No. 94162-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE, WA
IN

LYFT, INC., a Delaware corporation

Appellant,

v.

KENNETH WRIGHT, on his own behalf and on the behalf of other similarly situated persons,

Respondent

BRIEF OF RESPONDENT ON CERTIFIED QUESTIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

The district court asks (1) whether the recipient of a text message that violates the Consumer Electronic Mail Act, Ch. 19.190 RCW ("CEMA") has a private right of action for damages?; and (2) whether the liquidated damages provision of CEMA, RCW 19.190.040(1), establishes the causation and/or injury elements of a claim under the Washington Consumer Protection Act, Ch. 19.86 RCW ("CPA")? This Court should answer both questions yes.

Lyft harvests contact information from its users' mobile phones to send third parties unsolicited commercial text messages advertising Lyft. In addition to representative plaintiff Ken Wright, Lyft has sent the same or similar text message to thousands of consumers across the state and the country. CEMA is specifically designed to stop these unsolicited texts, making them a *per se* violation of the CPA, and providing fixed statutory damages of $500 per violation, or actual damages, whichever is greater.

Lyft argues that a subsequent amendment prohibiting phishing, and limiting actions "under [that] subsection" to "direct violations" of the anti-phishing provisions, somehow retroactively removes the protections against commercial texts. Lyft misreads the statutes. The Court should answer both certified questions yes.

CERTIFIED QUESTIONS

The U.S. District Court for the Western District of Washington certified the following questions (ECF 73):

> 1. Does the recipient of a text message that violates the Consumer Electronic Mail Act, Ch. 19.190 RCW ("CEMA"), have a private right of action for damages (as opposed to injunctive relief) directly under that statute?
>
> 2. Does the liquidated damages provision of CEMA, RCW 19.190.040(1), establish the causation and/or injury elements of a claim under the Washington Consumer Protection Act, Ch. 19.86 RCW ("CPA"), as a matter of law or must the recipient of a text message that violates CEMA first prove injury in fact before he or she can recover the liquidated damage amount?

STATEMENT OF THE CASE

Defendant Lyft, Inc. spends considerable time attempting to establish that a Lyft App user must initiate the process that results in Lyft sending unsolicited text messages to contacts in the user's address book. Lyft Brief at 4-7. That is irrelevant, where CEMA prohibits a person conducting business in the state from even assisting in the transmission of a commercial text message:

> No person conducting business in the state may initiate or assist in the transmission of an electronic commercial text message to a telephone number assigned to a Washington resident for cellular telephone or pager service that is equipped with short message capability or any similar capability allowing the transmission of text messages.

RCW 19.190.060(1). Even assuming *arguendo* that Lyft did not initiate the texts at issue, Lyft assisted in transmitting commercial text messages to plaintiff Ken Wright and other class members.

A. Lyft harvests contact information from its users' mobile phones to send third parties unsolicited text messages advertising Lyft.

Lyft, Inc. is a transportation network company whose computer systems and mobile telephone apps serve as a platform for "on-demand peer-to-peer ridesharing." EFC 62 at 3. To request a Lyft car, a user must download the Lyft App to their mobile telephone. *Id.* at 3. Wright believes that up to 500,000 mobile-phone users have installed the Lyft App. *Id.*

Using the Lyft App, users pay a $1.50 "Pickup Fee," a $1 "Trust and Safety Fee," and $0.35 per minute and $1.90 per mile ride fees. *Id.* Lyft receives the $1 Trust and Safety Fee and 20% of the total fare. *Id.*

Lyft competes with the industry leader, Uber Technologies, Inc., to win market share. *Id.* at 7. The Wall Street Journal called this battle "Tech's Fiercest Rivalry." *Id.* (citing Douglas MacMillan, *Tech's Fiercest Rivalry: Uber vs. Lyft,* WALL STREET JOURNAL (Aug. 11, 2014) (http://www.wsj.com/articles/two-tech-upstarts-plot-each-others-demise-1407800744)).

Lyft uses a type of text-message marketing known as "spam-viting" or "mobile growth hacking." *Id.* at 3. Spam-viting is the process by which an app developer either lures or bribes an app user to allow access to his or her electronic address book. *Id.* at 3-4. If access is permitted, then the app searches for and harvests mobile telephone numbers from the user's mobile phone, using them to send automated text messages encouraging third parties to download the app. *Id.* at 4. That is, the app is programmed "to send unsolicited text messages promoting the company's products and services to third parties." *Id.* This has generated complaints around the country from app users who did not know their contacts would be spammed, and from recipients who did not solicit the text messages. *Id.*

Lyft uses spam-viting, asking its users to "invite friends" and promising a $25 Lyft ride for every contact who downloads the Lyft App. *Id.* at 5. If a user agrees, the Lyft App collects the user's contact information for third parties who are not Lyft users, and transfers that data to Lyft's computer systems. *Id.* Lyft's sole purpose is to send those third parties an automated commercial text message advertising Lyft. *Id.* at 4-5, 9.

B. Plaintiff Wright received an unsolicited text advertising Lyft.

On March 20, 2014, Wright received an unsolicited text massage stating that Jo Ann C sent him a free Lyft ride worth $25, and directing him to the Lyft App to "claim" the ride. *Id.* at 7. The message was sent from Lyft's automated telephone dialing system. *Id.* at 8. Wright did not provide Lyft with his contact information, permit them to store his personal information, or consent to receiving advertisements. *Id.* at 10.

Other than one short business-related interaction over one year ago, Wright does not know Jo Ann C. *Id.* at 8. They have had no contact since, and he does not know how she got his number. *Id.*

C. Lyft has sent the same or similar unsolicited text messages to thousands of consumers across Washington and across the country.

Lyft sent the same or similar unsolicited text messages to thousands of consumers. *Id.* at 8, 9. Lyft's computer systems can send automated text messages to "tens of thousands" of consumers. *Id.* at 8. Again, Wright estimates that Lyft has 500,000 users, thousands of whom use the Lyft App daily. *Id.* at 3, 8.

D. CEMA is designed to stop unsolicited text messages.

In 1998, the Legislature enacted CEMA to address consumer complaints about spam email. Wash. Final B. Rep., 1998 Reg. Sess.

H.B. 2752 (Apr. 6, 1998). CEMA provides that sending, or assisting in sending, an unpermitted or misleading commercial email is a *per se* CPA violation. RCW 19.190.030(1)-(3). CEMA also provides that "the recipient of a commercial electronic mail message" is damaged to the tune of $500, or more. RCW 19.190.040(1).

In the years following CEMA's adoption, the Legislature recognized that a similar problem existed with text messages. 2003 Wn. Legis. Serv. Ch. 137 § 1 (S.H.B. 2007). As a growing number of Washington consumers raised "serious concerns" about unsolicited and unwanted commercial text messages, the Legislature amended CEMA in 2003 to prohibit sending, or assisting in sending, commercial text messages:

> No person conducting business in the state may initiate or assist in the transmission of an electronic commercial text message to a telephone number assigned to a Washington resident for cellular telephone or pager service that is equipped with short message capability or any similar capability allowing the transmission of text messages.

RCW 19.190.060(1). The 2003 CEMA amendments again provide that sending, or assisting in sending, a commercial text message satisfies the first three elements of a CPA claim, set forth in ***Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.***, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). RCW 19.190.060(2).

At the same time, the Legislature amended RCW 19.190.040 to add that "recipients of . . . a commercial electronic text message sent in violation of this chapter" are damaged $500 or more. The Legislature's goal was to "limit the practice of sending unsolicited commercial text messages to cellular telephone or pager numbers in Washington." 2003 Wn. Legis. Serv. Ch. 137 § 1 (S.H.B. 2007).

In 2005, the Legislature again amended CEMA, this time to prohibit "phishing" (fraudulent e-mails used to solicit personal information from the recipient). Wash. B. Analysis, 2005 Reg. Sess. H.B. 1888 (Feb. 15, 2005); RCW 19.190.080. The 2005 amendments again provided that "the practices covered by this chapter" satisfy the first three elements of a CPA claim. RCW 19.190.100. The 2005 amendments also provided a cause of action for any person injured "under this chapter," again permitting injunctive relief and $500 per violation, or actual damages, whichever is greater. RCW 19.190.090(1). But a "person who seeks damages *under this subsection* [§ .090] may only bring an action against a person or entity that directly violates RCW 19.190.080" [anti-phishing]. *Id.* (emphasis added).

In sum, in 1998 the Legislature prohibited spam emails, made them *per se* CPA violations, and provided statutory damages of

$500, or actual damages, whichever is greater. In 2003, the Legislature added prohibitions on commercial texts, made them *per se* CPA violations, and provided statutory damages. In 2005, the Legislature added anti-phishing provisions, yet again making them *per se* CPA violations and providing statutory damages. The 2005 amendments also limited anti-phishing actions under that subsection [§ .090] to direct violations of § .080.

E. Procedural History.

Wright filed suit on March 24, 2014, alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, CEMA, and the CPA. ECF 62 at 1, 13-16. On April 15, 2016, the district court dismissed Wright's TCPA claim under FRCP 12(b)(6), but denied Lyft's motion to dismiss Wright's CEMA and CPA claims. ECF 63. The district court stayed this matter pending this Court's answer to the questions certified in ***Gragg v. Orange Cab Co.***, No. 2:12-cv-00576-RSL (W.D. Wash.). ECF 65. Since ***Gragg*** settled before this Court addressed the certified questions, the parties to this matter filed a stipulated motion to certify the same questions to this Court. ECF 71. The district court granted that motion on February 16, 2017. ECF 72. The district court amended its order on February 17, 2017. ECF 73.

ARGUMENT

A. The standard of review is *de novo*, providing a liberal construction of these remedial consumer protection statutes as a matter of law.

Questions certified from the federal courts present questions of law this Court reviews *de novo*. ***Carlsen v. Global Client Solutions, LLC***, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). The Court's consideration is based on the certified record provided by the federal court. *Id.*; RCW 2.60.030(2).

Statutory interpretation is also a question of law, reviewed *de novo*. ***Jametsky v. Olsen***, 179 Wn.2d 756, 761-62, 317 P.3d 1003 (2014) (citing ***Dep't of Ecology v. Campbell & Gwinn, LLC***, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) ("***DOC***") (citing ***State v. Breazeale***, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001); ***State v. J.M.***, 144 Wn.2d 472, 480, 28 P.3d 720 (2001))). The Court's primary goal is to ascertain and to carry out the Legislature's intent. *Id.* at 762.

Whenever possible, courts "must give effect to [the] plain meaning [of a statute] as an expression of legislative intent." *Id.* (quoting ***DOC***, 146 Wn.2d at 9-10). Courts derive plain meaning "from the context of the entire act as well as any 'related statutes which disclose legislative intent about the provision in question.'" *Id.* (quoting ***DOC*** at 11). "'Plain language does not require

construction,'" so courts need not consider outside sources if the statute is unambiguous. *Id.* (quoting ***State v. Delgado***, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting ***State v. Wilson***, 125 Wn.2d 212, 217, 883 P.2d 320 (1994))). Thus, when "a statute is clear and unambiguous, [its] meaning is derived from its language." ***Perez-Farias v. Global Horizons, Inc.***, 175 Wn.2d 518, 527, 286 P.3d 46 (2012). All language is given effect, and no portion is rendered meaningless or superfluous. *Id.* at 526.

A statute is ambiguous when "'it is subject to more than one reasonable interpretation.'" ***Jametsky***, 179 Wn.2d at 762 (quoting ***City of Seattle v. Winebrenner***, 167 Wn.2d 451, 456, 219 P.3d 686 (2009) (citing ***State v. Jacobs***, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005)). If so, courts "may look beyond its words to determine legislative intent." ***Perez-Farias***, 175 Wn.2d at 527. They "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." ***Jametsky***, 179 Wn.2d at 762 (quoting ***Christensen v. Ellsworth***, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

Importantly here, however, courts "construe remedial statutes liberally in accordance with the legislative purpose behind them." ***Jametsky***, 179 Wn.2d at 763. "A policy requiring liberal construction

is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined." ***Nucleonics Alliance v. WPPSS***, 101 Wn.2d 24, 29, 677 P.2d 108 (1984). Courts thus "construe remedial consumer protection statutes . . . liberally in favor of the consumers they aim to protect." ***Jametsky***, 179 Wn.2d at 765. Indeed, remedial statutes are so construed even when their text is unambiguous. *Id.* at 763-64 (remedial statute "is not ambiguous"); 764-65 (applying interpretation providing consumers "more rather than less protection").

B. QUESTION 1: The recipient of a text message that violates CEMA has a private right of action for damages directly under RCW 19.190.040(1).

Our Legislature "can and does provide for fixed statutory damages awards in an array of statutory provisions, many of which create awards that are nondiscretionary and 'automatic.'" ***Perez-Farias***, 175 Wn.2d at 533. One example is RCW 19.190.040(1), which unambiguously provides "$500 or actual damages, whichever is greater, for [an] improper commercial text message." *Id.* (citing RCW 19.190.040(1)). Viewed *in situ* within the remedial CEMA, the Legislature's purpose is unmistakable: if you assist in sending an improper commercial text, you pay at least $500. The Court should answer the first certified question yes.

1. This Court should interpret the Legislature's fixed statutory damages provision as serving the usual purposes of such provisions – to deter, to compensate, and to remediate.

This Court should interpret the Legislature's fixed statutory damages provision (RCW 19.190.040) to serve the usual purposes of such provisions. The purposes of a fixed statutory damages provision are to deter, to compensate, and to remediate, particularly where (as here) actual damages are difficult to prove:

> [Such statutes are enacted to] compensate injuries, promote enforcement of [a remedial statute], and deter violations. The provision permits trial courts to promote these goals through liquidated damages awards in the event that actual damages are difficult or impossible to measure or prove.

Id. at 529-30. This is consistent with the Legislature's stated intent regarding unsolicited commercial text messages:

> The legislature recognizes that the number of unsolicited commercial text messages sent to cellular telephones and pagers is increasing. This practice is raising serious concerns on the part of cellular telephone and pager subscribers. These unsolicited messages often result in costs to the cellular telephone and pager subscribers in that they pay for use when a message is received through their devices. The limited memory of these devices can be exhausted by unwanted text messages resulting in the inability to receive necessary and expected messages.
>
> The legislature intends to limit the practice of sending unsolicited commercial text messages to cellular telephone or pager numbers in Washington.

2003 Wn. Legis. Serv. Ch. 137 § 1 (S.H.B. 2007). This stated intent has not changed since its passage in 2003. *See, e.g.*, RCWA 19.190.060 (Editor's and Revisor's Notes).

But consumers can obtain their "nondiscretionary and 'automatic'" awards only if they have a right to proceed in court. *See* ***Perez-Farias***, 175 Wn.2d at 533. It is a fundamental maxim of justice that a right must have a remedy. *See, e.g.*, ***Rummens v. Guar. Trust Co.***, 199 Wash. 337, 346-47, 92 P.2d 228 (1939) ("probably the most important of the equitable maxims, namely, that equity will not suffer a wrong (or, as sometimes stated, a right) to be without a remedy"). As this Court interprets remedial statutes like RCW 19.190.040(1) to provide consumers "more rather than less protection," failing to find a cause of action here undermines clear legislative intent. ***Jametsky***, 179 Wn.2d at 764-65.

It is well "'recognized that a legislative enactment may be the foundation of a right of action.'" ***Tyner v. Dep't of Soc. & Health Servs.***, 141 Wn.2d 68, 77-78, 1 P.3d 1148 (2000) (citing ***Bennett v. Hardy***, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990) (quoting ***McNeal v. Allen***, 95 Wn.2d 265, 274, 621 P.2d 1285 (1980) (Brachtenbach, J., dissenting))). A statutory cause of action is implied under the following test (*Id.* (citing ***Bennett***, 113 Wn.2d at 920-21)):

> First, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Here, (as Lyft apparently concedes) the class for whose "especial" benefit CEMA was enacted is Washington citizens who receive unsolicited commercial texts, precisely the class here. As explained *supra*, the legislative intent explicitly (CEMA establishes a right and a remedy) and implicitly (through the legislative-intent provision) supports a remedy. And implying a remedy is consistent with the purposes of a statutory damages provision, to compensate, to remediate, and to deter wrongdoers. Again, the Court should answer the first certified question yes.

Lyft argues that the legislative intent and underlying purposes of the statute are inconsistent with an implied right of action. Lyft Brief at 18-22. Interestingly, Lyft fails to answer the most essential question: what is the point of § .040, if not to provide fixed statutory damages for unsolicited commercial emails and texts? Lyft's misreading of the statutory scheme defies the legislative intent and purposes. It is painfully obvious that the Legislature intended to provide statutory damages for Lyft's violations. No cannon of construction can contradict that plain truth.

2. Section .090 did not – and cannot – repeal § .040.

Although Lyft backs into its argument, its real claim is that by enacting RCW 19.190.090(1) in 2005, the Legislature impliedly repealed the claim for damages it had provided to consumers in 2003 under RCW 19.190.040(1). Repeal "by implication is strongly disfavored." ***ATU Leg. Council of Wn. State v. State***, 145 Wn.2d 544, 552, 40 P.3d 656 (2002) (citation omitted):

> The legislature is presumed to be aware of its own enactments, and the court will presume that the legislature did not intend to repeal a statute impliedly if the legislature has provided an express list of statutes to be repealed.

In fact, the Legislature declined to repeal or amend CEMA's express provisions concerning commercial text messages. *See* 2005 Wn. Legis. Serv. Ch. 378 (S.S.H.B. 1888). And this Court is of course "loathe to find a silent repeal" of any statute. ***Johnson v. Recreational Equip., Inc.***, 159 Wn. App. 939, 950, 247 P.3d 18 (2011). There is no need to do so here.

Coming into existence about seven years after CEMA's enactment, RCW 19.190.090(1) does not state that its provisions are the only means by which consumers can seek damages for CEMA violations. Rather, it limits actions "under [that] subsection" to direct violations of § .080. RCW 19.190.090(1). Lyft erroneously tries to

make an amendment that is expressly limited to that new subsection overrule the existing statutes and clear legislative intent.

But this Court reads statutes as a whole, harmonizing them when possible, ensuring that every provision has meaning. *See, e.g.*, ***In re Estate of Kerr***, 134 Wn.2d 328, 949 P.2d 810 (1998). Crucially here, a specific statute (like subsection .090) controls the general statute (like § .040) only where "the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized." *Id.* at 335. Repeatedly providing statutory damages for distinct causes of action (*e.g.*, emails, texts, phishing) simply emphasizes their necessity in all similar actions, creating no conflict. And limiting an action "under this subsection" (.090) to direct violations of § .080's anti-phishing provision also creates no conflict with § .040 – they deal with different subject matters.[1] *See* ***Kerr***, 134 Wn.2d at 343 (the "maxim of express mention and implicit exclusion should not be used to defeat legislative intent").

Even assuming *arguendo* that some conflict had existed, the better rule of construction in this situation would be "to enforce the

[1] Of course, if this case involved phishing, then § .090 would control. But here, the mere existence of a specific amendment adding a distinct subject matter cannot control or limit the general intent of the Legislature.

provision 'relatively more important or principal to the'" statute. *See* Antonin Scalia & Bryan Garner, READING LAW: *THE INTERPRETATION OF LEGAL TEXTS,* 190 & nn. 5 & 6 (Thompson/West 2012) (citing ***Israel v. Chabra***, 906 N.E.2d 374, 380 n. 3 (N.Y. 2009) (quoting 11 Richard A. Lord, WILLISTON ON CONTRACTS § 32:15 at 507-10 (4th ed. 2007))); *see also* ***U.S. Composite Pipe S., LLC v. Frank Coluccio Constr. Co.***, 2014 U.S. Dist. LEXIS 144404, *34-*35 (2014). It almost goes without saying that the fundamental principle of RCW Ch. 19.190 is consumer protection. As noted *supra*, the liberal construction cannon requires an interpretation that provides more consumer protection, not less. The most important provision here is thus the one that provides the greatest protection: § .040's fixed statutory damages.

As a result, and under any analysis, CEMA as a whole can and should be construed to allow statutory damage awards for consumers who receive improper text messages or fraudulent emails. Lyft misreads the statutes to undermine legislative intent.

3. Section .040 does not render §§ .060 or .090 superfluous.

Lyft also incorrectly argues that finding a right of action under § .040 would render §§ .090(1) and .060 superfluous. Lyft Brief at

18-19. But § .090 is expressly limited to a "person who seeks damages *under this subsection*" – not a person within this class. And that subsection is limited to *direct* violations of RCW 19.190.080, excluding indirect violations. But § .040 does not apply to phishing, or otherwise affect § .090, which applies only to phishing.[2]

As for § .060, it says that anyone assisting in sending an unsolicited commercial text message commits a *per se* CPA violation, as Lyft acknowledges. That is, it expressly satisfies the first three elements of a CPA claim, omitting causation and damages. Interpreting § .040 to authorize a cause of action for damages does not in any way contradict § .060, or render it useless. And as discussed *infra*, it is perfectly reasonable to have two (or more) causes of action for this offense, so § .040 can both authorize a cause of action and also fulfill the last two elements of a CPA claim.

In sum, the Court should continue to construe CEMA's unsolicited text message provisions broadly in favor of the consumers they are intended to protect. *See* ***Jametsky***, 179 Wn.2d at 764-65. It should answer the first certified question yes.

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[2] To put perhaps too fine a point on it, the Legislature could have again amended § .040 to address phishing, like it did with unsolicited commercial texts. It chose instead to make the phishing provisions stand alone.

C. QUESTION 2: The liquidated damages provision, RCW 19.190.040(1), also establishes the causation and injury elements of a CPA claim as a matter of law.

RCW 19.190.060 makes assisting in sending commercial text messages a *per se* violation of the CPA. RCW 19.190.040 provides automatic fixed statutory damages for such violations. This is consistent with the Legislature's intent to protect consumers. The Court should also answer the second question yes.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . .." RCW 19.86.020. The citizen-suit provision entitles "[a]ny person who is injured in his or her business or property" by a violation of the act to bring a civil suit for injunctive relief, damages, attorney's fees, and treble damages. RCW 19.86.090. To bring a successful CPA claim, a private plaintiff "must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation." ***Hangman Ridge***, 105 Wn.2d at 780; *accord* ***Panag v. Farmers Ins. Co. of Wn.***, 166 Wn.2d 27, 37, 204 P.3d 885 (2009).

A statutory violation also can (as here) create a *per se* CPA claim. *See* ***Klem v. Washington Mut. Bank***, 176 Wn.2d 771, 787,

295 P.3d 1179 (2013) ("To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon a *per se* violation of statute"). In both types of CPA actions, 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).

And the CPA takes a "relatively expansive" view of what constitutes a compensable injury to property. ***Frias v. Asset Foreclosure Servs., Inc.***, 181 Wn.2d 412, 431, 334 P.3d 529 (2014). "Because the CPA addresses 'injuries' rather than 'damages,' quantifiable monetary loss is not required." *Id.* Therefore, the "injury element can be met even where the injury alleged is both minimal and temporary." *Id.* Thus, Judge Pechman properly found a cognizable injury to property here. ECF 63 at 11.

In ***Gragg III***, Judge Lasnik also correctly found "a legislative intent, expressed in the original version of CEMA, that violations of that statute (which at that time was solely concerned with emails) constitute per se violations of all five elements of a CPA cause of action. *See* RCW 19.190.030(1)." ECF 63 at 11 (citing ***Gragg v. Orange Cab Co.***, 145 F. Supp.3d 1046, 1053 (W.D. Wa. 2015)). While the Legislature did not repeat itself when it barred commercial text messages in 2003, "'there is also no indication that the

legislature intended to regulate the two forms of communication differently.'" *Id.* As Judge Pechman stated, "There is certainly no obvious basis on which to differentiate them." *Id.* Judge Lasnik thus ruled that "'the only way to give effect to the legislature's stated intent is to construe the liquidated damages provision [of CEMA's language regarding text messages] as establishing the injury and causation elements of a CPA claim.'" *Id.* at 11-12 (quoting ***Gragg III*** at 1053).

As Judge Pechman agreed, this is correct statutory analysis. Keeping in mind the necessity of liberal construction to best protect consumers, the absence of a clear intent – or really of anything at all – requiring a less protective approach leads inexorably to the conclusion that all five required CPA elements are met under RCW 19.190.040 & .060. The only thing left for trial is proof of the number of violations.

Lyft raises the old chestnut that if the Legislature wanted to say that commercial text messages automatically meet all five CPA elements, it knew how to do so. Lyft Brief at 23-27. But the Legislature did precisely that. The mere possibility that it could have done so in a different manner does not preclude that conclusion.

Finally, Lyft argues that concluding all five elements are met under §§ .040 and .060 somehow "contradicts" § .060. Lyft Brief at

27-28. That makes no sense. Determining that § .060 covers the first three elements and § .040 covers the other two is wholly consistent with the Legislature's intent to stop Lyft's harassing behaviors.

Bottom line, the whole point of allowing fixed statutory damages is to create a penalty sufficient to stop the proliferation of commercial texts. Individual citizens (like Wright and the rest of the class) would never undertake a lawsuit of this magnitude against an opponent with Lyft's financial resources just to stop a few texts that any one individual might receive. Without at least the possibility of a monetary benefit at the end of it all, the litigation costs alone would be prohibitive. Our Legislature simply recognized that citizens will not bring suit solely for injunctive relief in these circumstances. Without the financial incentive, there is no way to stop Lyft and its ilk. The Court should answer the second certified question yes.

D. The answer to both certified questions is yes.

In sum, the answer to both certified questions is yes. Implicit in Lyft's arguments is a tacit suggestion that it would somehow be improper for the Legislature to provide *two* causes of action here. There are, however, a great many situations in which more than one cause of action can be based on the same wrongdoing. Indeed, it is most common for plaintiffs to bring a tort claim and a CPA claim

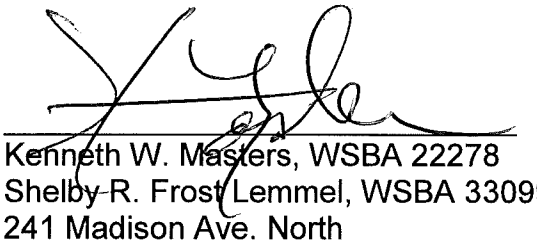
arising from a common nucleus of operative facts. Different elements, different remedies, and different legal strategies are commonly available. The Court should answer both certified questions yes.

CONCLUSION

For the reasons stated, the Court should answer both certified questions yes.

RESPECTFULLY SUBMITTED the 6th day of July, 2016.

MASTERS LAW GROUP, P.L.L.C.



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CERTIFICATE OF SERVICE

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT ON CERTIFIED QUESTIONS**, postage prepaid, via U.S. mail on the 6th day of July 2016, to the following counsel of record at the following addresses:

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