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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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Brian & Karen Handlin,

Plaintiff/Appellant,

v.

On-Site Manager, Inc.,

Defendant/Respondent.

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**BRIEF OF APPELLANTS BRIAN & KAREN HANDLIN**

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## **I. Introduction**

The Fair Credit Reporting Act provides a person who is turned down for credit, employment, housing, or other kind of transaction based on a “consumer report” to receive a free and complete disclosure of that report on request.<sup>1</sup> In the rental housing context, this means an applicant who is denied admission to an apartment can obtain a copy of the tenant-screening report the landlord used to consider the application.<sup>2</sup> Access to the report enables the applicant to dispute inaccurate or misleading items, provide explanatory or mitigating information to the housing provider, or simply make wise decisions about the kinds of housing opportunities available to him or her.

In this case, Brian and Karen Handlin requested copies of their tenant-screening reports after being denied admission to a rental property called Forestview Apartments.<sup>3</sup> But the source of those reports, On-Site Manager, Inc., produced only incomplete reports, in the wrong format, and

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<sup>1</sup> See RCW 19.182.100(2); see also RCW 19.182.010(4)(a) (“‘Consumer report’ means means a written, oral, or other communication of information by a consumer reporting agency bearing on a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for: (i) The purpose of serving as a factor in establishing the consumer’s eligibility for credit or insurance to be used primarily for personal, family, or household purposes; (ii) Employment purposes; or (iii) Other purposes authorized under RCW 19.182.020.”).

<sup>2</sup> See RCW 19.182.070; see also RCW 59.18.030(23) (“‘Tenant screening report’ means a consumer report as defined in RCW 19.182.010 and any other information collected by a tenant screening service.”).

<sup>3</sup> CP at 2-3.

after an unreasonable delay.<sup>4</sup> These tardy and improper disclosures violated the FCRA (which required On-Site to produce the full reports, within a reasonable time and in the medium the requested).<sup>5</sup>

The Handlins did manage to obtain an apartment elsewhere, and were later approved even at Forestview despite the improper disclosures.<sup>6</sup> But they still brought this action, seeking primarily to enjoin On-Site from continuing to violate the FCRA disclosure requirements, and to recover statutory damages.<sup>7</sup> The trial court dismissed, however, finding the Handlins had not alleged an “actual injury.”<sup>8</sup>

The trial court was incorrect because the Handlins’ allegation that On-Site failed to make complete disclosures to which the Handlins were entitled, and did not produce them within a reasonable time or in the requested format, established an adequate injury.<sup>9</sup> Not only did the Legislature intend to establish a cause of action against consumer reporting agencies that fail to make statutorily-required disclosures, but consumer reports—such as tenant-screening reports—are a form of

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<sup>4</sup> CP at 4-6.

<sup>5</sup> See RCW 19.182.070-090.

<sup>6</sup> CP at 5.

<sup>7</sup> CP at 9-10.

<sup>8</sup> CP at 87-88; Tr. of Hrg. on Moion. to Dismiss, p. 33, ln. 1-6 (May 2, 2014).

<sup>9</sup> See RCW 19.86.090 (authorizing cause of action for “[a]ny person injured in his or her business or property” by an unfair or deceptive act in trade or commerce).

“property” with intrinsic value to consumers and other users. The trial court’s order of dismissal under CR 12(b)(6) should therefore be reversed.

## **II. Assignment of Error/Issue Presented**

Did the Handlins’ allegations, that On-Site Manager failed to make timely and complete disclosures of consumer information (to which the Handlins were entitled under the FCRA), establish an “injury to property” on which a Consumer Protection Act claim could be based?

## **III. Statement of the Case**

In early 2013, Plaintiffs/Appellants Brian and Karen Handlin were living in an apartment in Newcastle, Wash., when they were informed that property was going to be extensively renovated.<sup>10</sup> Because the construction would render the premises uninhabitable, this meant the Handlins would have to move by the end of August 2013.<sup>11</sup> They began looking for a new apartment, and eventually applied for a two-bedroom unit at Forestview Apartments of Renton, Wash., on August 5, 2013.<sup>12</sup>

As is now customary in the rental housing industry, Forestview collected tenant-screening fees from the Handlins and used those fees to purchase tenant-screening reports about the Handlins, for use in deciding

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<sup>10</sup> CP at 3.

<sup>11</sup> CP at 3.

<sup>12</sup> CP at 3.

whether their rental application would be approved.<sup>13</sup> Those reports, which Forestview obtained from Defendant/Respondent On-Site Manager, Inc., included information about the Handlins' credit, criminal history, and civil litigation involvement.<sup>14</sup> The reports also contained a "rental score" and a recommendation that Forestview deny the Handlins' application.<sup>15</sup>

Based on the reports, Forestview did indeed deny the application; shortly thereafter, Forestview provided the Handlins a letter stating that the reason for denial was a low "rental score" of 4.5 out of 10.<sup>16</sup> That notice also contained contact information for On-Site, including a telephone number.<sup>17</sup> Using that number, Karen Handlin called On-Site and was told that a 2008 eviction lawsuit was the main reason for the low rental score and resulting denial.<sup>18</sup> Ms. Handlin stated that the 2008 eviction suit had been resolved in the Handlins' favor, but the On-site representative told her that the suit appeared to still be pending.<sup>19</sup>

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<sup>13</sup> CP at 3.

<sup>14</sup> CP at 3.

<sup>15</sup> CP at 3.

<sup>16</sup> CP at 3.

<sup>17</sup> CP at 4; see also RCW 59.18.257(1)(c) ("The adverse action notice must contain ... the name, address, and phone number of the consumer reporting agency that furnished the consumer report that contributed to the adverse action.").

<sup>18</sup> CP at 4.

<sup>19</sup> CP at 4.

Ms. Handlin returned to Forestview on August 9 and presented copies of court documents showing the 2008 eviction lawsuit had indeed been resolved in the Handlins' favor.<sup>20</sup> A Forestview employee faxed those records to On-Site, and On-Site promptly amended the Handlins' reports to state that the 2008 eviction suit had been dismissed.<sup>21</sup> However, On-Site did not alter its recommendation that the Handlins' application be denied.<sup>22</sup> Forestview again followed On-Site's recommendation, and told the Handlins that they would still not be admitted as tenants.<sup>23</sup>

The Handlins then, on August 13, sent a request through On-Site's website for copies of their screening reports.<sup>24</sup> When On-Site did not provide the reports in response to this request, the Handlins' counsel requested the reports on August 16.<sup>25</sup> The Handlins' counsel asked that On-Site send the reports by e-mail or fax, and provided the appropriate e-mail address and fax number.<sup>26</sup> On-Site would eventually produce these reports—but not for seventeen days, by regular mail only, and without

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<sup>20</sup> CP at 4.

<sup>21</sup> CP at 4.

<sup>22</sup> CP at 4.

<sup>23</sup> CP at 4.

<sup>24</sup> CP at 4-5.

<sup>25</sup> CP at 4-5.

<sup>26</sup> CP at 5.

including the rental scores, recommendations, or explanatory information (that must accompany scores and recommendations).<sup>27</sup>

The Handlins sought their screening reports for use in trying to persuade Forestview to still admit them.<sup>28</sup> By August 19, with On-Site still not having produced the reports, the Handlins decided to begin looking for another rental property (besides Forestview).<sup>29</sup> At that time, the Handlins had less than two weeks remaining before the deadline to move from their Newcastle apartment.<sup>30</sup> Meanwhile, the Handlins' counsel sent a letter to Forestview seeking reconsideration of their rental application.<sup>31</sup>

On August 21, a property called Windsor Apartments offered the Handlins a tenancy.<sup>32</sup> With only ten days left to move, the Handlins accepted the offer.<sup>33</sup> They paid a \$250 deposit that day, then proceeded to sign a lease and begin moving in.<sup>34</sup>

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<sup>27</sup> CP at 6.

<sup>28</sup> CP at 4.

<sup>29</sup> CP at 4.

<sup>30</sup> CP at 5.

<sup>31</sup> CP at 5.

<sup>32</sup> CP at 5.

<sup>33</sup> CP at 5.

<sup>34</sup> CP at 5.

On August 22, a representative of Forestview reported that the Handlins' application would be approved, but with an extra security deposit (equal to one month's rent).<sup>35</sup> By then, the Handlins had already accepted the apartment at Windsor and paid a deposit; they chose to move forward with Windsor, rather than pursue a Forestview lease.<sup>36</sup>

On August 24, the Handlins' counsel received, by regular mail, a letter from On-Site stating that copies of the Handlins' reports would not be produced until "ID/DL of Brian Handlin and Karen Handlin" was submitted.<sup>37</sup> Even though the Handlins had already decided to move to Windsor Apartments, they chose to follow-through with the request for the On-Site reports.<sup>38</sup> Their counsel sent copies of the driver's licenses to On-Site by e-mail and fax on August 26, and On-Site mailed the reports the following day.<sup>39</sup> The reports finally arrived on August 30, 2014.<sup>40</sup>

#### **IV. Argument**

On-Site failed to make disclosures to which the Handlins were entitled under the FCRA. The disclosures On-Site did make were tardy and incomplete. Because of these violations, the Handlins were denied

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<sup>35</sup> CP at 5.

<sup>36</sup> CP at 5.

<sup>37</sup> CP at 5.

<sup>38</sup> CP at 5-6.

<sup>39</sup> CP at 6.

<sup>40</sup> CP at 6.

prompt and complete access to the information in their tenant-screening reports at the time they needed it most. The trial court was incorrect not to find this was an injury.

**A. Standard of Review**

The superior court dismissed the Handlins' action for failure to state a claim upon which relief may be granted.<sup>41</sup> "This Court reviews de novo a trial court's dismissal pursuant to CR 12(b)(6) and will affirm where no set of facts consistent with the complaint justify recovery."<sup>42</sup>

**B. On-Site Manager failed to make consumer disclosures to the Handlins that were required by the FCRA.**

The Handlins alleged in their complaint that On-Site Manager, a consumer reporting agency,<sup>43</sup> violated the FCRA disclosure provisions in three main ways. First, On-Site, did not produce all of the information the Handlins were entitled to receive under RCW 19.182.070.<sup>44</sup> Second, the disclosures On-Site did make were untimely and in the improper form,

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<sup>41</sup> See CR 12(b)(6).

<sup>42</sup> *McCarthy Finance, Inc. v. Premera*, \_\_\_ Wn. App. \_\_\_, 328 P.3d 940, 945 (2014).

<sup>43</sup> CP at 7; see also RCW 19.182.010(5) ("Consumer reporting agency" means a person who, for monetary fees ... regularly engages in whole or in part in the business of assembling or evaluating ... information on consumers for the purpose of furnishing consumer reports to third parties, and who uses any means or facility of commerce for the purpose of preparing or furnishing consumer reports.").

<sup>44</sup> CP at 7.

contrary to RCW 19.182.080.<sup>45</sup> Third, On-Site did not make post-reinvestigation disclosures at all, in violation of RCW 19.182.090(8).<sup>46</sup>

**1. RCW 19.182.070 violations.**

A consumer reporting agency that receives a consumer's request for disclosures must, under RCW 19.182.070, "clearly and accurately disclose: (1) All information in the file on the consumer at the time of request [and] (2) All items of information in its files on that consumer, including disclosure of the sources of the information..."<sup>47</sup>

The Handlins' request to On-Site Manager sought disclosure of all such information.<sup>48</sup> On-Site, a consumer reporting agency, violated this provision by omitting the rental scores and recommendations from the disclosures it eventually sent.<sup>49</sup> And though the Handlins did learn (from Forestview) what their rental scores were, On-Site also had a duty to provide "an explanation of the meaning" of those scores.<sup>50</sup> In withholding

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<sup>45</sup> CP at 7.

<sup>46</sup> CP at 7-8.

<sup>47</sup> RCW 19.182.070.

<sup>48</sup> See CP at 4 ("the Handlins requested copies of their screening reports through On-Site's website"); se CP 6; see also *Taylor v. Screening Reports, Inc.*, 294 F.R.D. 680, 686 (N.D.Ga. 2013) (under federal FCRA, 15 U.S.C. § 1681g, consumer's request for his "report" without limitation entitled Plaintiff to his entire consumer file).

<sup>49</sup> CP at 6-7; see RCW 19.182.070(1-2).

<sup>50</sup> See RCW 19.182.080(5) ("If a credit score is provided by a consumer reporting agency to a consumer, the agency shall provide an explanation of the meaning of the credit score.").

the rental scores, On-Site deprived the Handlins of this explanatory information as well.

**2. RCW 19.182.080 violations.**

A consumer reporting agency must produce disclosures (in response to a consumer's request) in person, by telephone, or "[b]y any other reasonable means that are available to the consumer reporting agency if that means is authorized by the consumer."<sup>51</sup> The disclosures must also be made "during normal business hours and on reasonable notice."<sup>52</sup>

On-Site violated this provision by failing to send the disclosures within a reasonable time after the Handlins' August 13 request.<sup>53</sup> On-Site also violated this provision by sending the disclosures by regular mail only, rather than e-mail or fax as had been requested.<sup>54</sup> Naturally, On-Site's decision to send the disclosures by mail caused much of the delay in receiving them.

**3. RCW 19.182.090 violations.**

In addition to the disclosures the Handlins specifically requested, the Handlins were separately entitled to receive "post-reinvestigation"

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<sup>51</sup> See RCW 19.182.080(2).

<sup>52</sup> See RCW 19.182.080(1).

<sup>53</sup> CP at 4-5.

<sup>54</sup> CP at 4-5.

disclosures from On-Site within five business days after August 9, 2013.<sup>55</sup>

On-Site further violated the FCRA by failing to make these disclosures.<sup>56</sup>

In summary, the FCRA requires a consumer reporting agency to “reinvestigate” information that a consumer has disputed with the agency, and either verify the information or correct the report.<sup>57</sup> On completing a reinvestigation, a consumer reporting agency must send written notice to the consumer “of the results of [the] reinvestigation within five business days.”<sup>58</sup> That notice must include, among other things, “(i) A statement that the reinvestigation is completed; (ii) A consumer report that is based upon the consumer’s file as ... revised as a result of the reinvestigation; [and] (iii) A description or indication of any changes made in the consumer report as a result of those revisions to the consumer’s file[.]”<sup>59</sup>

On August 5, 2013, Karen Handlin told On-Site’s representative, by phone, that information On-Site had reported about the Handlins’ 2008 eviction lawsuit was inaccurate.<sup>60</sup> This statement triggered On-Site’s duty to reinvestigate that information.<sup>61</sup> On-Site completed that reinvestigation

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<sup>55</sup> See RCW 19.182.090(8); see CP at 8.

<sup>56</sup> CP at 8.

<sup>57</sup> See RCW 19.182.090.

<sup>58</sup> See RCW 19.182.090(8)(a).

<sup>59</sup> RCW 19.182.090(8)(b).

<sup>60</sup> CP at 4, 8.

<sup>61</sup> See RCW 19.182.090(1).

on August 9, when it amended the Handlins' reports to show the eviction suit had been dismissed.<sup>62</sup> Thus, On-Site was obligated to provide the post-reinvestigation disclosures within five business days after August 9.<sup>63</sup> On-Site, however, never provided the post-reinvestigation disclosures (which would likely have contained much or all of the information the Handlins were seeking under RCW 19.182.070).<sup>64</sup>

**C. Violations of the Fair Credit Reporting Act are actionable under the Consumer Protection Act.**

A consumer who is injured by a violation of the FCRA may bring an action for relief under the Consumer Protection Act.<sup>65</sup> A CPA claim has five basic 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.”<sup>66</sup> But under the per se doctrine, in an FCRA case the first three elements are met by statute—i.e., the FCRA expressly states that a violation “is an unfair or

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<sup>62</sup> CP at 4, 8.

<sup>63</sup> See RCW 19.182.090(8)(a).

<sup>64</sup> CP at 4, 8.

<sup>65</sup> See RCW 19.182.150; see also RCW 19.86.090 (“Any person who is injured in his or her business or property by a violation of [the Consumer Protection Act] may bring a civil action in superior court...”).

<sup>66</sup> *Ambach v. French*, 167 Wn.2d 167, 171; 216 P.3d 405 (2009), quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780; 719 P.2d 531 (1986).

deceptive act in trade or commerce” and “vital[ly] affect[s] the public interest for the purpose of applying the consumer protection act.”<sup>67</sup>

The trial court dismissed the Handlins’ claim, however, after finding they had not met the fourth and fifth elements—i.e., that On-Site’s failure to produce proper disclosures did not cause the Handlins an “actual injury” to their business or property.<sup>68</sup> This dismissal was incorrect, both because the disclosures themselves were a form a property and because the Handlins incurred other tangible injuries when they did not receive the disclosures in a timely manner.

### **1. FCRA consumer disclosures are a form of property.**

The Consumer Protection Act does not further define “injury to property.”<sup>69</sup> But courts construing this requirement have found that “the scope of injury to ‘property’ is especially broad” and encompasses any “inconvenience that deprives the claimant of the use and enjoyment of his property.”<sup>70</sup>

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<sup>67</sup> RCW 19.182.150; see also RCW 19.86.093; see also *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 2 Wn. App. 384, 393; 589 P.2d 1265 (1979) (“Under the per se doctrine, an infringement of a statute designed to protect the public is considered inimical to the public interest and, therefore, on that basis is by itself an unfair or deceptive practice condemned by the act.”).

<sup>68</sup> CP at 87-88; Tr. of Hrg. on Motion to Dismiss, p. 33, ln. 1-6 (May 2, 2014).

<sup>69</sup> See RCW 19.86.010; note that the statute does define “assets” to mean “any property, tangible or intangible, real, personal, or mixed, and wherever situated, and any other thing of value.”).

<sup>70</sup> *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 180; 159 P.3d 10 (2007).

“Property” ordinarily means the “right to possess, use, and enjoy a determinate thing [or] the right of ownership.”<sup>71</sup> But “property” has a narrower meaning in the CPA context; it “includes not all a person’s rights, but only his proprietary as opposed to his personal rights.”<sup>72</sup> That is, “a man’s land, chattels, shares, and the debts due to him are his property; but not his life or liberty.”<sup>73</sup>

The Supreme Court closely analyzed the CPA’s “injury to property” requirement in *Ambach v. French*, which involved a suit by a patient injured in an improper shoulder surgery.<sup>74</sup> Although the injury had caused the patient to incur subsequent medical bills and other expenses for corrective procedures, the court concluded that the Legislature intended the “injury to property” requirement to distinguish claims fundamentally related to business or consumer transactions, which the CPA was meant to reach, from claims fundamentally related to personal injuries, to which the CPA was not directed.<sup>75</sup> The *Ambach* case thus held that “property” under the CPA means a person’s tangible and intangible belongings, time and

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<sup>71</sup> *Ambach*, 167 Wn.2d at 172, quoting *Black’s Law Dictionary*, 9<sup>th</sup> Ed. at 226 (9<sup>th</sup> 2009).

<sup>72</sup> *Ambach* at 174.

<sup>73</sup> *Ambach* at 172, quoting *Black’s Law Dictionary*, 9<sup>th</sup> Ed. at 1336 (9<sup>th</sup> 2009).

<sup>74</sup> *Ambach* at 170.

<sup>75</sup> See *Ambach* at 172-73 (“The legislature’s use of the phrase ‘business or property’ in the CPA is restrictive of other categories of injury and is used in the ordinary sense to denote a commercial venture or enterprise.”).

effort, commercial ventures or transactions, and legal and contractual rights—but does not reach bodily or mental rights.<sup>76</sup> “The former constitute [a person’s] estate or property” the court observed, “while the latter constitute his status or personal condition.”<sup>77</sup>

The consumer disclosures the Handlins sought from On-Site in this case were “property” under the *Ambach* analysis. The disclosures, and the information contained therein, were a determinate thing that the Handlins had a distinct legal right to receive, possess and use.<sup>78</sup> And the disclosures related to a rental housing application, not to a Handlins’ physical or mental health —i.e., the claim was fundamentally based on a consumer transaction, not a derivative from a personal injury.

Consumer disclosures also a form of property because they have intrinsic value.<sup>79</sup> Consumer reports can help a person make informed judgments about the kinds of jobs, housing, credit, or other products and services he may qualify for. Consumer reports may enable a consumer negotiate more effectively with landlords, employers, lenders, licensing entities, or other third-parties. Checking one’s consumer reports can help detect identity theft, for instance, or help ensure that she is not improperly

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<sup>76</sup> See *Ambach* at 172-74.

<sup>77</sup> *Ambach*, 167 Wn.2d at 172, quoting *Black's Law Dictionary*, 9<sup>th</sup> Ed. at 1336 (9<sup>th</sup> 2009).

<sup>78</sup> CP at 3-4; see RCW 19.182.070; see also RCW 19.182.100(2).

<sup>79</sup> See, accord, RCW 19.86.010 (defining “assets” to include any “thing of value”).

denied housing, credit, employment or some other benefit because of outdated, inaccurate, or misleading information. Indeed, both the Attorney General of Washington and the Federal Trade Commission recommend periodically requesting and reviewing one's consumer reports as a matter of ordinary prudence.<sup>80</sup>

Interpreting "property" to encompass FCRA consumer disclosures fulfills the legislative intent and public policies underlying the both the FCRA and Consumer Protection Act.<sup>81</sup> The purposes behind RCW 19.182.070 and 090(8) are to ensure that consumers have access to their credit reports and background checks, while RCW 19.182.080 ensures consumers are not denied those disclosures through unreasonable delays, onerous identification requirements, or other procedural obstacles. The legislature also authorized private CPA claims to help enforce these laws and deter violations.<sup>82</sup> Failing to recognize the denial of required FCRA

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<sup>80</sup> See Fed. Trade Com'n, "Free Credit Reports," <http://www.consumer.ftc.gov/articles/0155-free-credit-reports>, last visited Sept. 29, 2014; see Wash. State Office of the Attorney General, "Consumer Issues A to Z -- Credit Reports," <http://www.atg.wa.gov/ConsumerIssues/Credit/CreditReports.aspx#.VCm9Z2ddUnX>, last visited Sept. 29, 2014.

<sup>81</sup> See *Federal Way School Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 765; 261 P.3d 145 (2011) ("Our fundamental objective in construing a statute is to ascertain and carry out the intent of the legislature.").

<sup>82</sup> See RCW 19.182.150; see also Laws of 1983, Ch. 288 ("This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter 19.86 RCW...").

disclosures as an injury to property frustrates these statutory purposes by preventing consumers (who are denied proper disclosures) from enforcing the right to receive them.

Indeed, the Legislature gave consumers the right to request their reports at practically any time, and for any reason—or no reason at all.<sup>83</sup> Consumers are injured when those reports are not properly provided, because the information in consumer reports has value and may influence a person’s choices and actions. That remains true whether or not a consumer is *further* injured because an inadequate disclosure prevents an erroneous report from being corrected, keeps an identity theft from being detected, or handicaps negotiations with a third-party employer or landlord.

This Court should thus conclude that the Handlins sustained an injury to “property” when On-Site failed to properly produce their tenant-screening reports. And because the disclosures were a form of property, On-Site’s interference with the Handlins’ use and enjoyment of that property is actionable under the CPA, even if the monetary value of that injury may have been slight.<sup>84</sup>

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<sup>83</sup> See Compare RCW 19.182.100(2) (establishing right to free disclosures of consumer report within sixty days after an adverse action) with RCW 19.182.080 (establishing unlimited right to obtain disclosures of consumer reports on reasonable notice).

<sup>84</sup> See *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 62; 204 P.3d 885 (2009) (injury based on “out-of-pocket expenses for postage, parking, and consulting an attorney.”); see

**2. Failing to produce FCRA disclosures within a reasonable time is an interference with use or enjoyment of property.**

Although On-Site eventually produced most of the disclosures to which the Handlins were entitled, an injury to property “is established when a plaintiff is *deprived of the use* of his property as a result of an unfair or deceptive act or practice.”<sup>85</sup> On-Site deprived the Handlins of the use of the screening reports by unreasonably delaying the disclosure.

The FCRA does not prescribe a specific deadline for disclosures that are requested under RCW 19.182.070. However, the FCRA does require that disclosures be made “during normal business hours and on reasonable notice.”<sup>86</sup> What constitutes “reasonable notice” might differ from one situation to the next. But the trial court, had it viewed the record in the light most favorable to the Handlins, could certainly have found that the seventeen days On-Site took to produce the disclosures was not within a reasonable notice period.<sup>87</sup>

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*Tallmadge v Aurora Plymouth Chrysler, Inc.*, 25 Wn. App. 90, 93; 605 P.2d 1275 (1979) (injury based on inconvenience of having to return defective vehicle to dealer); see *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564; 825 P.2d 714 (1992) (injury based on time diverted from plaintiff’s business); see *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 316; 858 P.2d 1054 (1993) (injury based on damage to physician’s professional reputation).

<sup>85</sup> *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298; 38 P.3d 1024 (2002) (italics added) (“No monetary damages need be proven so long as there is some injury to property or business.”).

<sup>86</sup> RCW 19.182.080(1).

<sup>87</sup> CP at 4-6; see *FutureSelect Portfolio Mngmt., Inc. v. Tremont Group Holdings, Inc.*, \_\_\_ Wn.2d \_\_\_, 331 P.3d 29, 34 (2014) (dismissal under CR 12(b)(6) “is warranted only

On-Site responded within two business days (i.e., on August 20) from the request for disclosures it received from the Handlins' counsel on August 16, and within one business day (i.e., on August 27) from the follow-up correspondence the Handlins' counsel sent on August 26.<sup>88</sup> Only because On-Site improperly responded by regular mail, rather than e-mail or fax (as had been requested), did the responses take so long to arrive.<sup>89</sup> Had On-Site responded by e-mail or fax, the disclosures could have been produced up to ten days sooner.

Worse still, On-Site did not respond at all to the Handlins' August 13 request for disclosures (other than to acknowledge receipt); had On-Site responded to that request within one or two business days and sent the disclosures electronically, then the Handlins would have received the disclosures by August 14 or 15.<sup>90</sup>

Furthermore, On-Site did have a hard deadline (i.e., five business days) for producing the post-reinvestigation disclosures required under

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if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.' All facts alleged in the complaint are taken as true, and [court] may consider hypothetical facts supporting the plaintiff's claim."), quoting *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 330, 962 P.2d 104 (1998).

<sup>88</sup> CP at 5-6.

<sup>89</sup> CP at 5-7; see also RCW 19.182.080(2) ("The consumer reporting agency shall make the disclosures required under RCW 19.182.070 to the consumer: ... (c) By any other reasonable means that are available to the consumer reporting agency if that means is authorized by the consumer.").

<sup>90</sup> CP at 4-5.

RCW 19.182.090.<sup>91</sup> That five-day period started running when On-Site completed its reinvestigation on August 9, 2013 (a Friday), and expired on August 16.<sup>92</sup> On-Site never made the post-reinvestigation disclosures, and did not make disclosures of any kind until August 30.<sup>93</sup>

**3. A consumer need not sustain actual damages to obtain relief under the Consumer Protection Act.**

While the trial court did not elaborate on the reasoning behind its conclusion that no *injury* occurred, the rationale appears to have been a view that On-Site's failure to produce proper disclosures did not cause the Handlins any actual *damages*.

In fact, the Handlins did have actual damages—and though the question of whether On-Site caused those damages is a close one, the trial court should still have found the Handlins' made sufficient allegations on that point to state a viable claim. But even if the Handlins did not have actual *damages* attributable to On-Site's FCRA violations, they at least had an injury to property. This was adequate to avoid dismissal, because “under the CPA, injury is distinguished from damages. No monetary

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<sup>91</sup> See RCW 19.182.090(8)(a).

<sup>92</sup> CP at 4, 8.

<sup>93</sup> CP at 4-6, 8.

damages need be proven so long as there is some injury to property or business.”<sup>94</sup>

On this point, the Handlins’ case has much in common with *Sorrell v. Eagle Healthcare*, which involved a nursing home failure to refund a consumer’s unused pre-paid charges in a timely manner.<sup>95</sup> The court did not require the plaintiff to show actual damages—such as lost interest on those funds, for example, or the lost opportunity to spend the funds on some important need.<sup>96</sup> Rather, merely denying the plaintiff “rightful possession of his funds for a period of two weeks” caused a sufficient injury to support a CPA claim.<sup>97</sup> In this case, On-Site’s similarly caused an injury by delaying production of the screening reports; whether On-Site caused the Handlins actual damages occurred is a separate inquiry.<sup>98</sup>

Even without actual damages, the Handlins would still have had both a viable a CPA claim and a reason to bring it.<sup>99</sup> A \$1,000 statutory damage award is available—the very purpose of which is to incentivize

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<sup>94</sup> *Sorrell*, 110 Wn. App. at 298; see also *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854-55; 792 P.2d 142 (1990) (consumer who establishes injury to property may still state a viable CPA claim for any available statutory remedies, even in the absence of actual damages).

<sup>95</sup> See *Sorrell*, 110 Wn. App. at 293-94.

<sup>96</sup> See *Sorrell* at 298-99.

<sup>97</sup> See *Sorrell* at 298.

<sup>98</sup> CP at 5.

<sup>99</sup> See *Sorrell* at 298; see *Mason* at 854-55.

private enforcement.<sup>100</sup> Injunctive relief against further violations is also available, a factor the Supreme Court has interpreted as “clearly implying that injury without monetary damages will suffice.”<sup>101</sup>

Notably, at least two federal courts have held that a consumer reporting agency which violates disclosure requirements under the federal FCRA may be liable for statutory damages even in the absence of any actual losses.<sup>102</sup> The same policy ought well to apply here, given the Legislature clear intention to enable private enforcement of Washington consumer protection laws.<sup>103</sup> The Legislature may have given consumers a right to obtain their credit reports and other background check materials fully and without unreasonable delay—but consumer reporting agencies will have little incentive to comply with that law unless they can be held liable for making incomplete and unduly tardy disclosures.<sup>104</sup>

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<sup>100</sup> See RCW 19.182.150; see also RCW 19.86.090.

<sup>101</sup> See *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740; 733 P.2d 208 (1987) (overruled on other grounds) (“This is bolstered by the fact that the act allows for injunctive relief, clearly implying that injury without monetary damages will suffice.”).

<sup>102</sup> See *Taylor v. Screening Reports, Inc.*, 289 F.R.D. 680, 687 (N.D.Ga. 2013) (statutory damages for improperly withholding consumer disclosures were appropriate even if consumer was not actually harmed); see *Ashby v. Farmers Ins. Co.*, 592 F.Supp.2d 1307, 1317 (D.Or. 2008) (statutory damages for willful non-compliance with duty to give adverse action notice were proper even though affected consumers did not allege actual damages).

<sup>103</sup> See RCW 19.86.090; see also Laws of 1983, Ch. 288 (RCW 19.86.090 intended “to strengthen public and private enforcement of the unfair business practices-consumer protection act”).

<sup>104</sup> See RCW 19.182.070, 080.

**4. The superior court could reasonably have found that On-Site's failure to properly produce the Handlins' reports did cause them actual damages.**

The Handlins alleged that On-Site's failure to properly produce their screening reports cost them a lost rental opportunity at Forestview, and caused them to incur additional time and expenses searching for rental housing.<sup>105</sup> While these are certainly the kinds of "actual damages" for which the Consumer Reporting Act authorizes compensation, the closer question seems to be whether On-Site actually *caused* those damages.<sup>106</sup>

The Handlins' theory of causation was based on the fact that they delayed their negotiations with Forestview while awaiting the screening reports from On-Site.<sup>107</sup> Had the On-Site produced the disclosures promptly, the Handlins could have approached Forestview sooner and likely secured an offer for housing there at an earlier date. This would have enabled them both to accept the Forestview offer, and to avoid incurring the additional search time and expenses. Viewed in the light most favorable to the Handlins, these allegations raised a plausible claim for actual damages.<sup>108</sup>

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<sup>105</sup> CP at 5, 51.

<sup>106</sup> See RCW 19.86.090; see also *Mason*, 114 Wn.2d at 854-55.

<sup>107</sup> CP at 5, 51.

<sup>108</sup> See *FutureSelect*, 331 P.3d at 34.

Of course, the Handlins did eventually attempt to negotiate with Forestview even without the disclosures—and succeeded in being offered an apartment (albeit with a higher security deposit).<sup>109</sup> The Handlins did so by guessing at what negative credit information had caused their rental application to be rejected.<sup>110</sup> That they guessed correctly seemed to be the critical factor in the superior court’s causation analysis: the reports did not ultimately contain unexpected information “that would have made a difference if [the Handlins] received it earlier to their negotiations with Forestview.”<sup>111</sup>

Under the FCRA, however, the Handlins should not have had to guess. They had a right to obtain their full reports without unreasonable delay.<sup>112</sup> Had On-Site properly produced the reports, the Handlins could have begun their negotiations with Forestview sooner and with full knowledge of what items were in their reports, how those items were presented, and what items were omitted.<sup>113</sup> Though it ultimately turned out not to be necessary, delaying those negotiations to await the reports—

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<sup>109</sup> CP at 5.

<sup>110</sup> CP at 5.

<sup>111</sup> See Tr. of Hrg. on Motion to Dismiss, p. 30, ln. 1-5 (May 2, 2014) (“So don't you now need to tell me that having the reports in hand, you can point to the information that you think would have made a difference if your clients had received it earlier to their negotiations with Forestview or something like that?”).

<sup>112</sup> See RCW 19.182.080(1).

<sup>113</sup> See RCW 19.182.070(1-2).

in the expectation that On-Site would properly produce them—was a reasonable and prudent precaution.<sup>114</sup> When the reports did not arrive as expected, the Handlins followed a completely different course of action than they otherwise would have.<sup>115</sup>

The Handlins' alternative course of action entailed additional time and expenses searching for housing, and ended with them committing to an apartment at Windsor rather than Forestview.<sup>116</sup> While even the delayed production of the reports was an interference with the use of property, the trial court could well have reasonably concluded that On-Site's failure to produce the Handlins' reports in a timely manner caused those subsequent actual damages.

**D. The Court should reverse and remand for trial.**

A motion to dismiss (for failure to state claim) under CR 12(b)(6) “should be granted only if the plaintiff cannot prove any set of facts which would justify recovery.”<sup>117</sup> In this case, the Handlins' allegation that On-Site Manager willfully failed to make timely, complete, and otherwise proper consumer disclosures to which the Handlins were entitled by the FCRA interfered with their use of property. As this was a claim upon

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<sup>114</sup> CP at 4-5.

<sup>115</sup> CP at 5.

<sup>116</sup> CP at 5.

<sup>117</sup> *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 485; 309 P.3d 636 (2013).

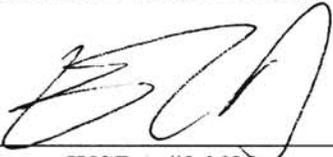
which relief could be granted, the superior court should have denied On-Site's motion to dismiss. This Court should reverse the order of dismissal and remand the case for the completion of discovery and trial.

**V. Conclusion**

For all of the foregoing reasons, the order dismissing this action should be reversed.

RESPECTFULLY SUBMITTED this 29 day of September, 2014.

**NORTHWEST JUSTICE PROJECT**

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