

No. 94162-9

SUPREME COURT OF THE STATE OF WASHINGTON

LYFT, INC., a Delaware corporation,

Appellant,

v.

KENNETH WRIGHT, on his own behalf and on behalf of other similarly
situated persons,

Respondent.

**APPELLANT'S BRIEF IN ANSWER TO BRIEF OF *AMICUS*
CURIAE ATTORNEY GENERAL OF WASHINGTON**

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I. INTRODUCTION

The Attorney General’s *amicus* brief, which is expressly limited to the second certified question, is most notable for what it fails to say: it does not identify a single word in the text of the Commercial Electronic Mail Act (“CEMA”) providing that the injury and causation elements of a Consumer Protection Act (“CPA”) claim are automatically satisfied whenever a consumer sues over unsolicited text messages. Instead, the brief insists that CEMA’s legislative history shows that the Legislature *meant* to treat unsolicited text messages the same as spam emails, despite the fact that the text of CEMA expressly provides that spam e-mails—*not text messages*—satisfy the injury and causation elements of the CPA.

The Attorney General’s arguments cannot withstand scrutiny. As this Court has held time and again, “[i]n general, the intent of the Legislature is to be deduced from what it *said*”—*i.e.*, from the statutory text. *In re Smith*, 139 Wn.2d 199, 204, 986 P.2d 131 (1999) (emphasis added). Here, CEMA’s text is clear. It provides that the CPA’s injury and causation elements are automatically satisfied for spam emails, but does not say anything of the sort with respect to text messages. The Legislature’s choice of words matters: It proves that the Legislature did *not* intend to treat text messages and spam emails the same. That should be the end of the analysis. This Court should not accept the Attorney

General's contention that the Legislature meant to say something different than what the text of the statute actually says.

The Attorney General's arguments about CEMA's legislative history also fail on their merits. They rest on a few snippets from the bill report for the 2003 bill that added text messages to CEMA—and those snippets indicate only that the Legislature wanted to make statutory damages available to recipients of unsolicited text messages *if* they prevailed on a CPA claim. Nothing in the legislative history quoted by the Attorney General shows that the Legislature intended to eliminate the usual requirement that a plaintiff satisfy the injury and causation elements of a claim under the CPA. *A fortiori*, nothing in the cited legislative history speaks with enough force to override the statute's plain language, which demands that text message recipients prove injury.

Finally, the Attorney General's contention that requiring consumers to meet all of the elements of a CPA claim to recover statutory damages for text messages will harm the public interest is mistaken. It is clear that the Attorney General retains the authority to enforce CEMA's requirements through the CPA in appropriate situations. The Court should accordingly answer the second certified question in the negative (and, for the reasons explained in our earlier briefing, do the same with respect to the first certified question).

II. ARGUMENT

A. **Arguments Based on CEMA’s Legislative History Cannot Override the Statute’s Text—Which Expressly Provides That Text Messages Sent in Violation of CEMA Establish Only the First Three Elements of a CPA Violation.**

Apparently unwilling to endorse Wright’s textual arguments (which are wrong for the reasons Lyft has explained), the amicus brief filed by the Attorney General’s Office rests almost exclusively on CEMA’s legislative history. The amicus brief contends that, according to the history, the Legislature intended for spam emails and unsolicited text messages to be treated the same for purposes of CPA claims. AG Br. 9. The Attorney General’s reading of the legislative history is wrong, as we explain *infra* (at 6-9)—but it should be disregarded from the start because the statutory text is more than sufficient to answer the question.

This Court has recognized for decades that “[o]nly where the legislative intent is not clear from the words of a statute may the court ‘resort to extrinsic aids, such as legislative history.’” *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (quoting *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992)). Here, the language of CEMA expressly indicates that spam emails and unsolicited text messages should *not* be treated the same for purposes of CPA claims. That is because the statute treats the two categories of communications very differently. The

statute says unambiguously that *spam emails* are a “violation of the consumer protection act” (RCW 19.190.030(1)), while conspicuously omitting any such language from the statute’s text-message provisions. The distinction drawn could not be clearer: the Legislature did not intend for unsolicited text messages to be treated as automatically establishing all five CPA elements. *See* Opening Br. 26-27; Reply Br. 10-12. This Court has repeatedly made the common-sense observation that “[w]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *Matter of Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (quoting *United Parcel Serv., Inc. v. Dep’t of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)).

The Attorney General’s brief does not meaningfully address this straightforward textual point. Instead, the brief simply says that Lyft has “ignore[d]” the legislative history that the Attorney General characterizes as persuasive here. AG Br. 14. But Lyft’s focus on the text follows from this Court’s repeated admonition that, “[w]hen possible,” this Court “derive[s] the legislature’s intent *solely* from the statute’s plain language.” *Segura v. Cabrera*, 184 Wn.2d 587, 591, 362 P.3d 1278 (2015) (emphasis added); *see also, e.g., State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (“[I]f the statute’s meaning is

plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.”). Here, the plain language of the statute demonstrates that the Legislature intended for text messages to establish only the first three elements of a CPA claim, making it resort to sources outside the statutory text (such as legislative history) unnecessary—and, indeed, improper. This Court has put it best: “[A] court must not add words where the legislature has chosen not to include them.” *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

In sum, because CEMA’s language “specifically defines the exact relationship between [CEMA] and the CPA”—providing that text-message violations of CEMA only establish the first three CPA elements automatically—this Court is required to “acknowledge that relationship.” *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787, 719 P.2d 531 (1986). For that reason alone, the Attorney General’s arguments about CEMA’s legislative history offer no support for Wright’s position.¹

¹ In passing, the Attorney General adverts to the principle that “[t]he purpose of an enactment should prevail over express but inept wording.” AG Br. 13. That principle has no application here, however. It applies when “a literal reading” of a statute would “result[] in unlikely, absurd or strained consequences.” *State v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981). But as the Chamber of Commerce has explained convincingly in

B. CEMA’s Legislative History Does Not Indicate That the Legislature Intended for Text Messages to Satisfy All Five CPA Elements Automatically.

In any event, the Attorney General’s reading of the legislative history is wrong. Nothing in CEMA’s legislative history demonstrates that the Legislature wanted consumers to recover statutory damages upon the receipt of text messages when they could not satisfy the usual rule under the CPA that a plaintiff prove that he or she was injured by those messages.

1. The Attorney General’s brief first quotes passages from the bill report for the 2003 bill that added text messages to CEMA. According to the brief, those passages show that the Legislature intended to treat text-message violations “in a similar fashion” to spam email. AG Br. 8. Specifically, the brief notes that the 2003 bill report stated that (1) a text-message violation of CEMA “provides penalties similar to those for commercial e-mail messages” and (2) a violation of the text-message provisions of CEMA “is also a violation of the Consumer Protection Act.” *Id.* at 7-8 (emphasis omitted). But the first observation is irrelevant and the second is an overstatement.

its amicus brief, there are strong reasons—and certainly not absurd reasons—to require CPA plaintiffs to prove injury in order to recover damages for text messages (as opposed to spam emails). Hence, there is nothing “inept” about CEMA’s wording. Chamber Br. 4-5.

First, it is unremarkable that the 2003 bill report would mention “similar” penalties: the bill provided for statutory damages for text messages under the CPA, which is the same remedy that the 1998 bill authorized with respect to spam emails.

Second, the Attorney General’s brief reads far too much into the stray statement that a text-message violation of CEMA “is also a violation of the Consumer Protection Act.” AG Br. 8 (emphasis omitted). It is undisputed that *some* text-message violations of CEMA are CPA violations; the question is whether *all* text-message CEMA violations are *automatically* CPA violations. This cryptic quotation does not answer that question—much less address why the actual language of the statute treats text messages differently from spam emails.

2. The Attorney General also argues that the Legislature found that unsolicited text messages “cause injury to their recipients,” which, in the Attorney General’s view, shows that the Legislature wished to relieve CPA plaintiffs of their obligation to prove injury. AG Br. 10. It is unsurprising, however, that the Legislature would discuss the potential impact of unwanted text messages on consumers in the bill report: every piece of legislation aims at remedying a problem, and the Legislature often describes the problem it seeks to address in a bill report. The Legislature’s acknowledgment that text messages could “result in costs” for consumers

does not come close to a finding by the Legislature that injury and causation should be automatically presumed in all cases.

Indeed, if anything, the fact that the Legislature acknowledged the potential existence of these “costs” and yet decided *not* to specify that all of the elements of the CPA are met whenever CEMA’s text-message provisions are violated—as it had done with respect to spam emails—indicates that the Legislature thought that consumers *should* have to prove injury in order to recover under the CPA. By the time the Legislature passed the text-message bill in 2003, *Hangman Ridge* had been on the books for 17 years, and this Court explained in *Hangman Ridge* itself that the Legislature should be presumed to have been aware of this Court’s rulings interpreting the CPA. *See, e.g., Hangman Ridge*, 105 Wn.2d at 789 (“We presume the Legislature is familiar with past judicial interpretations of its enactments.”). Thus, if the Legislature wanted to declare that—contrary to the usual rule under the CPA—the statute’s injury requirement is automatically satisfied in every text-message case, *Hangman Ridge* told the Legislature that the way to accomplish that result was in the text of the statute. And the Legislature in fact followed that guidance with respect to spam emails in CEMA itself.

Moreover, the Legislature’s choice *not* to include statutory language providing that the CPA’s injury requirement is automatically

satisfied in text-message cases is fully consistent with the concerns identified in the legislative history. The 2003 bill report mentioned that consumers might pay charges to receive each text message or might risk having their storage “exhausted” by receiving too many texts. But the same discussion reflects the Legislature’s understanding that not *all* unsolicited text messages result in consumers being charged or exhaust consumers’ phone storage. That understanding applies with even greater force today: Although the Attorney General’s brief suggests that charges to receive text messages are a common feature of cell phone plans (AG Br. 11-12), just the opposite is true: the vast majority of phone plans include unlimited text messaging.² The Legislature thus sensibly chose to make statutory damages available when, and only when, consumers could prove that harms from a text message had caused injury to their “business or property” (RCW 19.86.090), rather than making statutory damages the automatic penalty for every text message.

² See, e.g., Josh Zagorsky, *Almost 90% of Americans Have Unlimited Texting*, Instant Census, Dec. 8, 2015, <https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting>; GSMA, *The Mobile Economy: North America 2016*, at 30 (2016), <https://www.gsmaintelligence.com/research/?file=28a21e457f1b516b804f8b0f6cef5815&download> (“[M]ost US mobile contracts include unlimited text messaging....”).

C. The Attorney General’s Policy Arguments Are Misplaced.

In a coda to his brief, the Attorney General argues that consumer actions under the CPA further an important public interest and that this Court should thus “refrain from creating obstacles that would impair Washington citizens’ ability to bring private CPA actions.” AG Br. 17. But requiring private plaintiffs to prove two of the statutory elements of their claim does not “creat[e] [an] obstacle []” to their recovery; on the contrary, it honors the Legislature’s decision—made express in CEMA’s text—that statutory damages are available to private plaintiffs when, and only when, consumers can prove injury and causation.

Moreover, the Attorney General’s concerns about enforcement of CEMA overlook that his office has authority to enforce the requirements of CEMA through a CPA action on behalf of Washington consumers, irrespective of whether a defendant’s actions have caused injury. *See* RCW 19.86.080(1). Thus, in cases where text messages have not caused any injury to consumers’ business or property but the Attorney General still believes a CPA action is in the public interest, he can pursue that action. Indeed, in the context of a similar “Invite-A-Friend” program used by Uber—one of Lyft’s well-known competitors—the Attorney General announced an Assurance of Discontinuance designed to bring Uber’s program into compliance with CEMA. Assurance of Discontinuance,

Washington v. Uber Techs., Inc., No. 17-2-11428-6 (Wash. Super. Ct. May 5, 2017), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/2017_05_04UberAOD.pdf.

Finally, the Attorney General falls back—as Wright did—on the general principle that remedial statutes are construed liberally. AG Br. 15-16. But as Lyft explained in its reply brief (at 15), this principle does not favor exempting text-message recipients from the CPA’s injury requirement. In this context, where the question is the *relationship* between the CPA and CEMA, any general rule about interpreting remedial statutes liberally is displaced by this Court’s holding in *Hangman Ridge* that the Legislature, not the courts, determines whether another statute satisfies one or more elements of the CPA.

III. CONCLUSION

The Court should answer both certified questions in the negative.

DATED this 26th day of October, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 26th day of October, 2017, a true copy of the foregoing was served on each and every attorney of record herein via email:

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

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