Supreme Court No. 98927-3
Court of Appeals No. 53373-1-II

SUPREME COURT OF WASHINGTON

PHYLLIS FARRELL, an individual; BRANDY KNIGHT, an individual; DEBRA JAQUA, an individual; LONI JEAN RONNENBAUM, an individual; SARAH SEGALL, an individual,

Respondents,

v.

FRIENDS OF JIMMY, a registered political committee; WE WANT TO BE FRIENDS OF JIMMY, TOO, a registered political committee; GLEN MORGAN and JANE DOE MORGAN, and the marital community comprised thereof,

Petitioners.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

In an unpublished opinion, the Court of Appeals applied well-settled precedent to a "narrow" question: whether unlawful "robocalls"—initiated through a commercial robocalling service—meet the trade or commerce element of a Consumer Protection Act ("CPA") claim. Affirming that they do, the unanimous court followed this Court's longstanding rejection of the argument that the CPA requires a commercial relationship between plaintiff and defendant.

Far from a matter of first impression, this Court has unequivocally held that "[n]othing in [the CPA] requires that the plaintiff must be a consumer or in a business relationship with the actor." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 39, 204 P.3d 885 (2009). Indeed, nothing in the CPA's plain language "suggests any particular required relationship with the *plaintiff*." *Id.* at 45 (emphasis in *Panag*).

Nonetheless, Petitioner Glen Morgan and his affiliates maintain that "the Court of Appeals erred by expanding the coverage of the CPA to cover claims where no economic relationship exists between the parties." Pet. at 9. There can be no CPA violation, they say, because the robocall recipients "did not have any commercial relationship with Petitioners[.]" *Id.* This is simply not the law.

Morgan fails to meet any of the standards for obtaining Supreme Court review. While he makes a singular reference to "RAP 13.4," he does not articulate a conflict with a decision of this Court, of which he cites just

one. Nor does he identify conflicting Court of Appeals decisions (again, he cites just one). Nothing is of constitutional magnitude. And the conclusory assertion of "great public importance," fails to establish circumstances worthy of Supreme Court review.

The supposed expansion of the CPA is pure fiction—advocated by no one, unsupported by the record, and finding no traction in the unpublished opinion. But even if the Court of Appeals had done any more than apply established law to analogous facts (and that is all it did), Morgan failed to preserve his new contentions and cannot seek to overturn the trial court based on arguments he did not make below.

Discretionary review should be denied.

II. STATEMENT OF CASE

The Statement of the Case in the Petition is taken nearly verbatim from the Brief of Appellants. Respondents (collectively, "Farrell") therefore refer to their prior Statement of the Case and the Court of Appeals' factual recitation. Br. of Resps. at 3–8; Op. at 1–2.

Of note, both the trial court and Court of Appeals' decisions turned on this Court's controlling opinion in *Panag*. *See* Br. of Resps. at 15; Op. at 4–5. Yet Morgan never addressed *Panag* in the trial court—and certainly never argued that it was wrongly decided. *See* CP 244–47, 390–93. Nor did he mention it in his opening appellate brief. *See* Br. of Apps. at ii (Table of Authorities). Rather, Morgan's first discussion of *Panag* was presented untimely in his appellate reply brief. Reply Br. of Apps. at 2. Consistent

with that pattern, the Petition does not even cite *Panag*, the controlling authority for which Morgan now seeks "guidance."

III. ARGUMENT

A. None of the requirements for obtaining discretionary review under RAP 13.4 are established.

This Court only accepts review of a Court of Appeals decision terminating review if that decision fits within one of four criteria under RAP 13.4(b)(1)–(4). Yet most of the Petition merely aims to convince that the Court of Appeals misapplied one CPA case. *See* Pet. at 9. While that is just not so, "RAP 13.4(b) does not allow review simply to correct isolated instances" as this Court "is not operating as a court of error[.]" Wash. State Bar Ass'n, APPELLATE PRACTICE DESKBOOK § 18.2(5) at 18-7 (4th ed. 2016) (herein, "APPELLATE DESKBOOK"). None of the criteria for review are satisfied.

1. The Court of Appeals' decision applies—rather than conflicts with—a Supreme Court decision.

The Petition fails to explain how the Court of Appeals' decision conflicts with any decision of this Court. *See* RAP 13.4(b)(1). Indeed, the Petition cites just one Supreme Court opinion, *Michael v. Mosquera–Lacy*, 165 Wn.2d 595, 200 P.3d 685 (2009), and only to state the elements of a CPA claim. Pet. at 8.

The Court of Appeals' decision is consistent with this Court's decision in *Panag* (decided after *Michael*) for the reasons in the unpublished opinion and the Brief of Respondents. Of particular note, this

Court rejected the same argument advanced by Morgan, stating: "There is no merit to [defendant's] assertions that the CPA's purpose is to provide heightened protection only for individuals involved in certain 'protective relationships[,]'" that is, "only those individuals who enter into a consensual transaction for goods or services[.]" *Panag*, 166 Wn.2d at 40.

2. There is no conflict with a published decision of the Court of Appeals.

The Petition fails to explain how the unpublished opinion conflicts with another Court of Appeals decision. *See* RAP 13.4(b)(2). The Court is not called upon to resolve a split among the divisions of the Court of Appeals. *See, e.g.*, *Thompson v. Hanson*, 168 Wn.2d 738, 742, 239 P.3d 537 (2009) ("We accepted review . . . to resolve a split between Divisions One and Three . . . ."). Inasmuch as Morgan claims a "conflict" with *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 159 P.3d 10 (2007), *aff'd sub nom.*, *Panag*, 166 Wn.2d 27 (2009), the unpublished opinion is consistent for the reasons therein and the Brief of Respondents. And while Morgan's contention that the court *misapplied Stephens* is wrong, such would not warrant discretionary review, regardless.

3. No constitutional issue is presented.

The Petition makes no reference to constitutional concerns. *See* RAP 13.4(b)(3). While Morgan alludes to his political motivations, both lower courts and Farrell herself made clear that the content of the robocalls have no bearing. *See* Br. of Resps. at 6–7 n.6. The main thrust of Morgan's argument below—that there is a "political speech" exception to the

CPA—was rightly abandoned on appeal. *Compare* CP 244–47, 385–96 *with* Br. of Apps. at 1.

4. The Court of Appeals correctly determined that its decision is not of general (let alone substantial) public interest.

There being no other grounds for review, Morgan necessarily relies on RAP 13.4(b)(4)'s "substantial public interest" factor. But he comes nowhere near this high bar. *See, e.g.*, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (published Court of Appeals decision had "the potential to affect every sentencing proceeding in Pierce County after November 26, 2001"); *In re Pers. Restraint of Arnold*, 189 Wn.2d 1023, 1092, 408 P.3d 1091 (2017) ("likely incorrect" published Court of Appeals decision could "affect public safety by removing an entire class sex offenders from . . . registration requirements").

At the outset, the Court of Appeals determined that its decision was not "of general public interest or importance" when it decided not to publish. RAP 12.3(d). Neither Morgan nor anyone else sought publication. *See* RAP 12.3(e). Accordingly, the opinion "has no precedential value" and is "not binding upon any court" (there being plenty of other cases supporting the same propositions). GR 14.1(a).

Consistent with those facts, Morgan points to no pending or anticipated litigation that will be impacted in any way by even the persuasive weight of the unpublished opinion. Farrell is not aware of any. And there seems to be no groundswell of public support for increasing the number of robocalls people receive.

The claim that there are "few reported cases from the Supreme Court" applying the CPA is unsupported and incorrect. Pet. at 9. Per Westlaw, there are at least 89 Supreme Court opinions that cite RCW 19.86.010 (the definitions section of the CPA) and 97 Supreme Court opinions citing RCW 19.86.090 (the provision governing private CPA actions). As discussed, in *Panag* this Court expressly rejected the suggestion that there is any required relationship between a CPA plaintiff and defendant. 166 Wn.2d at 39–45. *Panag* has been cited by courts over 300 times—dozens of times for that very proposition.

With nothing in the record evidencing a substantial public interest, Morgan resorts to hypotheticals. But "[t]he Supreme Court does not issue advisory opinions or address issues in the abstract." APPELLATE DESKBOOK, *supra*, § 18.2(5) at 18–8. Nonetheless, Morgan asserts, without analysis, that "the CPA *could* be asserted in the realms of politics, romance, neighborly disputes, academics, and others . . . ." Pet. at 10 (emphasis added). But no one need fear the legitimization of CPA suits by lovers scorned, or anyone else who cannot satisfy the *five* elements of a CPA claim.

To run with that example, a telegram of sweet nothings (even exaggerated ones) would not be cognizable as "unfair or deceptive" within the meaning of CPA element one. *E.g.*, *Panag*, 166 Wn.2d at 51 (conduct is "unfair," for example, where it "offends public policy" or "the common law"); *Rush v. Blackburn*, 190 Wn. App. 945, 963, 361 P.3d 217 (2015) ("The question is whether the conduct has the capacity to deceive a

substantial portion of the public."). Nor would it impact the public interest, CPA element three. *E.g.*, RCW 19.86.093. And any heartbreak sustained by the recipient would not constitute an injury to business or property, CPA element five. *E.g., Trujillo v. Nw. Trustee Servs., Inc.*, 183 Wn.2d 820, 837, 355 P.3d 1100 (2015) ("emotional distress, embarrassment, and inconvenience are not compensable injuries under the CPA"). Here, in contrast, the robocalls undisputedly violated federal law, impacted thousands of Washingtonians, and interfered with the use and enjoyment of their phones.

Had Morgan played out any of his other hypotheticals, they would find the same fate. That is, undoubtedly, why Supreme Court review is limited to *actual* matters of substantial public interest rather than concoctions that "could" (but will not really) come to pass.

B. Morgan failed to preserve the issues for which he seeks review.

While Morgan fails to establish any basis for review, he did not, in any event, preserve the issues he now asks this Court to address. He has failed to "assure[] that a routine procedural . . . issue will not be dispositive of the case." APPELLATE DESKBOOK, *supra,* § 18.2(5) at 18–8.

It is axiomatic that an appellate court reviewing summary judgment engages in the same analysis as the trial court. RAP 9.12; *see also* Br. of Resps. at 18–20. Likewise, arguments presented for the first time in an appellate reply brief are not considered. *E.g.*, *Ainsworth v. Progressive*

Cas. Ins. Co., 180 Wn. App. 52, 78 n. 20, 322 P.3d 6 (2014). These principles control here.

First, the Court of Appeals correctly held that Morgan failed to preserve his challenge to the CPA's injury element. Op. at 7–8; *see also* Br. of Resps. at 18–22. While Morgan assigns error to that issue,[1] the Petition offers no explanation why the Court of Appeals should have considered a question that Morgan previously conceded in the trial court.

Second, without mentioning *Panag* by name, Morgan asks this Court to overturn its holding that there is not "any particular required relationship with the *plaintiff*," 166 Wn.2d at 45 (emphasis in *Panag*), and instead hold that the CPA requires that an "economic relationship exists between the parties." Pet. at 9. But as noted, Morgan never addressed *Panag* (or *Stephens*) in the trial court, even though they were central to the argument and ruling. His *only* reference to either case in the trial court came in a parenthetical in a motion for reconsideration, for an unrelated proposition, stating only that "[t]his case was incorrectly used by Plaintiff in oral arguments." CP 393. Morgan's first substantive discussion of *Panag* came in an appellate *reply* brief, two years after the trial court granted summary judgment against him.

It follows that Morgan never made any argument below why *Panag* does not control and cannot now ask this Court to hold that *Panag* does

[1] Morgan inaccurately states that the Court of Appeals "conclu[ded] that Respondents' [sic] were injured in their 'business or property' . . . ." Pet. at 1. But the court simply did not reach the issue as "Morgan never disputed the injury element of Farrell's CPA claim in the trial court." Op. at 7.

not. This Court cannot conclude that the trial court erred by failing to accept arguments that Morgan never made. It is yet another reason why discretionary review should be denied.

C. Fees and expenses.

The Court of Appeals awarded fees and expenses to Farrell as required under the CPA. Op. at 8 (citing RCW 19.86.090; *Svendsen v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001)). Farrell requests an award of fees and expenses under RAP 18.1(j) for answering the Petition.

IV. CONCLUSION

Morgan fails to establish any basis for obtaining discretionary review because there is none. Farrell respectfully requests that the Court deny review and award fees and expenses.

Respectfully submitted September 21, 2020.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 21, 2020, I e-filed a copy of the foregoing **Answer to Petition for Discretionary Review** with the Supreme Court and delivered the same by email per an electronic service agreement among the parties, to the following:

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