No. 103685-0

SUPREME COURT

OF THE STATE OF WASHINGTON

SCOTT HILLIUS; TOM STAEHR; RANDY DRUBEK; MARK MIEDEMA; DANIEL LYONS; SONJA LYONS; DOUGLASS 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.

MJ MANAGEMENT'S OPPOSITION TO PETITIONERS' STATEMENT OF GROUNDS FOR DIRECT REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

1. IDENTITY OF ANSWERING PARTY

Appellants, Class Representatives, have sought direct review of 13 Orders, and two different Judgements; the Final Judgment, and a judgment confirming an order for attorney's fees, issued by the trial court. MJ Management LLC and its member Mick O'Bryan, and former member Josh Williams, Respondents, file this Opposition to Petitioners Statement of Grounds for Direct Review.

2. STATEMENT OF RELIEF SOUGHT

MJ Management, Mr. O'Bryan, and Mr. Williams oppose direct review and ask the Court to direct this case to the Court of Appeals. They also incorporate in this Response, the relief they requested in their Motion to Dismiss, filed with this Court on January 7, 2025.

3. FACTS RELEVANT TO DENY DIRECT REVIEW

a. Factual Background

Petitioners are Class Representatives of the Lynden, Washington, Homestead Homeowners Class; made up of roughly

614 homes surrounding a golf course and small resort in Whatcom County. Homestead is a Planned Residential Community encompassing about 250 acres split broadly into residential land, the golf course (and resort), and Common Open Space. Homestead was the first PRD in Lynden. To facilitate Homestead's development, Lynden passed a PRD Ordinance that Petitioners assert requires a homeowner's association which controls community facilities and the Common Open Space.

The original Declarant, Homestead Northwest, created Homestead in 1992 with the PRD's Conditions, Covenants, Rights, and Restrictions. Under the Covenants, Conditions, Restrictions, and Reservations ("CC&Rs"), so long as the Declarant retained the Common Open Space, it could assess joint maintenance fees to the Homeowners and use that money around the community to provide services, including maintain open space, provide for general maintenance, and do work around the

golf course that benefits the community.[1] The CC&Rs did not impose a timeline on the Declarant to convey the Common Open Space, and according to witness testimony at trial, the original Declarant intended to never transfer the Common Open Space to an HOA.

18 Paradise eventually bought Homestead, and with it, all Declarant rights; four years later, it entered into a Management and Lease Agreement with MJ Management. The Management and Lease Agreement assigned MJ Management certain rights and obligations and delegated others.

While managing the property 18 Paradise assigned MJ Management the right to collect maintenance fees from homeowners, to enact regular maintenance fee increases under the CC&Rs, and to maintain both the golf course and the

[1] Homestead is built on a flood plain north of the Nooksack river. The Golf Course's water features not only serve the purpose of improving the look and play of the golf course but also protects between 614 homes-and their owners-and from substantial flooding every year or two.

residential areas (including Common Open Space) of the property.

MJ Management quickly recognized that the maintenance fees were insufficient to provide the services they were expected to provide and so, executed 2 Amendments to the CC&Rs. The first (The Sixth Amendment) let MJ Management enact Special Assessments. The second (The Seventh Amendment) let MJ Management raise the monthly maintenance fee from $36 a month to $93 a month in a manner as if prior Declarants had imposed the contractually contemplated maintenance fee increase each year[2]. MJ Management was primarily concerned that if they did not catch up on decades of deferred maintenance in the Golf Course's water features, among other issues, the flood protection would soon fail.

[2] For many years the Joint Maintenance Fee had remained at the original $25 per month and had had not been raised to keep up with inflation or other costs and slowly was raised to the $36 per month amount immediately preceding this litigation.

MJ Management used the new authority from the Seventh Amendment to increase maintenance fees in late November 2018.

Petitioners filed suit in early 2019, alleging a multifaceted attack against 18 Paradise, MJ Management, both entities' owners, and the City of Lynden relating to who could own the Common Open Space; whether Homestead had to have a Homeowners Association; whether the Declarant could continue to own the Common Open Space; whether the Amendments were valid; whether Mr. Williams and Mr. O'Bryan were personally liable for MJ Management's actions; RICO; Contract Violations; and a bevy of other legal theories. They quickly moved certify a class of every Homestead homeowner.

The Court certified the Class the following year. During the litigation, the trial court dismissed most of Petitioners' claims, including the CPA claim, before trial. The only remaining issues for trial were the parties competing declaratory claims regarding the validity of the Sixth and Seventh Amendments. The

case went to trial in April 2024. This appeal followed the Court's determination that the Sixth and Seventh Amendments were void *ab initio*.

b. Petitioners' Notice of Appeal.

The Court can group the Petitioners' Notice of Appeal into three primary categories.

In the first, Petitioners claim that the Sixth and Seventh Amendments to the Homestead CC&Rs violated the Consumer Protection Act; they disagree with how the Court applied Hangman Ridge's public interest test; and their theory that a CPA claim automatically pierces a business entities' corporate veil.

In the second, they argue that they have the standing and right to compel Lynden to enforce its PRD Ordinance; i.e., the Lynden PRD Ordinance should divest 18 Paradise from the Common Open Space and transfer it to an HOA.

Finally, Petitioners appeal several orders relating to the Court's Order granting MJ Management and 18 Paradise's TRO and Preliminary Injunction, in effect arguing that plaintiffs

and/or their counsel should not face consequences for posting Defendants' privileged documents on a public website (which prompted the TRO), that Plaintiffs' and/or their counsel should not face consequences for ignoring Court orders to take down those documents (and stop filing these protected documents into the Court record at every turn), and that MJ Management and 18 Paradise were entitled to attorneys' fees for Petitioners' discovery misconduct.

Despite appealing a veritable kitchen sink of the trial court's orders, Petitioners only substantively address two (related) Orders, and one issue in their Statement of Grounds: namely that in citing *Hangman Ridge* after the legislature amended the CPA, the Supreme Court has "confused" the lower courts. This is not the case.

4. DIRECT REVIEW IS NOT WARRANTED.

a. Standard for Direct Review.

The Washington Supreme Court is a court of last resort and will only entertain direct review for certain narrowly defined

matters. A party seeking this Court's direct review must explain why this Court, rather than the intermediate court of appeals, should take the case. RAP 4.2 provides six potential bases a petitioner may rely on: (1) Authorized by Statute; (2) Law Unconstitutional; (3) Conflicting Decisions; (4) Public issues; (5) Action against State Officer; and (6) Death Penalty. These extraordinary criteria plainly indicate that parties cannot bring an ordinary appeal directly to the Supreme Court.

b. There is no Public Interest Basis for Direct Review because there is no Confusion in the Law Regarding the "Public Interest Element" of the CPA.

Petitioners assert that this case presents a matter of significant public interest because "whether RCW 19.86.093 sets forth the exclusive test for the public interest under the Consumer protection Act is a question of significant public interest." *See* Pet. Statement of Grounds for Direct Review.

In effect, Petitioners' entire argument for direct review of over a dozen Orders (most are unrelated) depends on the

assumption that the Supreme Court has ignored the law when it has decided every CPA case after 2009, most recently *Trujillo v. NW. Tr. Servs., Inc.* 183 Wn.2d 820, 835-36, 355 P.3d 1100 (2015). According to Petitioners, the Legislature overrode *Hangman Ridge* when it amended the CPA in 2009. See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 719 P.2d 531 (1986). Yet, they don't cite to any authority for this proposition – because none exists. The primary thrust of their argument seems to be that the Court doesn't specifically discuss RCW 19.86.093 enough. That is not evidence of confusion, nor does it demonstrate the significant Public Interest they must show for direct review.

Because the *Trujillo* Court based their decision on their holding in *Klem*, the Court must first consider how the Court interpreted the law in *Klem*. *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013). Petitioners argue *Klem* ignored a "new test" which they assert the legislature created when it amended RCW 19.86.093. Petitioners are wrong on two counts;

First that RCW 19.85.093 created a new test – it did not; and second that the *Klem* Court ignored RCW 19.86.093. While it is true that the Majority did not cite it directly, they did discuss it substantively:

> To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon [1] a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or [2] an unfair or deceptive act or practice not regulated by statute but in violation of public interest.

Id. at 787. The Court pulled these three predicates for claims directly, albeit not verbatim, from RCW 19.86.093.[3] But that holding, which identifies predicate acts for a CPA claim, is

[3] 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. RCW 19.86.093. Respectfully, "a per se violation" aligns with parts 1 & 2 and "an unfair or deceptive act..." aligns with part 3 (a-c) of RCW 19.86.093.

not a test. The Court must analyze whether the alleged predicate acts have "the capacity to deceive substantial portions of the public" or are "an unfair or deceptive act or practice not regulated by statute by in violation of public policy." *Id.; compare* RCW 19.86.093, Supra n. 1. For that, the Court must turn to the tests in *Hangman Ridge*.

Petitioners point to Justice Madsen's concurrence in *Klem* as one of the very few times that this Court has ever specifically cited RCW 19.86.930. *See Klem*, 176 Wn.2d at 279. While it's true that Justice Madsen's citation is one of the few times the Court has specifically cited the RCW, it's also true that Justice Madsen argued against Petitioners' position. "[I]t is well-settled that both legislatively designated and court determined unfair or deceptive acts or practices may support private CPA actions, *as explained fully in Hangman Ridge Training Stables v. Safeco Title Insurance Co... and its progeny.*" *Klem*, 176 Wn.2d at 798 (Madsen, Concurring) (emphasis added). Justice Madsen goes on to explain that:

> [g]iven the Majority's identification of issues that are not truly raised here and that are in any event already resolved, its misreading of *Hangman Ridge*, and its puzzling attempt to resolve confusion that does not exist, the majority should not be read as altering the settled analysis in Hangman Ridge and its progeny.

Id at 805 (Emphasis added). Justice Madsen, who identified the Legislature's change to the CPA in 2009, nonetheless agreed that *Hangman Ridge* is the settled test; i.e. it is consistent with RCW 19.86.093. Had *Klem* been the end of this line of cases, perhaps the Petitioners would have a point.

However, *Klem* is not the last case in the line. Turning to *Trujillo v. NW Tr. Servs., Inc*, Justice Madsen's concurrence in *Klem* has clearly carried the day. *Trujillo v. NW Tr. Servs., Inc*, 183 Wn.2d 820, 355 P.3d 1100 (2015). *Trujillo* resolved any confusion that may have arisen out of split between the Majority and Concurrence in *Klem*. *See Id.* The Court, taking the principle, if not the citation, from RCW 19.86.093 said "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." *Trujillo*, 183 Wn.2d at 835-836 (relying on *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009); *compare* RCW 19.86.093, *Supra* n. 1.

Immediately following that announcement, the Court then explains the four factor test to assess the public interest element first set out in *Hangman Ridge*. *Id* (citing *Hangman Ridge*, 105 Wn.2d at 791). Clearly, *Hangman Ridge* is still the test to determine whether there is a public interest element in a private transaction. *Id.* at 834-837. Just as clearly, RCW 19.86.093's conclusory language did not supplant the Court's four factor public interest analysis. *See Trujillo*, 183 Wn.2d at 835-836.

Likewise, the Court of Appeals has interpreted the interplay between RCW 19.86.093 and *Hangman Ridge* consistently as well. The Court need look no further than the *Rush v. Blackburn* decision. The Court in *Rush* plainly set forth the relationship between RCW 19.86.093 and the *Hangman Ridge* public interest elements. Specifically, the Court held:

"[f]or violations falling under subsection (3), 'whether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed.'" *Rush v. Blackburn,* 190 Wn. App. 945, 968, 361 P.3d 217, 228 (2015). Critically, the court cites *Hangman Ridge* for this proposition and then recites the two different tests from *Hangman Ridge* for consumer transactions and private disputes. Thus, the court in *Rush* unequivocally holds that the Hangman Ridge factors survive the passage of RCW 19.86.093. *Rush* is far from being alone on this issue.[4]

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[4] *See Evergreen Money Source Mortg. Co. v. Shannon*, 167 Wn. App. 242, 261, 274 P.3d 375 (2012) (Plaintiff's CPA claim was dismissed as Plaintiff failed to meet the public interest element of the *Hangman Ridge* test); *accord Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015); *Rhodes v. Rains*, 195 Wn. App. 235, 247, 381 P.3d 58 (2016); *Rush v. Blackburn*, 190 Wn. App. 945, 361 P.3d 217 (2015); *Falcon*, 16 Wn. App. at 13-14 (2020); *Spokeo, Inc. v. Whitepages, Inc.*, No. 78897-3-I (2020) (Unpublished Opinion permitted under GR 14.1(a)) (The Court of Appeals confirmed that while the RCW sets out when an act may injure the public interest, *Hangman Ridge*'s four factor test lets the Court determine the public interest impact; the Court dismissed the CPA claim for failing to satisfy the public interest element.)

In effect, Petitioners' only stated grounds for direct review—that this case presents a matter of significant public interest—relies entirely on a false premise: that RCW 19.86.093 conflicts with the public interest test in *Hangman Ridge*.[5] Petitioners cite to no authority that the RCW *replaced* any test contained in *Hangman Ridge*.[6] The authority that does exist presents the reality of the law, namely that the RCW has been amended to align the statute with what the Courts were already doing.

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[5] Petitioners ignore the second half of the trial court's Order dismissing their CPA claim: Petitioners can't satisfy the "test" they claim RCW 19.86.093 created. *See* App. 1 to Petitioner's Statement of Grounds at p. 58 (Order Dismissing CPA Claims 4:7-8) ("Even if the Court solely applied the provisions of RCW 19.86.093 in its analysis of Plaintiffs' CPA claim, the Claim would fail."). Petitioners do not explain how the trial court erred by considering and rejecting the test Petitioners claim the Court should have used. Even if this Court concludes that RCW 19.86.093 overruled *Hangman Ridge*, as Petitioners insist, Petitioners' claim still fails.

[6] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Logan*, 102 Wn. App. 907, 911, 10 P.3d 504 (2000).

Because there is no confusion, there is no matter of significant public interest for the Supreme Court to address. The Court should deny Direct Review.

c. Petitioners Fail to Explain Why the Orders Concerning the PRD or Discovery Misconduct Warrant Direct Review.

Because they do not bother explaining why the Court should consider whether these parts of the appeal satisfy direct review, Respondents can confidently confirm they do not.

Petitioners' claim around the Lynden PRD Ordinance seeking to compel 18 Paradise to divest its property from Homestead is a purely private dispute between the Declarant and an unformed HOA. While they are trying to turn Lynden into their cudgel, at its core, their claim is simply a private dispute between homeowners and a community landlord. It does not affect any substantial public interest of the people of Washington State. Nor does it satisfy any of the other potential bases for direct review.

Likewise, Petitioners' submission is entirely silent on why their appeal from the various discovery related orders have any basis for the Supreme Court to take direct review. Given that the Petitioners have provided no grounds for review the Court should not consider them. At best, these Orders and Judgment warrant an ordinary appeal; and with respect to the Judgement on Attorney's Fees, should be dismissed for reasons set out in Respondents' Motion to Dismiss previously filed with the Court.

5. CONCLUSION

The Legislature never displaced the tests in *Hangman Ridge*. Instead, it articulated more clearly how a plaintiff might bring a case under the Consumer Protection Act. The Court has continued to apply the tests in *Hangman Ridge* because they set forth the criteria to determine whether a plaintiff's claim meets the avenues set forth in RCW 19.86.093(c).

The Courts have recognized this and continued to apply *Hangman Ridge* after the Legislature updated the CPA in 2009. There is no reason for the Supreme Court to take this appeal on

Direct Review. The Court should send this case to the Court of Appeals, or alternatively, incorporate MJ Management's requested relief from its recent Motion to Dismiss the appeal in part or in its entirety.

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I certify that this brief has 2,990 words in accordance with the Rules of Appellate Procedure 4.2

CERTIFICATE OF SERVICE

I, Jody Reigler, certify that on January 29, 2024, I served a true and correct copy of this OPPOSITION TO PETITIONERS' STATEMENT OF GROUNDS FOR DIRECT REVIEW on Counsel of record using the Court's Electronic Service System and/or via email.

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