81512-1

FILED
Court of Appeals
Division I
State of Washington
9/30/2020 3:23 PM

Docket No. 81512-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

WASHINGTON LEAGUE FOR INCREASED TRANSPARENCY & ETHICS, a Washington non-profit corporation, JOHN & JANE DOES 1-1000

Plaintiffs/Appellants

v.

FOX CORPORATION, a Delaware corporation; FOX NEWS NETWORK, LLC, a Delaware corporation d/b/a FOX NEWS CHANNEL; FOX BUSINESS NETWORK, a for profit company d/b/a/ FOX BUSINESS; JOHN MOE and JANE MOE, 1-100

Defendants/Respondents.

APPPELLANT'S BRIEF

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I. INTRODUCTION

A "hoax" is defined as an action "to trick into believing or accepting as genuine something false and often preposterous."[1] The term "fake news" is news consisting of "deliberately constructed lies, in the form of news articles, meant to mislead the public."[2] Both terms are front and center in this case which asks the Court to decide whether the First Amendment protects Fox[3] who repeatedly stated, on the national airways and under the guise of a "news organization," that COVID-19, a known threat to the public health, safety and welfare, is a hoax and therefore not a threat to human life.

There is no intelligent debate on the lethality of COVID-19: As of the date of this brief, over 1,000,000 people worldwide have died from COVID-19, over 200,000 of whom were Americans. ER 201. All of these people have perished in the year 2020 and the large majority have died since this case was initiated. ER 201. Such false statements of fact are not protected speech under the First

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[1] Merriam-Websters Online: https://www.merriam-webster.com/dictionary/hoax

[2] Margaret Sullivan, *It's Time to Retire the Tainted Term 'Fake News,'* WASH. POST, Jan. 8, 2017, https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a-76f69a399dd5_story.html?utm_term=.146db39702b1

[3] The various Fox respondents are referred to herein collectively as "Fox."

Amendment.[4] *See New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

Because of the threat to human life, Governor Inslee (and other governors throughout the United States) took drastic actions to slow the spread of this deadly virus. Such actions included a statewide "stay at home order" and the shuttering of a variety of businesses. All of these actions had significant economic impacts to the citizens in the State of Washington. WASHLITE contends that these "stay at home" orders and related actions were rendered more severe than necessary because Fox told its viewers that COVID-19 was a hoax thus encouraging them to ignore the various governmental actions implemented to slow the spread of the virus. This, more governmental action was required to stem the tide of COVID-19 and thus the economic impact was made more severe. Thus, contends WASHLITE, Fox has violated the Washington Consumer Protection Act, RCW 19.86.

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[4] The term "First Amendment" as used in this brief refers, generally to the First Amendment of the Federal Constitution which states: " U.S. CONST. AMEND I. The right to speak and publish under the Washington Constitution is Article 1, §5 which provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." CONST. ART. I, §5.

Moreover, in addition to the economic impact to Washington State subscribers to cable television operators in Washington State such as AT&T, Comcast and Spectrum pay a monthly fee for cable television services including content provided by Fox which receives a portion of these fees. Thus, Fox charges and receives a fee for making false statements of fact relating to the public health, safety and welfare. This too is a violation of RCW 19.86.

The trial court ruled that the First Amendment protects Fox for its statements on its Fox News, Fox Business or other stations. The trial court based its decision on *Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994) which concluded that a content provider such as Fox has only a derivative, not a free standing independent, First Amendment right. In *Turner,* the court recognized that the right derives from the owner of the cable system on which the program is broadcast and is subject to the editorial control of that owner. The trial court dismissed the case citing *Turner*.

In deciding this case, this court is asked to issue a decision issuing a bright line rule regarding the misrepresentation of facts relating to the public health, safety and welfare. The court is further asked to reexamine its decision in *Fidelity Mort. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 128 P.3d 621 (2005) wherein it held

that the Consumer Protection Act does not apply to newspapers or "news" stories in general. More specifically, WASHLITE asks this court to limit *Fidelity* to its facts and specifically state that the ruling applies only to newspapers in Washington State.

Based on the above, this court is asked to reinstate WASHLITE's case and remand the matter to the trial court for further proceedings.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred by granting the Fox's motion to dismiss and by entering the following findings and conclusions in its order:

> 15. The speech in this case involves matters of public concern that is at the heart of the First Amendment's protection, and WASHLITE does not explain how its CPA claim in this case might fall under the few categories identified in Alvarez. Washington courts have previously rejected attempts to use the CPA to punish speech made by the media. In Fid. Mort. Corp. v. Seattle Times Co., 131 Wn. App. 462, 128 P.3d 621 (2005), the Court of Appeals upheld the trial court's dismissal of a CPA claim against the Seattle Times based upon an allegedly false and deceptive mortgage rate chart published in the newspaper. In doing so, the court held "the quarterly rate chart is not paid advertising. It is a news article, and as such it is not published 'in the conduct of any trade or commerce.' It does not fall within those activities governed by RCW 19.86.020." Id. at 468.
>
> 16. In many of the United States Supreme Court's seminal First Amendment decisions, the motives for seeking to curtail or prohibit speech were understandable and

> could be considered righteous. Yet, as the Supreme Court recognized, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). WASHLITE's professed goal in this lawsuit - to ensure that the public receives accurate information about the coronavirus and COVID-19 - is laudable. However, the means employed here, a CPA claim against a cable news channel, runs afoul of the protections of the First Amendment.
>
> 17. This Court concludes that WASHLITE's CPA claim against Fox is barred under the First Amendment. Fox's Motion to Dismiss is GRANTED

CP 528-535

Assignment of Error No. 2. The trial court erred by awarding Fox expenses charged by the King County Superior Court for the delivery of working papers to the assigned judge through the court's internal computer system and entering judgment thereon. CP 561-564.

III. ISSUES PRESENTED FOR REVIEW

Whether the trial court properly dismissed WASHLITE's claims against Fox for violations of the Washington Consumer Protection Act, RCW 19.86 as barred by the First Amendment.

Whether the trial court improperly awarded Fox expenses incurred for the electronic delivery of judge's working papers,

characterizing them as filing fees under RCW 4.84.010 and/or RCW 4.84.080.

IV. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Below is a summary of the facts alleged in the First Amended Complaint. CP 89-120. The facts stated therein are incorporated here.

Fox provides programming content to consumers in Washington through a subscription service and the cable television network owned and operated by Comcast/Xfinity, AT&T, Spectrum Cable Services, DISH TV and other similar services. The subscription service is available to Washington consumers are bundled into a variety of packages containing various programming stations. Consumers do not have the opportunity to opt-out of any of the channels provided in the subscription bundle. Two of the channels provided by Fox and included in the programming packages offered in Washington State are the Fox News Channel and the Fox Business Channel.

As of September 2018, approximately 87,118,000 United States households (90.8% of television subscribers) had the Fox News Channel through a cable subscription. In 2019, the Fox News

Channel was identified the top-rated cable network averaging 2.5 million viewers daily in the United States.

The two television channels cited in this case, Fox News Network and Fox Business, are both cable television channels operated by Fox News Network LLC (FNN). A variety of chyrons[5] are used on both channels during broadcasting hours (both channels are on the air 24 hours a day, seven days a week) which include an image with the text “Fox News” rotating through as follows:

This chyron appears in all programming on Fox News and Fox Business.

In the Fall of 2019, a “pneumonia of unknown cause” was discovered in the Hubei Province of China. This “pneumonia of unknown cause/origin” was later identified as COVID-19. On December 31st, 2019, China reported this “pneumonia of unknown

[5] A chyron is “a caption superimposed over usually the lower part of a video image.” MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/chyron

cause" to the World Health Organization (WHO). On January 3, 2020[6] China informed the United States Government of an ongoing outbreak relating to COVID-19. On January 11, China reported the death of one of its citizens from COVID-19. This was the first reported death of a person from COVID-19 in the world.

Thereafter, COVID-19 began to spread at an exponential rate through the world. Reports came in from Thailand and South Korea that COVID-19 had arrived there. On January 21, Washington State reported its first case of COVID-19.

The global reaction was swift. The Gates Foundation committed $10,000,000 to the global response. On January 30, the WHO declared a public health emergency relating to COVID 19. On January 31 United States Department of Health and Human Services Secretary Alex Azar declared a National Public Health Emergency. In partial response to this declaration, President Trump restricted travel from China in an effort to stop the spread of COVID-19.

The virus continued to spread worldwide and in the United States. On February 2, the Philippines reported the death of a person

[6] At this point, all dates referred to in this brief occurred within 2020 and thus repeated references to it are not stated herein. If a date occurs outside the year 2020, that year is specifically stated.

there, this being the first death of someone outside of China from COVID-19. Also in February 2020, Cruise ships were detained offshore from Japan and California as COVID-19 had been found among the passengers. The Gates Foundation increased its global commitment to 100 million dollars to help fund the response to COVID-19. On February 6, 2020, a United States citizen in China died from COVID-19. By February 13th, 1,130 people in China had died from the virus.

Other countries began reporting deaths from and the spread of COVID-19. France, South Korea, Iran and Italy appeared to be the hardest hit. Brazil reported a case of COVID-19 as the first report from South America.

In the United States, three people in Washington state died from COVID-19 on February 26th. California reported discovery of a COVID-19 case. Finally, on February 29, Governor Inslee declared a State of Emergency in Washington State.

In March, the situation worsened. Residents of nursing homes in the Kirkland area who had been exposed to COVID-19 died. K-12 schools in Washington State were closed by local school districts in order to stop the spread. Various state governors in addition to Governor Inslee took action to protect their citizens such as Ohio

governor Mark DeWine who announced a ban on spectators at the Arnold classic, a popular sports festival in Ohio.

In addition, the Washington Supreme Court, along with various other lower courts in Washington State, issued a variety of emergency orders suspending court operations in order to address the public health emergency posed by COVID-19. In the middle of March, the King County Superior Court suspended all trials until further order of the court. Universities such as the University of Washington moved all classes to an online format which continued through Spring Quarter 2020. Classes again for the Fall Quarter of 2020 at the University of Washington are largely now held online in response to COVID-19. Artistic, cultural and sporting events and programs were suspended throughout out the state. Various employers in the Seattle area, such as Amazon and Microsoft, directed their employees to work at home. A variety of restaurants and other businesses closed in direct response to Governor Inslee's various orders relating to the pandemic. And on March 11, the WHO formally declared COVID-19 of pandemic. And in the middle of March, a National Emergency was declared by President Trump.

While all this is going on, Fox through a variety of its on-air personalities on Fox News regularly spread patent falsehoods

regarding the lethality of COVID-19 including the following statements as alleged in the Amended Complaint:

Speaker/On Air Personality	**Statement**
Sean Hannity	“zero people in the United States of America have died from the coronavirus”
Sean Hannity	COVID-19 was an invention of the political left in an effort to “bring down the President.”
Geraldo Rivera	The far more deadly, more lethal threat right now is not the coronavirus, its the ordinary old flu. Nobody has died yet in the United states as far as we know from this disease. ”
Dr. Drew Pinksy	“It’s milder than we thought…the fatality rate is gonna drop.”
Jesse Watters	“If I get it, I’ll beat it. I’m not afraid of the coronavirus and no one else should be that afraid either”
Dr. Marc Siegal	“This virus should be compared to the flu because at worst…at worst … worst case scenario it could be the flu"
Judge Jeanine Pirro (ret.)	"It’s a virus…like the flu…the talk about coronavirus being much more deadly doesn’t reflect reality. ”
Pete Hegspeth	“The more I learn about coronavirus, the less concerned I am”
Laura Ingraham	“and the facts are actually pretty reassuring, but you’d never know it watching all this stuff”

Lou Dobbs	“the left-wing media playing up fears of the coronavirus. ”
Sean Hannity	“This is scaring the living hell out of people—I see it, again, like, let’s bludgeon Trump with this new hoax.”
Ed Henry	“when you hear the context it’s not quite as scary. ”
Tomi Lahren	stated she was more concerned with stepping on a used heroin needle than contracting the coronavirus
Matt Schlapp	“It is very very difficult to contract this virus”
Ainsley Earhardt	“it is actually the safest time to fly”

Perhaps the most egregious statements were made by Ms. Trish Regan on March 9 on her then program on the Fox Business Channel who stated, with the statement “Coronavirus Impeachment Scam” in a chyron sharing the screen with her:

> The chorus of hate being leveled at the President is nearing a crescendo as Democrats blame him -- and only him -- for a virus that originated halfway around the world. This is yet another attempt to impeach the President. And sadly it seems they care very little for any of the destruction they are leaving in their wakes. Losses in the stock market, all this unfortunately just part of the political casualties for them.
>
> And, like with the Robert Mueller investigation, like with the Ukraine-gate, they don’t care who they hurt, whether it be their need to create mass hysteria to encourage a massive sell-off in an overly anxious stock market or, to create mass hysteria in order to stop our economy dead in its tracks.

Again, as of the date of this brief, over 200,000 Americans have died from COVID-19.

B. PROCEDURAL FACTS

WASHLITE filed this action on April 2, 2020. CP 1-10. It amended its complaint on April 15, 2019. CP 89-120. On May 27, 2018, the trial court granted Fox's motion to dismiss. CP 528-535. The trial court entered judgment for costs over WASHLITE's objection. CP 561-564. This appeal followed. CP 544-554; 565-582.

V. ARGUMENT

A. STANDARD OF REVIEW

This case was decided under CR 12(b)(6). CP 530. As such, the *de novo* standard of review applies here.

> Dismissal of a claim under CR 12(b)(6) is reviewed de novo. *Reid v. Pierce County*, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998). Dismissal is appropriate only if the complaint alleges no facts that would justify recovery. *Id.* The plaintiff's allegations are presumed to be true, and all reasonable inferences are drawn in the plaintiff's favor. *Id.* at 201.

Gorman v. City of Woodinville, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012). Washington's does not apply the federal standard set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) to motions brought under CR 12(b)(6) as *Twombly* was rejected by the Washington Supreme Court in *McCurry v. Chevy Chase Bank,* 169 Wn.2d 96, 101-102, 233 P.3d 861 (2010).

When considering a motion brought under CR 12(b)(6), the "court may consider hypothetical facts not included in the record." *Holiday Resort Comm. Assoc. v. Echo Lake Assoc., LLC,* 134 Wn. App. 210, 135 P.3d 499 (2006). Additionally, under CR 8,

> It is well established that pleadings are to be liberally construed; their purpose is to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process. If a complaint states facts entitling the plaintiff to some relief, it is immaterial by what name the action is called. Furthermore, initial pleadings which may be unclear may be clarified during the course of summary judgment proceedings.

(Citations omitted.) *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

> CR 12(b)(6), read together with CR 8(a)(1), requires the court to decide whether the allegations in a complaint constitute a short and plain statement of the claim showing that the pleader is entitled to relief. The court need not accept legal conclusions as correct. When an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion.

(Other citations omitted.) *Haberman v. Wash. Pub. Power Supply Sys.,* 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). Under these standards, the trial court should be reversed, the action reinstated and remanded for further proceedings.

B. FALSE STATEMENTS OF FACT RELATING TO THE PUBLIC HEALTH, SAFETY AND WELFARE ARE NOT PROTECTED BY THE FIRST AMENDMENT

Protection of the public health safety and welfare is a paramount governmental function. False statements regarding a threat to the public health in the midst of a pandemic is not protected speech. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974) ("… there is no constitutional value in false statements of fact.").

1. Constitutional rights are not unfettered

It has long been the rule of law in the United States that the exercise of constitutional rights is not an unrestricted license to do as one pleases.

> The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.

Crowley v. Christensen, 137 US 86, 89–90 (1890); *see also District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited.).

While the First Amendment guarantees the right to free speech, the right to speak may be limited in some circumstances.

> The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed* v. *Town of Gilbert*, 576 U.S. ___, ___, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.*

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

In *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791, 131 S. Ct. 2729, 2733 (2011), the Supreme Court stated:

> There are of course exceptions. " 'From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *United States* v. *Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 444 (2010) (quoting *R. A. V.* v. *St. Paul*, 505 U.S. 377, 382-383, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)). These limited areas--such as obscenity, *Roth* v. *United States*, 354 U.S. 476, 483, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), incitement, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-449, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) *(per curiam)*, and fighting words, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) --represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.*, at 571-572, 62 S. Ct. 766, 86 L. Ed. 1031.

*Id.*at 791. In *Roth v. United States*, 354 U.S. 476, 484 (1957), the supreme court noted,

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:
>
> > "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." 1 Journals of the Continental Congress 108 (1774).
>
> All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.

Areas of “more important interests” include false statements to the government which are prohibited under 18 U.S.C 1001 and RCW 9A.76.175. A violation of either of these statutes is a criminal act. In fraud and/or misrepresentation cases, parties are regularly held civilly liable for the consequences of their false statements. *E.g. Carlile v. Harbour Homes, Inc.,* 147 Wn. App. 193, 194 P.3d 280 (2008). Speech which entails imminent, lawless action, it is not accorded First Amendment protection. *Brandenberg v. Ohio*, 395 US 444 (1969). Additionally, terroristic threats do not enjoy constitutional protection either. *See, e.g., Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771, 773

(1975) (denying that the Georgia terroristic threats statute is unconstitutionally vague because "the standard of guilt contained in the statute is not left to speculation or conjecture, but rather, is fixed and certain as to the conduct prohibited therein"); *State v. Milner,* 571 N.W. 2d 7, 14 (Iowa 1997) (dismissing defendant's First Amendment claims on the ground that the defendant's statements were not protected by the First Amendment).

In a defamation case, a plaintiff may recover damages when they prove actual malice which includes proving that the information was published “with knowledge that it was false” and that the publisher of the information acted with “reckless disregard of whether [the] information was false or not.” *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). And in obscenity cases, the Supreme Court has ruled that “the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.” *E.g. Miller v. California,* 413 U.S. 15, 19 (1973).

The trial court recognized that in some instances First Amendment protections do not apply.

> In Alvarez,[7] Justice Kennedy in his plurality opinion and Justice Breyer in his concurrence set forth examples of where narrowly tailored statutes properly allowed for civil claims or criminal prosecution based upon falsehoods. For example, Justice Kennedy noted that "[e]ven when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." 567 U.S. at 719.

CP 533.

Bootstrapping these concepts to this case, Fox cannot reasonably deny that it knew that characterizing COVID-19 as a hoax was false particularly in view of the worldwide reaction to it. It acted with reckless disregard for the truth of COVID-19 when it regularly broadcast that the virus was a hoax or words to that effect.

2. Protection of the public health, safety and welfare is a compelling state interest

There is no more compelling state interest than the protection of the public health, safety and welfare. See *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) ("There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

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[7] *State v. Alvarez*, 567 U.S. 709 (2012).

In *Sorrell v. IMS Health Inc.,* 564 U.S. 552 (2011), the Supreme Court recognized that information relating to public health is a paramount concern. There it stated that laws intended to suppress speech are unjustified in a constitutional sense as "that reality [of conveying accurate information] has great relevance in the fields of medicine and public health, where information can save lives." *Id. at 567; see also Becerra*, 201 L. Ed. 2d at 850-851. Justice Breyer, in his dissenting opinion in *Becerra*, a case relating to whether abortion providers in California were required to disclose certain information to the public, acknowledged the importance of accurate information when making medical decisions.

> Accordingly, the majority's reliance on cases that prohibit rather than require speech is misplaced. *Ante,* at 12-14, 201 L. Ed. 2d, at 850-851. I agree that "'in the fields of medicine and public heath, . . . information can save lives,'" but the licensed disclosure *serves* that informational interest by requiring clinics to notify patients of the availability of state resources for family planning services, prenatal care, and abortion, which—unlike the majority's examples of normative statements, *ante,* at 13, 201 L. Ed. 2d, at 850—is truthful and nonmisleading information. Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other. Similarly, the majority highlights an interest that often underlies our decisions in respect to speech prohibitions—the marketplace of ideas. But that marketplace is fostered, not hindered, by providing information to patients to

> enable them to make fully informed medical decisions in respect to their pregnancies.

Becerra, 138 S. Ct. at 2387-88 (2018) (Breyer, J. dissenting). What is abundantly clear is that the Constitution, in the protection of the public health, safety and welfare, requires accurate information be given on matters relating to the public health.

3. Washington State's Pandemic Influenza Preparedness Act acknowledges the importance of accurate information relating to a public health threat

Accurate information relating to pandemics is such a serious matter that the Washington legislature enacted the Pandemic Influenza Preparedness Act (PIP) RCW 70.26. RCW 70.26.010 specifically identifies a broad public interest in an effective response to a pandemic influenza such as COVID-19. PIP also identifies how an effective response to such a plague:

> **An effective response to pandemic influenza in Washington** must focus at the local level and will depend on preestablished partnerships and collaborative planning on a range of best case and worst case scenarios. It will require flexibility and real-time decision making, guided by accurate information. It **will also depend on a well-informed public that understands the dangers of pandemic influenza and the steps necessary to prevent the spread of the disease.**

(Emphasis added.) RCW 70.26.010(5). This is a clear and unambiguous statement of legislative intent.

Courts have ruled that protecting the public health is a paramount interest and actions taken in connection with that effort are constitutional. *In re Abbott*, 954 F.3d 772, 784 (CA 5, 2020) (Recognizing, when addressing Texas emergency rules during the coronavirus pandemic, that individual rights secured by the Constitution could be reasonably restricted during a health crisis).

> Numerous decisions, both federal and state, have considered the questions now before us. They are not all in accord and in some instances are not reconcilable. There is, however, a very marked trend in them in one direction, that which upholds the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, as will prevent the spread of this dread disease.

People ex rel Hill v Lansing Bd of Ed, 224 Mich. 388, 390, 195 NW 95 (1923) (ruling that the exclusion of children, who were not vaccinated against small pox, from school constitutionally permissible); *see also, Jacobsen v Commonwealth of Mass*, 197 US 11, 25-26 (1905) (upholding state's power to require vaccination over plaintiff's Fourteenth Amendment liberty interest to not be told what to do).

The cable television is an integral part of the infrastructure in the United States which provides information to the general public of threats against it. Such threats include, but are not limited to, an attack within the geographical confines of the Unites States such as the 9/11 attacks, or the threat to human life such as COVID-19. By

calling COVID-19 a hoax and claiming it was made up in some kind of mysterious effort to “bring down President Trump” lulled viewers into a sense of safety that does not exist. And because of this, viewers openly rejected the Governor’s efforts to stop the spread of COVID-19 such as his limitations on gatherings and the advice to wear a mask. This resistance, in turn, increased the economic impact as the disease spread causing extensions of the Governor’s orders.

C. CONTENT PROVIDERS LIKE FOX DO NOT HAVE A INDEPENDENT FREE SPEECH RIGHT, BUT A DERIVATIVE RIGHT SUBJECT TO EDITORIAL CONTROL BY A THIRD PARTY

At best, Fox has a derivative speech right on the cable systems owned by AT&T, Comcast, Spectrum and other owners. And given that such a right is subject to the editorial control of those entities, it does not have an absolute right to claim a First Amendment shield in this case.

1. A derivative right to speech is not an absolute defense to the claims here

The trial court relied upon *Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994) for its conclusion that cable programmers enjoy First Amendment rights on a cable system owned by someone else. This was error.

Turner was one of a number of cases decided in the 1990's where the courts were asked to decide whether cable operators (like AT&T, Comcast and Spectrum) were required to carry certain programming offered by third parties. These cases are commonly known as the "must carry" cases. In *Turner,* the Supreme Court cited to *Leathers v. Medlock,* 499 U.S. 439 (1991), for its statement that "Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." 512 U.S at 636. The *Turner* court went on to say "Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators "seek to communicate messages on a wide variety of topics and in a wide variety of formats.'" 512 U.S. at 636, citing *Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488 (1986). The court recognized the unique nature of television programming and stated:

> Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications--whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other

> newspapers from being distributed to willing recipients in the same locale.
>
> The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[8]
>
> _____
>
> n. 8 As one commentator has observed: "The central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant ....If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system." *I. de Sola Pool, Technologies of Freedom 168* (1983).

Turner Broad. Sys. v. FCC, 512 U.S. at 656 & n. 8.

Thus, under *Turner*, a cable operator/programmer like Comcast, AT&T and Spectrum have the right to exercise editorial control over programming offered by a third party such as Fox. Thus, a third-party programmer like Fox does not have an independent First Amendment right but a derivative right to speech on a cable network owned by a third party subject to editorial control by that third party.

In *Denver Area Educ. Telcoms. Consortium, v. FCC,* 518 U.S. 727, 812-826 (1996), Justices Thomas, Rehnquist & Scalia acknowledged this difference. There, the Supreme Court was asked to decide upon the constitutionality of certain provisions of the Cable Act which contained provisions requiring access to cable television systems for public access channels and restricted programming which "depicted sexual or excretory activities or organs in a patently offensive manner." *See* 47 USC §532(h) and (j). The Court concluded that portions of the challenged provisions were constitutional, and others were not.

Justices Thomas, Rehnquist and Scalia concurred in part and dissented in part and filed a separate opinion. 518 U.S. at 812-826. By way of a summary, these Justices stated that cable programmers using a private cable system owned by another have no independent constitutional right to speak through the cable medium as recognized by the progression of the law through a number of cases.[8] Justice Thomas stated:

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[8] The cases reviewed by Justices Thomas, Rehnquist and Scalia include, in the following order: *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488 (1986); *Leathers v. Medlock,* 499 U.S. 439

> We implicitly recognized in *Turner*[9] that the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion. Like a free-lance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no free-standing First Amendment right to have that programming transmitted. Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. at 256-258.

518 U.S. at 816-17. Thus, as a matter of law, Fox does not have a free standing unrestricted First Amendment right. Rather, it is subject to the editorial control of cable operators such as AT&T, Comcast and Spectrum at a minimum.

In *FCC v. Fox TV Stations, Inc.,* 567 U.S. 239, 244 (2012), the Supreme Court noted:

> Finding no First Amendment violation, the decision explained the constitutional standard under which regulations of broadcasters are assessed. It observed that "broadcast media have established a uniquely pervasive presence in the lives of all Americans," … and that "broadcasting is accessible to children, even those too young to read," … In light of these considerations, "broadcasting … has received the most limited First Amendment protection."

(Citation omitted.)

These holdings are consistent with other cases which hold that First Amendment rights do not exist on private property owned by

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(1991); *Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994); and *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.,* 475 U.S. 1 (1996).

[9] *Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994).

someone else unless that right is specifically granted. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (First Amendment rights not applicable to a shopping mall which is not dedicated to public use). In *Lloyd,* the court stated:

> We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.

Id. at 570. Here, the same is true: there is no evidence that any cable operator operating in Washington State has dedicated any portion of their cable systems to public use.

Here, WASHLITE contends that Fox does not enjoy a free standing First Amendment rights on the cable systems owned by AT&T, Comcast and/or Spectrum either by agreement or otherwise. This the court must accept as true. *Gorman,* 175 Wn.2d at 71. It may be possible that Fox has contracted with AT&T, Comcast and/or Spectrum for an unfettered right, but discovery of those agreements is the only way to answer the question. And for that to occur, the case must be reinstated.

2. The existence of COVID-19 is not a political issue

Below, Fox complained that WASHLITE is attempting to restrict its First Amendment rights on the cable medium by characterizing the

existence of COVID-19 as a political issue. Fox conflates the existence of the virus as a threat to human life with a discussion on the appropriate response to it. The former is a fact, not an idea. The latter involves a discussion of ideas. This is a critical difference.

> While we recognize that a precise definition of that elusive term "political issue" is at best a semantic improbability and that the term is best described by example rather than by sweeping generalizations, there are enough consistently recurring characteristics to render the term definable. These are best summarized by Mr. Justice Brennan in *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962):
>
> > It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Buchanan v. Rhodes, 249 F. Supp. 860, 863-64 (N.D. Ohio 1966).

Again, “… there is no constitutional value in false statements of fact.” *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974)).

Under this standard, the existence of COVID-19 as a grave threat to human life does not involve any of these elements and thus, its existence is not a political issue.

D. FOX HAS VIOLATED THE WASHINGTON CONSUMER PROTECTION ACT

The trial court did not address the substance of WASHLITE's consumer protection claim below. The argument is again presented here.

Washington's Consumer Protection Act, RCW 19.86 (CPA), may be enforced either by the state or a citizen. RCW 19.86.090. The purpose of the CPA is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive and fraudulent acts and practices in order to protect the public and foster fair and honest competition." RCW 19.86.020. The CPA is liberally construed so that its beneficial interest may be served. RCW 19.86.920.

> To prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co., 166 Wn.2d 27, 37, 204 P.3d 885 (2009). An action under the CPA does not require privity of contract. *Holiday*

Resort Cmty. Ass'n v. Echo Lake Assoc., LLC, 134 Wn. App. 210, 219, 135 P.3d 499 (2006).

1. Cable television is subject to consumer protection laws

The Cable Act specifically states that state consumer protection laws are not wholesale pre-empted by it and may be enforced. 47 USC §552(d)(1).[10] Billing practices are the only area which pre-empt state consumer protection acts. 47 USC §543(a)(1);[11] *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1994) (upholding a Wisconsin consumer protection statute--§100.20--relating to unfair trade practices as not preempted by the Cable Act). In Washington, a private right of action exists under the CPA. RCW 19.86.090 and .093.

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[10] The provision provides: "Consumer protection laws. Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title."

[11] The provision provides: "In general. No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction."

2. WASHLITE has standing to bring the action on behalf of its members

WASHLITE has standing to bring this claim on behalf of its members. In *Riverview Cmty. Grp. v. Spencer & Livingston,* 181 Wn.2d 888, 337 P.3d 1076 (2014), the Washington Supreme Court held

> "Organizations have standing to assert the interests of their members, so long as members of the organization would otherwise have standing to sue, the purpose of the organization is germane to the issue, and neither the claim nor the relief requires the participation of individual members." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 304, 268 P.3d 892 (2011) (citing *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186, 50 P.3d 618 (2002) (*Firefighters*)).

181 Wn. 2d at 894. As is shown by the declarations filed contemporaneously with this brief, members of WASHLITE have standing to sue under the CPA. First, they all declare they, as cable television consumers, have been damaged by Fox's deceptive acts. Second, WASHLITE was formed with the intention of protecting the various members interest relating to matters of public interest litigation such as the instant case. Third, relative to the relief requested, injunctive relief against Fox under the CPA does not require the member's participation. Relative to damages, it has long been the rule in Washington State, that a "consumer need not show specific monetary damages to recover under the" CPA. *E.g. St. Paul Fire & Marine Ins. Co. v. Updegrave,* 33 Wn. App. 653, 656 P.2d 1130

(1983). Thus, participation of the individual members of WASHLITE is not necessary for this result either. In short, WASHLITE is a proper party to this action and has standing to bring it.

3. Fox has deceived consumers in Washington State in a number of ways

The Consumer Protection Act also does not define the term "deceptive," but the Washington Supreme Court has declared that "[d]eception exists 'if there is a representation, omission or practice that is likely to mislead' a reasonable consumer." *Panag*, 166 Wn.2d at 50. To establish the deceptive element of a CPA claim, "a plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public." *Hangman Ridge Training Stables v. Safeco Title Ins. Co.,* 105 Wn.2d 77, 785, 719 P.2d 531 (1986). Because "the purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs," the statute's reach extends to the deterrence of deceptive conduct that aggravates and prolongs an existing and ongoing injury such as declaring an international and national health emergency a "hoax." *Id*.

> A claimant need not prove reliance or deceptive misrepresentation but only that the actions have a tendency or capacity to deceive a substantial portion of the public.

Tallmadge v. Aurora Chrysler Plymouth, 25 Wn. App. 90, 93, 605 P.2d 1275 (1979); *see also Young v. Toyota Motor Sales, U.S.A.,* 2020 Wash. LEXIS 520 (Washington Supreme Coafurt Docket No. 97576-1, September 24, 2020).

4. Fox deceives Washington consumers by disclaiming that it is a "news" source

In at least one other forum consisting of a variety of websites used by Fox where the broadcasts from Fox News and Fox Business are made available, it represents that its services are "for your personal enjoyment[12] and entertainment"[13] and makes no mention that it is a news source.[14] In this case, Fox claims the protections afforded to a known and authentic news source such as the Seattle Times but limits itself as an entertainment source thus disclaiming that it is a news source. Fox's own words condemn it claims. ER 801(d)(2). And because it disclaims itself as a news source, Fox is not entitled to

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[12] The term "enjoyment" is defined as "something that gives keen satisfaction." MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/enjoyment.

[13] The term "entertainment" is defined as "amusement or diversion provided especially by performers." MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/entertainment.

[14] See www.foxnews.com, Terms of Use found at this link: https://www.foxnews.com/terms-of-use There it specifically states: "Company furnishes the Company Sites and the Company Services for your personal enjoyment and entertainment."

the protection of a newspaper. *Cf. Fidelity Mort. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 128 P.3d 621 (2005).

By disclaiming that it is a "news" source, Fox is deceiving consumers in Washington State.

> With the existence of a truth, with physical facts per se, neither plaintiff nor defendant is concerned; for them facts in that absolute sense are but as ore in a mountain or fish in the sea -- valueless unless and until by labor mined or caught for use. Nor are facts, even after ascertainment, news, unless they have that indefinable quality of interest, which attracts public attention. Neither is news always synonymous with facts, in the sense of verity; indeed, much news ultimately proves fictitious, yet it is excellent news notwithstanding. **The word [news means] no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.**

Associated Press v. Int'l News Serv., 245 F. 244, 248 (2d Cir. 1917), *affirmed,* 248 U.S. 215 (1918) (Emphasis added).

Even news as entertainment/enjoyment has a basis in authenticity. An example of this is sports reporting. Consumers of sports news are, as one example, not only informed by learning about the comings and goings of their favorite athletes, such information is necessarily authentic where facts result in entertainment and enjoyment in addition to conveying knowledge.[15]

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[15] Examples of such stories include: *E.g.* M. Vorel, *Former UW Huskies C Nick Harris selected by Cleveland Browns in fifth round of NFL Draft,* SEATTLE TIMES (April 25, 2020) https://www.seattletimes.com/sports/uw-husky-football/former-uw-

In the acts complained of in this action, various television personalities speaking on Fox News and Fox Business stated that COVID-19 was (and is) a hoax, thus stating, as a matter of fact, that COVID-19, and the threat imposed by it, was non-existent.[16] It did so after the WHO, the Federal Government and Washington State all declared a health emergency as a direct result of the spread of COVID-19. It does all of this solely as an entertainment source by its own admission. And frankly, there can be no entertainment or enjoyment by a viewer who is exposed to a patent falsehood, particularly on an issue of such grave importance. Stating that COVID-19 is a hoax does not constitute "news" as a matter of law but, rather, is a patent and intentional falsehood as "news" necessarily implies authenticity.

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huskies-c-nick-harris-selected-by-cleveland-browns-in-fifth-round-of-nfl-draft/; G. Bell *Will Dissly's Seahawks return from another 'crushing' injury includes an important message,* TACOMA NEWS TRIBUNE (August 9, 2020), https://www.thenewstribune.com/sports/nfl/seattle-seahawks/article245072375.html

[16] The term "hoax" is defined as: **"**to trick into believing or accepting as genuine something false and often preposterous." MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/hoax

5. Fox's statements denying the lethality of COVID-19 are also unfair under the CPA as immoral and unethical

In determining whether an act is unfair under the CPA, the court considers the following:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 31 L. Ed. 2d 170, 92 S. Ct. 898, 905 (1972).

Magney v. Lincoln Mut. Sav. Bank, 34 Wn. App. 45, 57, 659 P.2d 537 (1983).

Claiming that something as lethal as COVID-19 is nothing but a hoax certainly qualifies as unfair, in addition to being deceptive, under these standards. At a minimum, such statements are immoral and unethical given the immediate and grave threat to human life that COVID-19 is. Moreover significant public policy issues are at stake.

6. FOX does business in Washington State—it maintains its office in Belltown

The CPA also provides that a defendant be engaged in trade or commerce in Washington State. RCW 19.86.020. In addition to providing cable television programming in Washington State, Fox,

through Fox News Network, maintains a physical presence in Downtown Seattle, with its principle place of business in the state located in Belltown. CP 90. It is further registered with the Washington Secretary of State's office as a foreign corporation doing business in the state. CP 90.[17]

Fox engages in substantial and pervasive commercial activity to the extent that its cable television content cannot be divorced from the broad definition of commerce within the meaning of the CPA. "Fox Corporation produces and distributes compelling news, sports and entertainment content through its domestic brands including: FOX News Media, FOX Sports, FOX Entertainment, and FOX Television Stations."[18] Fox claims that not only do "[t]hese brands hold cultural significance with consumers" but they also have significant "commercial importance for distributors and advertisers."[19] According to its own statement, "[t]he breadth and depth of [its] footprint allows [Fox] to deliver content that engages and informs audiences, develop

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[17] See also Washington Secretary of State https://ccfs.sos.wa.gov/#/BusinessSearch/BusinessInformation

[18] These statements are found on a news release on the Fox Corporation's website: https://www.foxcorporation.com/news/archives/2020/fox-corporation-completes-acquisition-of-seattle-duopoly-and-milwaukee-stations/

[19] *Id.*

deeper consumer relationships and create more compelling product offerings."[20] Therefore, Fox cannot escape liability under the CPA by claiming that its conduct did not occur in trade or commerce. In the same breath as expressed in the Motion, Fox argues that its COVID-19 commentary is not commercial, while boasting about the commercial influence of its cable television channel coverage and charging a fee for it.

Although Washington courts have declined to endorse the position "that all reporting is inherently commercial," the opposite conclusion is just as problematic.[21] Categorically exempting non-print broadcast, cable and subscription entertainment "brand" distributors from the scope of the CPA would give a free pass to any corporate empire with a dominant market share (Fox distributes its "brand" to over 90% of Washington consumers) wishing to skirt consumer protection laws.

Under this standard, even a traditional print news article may be "properly characterized as occurring in trade or commerce under the CPA," if it is sufficiently connected with business-related activity.

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[20] *Id.*

[21] This point is noted in *Delashaw v. Seattle Times Co.*, 2018 U.S. Dist. LEXIS 143675, an unpublished decision from the United States District Court for the Western District of Washington.

Fidelity, 131 Wn. App. at 468-69 (a newspaper may be properly characterized as occurring in trade or commerce if a person paid the newspaper to be included in the article).

As a threshold matter, this element is satisfied as applied to Fox's misrepresentations because it is not traditional print media obtaining the bulk of its revenue from advertising. Rather, it is a corporation selling entertainment content, broadcasting, and maintaining subscription services to paying consumers to distribute its "brands" described above. As such, these "entrepreneurial aspects" of the Fox corporation places its conduct "within the 'trade or commerce' definition of the CPA" by default. *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984).[22]

This approach is consistent with Washington law, which holds that courts may ascertain the CPA's meaning through a "'gradual process of judicial inclusion and exclusion." *State v. Reader's Digest Ass'n,* 81 Wn.2d 259, 274, 501 P.2d 290 (1972) (citing *Federal Trade Comm'n v. Raladalm Co.,* 283 U.S. 643, 648, 51 S. Ct. 587, 75 L. Ed. 2d 1324 (1931)); *see also Ivan's Tire Serv., v. Goodyear Tire &*

[22] One commentator has suggested that criminal penalties should attached to the publication of fake news. Robert Size, *Publishing Fake News for Profit Should be Prosecuted as Wire Fraud*, 60 SANTA CLARA L. REV. 29 (2020).

Rubber Co., 10 Wn. App. 110, 123, 517 P.2d 229 (1973), *affirmed,* 86 Wn.2d 513 (1976) (when defining the bounds of the CPA, courts should consider the facts of each CPA case and "let the law develop on a case-by-case basis"). Whether the "commerce" at issue in a given case directly or indirectly affects the people of the State of Washington must be decided on the facts of that case. *See Thornell v. Seattle Serv. Bureau, Inc*., 184 Wn.2d 793, 800, 636 P.3d 587 (2015) (““In order to give effect to the phrase ‘indirectly affecting,’ claims are not limited to those having only a direct affect” on the people of Washington.”). In this case, the facts as they appear now, and as they will be developed through discovery, demonstrate that Fox was (and is) involved in deceptive commerce negatively impacting consumers in Washington State.

7. Spreading misinformation about COVID-19 adversely affects the public interest

Below, Fox contended that RCW 70.26, the Pandemic Influenza Preparedness Act, does not apply to Fox but only to public health officials and therefore cannot be the basis of a CPA clam. This is incorrect.

RCW 19.86.093 provides:

> 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.

The PIP clearly qualifies under RCW 19.86.093 as a basis for a private claim under the CPA as the legislature made a clear statement of legislative intent that a well-informed public was necessary in a pandemic.

> **An effective response to pandemic influenza in Washington** must focus at the local level and will depend on preestablished partnerships and collaborative planning on a range of best case and worst case scenarios. It will require flexibility and real-time decision making, guided by accurate information. It **will also depend on a well-informed public that understands the dangers of pandemic influenza and the steps necessary to prevent the spread of the disease.**

RCW 70.26.010(5).

8. False statements regarding the lethality of COVID-19 have the capacity to injure Washington consumers

RCW 19.86.093(3) provides that actions which injured other persons, had the capacity to injure other persons, or have the capacity to injure other persons are also actionable under CPA. As is shown herein, Fox's claim that COVID-19 is a hoax, and its continuing

related statements, certainly have injured persons, and have the capacity to injure persons.

Recent scholarly research into the impact of misinformation proves this point. The Becker Friedman Institute at the University of Chicago, in a study directly examining Fox's misrepresentations on COVID-19, noted that "[e]fforts to contain a pandemic depend crucially on citizens holding accurate beliefs"[23] and concluded that greater exposure to the falsehoods broadcast by Mr. Hannity as one example were "associated with a greater number" of deaths.[24] Additionally, the Harvard Kennedy School Misinformation Review, recently concluded:

> Public understanding of needed preventative measures and rejection of bogus ones is important because SARS-CoV-2 is highly contagious and potentially lethal (cdc.gov). Pollsters have identified partisan differences in views on SARS-CoV-2. In particular, a number of March 2020 polls showed that Republicans were less worried than were Democrats about exposure to the virus (Gallup 2020), less likely to consider the SARS-CoV-2 outbreak a major health threat (Pew 2020), and more likely to approve of President Donald Trump's handling of the "coronavirus pandemic" (Marist, 2020). Like this work, our early March data registered differences tied to partisanship in their concern about SARS-CoV-2, specifically that Republicans were less knowledgeable about the relative lethality of SARS-

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[23] Leonardo Bursztyn, Aakaash Rao, Christopher Roth, and David Yanagizawa-Drott, *Misinformation During a Pandemic*, Working Paper No. 2020-44, p. 1, BECKER FRIEDMAN INSTITUTE FOR ECONOMICS AT THE UNIVERSITY OF CHICAGO (April 2020). Copy attached as Exhibit A.

[24] *Id. p. 2.*

> CoV-2. **In addition, our data suggested an association between exposure to some kinds of media, conservative and social media in particular, and being misinformed, associations that persist when partisanship is considered.** …[25]

Therefore, even the possibility that Fox's coverage misled a portion of its viewership demonstrates an unprecedented capacity to cause injury to the public, satisfying this element as defined by the statute. The CPA provides, in relevant part that "a claimant may establish that the act or practice *is injurious to the public interest* because it: … (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. (Emphasis added). Fox's brand distribution reaches 90% of the households in Washington, firmly establishing its capacity to disseminate false information about the dangers of COVID-19 is injurious to the public interest as a matter of law. Additionally, this misinformation has contributed, at a minimum, to an increased reaction to COVID-19 as demonstrated by Governor Inslee's extensions of the "stay at home" order and the planned staged

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[25] Kathleen Hall Jamieson & Dolores Albarracin, *The Relation between Media Consumption and Misinformation at the Outset of the SARS-CoV-2 Pandemic in the US,* HARVARD KENNEDY SCHOOL MISINFORMATION REVIEW, Vol. 1 p. 2 (April 2020). Copy attached as Exhibit B.

reopening of the State of Washington.[26] Consumers in Washington State are directly impacted by this more severe reaction to COVID-19.

9. WASHLITE members and Washington consumers have been injured by Fox's false statements

WASHLITE alleges in its Amended Complaint that its members have been injured by Fox's misrepresentations regarding the lethality of COVID-19. CP 119. As the motion was made under CR 12, then that element of the claim has been met as such a statement is treated as true. *Parilla v. King County,* 138 Wn. App. 427, 431-432, 157 P.2d 879 (2007).

10. A causal link between Fox's false statements and damage has already been established

In the briefing below, Fox misstates the test for causation under the CPA. CP 139. Only some "causal link is required between the … deceptive acts and the injury suffered by the plaintiff," in order to satisfy this element. *Hangman Ridge*, 105 Wn.2d at 793. The requirement that "the defendant induced the plaintiff to act or refrain from acting" is a mislaid prong of the long-abandoned public interest analysis." *Hangman,* at 789-90. Although Washington courts have

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[26] A selection of Governor Inslee's Proclamations are attached as Exhibit C.

been a little slow on the uptake, 'inducement' has no bearing on the current test for causation. According to the relevant case law, "causation is a factual question for the jury," and the CPA relies on the much simpler 'but for' test to establish this element. *E.g. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,* 162 Wn.2d 59, 83, 170 P.3d 10 (2007).

This element is satisfied as there is a robust correlation between Fox viewers' consumption of misinformation about the dangers of COVID-19, and negative impacts on community-wide health outcomes, and economic impacts as the pandemic have been so severe that the court may take judicial notice of it. ER 201. The economic impacts of the pandemic cannot be overstated as acknowledged by Kidder Mathews in its May 2020 publication on the impacts on commercial real estate as one example. *Copy attached as Exhibit D*.

Additionally, although many WASHLITE members pay for Fox cable channels content directly,[27] the CPA does not require that the person injured be the actual consumer of goods or services. *See*

[27] Washington consumers do not have the choice to "opt-out" of Fox channels or any other channel but only have the ability to choose a package of cable television channels. *Amended Complaint*, ¶4.10.

Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d. 1054 (1993).

The trial court's reliance on *Fidelity Mort. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 128 P.3d 621 (2005) is misplaced as it does not provide a blanket exclusion for those claiming to be news sources from the CPA. In *Fidelity*, a mortgage rate chart published in the Seattle Times failed to satisfy this element because the causal chain was "too remote." Where unknown third-parties "*might* have been considering Fidelity for their residential loan, *might* have read the Times' chart, *might* have been misled by rate quotes that were not precise enough, and *might* have refrained from obtaining a Fidelity mortgage as a result," the causal link was insufficient. *Id*. at 469 (Emphasis added). Further, *Fidelity* makes no mention of an exception to the CPA for a cable programmer on a cable system owned by someone other than the cable programmer. *Fidelity* is distinguishable because the present case does not solely rely upon attenuated third-party conduct to establish a link between Fox's deception and plaintiffs' injury. Further, in light of the University of Chicago study and the Harvard study cited above, the causation in this case is not subject to reasonable dispute.

The Washington consumers who were deceived by Fox's misrepresentations are among the people suffering as a result. The fact that more people than those included in the complaint were induced to act as a result of Fox's deceptive conduct strengthens it in regard to the effects of causally related third-party actions and effects.

E. THE COURT ERRED IN AWARDING CERTAIN COSTS TO FOX

Once the court entered its order dismissing the case, Fox sought an award of certain costs. CP 536-540. WASHLITE objected to Fox's request for an award of charges imposed by the King County Superior Court for the delivery of working papers to the court. These contested fees amounted to $134.94. Fox cited to RCW 4.84.010 and RCW 4.84.080 which provide for the recovery of filing fees.

A fee in the amount of $20 is charged by the King County Superior Court for the electronic delivery of working copies to judges within the court in addition to a $2.49 e-commerce fee under the King County Code,

> **Preparing and providing documents to the court.** The department of judicial administration is hereby authorized to assess and collect a fee for preparing and providing copies of documents to the court. This fee only applies when documents have been electronically submitted to the clerk by parties who wish to have copies provided to the respective judicial officer. The fee assessed shall be twenty dollars per submission. (Ord.

> 17150 § 33, 2011: Ord. 16297 § 3, 2008. Formerly K.C.C. 4.83.080).

KCC 4A.630.190.

The trial court erred by characterizing working copy fees as filing fees under RCW 4.84.010 and RCW 4.84.080. No Washington case has done so. Rather, the Washington Supreme Court has specifically stated that RCW 4.84.010 constitutes a narrow range of expenses which does not include working paper charges.

> Costs have been narrowly defined in RCW 4.84.010 as a narrow range of expenses, including filing, witness fees, and service of process expenses. *See Nordstrom, Inc. v. Tampourlos, supra*. [107 Wn.2d 735 (1987)] Boeing's attorneys should not be able to inflate their cost bill to recover additional fees, and the costs recovered should be strictly limited to those defined in RCW 4.84.010.

Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 66, 738 P.2d 665, 683 (1987). As working paper charges are not included within the list of recoverable charges under RCW 4.84.010, they were not properly awarded to Fox as to include these unlisted charges violates the canon of statutory construction *expressio unius est exclusio alterius. E.g. State v. Delgado*, 148 Wn.2d 723, 728-729, 63 P.3d 792 (2003) (the absence of language in a statute is deemed intentional).

> In judicial interpretation of statutes, the first rule is "the court should assume that the legislature means exactly what it says. Plain words do not require construction." *Snohomish v. Joslin*, 9 Wn. App. 495, 498, 513 P.2d 293 (1973). This court will not

> construe unambiguous language. *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978).

Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 329, 815 P.2d 781 (1991), *citing King Cy. v. Taxpayers of King Cy.*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985)..

VI. CONCLUSION

In *Jacobson v. Massachusetts*, 197 US 11 (1905), the Supreme Court noted:

> Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Id. at 26. There is no unfettered constitutional right to speak. Speech which spreads misinformation regarding a known public health crisis such as COVID-19 is not protected speech. For the above stated reasons, the trial court should be reversed and this matter remanded for further proceedings.

Dated this 30th day of September, 2020.

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September 30, 2020 - 3:23 PM

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