**No. 98627-4**

---

**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

---

**SPOKEO, INC.,**

***Petitioner,***

**vs.**

**WHITEPAGES, INC.,**

***Respondent.***

---

# ANSWER TO PETITION FOR REVIEW

---

Timothy G. Leyh, WSBA #14853
Tyler L. Farmer, WSBA #39912
Kristin E. Ballinger, WSBA #28253
HARRIGAN LEYH FARMER &
THOMSEN LLP
999 Third Avenue, Suite 4400
Seattle, WA 98104
(206) 623-1700

*Attorneys for Whitepages, Inc.*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**Washington Cases**

**Federal Cases**

**Statutes and Rules**

## I. INTRODUCTION

After a week of deliberations, the jury rejected Spokeo's $27 million breach of contract claims and, in doing so, rejected the very factual claim Spokeo continues to emphasize on appeal (*e.g.*, Pet. 1): that Whitepages breached the parties' agreement not to use the other's confidential information. The jury concluded that Whitepages had not used Spokeo's confidential information and owed no contractual duty to continue auctioning ad space on Whitepages' website or to refrain from developing a product that competed with those offered by its advertisers.

Nor (as a matter of law) did Whitepages violate the Consumer Protection Act (CPA). The trial court held that three independent bases justified judgment for Whitepages on that claim, and the Court of Appeals affirmed because, even assuming Spokeo proved every allegation it claimed, this contract dispute between two sophisticated businesses had no public interest impact. That conclusion applied settled Washington law, as did the court's affirmance of the trial court's decisions not to supplement the accurate jury instructions Spokeo originally proposed and to decline to give an anticipatory repudiation instruction that did not fit the facts.

Review is not warranted.

## II. COUNTER-STATEMENT OF ISSUES

1. Whether the Court of Appeals properly affirmed the trial

court's decision to dismiss Spokeo's CPA claim, where Spokeo failed to present substantial evidence that Whitepages' actions were unfair, were deceptive, or impacted the public interest.

2. Whether the Court of Appeals properly affirmed the trial court's decision to not supplement instructions proposed by Spokeo for two, independent reasons: they were correct statements of the law and there is no evidence that the entire jury was confused by them.

3. Whether the Court of Appeals properly affirmed the trial court's decision to not provide an anticipatory repudiation instruction where no facts supported the instruction.

By not briefing the alleged spoliation issue, Spokeo concedes that nothing about Spokeo's claim[1] merits review by this Court. *See* RAP 13.7(b); *cf.* Pet. 2 & n.1.

## III. STATEMENT OF THE CASE

The decision of the Court of Appeals contains a fair statement of the case (Op. 2-3).

## IV. LEGAL AUTHORITY AND ARGUMENT

### A. As a Matter of Law, Whitepages Did Not Violate the CPA.

[1] Spokeo claimed that the trial court erred in instructing the jury that it *could* draw an adverse inference about evidence, arguing that the court should have instructed the jury that it *must* draw an adverse inference, despite such an instruction being contrary to law.

Spokeo claims that only public interest impact was at issue on appeal from the CR 50 decision (Pet. 10), but that is not true. The trial court correctly found[2] that three independent bases justified judgment for Whitepages: (1) Spokeo did not present substantial evidence that Whitepages' actions had any impact on the public interest; (2) as a matter of law, Whitepages' actions were neither deceptive nor unfair; and (3) Spokeo did not present substantial evidence that Whitepages actions were not for a legitimate business purpose. Whitepages defended the ruling on all three bases. Although the Court of Appeals addressed only the first, each independently justified judgment in favor of Whitepages.

The Court's inquiry is the same as the trial court's: for issues of fact (here, public interest impact and legitimate business purpose), the court reviews, de novo, whether "substantial evidence or reasonable inference[s]" sustain the verdict, meaning enough "to persuade a fair-minded, rational person of the truth of the declared premise." *Wilcox v. Basehore*, 187 Wn.2d 772, 782, 389 P.3d 531 (2017) (citations omitted). For issues of law (here, whether the conduct is unfair or deceptive), review is de novo. *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).

[2] In falsely implying that the trial court found substantial evidence of an unfair or deceptive act, Spokeo cites its own brief (CP 9641-46), the trial court stating it "assume[d] that the jury found" an unfair or deceptive act (CP 12270, mistyped by Spokeo as CP 12770), and pages of the order irrelevant to that issue (CP 12277-78).

### 1. Impact on a few sophisticated tech companies' interests is not a "public interest impact" under the CPA.

The CPA "shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest." RCW 19.86.920. Thus, this Court has consistently held that the CPA was not intended "to provide an additional remedy for private wrongs which do not affect the public generally." *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976). Rather, this provision "expresses a clear intent *to protect the general public.*" *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 788, 719 P.2d 531 (1986) (emphasis added).

Although this element is one of fact, courts (including in *Lightfoot* and *Hangman Ridge*) routinely determine that the evidence of public interest impact is insufficient as a matter of law. That is why it is incorrect to claim the Court of Appeals decision here conflicts with *Hangman Ridge* (*see* Pet. 12-13); the Court directed judgment in favor of the defendant in *Hangman Ridge* because the public interest element was not met. This was so despite the "escrow closing agent-client" relationship because the plaintiffs "had a history of business experience," "were sole shareholders in a closely held corporation," "retained an attorney and an accountant on a regular basis," and "*are not representative of bargainers subject to exploitation and unable to protect themselves*." 105 Wn.2d at 794

(emphasis added).

Nor did the 2009 enactment of RCW 19.86.093 change the analysis as Spokeo claims (Pet. 10-12). It provides that "a claimant may establish that the act or practice is injurious to the public interest because it . . . [i]njured other persons," *id.*,[3] codifying the common law rule that one "factor" of evaluating whether public interest impact may be proven is whether "additional plaintiffs" may have been injured, *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 177-78, 159 P.3d 10 (2007). That is important because it "show[s] how the practice *has the potential of affecting large numbers of people*." *Id.* at 178 (emphasis added); *see also Hangman Ridge*, 105 Wn.2d at 790-91 (holding that factors to determine whether "the public has an interest in the subject matter" include, "Did defendant advertise to the public in general?"). That is, the public interest impact may be shown where there is a "likelihood" or "real or substantial

[3] The jury was instructed on this point (CP 8983), but Spokeo incorrectly argued to the jury in closing that "in order to affect the public interest, [Whitepages' conduct] only has to have impacted one other person" (RP 2903). This is an incorrect statement of the law because it directly conflicts with RCW 19.86.920 and misstates RCW 19.86.093.

The Court of Appeals rightly rejected Spokeo's now-implicit argument that how the trial court instructed the jury is relevant. (At the Court of Appeals, Spokeo devoted many pages to a flawed "law of the case" argument. It now says without explaining the relevance that an instruction was "unchallenged on appeal." Pet. 10.) It is not: the jury's verdict is subject to a legal determination that Spokeo failed to prove a CPA violation *as a matter of law*: "Judgment as a matter of law sought with a CR 50(a) motion is governed by the applicable substantive law, not the trial court's instructions to the jury." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 749 n.5, 310 P.3d 1275 (2013) (citing *Kim v. Dean*, 133 Wn. App. 338, 349, 135 P.3d 978 (2006)).

potential that other people *will be injured in the same way*." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 605, 200 P.3d 695 (2009) (emphasis added).

While RCW 19.86.093 codified the guidance for that determination ("a claimant may establish"), the holding of *Hangman Ridge* and the statutory language at RCW 19.86.920 remain unchanged: without proof that the CPA claim is for the "protect[ion of] the general public," it fails as a matter of law. *Hangman Ridge*, 105 Wn.2d at 788.

Justice Madsen's concurring opinion in *Klem* in no way conflicts with the Court of Appeals decision here (*cf.* Pet. 11-12). Justice Madsen described the amendment as "codif[ying] the requirement that the unfair act or practice be injurious to the public interest." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 804, 295 P.3d 1179 (2013) (Madsen, J., concurring). Nowhere did Justice Madsen suggest that the amendment "eas[ed] . . . the requirement to prove public interest in the context of a" private dispute amongst competitors as Spokeo says (Pet. 12). In fact, she was not interpreting the new statutory language at all. She was merely underscoring her argument that it was unnecessary to graft a public interest requirement onto a wholly separate determination—whether an act is "unfair"—as the majority had done. *Klem*, 176 Wn.2d at 805.

Nor does the Court of Appeals decision here conflict with *Rush v.*

*Blackburn*, 190 Wn. App. 945, 361 P.3d 217 (2015), *Rhodes v. Rains*, 195 Wn. App. 235, 381 P.3d 58 (2016), or the unpublished *Wells Fargo Bank N.A. v. Gardner*, 5 Wn. App. 2d 1011, 2018 WL 4334227 (2018). In each case, the challenged business practice impacted the general public because the defendants did business with the general public: in *Rush*, the court applied the *Hangman Ridge* factors to a defendant tow-truck operator who sold vehicles it towed while the owner was contesting the impound (190 Wn. App. at 967-72); in *Rhodes*, the court applied the *Hangman Ridge* factors to a defendant who "represented that she had 1,500 clients" (195 Wn. App. at 239) and concluded the factors were met where the accountant advertised "on the internet, directed at the public in general" and "targeted . . . an unsophisticated and vulnerable group" (*id.* at 248); and in *Wells Fargo Bank*, the court found a per se public interest impact and capacity to injury others where the defendant bank (whom the plaintiffs had not chosen as their lender) instituted foreclosure proceedings and then failed to negotiate in good faith as it was required to do (5 Wn. App. 2d at *6-7). Here, the only "impact" shown was to a small group of business competitors, not the general public.

As recognized by these and other cases after the 2009 amendment, it still is the function of the court to ensure that the public interest impact requirement of RCW 19.86.920 has been met, and, in doing so, to utilize

the *Hangman Ridge* factors.[4] The court in *Stiegler v. Saldat*, No. C14-1309TSZ, 2015 WL 13686087 (W.D. Wash. Oct. 23, 2015), rejected precisely the argument Spokeo makes, holding that despite alleged injury to "more than 2000 individual persons," the language of RCW 19.86.093 ("injured other persons") "relate[s] to persons not already members of the two time-share entities." *Id.* at *3.

Spokeo claimed no injury (or potential for injury) to anyone other than (potential) injury to the six other advertisers actively participating in auctions when Whitepages stopped the auctions, none of whom sued. But even if Whitepages had a similar private dispute with a few other tech companies in a specialized field (a fact not evidenced at trial), that does not turn this case into one in which "the public has an interest." *Stephens*, 138 Wn. App. at 177. The evidence at trial established that the companies Spokeo presented as "victims" of Whitepages are sophisticated, multi-million dollar tech businesses. *E.g.*, Ex. 761; RP 2661. Just like Spokeo, their bargained-for contracts with Whitepages allowed competition, confirmed Whitepages' ownership of the information used to develop its

[4] *See Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 835-36, 355 P.3d 1100 (2015); *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 506, 309 P.3d 636 (2013); *see also Kforce Inc. v. Oxenhandler*, No. C14-774MJP, 2015 WL 1880450, at *5 (W.D. Wash. Apr. 24, 2015) (Pechman, C.J.) ("conduct affecting a small portion (four firms) of a niche market (technology specialty staffing firms) does not harm a substantial portion of the general public, especially where the companies do not offer services to the public").

new product, and did not require that Whitepages auction them ad space, and their private dispute (if there was one) did not negatively impact the public *at all*.[5]

The Court of Appeals and the trial court properly concluded that the CPA claim failed for lack of evidence of public interest impact.

**2. The court, not the jury, must decide whether the acts at issue are unfair or deceptive.**

The trial court also concluded that Spokeo's failure to evidence an unfair or deceptive act justified judgment for Whitepages on the CPA claim. The Court of Appeals did not reach this issue, but the trial court's decision could have been independently affirmed on this basis.

Taking all evidence and inferences in Spokeo's favor, it proved, at most, that Whitepages (1) developed Whitepages Premium in part with information it learned from its advertisers but that the jury determined Whitepages owned and was contractually entitled to use; (2) actively kept the development of Premium secret from its advertisers as the jury found it was contractually entitled to do; and (3) chose to run no additional

[5] Rather, the public *benefited* from Whitepages' development of Premium because Whitepages increased competition in the market for paid people searches. *See State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984) (CPA "enacted in 1961 to promote free competition in the marketplace *for the ultimate benefit of the consumer*" (emphasis added)). As the court held in dismissing a CPA claim in *Evergreen Moneysource Mortgage Co. v. Shannon*, 167 Wn. App. 242, 274 P.3d 375 (2012), "conduct that is not directed at the public, but, rather, at a competitor, lacks the capacity to impact the public in general." *Id.* at 261.

auctions as the jury found it was contractually entitled to do.

Whether those things happened is an issue of fact, but whether they were "'unfair or deceptive' is a question of law." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009) (citation omitted); *see also Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014) ("Whether undisputed conduct is unfair or deceptive is a question of law, not a question of fact."). That is, the trial court here "assumed" Spokeo proved the factual predicate of its claim (CP 12270).

Other than a per se violation of a statute (which Spokeo did not and does not claim), conduct can be unfair or deceptive under the CPA if it has "the capacity to deceive substantial portions of the public" or is "unfair" "in violation of [the] public interest." *Klem*, 176 Wn.2d at 787.

**a. Not deceptive: Whitepages' actions did not have "the capacity to deceive a substantial portion of the public."**

The jury decided that Whitepages did not deceive Spokeo. CP 9357. Nor was Whitepages' conduct "deceptive" under the CPA because it did not have "the capacity to deceive substantial portions of the public." *Klem*, 176 Wn.2d at 787. As the court held in *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 935 P.2d 628 (1997), deceptive acts that are directed at a small number of companies with contracts with the defendant "are [not] actionable":

> Only acts that have the capacity to deceive *a substantial portion* of the public are actionable. Whiteman has not made such a showing here. Goodyear's conduct was not directed at the public. Its competition with dealers and the tactics it used to secure dealership expansions had no deceptive capacity affecting the public in general.

*Id.* at 744 (citation omitted); *see also Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 438-39, 40 P.3d 1206 (2002) (contracts sent to nine clients). Multiple judges have dismissed CPA claims for this reason[6] and the cases Spokeo cited for its argument otherwise are in accord.[7]

Only seven advertisers were actively bidding when Whitepages developed and tested Premium. Ex. 200, pp. 5, 11. Spokeo's claim that Whitepages engaged in deceptive conduct is based entirely on conduct aimed at some unspecified subset of this discrete group, not an act with

---

[6] *E.g.*, *Segal Co. v. Amazon.com*, 280 F. Supp. 2d 1229, 1232-34 (W.D. Wash. 2003) (Coughenour, J.) (no "reasonable inference that defendant engaged in . . . random widespread solicitation of consumers, . . . defendant's conduct had little potential to deceive the public and is therefore not governed by the CPA"); *Aziz v. Knight Transp.*, No. 12-904RSL, 2012 WL 3596370, at *2 (W.D. Wash. Aug. 21, 2012) (Lasnik, J.) (dismissing CPA claim because conduct affected only the company's 50 to 295 employees); *Luken v. Christensen Grp. Inc.*, 247 F. Supp. 3d 1158, 1164 (W.D. Wash. 2017) (Leighton, J.) (dismissing CPA claim because acquisition of yacht at issue "even used, is well beyond the realm of possibility for all but a tiny fraction of the population"). *But see Estes v. Wells Fargo Home Mortg.*, No. C14-5234BHS, 2015 WL 362904, at *5 (W.D. Wash. Jan. 27, 2015) (Settle, J.) ("Wells Fargo services thousands of Washington customers and the form solicitation at least has the capacity to deceive any of the Washington customers.").

[7] *See Rhodes*, 195 Wn. App. at 239 (accountant "represented that she had 1,500 clients"); *Williams v. Lifestyle Lift Holdings, Inc.*, 175 Wn. App. 62, 72, 302 P.3d 523 (2013) (defendants "used mass-market advertising, solicitation, and high-pressure sales techniques"); *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 42-43, 802 P.2d 1353 (1991) ("overall promotional and sales program" directed at "consumers").

"the capacity to deceive substantial portions of the public." *Klem*, 176 Wn.2d at 787. Just like in *Goodyear Tire*, conduct that could only impact the closed universe of sophisticated advertisers here does not amount to "deceptive" conduct under the CPA and is therefore "not actionable."

**b. No unfairness: Spokeo makes no claim that the conduct it claims was "unfair" was "in violation of the public interest."**

Whitepages' conduct also was not "unfair" under the CPA. "[W]hether particular actions rise to the stature of being 'unfair'" is "reviewable as a question of law." *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 309, 698 P.2d 578 (1985). As the Court held in *Klem*, the CPA does not regulate an "unfair" act between private parties unless that conduct is "in violation of public interest." 176 Wn.2d at 787. The Court left "for another day" "to explore in detail how to define unfair acts for the purposes of our CPA," but stated that "[c]urrent federal law," which "guide[s]" the development of the CPA (*see* RCW 19.86.920), "suggests a 'practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits.'" *Id.* at 787-88 (quoting 15 U.S.C. § 45(n)). This quoted federal statute, enacted in 1994, codified the FTC's abandonment of an earlier, broader definition (it included

"immoral, unethical, or unscrupulous" conduct[8]) and requires that "[t]he act or practice alleged to have caused the injury must still be unfair under a well-established legal standard, whether grounded in statute, the common law, or the Constitution." *LabMD, Inc. v. Fed. Trade Comm'n*, 894 F.3d 1221, 1228-29 & n.24 (11th Cir. 2018). Thus, under current federal law, to be "unfair," an act or practice must (1) be "unfair under a well-established legal standard, whether grounded in statute, the common law, or the Constitution," (2) cause or be likely to cause "substantial injury to consumers," (3) be "not reasonably avoidable by consumers themselves," and (4) be "not outweighed by countervailing benefits." *Id.* at 1226 n.10 (quoting 15 U.S.C. § 45(n)), 1228-29 & n.24.

Although there are few Washington cases finding an act "unfair," one such case is *Rush*, 190 Wn. App. 945, which hewed to the current federal definition. There, a towing company sold an impounded car while the impound hearing was pending. The court held that, if proven, that conduct was unfair because the practice "offend[ed established] public policy" by "violat[ing] WAC 308-61-168" and "caused [the plaintiff] substantial injury" that was not "reasonably avoidable." *Id.* at 975-76.

Spokeo did not meet this test: (1) No "well-established legal

[8] Whitepages took exception to inclusion of this language in the jury instructions. RP 2850; *see also* RP 2807-09.

standard" grounded in statutory or common law imposed on Whitepages the duty to develop Premium without looking at data Whitepages owned or was publicly available; disclose to its competitors that it was developing a competing product; or notify its advertisers that it might choose not to run another auction (duties which the jury found Whitepages did not owe as a matter of contract); (2) Spokeo did not evidence "substantial injury" to it or any other of the handful of tech companies, where the jury awarded $72,915 in damages to a company which sought $27 million in damages and with revenues and earnings that *increased* to $81 million (from $78 million) and $8.5 million (from $5.2 million) the year Whitepages stopped the auctions (RP 473; Ex. 761; CP 9356, 9424); (3) Spokeo could have "reasonably avoid[ed]" the conduct by contracting for the protections it sought at trial, *i.e.*, it could have chosen not to bid at auction absent an agreement that Whitepages would restrict use of data it gathered from advertisements for any purpose other than servicing Spokeo (it instead agreed Whitepages owned and was "entitled to use" the information it gathered "in any manner, in its sole discretion" (Ex. 484, p. 5, ¶ 7)) and not to participate at auction without a promise from Whitepages that it would be guaranteed advertising space for a specific period; (4) Any alleged "unfairness" to Spokeo was outweighed by the "countervailing benefits," as described in the next section.

The trial court rightly concluded that, as a matter of law, Whitepages did nothing "unfair" as defined by the CPA, independently justifying its CR 50 ruling dismissing the CPA claim.

### 3. Spokeo failed to present any evidence to rebut the evidence that Whitepages had a legitimate business purpose for its actions.

"Where conduct is motivated by legitimate business concerns, there can be no violation of RCW 19.86." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 54, 738 P.2d 665 (1987). The CPA states this explicitly: "this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business." RCW 19.86.920. The focus is the motivations for the defendant's actions. *E.g.*, *State v. Black*, 100 Wn.2d 793, 803, 676 P.2d 963 (1984) (while "[a] reduction in commission splits may not be the fairest way to do business," the legitimate reason for doing so defeated the CPA claim). The analysis in *Boeing* is dispositive: just as here, *a jury* found that Boeing had violated the CPA in its dealings with an airplane window manufacturer, but this Court set aside the verdict and directed judgment for Boeing because the window manufacturer had not rebutted Boeing's evidence that legitimate business concerns motivated its conduct. 108 Wn.2d at 40, 60-61, 68.

Because Spokeo rebutted none of the evidence reflecting

Whitepages' legitimate business reasons for (1) developing Premium,[9] (2) restricting disclosure of the development of Premium from the advertisers,[10] and (3) not notifying the advertisers before February 12, 2016, that Whitepages no longer would advertise products that competed with Premium,[11] the trial court rightly determined this to be an independent basis justifying judgment for Whitepages.

### B. The Trial Court Did Not Abuse Its Discretion in Not Supplementing the Negligent Misrepresentation Instructions Proposed by Spokeo.

The trial court did not abuse its discretion in declining to supplement the standard pattern instructions Spokeo proposed (and the trial court gave) on the two means of committing negligent misrepresentation (CP 8987, 8989, 9317, 9319). *See State v. Hampton*, 184 Wn.2d 656, 670-71, 361 P.3d 734 (2015) (abuse of discretion requires a decision based

---

[9] Multiple witnesses testified that two factors drove the decision to develop Premium: user dissatisfaction (due, ironically, to Spokeo and other advertisers displaying deceptive ads on Whitepages' website) and the dying auction model. *See* WP Merits Brief, pp. 25-26.

[10] Whitepages did not know if its new product was viable and was concerned that disclosing the development efforts to the advertisers would unnecessarily disrupt the auction marketplace. *See* WP Merits Brief, pp. 26-27.

[11] As the jury found, Whitepages did not owe a contractual duty to provide notice that it would not run another auction. Moreover, the evidence established that Whitepages (1) did not tell the advertisers that it was going to stop running ad campaigns until it made that decision in early February 2016 because it could not tell them what it did not know and (2) it kept them informed as it increased the volume of ad inventory devoted to Premium. *See* WP Merits Brief, pp. 27-28.

on an "unsupported" fact or "wrong legal standard" or an "unreasonable" view taken by the trial court leading to a "decision outside the range of acceptable choices"). Those instructions allowed Spokeo to argue in closing that the jury could find negligent misrepresentation by either means, and did not erroneously instruct the jury that it must find both.[12] To the contrary, each instruction said that if the jury found each of the elements *in that instruction*, it should find for Spokeo. CP 8987, 8989.

That distinguishes what happened here from what happened in *State v. Campbell*, 163 Wn. App. 394, 260 P.3d 235 (2011), which was reversed after remand from this Court, *see* 172 Wn. App. 1009, 2012 WL 5897625 (2012) (unpubl.). There, the court's instruction was *wrong* because it failed to tell the jurors that if even one juror voted "no" on the question asked in the special verdict form, they should return a verdict of "no." 163 Wn. App. at 401. That the trial court "compounded" the error by "referr[ing] the jurors back to the [erroneous] instructions" does not make the situation in *Campbell* like the situation here.

Here, Spokeo *agrees* that the instructions it proposed were accurate, and the question is whether the jury's questions rose to the level of mandating a response by the trial court beyond a reference back to

[12] Ironically, Whitepages opposed the failure to disclose claim even going to the jury because Spokeo pled only an affirmative misrepresentation. *See* CP 9025 (*citing* CP 7).

those *accurate* instructions. As the court said in *Campbell*, "Where the instructions given accurately state the law, the trial court need not further instruct the jury." *Id.* at 402. The only exception is "where a jury's question to the court indicates an *erroneous understanding* of the applicable law." *Id.* (emphasis added). But the jury's two questions in this case indicated no such "erroneous understanding":

> Is it necessary to find all of the elements in both Instructions are true to give a verdict for Spokeo on their negligent misrepresentation claim? Or is it sufficient to find all of the elements on only one of the Instructions to be true? [CP 9359]
>
> We need clarification on whether <u>one</u> or <u>both</u> sets of criteria need to be satisfied in order for our verdict to be for Spokeo. Several of our votes depend on this, and we may not be able to reach an agreement without further clarification, for fear that we're not all even answering the same question. [CP 9369]

The jury "reach[ed] an agreement without further clarification" that same day, less than two hours after the trial court again directed them to follow the instructions. CP 9369, 9358.

*Campbell* is not an outlier. It applied settled law on whether to provide a further instruction, which has two predicates before even reaching the issue of whether the jury had an erroneous understanding of the law: (1) having proposed the instructions, Spokeo cannot now be heard to complain about them (*Lamborn v. Phillips Pac. Chem. Co.*, 89 Wn.2d 701, 709, 575 P.2d 215 (1978)); and (2) Spokeo failed to provide a proposed supplemental instruction *in writing* to consider until *after* the

court responded to the jury and an hour before it returned with a verdict (*Gorman v. Pierce County*, 176 Wn. App. 63, 86, 307 P.3d 795 (2013)).

Finally, "the jury's question does not create an inference that *the entire jury* was confused, or that *any confusion was not clarified before a final verdict was reached*." *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (emphasis added). In *Campbell*, the court could assume the "entire jury was confused" because the instruction was *wrong*. Here, the instructions were correct, and the questions show the "entire jury" was *not* "confused": to the contrary, some clearly understood the instructions posed alternative ways of finding negligent misrepresentation (CP 9369) and confusion of *others* was preventing a verdict. Evidently, they resolved the confusion, given that they rendered a verdict within hours.

### C. The Court Did Not Abuse Its Discretion in Refusing to Give Spokeo's Proposed Anticipatory Repudiation Instructions.

The trial court did not abuse its discretion by refusing to instruct the jury on anticipatory repudiation. First, the trial court correctly recognized that having failed to raise anticipatory repudiation as an affirmative defense, Spokeo could not rely on it. RP 2788-89; *see Heath v. Uraga*, 106 Wn. App. 506, 516 n.12, 24 P.3d 413 (2001).

Second, the evidence did not support the instruction. Repudiation "is an express or implied assertion of intent not to perform a party's

obligations under the contract prior to the time for performance." *Wallace v. Kuehner*, 111 Wn. App. 809, 816, 46 P.3d 823 (2002). Spokeo does not dispute that Whitepages displayed the advertisements for which Whitepages sought payment, *i.e.*, Whitepages fully performed its obligation giving rise to Spokeo's obligation to pay. Spokeo's claim that Whitepages was obligated to run *future* auctions could not relieve Spokeo of its contractual obligation to pay for the advertisements *already run*.

Finally, Spokeo's repudiation theory required a finding that Whitepages repudiated the contract by not performing a contractual duty it owed. *Id.* at 816. But in a finding unchallenged by Spokeo on appeal, the jury *rejected* that theory, finding that Whitepages *did not* breach the contract. The jury's rejection of Spokeo's breach of contract claim dooms its anticipatory repudiation defense.

## V. CONCLUSION

The Court should decline review.

SUBMITTED this 6th day of July, 2020.

HARRIGAN LEYH FARMER & THOMSEN LLP

By _____

Timothy G. Leyh, WSBA #14853
Tyler L. Farmer, WSBA #39912
Kristin E. Ballinger, WSBA #28253
999 Third Avenue, Suite 4400
Seattle, WA 98104
Tel: (206) 623-1700
Fax: (206) 623-8717

Email: timl@harriganleyh.com
Email: tylerf@harriganleyh.com
Email: kristinb@harriganleyh.com

*Attorneys for Whitepages, Inc.*

## CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On July 6, 2020, I caused a true and correct copy of the foregoing document to be served on the person(s) listed below in the manner indicated:

**Attorneys for Appellant**
Kenneth W. Masters
Shelby R. Lemmel
Masters Law Group, P.L.L.C.
241 Madison Avenue North
Bainbridge Island, WA 98110
Tel: (206) 780-5033
ken@appeal-law.com
shelby@appeal-law.com

☐ Legal Messengers
☐ First Class Mail
☐ Facsimile
☐ Electronic Mail
☑ WA Appellate Courts' Portal

**Attorneys for Appellant**
William H. Walsh
Karl Neumann
Anusha E. Jones
Law Offices of Cozen O'Connor
999 Third Avenue, Suite 1900
Seattle, WA 98104
Tel: (206) 340-1000
wwalsh@cozen.com
kneumann@cozen.com
aejones@cozen.com

☐ Legal Messengers
☐ First Class Mail
☐ Facsimile
☐ Electronic Mail
☑ WA Appellate Courts' Portal

DATED this 6th day of July, 2020.

*s/ Florine Fujita*
Florine Fujita, Legal Assistant
florinef@harriganleyh.com

## HARRIGAN LEYH FARMER & THOMSEN LLP

## July 06, 2020 - 4:09 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 98627-4 |
| **Appellate Court Case Title:** | Spokeo, Inc. v. Whitepages, Inc. |

**The following documents have been uploaded:**

- 986274_Answer_Reply_20200706155637SC072270_5753.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  *The Original File Name was WP Answer Petition for Review.pdf*

**A copy of the uploaded files will be sent to:**

- AEJones@cozen.com
- barb@focallaw.com
- erinf@harriganleyh.com
- jmyoung@cozen.com
- ken@appeal-law.com
- kneumann@cozen.com
- kristinb@harriganleyh.com
- paralegal@appeal-law.com
- pcameron@cozen.com
- sean@focallaw.com
- shelby@appeal-law.com
- tylerf@harriganleyh.com
- venkat@focallaw.com
- wwalsh@cozen.com

**Comments:**

---

Sender Name: Florine Fujita - Email: florinef@harriganleyh.com
**Filing on Behalf of:** Timothy George Leyh - Email: timl@harriganleyh.com (Alternate Email: florinef@harriganleyh.com)

Address:
999 Third Avenue
Suite 4400
Seattle, WA, 98104
Phone: (206) 623-1700 EXT 303

**Note: The Filing Id is 20200706155637SC072270**