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COURT OF APPEALS NO. 76796-8-I

(Transferred from 48888-4-II.)

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THE SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN P. KOZOL, LARRY BALLESTEROS,
KEITH CRAIG, AND KEITH BLAIR,

Plaintiffs/Appellants,

v.

JPay, Inc., a foreign corporation,

Defendant/Respondent.

P E T I T I O N F O R R E V I E W

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Additional Authorities

I. IDENTITY OF PETITIONER

The Appellants, Steven P. Kozol, Larry Ballesteros, Keith Craig and Keith Blair (hereinafter collectively referred to as "Kozol") herein petition this Court for review of the decision by the Court of Appeals, Division I, designated in Appendix A and B of the Petition, as set forth below.

II. COURT OF APPEALS DECISION

The Court of Appeals, Division I, affirmed the trial court's ruling granting Respondent, JPay, Inc., summary judgment dismissal of Kozol's claims for violation of the Consumer Protection Act ("CPA"), conversion, trespass to chattels, and for a declaratory judgment and injunctive relief. In its opinion, attached as Attachment A, the appellate court determined that Kozol failed to prove JPay acted with the requisite intent to support the CPA, conversion or trespass to chattels claims. The court also determined that Kozol failed to establish the elements of standing and an "actual, present and existing dispute" under the Uniform Declaratory Judgments Act, ch. 7.24 RCW. Kozol filed motions for RAP 12.4 reconsideration accompanied by a RAP 9.11 motion to submit additional evidence. The appellate court denied these motions. Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Is denial of a CR 59 motion for reconsideration of a summary judgment dismissal reviewed on appeal using the de novo or the abuse of discretion standard?

2. Are the requisite criteria of "standing" and a showing of an "actual, present and existing dispute" under the Uniform Declaratory Judgments Act interchangeable?

3. When a trial court's oral ruling and written order dismiss a declaratory judgment claim on summary judgment, may an appellate court rely on the trial court's oral ruling to "assume" the dismissal is reviewed using the abuse of discretion standard?

4. Does a defendant's offer of a post hoc remedy after the suit was commenced vitiate a plaintiff's cause of action for a CPA violation, conversion, or trespass to chattels?

5. In moving for summary judgment does a defendant carry its initial burden by declaring it unintentionally caused injury to "many" or "some" customers, but does not specifically state this included the specific Plaintiffs?

6. Is it improper to deny a RAP 9.11 motion seeking to introduce additional evidence upon the appellate court having stated such evidence is material?

7. Does a notice of CR 30(b)(6) deposition served upon an out-of-state party conducting commerce in Washington require that party to appear for depositions?

8. When a plaintiff brings a motion to compel discovery based upon a defendant's objection of a protected trade secret under RCW 19.108.010(4), are mere arguments of counsel a sufficient factual basis to deny the motion to compel?

IV. STATEMENT OF THE CASE

A. Contract Pricing Agreement

In 2009, JPay, Inc. entered into a contract with the Department of Corrections ("DOC") to sell digital music players and digital music downloads to DOC inmates. CP 424-428. Under the contract JPay agreed that "Contractor agrees to provide to DOC, the following services....(6) Operation - Digital media purchases are comparable to cost from major providers such as iTunes" (CP 305-308), and promised for "Offenders purchasing MP3 Players/ Media....Song and music video prices are also comparable to suggested retail prices from the record labels." CP 309.

Under the contract JPay agreed that music download prices would range from $0.99 to $2.00 each. CP 308-310. In 2015 Kozol obtained a copy of an online news article in which an investigation into JPay's predatory pricing scheme revealed JPay charged its customers 30%-50% more than iTunes charged for the same music. CP 185. Kozol obtained a copy of the JPay/DOC contract in 2015. CP 270. Kozol realized that if the same songs he purchased from JPay at $1.99 each were in fact 30%-50% cheaper on iTunes, then JPay's inflated prices may be prohibited under the contract.

B. JPay's Intentional "Malfunction" Procedure

JPay maintains a series of electronic kiosks throughout various DOC prison facilities. These kiosks allow the inmate customers to purchase digital music downloads, and to download the music onto their JPay music players by docking or syncing them to a kiosk. CP 565-572. While JPay's first offered music player was

called the JP3, it began in 2014 to offer a newer model player called the JP4. The JP3s and JP4s operate using the same JPay kiosk platform. CP 86.

While many inmates wanted to upgrade to the JP4, others did not because the JP4 was far bigger and heavier than the compact JP3, and it was widely known that the JP4 operating software and poor quality and design made those model devices clumsy and difficult to use. CP 419-420. Additionally, because the JP3s still played customer's music, many inmates did not want to spend additional money for a new device merely to keep listening to their song purchases.

In May 2015 Kozol's four different JP3 players were docked into the kiosk system on different days to download music. The devices' display screens suddenly registered as being "locked" and "Property of JPay."[1] The JP3's no longer would play music or other content. CP 436, 310-324.

Kozol submitted an exhaustive array of help ticket emails and written letters via U.S. Mail notifying JPay that something in its kiosk software had "locked" each of their JP3 players. JPay's consistent response was to tell Kozol that nothing could be done, the JP3's "can't be repaired or replaced," and that Kozol could "keep all of [their] music" if they bought a new player, at which time JPay would "reset" their music library account. CP 436, 438, 212, 268-270, 310-312, 320-323. Kozol provided notice

[1] The JP3s came from the factory with each inmate's name and DOC# preinstalled as a security measure. CP 570, 418.

of potential civil action (CP 438, 443-446, 314-315), but JPay still refused to provide a remedy even upon notice the suit had been filed. CP 438. It was not until the suit was actually served upon JPay (CP 584-585) that it first began to offer any type of remedy on July 10, 2015. CP 440.

C. Superior Court Procedural History

In bringing suit Kozol pled claims for, inter alia, violation of the Consumer Protection Act, ch. 19.86 RCW, conversion, trespass to chattels, and for a declaratory judgment and injunctive relief. CP 6-16. JPay moved for summary judgment as to all claims. CP 90-111. The trial court granted summary judgment dismissal of Kozol's CPA claims on the basis that JPay did not act unfairly or deceptively in trying to get Kozol to purchase additional music players, and that Kozol did not establish an injury. Verbatim Report of Proceedings (VRP), at 39-40. The trial court granted summary judgment dismissal of Kozol's conversion and trespass to chattels claims on the basis that Kozol did not establish a requisite injury. VRP, at 41. Kozol's declaratory judgment claim concerning the contractual pricing dispute was dismissed on summary judgment without elaboration. VRP, at 45. The court entered the written order granting summary judgment dismissal. CP 510-511. Kozol moved for CR 59 reconsideration. CP 131-242. The trial court denied the motion. CP 512.

D. Court of Appeals Procedural History

This appeal was originally filed in the Division II Court of Appeals. CP 504. Kozol filed their opening briefs, and a

RAP 9.11 motion asking the court to take additional evidence. The Division II Court denied the RAP 9.11 motion. Kozol and JPay then filed their respective briefs. This appeal was then transferred to the Division I Court of Appeals. The Division I panel heard the appeal on July 21, 2017 and issued its unpublished opinion on December 18, 2017. Appendix A. Kozol filed RAP 12.4 motions for reconsideration and a RAP 9.11 motion.[2] These motions were denied. Appendix B.

In its opinion the Division I Court affirmed summary judgment dismissal of the CPA claims, but in part on different grounds. While affirming the trial court's finding that JPay did not act unfairly or deceptively, the Court of Appeals did not reach whether Kozol suffered an injury, but rather affirmed on the different basis that Kozol did not establish JPay acted intentionally. Opinion, at 5-8. The Court of Appeals also determined that the JPay user agreement was not substantively unconscionable under the CPA. Id.

As to Kozol's conversion and trespass to chattels claims, while the trial court dismissed these claims on summary judgment on the basis Kozol did not establish an injury, the Court of Appeals affirmed on the different basis that Kozol did not

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[2] Kozol's CR 59 motion contained evidence that was unavailable to file on summary judgment. DOC had seized "all" of Kozol's legal files on January 22, 2016. CP 70-75. JPay filed its summary judgment motion on January 25, 2016. CP 90-111. Kozol's first RAP 9.11 motion filed in September 2016 sought to introduce evidence showing specific seized documents were not returned to Kozol until March 1, 2016, and thus comported with CR 59(a)(4). This first RAP 9.11 motion was denied. But upon the Division I's opinion stating Kozol failed to show the seized evidence was unavailable for summary judgment, Kozol filed another RAP 9.11 motion, now that the Court's opinion made manifest that the RAP 9.11 evidence was material.

establish JPay intentionally interfered with Kozol's use of their JP3s and music content. Opinion, at 9-10.

As to Kozol's declaratory judgment claims, the Court of Appeals stated that the abuse of discretion standard applied on appeal because "we assume that the trial court intended to decline to issue a declaratory judgment rather than dismiss a request for a declaratory judgment on summary judgment." Opinion, at 11 n.10. Also, the Court of Appeals determined that Kozol did not carry their burden of establishing the fact that JPay's prices actually are higher than what iTunes charges. Opinion, at 11-13.

As to Kozol's motion to compel discovery and for a CR 56(f) continuance, the Court of Appeals affirmed the trial court's denial of the motions, and held that "Kozol does not have a right to call out-of-state witnesses to Washington to provide deposition testimony," (Opinion, at 16 n.19), and decided that "it is reasonable to conclude that proprietary computer code data involving specific command functions of electronic devices would have potential independent economic value from being kept secret." Opinion, at 16.

Because the Court of Appeals' decision on these issues is contrary to settled law, Kozol now seeks discretionary review from this Court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b) there are four criteria this Court relies upon when considering whether or not to accept review: (1) if the decision of the Court of Appeals is in conflict with a decision

of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

It is appropriate for this Court to accept review because the decision of Division I conflicts with decisions of both the Court of Appeals and the Supreme Court, and there are issues of substantial public interest which would provide guidance under the Consumer Protection Act and to legal practitioners conducting discovery under the Civil Rules of Superior Court.

A. This Court Should Accept Review to Clarify Whether Denial of a CR 59 Motion for Reconsideration of an Order Granting Summary Judgment is Reviewed Using the De Novo or the Abuse of Discretion Standard

Kozol argued below that when an appellate court reviews the denial of a CR 59 motion for reconsideration of an order granting summary judgment dismissal, the de novo standard applies. Opening Brief of Appellants Ballesteros, Craig and Blair, at 12-13. The Court of Appeals decided that the abuse of discretion standard applies. Opinion, at 17 n.17. The Court of Appeals decision conflicts with other appellate decisions.

Civil Rule 59 expressly encompasses motions for reconsideration and for a new trial. It is well settled that a motion for a new trial is committed to the sound discretion of the trial court.

Wash. Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 694, 724 P.2d 997 (1986). However, the "reconsideration" terminology under CR 59 does apply to motions that seek reconsideration of a decision leading to a judgment. While in the context of a trial verdict a denial of a CR 59 motion for new trial is generally reviewed under the abuse of discretion standard,[3] the alternate relief of reconsideration under CR 59 following entry of summary judgment requires de novo appellate review.

In Tanner Elec. Co-Op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 675 n.6, 911 P.2d 1301 (1996) the Supreme Court noted that evidence not submitted until the filing of a motion for reconsideration was considered by the trial court before denying the motion, and thus, the documents were properly a part of the Supreme Court's review of the underlying summary judgment. In accord the Division III Court of Appeals has decided, "[w]here a trial court grants summary judgment and then denies reconsideration, evidence offered in support of the motion for reconsideration is properly part of an appellate court's de novo review." Rodriguez v. City of Moses Lake, 158 Wn.App. 724, 728, 243 P.3d 552 (2010), review denied, 171 Wn.2d 1025 (citing Tanner, supra). As this Supreme Court established three decades ago, the de novo review standard applies to "all trial court rulings

[3] "However, 'this principle is subject to the limitation that, to the extent that such an order is predicated upon rulings of law, such as those involving the admissibility of evidence [...] no element of discretion is involved.'" Wash. Irrigation & Dev. Co., 106 Wn.2d at 694 (citing Detrick v. Garretson Packing Co., 73 Wn.2d 804, 812, 440 P.2d 834 (1968)(in turn, quoting Johnson v. Howard, 45 Wn.2d 433, 436, 275 P.2d 736 (1954)).

made in conjunction with a summary judgment motion." Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1988).

In holding the abuse of discretion standard applies, the Division I Court relied on Wagner Dev. Inc. v. Fidelity & Dep. Co., 95 Wn.App. 896, 977 P.2d 636 (1999). But it is inconsistent to review an issue on summary judgment under the de novo standard, and then, when a party argues for reconsideration of the summary judgment issues, only review the issues for an abuse of discretion. To do so undermines the very basis for de novo review and in effect creates two different standards for reviewing a summary judgment issue, meaning a litigant who has evidence unavailable for summary judgment but meets the CR 59(a)(4) requirement must now be relegated to review under the abuse of discretion standard simply because of events outside of his or her control.

The Division I Court's reliance on Wagner conflicts with decisions from the Division III Court and this Supreme Court. The de novo standard must apply when reviewing denial of a CR 59 motion to reconsider entry of summary judgment, because substantive summary judgment issues are always reviewed de novo. This conflict presents an important issue of law that warrants acceptance for review under RAP 13.4(b)(1),(2).

B. This Court Should Accept Review to Clarify that the Requirement of "Standing" and the "Actual, Present and Existing Dispute" Criterion for a UDJA Claim are Different

In determining that Kozol's declaratory judgment claim was properly dismissed, the Court of Appeals held that because "Kozol

has not established that an actual dispute or the mature seeds of one presently exists," then "Kozol has not demonstrated that they have standing under the UDJA to request a declaratory judgment." Opinion, at 12.

In moving for RAP 12.4 reconsideration Kozol explained that "standing" to bring a UDJA claim is different than the criteria of showing an "actual, present and existing dispute" between the parties. See RAP 12.4 Motion of Appellant Steven Kozol, at 10-13. The Court of Appeals rejected this argument. Appendix B. As such, the Court of Appeals decision is in conflict with other decisions of this Supreme Court.

The UDJA's "justiciable controversy" requirement has four prongs. The first prong requires an "actual, present and existing dispute." Benton County v. Zink, 191 Wn.App. 269, 278, 361 P.3d 801 (2015). Here, the Court of Appeals erroneously held that "standing" to bring a UDJA action is the same as the first justiciability prong showing an "actual, present and existing dispute...as distinguished from a...hypothetical...disagreement." Opinion, at 12. However, this Supreme Court has clarified that it is the "third prong" of the justiciability requirement that "has been construed as encompassing standing." Lee v. State, 185 Wn.2d 608, 618, 374 P.3d 157 (2016)(citing To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 414, 27 P.3d 1149 (2001). Because the Court of Appeals decision conflicts with this Supreme Court's prior decisions, review should be accepted under RAP 13.4(b)(1).

C. This Court Should Accept Review to Clarify That Upon a Trial Court Expressly Granting Summary Judgment of a UDJA Claim, an Appellate Court Cannot Look to the Trial Court's Oral Ruling and Then "Assume" the Dismissal is Reviewed Under the Abuse of Discretion Standard

Kozol pled a claim for a UDJA declaratory judgment as to contract music pricing. CP 6-7, 13, 15. JPay moved for summary judgment of this claim. CP 105-106. The trial court expressly dismissed all of Kozol's claims on summary judgment. VRP at 45. The trial court entered a written order of summary judgment dismissal on all of Kozol's claims. CP 510-511.

On review the Court of Appeals stated, "we assume that the trial court intended to decline to issue a declaratory judgment rather than dismiss a request for a declaratory judgment on summary judgment," and then proceeded to apply the abuse of discretion standard on review. Opinion, at 11.

On RAP 12.4 reconsideration Kozol explained how the Court of Appeals (1) improperly reframed their appeal issues as arguing an abuse of discretion, (2) improperly deviated from the summary judgment de novo standard of review, and (3) improperly shifted the initial burden on summary judgment to Kozol. See RAP 12.4 Motion of Appellant Steven Kozol, at 2-9. The Court of Appeals rejected this argument. Appendix B.

The Court of Appeals' decision conflicts with other decisions of the appellate courts and of this Supreme Court. This Court has made clear that "review of the trial court's denial of declaratory relief is de novo." To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001)(citing Nollette v.

Christiansen, 115 Wn.2d 594, 600, 800 P.2d 359 (1990); see O.S.T. v. Regence Blue Shield, 181 Wn.2d 691, 704, 335 P.3d 416 (2014)(summary judgment of UDJA claim as to validity of contract reviewed de novo); Hood Canal Sand & Gravel, LLC v. Goldmark, 195 Wn.App. 284, 305-306, 381 P.3d 95 (2016)(trial court's determination that declaratory judgment was not appropriate was reviewed de novo).

Moreover, the Court of Appeals decision conflicts with general summary judgment principles. Because a summary judgment is reviewed de novo, appellate courts do not look to a trial court's findings and conclusions, because they are "superfluous". Hemenway v. Miller, 116 Wn.2d 725, 731, 807 P.2d 863 (1991); Donald v. City of Vancouver, 43 Wn.App. 842, 848-849, 855 P.2d 1216 (1993). On summary judgment "[t]he burden is on the moving party to demonstrate there is no issue as to a material fact, and the moving party is held to a strict standard." Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992); CR 56(c).

Here, the Court of Appeals improperly disregarded both the trial court's express oral ruling dismissing "all" of Kozol's claims on "summary judgment" (VRP, at 45), and the signed order granting summary judgment dismissal to all claims. CP 510-511. Instead, the Division I Court excised partial language from the trial court's oral ruling as a basis to sua sponte transmogrify summary judgment dismissal of Kozol's UDJA claim into a quasi "motion" for declaratory judgment that the trial court "declined

to issue," which only garnered review for an abuse of discretion. See RAP 12.4 Motion of Appellant Steven Kozol, at 5-6.

As a result, the court improperly shifted the burden to Kozol and found that he did not establish the fact of whether JPay's prices were higher than iTunes, but completely ignored the fact that JPay's declaration evidence failed to carry its rightful burden on summary judgment to establish the fact of JPay's pricing differences compared to iTunes. RAP 12.4. Motion of Kozol, at 7-9.

Because the Court of Appeals decision conflicts with other decisions of the Court of Appeals and this Supreme Court, review should be granted under RAP 13.4(b)(1),(2).

D. The Court Should Accept Review to Clarify That a Defendant's Offer of a Post-Hoc Remedy After Being Sued Does not Vitiate a Plaintiff's Cause of Action for a CPA Violation, Conversion or Trespass to Chattels

The Court of Appeals held that because JPay eventually "offered to replace" Kozol's damaged JP3s "free of charge" after Kozol filed suit, then JPay did not violate the CPA. Opinion, at 6-7. The court also held that because JPay "offered them refurbished JP3s or a free upgrade to a newer model" after Kozol had to sue, then there was no conversion or trespass to chattels. Id., at 10.

The appellate court's decision is in conflict with other appellate decisions. In Demalash v. Ross Stores, Inc., 105 Wn.App. 508, 20 P.3d 447 (2001) the court of appeals reversed summary judgment dismissal of the conversion claims because the defendant did not relinquish the unwarranted control over the chattel until

16 days later upon plaintiff retaining counsel, and the return of chattel created a question for a jury.[4] At best JPay's offer of a remedy could only operate to limit damages, or under the CPA -- which is to be liberally construed in favor of a plaintiff, RCW 19.86.920 -- serve as a mitigator to penalties imposed under RCW 19.86.140. This was at least properly recognized by the trial court. VRP, at 28.

Because the decision below conflicts with the decision in Demalash, review should be accepted under RAP 13.4(b)(2).

E. The Court Should Accept Review to Clarify Whether a Defendant's Qualified Admission of Accidental Liability for Injury to "Some" or "Many" Customers is Sufficient to Carry its Initial Summary Judgment Burden to Show it did not Intentionally Cause Injury to Specific Plaintiffs

Kozol alleged that JPay sent a software command to their JP3 players in an effort to force Kozol to buy additional JPay product. CP 10:¶4.11, 11:¶4.14. In moving for summary judgment JPay submitted the declaration of Shari Katz who testified that a defective software update for newer model JP4 devices inadvertently caused "many JP3 players to malfunction" for "some [customers]." CP 86. The Court of Appeals held this sufficiently met JPay's initial burden on summary judgment to establish beyond genuine issue that JPay did not intentionally "Malfuction" Kozol's four JP3 players. Opinion, at 3-4. Kozol's RAP 12.4 motion argued this decision was contrary to law. See RAP 12.4 Motion of

[4] It is well settled that "a conversion can occur when wrongfully detaining chattels by refusing to return them to the rightful owner." Vol.16 Washington Practice: Tort Law & Practice (4th ed. 2014) chpt.14, pg.936 (citing Restatement (Second) of Torts (1965) §§ 237-241). "When a person entitled to possession demands it, the wrongful, unjustified withholding is actionable as conversion." CRS Recovery, Inc. v. Laxton, 600 F.3d 1138, 1145 (9th Cir. 2010).

Ballesteros, Craig and Blair, at 2-5. The Court of Appeals denied reconsideration. Appendix B.

The decision below conflicts with other decisions of the court of appeals and this Supreme Court. On summary judgment all facts and inferences must be construed most favorably to the nonmoving party. Staats v. Brown, 139 Wn.2d 757, 764, 991 P.2d 615 (2000). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Here, because JPay limited its declaration to only describe accidental injury to "many" and "some" customers, as a matter of law this does not apply to Kozol when viewing all inferences most favorably to them. It must be inferred that because JPay elected to not specifically include Kozol's four JP3s as being inadvertently "Malfunctioned", then Kozol's four JP3s were not injured in the accidental manner JPay described.[5] Had JPay's evidence stated "all" JP3 devices were accidentally injured this would necessarily include Kozol's four devices, but JPay did not identify "all" JP3s nor Kozol's four specific JP3s as being unintentionally damaged. Because the appellate court's decision conflicts with decisions of the Supreme Court review should be granted under RAP 13.4(b)(1).

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[5] Kozol's evidence on CR 59 reconsideration shows JPay can in fact intentionally "Malfunction" a JP3 player. CP 217, 167-169. See RAP 12.4 Motion of Ballesteros, Craig and Blair, at 6-8.

F. This Court Should Accept Review to Define Whether it is Improper to Deny a RAP 9.11 Motion Seeking to Introduce Evidence Identified as Material by the Appellate Court

The Court of Appeals determined Kozol's seized evidence filed on CR 59 reconsideration did not comport with CR 59(a)(4). Opinion, at 16-18. Kozol filed motions for RAP 12.4 reconsideration accompanied by a supporting RAP 9.11 motion seeking to introduce evidence showing specific documents in their CR 59 motion were not returned to them until March 1, 2016, and therefore could not have been filed on summary judgment, and comported with CR 59(a)(4). Based upon the court's December 18, 2017 opinion stating Kozol was unable to prove their CR 59 evidence was unavailable on summary judgment, and thus under Wagner Dev. Inc. v. Fid. & Dep. Co. of Md., 95 Wn.App 896, 907 (1999) their CR 59 motion was properly denied, Kozol's new RAP 9.11 evidence became material as a matter of law because it provided the very proof the Court of Appeals determined Kozol had failed to establish. However, the court denied Kozol's RAP 12.4 motions and RAP 9.11 motion. Appendix B.

As such, this conflicts with decisions of the Court of Appeals and this Supreme Court, where RAP 9.11 motions were granted when a movant met the six criteria in RAP 9.11(a). See Spokane Airports v. RMA, Inc, 149 Wn.App. 930, 936-37 (2009); Mansour v. Mansour, 129 Wn.App. 1, 7-8 (2004); State v. Gossage, 138 Wn.App. 298, n.1 (2007); Lawson v. State, 107 Wn.2d 444, 447-48 (1986).

Here Kozol's RAP 9.11 motion met the six criteria of the rule. See RAP 9.11 Motion, at 12-14. It is clear Kozol met the six criteria, as there can be no question the evidence would change the decision, and is needed to fairly resolve the issues, since the Court of Appeals stated Kozol's failure to establish these facts were the basis for affirming summary judgment dismissal.

Moreover, two of the six RAP 9.11(a) prongs sound in equity. There is hardly a stronger showing for equity, when DOC -- a party in privity with JPay -- seized Kozol's evidence prior to summary judgment, and JPay thus benefited by obtaining summary judgment, and prevailing in the Court of Appeals. Indeed, it was this Court that stated,

> "[t]he goal of equity is to do substantial justice. Equity exists to protect the interests of deserving parties from the 'harshness of strict legal rules.' Washington Court's embrace a long and robust tradition of applying the doctrine of equity."

Columbia Cmty. Bank v. Newman Park, LLC, 177 Wn.2d 566, 569, 304 P.3d 472 (2013). This Court has also emphasized the overarching principle that procedural rules must be liberally construed to meet the ends of justice and reach the merits of cases. Sheldon v. Fettig, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996); In re Recall of Bolt , 177 Wn.2d 168, 183, 298 P.3d 710 (2013)("refusing this issue on appeal would prioritize form over substance and disadvantage these pro se parties"); CR 1, RAP 1.2(a). Here, Kozol's first attempt to introduce the evidence under RAP 9.11 was denied, then the Court of Appeals' opinion explicitly affirmed

summary judgment due to a lack of such evidence, yet when Kozol moved to introduce the evidence again under RAP 9.11 to support their RAP 12.4 motions the court would not accept the material evidence. A failure to direct further fact-finding pursuant to RAP 9.11 is treated as an error of law. L.K. Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 48, 72, 331 P.3d 1147 (2014).

The Court of Appeals should have found Kozol met the six criteria in RAP 9.11(a), or in the alternative waived the RAP 9.11 requirements to serve the ends of justice. Spokane Airports, 149 Wn.App. at 937 (citing RAP 1.2(a)); Wash. Fed'n of St. Empls., Council 28 v. State, 99 Wn.2d 878, 884-85, 665 P.2d 1337 (1983). Accordingly, review should be granted under RAP 13.4(b)(1),(2).

G. The Court Should Accept Review to Clarify Whether an Out-of-State Defendant Conducting Commerce in Washington is Required to Appear for Noted CR 30(b)(6) Deposition

Kozol properly served JPay with a notice of CR 30(b)(6) deposition. CP 349-353. JPay objected that no basis in law existed to appear in Washington for depositions. CP 355, 120-121. Kozol notified JPay that it was misinformed. CP 357-359. Kozol moved to compel discovery. CP 338-375. The trial court denied the motion.[6] CP 506.

On appeal the Division I Court quoted from CR 45(d)(2)[7] and held that "Kozol does not have a right to call out-of-state

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[6] Most confounding, the trial court stated that, "it would be my recommendation that a couple of depositions of JPay officials that have knowledge of the system, the [JP3s] and [JP4s] and how they interact with the kiosk, that these be the first step." VRP, at 16.

[7] The court cited CR 45(e)(2), but quoted language from CR 45(d)(2).

witnesses to Washington to provide deposition testimony." Opinion, at 16. But CR 45(d)(2) applies to subpoena of a non-party witness. JPay is not a non-party witness, rather it is a party to the action. It is well established that a party can be compelled by notice to appear for a deposition, and service of a subpoena is not necessary on a party.[8]

The Division I Court's decision is in conflict with decisions of the Court of Appeals and this Supreme Court. In State ex rel. Onishi v. Superior Court, 30 Wn.2d 348, 355-56, 191 P.2d 703 (1948) the Supreme Court previously held that the deposition of an out-of-state defendant had to be taken at his or her place of residence. However, in Campbell v. A.H. Robins, Co., 32 Wn.App. 98, 106, 645 P.2d 1138, review denied, 97 Wn.2d 1037 (1982), the Court of Appeals indicated that Onishi was no longer valid law, asserting Onishi had been overruled sub silentio in Allen v. American Land Research, 95 Wn.2d 841, 631 P.2d 930 (1981).[9]

Since 1982 there is a dearth of caselaw on this issue, and the Washington State Bar Association has commented that, "[t]he

[8] CR 37(d) provides for sanctions if a "party or an officer, director, or managing agent of a party...fails...to appear before the officer who is to take his deposition after being served with a proper notice...." CR 37(d). This sanction makes clear that a party's attendance is required by a notice of deposition. See Civil Procedure Deskbook (Wash.St.Bar.Ass'n, 2d ed. 2004 & Supp. 2006) §45.1, pg.3 ("Although a party may be compelled to attend a deposition through use of a deposition notice, a subpoena is necessary to compel the attendance [at deposition] of a witness who is not a party to that litigation.")

[9] While Campbell involved an appearance at trial pursuant to CR 43(f)(1) rather than a deposition, CR 30 and CR 43 make it abundantly clear that the same rules apply to a request to a party (or managing agent) to appear for deposition testimony taken under the jurisdiction of the superior court for this action, and deposition attendance is required under CR 30 and CR 43(f)(1).

Washington courts have yet to address directly the issue of deposition attendance of out-of-state defendants under CR 26(c), 30(d), and 43(f)." Civil Procedure Deskbook (Wash.St.Bar Ass'n 2d ed. 2004 & Supp. 2006) §26, pg. 76.

Here, JPay signed a contract agreeing it "shall comply with all...state and local laws." CP 427. JPay conducts commerce in Washington, and routinely sends employees to Washington prisons.[10] JPay is also registered with the Office of the Secretary of the State. ER 201. As such, its attendance at deposition was required. The Court of Appeals decision erroneously applying the CR 45(d)(2) subpoena of a nonparty witness as a basis preventing Kozol from deposing JPay's managing agent in Washington is in conflict with the long-standing decision in Campbell and Allen. This issue is a significant question of law and review should be granted under RAP 13.4(b)(1),(2).

H. The Court Should Accept Review to Clarify Whether a Defendant Objecting to Discovery as a Protected Trade Secret Under RCW 19.108.010(4) Must Make a Factual Showing in Response to a Plaintiff's Motion to Compel

To carry their burden on summary judgment to establish JPay used its intentional "Malfunction" procedure to lock their JP3 players, Kozol requested discovery of the small portion of computer code that was last sent to their JP3s when they were docked into the JPay kiosk and became locked. JPay objected on the basis

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[10] JPay also objected by claiming it was unduly burdensome and too costly to send CR 30(b)(6) deponents to Washington State. CP 120-121. But at the same time JPay was making this assertion, it sent four agents from company headquarters to have a meeting on February 18, 2016 with inmates and staff at Stafford Creek Corrections Center — the same prison Kozol requested JPay appear at — to discuss various issues with the JPay kiosk system and the various music players. As such, there was no reason Messrs. Dhanukdarrishingh, Posner, Levine, and Markey, or other JPay employees could not be deposed in Washington. CP 176-178.

of a protected trade secret under RCW 19.108.010(4). Kozol moved to compel production of this discovery. CP 338-375. The trial court denied the motion. CP 506-507.

On appeal the Division I Court affirmed the trial court, stating "it is reasonable to conclude that proprietary computer code data involving specific command functions of electronic devices would have potential independent economic value from being kept secret." Opinion, at 16. This decision is contrary to decisions of the Court of Appeals and this Supreme Court.

First, there is no evidence in the record from JPay to factually establish this limited software code is a trade secret. JPay's only assertion was the argument of counsel, that "[c]ertainly, JPay's computer programs and devices are subject to trade secret protection." CP 122. But argument of counsel does not constitute competent evidence. Lemond v. Dep't of Licensing, 143 Wn.App. 797, 807, 180 P.3d 829 (2008). The party asserting a trade secret bears the burden of proof. See Boeing Co. v. Sierracin Corp., 180 Wn.2d 38, 49, 738 P.2d 665 (1987). "[T]he determination in a given case whether specific information is a trade secret is a factual question." Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 436, 971 P.2d 936 (1999)(citations omitted). Here, JPay submitted no evidence that this single command to intentionally "Malfunction" Kozol's JP3s was a protected trade secret. See McCallum v. Allstate Prop. & Cas. Ins. Co., 149 Wn.App. 412, 204 P.3d 944 (2009)(protective order vacated

because the insurer provided no evidence to support its contention that documents concerning its claim handling process contained trade secrets under RCW 19.108.010(4)).

Conversely, Kozol's evidence before the trial court established that the limited line of computer code could not be a protected trade secret. "For trade secrets to exist, they must not be 'readily ascertainable by proper means' from some other source, including the product itself." Boeing, 180 Wn.2d at 49-50 (quoting RCW 19.108.010(4)(a)).

The JP3 software code Kozol sought is an open-source, Unix-based platform called "C language." CP 362, 529 (ROG No. 7). JPay's CEO revealed to the media that the software was not a protected secret because, "[w]e take outside applications, redevelop them for prisons specifically, and then deploy them." CP 174. Thus, JPay could not establish "independent economic value" under RCW 19.108.010(4)(a) because JPay discontinued manufacture and sales of its JP3 years ago and now sells only newer model devices (CP 86:¶17), and JPay only sold its JP3s to DOC inmates under an exclusive contract. CP 424. As a result, no one can potentially "obtain economic value" from this limited and now defunct code. RCW 19.108.010(4)(a). See Petters v. Williamson & Assoc., Inc., 151 Wn.App. 154, 210 P.3d 1048 (2009)(trial court properly dissolved a previous injunction because the trade secret encompassed by the injunction had ceased to exist).

Second, to qualify as a trade secret, "reasonable efforts must be taken to maintain secrecy." Machen, Inc. v. Aircraft Design, 65 Wn.App. 319, 327, 828 P.2d 73 (1992).[11] Here, JPay agreed to showing the code to Kozol and their expert witnesses under supervision and control of JPay's counsel with an appropriate protective order in place. VRP 13. JPay tells its customers of the coding ability to intentionally "Malfunction" their JP3 and other model devices. CP 217, 167-169. JPay routinely unlocks its media devices so customers leaving prison can fully access the device/software with their own computer. CP 171. All the more, to maintain the integrity of the evidence Kozol's attorney has possession of their JP3s, and they could hire independent software experts to access their JP3s and show them the software code that "locked" the devices.[12] CP 371-375.

Therefore, because the software code Kozol seeks is open-source, publicly accessed by former inmates with JPay permission, and can be accessed by Kozol having an expert examine the JP3s, the limited code is "readily available by proper means from some other source, including the product itself," and is

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11 "Reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on a 'need to know basis,' and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection." Id., at 327 (quoting Unif. Trade Secrets Act §1 comment, 14 U.L.A. 439 (1990)).

12 Kozol should not have to incur such additional expense to obtain the same information that JPay can simply print out and provide via a protective order. The Rules are to be construed for inexpensive determination of an action. CR 1.

not a trade secret. Boeing, 180 Wn.2d at 349-50. In light of JPay's failure to establish Kozol's JP3s were unintentionally damaged by a JP4 software update, ante, at 15-16, this requested discovery is "reasonably calculated to lead" to evidence of whether JPay intentionally malfunctioned Kozol's JP3s. CR 26(b)(1). Because the Court of Appeals' decision conflicts with decisions of the Court of Appeals and this Supreme Court, review should be granted under RAP 13.4(b)(1),(2).

VI. CONCLUSION

For the reasons stated above, the Petitioners respectfully ask this Court to acknowledge the case conflicts and significant issues to legal practitioners and the public interest by accepting review. Petitioners also preserve any request for attorney fees and costs pursuant to RAP 18.1.

DATED this 25th day of February, 2018.

RESPECTFULLY submitted,

STEVEN P. KOZOL

LARRY A. BALLESTEROS

KEITH CRAIG

KEITH BLAIR

191 Constantine Way
Aberdeen, WA 98520

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Larry A. Ballesteros, declare and say:

That on the 25th day of February, 2018, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. COA No. 76796-8-I:

Petition for Review;

;

;

.

addressed to the following:

Clerk of the Court
Division I Court of Appeals
One Union Square
600 University Street
Seattle, WA 98101-4170

John A. Kesler III
910 Lakeridge Way S.W.
Olympia, WA 98502

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 25th day of February, 2018, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

Larry A. Ballesteros
Print Name

DOC 847194 UNIT H6-A91
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

Appendix A

COURT OF APPEALS
STATE OF WASHINGTON
2017 DEC 18 AM 9:24

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN P. KOZOL, LARRY BALLESTEROS, KEITH CRAIG, and KEITH BLAIR, Appellants, v. JPAY, INC., Respondent.	No. 76796-8-I DIVISION ONE UNPUBLISHED OPINION FILED: December 18, 2017

TRICKEY, A.C.J. — Steven Kozol, Larry Ballesteros, Keith Craig, and Keith Blair[1] appeal the trial court's grant of summary judgment in favor of JPay, Inc. and denial of their motion for a CR 56(f) continuance, motion to compel discovery, and motion for reconsideration. Finding no error, we affirm.

FACTS

Kozol, Ballesteros, Craig, and Blair are housed at the Stafford Creek Corrections Center in Aberdeen, Washington.[2] JPay has a contract with the Washington State Department of Corrections (DOC) to sell electronics, including

[1] Two sets of opening and reply briefs were filed by the appellants in this case. Appellants Ballesteros, Craig, and Blair filed one set of briefs and appellant Kozol filed a separate set. The two sets of briefs contain identical issue statements and incorporate one another's argument sections by reference. For purposes of this opinion, the appellants will be treated as a group and will be collectively called Kozol for actions on appeal.

[2] Michas Taitano participated in the trial proceedings but was not named as a party on appeal.

MP3 music players, and electronic music to inmates. Kozol, Ballesteros, Craig, and Blair each received a JP3 model MP3 music player from JPay in 2012, and have purchased music to listen to on their JP3s. JPay's music players are sold with a limited warranty.[3]

Kozol, Ballesteros, Craig, and Blair's JP3s stopped working in 2015. Steven Kozol filed help tickets with JPay and was told that he would need to purchase a new device. In June 2015, Steven Kozol filed a pro se complaint against JPay, alleging fraud, negligent misrepresentation, violation of the Consumer Protection Act[4] (CPA), tortious interference, trespass, conversion, and estoppel. Blair and Ballesteros joined Steven Kozol's lawsuit as intervenors. Craig filed a separate complaint, and Kozol's subsequent motion to consolidate the cases was granted.

In July 2015, JPay determined that its new software, which was designed for its new JP4 model music player, was causing many JP3s to malfunction when it was downloaded. JPay offered a free hardware upgrade to any inmate whose JP3 was affected, including Kozol, Ballesteros, Craig, and Blair, regardless of its warranty status. JPay has since stopped producing JP3 models but continues to offer free upgrades to new models. Inmates' music libraries are associated with their JPay account and were unaffected by the issues with the music players.

Kozol, Ballesteros, Craig, and Blair moved for a CR 56(f) continuance and moved to compel discovery. The trial court denied their motions. JPay moved for

[3] Although the parties do not cite a copy of the applicable user agreements in the record, JPay has never offered a limited warranty longer than one year during the relevant time period.
[4] Ch. 19.86 RCW.

summary judgment. The trial court granted summary judgment in favor of JPay and dismissed Kozol, Ballesteros, Craig, and Blair's claims. Kozol, Ballesteros, Craig, and Blair moved for reconsideration, which the trial court denied.

Kozol, Ballesteros, Craig, and Blair appeal.

ANALYSIS

Evidence Supporting Summary Judgment

Kozol argues that the trial court erred when it admitted the declaration of JPay's compliance officer Shari Katz because Katz's declaration does not demonstrate that it was based on her personal knowledge. We disagree.

Affidavits submitted in support of summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e).

"The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Here, Katz declared under penalty of perjury that she had personal knowledge of the facts contained in her declaration. Katz's declaration contains facts that would be particularly within the personal knowledge of an officer of JPay, such as the number of affected JP3s, the cause of the malfunctions, and JPay's efforts to respond to the issue. Thus, Katz's declaration indicates that she testified from her personal knowledge. Kozol has not argued that the facts in Katz's declaration were inadmissible or that Katz was not competent to testify. Therefore,

we conclude that the trial court did not err when it considered Katz's declaration when deciding to grant JPay's motion for summary judgment.

Kozol argues that Katz's declaration is overly generalized, conclusory, and speculative.[5] Kozol has not offered relevant legal authority in support of this argument. Moreover, Katz did not need to declare that every JP3 had been affected to provide sufficiently specific testimony. We reject this argument. RAP 10.3(a)(6).

Kozol next argues that Katz's declaration did not establish her personal knowledge because she did not declare that she worked at JPay when the events at issue occurred or that she had first-hand knowledge of the writing of the defective computer code. Kozol asserts that we must view this in the light most favorable to them and conclude that Katz started working at JPay on the day she made her declaration. This is incorrect. As discussed above, Kozol has not demonstrated that the trial court erred in concluding that Katz's declaration established her personal knowledge and was admissible. Moreover, Katz did not have to have personal knowledge of the software code itself to have personal knowledge of its effects on inmates' JP3s. We reject this argument.

Summary Judgment

Kozol argues that the trial court erred in granting summary judgment in favor of JPay because genuine issues of material fact exist regarding their claims for violation of the CPA, conversion, and trespass to chattels. JPay relies on the facts

[5] For example, Kozol takes issue with Katz's statements that "many JP3 players" were affected and that the software caused "malfunctions for some offenders." Clerk's Papers (CP) at 86.

and arguments it offered to the trial court. We examine each of Kozol's dismissed claims in turn.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "[W]here, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, [and] negligence," summary judgment is inappropriate. Preston v. Duncan, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960).

A trial court's summary judgment ruling is reviewed de novo. Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Consumer Protection Act

Kozol argues that the trial court erred in granting summary judgment on their claim of violation of the CPA because there is a genuine issue of material fact regarding whether JPay acted unfairly or deceptively. Because the record does not show that there is a genuine issue of material fact over whether it acted unfairly or deceptively under the CPA, we disagree.

"[T]o prevail in a private CPA action . . . a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or

property; (5) causation." Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

A plaintiff may demonstrate an unfair act or practice based on violation of a statute or an act or practice that has either the "'capacity to deceive substantial portions of the public'" or is "'in violation of public interest.'" Mellon v. Reg'l Tr. Servs. Corp., 182 Wn. App. 476, 488, 334 P.3d 1120 (2014) (quoting Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013)). A defendant's actions may be unfair or deceptive if they cause or are likely to cause substantial injury to consumers that is not reasonably avoidable and not outweighed by countervailing benefits. Mellon, 182 Wn. App. at 489-90.

Although the CPA is construed liberally, it does not "prohibit acts or practices which are reasonable in relation to the development and preservation of business." RCW 19.86.920.

Here, Kozol argues that the record demonstrates that JPay may have intentionally caused their JP3s to malfunction, misrepresented that it could not "unlock" their JP3s or offer replacements, and violated RCW 19.190.030(2).[6] We disagree. JPay has acknowledged that its new update, designed for JP4 models, was not compatible with JP3s and has offered to replace malfunctioning JP3 models free of charge. These both weigh against the conclusion that JPay

[6] "It is a violation of the consumer protection act, chapter 19.86 RCW, to assist in the transmission of a commercial electronic mail message, when the person providing the assistance knows, or consciously avoids knowing, that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any act or practice that violates the consumer protection act." RCW 19.190.030(2).

intentionally caused Kozol's JP3s to malfunction, and Kozol has not offered countervailing evidence.

Kozol's claim that JPay misrepresented that it was unable to unlock or replace JP3s is also unsupported. JPay informed Steven Kozol that JPay no longer produced JP3s or offered support services because it had developed new generations of devices. The fact that JPay eventually refurbished five older JP3s in response to Kozol's lawsuit and offered them free of charge to Kozol, after it offered them a free upgrade to newer devices, does not establish that JPay acted unfairly or deceptively. Moreover, Kozol has not cited to relevant opposing evidence in the record.[7]

Similarly, JPay did not act unfairly or deceptively when it told Kozol that their only option was to purchase a new device because the limited warranties on their JP3s had expired by 2015. JPay did not have a duty to repair or replace any JP3 that stopped working after its limited warranty expired, and thus did not act unfairly or deceptively when it informed Kozol that they could purchase a newer device to replace their malfunctioning JP3s.

Further, the record does not support Kozol's assertion that JPay or its employees violated RCW 19.190.030(2). Kozol's arguments rely on their assertions that JPay was capable of repairing or replacing their malfunctioning

[7] Kozol cites to the declaration of Ronnie Bowman to argue that JPay was capable of unlocking JP3s, but ignores that Bowman declared that JPay was capable of doing so "[d]uring the time that JPay sold only its JP3 model music players." This was no longer the case in 2015 because JPay had discontinued its production of JP3s. Further, Kozol's argument that released inmates were given the option of having their JP3s unlocked with their existing music intact is unpersuasive because the cited evidence concerns JP4 mini-tablets, not JP3s.

JP3s. As discussed above, Kozol's arguments are insufficient to demonstrate an unfair or deceptive act or practice under the CPA. Thus, Kozol has not shown that JPay or its employees may have violated RCW 19.190.030(2).

Kozol also argues that JPay's user agreement was substantively unconscionable because it "permits [JPay] to do anything it desires to [Kozol's] music players or music purchases,"[8] and thus the trial court erred in granting summary judgment if it based its decision in any part on the user agreement.

"A term is substantively unconscionable where it is 'one-sided or overly harsh,' '[s]hocking to the conscience,' 'monstrously harsh,' or 'exceedingly calloused.'" Gandee v. LDL Freedom Enters., 176 Wn.2d 598, 603, 293 P.3d 1197 (2013) (alteration in original) (internal quotation marks omitted) (quoting Adler v. Fred Lind Manor, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004)).

Assuming that Kozol is referencing the limited warranties in JPay's user agreement, they are not substantively unconscionable. During the period the limited warranties were in place, Kozol could have taken advantage of their benefits. The fact that the warranties on the products would eventually expire does not render them unconscionable.[9]

[8] Opening Br. of Appellants Ballesteros, Craig, and Blair at 29.
[9] Kozol also contends that Steven Kozol did not agree to JPay's user agreement. This is irrelevant. At most, it means that Steven Kozol could not benefit from the limited warranties while they were in place.

Conversion

Kozol argues that the trial court erred in granting summary judgment in favor of JPay on their conversion claims. Because the record does not show that JPay willfully interfered with Kozol's JP3s, we disagree.

The tort of conversion is "the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession." Meyers Way Dev. Ltd. P'ship v. Univ. Savings Bank, 80 Wn. App. 655, 674-75, 910 P.2d 1308 (1996). "Wrongful intent is not a necessary element of conversion, and good faith cannot be shown as a defense to conversion." Paris Am. Corp. v. McCausland, 52 Wn. App. 434, 443, 759 P.2d 1210 (1988).

Here, Katz's declaration demonstrates that JPay did not intend for their new software to impact JP3s. Kozol has not cited evidence in the record contravening the facts offered by Katz's declaration. Thus, we conclude that the record does not show a genuine issue of material fact regarding whether JPay willfully interfered with Kozol's JP3s. We need not reach the issue of whether Kozol was injured by the alleged conversion.

Kozol argues that JPay intended that the new software would be installed in JP3s when they were plugged into JPay kiosks. This does not establish that JPay also intended that the new software would interfere with JP3s. We reject this argument.

Kozol argues that JPay committed a continuing conversion of Kozol's JP3s when it wrongfully refused to unlock or otherwise return their affected JP3s. Because, as discussed above, the record does not show that JPay willfully

interfered with Kozol's JP3s and in fact offered them refurbished JP3s or a free upgrade to a newer model in a timely manner, we reject this argument.

Trespass to Chattels

Kozol argues that the trial court erred in granting summary judgment in favor of JPay on their trespass to chattels claims. Because the record does not demonstrate that a genuine issue of material fact exists regarding whether JPay intentionally interfered with Kozol's JP3s, we disagree.

"A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." RESTATEMENT (SECOND) OF TORTS § 217 (AM. LAW INST. 1965); see also 16 WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 14:15, at 585 (4th ed. 2013); Repin v. State, 198 Wn. App. 243, 268-69, 392 P.3d 1174 (recognizing trespass to chattels cause of action), review denied, 188 Wn.2d 1023 (2017).

Here, as discussed above, the record does not demonstrate that a genuine issue of material fact exists regarding whether JPay intentionally interfered with Kozol's JP3s. Kozol again argues that JPay intended that inmates would download the new software, but this is insufficient to show that JPay intended to dispossess someone of a chattel or otherwise interfere with its use. Thus, we conclude that the trial court did not err when it granted summary judgment in favor of JPay on Kozol's trespass to chattels claims. We need not reach the issue of whether Kozol was harmed by the alleged trespass.

Declaratory Judgment

Kozol argues that the trial court abused its discretion when it declined to issue a declaratory judgment ordering the return of funds they had spent on downloaded music that exceeded the amount charged by iTunes based on the language of JPay's contract with the DOC.[10] We disagree.

A person who's rights are affected by a contract may "have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020.

To have standing under the Uniform Declaratory Judgments Act[11] (UDJA), a party must meet the following elements:

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Benton County v. Zink, 191 Wn. App. 269, 278, 361 P.3d 801 (2015) (alteration in original) (internal quotation marks omitted) (quoting To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)), review denied, 185 Wn.2d 1021 (2016).

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[10] In its oral ruling, the trial court stated that "the court is finding that this is not an appropriate case for a declaratory judgment." Report of Proceedings (RP) at 45. Although the court did not change the defense's proposed order granting summary judgment, we assume that the trial court intended to decline to issue a declaratory judgment rather than dismiss a request for a declaratory judgment on summary judgment.

[11] Ch. 7.24 RCW.

A trial court's decision to consider or refuse to consider a motion for declaratory judgment is reviewed for abuse of discretion. Nollette v. Christianson, 115 Wn.2d 594, 599, 800 P.2d 359 (1990).[12]

Here, Kozol has not established that an actual dispute or the mature seeds of one presently exists. JPay's contract with the DOC provides that, "Digital media purchases are comparable to cost from major providers such as iTunes."[13] The contract also states that, "The cost per song ranges between $0.99 and $2.00 depending on the label and song."[14] Kozol contends that, under the contract language giving a range of possible prices, JPay would be able to charge $1.99 for a song that is being sold for $0.79 on iTunes, thus violating the language requiring comparable pricing. This offered hypothetical is insufficient to demonstrate that an actual dispute presently exists or that one is imminent.[15] Thus, Kozol has not demonstrated that they have standing under the UDJA to request a declaratory judgment.

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[12] Kozol argues that they have standing to sue under the contract between JPay and the DOC as third party beneficiaries. See Branson v. Port of Seattle, 152 Wn.2d 862, 877, 101 P.3d 67 (2004) ("the UDJA allows for an interested person to have any question arising under the validity of a contract determined, so long as the UDJA's underlying requirements are met"). JPay has not offered opposing argument. We assume without deciding that Kozol is a third party beneficiary with standing to sue to enforce rights under the contract between JPay and the DOC.

[13] CP at 309.

[14] CP at 310.

[15] Kozol relies on an internet article Steven Kozol attached to his declaration, which stated that a 2014 investigation discovered that "JPay's songs can cost 30% to 50% more than they would on iTunes." CP at 185. Assuming that this article is properly before us, it is insufficient to demonstrate that an actual and present dispute exists in the present case. The parties have not cited to evidence in the record that JPay has continued to use the same pricing practices for its songs, and the article does not provide information on the prices of downloadable music on other platforms. Thus, Kozol has not demonstrated that the article's statements are applicable to the present case and show that an actual and present dispute exists.

Because Kozol cannot establish standing under the UDJA, we conclude that the trial court did not abuse its discretion by declining to issue a declaratory judgment in their favor. We need not reach the issue of whether Kozol has established the other elements of standing under the UDJA.

Motion for CR 56(f) Continuance

Kozol argues that the trial court erred when it denied their motion for a continuance under CR 56(f). Because Kozol did not state why they did not offer good reason for their delay in obtaining the evidence at issue, we disagree.

A court may grant a continuance or stay a motion for summary judgment "[s]hould it appear from the affidavits of a party opposing the motion that . . . the party cannot present by affidavit facts essential to justify the party's opposition . . . to permit affidavits to be obtained or depositions to be taken or discovery to be had." CR 56(f). But a court may deny the motion if "(1) the moving party does not offer a good reason for the delay in obtaining the evidence; (2) the moving party does not state what evidence would be established through the additional discovery; or (3) the evidence sought will not raise a genuine issue of fact." Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

A trial court's decision to deny a motion for a CR 56(f) continuance is reviewed for abuse of discretion. Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 183, 313 P.3d 408 (2013). A court abuses its discretion if its decision is based on unreasonable or untenable grounds. Clarke v. Office of Att'y Gen., 133 Wn. App. 767, 777, 138 P.3d 144 (2006).

Here, Kozol argues that they needed to conduct additional discovery to determine whether JPay had intentionally interfered with their JP3s by sending a computer command to their JP3s to lock them. In their motion for a continuance, Kozol stated that they required a continuance in order to obtain their "requested document productions" and that a continuance was the only way to obtain evidence possessed exclusively by JPay.[16] But they did not state good reason for why they could not have requested this evidence prior to summary judgment. The fact that the evidence was exclusively held by JPay is insufficient to require the trial court to grant a CR 56(f) continuance.[17] Thus, we conclude that the trial court did not abuse its discretion when it denied Kozol's motion for a CR 56(f) continuance.

Motion to Compel Discovery

Kozol argues that the trial court abused its discretion when it denied their motion to compel discovery because the trial court should have issued a protective order to protect any trade secret information. Because Kozol's requests for discovery were overbroad and sought privileged information, we disagree.

A party may obtain discovery through various tools, including depositions. CR 26(a). But a court may limit a party's use of discovery tools if it determines that:

> (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less

[16] CP at 125-26.

[17] Further, Kozol's motion to continue is premised on giving them an opportunity to obtain the same information they sought in their motion to compel discovery. As discussed below, the trial court denied Kozol's motion to compel discovery in part because the information they sought was privileged.

> burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

CR 26(b)(1).

A party may object to a discovery request if it is overbroad, vague, or ambiguous, such as when the request is so broad that it may be reasonably interpreted to include irrelevant or undiscoverable information. See Weber v. Biddle, 72 Wn.2d 22, 29, 431 P.2d 705 (1967).

> (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4).

A trial court's decision to deny a motion to compel is reviewed for abuse of discretion. Lake Chelan Shores Homeowners Ass'n, 176 Wn. App. at 183. A court abuses its discretion if its decision is based on unreasonable or untenable grounds. Clarke, 133 Wn. App. at 777.

Here, the trial court denied Kozol's motion to compel discovery because it was "over-broad and is . . . a fishing expedition for things at this point I do not see are likely to lead to the discovery of admissible evidence and also seeks trade

secret information."[18] Kozol has not demonstrated that this determination was an abuse of discretion. Kozol's motion to compel discovery sought computer data and commands that would allegedly show that JPay intentionally interfered with Kozol's JP3s.[19] Kozol's requests could include computer data and information that is not relevant to the present dispute. Moreover, it is not unreasonable to conclude that proprietary computer code data involving specific command functions of electronic devices would have potential independent economic value from being kept secret. Thus, we conclude that the trial court did not abuse its discretion when it denied Kozol's motion to compel discovery.

Motion for Reconsideration

Kozol argues that the trial court erred in denying their motion for reconsideration because they offered new material evidence. Because Kozol has not demonstrated that their offered evidence was material or could not have been offered at summary judgment, we disagree.

A trial court may vacate its decision and grant reconsideration upon the motion of an aggrieved part who offers "[n]ewly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4). "If the evidence

[18] RP at 16.

[19] Kozol also sought to depose JPay's software development engineers under CR 30. An out-of-state deponent may only be deposed "in the county where the person is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of the court." CR 45(e)(2). Kozol argues that JPay's argument that sending its employees to Washington for depositions would be an undue burden is inaccurate and that CR 30 and CR 43 require their attendance. This is unpersuasive. Kozol does not have a right to call out-of-state witnesses to Washington to provide deposition testimony, and their arguments are not relevant to the trial court's determination that their discovery requests were overbroad. We reject this argument.

was available but not offered until after [an earlier opportunity to present it] passes, the parties are not entitled to another opportunity to submit that evidence." Wagner Dev. Inc. v. Fid. & Deposit Co. of Md., 95 Wn. App. 896, 907, 977 P.2d 639 (1999).

"Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of that discretion." Wagner Dev. Inc., 95 Wn. App. at 906.[20]

Kozol has not demonstrated that several of the cited items of evidence are material to the present dispute. First, Kozol argues that he was unable to submit several declarations of other inmates whose JP3s had malfunctioned because the DOC had seized Steven Kozol's legal files and the declarations were missing when his files were returned. Kozol has not established that additional evidence of affected JP3s would be material to the present case.

Second, Kozol argues that minutes from an Offender Tier Rep Meeting and a letter to Steven Kozol were not available in time for them to be submitted at summary judgment. The minutes do not include a reference to JP3s and the letter appears to contain a picture of an album cover. Kozol has not demonstrated that either are material to the present dispute.

Third, Kozol argues that the declaration of Ansel Hofstetter was not taken at the time of summary judgment and thus is new evidence. Hofstetter's declaration states that he experienced software issues with his JP4 media player

[20] Kozol argues that the trial court's denial of their motion to reconsider was part of its decision to dismiss their claims at summary judgment, and thus our review is de novo. This is incorrect. The trial court's denial of Kozol's motion to reconsider is a separate decision that we review for abuse of discretion. See Wagner Dev. Inc., 95 Wn. App. at 906.

when JPay released its new JP5-mini device, and that several other inmates experienced similar issues. Hofstetter's declaration does not concern JP3 players or the present dispute, and Kozol has not demonstrated how it is otherwise material to the present case.

Kozol has not demonstrated that the remaining items of evidence were unavailable in time to be submitted for the summary judgment hearing. First, Kozol argues that the declaration of John Shefcik could not have been presented at summary judgment because it relies on a transcript of an e-mail exchange between Blair and JPay that the DOC seized and did not return to him prior to the summary judgment hearing. The e-mail exchange between Blair and JPay occurred on June 18, 2015. Steven Kozol declared that his legal materials were seized on January 22, 2016. Kozol has not demonstrated that they were unable to provide Shefcik with the e-mail exchange in the months between when the exchange occurred and Steven Kozol's legal materials were seized.

Second, Kozol argues that, following summary judgment, each appellant presented new evidence of emotional distress, and that Ballesteros was formally diagnosed with posttraumatic stress disorder that he had been suffering from for decades. Kozol has not argued why they could not have discovered this evidence with reasonable diligence prior to summary judgment. For example, each of Kozol's cited declarations state that their claimed stress and anxiety began when they were locked out of their JP3s in May 2015. This evidence was available to Kozol in time for them to have offered it at the summary judgment hearing in February 2016.

In sum, Kozol has not demonstrated that the new evidence offered in their motion for reconsideration was material to the present case or was unavailable to them at the time of the summary judgment hearing. Therefore, we conclude that the trial court did not abuse its discretion when it denied Kozol's motion for reconsideration.

Attorney Fees on Appeal

Kozol requests their reasonable costs on appeal. RAP 14.2; RAP 18.1. Because Kozol has not prevailed on their claims on appeal, we deny their request.

Affirmed.

Trickey, ACJ

WE CONCUR:

Schindler, J.

Cox, J.

Appendix B

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

STEVEN P. KOZOL, LARRY BALLESTEROS, KEITH CRAIG, and KEITH BLAIR, Appellants, v. JPAY, INC., Respondent.	No. 76796-8-I ORDER DENYING MOTIONS FOR RECONSIDERATION

The appellant, Steven P. Kozol, has filed a motion for reconsideration. The appellants, Larry Ballesteros, Keith Craig, and Keith Blair, have also filed a motion for reconsideration. The court has taken the matters under consideration. A majority of the panel has determined that the motions should be denied.

Now, therefore, it is hereby

ORDERED that the motions for reconsideration are denied.

FOR THE COURT:

Trickey, ACJ

FILED
2/7/2018
Court of Appeals
Division I
State of Washington

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

STEVEN P. KOZOL, LARRY BALLESTEROS, KEITH CRAIG, and KEITH BLAIR, Appellants, v. JPAY, INC., Respondent.	No. 76796-8-I ORDER DENYING MOTION TO SUPPLEMENT RECORD WITH ADDITIONAL EVIDENCE

The appellants, Steven P. Kozol, Larry Ballesteros, Keith Craig, and Keith Blair, have filed a motion to supplement the record with additional evidence pursuant to RAP 9.11. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion to supplement the record with additional evidence is denied.

FOR THE COURT:

Trickey, ACJ