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No. 956227

SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN P. KOZOL, LARRY BALLESTEROS,
KEITH CRAIG, and KEITH BLAIR,

Petitioners,

v.

JPAY, INC.,
a foreign corporation,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

JPay, Inc., (“JPay”) has a contract with the Washington State Department of Corrections (“DOC”). This contract allows JPay the opportunity to sell electronic media devices, and related content, to inmates. JPay’s products are designed for the prison environment.

Petitioners are inmates housed by the DOC. Petitioners opted to purchase electronic media devices from JPay and additionally opted to purchase content (*e.g.*, music) playable on those devices. JPay also has a contract with each of the Petitioners—as they accepted User Agreements when they purchased their electronic devices. The User Agreements provided a warranty for up to one year. Petitioners’ devices all functioned for over a year. Petitioners’ devices eventually failed and JPay replaced the old devices with new, newer model devices. Petitioners’ new devices play the digital content downloaded for the old devices. Petitioners continue to use their new devices and continue to purchase content.

JPay makes some money selling devices, but more money selling content—*e.g.*, songs that can be downloaded. It would be bad business for JPay to intentionally disrupt the ability of inmates to download content. However, Petitioners alleged JPay intentionally malfunctioned Petitioners’

electronic devices so Petitioners could not download content for a period of time, or access content they previously purchased, until they received new devices. Petitioners have no evidence to support their theory and also no evidence of damages. Petitioners' causes of action were dismissed on summary judgment.

On appeal, the complete dismissal of Petitioners' lawsuits was affirmed. The Court of Appeals decided that: there is no evidence that JPay acted unfairly or deceptively; there is no evidence that JPay acted willfully or intentionally; there is no evidence that JPay's User Agreements are unconscionable; and there is no evidence that a dispute exists or is imminent regarding JPay's pricing for optional, downloadable content. The Court of Appeals also decided that: Petitioners' post-motion requests for reconsideration did not include evidence material to the lawsuit and/or evidence that Petitioners were unable to present in a timely manner; Petitioners did not have a good reason to request a continuance and the continuance was not likely to lead to the discovery of material evidence; and Petitioners' requests for discovery were overbroad and sought privileged information.

II. COUNTERSTATEMENT OF ISSUES

JPay submits there is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. However, if review were accepted, the issues before this Court would be:

A. Are Petitioners' claims limited in whole or in part based on applicable contracts, which contracts Petitioners have largely ignored in this case?

B. Do Petitioners' claims fail in whole or in part without further analysis in the absence of credible damages evidence?

C. Is the Court of Appeals' decision consistent with published authority?

D. Is this case absent of significant issues under the state or federal constitutions, and otherwise lack issues of substantial public interest?

III. COUNTERSTATEMENT OF THE CASE

Petitioners are each incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington, and received their subject JP3s in 2012. Their JP3s stopped working in May or June 2015, which was after limited warranties associated with the JP3s had expired. CP 90-91.

Petitioners do not allege in their Complaints that JPay had any contract with them and Appellants do not allege breach of contract as a cause of action. The only contract referenced in Petitioners' Complaints is JPay's contract with DOC. Petitioners' Complaints conveniently ignore the applicable User Agreements and Limited Warranties. CP 91-94.

JPay complied with its DOC contract. JPay also complied with the terms of its User Agreements and Limited Warranties. CP 90-97.

In the first six months of 2015, thirty-three offenders in Washington State who had purchased JP3s reported their players had malfunctioned. In July 2015, another fifty-two offenders reported malfunctions. With the increasing number of malfunctions, JPay was able to determine that new software designed for new model players was causing many of the malfunctions. CP 94-95.

Once JPay discovered that new software was the likely issue for malfunctions, JPay offered any offender with a malfunctioning JP3 a free upgrade to a newer model player regardless of warranty status. Offenders who had already purchased new model players were given a credit to their JPay accounts. In October 2015, for example, 107 JP3s were reported as malfunctioning so that offenders could receive a free upgrade. CP 95.

JPay has completely discontinued JP3s. Newer models are being sold instead of JP3s. CP 95.

Within a couple of months of Appellants reporting JP3 malfunctions, JPay was able to discover the cause of malfunctions and offered Appellants a free upgrade to a player that would play the same music Appellants had previously downloaded on their JP3s. CP 95-97.

There is no allegation or evidence in this case that JPay has breached any contract. There is no evidence in this case that JPay has acted unreasonably. And there is no evidence in this case that Appellants have been damaged. The decisions by the trial court and Court of Appeals were sound and there is no reason for further review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court if one of four tests is met: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or the United States

is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

There are no issues presented by Petitioners that would fall under one of the four tests as outlined by RAP 13.4(b). The Court of Appeals' holding in this case is not in conflict with any decisions within either the Washington Supreme Court or another division of the Court of Appeals. Further, Petitioners allege the decision of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court, but none of the arguments presented specifically address this test.

A. The Court used the proper standards of review in affirming the trial court's decisions.

Petitioners' argument is framed as an issue with reviewing a trial court's denial of a Motion for Reconsideration. Review of a Motion for Reconsideration is based on an abuse of discretion. *Wagner Dev. Inc. v. Fid & Deposit Co. of Md.*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999). Petitioners do not dispute this where a Motion for Reconsideration is submitted after an Order granting summary judgment, but argue the Court of Appeals should consider new evidence submitted with a Motion for

Reconsideration as part of the Court's *de novo* review of a summary judgment order.

Petitioners then argue the Court did not consider the new evidence submitted with their Motion for Reconsideration. However, the Court's Opinion repeatedly indicates that Petitioners' new evidence was reviewed and the Court determined that Petitioners failed to demonstrate the new evidence was material to the case. Opinion pp. 16-19.

Petitioners' arguments in favor of review mischaracterizes the Court of Appeals' analysis. The Court's decision is not in conflict with a decision of other Courts and does not otherwise merit additional review.

B. Petitioners failed to establish that an actual dispute exists, and lacks standing for a UDJA claim.

Petitioners argue the Court erred in denying declaratory relief and that Petitioners had standing to bring a claim under the Uniform Declaratory Judgments Act ("UDJA"). The Court concluded that Petitioners lacked standing to bring an action under the UDJA. Opinion p. 13. Petitioner Stephen Kozol interjects his own opinion that "'standing' to bring a UDJA claim is different than the criteria of showing an 'actual, present and existing dispute' . . ." Petition for Review p. 11.

Petitioners argue the third prong of justiciability applies and that it has been construed as encompassing standing, citing *Lee v. State*. Petition for Review p. 11; *Lee v. State*, 185 Wn.2d 608, 618, 374 P.3d 157 (2016). However, Petitioners' argument is undeveloped, and, ultimately flawed.

To proceed under the UDJA, a person must present a justiciable controversy and establish standing. *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 938, 939, 121 P.3d 95, 101 (2005), *aff'd*, 160 Wn. 2d 173, 157 P.3d 847 (2007). Justiciability is a threshold requirement that must be satisfied before proceeding to a litigant's claims. *Huff v. Wyman*, 184 Wn. 2d 643, 650, 361 P.3d 727, 731 (2015) [emphasis added]. The focus is "whether the question sought to be adjudicated is appropriate for the court to address." *Huff* at 650. To establish standing, a party must have an interest that is within the zone of interests protected by a statute or a constitutional right, and they have to have suffered an injury in fact. *Nelson* at 939. Petitioners did not have an interest that was protected by a statute or constitutional right, and even if they did, they certainly did not suffer an injury in fact.

Petitioners lacked both justiciability and standing, and both are required to proceed under the UDJA. The Court was correct to determine

that Petitioners lacked standing to proceed under the UDJA. This decision is not in conflict with a decision of other Courts and does not otherwise merit additional review.

C. Rejecting Petitioners' UDJA claim via summary judgment was appropriate, and Petitioners have failed to properly state a legal argument.

Petitioners incorrectly summarize the Court's reference to the declaratory judgment decision of the trial court. Petitioners focus on a comment regarding the trial court's decision to decline to issue a declaratory judgment. Opinion p. 11. However, this comment had no bearing on Petitioners' failure to establish an actual dispute existed. Opinion p. 11. Petitioners cite no relevant case law to support their argument that the decision conflicts with other decisions within the Court of Appeals and the Supreme Court. Rather, Petitioners revert to their argument on the standard. Petition for Review p. 12; *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001). Petitioners appear to confuse several of their arguments here, and misconstrue the Court's wording. Regardless, no clarification is needed because the Court properly determined that Petitioners failed to establish standing and could not proceed under the

UDJA. Opinion p. 12. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court or another division of the Court of Appeals and does not otherwise merit additional review.

D. The Court correctly determined that Petitioners failed to establish a claim for a CPA violation, conversion or trespass.

Petitioners argue the Court erred in affirming the dismissal of claims for a CPA violation, conversion, and trespass to chattels, and Petitioners allege the Court's decisions in these respects conflict with other appellate decisions. Petition for Review pp. 14-15. Petitioners cite *Demelash v. Ross Stores, Inc.*, in support of their argument. Petition for Review p. 15; 105 Wn. App. 508, 522, 20 P.3d 447 (2001). However, *Demelash* does not substantiate Petitioners' argument, and, instead supports the Court's decision.

In *Demelash*, there was a material fact as to whether the store engaged in conversion after withholding the customer's coat for sixteen days. 105 Wn. App. at 522. In reviewing a claim for conversion, *Demelash* provides that a defendant is liable for conversion if he *willfully and without legal justification* deprives another of ownership of his property. *Id.* at 522 [emphasis added]. Petitioners failed to show that JPay willfully interfered

with Petitioners' JP3s. Opinion p. 9. Further, Petitioners failed to show they met the elements of a CPA violation or trespass to chattles. The Court was correct to determine Petitioners failed to show a genuine issue of material fact regarding JPay's alleged willful interference with the JP3s. Opinion p. 9. The decision of the Court of Appeals is not in conflict with a decision of another division of the Court of Appeals and does not otherwise merit additional review.

E. Petitioners have failed to show an injury occurred that would survive a motion for summary judgment.

Petitioners fail to cite relevant case law substantiating their apparent argument that the Court's decision to deny reconsideration conflicts with other decisions of the Court of Appeals and the Supreme Court. Petition for Review pp. 15-16. The cases cited by Petitioners are Washington Supreme Court cases, and neither furthers their argument.

The *Vallandigham* decision cited by Petitioners supports JPay's position because no reasonable decision maker could conclude that Petitioners' claims have merit based on the evidence and arguments in this case. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805(2005). Petitioners have not shown their JP3 device was any

more special than any other player, and yet Petitioners allege without any factual basis or reasonable inference that JPay targeted their JP3 players to the point where they purposely malfunctioned. Petition for Review p. 16. Again, Petitioners have neither substantiated their conspiracy theory with any supportive case law nor have they showed where the Court's decision was contrary to other decisions of the Court of Appeals and the Supreme Court.

F. The Court properly determined the evidence “seized” did not comport with CR 59(a)(4), and it was proper to deny Petitioners’ RAP 9.11 motion seeking to introduce immaterial evidence to the appellate court.

The Court may direct that additional evidence based on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review; (2) the additional evidence would probably change the decision being reviewed; (3) it is equitable to excuse a party's failure to present the evidence to the trial court; (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive; (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily

expensive; and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court. RAP 9.11(a). A RAP 9.11 motion will be granted only “when a movant [meets] the six criteria in RAP 9.11(a).” *See, Spokane Airports v. RMA, Inc.* 149 Wn. App. 930, 937, 206 P.3d 364 (2009); *Mansour v. Mansour*, 126 Wn. App. 1, 7, 131 Wn. App. 255, 128 P.3d 1241 (2006)¹, and *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986).²

Petitioners’ arguments fail to demonstrate that the Court was incorrect in its decision to deny the RAP 9.11 motion. Moreover, Petitioners fail to demonstrate that the decision in this regard conflicts with other decisions of the Court of Appeals or the Supreme Court.

G. An out-of-state defendant is not required to appear for a noted CR 30(b)(6) deposition when the deposition is located within Washington State.

Petitioners incorrectly interpret the Court’s decision and rely on a footnote, rather than the substance of the opinion itself. Regardless, Petitioners’ pursuit of discovery included a subpoena to depose JPay

¹ Improperly cited by Kozol as “129 Wn. App. 1.”

² Kozol also cited *State v. Gossage*, 138 Wn. App. 298, 156 P.3d 951 (2007). However, this case was reversed in part by *State v. Gossage*, 165 Wn.2d 1, 195 P.3d 525 (2008), and the case does not support his argument.

representatives, who are out-of-state employees of a foreign party. Opinion p. 16. Nothing in the Opinion conflicts with decisions of the Court of Appeals or the Supreme Court.

Deposing a witness is a two-part process. First, CR 30(b)(6) provides that “a party may in a notice and in a subpoena name as the deponent...a private corporation.” Petitioners cite CR 45(d)(2), which pertains to privileged information. Petition for Review p. 20. The Court’s opinion cites CR 45(e)(2), which is the applicable rule. Opinion p. 16.

CR 45(e)(2) provides that “a nonresident of the state may be required to attend an examination, produce documents, or permit inspection only in the county where the person is served with a subpoena, *or within 40 miles from the place of service*, or at such other convenient place as is fixed by an order of the court.” [Emphasis added]. Petitioners argue that out-of-state JPay employees should have been compelled to appear in Washington State for depositions. CP 355, 120-121; Petition for Review p. 19. Petitioners fail to explain how it would be fair for a Florida corporation based out of Miami to fly employees out to a Washington State penitentiary for a deposition in a case that had no legal basis.

At the end of the analysis on this issue, the Court's decision to affirm dismissal of Petitioners' claims was based on Petitioners' failure to demonstrate that a deposition of a JPay employee, wherever the deposition were to take place, was likely to result in evidence that might create a material issue of fact. Review should not be granted based on an issue that is essentially a moot point.

H. Petitioners' Motion to Compel discovery was overbroad, sought privileged, trade secret information, and was properly denied.

Petitioners' Motion to Compel discovery was denied, and the denial was affirmed, because "Kozol's requests for discovery were overbroad and sought privileged information." Opinion p. 14.

Petitioners argue they have figured out the software and so it is not a protected trade secret. Petition for Review p. 23. Petitioners misconstrue the case law, and incorrectly conclude that JPay does not have protected trade secrets in its older products. Petitioners assert that JPay had an obligation to hire an independent software expert to illustrate the accessibility of the software. Petition for Review p. 24. Petitioners oversimplify the issue and rationalize that because other inmates have

accessed a code, then JPay's code must be "readily available" and is considered an "open source."


Petitioners' argument is circular and self-serving, and does nothing to illustrate that the Court's decision conflicts with decisions of the Court of Appeals and the Supreme Court. Moreover, Petitioners continue to ignore the main point—which is that even if they were provided with JPay's code, there is no way to determine from the code whether a coding error was willful. Everyone agrees there was a software glitch in this case, and confirming the glitch by diagnosing the code does not support Petitioners' underlying claims.

V. CONCLUSION

For the reasons stated above, this Court should deny review.

RESPECTFULLY SUBMITTED this 19th day of April, 2018.

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Attorneys for Respondent



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PROOF OF SERVICE

I certify that on April 19, 2018, I caused to be served a copy of the foregoing document on all parties or their counsel of record via U. S. mail, postage prepaid:

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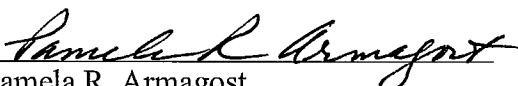
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19 day of April, 2018, at Olympia, Washington.


Pamela R. Armagost

BEAN GENTRY WHEELER & PETERNELL

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