

NO. 71954-8

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

Brian & Karen Handlin,

Plaintiffs/Appellants,

v.

On-Site Manager, Inc.,

Defendant/Respondent.

REPLY BRIEF OF APPELLANTS BRIAN & KAREN HANDLIN

 **ORIGINAL**

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I. Argument

The King County Superior Court dismissed Brian Handlin's & Karen Handlin's Fair Credit Reporting Act and Consumer Protection Act claims on finding they did not allege an injury to property, despite being denied full and prompt disclosure of their tenant-screening reports. That ruling was incorrect because the denial of those reports was an injury to property. On-Site Manager, in its response brief, makes several additional arguments it contends also defeat the Handlins' claim. The superior court expressed skepticism about, but did not actually reach, those arguments; if this Court does reach those arguments, should reject them as well.

A. Post-Reinvestigation Disclosures, RCW 19.182.090

On August 9, 2013, On-Site completed its reinvestigation of information (about a 2008 eviction suit) On-Site had previously reported, and which Karen Handlin had disputed.¹ This triggered On-Site's duty to make post-reinvestigation disclosures to the Handlins within five business days (i.e., by August 16).² On-Site never made those disclosures.³

¹ CP at 4; see RCW 19.182.090(8).

² See RCW 19.182.090(8)(a) ("Upon completion of the reinvestigation ... a consumer reporting agency shall provide notice, in writing or by any other means authorized by the consumer, of the results of a reinvestigation within five business days.")

³ See CP at 4, 7-8.

On-Site argues its failure to make post-reinvestigation disclosures did not cause the Handlins actual damages.⁴ But a CPA claim requires only an injury to business or property.⁵ Such an injury “is ‘distinct from ‘damages’” and does not require monetary loss or “quantifiable” harm.⁶ On-Site’s failure to make the disclosures caused the Handlins an injury to property by interfering with their ability to use those disclosures—a determinate thing to which the Handlins had a clear statutory right.⁷

In their opening brief, the Handlins discussed *Sorrel v. Eagle Healthcare*, which held that a nursing home’s failure to refund unused pre-paid charges in a timely manner caused an injury to property by denying the plaintiff “rightful possession of his funds for a period of two weeks.”⁸ But *Sorrel* is hardly the only decision establishing that the “injury element

⁴ See Br. of Respondent at 28-29.

⁵ See RCW 19.86.090; see *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 741; 733 P.2d 208 (1987) (“This requirement is based on RCW 19.86.090, which uses the term ‘injured’ rather than suffering ‘damages.’ This distinction makes it clear that no monetary damages need be proven”), discussing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).

⁶ See *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 58; 204 P.3d 885 (2009), citing *Nordstrom*, 107 Wn.2d 735 at 740; see also *Tallmadge v. Aurora Plymouth Chrysler, Inc.*, 25 Wn. App. 90, 93; 605 P.2d 1275 (“Although the trial judge did not award Tallmadge pecuniary damages, he suffered injuries for purposes of the Consumer Protection Act in that he was inconvenienced, deprived of the use and enjoyment of his property, and received an automobile with defects needing repair.”).

⁷ See, e.g., *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298; 38 P.3d 1024 (2002). (interference with use or enjoyment of property can establish injury for CPA purposes); see *Ambach v. French*, 167 Wn.2d 167, 172; 216 P.3d 405 (2009) (“property” under the CPA means a “right to possess, use, and enjoy a determinate thing,” but must relate to economic activity, and not “to one’s person or body”).

⁸ *Sorrel*, 110 Wn. App. at 298.

can be met even where the injury alleged is both minimal and temporary.”⁹ Others include *Tallmadge v. Aurora Plymouth Chrysler* (inconvenience of having to take a damaged vehicle to the dealership for repairs was an injury to property),¹⁰ *Mason v. Mortgage America* (injury occurred when lender took a quitclaim deed as security for a loan to a mobile home, rather than a deed of trust),¹¹ and *Panag v. Farmers Ins.* (deceptive collection notices injured recipients, who incurred time and expenses investigating and following up on the notices, even though they did not tender payment in response to the notices).¹²

B. Disclosures under RCW 19.182.070, 080

The Handlins also became entitled to receive consumer disclosures from On-Site when they requested copies of their tenant-screening reports on August 13, 2013.¹³ Unlike the post-reinvestigation disclosures, On-Site did eventually produce these reports—but the disclosures were tardy and

⁹ *Frias v. Asset Foreclosure Services, Inc.*, ___ Wn.2d ___, 334 P.3d 529, 538 (2014), citing *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854; 792 P.2d 142 (1990).

¹⁰ See *Tallmadge*, 25 Wn. App. at 93.

¹¹ *Mason*, 114 Wn.2d at 854.

¹² See *Panag*, 166 Wn.2d at 35-36, 62 (“out-of-pocket expenses for postage, parking, and consulting an attorney” established injury).

¹³ RCW 19.182.070 (consumer reporting agency must “clearly and accurately disclose: (1) All information in the file on the consumer at the time of request [and] (2) All items of information in its files on the consumer...”). Note these disclosure requirements are subject to certain exceptions not pertinent to this case.

incomplete.¹⁴ Again, On-Site interfered with the Handlins' use of property by failing to make complete disclosures in a timely manner.¹⁵

1. The Handlins were entitled to possess and use copies of their tenant-screening reports.

On-Site counters that its duty to disclose "information" does not include "reports."¹⁶ But the statutory term "information" is broader than and includes "reports;" specifically, a "tenant-screening report" includes "any information collected by a tenant screening service," whether or not that information also constitutes a consumer report.¹⁷

A federal district court rejected substantially the same semantic argument On-Site makes here in *Taylor v. Screening Reports, Inc.*, which held that "requesting one's report without limitation is synonymous with requesting one's entire consumer file."¹⁸ Though *Taylor* was decided under the federal FCRA, the text of the disclosure provision at issue in

¹⁴ CP at 4-8.

¹⁵ See *Sorrel*, 110 Wn. App. at 298 (improper delay in delivering property to consumer constitutes interference with use or enjoyment of property).

¹⁶ See Br. of Respondent at 21.

¹⁷ See RCW 19.182.070(1-2); see RCW 59.18.030(23) ("Tenant screening reports' means a consumer reports as defined in RCW 19.182.010 and any other information collected by a tenant screening service."); see also RCW 19.182.010(4)(a) ("Consumer report' means a written, oral, or other communication of information by a consumer reporting agency [bearing on a consumer's creditworthiness and related to a consumer transaction or other statutorily-authorized purpose]").

¹⁸ See *Taylor v. Screening Reports, Inc.*, 294 F.R.D. 680, 686 (N.D.Ga. 2013).

Taylor was identical to RCW 19.182.070(1).¹⁹ Washington’s disclosure provision, which also contains RCW 19.182.070(2), is even broader.²⁰

On-Site further argues the Handlins did not have a right to possess or use the screening reports because Forestview, not the Handlins, paid for them.²¹ This is irrelevant because the Handlins were entitled to the reports by statute.²² The FCRA specifically entitles a consumer to obtain a free copy of a report within 60 days of an adverse action, and the Handlins requested their reports than two weeks after Forestview denied their rental application;²³ an agency cannot charge for post-reinvestigation disclosures at all.²⁴ This argument is also misleading, as it was actually the Handlins, not Forestview, who effectively paid for the reports in the first place.²⁵

2. The screening reports On-Site eventually produced were not full and complete.

¹⁹ See *Taylor* at 686; compare 15 U.S.C. § 1681g(a) (requiring consumer reporting agency to “clearly and accurately disclose to the consumer: (1) All information in the consumer’s file at the time of the request”) with RCW 19.182.070 (same).

²⁰ See RCW 19.182.070(2) (requiring consumer reporting agency to also disclose “[a]ll items of information in its files on that consumer”).

²¹ See Br. of Appellant at 21.

²² See RCW 19.182.070; see also RCW 19.182.100.

²³ See RCW 19.182.100(2) (“A consumer reporting agency shall make all disclosures under RCW 19.182.070 and 19.182.080 and furnish all consumer reports under RCW 19.182.090 without charge, if requested by the consumer within sixty days after receipt by the consumer of a notification of adverse action[.]”); see CP at 3-4.

²⁴ See RCW 19.182.100(3) (“A consumer reporting agency shall not impose any charge for (a) providing notice to a consumer required under RCW 19.182.090[.]”).

²⁵ See CP at 3; see also RCW 59.18.257(1)(b)(i) (“landlord may charge a prospective tenant for costs incurred in obtaining a tenant screening reports”).

On-Site also claims it did not have the Handlins' rental scores or recommendations on file at the time they requested their reports.²⁶ This appears unlikely; Forestview cited the Handlins' low rental score as the reason for denial, and directed them to contact On-Site to learn why their score was so low.²⁷ In turn, an On-Site representative told Karen Handlin that a 2008 eviction suit was the main reason for the low rental score (and denial recommendation).²⁸ These facts strongly suggest On-Site did keep the rental scores and recommendations on file. To verify this fact likely requires discovery into how On-Site calculates, transmits, and stores rental scores and recommendations. But the Handlins certainly *alleged* that On-Site had their scores and recommendations on file and On-Site's factual contention to the contrary would not have been a proper basis for dismissal under CR 12(b)(6).²⁹

3. On-Site did not produce copies of the Handlins' screening reports in a timely manner.

²⁶ See Br. of Respondent at 26-27.

²⁷ CP at 3-4.

²⁸ CP at 4.

²⁹ See CP at 6 ("The disclosures that On-Site mailed on August 27, 2013, were yet incomplete. The Handlins' rental scores were not included, and no explanation of the meaning of the rental scores was provided. The recommendation was not provided."); see *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71; 283 P.3d 1082 (2012) (on motion to dismiss under CR 12(b)(6), plaintiffs' allegations are presumed true and all reasonable inferences are drawn in their favor).

Whether or not the rental scores and recommendations should have been included, the Handlins' more significant grievance has always been with the length of time On-Site took to produce the reports. The Handlins first requested the disclosures on August 13, and did not receive them until August 30.³⁰ This delay was inconsistent with On-Site's duty to provide disclosures "on reasonable notice."³¹ Much of the delay occurred because On-Site sent the reports by mail, rather than electronically as the Handlins had requested; this was inconsistent with On-Site's duty to provide disclosures by any "reasonable means available" a consumer authorizes.³²

On-Site denies owing a duty to make consumer disclosures within a reasonable time, and argues that the text requiring disclosures "during normal business hours and on reasonable notice" means only that consumers must give "'reasonable notice' of what they seek."³³ But the following subsection makes clear the Legislature contemplated that consumer reporting agencies would make disclosures as quickly as within a single phone call or office visit.³⁴ Yes, the statute does suggest that the consumer must give "reasonable notice" of what disclosures she seeks—but once the consumer does so, then the disclosures are due more-or-less

³⁰ CP at 4-6.

³¹ See RCW 19.182.080(1).

³² See CP at 4-6; see RCW 19.182.080(2)(c).

³³ See RCW 19.182.080(1); see Br. of Respondent at 27-28.

³⁴ See RCW 19.182.080(2) (requiring disclosures by telephone or in-person)

immediately (or, at least, within a reasonable time thereafter).³⁵ Slight delays seem permissible, such as where a request for disclosures comes in at night or on a weekend or holiday, but RCW 19.182.080(1) does not countenance delays of 13+ days.³⁶

Interpreting the statute to require disclosures be produced within a reasonable time is consistent with the purpose of the overall FCRA, which includes ensuring consumer reporting agencies “resolve disputed reports promptly and fairly.”³⁷ Since consumers usually need to see their reports in order to detect and dispute inaccurate contents, delaying disclosures can allow inaccuracies to persist longer. Moreover, allowing unlimited time to produce disclosures would frustrate the purpose of RCW 19.182.070, which assures consumers meaningful access to their reports.

As for the method of production, On-Site accuses Plaintiffs’ counsel of “attempt[ing] to conceal from the trial court” a letter that supposedly authorized On-Site to send the disclosures by mail.³⁸ Apart from being another improper factual argument, the letter to which On-Site

³⁵ See RCW 19.182.080(1-2).

³⁶ See RCW 19.182.080(1).

³⁷ RCW 19.182.010 (“It is the policy of the state that credit reporting agencies maintain accurate credit reports, resolve disputed reports promptly and fairly, and adopt reasonable procedures to promote consumer confidentiality and the proper use of credit data in accordance with this chapter.”); see also (legislative intent)

³⁸ Br. of Respondent at 27; CP at 4-6 (reports requested August 13, arrived August 30).

refers stated that production by e-mail or fax was “most prefer[red].”³⁹

Also, the attorney’s letter was not even sent until after On-Site failed to produce disclosures in response to the Handlins’ August 13 request.⁴⁰

C. The Handlins did plead a viable claim for actual damages.

While On-Site’s failure to make proper FCRA disclosures is alone sufficient to establish injury to property, the Handlins did allege that On-Site’s delay in producing those disclosures caused them actual damages. Specifically, they incurred additional screening fees when they resumed their apartment search on August 19, 2013, and they committed to an offer for housing at Windsor Apartments, rather than Forestview—their first choice.⁴¹ On-Site proximately caused these losses because the Handlins, who delayed their negotiations with Forestview to await the reports, would likely have received the offer for housing at Forestview in time to accept it had On-Site produce the reports in a timely manner.⁴² On-Site could well have foreseen that the Handlins, having requested their reports, would wait

³⁹ CP at 91-92, 94; see Tr. of Hrg. on Motion. to Dismiss, pp. 14-15 (May 2, 2014). Even though the letter actually supports the Handlins’ claim, for the plaintiff to present that letter (or other evidence) to the trial court in response motion was for dismissal under CR 12(b)(6) would have been illogical. For its part, On-Site did not present that letter with its briefing or make any arguments based on the letter until oral argument on the motion, and the superior court did not make any rulings based on the letter. CP at 87-88, 91.

⁴⁰ CP at 4.

⁴¹ CP at 5.

⁴² CP at 4-5; see *McRae v. Bolstad*, 32 Wn. App. 173, 178; 646 P.2d 771 (1982) (affirming jury instruction that “proximate cause means a cause which in a direct sequence, unbroken by any new independent cause, produces the event complained of and without which such event would not have happened.”).

to see those reports before negotiating with a landlord that had denied them because of its contents.⁴³

Again arguing facts, On-Site denies that it caused these damages because the Handlins supposedly “*knew* that Forestview had the correct information on August 9, yet ... waited until August 19 to request that Forestview reconsider their application.”⁴⁴ But August 9 was the day On-Site corrected the erroneous report (about the 2008 eviction suit) that had caused Forestview to deny the application on August 5.⁴⁵ Forestview did reconsider the application after the August 9 update, but did not admit the Handlins then because On-Site still gave a negative recommendation.⁴⁶ The Handlins did not know what specific information that negative recommendation was based on, that’s why they requested their reports.⁴⁷

D. Statutory damages and injunctive relief are available regardless whether actual damages occurred.

⁴³ See generally *Lindstrad v. Silvercrest Industries*, 28 Wn. App. 359, 365; 623 P.2d 710 (1981) (In determining damages for UCC breach of warranty and CPA case, “proper test is whether losses were reasonably foreseeable, not whether they were actually foreseen”).

⁴⁴ Br. of Respondent at 24-25 (italics in original).

⁴⁵ CP at 4.

⁴⁶ CP at 4 (“Despite this change in their screening reports, Forestview representatives continued to tell the Handlins that their application would not be approved, citing the negative recommendation from On-Site.”).

⁴⁷ CP at 4 (“The Handlins needed the reports to determine what additional negative information in the reports was responsible for Forestview’s continued rejection of their application.”).

Even if their claim for actual damages does not succeed, dismissal would still not be appropriate because the Handlins could recover statutory damages and injunctive relief under the FCRA and CPA.⁴⁸

1. Statutory Damages, RCW 19.182.150

The Handlins alleged that On-Site’s violations of the consumer disclosure provisions were willful.⁴⁹ A consumer who is injured by a “willful” violation of the FCRA is entitled to a \$1,000 monetary penalty.⁵⁰ So long as they show an injury to property, the Handlins could recover these statutory damages regardless whether they prove actual damages.⁵¹

On-Site’s contention that the Handlins “must show ... actual damages before they may qualify for the \$1,000 monetary penalty” is without meaningful support and at odds with cases such as *Tallmadge*, *Sorrel*, and *Panag*—all of which hold that a viable CPA claim requires only an injury to property and not actual damages.⁵² The two non-CPA cases On-Site relies on, *Havsy v. Flynn* and *Quinn Construction v. King*

⁴⁸ See RCW 19.86.090; see RCW 19.182.150 (“where there has been willful failure to comply with any requirement imposed under this chapter, the consumer shall be awarded actual damages, a monetary penalty of one thousand dollars, and the costs of the action together with reasonable attorneys’ fees as determined by the court.”); see CP at 10.

⁴⁹ See CP at 8-9.

⁵⁰ See RCW 19.182.150.

⁵¹ See *Tallmadge* at 94; see *Sorrel* at 298; see, accord, *Ashby v. Farmers Ins. Co.*, 592 F.Supp.2d 1307, 1318 (D.Or. 2008) (“The import of FCRA’s statutory/actual damage scheme is that those plaintiffs who are unwilling or unable to present proof of actual damage may still recover statutory damages, but only on the condition that they establish the defendant at least recklessly disregarded FCRA’s ... requirements.”).

⁵² Br. of Respondent at 17-18; see *Tallmadge* at 94; *Sorrel* at 298; *Panag* at 57-58.

County Fire Prot. Dist., hold that a lack of actual damages calls for dismissal when the plaintiff does not seek other relief (*Havsy*) or when the court has already denied it (*Quinn Construction*).⁵³ Those cases are not relevant because the Handlins do seek relief other than actual damages.⁵⁴

2. Injunctive Relief, RCW 19.86.090

As authorized by the CPA, the Handlins also sought to enjoin further violations of the FCRA consumer disclosure requirements.⁵⁵

a. RCW 19.182.150 does not preclude injunctive relief.

On-Site contends injunctive relief is not available for three reasons, the first of which is that the FCRA remedy provision (RCW 19.182.150) does not mention injunctive relief. But RCW 19.182.150 does not contain the full extent of the relief available for FCRA violations.

RCW 19.182.150 explicitly authorizes consumers to obtain the remedies under the CPA (including orders to “enjoin further violations”).

It is not necessary for the FCRA to expressly authorize injunctive relief for

⁵³ See Br. of Respondent at 17; see *Havsy v. Flynn*, 88 Wn. App. 514, 516-17; 945 P.2d 221 (1997) (physician’s “tortious interference with a business relationship” claim against an insurer that declined to pay a patient’s medical expenses was dismissed for failure to allege damages); see *Quinn Const. Co. v. King Cty. Fire Prot. Dist.*, 111 Wn. App. 19, 30; 44 P.3d 865 (2002) (“Because damages are unavailable as a remedy for a disappointed bidder on a public project, the trial court correctly concluded that no set of facts would entitle Quinn to relief once Quinn’s motion for preliminary injunction had been denied.”).

⁵⁴ See *Havsy*, 88 Wn. App. at 519; see *Quinn Const.*, 111 Wn. App. at 30.

⁵⁵ See CP at 9-10; see RCW 19.86.090 (authorizing “a civil action in superior court to enjoin further violations...”); see also RCW 19.182.150.

a consumer to obtain it under the CPA; for instance, the Supreme Court held in *Klem v. Washington Mutual* that a plaintiff can obtain injunctive relief under the CPA, even if the CPA claim is predicated on a violation of a separate statute that does not provide for injunctive relief.⁵⁶ Indeed, the CPA “shall be liberally construed that its beneficial purposes may be served.”⁵⁷ Thus, absent a clear statement to the contrary, the CPA provision authorizing private suites to “enjoin further violations” should be available no matter what the underlying unfair or deceptive practice is.

RCW 19.182.150 does describe the specific monetary remedies available for “purposes of a judgment awarded [to] a consumer” in a CPA action.⁵⁸ But to construe this text as an exclusive list of the only relief a court can enter for FCRA violations would make the language authorizing private CPA actions superfluous—and a statute should be interpreted “to give effect to all the language used so that no portion is rendered meaningless or unnecessary.”⁵⁹ Thus, the reason specific monetary remedies were listed is more likely to distinguish the appropriate damages for willful violations from those proper in other (i.e., non-willful) cases.

⁵⁶ See *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 796; 295 P.3d 1179 (2013) (the absence of a specific grant of authority for injunctive relief in the Deed of Trust Act did not preclude injunctive relief under RCW 19.86.090).

⁵⁷ RCW 19.86.920.

⁵⁸ See RCW 19.182.150.

⁵⁹ *Cornu-Labat v. Hospital Dist. No. 2*, 77 Wn.2d 221, 231; 298 P.3d 741 (2013).

b. Injunctive relief is not preempted.

On-Site next argues the injunctive relief claim is preempted by the federal FCRA (15 U.S.C. § 1681 et seq.). But as several recent decisions have held, the federal FCRA does not preempt claims for injunctive relief based on violations of state credit reporting laws.⁶⁰

Under the federal FCRA, private consumers may recover damages for negligent or willful violations, but only the Federal Trade Commission, state attorneys general, and certain other government actors may obtain injunctive relief.⁶¹ Some courts have extended this rule to also preclude injunctive relief under state laws to enforce substantive provisions of the federal FCRA. In *Smith v. Equifax*, for instance, the court ruled that a consumer could not enforce the dispute and reinvestigation provision of the federal FCRA (i.e., 15 U.S.C. §1681i) through an injunction based on a Texas consumer protection statute.⁶² Similarly, the case On-Site heavily relies on, *Quadrant Info. Services v. LexisNexis Risk Solutions*, held that a business could not use California's unfair competition statute to obtain an

⁶⁰ See, e.g., *Ramirez v. Trans Union, LLC*, 899 F.Supp.2d 941, 947 (N.D.Cal. 2012); *Fishback v. HSBC Retail Services, Inc.*, 2013 WL 3227458, at pp. 21-24 (D.N.M. 2013); *White v. First American Registry, Inc.*, 378 F.Supp.2d 419, 424-25 (S.D.N.Y. 2005).

⁶¹ See *Ramirez*, 899 F.Supp.2d at 947 (“The only federal court of appeals to have addressed the issue held that while the Federal Trade Commission may obtain injunctive relief under the [federal] FCRA, a private litigant may not. *Washington v. CSC Credit Services, Inc.*, 199 F.3d 263, 268-69 (5th Cir. 2000). District courts in the Ninth Circuit are generally in accord with the Fifth Circuit.”).

⁶² See *Smith v. Equifax Info. Services, Inc.*, 522 F.Supp.2d 822, 823 (E.D.Tex. 2007).

injunction that would enforce a substantive provision of the federal FCRA (specifically, 15 U.S.C. § 1681e).⁶³

This action, being based solely on the Washington FCRA, differs fundamentally from cases like *Smith* and *Quadrant*. Both the injunctions the Handlins seek and the substantive laws they seek to enforce are based entirely on Washington statutes.⁶⁴ And unlike the federal FCRA, the Washington FCRA does expressly authorize injunctive relief (via the CPA) in private civil actions.⁶⁵ On-Site argues that allowing the Handlins to seek injunctive relief would nonetheless hinder a federal purpose (in limiting injunctive enforcement to the FTC).⁶⁶ But as federal courts have repeatedly held, allowing consumers to seek injunctions that enforce state credit reporting laws does not obstruct any federal objective.

The case most directly on-point is *Ramirez v. Trans Union*, in which the plaintiffs sought an injunction to prevent persons from being erroneously reported as appearing in a federal anti-terrorism database, based on having names similar to people actually listed in that database.⁶⁷

⁶³ See *Quadrant Info. Services, LLC v. LexisNexis Risk Solutions, Inc.*, 2012 WL 3155559, at p. 2 (N.D.Cal. 2012).

⁶⁴ See CP at 9-10.

⁶⁵ See RCW 19.86.090; see RCW 19.182.150.

⁶⁶ See Br. of Respondent at 33; see *P.A.W.S. v. University of Washington*, 125 Wn.2d 243, 265; 884 P.2d 592 (1995) (Conflict preemption occurs “when state law acts as an obstacle to the accomplishment of the federal purpose.”).

⁶⁷ See *Ramirez*, 899 F.Supp.2d at 943.

Despite bringing claims under both the federal FCRA and a California credit reporting statute, they sought the injunction under the California provision only.⁶⁸ Making essentially the same “end run” argument On-Site presents here, the defendants in *Ramirez* argued that injunctive relief under the California statute would be “inconsistent with the [federal] FCRA,” which does not authorize private plaintiffs to obtain injunctions.⁶⁹ But the court, after reviewing the legislative history of the federal FCRA, found no such inconsistency and noted that no court had held “a state law inconsistent with, and therefore preempted by, the [federal] FCRA because it includes a remedy not available under the [federal] FCRA.”⁷⁰

In addition to *Ramirez*, two other cases—*Fishback v. HSBC* (federal FCRA did not preempt consumer’s injunction claim under New Mexico consumer protection law) and *White v. First American Registry* (federal FCRA did not preempt consumer’s injunction claim under New York credit reporting law)—similarly held that the federal FCRA does not preempt claims to enjoin compliance with state credit reporting laws.⁷¹

⁶⁸ See *Ramirez*, 899 F.Supp.2d at 943.

⁶⁹ See *Ramirez* at 947.

⁷⁰ *Ramirez* at 948; see also *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1172 (9th Cir. 2009) (a “difference between [a state] statute and the [federal] FCRA regarding remedies does not offend the purported goal of uniformity of credit reporting obligations. The enforcement sections do not impose inconsistent or conflicting obligations[.]”).

⁷¹ See *Fishback*, 2013 WL 3227458, at pp. 21-24 (“Allowing a private plaintiff to seek injunctive relief under an affirmative state law grant of that power would not violate any express federal statute. While the [federal] FCRA does not create a private right to seek

On-Site's brief does not discuss *Ramirez*, *Fishback*, *White*, or any other case in which a party sought injunctive relief to enforce a state credit reporting law. Instead, On-Site points to a raft of federal court decisions in which private consumers sought injunctive relief to enforce the federal FCRA.⁷² Those cases are not relevant because the Handlins have pleaded claims under only the Washington FCRA.

Washington has a strong presumption against finding preemption in an ambiguous case; a party asserting preemption must show a clear and manifest purpose of Congress that the state law be superseded.⁷³ On-Site cannot meet that burden here. Congress expressly preserved states' ability to establish and implement their own local credit reporting regulations.⁷⁴ The federal FCRA preempts state laws only "to the extent that those laws are inconsistent with [the federal FCRA], and then only to the extent of the inconsistency;" preemption is limited to topics specified at 15 U.S.C. § 1681t, none of which involve injunctive relief.⁷⁵ Nothing in the federal

injunctive relief, it does not expressly bar such a claim. There is no clear Congressional intent to preempt state law claims for private injunctive relief. Indeed, the available information on Congressional intent for the FCRA indicates that such a claim would be permissible."); see also *White*, 378 F.Supp.2d at 424-25.

⁷² See Br. of Respondent at 34-37.

⁷³ See *Dept. of Labor and Industries v. Lanier Brugh*, 135 Wn. App. 808, 815-16; 147 P.3d 588 (2006).

⁷⁴ See 15 U.S.C. § 1681t(a).

⁷⁵ See 15 U.S.C. § 1681t(b).

FCRA indicates a purpose—let alone a clear and manifest purpose—of precluding private injunctions to enforce state credit reporting laws.

c. The Consumer Protection Act exception at RCW 19.86.170 is not applicable.

The CPA contains an exception, RCW 19.86.170, that makes it inapplicable to “actions or transactions” that are specifically authorized by regulatory agencies.⁷⁶ This exception prevents businesses from being held liable under the CPA for acts or practices that are specifically allowed under regulatory schemes. For instance, in *Vogt v. Seattle-First National Bank*, a bank argued it could not be liable (under the CPA) for charging improper fees or mismanaging trust assets because its actions had been authorized by the Comptroller of Currency.⁷⁷ In *Edmonds v. John L. Scott*, a real estate broker argued its method of disbursing earnest money could not violate the CPA because a real estate regulation authorized the method.⁷⁸ And in *Singleton v. Naegeli Reporting*, a court reporting firm argued the exception barred a CPA claim for inflating transcript costs by adding unnecessary tabs and pages, because a licensing rule for court reporters supposedly allowed this.⁷⁹

⁷⁶ See RCW 19.86.170.

⁷⁷ See *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 551; 817 P.2d 1364 (1991).

⁷⁸ See *Edmonds v. John L. Scott, Inc.*, 87 Wn. App. 834, 844; 942 P.2d 1072 (1997).

⁷⁹ See *Singleton v. Naegeli Reporting Corp.*, 142 Wn. App. 598, 601-02; 175 P.3d 594 (2008).

In its final argument, On-Site claims the RCW 19.86.170 exception precludes the Handlins from seeking injunctive relief. For the exception to even possibly apply here, however, On-Site would need to show that some regulatory agency authorized it not to make post-reinvestigation disclosures, to withhold the Handlins' rental scores and recommendations, to provide the Handlins' consumer reports by regular mail even though requested electronically, or permitted the disclosure to be delayed by 13+ days. On-Site has made no such showing.

E. On-Site should not be awarded attorney fees, regardless of the outcome.

Even if On-Site prevails, it should not be awarded attorney fees. Attorney fees may be awarded only if authorized by contract, statute, or recognized ground in equity.⁸⁰ Neither the FCRA nor CPA authorize an award of attorney fees to the defendant.⁸¹ There is no contractual basis for attorney fees, and this appeal is not frivolous.

II. Conclusion

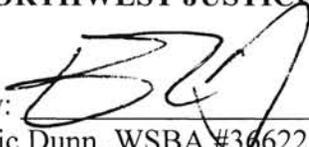
For the foregoing reasons, the order of dismissal should be reversed, and the action remanded to the superior court for trial.

⁸⁰ *Wright v. Dave Johnson Ins. Inc.* 167 Wn. App. 758, 783; 275 P.3d 339 (2012).

⁸¹ See *Sato v. Century 21*, 101 Wn.2d 599, 603; 681 P.2d 242 (1984) (Consumer Protection Act authorizes attorney fees only for the claimant); see RCW 19.182.150 (authorizing award of attorney fees to "the consumer"); see also RCW 19.86.090.

RESPECTFULLY SUBMITTED this 15 day of November, 2014.

NORTHWEST JUSTICE PROJECT

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