

IN THE COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON

NO. 280608-III

Spokane County Superior Court  
NO. 08-2-01519-4

---

DEBBIE DONOHUE, and all other  
similarly situated persons,

Plaintiffs/Appellants,

v.

GREGORY A. NIELSON and/or  
GREGORY A. NIELSON, P.S.,

Defendants/Respondents.

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**BRIEF OF RESPONDENTS**

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EVANS, CRAVEN & LACKIE, P.S.  
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## I. COUNTER STATEMENT OF CASE

### A. General Nature of Case and Identity of Parties

This is a Fair Debt Collection Practices Act (FDCPA) case. The parties are Debbie Donohue (Donohue), the appellant and plaintiff below, and attorney Gregory A. Nielson, and his law firm, Gregory A. Nielson, P.S. (Nielson), respondents and defendants below. The case arises from Nielson's initiation of a collection lawsuit against Donohue at the request of a collection agency client, Quick Collect, Inc. (Quick Collect).

### B. Pertinent Facts

On or about October 26, 2007, the Children's Choice, a dental practice located in Spokane, Washington, assigned to Quick Collect, an unpaid dental services account owed by Donohue. *CP 143*. The assigned amounts were principal of \$270.99, and finance charges totaling \$24.07. *Id.*

Over the next 60 days, in an effort to collect the debt, Quick Collect sent three notices to Donohue. First, upon receipt of the assignment, Quick Collect mailed to Donohue, first-class postage prepaid, a Formal Demand Statement. *CP 143, 158*. The Demand Statement was never returned as undeliverable, nor was Quick Collect informed the Demand Statement was refused, or that Donohue had moved and left no forwarding address. *CP 144*.

Next, having heard nothing from Donohue in response to the Formal Demand Statement, on November 29, 2007 Quick Collect mailed Donohue a "Notice of Intent to File Suit". *CP 144, 160.*

Finally, on December 19, 2007, Quick Collect mailed a "Property Notice" to Donohue, referencing her ownership of property in Spokane County and indicating that the file was being prepared for Quick Collect's legal department. *CP 144, 162.*

Quick Collect heard nothing from Donohue in response to these mailed notices. Thus, Quick Collect referred the matter to attorney Nielson for the commencement of litigation. *CP 144.*

On or about January 18, 2008, Nielson, on behalf of Quick Collect filed a Summons and Complaint against Donohue in the District Court of Spokane County, Washington, under cause number 28098575. *CP 144.* Donohue was personally served with the Summons and Complaint on January 30, 2008 at the same address to which the Formal Demand Statement and other notices had been mailed. *CP 144, 168.*

Before the Summons and Complaint were prepared, filed and served, Nielson had no contact with Donohue. *CP 125.* After the Complaint was filed and served, and before counsel appeared for Donohue, Nielson did have a unilateral written contact with Donohue. On or about February 7, 2008, Quick Collect received a check from Donohue

dated January 25, 2008. *CP 145, 170*. The check was made payable to Quick Collect in the amount of \$300.23. *Id.* Because the matter had already been placed in litigation, and because Quick Collect determined that Donohue's check was insufficient to satisfy the amounts due and owing, Quick Collect asked Nielson to respond to Donohue's insufficient tender. *CP 124, 125, 145*. Nielson responded by writing to Donohue on February 7, 2008, and advising her of the insufficient tender, and setting forth the amounts that would be required to satisfy and extinguish the debt. *CP 125, 137*.

**C. Procedure Below**<sup>1</sup>

Donohue's Amended Complaint alleged that Nielson violated the FDCPA in a number of respects, including by not sending Donohue a

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<sup>1</sup> This case has a complex procedural history largely as a result of parallel litigation in federal court. On essentially the same facts, Donohue filed a second action, this time against Quick Collect only, in Spokane County Superior Court under cause number 08-2-02087-2. The only difference between that case and the one at bar was that the Quick Collect case excluded the validation notice claim. The case against Quick Collect was removed to the Federal District Court for the Eastern District of Washington on May 7, 2008.

Both parties moved for summary judgment in the federal case. Before Judge Gregory Sypolt issued an order on the parties' respective summary judgment motions in the instant case, the federal trial court granted summary judgment in favor of Quick Collect. On Nielson's motion in the instant case, Judge Sypolt determined that the federal court judgment was res judicata on all claims except the validation notice issue. Because Judge Sypolt had determined that summary judgment in favor of Nielson was appropriate on that issue, ultimately he granted Nielson's Motion for Summary Judgment of Dismissal.

Donohue appealed both the federal and state summary judgment orders. The instant appeal was stayed pending resolution of the federal appeal. On January 13, 2010, the Ninth Circuit, in a published opinion, affirmed summary judgment in favor of Quick Collect. *See Donohue v. Quick Collect, Inc.*, 592 F.3d 1027 (9th Cir. 2010).

validation notice under 15 U.S.C. §1692g(a). *CP 23-32*. Both parties moved for summary judgment. *CP 7, CP 173-174*. On April 6, 2009 the Court denied Plaintiff's Motion for Partial Summary Judgment on Liability and granted Defendants Motion for Summary Judgment of Dismissal. *CP 253-264*. On appeal, Donohue challenges only the summary judgment determination that the FDCPA did not require Nielson to provide Donohue with a validation notice.

## **II. ARGUMENT AND AUTHORITIES**

### **A. Standard of Review**

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Whether a defendant violated the notice requirements of the FDCPA is a matter determinable on summary judgment, and appellate review is de novo. *See, Donohue v. Quick Collect, Inc.*, 592 F.3d 1027 (2010).

**Nielson, a Lawyer Hired By Quick Collect to Initiate a Collection Action Against Donohue, Was Not Required to Follow Quick Collect's Validation Notice With a Second Notice**

15 U.S.C. §1692g(a) is the applicable provision of the FDCPA. It states, in pertinent part:

(a) Notice of Debt; contents. Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing-

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within 30-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer and a copy of such verification or judgment will

be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the 30 day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. (emphasis added).

Donohue contends this statute required Nielson to send her a validation notice in addition to the one sent by Quick Collect. This argument is misplaced. Where multiple related "debt collectors" are involved in attempting to collect a debt, each need not send a separate debt validation notice. See *Goray v. Unifund CCR Partners*, 2007 WL 4260017 (D. Hawaii 2007); *Nichols v. Byrd*, 435 F.Supp. 2d 1101 (D. Nev. 2006); *Senfile v. Landau*, 390 F.Supp.2d 463 (D. Maryland, 2005); *Oppong v. First Union Mortgage Corp.*, 566 F.Supp.2d 395 (E.D. Penn. 2008). The Court in *Senfile* addressed this issue succinctly, stating:

The Court again looks to the plain language of §1692g “[within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall unless the following information is contained in the initial communication...], send the consumer written notice.” Though “communication” is broadly defined, the statute explicitly refers in the singular to the “initial communication.” Again, had Congress intended that there might be more than one initial communication with a debtor on a given debt, it certainly could have provided

that, such as by explicitly requiring both initial and successive debt collectors to provide the §1692g validation notice. In fact, Congress made just such distinctions in § 1692e(11) when it distinguished between initial and subsequent communications to a debtor on a given debt. See 15 U.S.C. §1692e(11). Here the preeminent canon of statutory interpretation requires the court to “presume that the legislature says in a statute what it means and means in a statute what it says there.” (citations omitted). The court thus holds that there is only one “initial communication” with a debtor on a given debt under §1692g(a), even though subsequent debt collectors may enter the picture. (emphasis added).

390 F.Supp.2d at 473.

In the instant case, the "Formal Demand Statement" sent by Quick Collect to Donohue on October 27, 2007 satisfied the validation notice requirements of 15 U.S.C. §1692(g), and no additional notices were required to be sent to Donohue by Nielson, a lawyer hired by Quick Collect to litigate for collection of the same debt.

There is limited federal authority to the contrary on this issue, some of which is cited by Donohue in her brief. However, in *Oppong, supra*, the court observed as follows regarding that line of cases:

To the extent that there is authority to the contrary (citations omitted) it is not persuasive. Under the FDCPA, the goal of the initial communication is to advise the debtor of his rights and obligations to his

creditor. Once the validation information is provided in the initial communication, and once the debtor is made aware of his rights at the time the collection process begins, it would serve no purpose to require that the same information be given again and again, each time the servicing function was passed from one creditor to another.

566 F.Supp.2d at 404 (emphasis added).

It bears emphasizing that Nielson's first contact with Donohue was service of the Summons and Complaint. §1692g specifically provides that "[a] communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a)." 15 U.S.C. §1692g(d). With legal pleadings specifically exempted from the definition of "initial communication", it would be absurd to apply the validation notice requirement to post-litigation communications between the lawyer initiating the lawsuit and the defendant debtor. If Donohue's interpretation of the law were correct, a post-litigation inquiry from the initiating lawyer regarding such matters as defendant's filing of an answer, the issuance of written discovery, or the prospect of settlement, would trigger another validation notice. The FDCPA should not be applied in such a "fundamentally nonsensical manner." See *Motherway v. Gordon*, 2010 WL 2803052 (W.D. Wash.) (post-commencement litigation documents such as motions and requests for admission not "subsequent

communications" within the meaning of §1692(e)(ii), even through such documents not specifically exempted); *Clark v. Capital Credit and Collection Services, Inc.*, 460 F.3d 1162, 1169-70 (9<sup>th</sup> Cir. 2006) (court is not required to interpret FDCPA "in a formalist manner when such an interpretation would produce a result contrary to the statute's purpose or lead to unreasonable results.").

Donohue makes much of the fact that the amount set forth in the February 7, 2008 letter were different than the amounts set forth in Quick Collect's validation notice, and in the collection complaint. But a collection complaint can request additional interest and attorney fees, as long as those amounts are authorized by law. And, where the recovery of such things as court costs, attorney fees and accruing interest are authorized by law, the FDCPA does not require that those amounts be set forth exactly. *See Hutton v. Law Offices of Collins & Lamore*, 668 F.Supp.2d 1251 (S.D. Cal. 2009) (a creditor can request interest that accrues after a validation notice is sent, and before the debt is satisfied, without specifying the exact amount of the interest and without violating the FDCPA); *Reyes v. Kenosian and Miele LLP*, 619 F.Supp.2d 796 (N.D. Cal. 2008) (not a violation of the FDCPA for complaint to request attorney fees unspecified as to exact amount). If a complaint asking for unspecified amounts such as accruing interest or court costs and attorney's fees, is in

compliance with the FDCPA, and is not a communication within the meaning of the Act, it would be absurd to construe the Act as requiring a 30 day validation notice on the heels of what was essentially a post litigation settlement letter sent.

As a final matter, in considering whether the FDCPA should be construed to have required Nielson to follow Quick Collect's validation notice with a second notice, the Court should consider the policy considerations articulated in *Jacobson v. Healthcare Financial Services, Inc.*, 434 F.Supp.2d 133 (2006). There, the court stated:

Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of this civil liability scheme defined by [the FDCPA], not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting the legislation, 1977 U.S.C.C.A.N. 1695, 1696, nor to ferret out collection abuse in the form of "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." *Id.* Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs.

The court then went on to advise against a hyper-technical reading of the statute:

The statute need not be applied in this manner; and indeed, this Circuit has recognized that courts should not countenance lawsuits based on frivolous misinterpretations of nonsensical assertions of being led astray. In *Russell v. Equifax A.R.S.*, one of the most often quoted opinions on the "least sophisticated consumer" standard, the Circuit emphasized that "the test is how the least sophisticated consumer—one not having the astuteness of a 'Philadelphia lawyer' or even the sophistication of the average, everyday, common consumer—understands the notice he or she receives." *Russell*, 74 F.3d at 34. This understanding of the least sophisticated consumer standard points away from closely parsing a debt collection letter like a municipal bond offering and towards a common sense appraisal of the [communication].

It is interesting to contemplate the genesis of these suits. The hypothetical Mr. Least Sophisticated Consumer ("LSC") makes a \$400 purchase. His debt remains unpaid and undisputed. He eventually receives a collection letter requesting payment of the debt which he rightfully owes. Mr. LSC, upon receiving a debt collection letter that contains some minute variation from the statute's requirements, immediately exclaims "This clearly runs afoul of the FDCPA!" and — rather than simply pay what he owes — repairs to his lawyer's office to vindicate a

perceived "wrong." "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." (citation omitted).

434 F.Supp.2d 133, at 138-39.

In the instant case, Donohue incurred a debt to the Children's Choice that she refused or neglected to pay. As a consequence, the account was referred to Quick Collect. As required by the FDCPA, Quick Collect sent Donohue a proper validation notice. Donohue has never claimed this notice was misleading or in any way violative of the FDCPA. When Donohue still refused or neglected to pay, Quick Collect referred the matter to Nielson for initiation of a collection action. Without communicating in any way with Donohue, Nielson caused a collection complaint to be filed in Spokane County District Court and served on Donohue. The collection complaint, as permitted by state law and the FDCPA, asked for interest, costs and attorney fees. On February 7, 2008 Nielson simply sent Donohue a post-litigation settlement letter identifying the amounts then due and owing. Donohue contends the February 7, 2008 letter triggered yet another validation notice, and an attendant 30 day waiting period. Under the circumstances a second notice would tend to promote debtor confusion, not lessen it. With all due respect to Donohue

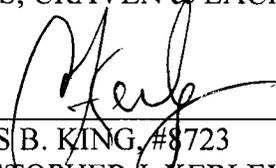
and her counsel, the FDCPA should not be interpreted in such a nonsensical and absurd manner.

### III. CONCLUSION

Based on the foregoing argument and authorities, Gregory A. Nielson and Gregory A. Nielson, P.S. respectfully request that the trial court's summary judgment ruling be affirmed.

Dated this 6 day of December, 2010.

EVANS, CRAVEN & LACKIE, P.S.

By 

JAMES B. KING, #8723

CHRISTOPHER L. KERLEY, #16489

Attorneys for Defendants/Respondents

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 6<sup>th</sup> day of December, 2010, the foregoing was delivered to the following persons in the manner indicated:

Michael J. Beyer Attorney at Law 1403 W. Broadway Avenue Spokane, WA 99201	VIA REGULAR MAIL [ ] VIA CERTIFIED MAIL [ ] VIA FACSIMILE [ ] HAND DELIVERED <input checked="" type="checkbox"/>
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Dec 6, 10 /Spokane, WA  
(Date/Place)

*Frances Ora*