No. 98627-4

Court of Appeals No. 78897-3-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

SPOKEO, INC.,

Petitioner,

and

WHITEPAGES, INC.,

Respondent.

PETITION FOR REVIEW

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INTRODUCTION

Spokeo, Inc. and 17 other companies entered into advertising contracts with Whitepages, Inc. All was going well – and the parties here were making millions of dollars together – when Whitepages surreptitiously exploited the confidential information it obtained under the advertising contracts to create a competing product – a secret scheme using codenames like "Matador" and "Mariachi." When it had everything it needed, Whitepages suddenly and unexpectedly pulled the Marketplace out from under its partners, seriously injuring them.

The jury was instructed on RCW 19.86.093, a significant 2009 CPA statute that so far has evaded this Court's consideration. The jury found Whitepages violated the CPA, awarding damages. But the trial court later made its own findings and threw out the jury's verdict.

Until now, the appellate courts that have considered § .093 have properly followed its plain language. This Opinion undermines that language and the Legislature's intent. It also contradicts (a) existing appellate CPA decisions; and (b) controlling law on (i) when a trial court should alleviate a jury's confusion about otherwise correct jury instructions, and (ii) when a trial court should instruct a jury on anticipatory repudiation.

This Court should grant review of these significant conflicts.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court erroneously grant judgment as a matter of law – nullifying the jury's CPA Verdict in favor of Spokeo – where the trial court accepted the jury's well-supported findings, which fully supported their Verdict, but then made its own findings?

2. Did the trial court erroneously fail to alleviate jury confusion by not answering two jury questions on negligent misrepresentation, where the questions indicated an erroneous view of the law and the jury told the trial court that votes depended on the answers?

3. Did the trial court erroneously decline to instruct the jury on anticipatory repudiation, where the defense had been raised on summary judgment and evidence at trial fully supported giving the instruction?

4. Did the trial court erroneously instruct the jury on spoliation?[1]

[1] The Opinion is wrong on spoliation – an important issue that this Court should review – but it does not independently justify review, so it is not briefed here. The issue was fully briefed in the Court of Appeals.

FACTS RELEVANT TO PETITION FOR REVIEW

A. Spokeo and Whitepages (and others) formed lucrative partnerships that worked well for years.

Spokeo is a "people search engine" founded in 2006. RP 222-25. Spokeo now has about 210 employees and helps over 18 million unique visitors to connect and to know who they are dealing with. RP 222-23, 457. Whitepages.com ("Whitepages") is a free online directory for locating people and businesses. RP 231, 2076-77.

Initially, Whitepages' revenue came from renting ad space on its website. RP 2077. In 2012, Whitepages developed "Marketplace," an auction system allowing "endemic partners"[2] to bid for specific ad space on Whitepages.com at a cost-per-click price. RP 496-97, 1244-45, 2090. Beginning in early 2012, Spokeo advertised with Whitepages through Marketplace. RP 226, 2102; Ex 484. As with all 17 endemic partners, Whitepages and Spokeo entered an individual Marketplace Participation Agreement ("MPA") in March 2012. RP 226, 1045; Ex 484. The MPA incorporated the parties' prior mutual confidentiality agreement, purportedly protecting Spokeo's confidential information in Marketplace. RP 227-29; Exs 2, 484.

[2] "Endemic" here means native. WEBSTER'S THIRD NEW INT'L DICTIONARY 748 (1993). Endemic partners' ads look native to the website – that is, they generally have the same "look and feel" as other content on a webpage; they do not obviously look like advertisements. *See* RP 497, 1018.

Spokeo viewed Whitepages as its "number one partner." RP 475. Whitepages assured Spokeo that it felt the same way. RP 240, 400, 475, 810. The parties worked closely, collaborating on Spokeo's ads and ad performance weekly, if not daily. RP 403. They met quarterly to go over Spokeo's accounts, discuss future plans, and address any product testing and new products. RP 749.

Whitepages was Spokeo's "second biggest source of revenue" behind Google, at 20%. RP 235-36. And Marketplace made Whitepages a lot of money: Spokeo alone spent $7-$8 million per year on Whitepages ads. RP 257, 492. But the partnership depended on confidentiality, the heart and soul of revenue production in this industry. RP 698. Relying on their existing confidentiality agreement, Spokeo shared quite a lot of confidential information with Whitepages, including (among other things) marketing strategy, price strategy, bidding history, and conversion information, each of which is extremely confidential. RP 254-55, 379-80, 395, 710, 1236, 1543, 1549, 1551-52.

B. In 2015, Whitepages secretly formulated a plan to displace its partners.

In late 2014 and early 2015, for the first time ever, Whitepages' board began considering whether it should develop a

paid-subscription people-search service. RP 1098, 1643, 2137-38. In late 2014, Whitepages hired Geoffrey Arone as a senior product executive to work through some issues with Whitepages' business model. RP 601, 603, 1587-88. Arone always believed that the "optimal" approach was to replace Marketplace with a Whitepages product. RP 609-10, 620-21. Within months, Whitepages' consultant Arjun Kakkar came on as a fulltime employee, focusing on "Premium development." RP 486, 1586-87. Arone was soon dedicating all his time to the Premium project, along with one part-time and four other full-time employees. RP 1588, 2306-07. In April 2015, the board authorized developing the subscription product that became "Whitepages Premium." RP 502, 1586, 2139-43, 2577.

While Whitepages began live-testing Premium in September 2015, it directed employees not to tell its endemic partners about Premium, fearing they would stop participating in Marketplace. RP 565-66, 1257-58. Whitepages took increasing ad space over time, but used "geo-filtering" to hide the testing in states where endemic partners were located. RP 1266. By November 2015, Whitepages was taking 10-to-15 percent of the ad space to test Premium. RP 574. Whitepages coined the code words "Matador" and "Mariachi" to keep the project secret. RP 504-05.

C. Whitepages exploited the advertising contracts with its partners to gather their confidential information and develop a competing product.

Whitepages exploited its advertising contracts to gather confidential information from its partners.[3] Whitepages planned to bring a substantial portion of the people-search industry into Marketplace, then test Premium against those customers until it could successfully take over the industry.[4] Once Whitepages had enough partners in Marketplace, it began aggressively developing Premium by replicating its partners' products and practices.[5] Whitepages expressly tasked Arone with replicating Spokeo's proprietary funnel.[6] In sum, Whitepages created its own competitive service using Spokeo's product information and research.

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[3] RP 946 ("In all my experience, when I see that, it very clearly means one and only one thing, that confidential conversion information . . . was used to build the funnel that you would see on Whitepages Premium, and they only got that by having that marketplace data"); RP 954-55 (Whitepages was mining and conveying Marketplace data for purposes of developing Premium); Ex 321 ("We are trying to assess where Premium is vs. Endemic").

[4] *See, e.g.*, Ex 246 ("Having premium compete in the marketplace will help us find the optimal sales funnel during the worst part of the year"; "The point is to test our ability to take over all placements when we are ready to do so"); Ex 256 (Whitepages "3rd tier" in November 2015).

[5] Ex 249 ("Already improved funnel performance by >2x by copying best performing competitor funnels").

[6] Ex 315 (assignment to create a "Spokeo Inspired Reverse Phone Funnel"); Ex 306 (sending Arone "all of the funnels").

Whitepages intended "100% replacement of endemic" partners as early as 2013. Ex 45. Communications throughout 2015 show Whitepages' unequivocal intent to "displace" its partners. Ex 246 (confirming "transition away from the marketplace"); Ex 181:

> Spokeo (and its brethren) are the form of advertisers we intend to displace with our eCommerce solution ("Whitepages Premium") . . . . I want to emphasize that we DO NOT need Spokeo (or any of these companies) . . . . The paying user will now just be paying Whitepages . . . rather than Spokeo.

Of course, Spokeo told the jury that it would have never done business with Whitepages had it known of this scheme. RP 379-80.

As early as September 2015, however, Whitepages secretly knew that Spokeo "will want to shoot us as soon as we launch Premium." Ex 221. But Spokeo did not learn about Premium until December 2015, when Whitepages notified Spokeo it was taking 20% of the ad space to test Premium. RP 236, 240-41, 646, 809, 823-24; Ex 711. Whitepages still gave no indication it was ending Marketplace, assuring Spokeo it was committed to Marketplace and its "long-standing" partnership with Spokeo. RP 240, 400, 810. And yet on December 2, 2015, its CEO internally noted, "if we were really looking out for the endemics, we'd have given them the courtesy of notice earlier." Ex 287.

In January or February 2016, Whitepages took 50% of the ad space for Premium. RP 785-86; Ex 333. Spokeo then knew Whitepages had become a competitor. RP 879. Still, it had no idea Whitepages would soon end Marketplace. *Id*.

D. On February 12, 2016, Whitepages terminated the Marketplace partnerships without notice.

Whitepages decided to reveal the end of Marketplace in early February 2016. RP 2219. Whitepages called Spokeo on Friday afternoon, February 12, stating it was completely terminating Marketplace, effective Monday. RP 247-48, 397-98. Spokeo immediately notified Whitepages it believed Whitepages had breached the parties' contract by terminating Marketplace without written notice. RP 250-51; Ex 346. Spokeo followed up with calls and letters. RP 402. No auctions occurred after February 12. RP 426.

REASONS THIS COURT SHOULD ACCEPT REVIEW

E. The jury found that Whitepages violated the CPA, awarding Spokeo damages, but the trial judge threw out their verdict five months later.

Spokeo sued Whitepages on April 6, 2016, raising breach of contract, duty of good faith, the Consumer Protection Act (CPA), negligent misrepresentation, fraudulent inducement, and specific performance. CP 1-10. Whitepages answered and counterclaimed for breach of contract. CP 13-25.

Discovery was difficult due to Whitepages' repeated failures to produce. The trial lasted 14 days. RP 1-2991. The jury returned a verdict for Spokeo on the CPA ($72,915) and for Whitepages on an interest calculation ($18,003.06). CP 9356, 9358.

Five months later, the trial court nullified the jury's CPA Verdict. CP 12263-82. It then determined that Whitepages was the prevailing party, awarding it $2,136,030.95 in costs and attorney fees. CP 12309.

Spokeo appealed (1) the trial court's CPA ruling taking away the jury's CPA award; (2) its failure to answer juror's questions regarding whether the elements stated in two independent negligent misrepresentation instructions all had to be proved for Spokeo to prevail – a question on which votes depended; (3) its failure to instruct the jury on anticipatory repudiation; and (4) its mishandling of Whitepages' spoliation of evidence. CP 12462-592.

The Court of Appeals affirmed. Crucially here, it disregarded the plain language of RCW 19.86.093(3), by which the Legislature intended to make public-interest impact much easier to prove.

A. The Opinion conflicts with the only opinion of this Court addressing RCW 19.86.093(3) – a significant 2009 CPA statute that has otherwise evaded this Court's review; conflicts with *Hangman Ridge*; undermines the plain language of § .093(3); and conflicts with other appellate court decisions. RAP 13.4(b)(1), (2) & (4).

The lynchpin of the Court of Appeals' decision is its determination that Spokeo did not prove the third element of a CPA cause of action: whether Whitepages' unfair and deceptive acts or practices affected the public interest. Op. at 4-6. The trial court ruled that Spokeo *did prove* the other CPA elements (*i.e.*, that Whitepages' acts were unfair and deceptive, occurred in trade or commerce, and proximately caused injury to Spokeo's business or property, to the tune of $72,915). *See, e.g.*, BA 14 (citing CP 9641-46, 12770, 12277-78). Whitepages did not appeal those determinations, and the Court of Appeals did not set them aside.

On public interest, the jury was properly instructed on RCW 19.86.093(3) ("§ .093(3)"). CP 8983 (Jury Inst. 26, attached as App. B). That instruction was unchallenged on appeal. And the jury and the trial court both correctly found that Spokeo proved injury to others – which is all that is required to prove public interest under § .093(3) and Jury Inst. 26. *Compare* CP 12278 *with* App. B. Nonetheless, the Court of Appeals held that Whitepages' unfair and deceptive acts or

practices in the course of commerce that injured Spokeo and others' businesses did not affect the public interest. Op. at 4-6. Under controlling Washington law, that holding is impossible.

This decision conflicts with the only opinion of this Court to address § .093(3), Justice Madsen's concurrence (for three Justices) in ***Klem v. Wash. Mut. Bank***, 176 Wn.2d 771, 804-05, 295 P.3d 1179 (2013).[7] As she noted there, the Legislature had "recently codified the requirement that the unfair act or practice be injurious to the public interest and specifically set out how this element may be satisfied." ***Klem***, 176 Wn.2d at 804 (citing § .093):

> a claimant may establish that the act or practice is injurious to the public interest because it:
>
> . . .
>
> (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

In light of the jury's finding, and the trial court's ruling, that Spokeo proved injury to other "endemic" partners, all three subparts of § .093(3) are met here.

But § .093(3) – which became effective in 2009 – has so far evaded this Court's review. As Justice Madsen noted, it represents

[7] Presumably because § .093 had not yet taken effect when the alleged CPA violation occurred in ***Klem***, the lead opinion did not address it.

a significant easing of the requirement to prove public interest in the context of a so-called "private dispute" among numerous competing businesses. Despite this legislative easing of the public-interest test, the trial and appellate courts here imposed an additional requirement that the jury was not required to find. *See, e.g.*, CP 12275 (injury "may (in context with other facts) support a finding of public-interest impact," but "such evidence, by itself, does not automatically establish" such injury). This is *contrary to* both the trial court's unchallenged CPA instructions and § .093(3).

The CPA is designed to discourage unfair competition – like Whitepages' unfair and deceptive acts in the course of its business – just as much as it is designed to discourage unfair or deceptive acts in consumer transactions. *See, e.g.*, RCW 19.86.020. This Court should accept review to address this significant issue.

Indeed, the appellate decision – like the trial court's decision – even conflicts with this Court's most important CPA decision, ***Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.***, 105 Wn.2d 778, 719 P.2d 531 (1986). To undermine the jury's verdict, the trial court purported to *make its own findings* on seven factors it culled from ***Hangman Ridge*** and § .093. CP 12275-78. But "whether the public has an interest in any given action ***is to be***

determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed." 105 Wn.2d at 789-90 (emphases added). Both the trial and appellate decisions conflict with ***Hangman Ridge*** in this regard.

While § .093(3) has so far evaded this Court's review, the Court of Appeals has addressed it. ***Rhodes v. Rains***, 195 Wn. App. 235, 247, 381 P.3d 58 (2016) (finding public-interest impact under § .093(3) where alleged unfair and deceptive act was repeatable); ***Rush v. Blackburn***, 190 Wn. App. 945, 967-68, 361 P.3d 217 (2015) (same).[8] In both of those cases, the same Division of the Court of Appeals applied the statute in a manner contrary to its approach here. This Court should grant review to resolve this conflict.[9]

[8] Section .093 has been cited in Court of Appeals decisions 17 times, only three of them published: ***Rhodes***, ***Rush***, and ***Villegas v. Nationstar Mortg., LLC***, 8 Wn. App. 2d 876, 882, 444 P.3d 14, *rev. denied*, 194 Wn.2d 1006 (2019) (citing statue, but not applying it).

[9] Division Two has also applied the plain language of § .093(3) in a manner consistent with Spokeo's analysis, and inconsistent with Division One's analysis here. ***Wells Fargo Bank N.A. v. Gardner***, 2018 Wash. App. LEXIS 2108, at *17 (Sep. 11, 2018) ("In addition, the failure to negotiate in good faith plainly has the capacity to injure other persons. For this reason, the Gardners' CPA claim also affects the public interest under RCW 19.86.093(3)") (unpublished opinion cited under GR 14.1).

B. The Opinion conflicts with controlling appellate authority regarding answering jurors' questions, an important issue this Court should decide. RAP 13.4(b)(2) & (4).

The Court of Appeals has held that where, as here, "a jury's question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction." ***State v. Campbell***, 163 Wn. App. 394, 402, 260 P.3d 235 (2011). Here, the jury asked two *very* clear questions regarding the two negligent misrepresentation instructions:

> Jury Instructions No. 30 and 32 both list elements Spokeo must prove for their claim of negligent misrepresentation. Is it necessary to find all of the elements in both Instructions are true to give a verdict for Spokeo on their negligent misrepresentation claim? Or is it sufficient to find all of the elements on only one of the Instructions to be true?

CP 9359 (attached in App. C). Its second request desperately noted that votes depended on obtaining an answer to their question:

> In response to a previous question, you said we have all we need to determine the answer to [Special Verdict Form] 1(d)(1) [asking whether Whitepages made negligent misrepresentation(s) to Spokeo]; however, page 36 presents one set of criteria for negligent misrepresentation and page 38 presents another set (but with no instructions after the criteria about forming verdict, as is shown on page 36). We need clarification on whether <u>one</u> or <u>both</u> sets of criteria need to be satisfied in order for our verdict to be for Spokeo. Several of our votes depend on this, and we may not be able to reach an agreement without further clarification, for fear that we're not all even answering the same question.

App. C, CP 9369 (emphasis original). The trial court refused to answer either of these questions. The Court of Appeals affirmed.

But the law is quite clear that Spokeo did not have to prove all the elements in *both* instructions to prevail – either was sufficient – and no one has argued otherwise. *See, e.g.*, BA 34-35; Reply 19-21. The jury's questions to the court thus indicated "an erroneous understanding of the applicable law." ***Campbell***, 163 Wn. App. at 402. It therefore was "incumbent upon the trial court to issue a corrective instruction." 163 Wn. App. at 402. It failed to do so. The appellate court should have reversed and remanded for trial.

But instead, it contradicted its correct holding in ***Campbell***. Contrary to the Opinion, the ***Campbell*** jurors were "correctly instructed . . . as to the process by which each juror could arrive at an individual conclusion that the correct answer to the inquiry on a special verdict form was 'yes,' the process by which each juror could arrive at an individual conclusion that the correct answer to the inquiry was 'no,' and the process by which the jury could properly render a collective 'yes' answer." *Id.* at 397. But "the trial court did not instruct the jurors as to how the jury could properly return a collective answer of 'no'—that is, by either unanimously agreeing that the correct answer was 'no' or by failing to reach unanimous

agreement on the question." *Id.* (emphasis added). In short, just like these jurors, the ***Campbell*** jurors had *legally correct* instructions, but were nonetheless confused by them. *Id*. ***Campbell*** controls.

The Opinion truncates the ***Campbell*** analysis. While ***Campbell*** does say that "the trial court need not further instruct the jury" about accurate jury instructions (*id*. at 402), it went on to make its crucial, dispositive holding that where, as here, no ambiguity was apparent when the instructions were given, but the jury's questions disclose an erroneous understanding of the law, it is incumbent upon the trial court to issue a corrective jury instruction (*id*.):

> However, **where a jury's question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction**. ***State v. Davenport***, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Here, **even if the ambiguity of the instructions given was not apparent at the time they were issued, the jury's question identified their deficiency**. Where the jury specifically asked whether it must be unanimous in order to return a "no" answer on the special verdicts and where the instructions, taken as a whole, did not properly inform the jury of the applicable law, **the trial court abused its discretion by not issuing a clarifying instruction**. [Emphases added.]

The appellate court contradicts its own decision in ***Campbell***.

The Opinion says that "Spokeo does not assign any error to any actual jury instruction." Op. at 9. *Of course not*: the pertinent jury

instructions correctly stated the law. As in ***Campbell***, any ambiguity was not apparent when they were given. The Opinion thus appears to suggest that parties must assign error to *correct* jury instructions. That is never required. RAP 10.3(g).

The Opinion says that Spokeo cited no "conflicting controlling law." Op. at 9. ***Campbell*** *is* the conflicting controlling law. It holds that where, as here, an ambiguity is first identified by jury questions indicating an erroneous understanding of the law, it is incumbent upon the trial court to issue a corrective instruction. 163 Wn. App. at 402. And to the extent that the appellate court erroneously believed that no conflicting controlling law exists, the result should have been that this case presents a question of first impression: where, as here, juror questions express obvious confusion regarding otherwise correct jury instructions, may a trial court simply leave the jury to guess at the correct law?

The answer should be no. This Court should grant review to resolve this conflict with a published decision of the Court of Appeals and to address this important issue.

C. The trial court's decision conflicted with a decision of this Court, but the Opinion affirmed on a different – and erroneous – ground that conflicts with other appellate decisions and raises an issue of substantial public import that this Court should determine. RAP 13.4(b)(2) & (4).

The trial court incorrectly determined that Spokeo waived its affirmative defense that in abruptly canceling Marketplace, Whitepages anticipatorily repudiated the advertising contracts. *See* BA 39-40. This ruling conflicted with this Court's holding in ***Mahoney*** that where, as here, a party raises an affirmative defense on summary judgment and the opposing party does not object, there is no waiver. *Id*. (citing ***Mahoney v. Tingley***, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975) (citing ***Joyce v. L.P. Steuart, Inc.***, 227 F.2d 407 (D.C. Cir. 1955)).

The appellate court first "assumed without deciding" that no waiver occurred. Op. at 9. But rather than reverse, the appellate court changed the subject, asking whether Spokeo was "entitled to" a jury instruction on this issue. Op. at 9-10. It held that Spokeo failed to prove that it was for two reasons: (1) Spokeo did not challenge the jury's verdict that Whitepages did not breach the agreement; and (2) Spokeo did not cite evidence that it was entitled to the defense. *Id*. Neither decision is consistent with the law or the record.

The appellate court's first conclusion is just an exercise in question-begging. *Of course* Spokeo did not challenge the jury's verdict: the jury was never instructed on Spokeo's theory of breach, ***anticipatory repudiation***. Without that instruction, Spokeo could not argue, and the jury could not conclude, that Whitepages ***anticipatorily*** breached the contract. The jury's verdict is the direct result of the trial court's "waiver" error causing a failure to instruct.

The Court's second conclusion simply usurps the jury's function. It is not up to an appellate court to resolve whether Whitepages anticipatorily breached the contract. That is a jury question. *See, e.g.*, ***VersusLaw, Inc. v. Stoel Rives, L.L.P.***, 127 Wn. App. 309, 321, 111 P.3d 866 (2005) ("anticipatory repudiation is [a question of] fact") (citing ***Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.***, 85 Wn. App. 354, 365, 933 P.2d 417 (1997) (same)); ***Wallace Real Estate Inv. v. Groves***, 72 Wn. App. 759, 772, 868 P.2d 149 (1994) ("A party's performance is excused when the other party repudiates the contract. Repudiation is a question of fact"). The appellate decision is in conflict with these appellate decisions. This Court should accept review and reverse.

CONCLUSION

It is particularly important that this Court consider the RCW 19.86.093 issue – a significant CPA statute that has so far evaded consideration by this Court. Until now, the appellate courts that have considered the statute have properly applied its plain language. The Opinion undermines that language and the Legislature's intent to substantially lower the burden to establish that unfair and deceptive acts affect the public interest in the context of a so-called "private dispute" involving unfair competition that injured numerous other parties and that both had and has the potential to injure many more. Resolving the other conflicts is also important. This Court should accept review under RAP 13.4(b) (1), (2) & (4).

RESPECTFULLY SUBMITTED this 4th day of June 2020.

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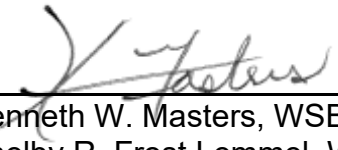

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APPENDIX
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APPENDIX A

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

SPOKEO, INC., Appellant. v. WHITEPAGES, INC. Respondent.	No. 78897-3-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — Spokeo primarily appeals the trial court's decision to award Whitepages' judgment as a matter of law notwithstanding a jury's verdict in its favor. Spokeo also challenges the trial court's decision not to answer certain jury questions and its refusal to give Spokeo's anticipatory repudiation instructions to the jury. Finally, Spokeo claims the trial court should not have allowed the jury to decide a spoliation issue, and it should have sanctioned Whitepages for a discovery violation.

Spokeo fails to show that substantial evidence supports the jury's verdict on its Consumer Protection Act (CPA) claim, or that it was entitled to an anticipatory repudiation jury instruction. The record shows the trial court did not abuse its discretion by refusing to answer some jury questions or by refusing to sanction Whitepages for alleged discovery violations. Finally, the trial court acted within its discretion by submitting a spoliation issue to the jury to decide. We affirm.

FACTS

Whitepages is a technology company that provides online information about people. It sold advertising spaces on its website and used an auction process to sell companies advertising space for a specified time. Some of the companies purchasing advertising space also provided online information about people such as names, phone numbers, addresses, and criminal backgrounds. The parties have referred to these companies as "endemic partners." Spokeo was one of these companies. When a customer arrived at Whitepages' website, and clicked on Spokeo's advertisement, the customer would then visit Spokeo's website. Spokeo would pay Whitepages for the click or "interaction."

Over time, Whitepages developed its own product for providing information about people similar to the product provided by some of the endemic partners. Whitepages notified its advertisers that it was testing this new product. Later, it informed the endemic partners, including Spokeo, that it would stop holding auctions. Spokeo considered Whitepages' actions a breach of contract. It refused to pay Whitepages' last invoice for February 2016 even though Spokeo received clicks and customer interactions from the Whitepages' website the whole month.

Spokeo sued Whitepages on April 6, 2016. It asserted claims for breach of contract and implied duties of good faith, violation of the Washington Consumer Protection Act (CPA), negligent misrepresentation, fraudulent inducement, statutory penalties, and injunctive relief. Whitepages responded by suing Spokeo for breach of contract for not paying its February 2016 invoice.

The jury found for Spokeo on the CPA claim, but found that Whitepages did not breach the contract, did not make any negligent misrepresentations, or commit fraud. It also found that Spokeo breached the contract.

After the trial, the trial court granted Whitepages' renewed request for judgment as a matter of law. It decided the "evidence and the reasonable inferences are legally insufficient to support the jury's verdict on Spokeo's CPA claim." The trial court awarded Whitepages' attorney fees based on Spokeo's contract breach and awarded Spokeo fees and costs for Whitepages' spoliation. Spokeo appeals.

ANALYSIS

Washington Consumer Protection Act Claim[1]

Spokeo challenges the trial court's decision under CR 50 to dismiss its CPA claim.

We review a trial court's CR 50 decision de novo.[2] A trial court properly grants a judgment notwithstanding the jury's verdict under CR 50 when "'viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.'"[3] "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the premise is true."[4]

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[1] Spokeo also claims the trial court's order denying Spokeo's motion for a new trial is void under RAP 7.2(e) because the trial court did not have the authority to decide it. Spokeo filed an appeal. RAP 7.2(e) states that: "If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." Because denying Spokeo a new trial would not "change a decision…being reviewed by the appellate court," the trial court had authority to enter this order.

[2] Davis v. Microsoft Corp., 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

[3] Davis, 149 Wn.2d at 531 (quoting Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

[4] Jenkins v. Weyerhaeuser Co., 143 Wn. App. 246, 254, 177 P.3d 180 (2008).

Spokeo claims the trial court "ignored the law of the case" and applied law different than stated in the court's instructions to the jury.

Contrary to Spokeo's position, a "court must follow Washington law, not jury instructions" when considering a motion for judgment as a matter of law.[5] This means that an appellate court looks to controlling case law, and not jury instructions, when reviewing a trial court's CR 50 decision.

The CPA declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[6] To prevail on a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.[7]

Unfair or Deceptive Act or Practice and Public Interest Impact

"Whether an action constitutes an unfair or deceptive practice is a question of law."[8] An act or practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public.[9] "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance."[10]

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[5] Kim v. Dean, 133 Wn. App. 338, 349, 135 P.3d 978 (2006) (quoting Hanson v. Ford Motor Co., 278 F.2d 586, 593 (8th Cir. 1960).
[6] RCW 19.86.020.
[7] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784–85, 719 P.2d 531 (1986).
[8] Columbia Physical Therapy, Inc., PS v. Benton Franklin Orthopedic Assocs., PLLC, 168 Wn.2d 421, 442, 228 P.3d 1260, 1270 (2010).
[9] State v. Pacific Health Ctr, Inc., 135 Wn. App. 149, 170, 143 P.3d 618 (2006).
[10] Holiday Resort Comty. Ass'n v. Echo Lake Assoc., LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006).

An act or practice is injurious to the public interest if it "(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons."[11] A plaintiff must show "not only that a defendant's practices affect the private plaintiff but that they also have the potential to affect the public interest."[12]

"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...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."[13] This means when a transaction essentially involves a private dispute, a party may have more difficulty showing that the public has an interest in the subject matter.[14] Here, Spokeo claims that because Whitepages injured it and the other endemic partners, "the evidence was more than sufficient to meet [the public interest] test." But, this evidence does not prove the public interest prong of the CPA claim. "Only acts that have the capacity to deceive a substantial portion of the public are actionable."[15]

Our Supreme Court has identified four factors to consider when analyzing public interest impact:

> "(1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal

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[11] RCW 19.86.093(3).
[12] Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (citing Hangman Ridge, 105 Wn.2d at 788; Lightfoot v. MacDonald, 86 Wn.2d 331, 335–36, 544 P.2d 88 (1976)).
[13] Hangman Ridge, 105 Wn.2d at 790–91 (citing Lightfoot, 86 Wn.2d at 334, and McRae v. Bolstad, 101 Wn.2d 161, 166, 676 P.2d 496 (1984)).
[14] Hangman Ridge, 105 Wn.2d at 790.
[15] Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 744, 935 P.2d 628 (1997) (citing Hangman Ridge, 105 Wn.2d at 785).

> bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the "consumer" and "private dispute" contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact."[16]

Whitepages' acts only affected Spokeo and the other endemic partners. These parties are sophisticated businesses and occupy equal bargaining positions.[17] And, while Whitepages committed the accused acts in the course of its business, it did not target its actions at the public. They were not likely to injure additional parties, unlike cases where the courts found the public interest prong satisfied.[18]

When an unfair or deceptive act only affects a select few in a niche market, as here, it does not affect "public interest."[19] "Significantly, conduct that is not directed at the public, but, rather, at a competitor, lacks the capacity to impact the public in general."[20]

Spokeo has not explained how Whitepages' actions did, or had the potential to, affect a large number of people, and it fails to show how Whitepages' conduct affected the public in any way. Because Spokeo fails to establish the public interest element of its CPA claim, no substantial evidence exists showing Whitepages violated the CPA.

Jury Questions

Spokeo claims the trial court should have answered two jury questions asking whether the jury must find all the elements in both independent negligent

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[16] Hangman Ridge, 105 Wn.2d at 790–91.
[17] Broten v. May, 49 Wn. App. 564, 571, 744 P.2d 1085 (1987).
[18] Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 847, 942 P.2d 1072 (1997), Stephens v. Omni Ins. Co., 138 Wn. App. 151, 178, 159 P.3d 10 (2007).
[19] Goodyear, 86 Wn. App. at 744-45.
[20] Evergreen Moneysource Mortg. Co. v. Shannon, 167 Wn. App. 242, 261, 274 P.3d 375 (2012) (citing Goodyear, 86 Wn. App. at 744).

misrepresentation instructions to find for Spokeo on the negligent misrepresentation claim.

The trial court has discretion to decide whether to give further instructions to a jury after deliberations begin.[21] An appellate court reviews for abuse of that discretion by a trial court's refusal to give an additional instruction.[22] When a jury instruction accurately states the law, the trial court need not provide further instructions.[23] The court has no duty to answer the jury's question.[24]

During deliberations, the jury asked two questions related to Spokeo's negligent misrepresentation claim involving jury instructions 30 and 32. Jury instruction 30 stated:

> Spokeo has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claims of negligent misrepresentation:
>
> (1) that Whitepages supplied information for the guidance of Spokeo in Spokeo's business transactions that was false;
> (2) that Whitepages knew or should have known that the information was supplied to guide Spokeo in business transactions;
> (3) that Whitepages was negligent in obtaining or communicating the false information;
> (4) that Spokeo relied on the false information;
> (5) that Spokeo's reliance on the false information was reasonable; and
> (6) that the false information proximately caused damages to Spokeo…

Jury instruction 32 stated:

> Spokeo has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation:
>
> (1) that Whitepages had a duty to disclose to Spokeo certain information;

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[21] State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988).
[22] A.C. v. Bellingham Sch. Dist., 125 Wn. App. 511, 516, 105 P.3d 400 (2004).
[23] Ng, 110 Wn.2d at 42–44; State v. Sublett, 156 Wn. App. 160, 184, 231 P.3d 231 (2010).
[24] State v. Langdon, 42 Wn. App. 715, 718, 713 P.2d 120, review denied, 105 Wn.2d 1013 (1986).

(2) that Whitepages did not disclose this information to Spokeo;
(3) that Whitepages was negligent in failing to disclose this information;
(4) that Plaintiff was damaged by the failure to disclose this information.

On February 20, 2018, the jury's first question asked was if it must "find [whether] all of the elements in both [i]nstructions are true to give a verdict for Spokeo?" The court replied, "Please read both instructions carefully and follow both instructions as applicable."

On February 22, 2018, the jury asked again for "clarification on whether one or both sets of criteria need to be satisfied in order for our verdict to be for Spokeo," stating that "[s]everal of our votes depend on this." The court instructed, "The jury instructions and the admitted exhibits contain all of the information that is relevant for purposes of reaching your verdict regarding the plaintiff[']s claims. Please read the instructions carefully and follow them as applicable." The jury found for Whitepages on Spokeo's negligent misrepresentation claim.

Spokeo analogizes this case to State v. Campbell.[25] There, the court held that the instructions "did not accurately inform the jury of the law."[26] Spokeo's analogy has a fatal flaw. The court's original instructions accurately informed the jury of the applicable law. Spokeo does not dispute the accuracy of these instructions. Instead, Spokeo contends the court should have clarified whether the jury had to find all elements described in each instruction to find for Spokeo on the negligent misrepresentation claim.

[25] 163 Wn. App. 394, 260 P.3d 235, rev'd on other grounds, No. 66732–7–I, 2012 WL 5897625 (Wash. Ct. App. Nov. 26, 2012).
[26] 163 Wn. App. at 401.

Because Spokeo does not assign any error to any actual jury instruction or cite to conflicting controlling law,[27] and because a trial court is not required to further instruct a jury about accurate jury instructions, the trial court did not abuse its discretion in failing to answer the jury's questions.[28]

Waiver of Affirmative Defense

Spokeo challenges the trial court's ruling that because Spokeo did not affirmatively plead the anticipatory repudiation defense it waived this defense. Where the parties do not dispute the facts, we review waiver as a question of law subject to de novo review.[29]

Assuming, without deciding, that Spokeo did not waive the anticipatory repudiation defense, it fails to show it was entitled to a jury instruction on this defense. For a party to be entitled to have the jury instructed about an affirmative defense, the record must include sufficient evidence "to permit a reasonable juror to conclude that the defendant has established the defense…by a preponderance of the evidence."[30]

First, Spokeo does not challenge the jury's finding that Whitepages did not breach the contract. So, we accept this unchallenged finding as true for purposes of this appeal.[31] A Whitepages breach would be required for Spokeo to succeed on the anticipatory repudiation affirmative defense. Since Spokeo accepts the finding that

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[27] State v. Logan, 102 Wn. App. 907, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).
[28] Spokeo also fails to provide any controlling case law on this issue in its 30-page reply brief.
[29] Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 440–41, 191 P.3d 879 (2008).
[30] State v. Trujillo, 75 Wn. App. 913, 917, 883 P.2d 329 (1994).
[31] State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Whitepages did not breach its contract with Spokeo, it cannot show that the court's refusal to instruct on anticipatory repudiation harmed it.

Also, Spokeo does not identify evidence in the record that shows it was entitled to the defense. It claims an anticipatory repudiation occurred because Whitepages charged Spokeo for clicks and impressions after it terminated the Marketplace Program. But, Spokeo does not dispute it continued receiving clicks after Whitepages discontinued Marketplace. So, Spokeo fails to explain how Whitepages anticipatorily repudiated the contract. The trial court did not abuse its discretion by refusing to give Spokeo's proposed anticipatory repudiation jury instructions.

Discovery Violations

Spokeo asserts the trial court should not have allowed the jury to decide a spoliation issue about evidence related to Whitepages' messaging platform "Yammer."

If a party commits spoliation, the fact finder may infer the evidence was harmful to the party's case.[32] After Spokeo sued Whitepages, both parties agreed on a Stipulated Protective Order and Confidentiality Agreement. Spokeo then asked the court to compel discovery. The trial judge granted this request in part by ordering Whitepages to "fully respond" to Spokeo's discovery requests "as modified."

Whitepages' employees used a Microsoft messaging platform called Yammer to communicate with each other. Whitepages ended its Yammer license agreement and Microsoft informed Whitepages that it deleted Whitepages' communications. Spokeo requested copies of "Yammer.com conversations from Whitepages' employees." In April

[32] Pier 67, Inc. v. King Cty, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

2017, Whitepages responded that it had no such documents in its possession, custody, or control, and because Whitepages' had discontinued use of Yammer, it could not produce documents.

After Spokeo made numerous requests about discovery, the court ordered Whitepages to "make the Yammer files available to a third-party vendor chosen by Plaintiff's counsel on an expedited basis." Although Whitepages only produced 31 Yammer messages, a third-party discovery vendor found 187 Yammer messages using the same search terms used by Whitepages, which was 156 more messages than Whitepages produced.

Spokeo claimed that Whitepages' withholding of the Yammer messages "substantially prejudiced" it. The trial court made the following find about this issue:

> "At a minimum, the Defendant's actions and omissions kept the native Yammer files out of the Plaintiff's reach during the discovery phase of this case, and prevented the Plaintiff from having any reasonable opportunity to evaluate the files and follow up on any leads that there may be in those files during discovery. The court finds that the serious investigative disadvantage that the Defendant's conduct caused the Plaintiff is substantial prejudice. As noted above, it is not possible to quantify precisely the amount of prejudice because it cannot be known how many files have been deleted, corrupted, fragmented, omitted, or otherwise lost. It also cannot be known where possible leads from any of the native Yammer files might have taken the Plaintiff during discovery, what additional written discovery requests the Plaintiff may have served, or what additional depositions the Plaintiff might have taken, or what additional relevant evidence the Plaintiff might have pursued and found."

When discussing sanctions, the court stated, "the Plaintiff is entitled to recover its reasonable costs, including its reasonable attorneys' fees and costs, incurred in litigating Plaintiff's CR 37(b) discovery violation, which necessarily includes the fees and costs incurred in litigating the spoliation issue." The trial court also ruled it would give the jury an instruction "allowing (but not requiring) the jury to infer that the Yammer.com account

was terminated for the reason that the Defendant was concerned that some information in the native Yammer files was (or might be) adverse to the Defendant's case" and an instruction "allowing (but not requiring) the jury to infer that, had the native Yammer files been turned over during discovery, the files would have contained relevant admissible evidence favorable to the Plaintiff's claims and harmful to Whitepages' defense."

Spokeo asks this court to hold that whenever a party fails to produce evidence, the court must draw a spoliation inference. But, it provides no authority to support its claim. Rather, the one case it does cite, Pier 67, Inc. v. King Cty., states that when a party destroys evidence, the only inference that the fact-finder may draw is that such evidence would be unfavorable to him.[33] This does not mean when a party destroys evidence the court is required to draw this inference. It simply means, that at most, a fact-finder may conclude the evidence is unfavorable. Spokeo does not support with any authority its claim that the trial court should not have allowed the jury to decide the spoliation issue. The trial court did not abuse its discretion by allowing the jury to decide what inference to draw.

PowerPoint Slides

Spokeo next claims the trial court should have sanctioned Whitepages when it learned it failed to disclose certain PowerPoint slides from a January 2015 Board meeting.

A trial court has discretion to impose sanctions for discovery violations and we will not reverse those decisions absent a showing of abuse of discretion.[34] A trial court

[33] 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).
[34] Henderson v. Tyrrell, 80 Wn. App. 592, 604, 910 P.2d 522 (1996) (citing to Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 283, 840 P.2d 860 (1992); Hampson v. Ramer, 47 Wn. App. 806, 813, 737 P.2d 298 (1987).

abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.[35] A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.[36]

To decide whether spoliation requires a sanction, courts weigh: "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party."[37]

Spokeo claims Whitepages "withheld 54 slides from the January 2015 PowerPoint." But, Spokeo does not cite where the record it shows this.[38] More significantly, Spokeo does not show that the nondisclosure of the PowerPoint slides prejudiced it.

The trial court found that the documents Spokeo claims Whitepages withheld were in Spokeo's possession, and Spokeo failed to complain about incompleteness when they were in their possession. The trial court stated, during a February 7, 2018 hearing, that it did not see any prejudice at that time and again at a February 12, 2018 hearing stated, "I don't think there is sufficient evidence of prejudice on the record." The court also noted that Whitepages made a prima facie case showing its failure to produce the missing slides was a mistake. Because Spokeo provides no basis for the assertion that the trial court abused its discretion in failing to impose sanctions, this claim fails.

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[35] Holbrook v. Weyerhaeuser Co., 118 Wn.2d 306, 315, 822 P.2d 271 (1992); Watson v. Maier, 64 Wn. App. 889, 896, 827 P.2d 311, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992).
[36] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 2460–61, 110 L. Ed. 2d 359 (1990).
[37] Henderson, 80 Wn. App at 607.
[38] RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Attorney Fees

Spokeo requests attorney fees and costs under the CPA claim. Because we affirm the dismissal of Spokeo's CPA claim, we deny its request for attorney fees. Whitepages also requests attorney fees and costs for "defending the verdicts on the breach of contract claims." Because Spokeo did not appeal the jury verdict on the breach of contract claim, we deny Whitepages' request for attorney fees.

CONCLUSION

We affirm. The record contains insufficient evidence to support the jury's verdict on Spokeo's CPA claim. Also, the trial court did not abuse its discretion by declining to respond to the jury's questions with additional instructions. Spokeo identifies no evidence in the record showing how Whitepages anticipatorily repudiated the contract. And, Spokeo fails to show the trial court abused its discretion by allowing the jury to decide what inference to draw from spoliation. Finally, Spokeo fails to show how the trial court abused its discretion in failing to sanction Whitepages.

Leach, J.

WE CONCUR:

Mann, C.J.

Appelwick, J.

APPENDIX B

No. 26.

An act or practice "affects the public interest" if the act or practice:

1. Injured other persons;

2. Had the capacity to injure other persons; or

3. Has the capacity to injure other persons.

APPENDIX C

Superior Court of Washington
County of King

Spokeo, Inc. Plaintiff/Petitioner vs. Whitepages, Inc. Defendant/Respondent	Cause No: 16-2-07970-9 SEA INQUIRY FROM THE JURY AND COURT'S RESPONSE (JYN)

JURY INQUIRY:

Jury Instructions No. 30 and 32 both list elements Spokeo must prove for their claim of negligent misrepresentation. Is it necessary to find all of the elements in both Instructions are true to give a verdict for Spokeo on their negligent misrepresentation claim? Or is it sufficient to find all of the elements on only one of the Instructions to be true?

Adam Fass
FOREPERSON

2/20/2018 1:46pm
DATE AND TIME

DATE AND TIME RECEIVED: _____

****DO NOT DESTROY- LEAVE IN JURY ROOM****

Superior Court of Washington
County of King

Spokeo, Inc. **Plaintiff/Petitioner** **vs.** **Whitepages, Inc.** **Defendant/Respondent**	**Cause No: 16-2-07970-9 SEA** **INQUIRY FROM THE JURY AND COURT'S RESPONSE (JYN)**

JURY INQUIRY:

In response to a previous question, you said we have all we need to determine the answer to 1(d)(1); however, page 36 presents one set of criteria for negligent misrepresentation and page 38 presents another set (but with no instructions after the criteria about forming a verdict, as is shown on page 36). We need clarification on whether one or both sets of criteria need to be satisfied in order for our verdict to be for Spokeo. Several of our votes depend on this, and we may not be able to reach an agreement without further clarification, for fear that we're not all even answering the same question.

Adam Fass
FOREPERSON

2/22/2018 11:10am
DATE AND TIME

DATE AND TIME RECEIVED: _____

****DO NOT DESTROY- LEAVE IN JURY ROOM****

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **PETITION FOR REVIEW** on the 4th day of June 2020 as follows:

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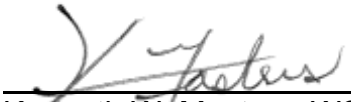

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June 04, 2020 - 3:36 PM

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