No. 997136

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VERNICE ZANCO AND FRED ZANCO, d.b.a. ZANCO PROPERTIES, and UNIVERSITY SOUTH AND EAST, LLC,

Petitioners,
vs.

PAUL LEWIS, Respondent.

PAUL LEWIS' ANSWER OPPOSING PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Paul Lewis, Respondent, asks this Court to decline review of the Court of Appeals decision designated in Part B of this motion.

B. COURT OF APPEALS DECISION

On March 30, 2021, the Division III Court of Appeals reversed the Spokane Superior Court's ruling dismissing Mr. Lewis' CPA claim per CR 12(b)(6) for failure to state a claim, where his former landlord committed an unfair and deceptive trade practice by unilaterally imposing on, and collecting from him, a $200.00 regulatory fine for an allegedly defective smoke detector device that his landlord discovered in his apartment, after Mr. Lewis moved out.

In so holding, the Court of Appeals specifically analyzed this Court's ruling in *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1985), and tailored its opinion to fit squarely within *Schwab*'s parameters. The Court of Appeals reasoned "we read Schwab to say that when the RLTA provides a set of rights and remedies, those rights and remedies operate to the exclusion of the CPA. This reading is consistent with the brief description of *Schwab* set forth in *Panag v. Farmers Insurance Company of Washington*: 'In *Schwab*, this court declined to allow CPA actions based on violations of the [RLTA]. This court considered it inappropriate to extend the CPA to landlord-tenant disputes in view of the detailed

nature of the RLTA, which includes an array of specific remedies."' (Opinion at pg. 5 citing 166 Wn.2d at 55 n.12 (2009)).

The Court of Appeals then analyze the complained-of action in the case at bar. It found that the authority to assert the statutory fine at issue in this matter under RCW 43.44.110 lies solely with a fire official. (Opinion at page 6). The Court of Appeals further found that there was no authority in the RLTA for a landlord to assess an illegal regulatory fine. Opinion page 7. The Court of Appeals concluded that there was no remedy provided in the RLTA for Zanco's assessment and collection of the illegal fine under RCW 59.18.130-140, RCW 59.18.280, and/or RCW 59.18.230(3).

C. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals decision that Mr. Lewis' stated a viable Consumer Protection Act ("CPA") claim against his former landlord for its imposition and collection of a $200.00 regulatory fine conflicts with this Court's decision in *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1985).

D. STATEMENT OF THE CASE

As presented in his Amended Complaint, on or about September 10, 2014, Respondent Paul Lewis agreed to rent an apartment at "University Apartments S&E" from Respondent Vernice Zanco, Fred

Zanco, d.b.a. Zanco Properties and University South and East, LLC (collectively "Zanco"). (CP 3; CP 32). The parties' lease was a term tenancy running from September 10, 2014, through September 30, 2015, with tenancy continuing on a month-to-month basis thereafter. (CP 32).

To occupy the premises, Mr. Lewis was required to pay monthly rent of $495.00. (CP 4; CP 32). He was also required to pay a "Security, Damage, and Cleaning deposit" of $200.00, plus a non-refundable fee of $150.00 for "professional carpet cleaning and administrative fees when the lease was signed." (CP 4; CP 32).

In pertinent parts, the parties' lease and addendums provided:

> 1. "SMOKE DETECTORS: this dwelling has been equipped with smoke detector device(s) in accordance with RCW 48.48.140. Devices have been checked by the Landlord or agent and found to be in good working order." (CP 33).
>
> 2. An addendum to the lease entitled "ZANCO PROPERTIES – HOUSE RULES OF OCCUPANCY" provided: "The following rules are for the benefit and safety of you and your neighbors. Residents are required by law to abide by all given requirements in the lease agreement rules of occupancy (RCW 59.18.140). Disregarding these requirements constitutes a substantial and material breach of tenant duties and is grounds for termination of tenancy." (CP 34).
>
> 3. Rule 10 of the House Rules of Occupancy Addendum titled "SMOKE DETECTORS" provided: "a) Smoke detectors are in operation upon move-in. From that point on they are resident's responsibility to maintain. If smoke detectors are not maintained or are dismantled, the Resident could be held liable for a fine of up to $200.00 per RCW 59.18.130(7) and RCW 43.44.110." (CP 34).
>
> 4. The house rules also included the following provision: "In entering into this lease/agreement I/we also agree that the rules are an integral part of said lease/agreement. I/we agree that a

> violation of any of these rules shall constitute a substantial and material breach of the lease agreement and may be basis for cancellation of agreement or may give rise to damages against me." (CP 34).

On July 29, 2016, Mr. Lewis terminated his tenancy. (CP 4). Thereafter, on August 4, 2016, Zanco sent Mr. Lewis a Deposit Disposition and Property Condition Report demanding he pay an additional $699.90 for cleaning and damages, for a total due from Lewis of $494.90, after subtracting Mr. Lewis's $200.00 deposit. (CP 4; CP 53). Among the charges was $200.00 for "Smoke/CO detector – smoke not working." (CP 5; CP 54).

In a letter dated August 18, 2016, Mr. Lewis disputed Zanco's charges, including the unilaterally imposed fine for the smoke detector. (CP 56). Thereafter, Zanco referred Mr. Lewis's alleged debt to a collection agency. (CP 5). Because Zanco's third-party collection action threatened Mr. Lewis' continuing housing assistance program support, he capitulated to Zanco's demand for a revised payment of $510.00, under protest. (CP 5).

On September 28, 2017, after paying Zanco under protest the amount it demanded, Mr. Lewis filed suit against Zanco on behalf of himself and all others similarly situated. (CP 1). Mr. Lewis alleged that Zanco violated the CPA, RCW 19.86, *et seq*., by imposing and collecting

regulatory agency "fines" from its former tenants' deposit trust monies and other sources. (CP 6-7). Mr. Lewis prayed for actual and treble damages, reasonable attorney's fees and costs, and declaratory relief holding that the unauthorized administrative fines imposed by Zanco are not legal, valid, or collectible. (CP 8).

Zanco filed its Motion to Dismiss or, alternatively, for Summary Judgment, on January 18, 2019. (CP 9). Zanco's Motion sought dismissal on three grounds: 1) *Schwab* precluded Mr. Lewis' CPA claim as the dispute involved matters within the purview of the RLTA; 2) The RCW 4.16.115 statute of limitation applied to the action and time-barred Mr. Lewis' claim; and 3) Zanco was authorized by RCW 43.44.110 to impose a $200.00 fine against Mr. Lewis' for his allegedly defective smoke detector. (CP 13).

Following oral argument, the Spokane Superior Court entered an Order dismissing Mr. Lewis' CPA claim on February 12, 2020. (CP 77). The lower court determined, as a matter of law, that Mr. Lewis's issue implicated the RLTA, "which includes disputes regarding imposing a fine under RCW 59.18.130(7), which incorporates RCW 43.44.110; a proper accounting and return of a tenant's deposit under RCW 59.18.280; and prohibited acts under RCW 59.18.230(3)." (CP 80). The lower court rejected Zanco's two other dismissal arguments, finding that only fire

officials could assess the $200.00 fine under RCW 43.44.110 and that the RCW 4.16.115 statute of limitation was not applicable to Mr. Lewis' CPA claim. (CP 80-81).

Mr. Lewis timely appealed the Spokane Superior Court's dismissal of. On April 29, 2021, the Court of Appeals, in a published decision, reversed the Spokane Superior Court, holding that Zanco's conduct in imposing the fine exceeded the generally comprehensive ambit of the RLTA, and that *Schwab*'s does not apply when the RLTA's specified rights and remedies are not implicated. (Opinion p. 1, 8).

E. ARGUMENT

Division III's decision does not implicate RAP 13.4(b)(1) because it does not conflict with this Court's decision in *Scwhab*. The Court of Appeals correctly decided the issue.

1. The Court of Appeals' opinion does not conflict with this Court's decision in State v. Schwab, 103 Wn.2d 542, 693 P.2d 108 (1985).

By its terms, *Schwab* applies only to "violations" of the RLTA that carry "specific remedies." The first line of the *Schwab* opinion describes the specific (and only) issue addressed by the Court in that case: "whether violations of the Residential Landlord-Act of 1973 come under the Consumer Protection Act." *Id*. at 543. In concluding they do not, the

Court held that "violations of [the RLTA] do not also constitute violations of the Consumer Protection Act." *Id*. at 545. Violations cannot be double counted in the RLTA context, according to *Schwab*, because where the RLTA spells out "the respective rights and duties of residential tenants and landlords . . . in great detail," and also provides "specific remedies for . . . violations thereof," the proper mechanism to enforce those specific rights and duties is the RLTA. *Id*. at 550. By its own terms, the *Schwab* exception is limited to residential rental practices within the "express purview of the [RLTA]," and for which the RLTA delineates "specific rights, duties, and remedies." *Id*. at 545.

In Zanco's argument to both this Court (Pet.'s Brief at p. 7 quoting *Schwab*, 103 Wn.2d at 545) and the lower court (Resp'ts Br. at 4 quoting the same) it relies on the selective language of the *Schwab* decision to extend *Schwab*'s CPA exemption to all "[r]esidential landlord-tenant problems." In doing so, Zanco ignores the remainder of that sentence in *Schwab* which limits the CPA exemption to matters within the "express purview" of the RLTA, and to "violations of [the RLTA] . . . ." *Id*.

Adopting Zanco's proffered holding would provide blanket CPA immunity for landlords with unfair or unscrupulous business practices so long as they structured their practices to avoid the discrete terms of the RLTA. In addition to producing this absurd result, Zanco's approach

would be at odds with the Legislature's mandate and this Court's repeated recognition that the CPA must be applied and construed liberally, and this Court's instruction that any exemptions to the CPA's application be confined narrowly, as discussed supra in section 2 below.

As Division III correctly held, where an allegedly unfair or deceptive business practices occurs in the residential housing context, but is not addressed directly by the RLTA, *Schwab* does not apply, and the CPA remains available as an enforcement mechanism. (RA A-1). Here, Division III's decision is in harmony with *Schwab*. It allows injured tenants, former tenants, or individuals to raise a CPA cause of action when the RLTA has not otherwise spoken to the offending conduct and provided a remedy therein.

2. The Court of Appeals' opinion is consistent with the Legislature's mandate and this Court's repeated recognition thereof that the CPA be applied and construed liberally, and this Court's instruction that any exemptions to the CPA's application be confined narrowly.

The Legislature drafted the CPA to reach every person who commits unfair or deceptive acts or practices and to provide sufficient flexibility to reach conduct that inventively evades regulation. *Demopolis*, 103 Wn.2d at 61; *Panag*, 166 Wn.2d at 49. In bringing CPA claims, "[p]rivate citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and

commerce." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007) citing *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976). Given the availability of actual damages, attorneys fees, and treble damages available under the CPA, such actions (especially in the form of class actions), are vital to bringing claims that involve nominal damages. *See Id*. at 853-854.

The Legislature also directed the CPA to be liberally construed so that its beneficial purposes may be served. *Demopolis*, 103 Wn.2d at 61; RCW 19.86.920 ("to this end this act shall be liberally construed that its beneficial purposes may be served."). As this Court has remarked frequently in its CPA jurisprudence, "[t]here is no limit to human inventiveness" in the field of "unfair practices." *See, e.g., Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786, 295 P.3d 1179, 1187 (2013) (quoting *Panag*, 166 Wn.2d at 48). "even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." *Id*. As such, the CPA "shows a carefully drafted attempt to bring within its reach every person who conducts unfair or deceptive acts or practices in any trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163, 168 (1984). To carry out the CPA's legislative intent, this Court has instructed courts to willingly and liberally include unfair and deceptive conduct within the reach of the CPA. *Panag,* 166

Wn.2d at 49 (citing *see Fed. Trade Comm'n v. R.F. Keppel & Bro.,* 291 U.S. 304, 308, 54 S. Ct. 423, 78 L. Ed. 814 (1934)).

Consequently, in addition to legislatively designated activities, there is an endless multitude of business activities which have been judicially included within the ambit of the CPA. *See, e.g., Ethridge v. Hwang*, 105 Wn. App. 447, 457, 20 P.3d 958 (2001), mobile home landlords; *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, 134 Wn. App. 210, 135 P.3d 499 (2006), Mobile home distributors; *Panag,* 166 Wn.2d 27, collection of insurance subrogation claims; *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984), building contractors; *McRae v. Bolstad*, 101 Wn.2d 161, 676 P.2d 496 (1984), real estate sales; *Ulberg v. Seattle Bonded, Inc*., 28 Wn. App. 762, 626 P.2d 522 (1981), collection agencies; *Tallmadge v. Aurora Chrysler Plymouth, Inc.,* 25 Wn. App. 90, 605 P.2d 1275 (1979), automobile sales; *Demopolis*, 103 Wn.2d 52, law practice; *Salois v. Mutual of Omaha Ins. Co*., 90 Wn.2d 355, 581 P.2d 1349 (1978), insurance business.

Finally, to give further effect to the requirement of liberal construction, this Court has explicitly instructed that CPA exceptions must be "narrowly confined." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364, 1370 (1991).

Specifically in the residential housing content, consistent with the Legislature's intent that the CPA address the full scope of unfair or deceptive business practices, the Attorney General of Washington has brought CPA claims against residential housing providers where the specific landlord conduct at issue is not directly addressed or redressed by the RLTA. Recently, for example, the Washington AG has brought claims against residential housing providers for violations of emergency proclamations enacted in response to the COVID-19 pandemic, where housing providers used unfair and deceptive rent-collection tactics against economically distressed tenants during a public health and economic emergency. *See* Civil Rights Division Cases, "Housing" Sub-Heading, Wash. State Office of the Att'y Gen., https://www.atg.wa.gov/cases (case entries and 15 links to complaints in *State v. JRK Residential Grp., Inc*., Case No. 20-2-05933-7 (Pierce Cnty. Super. Ct., filed Apr. 20, 2020) and *State v. Whitewater Creek, Inc.,* Case No. 20-2-02271-32 (Spokane Cnty. Super. Ct., filed Aug. 20, 2020)).

Schwab's CPA prohibition was not intended to encompass all activity that has some connection, however attenuated, to a rental property. There must be a limit. For example, If a landlord employs a "bait-and-switch advertising scheme" a prospective tenant should be allowed to pursue recourse under the CPA. *See State v. Ralph Williams'*

North West Chrysler Plymouth, 87 Wn.2d 298, 306 553 P.2d 423 (1976) (finding that bait-and-switch advertising is actionable under the CPA). If a landlord is taking application monies from several prospective tenants with no intention of renting out the property, there should be recourse under the CPA. If a person is pretending to be a landlord and is renting out a property to multiple prospective tenants, only to discover later that the "landlord" does not actually own or manage the property, there should be recourse under the CPA. Or here, where a former landlord, unapologetically assesses and collects $200.00 regulatory fines without any legal authority to do so, Mr. Lewis and other tenant victims should have recourse under the CPA.

Here, the Court of Appeals found that "[w]hen the RLTA's rights and remedies are not at issue" there is no basis under *Schwab* or otherwise to bar CPA claims. (Pg. 1). Specifically, it found that Zanco's act of unilaterally assessing a $200.00 fire code violation for its own profit did just that, because it "reached outside the comprehensive ambit of the RLTA." (Pg. 8). The Court of Appeals' decision was wholly consistent with *Schwab* and the CPA exemption it created. Further, its decision was in harmony with the CPA's legislative mandate and this Court's repeated recognition that the act be liberally construed to willingly and liberally include unfair and deceptive conduct within the reach of the CPA. And

finally, its decision was in line with this Court's instruction that any exemption to CPA applicability be narrowly confined.

F. CONCLUSION

This Court should decline review for the reasons indicated above, affirming that the Court of Appeals' decision does not conflict with tis Court's holding in *Schwab*. The Court of Appeals was correct in finding that when the complained-of conduct is not specifically afforded a a right and a remedy under the RLTA, *Schwab* does not preclude an action under the CPA.

DATED this 1st day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the **1st day of June, 2021**, at Spokane, Washington, I caused to be served the foregoing document(s), on the following person(s) and/or entity(ies) in the manner indicated:

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DATED this 1st day of June, 2021.

s/ *Katie Grace*
Katie Grace
Paralegal

KIRK D. MILLER, P.S.

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