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Court of Appeals
Division III
State of Washington
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No. 37471-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PAUL LEWIS, Appellant,

vs.

VERNICE ZANCO AND FRED ZANCO, d.b.a. ZANCO PROPERTIES,
and UNIVERSITY SOUTH AND EAST, LLC, Respondents.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Superior Court erred in finding that *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1985), prohibited Appellant Paul Lewis' Consumer Protection Act ("CPA") claim that his former landlords, Vernice Zanco and Fred Zanco, d.b.a. Zanco Properties, and University South and East, LLC, (collectively "Zanco"), engaged in unfair or deceptive trade practices when, following the termination of the parties' landlord-tenant relationship, Zanco unilaterally imposed and collected from him the maximum \$200.00 regulatory fine, which is specifically reserved for government agency enforcement under RCW 43.44.110(5), for an allegedly defective smoke detector device after the termination of his tenancy.

Issues Pertaining to Assignments of Error

1. Is Mr. Lewis' CPA claim that his former landlord, Zanco, committed an unfair and deceptive trade practice when it imposed against and collected from him the maximum \$200.00 regulatory fine for an allegedly defective smoke detector after the termination of his tenancy barred by *Schwab*, when the Legislature neither envisioned a landlord's illegal imposition of government regulatory fines nor provided an express

or adequate remedy for that illegal action in drafting the Residential Landlord-Tenant of 1973 (“RLTA”)?

2. Is Mr. Lewis’ CPA claim that his former landlord, Zanco, committed an unfair and deceptive trade practice when it imposed against and collected from him the maximum \$200.00 regulatory fine for an allegedly defective smoke detector after the termination of tenancy barred by *Schwab* when Mr. Lewis was no longer a “tenant” either under the parties’ rental agreement or the RLTA at RCW 59.18.030(32)?

II. STATEMENT OF THE CASE

As presented in his Amended Complaint, on or about September 10, 2014, Mr. Lewis agreed to rent an apartment at a complex known as “University Apartments S&E” from Respondents Zanco. (CP 3; CP 32). The parties’ lease was a fixed-term tenancy running from September 10, 2014, through September 30, 2015, with tenancy continuing on a month-to-month basis thereafter. (CP 32).

To occupy the premises, Mr. Lewis was required to pay monthly rent of \$495.00. (CP 4; CP 32). He was also required to pay a “Security, Damage, and Cleaning deposit” of \$200.00, plus a non-refundable fee of \$150.00 for “professional carpet cleaning and administrative fees when the lease was signed.” (CP 4; CP 32).

In pertinent parts to the issues before this Court, the parties' lease and addenda provided:

1. "SMOKE DETECTORS: this dwelling has been equipped with smoke detector device(s) in accordance with RCW 48.48.140. Devices have been checked by the Landlord or agent and found to be in good working order." (CP 33).

2. An addendum to the lease entitled "ZANCO PROPERTIES – HOUSE RULES OF OCCUPANCY" provided: "The following rules are for the benefit and safety of you and your neighbors. Residents are required by law to abide by all given requirements in the lease agreement rules of occupancy (RCW 59.18.140). Disregarding these requirements constitutes a substantial and material breach of tenant duties and is grounds for termination of tenancy." (CP 34).

3. Rule 10 of the House Rules of Occupancy Addendum titled "SMOKE DETECTORS" provided: "a) Smoke detectors are in operation upon move-in. From that point on they are resident's responsibility to maintain. If smoke detectors are not maintained or are dismantled, the Resident could be held liable for a fine of up to \$200.00 per RCW 59.18.130(7) and RCW 43.44.110." (CP 34).

4. The house rules also included the following provision: "In entering into this lease/agreement I/we also agree that the rules are an

integral part of said lease/agreement. I/we agree that a violation of any of these rules shall constitute a substantial and material breach of the lease agreement and may be basis for cancellation of agreement or may give rise to damages against me.” (CP 34).

On July 29, 2016, Mr. Lewis terminated his tenancy. (CP 4).

Thereafter, on August 4, 2016, Zanco sent Mr. Lewis a Deposit Disposition and Property Condition Report demanding that he pay an additional \$699.90 for cleaning and damages, less \$5.00 for a previous “overpayment.” (CP 4; CP 53). After claiming the entirety of Mr. Lewis’ \$200 deposit, Zanco alleged a balance of \$494.90 remaining due. *Id.* Among the charges was \$200.00 for an item titled “Smoke/CO detector – smoke not working.” (CP 5; CP 54).

In a letter dated August 18, 2016, Mr. Lewis disputed Zanco’s charges, including the charge for the allegedly defective smoke detector. (CP 56). In response, Zanco referred its claims to a third-party debt collector. (CP 5). Because Zanco’s third-party collection action threatened to undermine Mr. Lewis’ continuing housing assistance program support, he capitulated to Zanco’s demand that he pay an even greater amount of \$510.00, under protest and with a reservation of all rights. (CP 5).

On September 28, 2017, Mr. Lewis filed suit against Zanco on behalf of himself and all others who had been similarly subjected to Zanco's regulatory fines. (CP 1). Mr. Lewis alleged that Zanco violated the CPA, RCW 19.86, *et seq.*, by imposing and collecting government agency "fines" from its former tenants' deposit trust monies and other sources. (CP 6-7). Mr. Lewis prayed for actual damages, exemplary damages, reasonable attorney's fees and costs, and declaratory relief holding that the unauthorized regulatory fines imposed by Zanco were not legal, valid, or enforceable by private landlords. (CP 8); *see* RCW 43.44.115(5)(b) (specifying that only local or county fire officials are authorized to impose and enforce such regulatory actions).

Zanco filed its Motion to Dismiss or alternatively, for Summary Judgment, on January 18, 2019. (CP 9). Zanco's Motion sought dismissal on three grounds: 1) *Schwab* precluded Mr. Lewis' CPA claim, as the dispute involved matters within the purview of the RLTA; 2) Mr. Lewis' action was barred by a one-year statute of limitations that applied to the imposition of regulatory penalties under RCW 4.16.115; and 3) Zanco, as a private party, was nonetheless authorized by RCW 43.44.110 to impose the maximum \$200.00 regulatory fine against Mr. Lewis' for his allegedly defective smoke detector. (CP 13).

Following oral arguments, the lower court entered an Order dismissing Mr. Lewis' CPA claim on February 12, 2020. (CP 77). The lower court concluded that Mr. Lewis's issue implicated the RLTA, "which includes disputes regarding imposing a fine under RCW 59.18.130(7), which incorporates RCW 43.44.110; a proper accounting and return of a tenant's deposit under RCW 59.18.280; and prohibited acts under RCW 59.18.230(3)." (CP 80). Although not at issue in this appeal, the lower court rejected Zanco's two other arguments for dismissal, finding that only government fire officials could assess the \$200.00 fine under RCW 43.44.110(5) and that RCW 4.16.115's statute of limitation was not applicable to Mr. Lewis' claims. (CP 80-81).

Mr. Lewis therefore respectfully assigns error to the lower court's finding that *Schwab* precluded his CPA claim that Zanco unlawfully imposed against and collected from him, and countless other tenants, the maximum \$200.00 regulatory fine described in RCW 43.44.110.

In so finding, the lower court appeared to overlook that: 1) the Legislature neither envisioned Zanco's illegal imposition of government regulatory fines nor provided an express or adequate remedy for that prohibited conduct in drafting the RLTA; and/or 2) Mr. Lewis was not a "tenant" under the parties' lease or RCW 59.18.030(32) when Zanco

engaged in its prohibited conduct, and therefore Mr. Lewis' claim is not barred by the rule of *Schwab*.

III. SUMMARY OF ARGUMENT

This Court should reverse the ruling of the lower court, which dismissed Mr. Lewis' action, and find that *Schwab* does not preclude his CPA claim based on Zanco's unfair or deceptive practice of imposing and collecting from him the maximum \$200.00 regulatory fine under RCW 43.44.110(5) for an allegedly defective smoke detector device after the termination of the parties' landlord-tenant relationship.

First, the lower court erred in finding *Schwab* precluded Mr. Lewis' CPA claim because the Legislature neither envisioned Zanco's illegal actions at issue nor provided an express or adequate remedy for that such prohibited conduct in drafting the RLTA. Second, the lower court erred in concluding that *Schwab* precluded Mr. Lewis' CPA claim, because he was not a "tenant," either under the parties' lease agreement or RCW 59.18.030(32), at the time Zanco illegally imposed and collected the regulatory fine in violation of RCW 43.44.110.

IV. STANDARD OF REVIEW

Where there is no dispute about what the parties did, whether or not the conduct at issue constitutes an unfair or deceptive act is decided as a question of law and is reviewed de novo. *Peterson v. Kitsap Cmty. Fed.*

Credit Union, 171 Wn. App. 404, 425, 287 P.3d 27 (2012) (citing *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007)). A trial court's grant of summary judgment is also reviewed de novo. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

V. ARGUMENT

At issue in *Schwab* was whether or not violations of the RLTA fall under the ambit of Washington's CPA. 103 Wn.2d at 543. The *Schwab* Court found that the Legislature intended that "violations of the RLTA do not *also* constitute violations of the Consumer Protection Act, RCW 19.86." *Id.* at 553 (emphasis added).

In Mr. Lewis' case, Zanco imposed and collected a \$200.00 government regulatory fine for an allegedly defective smoke detector from Mr. Lewis. Zanco cited RCW 43.44.110(4) as authorizing itself, as the landlord, the authority to impose the maximum \$200.00 regulatory fine for defective smoke detectors following the termination of the tenancy. Although RCW 43.44, *et seq.* never authorized private landlord to imposed regulatory fines against their tenants, effective July 1, 2019, the Legislature amended RCW 43.44.110(5) to explicitly state that only a fire department chief, county fire marshal, or other fire official had the authority to administer any fines under that provision. *Id.* At no time has

Zanco had the authority under Washington law to act as a private enforcement arm of any fire department or as a deputy of any fire official.

Zanco's illegal acts and practices were neither envisioned nor accounted for in the Legislature's drafting of the RLTA. Consequently, the Legislature did not provide a remedy therein to adequately address and redress Zanco's illegal imposition of the government regulatory fines at issue in this case. Given the CPA's intentionally broad application and "liberal construction," RCW 19.86.920, this Court should clarify that *Schwab*'s prohibition against duplicative CPA actions, is limited to those unlawful actions where an RLTA remedy is expressly and adequately provided for therein. *Schwab* should not bar CPA actions simply because the complained-of action has some tangential connection, however tenuous it may be, to a residential landlord-tenant relationship, especially when that relationship no longer exists.

Mr. Lewis, on behalf of himself and similarly situated tenants, submits to this Court that *Schwab* does not preclude his CPA claim against Zanco's illegal imposition and collection of the maximum \$200.00 regulatory fines that are within the sole purview of the state, county, or city fire officials. RCW 43.44.100(5). For these reasons, and the following arguments, Mr. Lewis appeals to this Court to reverse the court below and allow his action to proceed.

A) **State v. Schwab does not preclude a CPA action for a former landlord's imposition and collection of a \$200.00 regulatory fine from its former tenants.**

1. State v. Schwab's Holding

Schwab, decided in 1985, involved a landlord who owned a number of submarginal Seattle residential housing units. *Id.* at 544. The landlord required his tenants to sign rental agreements, which in exchange for low rent, required the tenants to take their rental premises on an “as is” basis and instructed tenants that the landlord would not need to fulfill his RLTA obligations related to repairs and other services. *Id.* at 544. Following multiple complaints to the Attorney General’s office, an investigation was conducted, and the Attorney General filed suit against the landlord for concurrent violations of both the RLTA and CPA *Id.* The trial court found that the landlord’s conduct violated the CPA and awarded damages accordingly. *Id.* at 545.

After Division I granted certiorari for review, the Washington Supreme Court reversed the trial court, determining that “residential landlord-tenant problems are within the express purview of the Residential Landlord-Tenant Act of 1973, RCW 59.18 . . .” The Court found that the Legislature intended that “violations of the RLTA do not *also* constitute violations of the Consumer Protection Act, RCW 19.86.” *Id.* at 553 (emphasis added).

In determining that the Legislature intended to disallow the CPA as a recovery method for RLTA violations, the Court cited three reasons: First, that nothing in the legislative history of the CPA suggested it was ever intended to be applied to the rental of residential housing, *id.* at 549-550; second, the RLTA was a carefully crafted delineation of the specific rights, duties, and remedies of both landlords and tenants, and nothing in the RLTA purported to give any authority to the Attorney General to enforce violations thereof, *id.* at 550; and third, when the RLTA was enacted in 1973, an amendment making RLTA violations *per se* CPA violations was rejected on the Senate floor. *Id.* at 551-552. This, the Court concluded, indicated that the Legislature did not intend for claims arising under the RLTA to also constitute violations of the CPA. *Id.* at 552.

Here, Mr. Lewis asks this Court to better define the reach of *Schwab's* holding. In deciding *Schwab*, the Supreme Court highlighted the RLTA's delineation of specific rights and duties between landlords and tenants, as well as the remedies provided for therein. 103 Wn.2d at 551. However, in cases such as Mr. Lewis', where a landlord's illegal acts and practices were not contemplated in the RLTA's drafting, and consequently, an express or adequate remedy was not provided, the CPA must be allowed as an available avenue for recovery. In addition, where a

landlord-tenant relationship is terminated, never existed in the first place, or an individual is otherwise not a “tenant” as defined in RCW 59.18.030(32)¹, *Schwab*’s holding should not be construed to limit an individuals’ remedies under the CPA.

2. The CPA as a Vehicle for Recovery

The CPA was a carefully drafted attempt to bring within its reach 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). “By broadly prohibiting unfair or deceptive acts or practices in the conduct of any trade or commerce, the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 49, 204 P.3d 885 (2009) (internal citations omitted).

The purposes of the CPA are “to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices *in order to protect the public and foster*

¹ The RLTA defines “tenant” as “any person who is [presently] entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement.” RCW 59.18.030(32). The statute also defines “prospective tenant,” RCW 59.18.030(24), and specifically includes the same in some provisions. *See, e.g.*, RCW 59.18. 253 (Deposit to secure occupancy by tenant) and RCW 59.18.257 (screening of prospective tenants). At the same time, the RLTA does not define or specifically name “former tenant” or “previous tenant” within its provisions.

fair and honest competition.” *Id.* at 40 (citing RCW 19.86.920) (emphasis in original).

The Legislature explicitly required the CPA to be liberally construed so that those beneficial purposes may be served. *Demopolis*, 103 Wn.2d at 61; RCW 19.86.920. Accordingly, courts have been instructed to liberally include unfair and deceptive conduct within the reach of the CPA. *Panag*, 166 Wn.2d at 49 citing *see Fed. Trade Comm'n v. R.F. Keppel & Bro.*, 291 U.S. 304, 308, 54 S. Ct. 423, 78 L. Ed. 814 (1934).

Consequently, in addition to legislatively designated activities, there is an endless multitude of business activities that have been judicially included within the ambit of the CPA. *See, e.g., Ethridge v. Hwang*, 105 Wn. App. 447, 457, 20 P.3d 958 (2001) (mobile home landlords); *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, 134 Wn. App. 210, 135 P.3d 499 (2006) (mobile home distributors); *Panag*, 166 Wn.2d 27 (collection of insurance subrogation claims); *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984) (building contractors); *McRae v. Bolstad*, 101 Wn.2d 161, 676 P.2d 496 (1984) (real estate sales); *Ulberg v. Seattle Bonded, Inc.*, 28 Wn. App. 762, 626 P.2d 522 (1981) (collection agencies); *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979) (motor vehicle sales);

Demopolis, 103 Wn.2d 52 (law practices); and *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978) (insurance businesses).

In bringing CPA claims, “[p]rivate citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007) citing *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976). Given the actual damages, attorneys fees, and treble damages available under the CPA, such actions (especially in the form of class actions), are vital to bringing claims that involve nominal damages. *See Id.* at 853-854.

Thus, given the CPA’s intentional breadth, legislative purpose, its long history of judicial inclusion, its unique propriety to address and redress the unlawful action complained of in this action, and the reasons set forth below, Mr. Lewis requests this Court acknowledge his ability to pursue his claims under the CPA for Zanco’s unfair or deceptive conduct regarding the illegal imposition and collection of the maximum \$200.00 regulatory fine from Mr. Lewis and other former tenants, which it had absolutely no authority to impose or collect under RCW 43.44.110 or any other statutory authority.

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3. *The RLTA Does Not Provide an Adequate Remedy to Mr. Lewis for Zanco’s Illegal Imposition and Collection of Regulatory Fines.*

In support of its decision to disallow CPA coverage for the RLTA violations committed in that case, the *Schwab* Court emphasized that the tenants had recourse under the RLTA for the landlord’s “as-is” leases. *Id.* at 551. The *Schwab* Court cited to RCW 59.18.230(3), which provides actual damages, statutory damages, and reasonable attorney’s fees when a lease agreement waives the rights or remedies under the RLTA or exculpates from or limits the liability of any landlord arising under law. *Id.*

Twenty-five years after the decision in *Schwab*, the Supreme Court in *Panag*, in undertaking a similar analysis, conversely determined that the CPA was an appropriate vehicle of recovery for the deceptive collection of insurance subrogation claims. The Supreme Court stated the following regarding *Schwab*’s holding:

In *Schwab*, this court declined to allow CPA actions based on violations of the Residential Landlord-Tenant Act of 1973 (RLTA), chapter 59.18 RCW. This court considered it inappropriate to extend the CPA to landlord-tenant disputes in view of the detailed nature of RLTA, which includes an array of specific remedies.

Id. at 55.

Accordingly, as the decisions in *Schwab* and *Panag* state, the prohibition against CPA claims for RLTA-related issues exists primarily because the Legislature provided for specific, articulated remedies for specific and certain landlord or tenant claims under the RLTA.

Here, the lower court found Mr. Lewis' issue was barred by *Schwab* because it was a landlord-tenant problem within the express purview of the RLTA which included "disputes regarding: Imposing a fine under RCW 59.18.130(7), which incorporates RCW 43.44.110; a proper and accounting and return of a tenant's deposit under RCW 59.18.280; and prohibited acts under RCW 59.18.230(3)."

Respectfully, Mr. Lewis disagrees with the lower court's ruling. RCW 59.18.230, RCW 59.18.280, and RCW 59.18.130(7) do not provide a remedy for Zanco's illegal practice of imposing and collecting "fines" against and from former tenants, particularly after the landlord-tenant relationship has ended. Without the ability to vindicate his claims under the CPA, Mr. Lewis is potentially left without any statutory remedy.

- i. RCW 59.18.230 does not provide Mr. Lewis with a remedy for Zanco's illegal conduct.

RCW 59.18.230(3) provides a remedy to a tenant if a "landlord *deliberately uses* a rental agreement containing provisions *known by him or her to be prohibited.*" RCW 59.18.230(3) (emphases added). On its

face, this provision only provides a tenant a remedy or recourse if the tenant can prove that the landlord *knew* that an included lease provision is prohibited by law, and thereafter *deliberately* includes such a provision in its leases. *Id.*

Zanco, time and again claimed in its pleadings before the lower court that it was within its rights to impose and collect the maximum-allowable \$200.00 fine for allegedly defective smoke detectors from its former tenants. *See e.g.*, (CP 19) (stating that Zanco is not liable under the CPA for assessing the maximum \$200.00 fine because the RLTA and RCW 43.44.110 do not say the landlord may not assess the fine); (CP 23 and 24) (arguing the same by stating that the maximum allowable \$200.00 civil penalty is somehow transformed into damages to be collected by the landlord); (CP 27) (arguing the same).

A landlord who uses lease provisions like Zanco's for authority to unilaterally impose government regulatory fines against tenants can escape liability under RCW 59.18.230 simply by averring that the landlord did not know its lease provisions were illegal. Given the difficulty associated with proving a landlord's subjective intent, one would suppose .230 can only be used as remedy in extremely limited circumstances—either where a landlord admits on the record it knew its lease provision was illegal and included it therein in an attempt to swindle its tenants, or like in *Schwab*

(though the appellate decision is silent on the fact), where the landlord is also an attorney, and presumably can be held liable under a “should have known” standard versus actual knowledge. Here, as Zanco believed its conduct was lawful it evades any liability under RCW 59.18.230, and no remedy is available to Mr. Lewis under that statute to address Zanco’s illegal fines.

Moreover, the lease provision is not unlawful on its face. It simply informs and advises tenants of the possibility that a fine might be imposed if they fail to maintain their smoke alarms. Nowhere does it state that the landlord is authorized to impose a fine. Nor does it state that the statutory maximum fine will automatically be imposed by the landlord without any advance notice or warnings, and after the landlord-tenant relationship has terminated. Similarly, a landlord could include a warning in a lease that speeding on public roads may result in traffic tickets. However, tenants should not then expect landlords to follow them around town with radar guns and issue traffic fines payable to the landlord.

- ii. RCW 59.18.280 does not provide Mr. Lewis with a remedy for Zanco’s illegal conduct.

RCW 59.18.280 concerns a landlords’ requirements to send a full and specific statement of damages and any refund due to a tenant within 21 days of the termination of tenancy. Recourse under that statute is not

available to Mr. Lewis in this instance either. As Mr. Lewis vacated July 29, 2016, Zanco's August 4, 2016, final deposit disposition statement was timely. (CP 4; CP 53). In its disposition, Zanco claimed damages of \$699.90, of which \$200.00 was the disputed smoke detector fine. (CP 53). Because Zanco alleged damages of \$494.90 over the \$200.00 disputed fine for an inoperable smoke detector, there would be no refund due to Mr. Lewis, even if the \$200.00 fine were excluded. (CP 53). Consequently, RCW 59.18.280 does not provide Mr. Lewis with a remedy to dispute and recapture Zanco's wrongfully imposed \$200.00 regulatory fine.² See RCW 59.18.280.

iii. RCW 59.18.130 is not a basis for assessing and collecting regulatory fines.

In support of its decision, the lower court cited RCW 59.18.130(7). That provision makes it a tenant's duty to maintain a smoke alarm in accordance with manufacturer's recommendations, including but not limited to replacing batteries. *Id.*

The RLTA provides landlords with options when a tenant fails to comply with RCW 59.18.130(7) or any of the other duties stated therein:

² It is common knowledge that many landlords will not allow a tenant to enter into a tenancy if he or she has an alleged outstanding debt to a former landlord (disputed or not) appearing on his or her tenant report. In such a case, when Zanco imposes its illegal \$200.00 regulatory fine, a former Zanco tenant would either have to pay the fine or attempt to find new housing that will accept an application with an alleged outstanding obligation owed to Zanco.

1) pursuant to RCW 59.18.170 through RCW 59.18.190, the landlord can send a notice to its tenant to remedy the noncompliance within 30 days, and if tenant fails to correct, can fix the noncompliance itself and charge the tenant the actual replacement cost of repair; or 2) claim that the noncompliance is so substantial so as to form the basis of an unlawful detainer action RCW 59.12, *et. seq.*

However, Zanco has never claimed that its alleged repair or replacement of the smoke detector was based on any expense actually incurred, which would most likely be the cost of a common battery, if any “repair” occurred at all. The provision does not give a landlord or former landlord the authority to impose and collect the maximum allowable \$200.00 regulatory fine from its former tenants under the false auspices of enforcing RCW 43.44.110. More importantly, RCW 59.18.130 does not provide a tenant, or Mr. Lewis (as a former tenant), with any remedy to recover his or her wrongfully taken money when a landlord illegally imposes government regulatory fines. As such, Zanco’s action of imposing and collecting \$200.00 regulatory fines from its former tenants, for which it clearly had no authority to impose or collect, is an action the Legislature neither foresaw in drafting the RLTA nor accounted for by providing a remedy therein. Accordingly, Mr. Lewis’ CPA claim must be allowed to proceed.

4. Schwab’s CPA Prohibition Does Not Apply When the Landlord-tenant Relationship has Ended or There is No Landlord-tenant Relationship.

The RLTA defines a “tenant” as “any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement.” RCW 59.18.030(32). In turn, a “rental agreement” is defined as “all agreements which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit.” RCW 59.18.030(29). Here, Zanco’s assessment of an illegal regulatory fine took place after the conclusion of Mr. Lewis’s tenancy. At the time the fine was imposed, Mr. Lewis was no longer entitled to occupy or use the former rental property. Simply put, as Mr. Lewis was not a “tenant” when Zanco imposed and collected the illegal \$200.00 regulatory fine from his deposit trust monies, *Schwab’s* CPA prohibition does not apply.

The Legislature drafted the CPA to reach every person who conducts unfair or deceptive acts or practices in any trade and to provide sufficient flexibility to reach conduct that inventively evades regulation. *Demopolis*, 103 Wn.2d at 61; *Panag*, 166 Wn.2d at 49. The Legislature also directed the CPA to be liberally construed so that its beneficial purposes may be served. *Demopolis*, 103 Wn.2d at 61. Consequently, the Supreme Court has said courts should be willing to liberally include unfair

and deceptive conduct within the reach of the CPA. *Panag*, 166 Wn.2d at 49. Given Washington's CPA precedent which calls for courts to error on the side of inclusion and protection of its citizens, this Court should find Zanco's illegal action, taken after the parties' tenancy ended, is not subject to *Schwab's* CPA prohibition.

Schwab's CPA prohibition cannot be allowed to encompass all activity that has some connection, however attenuated, to a rental property. There must be a limit. If a landlord employs a "bait-and-switch advertising scheme" a prospective tenant should be allowed to pursue recourse under the CPA. *See State v. Ralph Williams' North West Chrysler Plymouth*, 87 Wn.2d 298, 306 553 P.2d 423 (1976) (finding that bait-and-switch advertising is actionable under the CPA).

If a landlord is taking application monies from several prospective tenants with no intention of renting out the property, there should be recourse under the CPA. If a person is pretending to be a landlord and is renting out a property to multiple prospective tenants, only to discover later that the "landlord" does not actually own or manage the property, there should be recourse under the CPA.

Or here, where a former landlord, unapologetically assesses and collects \$200.00 fines, without any authority to do so, Mr. Lewis and other tenant victims should have recourse under the CPA.

As Justice Dore set forth in dissent in *Schwab*:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country.

Schwab, 103 Wn.2d at 558 (Dor, J., dissenting)(quoting H.R. Rep. No. 1142, at 19 (1914)(Conf. Rep.); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009).

An outer limit of *Schwab*'s holding must be established. To the extent that *Schwab* remains good law, it should not limit unfair and deceptive actions by landlords, which were not contemplated or accounted for by the Legislature. Nor should *Schwab* act as a bar to claims of unfair and deceptive actions taken by landlords against former tenants or prospective where the RLTA provides no remedy. *Schwab* must not be used to prohibit CPA actions when the complained-of action can ever so remotely be tied to an issue between a landlord and tenant. Otherwise, such a holding would open the floodgates for abuse of tenants that is limited only by a landlord's creativity – precisely what the CPA is intended to protect against.

VI. CONCLUSION

Based upon the legal authorities and arguments herein presented, Mr. Lewis respectfully requests that this Court reverse the decision of the Superior Court below and deny Plaintiff's Motion to Dismiss and/or Grant of Summary Judgment.

DATED this 22nd day of July, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the **22nd day of July, 2020**, at Spokane, Washington, I caused to be served the foregoing document(s), on the following person(s) and/or entity(ies) in the manner indicated:

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DATED this 22nd day of July 2020.

s/ Teri A. Bracken
Teri A. Bracken, Paralegal

KIRK D. MILLER, P.S.

July 22, 2020 - 4:45 PM

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