

No. 67126-0

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

EMILY JOHNSON,

Appellant,

v.

STATE FARM AUTOMOBILE INSURANCE COMPANY,

Respondent.

APPELLANT'S BRIEF

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I. INTRODUCTION

Plaintiff Emily Johnson brought a claim for an injunction under the Consumer Protection Act, RCW 19.86.010 to 19.86.920, against her auto insurer, defendant State Farm Automobile Insurance Company. The superior court dismissed her claim under CR 12(b)(6), apparently because Ms. Johnson has a CPA damages claim against State Farm. Because the supreme court has held that a CPA plaintiff “may obtain injunctive relief in addition to recovering actual damages,” *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973), Ms. Johnson respectfully requests that this court reverse the dismissal and remand the case.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in dismissing Ms. Johnson’s complaint under CR 12(b)(6) . CP 217–18.
2. The superior court erred in denying Ms. Johnson’s motion for reconsideration. CP 232–33.

III. ISSUES PRESENTED

1. At the pleadings stage, without the benefit of discovery, must a plaintiff who seeks a CPA injunction articulate the terms of the injunction she will request at the end of trial (Error Nos. 1–2)? **No.**

2. Does the availability of a damages claim foreclose a claimant's right to obtain an injunction under the CPA (Error Nos. 1–2)?

No.

3. Did the superior court's CR 12(b)(6) dismissal order comport with Ms. Johnson's right to access to the courts (Error Nos. 1–2)?

No.

IV. STATEMENT OF THE CASE

The posture of the case commands that the parties rely on the complaint, reasonable inferences that can be drawn from it, and scenarios that are hypothetical or conceivable. *See Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 648–49, 994 P.2d 901 (2000); *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995).

A. Ms. Johnson originally brought a single action with both damages and injunction claims.

Ms. Johnson was involved in a car accident on December 15, 2007, and she made a claim with her auto insurer, State Farm. CP 90, 95. Ms. Johnson asked State Farm to open an underinsured motorist (UIM) claim in April 2008. CP 95. She signed authorizations so that State Farm could obtain medical records. *Id.* In July 2008, with State Farm's consent, Ms. Johnson reached a policy-limits settlement with the driver who hit her. *Id.* Then, for a couple of years after the accident, State Farm failed to communicate any value for Ms. Johnson's claim. CP 95–97. In August

2009, Ms. Johnson sent State Farm a letter explaining why she believed State Farm owed her the full \$1 million limits on the policy. CP 96.

Two years after the accident, in December 2009, the adjuster told Ms. Johnson that other claims, in which insureds had attorneys, were in line ahead of hers. *Id.* For the first time, State Farm asked Ms. Johnson to obtain a disability rating, which she did in early January 2010. *Id.* Throughout the claim, Ms. Johnson incessantly called State Farm for updates. But State Farm refused to place any value on the admittedly covered claim. It was more than two years after the accident and almost a half year after Ms. Johnson sent her policy-limits letter that State Farm referred Ms. Johnson's file to a lawyer for valuation analysis. Even then State Farm communicated no value. In April 2010, Ms. Johnson told State Farm she intended to sue to obtain the benefit of the insurance she purchased from State Farm. CP 97. A couple of weeks later, State Farm finally told Ms. Johnson it had a dollar amount for her claim—\$200,000, which Ms. Johnson contends is nowhere near a fair value. *Id.*

Ms. Johnson filed suit in King County Superior Court, alleging that State Farm is in breach of contract and in violation of the Insurance Code, the Insurance Fair Conduct Act, Washington good-faith standards, and the CPA's proscription against unfair or deceptive practices. CP 73–74. Ms. Johnson also alleged that State Farm violated the spirit and letter of the

unfair claims settlement practices regulations. CP 74. Ms. Johnson sought a money judgment and injunctive relief. *Id.*

B. State Farm removed the action to federal court, which dismissed the injunction claim for lack of subject-matter jurisdiction.

State Farm removed the entire action to federal court. *Id.* Ms. Johnson—not State Farm—then filed a motion asking that the federal district court determine whether it had subject-matter jurisdiction over the CPA injunction claim. CP 148–57. If the district court determined that jurisdiction was lacking, Ms. Johnson contended that Ninth Circuit case law required the district court to remand the CPA injunction claim or dismiss it without prejudice so that Ms. Johnson could refile the claim in state court. CP 155. Ultimately, the district court concluded it had no subject-matter jurisdiction over the injunction claim and dismissed it **without prejudice** to refiling in state court. CP 159. Unlike the federal court, this state court has jurisdiction over Ms. Johnson’s injunction claim. CP 154–56 (citing *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 489, 997 P.2d 960 (2000)). The federal court did not rule on the merits of the CPA injunction claim. The court denied State Farm’s summary-judgment motion on Ms. Johnson’s CPA damages claim. CP 203–08.

C. Ms. Johnson refiled her injunction claim in state court, while her damages claim remained pending in federal court.

Ms. Johnson commenced a new lawsuit in King County Superior Court that asserts only a CPA injunction claim. CP 1–57. In her complaint, she alleges that State Farm owed her obligations under the unfair claims handling regulations. CP 9–10. For example:

- 284-30-330(2) requires that insurers acknowledge and act reasonably and promptly upon communications with respect to claims.
- 284-30-330(3) requires that insurers adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
- 284-30-330(4) requires that insurance companies conduct a reasonable investigation before refusing to pay claims.
- 284-30-330(6) requires that insurance companies attempt in good faith to effectuate prompt, fair, and reasonable settlements of claims in which liability has become reasonably clear.
- 284-30-330(7) prohibits insurance companies from compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.
- 284-30-330(13) requires that insurers promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for the denial of the claims or for the offer of a compromise settlement.
- 284-30-370 requires that every insurer complete its investigation into a claim within 30 days of the notice of the claim.

See id.

Ms. Johnson's complaint did not specify the terms of the injunction she would request at the time of final judgment. Instead, the complaint notified State Farm that Ms. Johnson would seek an injunction (1) prohibiting further acts that violate the regulations and the CPA; and (2) mandating that State Farm enact procedures that live up to its legal obligation to perform a full and fair investigation of claims and to comply with the regulations. CP 11. Not having had discovery when drafting a complaint, Ms. Johnson could not identify the specific acts to be enjoined, nor could she articulate the specific procedures that an injunction would require State Farm to enact.

D. The superior court dismissed Ms. Johnson's injunction claim, apparently on the basis that Ms. Johnson has a remedy at law.

State Farm filed a motion to dismiss under CR 12(b)(6) . CP 58–70. The bases for the motion were “first, plaintiff's suit seeks an untenable general decree against State Farm to refrain from violating Washington law, and second, the proposed injunction does not and could never meet the specificity requirements for an injunction.” CP 58. Ms. Johnson opposed the motion, articulating specific forms of injunctive relief that could be awarded against State Farm in this case and that would comport with controlling legal principles. CP 82–83. Alternatively, Ms. Johnson sought leave to amend the complaint. CP 83.

On April 22, 2011, the superior court granted State Farm's motion to dismiss for failure to state a claim upon which relief may be granted. CP 217–18. The superior court's order did not address the two points in State Farm's brief. Instead, the court articulated the following reason for dismissal: "Plaintiff has, and is pursuing, a remedy at law in the U.S. District Court for the Western District of Washington, #C10-1650 TSZ." CP 217–18. Such a basis for relief was not given in State Farm's motion, and Ms. Johnson was not allowed an opportunity to address it in connection with the CR 12(b)(6) motion. The superior court did not address Ms. Johnson's request for leave to amend the complaint.

E. The superior court denied reconsideration.

Ms. Johnson moved for reconsideration. CP 220–31. By that time, Ms. Johnson had learned through discovery that the adjuster on the UIM claim evaluated the claim at the policy-limits amount of \$1 million, but his supervisors instructed him to offer just 20% of that without any factual justification. CP 223. Ms. Johnson also addressed the basis for the superior court's dismissal—namely, that Ms. Johnson has a remedy at law. CP 225–28. Ms. Johnson cited *Hockley*, 82 Wn.2d at 350–51, for the proposition that the existence of a remedy at law is irrelevant for purposes of a CPA injunction. CP 225, 227–28. The superior court denied

reconsideration without explanation and without requiring a response brief from State Farm. CP 240–41.

Ms. Johnson timely appealed.

V. ARGUMENT

A. **Rule 12(b)(6) is reserved for obviously deficient cases in which there is no chance the plaintiff can prevail.**

This court reviews CR 12(b)(6) dismissals de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). The classic CR 12(b)(6) situation is when Washington does not recognize a particular cause of action, but that is not the case here. “Under CR 12(b)(6), dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery.” *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). “Such motions should be granted sparingly and with care, and only in the unusual case in which the plaintiff’s allegations show on the face of the complaint an insuperable bar to relief.” *Id.* (quotation omitted). In ruling on a CR 12(b)(6) motion, the superior court considers hypothetical facts offered by the plaintiff. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005). “Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim. Hypothetical facts may be introduced to assist the court in establishing the conceptual backdrop

against which the challenge to the legal sufficiency of the claim is considered.” *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quotations and brackets omitted). The Supreme Court of Washington recently reaffirmed the rules making CR 12(b)(6) dismissal extremely rare and difficult. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101–03, 233 P.3d 861 (2010).

B. At the pleading state, Ms. Johnson was not required to articulate the precise terms of an injunction.

It appears that the superior court rested its dismissal on the basis that Ms. Johnson has a “remedy at law.” Because the dismissal order contains very little analysis, it is possible that the court may have relied on State Farm’s argument that it would be impossible to fashion an injunction in Ms. Johnson’s case that would satisfy the requirements of CR 65(d).

That rule provides:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

CR 65(d). Like its federal counterpart, CR 65(d) applies only to “[e]very **order** granting an injunction and every restraining **order**.” CR 65(d) (emphasis added). Ms. Johnson concedes that, at the time of final

judgment, CR 65(d) will require an order that “set[s] forth the reasons for its issuance,” that is “specific in terms,” and that “describe[s] in reasonable detail ... the act or acts sought to be restrained.” *Id.* This will not be accomplished until the parties go through the litigation process, including discovery. Underscoring that CR 65(d) does not apply at the pleadings stage, the rule states that it is not satisfied by “reference to the complaint.”

Under CR 8(a), a complaint only has to include “(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.” Civil Rule 9 creates exceptions for items that must be pleaded with particularity—special damage, for example—but none of the exceptions involve injunctions. *See* CR 9(a)–(k). Under CR 54(c), a plaintiff does not even have to plead an injunction as a prerequisite for obtaining injunctive relief. “Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, **even if the party has not demanded such relief in his pleadings.**” CR 54(c) (emphasis added).

C. The cases cited by State Farm do not support dismissal.

State Farm cited *State ex rel. Department of Public Works v. Skagit River Navigation & Trading Co.*, 181 Wash. 642, 643–44, 45 P.2d 27

(1935), in its motion to dismiss, but nothing in that case alters the CR 12(b)(6) analysis. That case was an appeal from the imposition of an injunction, not a CR 12(b)(6) motion.

State Farm also cited several federal cases. Like *Skagit River*, the following were appeals from injunction orders and therefore do not address the standard to be applied on a Rule 12(b)(6) motion: *Schmidt v. Lessard*, 414 U.S. 473, 473, 94 S. Ct. 713 (1974), *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1408–09 (11th Cir. 1998), *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1524 (11th Cir. 1996), and *Daniels v. Woodbury County*, 742 F.2d 1128, 1130 (8th Cir. 1984). The following was an appeal from summary judgment after “extensive pretrial proceedings” and, again, does not address the Rule 12(b)(6) standard. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1183 (11th Cir. 1999). The following was an appeal from the denial of an injunction. *Sanders v. Air Line Pilots Ass’n*, 473 F.2d 244, 245 (2d Cir. 1972). While the case of *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206, 221 (D. Conn. 2007), quickly and without much analysis applies Fed. R. Civ. P. 65(d) on a Rule 12(b)(6) motion, its holding is against the great weight of authority. The authors of *Federal Practice and Procedure* explain: “As is true of the other elements, the obligation to provide reasonable detail applies only to the order for injunctive relief and does not mean that plaintiff must be any

more specific in drafting the complaint than generally is required by Rule 8.” 11A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2955, at 328–29 (2d ed. 1995). The *Xerox* case, in fact, relies on *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 49–50 (2d Cir. 1996), which was not a Rule 12(b)(6) case at all but an appeal from the imposition of an injunction. *See also United States v. Georgia Power Co.*, 301 F. Supp. 538, 543 (N.D. Ga. 1969) (“Rule 65(d), as indicated by its title, refers to the form of an injunction or a restraining order, and is silent as to the specificity required in the complaint’s request for injunction.”).

D. Ms. Johnson states a claim upon which relief may be granted.

1. The CPA authorizes injunctive relief.

Is there any set of hypothetical facts conceivably raised by the complaint that would support a CPA injunction? *Bravo*, 125 Wn.2d at 750. Clearly, yes. Authority for the injunction is found in the statute, which provides:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, **may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both**, together with the costs of the suit, including a reasonable attorney’s fee.

RCW 19.86.090 (emphasis added). The legislature expressly provided that the CPA would “be ‘liberally construed that its beneficial purposes may be served.’” *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (quoting RCW 19.86.920). The CPA’s “broad public policy is best served by permitting an injured individual to enjoin future violations of RCW 19.86, even if such violations would not directly affect the individual’s own private rights.” *Hockley*, 82 Wn.2d at 350.

2. The CPA applies to UIM coverage.

The CPA prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. The Insurance Code is found at Title 48, RCW. It operates in conjunction with the CPA and prohibits unfair or deceptive acts or practices by insurers.

RCW 48.30.010(1). The Insurance Code also authorizes the Insurance Commissioner to promulgate regulations defining additional unfair or deceptive acts or practices, *see* RCW 48.30.010(2)—regulations found at WAC 284-30-310 *et seq.* The regulations apply to every insurance contract. WAC 284-30-310 states: “This regulation applies to all insurers and to all insurance policies and insurance contracts.” “[T]he legislature expressly provided that violations of the insurance regulations are subject to the CPA.” *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 924, 792 P.2d 520 (1990). “A single violation of WAC 284-30-330 constitutes a

violation of RCW 48.30.010. Under RCW 19.86.170, a violation of RCW 48.30.010 is a per se unfair trade practice and satisfies the first element of the 5-part test for bringing a CPA action under RCW 19.86.090.” *Id.* at 925. Authorized insurers, like State Farm, must comply “fully” with the Insurance Code. RCW 48.05.040(4).

As stated above, *see supra* p. 5, the regulations impose timeliness and fairness obligations. The regulations apply to UIM insurance. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329–31, 2 P.3d 1029 (2000). A leading case holding that violation of the regulations equals “an unfair insurance claims practice actionable under the Consumer Protection Act,” is a UIM case. *Id.* at 331. *Anderson* holds that a “single violation ... constitutes a per se unfair or deceptive practice for purposes of a Consumer Protection Act violation.” *Id.* at 331–32. The case also stands for three principles supporting Ms. Johnson here: **1st**, an insurer’s delay in violation of the regulations is harm that is actionable under the CPA. *Id.* at 333. **2nd**, a UIM insurer violates the unfair claims settlement practices regulations by making an unreasonably low offer on the claim. *Id.* at 335–36; *id.* at 336. And **3rd**, a UIM insurer is not permitted to act based on a “self-serving view of the available evidence.” *Id.* at 331.

Ms. Johnson contends these principles are incompatible with the claims-handling conduct that State Farm exhibited when handling Ms.

Johnson's claim. State Farm and Ms. Johnson have an insurer–insured relationship. Ms. Johnson paid State Farm money for her UIM coverage. Nothing in the CPA, Insurance Code, or the regulations creates an exception for UIM policies. Washington law forecloses State Farm's philosophy, exhibited both in its handling of the claim and in its arguments in the damages case, *see* CP 194, 196, 199–200, that a UIM insurer can sit on its hands without investigating a claim, *see, e.g.*, WAC 284-30-330(3), (4); make unreasonably low offers as part of a “dance” with the policyholder, *see, e.g.*, WAC 284-30-330(7); and compel an insured into litigation to get the benefit of her insurance policy.

3. Ms. Johnson described forms of injunctive relief that could be awarded in her case.

It is impossible to say everything that discovery will reveal, and so the complaint does not spell out the particular acts to be enjoined or the particular procedures to be enacted. From what Ms. Johnson has learned so far in State Farm's arguments in the case and from her own experiences with the State Farm claims department, Ms. Johnson envisions an injunction prohibiting the following acts:

- instruction to UIM claims handlers that it is proper to delay investigation of UIM claims;
- instruction or tolerance for discrimination (in the form of delay or low offers) against claims in which the insured does not have an attorney;

- instruction to UIM claims handlers that claims-handling regulations do not apply in UIM claims;
- company policies for extending offers known to be lower than the fair value of the claim as a step in a “dance” during the handling of a UIM claim; and
- company policies that encourage claims handlers to compel UIM insureds into litigation by extending low offers.

Ms. Johnson envisions an injunction mandating procedures such as the following:

- procedures that require State Farm to inform injured insureds about UIM coverage upon receiving notice of an auto-accident claim;
- procedures that require State Farm to inform injured insureds about the right to a full, fair, and prompt investigation of the UIM claim;
- procedures for periodic training of claims representatives about the regulations that apply to insurance claims, including UIM insurance;
- procedures for providing supervision and oversight of UIM claims handling; and
- procedures that instruct claims handlers that unreasonably low offers in UIM cases are not permitted.

An injunction for enactment of these kinds of procedures is also fairly characterized as a prohibitory injunction enjoining CPA violations because WAC 284-30-330(3) makes it a violation for an insurer to fail to adopt and implement reasonable standards for the prompt investigation of claims.

Ms. Johnson articulated all of these potential injunctions in her briefing

before the superior court. CP 82–83. Ms. Johnson also explained that these lists were illustrative and not a catalog of every form of injunction that might be warranted upon final judgment. Ms. Johnson intended to collect discovery from State Farm and obtain expert claims-handling testimony. The superior court would serve as gatekeeper to ensure that whatever injunction is entered satisfies CR 65(d)'s requirements. Nonetheless, the examples easily showed that the CPA injunction claim meets and exceeds the “hypothetical” and “conceivable” test for CR 12(b)(6) motions.

In its motion, State Farm argued that injunctions that vaguely require a defendant to “obey the law” or to conform to a vague “reasonableness” standard are improper. CP 63–64. State Farm added that it would be unfair to hold it in contempt any time there is a disagreement between it and an insured. CP 64. Not so. None of the forms of injunctive relief articulated above fit State Farm’s description of a faulty injunction. The injunction would require State Farm to cease specific acts that violate the CPA and to take specific acts to bring it into compliance. If State Farm adhered to such an injunction, disputes with other insureds would be less frequent; but in such a case, a dispute over a claim would not be contempt.

4. Even if Ms. Johnson were required to include more detail in her complaint, the superior court should have permitted amendment instead of dismissing.

Ms. Johnson stated a claim with sufficient detail. Even if that were not true, the superior court erred in dismissing instead of granting leave to amend. CR 15(a) (“leave shall be freely given when justice so requires”). Had the superior court permitted, Ms. Johnson would have amended her complaint to include the above examples of injunctive relief.

E. Ms. Johnson may bring a CPA injunction claim even though she has a claim for damages.

In her opposition to dismissal, Ms. Johnson did not have an opportunity to address the ground for dismissal set out in the Court’s April 22, 2011 order—namely, that Ms. Johnson had a remedy at law preventing the issuance of injunctive relief. CP 237–38. That issue was not briefed by State Farm. Ms. Johnson addressed the issue for the first time in her motion for reconsideration, CP 220–31, which the superior court denied, CP 232–33.

It bears emphasizing that Ms. Johnson asks for a statutory injunction under the CPA, not a common-law injunction. For common-law injunctions, the Washington Supreme Court has stated, “The rule in this state is that injunctive relief will not be granted where there is a plain, complete, speedy, and adequate remedy at law.” *Tyler Pipe Indus., Inc. v. State Dep’t of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982). Even

so, the courts of this state hold that the unavailability of other remedies is **not an essential element** of a common-law injunction claim. *Wimberly v. Caravello*, 136 Wn. App. 327, 340, 149 P.3d 402 (2006); *Hollis v. Garwall, Inc.*, 88 Wn. App. 10, 16, 945 P.2d 717 (1997) (“The essential elements of the right to injunctive relief are necessity and irreparable injury. In the exercise of its discretion, the court may consider a number of circumstances including the adequacy of other remedies, delay in bringing suit, plaintiff misconduct, and the relative hardship to the parties resulting from the granting or denial of injunctive relief. These circumstances are not, however, essential elements of an action for injunctive relief.”), *aff’d*, 137 Wn.2d 683, 974 P.2d 836 (1999).

CPA injunctions are different, and the requirements for their issuance are more liberal. The CPA provides that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” RCW 19.86.020. “[T]he legislature expressly provided that violations of the insurance regulations are subject to the CPA.” *Kallevig*, 114 Wn.2d at 924. A violation of any of the regulations set out above, supra p. 5, is a per se unfair trade practice for purposes of the CPA. *Kallevig*, 114 Wn.2d at 925. “The CPA is to be ‘liberally construed that its beneficial purposes may be served.’” *Panag*, 166 Wn.2d at 37 (quoting RCW 19.86.920).

Again, the CPA's citizen-suit provision states:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, **may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both**, together with the costs of the suit, including a reasonable attorney's fee.

RCW 19.86.090 (emphasis added). By this statute's terms, a private CPA claimant is authorized to bring a claim for damages **and** a claim for injunctive relief. The availability of a remedy at law—one for money damages—is not significant in the context of the CPA.

Ms. Johnson's federal-court action for money damages does not, in any event, remedy the same harm addressed in the present state-court action—namely, the public interest against unfair and deceptive acts and practices. The Supreme Court explained this in *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007) (emphasis added):

Private enforcement of the CPA was not possible until 1971, when the legislature created the private right of action to encourage it. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 783-84, 719 P.2d 531 (1986). Private actions by private citizens are now an integral part of CPA enforcement. *See* RCW 19.86.090. Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce. *Lightfoot v. MacDonald*, 86 Wash. 2d 331, 335-36, 544 P.2d 88 (1976).

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. *Hangman Ridge*, 105 Wash. 2d at 790, 719 P.2d 531; *Hockley v. Hargitt*, 82 Wash. 2d 337, 349-50, 510 P.2d 1123 (1973).

In *Hockley*, the leading CPA injunction case, the defendants argued “that because plaintiff could be made whole by a money judgment, he lacks standing to enjoin further violations of the act.” 82 Wn.2d at 349.

The Supreme Court rejected this argument, explaining:

By the very language of the statute, plaintiff may obtain injunctive relief in addition to recovering actual damages. However, defendants further argue that plaintiff may enjoin future violations only as to himself, thus protecting his own interests, but that he may not protect the public interest as well. Such a constriction of the scope of injunctive relief provided to the individual by RCW 19.86.090 is inconsistent with both the language of that section and the spirit and purpose of the consumer protection act.

RCW 19.86.090 authorizes an injured person to recover only the ‘actual damages sustained by him’ but imposes no such limitation upon injunctive relief. Had the legislature desired to so limit the injunction they could have easily done so, as they did with damages.

* * *

[The CPA’s] broad public policy is best served by permitting an injured individual to enjoin future violations of RCW 19.86, even if such violations would not directly affect the individual’s own private rights.

If each consumer victim were limited to injunctive relief tailored to his own individual interest, the fraudulent

practices might well continue unchecked while a multiplicity of suits developed. On the other hand, if a single litigant is allowed to represent the public and consumer fraud is proven, the multiplicity of suits is avoided and the illegal scheme brought to a halt. Both results are in the public interest and consistent with the liberal construction of our consumer protection act. Indeed, in many private consumer protection cases the damage has already been done to the particular individual plaintiff at the time the lawsuit is filed, making ineffectual an injunction limited solely to the protection of the individual plaintiff.

* * *

We hold that under RCW 19.86.090 an individual may seek and obtain an injunction that would, besides protecting his own interests, protect the public interest.

82 Wn.2d 350–51 (emphasis added).

In sum, the availability of a monetary remedy to Ms. Johnson does not foreclose her right to seek injunctive relief to vindicate the public interest.

F. The superior court’s dismissal denies Ms. Johnson her constitutional right to access to the courts.

At the superior court, Ms. Johnson cited *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009), for the proposition that litigants in Washington have a constitutional right to discovery. CP 78. The state constitution mandates that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.”

Const. art. 1, § 10¹. “That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people’s rights and obligations.” *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). A plaintiff has the right to access to the courts, including “the right of discovery authorized by the civil rules, subject to the limitations contained therein.” *Id.*

This broad right of discovery is necessary to ensure access to the party seeking the discovery. It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense. Thus, the right of access as previously discussed is a general principle, implicated whenever a party seeks discovery. It justifies the limited nature of the exceptions to broad discovery found in CR 26(c). Plaintiff, as the party seeking discovery, therefore has a significant interest in receiving it.

...

Thus, plaintiff’s right of access to the courts and his concomitant right of discovery must be accorded a high priority in weighing the respective interests of the parties in litigation.

Id. at 782–83.

Ms. Johnson’s right to access to the courts has been violated here to the extent the superior court’s order rests on the erroneous premise that

¹ Even if Ms. Johnson had not cited *Putman* in her superior court brief, a party may allege the existence of “manifest error affecting a constitutional right” for the first time on appeal. RAP 2.5(a).

a plaintiff must plead—in her complaint—the contents of the injunction she will seek at the conclusion of trial. Such analysis requires a plaintiff to litigate her claim in summary fashion, without the benefit of any discovery. As stated above, the superior court’s dismissal of Ms. Johnson’s injunction claim is unwarranted under CR 12(b)(6). Ms. Johnson contends that this appeal should be resolved on that basis, so that a constitutional question may be avoided. *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) (“Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds.”).

G. The superior court should have granted reconsideration and reversed its dismissal order.

The standard of review for denials of motions for reconsideration is abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). “A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons.” *Id.* Motions for reconsideration are governed by CR 59(a). Grounds for reconsideration include irregularity in any order of the court by which a party is prevented from having a fair trial, CR 59(a)(1); error in law occurring in the trial, CR 59(a)(8); and when substantial justice has not been done, CR 59(a)(1)(9).

The superior court issued an order that articulated a basis for dismissal that the parties had not briefed—namely, that Ms. Johnson had no claim for a CPA injunction because of the existence of a remedy at law. CP 217–18. Ms. Johnson promptly moved for reconsideration, alerting the superior court to case law establishing the opposite. CP 225–29; *see supra* pp. 18–22. The superior court nonetheless denied reconsideration in an order containing no analysis and without requiring a response brief from State Farm. CP 240–41. The dismissal in this case was an irregularity that prevented Ms. Johnson from obtaining a fair trial (or **any** trial on her injunction claim). It was an error in law. And substantial justice was not done. For the reasons stated above, the superior court’s dismissal is based on untenable grounds or reasons. The superior court not only erred when it dismissed Ms. Johnson’s CPA injunction claim, but it abused its discretion when it refused to reconsider the dismissal.

VI. CONCLUSION

Ms. Johnson respectfully requests that this court reverse and remand.

RESPECTFULLY SUBMITTED this 28th day of July, 2011.

KELLER ROHRBACK L.L.P.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 28th day of July, 2011, I
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I declare under penalty of perjury under the laws of the State of
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