IN THE SUPERIOR COURT OF WASHINGTON FOR BENTON COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS; and BARRONELLE STUTZMAN,

Defendants.

ROBERT INGERSOLL AND CURT FREED,

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 No. 13-2-00953-3)

PLAINTIFFS ROBERT INGERSOLL AND CURT FREED'S OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON CPA CLAIM BY INGERSOLL AND FREED

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I. INTRODUCTION

Defendants Arlene's Flowers and Barronelle Stutzman refused to sell Plaintiffs Robert Ingersoll and Curt Freed flowers for their wedding because Robert and Curt are gay. After being told he could not order flowers for their wedding by their florist of many years, Robert had to turn around, leave Arlene's Flowers, get back into his car, and drive back to work empty handed. Robert and Curt then had to deal with the discrimination by making new plans for their wedding. Defendants claim there is no injury here. They argue Washington's Consumer Protection Act provides no remedy to a consumer who suffers the kind of discrimination experienced by Robert and Curt. Defendants are wrong, and their motion for partial summary judgment should be denied.

II. STATEMENT OF FACTS

Robert Ingersoll and Curt Freed are gay men who have been in a romantic relationship since 2004. Decl. of Robert Ingersoll in Supp. of Opp'n to Defs.' Mot. for Partial Summ. J. ("Ingersoll Decl.") ¶ 3; Decl. of Curt Freed in Supp. of Opp'n to Defs.' Mot. for Partial Summ. J. ("Freed Decl.") ¶ 4. After sharing their lives with each other for eight years, Curt proposed to Robert in December 2012 and they planned to marry on their anniversary in 2013. Ingersoll Decl. ¶ 4; Freed Decl. ¶ 5.

Robert and Curt were excited about organizing their wedding, and planned to buy flowers for their wedding from Arlene's Flowers. Ingersoll Decl. ¶ 5; Freed Decl. ¶ 6. Robert and Curt had purchased flowers from Arlene's Flowers many times over the years, and considered Arlene's Flowers to be their florist. *Id.*

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On February 28, 2013, Robert drove to Arlene's Flowers to speak to someone about floral arrangements for the wedding. Ingersoll Decl. ¶ 6. When Robert informed Janell Becker that he and Curt were getting married and wanted Arlene's Flowers to do the flowers for their wedding, Ms. Becker informed Robert that he had to speak to the owner, Barronelle Stutzman. *Id.* Ms. Becker wrote Ms. Stutzman's schedule on a scrap of paper. *Id.* On March 1, 2013, Robert drove back to Arlene's Flowers to speak to Ms. Stutzman. *Id.* ¶ 7. Robert and Curt had ordered flowers from Ms. Stutzman many times, including for birthdays and anniversaries. *Id.*; Freed Decl. ¶ 6. On this occasion, however, Ms. Stutzman refused to sell Robert and Curt flowers. Ingersoll Decl. ¶ 8. She refused because Robert and Curt are gay, and because she claimed her "relationship with Jesus Christ" prevented her from selling them flowers for their wedding. Ingersoll Decl. ¶ 8.

The refusal sent Robert and Curt reeling. *Id.* ¶ 11. It took the wind out of their sails, and they stopped planning for a wedding in September because they feared being denied service by other wedding vendors. *Id.* They felt their friends and family should know about the refusal and they shared their story on Facebook. *Id.* ¶ 12. The story was spread widely. *Id.* As a result of others learning about the refusal, Robert and Curt received unsolicited florist recommendations, referrals, and offers from friends and strangers. *Id.*

When Robert and Curt felt ready to resume planning their wedding, they decided to postpone a big celebration and host a small wedding ceremony at their home instead. Freed Decl. ¶ 7. They needed to make alternative arrangements to buy flowers for their wedding. Ingersoll Decl. ¶ 14; Freed Decl. ¶ 7. They ultimately decided to buy flowers from two other sellers. *Id.* Robert contacted Carol Travis, who was supportive of their

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relationship, and who had offered her floral services after learning about the refusal. Ingersoll Decl. ¶ 14. Robert drove to Carol's home in Kennewick and bought boutonnieres and corsages. *Id.* Curt also drove to Lucky Flowers in Kennewick and bought an arrangement the day before their wedding ceremony. Freed Decl. ¶ 7. Curt had learned that Lucky Flowers was supportive of the gay community in the Tri-Cities. *Id.* Robert and Curt were then married in a small ceremony at their home on July 21, 2013. Ingersoll Decl. ¶ 15.

Robert and Curt also considered whether they should do something in response to the discrimination they encountered. *Id.* ¶ 13. After much heartwrenching thought, Robert and Curt decided to contact attorneys to inquire about commencing a legal action. *Id.* They filed this action on April 18, 2013.

III. ARGUMENT

Summary judgment is appropriate only if the moving party is entitled to judgment as a matter of law. CR 56(c). Defendants argue they are entitled to partial summary judgment here because they claim Robert and Curt cannot show injury to their business or property sufficient to support a Consumer Protection Act ("CPA") claim. But a violation of the Washington Law Against Discrimination ("WLAD"), which Defendants argue should be the focus of this lawsuit, is a *per se* violation of the CPA; and in any event Robert and Curt suffered injury sufficient to support a CPA claim. Defendants' motion should be denied.

A. A Violation of the Washington Law Against Discrimination is a *Per Se* Violation of the Consumer Protection Act

In drafting the WLAD, 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.

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RCW 49.60.030(3). The WLAD states that any WLAD violation occurring in the course of trade or commerce is, "for the purpose of applying [the CPA], a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce." *Id.*

The nexus between the two statutes is obvious. The WLAD ensures that Washington residents have the right to be free from discrimination generally, and particularly in specified commercial contexts including employment, public accommodations, real estate transactions, and credit and insurance transactions. RCW 49.60.030(1). Washington's CPA also protects consumers in commercial contexts, and the WLAD explicitly acknowledges that a violation of the WLAD will often be a violation of the CPA. RCW 49.60.030(3).

Because the Legislature expressly linked these two statutes, "[v]iolations of the WLAD that occur in the course of trade or commerce are per se violations of the CPA."[1] *Johnson v. Grady Way Station, LLC*, No. C08-1651RAJ, 2009 WL 3380641, *3 (W.D. Wash. 2009).[2] In *Johnson v. Grady Way Station, LLC*, for example, the court allowed the plaintiff to maintain both WLAD and CPA actions where the plaintiff alleged racial discrimination that resulted in (1) the denial of goods and services, and (2) the *immediate refund* of money paid for those goods and services. *Id.* at *1-5. In *Johnson*, the plaintiff claimed he paid $10 for gas, that the gas station attendant refused to dispense gas to the plaintiff after the plaintiff was unable to operate the pumps himself, and that the attendant threw the $10 back at the plaintiff and used a racial slur. *Id.* at *1. On summary judgment, the court refused to dismiss the plaintiff's CPA claim. The court noted that a plaintiff must "suffer injury in his 'business or

[1] The WLAD makes two explicit exceptions that do not apply here. RCW 49.60.030(3).
[2] Unpublished federal decisions may be cited as authority. Fed. R. App. P. 32.1.

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property,'" but explained that "[v]iolations of the WLAD that occur in the course of trade or commerce are per se violations of the CPA." *Id.* at *3. The court rejected the defendants' argument that no trade or commerce was affected at the time of the alleged discrimination. *Id.* at *4.

Here, Robert Ingersoll and Curt Freed suffered a discriminatory denial of services similar to the denial alleged in *Johnson*. Their WLAD and CPA claims should therefore proceed together, as in *Johnson*. Because the same facts that establish Plaintiffs' WLAD claims also establish the CPA claim, the Court should deny Defendants' motion for partial summary judgment. *Johnson*, 2009 WL 3380641 at *3; *accord Webb v. Ray*, 38 Wn. App. 675, 679-80, 688 P.2d 534 (1984) (violation of Automotive Repair Act a "per se violation of" the CPA).

B. Robert Ingersoll and Curt Freed Were Injured Because They Were Unlawfully Denied Goods and Services by Arlene's Flowers and Barronelle Stutzman

Regardless of the statutory link between Plaintiffs' WLAD and CPA claims, Robert Ingersoll and Curt Freed have suffered injury sufficient to support a CPA claim. They do not claim significant monetary damages, but they do not need to claim significant monetary damages to allege a CPA violation.

1. The Consumer Protection Act protects consumers from unfair business practices even when damages are small or unquantifiable.

A person making a CPA claim must show injury to business or property, but the term "injury" is distinct from "damages." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). That "distinction makes clear that no monetary damages need be

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proven, and that nonquantifiable injuries . . . suffice." *Id.* (discussing loss of goodwill). The case law is filled with examples of valid CPA claims based on unquantifiable injuries.

For example, in *Northwest Airlines, Inc. v. Ticket Exchange, Inc.*, 793 F. Supp. 976, 978-79 (W.D. Wash. 1992), the court found injury where a third party ticket re-seller violated Northwest Airlines' frequent flier policies. The court held that "the airline's inability to document specific instances of financial harm [could] not defeat its [CPA] claims." *Nw. Airlines*, 793 F. Supp. at 979. In *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 563-64, 825 P.2d 714 (1992), the court found injury where the plaintiff was "unable to tend to her store the way she normally would have" and was distracted from her business for "at least 3 hours each month for 4 years," even though those alleged injuries were "not quantifiable." And in *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 93-94, 605 P.2d 1275 (1979), a plaintiff who bought a defective car was entitled to a remedy under the CPA because, even though the car was ultimately repaired, the plaintiff was "inconvenienced, deprived of the use and enjoyment of his property, and received an automobile with defects needing repair." None of these cases featured quantifiable monetary harm to business or property. *See also, e.g.*, *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990) (plaintiff injured for purposes of CPA where temporarily deprived of use of real estate); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298-99, 38 P.3d 1024 (2002) (holding that a two week delay in receiving a refund was "[s]ufficient injury" for a CPA claim and that "[n]o monetary damages need be proven" because of the distinction between "injury" and "damages" under the CPA).

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Where attempts are made to identify quantifiable money damages, even the smallest damages are sufficient to constitute "injury" under the CPA. For example, in *Smith v. Stockdale*, 166 Wn. App. 557, 558-63, 271 P.3d 917 (2012), the plaintiff was injured when jumping off a cliff above the Columbia River. She sued the entity responsible for the cliff and, even though her personal injuries could not constitute "injury" for purposes of the CPA, the court found she was injured for purposes of the CPA because she had paid a $5 fee to access the cliff. *Smith*, 166 Wn. App. at 565.

In *Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 57-63, 204 P.3d 885 (2009), the court found injury where the plaintiffs, who were subjected to deceptive debt collection practices, incurred expenses associated with investigating the alleged debts. Those expenses included taking time away from work to consult with an attorney, and "out-of-pocket expenses for postage [and] parking." *Panag*, 166 Wn.2d at 57-63. The court also explained that minimal "[p]ecurniary losses occasioned by inconvenience may be recoverable as actual damages," including travel costs incurred because of deceptive practices. *Id.* at 57-58 (citing *Tallmadge* and explaining that the cognizable injuries in that case included "costs associated with traveling to [the] dealership in reliance on false advertisements").

In short, a wide range of injuries are cognizable under the CPA, and "[t]he scope of injury to 'property' is . . . quite broad and is not restricted to commercial or business injury." *Keyes v. Bollinger*, 31 Wn. App. 286, 296, 640 P.2d 1077 (1982). Here, Robert Ingersoll and Curt Freed plainly suffered injury under the CPA.

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2. Robert Ingersoll and Curt Freed were injured by Arlene's Flowers and Barronelle Stutzman.

When a place of public accommodation discriminates against customers, as happened here, injury inevitably follows. In this case, Robert had to drive to Arlene's Flowers twice. Then, after his business was refused, he had to get back in his car, drive back to work empty handed, then drive home and devise, with Curt's help, a new plan for obtaining flowers. Robert and Curt then had to drive in their cars to other sellers and purchase flowers from them instead of Arlene's Flowers, where they drove first. There are expenses associated with that wasted travel (including, for example, gas and mileage), and that expense is an injury sufficient to support a claim under the CPA. *Panag*, 166 Wn.2d at 57-58 ("Pecuniary losses occasioned by inconvenience," including travel costs like those expended in *Tallmadge*, "may be recoverable as actual damages" under the CPA.)

There are also costs associated with the time Robert and Curt spent identifying and selecting new florists. They routinely purchased flowers from Arlene's Flowers, and Robert recalls making no more than one or two floral purchases from other sources in the last five years. Ingersoll Decl. ¶ 5. Those costs are injuries sufficient to support a claim under the CPA. *E.g.*, *id.* at 57 (time taken away from business activities results in an injury cognizable under the CPA); *Sign-O-Lite*, 64 Wn. App. at 563-64 (same).[3]

These economic injuries are not insignificant. In the absence of laws like the WLAD and CPA, people all over the state might have to spend time ascertaining whether a store would serve them because of their race, religion, or sexual orientation (as in this case), for

[3] Unlike the plaintiffs in *Panag* and *Sign-O-Lite*, who owned their own businesses, Robert and Curt cannot readily point to theoretical lost sales or business opportunities, for example. But it cannot be the case that the protections of the CPA extend only to business owners and not to people engaged, as Curt and Robert are, in other meaningful enterprises. Ingersoll Decl. ¶ 2; Freed Decl. ¶¶ 2-3.

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example, and might have to try multiple stores before finding one that would serve them. They would waste time and resources in the process, and might ultimately be denied the goods they need to carry out their various endeavors. Such discrimination distorts the whole marketplace. Our country has seen the effects of these distortions on a large scale, and modern civil rights law is built in part on efforts to protect economic activity from the negative effects of discrimination. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 299-301, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964) (discussing the effect of discrimination on the Southern economy and affirming the constitutionality of the Civil Rights Act of 1964).

Defendants do not acknowledge that their discrimination injured Robert and Curt. Indeed, they ask the Court to find no injury *as a matter of law*, and to dismiss the CPA claims alleged in this case. The Court should do no such thing. Even though the injuries to property suffered by Robert and Curt are small, and even though they are difficult to quantify, they are real and cognizable under Washington law. This is as it should be. The CPA was meant to protect consumers; it is not reserved for large-scale transactions. Robert and Curt are entitled to a remedy for their injuries under the CPA.

IV. CONCLUSION

Defendants' motion for partial summary judgment should be denied. A violation of the WLAD is a *per se* violation of the CPA, and Defendants do not challenge Plaintiffs' WLAD claims here. In addition, Plaintiffs have suffered injuries to their property as a result of Defendants' discrimination. Those injuries, caused by Defendants, are sufficient to support

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a CPA claim. Defendants are therefore not entitled to judgment on the CPA claim as a matter of law, and their motion should be denied.

DATED this 23rd day of September, 2013.

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