No. 94785-6

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THE MANDATORY POSTER AGENCY, INC., d/b/a CORPORATE RECORDS SERVICE, THE WASHINGTON LABOR LAW POSTER SERVICE, WASHINGTON FOOD SERVICE COMPLIANCE CENTER, and STEVEN J. FATA, THOMAS FATA, AND JOSEPH FATA, individually and their corporate capacity,

Petitioners.

ANSWER TO AMICUS MEMORANDUM

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A. INTRODUCTION

Petitioners Mandatory Poster Agency, Inc. d/b/a Corporate Records Service, the Washington Labor Law Poster Service, Washington Food Service Compliance Center, and Steven J. Fata, Thomas Fata, and Joseph Fata ("CRS") believe that the amicus memorandum of L.A. Investors LLC, d/b/a Local Records Office and the Romeros ("LRO") only confirms that this Court should grant review. This Court needs to address whether the capacity to deceive, an element of a Consumer Protection Act, RCW 19.86 ("CPA") claim, is a question of fact in Washington. Prior Division I decisions and federal authorities have properly concluded that this element of the test for a CPA claim articulated by this Court in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) is a fact question. This Court should grant review here because Division I's opinion is contrary to other Division I decisions on this precise point. RAP 13.4(b)(2). Moreover, this is an issue of first impression for this Court. RAP 13.4(b)(4).

B. STATEMENT OF THE CASE

The LRO amicus memorandum documents that CRS was not the only records service pursued by the State in its zeal to claim that direct mail companies offering business services violated the CPA. Although

CRS's services are similar to those provided by lawyers, accounting firms, and other corporate service providers such as Legal Zoom and CT Corporation Services, CP 1965-66, 1968, the State pursued CRS.[1] Similarly, the State pursued LRO.

The Court of Appeals opinion is oblivious to the rush to judgment by the Secretary of State and the Attorney General as to CRS. Petition at 3-6. Both state agencies were content to disparage CRS and its business at great lengths in multiple public pronouncements in multiple settings, causing the media to join in such disparagement. Br. of Appellants at 7-9.

CRS's mailings to businesses had no capacity to deceive the public *either* as to their content or their format.[2] In fact, the State only mentions its expert on marketing in its answer at 6, ignoring CRS's. CRS's well-qualified experts, Professors Dwight Drake of the University of Washington, and Seattle University's Professor Carol Obermiller, fully documented in their extensive testimony below that the content of the mailings was not deceptive, but rather was an accurate statement of

[1] CRS charged $125 for its service. CP 618. Some law firms charge in excess of $1,000 for corporate maintenance requirements; Legal Zoom charges $99. CP 1308-15.

[2] The State seems to continue to believe that the service offered by CRS to corporate businesses was "unnecessary." It persists in contending that there is no requirement that a corporation hold an annual meeting, that meeting minutes be taken, or that minutes be kept by the corporation. Answer at 4. The State is wrong, as its own attorney effectively conceded. CP 867-68.

Washington corporate law. For example, Professor Drake, who has practiced law and advised corporate clients in private practice for more than 30 years, opined in his extensive report, CP 680-97, that Washington's statutes and their legislative history make it clear that minutes of an annual meeting are mandatory. CP 687. Further, the mailings' format did not resemble government mailings as Professor Obermiller testified. He averred that the format of the CRS mailings did not have a capacity to deceive; he also noted their clear disclaimers denying a government connection. CP 1245-71.[3]

Division I's opinion is *devoid* of any discussion, or even any mention, of such expert opinions.

C. ARGUMENT WHY REVIEW SHOULD BE GRANTED

LRO's memorandum only confirms the point made by CRS in its petition at 9-12 that Division I's opinion contradicts opinions of Division I itself. The first *Hangman Ridge* element – an unfair or deceptive act or practice – can be met if the acts of the defendant have the capacity to deceive a substantial portion of the public. *Hangman Ridge,* 105 Wn.2d at 785; *Behnke v. Ahrens*, 172 Wn. App. 281, 290-92, 294 P.3d 729 (2012),

[3] Ordinarily, with strong differences among experts on such a factual point, the trier of fact must resolve any such conflict. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); *Bowers v. Marzano*, 170 Wn. App. 498, 505, 290 P.3d 134 (2012) ("An affidavit expressing an expert's opinion may be sufficient to create a genuine issue of fact and thus preclude summary judgment.").

review denied, 177 Wn.2d 1003 (2013). But as this Court noted in *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 785, 787, 295 P.3d 1179 (2013), this element can also be proved in two other ways. The capacity to deceive approach to proving the first *Hangman Ridge* element is a question of fact as Division I itself ruled in *Behnke,* 172 Wn. App. at 292 ("Whether a deceptive act has the capacity to deceive a substantial portion of the public is question of fact."). *See also, Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, 134 Wn. App. 210, 226-27, 135 P.3d 499 (2006), *review denied*, 160 Wn.2d 1019 (2007) (form rental agreement sent to 500 mobile home park owners; question of fact as to whether that had the capacity to deceive a substantial portion of the public).

Division I's effort in this case to distinguish those decisions simply made no sense. Op. at 10 ("… these cases hold that the capacity to reach a substantial portion of the public may present a question of fact, *not* that the fact finder is asked to determine whether undisputed facts are likely to mislead a reasonable consumer.") (court's emphasis). Those cases affirmatively state that this a fact question.[4] Similarly, the State makes no effort to distinguish those prior Division I precedents and is content to repeat the analysis set forth above. Answer at 12. It accuses CRS of

[4] Moreover, *Behnke* and *Holiday Resorts* plainly imply that the trier of fact, not the court, must decide the capacity to deceive issue; triers of fact decide questions of fact.

"manufacturing" a conflict in these decisions. *Id.* at 11. The closest it comes to any "analysis" is the State's simply bogus assertion that CRS is criticizing the "training and ability" of judges to make a decision about the capacity of mailings to deceive. *Id.* at 13-14. That was clearly not CRS's actual argument. The question is whether the factually-laden question of whether an act has a capacity to deceive is one of fact for the jury or one of law for the court. The former is true.

LRO's argument on authority arising under § 5 of the Federal Trade Commission Act on which RCW 19.86.020 is based, makes this point ever the clearer. Critically, capacity to deceive under § 5 of the FTCA is a question of fact. LRO memo. at 4-5.

Where, as here, the evidence on the capacity of the content and the format of CRS's mailings was fully disputed, that issue should have been left to the trier of fact as the *Behnke* and *Holiday Resorts* courts determined. This Court should grant review to establish the appropriate rule, particularly where it has not done so in any decision to date. RAP 13.4(b)(1), (4).

D. CONCLUSION

LRO's memorandum documents why the Court of Appeals decision merits review under RAP 13.4(b)(2); Division I's decision creates a conflict among decisions of that Court on the standard for a key element

of CPA claims. Review is also merited under RAP 13.4(b)(4) where the CPA penalties imposed by the trial court violate due process and/or excessive fines principles, as fully discussed in CRS's petition.

This Court should grant review and reverse the trial court's summary judgment and vacate its award of restitution, penalties, fees, and costs. Costs on appeal should be awarded to CRS.

DATED this 21st day of September, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Amicus Memorandum*** in Supreme Court Cause No. 94785-6 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 21, 2017, at Seattle, Washington.

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September 21, 2017 - 2:53 PM

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