

FILED  
Court of Appeals  
Division II  
State of Washington  
4/1/2020 1:03 PM

**NO. 53373-1-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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PHYLLIS FARRELL, and 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.

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**REPLY BRIEF OF APPELLANTS**

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Attorney for Appellants

Nicholas Power  
WSBA No. 45974  
The Law Office of Nicholas Power  
540 Guard St., Suite 150  
Friday Harbor, WA 98250  
(360) 298-0464 (Phone)  
nickedpower@gmail.com

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## I. INTRODUCTION

Respondents are simply incorrect that the state of the law provides that Appellants contracting with an out-of-state robocall vendor to place political phone calls to Washingtonians gives rise to a cause of action under the CPA. While the content, and manner of making such calls are regulated by a variety of other laws, such is not regulated by the CPA. Respondents stretch existing case law well past its limits to assert essentially that any commercial transaction undertaken in preparation for political communication can be actionable by the recipient of political advertising.

What Respondents propose is nothing short of an opening of a “pandora’s box” that would make actionable any number of campaign activities under the Consumer Protection Act (“CPA”), RCW 19.86, et. seq. Because the CPA is designed to address only activities which occur in “trade or commerce” the trial court erred in finding Respondents liable. This Court should reverse the trial court’s finding.

Respondents are similarly incorrect that Appellant, who was *pro se* below, did not assert that Respondents had not suffered an injury in fact. Because the record is clear on this issue, this argument was appropriately raised and provides an additional basis for reversal.

## II. DISCUSSION

### A. CPA only Applies to “Trade or Commerce”

1. *Panag and Stephens* are factually distinguishable.

A review of the cases cited in Respondents' brief reveals that none are applicable to the present situation presented in this case. A confirmation of liability by this Court would be a stark departure from CPA's intended scope and the case law that has elaborated on the CPA's limits.

Respondents cite to *Stephens v. Omni Ins. Co.*, 159 P.3d 10 (Div. I, 2007) (consolidated and later reviewed as *Panag v. Farmers Ins. Co. of Washington*, 204 P.3d 885 (2009)), for the proposition that CPA is so broad as to include the actions presented here. But *Panag* differs substantially in that the unfair act occurred in a undeniably commercial setting. In *Panag*, the issue was whether the CPA applies to a collection agency's deceptive efforts to collect on an insurance company's subrogation claim against an uninsured motorist. *Id.* at 887.

While true that the *Panag* court observed that "an actionable violation can occur without any consumer or business relationship between the particular plaintiff bringing a private cause of action under the CPA and the actor because trade or commerce' is not limited to such transactions.". *Id.* at 890. The *Panag* court identified what sort of relationship was required. The *Panag* court wrote:

What is necessary, and does constitute the needed link between the plaintiff and the actor, is that the violation cause injury to the plaintiff's business or property as required by RCW 19.86.090.

*Id.*

While it is true that Mr. Morgan's contractual relationship with Dialing Services LLC occurred within "trade and commerce" within the meaning of the CPA, it does not follow that the subsequent political messaging that was made possible by such contracting similarly occurred in that same realm. To allow a CPA claim to exist here would give the CPA tentacles to reach virtually any social interaction.

Respondents argue that Dialing Services' political phone calls that were placed on the behalf of Appellants is analogous to the "aggressive notices on behalf of insurance companies" that were sent by the debt collector in *Stephens*. This, however, ignores that those debt collection notices that were sent *Stephens* were for unquestionably commercial purposes and obviously intended to affected the "business or property" of debtors. The facts of *Panag* stem from the epicenter of "trade and commerce".

In the instant matter, assuming *arguendo* that the phone messages that Appellants contracted with Dialing Services to send were deceptive, such were simply not in commerce. Unlike the debt collectors in *Stephens* and *Panag*, Appellants did not solicit business or engage in or propose to engage in any economic activity with the called party. Nor did Appellants propose any waiver, relinquishment or modifications, of the rights of debtors. Here, instead, Appellants contracted to have Dialing Services initiate a purely political message.

2. Michael is Applicable as it underscores the CPA's limited applicability to the realm of Trade and Commerce.

Contrary to Respondents' assertion, Appellants are not relying on *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 685 (2009), for the proposition that Appellants were engaged in an entrepreneurial activity or acting as a licensed professional and are therefore not subject to the CPA. See Br. of Resp. at 17. Rather, Appellants cite to *Michael* for the proposition that Washington expressly recognizes that the CPA is limited to trade or commerce.

In *Michael*, the Supreme Court found it determinative that the health care provider who used cow bone in the surgical procedure did not do so to obtain economic advantage of his patient. The Court found:

“[Defendant] contends that the use of cow bone for Michael's procedure did not occur in trade or commerce. We agree.” The Court explained: “**There is no evidence that cow bone was used to increase profits or the number of patients.**”

*Michael v. Mosquera-Lacy*, 200 P.3d at 699-700.

Indeed, this jibes with all cases that Respondents have presented to the Court. There must be some economic motive or nexus that the alleged act has on commerce. The CPA's express purpose is to “limit restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition.” RCW 19.86.920.

**B. Appellants Never Conceded Injury Element**

What Respondents argue is simply is simply incorrect -- Appellants have consistently maintained that Respondents have not suffered an injury. Appellants did this by arguing that the phone messages were factually correct and not misleading. CP at 245-246. It must naturally follow, therefore, that such an assertion necessarily disputes injury. In other words, by maintaining that the messages contained in the phone calls were factually accurate, Appellants unquestionably raised the issue as to whether an injury had been sustained by Plaintiff's below.

Indeed, as Appellants explained in their response to Respondents' Motion for Summary Judgement, "Defendant was clearly attempting to educate the public about the lack of fitness for the important job of Thurston County Commissioner by political candidate Jim Cooper. Defendant was also attempting to warn voters in Washington State and Thurston County about the obvious dangers and concerns by a wealthy racist cult leader spending more than any. Other special interest in Thurston County history to influence local politicians, and buy influence and control over the Thurston County Democratic Party." CP at 247.

Again, Appellants were *pro se* below. By asserting the constitutional and truthful dimension of the telephone at issue, Appellants successfully contested damage.

### **III. CONCLUSION**

For the foregoing reasons, the Court should reverse the trial court's determination that Appellants are liable for violations under the CPA and remand this case for further proceedings.

Respectfully submitted this 1st day of April 2020.

The Law Office of Nicholas Power

s/ Nicholas Power  
Nicholas Power WSBA #45974  
Attorney for Appellants

# LAW OFFICE OF NICHOLAS POWER

April 01, 2020 - 1:03 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53373-1  
**Appellate Court Case Title:** Phyllis Farrell, et al, Respondents v. Friends of Jimmy, et al, Appellant  
**Superior Court Case Number:** 16-2-04464-3

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Address:  
540 GUARD ST  
FRIDAY HARBOR, WA, 98250-8044  
Phone: 360-298-0464

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