missing a single payment. CP 366-68. Nevertheless, in 2007, the Askins were sued by Fireside Bank for an alleged auto loan deficiency. CP 1. A default judgment for $7,754.39 was entered. CP 12. On September 11, 2012, Fireside sold and assigned the default judgment to Cavalry. CP 297. Between 2007 through 2016,

the two creditors (Fireside then Cavalry) obtained 19 writs of garnishment collecting a total of $10,849.16 from the Askins' wages and bank account.[1] Cavalry and Fireside sent a copy of each writ of garnishment directly to the Askins as required by RCW 6.27.130.

On August 3, 2015, an attorney for Cavalry obtained the most recent writ of garnishment in the sequence, alleging that there was a remaining judgment balance in the amount of $11,158.94. CP 361.

In the Fall of 2015, the Askins obtained legal services counsel to investigate the garnishment. CP 374. Cavalry, as a collection agency, has a statutory duty to provide accountings under the CAA. RCW 19.16.250(8)(c)(d). After numerous, ignored requests, on April 7, 2016, Cavalry's trial counsel responded by emailing an internal accounting to justify the particularly large remaining balance. CP 369-381. The spreadsheet attached to the April 7, 2016, email was an internal accounting, which appears to have been originally created by Fireside and then adopted in whole by Cavalry and Cavalry's attorneys. The internal accounting of the judgment

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[1] CP 17-19, 25-27, 36-37, 53-54, 60-63, 74-76, 81-82, 95-97, 102-103, 119-120, 124-126, 138-140, 149-150, 163-166, 171-172, 182-184, 191-192, 209-210, 215-217, 232-233, 238-240, 251-253, 265-266, 270-272, 283-285, 291-292.

revealed that Cavalry and Fireside, or their attorneys, inflated costs and unlawful garnishment attorney's fees. CP 372; RCW 6.27.090. Further, the majority of the costs and fees added by Cavalry and Fireside to the claimed judgment balance were never actually awarded by the trial court. CP 372. The Askins moved for, and obtained, an order to show cause why Cavalry should not be found to have violated the CAA's prohibited practices section at RCW 19.16.250(21). CP 405.

Based on the April 7 accounting, and a second incongruent accounting provided by Cavalry, the trial court found that Cavalry violated the CAA. CP 470-473. Holding, "*through writs of garnishment*, Cavalry attempted to collect more money than allowed by law." CP 427 (emphasis added). CP 462-3. The trial court then applied the CAA's remedy and stripped the debt to its principal judgment balance. *Id.* Since the record showed a greater sum than principal was garnished from the Askins' wages, the trial court ordered Cavalry to file a full satisfaction of the judgment. CP 427.

Cavalry appealed the finding.

The Court of Appeals did not directly address the trial court's finding that Cavalry violated the CAA by attempting to collect inflated amounts through writs of garnishment. Instead, the Court of Appeals

ruled that communications between counsel could not violate the CAA (which was an issue not raised in the trial court). At footnote 1, the Court of Appeals warned Cavalry, "This case should settle. In light of the fact that Fireside appears to have collected, or attempted to collect, fees and costs that it was not entitled to collect, it may be prudent for Cavalry to abandon its efforts to collect on the debt and enter a satisfaction of judgment." Opinion, p. 10, n.1. The fact that Cavalry, after purchasing the judgment and the balance information from Fireside, attempted to collect the same inflated amounts through writs of garnishment was not addressed.

In reversing the trial court, the Opinion first held that CR 60(b) was a procedurally improper means to address post-judgment CAA violations. However, the trial court did not base any part of its decision on CR 60(b) and neither did either party ever claim that the Askins filed a motion seeking relief under CR 60(b). The Court of Appeals further ruled that the April 7 email could not violate the CAA because every CAA violation requires a "communication" and communications between attorneys are never actionable. But, whether the April 7 email violated the CAA or not was not raised, addressed or decided by the trial court. The trial court was singularly focused on whether there had been attempts to collect illegal sums

via the writs or garnishment that were sent directly to the Askins. Finally, in order to reach the conclusion that emails between counsel cannot violate the CAA, the Court of Appeals fundamentally altered the statutory text of the CAA, finding a violation of RCW 19.16.250(21) requires a "communication," and then holding that communications to attorneys for debtors are excluded under the Court of Appeals' definition of "communication," which is not found in the statute. The April 7 email was presented as evidence of Cavalry's inclusion of unlawful fees and costs in its writs of garnishment, not a separate violation.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case presents an issue of critical importance to the public and, in particular, low income residents of this State subject to post-judgment collection practices. Judgment debtors subject to the "extraordinarily harsh remedy" of garnishment are protected by only two statutes. *See Watkins v. Peterson Enterprises, Inc.,* 137 Wn.2d 632, 646, 973 P.2d 1037, 1047 (1999).

First, the garnishment statute's procedures and protections, and second, for "collection agencies" regulation under the CAA.

The only pre-deprivation procedural protection of a debtor's property under the garnishment statute is the requirement that the

creditor, or an attorney on its behalf, file an affidavit attesting to four facts, one of which is stating the current judgment balance. RCW 6.27.060. Then the clerk "shall" issue a writ of garnishment. RCW 6.27.070. The CAA prohibits collection agencies from certain acts, including "collecting or attempting to collect" more money than allowed by law. RCW 19.16.250(21).

The Opinion below limits relief for violations of the prohibited practices section of the CAA to bringing separate litigation against the collection agency. But the CAA does not provide a private right of action on its own. *Paris v. Steinberg & Steinberg*, 828 F. Supp.2d 1212, 1218 (W.D. Wash. 2011). Actions for damages for CAA violations are affirmatively sought through the Consumer Protection Act, RCW 19.86, *et seq*. But, the CAA also has a penalty at RCW 19.16.450 that applies automatically. The RCW 19.16.450 penalty can clearly be enforced as an affirmative defense to a collection action, even where the violations occur pre-judgment. *See Wholesale Info. Network, Inc. v. Cash Flow Mgmt., Inc.*, No. C07-5225RBL, 2007 WL 1893343, at *1 (W.D. Wash. 2007).

The question this case presents is how should the RCW 19.16.450 penalty be enforced in the case of *post-judgment* violations? And, more specifically, where the violations occur before

the court through the post-judgment remedy of garnishment. RCW 19.16.450 speaks broadly, penalizing all violations without distinction between pre- and post-judgment violations.

The published Opinion below is one of first impression and denies judgment debtors and courts any procedural guidance to enforce the RCW 19.16.450 penalty post-judgment. The effect is that judgment debtors are left with no remedy to address serious and consequential post-judgment collection abuses without initiating new litigation, which is an option that is completely beyond the means of the vast majority of judgment debtors. Further, the Opinion deprives trial courts, where the violations occurred, from redressing them in the same proceeding. New litigation is not a practical solution, and it is inconsistent with the plain language of RCW 19.16.450, which is self-enforcing and automatically applied when RCW 19.16.250 is violated.

A. REVIEW SHOULD BE ACCEPTED BECAUSE UNDER RAP 13.4(B)(4) IT INVOLVES ISSUES OF SUBSTANTIAL PUBLIC IMPORTANCE.

1. The Only Garnishment Pre-Deprivation Procedural Protection for Judgment Debtors is that the Creditor is Required to File an Affidavit Swearing to the Judgment Balance.

Under RCW 6.27.060 a creditor applies for a writ of

garnishment by filing an affidavit attesting certain facts, including "the amount alleged to be due under that judgment." Upon receiving an affidavit meeting these requirements, under RCW 6.27.070 the clerk "shall immediately issue and deliver a writ of garnishment to the judgment creditor." There is no discretion on the part of the clerk. There is no independent review of the alleged balance -- the writ simply issues following the affidavit. The process relies exclusively on the accuracy of the affidavit, which naturally relies on the accuracy of the creditor's balance information.

This is a case of first impression, presenting the question, what can a debtor do when a creditor obtains writs of garnishment based on affidavits with inaccurate balance information? The problem is pervasive across the state.

In *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 336, 334 P.3d 14, 17 (2014) this Court cited a "growing concern that collection practices employed by debt buyers are harmful to consumers," citing legislative testimony:

> Many of the worst abuses in the debt collection industry are by debt buyers. Debt buyers purchase mass portfolios of charged off debt for pennies on the dollar, with little evidentiary basis, and get massive default judgments because the consumers have no notice of the lawsuit. Consumers have had to go to great lengths to rectify judgments based on fraudulent or

> paid-off claims that were sold to debt buyers who did not know they were buying illegitimate claims.

Gray, 181 Wn.2d at 336-7.

This case presents a slight variation. Here, the debt was already reduced to judgment when it was purchased by a debt buyer. As the debt buying industry has grown, so are the number of consumers affected by bad accounting data. "The Federal Trade Commission noted that "'[t]he most significant change in the debt collection business in recent years has been the advent and growth of debt buying.'" *Gray*, 181 Wn.2d at 336 (internal quotations omitted).

Indeed, "in 2016, the [debt buying] industry raked in an estimated annual revenue of $11.4 Billion. Large debt buyers' profit margins far surpass those of Walmart." JENNIFER TURNER, AMERICAN CIVIL LIBERTIES UNION, A POUND OF FLESH, THE CRIMINALIZATION OF PRIVATE DEBT (2018) available at https://www.aclu.org/report/pound-flesh-criminalization-private-debt.

In the proceedings below, including appeal, Cavalry has provided several different accountings, but has been unable to reconcile the balance its attorneys swore was owed in its applications for writs of garnishments. *See* CP 372, 412. It appears Cavalry

simply accepted and relied on the incorrect balance information from Fireside when it purchased the Askins' judgment. As the trial court found, and the Court of Appeals, at footnote 1, recognized, Fireside's balance information was heavily inflated. CP 470-473.

An untold number of debtors statewide are likely suffering similar wrongs. Debtors need guidance from this Court, setting forth the correct procedural process to pursue relief under the CAA when the violations occur post-judgment.

2. RCW 19.16.250(21); The Legislature's Intent is Apparent from the Statute's Plain Language.

At RCW 19.16.250, the Legislature enumerated 26 prohibited practices applicable to collection agencies. RCW 19.16.250(1)-(26). The prohibitions are specifically targeted to end harmful acts and practices that are endemic within the collection industry. As this Court has previously noted, there is a "strong public policy underlying state and federal law regulating the practice of debt collection." *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 54, 204 P.3d 885, 897 (2009). "The business of debt collection affects the public interest, and collection agencies are subject to strict regulation to ensure they deal fairly and honestly with alleged debtors." *Id.*

At issue in this case is RCW 19.16.250(21), which provides:

> No licensee or employee of a licensee shall:
>
> (21) Collect or attempt to collect in addition to the principal amount of a claim any sum other than allowable interest, collection costs or handling fees expressly authorized by statute, and, in the case of suit, attorney's fees and taxable court costs.

RCW 19.16.250(21).

Notably, subsection 21 does not regulate "communications." RCW 19.16.250(21). Instead, this section regulated every act of collecting or attempting to collect debts. Black's Law Dictionary defines an "attempt" as "the act or an instance of making an effort to accomplish something, esp. without success." ATTEMPT, BLACK'S LAW DICTIONARY (10th ed. 2014). "Without success" is a strong indicator of the distinction between an act of "attempting to collect," regulated by RCW 19.16.250(21), and certain types of unfair, harassing or deceptive "communications" regulated by other subsections of RCW 191.6.250(21). A "communication" is "the expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception." COMMUNICATION, BLACK'S LAW DICTIONARY (10th ed. 2014). An act may sometimes communicate something, but a communication is not intrinsic to an act. RCW 19.16.250(21) plainly prohibits an act;

"collecting or attempting to collect." By the plain meaning of the word "attempt," a communication should not be read into the statute.

"The purpose of statutory interpretation is to determine and give effect to the intent of the legislature." *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14, 19 (2014) (internal quotations omitted). "When possible, the court derives legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Id.* Courts employ traditional rules of grammar to discern plain meaning. *Id.* A statute is ambiguous if it remains susceptible to more than one reasonable meaning. *Id.*

The Court of Appeals did not find RCW 19.16.250(21) to be ambiguous. Its analysis began by noting that "many [10 of 26] of the prohibited practices involve improper communication" and simply held all of the prohibited practices must, therefore, have a "communication" element. This holding ignores the unambiguous plain meaning of RCW 19.16.250(21).

It is not relevant to subsection (21) what behaviors the other 25 prohibited practices restrict. They are independent of one another. They each prohibit distinct practices found to be harmful to

the public. Communication is inherent to some of them. For example, with harassment it is axiomatic that some form of communication take place; it stands to reason a person would not be intimidated by threats they don't know about. *See* RCW 19.16.250(13).

A "communication" is not necessary to *all* prohibited practices. Some actions are so harmful, or so potentially harmful, that a mere "attempt" is prohibited. Collection agencies must be licensed. RCW 19.16.250(1). They cannot place calls from blocked numbers. RCW 16.16.250(19). And they cannot attempt to collect more than permitted by law. RCW 19.16.250(21).

3. The Trial Court's Order was not Based on the April 7 Email.

Notwithstanding the previous section, the trial court never found that the April 7 email was the basis of a violation. This argument was not raised in the trial court and the trial court never considered it.

The trial court's actual written order found that Cavalry "attempted to collect and did collect" sums greater than principal, allowable interest, costs or fees authorized by statute "*through* writs of garnishment." CP 470 (emphasis added). The greater sums were

comprised of inflated garnishment costs and attorney fees that were not awarded by the court, conduct that violated RCW 19.16.250(21) and this Court's holding in *Watkins v. Peterson Enterprises, Inc.,* 137 Wn.2d 632, 644, 973 P.2d 1037, 1045 (1999). In this case, even if the costs and fees were awarded, the amount Cavalry and Fireside added to their judgment balance calculation exceeded the (then) statutory maximum attorney fee of $250. *See* former RCW 6.27.090(2) (2012). *Id.* The costs, added to the balance, sought through the writs were inflated above actual costs. CP 470. These findings of the trial court were largely based on the content of Cavalry's own attempt to comply with another prohibited practice section, RCW 19.16.250(8), by providing the Askins with an itemized statement explaining the balance. That statement, sent by email on April 16, 2016, plainly showed the addition of $660 in attorney fees (the statutory maximum was $250) following each garnishment, where *no* fees were awarded, and costs of $285 that are unrelated to any actual costs incurred by Cavalry or Fireside. CP 371. As discussed *infra,* the Court did not rule the email itself violated RCW 19.16.250(21). The April 16 email was considered as evidence that Cavalry "attempted to collect" "through writs of garnishment" sums greater than permitted by RCW 19.16.250(21). CP 470; 473.

4. Post-Judgment CAA Violations, Procedural Process to Enforce.

The show cause procedure actually used by the Askins was not a CR 60(b) motion, but modeled on show cause proceedings familiar in family law to pursue remedies after final orders have been entered. *See* RCW 26.09.160(2)(a). No specific statute or precedent provides guidance regarding how post-judgment, prohibited practice violations may be addressed by the court in which they occurred. The ruling by the Appellate Court leaves this case and others like it in a confusing posture as the Court of Appeals did not provide guidance as to what procedure a trial court should follow when a collection agency violates a prohibited practice post-judgment by seeking and obtaining writs of garnishment for sums greater than allowed by law.

Prior to this case, there was no precedent or statutory guidance as to how an aggrieved debtor could enforce the protections afforded by the CAA before the court in which post-judgment CAA violations occurred in garnishment proceedings.

In light of the *Askins'* ruling below, only this Court can resolve this question, and establish a process for aggrieved judgment

debtors to redress post-judgment violations of the collection agency act to be addressed in that same proceeding in which they occurred.

VI. CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court accept review, under RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 15th day of February, 2019.

Scott M. Kinkley, WSBA # 42434
NORTHWEST JUSTICE PROJECT
1702 West Broadway
Spokane, WA 99201
Tel. (509) 324-9128
Attorney for Defendants/Appellants

APPENDIX

App. 1-10	Court of Appeals Published Opinion

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

FIRESIDE BANK fka FIRESIDE THRIFT CO., a California corporation, Appellant, v. JOHN W. ASKINS and LISA D. ASKINS, husband and wife and their marital community comprised thereof, Respondents.	)	No. 34918-7-III PUBLISHED OPINION

KORSMO, J. — Cavalry Investments appeals from a decision of the superior court determining that violations of the Washington Collection Agency Act (CAA), ch. 19.16 RCW, needed to be remedied by stripping the debt to the principal and declaring the debt paid. Concluding that an email communication between attorneys does not constitute a violation of the CAA and that CR 60 was not a proper method of presenting the debtors' theory of the case, we reverse and remand for further proceedings.

FACTS

A used car loan bearing an interest rate of 18.95 percent issued in 2004 to respondents John and Lisa Askins is the basis for this case. According to the Askins, the car was returned in 2006, supposedly in satisfaction of the balance of the loan, and no

further loan payments were made. However, this transaction was not reduced to writing. Fireside Bank, the assignee on the loan note, asserted that it repossessed the vehicle in December 2006, and sold it the following month for $4,200.

Fireside then filed suit seeking the balance of the note. The Askins did not appear in the action and ultimately a default judgment was entered against them on September 28, 2007, in the amount of $7,754.39, plus prejudgment and postjudgment interest. Clerk's Papers (CP) at 13. After collecting some money from the Askins over the years via garnishment, Fireside in 2012 sold the note to appellant Cavalry Investments, a debt collection agency. The two creditors issued 19 writs of garnishment between 2008 and 2015. A total of $10,849.16 was collected by the writs.

With collection efforts against them continuing, the Askins obtained an attorney. Their attorney contacted Cavalry's counsel in November 2015, and requested an accounting. Three months later, the Askins' counsel asked Cavalry's attorney to enter a satisfaction of judgment. Cavalry's counsel did not agree that the judgment had been satisfied and sent an email to counsel on April 7, 2016, containing an amortization schedule explaining the balance still owed. Both the email and the amortization schedule bore the notice: "This is an attempt to collect a debt. Any information obtained will be used for that purpose." CP at 372. The schedule also reported that the remaining debt had been calculated by adding $643 in attorney fees and $280 or $285 in collection costs

for each writ of garnishment. The spreadsheet concluded that the Askins still owed $15,820.89.

The Askins then requested, and the court granted, a show cause hearing pursuant to CR 60 to determine that the debt had been paid. The hearing request also asked for additional relief, including: quashing the most recent writ of garnishment, entry of a satisfaction of judgment, return of all money paid in excess of the debt principal, finding a violation of the CAA for attempting to collect unlawful amounts, and awarding sanctions and damages. CP at 403. The motion relied on the schedule contained in the April 7 email between counsel.

The parties argued the matter before the Honorable David Frazier of the Whitman County Superior Court, the same judge who had signed the judgment nine years earlier. Cavalry argued that the April 7 email accounting had been erroneous and that the proper accounting showed that a balance remained. Judge Frazier considered the email accounting and found that the CAA had been violated by Cavalry requesting more costs than they were entitled to collect in violation of RCW 19.16.250(21). He ordered the judgment stripped to its principal pursuant to RCW 19.16.450 and declared the judgment satisfied. CP at 427.

Cavalry moved for reconsideration and argued, with two alternative accountings attached, that the debt remained unsatisfied and that the matter should be set for trial. The Askins argued that the original ruling was proper and that Fireside Bank also had

violated the CAA before Cavalry acquired the debt. Judge Frazier heard oral argument on the motion and took the matter under advisement before subsequently entering an order denying reconsideration. The order on reconsideration stated, in part, that the court's original ruling was based on efforts to claim more in attorney fees and costs than was legally permissible, and that the new accounting could not cure the earlier error. CP at 462-63.

Cavalry timely appealed to this court. An amicus curiae, the Statewide Poverty Action Network, filed a brief in support of the Askins. A panel heard oral argument of the case.

ANALYSIS

Cavalry's appeal presents us with two significant questions. First, was the accounting contained in the email between the attorneys an effort to collect a debt under the CAA? Second, could the Askins pursue violations of the CAA under the provisions of CR 60? We first consider the relevant statutes before turning to the two questions presented.

The CAA is a counterpart of the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o, and constitutes our state's effort to regulate debt collection practices by in-state and out-of-state collection agencies. *Panag v. Farmer's Ins. Co. of Wash.*, 166 Wn.2d 27, 53, 204 P.3d 885 (2009). Those who make collection efforts in this state must be licensed, RCW 19.16.110, and also must not violate a lengthy

list of prohibited debt collection practices. RCW 19.16.250. Violations of these two statutes are actionable under the Washington Consumer Protection Act (CPA), ch. 19.86 RCW. *See* RCW 19.16.440.

In addition, a violation of any of the practices prohibited by RCW 19.16.250 results in the creditor losing its right to collect any costs or interest, and limits collection to only the original judgment principal. RCW 19.16.450. Among the prohibited practices are efforts to attempt to collect "any sum other than allowable interest, collection costs or handling fees expressly authorized by statute." RCW 19.16.250(21).

Washington's garnishment statute authorizes the imposition of attorney fees and other allowable costs. RCW 6.27.090(2). The attorney fee was $250 at the onset of this litigation, but was raised to $300 in 2012. *See* LAWS OF 2012, ch. 159, § 2. In order to recover costs or attorney fees, the plaintiff must obtain a judgment specifying the amount recovered. *Watkins v. Peterson Enters., Inc.*, 137 Wn.2d 632, 647, 973 P.2d 1037 (1999).

With these understandings in mind, we turn to the questions presented by this appeal.

April 7 Email between Counsel

The initial order granting the Askins' motion was predicated in part on the incorrect figures used in the April 7 email between the two attorneys. To the extent that the trial court considered that accounting to constitute a violation of the CAA, it erred.

Communications between opposing attorneys do not constitute an effort to collect debt under the CAA.

The CAA defines "debtor" as "any person owing or alleged to owe a claim." RCW 19.16.100(7). Many of the prohibited practices involve improper communication practices between collection agencies and debtors. *E.g.*, RCW 19.16.250(8), (9), (11), (13), (14), (15), (16), (17), (18). A collection agency is prohibited from communicating directly with a debtor who is represented by counsel. RCW 19.16.250(12).

These provisions of the CAA prohibit collection agencies, including attorneys or other agents, from contacting the debtor. They simply do not apply to communications with a debtor's attorney. The federal courts have reached the same conclusion under the FDCPA. "The purpose of the FDCPA is to protect vulnerable and unsophisticated debtors from abuse, harassment, and deceptive collection practices." *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007). Similarly, the purpose of the CAA is to "ensure [collection agencies] deal fairly and honestly with alleged debtors." *Panag*, 166 Wn.2d at 54.

Neither act categorically excludes attorneys from its scope. *Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1220 (W.D. Wash. 2011) ("The [CAA] does not exempt attorneys attempting to collect a debt owed to a third party . . . ."); *Heintz v. Jenkins*, 514 U.S. 291, 299, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) ("[The FDCPA] applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that

activity consists of litigation."). However, the FDCPA's "purposes are not served by applying its strictures to communications sent only to a debtor's attorney." *Guerrero*, 499 F.3d at 938; *see also Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002) ("Where an attorney is interposed as an intermediary between a debt collector and a consumer, we assume the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior."). Thus, "when the debt collector ceases contact with the debtor, and instead communicates exclusively with an attorney hired to represent the debtor in the matter, the [FDCPA's] strictures no longer apply to those communications." *Guerrero*, 499 F.3d at 939.

We believe the *Guerrero* principle governs here. Accordingly, we conclude that a communication by a creditor's attorney to a debtor's attorney, even if in violation of a provision of the CAA, does not itself constitute a violation of the CAA. The communication may still be of evidentiary value in subsequent litigation, but it does not constitute a prohibited communication to a debtor.

The trial court appeared to rely heavily upon the email communication in its original ruling. Although we reverse for the reasons stated in the next section and remand for additional action, we expressly note that sending the amortization schedule to the Askins' attorney could not itself constitute a violation of the CAA. The schedule itself, though, may still be of some evidentiary value to the parties. We believe that any

future consideration of this communication will be consistent with the views expressed in this opinion.

Use of CR 60 to Obtain Affirmative Relief

The Askins brought the show cause hearing under CR 60 to establish a satisfaction of the judgment and other affirmative relief. We conclude that this was not a proper method of establishing a violation of the CAA.

CR 60 allows relief from judgment in several circumstances, including:

> (b)(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

We believe this provision probably was the one relied on in the request for relief, although the calendaring order simply stated "CR 60."

"'Rule 60(b) is available only to set aside a prior judgment or order; courts may not use Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior order or judgment.'" *Geonerco, Inc. v. Grand Ridge Prop. IV, LLC*, 159 Wn. App. 536, 542, 248 P.3d 1047 (2011) (applying federal standard to CR 60(b) and quoting *Delay v. Gordon,* 475 F.3d 1039, 1044-45 (9th Cir. 2007)). The party seeking vacation of a judgment under CR 60(b) bears the burden of establishing entitlement to relief. *Puget Sound Med. Supply v. Dep't of Soc. & Health Servs.*, 156 Wn. App. 364, 373 n.9, 234 P.3d 246 (2010). The effect of vacating a judgment is that it "is of no force or effect

and the rights of the parties are left as though no such judgment had ever been entered." *In re Estate of Couch*, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986).

CR 60(b) allowed the Askins to establish that the judgment had been satisfied through their payments, but they did not directly attempt to do so. Instead, they sought to show a violation of the CAA, invoke the remedy of RCW 19.16.450, and, once applying that remedy, claim that the judgment was satisfied. While this novel approach had the benefit of limiting the expenses of the parties by reducing the case to a motion, it appears to run counter to legislative intent that the CAA be enforced through the CPA. RCW 19.16.440. It also required Cavalry to essentially defend against a CPA action without such a case having been initiated and without being allowed to engage in relevant discovery, while conversely permitting the Askins to litigate a CPA claim without filing one. Although the trial court did not grant all relief available under the CPA, it granted enough to exceed the scope of its authority under CR 60.

Without applying the RCW 19.16.450 remedy, it is unclear on this record whether the trial judge believed the Askins had met their burden under CR 60(b)(6). Although we recognize that all parties benefit from the simplified and less expensive motion practice, it was not a practice available under the rule. We therefore reverse and remand for

further proceedings and without prejudice to seeking relief outside the strictures of CR 60.[1]

Reversed and remanded.

Korsmo, J.

WE CONCUR:

Fearing, J.

Siddoway, J.

[1] This case should settle. In light of the fact that Fireside appears to have collected, or attempted to collect, fees and costs that it was not entitled to collect, it may be prudent for Cavalry to abandon its efforts to collect on the debt and enter a satisfaction of judgment rather than defend Fireside's actions.

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