101667-1

No. 82970-0

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

NATHAN BUDKE, an individual, and all those similarly situated,

Petitioner,

vs.

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,

Respondent.

NATHAN BUDKE'S PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTIFY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 5

IV. STATEMENT OF THE CASE 6

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 8

1. Division I's Holding Causes CEMA to Violate the U.S. Constitution's Supremacy Clause and the TCPA's Savings Clause. 8

2. Division I's Decision Will Profoundly Affect the Public Interests of Consumers Throughout Washington 12

3. Division I's Decision Is in Conflict with This Court's Decisions 19

VI. CONCLUSION 19

VII. WORD COUNT CERTIFICATION 19

TABLE OF AUTHORITIES

Cases

Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 421, 395 P.3d 1031 (2017) 18

Gragg v. Orange Cab Co., Inc., 2013 WL 195466 (W.D. Wash. Jan. 17, 2013) 15

In re Estate of Little, 106 Wn.2d 269, 721 P.2d 950 (1986) 18

Klem v. Washington Mut. Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) 16

Martin v. Department of Social Sec., 12 Wn.2d 329, 121 P.2d 394 (1942) 18

Massachusetts Ass'n of Private Career Schools v. Healey, 159 F.Supp.3d 173 (D. Mass. 2016) 9

Sussman v. I.C. System, Inc., 928 F.Supp.2d 784 (S.D.N.Y. 2013) 9

Wick v. Twilio Inc., 2017 WL 2964855 (W.D. Wash. July 12, 2017) 14,15

Wright v. Lyft, 189 Wn.2d 718, 406 P.3d 1149 (2017) 13,16

Statutes

47 U.S.C § 227 2
§§ 227(b)(1)(A) 3
47 U.S.C. § 227(b)(2) 3
47 U.S.C. § 227 (f)(1)(A) 9
47 U.S.C. § 227 (f)(1)(D) 9
RCW 19.190 1
RCW 19.190.060(1) 2
RCW 19.190.070(1)(b) 2
RCW 19.86 6
RCW 19.86.920 14,16

Rules

CR 12(b)(6) 4
RAP 2.3(b)(4) 1,4,5
RAP 13.4(b)(1). 16
RAP 13.4(b)(3) 8
RAP 13.4(b)(4) 12

Other

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014 (July 3, 2003) 10

LAWS OF 2003, ch. 137 § 1 13,17

U.S. Const. art. VI, cl. 2 9

APPENDIX

WA Court of Appeals Division I Unpublished Opinion A-001
Ruling Granting Discretionary Review A-008

I. IDENTIFY OF PETITIONER

Petitioner Nathan Budke asks this Court to accept review of the Division I Court of Appeals' designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Mr. Budke asks this Court to review the Division I Court of Appeals' opinion, *Budke v. Dan's Herbs, LLC, et al*, No. 82970-0-I (Dec. 27, 2022), which concluded that the certified question before Division I was not reviewable as a question of law under RAP 2.3(b)(4), finding that every issue of consent to receiving commercial text messages under RCW 19.190, *et seq.* is an individual question that must be determined by a fact finder, and remanding the case for further proceedings.

The issue on discretionary review before Division I involves an issue of first impression under Washington's Commercial Electronic Mail Act ("CEMA"), RCW 19.190, *et seq.*, as to the consent that a commercial text message solicitor must acquire from a phone subscriber before sending that phone

subscriber a commercial text messages (i.e., those sent to promote real property, goods, or services for sale or lease). Of particular issue is the overlap between the state and federal telemarketing laws, which both limit and regulate the practice of sending commercial text messages.

Washington's telemarketing law, CEMA, was enacted in 2003 and prohibits *all* commercial text messages, without regard to the mechanism by which the text messages are sent. RCW 19.190.060(1). CEMA does, however, provide an exemption to this prohibition and allows a person to send a commercial text message to a phone subscriber only *if* the subscriber has "clearly and affirmatively consented in advance to receive these text messages." RCW 19.190.070(1)(b). CEMA does not define what constitutes "clear and affirmative consent."

The federal equivalent, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, was enacted in 1991 and prohibits commercial text messages that are sent

using an Automatic Telephone Dialing System ("ATDS"). Like CEMA, the TCPA also provides an exemption to this prohibition and allows a person to send a commercial text message to a phone subscriber only if the subscriber has provided his or her "prior express consent." 47 U.S.C. § 227(b)(1)(A). Like CEMA, the TCPA also does not precisely define what constitutes "consent," instead delegating to the Federal Communications Commission ("FCC") the authority to implement rules and regulations for the TCPA, including the standard of "consent" required under the law. 47 U.S.C. § 227(b)(2).

The parties to this lawsuit agree that Washington courts should look to the FCC Orders implementing the consent requirements under the TCPA to determine the legal significance of "clear and affirmative consent" under CEMA. Respondents in this case argued that the FCC's subsequently modified 1992 Order construing "consent" to include all persons who knowingly release their phone numbers, absent

instructions to the contrary, should be the same standard under CEMA. Mr. Budke argued that the modern FCC 2012 Order, which requires written consent for commercial text messages, should apply to CEMA.

At the trial court, Respondents brought a CR 12(b)(6) Motion to Dismiss, arguing that providing a business with a phone number constitutes consent to receive commercial text messages under CEMA. The Honorable Johanna Bender of the King County Superior Court denied the motion. Afterward, the parties stipulated, and the superior court certified, pursuant to RAP 2.3(b)(4), that the order involved a controlling question of law to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. On November 12, 2021, Commissioner Masako Kanazawa found that at least one of the issues certified by the superior court met RAP 2.3(b)(4)'s requirements and granted discretionary review.

After briefing and oral argument, on December 27, 2022, Division I determined that "whether a consumer consents to receive commercial messages under CEMA is a question of fact based on the totality of the circumstances." Division I then concluded that "the certified question is not reviewable as a question of law under RAP 2.3(b)(4)" and remanded for further proceedings. See Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Is the "clear and affirmative" consent standard under CEMA a question of law rather than a question of fact?

2. Does CEMA require a person to obtain the written consent of the phone subscriber in advance of sending the subscriber commercial text messages?

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

4. Does Division I's holding ignore or deviate from the Legislature's intent under the Consumer Protection Act,

RCW 19.86, that Washington courts be guided by final decisions of the federal courts and final orders of federal commissions interpreting the TCPA?

5. Does Division I's holding conflict with this Court's decision on issues of the CPA, CEMA, and statutory construction?

IV. STATEMENT OF THE CASE

Mr. Budke is a Washington resident who uses a text-enabled telephone. CP at 16, Compl. ¶ 5.12. On July 25, 2020, Mr. Budke visited one of Respondents' Higher Leaf retail stores. *Id.*, Compl. ¶ 5.13. During the visit, a Higher Leaf salesperson verbally obtained Mr. Budke's phone number after the salesperson invited Mr. Budke to join the Respondents' loyalty program. CP at 15-16, Compl. ¶¶ 5.9, 5.13 – 5.14. Neither the salesperson nor anyone else at Higher Leaf informed Mr. Budke that his phone number would be used in the Respondents' unsolicited commercial text message spamming campaigns. CP at 16, Compl. ¶¶ 5.15. In fact, Mr.

Budke did not consent in any manner to receive commercial text messages, whether verbal, written, or otherwise. *Id.*, Compl. ¶¶ 5.16.

Over the next several weeks, Mr. Budke received multiple unsolicited commercial text messages from Respondents, which promoted their brand, products for sale, and online order discounts. CP at 16-18, Compl. ¶¶ 5.17 – 5.20. Mr. Budke subsequently filed a putative class action against Defendants for violating CEMA through the sending of unsolicited commercial text messages to phone subscribers without first obtaining their clear and affirmative consent in advance to receive these text messages.

As discussed in depth in Part II herein, the parties all agreed that Washington courts should look to the FCC's Orders implementing the TCPA, an analogous federal statute, when considering interpreting the standard of "clear and affirmative consent" under CEMA. The superior court denied Respondents' Motion to Dismiss, and Division I did not reverse that decision.

Division I's opinion, however, leads to serious problems that this Court should address.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may accept a petition for review of a Court of Appeals decision if the decision involves an issue of substantial public interest that should be determined by the Supreme Court, RAP 13.4(b)(4); or if the decision involves a significant question of law under the Constitution of the State of Washington or of the United States, RAP 13.4(b)(3); or if the decision of a Court of Appeals is in conflict with a decision of the Supreme Court. This Court should accept review for all of these reasons.

1. Division I's Holding Causes CEMA to Violate the U.S. Constitution's Supremacy Clause and the TCPA's Savings Clause.

This Court may accept a petition for review where Division I's decision involves a significant question of law under the federal or state constitutions. RAP 13.4(b)(3).

Division I held that "whether a consumer consents to receive commercial messages under CEMA is a question of fact based on the totality of the circumstances." This decision places CEMA in conflict with the federal TCPA, thereby violating the Supremacy Clause, U.S. Const. art. VI, cl. 2.

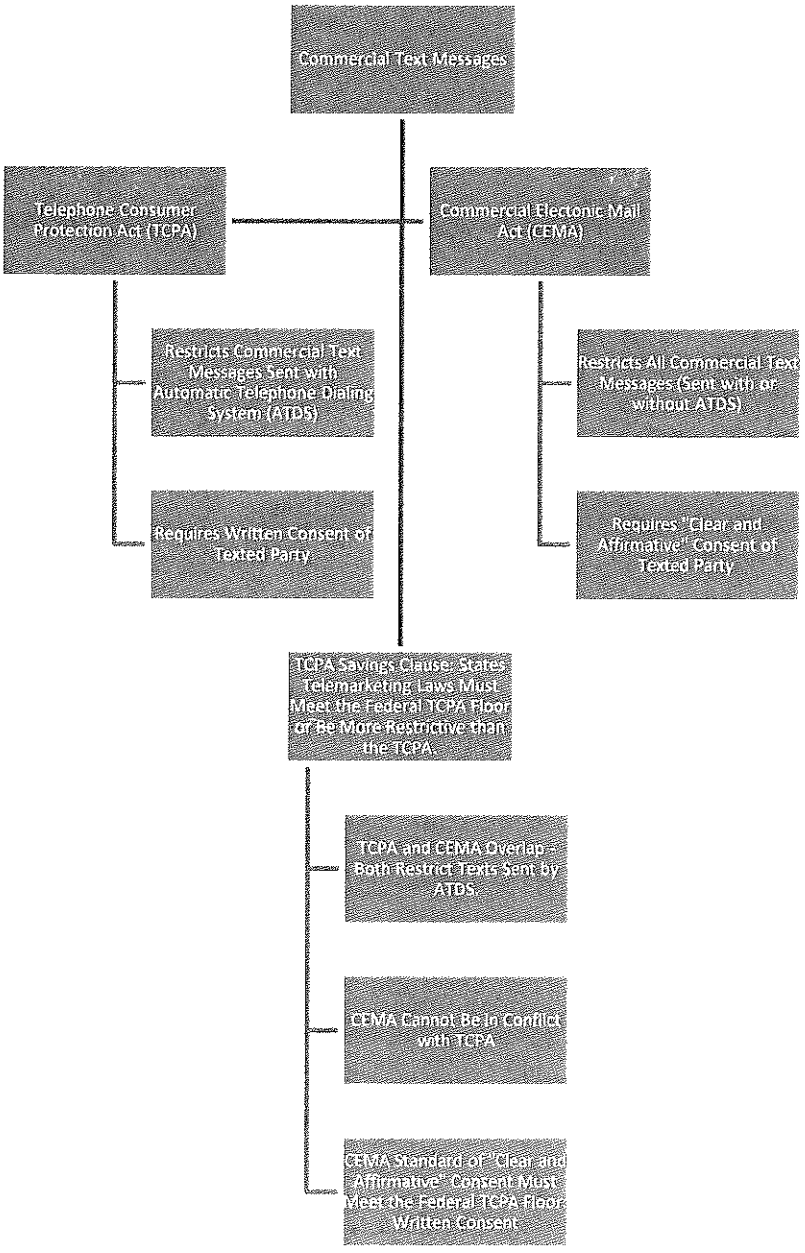
The TCPA contains a savings/preemption clause that states, in part, that state telemarketing laws dealing with telephone solicitations are not preempted if they impose more restrictive intrastate requirements or regulations on, or prohibit, them. 47 U.S.C. § 227 (f)(1)(A), (D). "[B]oth the text and the legislative history of the TCPA suggest that Congress intended to set a uniform minimum standard of consent, while permitting the states, who have an obvious interest in protecting their citizens and are better able to understand their needs, to enact more restrictive regulations if necessary." *Massachusetts Ass'n of Private Career Schools v. Healey*, 159 F.Supp.3d 173, 218 (D. Mass. 2016) (quoting *Sussman v. I.C. System, Inc.*, 928 F.Supp.2d 784, 791 (S.D.N.Y. 2013).

The FCC has similarly stated:

> "[B]y operation of general conflict preemption law, the federal rules constitute a floor, and therefore would supersede all less restrictive state [] rules. We believe any such rules would frustrate Congress' purposes and objectives in promulgating the TCPA. Specifically, application of less restrictive state exemptions directly conflicts with the federal objectives in protecting consumer privacy rights under the TCPA...Because the TCPA applies to both intrastate and interstate communications, the minimum requirements for compliance are therefore uniform throughout the nation. We believe this resolves any potential confusion for industry and consumers regarding the application of less restrictive [] rules."
>
> *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14062-63 at para. 81 (July 3, 2003) (emphasis added).

Division I's decision – that "clear and affirmative consent" under CEMA is a question of fact for the fact finder based upon the totality of the circumstances – runs afoul of the minimum requirement for written consent under the TCPA. Both the TCPA and CEMA place a consent requirement on commercial text messages sent with an ATDS. The TCPA does

this directly in the text of the law, and CEMA does this indirectly by placing requirements on *all* commercial text messages. The interplay and overlap looks like this:



Division I created a scenario where CEMA would allow an ambiguous and subjective "question of fact" analysis regarding what is required for consent to receive a commercial text message sent by an ATDS. However, there is no question of fact on what the TCPA requires. Through the FCC, Congress has commanded that written consent is required. Division I's decision creates an obvious conflict preemption problem and has effectively rendered CEMA unconstitutional based on the U.S. Constitution's Supremacy Clause. This Court should correct this error and protect the laws of Washington from unnecessary preemption.

2. Division I's Decision Will Profoundly Affect the Public Interests of Consumers Throughout Washington.

This Court may accept a petition for review where Division I's decision involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). The manner in which millions of phone subscribers are subjected to unsolicited commercial text messages remains

a consumer protection issue of great import. It is an issue that vitally affects the public interest in a world where a cell phone is in nearly every home and every pocket.

This Court previously acknowledged the public interest inherent in CEMA in the decision of *Wright v. Lyft*, 189 Wn.2d 718, 406 P.3d 1149 (2017). "Recognizing the rise of unsolicited commercial text messages sent to cell phones, lawmakers sought to 'limit the practice.'" *Wright*, 189 Wn.2d at 724 (citing LAWS OF 2003, ch. 137 § 1). RCW 19.190.060(2) includes a legislative finding:

> "that the practices covered by this section are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. A violation of this section is not reasonable in relation to the development and preservation of business and is an unfair and deceptive act in trade or commerce and an unfair method of competition for the purpose of apply the consumer protection act, chapter 19.86 RCW."

It is the "legislature's intent that for CEMA violations to be brought under the CPA." *Wright*, 189 Wn.2d at 726. Under the CPA, one of the fundamental purposes is "to complement

the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices." RCW 19.86.920. The CPA also declares that "[i]t is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters."

Despite both parties to the lawsuit arguing that the appellate court should look to federal court decision and FCC Orders concerning the TCPA, Division I chose not to follow long-standing principles of consumer protection. Instead, Division I looked to an individualized question-of-fact standard of consent based upon the totality of the circumstances in each case. Division I also ignored the Legislature's instruction under the CPA, in spite of clear guidance from the federal courts (who deal with telemarketing claims more often) having routinely applied TCPA interpretations to claims under CEMA. *See Wick*

v. Twilio Inc., 2017 WL 2964855, at *5 (W.D. Wash. July 12, 2017) ("...the Court applies the federal interpretations of the TCPA when considering this [CEMA] claim."); *Gragg v. Orange Cab Co., Inc.*, 2013 WL 195466, at *4 (W.D. Wash. Jan. 17, 2013) (finding that despite differences in word choice, both CEMA and WADAD regulate communications that promote or encourage commercial transactions and that their interpretation should, absent controlling state decisions, be guided by the administrative and judicial interpretations of the TCPA).

Division I's decision not to follow, or even consider, the legislature's instruction under the CPA when considering a CPA claim is unprecedented. Division I's opinion sets the stage for future decisions by appellate courts that likewise stray from consumer protection principles on CPA claims. Division I's decision to wholly ignore the legislature's will and CPA guidance warrants review by this Court to ensure that the sanctity of the CPA remains intact.

3. Division I's Decision Is in Conflict with This Court's Decisions.

This Court may accept a petition for review where Division I's decision is in conflict with a decision of the Supreme Court. RAP 13.4(b)(1). Division I's decision conflicts with this Court's long-standing CPA and statutory construction jurisprudence.

As discussed above in Part V.II, Division I's decision not to be guided by federal law stands in conflict of this Court's recognition of that CPA principle. *See Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013) ("[Under RCW 19.86.920] [t]he Washington Legislature instructed courts to be guided by federal law in the area.").

Division I's decision to create a "clear and affirmative consent" standard that leaves open the door for innumerable fact-based determinations of consent is also in conflict with this Court's recognition in *Wright* of the legislature's desire to limit the practice of sending unsolicited commercial text messages:

> The legislature recognizes that *the number of unsolicited commercial text messages sent to cellular telephones and pagers is increasing. This practice is raising serious concerns on the part of cellular telephone and pager subscribers.* These unsolicited messages often result in costs to the cellular telephone and pager subscribers in that they pay for use when a message is received through their devices. The limited memory of these devices can be exhausted by unwanted text messages resulting in the inability to receive necessary and expected messages. *The legislature intents [intends] to limit the practice of sending unsolicited commercial text messages to cellular telephone or pager numbers in Washington.*
>
> 189 Wn.2d at 730 (citing Laws of 2003, ch. 137, § 1; RCW 19.190.060, *Intent* (emphases added)).

Division I's refusal to follow the minimum federal telemarketing standard of written consent has the exact opposite effect that the Washington legislature intended – it allows for the proliferation of unsolicited commercial text messages, rather than restricting them.

Division I's decision to rest on a plain language question-of-fact standard is also in conflict with this Court's decisions that require carrying out the manifest intent of the legislature

when a contrary intent appears, as when the Washington legislature intentionally did not define the term "clear and affirmative consent". *See In re Estate of Little,* 106 Wn.2d 269, 283, 721 P.2d 950 (1986) (The court must give words in a statute their plain and ordinary meaning unless a contrary intent appears); *Martin v. Department of Social Sec.*, 12 Wn.2d 329, 121 P.2d 394 (1942) (When a statute is susceptible to a reasonable interpretation, it is the court's duty to carry out the manifest intent of the legislature); *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017) (The court then considers the text of the provision, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole).

Division I's decision is in conflict with decisions of this Court on the CPA, CEMA, and statutory construction. Under Division I's interpretation of CEMA, every commercial text message sent to a Washington recipient is now subject to a

consent standard that will vary depending on the subjective opinion of each fact finder, with no guidance or assurance to both the business or consumer that the communication is lawful.

This Court should accept review to correct these conflicts and provide guidance to businesses that choose to send Washington law-compliant text messages, to provide certainty and uniformity as to the protections for consumers receiving these text messages, and to provide guidance to the lower courts hearing CEMA cases.

VI. CONCLUSION

Based upon the foregoing, Mr. Budke petitions this Court to accept review of this matter.

VII. WORD COUNT CERTIFICATION

The undersigned certifies that this document contains 2,858 words and complies with RAP 18.17.

SUBMITTED this 26th day of January 2023.

HOGUE LAW FIRM

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CERTIFICATE OF SERVICE

I hereby declare upon penalty of perjury under the laws of the United States that on the date stated below I served a copy of this document by electronic mail to:

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DATED this 26th day of January 2023.

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APPENDIX

Nathan Budke v. Dan's Herbs, LLC et, al.

Petition for Review

FILED
12/27/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NATHAN BUDKE, an individual, and all those similarly situated, Respondent, 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, Appellants.	No. 82970-0-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Nathan Budke gave his cell phone number to a clerk at Higher Leaf while making an in-store transaction. Budke then received several text messages from Higher Leaf promoting its brands and products. Budke sued Higher Leaf and several related defendants under Washington's commercial electronic mail act (CEMA), chapter 19.190 RCW. Defendants moved to dismiss the lawsuit under CR 12(b)(6). The trial court denied the motion and defendants appealed. The trial court then certified for discretionary review under RAP 2.3(b)(4) as a controlling question of law whether Budke "provided his consent to receive commercial text messages under CEMA by voluntarily providing his cell phone number during the course of a commercial transaction." But whether a

consumer consents to receive commercial messages under CEMA is a question of fact based on the totality of the circumstances. We conclude that the certified question is not reviewable as a question of law under RAP 2.3(b)(4) and remand for further proceedings.

FACTS

In July 2020, Budke visited Higher Leaf in Kirkland, a cannabis shop owned by Dan's Herbs LLC. While making a purchase, Budke gave his cell phone number to Higher Leaf "after a salesperson invited him to join the . . . rewards program." In the weeks following, Budke received at least three text messages from Higher Leaf promoting its brand and cannabis products. Higher Leaf sent each of the text messages en masse to its "former, current, and potential customers."

In February 2021, Budke filed a class-action lawsuit against Dan's Herbs d/b/a Higher Leaf; Five Star Trading Company LLC d/b/a Higher Leaf;[1] Dan's Herbs and Five Star owners Molly Honig, Daniel Dubois, and Beverly Kelleher; and Five Star owners Dave Mills and Catherine Schultz (collectively Dan's Herbs). Budke claimed that by sending "unsolicited" texts, Dan's Herbs violated CEMA.[2]

Dan's Herbs moved to dismiss Budke's complaint for failure to state a claim for which a court could grant relief under CR 12(b)(6). It argued that Budke

[1] This Higher Leaf store is in Bellevue.

[2] A violation of CEMA amounts to "an unfair or deceptive act in trade or commerce and an unfair method of competition" under the Consumer Protection Act, chapter 19.86 RCW. RCW 19.190.060(2).

consented to receive the texts under CEMA by voluntarily providing Higher Leaf his cell phone number. Budke opposed the motion to dismiss, arguing that voluntarily providing a cell phone number does not amount to "consent" to receive commercial "telemarketing text-spamming" messages under CEMA.

The trial court denied the motion to dismiss. It concluded that the allegations in the complaint and "hypothetical facts that might flow from those allegations" stated a claim for which the court could grant relief "with respect to the scope of the consent that was given by [Budke] and whether the subsequent communications from [Dan's Herbs] exceeded that scope."

Dan's Herbs then sought RAP 2.3(b)(4) certification for review. Budke did not oppose the motion. The trial court stayed the case and certified the question of whether Budke "provided his consent to receive commercial text messages under CEMA by voluntarily providing his cell phone number during the course of a commercial transaction." Dan's Herbs then moved this court for discretionary review of that certified question. A commissioner granted review.[3]

ANALYSIS

Under RAP 2.3(b)(4), the superior court may certify for review "a controlling question of law as to which there is a substantial ground for a

[3] The trial court also certified the questions of (1) whether CEMA "required Defendants to obtain the prior express written consent of Plaintiff prior to sending him commercial text messages," (2) whether "Washington courts should look to the Federal Communication[s] Commission's ('FCC') 2012 Order and regulations on the TCPA" (telephone consumer protection act, 47 U.S.C. § 227), as well as applicable Ninth Circuit case law "analyzing the same for guidance on interpreting CEMA," and (3) whether "for CEMA[,] Washington courts should adopt the courts of the [Ninth] Circuit's analysis of what constitutes consent under the TCPA prior to the 2012 FCC Order and regulations on the TCPA." But this court did not accept review of those issues as controlling questions of law.

difference of opinion." We review certified questions of law de novo. Rowe v. Klein, 2 Wn. App. 2d 326, 332, 409 P.3d 1152 (2018). We also interpret statutes de novo. West v. Dep't of Fish & Wildlife, 21 Wn. App. 2d 435, 441, 506 P.3d 722 (2022). Our goal is to give effect to the legislature's intent. Id. We first look to the plain meaning of a statute as an expression of intent. Id. When a statute fails to define a term, we may rely on the ordinary dictionary definition of the word. One Pacific Towers Homeowners' Ass'n. v. HAL Real Est. Invests., Inc., 148 Wn.2d 319, 330, 61 P.3d 1094 (2002). If the statute's language is plain and unambiguous, our inquiry ends. West, 21 Wn. App. 2d at 441.

CEMA prohibits businesses from sending commercial text messages to Washington residents:

> No 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 or pager service.

RCW 19.190.060(1). But a business does not violate CEMA if it transmits a text message to a person who has "clearly and affirmatively consented in advance to receive these text messages." RCW 19.190.070(1)(b).

CEMA does not define "consent." And no Washington court has considered what amounts to clear and affirmative consent under the statute. But the dictionary defines "clear" as "without obscurity or ambiguity" and "easily understood." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 419 (2002). And "affirmative" means "an expression (as the word yes or the phrase that's so) of affirmation or assent." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 36. "Consent" is defined as "voluntary agreement to or concurrence in some act or

purpose." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 482. So, a person clearly and affirmatively consents by unambiguously asserting voluntary agreement or concurrence or, in other words, by making an expression of affirmation of agreement or concurrence in a manner easily understood.

Both parties urge us to look to the Federal Communications Commission's (FCC's) interpretation of "consent" under the telephone consumer protection act (TCPA), 47 U.S.C. § 227, to decide whether voluntarily providing a cell phone number to a business during a commercial transaction amounts to clear and affirmative consent. Congress enacted the TCPA in 1991 with the rise of telemarketing. Pub. L. No. 102-243, 105 Stat. 2394; Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009). The TCPA makes automatic telephone dialing system (ATDS) telemarketing calls unlawful, but it permits calls made with "prior express consent."[4] 47 U.S.C. § 227(b)(1)(A).

In enacting the TCPA, Congress delegated to the FCC the authority to establish rules and regulations for its administration. 47 U.S.C. § 227(b)(2). In 1992, the FCC ruled that "prior express consent" under the TCPA includes "persons who knowingly release their phone numbers," concluding those persons "have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." In re Rules & Regulats. Implementing Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769. Then, in 2012, the FCC created a new rule interpreting prior express consent to require "written" consent to receive commercial messages under the

[4] While the TCPA addresses only telephone calls, the FCC ruled that it also applies to text messages sent by ATDS. See Satterfield, 569 F.3d at 952.

TCPA. In re Rules & Regulats. Implementing Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 1830, 1838.

Dan's Herbs says we should look to the 1992 FCC rule as analogous federal authority. Budke says we should look to the 2012 rule requiring written consent. But the FCC is a federal agency, and its rules interpret terms in federal statutes to which federal courts must defer. See Satterfield, 569 F.3d at 954 (federal courts must defer to the FCC's interpretation of ambiguous terms in the TCPA). We need not defer to the FCC's interpretation of terms in an analogous federal statute.[5] See City of Arlington, Tex. v. Fed. Commc'ns Comm'n, 569 U.S. 290, 303-04, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013); Fode v. Dep't of Ecology, 22 Wn. App. 2d 22, 33, 509 P.3d 325 (2022) (we defer to an agency's interpretation of a statute only if the agency is charged with the administration and enforcement of the statute).

We decline to adopt either FCC rule. Instead, we look to Washington law for guidance. And 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. See, e.g., Grannum v. Berard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967) (whether patient consented to a surgical

[5] We reject Budke's argument that failure to adopt the 2012 FCC rule renders CEMA constitutionally infirm by preemption. Budke does not show that the TCPA expressly preempts CEMA. See Mass. Ass'n of Priv. Career Schs. v. Healey, 159 F. Supp. 3d 173, 215 (D. Mass. 2016). Nor does he show that the FCC's 2012 rule impliedly preempts CEMA by conflict. Budke fails to show that compliance with CEMA would place Dan's Herbs in direct noncompliance with the TCPA because that statute applies to only ATDS calls. Neither does Budke show that CEMA hampers the objectives or purpose of the TCPA. See Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 800, 225 P.3d 213 (2009); Pub. L. No. 102-243, 105 Stat. 2394; SUBSTITUTE H.B. 2007, 58th Leg., Reg. Sess. (Wash. 2003).

operation is a question of fact to be determined from the circumstances of each individual case); Alston v. Blythe, 88 Wn. App. 26, 33-34, 943 P.2d 692 (1997) (consent in an implied assumption of risk analysis is an issue of fact); Cranwell v. Mesec, 77 Wn. App. 90, 101, 890 P.2d 491 (1995) (whether tenants voluntarily consented to inspections is a question of fact to be determined from the totality of the circumstances); State v. Russell, 180 Wn.2d 860, 871, 330 P.3d 151 (2014) (whether a person consented to a search is a question of fact dependent on the totality of the circumstances). We do not decide questions of fact under RAP 2.3(b)(4).

We conclude that whether Budke consented to receive commercial text messages under CEMA by voluntarily providing his cell phone number during a commercial transaction is a question of fact not reviewable as a controlling question of law under RAP 2.3(b)(4). We remand for further proceedings.

Brennan, J.

WE CONCUR:

Bjorgen, J.

Coburn, J.

LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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November 12, 2021

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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

KIRK D. MILLER, P.S.

January 26, 2023 - 4:27 PM

Transmittal Information

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Appellate Court Case Title:	Nathan Budke, Respondent v. Dan's Herbs, et al, Petitioners

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