No. 102298-1

SUPREME COURT
OF THE STATE OF WASHINGTON

DAN YOUNG,

Appellant,

v.

TODD S. RAYAN ET UX., SAMUEL WILKENS ET UX., PENNY ROHR ET VIR, AND ALTHAUSER RAYAN ABBARNO, a Washington Limited Partnership,

Respondents.

AMICUS MEMORANDUM OF NORTHWEST CONSUMER LAW CENTER

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I. INTEREST OF AMICUS NORTHWEST CONSUMER LAW CENTER

Northwest Consumer Law Center ("NWCLC") is a nonprofit law firm serving low and moderate income consumers in Washington. NWCLC is the only organization in Washington that focuses solely on consumer legal issues. NWCLC is based in Seattle, but helps consumers statewide. Since 2013, NWCLC has represented hundreds of Washington consumers facing coercive collection litigation and other consumer issues, and counseled thousands more on navigating collection lawsuits.

II. ISSUES ADDRESSED BY AMICUS

This amicus brief addresses the broader legal and policy issues involving the litigation privilege in the context of debt collection and consumer rights cases. Some of the worst abuses against consumers occur when they are sued by collection law firms. *Kaiser v. Cascade Capital, LLC,* 989 F.3d 1127, 1136 (9th Cir. 2021). "[L]itigation conduct can sometimes violate the FDCPA even without a violation of the rules of civil procedure, let alone a sanctionable violation of those rules." *Id.*

The current conflict between Division I and Division II regarding the litigation privilege opens the door for debt collectors to abuse the justice system and consumers with impunity. NWCLC requests that this Court accept review to make clear that "[t]he fact that statements made in pleadings are absolutely privileged does not mean that an attorney may abuse the privilege with impunity." *McNeal v. Allen,* 95 Wn.2d 265, 267 (1980). As stated in *McNeal*, the "attorney is subject to the supervision and discipline of the court"—and consumer statutes. *Id.* The litigation privilege cannot be interpreted to nullify consumer protections.

III. SUMMARY OF ARGUMENT

Abuses in the collection industry gave rise to broad remedial statutes: the FDCPA, and the Washington Collection Agency Act, enforced through the Consumer Protection Act. The FDCPA includes strict liability and one-way fee-shifting to address widespread abuse by third-party collectors. 15 U.S.C. § 1692(a); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1024 (9th Cir. 2012). The Washington Consumer Protection Act has one-way fee-shifting, injunctive relief, and treble damages to encourage consumers to police bad business behavior.

Collection lawyers' litigation activities are subject to the FDCPA and WCAA. But Division I's opinion below will result in more lawyers and litigants hiding behind the "absolute" litigation privilege to engage in unlawful tactics.

Division II recognized that the public policy objectives of consumer statutes matter too:

> Because law firms may be collection agencies subject to liability under the WCAA under both RCW 19.16.250 and RCW 19.16.260, applying litigation privilege would defeat the public policy considerations justifying the privilege. And, in this case, immunity "neither preserves 'integrity of the judicial process,' nor 'further[s] the administration of justice.'" If immunity applies broadly to any action associated with litigation, there could never be a CPA claim based on RCW 19.16.250(9) and RCW 19.16.260(1)(a).

Scott v. Am. Express Nat'l Bank, 22 Wn. App. 2d 258, 269 (2022) (citing *Mason v. Mason,* 19 Wn. App. 2d 803 (Div. II 2021)).

This Court faces a split of authority between Division I, which holds that the litigation privilege is absolute, and Division II, which recognizes that the litigation privilege applies only where the public policy considerations justifying the privilege are present. The Court should accept review to provide clarity on the

contours of the litigation privilege, as Division I's holding in this case will have far-reaching effects, including on NWCLC's litigation on behalf of consumers in debt collection.

IV. ARGUMENT

A. Washington courts are mandated to protect consumers.

1. Debt collection is a matter of public interest.

The conduct of litigants and attorneys is a matter of public interest. *McNeal,* 95 Wn.2d at 267. Debt collection is also a matter of public interest, as mandated by the Washington State Legislature. RCW 19.86.920; *Panag v. Farmers Inc. Co. of Wash.* 166 Wn.2d 27, 54 (2009). One-third of Americans have a debt in collection on their credit reports. In a 2014-2015 survey by CFPB, 32% of consumers had been contacted by a creditor or collector during the preceding year. *Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 5*, 46 (Jan. 2017) (available at https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (accessed October 21, 2023) (hereinafter CFPB 2017 Consumer Views Report)). One debt buyer, Encore Capital Group, has claimed that 20 percent of

Americans either currently owe Encore Capital money or have in the past. *See* Chris Albin-Lackey, Human Rights Watch, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor* 11 (Jan. 2016) (available at https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf (accessed October 21, 2023)).

Debt collectors contact Americans an estimated *billion-plus* times a year. *See* Robert Hunt, *Understanding the Model: The Life Cycle of a Debt*, presented at FTC-CFPB Roundtable "*Life of a Debt: Data Integrity in Debt Collection*," 10 (June 6, 2013) (available at https://www.ftc.gov/sites/default/files/documents/public_events/life-debt-data-integrity-debt-collection/understandingthemodel.pdf (accessed October 21, 2023)).

2. It is worse when the consumer is sued.

Lawsuits are a primary tool of the collection industry. A 2019 investigation by the Seattle Times found, in its analysis of Washington court records, four Washington collection attorneys who each filed more than 6,200 lawsuits in 2017, one of them having topped 7,000. *See* Mike Baker, *Debt collectors that 'sue,*

sue, sue' can squeeze Washington state consumers for more cash, Seattle Times, March 23, 2019, (available at https://www.seattletimes.com/seattle-news/times-watchdog/with-a-chance-to-sue-sue-sue-debt-collectors-squeeze-washington-consumers-for-more-cash/; accessed October 21, 2023). The court system is typically stacked in favor of the debt collector against the consumers, typically laypersons without sophisticated knowledge of finance, banking, collections, and law, with limited resources to defend themselves or fight back.

Debt collection is frequently an "entrepreneurial" or "volume" practice where lawyers are regularly found to be inattentive to factual detail in pleadings, such as the amount allegedly owed. *See Lang v. Gordon,* No. C10-819RSL, 2011 WL 62141 at *3 (W.D. Wash. Jan. 6, 2011) ("[L]awyers who are acting as debt collectors are engaging in the entrepreneurial aspects of law rather than practicing law…"). For example, the robo-signing deficiencies that came to light during the 2009 foreclosure crisis also infiltrated the debt collection industry. In *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 966-69 (N.D. Ohio 2009), the court found that an affidavit signed by a

"specialist" who signed 200 to 400 affidavits per day, falsely claiming to have personal knowledge of its contents, was misleading and violated the FDCPA. Mass filings of debt collection cases have also resulted in the mass entry of default judgments, none of which are obtained on the merits, with studies showing such defaults occurring in 70 to 94 percent of cases. Peter Holland, *Junk Justice: A Statistical Analysis of 4400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 226 (2014) (comparing the results of seven prior studies between 1967 and 2010 and finding that between 70 percent and 94 percent of consumers "failed to respond" to collection lawsuits).

Debt collectors and their attorneys regularly engage in unfair or deceptive conduct. In the King County case *Trahan v. Merchants Credit Corp.,* Merchants Credit and its counsel filed third-party claims against a consumer's lawyers, claiming without basis that the law firm had no authority to represent the consumer and was a "credit repair organization." King County Superior Court Case No. 22-2-01322-2 SEA (April 26, 2022 Order). Merchants Credit was sanctioned in the amount of $20,000 and its claims were dismissed. *Id*.

In another case, a debt collection attorney repeatedly garnished a consumer who had already settled a judgment. *Brandt v. Columbia Credit Servs.*, No. C17-703 RSM, 2018 U.S. Dist. LEXIS 62297, at *3-4 (W.D. Wash. Apr. 12, 2018). The consumer repeatedly gave the attorney proof that the judgment had been settled, and the attorney was told by King County judges during supplemental proceedings to look at the consumer's records and figure it out. *Id*. The attorney and his law firm were ultimately found to have violated the FDCPA, CAA, and CPA. *Id*. at *14.

NWCLC frequently confronts Debt collectors' misuse of the court system. Collectors flood state court dockets, sometimes to collect medical debts as low as $100.00. *See* Baker, *Debt collectors that 'sue, sue, sue,' supra*. Collectors can bulk file collection lawsuits and receive a statutory attorney fee, interest, and costs for each. *Id.*

Currently in Division I, debt collectors will be incentivized to misuse the justice system. Even before Division I's decision, collection lawyers attempted to skirt liability for collection abuses by claiming that the litigation privilege gave them absolute

immunity. *See Howard v. Patenaude & Felix APC*, 634 F. Supp. 3d 990, 1014-15 (W.D. Wash. 2022) (compiling cases); *Hoffman v. Transworld Sys.*, 806 F. App'x 549, 551 (9th Cir. 2020).

B. The litigation privilege is not infinite.

1. The litigation privilege is just one public policy.

Washington State trial courts shall construe the Civil Rules "to secure the just, speedy, and inexpensive determination of every action." CR 1. To that end, Washington courts recognize the "litigation privilege," so that statements made by lawsuit participants do not expose them to liability for defamation. *See, e.g.*, *Mason*, 19 Wn. App.2d at 830-31; *Deatherage v. Examining Bd. of Psychology*, 134 Wn.2d 131, 135-36 (1997). This Court has articulated the strong public policy underlying the litigation privilege:

> The privilege of attorneys is based upon a public policy of securing to them as officers of the court the utmost freedom in their efforts to secure justice for their clients. The attorney's purpose in publishing defamatory matter, his belief in its truth, or even his knowledge of its falsity, are of importance only in determining the amenability of the attorney to the disciplinary power of the court of which he is an officer. *See* Restatement (Second) of Torts § 587 (1977). In the same vein, the privilege of parties to judicial proceedings is based upon the public interest

> in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes. Restatement (Second) of Torts, *supra.*

McNeal, 95 Wn.2d at 267.

The basic rule is broad:

> Allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief.

Id. (citing *Gold Seal Chinchillas, Inc. v. State,* 69 Wn.2d 828 (1966)).

However, the litigation privilege is not without limits:

> The fact that statements made in pleadings are absolutely privileged <u>does not mean that an attorney may abuse the privilege with impunity</u>…. [T]he attorney is subject to the supervision and discipline of the court.

Id. (emphasis added).

2. <u>There is a split of authority that the Court should resolve.</u>

A judicially-created doctrine is subject to judicially-recognized exceptions based on compelling public policies. *See,*

e.g. *City of Seattle v. Patu,* 147 Wn.2d 717, 275 (2002) (invited error doctrine judicially created and thus not a bar to review); *State v. Barnes,* 85 Wn. App. 638, 651 (1997) (declining to apply judicially-created doctrine collateral estoppel). As such, Division II's approach to the litigation privilege (and its exceptions) is the correct one:

> In *Mason*, we noted that litigation privilege does not apply when the facts are such that application of the privilege would defeat the public policy considerations justifying the privilege. This exception applies in a narrow set of circumstances where an attorney "misappropriates a judicial proceeding to achieve an improper and extrinsic end," immunity "neither preserves 'integrity of the judicial process,' nor 'further[s] the administration of justice.'"

Scott, 22 Wn. App. 2d at 267-68 (citations omitted).

The Division II approach is not radical. When a decision rests in public policy, courts must look at all public policies at issue in a case. Division I's absolute privilege ruling will have effects far outside of the context of the underlying case, and this Court should accept review to clarify the scope of the litigation privilege.

C. The division split creates unnecessary risk to consumers.

When an attorney or party is also a debt collector, that attorney or party is not just an ordinary participant in the court system. They remain subject to the FDCPA and CAA, statutes with a strong public policy of protecting consumers and debtors from unfair and deceptive conduct in the justice system. *See Heintz v. Jenkins*, 514 U.S. 291, 292 (1995) (FDCPA applies to collection activities of lawyers); *Fox v. Citicorp Credit Servs., Inc.,* 15 F.3d 1507 (9th Cir. 1994) (FDCPA applies to attorneys who "regularly" collect); *Garrett v. Derbes*, 110 F.3d 317 (5th Cir. 1997) (attorney who collected against 639 individuals in a nine-month period "regularly" collected despite representing just 0.5% of his practice); *Lang,* 2011 WL 62141, at *3 ("[L]awyers who are acting as debt collectors are engaging in the entrepreneurial aspects of law rather than practicing law…"); *Mandelas v. Gordon,* 785 F. Supp. 2d 951, 960-61 (W.D. Wash. 2011) (WCAA may be applicable to law firm); *Moritz v. Daniel N. Gordon, P.C.,* 895 F. Supp. 2d 1097, 1111 (W.D. Wash. 2012) (if a law firm's principal purpose is collection, WCAA may apply).

Since the enactment of the FDCPA, collectors and collection attorneys still vigorously litigate, often bending the truth. An attorney's privilege to "rely on one's client" can become acting with a "disturbing lack of responsibility" "at the client's behest." *See Brandt,* 2018 U.S. Dist. LEXIS 62297, at *3-4.

Unsurprisingly, the litigation privilege has been regularly raised by debt collectors as an excuse for their abuses, which trial courts have rejected. *See Frias v. Patenaude & Felix, P.C.,* 2021 WL 1192421 (W.D. Wash. Mar. 30, 2021) (neither litigation privilege nor public policy shield collector who is trying to collect from wrong person); *Hoffman v. Transworld Sys., Inc.,* 2018 WL 5734641 (W.D. Wash. Nov. 2, 2018); *Moritz*, 895 F. Supp. 2d at 1111 (litigation privilege does not bar CPA claim based on violation of FDCPA or WCAA); *Scott,* 22 Wn. App. 2d at 268-69 (litigation privilege protects collection law firm from tort, but not from CPA). The Sixth Circuit has likewise interpreted *Heinz* to mean that collection attorneys are not entitled to the litigation privilege. *Hartman v. Great Seneca Fin. Corp.,* 569 F.3d 606, 615–617 (6th Cir. 2009).

The division split resulting from the decision below is an invitation for more collection abuses in the courts. Trial courts inexperienced in presiding over collection or consumer cases might follow Division I, with unjust outcomes exacerbated by unequal resources.

Both the FDCPA and the CAA make it unlawful for a debt collector to suggest that the consumer has committed a crime. 15 U.S.C. §1692e(2)(A); 15 U.S.C. §1692e(7); RCW 19.16.250(13). California excepts knowing or recklessly false reports to law enforcement from its otherwise broad litigation immunity. 2020 Cal. Legis. Serv. Ch. 327, § 2 (A.B. 1775), effective Jan. 1, 2021.

V. CONCLUSION

For the above reasons, this Court should accept review of the decision below.

VI. RAP 18.17(c)(9) CERTIFICATION

Counsel certifies that this brief contains 2,340 words in compliance with 18.17(c)(9).

RESPECTFULLY SUBMITTED AND DATED this 30th day of October, 2023.

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I certify that on October 30, 2023, I caused a true and correct copy of the foregoing to be served on the following via the Court of Appeals Electronic Filing Notification System:

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