No. 103685-0

SUPREME COURT

OF THE STATE OF WASHINGTON

SCOTT HILLIUS; TOM STAEHR; RANDY DRUBEK; MARK MIEDEMA; DANIEL LYONS; SONJA LYONS; DOUGLAS SCARLETT; ANGELIQUE SCARLETT; STEVEN ZEHM; LISA ZEHM; and RONALD SARAN

Petitioners,

v.

18 PARADISE LLP; MJ MANAGEMENT LLC; WILLIAM O'BRYAN; and JOSH WILLIAMS,

Respondents.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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1. Nature of the Case and Decision

This is a class action lawsuit brought on behalf of the residents of the Homestead Planned Residential Development in Lynden, Washington. The Homestead PRD was established in 1992 and includes approximately 250 acres of land, of which 100 acres were developed into 614 units of residential use and 140 acres were used for an 18-hole golf course and related facilities. Appendix at 8-9.

Lynden's PRD Ordinance contains two separate provisions requiring every PRD to have a homeowners association "to preserve community facilities and open space." Appendix at 20 (19.29.020) and 23 (19.29.090). It also contains provision stating that Common Open Space may be privately owned only pursuant to an agreement approved by the City Council. Appendix 24 (19.29.090(D).

Notwithstanding the provisions of the PRD Ordinance, HNW recorded a Declaration of Covenants (the "Declaration") for the Homestead PRD, which provided that the declarant intended to retain ownership of the Common Open Space and control over the homeowners association. Appendix at 32 (3.1). The homeowners association would not be organized unless and until the declarant conveyed the Common Open Space to the association. Appendix 34 (3.10).

As long as the declarant retained ownership of the Common Open Space, it was required to maintain the Common Open Space and was entitled to collect maintenance fees from the homeowners. Appendix 32-23. The Homestead PRD has approximately eight acres of Common Open Space. Appendix 34 (3.8).

Before the PRD was complete, HNW experienced financial difficulties, and in 2010 it sold the golf course and the incomplete portions of the Homestead PRD to Raspberry Ridge LLC. Appendix 11 (2.53). That sale expressly included an assignment of the declarant right to collect the maintenance fee, which by that time had increased from the original $25 to $30 per month. *Id*. Raspberry Ridge completed the PRD and sold the golf course and the declarant rights to 18 Paradise LLP in 2013. Appendix 11 (2.54).

In 2017, 18 Paradise entered into a Management and Lease Agreement (the "Management Agreement") with MJ Management under which MJ Management would operate and maintain the golf course. Appendix 11 (2.55). MJ Management also assumed responsibility for Common Open Space maintenance and the maintenance fee. Appendix 11-12 (2.56). By 2019, MJ Management had increased the maintenance fee to $36 per month. Appendix 12 (2.59).

The Declaration provided that as long as the declarant retained control over the homeowners association, it could amend the covenants. Appendix 10 (2.47). In 2019, MJ Management recorded the Sixth Amendment to the Declaration in the name of 18 Paradise. Appendix 12 (2.60). The Sixth Amendment added a provision allowing the declarant to impose special assessments. *Id.* Immediately after the recording, MJ Management assessed Homestead owners with a $83.00 special assessment. Appendix 12 (2.61).

In December 2019, MJ Management executed and recorded the Seventh Amendment to the Declaration, again in the name of 18 Paradise. Appendix 12 (2.62). The Seventh Amendment provided that the declarant could retroactively impose annual increases to the maintenance fee for prior years when it had not been increased. *Id.* On December 4, 2019, MJ Management sent Homestead owners notice that it was increasing the maintenance fee by 5% for every year since 1992, and that the fee for 2020 would increase from $36 to $93. Appendix 13 (2.63).

Homestead owners organized in opposition to the increase, and when efforts to negotiate a resolution failed, a group of them filed this action as a class action. The trial court certified the case as a class action on November 25, 2020. The class consists of the owners of the 614 parcels subject to the maintenance fee.

Plaintiffs asserted claims for a violation of the Consumer Protection Act as well as claims for declaratory judgments (1) that the Sixth and Seventh Amendments were invalid, and (2) that the failure to establish a homeowners association and 18 Paradise's private ownership of the Common Open space violated the PRD Ordinance.

On January 26, 2024, the trial court granted summary judgment dismissing plaintiffs' claim that the PRD Ordinance barred 18 Paradise's private ownership of the Common Open Space. Appendix 49-54. The court's order states that

> Plaintiffs' Property Claims seek relief in this action that would either compel 18 Paradise or a successor declarant to convey the common open space or make 18 Paradise or a successor declarant's ownership of the common open space illegal. As a matter of law, Plaintiffs do not have a right to such relief.

Appendix 51. However, the order does not address or interpret the ordinance.

On April 12, 2024, the trial court granted partial summary judgment dismissing plaintiffs' Consumer Protection Act claim for failure to meet the public interest element. Appendix 55-59. The motion argued that the public interest element was to be decided under the test set forth in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). Specifically, defendants argued that the *Hangman*

Ridge factors for private transactions were not met. Appendix 56-57.

Plaintiffs argued that the Legislature codified the public interest element in RCW 19.86.093, and that the public interest element was met because more than a thousand people had been directly affected by the acts at issue and would continue to be affected every month as long as the practice continued. Appendix 57.

The trial court ruled that "the Hangman Ridge test has not been expressly overruled by the 2009 amendment to RCW 19.86.093," and that "Courts continue to apply the Hangman Ridge test when analyzing the public interest element of a CPA claim." Appendix 58. The trial court ruled that plaintiffs' claims failed under the private transaction factors because 18 Paradise did not advertise to the public, did not solicit the defendants, and had equal bargaining power because the covenants were recorded. *Id.*

The trial court further ruled that even if RCW 19.86.093 did apply, the public interest element would fail because the Declaration allowed the declarant to amend the declaration, and it was publicly recorded when homeowners purchased their properties. *Id.* The trial court did not consider or address plaintiffs' argument that the Sixth and Seventh Amendments were invalid.

Plaintiffs' Declaratory Judgment Act claims were tried to the court. At the conclusion of trial, the court ruled that the Sixth and Seventh Amendments were invalid and void *ab initio* because MJ Management executed and recorded them without 18 Paradise's consent. Appendix 14 (3.7). The trial court further ruled that the PRD Ordinance requires the Homestead PRD to have a homeowners association. Appendix 16 (3.13).

Plaintiffs and MJ Management filed motions for reconsideration, which the trial court denied. Plaintiffs timely appealed.

2. Issues Presented for Review

The primary issue presented for review is whether the Legislature displaced the *Hangman Ridge* test for the public interest element when it enacted RCW 19.86.093.

This appeal also presents the question whether the trial court erred when it dismissed plaintiffs' claim for declaratory judgment that 18 Paradise's ownership of the Common Open Space violates section 19.29.090(D) of the Lynden Municipal Code.

3. Grounds for Direct Review

Direct review is warranted pursuant to RAP 4.2(a)(4) because whether RCW 19.86.093 sets forth the exclusive test for the public interest under the Consumer Protection Act is question of significant public interest.

The public interest element for Consumer Protection Act claims was announced in *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333-34, 544 P.2d 88 (1976). *Lightfoot* held that a public interest element was inferred in the Consumer Protection Act because RCW 19.86.920 states that it was "the intent of the legislature that this act shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest." *Id.* (citing RCW 19.86.920, ellipses in original). The Court also noted that RCW 19.86.920 provides that when interpreting the act, courts should be guided by similar federal law, and that the Federal Trade Commission Act has a public interest requirement. *Id.* (citing *Federal Trade Comm'n v. Klesner*, 280 U.S. 19, (1929))." *Lightfoot v. MacDonald*, 544 P.2d 88, 86 Wn.2d 331 (1976). This Court stated in *Lightfoot* that the test for the public interest was whether the attorney general could bring the action. *Id.* at 334.

Four years later in *Anhold v. Daniels*, 94 Wn.2d 40, 614 P.2d 184 (1980), this Court found that test unworkable and restated the test as whether the defendant's deceptive acts or practices have the potential for repetition. *Id.* at 46. That test also proved unworkable, and this Court later Court clarified that the test required "a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated" in *Eastlake Const. Co., Inc. v.*

Hess, 686 P.2d 465, 102 Wn.2d 30 (1984). It later further clarified that "a party must be engaged in a general pattern of deceptive acts or practices in order for the trial court to find a potential for repetition." *Burton v. Ascol*, 105 Wn.2d 344, 715 P.2d 110 (1986).

None of these decisions provided the desired clarity, and in 1986, this Court completely rewrote the public interest test in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). *Hangman Ridge* divided the universe of Consumer Protection Act claims into consumer transactions and private transactions and set forth different factors to be considered in each case. The Consumer Protection Act itself contains no references to consumer or private transactions.

Hangman Ridge did not provide the desired clarity. The very next year, this Court stated that its "neat distinction between consumer and private disputes is not workable" in all cases when it affirmed a Consumer Protection Act judgment in a case concerning tradename infringement. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987). No transaction at all existed in *Tampourlos*, and the Court shifted its terminology from "private transactions" to "private disputes." *Hangman Ridge*, 105 Wn.2d at 790.

In 2009, the Legislature enacted Substitute Senate Bill 5531 to provide a clear and simple test for the public interest element. SSB 5531 amended the Consumer Protection Act in two respects. The first increased the maximum amount of treble damages for Consumer from $10,000 to $25,000, and the second defined the public interest element for private claims. Specifically, Section 2 states that

> In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:
>
> (1) Violates a statute that incorporates this chapter;
>
> (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
>
> (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

Pursuant to RCW 19.86.093, the public interest test no longer distinguishes between consumer and private transactions.

RCW 19.86.093 "applies to all causes of action that accrue on or after the effective date of this act." SSB 5531 became effective on July 26, 2009. One might have expected that RCW 19.86.093 would end the uncertainty and confusion over the public interest element once and for all, but that did not happen. Instead, courts routinely ignored RCW 19.86.093 altogether and continued to apply the *Hangman Ridge* test.

As the court put it in *Miller v. Dalton*, No. 35163-7-III (2018), "We agree with our brother's observation that in the nine years since the enactment of RCW 19.86.093, the statute has been largely ignored." Washington courts have cited RCW 19.86.093 a total of 33 times, including a single citation by this Court (and that in a concurring opinion by Justice Madsen) in *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013).

Despite Justice Madsen's acknowledgment in *Klem* that the legislature had codified the public interest element, this Court again relied on the *Hangman Ridge* test two years later in *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015).

> In a private action, a plaintiff can establish that the lawsuit would serve the public interest by showing a likelihood that other plaintiffs have been or will be injured in the same fashion. *Michael v. Mosquera–Lacy*, 165 Wash.2d 595, 604–05, 200 P.3d 695 (2009) (quoting *Hangman Ridge*, 105 Wash.2d at 790, 719 P.2d 531). The court considers four factors to assess the public interest element when a complaint involves a private dispute: (1) whether the defendant committed the alleged acts in the course of his/her business, (2) whether the defendant advertised to the public in general, (3) whether the defendant actively solicited this particular plaintiff, and (4) whether the plaintiff and defendant have unequal bargaining positions. Id. (citing Hangman Ridge, 105 Wash.2d at 791, 719 P.2d 531).

Trujillo v. NW. Tr. Servs., Inc., 183 Wn.2d 820, 835-36, 355 P.3d 1100 (2015).

Washington courts continue to apply the *Hangman Ridge* test for the public interest element. In 2024 alone, the Court of

Appeals has twice cited *Hangman Ridge* and applied the private or consumer transaction test. *Tilley v. Edelweiss Maint. Comm'n,* 39875-7-III (Wash. App. Aug 01, 2024); *Klein v. Cris Simmons DDS PLLC*, 84141-6-I (Wash. App. Apr 22, 2024).

5. Conclusion.

On its face, the Legislature displaced the *Hangman Ridge* test and established a single, unified test for the public interest under the Consumer Protection Act when it enacted RCW 19.86.093. The statute cannot be interpreted any other way.

Trujillo was this Court's last decision addressing the public interest element, and the Court explicitly applied the *Hangman Ridge* public interest test. No Court of Appeals could hold that RCW 19.86.093 sets forth the singular test for the public interest element without at least appearing to reverse this Court's decision in *Trujillo*. Only this Court can overrule *Trujillo*, and only this Court can deliver a statewide decision ending the confusion and uncertainty regarding the public interest element once and for all. This issue therefore presents a question of substantial public interest that should be determined by the Supreme Court. The Court should grant direct review under RAP 4.2(a)(4).

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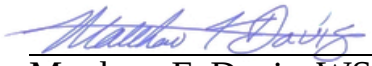

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DATED this 14th day of January, 2025.

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