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No. 829700

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

(King County Superior Court Cause No. 21-2-02324-6 SEA)

NATHAN BUDKE,

Plaintiff / Petitioner;

v.

DAN'S HERBS, LLC, d.b.a. HIGHER LEAF MARIJUANA BOUTIQUE, a Washington limited liability company; FIVE STAR TRADING COMPANY, LLC, d.b.a. HIGHER LEAF, a Washington limited liability company; and MOLLY HONIG, DANIEL DUBOIS, BEVERLY KELLEHER, DAVE MILLS, and CATHERINE SCHULTZ, each an individual, and their respective marital communities,

Defendants / Respondents.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION / IDENTITY OF RESPONDENTS

Respondents Dan's Herbs, LLC, Five Star Trading Company, LLC, Molly Honig, Daniel Dubois, Beverly Kelleher, Dave Mills, and Catherine Schultz (collectively, "Respondents" or "Higher Leaf") ask this Court to deny Petitioner's (Nathan Budke's or "Budke's") Petition for Review. Budke's Petition does not satisfy any of the three grounds Petitioner argues for review by this Court.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the December 27, 2022 decision of the Court of Appeals, Division One. There, Division One answered "no" to the only certified question for which that court granted discretionary review: Whether a consumer who voluntarily provides his cell number to a business during a commercial transaction consents, under CEMA,[1] to receive commercial text messages from that business, presents a controlling question of law.

[1] CEMA is the acronym for Commercial Electronic Mail Act, RCW 19.190 *et seq.*

Division One concluded "the certified question is not reviewable as a question of law under RAP 2.3(b)(4) and remand[ed] for further proceedings."

In a nutshell, Petitioner wants this Court to legislate—and add a "writing" requirement to the form of consent a business must obtain from a customer before sending that customer a commercial text message. Currently, the statute at issue, CEMA, at RCW 19.190.070(1)(b), allows businesses to send commercial text messages to a customer who *clearly and affirmatively consents* in advance to receive such messages. This statute does not now require, and CEMA never has required, that the customer's consent be in writing.

III. COUNTERSTATEMENT OF ISSUE

Does the Court of Appeals' decision that the totality of circumstances surrounding a consumer's interactions with a commercial enterprise guides whether that consumer has given "consent to receive commercial text messages under CEMA" raise a significant constitutional question? Does that court's decision

involve an issue of substantial public interest? Does it conflict with the decisions of this Court? The answer to all three questions is: "No."

IV. COUNTERSTATEMENT OF THE CASE

On February 10, 2021, Nathan Budke filed this purported class action against Respondents, alleging that Higher Leaf violated CEMA, and by extension, Washington's Consumer Protection Act ("CPA"), when Higher Leaf sent Budke three promotional text messages following his visit to Higher Leaf's retail store in Kirkland, Washington. CP 1. "During the course of the in-store transaction, an employee and agent of Defendants verbally obtained Mr. Budke's cellular phone number." CP 16. As context for this communication, Budke alleged: "Defendants operate a 'loyalty program' within the 'Higher Leaf' brand to advertise and promote the mass-marketing, sale, and distribution of recreational cannabis … by offering former, current, and potential customers various discounts and incentives at Defendants' retail locations." CP 14-15. "Defendants collect telephone contact information from

first-time and returning customers, including but not limited to Plaintiff, at the point of sale during the course of consumer transactions … for the purpose of sending advertisements and promotions via text messages to [these] customers." CP 15. "Defendants' 'loyalty program' is a joint program under a uniform 'Higher Leaf' system where collection of an individual's cellular phone number on one of the Defendants' retail locations results in that individual receiving unsolicited commercial text messages promoting discounts, incentives, and sales of cannabis-related products for all of Defendants' retail locations …." CP 15-16.

Higher Leaf moved to dismiss Budke's claims under CR 12(b)(6). CP 29-38. Higher Leaf argued that Budke's claims were defeated by his admission that he voluntarily provided his cell phone number under the circumstances described in his complaint. The Superior Court denied Higher Leaf's motion. CP 115. In handwritten remarks on its order, the Superior Court said: "[T]he Court does not reach the question of whether the federal 'prior written consent' standard governs Plaintiffs' claim. Even under the

federal standard that pre-dates the 2012 FCC order, the complaint states a claim under which relief could be granted." CP 118. Higher Leaf then moved for certification under RAP 2.3(b)(4), CP 131-138, which motion Budke did not oppose. CP 148 ("Plaintiff provides notice to the Court that he does not oppose Defendants' request to have this Court certify discretionary review of the Court's … Order denying Defendants' CR 12(b)(6) Motion to Dismiss."). The Superior Court granted the parties' "Stipulated Order … for Certification" on four "issues of law." CP 156-157.

Higher Leaf then moved for discretionary review. Budke answered. Higher Leaf replied. In a letter ruling dated November 12, 2021 (Appendix I hereto), Commissioner Masako Kanazawa granted discretionary review on only one of the four issues the trial court certified, and only under RAP 2.3(b)(4). Though Petitioner Budke argues about the three issues rejected by Division One for discretionary review; there is but one question with which Budke's Petition to this Court should concern itself: whether consent under CEMA is a pure question of law?

Division One's conclusion that consent is a question of fact, and therefore is "not reviewable as a controlling question of law under RAP 2.3(b)(4)," merits no basis for review under RAP 13.4(b) . And were it to matter, Division One did not grant discretionary review based on any other criteria listed in RAP 2.3(b).[2]

V. ARGUMENT

RAP 13.4(b) establishes four bases upon which this Court will grant a Petition for Review. Petitioner here advances argument on three of them, but he cannot meet his burden on any one of them.

A. "Does Division I's holding violate the U.S. Constitution's Supremacy Clause and the TCPA's Savings Clause?"

CEMA, Washington's Commercial Electronic Mail Act, RCW 19.190 *et seq.*, was enacted in 1998.[3] It provides:

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[2] RAP 2.3(b) identifies three other grounds upon which the Court of Appeals can grant discretionary review: (1) [O]bvious error; (2) probable error that substantially alters the status quo or limits a party's freedom to act; and (3) such departure from the "accepted and usual course of judicial proceedings" as to call for appellate review. None of these apply here.

[3] This Court recounted CEMA's legislative history in *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 724-725, 406 P.3d 1149 (2017). The

> It is not a violation of RCW 19.190.060 if . . . The unsolicited commercial electronic text message is transmitted by a person to a subscriber and the subscriber has *clearly and affirmatively consented* in advance to receive these text messages.

RCW 19.190.070(1)(b) (emphasis added). CEMA does not require any specific form of consent—only that consent be clear and affirmative. *Id.* Clear and affirmative consent can take many forms beyond something written. *See, e.g.*, *State v. Meredith*, 18 Wn. App. 2d. 499, 492 P.3d 198 (Wn. Ct. App. 2021) (act of boarding a bus constituted consent to conditions of ridership). This is not a novel concept. Nor is there anything surprising or noteworthy about Division One's statement that "Washington courts have consistently held that whether a person provides express or implied consent is a question of fact to be determined from the totality of

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"consent" provision at issue in this case was added in 2003 and has not changed since. CEMA was last amended in 2005, when the legislature added protections against "phishing." In 2022, the legislature considered an amendment *that would have added a written consent* requirement to CEMA. *See* Engrossed Substitute House Bill 1650 (2022 regular session). This proposed amendment did not pass out of committee.

the circumstances."[4] And, it was upon this statement that Division One based its holding that the issue presented for discretionary review was "a question of fact not reviewable as a controlling question of law under RAP 2.3(b)(4)."

Such simple, logical, and direct observations about what constitutes consent in Washington, and about whether the Court of Appeals' rules prescribing grounds for discretionary review are met, do not raise a constitutional question of any kind.

Budke's argument that "Division I's Holding Causes CEMA to Violate the U.S. Constitution's Supremacy Clause [Etc.]" is fundamentally misplaced. "Division I's Holding" does nothing of the kind. "Division I's Holding" simply is that consent, under Washington law, depends on the totality of circumstances, and does

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- [4] Opinion at p. 6. This determination was followed most recently in *Barton v. Delfauw*,, 2023 U.S. DIST. LEXIS 21804 (W.D. Wash. Feb. 7, 2023) at *15: "Further, on an issue of first impression, a Washington Court of Appeals recently held that, as it relates to RCW 19.190.070(1)(b), 'whether a person provides express or implied consent is a question of fact to be determined from the totality of the circumstances.' *Budke v. Dan's Herbs, LLC*, No. 82970-0-I, 2022 Wash. App. LEXIS 2451 at * 3 (Wash. Ct. App. Dec. 27, 2022) (collecting cases). Accordingly, whether or not plaintiff consented [under RCW 19.190.060(1) and 80.36.390(2)] is an issue of fact to be determined by a jury."

not present a pure question of law for which discretionary review by the Court of Appeals is available. What constitutes consent during a commercial transaction between a Washington business and a Washington consumer raises no constitutional issue whatsoever.[5]

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[5] Regarding the "merits" of Budke's "constitutional argument," Higher Leaf refers this Court to "Petitioner's Reply Brief" filed with Division One on 8/12/2022. As discussed therein: (1) Mr. Budke failed to raise his constitutional / preemption argument in the trial court and preemption is not an issue that can be raised for the first time on appeal. *See e.g.* RAP 2.4(a); RAP 2.5(a); *Ruddach v. Don Johnston Ford*, 97 Wn.2d 277, 281, 644 P.2d 671, 673 (1982) ("Issues not raised in the trial court will not be considered for the first time on appeal."). (2) Exceptions to this general rule do not apply. *See Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 853-54, 50 P.3d 256, 262-63 (2002) (where this Court noted that although RAP 2.5(a) allows for a party to present a new issue where "the record has been sufficiently developed to fairly consider the ground … The preemptive effect of federal law is not an issue that satisfies any of the exceptions to the general rule that 'arguments not raised in the trial court generally will not be considered on appeal.'"). (3) There is a strong presumption against preemption of state laws by federal enactments. *See Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 78, 896 P.2d 682, 688 (1995) ("we have 'repeatedly emphasized' that there is a 'strong presumption against finding preemption'"). (4) If CEMA applies, which is the basis for Budke's request for relief under Washington's Consumer Protection Act, CP 20-22; then CEMA cannot be "preempted" by a federal statute, *i.e.*, the TCPA, that Budke did not reference at all in his complaint. (5) The grounds for

B. Division One's Decision to Let the Trier of Fact Determine "Consent" Based on Totality of Circumstances Does Not "Involve an Issue of Substantial Public Interest."

A violation of CEMA is actionable under Washington's CPA. RCW 19.190.040. Higher Leaf does not contest this point. And, there are other state laws and regulations that, if violated, can be redressed under the CPA. *See, e.g.,* Washington's Fair Credit Reporting Act, RCW 19.18 *et seq.*, discussed in *Handlin v. On-Site Manager, Inc.*, 187 Wn. App. 841, 351 P.3d 226 (2015); Washington's Collection Agency Act, RCW 19.16, discussed in *Panang v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009); and RCW 48.01 *et seq.,* Washington's Insurance Code, discussed in *Kosovan v. Omni Ins. Co.,* 19 Wn. App. 2d 668, 496 P.3d 347 (2021). If, however, every CPA case based on an alleged statutory violation merited this Court's review because the public's interest is involved; then this Court would have to review dozens if

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"conflict preemption" do not apply here—either impossibility preemption or obstacle preemption. The TCPA applies to automatic telephone dialing systems ("ATDS") only. The three text messages Budke received from Higher Leaf were not ATDS generated.

not hundreds of such cases every year. No other work would get done. That cannot be the rule. "Substantial public interest" must mean something more than a claim's CPA actionability.

There have been few cases brought under CEMA since its enactment in 1998. If there were such a demand for redress by "millions of phone subscribers … subjected to unsolicited commercial text messages[,]" as Budke argues (see pages 12-13 of his Petition) without any metric of legal support, then would not there be dozens—if not hundreds of such cases—pending in Washington's courts, and long before now? The proof is in the pudding, as they say. There is a dearth, not a plethora, of CEMA cases demanding liability as a matter of law because the complainant did not give his or her or their consent in writing under a statute that does not mandate written consent.

Petitioner cites *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 406 P.3d 1149 (2017) in support of his "substantial public interest" argument and his claim that "Division I chose not to follow long-standing principles of consumer protection." The *Wright* court answered two

certified questions involving statutory interpretation from the U.S. District Court, Western Dist. WA: (1) "No," the recipient of a text message that violates CEMA does not have a private right of action for damages (other than for phishing violations); and (2) "yes," the causation and injury elements of a CPA claim are established as a matter of law when a person receives a text message that violates CEMA. This Court, in *Wright*, refused to imply a cause of action for damages under CEMA—hardly a "consumer take all" result, despite this Court's recognition of the legislature's consumer protection intent underlying CEMA. This Court also observed that "[*w*]*hether Wright is ultimately successful proving Lyft violated RCW 19.190.060 by sending an unsolicited commercial text message* <u>*is a question of fact*</u> *to be determined at the district court.*" 189 Wn.2d. at 732 (emphasis added).[6] That statement is 100%

[6] This Court, in *Wright*, also noted: "We presume the legislature means exactly what it says…. Omissions are deemed to be exclusions." 189 Wn.2d at 727. "[R]eviewing courts cannot add words or clauses to a statute when the legislature has chosen not to include that language." *Id.* at 729. *These* remarks are important because Petitioner seeks to impose the requirement of a "writing" onto CEMA's consent provision. *See, e.g.*, Budke's Petition at 10:

consistent with Division One's holding in this case; *i.e.*, that whether Budke gave consent to receiving commercial text messages—when "after the [Higher Leaf] salesperson invited Mr. Budke to join [its] customer loyalty program,"[7] Mr. Budke provided his cell phone number—is a question of fact.

C. Division One's Decision to Let the Trier of Fact Determine "Consent" Based on Totality of Circumstances Does Not "Conflict with This Court's Decisions."

Here, Petitioner argues "Division I's decision not to be guided by federal law stands in conflict of this Court's recognition of that CPA principle," referring to *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). What "CPA principle" is that? To what "federal law guide" is Petitioner referring?

In *Klem*, which involved a complicated fact pattern, this Court reviewed a matter involving CPA allegations. The case concerned an elderly woman, suffering from dementia, whose

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"Division I's decision … runs afoul of the minimum requirement for written consent under the TCPA."

[7] Brief of Respondent Nathan Budke at p.1.

home was subject to a non-judicial foreclosure for an unpaid loan secured by her home. A notary had falsely notarized the notice of sale by predating the notary acknowledgement. The trustee knew of this, but proceeded with a nonjudicial foreclosure sale anyway, to the detriment of the plaintiff, and to the benefit of the foreclosing lender. Loss occurred because the plaintiff had a willing buyer, ready to pay market value, but the trustee sold the property to the lender on the first day it could (based on the predated notary acknowledgement), for only $1.00 more than what the plaintiff owed.

The plaintiff sued the trustee for negligence, breach of contract, and violation of Washington's CPA. There was a jury trial and damages were awarded. Judgment was entered for the plaintiff on her CPA claim. The trustee appealed, and the court of appeals reversed, "appear[ing] to have agreed, that only an act or practice the legislature has declared to be 'unfair' is unfair for purposes of the CPA." 176 Wn. App. at 784.

This Court disagreed: "That is an incorrect reading of the act," and instead held "a claim under the Washington CPA may be predicated upon a per se violation of a statute, an act or practice that has the potential to deceive a substantial portion of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Id.* at 787. Rightfully so, this Court was troubled by the private trustee's conduct, and the power vested in trustees to sell another's property: "We hold the practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act … and satisfies the first element of the CPA." *Id.* at 792.

To the extent this Court considered what the congressional record said about the federal consumer protection act (the primary reason Petitioner cites the *Klem* case), it was only to note "there is 'no limit to human inventiveness'" when it comes to defining the term "'unfair practices.' [It is] practically impossible to define

unfair practices so that the definition will fit business of every sort in every part of this country." *Id.* at 786. Thus, this Court decided the conduct in which the *Klem* trustee engaged could be an unfair or deceptive act or practice actionable under the CPA, even though no statute expressly prohibited the trustee's actions. By contrast, and about which there is no dispute, CEMA expressly provides that a CEMA violation is actionable under the CPA. *Klem* by no means requires or even suggests that Washington courts cannot find issues of fact in CPA cases.

CEMA is a Washington statute that applies to commercial text messages sent to Washington consumers by a Washington business. Though CEMA may be "analogous" to the TCPA, a federal law that applies to automatic telephone dialing systems,[8]

[8] *See N. L. v. Credit One Bank, N.A.*, 960 F.3d 1164, 1171 (9th Cir. 2020); *see also* Brief of Respondent [Budke], filed in Court of Appeals, Division I, 7/15/2022, at p. 6. A "necessary feature" of an ATDS "is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173, 209 L. Ed. 2d 272, 283 (2021). A dialing system that calls numbers from a list (Higher Leaf used its own customer loyalty list when it sent three text messages to Mr. Budke) is not an ATDS. *Id*. at 1166.

they are different statutes with different scopes and objectives.[9] Thus, Division One was well within its authority when it said "[w]e need not defer to the FCC's interpretation of terms in an analogous federal statute,"[10] and instead concluded "Washington courts have consistently held that whether a person provides express or implied consent is a question of fact to be determined from the totality of the circumstances…. We do not decide questions of fact under RAP 2.3(b)(4)."

VI. CONCLUSION

The Court of Appeals' decision, for which Budke now seeks review, was simply that whether Nathan Budke gave "consent" under CEMA to receive commercial text messages from Higher Leaf after he voluntarily provided his cell number during a

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[9] Washington has its own statutory prohibition against the use of automatic dialing devices to send commercial messages. *See* RCW 80.36.400.

[10] Opinion at p. 6, citing U.S. Supreme Court and Washington State precedent: "[W]e defer to an agency's interpretation of a statute only if the agency is charged with the administration and enforcement of the statute." The FCC has no authority over CEMA.

discussion with Higher Leaf about its loyalty program, must be determined from the totality of circumstances. Because consent is a question of fact under Washington law, Division One held that discretionary review of the trial court's certified question on this issue was unavailable under RAP 2.3(b)(4). No constitutional question is involved. There is no conflict with a decision of this Court. And, substantial public interest is not in play.

Budke's Petition for Review should be denied.

This document contains 3,381 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 27th day of February 2023.

KARR TUTTLE CAMPBELL

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 27, 2023, a copy of the foregoing document was served by electronic mail to:

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Dated this 27th day of February 2023 at Seattle, Washington.

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APPENDIX 1

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Case #: 829700
Nathan Budke, Respondent v. Dan's Herbs, et al, Petitioners
King County Superior Court No. 21-2-02324-6

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on November 12, 2021:

RULING GRANTING DISCRETIONARY REVIEW
Budke v. Dan's Herbs, LLC, No. 82970-0-I
November 12, 2021

This case involves an allegation that defendants, who market, distribute, and sell recreational cannabis products, transmitted unsolicited commercial electronic text messages to Washington residents in violation of Washington's Commercial Electronic Message Act (CEMA), chapter 19.190 RCW. CEMA prohibits a business from transmitting or assisting in the transmission of an electronic commercial text message to a cell phone assigned to a Washington resident. The parties dispute over the meaning of a CEMA provision that exempts from the act's prohibition unsolicited commercial text messages when they are "transmitted by a person to a subscriber and the subscriber has *clearly and affirmatively consented in advance to receive these text messages*." RCW 19.190.070(1)(b) (emphasis added). Plaintiff Nathan Budke filed a class action complaint

against the defendants under Washington's Consumer Protection Act (CPA), chapter 19.86 RCW, asserting a CEMA violation. The defendants filed a CR 12(b)(6) motion to dismiss, arguing that because plaintiff Budke verbally provided them with his cell phone number, he thereby clearly and affirmatively consented to receiving unsolicited commercial text messages from them as a matter of law. The trial court rejected this argument and denied the motion to dismiss, and the defendants seek interlocutory review of the denial. The trial court later certified the parties' stipulated issues for immediate review under RAP 2.3(b)(4) and stayed the case pending review. As explained below, I accept the trial court's certification and grant review.

"Interlocutory review is disfavored." Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959)). This Court accepts pretrial review only on the four narrow grounds set forth in RAP 2.3(b). The defendants seek review under RAP 2.3(b)(4), under which this Court may accept review when the "superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." RAP 2.3(b)(4). The trial court certified, and the parties stipulated, that the order denying the defendants' motion to dismiss involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review may materially advance the ultimate termination of the litigation. The trial court's certification or the parties' stipulation for review is not binding on this Court.

Under CEMA, "[n]o person conducting business in the state may initiate or assist in the transmission of an electronic commercial text message to a telephone number assigned to a Washington resident for cellular telephone . . . that is equipped with short message capability or any similar capability allowing the transmission of text messages." RCW 19.190.060(1). A violation of RCW 19.190.060 is an "unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying" CPA. RCW 19.190.060(2). But "[i]t is not a violation of RCW 19.190.060 if . . . [t]he unsolicited commercial text message is transmitted by a person to a subscriber and the subscriber has *clearly and affirmatively consented* in advance to receive these text messages." RCW 19.190.070(1)(b) (emphasis added).

The parties discuss federal cases interpreting Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, which has been considered as "substantially similar" to Washington's CEMA. Wick v. Twilio Inc., 2017 WL 2964855, at *5 (W.D. Wash. July 12, 2017) (unpublished) ("Because the TCPA's prohibition against unsolicited communications advertising property, goods, or services is substantially similar to the CEMA prohibition, the Court applies the federal interpretations of the TCPA when considering this claim."). In their motion to dismiss, the defendants relied largely on federal TCPA cases that applied Federal Communications Commission's (FCC) interpretation that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given,

absent instructions to the contrary." 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992). But FCC changed this interpretation in 2012 to require "prior express written consent," based on "substantial record support, the volume of consumer complaints we continue to receive concerning unwanted, telemarketing robocalls, and the statutory goal of harmonizing our rules with those of the [Federal Trade Commission]." 27 FCC Rcd. 1830, 1838-40 (Feb. 15, 2012).

The defendants' CR 12(b)(6) motion to dismiss was based on Budke's acknowledgment that he verbally provided his cell phone number to the defendants upon his visit to their store. In denying the motion to dismiss, the trial court stated it did not "reach the question of whether the federal 'upon written consent' standard governs plaintiff's claim," explaining that even under the pre-2012 standards, Budke's complaint stated a claim upon which relief could be granted. But the court certified the following issues proposed by the parties:

a. Whether CEMA required Defendants to obtain the prior express written consent of Plaintiff prior to sending him commercial text messages;

b. Whether Plaintiff provided his consent to receive commercial text messages under CEMA by voluntarily providing his cell phone number during the course of a commercial transaction;

c. Whether Washington courts should look to the Federal Communication Commission's ("FCC") 2012 Order and regulations on the TCPA as well as applicable 9th Circuit case law analyzing the same for guidance on interpreting CEMA;

d. Whether for CEMA Washington courts should adopt the courts of the 9th Circuit's analysis of what constitutes consent under the TCPA prior to the 2012 FCC Order and regulations on the TCPA[.]

The certified issue "[w]hether CEMA required Defendants to obtain the prior express written consent of Plaintiff prior to sending him commercial text messages" may not be a controlling question of law as the trial court concluded that even if CEMA did not require prior written consent, the defendants' CR 12(b)(6) motion would fail. But the issue "[w]hether Plaintiff provided his consent to receive commercial text messages under CEMA by voluntarily providing his cell phone number during the course of a commercial transaction" appears to be a controlling question of law. In light of the cases cited by the parties, I accept the trial court's certification and the parties' stipulation that there is a substantial ground for a difference of opinion on the issue. See Baird v. Sabre, Inc., 636 Fed. Appx. 715, 716 (9th Cir. 2016) (applying the pre-2012 FCC interpretation to the text message sent before the interpretation to conclude plaintiff expressly consented to the text message under TCPA "when she provided Hawaiian Airlines with her cellphone number"); Van Patten v. Vertical Fitness Group, LLC, 847 F.3d 1037, 1046 (9th Cir. 2017)

(plaintiff who visited a Gold's Gym franchise, signed a gym membership agreement, and provided his demographic, financial, and contact information, including his cell phone number for his application, gave "prior express consent" to receive from the gym franchise owner or manager text messages under TCPA "for the purpose of a gym membership contract with a Gold's Gym franchised gym"); Roberts v. Paypal, Inc., 621 Fed. Appx. 478, 479 (9th Cir. 2015) (applying the pre-2012 FCC interpretation to the text messages sent before the interpretation to conclude plaintiff "expressly consented to text messages from PayPal [under TCPA] when he provided PayPal his cell phone number"). I also accept the trial court's certification and the parties' stipulation that immediate review of the issue may materially advance the ultimate termination of the litigation.

Discretionary review is granted under RAP 2.3(b)(4). The clerk shall issue a perfection schedule.

Masako Kanazawa
Commissioner

Please be advised a ruling by a Commissioner "is not subject to review by the Supreme Court." RAP 13.3(e)

Should counsel choose to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served... and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,

Lea Ennis
Court Administrator/Clerk

law

KARR TUTTLE CAMPBELL

February 27, 2023 - 2:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82970-0
Appellate Court Case Title:	Nathan Budke, Respondent v. Dan's Herbs, et al, Petitioners

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