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SUPREME COURT OF THE STATE OF WASHINGTON

CINDY ALEXANDER; BLOCKER VENTURES, LLC; CHRIS CLARK;
R. BRUCE EDGINGTON; KIPP JOHNSON and JENNIFER JOHNSON;
GOPIKRISHNA KANURI and HIMABINDU KANURI; CHRIS
KASPRZAK and ELIZABETH KASPRZAK; PAUL LARKINS and
JOYCE HYJUNG LARKINS; KRISTINE MAGNUSSEN; SCOTT
McKILLOP; CAINE OTT and DANA OTT; MARA PATTON; PETER
RICHARDS; DANTE SCHULTZ; WINFRED D. SMITH; ROBERT
STODDARD and COLETTE STODDARD; NEIL WEST; LIANG XU
and JIA LU DUAN,

Petitioners,

v.

GARY SANFORD and JANE DOE SANFORD; PAUL BURCKHARD
and MURIEL BURCKHARD; JAMES SANSBURN and JANE DOE
SANSBURN; RICHARD PETER and JANE DOE PETER; SHANA
HOLLEY and RICHARD HOLLEY; BRETT BACKUES and JANE DOE
BACKUES; JOSEPH CUSIMANO and JANE DOE CUSIMANO;
JASON FARNSWORTH and JANE DOE FARNSWORTH; PATRICIA
HOVDA and JOHN DOE HOVDA; ALEXANDER W. PHILIP and
NATALIA T. PHILIP; HUCKLEBERRY CIRCLE, LLC; LOZIER
HOMES CORPORATION; DOE DECLARANT AFFILIATES 1-20;
DIANE GLENN and JOHN DOE GLENN; CONSTRUCTION
CONSULTANTS OF WASHINGTON, LLC,

Respondents.

**BRIEF OF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF
THE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS**



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I. IDENTITY AND INTEREST OF *AMICUS*

Amicus Curiae is the Attorney General of Washington. The Attorney General submits this amicus brief to urge this Court to hold that for purposes of the Consumer Protection Act, RCW 19.86 (CPA), the actions of declarant-appointed condominium association board members are in “trade or commerce” as defined by RCW 19.86.010, even if those board members had no contractual relationship with the plaintiff condominium purchasers.

The Attorney General’s constitutional and statutory powers include the submission of amicus curiae briefs on matters affecting the public interest.¹ This case presents issues of significant public interest, including the scope of “trade” and “commerce” covered by the CPA, and the level of protection afforded to Washington consumers who own and/or purchase condominiums. The Attorney General enforces the CPA on behalf of the public, RCW 19.86.080, and has an interest in the development of CPA case law, RCW 19.86.095, including the availability of private CPA claims:

Private actions by private citizens are now an integral part of CPA enforcement. Private citizens act as private attorneys general in protecting the public’s interest against

¹ See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

unfair and deceptive acts and practices in trade and commerce. Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests.

Scott v. Cingular Wireless, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007) (internal citations omitted). Amicus addresses only the issues presented as they relate to the CPA.

II. ISSUE ADDRESSED BY AMICUS

Whether the activities of declarant-appointed condominium association board members constitute “trade or commerce” as defined by RCW 19.86.010(2), making them subject to a CPA claim arising from their alleged misrepresentations and failure to disclose material facts to homeowners regarding the condominiums.

III. STATEMENT OF THE CASE

Amicus relies on the facts of this case as set forth in the Court of Appeals’ decision below.

IV. ARGUMENT

A. Summary of Argument.

This case asks the Court to determine whether a private plaintiff may bring a CPA action against declarant-appointed condominium association board members (Board Members) challenging their unfair or

deceptive misrepresentations and failure to disclose material facts regarding the condominiums to homeowners. Specifically, the question is whether the Board Members' conduct giving rise to the plaintiffs/homeowners' (Homeowners) CPA claims occurred in "trade or commerce" as defined by RCW 19.86.010(2), the second element of a CPA claim.

The Court of Appeals dismissed the Homeowners' CPA claims because the Homeowners did not purchase their units from the developer (Lozier Homes Corporation) or the Board Members and because the developer and Board Members "were not in the business of selling condominiums." *Alexander v. Sanford*, 181 Wn. App. 135, 182, 325 P.3d 341 (2014). Citing no legal authority, the Court of Appeals held that "[w]hen [the] Homeowners purchased their units, they were not engaged in trade or commerce with [the developer or the declarant-appointed condominium association board members]" and thus, the "Homeowners failed to state a claim for violation of the CPA." *Id.*²

Nothing in the CPA's language or structure requires privity or a consumer transaction between plaintiff and defendant, and a narrow

² The Homeowners alleged sufficient facts that the developer, Lozier Homes is the "alter ego of Declarant." *Alexander*, 181 Wn. App. at 178 n. 33. There is no dispute that the declarant was in the business of selling condominium units. If the Homeowners' alter ego theory is proven after discovery and they were injured by the declarant's acts, they could impose CPA liability on Lozier through veil-piercing. Amicus therefore focuses on issues surrounding the declarant-appointed board members.

reading of the CPA would undermine the legislative mandate that the act must be liberally construed. RCW 19.86.920. And this Court has already rejected the argument that a “privity” or a “consumer transaction” between the parties is an element of a private CPA claim. *See, e.g., Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 38, 204 P.3d 885 (2009) (rejecting argument that “the CPA applies only to disputes arising from a consumer or business transaction and that only a consumer or someone in a business relationship can bring a private cause of action under the CPA”). The facts alleged here show the Board Members acting in trade or commerce by facilitating the sale of condominium units by a company they owned and worked for. Finally, there is no basis to extend the limited CPA exemption for “learned professions” to declarant-appointed condominium board members.

B. Actions by Declarant-Appointed Condominium Association Board Members Are in “Trade or Commerce” for Purposes of the Consumer Protection Act.

The CPA prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of *any* trade or commerce.” RCW 19.86.020 (emphasis added). It was enacted by the Legislature “to protect the public and foster fair and honest competition.” RCW 19.86.920. The elements of a private CPA claim are well-established: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce,

(3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). These elements, and these elements alone, define the set of plaintiffs who may bring a successful private CPA action.

As detailed below, nothing in this statutory language, the purpose of the CPA, or Washington case law requires that an injured consumer who brings a claim under the CPA must have a direct contractual relationship with the defendant in order to sue.³

1. The plain language of RCW 19.86.090 precludes a “privity” or “consumer transaction” requirement.

In every relevant statutory term, the Legislature chose to use broad language that encompasses “trade” and “commerce” outside of direct consumer transactions between a CPA plaintiff and a defendant. RCW 19.86.020 prohibits “unfair or deceptive acts or practices in the conduct of *any* trade or commerce” (emphasis added). RCW 19.86.090 creates a private cause of action for “[*a*]ny person who is injured in his or her business or property by a violation of RCW 19.86.020” (emphasis

³ The statutory requirement of an act or practice “in trade or commerce” is an element of CPA enforcement actions by the Attorney General. *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2001) (defining elements of a CPA enforcement action by the Attorney General as (1) an unfair or deceptive act or practice, (2) in commerce, and (3) public interest impact). But because the Attorney General brings suit “in the name of the state, or as *parens patriae* on behalf of persons residing in the state,” RCW 19.86.080(1), the Board Members’ proposed “standing” aspect of the “trade or commerce” element would not apply to an Attorney General CPA enforcement action.

added). Neither provision requires a consumer transaction between the person injured and the person causing the injury. On the contrary, RCW 19.86.090's use of the term "any" to modify "person who is injured" makes clear that the person authorized to bring suit need only be *injured* by the defendant's CPA violation – privity is irrelevant.

Most tellingly, RCW 19.86.010(2) defines the terms "trade" and "commerce" to "include the sale of assets or services, and *any* commerce directly or *indirectly affecting* the people of the state of Washington." (emphasis added.) A privity requirement would nullify the term "indirectly affecting," in contradiction to fundamental tenets of statutory interpretation. *See Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P. 2d 683 (1985) ("We are required, when possible, to give effect to every word, clause and sentence of a statute."). As this Court has held, "[i]t is difficult to conceive how [the CPA] can be read to require the plaintiff to have a consumer or other specialized relationship with the violator." *Panag*, 166 Wn.2d at 45. The CPA's plain language precludes any requirement of a direct consumer relationship between plaintiff and defendant.

If the Legislature had intended to include such a requirement, it could easily have done so. *See, e.g.*, RCW 19.86.093 (defining proof required by "public interest" element of private CPA claim). Indeed, other states' consumer protection statutes *do* include a "consumer transaction"

requirement. *See Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 313, 858 P. 2d 1054 (1993) (rejecting “direct contractual relationship” requirement because “[a]lthough the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services.”); *Panag*, 166 Wn.2d at 40 n.4 (“some states limit a private right of action to consumers”); *see also* Va. Code. § 59.1-200(A) (under Virginia consumer protection statute, “fraudulent acts or practices committed by a supplier in connection with a consumer transaction” are unlawful); Ky. Rev. Stat. §367.220(1) (Kentucky consumer protection act provides a private remedy to “[a]ny person who purchases or leases good or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property as a result...”). The Court should not insert what the Legislature has declined to enact.

Even if the CPA could potentially be read to support a “consumer transaction” or “privity” requirement, such a reading would be contrary to the statutory instruction that the CPA “shall be liberally construed that its beneficial purposes may be served.” RCW 19.86.920; *see Panag*, 204 P.3d at 891 (refusing to “narrowly construe the act by importing a requirement that the plaintiff be a consumer or be in a consensual business relationship,

when to do so would conflict with the language of the act and its stated purposes.”). In any event, this Court has already considered and rejected the notion that “privity” or a “consumer transaction” is implicitly part of the “trade or commerce” element for private CPA claims.

2. Washington case law precludes a “privity” or “consumer transaction” requirement.

In *Panag*, the plaintiff brought a CPA claim alleging that a collection notice from Farmers Insurance deceptively indicated that an unliquidated subrogation claim against her was instead a finalized, undisputable debt. The plaintiff had not paid the subrogation claim, and the defendant argued she lacked “standing” to maintain a CPA claim because there was no consumer or business relationship between the parties. 166 Wn.2d at 37.

This Court held that “a private CPA action may be brought by one who is not in a consumer or other business relationship with the actor against whom the suit is brought.” *Id.* at 43-44. The majority explicitly rejected the dissent’s attempt to “engraft a requirement that the plaintiff be in a consumer or other specified relationship with the actor-defendant onto the second *Hangman Ridge* element, occurrence of the violation *in trade or commerce.*” *Id.* at 44 (emphasis in original). Instead, *Panag* held that the five *Hangman Ridge* elements control whether a consumer may

maintain a CPA claim against a defendant, reasoning that the injury and public interest impact requirements addressed concerns related to the plaintiff's "standing." *Id.* at 38. Whether the issue is cast as "standing," "privity," or a "consumer transaction" between plaintiff and defendant, *Panag* controls here.

Panag is just the most recent in a line of Washington cases rejecting "standing" or "privity" as elements in private CPA lawsuits.

Over twenty years ago, in *Fisons*, this Court held:

The leading CPA case of *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) does not include a requirement that a CPA claimant be a direct consumer or user of goods or in a direct contractual relationship with the defendant. Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services.

122 Wn.2d at 312-13. In 2006, the Court of Appeals held that "[a]s a general rule and as a matter of legislative intent, neither the CPA nor case law require privity of contract in order to bring a CPA claim," noting that "on numerous occasions, our courts have rejected the argument that a contractual relationship must exist to sue under the CPA." *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 219-20, 135 P.3d 499 (2006) (allowing mobile home tenants to sue distributor of unfair

lease despite lack of privity). *Holiday Resort* is correct. See, e.g., *Nordstrom v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987) (holding that infringement on a trade name is actionable under the CPA despite no consensual business relationship between the parties); *Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978) (CPA includes sales but encompasses “more than just sales”); *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 387, 743 P.2d 832 (1987) (injured passenger could maintain CPA claim against insurance company based upon bad faith claims-handling of a claim although not a party to the insurance contract, paid no premiums, and had no consumer relationship).

Panag and its predecessors control, and the Board Members have offered no basis for the Court to depart from the principle of stare decisis. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (“The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned.”). Stare decisis is particularly strong where the Legislature has declined to change statutory language in the wake of judicial interpretation.

“‘The Legislature is presumed to be aware of judicial interpretation of its enactments,’ and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d

231, 238, 236 P. 3d 182 (2010) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). Washington courts have repeatedly provided a roadmap for the Legislature if it wished to add a “privity” or “consumer relationship” requirement for private CPA claims by explicitly and repeatedly pointed out that other states have adopted statutory language addressing the issue. *See Fisons*, 122 Wn.2d at 313; *Panag*, 166 Wn.2d at 40 n.4. But the Legislature declined to take that road. It adopted the current “trade” and “commerce” definition and the prohibition on unfair or deceptive acts or practices in trade or commerce in 1961. Laws of 1961, ch. 216 §§ 1, 2. It created a private right of action under the CPA in 1971. *Hangman Ridge*, 105 Wn.2d at 784. It has revised various portions of the CPA twice in the last decade, *see* Laws of 2009, ch. 371 and Laws of 2007, ch. 66, including a statutory definition of the “public interest” element in private actions. RCW 19.86.093 (enacted 2009). But the Legislature has left the “trade or commerce” definition untouched, and this Court should not reverse course on *Panag* and its predecessors. The allegations in this case demonstrate that plaintiffs may be injured by acts in trade or commerce despite having no privity or “consumer transaction” with each defendant.

3. The Board Members acted “in trade or commerce” by facilitating the sale of condominium units.

When determining whether an act is “in trade or commerce,” courts should look to the totality of the circumstances, including the structure of the transactions or proposed transactions, the role of each party, and the nature of their acts and practices. Here, the declarant-appointed board members were necessary and integral to the declarant’s marketing and sale of condominium units. They were therefore engaged in trade or commerce.

A condominium is created by a “declarant,” RCW 64.34.200, which initially owns all the units. Each condominium has a “unit owners’ association,” which must “be organized no later than the date the first unit in the condominium is conveyed.” RCW 64.34.300. A board governs and acts on behalf of the condominium association. RCW 64.34.308(1). Initially, the board members are appointed by the declarant. RCW 64.34.308(5)(a). The declarant, meanwhile, markets and sells the individual units to consumers. Declarant-appointed board members are gradually replaced by homeowner-elected members as units are sold, with certain statutorily dictated benchmarks. RCW 64.34.308(6). The declarant-appointed board members therefore create a bridge between the declarant- and a homeowner-controlled board, and their governance maintains the condominium’s very legality as the declarant sells its units, recoups its investment, and (it hopes) makes a profit. The Legislature has

recognized the centrality of declarant-appointed board members to the condominium development process by imposing upon them a fiduciary duty running toward the unit owners. RCW 64.34.208(1)(a).

The Board Members' activities were in "trade or commerce" because they actively supported the declarant's sale of assets to Washington consumers, either "directly" or "indirectly," as contemplated by RCW 19.86.010(2).⁴ Each case is different, but the declarant is exceedingly likely to have a pre-existing business or personal relationship with the board members it appoints – it is entrusting them with management over its investment. The original Board Members here (Sanford, Burckhard, and Sansburn) were also allegedly "owners, officers, and members" of the declarant and its alter ego, defendant Lozier Homes Corporation. CP at 3. Even where the declarant-appointed board members are not employees of the declarant, the declarant is likely to communicate with its appointed board members concerning the condominium building(s), the sale of units, and other matters relating to condominium governance. Declarant-appointed board members are therefore likely to

⁴ Whether *unit*-owner elected board members are engaged in trade or commerce when they manage the condominium association is a closer question. The Condominium Act recognizes the difference between members of the board appointed by the declarant and those elected by unit owners: "In the performance of their duties, the officers and members of the board of directors are required to exercise: (a) If appointed by the declarant, the care required of fiduciaries of the unit owners; or (b) if elected by the unit owners, ordinary and reasonable care." RCW 64.34.208(1). Here, Amicus addresses only the actions of *declarant*-appointed condominium association board members.

have knowledge of matters, such as any suspected construction defects, that a unit owner or potential purchaser would consider material – and a fiduciary obligation to disclose the facts to the unit owner.

The construction defects alleged here would have affected the timing and price of both condominium unit sales and structural repairs – both of which are “commerce.” The Board Members’ alleged failure to disclose these defects was “in commerce” because it likely affected unit sales (by permitting sales to proceed without either delays for repairs or a price discount for future repair costs), and repairs (by delaying repairs and likely making them more expensive as the defects caused additional damage to the building over time). The Board Members’ alleged concealment of defects effectively shifted repair costs from the declarant (in which they had an interest) to subsequent unit owners, and likely increased those costs. And because Sanford, Burkhard, and Sansburn owned and managed the declarant, the Court may reasonably infer that their actions were intended to benefit themselves. Their acts were in “trade or commerce.”

The Board Members rely on two non-Washington decisions, but those cases are distinguishable and unpersuasive. Joint Answer to Homeowners’ Pet. for Review at 6-7. First, the Board Members cite *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 759 (Mass. 2002). That case involved

a private dispute between the volunteer trustees of a condominium trust and the purchaser of a commercial unit arising out of the trustees' alleged attempts to interfere with the purchase. 769 N.E.2d at 114-18. The court held that the alleged unlawful acts "did not fall within the purview of" Massachusetts' consumer protection statute because they were "principally private in nature[.]" *Id.* at 759 (internal citations and marks omitted). *Office One* therefore relates to the "public interest" element of a private CPA claim in Washington – an issue not presented here and subject to specific statutory guidance. *See* RCW 19.86.093. It is irrelevant to the "trade or commerce" issue presented here.

Second, the Board Members cite *Rafalowski v. Old County Rd., Inc.*, 714 A.2d 675 (Conn. 1998). There, the alleged violations of the Connecticut Unfair Trade Practice Act ("CUTPA") arose from the developers' alleged mismanagement – specifically the developer-controlled association's failure to provide notice of and hold meetings and failure to provide unit owners a budget summary. *Rafalowski v. Old County Rd., Inc.*, 719 A.2d 84, 89-91 (Conn. Super Ct. 1997), *aff'd*, 714 A.2d 675 (1998). The trial court's decision, adopted by the appellate court,⁵ held that "alleged instances of mismanagement...are not a 'trade' or 'practice' and, therefore, do not come within the purview of CUTPA."

⁵ 714 A.2d at 677.

719 A.2d at 91.⁶ There was no allegation that the association's activities facilitated the sale of units to either the plaintiffs or their predecessors, or that the board members concealed material construction defects or failed to take action – which would have involved “trade or commerce” – to address those defects.

The Maryland Court of Appeals supplies a more analogous case, holding that unit purchasers could bring a consumer protection claim against their condominium association for failure to disclose construction defects. In *MRA Prop. Mgmt. v. Armstrong*, 43 A.3d 397, 413-15 (Md. 2012), the plaintiffs purchased condominium units from prior owners. During the purchases, the association represented to the plaintiffs that there were “no known health or building code violations,” and “the operating budgets reflected that repair expenses in the community were declining, at a time when [the property management company] and the Association knew they were climbing.” *Id.* at 400-01. In fact, the units faced major repair costs due to water damage caused by improper construction and water damage, and a special assessment was later imposed. *Id.*

⁶ CUTPA's definition of “trade or commerce” is narrower than the CPA's definition: the advertising, the sale or rent or lease, the offering for sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state. Conn. Gen. Stat. § 42-110a(4).

The *MRA* court explained that the lack of a contractual relationship between the purchasers and association “is not dispositive[,]” nor is the fact that a defendant is not “a direct seller.” 43 A.3d at 109. Rather, “[i]t is quite possible that a deceptive trade practice committed by someone who is not the seller would so infect the sale or offer for sale to a consumer” that the association could be liable under Maryland’s consumer protection statute. *Id.* at 414 (internal citation and marks omitted). Here too, the Court should examine (a) the Board Members’ relationship to the Declarant, (b) their role in the governance of the condominium, (c) the relationship of that governance to the Declarant’s marketing and sale of units, and (d) the effects of their alleged concealment on the marketing and sale of units and timing and cost of repairs – the causal mechanism for injury to the Homeowners – and conclude that the Board Members actions were in “trade or commerce.”

C. The Board Members were not engaged in a “learned profession.”

The Board Members also assert that “they are not in the ‘business’ of being board members but are volunteering to provide direction and advice for the homeowners’ association[,]” and that their conduct is exempt from the CPA because it “is not entrepreneurial[.]” Joint Answer to Homeowners Pet. for Review at 6-7. But whether unfair or deceptive

acts or practices are “entrepreneurial” is only relevant when the defendant is a “learned professional,” such as a lawyer or doctor. *See Short v. Demopolis*, 103 Wn.2d 52, 55, 57-61, 691 P.2d 163 (1984) (discussing CPA claims against “learned professionals” and holding that “certain entrepreneurial aspects of the practice of law may fall within the ‘trade or commerce’ definition of the CPA”); *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 603-05, 200 P.3d 695 (2009) (applying *Short* analysis to a medical professional). The Board Members do not qualify.

Members of a condominium association board are not members of a “learned profession” as that term is commonly understood.⁷ The Condominium Act contains no educational or training requirements for board members. They are not governed by a professional body akin to the Washington State Bar Association or closely examined and licensed by a government body such as the Medical Quality Assurance Commission. The “CPA attempts ‘to bring within its reach [] every person who conducts unfair or deceptive acts or practices in any trade or commerce,’” *Michael*, 165 Wn.2d at 602 (emphasis and alteration in original), and must be construed liberally. RCW 19.86.920. The “learned profession” rule cuts against these principles. It is a judicially created exception to the CPA,

⁷ See Dictionary.com, <http://dictionary.reference.com/browse/learned%20profession?s=t> (last visited March 25, 2015) (“learned profession,” such as law or medicine, is “commonly held to require highly advanced learning”).

imported from federal anti-trust law into the CPA carefully and with some reticence. *See Short*, 103 Wn.2d at 57-61. The Court should likewise confine the “learned profession” rule to its current, limited scope.⁸

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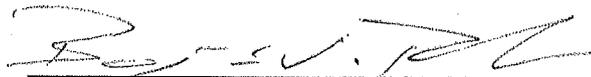
⁸ Even if the “learned profession” rule applied, at least some of the Board Members’ activities appear to have been “entrepreneurial” in nature. For example, defendants Sanford, Burkhard, and Sansburn were the “owners, officers, and members” of both Lozier (which built the condominium project) and the declarant, CP at 3, and presumably participated in the enterprise to make money. The Court should allow development of the facts in discovery, rather than resolving the issue using CR 12(b)(6).

V. CONCLUSION

The CPA's plain language and this Court's long-standing precedent preclude the "privity" or "consumer transaction" requirement for private actions that the Court of Appeals adopted. And the facts alleged show that the Board Members acted "in commerce" by facilitating the marketing and sale of condominium units. Finally, condominium association board members are not a "learned profession" such as doctors or lawyers, subject to a partial exemption from the CPA. The Attorney General respectfully requests that the Court reaffirm the parameters of "trade or commerce" and the "learned profession" rules, and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 6th day of April, 2015.

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