SUPERIOR COURT OF WASHINGTON
COUNTY OF BENTON

STATE OF WASHINGTON, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	)	No. 13-2-00871-5 (Consolidated with 13-2-00953-3)
ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS; and BARRONELLE STUTZMAN, Defendants.	)	DEFENDANTS' REPLY TO PLAINTIFFS OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON CPA CLAIM BY INGERSOLL AND FREED

COMES now the Defendants, and by way of reply to Plaintiffs' opposition to Defendants' motion for partial summary judgment, offers the following:

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Plaintiffs ask this Court to revise Washington law so that a private plaintiff raising a Consumer Protection Act ("CPA") claim no longer needs to show an actual injury to business or property that was caused by the defendant's alleged actions. In other words, they are asking the Court to strike two of the five criteria for a CPA claim, even though those criteria are based on clear legislative text and nearly 30 years of Washington precedent. Plaintiffs offer two arguments, both of which fail.

First, Plaintiffs ask the court to find that a violation of the Washington Law Against Discrimination ("WLAD") is a violation of all 5 criteria of a private CPA action. Not surprisingly, no court has ever so held because the argument is contrary to the CPA's explicit language creating a private right of action. A violation of the WLAD is a *per se* violation of only the first three statutory criteria of a CPA claim. Private plaintiffs cannot maintain a CPA action without establishing the remaining two criteria—injury to business or property and causation.

Plaintiffs' alternative argument is that if the Court won't altogether ignore the injury requirement, it should apply the statutory prerequisite so broadly as to essentially make it a nullity. At rock bottom, their argument is that an unidentified expense involved in driving to Arlene's Flowers should be enough to establish injury to business or property in this case. But under that theory, it is hard to imagine what wouldn't qualify as an injury to business or property, and, as a practical matter, the last two criteria would be rendered meaningless.

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1 Plaintiffs have not cited a case that has read the injury prong so broadly. This Court should not
2 be the first.[1]
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4 **I. A violation of the WLAD is not a per se violation of all of the elements of private cause of action under the CPA.**
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6 The Washington Supreme Court held that "five elements, all statutorily based, must be
7 established by a plaintiff in order that he or she prevail under a private CPA action." *Hangman*
8 *Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 784 (1986). As Arlene's
9 Flowers noted in the opening brief, those criteria are: "(1) an unfair or deceptive act or practice;
10 (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her
11 business or property; and (5) causation." *Id* at 780 (citation omitted).
12 A proven violation of the WLAD, in and of itself, satisfies the first three of those criteria
13 under the Legislature's statutory scheme. *See* RCW 49.60.030(3) (establishing that a violation
14 of the WLAD is "for the purpose of applying [the CPA], a matter affecting the public interest, is
15 not reasonable in relation to the development and preservation of business, and is an unfair or
16 deceptive act in trade or commerce."). But the Legislature did not thereby eliminate the
17 remaining two elements—injury to business or property and causation—for private claimants.
18 As the Supreme Court stated in *Hangman Ridge*, only those elements specifically stated by the
19 legislature are satisfied *per se*. 105 Wn. 2d at 792-93. Any elements not established as a *per se*
20 violation of the CPA must be independently met. *Id.*; *see also* 6A *Wash Prac., Wash. Pattern*
21 *Jury Instr. Civ.,* WPI 310.03 (recognizing that a *per se* violation only establishes the CPA
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25 [1] Defendant notes that Plaintiffs do not argue that there are any disputes of material fact. Therefore, all parties agree that this issue can be resolved as a matter of law.
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elements that are stated in the statute, not all of the elements); *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12 (2009) ("Violation of an insurance regulation is an unfair trade practice, which may result in CPA liability if the remaining elements of the five-part test are established").

Plaintiffs' repeated argument that "the Legislature expressly made any violation of the WLAD a violation of the CPA as long as the violation occurred in the course of trade or commerce" is simply incorrect. Plfs. Opposition at 4:26-28; 5:13-15; 10:21-24. To the contrary, the Supreme Court recently reaffirmed that the injury element is distinct from the question of whether a purported CPA violation occurred in the course of trade or commerce. "[P]laintiff's injury *is* the required connection to the defendant's unfair or deceptive acts or practices. [P]laintiff's injury, the fourth element, is an element distinct from occurrence of the violation in trade or commerce, the second element." *Panag v. Farmer's Insurance Company of Washington*, 166 Wn. 2d 27, 45 (2009). As the Court plainly recognized in *Panag*, the injury prong is the gatekeeper for who can successfully bring a CPA claim. *Id.* The statutory provision creating a private cause of action is explicit, limiting that entryway to a "person who is injured in his or her business or property." RCW § 19.86.090.[2]

Plaintiffs cite two cases to support their argument, neither of which help them. First, they cite an unpublished federal decision that discussed the Washington CPA in two brief paragraphs with barely any substantive discussion of the CPA claim, *Johnson v. Grady Way Station, LLC*,

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[2] A separate statute grants the Attorney General's authority to bring a CPA claim on behalf of the state, RCW § 19.86.080, which does not require the injury and causation prongs. Only

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No. C08-1651RAJ, 2009 WL 3380641 (W.D. Wash. Oct. 16, 2009). The only question in that case was whether the plaintiff had already completed his "trade or commerce," and therefore whether the CPA applied. The Court did not discuss the other CPA factors and did not hold that the statutorily required injury prong of a private CPA claim could be ignored. And if it had, it would be inconsistent with long-established Washington law.

The only Washington state case that Plaintiffs cite to support their argument is *Webb v. Ray*, 38 Wn. App. 675, 679-80 (1984). The court in *Webb* spent a single sentence on the CPA claim, and did not establish that injury is irrelevant to a private CPA claim or that a proven violation of the WLAD establishes *per se* all of the required elements. *Webb*, 38 Wn. App. at 680. Regardless, *Webb* was decided two years before *Hangman Ridge*, which was the Supreme Court's seminal case establishing the five-factor test for a CPA claim. So to the extent *Webb* is inconsistent with *Hangman Ridge*, it is no longer good law and the Court must disregard it. *Hangman Ridge*, 105 Wn. 2d at 784 (noting that some past decisions had only required the first three factors before establishing conclusively that injury and causation are required elements of a private CPA claim).

II. Unidentified "expense" in driving to Arlene's Flowers is no sufficient to establish injury to business or property.

Since Plaintiffs cannot establish their CPA claim solely through their WLAD allegations, they are left attempting to piece together some injury to business or property. Plaintiffs have no answer for their failure to even allege any injury to property or business in their complaint.

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private CPA claims must satisfy all five elements; the Attorney General must only satisfy the first three. *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 114 & n.22 (2001).

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Instead, they filed affidavits claiming that driving to Arlene's Flowers to tell Mrs. Stutzman that they wanted her to design flowers for their ceremony and then deciding on other florists is injury to property sufficient to sustain a CPA claim. If the Court accepts Plaintiffs' argument this case will make new law, setting an impossibly low threshold for what constitutes injury to property under the Washington CPA and effectively eliminating the Legislature's statutory requirement of injury to property altogether. Indeed, if Plaintiffs are correct, then *every* case will be able to find an injury to property as attenuated as the one Plaintiffs suggest.

For example, in *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366 (1989), a woman bought softball cleats and was later injured in a game because the cleats were not supposed to be used for softball, despite the salesperson's representations to the contrary. The court of appeals upheld the trial court's order granting summary judgment against the plaintiff's CPA claim because she had not shown injury to business or property. The court rejected the plaintiff's "attempts to come within this analysis by classifying her personal injury damages into a pseudo-property structure." *Id.* at 368-69. But under Plaintiffs' theory, the plaintiff in *Stevens* could have easily established injury to business or property because she had to drive to the store to pick up the defective shoes, and then presumably had to buy new ones. Courts simply have not recognized such an attenuated claim to injury to business or property under the CPA.

Likewise, in *Ambach v. French*, 167 Wn. 2d 167 (2009), the Court affirmed summary dismissal of the plaintiffs' CPA claim that a surgeon engaged in deceptive acts that caused injury to her shoulder, because she did not have injury to business or property. But under

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Plaintiffs' theory, she would have had injury to business and property because she drove to the hospital for the surgery, and then had expenses in trying to get the injury repaired.

Defendants need not belabor the point. The bottom line is that Washington courts reject such attenuated claims to injury to business or property. *See, e.g., Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730 (1998 (rejecting that damages for personal injury were cognizable under the CPA), *rev'd on other grounds*, 138 Wn. 2d 248 (1999); *Ledcor Industries, Inc. v. Mutual of Enumclaw Ins. Co*, 150 Wn. App. 1, 12-14 (2009) (damages associated with loss of peace of mind, emotional damage, and attenuated expenses do not constitute injury to business or property).

Indeed, each of the cases Plaintiffs cite to support their argument dealt with an identifiable injury to business or property that was caused by the plaintiff. In *Panag v. Farmers Insurance Company of Washington*, 166 Wn. 2d 27, 57 (2009), the Court recognized that the plaintiff had suffered a cognizable injury under the CPA because he had to devote substantial time to fend off a company's false representations and to protect his credit rating, "resulting in a loss of business profits." Similarly, in *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists*, 64 Wn. App. 553, 564 (1992), the court held that because a client had to devote three hours each month for four years to deal with a fraudulent and deceptive contract by a sign vendor, which resulted in loss of business, she met the injury requirement for a CPA claim. In *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 94 (1979), the court held that because a dealership sold the plaintiff a defective used car that was advertised as new, he was deprived of the use an

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enjoyment of his property, and received an automobile with defects needing repair.[3] In *Nordstrom, Inc. v. Tampourlos*, 107 Wn. 2d 735, 741 (1987), the Court found that the plaintiff suffered injury to business because a copyright infringement had caused damage to its "business reputation and goodwill." In *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298-99 (2002), the court found that because the plaintiff had been "denied rightful possession of his funds for a period of two weeks" by an unfair or deceptive contract, he had sufficiently alleged injury to his property. *See also, Mason v. Mortgage America, Inc.*, 113 Wn. 2d 842, 854 (1990) (wrongful loss of title to property was injury under CPA); *Northwest Airlines, Inc. v. The Ticket Exchange, Inc.*, 793 F. Supp. 976 (W.D. Wash. 1992) (Although the airline could not document incidents of specific financial harm, there was enough evidence to support injury to revenue and loss of good will among customers by third party's scheme to fraudulently transfer tickets).

Moreover, while the court's decision in *Smith v. Stockdale*, 166 Wn. App. 557 (2012), demonstrates that injury to property or business does not need to be great, there still needs to be an injury. There, the plaintiff alleged that she was "deceptively charged $5 to jump from a cliff." *Id.* at 565. The Supreme Court has held that "[i]f the deceptive act actually induces a person to remand payment that is not owed, that will, of course, constitute injury." *Panag*, 166 Wn. 2d at 64. Thus, the plaintiff in that case clearly established an injury, even though slight, by alleging that she was deceptively induced into paying $5.

Here, Plaintiffs make no such allegation. Rather, the damage that they allege is to their personal rights, which is not cognizable under the CPA. *Ambach*, 167 Wn. 2d at 172 (injury to

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[3] This case held that there was an injury, but the case was decided before *Hangman Ridge*

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"business or property" does not include injury to "personal rights," "status," or "liberty"). Thus, as Defendant noted in our motion, this case should proceed under the WLAD, not the CPA.

Conclusion

Because Plaintiffs have not alleged an injury to their business or property, the Court should grant summary judgment in Defendants favor on Plaintiffs' CPA claim and allow this case to proceed under WLAD.

DATED this 27th day of September, 2013.

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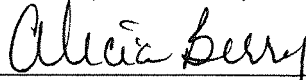

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strictly required injury to business or property and causation. *See, infra,* p. 5.