

COURT OF APPEALS  
DIVISION II

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STATE BY

NO. 35234-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CANDY SINGLETON,  
on behalf of herself and others similarly situated,

Appellant,

v.

NAEGELI REPORTING CORPORATION,

Respondent.

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On Appeal from Kitsap County Superior Court  
The Hon. Leila Mills

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APPELLANT'S OPENING BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court committed error when it granted the Respondent's motion to dismiss in part, dismissing Appellant Candy Singleton's Consumer Protection Act (CPA) claim against Respondent Naegeli Reporting Corporation ("Naegeli").

2. The trial court committed error when it denied Ms. Singleton's motion for reconsideration of the order dismissing her CPA claim against Naegeli.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court commit error because it used the wrong test to determine if Naegeli's conduct was exempt from the Consumer Protection Act?

2. Did the trial court commit error by dismissing Ms. Singleton's CPA claim against Naegeli, because the Department of Licensing did not specifically permit the conduct engaged in by Naegeli?

3. Did the trial court commit error by dismissing Ms. Singleton's CPA claim against Naegeli, because the Department of Licensing regulations governing court reporters do not address the conduct in which Naegeli engaged, which includes inserting unnecessary tabbing and new paragraphs in order to increase the length of transcripts?

4. Did the trial court commit error because its decision on the motion to dismiss was contrary to law, thus its denial of Ms. Singleton's

motion for reconsideration was an abuse of discretion?

### **III. STATEMENT OF THE CASE**

#### **A. Facts giving rise to lawsuit.**

In 2001, Plaintiff Candy Singleton was a plaintiff in a personal injury legal action filed in Kitsap County. Clerk's Papers (CP) 163. Beckett Law Offices, PLLC ("Beckett Law Offices"), on behalf of Ms. Singleton, contacted Naegeli to provide court reporters to report and transcribe oral testimony provided by witnesses in depositions for Ms. Singleton's personal injury lawsuit. CP 163-64.

Naegeli contends that it does not employ its court reporters, but instead that its reporters are independent contractors. CP 60. The depositions for Ms. Singleton's lawsuit occurred on August 22, 2002; December 2, 2002; December 12, 2002; and June 3, 2003. CP 163.

Naegeli altered the rough transcripts it received from its reporters for these depositions. It reduced in its final transcripts (which were supplied to Ms. Singleton) the number of reported characters per inch, characters per standard line, lines per page of transcribed testimony, and it added blank spaces to the text, extra tabbing at the start of lines, and new paragraphs where no new paragraphs were indicated. CP 16-17 at ¶9; CP 168-170 at ¶6 (illustrating Naegeli's violations of regulatory standards and insertion of additional paragraphs and unnecessary tabbing in transcripts, increasing their length); CP 171-73 at ¶9 (comparing draft version of

deposition transcript prepared in compliance with Naegeli's standards to final version which is two pages longer); CP 241 at ¶9. Ms. Singleton alleges that the testimony transcripts delivered to Ms. Singleton failed to comply with Naegeli's own standards, industry standards, and Washington's administrative regulations, which caused the transcripts to be longer and thus more expensive than they would otherwise have been. CP 241 at ¶9. Her allegations in this regard were stated generally in Paragraph 9 of her First Amended Complaint:

9. Defendant charged parties to legal actions that retained Defendant to provide court reporting services for the number of pages produced, at a fixed rate per page. Washington State has an administrative regulation, WAC 308-14-135, which was promulgated by the Department of Licensing and which has been effective since 1991 that requires court reporting firms like Defendant to produce on transcript pages a minimum number of lines per page, type characters per typed inch, and characters per standard line. Defendant provided its independent contractor and/or employee reporters production standards for transcripts in compliance with these regulations. Upon information and belief, in Plaintiff's previous legal proceeding, Defendant altered the rough transcripts it received from its reporters by reducing the number of reported characters per inch, characters per standard line, and lines per page of transcribed testimony. The resulting testimony transcripts failed to comply with Washington's applicable regulations. In addition, upon information and belief Defendant, after receiving the rough transcripts from its reporters, added blank spaces to the text, thereby increasing the total number of printed lines in the transcripts. For example, the transcripts purchased by Plaintiff from Defendant contained triple and quadruple tab spacing for some paragraphs rather than the standard two tabs. Further, upon information and belief as an additional example, Defendant added new paragraphs to the transcripts where no new paragraph was indicated. These alterations resulted in transcripts

produced and sold by Defendant containing more pages than its own standards, industry standards, and Washington administrative regulations required.

CP 16-17 at ¶9; see also CP 241 at ¶9. Ms. Singleton alleges that Naegeli was unjustly enriched and violated the Consumer Protection Act. CP 243 at ¶¶21–23).

**B. Procedural history.**

Ms. Singleton filed this action on December 12, 2005. CP 1. On May 23, 2006, Naegeli filed its motion to dismiss under CR 12(b)(6). CP 57-79. Naegeli asserted seven different legal arguments in support of its motion. *Id.* One of the asserted bases was that Naegeli was exempt from liability under the CPA because pursuant to RCW 19.86.170 "if the particular practices which are alleged to cause injury are regulated under statutory authority granted to a regulatory board or commission as established under Title 18 RCW, then the undertaking of such practices shall not be construed to be a violation of RCW Chapter 19.86." CP 58.

On May 12, 2006, the Court ruled that RCW 19.86.170 barred Ms. Singleton's CPA claim against Naegeli.<sup>1</sup> Verbatim Report of Proceedings

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<sup>1</sup>Although Naegeli styled its motion as one for dismissal under CR 12(b)(6), at the hearing on the motion Naegeli contended that because it had filed an affidavit with the motion the trial court was required to consider the motion as one for summary judgment under CR 56. Verbatim Report of Proceedings (April 28, 2006) at 3-5. Whether the trial court considered the motion under CR 12(b)(6) or CR 56 is not important to this appeal, however, because it effectively ruled that with respect to her CPA cause of action, Ms. Singleton had failed to state a cause of action upon which relief could be granted under CR 12(b)(6) because Naegeli was exempt from the claim under RCW 19.86.170. Verbatim Report of Proceedings (May 12, 2006) at 8, 14.

(May 12, 2006) at 13–15; CP 303–04. The Court effectively denied Naegeli’s motion to dismiss on all of Naegeli’s other asserted bases, although the Court required Ms. Singleton to file a Second Amended Complaint in order to clarify that the unjust enrichment cause of action is asserted under a principal-agent theory. Verbatim Report of Proceedings (May 12, 2006) at 8–9; CP 303.

Ms. Singleton timely filed a motion for reconsideration of the trial court’s decision granting Naegeli’s motion to dismiss the CPA cause of action, but the motion for reconsideration was denied. CP 312; CP 322. Ms. Singleton subsequently filed a timely Notice for Discretionary Review with this Court. CP 323; CP 330–33. This Court granted Ms. Singleton’s motion for discretionary review on October 31, 2006.

#### **IV. SUMMARY OF ARGUMENT**

This Court should reverse the trial court’s dismissal of Ms. Singleton’s CPA cause of action. By dismissing this claim, the trial court committed reversible error because Naegeli is not exempt from liability under the CPA for the conduct at issue in this case. The trial court erroneously applied the pre-1974 version of RCW 19.86.170, determining that Naegeli’s actions were exempted from the CPA because the court reporting industry is regulated by the Department of Licensing, a Title 18 agency. However, RCW 19.86.170 only provides exemption from the CPA for actions “specifically permitted” by a Title 18 agency, and not for

all actions of entities regulated by a Title 18 agency.

Even if the trial court had applied the correct test, however, its ruling was erroneous because the Department of Licensing did not “specifically permit” Nageli’s conduct that is the subject of this action. Therefore, Naegeli should be liable under the CPA for Ms. Singleton’s claims.

The trial court also erred because the Department of Licensing regulations are silent concerning the issues of Naegeli’s insertion of extra tabs and improper paragraph placement in its transcripts. Because the regulations do not even address this conduct, the trial court should have allowed Ms. Singleton’s CPA claim to proceed to the extent based on it.

The trial court further erred because it denied Ms. Singleton’s motion for reconsideration. Because its decision on the motion to dismiss was contrary to law, the denial of Ms. Singleton’s motion for reconsideration was an abuse of the trial court’s discretion.

For these reasons, this Court should reverse the trial court’s dismissal of Ms. Singleton’s CPA claim. The Court should also direct that once Ms. Singleton prevails on her CPA claim in the trial court, she is entitled to an award of her attorney’s fees incurred in prosecuting this appeal.

## V. ARGUMENT

- A. **The trial court committed error when it dismissed Ms. Singleton's CPA cause of action because it determined Naegeli's conduct was exempt from the CPA under the pre-1974 version of RCW 19.86.170.**

In dismissing Ms. Singleton's CPA claim, the trial court erroneously applied the pre-1974 test for determining whether a defendant's unfair or deceptive actions or transactions are exempted from the CPA. No regulatory agency "specifically permits" the actions or transactions at issue in this case, and the trial court failed to determine that any regulatory agency does. Therefore, the trial court committed reversible error by dismissing Ms. Singleton's CPA claim merely because court reporters are generally regulated by the Department of Licensing.

### 1. **Purpose of the Consumer Protection Act.**

The CPA protects consumers by declaring unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. An action may be brought by a person injured in his or her business or property by a violation of the CPA. RCW 19.86.090.

In enacting the CPA, the legislature intended that the CPA "shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920. "Liberal construction' is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541,

552, 817 P.2d 1364 (1991) (citation omitted).

In certain circumstances, a defendant's actions and transactions are exempt from application of the CPA. RCW 19.86.170. The test for determining what actions or transactions are exempt from the CPA changed in 1974 when the legislature amended RCW 19.86.170.

**2. Pre-1974 version of RCW 19.86.170.**

Prior to 1974, actions or transactions "regulated" by a regulatory body of the state were exempted from the CPA. The statute stated, in relevant part:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington public service commission, the federal power commission or any other regulatory body or officer acting under statutory authority of this state or the United States . . . .

RCW 19.86.170 (1967) (cited in *Allen v. Am. Land Research*, 25 Wn. App. 914, 917 n.1, 611 P.2d 420 (1980)).

Under this old test, in order to determine whether a defendant's actions were exempt, a trial court was to assess whether a regulatory body was involved, and whether the specific activity at issue was subject to regulation:

There are two inquiries which determine the applicability of the cited exemption: first, is there a "regulatory body" involved and second, is the transaction "permitted, prohibited or regulated".

To satisfy the first requirements, an agency must do more

than merely monitor the business practices of those who are in the area; the entry into that area must also be controlled.

...

Even if a business is generally regulated, the specific activity complained of must be subject to regulation to come within this exemption.

*Allen v. Am. Land Research*, 95 Wn.2d 841, 846, 631 P.2d 930 (1981).

In *Dick v. Attorney General*, 83 Wn.2d 684, 521 P.2d 702 (1974), the Washington Attorney General began an investigation of a naturopath licensed under RCW 18.36. *Id.* at 684–85. The naturopath claimed that his “drugless healing” practice was not subject to the CPA because his practice was regulated by the Director of Licensing under RCW 18.36. *Id.* at 685. The Attorney General alleged that the naturopath was prescribing medication without authorization. *Id.* at 689. The unauthorized practice of medicine was prohibited under RCW 18.71.020, and RCW 18.36.010 declared that the term “drugless therapeutics” would not include the giving, prescribing, or recommending of pharmaceutical drugs or poisons for internal use. *Id.* The Supreme Court disagreed that general regulation of the industry was sufficient to preclude application of the CPA; instead, the unfair or deceptive practice itself had to be specifically regulated. *Id.* at 688. However, the Court determined that the actions or transactions under investigation in that case were in fact specifically regulated within the meaning of RCW 19.86.170, as RCW 18.36.010 barred “drugless therapeutics” from prescribing drugs, and noted that it was incumbent on

the plaintiff to show that the actions or transactions at issue were not covered by regulations otherwise governing the defendant's practice. *Id.* at 689. The Court therefore affirmed dismissal of the case. *Id.*

Thus, under the pre-1974 version of RCW 19.86.170, a party could not obtain exemption from a CPA claim simply because the business was generally regulated; instead, the particular practice alleged to be unfair or deceptive had to be specifically regulated by the relevant agency in order for the actor's conduct to be exempt from the CPA. *Id.* at 688.

### **3. 1974 amendment to RCW 19.86.170.**

In 1974 the Washington Legislature significantly narrowed the scope of the CPA exemption under RCW 19.86.170. The changes were made in response to the Court of Appeals decision in *Dick v. Attorney General*, 9 Wn. App. 586, 513 P.2d 568 (1973). *Vogt*, 117 Wn.2d at 551; Sen. J. of the 3d ex. s. 43rd Leg., at 556 (Feb. 9, 1974) (Sen. Atwood: "It is my understanding that the Attorney General still has this case pending in the Supreme Court. Is that correct?" Sen. Durkan: "That is correct."): In *Dick*, the Court of Appeals analyzed the wording of RCW 19.86.170 and concluded that the use of the word "any" in describing "any other regulatory body" was intended to mean *any* regulatory body, not just regulatory bodies of the same nature and kind as the insurance commissioner, Washington Utilities and Transportation Commission, or the Federal Power Commission. *Dick v. Attorney General*, 9 Wn. App. at

589. The court opined that “[i]f drugless healers were intended to be subject to the Consumer Protection Act, we suggest the legislature and not the courts should amend the Act to so provide.” *Id.*

In the 1974 session, the legislature did precisely that, adding the following underlined language to RCW 19.86.170:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . . PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW. . . .

Laws of 1974, 1st Ex. Sess., ch. 158, § 1.

After the change to the statute, persons or entities licensed by Title 18 agencies find exemption from the CPA only if the actions and transactions at issue are *specifically permitted*; no longer does mere regulation or prohibition of the practice provide exemption from a CPA claim. The purpose of the change to the statute was to expand the coverage of the CPA:

[I]f a person who is licensed commits a consumer fraud, for example, you would be able to assert in a civil case the Consumer Protection Law. Now even though you are licensed, if you commit fraud that is not permitted by your regulatory agency, then you would be able to assert the Consumer Protection Law. That is what this is about, yes.

Sen. J. of the 3d ex. s. 43rd Leg., at 519 (Feb. 7, 1974) (statement of Sen. Francis).

The change “expands the rights given to consumers” by narrowing the exemptions available to those whose actions or transactions violate the CPA. *Lidstrand v. Silvercrest Indus.*, 28 Wn. App. 359, 369, 623 P.2d 710 (1981). The amendment thus restricted the scope of the exculpatory provisions of the CPA for those professions regulated by “other” regulatory bodies or officers. *Vogt*, 117 Wn.2d at 551.

**4. Current version of RCW 19.86.170.**

With the 1974 amendment, RCW 19.86.170 now reads in relevant part:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . . PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW. . . .

As the statute now clearly directs, actions or transactions of persons regulated under Title 18 (e.g., court reporters) must meet the

statute's second proviso<sup>2</sup>—i.e., that the actions or transactions must be “specifically permitted” by a regulatory agency before such conduct will be exempted from the CPA. *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 301, 622 P.2d 1185 (1981) (“We believe, however, that the correct interpretation of legislative intent as it relates to RCW 19.86.170 is that the requirements of the proviso (2), which was enacted in 1974, must be met in actions and transactions involving those persons regulated under RCW Title 18.”). “An action or transaction is not exempt merely because it is regulated generally, or merely because a regulating agency acquiesces in it.” *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 844, 942 P.2d 1072 (1997) (citations omitted). In order for the exemption to apply, the regulated person “must prove that the activity was authorized by statute and that acting within this authority the agency took overt affirmative action specifically to permit the actions or transactions engaged in by the [regulated person].” *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d at 301.

The interpretation of “specifically permitted” in the CPA must also

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<sup>2</sup>The first proviso is not relevant to this action. It reads:

PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020[.]

RCW 19.86.170.

be narrowly construed:

Overly broad construction of “permission” may conflict with the legislature’s intent that the Consumer Protection Act be liberally construed so that its beneficial purposes may be served. “Liberal construction” is a command that the coverage of an act’s provisions in fact be liberally construed and that its exceptions be narrowly confined.

*Vogt*, 117 Wn.2d at 552 (citations omitted).

In *State v. Tacoma-Pierce County Multiple Listing Services*, 95 Wn.2d 280, 622 P.2d 1190 (1990) (“*Tacoma-Pierce County MLS*”), the plaintiff alleged that the multiple listing association in Tacoma-Pierce County violated the CPA by denying “brokers who are not members of the Board of Realtors access to the MLS (Multiple Listing Service) services.” *Id.* at 282. The Court rejected the multiple listing association’s contention that it was exempt from plaintiff’s CPA claim, reiterating that a Title 18 regulatory agency must “specifically permit” the conduct complained of in order for the accused entity to benefit from the exemption clause of RCW 19.86.170:

Here there was no affirmative action taken by either the Department of Licensing or the Real Estate Commission to approve the action. There was no specific permission granted.

Furthermore, the multiple listing section of the real estate broker’s and salesmen’s statute (RCW 18.85.400) states that “In no event shall the real estate commission approve any entrance requirements which shall be more restrictive on the person applying to join a real estate multiple listing association than (the requirements listed in the statutes).” There is nothing in RCW 18.85 which confers on the Department of Licensing or the Real Estate Commission

the authority to approve the restrictions for membership in a multiple listing service which were allegedly required by defendants. RCW 19.86.170 does not provide an exemption for defendants.

*Id.* at 286–87.

Thus, although more restrictive entrance requirements to join a multiple listing association were regulated by statute (but were specifically *prohibited*, not specifically *permitted*), the Court denied the defendants exemption from the CPA because their complained-of conduct was not specifically permitted by the statute and the relevant regulatory authority.

Accordingly, it is of no consequence that a profession (such as court reporting) is generally regulated by a state agency, or if the practice at issue is generally regulated. The exemption under RCW 19.86.170 only applies if the defendant’s action or transaction complained of is *specifically permitted*. Cases applying the pre-1974 version of RCW 19.86.170 are no longer persuasive authority regarding the current version’s exemption clause. *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d at 301 (determining that citation to *Allen*, 25 Wn. App. 914, analyzing pre-1974 version of RCW 19.86.170, not on point).

In *Dick*, the defendants’ complained-of conduct was determined to be exempt from the CPA. *Dick*, 83 Wn.2d at 689. Under the current version of RCW 19.86.170, however, the result would likely have been different. “The exemption upon which the [naturopath] appellant in *Dick* relied and which this court approved in 1974 would under the current

Consumer Protection Act be allowed only if the activity is ‘specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW . . . .’” *Vogt*, 117 Wn.2d at 551 (quoting RCW 19.86.170).

In fact, regulation of a profession by a Title 18 agency or violation of a Title 18 agency’s rules does not prevent a CPA claim. Several Washington cases have interpreted analogous provisions of the Real Estate Broker’s Act, RCW Chapter 18.85, and have allowed CPA claims to proceed. The Broker’s Act regulates the licensing of real estate agents and their conduct, and it includes an enforcement provision, RCW 18.85.350. The Department of Licensing has promulgated regulations in WAC Chapter 308-124 governing real estate agents’ conduct. Notwithstanding the existence of the Broker’s Act and these regulations, courts have repeatedly allowed CPA claims to proceed against real estate agents that are subject to the Act and the regulations.

In *Harstad v. Frol*, 41 Wn. App. 294, 300–01, 704 P.3d 638 (1985), the court determined that the defendant real estate agent’s violation of the fiduciary duty stated in RCW 18.85.230 could support the plaintiff’s CPA claim. The court noted that while a violation of RCW 18.85 was not a per se violation of the CPA, a CPA claim may still proceed if the agent’s conduct (1) was unfair or deceptive; (2) was within the sphere of commerce or trade; and (3) impacted the public interest. *Id.*

at 300 (citation omitted).

Similarly, in *Nuttall v. Dowell*, 31 Wn. App. 98, 106, 639 P.2d 832 (1982), the court recognized that the Broker's Act and WAC Chapter 308-124 regulate real estate agents and their licensing; impose minimum standards of conduct; and authorize the Department of Licensing to revoke, suspend, or deny a license if those standards are violated. Nevertheless, the court did not exempt the defendant's actions from the plaintiff's CPA claims under RCW 19.86.170, noting that "if the plaintiff can establish that defendant Schwartz's conduct violated the provisions of RCW 18.85.230, the remaining prong of the two-part *Salois* test for a per se violation of RCW 19.86.020 [the CPA] will be satisfied." *Id.* at 109.<sup>3</sup> Thus, *Nuttall* illustrates that despite regulation by a Title 18 agency, a plaintiff can pursue a CPA claim against a professional licensee subject to state regulation.

In *Wilkinson v. Smith*, 31 Wn. App. 1, 9, 639 P.2d 768 (1982), the court determined that real estate agents' failure to fully disclose all facts to the seller they represented constituted a violation of RCW 18.85.230. The court further found that "[t]here can be little doubt the real estate industry, being heavily regulated, is within the sphere of trade and commerce to the

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<sup>3</sup>The *Nuttall* court ultimately denied the plaintiff's CPA claim because he did not prove that he relied on the defendant's misrepresentation for one claim and the other claim involved only an isolated breach of contract and therefore did not impact the public interest. *Nuttall*, 31 Wn. App. at 111-12.

extent that it affects the public interest.” *Id.* at 10. Despite acknowledging that the agents were subject to state regulations, the court did not exempt the actions from the CPA’s application, instead affirming the trial court’s decision that the agents’ actions, which violated a specific regulatory statute, also violated the CPA. *Id.*

In another case, this Court determined that although RCW 19.86.170 may provide an exemption to the CPA for a defendant’s actions that are specifically permitted by regulation, other actions related to the permitted conduct but not themselves specifically permitted do not enjoy the same protection from liability:

Scott points to Department of Licensing regulations, which require the speedy presentation of all offers to the seller, and argues that Prongay’s presentation of the Buckleys’ offer is specifically permitted and is therefore exempt from the CPA. Although Prongay’s presentation of the offer may be exempt from the CPA, Scott agents engaged in other conduct that is not specifically permitted by the Department of Licensing. Sing contends that the following constitute unfair or deceptive acts or practices: (1) allowing agents to obtain access to listing files containing other offers and thereby gain an advantage as purchasers; (2) failing to communicate to the seller that a prospective purchaser would pay more than the listed price; and (3) failing to advise a prospective purchaser that time was of the essence in accepting a counteroffer. The above conduct is not specifically permitted by the Department or any other agency or commission and thus is not exempt from the CPA.

*Sing v. John L. Scott, Inc.*, 83 Wn. App. 55, 68–69, 920 P.2d 589 (1996) (citations omitted), *rev’d on other grounds*, 134 Wn.2d 24, 948 P.2d 816 (1997).

Likewise, in *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997), the court noted that WAC 308-124E-013 allowed disbursement of earnest money only pursuant to the terms of the earnest money agreement or by written authorization from the buyer and seller. *Id.* at 844. Because the terms of the agreement did not allow disbursement of the earnest money and there was an actual dispute as to who was entitled to the funds, the agency that released the funds did not enjoy immunity from the CPA under RCW 19.86.170 as its action was not “specifically permitted” under RCW Chapter 18.85. *Id.* at 845.

Thus, in each of these cases regulation by a Title 18 agency did not preclude a CPA claim because the alleged violations of the relevant statute or regulation were not actions or conduct “specifically permitted” by the regulatory agency. This interpretation of RCW 19.86.170—that a defendant’s actions and transactions are exempt from a CPA claim only if the regulatory agency specifically permits the conduct in question—finds support in other jurisdictions interpreting similar exemption provisions. For example, in *Skinner v. Steele*, 730 S.W.2d 335 (Tenn. Ct. App. 1987), a plaintiff filed an action to recover for violations of Tennessee’s Consumer Protection Act in connection with the defendants’ sale of a single premium deferred annuity certificate. Defendants argued that they were exempt from liability under the Consumer Protection Act because the sale of insurance policies and annuities was regulated by the Tennessee

Insurance Law, which had its own chapter on deceptive acts. *Id.* at 337.

The Tennessee Consumer Protection Act stated in relevant part,

Exemptions. The provisions of this chapter shall not apply to: (a) Acts or transactions required or specifically authorized under the laws administered by or rules and regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States.

*Id.* (quoting T.C.A. § 47-18-111). Defendants argued that their acts and transactions were “specifically authorized” by the insurance code. *Id.*

The court rejected defendants’ argument that they were exempt from liability under the Consumer Protection Act:

The statutory exemption precludes the Attorney General and individual consumers from bringing an action based on practices that are “specifically authorized” under the insurance code, or under other regulatory statutes. However, authorization to engage in the business of selling annuities is not specific authorization to employ unfair or deceptive practices in that activity. The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the Act’s coverage every activity that is regulated by another statute or agency. Virtually every activity is regulated to some degree. The defendants’ interpretation of the exemption would deprive consumers of a meaningful remedy in many situations.

*Id.* (citations omitted).

Similarly, in *Robertson v. State Farm Fire & Cas. Co.*, 890 F.Supp. 671 (E.D. Mich. 1995), dairy farmers brought suit against their insurers for violations of Michigan’s Consumer Protection Act after their

claims arising out of the collapse of a barn were denied. The defendants argued they were exempt from liability under the exemption in the Act provided by the following language:

This act shall not apply to: (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this State or the United States.

*Id.* at 675 (quoting Mich. Comp. Laws § 445.904(1)(a)). Defendant argued that since its conduct was regulated by the Michigan insurance board, plaintiffs' Consumer Protection Act cause of action failed to state a claim upon which relief could be granted. The court rejected this argument:

The fact that the instant defendants may be subject to regulation by a board or agency is insufficient to invoke §1(a)'s exemption.

...

No one doubts that the board has authority from the state. The question, however, is whether the conduct alleged to have been taken by the defendant was specifically authorized by the board or officer. If so, the defendant may not be held liable for such action, even if plaintiff contends that such authorized action misled or deceived him or her. If the conduct was not *specifically authorized* by law so administered, then §1(a)'s exemption does not apply.

*Id.* at 676 (emphasis in original).<sup>4</sup>

In *Ward v. Dick Dyer & Assoc.*, 403 S.E.2d 310, 312–13 (S.C.

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<sup>4</sup>Although the court determined that the insurers were not exempt from plaintiffs' Consumer Protection Act cause of action, the court dismissed the claim because plaintiffs' purchase of insurance was not primarily for personal, family, or household purposes, as required under the Michigan Act. *Id.* at 681.

1991), automobile buyers brought suit against a dealership under South Carolina's Unfair Trade Practices Act ("UTPA") for the dealer's failure to disclose that the car had previously been involved in a wreck. The trial court granted the dealer's motion to dismiss on the basis that its conduct was regulated by the state agency overseeing automobile dealerships. The UTPA provided that it did not apply to "actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority or this State or the United States or actions or transactions permitted by any other South Carolina state law." *Id.* at 154 (quoting South Carolina Code 1976, §39-5-40). On appeal, South Carolina's Supreme Court reinstated plaintiffs' claim because no regulation specifically authorized the conduct which plaintiffs alleged the dealership had undertaken :

Dick Dyer argues and the trial court found that this section excludes from the Act any activity which is regulated by state or federal agencies or other state statutes. If we were to accept this contention, however, the UTPA would be rendered without meaning. Almost every business is subject to some type of regulation.

...  
We believe that the exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes.

*Id.* at 154-55.

In *WVG v. Pac. Ins. Co.*, 707 F.Supp. 70, 72 (D. N.H. 1986), an insured brought an action against its insurer under New Hampshire's Consumer Protection Act for alleged unfair and deceptive practices in

failing to pay its fire loss claim. The insurer argued that it was exempt under the Act because the insurance industry was regulated by New Hampshire's Unfair Insurance Trade Practices statute and the Consumer Protection Act exempted certain conduct from its provisions, including "trade or commerce otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of this state or of the United States." *Id.* at 72 (quoting New Hampshire RSA ch. 358-A:3, I). The court rejected the insurer's claim, concluding that the Unfair Insurance Trade Practices statute did not apply to the defendants' alleged conduct, and therefore the conduct was not exempt from the provisions of the Consumer Protection Act:

The plain meaning of the exemptive section of the Consumer Protection Act is that transactions permitted under other laws of New Hampshire or the United States will not be deemed illegal under RSA ch. 358-A. Conversely, if transactions are not permitted under other laws, either expressly or impliedly, then they are subject to regulation under the Consumer Protection Act. The goal of the legislature would seem to encompass avoidance of a direct conflict with a regulatory scheme. Under RSA ch. 358-A:3, I the issue is whether a transaction is "otherwise permitted" and not whether an agency exists to review the transaction.

There is no language in the Unfair Insurance Trade Practices statute, RSA ch. 417, which indicates an intention to permit an insurer to unfairly and deceptively fail to pay a claim.

*Id.*; see also *Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 56 (Colo. 2001) ("[T]his statutory exclusion does not apply to conduct that

is simply subject to regulation by a governmental agency, but applies only to conduct that is in compliance with the statute administered by such a governmental agency.”).

As these decisions show, courts in many other jurisdictions with similar exemption statutes that have addressed the issue on appeal in this case have ruled that a defendant is not exempt from liability under consumer protection laws merely because there is general regulation of the defendant’s profession or industry by a state agency or statute. Instead, to entitle the defendant to exemption, the complained-of conduct must be specifically permitted and authorized. This is precisely the interpretation of RCW 19.86.070 that Washington authority requires and with which Ms. Singleton requests this Court agree. Under this standard, the trial court should be reversed and Ms. Singleton’s CPA cause of action reinstated.

**5. The trial court erroneously applied the pre-1974 version of RCW 19.86.170.**

In this case the trial court erred in determining that because the court reporting profession is generally regulated and because the Department of Licensing has adopted regulations concerning the formatting of court reporter transcripts, Naegeli is exempt from Ms. Singleton’s CPA claim. The trial court did not rule that Naegeli’s complained-of conduct was specifically permitted by statute or regulation. Instead, in its ruling granting Naegeli’s motion to dismiss Ms. Singleton’s CPA claim, the trial court stated:

Lastly, also under the Consumer Protection Act, the defendant argued that the defendant is exempt because the action is controlled by a regulatory agency. RCW 19.86.170 states that nothing in this chapter shall apply to actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state. And further, that actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 shall not be construed a violation of Chapter 19.86.

In this case the regulatory body overseeing court reporters is more than a mere monitoring of the profession. The regulatory body does control entry into the occupation. It requires court reporters to maintain certain standards and codes of conduct. Also, the director of Department of Licensing is authorized to adopt rules under WAC 308-14-135, under which the court reporter transcripts are controlled in how they are formatted.

In light of the close control and regulation of the profession and practices, I find that the alleged actions or transactions complained of in the complaint under – as supported under the Consumer Protection Act are exempt under 19.86 of RCW.

Verbatim Report of Proceedings (May 12, 2006) at 13–14. Thus, the trial court considered merely whether the court reporting profession was subject generally to regulation, not whether the conduct at issue in this case is specifically permitted by the regulatory authority.

This Court should reverse the trial court’s dismissal of Ms. Singleton’s CPA claim because it clearly and erroneously applied the exemption test provided in the pre-1974 version of RCW 19.86.170. The trial court applied the first part of the pre-1974 test for exemption—i.e., whether a “regulatory body” is involved. *Allen*, 95 Wn.2d at 846. The

trial court also noted that the Department of Licensing is authorized to adopt rules governing the formatting of transcripts and has done so. However, the trial court never applied the second proviso of the post-1974 version of RCW 19.86.170: it never determined that Naegeli's actions were "specifically permitted" by the Department of Licensing or any other regulatory agency. *Id.* In fact, no regulatory agency specifically permitted Naegeli's actions at issue here.

Regulations promulgated pursuant to RCW Chapter 18.145, the Court Reporting Practices Act ("CRPA"), only state three requirements regarding transcript format. Transcripts must contain:

- (1) Twenty-five typed lines per 8 ½ x 11 inch standard page of paper.
- (2) No fewer than nine and no more than ten characters per inch of text.
- (3) No fewer than fifty-four and no more than sixty characters per standard line of text.

WAC 308-14-135.<sup>5</sup> A regulation does not exempt from the CPA conduct that the regulation fails to address. Naegeli's complained-of conduct is not specifically permitted by -- in fact, it is not addressed at all by -- WAC 308-14-135; thus, Naegeli is not exempt from the CPA.

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<sup>5</sup>From 2002 until an amendment effective September 13, 2004, WAC 308-14-135 required the following:

- (1) No fewer than twenty-five typed lines on a standard 8 ½ x 11 inch paper.
- (2) No fewer than ten characters to the typed inch.
- (3) No fewer than sixty characters per standard line.

*See* CP 178.

For example, if Ms. Singleton alleged that Naegeli's transcripts had twenty-five lines per 8 ½ x 11 inch page of paper, and that such formatting was an unfair or deceptive act or practice, Naegeli could assert the exemption provided in RCW 19.86.170 and point to WAC 308-14-135 which *specifically permits* transcripts to have twenty-five lines per 8 ½ x 11 inch page of paper. However, Ms. Singleton alleges that Naegeli's transcripts failed to comply with WAC 308-14-135 in several ways. *See* CP 241 at ¶9. None of Ms. Singleton's allegations include conduct that WAC 308-14-135 "specifically permits." Accordingly, the trial court should not have dismissed Ms. Singleton's CPA claim.

**B. The trial court erred because the Department of Licensing regulations regarding court reporting formatting standards do not address proper tabbing or new paragraph placement.**

In response to the motion to dismiss, Ms. Singleton produced evidence showing how Naegeli inflated the number of pages in its transcripts by adding tab spaces and inserting new paragraphs to the rough drafts of its transcripts. CP 168-73 at ¶¶ 6, 9; CP 241 at ¶9 ("For example, the transcripts purchased by Plaintiff (through her legal counsel and agent, Beckett Law Offices, PLLC) from Defendant contained triple and quadruple tab spacing for some paragraphs rather than the standard two tabs."). As a result of these additions, Naegeli's transcripts were more expensive than they should have been, because Naegeli charges by the page. *Id.*

As stated above, the CRPA only states three requirements regarding transcript format. Transcripts must contain:

- (1) Twenty-five typed lines per 8 ½ x 11 inch standard page of paper.
- (2) No fewer than nine and no more than ten characters per inch of text.
- (3) No fewer than fifty-four and no more than sixty characters per standard line of text.

WAC 308-14-135. Nothing in the regulation discusses tab spacing or paragraph placement; thus, the Department of Licensing has expressed no position on and has taken no action, either to permit or prohibit, such formatting matters.

Washington authority is clear: for the exemption provided by RCW 19.86.170 to apply, the regulating agency must take overt action, and nonaction isn't "specific permission." *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d at 301 ("Mere nonaction by a regulatory board or commission under RCW Title 18 to actions taken by members of a business, occupation or profession does not amount to specific permission."). In *Sing*, the court noted that the defendant's presentation of an offer was specifically permitted by a regulation and therefore was exempt from the CPA. *Sing*, 83 Wn. App. at 68. But the defendant's other actions were "not specifically permitted by the Department or any other agency or commission and thus [were] not exempt from the CPA." *Id.* at 69.

The CRPA fails to address the issues of proper tab spacing and

paragraph placement within the witness' transcribed testimony. Because the CRPA fails to address this conduct and it is not specifically permitted, the Department of Licensing could not enforce any requirements pertaining to it. Therefore Naegeli should not be exempt from Ms. Singleton's CPA claim based on these actions, and the trial court should not have dismissed Ms. Singleton's CPA claim.

**C. The trial court committed error by denying Ms. Singleton's motion for reconsideration, because the decision for which reconsideration was sought was contrary to law.**

Following the entry of the trial court's dismissal of her CPA claim, Ms. Singleton timely filed a motion for reconsideration of that order. The trial court committed error by denying the motion for reconsideration.

CR 59(a)(7) requires the court to reconsider a verdict or decision where "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision," or where "it is contrary to law." A trial court's decision on a motion for reconsideration is reversible where the decision constituted a manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). The proper standard for reversal is whether the trial court's discretion was "exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." *Id.* at 505.

In this case, there can be no conclusion other than that the trial court manifestly abused its discretion when it denied Ms. Singleton's

motion for reconsideration. As discussed above, the criteria which must be present in order to exempt an actor's conduct from the CPA were not present here. The trial court's order dismissing Ms. Singleton's CPA claim on the basis that Naegeli was exempt from the CPA was clearly contrary to law. Thus, when the trial court denied the motion for reconsideration on that very issue, it manifestly abused its discretion, and this Court should reverse the trial court's order denying the motion for reconsideration.

**D. Ms. Singleton is entitled to an award of the attorneys' fees she has incurred in this appeal.**

In relevant part, RCW 19.86.090 provides:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees.

Although there will be no decision in this appeal that Naegeli violated the Consumer Protection Act, the Court should make it clear in its

decision that once Ms. Singleton's CPA claim is reinstated in the trial court and when Naegeli is determined to have violated the CPA, Ms. Singleton is entitled to an award of attorney's fees and expenses incurred in prosecuting this appeal under RCW 19.86.090.

## **VI. CONCLUSION**

The trial court committed several errors when it granted Naegeli's motion to dismiss Ms. Singleton's CPA claim, and this Court should reverse that decision. The trial court's first error was that it applied the wrong test to determine if Naegeli's conduct was exempt from the CPA. A regulated business may find exemption from the CPA only if its conduct is "specifically permitted" by a regulatory agency. RCW 19.86.170. The trial court found that court reporting was a regulated industry and that the Department of Licensing regulated formatting of transcripts. Based on those determinations alone, the trial court ruled that Naegeli was exempt from the CPA. This ruling was error, because in order for an actor's conduct or actions to be exempt from the CPA, such actions must be "specifically permitted" by a regulatory agency. The trial court failed to determine that Naegeli's conduct at issue was "specifically permitted" by the Department of Licensing, which it is not.

Further, the trial court could not have found that Naegeli's conduct was specifically permitted. The only conduct "specifically permitted" by the Department of Licensing is stated in WAC 308-14-135. None of

Naegeli's conduct at issue in this case is specifically permitted by this regulation. Because mere regulation by an agency is insufficient to exempt a business from potential liability under the CPA, the trial court's dismissal of Ms. Singleton's CPA claim was error.

Additionally, the trial court committed error because the Department of Licensing regulations are silent concerning tabbing and new paragraphs. Because a regulatory agency's nonaction does not constitute permission, the CPA exemption does not apply to these issues, and the trial court's decision that it did was error.

Finally, the trial court committed error and abused its discretion by denying Ms. Singleton's motion for reconsideration, as its original decision granting Naegeli's motion to dismiss was contrary to law.

The trial court should have denied Naegeli's motion to dismiss in its entirety. This Court should reverse the trial court, reinstate Ms. Singleton's CPA claim against Naegeli, and direct the trial court to award Ms. Singleton her reasonable attorneys' fees and expenses for this appeal pursuant to RCW 19.86.090 when the trial court determines that Naegeli

violated the CPA.

DATED THIS 12<sup>th</sup> day of April, 2007.

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY ls  
DEPUTY

**DECLARATION OF SERVICE**

Guy W. Beckett declares:

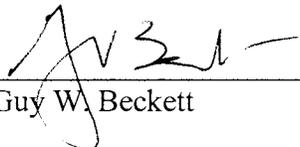
On April 12, 2007 I mailed a copy of the foregoing document by  
United States first-class mail, with proper postage affixed, to:

Stephen L. Pettler  
Harrison & Johnston, PLC  
21 S. Loudoun St.  
Winchester, VA 22601,

Bradford J. Fulton  
CARTER & FULTON, P.S.  
3731 Colby Avenue  
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I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

EXECUTED THIS 12<sup>th</sup> day of April, 2007, at Seattle,  
Washington.

  
\_\_\_\_\_  
Guy W. Beckett