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Court of Appeals
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State of Washington
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NO. 53373-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PHYLLIS FARRELL, an individual; BRANDY KNIGHT, an individual;
DEBRA JAQUA, an individual; LONI JEAN RONNEBAUM, an
individual; SARAH SEGALL, an individual;

Respondents,

v.

FRIENDS OF JIMMY, a registered political committee; WE WANT TO
BE FRIENDS OF JIMMY, TOO, a registered political committee; GLEN
MORGAN and JANE DOE MORGAN, and the marital community
comprised thereof;

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case squarely presents the easily resolvable question as to whether Washington’s Consumer Protection Act (“WCPA”), RCW 19.86, *et. seq.*, envisages liability for conduct occasioned during entirely political interactions. Since the WCPA only provides for liability for deception that occurs in trade or commerce, Appellants request reversal of the trial court’s finding of liability as well as the resultant monetary judgments in favor of Respondents for damages, fees, interest, and costs that flowed from the WCPA claim.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by finding liability pursuant to RCW 19.86 where the sole interaction between Appellants and Respondents were political in nature and Respondents were not injured in their business or property and the allegedly violative acts occurred outside the realms of trade or commerce.

2. The trial court erred when it entered a judgement awarding Respondents damages, fees, costs and interest totaling \$115,001.01¹ pursuant to RCW 19.86.

III. STATEMENT OF THE CASE

Appellant Glen Morgan is a political activist who directed the operations of the Appellant Political Action Committees, “Friends of Jimmy” and “We Want To Be Friends of Jimmy, Too”. CP at 177-178, 188. During the 2016 election season on behalf of the two PAC’s, Mr. Morgan sought out the services of Dialing Services, LLC a New Mexico

¹ Appellants concede that \$6,500 of the \$121,501.01 total judgment was appropriately awarded pursuant to Respondents’ TCPA claim.

limited liability company that provides bulk automated call services. Dialing Services is now, and has always been, a stranger to this litigation.

Mr. Morgan contracted with Dialing Services to make automated phone calls on the Appellants' behalf on five separate dates in during the fall election season of 2016. CP at 194. The calls were placed to various potential voters in Thurston County including Respondents. Dialing Services assured Mr. Morgan that it would scrub the call list for cells and further assured him that Dialing Services "will never dial a cell phone on our robodialers." CP at 259, 266.

There is no dispute that the calls scripted by Mr. Morgan were political in nature and that such variously urged voters to not vote for Jim Cooper a then-candidate for Thurston County Council who identified as a Democrat. CP 354-355.

Below, a chart identifies a transcript of what was said in each call:

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Date	Call Description	Transcribed Script
10/21/16	"JimCooperTrumpCall"	<p>Why does Democrat Commissioner Candidate, Jim Cooper, treat woman like Donald Trump does? This is Karen Rogers, former Olympia City Council Woman. Several complaints were filed against Cooper for employee mistreatment and one female employee even quit because of his behavior. Jim Cooper even used his political influence to get a gag order against the woman to prevent them from talking. County Commissioner is an important position that oversees hundreds of workers. I will not vote for Cooper because I don't want him treating the County workers the way he treated woman at [inaudible]. Protect Thurston County employees; do not vote for Jim Cooper.</p> <p>[7 second pause]</p> <p>Paid for by Friends of Jimmy. Top contributor, we want to be Friends with Jimmy too.</p>
10/24/16	"RejectHateCalCooperHulse] ZKn"	<p>Why did Democrat Commissioner Candidates, Jim Cooper and Kelsey Hulse, accept campaign support from a racist cult leader? According to NPR Radio, J.Z. Knight said "Mexican's breed like rabbits, they're poison." Knight has contributed \$8,000 to Cooper and Hulse's campaigns, breaking records for contributions. Democratic groups have rejected hate money; but, Cooper and Hulse keep it all. They even defended these comments to the Olympian. Please demand that Jim Cooper and Hulse get out of the gutter and reject hate money</p> <p>[7 second pause]</p> <p>Paid for by friends of Jimmy. Top contributor, we want to be friends with Jimmy too.</p>

10/31/16	"FinalThurstonRobocall"	<p>According to the Olympian, Democratic Commissioner candidate, Jim Cooper, refuses to talk about why he was terminated from a local non-profit. This is Karen Rogers, former Olympia City council member. I served with Cooper and I know how he mistreats people. Several employees that worked under Cooper</p> <p>filed complaints against him for his behavior and the entire staff threatened to walk out unless he was fired. He was later fired unanimously by the Board. Cooper can't be trusted with managing employees and you shouldn't trust him to manage Thurston County.</p> <p>[9 second pause]</p> <p>No candidate authorized this ad. Paid for by Friends of Jimmy. Top sponsor, We want to be friends with Jimmy, Too.</p>
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11/4/16	"CalltoArmsforDemsFINAL"	<p>Hi, I'm Glen Morgan. The Democrat Party has always opposed racism and violence in politics. That is why the Washington State Democratic Party divested itself from racist cult cash from J.Z. Knight in 2012. However, some have tried to turn the Party away from its principals. In Thurston County, the Party is funded by the same racist cult cash J.Z. Knight our State Party rejected. In Thurston County, Democratic Party officials have even made death threats. We are better than this. Call the State Party at this number and tell them to reject J.Z. Knight's racist cult cash and violence. Make your voice heard and keep the Party principals pure.</p> <p>[3 second pause]</p> <p>Paid for by friends of Jimmy. Top contributor, we want to be friends with Jimmy too.</p>
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CP 354-355.

Dialing Services, at the request of Mr. Morgan, engineered the calls to variously display, as the originating phone numbers, the numbers for the Thurston County Democratic Party Headquarters, The Washington State Democratic Party, the Cooper Campaign and a number owned and operated by Appellant. CP 155-156.

Respondents initiated suit against Appellant and alleged in their First Amended Complaint two causes of action. First, Appellants alleged that the phone calls violated the federal Telephone Consumer Protection Act (TCPA), 42 U.S.C. § 227(b)(1)(A), as Respondents had received automated calls to their cellular phones to which they did not consent that were initiated by Appellants. CP at 194. Second, Respondents alleged that the calls violated WCPA, RCW 19.86 et. seq., as the calls were unfair and deceptive because “*the spoofed caller ID numbers and the substance of the pre-recorded messages were likely to mislead reasonable persons*” and further that Respondents were “injured in their business or property by Defendant’s unfair and deceptive practices.” CP at 195.

Respondents moved for summary judgment on both claims and prevailed on both. On May 11, 2018, the Court granted Respondent’s TCPA claim as to liability and reserved ruling on damages and fees. CP at 378-382. After additional briefing, the trial court heard oral argument on February 15, 2019 on the WCPA claim and issued a ruling from the bench granting Respondents Motion for Summary Judgment and entered a subsequent written

order on Respondents' WCPA claim. See RP 2/15/19² Vol.1 at 1 (Oral Ruling) and CP at 671 (Written Order).

Subsequently, on March 22, 2019 the trial court entered a judgment in favor of Respondents totaling \$121,501.01. RP 3/22/19 at 34-37. CP at 1090-1093 (Order on Fees), CP at 1140-1142 (Final Judgment and Judgment Summary). This award was comprised of a "Principal Amount of \$13,000³", "prejudgment interest of \$2,337.33", "costs of \$3,347.84", and "attorneys fees of \$102,815.84". CP at 1140-1142. RP 3/22/19 at 34-37. CP at 1090-1093, CP at 1140-1142.

Appellants do not contend error in the trial court's determination with respect to the TCPA claim. Rather Appellants assert error in the trial court's finding of liability pursuant to the WCPA claim as well as the award of damages, fees, costs and interest, that flow from such. Accordingly, this appeal follows.

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² To avoid confusion because of multiple transcripts identified as "Volume 1" and "Volume 2", Appellant will designate the Report of Proceedings by the hearing date.

³ As more fully explained *infra*, the TCPA provides for the greater of presumed damages of \$500 or actual damages. The trial court evidently found that a total of 13 calls had been made and awarded \$6,500 in statutory damages. The trial court then doubled that amount to provide a "presumptive" damage award under the WCPA. Neither the trial court's oral ruling subsequent written determinations allocate which portion of the principal, fees or cost were attributable to which of the two causes of actions. CP at 1140-1142. RP 3/22/19 at 34-37. CP at 1090-1093, CP at 1140-1142. However, Appellant's briefing below advocated for such a distribution, and it appears that the trial court adopted such a distribution. CP at 572-578.

IV. ARGUMENT

A. Standard of Review

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wash.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995); *see also* CR 56(c).

B. The WCPA Only Applies to activities occurring in “trade or commerce”.

1. The History of the WCPA

In the 1950's and 1960's, individual states began to enact consumer protection laws. These acts were generally modeled after section 5 of the Federal Trade Commission Act (codified in 1938 as 15 U.S.C. § 45(a)(1)) which was adopted by Congress to protect United States citizens against unfair trade practices. *See generally* Note, *Toward Greater Equality in Business Transactions: A Proposal To Extend the Little FTC Acts to Small Businesses*, 96 Harv. L. Rev. 1621 (1983). Washington, along with Rhode Island, New York, and Alaska, led the states in enacting consumer protection legislation. Lovett, *Private Actions for Deceptive Trade Practices*, 23 Ad. L. Rev. 271, 275 (1971).

In 1961, the Washington Legislature adopted RCW 19.86.020, which to this day provides:

Unfair methods of competition and unfair or deceptive acts or practices **in the conduct of any trade or commerce** are hereby declared unlawful.

RCW 19.86.020

The purpose of the Washington CPA was set forth in RCW 19.86.920. That section reveals the Legislature's intent "to protect the public and foster fair and honest competition." To that end, the Attorney General was given enforcement powers under the act. In apparent response to the escalating need for additional enforcement capabilities, the State Legislature in 1970 amended the CPA to provide for a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA. RCW 19.86.090, was amended, first 1970, again in 1983, and finally in 2009 and provides in relevant part:

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 19.86.030, 19.86.040, 19.86.050, or 19.86.060 may bring a civil action in 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.

RCW 19.86.090. (Emphasis supplied).

2. Elements of a WCPA Claim

To establish a WCPA violation, the plaintiff must prove five elements: (1) an unfair or deceptive act or practice that (2) **occurs in trade or commerce**, (3) impacts the public interest, (4) and **causes injury to the plaintiff in her business or property**, and (5) the injury is causally linked to the unfair or deceptive act." *Michael v. Mosquera-Lacy*, 200

P.3d 695, 698-699 (2009). (Emphasis supplied). "A plaintiff alleging injury under the CPA must establish all five elements." *Id.* at 699.

3. Facts of this Case as Applied to WCPA

In the instant case, Appellants' automated calls neither occurred in "trade or commerce" nor did they cause "injury to business or property" which is a prerequisite for liability under the WCPA. Because this is so, the trial court's determination must be reversed.

The WCPA is not a panacea for all wrongs or a remedy for all instances of deception in all facets of social interaction. Rather the WCPA makes illegal only "unfair methods of competition and unfair or deceptive acts or practices **in the conduct of any trade or commerce.**" RCW 19.86.020. The terms "trade" and "commerce" are explicitly defined to "include the **sale of assets or services, and any commerce directly or indirectly** affecting the people of the state of Washington." RCW 19.86.010.

Because Appellant's calls were purely political in nature and totally devoid of economic attributes or consequences that could implicate the WCPA, the trial court erred when it determined that Appellants' conduct was illegal pursuant to the WCPA.

Indeed, the trial court itself recognized the novelty of its decision and absence of precedent when it reaffirmed its decision that Appellant's conduct violated the WCPA when ruling on Appellants' motion for reconsideration. CP 385-424 (Motion for Reconsideration). The trial court stated:

The Court is convinced that at this point, rather than expanding the Consumer Protection Act in issuing its ruling, the Court followed the

precedent that the Court is aware of that does not at this time allow for any exception for political activity.

The Court viewed the activities here in a content-neutral fashion for the purposes of the CPA alleged violation. That's the way that the Court viewed it, and **I appreciate that appellate courts in the future may decide this differently. It is an area that the Court and the parties, frankly, struggled to find political case law that might impact this particular case, but the Court feels that it followed applicable precedent that exists at this time in granting summary judgment.**

RP 6/22/18 at 22. (Emphasis supplied).

The “political case law” did not exist for the simple reason that the WCPA – by its express terms – does not apply in non-commercial settings. In other words, the trial court conflated the need for a specific exemption for political activity by overlooking the WCPA’s specific limitation that the violative act must occur or produce a consequence in “trade or commerce”. Because Appellants’ allegedly violative act did not occur in trade or commerce the trial courts finding of liability WCPA was in error.

It goes without saying that telephone calls are made for many reasons. Calls are made to friends, foes, family, and unknown recipients for millions of different reasons. Some calls are commercial in nature, many are not. In the instant case, the messages conveyed by Appellants were overtly and entirely political in nature. Appellants were advocating that voters to cast their vote in a certain way. The automated calls clearly addressed the perceived fitness for political office of a local candidate and urged the listener to evaluate with whom the candidate associated and the source of campaign contributions.

Respondents’ most persuasive argument below was that even putting the content of the calls aside that the spoofing was misleading because that misled voters about the calls

source. CP 429-431. While it might have been the case that voters were confused by the apparent origin of the call, such an effect was not palpated in “trade or commerce” nor did it result in any unfair economic advantage or otherwise frustrate competition in the marketplace.

Moreover, the record is entirely devoid of any evidence that Respondents suffered an “injury to business or property” as required by RCW 19.86.090. While the receipt of the calls may have caused minor annoyance and even may have momentarily occupied the services of Respondents’ cell phones such is not an “injury to business or property” within the meaning of the statute. Indeed, Respondents conceded that in most cases such an injury is a small “invasion of privacy” CP at 148.

While Respondents contend that the presumptive damages of their federal TCPA claim establishes the damages element of the WCPA (CP at 149-150) -- it does not. This is because 47 U.S.C. § 227(b)(3)(B) provides that a plaintiff may bring “**an action to recover for actual monetary loss** from such a [TCPA] violation, **or to receive \$500 in damages** for each such violation, whichever is greater.” In other words, even if a plaintiff is not injured at all (as was apparently the case here) a plaintiff that establishes technical liability is nonetheless entitled to a minimum penalty of \$500. That presumptive penalty does not relieve a WCPA’s requirement that a successful plaintiff must articulate and establish facts that demonstrate an actual injury to business or property. Respondents did not produce *any* evidence that the receipt of the campaign calls caused any actual injury to their business or property. As such, Respondents WCPA claim below should have been dismissed by the trial court as a matter of law.

The Supreme Court has expressly and specifically limited the WCPA's application to commercial circumstances. Appellants made this argument below and despite being pro se, identified the seminal case of *Michael v. Mosquera-Lacy* during motions practice. CP at 391. In *Michael v. Mosquera-Lacy*, 200 P.3d 695, 165 Wash.2d 595 (2009), Plaintiff asserted that Defendant violated the WCPA when Defendant used cow bone during a bone grafting procedure despite Plaintiff's request that such not be used. The *Michael* Court wrote:

“[Defendant] contends that the use of cow bone for Michael's procedure did not occur in trade or commerce. We agree.”
The Court explained:

"The term 'trade' as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided." *Ramos v. Arnold*, 141 Wash.App. 11, 20, 169 P.3d 482 (2007). The question is whether the claim involves entrepreneurial aspects of the practice or mere negligence claims, which are exempt from the CPA. *Short v. Demopolis*, 103 Wn.2d 52, 60, 691 P.2d 163 (1984).

Michael failed to show that Dr. Mosquera-Lacy's use of cow bone is entrepreneurial. It does not relate to billing or obtaining and retaining patients. It simply relates to Dr. Mosquera-Lacy's judgment and treatment of a patient. **There is no evidence that cow bone was used to increase profits or the number of patients.** When the supply of human bone ran out during the procedure, Dr. Mosquera-Lacy used her judgment and skills as a periodontist to finish the procedure. **This is not actionable under the CPA.**

Michael v. Mosquera-Lacy, 200 P.3d at 699-700. (Emphasis supplied).

Similarly, in the present case there is no evidence in the record that indicates that Appellants initiated these calls in order to increase revenue, profit, market share or hinder

competition. Accordingly, the trial court's finding of liability on the WCPA count is in error and should be reversed.

C. **Damages, Interest, Fees and Costs pursuant to the WCPA Must be Reversed.**

Unlike the WCPA, the TCPA is not a fee or cost shifting statute. A successful litigant is not entitled to fees or costs under the TCPA. See, *Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013).⁴ Rather, remedies under the TCPA are limited to injunctive relief and the greater of actual damages or \$500 for each violation. 47 U.S.C. § 227(b)(3). Here, the trial court evidently found that the Respondent's in total received 13 phone calls which resulted in a statutory award of \$6,500.

The remaining damages, fees and costs (and interest) totaling \$115,001.01 (\$121,501.01 less \$6500) were erroneously predicated on the invalid WCPA claim. Accordingly, Appellants respectfully request an order reducing the judgment amount by \$115,001.01.

V. **CONCLUSION**

Appellants respectfully request that the Court of Appeals reverse the trial court's finding of liability on Respondents' Washington Consumer Protection Act claim and further order that the trial court's judgment should be reduced by \$115,001.01.

Respectfully submitted this 3rd Day of January 2020.

THE LAW OFFICE OF NICHOLAS POWER

⁴ TCPA are almost universally brought as class actions where fee recovery is accomplished under the common-fund doctrine.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

Nicholas Power WSBA#45974
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that today I e-filed and delivered a copy of the foregoing **Brief of Appellant** by email pursuant to an electronic service agreement among the parties to the following:

Dated this 3rd day of January, 2020.



s/Nicholas Power
Nicholas Power

LAW OFFICE OF NICHOLAS POWER

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