

FILED
SUPREME COURT
STATE OF WASHINGTON
5/31/2019 3:02 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 96853-5

SUPREME COURT OF THE STATE OF WASHINGTON

Fireside Bank fka Fireside Thrift Co., a California corporation,

Plaintiffs/Respondents,

v.

John W. Askins and Lisa D. Askins,

Defendants/Appellants.

SUPPLEMENTAL BRIEF OF DEFENDANTS/APPELLANTS

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I. INTRODUCTION

This case is about debt buyers and collection agencies and the measures the Legislature has put in place to protect consumers in the state of Washington from collection abuses. The Collection Agency Act (CAA) prohibits collection agencies from collecting or attempting to collect amounts to which they are not entitled. The CAA penalizes prohibited practices by prohibiting anyone from ever collecting anything over the principal amount. Violations of the CAA's prohibited practice section are *also* deemed unfair acts and practices in trade or commerce for purposes of the application of the Consumer Protection Act. Petitioners Askins did not request relief under the CPA with the trial court.

The trial court found, in a post-judgment order to show cause proceeding, that Respondent Cavalry violated a CAA prohibited practices by filing post-judgment affidavits for writs of garnishment against the Askins' wages, which requested amounts greater than legally permitted, in violation of the CAA at RCW 19.16.250(21).

The Court of Appeals reversed, holding that the show cause procedure was not an appropriate procedural method to litigate remedies under the CPA, and that no violation of the CAA's prohibited practice section occurred where the violative action was

not “communicated” directly with a debtor, but instead to their attorney.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF THE CASE

Petitioners John and Lisa Askins affirm and incorporate the Assignments of Error and Statement of the Case presented in the Askins’ Petition for Discretionary Review. This brief is intended to supplement the issue of whether Division III was in error in holding: (1) that the CAA’s penalty for violations of prohibited practices may only be enforced or applied as a remedy in a separate action; (2) each prohibited practice CAA requires a “communication” to be enforceable even where that term was not included by the Legislature; and (3) violations contained in “communications” between attorneys cannot violate any prohibited practice.

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

Cavalry is a debt buyer¹ and, under Washington state law, a collection agency. *Gray v. Suttell & Associates*, 181 Wn.2d 329, 337,

¹ In *Gray*, this Court observed debt buyers purchase “mass portfolios of charged off debt ... with little evidentiary basis” ... obtaining “judgments based on fraudulent or paid-off claims that were sold to debt buyers who did not know they were buying illegitimate claims.” *Gray*, 181 Wn.2d at 337 (citation omitted).

334 P.3d 14 (2014). Accordingly, Cavalry is regulated by the CAA and prohibited from engaging in the CAA's list of prohibited practices. RCW 19.16.250(1)-(26).

Judgment debtors, subject to the "extraordinarily harsh remedy" of garnishment, are protected by only two statutes. See *Watkins v. Peterson Enterprises, Inc.*, 137 Wn.2d 632, 646, 973 P.2d 1037, 1047 (1999). First, the garnishment statute's procedures and protections, and second, for "collection agencies" regulation under the CAA. The only pre-deprivation procedural protection of a debtor's property under the garnishment statute is the requirement that the creditor, or an attorney on its behalf, file an affidavit attesting

As one leading commentator explained, debt buyers "often have only a spreadsheet or database summarizing the hundreds or thousands of accounts they have purchased." PETER HOLLAND, *Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 *Journal of Bus. & Tech. Law* 259, 268 (2011) (citations omitted).

Further, data obtained by the Federal Trade Commission (FTC) shows that the vast majority of accounts are sold to debt buyers without critical information necessary to verify the underlying balance. FED. TRADE COMM'N, *THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY* (2013), available at <https://www.ftc.gov/reports/structure-practices-debt-buying-industry>. Studies further show that the majority of contracts between debt buyers and sellers or original creditors are sold "as is," without representations, warranties, or guarantees from the seller as to the accuracy of amounts claimed owed or the collectability of the debts. *Id.* at 25-26.

to four facts, one of which is stating the current judgment balance. RCW 6.27.060. Then the clerk “shall” issue a writ of garnishment. RCW 6.27.070. The CAA prohibits collection agencies from certain acts, including “collecting or attempting to collect” more money than allowed by law. RCW 19.16.250(21).

At the trial court, in a post-judgment show cause proceeding, it was established that Respondent Cavalry attempted to collect, “through writs of garnishment,” an inflated judgment balance. CP 470-3. Based on this finding of fact, the court concluded that a violation of the CAA’s “prohibited practice” section, at RCW 19.16.250(21), occurred. Based on the violation, the court also concluded that the automatic statutory penalty, at RCW 19.16.450, prohibited the collection of any sum above principal. CP 470-3. Since a sum greater than principal had already been collected, the trial court directed Cavalry to enter a satisfaction of judgment. CP 470-3. Cavalry did not appeal the trial court’s finding of fact that Cavalry and its attorney violated RCW 19.16.250(21); opting instead to argue that Civil Rule 60(b) was an inappropriate procedural process to establish CAA violations and that “communications” between attorneys could not have violated RCW 19.16.250(21). The

Court of Appeals agreed with both arguments. Here, the Askins assign error to each holding.

The Court of Appeals held that CR 60(b) was not a procedurally proper method to establish violations of the CAA. However, the Askins did not request relief pursuant to CR 60(b). The Court of Appeals did not provide any direction whether a generic show cause proceeding, not seeking to alter a judgment, might be a procedurally proper method for a trial court to impose the CAA's penalty for post-judgment violations. The Opinion, instead, suggested the CAA penalty could only be enforced as a remedy in a separate CPA action.

Further, the Court of Appeals interpreted the prohibited practice at RCW 19.16.250(21) as including a "communication" element and that "communications" between attorneys cannot form the basis of any RCW 19.16.250 violation. Notably, the trial court did not find that RCW 19.16.250(21) was violated through a "communication" between attorneys; but, instead, "through writs of garnishment" that were served on the Askins' employer and the Askins themselves. CP 427. The plain meaning of that statute does not require a "communication" but, instead, prohibits "collecting or attempting to collect" money in excess of what is legally permissible.

B. STANDARD OF REVIEW

Questions of law are reviewed de novo. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179, 1185 (2013). Additionally, interpretation of a statute is a matter of law subject to de novo review. *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 722, 406 P.3d 1149, 1151 (2017).

C. RCW 19.16.450 IS A STATUTORY PENALTY INDEPENDENT OF CONCURRENT CPA REMEDIES – THE ASKINS DID NOT SEEK CPA REMEDIES.

The CAA provides both a statutory penalty and a concurrent civil remedy at RCW 19.16.450 and .440, respectively. Conflation of the two statutes caused the Court of Appeals to erroneously hold that Cavalry had to “essentially defend against a CPA action.” Opinion at 9. The Askins did not seek relief under the CPA. Instead, the Askins requested that the trial court make the appropriate finding to trigger the automatic RCW 19.16.450 statutory penalty, which prohibits the collection of any sum above the principal balance of the debt after a violation of RCW 19.16.250 “is committed.” RCW 19.16.450. That statute provides a penalty, not a remedy.

A “penalty” is defined as:

Punishment imposed on a wrongdoer, usually in the form of imprisonment or fine; especially a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss). Though usually for crimes, penalties are also sometimes imposed for civil wrongs.

BLACK’S LAW DICTIONARY (10th ed. 2014). See *also*, CIVIL PENALTY, “a fine assessed for a violation of a statute or regulation.”

Whereas a “remedy” is defined as: “The means of enforcing a right or preventing or redressing a wrong; legal or equitable relief. REMEDY, BLACK’S LAW DICTIONARY (10th ed. 2014).

The CAA provides for both. First, by imposing a penalty for a violation of the statute in the form of reducing the amount of an obligation. RCW 19.16.450. But also with a concurrent civil remedy enforceable through the Consumer Protection Act, RCW 19.16, *et seq.* The CAA aids enforcement of CPA remedies at RCW 19.16.440 by declaring violations of RCW 19.16.250 to be “unfair acts or practices or unfair methods of competition in the conduct of trade or commerce for the purpose of the application of the [CPA].” However, this “*per se*” violation only establishes the first two of five elements of a *prima facie* CPA claim; (1) an unfair or deceptive act or practice (2) occurring in trade or commerce. *Hangman Ridge*

Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Leaving the debtor with the burden of also establishing the remaining elements of (3) public interest impact, (4) injury to the plaintiff's business or property, and (5) causation. *Id.* at 780.

The CAA, at RCW 19.16.440, allows a debtor an alternate avenue of establishing the first two elements against an entity regulated by the CAA. See *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 54, 204 P.3d 885 (2009) (noting, "the business of debt collection affects the public interest" even where the CAA may not be applicable).

Requiring a debtor to establish the remaining elements, particularly an injury to property, would render RCW 19.16.450 violations superfluous by impossibility. Certain "prohibited practices," under RCW 19.16.250, by their nature, are unlikely to cause an injury to property. These include the acts prohibited by sections (3) publishing a list of debtors, (4) impersonating law enforcement, (13) harassing or intimidating, or (19) calling from a blocked number. Nevertheless, the Legislature has found them to be harmful and, accordingly, prohibited them. Additionally, the CAA does not provide a debtor a private right of action. *Paris v. Steinberg & Steinberg*, 828

F. Supp. 2d 1212, 1218 (W.D. Wash. 2011). And, the CPA does not appear to permit recovery of the RCW 19.16.450 penalty. See, RCW 19.86.090 (permitting injunction of other violation and “actual damages.”)

RCW 19.16.450 provides a clear statutory mandate that where a violation “is committed” the statutory penalty is imposed. It is written to apply as an automatic penalty. The entire section would become superfluous if it were not recognized as self-enforcing, otherwise a court would have to read the remaining three CPA elements into RCW 19.16.450 and the various RCW 19.16.250 prohibited practices. “A court must not interpret a statute in any way that renders any portion meaningless or superfluous.” *Jongeward v. BNSF R. Co.*, 174 Wn. 2d 586, 601, 278 P.3d 157, 164 (2012). “When possible, the court derives legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14, 19 (2014) (internal quotations omitted).

The penalty at RCW 19.16.450 is unique to the CAA. It is applicable only to “collection agencies.” But, most importantly, it

does not charge a debtor with establishing the five elements of the CPA. The penalty is imposed when a RCW 19.16.250 violation occurs. Concurrently, RCW 19.16.250 violations also establish the first two CPA elements. RCW 19.16.440.

The statutory penalty at RCW 19.16.450 and the *per se* CPA elements that can be established at RCW 19.16.440 are separate and distinct from one another – one is a penalty and the other a path to a remedy – although they can be concurrent, they are not procedurally linked.

To this end, the Court of Appeals, Division III, erred in treating the RCW 19.16.450 statutory penalty as a civil remedy dependent on establishing *prima facie* CPA liability, damages and causation.

D. A SHOW CAUSE HEARING IS AN APPROPRIATE PROCEDURE TO RAISE POST-JUDGMENT COLLECTION AGENCY ACT VIOLATIONS.

The Askins modeled their show cause motion on contempt proceedings commonly used following entry of final orders in family law proceedings. See RCW 26.09.160(2)(a) (providing a show cause procedure to enforce violations of final orders). Nevertheless, in reversing the trial court, the Court of Appeals held, “CR 60 was not a proper method of presenting the debtors’ theory of the case, we reverse and remand for further proceedings.” *Opinion*, p. 1.

However, if the Askins have no recourse in this action, the Opinion leaves the Askins with the option to file a doomed CPA action for relief not available under that statute.

Prior to this case, there was no precedent or statutory guidance as to how an aggrieved debtor could enforce the penalty afforded by the CAA, post-judgment, before the court in which post-judgment CAA violations occur in garnishment proceedings.

The Askins' show cause procedure is consistent with how other courts have viewed the penalties application in collection actions. For example, a federal court recognized that the CAA violation may be raised as an affirmative defense as to damages in a collection action. *Wholesale Info. Network, Inc. v. Cash Flow Mgmt., Inc.*, No. C07-5225RBL, 2007 WL 1893343, at *1 (W.D. Wash. 2007).

The show cause process provides a clear and fair procedure for debtors to enforce the penalty at RCW 19.16.450, which in turn encourages compliance with the CAA prohibited practices section. In the trial court proceedings, the court was most persuaded by Cavalry's inability to comply with another prohibited practice, RCW 19.16.250(8), and produce an accounting establishing that what it claimed in garnishment proceedings was owed, was actually owed.

Because the accountings it did produce showed illegal amounts being added to the Askins' debt, the trial court found violations of RCW 19.16.250(21). CP 470-3. Cavalry has not identified any specific harm, prejudice or unfairness it suffered through the show cause process, nor did it challenge this finding on appeal.²

E. A COLLECTION AGENCY VIOLATES RCW 19.16.250(21) WHEN IT ATTEMPTS TO COLLECT ANY ILLEGAL COSTS; IT DOES NOT REQUIRE A "COMMUNICATION" WITH THE DEBTOR.

The Court of Appeals erred when it decided that communications between attorneys do not violate the CAA, on the basis that the debtor's attorney may shield the debtor from harmful communications. The Court erred because nothing in RCW 19.16.250(21) requires a communication with the debtor. A prohibited act, such as Cavalry's attempt to collect unearned fees and costs, remains prohibited whether or not the debtor knows of it. The CAA's strong public policy against these behaviors is not served by the Court of Appeal's reasoning.

² Footnote one in the Opinion below, the Court wrote, "This case should settle. In light of the fact that Fireside appears to have collected, or attempted to collect, fees and costs that it was not entitled to collect, it may be prudent for Cavalry to abandon its efforts to collect on the debt and enter a satisfaction of judgment rather than defend Fireside's actions."

The Legislature prohibited collection agencies from engaging in 26 specific prohibited practices. RCW 19.16.250(1)-(26). The prohibitions are specifically targeted to end harmful acts and practices that are endemic within the collection industry. As this Court has previously noted, there is a “strong public policy underlying state and federal law regulating the practice of debt collection.” *Panag*, 166 Wn.2d 27, 54. “The business of debt collection affects the public interest, and collection agencies are subject to strict regulation to ensure they deal fairly and honestly with alleged debtors.” *Id.* At issue in this case is RCW 19.16.250(21), which provides:

No licensee or employee of a licensee shall:

(21) Collect or attempt to collect in addition to the principal amount of a claim any sum other than allowable interest, collection costs or handling fees expressly authorized by statute, and, in the case of suit, attorney's fees and taxable court costs.

RCW 19.16.250(21).

Subsection 21 does not regulate “communications.” RCW 19.16.250(21). Instead, this section regulates the act of collecting or attempting to collect unlawful amounts. Black’s Law Dictionary defines an “attempt” as “the act or an instance of making an effort to accomplish something, esp. without success.” ATTEMPT, BLACK’S

LAW DICTIONARY (10th ed. 2014). “Without success” is a strong indicator of the distinction between an act of “attempting to collect,” regulated by RCW 19.16.250(21), and certain types of unfair, harassing or deceptive “communications” regulated by other subsections of RCW 19.16.250. A “communication” is “the expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception.” COMMUNICATION, BLACK’S LAW DICTIONARY (10th ed. 2014). An act may sometimes communicate something, but a communication is not intrinsic to an act. RCW 19.16.250(21) plainly prohibits the act of “collecting or attempting to collect.” By the plain meaning of the word “attempt”, a communication should not be read into the statute.

The Court of Appeals did not find RCW 19.16.250(21) to be ambiguous. Its analysis began by noting that “many [10 of 26] of the other prohibited practices involve improper “communication” and simply held all of the prohibited practices must, therefore, have a “communication” element. This holding ignores the unambiguous plain meaning of RCW 19.16.250(21) (and other sections); which does not regulate “communications,” as well as the fact that the Legislature clearly knows how to incorporate “communication” in this statute when it intends to do so.

It is not relevant to subsection (21) what behaviors the other 25 prohibited practices restrict. They are independent of one another. They each prohibit distinct practices found to be harmful to the public. Communication is inherent to some of them. For example, with harassment it seems axiomatic that some form of communication take place. See RCW 19.16.250(13).

But, a “communication” is not necessary to *all* prohibited practices. Some actions are so harmful, or so potentially harmful, that a mere “attempt” is prohibited. Collection agencies must be licensed. RCW 19.16.250(1). They cannot place calls from blocked numbers. RCW 19.16.250(19). And they cannot attempt to collect more than permitted by law. RCW 19.16.250(21).

F. THE COURT OF APPEALS ERRED IN ADOPTING GUERRERO’S ATTORNEY IS A SHIELD HOLDING BECAUSE THAT PORTION OF GUERRERO RELATED TO REGULATION OF “MISLEADING” COMMUNICATIONS, AS OPPOSED TO PROHIBITED ACTS SUCH AS INFLATING GARNISHMENT BALANCES.

This Opinion below looks to the 9th Circuit holding in *Guerrero v. RJM Acquisitions, LLC*, 499 F.3d 926 (9th Cir. 2007) interpreting the federal Fair Debt Collection Act (FDPCA) to adopt a broad exemption from regulation any CAA prohibited practice violations that occur in attorney to attorney communications. However,

Guerrero only held that certain provisions of the FDCPA prohibiting *deceptive* means to collect a debt but made to a knowledgeable attorney that presumably would not be deceived. But, the FDCPA prohibits two broad categories of harmful collection conduct; deceptive acts or practices at 15 U.S.C. § 1692e, and unfair acts at 15 U.S.C. § 1692f. Though circuits are split³ (including a possible split within the 9th Circuit⁴) on the relevant portion of the *Guerrero* opinion holding that attempts to collect that are intercepted by attorneys are not capable of misleading debtors, was limited to *Guerrero*'s claims he was just that, misled.

But, neither the FDCPA nor the CAA are limited to merely regulating false or misleading communications. The FDCPA, under section 1692f, regulates practices that do not require a communication at all. Similar to RCW 19.16.250(21), 15 U.S.C.

³ Directly on point with the facts of this case, the Third Circuit in *Allen*, 629 F.3d at 365-66, which held that an itemized statement and accounting delivered to the consumer's attorney at the consumer attorney's request violates the FDCPA where it includes amounts of money not allowed by contract or law. *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 365-66 (3d Cir. 2011).

⁴ *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 946 (9th Cir. 2011) (FDCPA liability established based on unfair requests for admission answered by an attorney).

§ 1692f(1) prohibits the act of attempting to collect money in excess of what is legally allowed.

Accordingly, the Court of Appeals' broad exemption of any communication from one attorney to another undermines the Legislature's intent and the potency of multiple other prohibited practices, such as RCW 19.16.250(3)(6)(10)(11), which prohibit threats to sell debt, publish bad debt lists or impair credit, and (13) which prohibits threats to, "harass, intimidate, threaten, or embarrass a debtor." For example, the harm stemming from a threat to publish information about a debtor, a tactic used to create pressure with the threat to embarrass, is not mitigated where it is communicated to an attorney. The attorney could inform their client the threatened conduct is illegal but not that it will stop the collection agency from actually publishing a prohibited list. In this example, the debtor is not protected from the harmful effect, the pressure and false sense of urgency, a collection agency generates through the prohibited act merely by having an attorney assure them the action is unlawful (though unenforceable based on the Opinion below deregulating prohibited practices against represented people).

Similarly, an attorney might withhold details of a conversation with a debt collection attorney from their client to protect them from

being called racial slurs or being physically threatened, but the clear legislative purpose of the act is to wholesale “prohibit” collection agencies from engaging in certain types of awful behavior without regard to whether or not a debtor can obtain counsel. By wholesale exempting attorney to attorney communication from regulation, the Court of Appeals’ decision in this case has the capacity to cause great harm to debtors by broadly deregulating other forms of abhorrent conduct that the Askins were not subject to in this matter.

G. THE TRIAL COURT DID NOT FIND THAT THE APRIL 7, 2016, EMAIL WAS ITSELF A VIOLATION OF RCW 19.16.250(21).

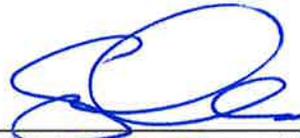
In its ruling on the Askins’ motion for an order to show cause whether a prohibited practice was committed, the trial court found, “Cavalry Investments, LLC violated RCW 19.16.250(21) by attempting to collect, *through writs of garnishment*, amounts of money greater than allowed by law.” CP 427 (emphasis added). Then, on reconsideration, the trial court elaborated, “The evidence submitted both in support and opposition to Defendant’s original motion, together with numerous documents in the casefile, supported the trial court’s finding that Plaintiff not only attempted to collect, but did collect, unlawful and unauthorized collection costs.” CP 462.

The trial court's written order did not find that Cavalry's attorney's April 7, 2016, email violated the CAA. The issue was confusingly first raised by Cavalry on appeal. The illegal amounts were merely documented in Cavalry's internal accounting, provided to the Askins on April 7, 2016, and again in a second incongruent accounting later provided to the trial court as part of a response brief. CP 412. The plain wording of the trial court's written order establishes that the CAA violation occurred when Cavalry both collected and attempted to collect unlawful amounts through writs and applications for writs of garnishment, which were also served on both the garnishee defendant and on the Askins themselves. CP 372. The communications were not limited to attorney-attorney communications. In fact, at the time Cavalry filed and served each of its applications for writs of garnishment, the Askins were unrepresented. In this case, the collection agency directly communicated with the Askins and attempted to, and did, collect unlawful amounts of money directly from their property, as the trial court found, "through writs of garnishment."

IV. CONCLUSION

Accordingly, the Askins request that this Court reverse the Opinion below and reinstate the trial court ruling, and affirm that debtors utilize a show cause process to challenge post-judgment collection practices.

RESPECTFULLY SUBMITTED this 31st day of May, 2019.



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May 31, 2019 - 3:02 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96853-5
Appellate Court Case Title: Fireside Bank, fka Fireside Thrift, Co. v. John W. Askins and Lisa D. Askins
Superior Court Case Number: 07-2-00204-7

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