 74978-1

No. 74978-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

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Court of Appeals
Division I
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

THE MANDATORY POSTER AGENCY, INC., d/b/a CORPORATE RECORDS SERVICE, THE WASHINGTON LABOR LAW POSTER SERVICE, WASHINGTON FOOD SERVICE COMPLIANCE CENTER, and STEVEN J. FATA, THOMAS FATA, AND JOSEPH FATA, individually and their corporate capacity,

Appellants.

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A. INTRODUCTION

"CRS" is a small family-owned business that offered a service to Washington corporations, assisting them to comply with their statutory obligation to properly prepare and maintain corporate documents. Recognizing that the trial court erred in ruing that CRS violated RCW 19.86.020 ("CPA") as a matter of law, the State ignores the fact that a key premise for CRS's alleged CPA violation was baseless. In fact, as the State begrudgingly admitted, after filing suit against CRS, CRS's service correctly reflected Washington corporate law.

Moreover, rather than directly defend the trial court's erroneous CPA ruling, the State instead falls back on groundless procedural arguments to avoid addressing the proper legal standard for the trial court's CPA summary judgment, and its fee/penalty decisions.

Substituted for any real legal analysis is the State's zealous insistence that CRS violated an Assurance of Discontinuance ("AOD") in an entirely different matter involving an entirely different CRS division.

This Court should reverse the trial court's decision with its heavy-handed penalties and excessive fee award. This Court should also reject the State's ham-handed cross-appeal demanding that further penalties be imposed against CRS. The State's cross-appeal is a but transparent ploy to have the last word in the briefing on appeal.

B. STATEMENT OF THE CASE

The State's Counterstatement of the Case, br. of resp't at 3-14, violates RAP 10.3(a)(5). It is not a fair recitation of the facts and procedure in this case without argument. Rather, it is entirely argumentative from its captions to its contents. It should be disregarded by this Court.

In its zeal to suggest that its position in this case is righteous, the State misleads this Court in its portrayal of the facts below. For example, it faults the Fatas for not being able to recite from memory RCW sections in support of their position on Washington corporate law in their depositions. Br. of Resp't at 4. The State is fully aware that the Fatas are not lawyers. CRS's position on Washington corporate law's requirement of annual meetings and minutes, or documents, in lieu thereof, *is* fully supported, with appropriate RCW citations, by the testimony of Professors Drake and Obermiller. CP 680-97, 1245-80, 1961-73.

Symptomatic of the State's shift from its initial assertions that CRS was selling a corporate record service that was *unnecessary* under Washington corporate law to an argument that the *format* of the materials soliciting business from corporate clients was somehow "deceptive," is the State's discussion in its brief at 7. The basis for the "120 complaints" referenced in the declaration of the State's investigator is *nowhere*

articulated.[1] Similarly, the State's discussion in its brief at 7-10, 12-13, addresses the mailings' format without acknowledging that the content correctly stated Washington law.

The State, however, engages in revisionist history. It fails to address the fact that its initial focus on CRS's mailings was largely on their Washington corporate law contents; it has no response to the facts set out in CRS's opening brief at 5-9, detailing the State's assertion that CRS's offer to assist corporate clients with filing annual corporate minutes was allegedly a "scam" because there was allegedly no Washington corporate law requirement of an annual corporate shareholder meeting and minutes for such a meeting.[2] That was the basis for the Secretary of State's claim, parroted by the Attorney General, that CRS's service was unnecessary.[3] The State later *admitted* below that its initial contentions about Washington corporate law requirements were *flatly wrong*.

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[1] The State's citation of a letter from a paralegal at CRS's trial counsel's office, br. of resp't at 7 n.2, is cute, but ultimately does not alter the point that the State's initial concern about CRS's mailings related more to their content than their format.

[2] Assistant Attorney General Marc Worthy's June 18, 2015 letter was an *abrupt turnaround* in the State's position, CP 867-69, as both Professor Drake and Obermiller observed. CP 693-94, 1261-62. Nevertheless, the State yet again asserts that there is no requirement of annual minutes. Br. of Resp't at 8.

[3] The State's position is baseless as noted by Professors Drake and Obermiller, whose testimony will be discussed in detail *infra*.

The State again shifts the focus of its argument. It does not now actually deny that Washington corporate law requires an annual shareholders meeting and that minutes of such meetings must be maintained. Nor could it. Br. of Appellants at 20-28. Instead, it asserts that the sale of a corporate minute book by CRS to its customers with a consent in lieu of minutes is somehow not a proper service to be sold to customers. Br. of Resp't at 10-12. It carps that such consent forms are available on the Internet. But it does not deny that other companies sell similar services to corporate clients. *Id.* at 11-13.[4]

Ultimately, in granting summary judgment to the State, the trial court failed to articulate the precise grounds for its decision as to how the contents of the CRS mailings or their format violated the CPA. CP 1590-94.

C. ARGUMENT

(1) The State Misunderstands the Law on Preservation of Error in Avoiding CRS's Arguments

Repeatedly throughout its responsive brief, the State avoids arguments advanced by CRS in its opening brief, claiming that the arguments were not advanced in the trial court and appellate review is

[4] Forms for appellate pleadings are found in Thomas Reuters' *Washington Court Rules*, but that does not make the billing for services by appellate lawyers using such forms a "scam."

foreclosed. *E.g.*, Br. of Resp't at 17, 19, 22, 42 n.14, 43-44, 45. In so doing, the State misstates the rule on preservation of error for appellate review, confusing the requirement that a party address an issue below to preserve it for appellate review with the unsupported notion that every facet of a party's argument on an issue must be surfaced in the trial court or the argument is foreclosed on appeal.

The State's position is undercut by the language of RAP 2.5(a) which forecloses a party from raising a "claim of error" for the first time on appeal. Our Supreme Court has interpreted that rule to apply to *issues*. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). The distinction between an "issue" and an "error" is frequently illusive. *See generally*, Karl B. Tegland, *Wash. Practice Rules Practice* (8th ed.) at 215-16.

For example, there is little question here that CRS objected vigorously to the State's request for fees and costs. CP 2054-2104. CRS objected to fees on the basis of the lodestar analysis and the cost award. *Id.* It was not obliged to surface every single contention as to why the trial court's fees/costs decision was wrong to preserve the *issue* of fees/costs for this Court's review, particularly where the trial court's ruling was patently erroneous.

Moreover, Washington appellate courts have never interpreted RAP 2.5(a) as *invariably* barring the raising of an argument or theory for the first time on appeal. The rule is "permissive in nature and does not automatically preclude the introduction of an issue at the appellate level." *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993). Stated in another way, this Court has discretion, notwithstanding RAP 2.5(a), to consider an issue. *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). *See generally*, RAP 1.2(a) (preference for resolving cases on the merits).

RAP 2.5(a) is not always a bar to raising issues for the first time on review. It is inapplicable if the issue involves the right to maintain the action. *Bennett*, 113 Wn.2d at 918; *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984); *Maynard Inv. Co., Inc. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970). Nor does it apply if a party failed to establish facts on which relief can be granted. *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005). Further, to the extent the issue raised for the first time on appeal arguably relates to issues raised in the trial court, this Court has considered them. *Mavis v. King County Pub. Hosp. Dist. No. 2*, 159 Wn. App. 639, 651, 248 P.3d 558 (2011); *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007). Washington courts have also reviewed

issues for the first time on appeal relating to application of a statute where the statute is pertinent to the substantive issues on appeal, *Bennett*, 113 Wn.2d at 918, or the addressing of the statute is necessary for a proper resolution of the case. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 880 n.9, 215 P.3d 162 (2009).

CRS preserved the issues raised in its opening brief for appellate review.

(2) CRS Did Not Engage in an Unfair or Deceptive Act or Practice in Selling Its Corporate Services

(a) The State Ignores This Court's Decision on the Standard of Review in a CPA Case

The State is obtuse to CRS's discussion in its opening brief at 17-19 of the applicable standard of review in this CPA case. It stubbornly insists that the issue of whether the first element of the test for a violation of RCW 19.86.020 under *Hangman Ridge Training Stables v. Safeco*, 105 Wn.2d 778, 719 P.2d 531 (1986) is a question of law. Br. of Resp't at 22-23.

In doing so, the State simply declines to even cite or address this Court's decision in *Behnke v. Ahrens*, 172 Wn. App. 281, 292-93, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 1003 (2013), or address the argument on the applicable standard of review outlined in CRS's brief at 15-20. Here, whether CRS's acts had the capacity to deceive a substantial

portion of the public or affected the public interest are *questions of fact*. *See also*, *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, 134 Wn. App. 210, 226-27, 135 P.3d 499 (2006), *review denied*, 160 Wn.2d 1019 (2007). The trial court erred in resolving them as a matter of law where the facts were disputed.

Similarly, the State has *no answer* to CRS's argument that businesses and other sophisticated parties are held to a higher standard of proof with regard to the first element of the *Hangman Ridge* test. Br. of Appellants at 19. The State thereby *concedes* the factual predicate for the argument. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992) (failure to respond to factual statements in brief of appellant "concedes the accuracy of the description of the nature, extent, and permanency of the injuries and their support by substantial evidence.") and under RAP 11.2(a) should not be permitted to offer contradictory oral argument on the issue. *Adams v. Dep't of Labor & Indus.*, 128 Wn. App. 224, 228-29, 905 P.2d 1220 (1995); *Guillen v. Pearson*, 195 Wn. App. 464, ___ P.3d ___ (2016).

(b) <u>CRS Did Not Engage In Unfair or Deceptive Practices As a Matter of Law With Regard to Its Services for Corporations</u>

The State steadfastly refuses to acknowledge that the initial reason it came after CRS was because it believed, incorrectly, that Washington

corporate law did not require annual shareholders meeting or that minutes of such meetings, or filing in lieu of such minutes, were required by law. Now, the State even has the audacity to assert in its brief at 31-35 that the parties are in agreement on Washington corporate law.[5] Indeed, the record is clear that the SOS and Attorney General both persisted in this mistaken perception of Washington law, chastising CRS publicly, as noted in CRS's opening brief. The June 18, 2015 letter of AAG Marc Worthy "clarifying" the State's position on the corporate law representations in CRS's mailings cannot be seen as anything but a recantation of the *repeated* public assertions by the SOS and the Attorney General's Office that CRS "misrepresented" the law. More importantly, it is unclear from the trial court's oral ruling, or its orders, if it believed CRS misstated the law, or on what precise points CRS was wrong.

The information provided by Professors Drake and Obermiller is vitally important on this question.[6] Simply put, consistent with this Court's determination that for purposes of the *Hangman Ridge* test

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[5] Untroubled by any reference *anywhere* in the trial court's decision to its argument that CRS was "deceptive" when it provided corporate consents to forego minutes of shareholder meetings rather than actual corporate minutes, the State contends that was CRS's "deception." Br. of Resp't at 33-35. The State's position is hypertechnical nonsense. CRS provided an appropriate means of complying with Washington corporate law to its customers.

[6] Even with the testimony from the State's experts, the existence of conflicting expert opinions on a key point, as here, is enough to foreclose summary judgment. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979).

whether actions have the capacity to deceive a substantial portion of the public or affect the public interest are questions of fact, both experts opined on those topics. Professor Drake summarized his views in this regard by stating:

> I disagree with Professor Branson's attempt to distort select provisions of Washington law. Defendants provide a document-preparation service that helps Washington corporations comply with RCW 23B.07.010. It's undeniable that some corporate owners, out of ignorance or neglect, will take the risks of not complying with the most basic governance requirements of the corporate entity that they have created. As previously stated, in my view this reality just confirms a need for service providers who call attention to the requirements, encourage compliance, and provide legally permissible tools to satisfy the requirements.

CP 1972-73. The entire gravamen of Professor Obermiller's report, like Professor Drake's reports, is that CRS's practices do not have the capacity to deceive a substantial portion of the public. CP 1245-71. These were *fact issues*. If the *content* of CRS's mailings was a basis for the trial court's decision (and that is ultimately unclear from the record), then the trial court erred in ruling on them as a matter of law. Its order on summary judgment cannot stand.

(3) <u>The Format of CRS's Mailings Was Neither Unfair Nor Deceptive</u>

The principal focus of the trial court's decision below seemed to focus on the *format* of CRS's mailings. RP 46-47, 50-51. As noted in

CRS's opening brief at 28-36, the format of its mailings, with their prominent disclaimers, was neither unfair nor deceptive.

CRS did not violate the terms of the AOD, the basis the trial court noted to conclude the CPA was violated, for the reasons articulated in its opening brief. RP 47.

More critically, the testimony of CRS's expert on marketing, Professor Obermiller, was key on this point. Professor Obermiller specifically opined that the State's own confusion about corporate law was problematic. CP 1256-57. Moreover, he rejected the State's view that the mailings gave the "net impression that the solicitation has the look and feel of a government document." CP 1267. He testified that the tone of CRS's mailings

> (the use of capital letters and bold font are cited) is both normal marketing practice and consistent with the bureaucratic language appropriate for legal documentation. I would grant the use of capital letters, boxes, bold font, etc. are efforts to increase attention and a sense of importance; but, as such, they are common marketing techniques that are used widely, in many mundane ads and direct mailings.

CP 1267-68. Finally, he specifically indicated that CRS's disclaimers that the mailings were not governmental in nature obviated any alleged harm. CP 1246-50, 1268. As with the *content* of the mailings, the factual questions of capacity to deceive a substantial portion of the public and the

effect on the public, per *Behnke*, should have been resolved by the trier of fact, not the trial court as a matter of law.

(4) The Trial Court Abused Its Discretion in Failing to Conduct a Proper Lodestar Analysis in Awarding the State Grossly Excessive Fees and Costs

The State asserts in its brief at 42-45 that the trial court's fee and cost awards are sustainable. They are not. In making this argument, the State misstates the law on the calculation of a reasonable fee award under the lodestar methodology and refuses to even address the fact that the trial court improperly awarded costs beyond those that are permissible under RCW 4.84.010.

(a) The Trial Court's Fee Award Is Unsustainable

First, the State agrees the lodestar method must be applied. Br. of Resp't at 42-43.[7]

Second, the State *admits* that it made no effort to segregate time spent on successful from unsuccessful activities and theories, and the trial court did not make a reduction of a *single penny* in its fee request. *Id*. at 44-45.

[7] Contrary to the State's contention that its documentation of its attorney/staff time was adequate, br. of resp't at 43, it was not for the reasons set out in the brief of appellants at 43-44. This Court can readily discern that the amorphous time entries, CP 1768-95, convey no meaningful information about the work performed.

Third, the State declines to address the reasonableness of its counsel/staff hourly rates by dodging the issue in a footnote. *Id*. at 42 n.14.[8] It essentially concedes that no client was ever charged the rates proffered by the State and used by the trial court to set the fee award here. In *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983), a CPA case, our Supreme Court indicated that courts should not simply accept counsel's hourly rates automatically. Rather, courts must look to the level of skill required by the case, time limitations imposed by the litigation, the amount of any potential recovery, the attorneys' reputations, and the undesirability of the case. *Id*. The trial court addressed *none* of those factors here. CP 2126-27.

On the legal analysis of the fee award, the most critical flaws in the State's analysis are its failure to segregate time its attorneys spent on unsuccessful matters and the paralegal investigation time. Under RCW 19.86.090, the State had a mandatory obligation to segregate time spent on successful from unsuccessful activities, as our Supreme Court and this Court have *repeatedly* emphasized in CPA litigation. *Nordstrom, Inc. v.*

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[8] The State is wrong in claiming CRS did not preserve the excessiveness of the Attorney General Office rates for appellate review. CRS challenged the fee award below. CP 2054-2104. The theoretical rates claimed by the State's lawyers were but one facet of the fee issue, and are plainly associated with CRS's overall claim that the State's requested fees are unreasonable under the lodestar methodology. *See* section (1) *supra*. CRS has the right to raise this point on review.

Tampourlos, 107 Wn.2d 735, 743-44, 733 P.2d 208 (1987); *Travis v. Wash. Horse Breeders Ass'n*, 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988); *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 169-71, 795 P.2d 1143 (1990). It did not do so. If, as the State asserts, the "trial court did not find that [CRS] prevailed on any portion or theory of the case," br. of resp't at 44, this is plainly erroneous for the reasons set forth *supra*. Simply put, the State cannot point to a single statement by CRS about Washington corporate law that is an incorrect statement of law. To the extent that the trial court's decision on RCW 19.86.020 rests on alleged misstatements of Washington corporate law by CRS (and that, of course, is unclear from the trial court's order, as noted *supra*), the trial court's fee award is unsustainable when it failed to excise time related to the State's unsupported argument.

Further, the time claimed by the State for the work of its investigator was not recoverable, despite the State's contrary assertion. Br. of Resp't at 43-44. The State cannot point to a *single case* in which an investigator's time was recoverable as part of a reasonable attorney fee in Washington.[9] Nor does the State document from the record any indication

[9] The State again asserts this point was not preserved for appellate consideration. Br. of Resp't at 43-44. The point was part of the issue of the reasonableness of the State's fee award. Moreover, it goes to the question of the State's entitlement to recover. *See* section (1) *supra*.

whatsoever that the trial court addressed the factors set out in *Absher Construction Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1996). No one can know, on this record, what the State's investigator was doing, whether it related to anything consequential to this case, or whether it was accomplished under an attorney's supervision for a purpose legal in nature.

Ultimately, in awarding the State *every penny* in fees it demanded, the trial court abdicated its responsibility – mandated by this Court in *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014) – to take an active role in assessing a fee request. This Court should reverse the excessive fee award.

(b) The Trial Court Plainly Erred in Awarding Costs Beyond Statutory Costs

The State does not deny that the trial court awarded costs beyond those authorized by RCW 4.84.010. Br. of Resp't at 45. Instead, it contends that the issue was not properly preserved for appellate review. *Id.* Again, the State is wrong.[10] Washington law clearly provides that in

[10] As previously noted, CRS raised the issue of the State's right to secure fees and costs below. CRS is entitled, in any event, to raise this issue of *plain error*, notwithstanding RAP 2.5(a), as it relates to the State's ability to document an entitlement to the relief it received from the trial court, and it also relates to the proper interpretation of a statute. *See* section (1) *supra.*

CPA cases only costs allowed in RCW 4.84.010 are recoverable. Br. of Appellants at 49-50.

(5) The Trial Court's CPA Penalties Here Were an Abuse of Discretion, Violating Due Process

Washington courts have never adopted a standard by which to analyze the propriety of a penalty award. *State v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976); *State v. WWJ Corp.*, 138 Wn.2d 395, 980 P.2d 1257 (1999). Nor does RCW 19.86.090 specify the grounds for assessing a penalty. The State contends on cross-appeal that the penalty test of federal law or that of sister states should apply. The trial court, however, never applied those penalty criteria, making up the penalty as it went along. CP 2045; RP 48-49.[11] In doing so, it abused its discretion.

(a) The Trial Court's Penalty Award Was Excessive

For the reasons articulated in CRS's opening brief at 37-38, the trial court's penalty award was excessive, particularly when the trial court created a restitution fund. The State argues in its brief at 47 that the criteria for a penalty adopted in federal law should apply. *United States v. Readers Digest Ass'n*, 662 F.2d 955 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982). There, the defendant repeatedly violated a consent decree by

engaging in identical mass mailings to the mailings that prompted the consent decree. The court analyzed the penalty imposed against 5 factors:

> (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTO.

Id. at 967.

In *State ex rel. Wilson v. Ortho-MacNeil-Janssen Pharmaceuticals, Inc.*, 777 S.E.2d 176 (S.C. 2015), *rehearing granted*, 414 S.C. 33 (2015), the South Carolina Supreme Court actually applied an eight factor test:

> Application of the *Reader's Digest* factors was proper here. Given that this is our first opportunity to address the appropriate factors for assessing a civil penalty in an Attorney General directed claim under SCUTPA, we direct that, prospectively, the following list of non-exclusive factors be used in assessing civil penalties under SCUTPA: (1) the degree of culpability and good or bad faith of the defendant; (2) the duration of the defendant's unlawful conduct; (3) active concealment of information by the defendant; (4) defendant's awareness of the unfair or deceptive nature of their conduct; (5) prior similar conduct by the defendant; (6) the defendant's ability to pay; (7) the deterrence value of the assessed penalties; and (8) the actual impact or injury to the public resulting from defendant's unlawful conduct. We further authorize our able trial judges to consider any other factors they deem appropriate under the circumstances. In issuing a ruling, the trial court should make sufficient findings of fact concerning all relevant factors to enable appellate review.

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[11] The trial court indicated that its key focus was CRS's alleged lack of good faith, a conclusion reached without any factual basis. CP 2045. It neglected to address any other penalty criteria.

Id. at 203 n.31. Indeed, that court *rejected* certain excessive penalties imposed by the trial court, after considering the factors above. *Id.* at 204.

Applying the criteria the State itself claims are pertinent, the trial court abused its discretion in making its excessive penalty award.

(b) The Trial Court's Penalty Award Violated CRS's Due Process Rights

The State contends that the trial court's extraordinary penalty award here meets constitutional due process muster without even seriously addressing the United States Supreme Court's seminal decisions on the application of the Due Process Clause of the Fourteenth Amendment to punitive damages awards. Br. of Resp't at 39-42. The State has no answer to the fact that the United States Supreme Court in *BMW of No. America v. Gore*, 517 U.S. 559, 581, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) and *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2005) indicated that a punitives to compensatory ratio in excess of *single digits* violated due process. Depending how many CRS customers actually seek restitution, the trial court's award of $793,540 in punitive damages would exceed what *Gore* allowed.

The State acknowledges the thin constitutional ice on which the penalty award skates by contending that due process principles are

inapplicable to statutory penalties, citing *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 286 P.3d 46 (2012). That case does not help the State. There, the Court acknowledged that the issue of the applicability of *Gore* or *Campbell* to statutory penalties had not yet been addressed by the United States Supreme Court, but the Court also noted, 175 Wn.2d at 533 n.13, that statutory penalties could be invalidated if they were "so severe and oppressive as to be wholly disproportionated to the offense and obviously unreasonable." *St. Louis, Iron Mountain & Southern Rwy. Co. v. Williams*, 251 U.S. 63, 67, 40 S. Ct. 71, 64 L. Ed. 2d 139 (1919). *See also, Zomba Enters., Inc. v. Panorama Records*, 491 F.3d 574 (6th Cir. 2007), *cert. denied*, 553 U.S. 1032 (2008). *See also, WWJ Corp.*, 138 Wn.2d at 603-04 (8th Amendment may bar excessive fine/penalty).

Here, unlike *Perez-Farias* where the Court ruled that statutory liquidated damages of $500 per violation was mandatory under the statute as the plaintiffs' full recovery, the State recovered actual damages, in the form of a restitution fund. The penalties were not statutory liquidated damages; they were *punishment.* Moreover, the trial court here, like the juries in *Campbell* and *Gore,* had discretion on the amount of the penalty, up to $2,000 per violation. The conduct was akin to jury punitive damages decision to which the *Gore/Campbell* analysis properly applied.

Ultimately, whether based on common law or statute, a penalty decision should be subject to the same type of due process challenge.[12] In the due process analysis, reprehensibility of the defendant's conduct is the most important factor. *Gore*, 517 U.S. at 575. Indeed, this Court should be concerned that trial courts will use the reprehensibility factor or other factors for a punitive damages award described above to impose constitutionally excessive penalties for essentially the same allegedly wrongful conduct. Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages After State Farm v. Campbell*, 41 San Diego L. Rev. 1465, 1467 n.7 (2004).

This Court should strike the trial court's punitive damages award as violative of CRS's constitutional rights.

(c) <u>The State's Request on Cross-Appeal for Added Penalties Is Baseless, Bordering on Frivolous</u>[13]

As if the trial court's decision ruling that CRS must set up a restitution fund, imposing more than $793,000 in penalties, and giving the

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[12] If the State seriously contends that the trial court's excessive punitive damages award is exempt from constitutional scrutiny because it is derived from statute, that is not so, as CRS argued below. CP 1867. The Eighth Amendment precludes excessive state-imposed fines. *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) (fine violates 8th Amendment if it is grossly disproportional to the gravity of the alleged offense). *See WWJ Corp.*, 138 Wn.2d at 603-04.

[13] Rather than being a principled argument, the State's "tain't enough" argument is simply a thinly disguised device to afford it the opportunity to file the final

State *every penny* of its fee request, without reductions of any sort mandated by the lodestar methodology, the State has the audacity to claim the trial court abused its discretion in failing to award even *more penalties* against CRS. Br. of Resp't at 45-49. In making this argument, the State must assert that the trial court abused its discretion on penalties, after vociferously proclaiming that the trial court properly exercised its discretion, and that it did not violate CRS's right to due process of law. *Id.* at 35-42.

If the State is correct that the trial court here failed to address the allegedly appropriate elements of a civil penalty under federal law, as described by the Third Circuit in a 34-year-old decision or an 8-part test of a sister state, then the State has essentially confirmed CRS's argument that the trial court abused its discretion in making the initial penalty decision against CRS – *nowhere* on this record did the trial court articulate its consideration of what the State asserts are the crucial factors for a penalty decision imposing such sanctions against CRS. This Court should reverse the penalties imposed by the trial court against CRS for the reasons the State has articulated on cross-appeal.

D. CONCLUSION

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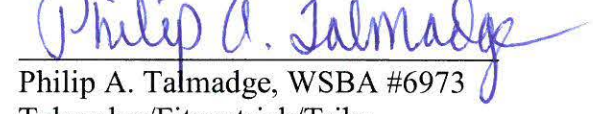
brief in this case, hoping that because it has the last word, its baseless arguments will attain validity that do not deserve. This Court should see through this tactic.

Nothing presented in the State's brief should deter this Court from concluding that the trial court jumped the gun in ruling as a matter of law that CRS violated the CPA in its mailings to prospective customers both as to their contents and format, in imposing onerous restitution and civil penalties on CRS, and in making an excessive award of attorney fees and costs to the State.

This Court should reverse the trial court's summary judgment and vacate its award of restitution, penalties, fees, and costs. Costs on appeal should be awarded to CRS.

DATED this 19th day of October, 2016.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Reply Brief of Appellants in Court of Appeals Cause No. 74978-1-I to the following:

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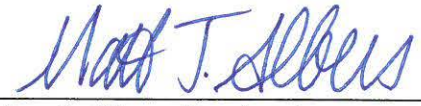
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 19, 2016, at Seattle, Washington.



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