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Court of Appeal Cause No. 761463

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIAN & KAREN HANDLIN, *Respondents.*

v.

ON-SITE MANAGER, INC., *Petitioner,*

PETITION FOR REVIEW

David W. Silke
WSBA No. 23761
Shannon L. Wodnik
WSBA No. 44998
Attorneys for Petitioner On-Site Manager, Inc.

Gordon Rees Scully Mansukhani, LLP
701 Fifth Avenue, Suite 2100
Seattle, Washington 98104-5017
(206) 695-5100

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A. IDENTITY OF PETITIONER

Petitioner On-Site Manager, Inc. ("On-Site") asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition for Review ("Petition").

B. COURT OF APPEALS DECISION

On April 23, 2018, the Court of Appeals, Division One, issued its opinion affirming, in part, and reversing, in part, the trial court's grant of Respondents' motion for summary judgment. The trial court ruled that On-Site failed to make certain statutorily required disclosures. Division One affirmed two of the four violations and reversed the remaining two violations. Division One affirmed the trial court's ruling that On-Site committed a willful violation by failing to reinvestigate and timely notify Respondents of results of reinvestigation, as required by Washington's Fair Credit Reporting Act ("WFCRA"). Division One also affirmed the trial court's ruling that On-Site committed a willful violation by not disclosing its source of information as required by the WFCRA. A copy of the decision is in the Appendix at pages A-1 through A-15.

On May 30, 2018, Division I denied Petitioner's Motion for Reconsideration of its Order. A copy of the Order denying Petitioner's Motion for Reconsideration is in the Appendix at page A-16.

C. ISSUES PRESENTED FOR REVIEW

1. Alleged violations of the WFCRA cannot be considered willful if the agency's interpretation is objectively reasonable and has foundation, and sufficiently convincing justification, in established legal precedent. Division One held that On-Site failed to identify the "source" of the judgment, but *Meyers v. Nat'l Tenant Network, Inc.* is the only published authority in this jurisdiction interpreting the term "source" and held that "source" means the original entity that publicizes the information, not intermediary or secondary sources. The Court should review Division One's ruling since On-Site identified the original source of the information at issue, in accordance with *Meyer.*

2. Alleged violations of the WFCRA cannot be considered willful if the agency's interpretation is objectively reasonable and has foundation and sufficiently convincing justification in established legal precedent. Division One held that On-Site failed to respond to Plaintiffs' alleged dispute. When viewed in the light most favorable to On-Site, the evidence shows that Forestview represented that it was acting as Respondents' agent in corresponding with and providing documents to On-Site that On-Site requested Plaintiffs provide. The Court should review Division One's holding since On-Site was entitled to rely on that representation when it responded in accordance with RCW 19.182.090.

D. STATEMENT OF THE CASE

This is a Washington Fair Credit Reporting Act ("WFCRA") case arising from Forestview Apartments' ("Forestview") denial of Respondents Brian and Karen Handlins' ("Respondents") rental application. Forestview obtained a rental report from On-Site Manager, Inc. ("On-Site" or "Petitioner") that accurately and completely identified a King County Superior Court-Seattle eviction judgment and several unpaid and past due collection accounts as belonging to Respondents.[1] The parties disagree on whether the King County Superior Court-Seattle is the "source" of the eviction judgment. Based on On-Site's rental report for the Respondents, Forestview calculated its own rental score and recommendation for Respondents. The parties disagree on whether On-Site recorded and retained Forestview's internal rental score and recommendation.[2] The parties also disagree on whether On-Site was required to disclose Forestview's own internal rental score and recommendation.

[1] Respondents acknowledged that the eviction judgment was correct and accurate and that the past due and unpaid collection accounts were also accurate. Clerk's Papers ("CP") 543:19- CP 545:25; CP 546:22-CP 548:10; CP 550 – CP 576; CP 258:2- CP 259:5; CP 259:20-24.CP 541:1-19.

[2] On-Site presented evidence that it does not retain or record Forestview's independent rental score or recommendation. CP 271, ¶10; CP 216:6-22; *see also* CP 212:6-7, 14; CP 210:25 – CP 211:1; CP 960 at 36:2-8; CP 975 at 93:16-95:14; CP 983 at 128:2-7. Respondents presented no evidence that On-Site recorded or retained Forestview's independent rental score or recommendation. *See generally*, Clerk Papers.

After Forestview denied the Handlins' application, Ms. Handlin contacted On-Site to find out why their application was denied. On-Site told Ms. Handlin that Forestview's Adverse Action Letter, addressed to her, identified an eviction judgment and poor finances as the reasons for the denial. The Handlins acknowledged that the judgment and financial information was correct and accurate.

Ms. Handlin then took an incomplete settlement agreement related to a federal case filed by her and her husband to Forestview. Ms. Handlin wanted Forestview to send this document to On-Site on the Handlins' behalf. Forestview sent the document to On-Site, on the Handlins' behalf, and asked On-Site to update the Handlins' report. The incomplete document did not establish that the judgment information was incomplete or inaccurate.

Nevertheless, upon Forestview's request, On-Site regenerated[3] the rental report, noted that the eviction was resolved, told Forestview the investigation was complete, and sent the regenerated report back to Forestview. Forestview continued to deny the Handlins' application because of their poor finances. Forestview provided the regenerated

[3] On-Site does not maintain any records of any consumer data in its own files and does not retain copies of issued reports from which data may be mined for the creation of new reports. CP 271, ¶10. Instead, each time On-Site issues a rental report or responds to a disclosure request, On-Site must re-purchase all consumer data, at its own expense, and re-create a new report. *Id.*; *see also* CP 524:4-9; CP 959 at 32:14- CP 960 at 33:9.

report to the Handlins along with a Summary of your Rights under the Fair Credit Reporting Act ("FCRA Disclosure") and a Washington State Applicant Addendum to a Summary of your Rights under the Fair Credit Reporting Act ("WFCRA Disclosure") statement. The parties disagree about whether Forestview gave Ms. Handlin the regenerated report along with the FCRA and WFCRA Disclosure statements.

The Handlins' attorney, Mr. Dunn, subsequently sent On-Site a letter requesting the Handlins' consumer information, their credit score, and all information recorded and retained by On-Site. In the letter, the Handlins' attorney authorized U.S. Mail as an acceptable means of disclosure. The day after verifying the Handlins' identities, On-Site regenerated the Handlins' rental report and mailed it, a FCRA Disclosure, and a WFCRA Disclosure to the Handlins' attorney. Mr. Dunn and On-Site disagree about whether On-Site sent the WFCRA Disclosure.

The Handlins subsequently sued On-Site, claiming that On-Site: (1) violated RCW 19.182.070 by failing to disclose Forestview's rental score and recommendation, failing to provide a WFCRA Disclosure, and failing to identify "LexisNexis" as the source of the eviction judgment; (2) violated RCW 19.182.080 by failing to provide disclosures via email; and (3) violated RCW 19.182.090 by failing to make reinvestigation

disclosures. In the face of overwhelming evidence to the contrary, the trial court granted the Handlins' summary judgment on these claims.

On-Site appealed the trial court's grant of the Handlins' summary judgment motion on the grounds that, among other things, numerous issues of material fact should have precluded judgment. On-Site also appealed the trial court's ruling on Plaintiffs' Motion to Quash and for Sanctions, as well as the trial court's final order and damages award. Division One reversed the trial court's ruling in part, but it affirmed the trial court's ruling that On-Site willingly failed to provide Respondent's Reinvestigation Disclosures, and affirmed the trial court's ruling that On-Site willingly failed to disclose the source of information in its report. On-Site moved for reconsideration of Division One's Order, but the motion was denied.

E. ARGUMENT AND AUTHORITY

1. The Court of Appeals' Decision Conflicts with Other Decisions

Division One's unpublished opinion on April 23, 2018 (the "Opinion") terminates review of On-Site's appeal regarding Plaintiffs' claims under RCW 19.182.090 and RCW 19.182.070 because it upholds the trial court's determinations. Review of the Opinion is warranted because it is in conflict with other authorities.

2. Division One Failed To Properly Apply *Safeco* Standards To On-Site's Alleged RCW 19.182.070 Violation

The Washington state courts have not interpreted the term "source" as it is used in the WFCRA. However, the Ninth Circuit has interpreted the term "source" as used in the WFCRA's federal counterpart in *Meyer v. Nat'l Tenant Network, Inc.*[4] In *Meyer*, the defendant CRA erroneously reported three criminal sex offense records and plaintiff was denied employment as a result.[5] The defendant obtained the sex crime information from a third-party vendor and not directly from courthouses.[6] The defendant did not identify its third-party vendor to Mr. Meyer but did identify the court that issued the orders.[7] Mr. Meyer argued that "source" required the defendant to identify the third-party vendor as well.[8]

The Ninth Circuit disagreed. It determined that under the plain reading of the statute, "source" meant the "public entity that reports or publicizes the public record information."[9] The Ninth Circuit determined that requiring a CRA to disclose a "chain of sources" or an intermediary

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[4] *Anaya v. Graham*, 89 Wn. App, 588, 592, 950 P.2d 16 (1998)(WFCRA is substantially based on the FCRA, judicial interpretation of the federal statute is persuasive and entitled to substantial weight when interpreting the similar Washington state counterpart); *Payne v. Children's Home Soc'y*, 77 Wn. App. 507, 512, 892 P.2d 1102 (1995) (same); *Fahn v. Cowlitz Cy.*, 93 Wn.2d 368, 376, 610 P.2d 857 (1980)(same).
[5] *Meyer v. Nat'l Tenant Network, Inc.*, 2014 U.S. Dist. LEXIS 94669*2-3 (DC N. Cal. 2014).
[6] *Id.* at *3.
[7] *Id.* at *3, 8.
[8] *Id.* at *8.
[9] *Id.* at *8-9.

source was "disconnected from [the information's] creation" and thus not relevant to the consumer.[10]

This case is similar to *Meyer*. The Handlins acknowledge that the rental report disclosed the original source of the judgment - the Seattle Superior Court.[11] Nevertheless, The Handlins contended that RCW 19.182.070 requires the disclosure of a third-party vendor in addition to the court information. The Handlins cited **no** authority for this position, and there is no Washington state precedent supporting the position. The only precedent in this jurisdiction interpreting "source" is *Meyer*. *Meyer* supports disclosure of the original public entity that created the information, which On-Site disclosed in the report. *Meyer* does not require disclosure of intermediary or secondary sources.

Division One's ruling with regard to On-Site's alleged willful violation of RCW 19.182.070 fails to account for the United States Supreme Court's holding in *Safeco* that if an agency's actions or analysis is objectively reasonable and substantially justified in light of legal precedent, it cannot be considered willful.[12] *Meyer v. Nat'l Tenant Network, Inc.* is the **only** published opinion in this jurisdiction interpreting

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[10] *Id.* at *9.
[11] CP 543:19-CP 545:25; CP 546:22-CP 548:10; CP 550-CP 576; CP 258:2-CP 259:5; CP 259:20-24; CP 541:1-19; *also see* Respondent Brief at 17.
[12] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69-70, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007).

the term "source" and held that only disclosure of the original source was required.

In determining that On-Site willfully violated the WFCRA, Division One ignored that On-Site's report and analysis are in accord with *Meyer*. Like the report at issue in *Meyer*, the Handlins' rental report identified the superior court that issued the judgment.[13] Given the opinion and sound reasoning in *Meyer*, On-Site's understanding that disclosing the original source of the judgment was reasonable in light of the legal guidance "clearly established" at the time.[14] On-Site's compliance with such authority cannot be deemed a willful violation of RCW 19.182.070 under *Safeco*, even if this Court disagrees with the *Meyer* holding. Review is proper so that a proper *Safeco* analysis may be performed.

3. Division One Failed To Properly Apply *Safeco* Standards To On-Site's Alleged RCW 19.182.090 Violation

A company does not act in "reckless disregard" of the consumer statute unless the action is "not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that

[13] *Meyer*, 2014 U.S. Dist. LEXIS 94669, *8-9.
[14] *Safeco*, 551 U.S. at 70.

was merely careless."[15] The United States Supreme Court opined that a reading of a statute that is objectively reasonable, albeit erroneous, is not negligent or reckless for purposes of determining whether an alleged violation is willful.[16] The United States Supreme Court went on to explain that even though a court may not agree with an agency's analysis, if the analysis has foundation and "sufficiently convincing justification" in legal authority, then it cannot be deemed a willful violation.[17]

1. The Appellate Court Ignored Federal Precedent Requiring That A Disputed Item Be Inaccurate To Obtain Relief For An Alleged Reinvestigation Violation

The Court of Appeals failed to take into account the federal precedent indicating that a plaintiff must demonstrate that a disputed item is inaccurate in order to obtain relief for an alleged reinvestigation violation. Washington state courts have not yet had occasion to consider this element. Judicial interpretation of the federal counterpart is persuasive and entitled to substantial weight.[18]

The FCRA provides, in relevant part:

> [I]f the completeness or accuracy of any item of

[15] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007).
[16] *Id.* at 69.
[17] *Id.* at 69-70.
[18] *Anaya v. Graham*, 89 Wn. App, 588, 592, 950 P.2d 16 (1998); *Payne v. Children's Home Soc'y*, 77 Wn. App. 507, 512, 892 P.2d 1102 (1995); *Fahn v. Cowlitz Cy.*, 93 Wn.2d 368, 376, 610 P.2d 857 (1980).

> information contained in a consumer's file at a consumer reporting agency is disputed by the consumer...[19]

The Ninth Circuit requires an actual inaccuracy to exist for a plaintiff to state a claim under 15 U.S.C. §1681i.[20] The inaccuracy requirement comports with the purpose of the FCRA: "to protect consumers from the transmission of inaccurate information about them."[21] Like the FCRA, the purpose of the WFCRA is to assure consumer information is accurately reported.[22] Based on judicial precedent, the accuracy of a consumer's report should be guided by whether it is patently incorrect or materially misleading.[23]

The Handlins did not sue On-Site for issuing an incomplete or inaccurate report because the Seattle judgment information was accurate.[24] The Handlins produced **no** evidence that the Seattle Superior Court docket information was inaccurate or adversely misleading. Thus, in accordance with established judicial precedent, the Handlins' claim should have been

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[19] 15 U.S.C. §1681i(a)(1)(A).
[20] *Carvalho v. Equifax Info. Servs., LLC*, 615 F.3d 1217, 1230 (9th Cir. 2010); *Dennis v. BEH-1, LLC*, 520 F.3d 1066 (9th Cir. 2008); *see also DeAndrade v. Trans Union LLC*, 523 F.3d 61, 67 (1st Cir. 2008)(collecting cases).
[21] *Carvalho*, 615 F.3d at 1230.
[22] RCW 19.182.005.
[23] *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009).
[24] CP 550 (Item # 16). The judgment is still valid. CP 550 – 576; *King County Superior Court Case No. 08-2-36918-8 at Dkt. no. 14* (Judgmt&Ord for Writ of Restitution).

dismissed because the information reported in the rental report was and still is accurate. Review is proper.

2. The Appellate Court Failed To Properly Apply *Safeco* Standards To On-Site's Alleged Violation of RCW 19.182.090 In Light of All Reasonable Inferences From Evidence

When viewed in the light most favorable to On-Site, there are (1) material inconsistencies in Ms. Handlin's testimony regarding the alleged dispute,[25] and (2) evidence that warrants the inference that On-Site does not maintain **any** files or consumer information and did not at the time of the alleged dispute.[26] Accordingly, there is a material issue regarding whether the Handlins' disputed information **on file with On-Site at the time of the dispute**. These inferences should have been made in On-Site's favor and necessitated remand on the issue of whether RCW 19.182.090 is applicable in this case. Instead, the Court of Appeals erred by making inferences in favor of the Handlins and against On-Site, and it ignored disputed evidence that was in controversy.

Additionally, when viewed in the light most favorable to On-Site, the inference should have been made that Forestview communicated to

[25] *See* CP 273; CP 152:22 – CP 153:3; CP 273; *see also* CP 145:14-18; CP 961 at 39:21-40:2.
[26] CP 271, ¶10*; see also* CP 524:4-9; CP 959 at 32:14- CP 960 at 33:9; CP 216:6-22; CP 190:17 – CP 191:8; CP 212:6-7, 14; CP 210:25 – CP 211:1; CP 212:6-7, 14; CP 975 at 93:16 – 95:14; CP 983 at 128:2-7; *see also* Opinion at 7.

On-Site that it was acting as the Handlins' agent.[27] The inference also should have been made that On-Site provided the Handlins' agent with the required RCW 19.182.090 disclosures.[28] On-Site was legally entitled to rely on this representation.[29] When viewed in the light most favorable to On-Site, the evidence shows, and a reasonable juror could conclude, that Forestview was acting as the Handlins' agent, and that On-Site responded in kind.[30] Review is necessary and reversal required regarding this issue and the willfulness of the alleged violation.

F. CONCLUSION

Given the conflict between Division I's Opinion and other decisions, On-Site requests that this Court grant its Petition for Review.

RESPECTFULLY SUBMITTED this 29th day of June, 2018.

GORDON REES SCULLY
MANSUKHANI, LLP

/s/ David W. Silke

David W. Silke, WSBA No. 23761
Shannon L. Wodnik, WSBA No. 44998

[27] *See, e.g.* CP 273.
[28] CP 271:14-15; CP 280- CP 283; CP 298:11-23; RCW 19.182.090(8)(b)(iii).
[29] *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 913, 154 P.3d 882 (2007).
[30] CP 271:14-15; CP 280- CP 283; CP 298:11-23; RCW 19.182.090(8)(b)(iii).

CERTIFICATE OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on this 29th day of June, 2018, I caused a true and correct copy of the foregoing document to be served as indicated:

Attorneys for Plaintiffs:
Leticia Camacho
Northwest Justice Project
401 Second Avenue S, Suite 407
Seattle, WA 98104
Tel.: (206) 464-1519
Fax: (206) 624-7501

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/s/ Francine M. Artero
Francine M. Artero, Legal Secretary
fartero@grsm.com

Court of Appeal Cause No. 761463

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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APPENDIX TO PETITION FOR REVIEW

David W. Silke
WSBA No. 23761
Shannon L. Wodnik
WSBA No. 44998
Attorneys for Petitioner On-Site Manager, Inc.

Gordon Rees Scully Mansukhani, LLP
701 Fifth Avenue, Suite 2100
Seattle, Washington 98104-5017
(206) 695-5100

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRIAN and KAREN HANDLIN, Respondents, v. ON-SITE MANAGER, INC. Appellant.	No. 76146-3-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2018

BECKER, J. — In this appeal, we review an order granting summary judgment to plaintiffs on four alleged violations of the Washington Fair Credit Reporting Act. When plaintiffs were trying to rent an apartment, the defendant company provided information about them to a landlord. The plaintiffs sued to obtain disclosure of the information. The trial court found that the company failed to make certain statutorily required disclosures. We reverse two violations and affirm two violations.

This court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). All facts and reasonable inferences are considered in the light

most favorable to the nonmoving party, and all questions of law are reviewed de novo. Mountain Park, 125 Wn.2d at 341.

On August 5, 2013, respondents Brian and Karen Handlin submitted a rental application to Forestview Apartments in Renton. Appellant On-Site Manager is Forestview's tenant screening company. On-Site screens tenants according to the criteria furnished by the prospective landlord. Forestview submitted the application to On-Site through a web portal and got back in return a "Rental Report." The rental report, a copy of which the Handlins later obtained through discovery from Forestview, included a chart of categories that could be checked "Pass" or "Fail," a "Score" of 4.5 out of 10, and an "Overall Recommendation" to decline the application. Forestview declined the application and informed Karen Handlin she could obtain information about the reasons by contacting appellant On-Site.

Karen declares that she called On-Site and was told that the application was denied because the Handlins had been "'evicted.'" Karen replied that was inaccurate:

> I replied that we had not been evicted, and the On-Site representative stated that her computer showed we had been. I stated that we had settled the case out of court and had not been evicted and that I had court documents to support that. The On-Site representative stated that On-Site would "look at" documents if I submitted them.

Karen took her documents about the settlement to Forestview. These documents reflect that the Handlins were involved in a sale and leaseback transaction described by their attorney as a "complex real estate scam." The other party sued the Handlins for unlawful detainer. The Handlins countersued

for quiet title. The consolidated matters were removed to federal court and were settled in 2010. The record of the unlawful detainer action in King County Superior Court had previously caused problems for the Handlins in obtaining rental housing.[1]

On August 7, 2013, the Forestview assistant manager, Shaki McHayle, faxed the documents to On-Site and requested that On-Site update the Handlins' file "as necessary." On-Site's notes indicate that on August 9, an On-Site representative reviewed the documents and "updated the report" and then advised Forestview that the update did not change the recommendation to decline the application.

On August 16, 2013, an attorney representing the Handlins wrote to On-Site requesting copies of "any and all consumer reports you made to Forestview Apartments regarding the Handlins, all information in your file regarding the Handlins as of the time of this request, and the sources of all such information" as well as their "credit score" and how it was calculated. Having received no response, the attorney wrote again on August 26, 2013, repeating the request. A copy of the "credit report" was sent to the attorney; On-Site's notes indicate that it was sent on August 27. The report did not mention the pass/fail chart, the rental score of 4.5 or the recommendation to Forestview that the application be declined.

The Handlins eventually rented an apartment at a different complex, but they were concerned about their credit information being inaccurate, and they

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[1] Clerk's Papers at 180-84.

believed they had not received a full disclosure from On-Site. The Handlins filed suit against On-Site, alleging violations of the Washington Fair Credit Reporting Act, chapter 19.182 RCW. On-Site successfully moved to dismiss under CR 12(b)(6) for failure to state a claim. The Handlins appealed. This court reversed. Handlin v. On-Site Manager, Inc., 187 Wn. App. 841, 844, 351 P.3d 226 (2015).

On remand, the Handlins moved for summary judgment. The trial court found that On-Site had committed four of the alleged violations, three of them willfully. "Where there has been willful failure to comply with any requirement imposed [by the Washington Fair Credit Reporting Act], the consumer shall be awarded actual damages, a monetary penalty of one thousand dollars, and the costs of the action together with reasonable attorneys' fees." RCW 19.182.150. The court imposed statutory damages of $1,000 for each willful violation, totaling $6,000 (three violations against Karen and three against Brian). The court awarded attorney fees and granted an injunction ordering On-Site to cease and desist from further violations of the same type. On-Site appeals.

Injury

On-Site argues that the Handlins did not establish "Article III standing" because they did not demonstrate "injury in fact." This issue was decided against On-Site in the previous appeal. The Handlins are in state court, so they are not required to show standing under article III of the United States Constitution. They have asserted an injury to property, an element necessary to prove a violation of Washington's Fair Credit Reporting Act as a consumer

protection violation. "An injury to property occurs when one's right to possess, use, or enjoy a determinate thing has been affected in the slightest degree." Handlin, 187 Wn. App. at 849.

The consumer disclosures mandated by the Fair Credit Reporting Act are a form of property. Handlin, 187 Wn. App. at 850. The Handlins can establish "injury" to "property" by proving they were denied their right to obtain information that has commercial utility for them, such as information in the agency's file or the identity of the source of the information. Handlin, 187 Wn. App. at 851. A failure of such proof would mean a failure to prevail in the lawsuit, not a lack of standing to bring it.

Rental Score and Recommendation

If requested by a consumer, a consumer reporting agency must provide all information "in the file on the consumer at the time of request":

> A consumer reporting agency shall, upon request by the consumer, clearly and accurately disclose:
> (1) All information in the file on the consumer at the time of request, except that medical information may be withheld. . . .
> (2) All items of information in its files on that consumer, including disclosure of the sources of the information, except that sources of information acquired solely for use in an investigative report may only be disclosed to a plaintiff under appropriate discovery procedures.

RCW 19.182.070. "The Fair Credit Reporting Act is designed to benefit consumers by giving them the same right of access to their credit information as is available to landlords, employers, or others who are evaluating their creditworthiness." Handlin, 187 Wn. App. at 850.

The trial court concluded that On-Site willfully violated RCW 19.182.070(1) by failing to "disclose the Handlins' rental scores, recommendations, or related information (such as the pass/fail chart), even though the information was recorded and retained by On-Site and in its files." On-Site contends there is a factual issue as to whether On-Site had in its "file" the "Rental Report" that Forestview received through On-Site's web portal—the report that gave the Handlins a score of 4.5 out of 10 and recommended that their rental application be declined.

A consumer reporting agency's file is defined as "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." RCW 19.182.010(9). According to On-Site, the rental report and recommendation was not retained by On-Site; rather, it was generated by Forestview for its own use by using On-Site's software to apply Forestview's own criteria to the credit information in the On-Site database.

The record does not rule out the possibility that On-Site actually did have in its file the rental score and recommendation prepared for Forestview. A document created for On-Site at the time of Karen Handlin's inquiry indicates that the representative who took her call had a copy of a report that stated the "Starting Report Score" was 4.5. There is evidence that on August 9, 2013, an On-Site representative reviewed the settlement documents provided by Karen Handlin and "updated the report." Her notes state that she then advised Forestview that the update did not change the "Decline" recommendation. One might infer the existence of an accessible file in which On-Site saved or stored

that scoring information because otherwise how did the On-Site representative know that the update did not change the recommendation?

But the record also contains evidence supporting On-Site's position. On-Site had an agreement to supply Forestview with a customized rental score and recommendation. According to On-Site's witnesses, On-Site does not save or store these items of information.[2] The Handlins' 4.5/10 score supplied to Forestview was generated by On-Site's algorithm. The algorithm is described as "essentially a calculator" where landlords "can configure different variables that are meaningful or less meaningful to them." The calculator provides the landlord with the score utilizing the landlord's own settings. The landlord's screening criteria are stored in "the cloud," but they are password-protected. On-Site employees do not have the landlord's password and thus do not have access to the settings.[3] According to On-Site, this is why Forestview was able to generate the rental report, but On-Site was not.

The Handlins contend it is immaterial whether On-Site employees have the landlord's password. They contend information is in a credit reporting agency's "file" if it appears in a report on an individual consumer, regardless of where the data is physically stored. They argue that the agency violates the law if it creates a system that can analyze the underlying credit data and format it into a customized report for a client like Forestview, yet cannot supply the same report to the consumer. They cite Cortez v. Trans Union, LLC, 617 F.3d 688,

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[2] Clerk's Papers at 980-82.
[3] Clerk's Papers at 991-92.

711 (3d Cir. 2010). In that case, a credit agency purchased credit information from a third-party vendor. The information included special messages indicating that the plaintiff's name matched one on a terrorist watch list. The plaintiff was not a terrorist. She won an award of damages against the credit agency for the failure to respond to her request to correct her credit report. Cortez, 617 F.3d at 703-04. The credit agency argued on appeal that there was no violation because the terrorist alert information was not a part of the credit agency's files. The court rejected this argument. Credit reporting companies cannot escape the disclosure requirement in the federal statute "by simply contracting with a third party to store and maintain information that would otherwise clearly be part of the consumer's file and is included in a credit report." Cortez, 617 F.3d at 711.

On-Site did disclose to the Handlins the underlying credit information it had purchased from third party vendors, including an "eviction data vendor." Arguably, this satisfied the statutory requirement at issue. The rental score and recommendation generated by Forestview using its own criteria is not directly analogous to the third party vendor data considered in Cortez. The factual record is not developed well enough to support a conclusion that the rental score and recommendation were in an On-Site "file" merely because they appeared in the report generated by Forestview's inquiry. We conclude there is a genuine issue of material fact as to whether the rental score, pass/fail chart and recommendation were in On-Site's file at the time of the request for disclosure. This violation, along with the corresponding statutory damages and injunctive relief, is reversed and remanded for further proceedings.

Inclusion of Washington Specific Disclaimer of Rights

When a consumer reporting agency makes disclosures to a consumer, it is required to include a written summary of all rights and remedies the consumer has under the Washington Fair Credit Reporting Act. RCW 19.182.080(7). The Handlins claim they proved beyond dispute that On-Site's August 27, 2013, disclosure to the Handlins did not include such a summary; On-Site disputes this claim. The trial court sided with the Handlins and found On-Site committed another willful violation of the act by failing to include the mandatory Washington summary.

Through discovery, the Handlins obtained On-Site's admission that it mailed documents labeled as "Exhibit 2" to the Handlins' attorney on August 27, 2013. Exhibit 2 does not include the summary of rights and remedies mandated by Washington law. On-Site's admission establishes that On-Site mailed the documents in exhibit 2, but that is not proof that On-Site did not also mail the Washington summary. Testimonial evidence submitted by On-Site tends to prove that the Washington summary was automatically included with disclosures as a matter of course. Because a genuine issue of material fact remains as to whether On-Site violated RCW 19.182.080(7), this violation and injunctive relief corresponding to it must be reversed.

Failure To Provide Post-Reinvestigation Disclosures

If a consumer disputes the completeness or accuracy of information in the consumer's file at a consumer reporting agency and notifies the agency directly of "the dispute," the agency must "reinvestigate without charge and record the

current status of the disputed information" within 30 days. RCW 19.182.090(1). Upon completion of the reinvestigation, the agency shall notify the consumer of the results within 5 business days. RCW 19.182.090(8)(a).

Karen Handlin called On-Site on August 5, 2013, to find out what credit information on file with On-Site had caused Forestview to deny the rental application. On-Site reviewed the settlement documents and then updated the credit report so that the unlawful detainer action was shown as "dismissed." But On-Site did not send the Handlins notice of the results of its investigation.

The trial court found that On-Site willfully violated RCW 19.182.090(8)(a) by failing to make the required post-investigation disclosure.

A post-investigation disclosure is required only if the consumer notifies the agency directly of a "dispute." RCW 19.182.090(1). On-Site claims Karen Handlin's call to On-Site on August 5, 2013, did not constitute notification of a dispute. This argument is without merit. On-Site's representative said the Handlins' application to Forestview was denied because they had been evicted. Karen Handlin disputed this information.

On-Site argues that if a violation of RCW 19.182.090(8)(a) occurred, it was not willful. But On-Site has not offered a reasonable excuse for its failure to a provide post-reinvestigation notice. On-Site's own policy as stated by the company's director of screening data is "by and large, if someone's calling in to Renter Relations and . . . thinks something should be amended on the report and wants us to look into something, we're going to treat it as a dispute." We conclude the company "ran a risk of violating the law substantially greater than

the risk associated with a reading that was merely careless." Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 69, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007).

On-Site argues that Brian Handlin was not entitled to statutory damages for this violation because only Karen Handlin called On-Site to dispute the rental report. This argument was not raised below. In any event, the information disputed by Karen Handlin was in a joint report for both her and her husband.

We affirm this finding of violation, along with the statutory damages associated with it.

Sources of Information

Upon request, the consumer reporting agency must disclose all items of information in its files on that consumer, "including disclosure of the sources of the information." RCW 19.182.070(2).

The disclosure made by On-Site on August 27, 2013, included a copy of the updated screening report. Under the heading "Landlord Tenant Court Records" is a reference to "SEATTLE-SUP.CT" and a case number. On-Site obtained the information from an "eviction data vendor" such as LexisNexis, not directly from superior court. Because the disclosure did not specify the vendor that was On-Site's source of the information, the trial court concluded that On-Site willfully violated its duty to disclose the sources of its information.

On-Site contends its duty to disclose was satisfied by listing the superior court as the original source of the unlawful detainer information. But because the disclosure did not identify the vendor that compiled the court records, the court properly concluded that the disclosure was incomplete. It left the Handlins

unable to prevent future adverse actions prompted by misinformation from that vendor. While the superior court may be the original source of court records, listing only the superior court does not satisfy the statutory requirement to disclose the "sources" of information.

On-Site argues the court erred by finding the violation to be willful because it was reasonable to designate the superior court as the "source." On-Site designated the information as coming "From On-Site.com," not from the superior court, further obscuring the source of the information. And in any event, it is unreasonable to read the statute in a way that would excuse On-Site from listing the "eviction data vendor" as the source from which On-Site obtained its information about landlord tenant court records.

We affirm this finding of a willful violation, along with the statutory damages associated with it.

Injunctive Relief

The trial court entered injunctive relief ordering On-Site to cease and desist from further violations of the act. On-Site contends the court abused its discretion.

With respect to the two violations that we affirm in this opinion, the order prohibits On-Site from failing to disclose the true sources of information in its consumer reports and from failing to make the post-reinvestigation disclosures as required by the statute. On-Site's challenge to the court's authority to order such relief was rejected in our opinion in the previous appeal. Handlin, 187 Wn. App. at 850-51. We adhere to that opinion.

CR 11 Sanctions and Motion To Quash

As discussed above, the parties disputed whether the disclosures On-Site provided by mail to the Handlins' attorney on August 27, 2013, included the statutorily required summary of Washington State rights and remedies. In depositions, the Handlins stated that they had never seen the August 27 disclosures. On-Site's attorney asked them if they had been told the disclosures did not include the Washington summary. Dunn objected on the grounds of attorney client privilege and instructed the Handlins not to answer. On-Site subpoenaed the Handlins' attorney, Eric Dunn, to question him on this topic. The trial court granted the Handlin's motion to quash the subpoena and imposed CR 11 sanctions against On-Site totaling $2,405.

On-Site appeals these rulings. This court reviews both CR 11 sanctions and discovery orders for abuse of discretion. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); Miller v. Kenny, 180 Wn. App. 772, 809, 325 P.3d 278 (2014).

Circumstances in which a trial court should order the taking of opposing counsel's deposition are rare. Miller, 180 Wn. App. at 808. A leading federal case states they are limited to instances where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case. Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

Two witnesses testified that a Washington summary was included with disclosures as a matter of course. But there is no indication that On-Site sought information on this topic from Margaret Carter or Tanya Biener, the On-Site employees who were responsible for physically mailing the disclosures to Dunn. Because On-Site did not exhaust other potential sources of information prior to subpoenaing Dunn, it was not an abuse of discretion for the trial court to quash the subpoena.

But the fact that the trial court was within its discretion to quash the subpoena does not necessarily mean that the court was within its discretion to impose CR 11 sanctions against On-Site. "Three conditions must be met before an attorney can be subjected to CR 11 sanctions: (1) the pleading, motion, or memorandum must not be well grounded in fact; (2) it must not be well grounded in law; and (3) viewed objectively, the attorney must have failed to make a reasonable inquiry into the factual or legal basis of the action." Brigade v. Econ. Dev. Bd., 61 Wn. App. 615, 619, 811 P.2d 697 (1991).

Dunn was the recipient of the letter in question. His clients had not seen it. On-Site may have failed to explore other sources of information about whether the Washington summary was included with the letter, but objectively, On-Site's limited inquiry was not unreasonable under the circumstances. The sanctions are reversed.

Other Matters

On-Site asks that we order the case to be assigned to a different judge on remand. This request is denied. On-Site's allegations demonstrate that On-Site

and the trial court had a number of disagreements, but they do not rise to the level of actual or potential bias. See State v. Finch, 181 Wn. App. 387, 398-99, 326 P.3d 148 (2014).

Both parties request an award of attorney fees on appeal under RAP 18.1. RAP 18.1 requires more than a bald request for attorney fees. Phillips Bldg. Co. v. An, 81 Wn. App. 696, 915 P.2d 1146 (1996). Neither party has stated the applicable law that would support an award of attorney fees. Both parties have prevailed on significant issues. We make no award of fees on appeal.

Affirmed in part, reversed in part.

Becker, J.

WE CONCUR:

Trickey, J

Schindler, J

FILED
5/30/2018
Court of Appeals
Division I
State of Washington

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

BRIAN and KAREN HANDLIN, Respondents, v. ON-SITE MANAGER, INC. Appellant.	)	No. 76146-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, On-Site Manager Inc., has filed a motion for reconsideration of the opinion filed in the above matter on April 23, 2018. Respondents, Brian and Karen Handlin, have not filed a response to appellant's motion. The court has determined that appellant's motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Becker, J.

GORDON REES SCULLY MANSUKHANI LLP

June 29, 2018 - 4:10 PM

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