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NO. 53373-1-II

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

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

Respondents,

v.

GLEN MORGAN, an individual,

Appellant,

and

FRIENDS OF JIMMY, a registered political committee; WE WANT TO BE FRIENDS OF JIMMY, TOO, a registered political committee; and JANE DOE MORGAN, an individual and her marital community,

Defendants.

Brief of Respondents

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I. INTRODUCTION

The only question properly before this Court is whether Glen Morgan engaged in “trade or commerce” when he—in his own words—“employed the services of,” coordinated with, and “paid a vendor” thousands of dollars to use its platform to make 146,032 “robocalls” to Washingtonians, including Plaintiffs. He did. And Morgan’s opening brief—like his briefs below—never mentions the “well settled” authority central to the trial court’s analysis of this Consumer Protection Act (“CPA”) element. That is understandably so, as courts have “flatly rejected” Morgan’s argument—that there must be some predicate commercial transaction between a CPA plaintiff and defendant—as inconsistent with the CPA’s plain language.

Morgan presents his remaining argument—that his robocalls did not injure Plaintiffs in their business or property—for the very first time on appeal as he *did not dispute* satisfaction of this CPA element below: not in his submissions opposing summary judgment; not in his motion for reconsideration; and not during multiple hearings. Instead, Morgan argued that his unlawful activity was constitutionally protected and thus, not “unfair or deceptive”—dubious contentions since abandoned on appeal.

Plainly, one cannot attack select elements of a claim in the trial court; get an unfavorable result; then attack different elements of the same claim on appeal. Regardless, the new argument fails for the same reason it was not made in the first place. Robocalls violating the federal Telephone

Consumer Protection Act (“TCPA”)—which Morgan concedes his calls did—necessarily cause the injury required by the CPA.

Morgan’s intimations to political messaging notwithstanding, the robocalls’ content is irrelevant—a fact Plaintiffs and the trial court repeatedly stressed. This case was decided solely upon the impartial application of undisputed material facts to well-settled CPA elements. This Court should affirm.

II. ISSUES

This appeal presents two main issues:

- **Trade or commerce.** The CPA broadly guards against misconduct in “*any* commerce directly or *indirectly* affecting the people” of Washington, allowing redress for “*any* person” suitably affected. No commercial transaction between plaintiff and defendant is required; the act applies where strangers to the plaintiff contract for services to distribute unfair or deceptive messages. Here, Morgan contracted with and paid thousands to a robocalling company to distribute concededly unfair or deceptive robocalls. Was this commerce?
- **Contradictory appeal.** At summary judgment and on reconsideration, Morgan never disputed that Plaintiffs established the CPA’s injury element as a matter of law. Nor did he challenge this fact when Plaintiffs highlighted it for the trial court in briefing and oral argument. A chief contention by Morgan on appeal is that injury was not established. Has he waived this argument?¹

¹ Had Morgan made his new argument below, it would have presented the following issue, there:

The threshold for injury under the CPA is not high and is met by even nonmonetary, nonquantifiable, minimal, and temporary harm, including loss of use of property, however brief. Robocalls that violate the TCPA necessarily cause “concrete, *de facto* injury” including interference with the capacity and function of the recipients’ cell phones. Morgan concedes that his robocalls violated the TCPA and “momentarily occupied the services” of Plaintiffs’ cell phones. Was injury established?

III. STATEMENT OF THE CASE

A. Morgan contracts with a robocalling company to make thousands of robocalls to Washington residents.

Glen Morgan directed 146,032 prerecorded, autodialed “robocalls” to Washingtonians. Clerk’s Papers (“CP”)² 158. The robocalls went to 52,122 distinct phone numbers, including 17,860 separate cell phones, over five sessions between October 21 and November 7, before the 2016 election. *Id.* Of those, 12,369 robocalls to cell phones succeeded, including multiple calls to Plaintiffs’ respective phones. *Id.*

For each robocall, Morgan “spoofed” caller ID information appearing on the recipients’ devices. CP 156–57. He commandeered phone numbers belonging to state and county political parties and the campaign of a candidate for local office. *Id.*

Morgan contracted with a business, Dialing Services LLC, to assist with the robocalling campaign as he and his associates did “not possess the skill required to place a robocall,” nor did they have the “tools, nor instruments” for such an undertaking. CP 255. Morgan therefore “employed the services of Dialing Services LLC” and “paid Dialing Services LLC for each call sent out, based on the number of calls made.” *Id.* That amounted to over \$3,300. CP 398.

Dialing Services sells access to its “Dialing Platform,” which it describes as “the underlying hardware, software, web interface, and

² For consistency, this brief designates the Report of Proceedings (“RP”) by hearing date. *See* Br. of App. at 6 n.2.

connectivity to the phone network” needed to place robocalls. CP 294. After a user buys access to the Dialing Platform, the user supplies the phone numbers to be autodialed, creates the prerecorded messages, inputs spoofed caller ID information, and dictates when the calls are placed. CP 358, 296–97, 321 at ¶ 3. Morgan did so. CP 254 at ¶ 9. Thereafter, according to Morgan, “Dialing Services was responsible for sending out the calls.” *Id.*

B. Morgan ignores several warnings that his robocalls are unlawful, including a cease and desist letter.

Before logging on to Dialing Services platform, users must agree to Terms of Use. CP 289–90. Those Terms state that the company “is only providing the Dialing Platform” and require the user to represent and warrant that he is responsible for complying with “all applicable laws and regulations,” including the TCPA. CP 294. The Terms further state:

You agree that You are aware of the laws and regulations contained on the following websites, as well as any similar state laws applicable to Your use of the Features:

. . . .

- <http://www.fcc.gov> (Federal Communications Commission and the Telephone Consumer Protection Act)

*Id.*³

³ Despite these disclaimers, the FCC held that *both* Dialing Services *and* its clients are liable for unlawful robocalls. *See* CP 321–36 (Forfeiture Order “against Dialing Services . . . for making robocalls to wireless phones using artificial or prerecorded voice messages”); *see also* CP 360–61. As the FCC explained:

We disagree with the implicit assertion that only one party can be liable under the TCPA for illegal calls. . . . [B]oth a seller (or client, in this case) who engages a telemarketer (or robocaller, in this case) **and** the

Had Morgan heeded the directive to familiarize himself with and abide by the law,⁴ he would have quickly found the FCC’s “**BIENNIAL REMINDER FOR POLITICAL CAMPAIGNS ABOUT ROBOCALL AND TEXT ABUSE.**” CP 206–12 (2016 Notice), 214–19 (2014 Notice). The express purpose of that notice is to “remind[] political campaigns . . . that there are clear limits on the use of [robocalls]” that apply across the board “including [to] those made by political campaigns or other organizations involved in the 2016 election.” CP 206.

Morgan also disregarded an October 31 letter—midway through the robocall campaign—advising that the calls were illegal and directing him to cease and desist. CP 180–81. He commenced two more robocalling sessions on November 4 and 7, disseminating thousands of additional robocalls.⁵ CP 158.

telemarketer (or robocaller) so engaged, may be liable for TCPA violations.

CP 328–29 at ¶ 21 (emphasis and parenthesis in original).

⁴ It has been a matter of public record since at least 2013 that Dialing Services is a prolific violator of anti-robocalling laws, particularly the provisions protecting cell phones. CP 327 n.51; *In the Matter of Dialing Servs., LLC*, DA 13-265 Citation & Order (FCC March 15, 2013) (available at <https://docs.fcc.gov/public/attachments/DA-13-265A1.pdf> (last visited Jan. 27, 2020)).

⁵ Though not relevant to any issue on appeal, Morgan asserts he was assured that robocalls would not reach the cell phone numbers *he provided*. Br. of App. at 2. But the *only* interaction he or his associates had with Dialing Services on this issue came on the last day of the robocalling campaign. See CP 361 n.7; RP 5/11/18 at 28. The Dialing Services platform asks the *user* if he wants to deliver calls to cell phones. CP 259. There is no evidence in the record that Morgan or anyone else deactivated that feature prior to sending robocalls on October 21, 24, 31, or November 4. Morgan initially took the position in this case that robocalling cell phones is legal. See CP 61:22–62:16.

C. Procedural history.

Plaintiffs Farrell and Knight filed suit, alleging TCPA violations. CP 4–10. Without answering, Morgan responded through counsel with a “Motion for Summary Judgment in Full,” asserting no genuine issue of material fact. CP 39. Plaintiffs cross-moved for summary judgment as to liability, CP 56–65, and prevailed. CP 124–28.

A few months later, Morgan’s first attorney withdrew. CP 132.

After conducting third-party discovery, Plaintiffs filed an amended complaint naming additional plaintiffs and asserting CPA violations. CP 185–197.

Plaintiffs sought summary judgment. CP 136–54. This motion was largely granted. CP 378–82. However, the trial court declined to rule on the question of remedies as certain discretionary relief under the TCPA and CPA (*e.g.*, treble damages) required factual findings. CP 381; RP 5/11/18 at 13–14, 36–37.

Morgan moved for reconsideration. CP 385–96. The trial court took “the opportunity to look closely at the [CPA] claim individually and take a look again at whether the Court correctly decided the issue at summary judgment.” RP 6/8/18 at 22–23. Upon that closer scrutiny, the trial court was “convinced” that it had correctly applied the law. *Id.* at 23.

Reconsideration was denied orally.⁶ *Id.* at 23–24.

⁶ The main thrust of Morgan’s arguments below was that content-neutral anti-robocalling rules infringe on his constitutional free speech rights. *E.g.*, CP 389. While his appellate brief alludes to politics several times, Morgan does not actually pursue any constitutional theories on appeal. This is for good reason, as courts have widely held that anti-robocalling provisions are constitutional, even where the message is “political.” *See*

The court entered a simple written order denying reconsideration, CP 564–65, following an unusually contentious process. *See, e.g.*, CP 443, 542, 559. Morgan sought, among other things, a written finding that this is “a case of first impression.” CP 492. The court declined as it had made no such finding. RP 7/27/18 at 11:25–12:19.

In a pragmatic effort to bring the litigation to a close, Plaintiffs voluntarily relinquished their request for discretionary relief (*e.g.*, treble damages), which had previously precluded the court from fully resolving the case on summary judgment. RP 1/11/19 at 4:20–5:15; RP 2/15/19 at 3:23–4:15. They filed a motion to (1) voluntarily dismiss all claims for discretionary relief; and (2) impose statutory damages. CP 572–78.

Therein, Plaintiffs explained that the TCPA’s mandatory \$500 award applies *per violation*, even if multiple violations occur during the same

CP 439 (collecting cases). Moreover, Plaintiffs and the trial court made it abundantly clear that analysis of the claims had nothing to do with the robocalls’ content or their truth or falsity. *E.g.*, CP 145:21–146:1 (Plaintiffs stating: “To be sure, all individuals are free to support political candidates and speak out against those they do not—with great hostility if they so choose.”); CP 364 (Plaintiffs reiterating that the robocalls’ accuracy “is a debate for another forum”); RP 5/11/18 at 20 (court observing that “the vast majority of the arguments made here by [Plaintiffs] apply no matter what the content is, in other words, it’s the method that’s being challenged[.]”), 21 (Morgan agreeing that “the vast majority of the elements of the claims talk about the mechanism,” not content); CP 429:2–3 (“This case is not about the content of Defendants’ ‘political speech.’”), CP 430:11 (“Plaintiffs’ arguments expressly stated that the substance of the calls—‘political’ or otherwise—should have no bearing on the Court’s analysis.”); RP 6/8/18 at 14 (“the Court also noted, and I think it has been reiterated several times here, this is not a case about the contents or substance of the political message. The Court has never weighted the truth or falsity of the message. The Plaintiffs have never contended that the contents of the message were true or false.”), 17:21–25 (“What Mr. Morgan or his companions had to say about the political candidate or how people should vote or anything like that, we are not saying that’s part of the deceptive conduct here.”), 18:7–10 (“we are not talking about the truth or falsity of the message that was delivered, simply the manner and mechanism in which it was delivered that is the problem”); 23:10–12 (“THE COURT: The Court viewed the activities here in a content-neutral fashion for purposes of the CPA alleged violation.”).

call. CP 643 (discussing authorities). Each of Morgan’s robocalls involved at least two violations—using an automatic dialing system *and* artificial or prerecorded voice. CP 380. Thus, Plaintiffs were entitled to a mandatory recovery of \$13,000 (representing 13 robocalls × 2 violations per call × \$500 per violation). Morgan offered no substantive opposition. *See* CP 658–65. The court granted the requested relief. CP 671–72.

Morgan is simply incorrect in telling this Court that “[t]he trial court . . . doubled [\$6,500] to provide a ‘presumptive’ damage award under the WCPA.” Br. of App. at 6 n.3. The court did not, and said as much: “The court is declining to exercise its discretion to add any additional fines to that or to add any multiplier . . . to those fines[.]” RP 2/15/19 at 10:3–7. It follows that Morgan is also incorrect that “Appellant’s [sic: Respondents’] briefing below advocated for such a distribution, and . . . the trial court adopted such a distribution.” Br. of App. at 6 n.3 (citing CP 572–78 (Plaintiff–Respondents’ damages brief)).

Plaintiffs moved to recover fees and costs. CP 828–42. The court granted the same in a detailed order. CP 1090–93. Judgment was subsequently entered. CP 1140–42.

This appeal followed solely on the application of the CPA.

IV. ARGUMENT

“The CPA, on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.” *Short v. Demopolis*, 103 Wn.2d 52,

61, 691 P.2d 163 (1984) (italics in original). The CPA “offer[s] broad protection to the citizens of Washington,” *Dix v. ICT Grp., Inc.*, 125 Wn. App. 929, 937, 106 P.3d 841 (2005), *aff’d*, 160 Wn.2d 826, 161 P.3d 1016 (2007) and, by its express statement of policy, “is to be ‘liberally construed that its beneficial purposes may be served.’” *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 73, 170 P.3d 10 (2007) (quoting RCW 19.86.920). “A policy requiring liberal construction is a command that the coverage of an act’s provisions be liberally construed and that its exceptions be narrowly confined.” *Nucleonics Alliance, Local Union 1–369 v. Wash. Pub. Power Supply Sys.*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984).

“[A] ‘successful plaintiff’ is ‘one who establishes all five elements of a private CPA action.’” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 38, 204 P.3d 885 (2009) (quoting *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986)). Those elements are: “(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and (5) causation.” *Id.* at 37.

Courts may not read additional elements or limitations into the CPA. *Id.* at 38 (“We will not adopt a sixth element, requiring proof of a consumer transaction between the parties”); *Short*, 103 Wn.2d at 61 (declining to exempt “learned professions” from CPA liability because “[t]here is no statutory exemption for lawyers.”).

The CPA may be applied in concert with the TCPA. 47 U.S.C. § 227(f) (TCPA shall not “preempt any State law that imposes more restrictive intrastate requirements or regulations”). This was not disputed below. *Compare* CP 142 with CP 233–248, 385–96. Nor is it challenged on appeal. *See* Br. of App. at 1.

In opposing summary judgment, Morgan contested elements 1 (unfair and deceptive) and 2 (trade or commerce)—loosely suggesting that there is a “political speech” exception to the CPA. CP 244–47, 385–96. On appeal, he now contests elements 2 and 3 (injury to business or property), though he previously conceded the latter. *See* Br. of App. at 1. Morgan abandons his challenge to the unfair and deceptive element, including the quasi-constitutional “speech” argument at the center of his opposition in the trial court. *Id.*

As below, Morgan continues to evade discussing—or even mentioning—the authorities Plaintiffs and the trial court relied upon. Those authorities confirm violations of the CPA and compel the conclusion that summary judgment was appropriately granted.

A. Appellate courts reviewing summary judgments engage in the same inquiry as the trial court.

“In reviewing an appeal of an order of summary judgment, [appellate courts] engage in the same inquiry under CR 56(c) as the trial court” and “consider only evidence and issues called to the attention of the trial court.” *Wash. Fed’n of State Emps., Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 156–57, 849 P.2d 1201 (1993) (quoting RAP

9.12). Summary judgment is appropriate if the materials presented to the trial court “show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

These rules apply equally whether parties have counsel or represent themselves. *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983). “[A] litigant appearing pro se . . . is bound by the same rules of procedure and substantive law as everyone else.” *Bly v. Henry*, 28 Wn. App. 469, 471, 624 P.2d 717 (1980).⁷

B. The CPA applies to “any commerce” affecting Washingtonians and requires no transaction or relationship with a plaintiff.

Under the CPA, “[a]n actionable violation can occur without any consumer or business relationship between the . . . plaintiff . . . and the actor because ‘trade or commerce’ is not limited to such transactions.” *Panag*, 166 Wn.2d at 39. Indeed, the CPA defines “trade or commerce” to include “any commerce directly or *indirectly* affecting the people of the state of Washington.” RCW 19.86.010(2) (emphasis added). “The Legislature intended these terms to be construed broadly.” *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 174, 159 P.3d 10 (2007), *aff’d sub nom.*, *Panag*, 166 Wn.2d 27 (2009). And since “[t]he CPA . . . mandates

⁷ Morgan’s “political activis[m],” Br. of App. at 1, includes abundant lawsuits against groups with whose politics he disagrees, including approximately three dozen such actions in Thurston County Superior Court, just while this case was pending there. CP 436 n.23 (listing suits). Toward the end of proceedings, the trial court observed that: “Morgan represents himself . . . extremely well in this case”; he “indicates a knowledge of the court’s local rules beyond attorneys that practice before th[e] court”; and “there’s not an instance that I’ve seen where Mr. Morgan has been disadvantaged by his representation in this case.” RP 3/22/2019 at 32:7–18.

that it be liberally construed to serve its purposes, RCW 19.86.920, [the Supreme Court] will not narrowly construe the act by importing a requirement that the plaintiff be a consumer or be in a consensual business relationship[.]” *Panag*, 166 Wn.2d at 40. “[T]o do so would conflict with the language of the act and its stated purposes.” *Id.* at 41.

This is “well settled” law. *Stephens*, 138 Wn. App. at 174; *see also Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987) (“Prior rulings by this court have broadly interpreted this provision to include every person conducting unfair acts in any trade or commerce.” (citing *Short*, 103 Wn.2d at 61)); *Merriman v. Am. Guarantee & Liab. Ins. Co.*, 198 Wn. App. 594, 626, 396 P.3d 351 (2017) (“The CPA does not apply only to disputes between parties with a consumer relationship.”); *Univ. of Wash. v. Gov’t Emps. Ins. Co.*, 200 Wn. App. 455, 470, 404 P.3d 559 (2017) (university was proper CPA plaintiff despite not being a GEICO insured); *Holiday Resort Cmty. Ass’n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 219, 135 P.3d 499 (2006) (“as a matter of legislative intent, neither the CPA nor case law require privity of contract in order to bring a CPA claim”); *Nw. Airlines, Inc. v. Ticket Exch., Inc.*, 793 F. Supp. 976, 979 (W.D. Wash. 1992) (corporate plaintiff “need not prove it was a consumer” to bring CPA claim).

Nonetheless, Morgan argues that he was not engaged in trade or commerce because he was not “attempting to . . . sell any assets or services.” CP 390. But it does not matter that Morgan was *buying* (rather than selling) services—in this instance, access to a robocalling platform. It

is still “*any* commerce,” and it affected Washingtonians by the thousands. Consistent with the above authority, courts have “flatly rejected” arguments like Morgan’s. *Stephens*, 138 Wn. App. at 174.

1. The purchase and sale of a service for disseminating unfair or deceptive messages is commerce.

The CPA’s trade or commerce element is established where persons unrelated to the plaintiff enter into a commercial transaction to deliver unfair or deceptive messages. *Id.* at 173; *Panag*, 166 Wn.2d at 40.

In *Stephens*, the defendant debt collector, Credit Collection Services, sent “aggressive notices on behalf of insurance companies [Omni and Farmers] in an attempt to recover subrogation interests from uninsured drivers.” 138 Wn. App. at 158. Credit argued that the plaintiffs—who received those notices—“cannot satisfy the ‘trade or commerce’ element because the plaintiffs were not involved in a consumer transaction.” *Id.* at 173. But this was irrelevant because “[t]he sale of Credit’s collection services to Omni and Farmers indisputably occurred in trade or commerce.” *Id.* (emphasis added). And Credit’s “commerce with Omni and Farmers . . . directly or indirectly affects people of the State of Washington” *Id.*

This Court also explained that where deceptive messages are concerned “[t]he recipient is a logical ‘private attorney general’ to argue that such deception is injurious to the public interest.” *Id.* at 176

The Supreme Court affirmed under a different name. *Panag*, 166 Wn.2d at 34. “Under the plain language of the act, it is not necessary to

establish any consumer relationship, direct or implied, between the parties.” *Id.* at 40. The Court explained:

The CPA itself, the purposes for which it was enacted, and our cases do not support the argument that a CPA claim must be predicated on an underlying consumer or business transaction. The CPA allows “[a]ny person who is injured in his or her business or property by a violation” of the act to bring a CPA claim. RCW 19.86.090 (emphasis added). Nothing in this language requires that the plaintiff must be a consumer or in a business relationship with the actor. . . .

Id. at 39 (emphasis in *Panag*). Moreover,

“Trade” and “commerce” are statutorily defined terms, and there is nothing in the definition of these terms that suggests any particular required relationship with the plaintiff. Rather, as explained, “commerce” encompasses that which “directly or indirectly affect[s] the people of the State of Washington.” RCW 19.86.010(2) (emphasis added). It is difficult to conceive how this can be read to require the plaintiff to have a consumer or other specialized relationship with the violator.

Id. at 45 (emphasis in *Panag*). Echoing the Court of Appeals, the Supreme Court reiterated that a recipient of a deceptive message “can serve the goal of protecting the public regardless of whether that person is a consumer or in a business relationship with the actor.” *Id.* at 40.

Stephens and *Panag* make clear that (1) the sale and purchase of services to disseminate unfair or deceptive messages satisfies the CPA’s trade or commerce element; and (2) recipients of those messages are well positioned to pursue the violation. Morgan’s attempt to frame the “violative acts” as “outside the realms of trade or commerce,” Br. of App. at 1; *see also id.* at 10, necessarily ignores these holdings. There is no dispute (nor could there be any serious one) that Morgan could not

disseminate the unlawful robocalls unless he contracted with, “employed the services of,” coordinated with, and “paid” a business to use its robocalling platform. *E.g.*, CP 255. Indeed, each individual call incurred a charge. CP 398. This commercial activity was indisputably “any commerce” that directly, or at a minimum, “*indirectly* affect[ed] the people of the state of Washington.” RCW 19.86.010(2) (emphasis added).

Morgan never attempted to explain to the trial court why *Stephens*, *Panag*, and their predecessors and progeny do not control here.⁸ *See* CP 244–47, 390–93. That avoidance persists on appeal. *See* Br. of App. at ii (Table of Authorities). But it was plain that Plaintiffs and the court relied on these very authorities. *E.g.*, CP 146–47, 366, 433–35; RP 6/8/18 at 23:4–8 (“The Court is convinced that at this point, rather than expanding the [CPA] in issuing its ruling, the Court followed the precedent that the Court is aware of . . .”). If Morgan ever addresses any of them, it will be for the first time, in an appellate reply brief, nearly two years after Plaintiffs moved for summary judgment. This should not be allowed,⁹ but even if it were, there is no sound basis to reconcile Morgan’s position with existing precedent.

⁸ In his motion for reconsideration, Morgan mentions *Stephens* for an unrelated proposition and, in parenthesis, states only that “[t]his case was incorrectly used by Plaintiff in oral arguments.” CP 393.

⁹ *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78 n. 20, 322 P.3d 6 (2014) (“To address issues argued for the first time in a reply brief is unfair to the respondent and inconsistent with the rules on appeal.” (citing RAP 10.3(c)); RAP 2.5(a).

2. Cases barring the reframing of malpractice claims against “learned professionals” as CPA violations are inapposite.

The *only* substantive case that Morgan cites—*Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 685 (2009)—is inapplicable here as it concerns a line of decisions addressing when the CPA does and does not apply to “learned professionals.”

The CPA has never applied to claims of malpractice or mere negligence. *E.g.*, *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976) (CPA does not “provide an additional remedy for private wrongs which do not affect the public generally”). And more than 30 years ago, there was some debate whether the term “trade or commerce” applied *at all* to fields “in the liberal arts or in the learned professions.” *See Short*, 103 Wn.2d at 57 (quotation marks omitted) (analyzing whether legal practice is subject to the CPA).

In *Short*, the Court struck the balance: professionals are not exempt from the CPA *but* claims “directed to the competence of and strategy employed by” professionals remained out of bounds as “they amount to allegations of negligence or malpractice and are exempt from the CPA.” *Id.* at 61–62. It was in this context that the Court referred to the “entrepreneurial aspects of legal practice”—pricing, billing, marketing, and the like—as distinct from “the actual performance of [the lawyers’] advice and services.” *Id.* at 61. Later decisions extended the rationale to other professions, including medicine. *E.g.*, *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986).

Michael merely applies the longstanding rule to a medical negligence and battery case against a dentist, in which a CPA claim was also asserted. 165 Wn.2d at 600–01, 602–03 (“The term ‘trade’ . . . includes only the entrepreneurial or commercial aspects of *professional services*, not the substantive quality of services provided.” (Emphasis added.)). Though the dentist had told an existing patient that she could complete a graft procedure without using cow bone, she ran out of human bone during the procedure “and used some cow bone to finish the bone grafting.” *Id.* at 600. As the Supreme Court explained: “She simply completed the procedure to the best of her ability with the materials available to her.” *Id.* at 604. Negligent or not, the exercise of that professional judgment could not serve as the basis for a CPA claim. *Id.*

Morgan misconstrues *Michael* to argue that he cannot be liable because he was not engaged in entrepreneurial activity.¹⁰ But Morgan was neither acting as a licensed professional nor exercising his professional judgment. Thus, there is no need to ask “[t]he question . . . whether the claim involves entrepreneurial aspects of” a doctor, dentist, or lawyer’s office. *Id.* at 603. Nor does *Michael* somehow displace the *subsequent* holding in *Panag* that the CPA requires no particular commercial relationship. 166 Wn.2d at 45. And nothing in *Michael* shortens the CPA’s

¹⁰ Morgan raised his theory, derived from *Michael*, for the first time on reconsideration. Compare CP 244–45 with CP 390–91; see also CP 433. A motion for reconsideration “does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.” *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

reach from “*any* commerce directly or *indirectly* affecting the people of the state of Washington” to *only* commerce where the defendant was a seller.¹¹ RCW 19.86.010(2) (emphasis added).

Deterring people from hiring and paying businesses for help disseminating unfair and deceptive messages is entirely consistent with the text and purpose of the CPA. The element is satisfied.

C. Morgan conceded that Plaintiffs satisfied the CPA’s injury element—on summary judgment and reconsideration—and he cannot now contest the issue for the first time on appeal.

It is a “fundamental principal of appellate review,” *Matter of Estate of Reugh*, ___ Wn. App. 2d ___, 447 P.3d 544, 567 (2019), *review denied*, 97659-7, 2020 WL 114822 (Jan. 8, 2020), that “[a]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.” *Silverhawk, LLC v. KeyBank Nat’l Ass’n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011). “It is well settled that ‘[appellate courts] will not review an issue, theory, argument, or claim of error not presented at the trial court level.’” *Ainsworth*, 180 Wn. App. at 81 (quoting *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001)). In the same vein, this Court “do[es] not consider issues apparently abandoned before the trial court.” *Reugh*, 447 P.3d at 567 (noting that “[u]nder the doctrine of

¹¹ By Morgan’s rationale, the company he contracted with engaged in trade or commerce because it sought to “increase revenue, profit, [or] market share,” Br. of App. at 12, but Morgan—who was himself part of the *market* for the unlawful services—did not. It is axiomatic that “commerce” requires sellers *and* buyers. The Legislature’s deliberate invocation of “*any* commerce” touches both. RCW 19.86.010(2) (emphasis added).

invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal.”).

To allow otherwise “would be to undermine the rule that an appellate court is to engage in the same inquiry as the trial court in reviewing an order of summary judgment.” *Wash. Fed’n of State Emps., Council 28, AFL-CIO*, 121 Wn.2d at 157. Thus, “[i]ssues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal.” *Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007).

For instance, in *Cano-Garcia v. King County*, this Court refused to consider a new legal argument, by an appellant seeking to overturn a summary judgment, because he “did not make this argument at the summary judgment stage[.]” 168 Wn. App. 223, 248, 277 P.3d 34 (2012). In particular, he did not “raise this issue in his pleadings in opposition to summary judgment, argue this theory at the hearing, [or] submit evidence in support of this theory[.]” *Id.*; see also *Ainsworth*, 180 Wn. App. at 80–81 (“Our review of [the] partial summary judgment response indicates [appellant] made the present arguments for the first time on appeal.”).

“Good sense lies behind this requirement.” *Reugh*, 447 P.3d at 566. It promotes judicial economy and fairness to litigants (who can only rebut arguments made) and trial courts (which can only rule on the arguments presented). *Id.* at 565–67 (appellants “never afforded the trial court an opportunity to review this potential ground for reversal”). “The rule also

facilitates appellate review by ensuring that a complete record of the issues will be available.” *Id.* at 567. “No procedural principle is more familiar” *Id.* at 565 (discussing RAP 2.5(a)).

Here, Morgan simply did not dispute that Plaintiffs established the CPA’s fourth element—injury to business or property—as a matter of law. Plaintiffs’ motion for summary judgment unambiguously explained that the CPA requires proof of five elements, CP 141, that “[e]ach element is satisfied here[,] CP 142, and why the injury element specifically is “established as a matter of law.” CP 148–49. In his response brief, Morgan argued that the CPA’s first (unfair or deceptive) and second (trade or commerce) elements were not satisfied, while unsuccessfully articulating a free speech component. CP 244–47. From these, he only challenges trade or commerce on appeal. But nowhere did Morgan contest that Plaintiffs were injured within the meaning of the CPA or address *any* of Plaintiffs’ authorities for that point. *Compare* CP 148–49 *with* CP 244–47.

To avoid any doubt, Plaintiffs twice pointed out that the injury element was not disputed. First, in their summary judgment reply, Plaintiffs wrote:

Defendants *do not dispute* that Plaintiffs satisfy the third (public interest), *fourth (injury)*, and fifth (causation) elements of a CPA claim.

CP 364 (emphasis added). As such, Plaintiffs expended no further attention to these undisputed elements. *See* CP 364–67.

Then, at the summary judgment hearing, Plaintiffs’ counsel stated:

First, I think it's important to point out that *the third, fourth, and fifth elements of the CPA claim are not disputed here*. What is disputed are two factors, that this did not occur in trade or commerce or that the calls, themselves, are not unfair or deceptive.

RP 5/11/18 at 9 (emphasis added).

Despite multiple opportunities, Morgan never even hinted that the injury element was in dispute, including during the hearing. *See id.* at 17–27. Accordingly, the well-prepared trial court asked no questions of either party regarding the undisputed element. *See id.* And the court held that the uncontested element was established. CP 35.

Morgan also did not dispute the injury element in his motion for reconsideration—in writing or at oral argument. CP 385–96; RP 6/8/18. Again, there was no basis for Plaintiffs to relitigate the uncontested issue. *See* CP 433 n.16, 433–40. There being no mention of it, the undisputed element did not factor into the court's order denying reconsideration. RP 6/8/18 at 22–24.

The injury element is now central to Morgan's appeal. This offends every rationale behind RAP 2.5(a). The trial court could not have erred in failing to accept an argument that was never made. Judicial economy is scarcely served by allowing litigants to float inconsistent positions over the course of litigation. And efficiencies are not generally achieved if the “fundamental principle” is not be enforced. *Reugh*, 447 P.3d at 657.

Morgan even seeks to gain a tactical advantage from the arguments he *did not make*, stating: “Respondents did not produce any evidence that the receipt of the campaign calls caused any actual injury to their business or

property.”¹² Br. of App. at 11 (emphasis in original). Respectfully, why would they? Plaintiffs explained in their summary judgment motion that the (now undisputed) TCPA violation necessarily established the requisite injury under the CPA. CP 148 (discussing authority). Since Morgan neither disputed nor rebutted the presumption, there was no basis for Plaintiffs to produce—or the court to seek—evidence supporting an uncontested proposition of law.

Ultimately, Morgan challenged two CPA elements below. Injury just was not one of them. The Court should not consider the new argument. *See Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002) (declining to consider argument on appeal attacking different CPA element than presented to the trial court).

D. The untimely attack on the injury element still fails as the now-undisputed violations of federal anti-robocalling laws necessarily mean concrete injuries, that satisfy the CPA, were established.

While this Court should not reach Morgan’s new argument about the CPA’s injury element, it fails, regardless. Congress has determined, as a matter of national policy, that unlawful robocalls necessarily injure those who receive them—“a violation of the TCPA is a concrete, *de facto* injury.” *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (bold emphasis added). The trial court held that Morgan violated the TCPA, CP 380, and Morgan now “concede[s] that . . .

¹² This assertion is incorrect, *see* CP 223 (plaintiff stating that Morgan had no permission to use his mobile phone for this purpose and describing time wasted attempting to locate robocall source), but also immaterial for the reasons below.

judgment was appropriately awarded pursuant to Respondents' TCPA claim." Br. of App. at 1 n.1. Thus, Morgan cannot simultaneously contend that his robocalls did not also cause the requisite injury under the CPA.

In *Van Patten*, the Ninth Circuit recognized that robocalls that violate the TCPA "*by their nature*" cause the harm that Congress intended to protect. 847 F.3d at 1043 (emphasis added). "The TCPA establishes the substantive right to be free from certain types of phone calls" and "Congress identified unsolicited contact as a concrete harm[.]" *Id.* (recognizing Congress's "role in elevating concrete, de facto injuries previously inadequate in law to the status of legally cognizable injuries." (internal quotation marks omitted) (emphasis added)).

"One such intangible harm is 'intrusion upon and occupation of the capacity of the plaintiff's cell phone.'" *Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc.*, No. 16-cv-05486-JCS, 2017 WL 733123, at *7 (N.D. Cal. Feb. 24, 2017) (quoting *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 645 (N.D. W. Va. 2016)). Courts have "reasoned that '[t]he harm recognized by the ancient common law claim of trespass to chattels—the intentional dispossession of chattel, or the use of or interference with a chattel that is in the possession of another, is a close analog for a TCPA violation.'" *Id.* (quoting *Mey*, 193 F. Supp. 3d at 645 (citing RESTATEMENT (SECOND) OF TORTS § 217 (1965))). A most basic tenet of the concept of "property" is "[t]he right to . . . use[] and enjoy a determinate thing . . ." BLACK'S LAW DICTIONARY 1335 (9th ed. 2009). Even small intrusions constitute injury.

For instance, “all [robocalls] deplete a cell phone’s battery, and the cost of electricity to recharge the phone is also a tangible harm. While certainly small, the cost is real, and the cumulative effect could be consequential.” *Mey*, 193 F. Supp. 3d at 645; *see also LaVigne v. First Cmty. Bancshares, Inc.*, 215 F. Supp. 3d 1138, 1149 (D.N.M. 2016) (“depletion of cell phone’s battery and cost of electricity to recharge the phone is also a tangible harm, regardless of how small”).

Interference with a cell phone’s functionality is a similarly concrete injury. *E.g., Rogers v. Capital One Bank (USA), N.A.*, No. 15-cv-4016, 2016 WL 3162592, *2 (N.D. Ga. Jun. 03, 2016) (robocall recipients “suffered particularized injuries because their cell phone lines were unavailable for legitimate use during the unwanted calls”).

“Courts have also recognized that the time that is wasted as a result of TCPA violations constitutes concrete injury.” *Abante Rooter*, 2017 WL 733123, at *7. Where “injury in fact” from robocalls is at issue, “the vast majority of courts that have addressed the question have concluded that . . . wasted time dealing with the calls are concrete injuries.” *Mix v. Ocwen Loan Servicing, LLC*, C17-0699-JLR, 2017 WL 5549795, at *3 (W.D. Wash. Nov. 17, 2017) (citing *Van Patten*, 847 F.3d at 1042) (collecting cases).

Citing no authority, Morgan inaccurately declares that the TCPA’s damage provision—which permits recovery of the greater of actual damages or \$500 per violation, 47 U.S.C. § 227(b)(3)(B)—somehow

means that TCPA victims have not sustained an injury. Br. of App. at 11. But as the above cases and many others show, this is not the law.

The injuries that unlawful robocalls cause by their very nature are more than sufficient under the CPA, as the threshold is not high. “Injury to property or business is broadly construed, and is not restricted to commercial or business injury.” *Univ. of Wash.*, 200 Wn. App. at 476. It is well settled that the CPA element may be satisfied by nonmonetary, nonquantifiable, minimal, and temporary injuries. *E.g.*, *Panag*, 166 Wn.2d at 58. That is the reality here.

First, “[m]onetary damages need not be proved; unquantifiable damages may suffice.” *Id.* The CPA itself “uses the term ‘injured’ rather than suffering ‘damages.’” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987) (quoting RCW 19.86.090). “This distinction makes it clear that no monetary damages need be proven, and that nonquantifiable injuries . . . would suffice for this element” *Id.*; *see also Nw. Airlines*, 793 F. Supp. at 978–79 (finding CPA violations on summary judgment while holding that plaintiff’s “inability to document specific instances of financial harm will not defeat its claims”).

Second, “[t]he injury involved need not be great[.]” *Hangman Ridge*, 105 Wn.2d at 792. “The injury element can be met even where the injury alleged is both minimal and temporary.” *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014).

Third, “[s]ufficient injury . . . is established when a plaintiff is deprived of the use of his property as a result of an unfair or deceptive act

or practice.” *Sorrel*, 110 Wn. App. at 298 (though nursing home refunded unearned deposit, injury was still established as plaintiff “was denied rightful possession of his funds for a period of two weeks”); *see also* *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990) (“a loss of use of property which is causally related to an unfair or deceptive act or practice is sufficient injury . . .”).¹³

In attempting to downplay the harms from robocalls, Morgan concedes that Plaintiffs sustained the very injuries Congress sought to prevent. He says the robocalls not only “confused” recipients and “caused minor annoyance,” but at least “momentarily occupied the services of Respondents’ cell phones. . . .” Br. of App. at 11. That is all that the CPA requires—lost use of property, including the cell phones’ storage capacity, voicemailbox space, calling capability, and battery contents, or wasted time—however brief, minimal, or monetarily unquantifiable.

With or without Morgan’s concession, it is a verity that his robocalls violated the TCPA, so there is no question that Plaintiffs sustained injuries, at the very least,¹⁴ to their property. This CPA element is met.

¹³ Plaintiffs relied on these same authorities below. CP 148–49. Morgan neither cites nor addresses any of them while attacking the injury element for the first time on appeal. *See* Br. of App. at ii (Table of Authorities).

¹⁴ Had Morgan not conceded the CPA’s injury element on summary judgment (and reconsideration), Plaintiffs would have had occasion to submit further evidence on injury—which they could have easily done. *See* discussion at § IV(C), *supra*.

E. The fee and cost award is mandatory as the CPA violations were properly found.

“In consumer protection actions brought by private plaintiffs under RCW 19.86.090, attorney’s fees awards are mandatory.” *State v. State Credit Ass’n, Inc.*, 33 Wn. App. 617, 624, 657 P.2d 327 (1983); *see also* CP 682 (collecting cases). This is not disputed,¹⁵ nor is the court’s application of the lodestar factors. *See* Br. of App. at 13.

The request to override the fee and cost award (which Morgan had numerous opportunities to avoid, *see* CP 829) is predicated entirely on the CPA claim’s purported invalidity. *Id.* But violation was properly found for the reasons above. The award must therefore stand.

F. Plaintiffs are entitled to fees and costs on appeal.

Successful CPA plaintiffs are entitled to recover fees and expenses on appeal. *E.g., Svendsen v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001) (citing RCW 19.86.090). Plaintiffs therefore request award of their reasonable attorney fees and expenses in accordance with RAP 18.1.

V. CONCLUSION

Robocalls are a “scourge.”¹⁶ Despite Congress and the FCC’s ever-increasing efforts,¹⁷ the problem grows.¹⁸ Understanding that there is no

¹⁵ Morgan notes that fee recovery on TCPA claims is typically accomplished through a class action. Br. of App. at 13 n.4. Had Plaintiffs brought a class action here, the judgment against Morgan would have been at least **\$12,369,000** (representing 12,369 successful robocalls to cell phones × 2 violations per call × \$500 per violation).

¹⁶ *Report on Robocalls: A Report of the Consumer and Governmental Affairs Bureau Federal Communications Commission*, CG 17–59, 2019 WL 945132, at ¶ 39 (F.C.C. Feb. 2019) (“FCC Report”) (quoting FCC Chairman Ajit Pai).

¹⁷ *E.g., Pallone–Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED)*, PUB. L. NO. 116-105, 133 Stat. 3274 (Dec. 30, 2019).

single solution, Congress empowered states to use their own laws to join the fight. Plaintiffs took advantage of that authority, recognizing that Washington’s Consumer Protection Act is an important tool for curbing robocall abuse. The trial court, in turn, applied the undisputed facts to the CPA’s established elements, carefully considering the arguments Morgan made in opposition. This Court should affirm.

Respectfully submitted January 31, 2020.

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¹⁸ See FCC Report at ¶ 13 (citing study that “estimated national volume of robocalls increasing from 29,082,325,500 in 2016 to 30,507,422,900 in 2017, and to 47,839,232,200 in 2018.”).

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 31, 2020, I e-filed a copy of the foregoing **Brief of Respondents** with the Court of Appeals and delivered the same by U.S. Mail and email to the following:

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