No. 101576-3

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

COURT OF APPEALS NO. 82554-2-I

STAN SCHIFF, M.D., PH.D.,

Respondent,

v.

LIBERTY MUTUAL FIRE INSURANCE CO., LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

AMICUS BRIEF OF NORTHWEST CONSUMER LAW CENTER

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The Northwest Consumer Law Center ("NWCLC") zealously advocates, litigates, and promotes access to justice for low- and moderate-income clients, and through its education programs, empowers consumers with the knowledge and resources to protect their rights. Since opening its doors in January 2013, NWCLC has served thousands of Washingtonians facing foreclosure, unfair debt collection practices, and other consequences of financial hardship. NWCLC regularly brings claims on behalf of consumers under Washington's Consumer Protection Act ("CPA"). NWCLC provides additional argument supporting Division I's ruling that the "good faith" defense to CPA claims is limited to claims involving allegations of bad faith denial of insurance coverage should be affirmed, and this Court should clarify or overrule *Perry v. Island Savings & Loan Association*, 101 Wn.2d 795, 810, 684 P.2d 1281, 1289 (1984). Such a decision will benefit consumers NWCLC represents, including those making

claims for unfair or deceptive business practices against debt collectors, fraudulent educational institutions, mortgage servicers, and others.

II. INTRODUCTION AND STATEMENT OF THE CASE

The Washington Consumer Protection Act (CPA) prohibits businesses from profiting off unfair or deceptive acts or practices. RCW 19.86.020. This case involves an insurer's practice of automatically capping payments to medical providers based on rates approved for other providers the same geographic area—a practice Washington courts have already held is unfair. *Schiff v. Liberty Mutual Fire Ins. Co.*, 24 Wn. App. 2d 513, 527-28, 520 P.3d 1085 (citing *Folweiler Chiropractic, PS v. Am. Fam. Ins. Co.*, 5 Wn. App. 2d 829, 429 P.3d 813 (2018)). Despite that, the insurer contends that the Court should excuse its unfair practice because it relied in good faith on an arguable interpretation of existing law. Petitioners' Supplemental Brief at 31. The Court of Appeals correctly held that good faith is not a defense in this case

because Schiff does not contend that the insurer denied coverage in bad faith. *Schiff*, 24 Wn. App. 2d at 543-44.

The question before this Court is whether a business can evade CPA liability because of its good faith belief that its unfair practice was permitted under an arguable interpretation of existing law. The "good faith defense" to the CPA originates not in the statute, but with a pre-*Hangman Ridge* decision of this Court. Federal courts have noted the lack of clarity as to when and how the defense applies. *See Ten Bridges, LLC v. Midas Mulligan*, 2022 WL 17039001, at *3 (9th Cir. Nov. 17, 2022) (unpublished). Nonetheless, businesses like the insurer here claim that a good faith defense can extinguish liability in any CPA case, including where the underlying claims involve no claim of bad faith.

NWCLC offers additional authority and argument explaining why this Court should seize this opportunity to clarify that there is no "good faith" defense to a CPA claim. Businesses

should not avoid CPA liability for unfair practices simply because they amongst the first to get caught profiting from unfair or deceptive conduct that violates the CPA.

III. ARGUMENT

A. The Court should hold that there is no good faith reliance on an arguable interpretation of existing law defense to a CPA claim, overruling *Perry v. Island Savings & Loan Association*.

This Court adopted a good faith reliance on an arguable interpretation of existing law defense to CPA liability in *Perry v. Island Savings & Loan Association*, 101 Wn.2d 795, 810, 684 P.2d 1281, 1289 (1984).

When Diane Perry sold her home in 1981, Island Savings & Loan demanded that she pay the balance of her mortgage in full. Perry argued the due-on-sale provisions in her deed of trust were unenforceable as a matter of law, that Island Savings & Loan knew they were unenforceable, and that Island's attempts to enforce those provisions anyway were unfair under the CPA. This

Court agreed that the provision was unenforceable, but noted that the question was uncommonly complicated and a matter of first impression. So the Court held that Island Savings & Loan had made a good faith effort to follow the law and that "such conduct in a single case attempting to determine the legal rights and responsibilities of both parties should not be considered unfair in the context of the consumer protection law." *Perry*, 101 Wn.2d at 810. The Court pointed to no language in the CPA's text supporting this new defense.

This is perhaps unsurprising given the development of CPA jurisprudence at the time. In the first two decades after the CPA was adopted there was significant confusion over the elements of a claim under the statute. Washington courts adopted three different tests to determine whether an individual could bring a private cause of action under the CPA. Johnathan A. Mark, *Dispensing with the Public Interest Requirement in Private Causes*

of Action under the Washington Consumer Protection Act, 29 Seattle U. L. Rev. 205, 206 n. 6 (2006).

But two years after *Perry*, this Court issued its watershed decision in *Hangman Ridge*, settling on five "statutorily based" elements of a CPA claim. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Noting that "confusion surrounding private rights of action under the CPA has steadily increased" as courts created various tests and defenses, the Washington Supreme Court used the *Hangman Ridge* decision "as a vehicle for clarification." *Id.* at 783–84. The Court discarded the old lines of cases and adopted the five elements of CPA claim: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to the plaintiff's business or property, and (5) causation. *Id.* at 784.

Since *Hangman Ridge*, this Court has rejected attempts to "engraft" additional requirements onto those five elements.

Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 44, 204 P.3d 885 (2009). In *Panag*, the majority criticized the dissent as proposing "an additional element" that "does not appear in the CPA and that would, if adopted, unduly restrict the intended broad scope of the act and conflict with both its language and its purpose." *Id.* at 47. The good faith reliance on a reasonable interpretation of existing law defense should be rejected under the same reasoning. The defense is not rooted in the text of the statute and should be reconsidered on that basis alone in light of *Hangman Ridge* and *Panag*.

This case further illustrates why the time has come for the Court to reconsider *Perry*. Here, "the insurer engaged in the precise conduct that we have recently determined constitutes an unfair practice," *Schiff v. Liberty Mutual Fire Insurance Co.*, 24 Wn. App. 2d 513, 518, 520 P.3d 1085 (2022), but nonetheless claims it can escape liability under a good faith reliance on an arguable interpretation of existing law defense. The insurer is not

alone in making that claim, other corporations have claimed the shield of the good faith defense to avoid responsibility for conduct declared unfair by Washington courts.

For example, Dane Scott and others brought claims against debt buyer Midland Funding, arguing that the debt buyer acted as a collection agency and had to get a license before filing collection lawsuits against consumers. Scott claimed that the debt buyer's failure to do so was a per se violation of the CPA. Answering a certified question in Scott's case, this Court agreed. *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 337, 337 P.3d 14 (2014) ("if Midland Funding solicits claims for collection, it is a collection agency and may not file collection lawsuits in Washington without a license").

The case then went back to the federal trial court and it found that the debt buyer acted as an unlicensed collection agency as a matter of law. But it then ruled the debt buyer was entitled to a good faith defense for its unfair practices, even

though this Court had concluded its conducted was prohibited under the plain language of a statute. *Gray v. Suttell & Associates*, No. 2:09-cv-00251-SAB, 2019 WL 96225, at *3 (E.D. Wash. Jan. 3, 2019). The plaintiff lost after nearly a decade of litigation even though both this Court and the federal court found the debt buyer's conduct was unfair.

The *Gray* result is inconsistent with this Court's recent jurisprudence under the CPA. The CPA does not define "unfair" or "deceptive." *See* RCW 19.86.010, .020. Instead, this Court "has allowed the definitions to evolve through a gradual process of inclusion and exclusion." *Klem v. Wash. Mut. Bank*, 179 Wn.2d 771, 785, 295 P.3d 1179 (2013). This is in part because there is "no limit to human inventiveness" in the field of unfair practices and the CPA is "intended to reach" "inventive" forms of unfair or deceptive activity. *Panag*, 204 P.3d at 895. The CPA's flexibility allows it to reach business practices that could not have been contemplated when the legislature added the statute's private

right of action in 1971. *See, e.g.*, *Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257, 1262-66 (W.D. Wash. 2011) (finding an unfair or deceptive practice where business used confusing web design to sign up unknowing consumers for ongoing subscription services).

The good faith defense discourages plaintiffs from challenging "inventive" unfair or deceptive acts in private actions. Consumers raising new challenges risk corporate defendants arguing that even if what they did was unfair, there was no case holding the conduct was unfair, so they acted in good faith under an arguable interpretation of existing law and are shielded from liability under the CPA. Such a result is contrary to the text and purpose of the statute. *See* RCW 19.86.920 (requiring that the statute be liberally construed to protect the public from unfair or deceptive business practices); *Thornell v. Seattle Service Bureau, Inc.*, 184 Wn.2d 793, 799, 363 P.3d 587, (2015) ("The language of the CPA evinces a broad, rather than narrow, lens through which we interpret the statute.").

This Court should do away with the "good faith" defense to CPA claims because it is not rooted in the text of the statute and is contrary to its broad remedial purpose.

B. The CPA is a strict liability statute—the defendant's "good faith" is therefore irrelevant to liability.

This Court recently clarified that the CPA "ordinarily imposes strict liability." *State v. TVI, Inc. d/b/a Value Village*, 1 Wn.3d 118, 131, 524 P.3d 622 (2023). None of the five elements of a CPA claim address the defendant's state of mind. *See Hangman Ridge*, 105 Wn.2d at 780. And there is generally no good faith defense to a strict liability statute. *See State, Dep't of Ecology v. Lundgren*, 94 Wn. App. 236, 244-45, 94 P.2d 948 (1999) (citing *United States v. Gulf Park*, 972 F. Supp. 1056 (S.D. Miss. 1997) (noting defendant's good faith did not excuse violation of a federal environmental statute because the statute imposed strict liability)); *but see State v. Williams*, 22 Wn. App. 197, 200-01 (1978) (finding that good faith defense was available

because the legislature did not intend for joyriding statute to impose strict liability). The Court should reject the good faith reliance on an arguable interpretation of existing law defense because a defendant's intent is irrelevant under strict liability statutes like the CPA.

The good faith defense to CPA claims is particularly incongruous in the context of per se CPA violations. *See Klem*, 176 Wn.2d at 787 ("we hold that a claim under the Washington CPA may be predicated upon a per se violation of a statute"). "A 'per se' violation is one in which the outlawed act alone is sufficient 'by itself' or 'standing alone' to create liability, 'without reference to additional facts' such as the actor's good faith." *Ten Bridges,* 2022 WL 17039001, at *3 (quoting *Per se*, Black's Law Dictionary (11th ed. 2019)); se*e also Perry*, 101 Wn.2d at 811, n. 9 (noting that there was no alleged per se CPA claim in the case and suggesting that the good faith reliance on an arguable interpretation of existing law defense would not apply in that

context). But federal courts have nonetheless allowed the defense in cases involving per se claims. *See, e.g., Watkins v. Peterson Enter., Inc.* 57 F.Supp.2d 1102, 1111 (E.D. Wash. 1999) (concluding the good faith defense is available for per se violations of the CPA). The Ninth Circuit's recent prediction that this Court would hold that good faith defense does not apply to per se CPA violations should put an end to that problem in federal courts. *See Ten Bridges,* 2022 WL 17039001, at *2. But the federal appellate court's need to guess how this Court would rule reflects the lack of clarity in this area of the law that the Court should take this opportunity to address.

If the Court does not eliminate the defense entirely, it should affirm Division I's holding that the defense applies only to claims under the CPA involving alleged bad faith denials of insurance coverage. *Schiff*, 24 Wn. App. 2d at 545 ("We are not persuaded that we should extend the application of the so-called good faith defense beyond the context of allegations of bad faith

denial of coverage."). That is the context in which the defense has been most frequently applied by Washington state courts since its adoption in *Perry*. *See, e.g., Mulcahy v. Farmers Ins. Co. of Wash.*, 152 Wn.2d 92, 105–106, 95 P.3d 313 (2004) (whether insurer could claim defense was not properly resolved on summary judgment); *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wn.2d 133, 155–56, 930 P.2d 288 (1997) (insurer relied in good faith on earlier court rulings in concluding that exclusion in its plan was valid and denying coverage); *Shields v. Enterprise Leasing Co.*, 139 Wn. App. 664, 676, 161 P.3d 1068 (2007) (noting existence of defense but not applying it—finding no insurance coverage for plaintiff's claims); *Capeluoto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 22–23, 990 P.2d 414 (1999) (concluding insurer did not act in bad faith); *Seattle Pump Co. v. Traders & Gen. Ins. Co.*, 93 Wn. App. 743, 752–53, 970 P.2d 361 (1999) (no bad faith where insurer denied coverage because policy was cancelled before loss). Under that rule, the insurer's defense fails because

Schiff's claim arises not from a denial of coverage, but rather a disagreement about reimbursement amounts. *Schiff*, 24 Wn. App. 2d at 545.

C. This case demonstrates why the "good faith" defense as described in *Perry* is largely unworkable.

In *Perry*, this Court said: "Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." 101 Wn.2d at 810. While courts and parties shorthand this as the "good faith" defense, a business asserting the affirmative defense must shore more than that it acted in good faith.

In *Mulcahy v. Farmers Insurance*, the defendant insurance company argued that "it could not have acted unreasonably because the issues raised are matters of first impression in Washington." 152 Wn.2d at 106. This Court rejected that argument and held that the court of the appeals erred when it "implied that acts under an arguable interpretation of existing

law are, as a matter of law, always performed in good faith." 152 Wn.2d at 106. The court ruled that summary judgment is improper if there are material issues of fact about whether the defendant's conduct was reasonable. *Id.* A company cannot have relied in good faith on a misunderstanding of the law if it never undertook any effort to ascertain the law. *See, e.g., Bollinger v. Residential Capital, LLC*, 761 F. Supp. 2d 1114, 1118 (W.D. Wash. 2011) (recognizing the "inherently factual nature" of good faith reliance and explaining that the defendant must offer proof that its "alleged compliance with the law was not merely coincidental," but instead that it "knew the law and took steps to follow it").

Here, the insurer argues that a routine approval of its insurance policy by the Office of the Insurance Commissioner (OIC) is the arguable interpretation of existing law on which it relied in good faith. *Schiff*, 24 Wn. App. 2d at 545–46; Respondent's Supplemental Brief at 28-29; Response to Petition

for Review at 6-7. The insurers claim raises a host of questions about what the defendant must have done to investigate the law before engaging in the challenged conduct, the relative weight of the legal authority the defendant points to determine whether it relied on a "arguable" interpretation of existing law, and how directly the authority speaks to the purported legality of the defendant's conduct. Indeed, defendants use the vague phrase "arguable interpretation of existing law" to claim that nearly any authority is sufficient to avoid CPA liability. *See James v. Safeguard Properties, Inc.*, 821 Fed. App'x 683, 686 (9th Cir. July 14, 2020) (unpublished) (finding defendant could not be held liable for acts done before this Court expressly declared them unfair under the CPA because it "relied on its clients, lenders, and loan servicers with whom it contracted, to ensure their loan agreements were in compliance with the law"). That is inconsistent with the mandate that exceptions to the statue be

construed narrowly. *See Vogt v. Seattle-First Nat. Bank*, 117 Wn.2d 541, 553, 817 P.2d 1364 (1991).

To the extent the Court maintains the defense and allows it to apply outside the context of bad faith coverage denials, it clarify the law by addressing whether the insurer's evidence in this case is sufficient to carry its burden to show good faith reliance on an arguable interpretation of existing law.

IV. CONCLUSION

NWCLC respectfully requests that the Court affirm the Court of Appeals either on the grounds that *Perry* is overruled and the good faith reliance on an arguable interpretation of existing law defense no longer applies, or because it does not apply except when the alleged unfair or deceptive acts or practices involve claims of bad faith denial of insurance coverage.

V. RAP 18.17(B) CERTIFICATION

I hereby certify that this brief contains _____ words in compliance with Rap 18.17(b) and RAP 18.17(c)(11).

RESPECTFULLY SUBMITTED AND DATED this 12th day of March, 2024.

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