101687-5

NO. 82725-1

Court of Appeals, Division I
of the State of Washington

SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Petitioner,

v.

STARKIST COMPANY, et al.,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

In an opinion that directly conflicts with decisions of this Court, the Court of Appeals mistakenly conflated the trial court's discretion to award restitution for a price-fixing conspiracy with the related but separate question of the liability of the conspiracy's participants.

StarKist, the leading brand in the U.S. packaged tuna market, pled guilty to a federal felony charge for conspiring to fix the price of packaged tuna in violation of the Sherman Act, 15 U.S.C. § 1. StarKist admitted conspiring with its largest competitors, Bumble Bee and Chicken of the Sea, to fix the price of packaged tuna sold throughout the United States and in Washington. Together, StarKist and its coconspirators command over 80 percent of the U.S. packaged tuna market and their illegal conspiracy inflated the prices consumers paid for this staple food.

The State commenced an action for violation of the Consumer Protection Act ("CPA"), RCW 19.86.030, on behalf of Washington consumers who overpaid for tuna because of this

price-fixing conspiracy. The trial court twice granted partial summary judgment for the State, first finding StarKist liable for price fixing for the period of its federal guilty plea, and next finding StarKist jointly and severally liable for the wrongful acts of its coconspirators, Bumble Bee and Chicken of the Sea. StarKist sought, and the Court of Appeals granted, interlocutory discretionary review of the summary judgment order on its joint and several liability.

The Court of Appeals properly held that the trial court has the authority to hold StarKist liable for the actions of its coconspirators, rejecting StarKist's arguments that joint and several liability cannot apply in an equitable action for restitution under the CPA. However, the court erroneously held that imposing joint and several liability on a conspirator for all of the acts of its coconspirators is discretionary and does not apply as a matter of law. It reached that conclusion despite StarKist's participation in the conspiracy having been established as a matter of law, and reversed the trial court's summary judgment

order because it "did not represent an exercise of the trial court's discretion." Compounding the error, the Court of Appeals conflated liability with remedy, remanding to the trial court "to allow it to determine, in the exercise of discretion, the amount of restitution it deems necessary," when the trial court's order concerned only liability, not restitution.

Joint and several liability for conspiracies is well-settled under Washington law and is a fundamental element of federal antitrust law on which the CPA's antitrust provisions are based. The Court of Appeals' decision that such liability is discretionary is in direct conflict with this Court's decisions that the liability of conspirators is joint and several as a matter of law, and is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1) & (b)(4). This Court should accept review, reverse the Court of Appeals, and confirm that where participation in a conspiracy is established as a matter of law, the liability of conspirators is joint and several.

II. IDENTITY OF PETITIONER

Petitioner is the State of Washington.

III. COURT OF APPEALS' DECISION

The State seeks discretionary review of the January 3, 2023 decision of the Court of Appeals, Division I, reversing the trial court's summary judgment order on StarKist's joint and several liability for the wrongful acts of its coconspirators, Bumble Bee and Chicken of the Sea. (Attached as Appendix A).

IV. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling that joint and several liability is a matter of the trial court's discretion where a conspirator's participation in a price-fixing conspiracy is established as a matter of law.

V. STATEMENT OF THE CASE

A. StarKist Pled Guilty to a Criminal Price-Fixing Charge For Its Tuna Price-Fixing Conspiracy

In 2018, StarKist pled guilty to a federal criminal charge for violating the Sherman Antitrust Act, 15 U.S.C. § 1. CP 427-45. As part of its plea, StarKist admitted that from "at

least as early as November 2011 and continuing through at least as late as December 2013," it "participated in a conspiracy among major packaged-seafood-producing firms, the primary purpose of which was to fix, raise, and maintain the prices of packaged seafood sold in the United States." CP 429-30.

Bumble Bee had previously pled guilty and, as part of its plea, admitted participating in the price-fixing conspiracy from "at least as early as the first quarter of 2011 and continuing through at least the last quarter of 2013." CP 396-97. Chicken of the Sea also admitted its participation in the conspiracy as part of receiving a grant of conditional leniency from the U.S. Department of Justice for corporations that admit their cartel activity and cooperate in its investigations. CP 138, 149. Chicken of the Sea later reached a similar agreement to cooperate with the State, entering into a consent decree providing for injunctive relief, monetary relief, and cooperation with the State's investigation and lawsuit against its coconspirators. CP 447-62. Chicken of the Sea detailed its cartel activities in federal civil

litigation arising from the same conspiracy, including that "as early as November 2011" there was agreement among Chicken of the Sea, Bumble Bee, and StarKist on the "timing of list price increase for branded tuna products." CP 389.

B. StarKist's Participation in the Tuna Price-Fixing Conspiracy Is Established as a Matter of Law

In June 2020, the State sued StarKist, StarKist's parent company Dongwon Industries Co. Ltd., and former Bumble Bee CEO Christopher Lischewski, alleging price fixing in violation of RCW 19.86.030, which prohibits every contract, combination, or conspiracy in restraint of trade or commerce. CP 1-53. Bumble Bee had commenced Chapter 11 bankruptcy proceedings in late 2019 and was therefore not included in the State's suit. CP 414. The State moved for partial summary judgment on StarKist's liability for price fixing in violation of the CPA for the same period as its federal guilty plea. CP 68-86. In February 2021, the Superior Court granted summary judgment on StarKist's liability under RCW 19.86.030. CP 106-108.

The State next moved for partial summary judgment on StarKist's joint and several liability for the wrongful acts of its coconspirators Bumble Bee and Chicken of the Sea for the period all three admitted participating in the conspiracy. CP 118-131. The trial court granted summary judgment, ordering that "StarKist is jointly and severally liable for the harm caused by its co-conspirators Bumble Bee and Chicken of the Sea as a result of the price-fixing conspiracy." CP 314-15. The order addressed only the legal question of StarKist's joint and several liability and did not address restitution. *Id.* The trial court did not, as the Court of Appeals said, "h[o]ld StarKist liable for the conspiracy's profits." *StarKist Co. v. State*, No. 82725-1, slip op. at 17 (Wash. Ct. App. Jan. 3, 2023). Restitution was not before Court of Appeals or trial court; neither the summary judgment order, nor the motion it granted, mentions profits and the trial court did not enter any order about the measure or amount of any restitution it may ultimately award after this case proceeds to trial. CP 314-15.

C. The Court of Appeals Granted Discretionary Review and Reversed the Trial Court's Ruling on Joint and Several Liability

StarKist sought interlocutory, discretionary review of the trial court's summary judgment order on StarKist's joint and several liability. CP 319-23. The Court of Appeals accepted review and reversed the trial court. *StarKist Co.*, slip op. at 1, 4. StarKist did not challenge the first summary judgment order on its liability for violating RCW 19.86.030. *Id.,* slip op. at 5.

The Court of Appeals explained its reversal of the joint and several liability ruling, "not because, as StarKist contends, it can be liable only for its own profits gained through the conspiracy, but because RCW 19.86.080 does not mandate joint and several liability." *Id.,* slip op. at 1. Because the statute "confers discretion on the trial court to determine what judgment 'may be necessary' to restore to consumers" money acquired by a conspiracy, the Court of Appeals concluded that the trial court "may impute to one conspirator the actions of all coconspirators" but is not required to do so. *Id.,* slip op. at 1-2. The Court of

Appeals further held that the trial court "may order StarKist to pay an amount equal to all consumer losses from the entire conspiracy if the court deems it necessary to do so" but that RCW 19.86.080 does not mandate joint and several liability. *Id.,* slip op. at 4.

The Court of Appeals acknowledged that StarKist's participation in the conspiracy is established as a matter of law. *Id.,* slip op. at 3. "There is no dispute that from November 2011 until December 2013, StarKist engaged in an unlawful conspiracy with Chicken of the Sea and Bumble Bee to fix the price of packaged tuna in Washington." *Id.,* slip op. at 5. The court affirmed it is "undisputed that StarKist conspired with Bumble Bee and [Chicken of the Sea] in a price fixing scheme," that StarKist had pled guilty in federal court to being a member of the conspiracy, and that its participation in a criminal partnership with Bumble Bee and Chicken of the Sea has been established as a matter of law. *Id.,* slip op. at 17.

Notwithstanding StarKist's undisputed liability as a price-fixing conspirator as a matter of law, the Court of Appeals concluded that StarKist is not jointly and severally liable for its coconspirators as a matter of law. Instead, the court held that the trial court has discretion to impose such liability, or to limit StarKist's liability to the extent of its participation in the conspiracy. *Id.*

VI. ARGUMENT

The Court of Appeals' holding is in direct conflict with decisions of this Court, which require joint and several liability as a matter of law for conspirators, and review is appropriate pursuant to RAP 13.4(b)(1). The decision also involves an issue of substantial public interest that should be determined by this Court and is reviewable pursuant to RAP 13.4(b)(4).

A. The Decision of the Court of Appeals Conflicts With Supreme Court Precedent and Review Is Proper Under RAP 13.4(b)(1)

1. It is well-established under Washington law that the liability of conspirators is joint and several

For decades, this Court has repeatedly held that "[e]very person who enters into a conspiracy, no matter whether at its beginning or at a later stage of its progress, *is in law a party to every act of the conspirators, and is liable for all of the acts done* in pursuance of the conspiracy in the same manner that they would be had they been a party to all of the wrongful acts." *Sears v. Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Loc. No. 524*, 8 Wn.2d 447, 454, 112 P.2d 850 (1941) (emphasis added) (citing *Eyak River Packing Co. v. Huglen*, 143 Wn. 229, 234, 255 P. 123, *on reh'g,* 143 Wn. 229, 257 P. 638 (1927)); *see State ex rel. Woodworth & Cornell v. Superior Ct. for King Cnty.*, 9 Wn.2d 37, 41, 113 P.2d 527 (1941) ("Defendants were charged with civil conspiracy, and are jointly and severally liable. The action may be maintained against any one or all.").

Consistent with this authority, this Court held in *Lyle v. Haskins* that, having concluded that a conspiracy existed, "the liability of the conspirators is joint and several." 24 Wn.2d 883, 900, 168 P.2d 797 (1946) (citing 11 Am. Jur. § 45). "Since the liability of the conspirators is joint and several, an[] action may be brought against only one of the conspirators, or plaintiff may, at his option, join all the conspirators as defendants in one action." 24 Wn.2d at 900.

In that case, Lyle purchased a sawmill and lumber business from Haskins, and then Haskins conspired with his son and other business partners to operate a competing sawmill business in violation of the sales contract with Lyle. *Id.* at 885-86. This Court affirmed the judgment and injunction entered by the trial court against Haskins, his son, and their business partners. *Id.* at 909. "Appellants Johnson, entering into the conspiracy after it was formed between Harold Haskins, Perkins and Robert Haskins, became liable for all acts committed by any

of the other parties, either before or after their entrance, in furtherance of the common design." *Id.* at 900.

Subsequent Washington courts have followed the bedrock principle in *Lyle* that the liability of conspirators is joint and several. *See Sterling Bus. Forms, Inc. v. Thorpe*, 82 Wn. App. 446, 454, 918 P.2d 531 (1996) (citing *Lyle*, 24 Wn.2d at 899) ("The liability of conspirators is joint and several. That is, each is liable for all acts committed by any of the other parties, either before or after their entrance, in furtherance of the common design."); *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc.*, 114 Wn. App. 151, 161, 52 P.3d 30 (2002), *as corrected* (Sept. 23, 2002) ("As his co-conspirator, Caledonian is jointly and severally liable for the damages resulting from his conduct.").

This Court's precedent is consistent with longstanding federal authority that antitrust coconspirators are jointly and severally liable. *See State of Wash. v. Am. Pipe & Const. Co.*, 280 F. Supp. 802, 804-05 (W.D. Wash. 1968) (citing federal

cases from across the nation) (explaining that "the fact of participation in the conspiracy" makes all coconspirators jointly and severally liable). When competitors conspire, "the action of any of the conspirators to restrain or monopolize trade is, in law, the action of all" and they are all "jointly liable for the acts of their co-conspirators." *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54, 60 S. Ct. 811, 84 L. Ed. 1129 (1940); *Am. Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1944), *aff'd*, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)). Courts "apply the well-established principle that 'a conspiracy (is) not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'" *Beltz,* 620 F.2d at 1366 (citing *United States v. Patten*, 226 U.S. 525, 544, 33 S. Ct. 141, 57 L. Ed. 333 (1913)). A conspirator is liable for the acts of all members of the conspiracy regardless of the nature of its own actions, and participation "in every detail in the execution of the conspiracy

is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result." *Beltz,* 620 F.2d at 1367 (citation omitted).

2. The Court of Appeals' decision is in direct conflict with decisions of this Court

The Court of Appeals' reversal of the trial court's ruling is in direct conflict with this Court's holdings on joint and several liability for conspirators. The Court of Appeals recognized that under "well-established Washington common law, a conspiracy is a single enterprise for which all coconspirators are responsible." *StarKist Co.*, slip op. at 8. It went on to conclude that the trial court's authority to restore money to consumers under RCW 19.86.080 "included the pre-existing power under common law to hold one conspirator liable for all of the acts done in pursuance of the conspiracy, even if they were not a party to all of the wrongful acts." *Id.*, slip op. at 13. The court cited *Lyle*, where this Court "stated that 'the liability of the conspirators is joint and several.'" *Id.*, slip op. at 12 (citing 24 Wn.2d at 900).

Yet despite its citation to this authority, the Court of Appeals did not follow it

The Court of Appeals' conclusion that the trial court "has the discretion to decide that StarKist should be liable for the full amount of the conspiracy's illegal gains but it also has the discretion to tie StarKist's liability to the extent of its participation" in the conspiracy, *Id.*, slip op. at 17, conflates liability with remedy in direct conflict with this Court's precedent that the liability of conspirators is joint and several. The Court of Appeals erred when it equated the trial court's discretion to determine the amount of restitution after liability is established with the initial, separate issue of the extent of StarKist's liability. In other words, the court put the cart before the horse. Liability and remedy are distinct determinations, and the trial court's discretion to award restitution under the CPA is separate from the joint and several liability of conspirators as a matter of law pursuant to this Court's decisions. Whatever amount of restitution the trial court may ultimately award in any

judgment, as a conspirator, StarKist is jointly and severally liable for it under Washington law.

The Court of Appeals' error is evident from its statement at the outset of its decision that RCW 19.86.080 "confers discretion on the trial court to determine what judgment 'may be necessary'" to restore money to consumers, but the statute "does not mandate joint and several liability." *Id.*, slip op. at 1. But it is not the CPA that imposes joint and several liability—it is the Washington common law of conspiracy and decisions of this Court that mandate joint and several liability for conspirators.

The Legislature did not derogate the common law of joint and several liability for conspirators in enacting the CPA, and that common law controls. Nothing in the CPA's text precludes joint and several liability or conveys a legislative intent to deviate from the common law. There "must be clear evidence of the legislature's intent to deviate from the common law, not clear evidence to preserve it." *State v. Kurtz*, 178 Wn.2d 466, 477, 309 P.3d 472 (2013). Statutes "will not be construed in derogation of

the common law absent express legislative intent to change the law." *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008).

The Court of Appeals' conclusion that the degree of liability is discretionary where participation in a conspiracy has been established as a matter of law directly conflicts with this Court's decisions that the liability of conspirators is joint and several and that every person who enters into a conspiracy "is in law a party to every act of the conspirators." *See Sears*, 8 Wn.2d 447 at 452 (quoting *Eyak River Packing Co.*, 143 Wn. at 234); *Lyle*, 24 Wn.2d at 900. To permit the trial court to decline to hold StarKist liable for the acts of its coconspirators, and to instead limit its liability to "the extent of its participation" in the conspiracy, deviates from controlling Washington law. This Court should therefore accept discretionary review pursuant to RAP 13.4(b)(1) and reverse the Court of Appeals' ruling.

B. Joint and Several Liability for Conspirators Is An Issue of Substantial Public Interest and Review Is Appropriate Under RAP 13.4(b)(4)

Joint and several liability for conspiracies in restraint of trade is also an issue of substantial public interest, warranting Supreme Court review. Joint and several liability as a component of CPA enforcement helps protect consumers and promote fair competition in Washington both as a deterrent to discourage companies from violating the CPA and as an important means of holding those who do violate it fully accountable. If conspirators are not liable for the wrongful acts of their coconspirators as a matter of law once participation in a conspiracy is established, this undermines the CPA enforcement scheme and its protections for Washington consumers. And it conflicts with the Legislature's stated intent that the CPA "be liberally construed that its beneficial purposes may be served." RCW 19.86.920. The purpose of the CPA is to "protect the public and foster fair and honest competition." RCW 19.86.920. The public has a substantial interest in effective CPA enforcement to serve those

purposes, and joint and several liability for conspirators that violate the CPA is an important element of that enforcement. Supreme Court review is thus also appropriate pursuant to RAP 13.4(b)(4).

VII. CONCLUSION

Discretionary review is appropriate pursuant to RAP 13.4(b)(1) and (b)(4) and the State requests that the Supreme Court accept review, reverse the Court of Appeals' decision, and affirm StarKist's joint and several liability for the wrongful actions of its coconspirators Bumble Bee and Chicken of the Sea.

This document contains 3,374 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 2nd day of February 2023.

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DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington, that on February 2, 2023, a true and correct copy of the foregoing The State of Washington's Petition For Review was served to the Court and the parties to this action as follows:

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Dated at Seattle, Washington, this 2nd day of February 2023.

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APPENDIX A

FILED
1/3/2023
Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STARKIST COMPANY, Appellant, v. THE STATE OF WASHINGTON, Respondent, and DONGWON INDUSTRIES CO. LTD., AND CHRISTOPHER LISCHEWSKI, Defendants.	No. 82725-1-I DIVISION ONE PUBLISHED OPINION

ANDRUS, C.J. — StarKist Company appeals a summary judgment order holding it jointly and severally liable for the harm it and its competitors, Chicken of the Sea and Bumble Bee Foods, caused consumers when they conspired to fix the prices of packaged tuna in violation of RCW 19.86.030.

We reverse the summary judgment order—not because, as StarKist contends, it can be liable only for its own profits gained through the conspiracy, but because RCW 19.86.080 does not mandate joint and several liability. The statute instead confers discretion on the trial court to determine what judgment "may be necessary" to restore to consumers the money acquired by an unlawful conspiracy.

The trial court may impute to one conspirator the actions of all coconspirators and, as a result, may order StarKist to pay an amount equal to the conspiracy's gains if the court deems it necessary to do so.

But the State of Washington settled with coconspirators Chicken of the Sea, and Bumble Bee's chief executive officer, Christopher Lischewski, for a fraction of these alleged consumer losses. And StarKist contends it was an insignificant player in the overall price-fixing scheme. We therefore reverse the summary judgment order imposing joint and several liability on StarKist "for the harm caused by its co-conspirators Bumble Bee and Chicken of the Sea" and remand for the trial court to enter findings of fact to justify any restitution it orders StarKist to pay under RCW 19.86.080.

FACTS

In 2016, Chicken of the Sea International (COSI) disclosed to federal investigators that it had conspired with competitors, including StarKist and Bumble Bee, to fix prices on packaged tuna products. Following these disclosures, Bumble Bee and StarKist were charged with and pleaded guilty in federal court to conspiring to fix prices with competitors in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. Both companies admitted that from November 2011 until December 2013, they "participated in a conspiracy among major packaged-seafood-producing firms, the primary purpose of which was to fix, raise, and maintain the prices of packaged seafood sold in the United States."

In March 2020, the State of Washington, through the Attorney General, brought an antitrust lawsuit against Chicken of the Sea, seeking an injunction, damages, restitution, and other relief under the Consumer Protection Act (CPA)

for this price-fixing conspiracy. Soon thereafter, Chicken of the Sea entered into a consent decree in which it agreed to pay $500,000 to the State of Washington in exchange for a release of liability.

On June 2, 2020, the State of Washington brought a similar antitrust lawsuit against StarKist, StarKist's parent company, Dongwon Industries Co. Ltd., and Bumble Bee Foods LLC's former chief executive officer, Christopher Lischewski, alleging these defendants had engaged in a conspiracy in restraint of trade with Chicken of the Sea.

In October 2020, the State entered into a consent decree with Lischewski in which he agreed to pay $100,000 to the State of Washington to compensate consumers allegedly harmed by the conspiracy.

In February 2021, the trial court held StarKist liable as a matter of law under RCW 19.86.030 for engaging in a price-fixing conspiracy during the period specified in its federal guilty plea.

On March 9, 2021, the State disclosed the report of its expert economist, Dr. David Sunding, who opined that the price-fixing scheme between StarKist, Chicken of the Sea, and Bumble Bee caused Washington consumers to overpay for packaged tuna by a total of $11,981,526. Sunding attributed $1,074,589 of the total losses to StarKist's sales.

The State then moved for partial summary judgment, seeking to hold StarKist "jointly and severally liable for the actions of its co-conspirators." The trial court granted the motion, concluding that StarKist "is jointly and severally liable for the harm caused by its co-conspirators Bumble Bee and Chicken of the Sea as a result of the price-fixing conspiracy from at least November 2011 continuing

through . . . December 2013." StarKist sought and we granted discretionary review of this order.

ANALYSIS

StarKist contends the trial court erred in imposing joint and several liability as a matter of law, arguing that the tort principle of joint and several liability cannot apply to an equitable action for restitution under RCW 19.86.080. We conclude that RCW 19.86.080(2) and (3) give the trial court broad discretion to determine what judgment "may be necessary" to restore to consumers monies acquired by an unlawful conspiracy. The trial court may impute to one conspirator the actions of all coconspirators and, as a result, may order StarKist to pay an amount equal to all consumer losses from the entire conspiracy if the court deems it necessary to do so. But we reverse the trial court's summary judgment order because RCW 19.86.080 does not mandate joint and several liability, as the trial court's order implies.

Standard of Review

We review a summary judgment order de novo. *Seattle Events v. State,* 22 Wn. App. 2d 640, 648-49, 512 P.3d 926 (2022). Statutory interpretation of the CPA presents an issue of law that this court also reviews de novo. *State v. LG Elecs.*, 186 Wn.2d 1, 7, 375 P.3d 636 (2016).

Conspiracies in Restraint of Trade

RCW 19.86.030 declares unlawful "[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce." Conspiring with competitors to fix prices is a per se illegal restraint of trade under

the Sherman Antitrust Act,[1] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007), and a violation of the CPA.[2] *See Murray Pub. Co., Inc. v. Malmquist*, 66 Wn. App. 318, 325, 832 P.2d 493 (1992) ("RCW 19.86.030 is essentially identical to section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.")

The trial court held StarKist liable under this statute and StarKist does not challenge this ruling. There is no dispute that from November 2011 until December 2013, StarKist engaged in an unlawful conspiracy with Chicken of the Sea and Bumble Bee to fix the price of packaged tuna in Washington.

The CPA provides two methods for enforcing RCW 19.86.030. RCW 19.86.090 authorizes any person injured in their business or property by a violation of RCW 19.86.030 to bring a civil action for "actual damages" and to seek treble damages. It also authorizes the State, when injured directly or indirectly by a violation of the act, to sue for its actual damages. *LG Elecs.*, 186 Wn.2d at 8.

RCW 19.86.080, the statute at issue here, authorizes the attorney general to bring an enforcement action "in the name of the state, or as *parens patriae* on behalf of persons residing in the state" for injunctive relief.[3] In addition, under RCW 19.86.080(2) and (3), the court has "broad, discretionary authority to order

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[1] 15 U.S.C. § 1.

[2] The legislature patterned the CPA's antitrust provisions after federal antitrust analogues and federal court decisions interpreting substantive violations of the Sherman Act guide Washington courts in constructing the state law. RCW 19.86.920 (in interpreting CPA, courts to be guided by final decisions of federal courts and final orders of Federal Trade Commission interpreting federal statutes dealing with same or similar matters).

[3] An action by the State of Washington for injunctive relief and restitution under RCW 19.86.080 is not subject to the CPA's four-year statute of limitations, RCW 19.86.120, because that provision by its plain language applies only to "claims for damages." *LG Elects.*, 186 Wn.2d at 9. Nor is the State subject to the general statute of limitations of RCW 4.16.160 because actions brought in the name of the state are excluded from that statute. *Id.* at 15.

restitution." *State v. Comcast Cable Commc'ns Mgmt., LLC*, 16 Wn. App. 2d 664, 686, 482 P.3d 925 (2021). The statute provides:

> (2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.
>
> (3) Upon a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

RCW 19.86.080; *see also LG Elecs.*, 186 Wn.2d at 17 (Supreme Court described the attorney general's claims under RCW 19.86.080(2) and (3) as "restitution claims"); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 321, 553 P.2d 423 (1976) (when the attorney general proves a defendant has acquired possession of property of a customer unlawfully, the court can order restitution).

When the attorney general seeks a restitution award under RCW 19.86.080(2) or (3), it is not required to prove causation or injury. *State v. CLA Estate Services, Inc.*, No. 82529-1-I, slip op. at 23 (Wash. Ct. App. Aug. 22, 2022).[4] And the court may calculate restitution based on the amount of illegal gains rather than net damages sustained by consumers. *Id.* at 24.

[4] https://www.courts.wa.gov/opinions/pdf/825291.pdf

Scope of Restitution under RCW 19.86.080

In this appeal, StarKist argues that any restitution award must be limited to the illegal gains StarKist itself enjoyed and cannot extend to the illegal gains realized by its coconspirators. It contends that the tort concept of "joint and several liability" is a principle applicable only to claims for actual damages under RCW 19.86.090 and cannot apply to RCW 19.86.080's equitable restitution remedy.

Our analysis of RCW 19.86.080 begins with examining the statute de novo to determine the legislature's intent. *State v. Hawkins*, No. 100060-0, slip op. at 13 (Wash. Oct. 27, 2022).[5] We discern legislative intent "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, amendments to the provision, and the statutory scheme as a whole." *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). We read each provision of a statute together with its related provisions to determine the legislative intent underlying the entire statutory scheme. *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998).

Based on these principles of statutory construction, we reject StarKist's argument that it cannot be held liable for unlawful gains realized by the conspiracy under RCW 19.86.080 for three reasons. First, the plain language of RCW 19.86.080 does not limit restitution to monies acquired by a single coconspirator. Second, although neither RCW 19.86.090 nor 19.86.080 explicitly refers to the

[5] https://www.courts.wa.gov/opinions/pdf/1000600.pdf

common law principles of joint and several liability, these statutory provisions must be read together with RCW 19.86.030, the provision outlawing conspiracies in restraint of trade. Under well-established Washington common law, a conspiracy is a single enterprise for which all coconspirators are responsible. Finally, federal antitrust case law does not require a different result.

1. Plain Text of RCW 19.86.080

StarKist first contends that RCW 19.86.080 limits its liability to profits it acquired from the conspiracy. But the plain text of RCW 19.86.080 does not support any such limitation.

RCW 19.86.080(2) states that "[t]he court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful." The "prohibited" or "unlawful" acts referred to in this paragraph are the acts explicitly outlawed by other provisions of the CPA, including RCW 19.86.030 prohibiting conspiracies in restraint of trade. The court may thus order a party participating in an unlawful conspiracy to pay "any moneys . . . which may have been acquired" by the conspiracy.

Neither RCW 19.86.080(2) nor .080(3) says restitution must be limited to any moneys which the defendant may have acquired from their participation in the conspiracy. We will not add words to a statute where the legislature has chosen not to include them. *Lake v. Woodcreek Homeowners Ass'n,* 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

StarKist directs our attention to a reference to "the defendant" in RCW 19.86.080(3). That provision now reads:

> Upon a violation of RCW 19.86.030 . . . the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, *which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers*. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

(Emphasis added.) StarKist contends that "the natural reading of this clause is that restitution is limited to the recovery of property that is 'acquired' by the 'defendant,' regardless of whether the defendant acquires it by transacting directly with consumers, or indirectly through resellers." We disagree with this reading.

The legislature added subparagraph (3) to RCW 19.86.080 in 2007, not as a way of restricting the scope of restitution that a court could order, but as a way to expand the class of customers on whose behalf the Attorney General could bring suit. The Final Bill Report for Substitute Senate Bill 5228 explained:

> The Attorney General may bring an action to restrain a person from violating the CPA. An action by the Attorney General may seek to prevent violations of the act and may seek relief for persons injured by violation of the CPA. As a result of a federal court ruling,[6] a question has arisen as to whether the Attorney General is authorized to bring an action for a CPA violation on behalf of persons who are "indirect purchasers" of goods or services. . . .
>
> Many states have enacted laws that allow an indirect purchaser to bring a suit directly, while others allow such suits only when brought by the Attorney General on behalf of the indirect purchasers. Washington has not enacted either type of law. However, based in

[6] The final House Bill Report on SSB 5228 identified the case as *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), in which the United States Supreme Court held that under federal antitrust law, indirect purchasers could not bring an action for damages, but left open the possibility that states enacting their own laws could allow indirect purchasers to sue for unfair business practices. *See* H.B. REP. ON SUBSTITUTE S.B. 5228, 60th Leg., Reg. Sess. (Wash. 2007), available at 5228-S BRH APH 07.pdf (wa.gov).

> part on the state court of appeals decision in *Blewett v. Abbott Laboratories*, 86 Wn. App. 782 (1997), the state Attorney General has brought suits on behalf of indirect purchasers under the common law doctrine of *parens patriae* . . . . The Attorney General reports, however, that in at least one multi-state case, a federal judge has rejected the Attorney General's attempts to sue on behalf of indirect purchasers.

FINAL B. REP. ON SUBSTITUTE S.B. 5228, 60th Leg., Reg. Sess. (Wash. 2007).[7] The addition of RCW 19.86.080(3) was thus intended to give the court the authority to order restoration for any injured party "regardless of whether the injury was the result of a direct or indirect purchase of goods or services" from the defendant. *Id.* The amendment expanded the consumers protected by the statute; it did not restrict the amount of restitution the court could order against any particular defendant.

RCW 19.86.080 is a grant of "broad, discretionary authority" to courts to order restitution. *State v. Comcast Cable Commc'ns. Mgmt., LLC*, 16 Wn. App.2d 664, 686, 482 P.3d 925 (2021). In *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 277-78, 510 P.2d 233 (1973), our Supreme Court affirmed a liberal construction of the restitution provision, as required by RCW 19.86.920, and "decline[d] to limit the traditional equity powers of the court." StarKist's restrictive interpretation of RCW 19.86.080 conflicts with RCW 19.86.920 and our case law liberally interpreting the restitution provision of the CPA.

2. Common Law of Conspiracy

[7] Available at 5228-S.FBR.pdf (wa.gov).

SkarKist's interpretation is also unpersuasive because it fails to address the common law of conspiracy. The word "conspiracy" in RCW 19.86.030 is not defined in the CPA. But this legal term has a well-understood legal meaning and we assign a familiar legal term in a statute its familiar legal meaning. *Floeting v. Group Health Cooperative*, 200 Wn. App. 758, 764, 403 P.3d 559 (2017).

A conspiracy is "a combination of two or more persons to commit a criminal or unlawful act, or to commit a lawful act by criminal or unlawful means." *Sears v. Int'l Bhd. of Teamsters, Chauffeurs, Stablemen and Helpers of Am.*, 8 Wn.2d 447, 452, 112 P.2d 850 (1941) (quoting *Eyak River Packing Co. v. Huglen*, 143 Wash. 229, 234, 255 P. 123 (1927)). Under Washington common law, "[e]very person who enters into a conspiracy, no matter whether at its beginning or at a later stage of its progress, is in law a party to every act of the conspirators, and is liable for all of the acts done in pursuance of the conspiracy in the same manner that they would be had they been a party to all of the wrongful acts." *Id.* We presume the legislature enacted the CPA "with full knowledge of existing laws." *Maziar v. Dep't of Corr.*, 183 Wn.2d 84, 88, 349 P.3d 826 (2015) (quoting *Thurston County v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1975)).

We can find no basis for limiting the application of this conspiracy case law to cases in which the plaintiff seeks monetary damages under RCW 19.86.090, rather than equitable relief under RCW 19.86.080. In Washington, all distinctions between actions at law and actions in equity have been abolished. *Hotchkin v. McNaught-Collins Imp. Co.*, 102 Wash. 161, 165, 172 P. 864 (1918). The nature of one's claim may govern whether there is a right to a jury trial, *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980) (constitutional right to jury

trial applies to civil actions purely legal in nature and not to actions purely equitable in nature), but does not preclude a court from holding one conspirator liable for the actions of its coconspirators.

Our Supreme Court has applied conspiracy concepts in cases brought in equity. In *Lyle v. Haskins*, 24 Wn.2d 883, 168 P.2d 797 (1946), the purchasers of a sawmill, Lyle and Nelson, sought to enjoin the sellers, the Haskins, and another couple, the Johnsons, from operating a competing sawmill based on their conspiracy to violate a noncompetition agreement, to which the Haskins had agreed. The court, noting that the case had been brought in equity, affirmed an injunction for the purchasers, finding the evidence sufficient to support the conclusion that the seller violated the restrictive covenant in the sales agreement and "that Harold Haskins and [his] wife entered into a conspiracy with [several people] to violate the restrictive covenant, and that Johnson and [Haskins' son, Robert] were aiding, abetting, conspiring and confederating with Harold Haskins in the violation of such covenant." *Id.* at 899. Citing 11 Am. Jur. § 45, our Supreme Court stated that "the liability of the conspirators is joint and several." *Id.* at 900. It held that Johnson, "entering into the conspiracy after it was formed . . . became liable for all acts committed by any of the other parties, either before or after their entrance, in furtherance of the common design." *Id.*

Also instructive is *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp, Inc.*, 114 Wn. App. 151, 52 P.3d 30 (2002). In that case, an insurance agency brought suit against a competitor for tortious interference and civil conspiracy after the competitor hired its former employee, with whom it had a noncompetition agreement. The agency obtained an arbitration award against the former

employee for lost revenue based on the employee's diversion of insurance business to the competitor. *Id.* at 157. The court of appeals held that the competitor, as a coconspirator of the former employee, was collaterally estopped from relitigating the amount of damages assessed by an arbitrator against the former employee, despite the fact the competitor had not participated as a party in the arbitration. *Id.* at 161. Collateral estoppel is an equitable doctrine. *Weaver v. City of Everett*, 194 Wn.2d 464, 472, 450 P.3d 177 (2019). Yet, this court had no difficulties in invoking that doctrine to impute liability of one conspirator to another.

Because we presume the legislature knows the law in the area in which it is legislating, we will not construe a statute in derogation of that common law absent an express legislative intent to change the law. *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008). We have no such expression of legislative intent here. We therefore conclude that when the legislature made conspiracies in restraint of trade unlawful and gave courts the authority to restore monies acquired through such a conspiracy, that authority included the pre-existing power under common law to hold one conspirator liable for all of the acts done in pursuance of the conspiracy, even if they were not a party to all of the wrongful acts.[8]

3. Federal Antitrust Case Law

StarKist finally contends that requiring it to pay restitution based on the actions of its coconspirators is inconsistent with federal antitrust law. RCW

[8] StarKist also contends the State should be judicially estopped from arguing that StarKist's liability is joint and several based on the State's characterization of its claim as equitable when it moved to strike StarKist's jury demand. StarKist contends that this argument is "flatly inconsistent with its argument now that the court should apply the tort doctrine of joint and several liability based on antitrust law." StarKist's argument is based on the erroneous premise that a trial court cannot, in equity, order one conspirator to pay restitution for profits realized by a coconspirator. The State's arguments are not inconsistent and judicial estoppel does not apply.

19.86.920 does provide that we should look to federal antitrust case law in interpreting the CPA:

> The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the *courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters* . . . . To this end this act shall be liberally construed that its beneficial purposes may be served.

(Emphasis added.) But we may also decline to follow federal law where the language and structure of the CPA departs from otherwise analogous federal statutes. *L.G. Elecs.*, 186 Wn.2d at 10 (Supreme Court refuses to interpret statute of limitations provision in CPA similarly to statute of limitations in Clayton Act, 15 U.S.C. § 15c, because the provisions were not parallel).

StarKist relies on *Honeycutt v. United States*, 581 U.S. 443, 137 S. Ct. 1626, 198 L. Ed. 2d 73 (2017), to argue that requiring it to pay for the actions of coconspirators is impermissible. In *Honeycutt*, after a hardware store owner and his brother, the sales manager, were convicted of conspiring to distribute iodine used to manufacture methamphetamine, the Sixth Circuit held that the brothers, as coconspirators, could be held jointly and severally liable for "any proceeds of the conspiracy." 137 S. Ct. at 1631. The Supreme Court reversed, holding that the language of the applicable statute did not authorize a defendant to be held jointly and severally liable for property that anyone other than the defendant derived from the crime. *Id.* at 1630. The holding in *Honeycutt* was based on the language of the federal criminal forfeiture statute, 21 U.S.C. § 853, that clearly

limited forfeiture to "proceeds *the person obtained*, directly or indirectly, as the result of such violation." 21 U.S.C. § 853 (emphasis added). There is no similar limiting language in either RCW 19.86.080(2) or (3).

StarKist also asks us to follow *Liu v. SEC*, __ U.S. __, 140 S. Ct. 1936, 207 L. Ed. 2d 401 (2020). In that case, the Securities and Exchange Commission (SEC) brought a civil enforcement action against developers of a cancer treatment center, alleging they engaged in a scheme to defraud foreign nationals investing in their center in violation of the Securities Act of 1933, § 77a *et seq.* and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq*. *Id.* at 1941-42. The SEC sought disgorgement of the total amount of money the developers had raised from investors under 15 U.S.C. § 78u(d)(5), which authorizes federal courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." *Id.* at 1940. The district court rejected the developers' arguments that the disgorgement award should be reduced by their legitimate business expenses. It entered an order making the developers jointly and severally liable for the gross amount the developers had raised from investors. *Id.* at 1942.

The Supreme Court granted certiorari to determine whether 15 U.S.C. § 78u(d)(5) authorized the SEC to seek disgorgement "beyond a defendant's net profits from wrongdoing." *Id.* It determined that the "equitable relief" allowable under the statute was limited to the wrongdoer's net profits after deducting legitimate business expenses. *Id.* at 1946.

In dicta, the court addressed, but did not decide, whether joint and several liability was appropriate. *Id.* at 1947. It noted that while joint and several liability "sometimes [seems] at odds with the common-law rule requiring individual liability

for wrongful profits," the common law also permitted liability for "partners engaged in concerted wrongdoing." *Id.* at 1949 (citing *Ambler v. Whipple*, 87 U.S. 546, 20 Wall. 54, 22 L. Ed. 403 (1874)). It went on to state:

> The historic profits remedy thus allows some flexibility to impose collective liability. Given the wide spectrum of relationships between participants and beneficiaries of unlawful schemes—from equally culpable codefendants to more remote, unrelated tipper-tippee arrangements—the Court need not wade into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals.

Id. It noted that the defendants were married and both were involved in the businesses that misappropriated investor funds. *Id.* It chose to "leave it to the Ninth Circuit on remand to determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required." *Id.*

Lui does not advance StarKist's argument on appeal. First, the Supreme Court discussion regarding joint and several liability is dicta. Second, the court explicitly recognized that "partners" can, under certain circumstances, be held jointly and severally liable for the actions of other partners. To the extent *Lui* applies here, it is consistent with Washington common law on conspiracy liability.

Referencing *Lui*'s discussion regarding partnership liability, StarKist argues that the State did not allege or prove that it was in a legal partnership with COSI or Bumble Bee. This argument misreads *Lui*. The court's reference to "partners in wrongdoing" can hardly be understood as a requirement of an actual legal partnership. *Amber v. Whipple*, the case cited by the *Liu* court for the principle that partners engaged in concerted wrongdoing are jointly and severally liable, contained no such pleading or proof requirement. The *Amber* court simply

recognized that participants in a fraudulent patent scheme would be liable for "the profits realized by them, or either of them, from the use or sale, or otherwise, arising from said patents." 87 U.S. at 559. *Lui* does not require the existence of a legal partnership as a precondition to joint and several liability.

StarKist's argument has the additional flaw of disregarding both federal and Washington cases describing a conspiracy as "a partnership in a criminal purpose." *United States v. Kissel*, 218 U.S. 601, 608, 31 S. Ct. 124, 54 L. Ed. 1168 (1910); *State v. Dent*, 123 Wn.2d 467, 475, 869 P.2d 392 (1994). It is undisputed that StarKist conspired with Bumble Bee and COSI in a price fixing scheme—StarKist pleaded guilty in federal court to being a member of this conspiracy. To the extent *Lui* requires the existence of a "partnership," the State has established the existence of such a partnership here as a matter of law.

We conclude that RCW 19.86.080 gives the trial court the authority to hold StarKist liable for the actions of its coconspirators but it does not mandate such a result. The trial court has the discretion to decide that StarKist should be liable for the full amount of the conspiracy's illegal gains but it also has the discretion to tie StarKist's liability to the extent of its participation in the common enterprise.

Summary Judgment Order

The summary judgment order, however, did not represent an exercise of the trial court's discretion under RCW 19.86.080. Instead, the trial court held StarKist liable for the conspiracy's profits without explaining its rationale for exercising its discretion in this manner and appears to have rendered this ruling as a matter of law. The failure to exercise discretion is itself an abuse of discretion. *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

We therefore reverse the summary judgment order and remand to the trial court to allow it to determine, in the exercise of discretion, the amount of restitution it deems necessary under RCW 19.86.080.

Reversed.

Andrus, C.J.

WE CONCUR:

PDF **RCW 19.86.030**

Contracts, combinations, conspiracies in restraint of trade declared unlawful.

Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

[**1961 c 216 § 3**.]

NOTES:

Monopolies and trusts prohibited: State Constitution Art. 12 § 22.

PDF **RCW 19.86.080**

Attorney general may restrain prohibited acts—Costs—Restoration of property.

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

(2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

(3) Upon a violation of RCW **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

[**2007 c 66 § 1**; **1970 ex.s. c 26 § 1**; **1961 c 216 § 8**.]

NOTES:

Effective date—2007 c 66: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 17, 2007]." [**2007 c 66 § 3**.]

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