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.

STATE'S ANSWER AND CROSS-PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Mandatory Poster Agency, Inc. entered into an Assurance of Discontinuance (AOD) with the State pursuant to RCW 19.86.100. In the AOD, it agreed to not send mailers that implied that the solicitation was from the government and not to use specified terms. Petitioners violated this AOD on a mass scale and created the deceptive net impression that their solicitation was from the government and that consumers were required to respond to the solicitation. The trial court correctly ruled and the appellate court affirmed that each of Petitioners' 79,354 solicitations was a deceptive act or practice that violated the Consumer Protection Act (CPA), RCW 19.86. The trial and appellate courts also correctly held that Petitioners committed 79,354 violations of the AOD, which was prima facie evidence of 79,354 CPA violations. See RCW 19.86.100.

The issues raised in Petitioners' petition do not involve issues of substantial public interest and there is no conflict with precedent. Based on the undisputed facts, Petitioners were running a scam. Division One followed existing Supreme Court and Court of Appeals precedent in affirming the trial court's summary judgment decision that Petitioners violated the CPA and in imposing a $793,540 civil penalty pursuant to RCW 19.86.140. The Court should deny the Petitioners' petition.

The only issue of substantial public interest is whether the State can recover expert witness costs in a CPA case pursuant to RCW 19.86.080 as the trial court had ordered. Although the issue had not been preserved for appellate review, Division One held that the State could not recover expert witness and deposition costs based on RCW 4.84.010. This is in direct conflict with this Court's decision in *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 313-4, 553 P.2d 423 (1976). In that case, the Court held that that State recovers costs pursuant to RCW 19.86.080 rather than RCW 4.84. *Id.* The Court should accept the State's cross-petition for review pursuant to RAP 13.4(b)(1) and (4).

II. COURT OF APPEALS DECISION

The Court of Appeals filed its published opinion on July 3, 2017. It is set forth in the Appendix at pages A1 through A23.

III. ISSUE PRESENTED FOR REVIEW

A. The issues raised in Petitioner's Petition do not warrant review:

1. Is the first element of a Consumer Protection Act claim a question of law?

2. When a party has entered into a prior Assurance of Discontinuance, does RCW 19.86.140 limit all

future Consumer Protection Act civil penalty awards against that party to a total of $25,000?

3. Was the amount of the civil penalty award unconstitutional?

B. Can the State recover expert witness and expert deposition transcription fees and costs pursuant to RCW 19.86.080 in a Consumer Protection Act action?

IV. STATEMENT OF THE CASE

A. The 2008 Assurance Of Discontinuance

In February 2008, Petitioner Mandatory Poster Agency, Inc. d/b/a Corporate Records Service (CRS) entered into an AOD with the Attorney General's Office (AGO) pursuant to RCW 19.86.100. CP 0487-0493. The AOD prohibits CRS and its "officers, directors, and principals" – the other Petitioners in this case – from engaging in a variety of unfair or deceptive practices including sending misleading solicitations to consumers that create the impression that the solicitations are from a government agency. *Id.* The AOD also barred the use of specific terms and practices. *Id.*

B. The "Corporate Minutes" Solicitation

Petitioners mailed 79,354 solicitations entitled "ANNUAL MINUTES RECORDS FORM" to Washington small business owners in 2012 and 2013. CP 0556:4, 1006. The envelope and solicitation contained

numerous violations of the AOD. CP 0489, 1006, 1011-13, 1023-25, 1027-9, 2195-2201. For instance, on both the envelope and solicitation, Petitioners chose to prominently state "IMPORTANT", even though AOD ¶ 2.1(b)(3) barred the "Use of the term *** 'important information' ***or any terms of similar import[.]" CP 0489, 1011, 1025, 1028, 2195-2201. The Petitioners' solicitations also included the business's Washington corporate ID number, a practice barred by AOD ¶ 2.1(b)(6). CP 0489, 1006, 1012-13, 1023-24, 1027, 1029, 2199-2200. The Petitioners could not identify a single section of Washington law as the basis for the legal advice they purport to give Washington small business owners. CP 0520:1–16, 0521:21–25, 0522:1–24.

In response to the mailings, 2,901 Washington small business owners purchased the Petitioners' product. CP 484, ¶ 8. For $125, these small business owners received a Corporate Minute Book from Petitioners that contained "Unanimous Consent of Shareholders" and "Unanimous Consent of Directors" form documents pre-populated with the small business's name, board of directors, and shareholders. CP 484, ¶8, 1015–21.

C. The Washington Secretary Of State Issued Warnings About Petitioners' Mailer In Response To Consumer Complaints

The Washington Secretary of State (SOS) received hundreds of customer calls, complaints, and inquiries about the Petitioners' mailers. CP 0429, ¶ 6. *See also* CP 0613:21–0614:2. The AGO received 120 complaints and letters regarding CRS. CP 1159-67. Patrick Reed of the SOS explained that Petitioners' mailer was "very similar in layout and structure, even to the bar coding section "as the State of Washington Business License Service form "[a]nd the instruction sheets were a very similar form as well." CP 1095.

To attempt to address the widespread consumer confusion that Petitioners' mailer had originated from the SOS, the SOS issued a number of consumer alerts and warnings. CP 0441-47. For instance, the October 24, 2012, Washington SOS alert stated in part:

> Our concern is that the form being mailed is not coming from the Secretary of State's office and it could be misleading for businesses to think it's a required filing. In fact, what they are referencing is something a corporation normally does internally themselves without a fee.

Id.

D. Washington Consumers Received The Mailers And Were Deceived

Many Washington consumers believed the CRS mailer originated from the government. For example, Christine Dormaier, a small business owner from Seattle, stated, "I believed that I was required to fill out the form and pay $125 as instructed in the letter or my corporate status would

be in default." CP 0175:4–5. Angela Douglas, a small business owner from Seattle, received the CRS mailing and stated, "I believed that it was a document from the State of Washington and that I was required to fulfill my corporate filing requirement with the state." CP 0185:4–5. The State submitted declarations from a total of 18 Washington consumers who had been deceived by Petitioners' solicitation. CP 0138-294. The State also submitted the declaration and expert reports of Professor Anthony Pratkanis, an experimental social psychologist at the University of California at Santa Cruz. CP 0448-82. The day before reply briefs were due on the summary judgment briefing, Petitioners submitted a declaration from one Washington consumer claiming to be satisfied with Petitioners' product. CP 1433-34. During the course of three years of investigation and litigation, this was the only Washington consumer Petitioners produced who was satisfied with their product.

E. The Trial Court's Decision

On January 26, 2016, the trial court partially granted the State's summary judgment motion and denied Petitioners' motion for summary judgment. CP 1590-94. The trial court held that Petitioners committed 79,354 violations of the CPA and AOD. CP 1591. The trial court later specified the restitution process and imposed civil penalties pursuant to RCW 19.86.140 in the amount of $793,540, which was based on $10 for

each of the 79,354 CPA violations. CP 2044-53. The trial court awarded the State $337,593.20 in attorneys' fees pursuant to RCW 19.86.080(1). CP 2125-27.

The trial court also awarded the State $39,571.27 in costs pursuant to RCW 19.86.080(1), which included $32,113.40 in expert witness fees and the transcription of depositions for those experts. CP 1798-9, 2125-7. Petitioners never argued that RCW 4.84 or the CPA barred the State from recovering expert witness and deposition fees and costs before the trial court. CP 2054-64.

F. The Appellate Court decision

Division One affirmed in part and reversed in part in a published opinion. Division One reversed the cost award of the State's expert witness fees and the transcription costs of those depositions on the rationale that costs in a CPA action are limited to those set out in RCW 4.84.010. Slip Op. at 22. Division One also reversed the recovery of paralegal and investigator time to the State for failure to address the six factors identified in *Absher Construction Co. v. Kent School District*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1996).

Division One affirmed on all other issues. In a CPA case, the State must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact. Citing Supreme Court and

other appellate precedent, Division One held that the first element of a CPA case is a question of law when the underlying facts are undisputed. The Court reviewed the undisputed facts and held that "[t]he CRS mass mailings are likely to mislead a reasonable consumer because the undisputed format, images, and content do mimic government-related forms and create the net impression that the recipient is obligated to return the form and pay $125 to CRS." Slip Op. at 12. As to the third element of a State CPA claim, the Court held that, "because there is no dispute that the mass mailing was sent to over 79,000 consumers, generating 2,901 paid responses, there is no question of fact whether the misleading mailings reached, and thus had the capacity to deceive, a substantial portion of the public." *Id.* at 14. Further, the Court held the mailings violated the AOD and were prima facie evidence of CPA violations. *Id.*

Division One held that RCW 19.86.140 did not limit the civil penalty award to $25,000 as Petitioners had argued. *Id.* at 16-17. Petitioners also argued that the civil penalty award violated due process relying upon *BMW of N. A., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996), where the United States Supreme Court examined the reprehensibility of conduct in reviewing a punitive damages award. Division One held that *Gore* did not apply. Citing *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 531-32, 286 P.3d 46 (2012),

Division One held "our Supreme Court expressly declined to apply the *Gore* factors to cases involving statutory damages, noting 'no state public policy or due process principles require reduction in the total damages mandated by statute.' And CRS does not provide any compelling authority that courts have applied the *Gore* factors to cases involving statutory damages." *Id.* at 17.

V. REASONS THE PETITION SHOULD BE DENIED AND CROSS-PETITION GRANTED

The issues raised by Petitioners do not involve issues of substantial public interest and are not in conflict with precedent. The only issue of substantial public interest is whether the State can recover expert witness and deposition fees and costs in a CPA case pursuant to RCW 19.86.080 as the trial court had ordered. Division One's decision is in conflict with this Court's decision in *State v. Ralph Williams' North West Chrysler Plymouth, Inc.* on that issue.

A. The issues in Petitioners' Petition do not warrant this Court's review.

1. The first element of a CPA case –whether an act or practice is unfair or deceptive – is a question of law.

Petitioners argue that there is a conflict among the Court of Appeals and a question of substantial interest regarding whether the first element of a CPA case is a question of law or a question of fact. There is not. Rather, the issue is well settled. In *Panag v. Farmers Ins. Co. of*

Washington, 166 Wn.2d 27, 204 P.3d 885 (2009), the Court held that whether a particular act is unfair or deceptive is a question of law:

> The next issue is whether, as CCS contends, the first *Hangman Ridge* element has been established. Whether a particular act or practice is "unfair or deceptive" is a question of law. *Leingang v. Pierce Cnty Med. Bureau, Inc.*, 131 Wash.2d 133, 150, 930 P.2d 288 (1997). A plaintiff need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public. *Id.*

Id. at 47; *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 149-50, 930 P.2d 288 (1997) ("The issue here is whether PCM committed an 'unfair or deceptive act.' Whether a party in fact committed a particular act is reviewable under the substantial evidence test. However, the determination of whether a particular statute applies to a factual situation is a conclusion of law. Consequently, whether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law.") *See also* Slip Op. at 9, fn 36 (listing 17 additional cases with the same holding).

Division One correctly applied this standard. The material facts were undisputed. Over 79,000 mailers were sent to Washington small business owners, all using the same form and content. Based on the undisputed facts, Division One determined as a matter of law that the mailers were deceptive. Petitioners disagree with Division One's

application of the undisputed facts and claim that Division One's application of this standard failed to address the content and format of the mailer. This is directly refuted by the Court of Appeals decision that quotes and discusses the mailer at length. *See* Slip Op. at 4-5, 12-14. More to the point, Division One's application of well-settled law is not a matter of substantial public interest as Petitioners' claim.

Petitioners also seek to manufacture a conflict between the Court of Appeals. Petitioners argue that the first element of a CPA claim is a question of fact because this Court and Courts of Appeals have repeatedly held that the third element of a CPA claim – the public interest element – is a question of fact. Using a similar rationale, Amici L.A. Investors LLC – who was found liable for over 250,000 CPA violations by the Thurston County Superior Court – claims that review should be accepted pursuant to RAP 13.4(b)(2). Petitioners and Amici's argument makes no sense. Moreover, Petitioners and Amici's desire to conflate the first and third elements of a CPA claim does not create a conflict between the Court of Appeals. Division One properly rejected this dubious theory, explained that there was no conflict with past precedent, and applied well-

established law. Slip Op. at 11 ("[Petitioners'] reliance on *Holiday Resort*[1] and *Behnke*[2] is misplaced. Those cases recognize only that the substantial portion of the public component of a deceptive act or practice may present a question of fact, not that a fact finder weighs whether a representation, omission, or practice is likely to mislead a reasonable consumer.")

While not a conflict for purposes of RAP 13.4(b)(2), Amici cites two federal cases as supposed support for Amici's position that the first element of a CPA claim should be a question of fact. Neither of these cases are a basis for changing Washington law. Amici first cites *Kalwajtys v. F.T.C.*, 237 F.2d 654, 656 (7th Cir. 1956), but this case reviewed an FTC administrative cease and desist order and has no relevance to whether the first element of a CPA case is a question of law. Amici cites *F.T.C. v. AMG Servs., Inc.*, 29 F. Supp. 3d 1338, 1373 (D. Nev. 2014) to suggest

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[1] *Holiday Resort Community Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006) ("Whether an alleged act is unfair or deceptive is a question of law.")

[2] *Behnke v. Ahrens*, 172 Wn. App. 281, 292-3, 294 P.3d 729 (2012) ("Washington courts have not tried to decide as a matter of law whether the potential victims of a deceptive act or practice are sufficiently numerous to qualify as 'a substantial portion of the public.' *** In applying the requirement that the allegedly deceptive act has the capacity to deceive 'a substantial portion of the public,' the concern of Washington courts has been to rule out those deceptive acts and practices that are unique to the relationship between plaintiff and defendant. The definition of 'unfair' and 'deceptive' must be objective to prevent every consumer complaint from becoming a triable violation of the act."(citations omitted.))

that a judge is not properly trained to decide whether a practice is deceptive, but Amici's selected quotation from the magistrate's decision fails to mention that the magistrate granted the FTC summary judgment:

> Second, even in the context of advertisements, summary judgment is appropriate where—as here—the representation is clearly misleading and the defendant relies exclusively on the fine print to correct the misrepresentation. See *F.T.C. v. Gill*, 265 F.3d 944, 957 n. 10 (9th Cir.2001); (affirming the district court's granting of summary judgment where "at least one of defendants' [advertisement representations] is illegal as a matter of law"); *Cyberspace.Com LLC*, 453 F.3d at 1200 (stating that a representation "may be likely to mislead by virtue of the net impression to makes even though the [representation] also contains truthful disclosures [in the fine print]"); *Figgie Int'l, Inc.*, 994 F.2d at 604 (stating that truthful fine print disclosures do not render a representation not deceptive); *Floersheim*, 411 F.2d at 876–78 (stating the same); *Brown & Williamson Tobacco Corp.*, 778 F.2d at 42–3 (stating the same); (see also Def.'s Opp'n (# 493) at 43:23–45:8) (relying exclusively on the fine print to correct Defendants' TILA box representations).

Id. at 1373. This decision is in accord with Ninth Circuit precedent. *See F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (reviewing the contents of solicitation checks sent to 4.4 million small businesses and individuals, and affirming Judge Lasnik's grant of summary judgment in favor of the FTC.) The puzzling aspect of Amici's criticism of a judge's training and ability to determine whether an act or practice is deceptive is that, even if Amici's position were accepted, a judge would still have to decide if an act or practice is deceptive as a State

CPA action is an equitable action tried to the court. *See State ex. rel. Dep't of Ecology v. Anderson*, 94 Wn.2d 727, 620 P.2d 76 (1980) (CPA action by the State is an equitable action and there is no jury trial.) Further puzzling is how Amici's theory would change the outcome in this case as Petitioners did not identify any material questions of fact in the trial court[3] nor did they rebut the prima facie evidence of 79,354 CPA violations due to their 79,354 AOD violations. See RAP 9.12; RCW 19.86.100.

2. The trial court did not abuse its discretion in setting the civil penalty.

Petitioners raise two issues with the Division One's affirmation of the civil penalty of $793,540. Division One correctly decided both issues, and neither are issues of great public interest.

First, Petitioners claim that RCW 19.86.140 limits the civil penalty that could be awarded to $25,000. Petitioners' theory argues that, because they agreed to a prior AOD, they can violate Washington law and RCW 19.86.140 limits any future civil penalty awards to $25,000. The plain language of RCW 19.86.140 does not support this theory, and Division One properly rejected it. *See* Slip. Op. at 17 ("The $25,000.00 limit from the first paragraph does not apply here because the State did not plead or seek to enforce the Assurance of Discontinuance injunctive

[3] See CP 0645-70, CP 1382-1421.

provisions.") Petitioners make no argument in their Petition as to why this issue is of great interest, and review should not be accepted.

Second, Petitioners argue that the civil penalty was unconstitutional based on the *BMW of N. A., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996) line of cases for reviewing whether a punitive damages award violated the Due Process Clause. Division One rejected Petitioners' argument based on this Court's decision in *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 531-4, 286 P.3d 46 (2012). Division One held that the *Gore* factors did not apply to cases involving statutory damages, and that "'no state public policy or due process principles require reduction in the total damages mandated by statute.'" Slip Op. at 17, quoting *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d at 533-4.

Petitioners argue that their due process objection to the penalty is an issue of great public interest, but only because it involves the application of federal constitutional principles to statutory penalties. Not every constitutional argument is of great public interest. Division One's decision was sound. Moreover, as Division One noted, Petitioners presented no case law supporting their theory that courts have applied the *Gore* factors to cases involving statutory damages. No case law for this proposition is identified in Petitioners' petition either.

In addition to being unsupported by case law, Petitioners do not explain how applying *Gore* to this case would change the outcome. *Gore* considered (1) the degree of reprehensibility of Petitioners' conduct, (2) a comparison of the amount of the award with the actual and potential harm caused by Petitioners' conduct, and (3) a comparison of the amount of the award to the civil penalties authorized by statute. The trial court considered each of these factors in setting the civil penalty:

> In setting the civil penalty amount, the Court considered Defendants' lack of good faith the most important element. This civil penalty will eliminate any benefits derived by the Defendants from their deceptive practices, and also will vindicate the authority of the Consumer Protection Act to protect Washington consumers from unfair and deceptive acts. Defendants entered into an Assurance of Discontinuance with the State and then repeatedly violated it. Defendants' conduct harmed those that bought their product due to Defendants' deception. In addition to those small businesses that purchased Defendants' product due to deception, others that did not purchase the product spent time and wasted effort reviewing the deceptive solicitation. The civil penalty set herein is less than the maximum potential civil penalty of $2,000 per violation, which would total $158,708,000. There is no mandatory "cap" on the penalty in this situation. The amount is also less than the potential harm of $9,919,250 that Defendants could have caused if all Washington consumers who had received Defendants' deceptive mailer had purchased the $125 product based on Defendants' deception.

CP 2045. In sum, the trial court did not abuse its discretion in setting the civil penalty, and there is no issue of substantial public interest.

B. Review should be granted for the issue raised by the State pursuant to RAP 13.4(b)(1) and (4).

Relying upon on RCW 4.84.010, Division One reversed the trial court's award of expert witness fees and deposition transcription costs pursuant to RCW 19.86.080. This holding is in conflict with a prior decision of this Court. In *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 313-4, 553 P.2d 423 (1976), this Court held that State recovers costs pursuant to RCW 19.86.080 in a CPA action rather than RCW 4.84:

> Appellants contend the trial court granted costs to respondent in violation of RCW 4.84.090. RCW 4.84.090 does not apply to this action. The trial court awarded costs to respondent pursuant to RCW 19.86.080. This provision states that 'the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.' The award of costs and attorney fees is consistent with this statutory directive.

Id. at 313-4. Review should be granted pursuant to RAP 13.4(b)(1).

Division One does not explain why it departed from this Court's holding in *Ralph Williams*, but the error may stem from the difference between a CPA private right of action pursuant to RCW 19.86.090 and a State cause of action pursuant to RCW 19.86.080. For *private* CPA causes of action pursuant to RCW 19.86.090, costs are limited to those allowable under RCW 4.84. See *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 693-94, 132 P.3d 115 (2006). However, a State CPA action pursuant to

RCW 19.86.080 is different than a private RCW 19.86.090 CPA claim – a State CPA claim has less elements, no jury is available, there are civil penalties and restitution as opposed to damages, the statute of limitations in the CPA does not apply to the State, and a final judgment for the State in a RCW 19.86.080 action is prima facie evidence in a private cause of action under RCW 19.86.090.[4] Costs are different too as they are awarded to the State pursuant to RCW 19.86.080 rather than RCW 4.84. *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d at 313-4.

The issue is also of substantial public interest pursuant to RAP 13.4(b)(4) because of the effect that Division One's reported decision will have on this case and other actions brought by the State under the CPA. As this Court has previously recognized, an award of costs to the State pursuant to RCW 19.86.080 encourages enforcement and does not drain public funds:

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[4] See *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011) (unlike a private CPA claim, the State is not required to prove causation or injury); *State ex. rel. Dep't of Ecology v. Anderson*, 94 Wn.2d 727, 620 P.2d 76 (1980) (a State CPA claim is an equitable action and no jury is available); RCW 19.86.140 (civil penalties are available to the State); RCW 19.86.080(2) (State CPA claim can recover restitution for Washington citizens); *State v. LG Electronics., Inc.*, 186 Wn.2d 1, 9, 375 P.3d 636 (2016) (the statute of limitations in the CPA does not apply to the State); RCW 19.86.130 (final judgment in State CPA action is prima facie evidence in private CPA cause of action.) A State CPA antitrust action has further differences. See RCW 19.86.030, 19.86.040, 19.86.050, 19.86.060, 19.86.080, 19.86.140.

> Such awards will encourage an active role in the enforcement of the consumer protection act. This construction places the substantial costs of these proceedings on the violators of the act, and it does not drain respondent's public funds.

State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wn.2d at 314-5. The same rationale continues to hold true. Some State CPA cases involve expert witness fees and costs that can run into the hundreds of thousands of dollars. If the State cannot recover expert witness fees as costs, it may hinder the State's ability to pursue CPA claims at a time in which there is an increased need for enforcement. This will thwart the liberal construction mandate in the CPA. *See* RCW 19.86.920.

VI. THE COURT SHOULD AWARD THE STATE ATTORNEYS' FEES AND COSTS INCURRED IN ANSWERING PETITIONERS' PETITION

Pursuant to RAP 18.1(a) and (j), the State respectfully requests the Court to exercise its discretion and award the State its reasonable attorneys' fees and costs in answering this petition. A prevailing party is entitled to attorneys' fees and costs in responding to a petition for review if requested in the party's answer and if "applicable law grants to a party the right to recovery." RAP 18.1(a) and (j). The CPA provides the Court with discretion to award the State reasonable fees and costs as the prevailing party on appeal. RCW 19.86.080(1); *State v. Kaiser*, 161 Wn.

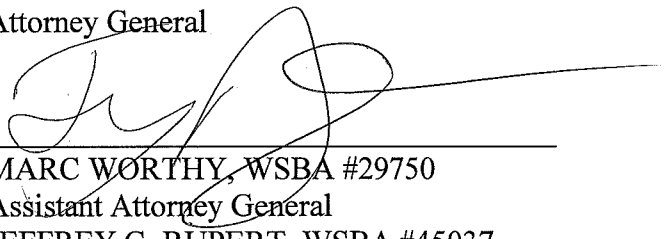
App. at 726. Should the Court grant the State's request, the State will file an affidavit detailing the fees and costs incurred. RAP 18.1(d).

VII. CONCLUSION

For each of these reasons stated, the State respectfully asks this Court to deny Petitioners' Petition for Review. The Court, however, should grant the State's cross-petition and hold that the State recovers expert witness and deposition transcription fees and costs pursuant to RCW 19.86.080 in a CPA action.

RESPECTFULLY SUBMITTED this 25 day of August, 2017.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein. I certify that on the 25th day of August, 2017, I caused a true and correct copy of Response to Petition of Review of Respondent State of Washington to be filed with the Court and served, via electronic service and U.S. Mail, Postage Prepaid, to the following parties:

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DATED: August 25, 2017, at Seattle, Washington.

JOSHUA BENNETT
Legal Assistant

APPENDIX A

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

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 in their corporate capacity, Appellant.	No. 74978-1-I PUBLISHED OPINION FILED: July 3, 2017

VERELLEN, C.J. — The first element of a Consumer Protection Act (CPA) violation is an unfair or deceptive act or practice.[1] An act is deceptive if it is likely to mislead a reasonable consumer. Such an act satisfies the first element if it has the capacity to deceive a substantial portion of the public. When the underlying facts are undisputed, the question whether the acts are likely to mislead–an objective inquiry–is a question of law. Whether such a deception has the capacity to reach a substantial portion of the public is a question of fact precluding summary judgment, unless the undisputed facts establish that capacity.

[1] Ch. 19.86 RCW.

Here, the undisputed facts show The Mandatory Poster Agency, Inc. (MPA) sent mass mailings under the assumed name Corporate Records Service (CRS) to more than 79,000 Washington corporations. As a matter of law, the undisputed format, images, and content of the mailings created a net impression likely to mislead a reasonable consumer into believing CRS is associated with a governmental agency and that the recipients were obligated to fill out and return the solicitations with a fee of $125. Notably, the mass mailings include language, tone, and imagery prohibited by MPA's 2008 "Assurance of Discontinuance," and such violations are prima facie evidence of a CPA violation.

Further, the undisputed scope of the extensive mass mailings generating payments by 2,901 consumers reveals a capacity to reach and thus deceive a substantial portion of the public. The trial court did not err in granting summary judgment that MPA engaged in a deceptive act or practice.

CRS contends the $793,540 penalty imposed by the court is excessive. On cross appeal, the State argues the penalty is too lenient. The trial court did not abuse its broad discretion in setting a penalty of $10 per mailing, together with a provision requiring CRS to fund restitution.

The trial court adequately engaged in a lodestar calculation of attorney fees, but failed to make the required findings for an award of nonlawyer time. And the trial court should not have awarded expert witness fees as costs.

Because the State is the prevailing party on appeal, it is entitled to fees on appeal.

We affirm in part and reverse in part.

FACTS

Steven Fata, Thomas Fata, and Joseph Fata each own one-third of MPA and jointly undertake all corporate decisions. CRS has a mailbox in Olympia, Washington at a United Parcel Service store.

Several years ago, the Attorney General's Office initiated an investigation into MPA's mass marketing of posters summarizing state and federal legal requirements. The State alleged MPA used mailers with various business names to deceive consumers into believing they must purchase posters from the company in order to comply with state and federal law. The MPA advertisements appeared to originate from the government or an organization associated or in contact with the government. The ads also used names that evoked "an official government tone" and emblems that "mimic a state agency emblem."[2] The ads also used a postal drop box with an Olympia address. The language suggested a necessity to act, such as "Advisory," "advisement," "achieve compliance," and "effective immediately."[3]

In February 2008, at the conclusion of the Attorney General Office's investigation, MPA entered into an Assurance of Discontinuance prohibiting the company and its officers, directors, and principals from engaging in a variety of unfair or deceptive practices, including sending misleading solicitations to consumers that create the impression that the solicitations are from a government agency. The Assurance of Discontinuance also barred the use of specific terms and practices, along with the following provision:

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[2] Clerk's Papers (CP) at 488.

[3] CP at 488.

> This Assurance of Discontinuance shall not be considered an admission of violation of the Consumer Protection Act for any purposes, but failure to comply with this Assurance of Discontinuance shall be prima facie evidence of violations of RCW 19.86.020, thereby placing upon the Respondents, and their officers, directors, and principals, the burden of defending against imposition by the court of damages, injunctions, restitution, civil penalties of up to $2,000.00 per violation and costs including reasonable attorney's fees. In addition, pursuant to RCW 19.86.140[,] violations of the injunctive provisions of this Assurance of Discontinuance may result in court imposed civil penalties of up to $25,000.00.[4]

In 2012 and 2013, CRS sent "Annual Minutes Records Form" solicitations to Washington consumers. Joseph Fata designed the solicitation; Steven Fata and Thomas Fata approved its use in Washington.

CRS mailed 79,354 solicitations to Washington consumers. The front of each envelope contained the language "IMPORTANT" in bold above "Annual Minutes Requirement Statement," "TIME SENSITIVE," and "If addressed name is incorrect, please forward document to an authorized employee representative Immediately."[5] The green colored envelope included a stylized eagle symbol in the upper right-hand corner and an Olympia return address. A notation "THIS IS NOT A GOVERNMENT DOCUMENT" was located just below the return address.[6]

Inside the envelope, CRS included a form entitled "2012 – ANNUAL MINUTES RECORDS FORM."[7] The form was addressed to the recipient's business and contained a key code, bar code, response date, and the recipient's date of incorporation. Each solicitation, excluding the February 2013 mailings, also included

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[4] CP at 492.

[5] CP at 1011, 1025, 1028.

[6] CP at 1011, 1025, 1028.

[7] CP at 1006, 1012-13, 1023-24, 1029, 2199-200.

the "Corporation Number" consisting of the uniform business identifier number assigned by the State to the corporation.[8] The first instruction on the form stated, "IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM. PLEASE PRINT."[9] CRS listed selected citations to the Washington Business Corporations Act near the top of the page. The form had the disclaimer "CORPORATE RECORDS SERVICE IS NOT A GOVERNMENT AGENCY AND DOES NOT HAVE OR CONTRACT WITH ANY GOVERNMENT AGENCY TO PROVIDE THIS SERVICE."[10] This disclaimer was surrounded by other text and was located one-third of the way down from the top of the form.

CRS titled the second page "INSTRUCTIONS FOR COMPLETING THE ANNUAL MINUTES RECORDS FORM (Washington Corporations)."[11] The instructions direct recipients to review the accuracy of their preprinted corporate name and address and to then complete seven steps to fill out the form. The instructions also note that "[m]aintaining records is important to the existence of all corporations."[12] In response to the mailing, 2,901 Washington businesses submitted a completed form with the $125 fee.[13]

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[8] CP at 2199; CP at 1010-14 (CRS did not include the corporation number in its February 2013 mailings, totaling approximately 5,619 mailings).

[9] CP at 1012-13, 1023-24, 1027, 1029, 2199.

[10] CP at 1012-13, 1023-24, 1029, 2199-200.

[11] CP at 1024.

[12] CP at 1024.

[13] CP at 484-85.

CRS sent a corporate minute book to Washington consumers who returned the Annual Minutes Records Form and $125.[14] The corporate minute book contained "Unanimous Consent of Shareholders" and "Unanimous Consent of Directors" forms.[15] The corporate minute book included instructions to sign and date the documents. It advised that "[y]our company will be in full compliance with the corporate minute records requirement after the Unanimous Consent documents are signed and dated."[16]

After receiving numerous complaints, the Attorney General's Office filed a lawsuit in King County Superior Court, alleging misrepresentation and violations of the CPA. Both parties moved for summary judgment. The trial court partially granted the State's motion and denied CRS's motion. The court concluded as a matter of law that the Annual Minutes Records Form solicitation was a deceptive act or practice that violated the Assurance of Discontinuance and the CPA. Specifically, the court determined CRS committed 79,354 separate violations by creating the deceptive net impression that its solicitations "were from a governmental agency and that Washington consumers were obligated to fill out and return the solicitations along with $125."[17] The court also concluded as a matter of law that the "solicitations had the capacity to deceive a substantial number of Washington consumers" and because CRS engaged in trade and commerce, their actions affected the public interest.

The trial court entered an order imposing a civil penalty under RCW 19.86.140 in the amount of $793,540, $10 per violation, and instituted a restitution process requiring

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[14] CP at 1006.

[15] CP at 1015-21.

[16] CP at 1019.

[17] CP at 1591.

CRS to transmit the full amount of potential restitution, $362,625, to a claims administrator.[18] The trial court also awarded the State $337,593.20 in attorney fees and $39,571.27 in costs.[19]

CRS appeals. The State cross appeals.

ANALYSIS

We review a summary judgment decision de novo.[20] Summary judgment is appropriate if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'"[21] A response to a summary judgment motion "must set forth specific facts showing that there is a genuine issue for trial."[22]

I. Unfair or Deceptive Act

CRS argues the trial court erred by concluding as a matter of law that its solicitation was an unfair or deceptive act under the CPA.

The CPA forbids "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[23] The State must prove "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact."[24] Unlike a private plaintiff under the CPA, the State is not required to

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[18] CP at 2046.

[19] CP at 2125-27.

[20] Keck v. Collins, 181 Wn. App. 67, 78, 325 P.3d 306 (2014), affirmed, 184 Wn.2d 358 (2015).

[21] Id. at 78-79 (quoting CR 56(c)).

[22] CR 56(e).

[23] RCW 19.86.020.

[24] State v. Kaiser, 161 Wn. App. 705, 719, 254 P.3d 850 (2011).

prove causation or injury.[25] A CPA case brought by the State is an equitable action, and there is no jury trial.[26]

The "unfair or deceptive act" element can be established in one of three ways: (i) per se unfair or deceptive conduct,[27] (ii) an act that has the capacity to deceive a substantial portion of the public,[28] or (iii) an unfair or deceptive act or practice not regulated by statute but in violation of the public interest.[29] A plaintiff does not need to show the act was intended to deceive, "only that it had the capacity to deceive a substantial portion of the public."[30] "'Deception exists "if there is a representation, omission, or practice that is likely to mislead" a reasonable consumer.'"[31] The CPA does not define "deceptive," but "the implicit understanding is that 'the actor *misrepresented* something of material importance.'"[32] A deceptive act or practice is measured by "the net impression" on a reasonable consumer.[33]

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[25] Id.

[26] RCW 19.86.080; State ex rel. Dep't of Ecology v. Anderson, 94 Wn.2d 727, 730, 620 P.2d 76 (1980).

[27] Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013).

[28] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531 (1986); Behnke v. Ahrens, 172 Wn. App. 281, 290-92, 294 P.3d 729 (2012).

[29] Klem, 176 Wn.2d at 787; Panag v. Farmers Ins. Co., 166 Wn.2d 27, 37 n.3, 204 P.3d 885 (2009).

[30] Panag, 166 Wn.2d at 47.

[31] Rush v. Blackburn, 190 Wn. App. 945, 963, 361 P.3d 217 (2015) (quoting id. at 50).

[32] Kaiser, 161 Wn. App. at 719 (quoting Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), rev'd on other grounds, 138 Wn.2d 248, 978 P.2d 505 (1999)).

[33] Panag, 166 Wn.2d at 50 (quoting Fed. Trade Comm'n v. Cyberspace.Com LLC, 453 F.3d 1196, 1200 (9th Cir. 2006)).

The parties dispute whether the first element of a CPA claim presents a question of law or question of fact. Several cases have recognized the first element is a question of law when the facts are undisputed.

In Leingang v. Pierce County Medical Bureau, Inc., the court noted:

> Whether a party in fact committed a particular act is reviewable under the substantial evidence test. However, the determination of whether a particular statute applies to a factual situation is a conclusion of law. Consequently, whether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law. *Therefore, since there is no dispute of facts as to what the parties did in this case, whether the conduct constitutes an unfair or deceptive act can be decided by this court as a question of law.*[34]

Twelve years later, our Supreme Court echoed the same standard in Panag v. Farmers Insurance Company of Washington: "The next issue is whether . . . the first [CPA] element has been established. Whether a particular act or practice is 'unfair or deceptive' *is a question of law.*"[35] We have recognized this standard in several cases.[36]

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[34] 131 Wn.2d 133, 150, 930 P.2d 288 (1997) (emphasis added) (citations omitted).

[35] 166 Wn.2d 27, 47, 204 P.3d 885 (2009) (emphasis added) (citing Leingang, 131 Wn.2d at 150).

[36] Rush, 190 Wn. App. at 963-64 ("'Whether undisputed conduct is unfair or deceptive is a question of law, not a question of fact.'") (quoting Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014)); Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006) ("Whether an alleged act is unfair or deceptive is a question of law.") (citing Leingang, 131 Wn.2d at 150); Kaiser, 161 Wn. App. at 719 (citing Leingang, 131 Wn.2d at 150); Stephens v. Omni Ins. Co., 138 Wn. App. 151, 166, 159 P.3d 10 (2007) (citing Leingang, 131 Wn.2d at 150); Bavand v. OneWest Bank, 196 Wn. App. 813, 840, 385 P.3d 233 (2016) (citing Leingang, 131 Wn.2d at 150); Keyes v. Bollinger, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982); Barkley v. GreenPoint Mortg. Funding, Inc., 190 Wn. App. 58, 68, 358 P.3d 1204 (2015) (citing Leingang, 131 Wn.2d at 150); Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 318, 308 P.3d 716 (2013); Wellman & Zuck, Inc. v. Hartford Fire Ins. Co., 170 Wn. App. 666, 678, 285 P.3d 892 (2012); Brown ex rel. Richards v. Brown, 157 Wn. App. 803, 815, 239 P.3d 602 (2010); Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 211, 194 P.3d 280 (2008) (citing Leingang, 131 Wn.2d at 150); Shields v. Morgan Financial, Inc., 130 Wn. App. 750, 755, 125 P.3d 164 (2005); Shah v. Allstate

CRS points to Behnke v. Ahrens[37] and Holiday Resort Community Association v. Echo Lake Associates, LLC[38] for the proposition that a question of fact may exist. But those 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.[39]

The Holiday Resort court acknowledged that whether an act is unfair or deceptive is a legal question, but "whether the 1997 Rental Agreement has the capacity to deceive a substantial portion of the public is a question of fact."[40] In that case, the trial court dismissed the plaintiffs' suit and ruled there was no connection between the alleged CPA violation and the plaintiffs' injuries.[41] On appeal, this court concluded the language in the rental agreement violated a statute and was an unfair act or practice

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Ins. Co., 130 Wn. App. 74, 86, 121 P.3d 1204 (2005); Robinson v. Avis Rent A Car System, Inc., 106 Wn. App. 104, 114, 22 P.3d 818 (2001) (citing Leingang, 131 Wn.2d at 150); Dwyer v. J.I. Kislak Mortg. Corp., 103 Wn. App. 542, 546, 13 P.3d 240 (2000) (citing Leingang, 131 Wn.2d at 150); Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 214, 969 P.2d 486 (1998) (citing Leingang, 131 Wn.2d at 150); Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 560, 825 P.2d 714 (1992).

[37] 172 Wn. App. 281, 294 P.3d 729 (2012).

[38] 134 Wn. App. 210, 135 P.3d 499 (2006)

[39] The comments to the pattern jury instruction are consistent with this interpretation: "Whether an act has the capacity to deceive a substantial portion of the public is a question of fact. If the facts about a party's act or practice are not in dispute, the trial court may decide whether that act or practice was deceptive as a matter of law." 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 310.08, at 43 (6th ed. Supp. 2013) (citing Behnke, 172 Wn. App. at 281; Leingang, 131 Wn.2d at 149-50).

[40] Holiday Resort, 134 Wn. App. at 226-27.

[41] Id. at 217-18.

under the CPA as a matter of law.[42] But it also noted that whether that act "has the capacity to deceive a substantial portion of the public is a question of fact," reasoning:

> Here, the tenants allege the language in the 1997 Rental Agreement not only misstates the law but also has the capacity to deceive a portion of the public *because it is available for dissemination* to the more than 500 [Manufactured Housing Communities of Washington] members who are mobile home park owners or managers.[43]

In Behnke, citing Holiday Resort, this court also recognized "[w]hether a deceptive act has the capacity to deceive a substantial portion of the public is a question of fact."[44] This court specifically emphasized, "In applying the requirement that the allegedly deceptive act has the capacity to deceive 'a substantial portion of the public,' the concern of Washington courts has been to rule out those deceptive acts and practices that are unique to the relationship between plaintiff and defendant."[45] We also recognized that "[t]he definition of 'unfair' and 'deceptive' must be objective to prevent every consumer complaint from becoming a triable violation of the act."[46]

CRS's reliance on Holiday Resort and Behnke is misplaced. Those cases recognize only that the substantial portion of the public component of a deceptive act or practice may present a question of fact, not that a fact finder weighs whether a representation, omission, or practice is likely to mislead a reasonable consumer.[47]

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[42] Id. at 226.

[43] Id. at 226-27 (emphasis added).

[44] Behnke, 172 Wn. App. at 292 (citing id.).

[45] Id. at 292-93.

[46] Id. at 293.

[47] Additionally, Behnke cites Holiday Resort, which in turn cites Hangman Ridge, 105 Wn.2d at 789-90, where our Supreme Court held only that the separate public interest element is a question of fact. CRS also cites Deegan v. Windermere Real Estate/Center-Isle, Inc., 197 Wn. App. 875, 391 P.3d 582 (2017) and Rhodes v. Rains,

The undisputed facts show each of the 79,354 solicitations included an envelope that (1) contained bolded text reading, "IMPORTANT" "Annual Minutes Requirement Statement"; (2) depicted a large eagle on the top right side of the green colored envelope; (3) stated "Business Mail - Time Sensitive"; (4) directed the recipient to "[p]lease forward to an authorized employee representative Immediately"; and (5) used authoritative language similar to a government document.[48] The solicitation inside the envelope (1) contained selective citations to Washington corporate statutes, (2) directed "IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM, PLEASE PRINT," (3) referred to the recipient's Washington State corporation uniform business identifier number, and (4) recited the recipient's incorporation date.[49] Although the CRS form is not identical to the Secretary of State's annual report form, the tone is similar to a mandatory governmental form.

The CRS mass mailings are likely to mislead a reasonable consumer because the undisputed format, images, and content do mimic government-related forms and create the net impression that the recipient is obligated to return the form and pay $125 to CRS. CRS contends its solicitations were not deceptive because they accurately stated Washington corporate law requirements. But "[e]ven accurate information may be deceptive 'if there is a representation, omission or practice that is likely to

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195 Wn. App. 235, 381 P.3d 58 (2016), but neither case affects the outcome of this matter. Deegan stands for the proposition that causation under the CPA is a question of fact, and Rhodes merely suggests that disputed facts should be resolved by the trier of fact.

[48] CP at 1011, 1025, 1028.

[49] CP at 1012-13, 1023-24, 1027, 1029, 2199.

mislead."[50] Here, it is clear that consents in lieu of director and shareholder meetings may satisfy Washington annual meeting and recordkeeping requirements. But the accuracy of those statements does not eliminate their likelihood to mislead in the context of the annual minutes solicitation. Consumers are likely misled by the net impression that CRS is associated with the government and that consumers are required to return the completed form with a fee.

CRS also focuses on its disclaimers, but courts have recognized that disclaimers do not always cure the potential for deception.[51] Here, the disclaimer "THIS IS NOT A GOVERNMENT DOCUMENT" is just underneath the return address on the envelope and is overshadowed by a large all caps and bold "IMPORTANT" notation on the face of the envelope just above "Annual Minutes Requirement Statement." The all-caps disclaimer in the instructions, that CRS is not a government agency and does not have a contract with a government agency is one-third down the page surrounded by unrelated instructions. Considering the format and placement, the disclaimers do not cure the potential for deception. Notwithstanding the disclaimers, CRS's solicitation created the misleading net impression that CRS is associated with a government agency and that consumers were obligated to return the form with a fee.

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[50] Kaiser, 161 Wn. App. at 719 (internal quotation marks omitted) (quoting Panag, 166 Wn.2d at 50).

[51] Panag, 166 Wn.2d at 50; Cyberspace.Com, 453 F.3d at 1200 (solicitation masquerading as a rebate check was misleading notwithstanding fine print notices accurately disclosing its true nature); Floersheim v. Fed. Trade Comm'n, 411 F.2d 874, 876 (9th Cir.1969) (disclaimer did not cure deceptive impression that demand letter was issued by United States government, as many individuals "would be unlikely to notice respondent's inconspicuous disclaimer or understand its import"); Indep. Dir. Corp. v. Fed. Trade Comm'n, 188 F.2d 468 (2d Cir.1951) (solicitation disguised as renewal notice deceptive notwithstanding fine print disclosures).

Additionally, because there is no dispute that the mass mailing was sent to over 79,000 consumers, generating 2,901 paid responses, there is no question of fact whether the misleading mailings reached, and thus had the capacity to deceive, a substantial portion of the public.

There is no issue of material fact for the trier of fact to decide.

Further, contrary to CRS's contentions, the mailings violated the Assurance of Discontinuance and are prima facie evidence of deceptive acts. The Assurance of Discontinuance precluded "[u]se of the term 'confidential', 'important information', 'approved', 'effective immediately', 'compliance', 'issued', or *any terms of similar import.*"[52] CRS used the words "IMPORTANT" and "Requirement" on its envelope and instructed recipients "IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM."[53]

The Assurance of Discontinuance barred language suggesting that "an enclosed solicitation requires immediate or other mandated response."[54] CRS used "Annual Minutes Requirement Statement," "If addressed name is incorrect, please forward document to an authorized employee representative Immediately," and "TIME SENSITIVE" on the envelope.[55] CRS also referred to a corporate uniform business identifier number on the vast majority of the solicitations.[56]

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[52] CP at 489, Assurance of Discontinuance (AOD) 2.1(b)(3) (emphasis added).

[53] CP at 1011-12, 1028-29.

[54] CP at 489, AOD 2.1(b)(5).

[55] CP at 1011, 1028.

[56] CP at 1029.

We conclude CRS's mailers violated the Assurance of Discontinuance. The violations are prima facie evidence of a CPA violation.

II. Penalties

CRS argues the trial court abused its discretion in imposing an excessive penalty because the State did not prove each recipient was deceived by the solicitation. In its cross appeal, the State contends the penalties were too lenient.

The CPA includes specific provisions for civil penalties, authorizing a penalty up to $2,000 per violation.[57] We review the trial court's assessment of civil penalties within the statutory limits for an abuse of discretion.[58] Each deceptive act is a separate violation. In State v. Ralph Williams' North West Chrysler Plymouth, Inc., our Supreme Court recognized that the CPA "vests the trial court with the power to assess a penalty for each violation."[59] And CPA penalties are valid even though "the trial court did not find that the consumers relied on appellants' wrongful conduct."[60] Similarly, because *each* of CRS's 79,354 solicitations had the capacity to deceive, each mailing was a violation, whether or not the recipient purchased its product.

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[57] RCW 19.86.140.

[58] See Ethridge v. Hwang, 105 Wn. App. 447, 459, 20 P.3d 958 (2001) (award of enhanced damages under the CPA reviewed for abuse of discretion); United States v. ITT Continental Baking Co., 420 U.S. 223, 229 n.6, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1975) (reviewing lower court assessment of civil penalty within statutory limits for Federal Trade Commission Act violation for abuse of discretion); see also Progressive Animal Welfare Soc'y v. University of Wash., 114 Wn.2d 677, 683-84, 688-89, 790 P.2d 604 (1990) (reviewing trial court's calculation of attorney fees mandated by statute for abuse of discretion).

[59] 87 Wn.2d 298, 317, 553 P.2d 423 (1976) (also recognizing the potential for multiple violations per consumer).

[60] Id.

Both parties cite United States v. Reader's Digest Association Inc., a similar mass mailing case under an analogous consumer protection standard, where a federal district court held that Reader's Digest committed 17,940,521 violations on the rationale that "each letter distributed in the Digest's mass mailings constituted a separate violation."[61] The United States Court of Appeals for the Third Circuit affirmed, holding "*each letter* included as part of a mass mailing constitutes a separate violation."[62] The court also identified five factors to consider in determining the appropriate penalty: (1) whether defendants acted in good faith, (2) injury to the public, (3) defendant's ability to pay, (4) desire to eliminate any benefits derived by the defendants from the violation at issue, and (5) necessity of vindicating the authority of the law enforcement agency.[63]

Here, the trial court focused on lack of good faith without addressing the other Reader's Digest factors. While the factors are helpful guidelines, we reject any suggestion by either party that a trial court is compelled to expressly address each factor.

Next, CRS argues RCW 19.86.140 limits the total civil penalty to $25,000.

RCW 19.86.140 provides, in relevant part:

> Every person who shall violate the terms of any injunction issued as in this chapter provided, shall forfeit and pay a civil penalty of not more than twenty-five thousand dollars.
>
> . . . .
>
> Every person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation.

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[61] 662 F.2d 955, 959-60 (3rd Cir. 1981).

[62] Id. at 966 (emphasis added).

[63] Id. at 967.

The $25,000.00 limit from the first paragraph does not apply here because the State did not plead or seek to enforce the Assurance of Discontinuance injunctive provisions. Instead, the State pleaded relief for violations of RCW 19.86.020 for deceptive acts. The trial court determined that the violations of the assurance of discontinuance constituted prima facie evidence of such CPA violations.

Relying on BMW of North America, Inc. v. Gore, CRS also argues this civil penalty violates due process.[64] To determine whether a $2,000,000 punitive damages award to one plaintiff in Gore violated due process, the United States Supreme Court looked to the reprehensibility of the defendant's conduct by considering specific factors.[65] But in Perez-Farias v. Global Horizons, Inc., our Supreme Court expressly declined to apply the Gore factors to cases involving statutory damages, noting "no state public policy or due process principles require reduction in the total damages mandated by statute."[66] And CRS does not provide any compelling authority[67] that courts have applied the Gore factors to cases involving statutory damages.[68]

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[64] 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

[65] The court in Gore looked at whether the harm caused was physical or economic, the conduct showed an indifference to or a reckless disregard of the health or safety of others, the target of the conduct had financial vulnerability, the conduct involved repeated actions or was an isolated incident, and if the harm was the result of intentional malice, trickery, or deceit. Id. at 575.

[66] 175 Wn.2d 518, 533-34, 286 P.3d 46 (2012).

[67] CRS cites to State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d. 585 (2003), but that case makes no mention of the applicability of the Gore factors to cases involving statutory damages.

[68] Although the State offers analysis as to how, if considered, the Gore factors would apply in this case, we need not apply those factors. See Perez-Farias, 175 Wn.2d at 532 n.15.

On cross appeal, the State argues the trial court did not impose penalties adequate to deter future violations, but does not establish that the trial court's decision was outside the range of acceptable choices. The trial court specifically noted the acceptable range of penalties in its order:

> The civil penalty set herein is less than the maximum potential civil penalty of $2,000 per violation, which would total $158,708,000. There is no mandatory "cap" on the penalty in this situation. The amount is also less than the potential harm of $9,919,250 that Defendants could have caused if all Washington consumers who had received Defendants' deceptive mailer had purchased the $125 product based on Defendants' deception.[69]

The penalties, combined with the restitution provisions, ensure compensation to injured consumers and, considering the likely response rate for such mass-mail solicitations, far exceed any potential profits. The penalty does deter similar misleading mailings.

We conclude the trial court did not abuse its discretion in setting the amount of penalties.

III. Fees

CRS argues the trial court abused its discretion in calculating and awarding the State a fee award in the amount of $337,593.20.

In a CPA enforcement action, the trial court has discretion to award the prevailing party the costs of the action, including reasonable attorney fees.[70] To determine a reasonable attorney fee, the court starts with the "lodestar" calculation.[71] That

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[69] CP at 2045.

[70] RCW 19.86.080(1); Ralph Williams, 87 Wn.2d at 314-15.

[71] Berryman v. Metcalf, 177 Wn. App. 644, 660, 312 P.3d 745 (2013).

calculation includes "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[72]

Here, the trial court engaged in the lodestar analysis and found that the hourly rates of the attorneys were reasonable. CRS argues that the requested government attorney rates are artificially high, but it was within the discretion of the trial court to accept the identified rates.[73] The trial court also concluded that the time detailed in the State's declarations was reasonable and appropriate. The State submitted a 28-page spreadsheet listing the individual time entries for which it sought fees. As CRS notes, several entries are vague and general. But the majority of the entries contain information identifying the nature of the work itemized. The trial court did not abuse its discretion in accepting the itemizations.

CRS argues the State failed to segregate its time spent on its abandoned theory that CRS misrepresented the legal standards for Washington corporate recordkeeping. The time itemized for a case should be discounted for hours spent on unsuccessful claims or otherwise unproductive time.[74] A reduction is warranted if "the hours at issue were unproductive or that they were not sufficiently related to the successful claim."[75]

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[72] Id.

[73] See W. Coast Stationary Eng'rs Welfare Fund v. City of Kennewick, 39 Wn. App. 466, 474-75, 694 P.2d 1101 (1985) (allowing fees for city attorney); Metro. Mortg. & Secs. Co., Inc. v. Becker, 64 Wn. App. 626, 632-33, 825 P.2d 360 (1992) (reasonable hourly rate for in-house counsel not limited to actual salary). We note that in the absence of any specific objection to the hourly rates, the record before us is not well developed regarding the basis for a challenge on appeal to the reasonableness of those rates.

[74] Berryman, 177 Wn. App. at 662 (quoting Bowers, 100 Wn.2d at 597).

[75] Pham v. Seattle City Light, 159 Wn.2d 527, 539, 151 P.3d 976 (2007).

The trial judge "is in the best position to determine which hours should be included in the lodestar calculation."[76]

Here, the question of segregation was squarely presented to the trial court. CRS argued a segregation was necessary for time spent by the State on its allegation that CRS inaccurately stated Washington corporate recordkeeping standards. Specifically, CRS pointed to the June 18, 2015 letter by the assistant attorney general as evidence the State abandoned that theory late in the litigation. The State replied:

> While the focus of the case has been on whether Defendants' solicitation created the deceptive net impression that the solicitation came from a government agency that consumers were required to return and whether Defendants violated the 2008 Assurance of Discontinuance (AOD), Defendants also engaged in deceptive acts and practices by offering to provide meeting minutes while actually providing corporate consents.[77]

The June 18 letter is largely consistent with the State's argument.[78] Although the State may have refined its theory of a corporate recordkeeping misrepresentation and the trial court granted summary judgment only on the "net impressions" theory, both alleged unfair and deceptive acts based on the same core of underlying facts of the contents of the mass mailings. Where the plaintiffs' claims involve a common core of facts and related legal theories, "'a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the [trial] court did not adopt each contention

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[76] Id. at 540.

[77] CP at 2111.

[78] The letter purports to clarify the State's legal theories and then reconcile its clarified position with an earlier interrogatory answer: "[I]t is our position that the Washington Business Corporation Act requires a corporation to take certain actions through a meeting or through executed consents. If a meeting is held, then minutes must be kept as permanent records. If a meeting is not held, and corporate actions are approved through executed consents, there is no requirement to prepare annual minutes. . . . We believe the State's response to Interrogatory No. 13 is consistent with the State's Causes of Action as plead." CP at 2088, 2090.

raised.'"[79] The trial court did not abuse its discretion in declining to require a segregation.

We conclude the trial court did not abuse its discretion in awarding $310,422.40 for the work performed by the State's four attorneys.

CRS also contends the trial court abused its discretion when it awarded fees for the State's paralegal and investigator.

For the recovery of fees of nonlawyers, the court must consider six factors identified in Absher Construction Co. v. Kent School District.[80] The State's declarations regarding the work of its investigator and paralegal do not specify how the services performed were legal in nature, whether they were supervised by an attorney, the qualifications of the person performing the work, or the reasonable community standards for the nature of work. CRS adequately raised the need to document requested fees. The trial court failed to address the governing factors.

We conclude the trial court abused its discretion when it included $10,405.80 for paralegal time and $16,764.90 for investigator time in the State's attorney fee award.

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[79] Martinez v. City of Tacoma, 81 Wn. App. 228, 243, 914 P.2d 86 (1996) (quoting Hensley v. Eckerhart, 461 U.S. 424, 440, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)).

[80] 79 Wn. App. 841, 845, 917 P.2d 1086 (1996) ("(1) the services performed by the nonlawyer personnel must be legal in nature; (2) the performance of these services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical; (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and (6) the amount charged must reflect reasonable community standards for charges by that category of personnel.").

IV. Costs

CRS argues the trial court erred in awarding costs beyond those allowed in RCW 4.84.010.

The standard of review for an award of costs involves a two-step process.[81] First, whether a statute, contract, or equitable theory authorizes the award is a matter of law, which we review de novo.[82] Second, if there is such authority, the amount of the award is subject to the abuse of discretion standard.[83]

Costs in a CPA action are limited to those set out in RCW 4.84.010.[84] RCW 4.84.010 does not authorize expert witness fees in an award of costs to the prevailing party.[85] Our Supreme Court has recognized that "'[w]here an expert is employed and is acting for one of the parties, it is not proper to charge the allowance of fees for such expert against the losing party as a part of the costs of the action.'"[86]

Here, the State included expert witness fees and the transcription of that expert witness testimony in its cost bill.

We conclude the trial court erred in awarding costs for expert witness fees and the transcription of that testimony.

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[81] Estep v. Hamilton, 148 Wn. App. 246, 259, 201 P.3d 331 (2008).

[82] Id.

[83] Id.

[84] Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 693-94, 132 P.3d 115 (2006).

[85] Estep, 148 Wn. App. at 263.

[86] Id. (alteration in original) (quoting Fiorito v. Goerig, 27 Wn.2d 615, 620, 179 P.2d 316 (1974)).

V. Fees on Appeal

The State requests fees and costs on appeal.

The prevailing party is entitled to attorney fees and costs on appeal if applicable law grants to a party the right to recover and that party includes such a request in its opening brief.[87] Under RCW 19.86.080(1), this court has discretion to award the prevailing party reasonable attorney fees and costs.[88]

We conclude, upon compliance with RAP 18.1, the State is entitled to an award of reasonable attorney fees and costs.

CONCLUSION

We reverse the portion of the fee award as it pertains to work performed by the two nonlawyers and the award of costs relating to expert witness fees and transcription of expert testimony. As to all other issues, we affirm the trial court.

WE CONCUR:

Mann, J.

Cox, J.

[87] RAP 18.1.

[88] Kaiser, 161 Wn. App. at 726.

APPENDIX B

RCW 4.84.010

Costs allowed to prevailing party—Defined—Compensation of attorneys.

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

(1) Filing fees;

(2) Fees for the service of process by a public officer, registered process server, or other means, as follows:

(a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.

(b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;

(3) Fees for service by publication;

(4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;

(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;

(6) Statutory attorney and witness fees; and

(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 19.86.080

Attorney general may restrain prohibited acts—Costs—Restoration of property.

(1) The attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

(2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

(3) Upon a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

RCW 19.86.090

Civil action for damages—Treble damages authorized—Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

RCW 19.86.100

Assurance of discontinuance of prohibited act—Approval of court—Not considered admission.

In the enforcement of this chapter, the attorney general may accept an assurance of discontinuance of any act or practice deemed in violation of this chapter, from any person engaging in, or who has engaged in, such act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of the superior court of the county in which the alleged violator resides or has his or her principal place of business, or in Thurston county.

Such assurance of discontinuance shall not be considered an admission of a violation for any purpose; however, proof of failure to comply with the assurance of discontinuance shall be prima facie evidence of a violation of this chapter.

RCW 19.86.140

Civil penalties.

Every person who shall violate the terms of any injunction issued as in this chapter provided, shall forfeit and pay a civil penalty of not more than twenty-five thousand dollars.

Every person, other than a corporation, who violates RCW 19.86.030 or 19.86.040 shall pay a civil penalty of not more than one hundred thousand dollars. Every corporation which violates RCW 19.86.030 or 19.86.040 shall pay a civil penalty of not more than five hundred thousand dollars.

Every person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation: PROVIDED, That nothing in this paragraph shall apply to any radio or television broadcasting station which broadcasts, or to any publisher, printer or distributor of any newspaper, magazine, billboard or other advertising medium who publishes, prints or distributes, advertising in good faith without knowledge of its false, deceptive or misleading character.

For the purpose of this section the superior court issuing any injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for the recovery of civil penalties.

With respect to violations of RCW 19.86.030 and 19.86.040, the attorney general, acting in the name of the state, may seek recovery of such penalties in a civil action.

RCW 19.86.920

Purpose—Interpretation—Liberal construction—Saving

The legislature hereby declares that the purpose of this act is 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 fair and honest competition. It 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 and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

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