IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

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

Defendants.

ROBERT INGERSOLL and CURT FREED,

Plaintiffs,

vs.

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

Defendants.

No. 13-2-00871-5
(Consolidated with 13-2-00953-3)

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF STATE OF WASHINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' NON-CONSTITUTIONAL DEFENSES, DENYING DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF STATE OF WASHINGTON, AND DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS AGAINST BARRONELLE STUTZMAN IN HER PERSONAL CAPACITY

A motion hearing occurred in the above-captioned matter on December 5, 2014, in Kennewick, Washington. The Plaintiff, State of Washington, by and through the Attorney General, was represented through argument[1] by Todd Bowers, Senior Counsel and Kimberlee Gunning, Assistant Attorney General. The Plaintiffs Robert Ingersoll and Curt Freed were present, and were represented through argument by Jake Ewart, of Hillis Clark Martin & Peterson, P.S. The Defendants, Arlene's Flowers, Inc., d/b/a/ Arlene's Flowers and Gifts, and Barronelle Stutzman, were present, represented by Alicia Berry, Liebler, Connor, Berry & St. Hilaire, PS,

[1] Additional counsel assisted in preparation of the briefing and declarations for both the Plaintiffs and Defendants.

through argument of David Austin Robert Nimocks and Kristen Waggoner, of Alliance Defending Freedom, appearing *pro hac vice*.

Before the Court were three motions: 1) Plaintiff's (State of Washington's) Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses; 2) Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington; and 3) Defendants' Motion For Partial Summary Judgment On Plaintiff's Claims Against Barronelle Stutzman In Her Personal Capacity. At the motions hearing, the Court heard argument from all parties and took the motions under advisement. After further consideration, the Court now grants, denies, and both denies in part and grants in part these motions, respectively.

I. INTRODUCTION

A. Plaintiff's Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses

In Benton County Cause Number 13-2-00871-5, the Attorney General (hereinafter AG), on behalf of the Plaintiff State of Washington, has moved for partial summary judgment, arguing that six of the Defendants' non-constitutional affirmative defenses in their Answer[2] fail as a matter of law, and must therefore be dismissed. Those affirmative defenses are as follows: 1) this Court has no subject matter jurisdiction; 2) the AG has no standing to bring this action on behalf of the State; 3) failure to state a claim upon which relief can be granted; 4) the State has failed to exhaust administrative remedies available before the Human Rights Commission (hereinafter HRC); 5) the bringing of this case frustrates the purpose of the Washington Law Against Discrimination (hereinafter WLAD); and 6) the HRC is a

[2] The AG's Complaint in Benton County Cause Number 13-2-00871-5 was filed on April 9, 2013. The Defendants' Answer, containing the affirmative defenses reference above, was filed on May 16, 2013. A Complaint by the individual plaintiffs, Robert Ingersoll and Curt Freed, in Benton County Cause Number 13-2-00953-3 was filed on April 18, 2013, to which the Defendants' answered on May 20, 2013. These matters were previously consolidated for consideration of these motions.

necessary party to this case that the State failed to join. Specifically, the AG alleges that these defenses fail because they are contradicted by the express language, structure and clear intent of the WLAD and the Consumer Protection Act (hereinafter CPA). The Defendants respond and allege that these affirmative defenses are supported by the AG's practice of deferring to the HRC. The Defendants also assert that there is clear legislative intent that the HRC handle claims of discrimination in the first instance. For the reasons set out below, the Court concludes that the legislature intended to allow the AG independent unfettered authority to bring this action and therefore grants the AG's motion.[3]

B. Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington

Also in Benton County Cause Number 13-2-00871-5, Defendants moved for summary judgment alleging that, for the same reasons listed in their non-constitutional defenses, the AG's Complaint must be dismissed. For the same reasons that the Court grants the AG's motion above, the Court denies the Defendants' motion.[4]

C. Defendants' Motion For Partial Summary Judgment On Plaintiff's Claims Against Barronelle Stutzman In Her Personal Capacity

In both Benton County Cause Numbers 13-2-00871-5 and 13-2-00953-3 Defendants moved for partial summary judgment, asking this Court to dismiss both

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[3] In reaching this conclusion, the Court reviewed and considered the Plaintiff's Motion For Partial Summary Judgment On Defendant's Non-Constitutional Defenses, filed October 25, 2013, the Defendant's Response To The State's Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses, filed November 12, 2013 (along with the Declaration of JD Bristol in support of the motion, filed the same day), as well as Plaintiff's Reply, filed December 1, 2014.

[4] In reaching this conclusion, the Court reviewed and considered the Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington, filed October 25, 2013 (along with the Declaration of JD Bristol in support of the motion, filed the same day), the State's Response To Defendants' First Motion For Summary Judgment, filed November 12, 2013 (along with the Declaration of Todd Bowers in support of the motion, filed the same day), as well as the Defendants' Reply In Support of Defendants' First Motion For Summary Judgment Against Plaintiff, State of Washington, filed December 1, 2014.

the AG and the Individual Plaintiffs' claims against Barronelle Stutzman in her personal capacity, as a corporate officer. Further, the Defendants, in Benton County Cause Number 13-2-00953-3, ask the Court to rule that the Individual Plaintiffs' Second Cause of Action, "aiding and abetting" a violation of the WLAD, fails as a matter of law. As to the first issue, both the AG and Individual Plaintiffs respond that the plain language of both the CPA and WLAD provide for both individual and corporate liability, and that there is no need to "pierce the corporate veil" to find individual liability for Barronelle Stutzman in either matter. The Individual Plaintiffs concede that one cannot aid and abet one's own actions, and that this cause of action should be dismissed. For the reasons set out below, the Court concludes[5] that the Defendants' reliance on theories of corporate officer liability in these matters is not well founded, and that the clear language of the CPA and WLAD supports both individual and corporate liability in the first instance. The Court concludes that the Defendants are correct that accomplice liability is unavailable on these facts as a matter of law, and therefore accepts the Individual Plaintiffs' concession that the Second Cause of Action in Benton County Cause Number 13-2-00953-3 must be dismissed. The Court therefore denies in part and grants in part the Defendants' motion.

I. FACTUAL BACKGROUND

Defendant Barronelle Stutzman is the president, owner and operator of Defendant Arlene's Flowers, Inc. d/b/a Arlene's Flowers and Gifts. This closely-held

[5] In reaching this conclusion, the Court reviewed and considered the Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman In Her Personal Capacity, filed October 25, 2013 (along with the Declaration of Barronelle Stutzman and attachments thereto, as well as the Declaration of Alicia Berry and attachments thereto), Ingersoll and Freed's Opposition To Defendant's Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman In Her Personal Capacity, filed November 12, 2013, the State's Response To Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman in Her Personal Capacity, filed November 12, 2013, Defendant's Joint Reply Supporting Their Motion For Partial Summary Judgment On Plaintiff's Claims Against Barronelle Stutzman In Her Personal Capacity, filed December 1, 2014, as well as Defendant's Supplemental Brief Regarding State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 82 Wn.2d 265 (1973), filed December 18, 2014.

Washington for-profit corporation has Stutzman and her husband as the sole corporate officers. From its retail store in Richland, Washington, it advertises and sells flowers and other goods to the public. The company sells flowers for events including, among others, weddings. The company, originally incorporated in 1989, was previously owned and operated by Stutzman's mother, from whom she purchased the corporation almost 13 years ago. The corporation was and is licensed to do business in the State of Washington.

Stutzman has a firmly-held religious belief, based on her adherence to the principals of her Christian faith, that marriage can only be between a man and a woman. As a result, she believes that she cannot participate in a same-sex wedding. Stutzman draws a distinction between the provision of raw materials for such an event (or even flower arrangements that she receives pre-made from wholesalers) and the provision of flower arrangements that she has herself arranged for the same event. Said more precisely, Stutzman does not believe that she can, consistent with tenets of her faith, use her professional skill to make an arrangement of flowers and other materials for use at a same-sex wedding. That which she believes she cannot do directly she also believes she cannot allow to occur on the premises of her company with her knowledge. Therefore she believes she cannot allow others in her employ to prepare such arrangements in her company's name. Stutzman believes that such participation would constitute a demonstration of approval for the wedding itself.

Plaintiff Robert Ingersoll is a gay man who was an established customer of Arlene's Flowers. During the approximately nine years leading up to the present action, Stutzman, on behalf of Arlene's Flowers, designed and created flower arrangements for Ingersoll. Stutzman prepared these arrangements knowing both that Ingersoll was gay and that the arrangements were for Ingersoll's same-sex partner, Curt Freed. On November 6, 2012, the voters confirmed, through Referendum 74, the

Legislature's earlier enactment of same-sex marriage. *See* Revised Code of Washington (hereinafter RCW) 26.04.010(1) (*as amended by* Laws of Washington 2012, Ch. 3, § 1(1)); *see also*, Referendum Measure 74, approved Nov. 6, 2012. Shortly thereafter, Ingersoll and Freed were engaged to be married.

On February 28, 2013, Ingersoll went to Arlene's Flowers to inquire about having Stutzman do the flowers for his and Freed's wedding. Stutzman was not present, and an employee who spoke with Ingersoll communicated the request to Stutzman. After speaking with her husband, Stutzman decided that she could not create arrangements for Ingersoll and Freed's wedding without violating her beliefs. On March 1, 2013, Ingersoll returned to Alrene's Flowers, where Stutzman informed Ingersoll that because of her beliefs, she could not do the flowers for his wedding. Ingersoll left Arlene's Flowers shortly thereafter. This interaction effectively severed the relationship between the parties and ultimately gave rise to the present actions.[6]

After efforts toward a negotiated resolution between the AG and Defendants proved fruitless in March and April of 2013, the AG commenced its action in Benton County Cause Number 13-2-00871-5 by the filing of a Complaint on April 9, 2013. Therein, the AG alleged a violation of the CPA, both under the Act itself, and pursuant to the WLAD, a violation of which is a *per se* violation of the CPA. Defendants' Answer, containing the affirmative defenses that are the subject of two of these pending motions, was filed on May 16, 2013.

A Complaint by the Individual Plaintiffs, Robert Ingersoll and Curt Freed, in Benton County Cause Number 13-2-00953-3 was filed nine days later, on April 18, 2013. The Individual Plaintiffs alleged three causes of action: 1) Violation of the WLAD; 2) Aiding and abetting a violation of the WLAD; and 3) Violation of the

[6] The preceding is only a brief statement of the agreed facts surrounding the interactions between Stutzman and Ingersoll in March of 2013. A more detailed statement of these facts, necessary to resolve the remaining motions of the parties heard on December 19, 2014, will accompany that future Memorandum Decision and Order.

CPA. Defendants answered on May 20, 2013. The cases were consolidated for consideration of these motions by the previously assigned judicial officer.

II. LEGAL BACKGROUND

A. The Consumer Protection Act (CPA)

The CPA provides:

> [u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.010. The CPA, "on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (italics in original).

In enacting the CPA, the Legislature sought "to protect the public and foster fair and honest competition." RCW 19.86.920. Consistent with its purpose, the Legislature has directed that the CPA "shall be liberally construed that its beneficial purposes may be served." *Id.* This statement from the Legislature "is a command that the coverage of [the CPA's] provision in fact be liberally construed and that its exceptions be narrowly confined." *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). The statute's purpose statement concludes as follows:

> [*i*]*t is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices* which are reasonable in relation to the development and preservation of business or *which are not injurious to the public interest, nor be construed to authorize those acts or practices which* unreasonably restrain trade *or are unreasonable per se.*

RCW 19.86.920 (italics added).

Actions for alleged violations of the CPA may be commenced by an individual or individuals. RCW 19.86.093. Individual plaintiffs must establish the following

elements to prove their case: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to business or property, and (5) causation." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (further citation omitted). While undefined in the CPA, "[w]hether a particular act or practice is 'unfair or deceptive' is a question of law," to be determined by the Court. *Panag*, 166 Wn.2d at 47; *see also, State v. Schwab*, 103 Wn.2d 542, 546, 693 P.2d 108 (1985). That said, certain acts or practices have been declared by the Legislature to be *per se* violations of the CPA, and "private litigants are empowered to utilize the remedies provided them by the act." *Schwab*, 103 Wn.2d at 546-7.

Actions alleging violations of the CPA may also be brought by the AG. RCW 19.86.080(1). The scope of the AG's authority to act under the statute is broad:

> [t]he attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, *against any person* to restrain and *prevent the doing of any act* herein prohibited or declared to be unlawful…

Id. (italics added). Unlike an individual plaintiff, the AG must establish only three elements: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also, State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011). In bringing actions under the CPA, the AG's role is different than that of the private litigants:

> [t]he Attorney General's responsibility in bringing cases of this kind is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress for private individuals. Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public.

Seaboard Surety Co. v. Ralph Williams' NW Chrysler Plymouth (hereinafter Ralph Williams' (I)), 81 Wn.2d 740, 746, 504 P.2d 1139 (1973). The Legislature's declaration of *per se* violations of the CPA "authorize[s]" the AG to bring actions

under the CPA for these acts or practices the Legislature declares as *per se* unfair or deceptive. *Schwab*, 103 Wn.2d at 546-7.[7]

B. The Washington Law Against Discrimination (WLAD)

The WLAD provides:

> (1) [*t*]*he right to be free from discrimination because of* race, creed, color, national origin, sex, honorably discharged veteran or military status, *sexual orientation…is recognized as and declared to be a civil right*. This right shall include, but not be limited to:
>
> …
>
> (b) *The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation,* assemblage, or amusement…

RCW 49.60.030(1)(b) (italics added). The purpose statement for the law states:

> [the WLAD] is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, in the fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation…are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state….

RCW 49.60.010. As with the CPA, the Legislature has directed this Court that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. The statute specifically prohibits discrimination as follows:

> (1) [*i*]*t shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination…or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, staying, or lodging in any place of public resort, accommodation,* assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, *regardless of race, creed, color, national origin, sexual orientation…*

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[7] The Defendant objects that *Schwab* is dicta as to the interplay of the CPA and WLAD, particularly on the issue of exhaustion. As indicated below, the Court analyzes the exhaustion defense under a different case.

RCW 49.60.215(1) (italics added).

The WLAD also created the Washington State Human Rights Commission (HRC), which is empowered, among other functions, to investigate and pursue violations of the WLAD. *See* RCW 49.60.010 & .050 (creating the HRC); *see also,* RCW 49.60.120 (powers and duties of HRC). "Any person" who claims a violation of the WLAD may file, either in person or through an attorney, a complaint with the commission. *See* RCW 49.60.230(1) (stating who may file a complaint); *see also,* RCW 49.60.040(19) (definition of "person"). The HRC may also issue a complaint whenever it has reason to believe any person is violating the WLAD. RCW 49.60.230(2).

A person need not file a complaint with the HRC before filing a separate action. *Galbraith v. TAPCO Credit Union*, 88 Wn.App. 939, 948 n. 6, 946 P.2d 1242 (1997) ("The parties do not contend and we see nothing in the statue that requires exhaustion of administrative remedies with the Human Rights Commission (HRC) prerequisite to filing a lawsuit under the statute."). Further, a person who files a complaint with the HRC does not thereby lose their right to file a separate action. *See* RCW 49.60.020 ("Nor shall anything herein contained be construed to deny the right of any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights."); *see also,* RCW 49.60.030(2) (providing right to seek injunction, actual damages, attorneys' fees, and "any other appropriate remedy" authorized by WLAD). In fact, the statute and the rules promulgated by the HRC thereunder contemplate a person or the AG pursuing a civil remedy and initiating or maintaining proceedings before the HRC. The HRC's rule regarding concurrent remedies, promulgated under the authority given to it by the Legislature, clearly contemplates a stay of proceedings when any action is filed that litigates the claim.

See RCW 49.60.120(3) (HRC authority to promulgate rules); *and see,* Washington Administrative Code (hereinafter WAC) 162-08-062. The rule provides:

> A complaint of an unfair practice other than in real estate transactions will be held in abeyance during the pendency of a case in federal or state court litigating the same claim, whether under the law of discrimination or a similar law, unless the executive director or the commissioners direct that the complaint continue to be processed....

WAC 162-08-062(2) (Abeyance – General Rule). The rule differentiates between the deference given to cases filed in federal or state court, where the default position is that HRC proceedings will be stayed, and other administrative proceedings, where they will not. *Id.* It does not distinguish between private actions and cases instituted by the AG.

C. Violation Of The Washington Law Against Discrimination (WLAD) As A *Per Se* Violation of the Consumer Protection Act (CPA)

The WLAD explicitly provides that a violation of the WLAD is a *per se* violation of the CPA:

> ...any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, 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.

RCW 49.60.030(3). Therefore, in addition to an individual's WLAD right of action,[8] both the AG and private individuals are authorized by the Legislature's designation of a WLAD violation as *per se* violations of the CPA to file a CPA action. *Schwab*, 103 Wn.2d at 546-7 (listing "discriminatory practices" under the WLAD (RCW

[8] The AG has disclaimed a right of action under the WLAD (including a right to file a complaint with the HRC in the first instance). The AG has consistently asserted the CPA as its source of authority to bring this action. The Defendants, at argument, did not commit to the position that the AG has such a right, rather arguing that the answer to that question is not necessary for the Court to rule their favor.

49.60.030(3)) as example of violations of other statutes that constitute *per se* violations of the CPA).

III. ANALYSIS

A. Plaintiff's (State of Washington's) Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses

In Benton County Cause Number 13-2-00871-5, the AG has moved for partial summary judgment, arguing that six of the Defendants' non-constitutional affirmative defenses in their Answer fail as a matter of law, and must therefore be dismissed. Either party may move for summary judgment upon their assertion, supported by record, that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Superior Court Civil Rule (hereinafter CR) 56(a-c). Where there is a factual dispute that is material to the resolution of the motion, the Court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn.App. 157, 161, 872 P.2d 69 (1994). Where there are no disputed facts, or the factual dispute is not material and only issues of law remain to be determined, summary judgment is appropriate. *See State Farm Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984); *see also, Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) ("A material fact is one upon which the outcome of the litigation depends."). The Court concludes that this matter is appropriate for summary judgment, as only questions of law remain.

A court's "'fundamental' objective when interpreting a statute is 'to discern and implement the intent of the legislature.'" *Estate of Bunch v. McGraw Residential Center*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012) (further citation omitted). When interpreting a statute, courts "look first to the statute's plain meaning." *Carlsen v.*

Global Client Solutions, LLC, 171 Wn.2d 486, 494, 256 P.3d 321 (2011). "Where the plain language of a statute is unambiguous and legislative intent is apparent, [the court] will not construe the statute otherwise." *Lowy v. PeaceHealth*, 174 Wn.2d 769, 778-79, 280 P.3d 1078 (2012). Plain meaning may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provisions in question." *Lowy*, 174 Wn.2d at 778 (further citation omitted). It is "fundamental that in construing any statute [the Court] avoid[s] absurd results." *Id.*

Courts are to "give effect to each word in a statute and will not adopt an interpretation that renders words useless, superfluous, or ineffectual." *BD Roofing, Inc. v. State of Wash. Dept. of L & I*, 139 Wn.App. 98, 108, 161 P. 3d 189 (2007) (further citation omitted). As indicated above, both the CPA and the WLAD are to be construed liberally. *See* RCW 19.86.920 (CPA "shall be liberally construed that its beneficial purposes may be served."); *see also,* RCW 49.60.020 ("[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."). "Ultimately, in resolving a question of statutory construction, [the] court will adopt the interpretation which best advances the legislative purpose." *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990); *see also, Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994) (Court's expansive interpretation of word "inhabitant" in WLAD upheld because it "comport[ed] with the purpose underlying the statute, to deter discrimination.").

1. Subject Matter Jurisdiction Of The Court To Hear The Case

The Defendants in their answer, assert their first affirmative defense as follows:

> 6.1 Lack of Subject Matter Jurisdiction: The Superior Court does not have a statutory grant of original jurisdiction to hear complaints

> filed under RCW 49.60, with specific limited exceptions that do not apply to this case. Washington's law against discrimination under RCW 49.60.215 allows only (a) a private right of action in Superior Court, or (b) an administrative action brought by the Washington Human Rights Commission.

Defendants' Answer (13-2-00871-5), pg. 5, para. 6.1.

"Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power." *In re Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). Subject matter jurisdiction "is the authority of the court to hear and determine the class of actions to which the case belongs." *Buehl*, 87 Wn.2d at 655. The Washington Constitution grants this Court broad authority to hear all cases in equity and law for which jurisdiction had not been vested exclusively in some other court. Wash. Const. art IV, §6; *see also, Ullery v. Fulleton*, 162 Wn.App. 596, 603-4, 256 P.3d 406 (2011) (contrasting jurisdiction of state superior courts with federal courts). As the Defendants correctly indicate in their affirmative defense, the WLAD allows only a private right of action in this Court, or an administrative action (brought by a person or the HRC *sua sponte*), which can ultimately come to this Court. *See* RCW 49.60.020 (individual right of action); *see also, e.g.*, RCW 49.60 (right of appeal from administrative law judge's order as part of HRC procedure). The Defendants argue that this case was brought under the WLAD, the AG has no right to bring it, and thus this Court has no power to hear it.

The AG responds that the Defendants are mistaken as to the statute under which their case was pled, pointing to the first paragraph of the AG's Complaint, which reads:

> 1.1 This Complaint is filed and these proceedings are instituted under the provisions of the Unfair Business Practices-Consumer Protection Act, 19.86.

AG's Complaint (13-2-00871-5), pg. 1, para. 1.1. While it is true that violation of the WLAD is a means of proving some of the necessary elements of a CPA claim, and

thus must be pled, the Defendants have provided no authority that a CPA claim is somehow converted into another action when a *per se* violation of another statute is pled as part of the CPA claim.

To hold as the Defendants suggest would frustrate the purpose of both the CPA and the WLAD: it would completely deny the AG, the sole government agency entitled to enforce the CPA, the ability to vindicate the public's interest in ending discrimination declared by the Legislature to be a *per se* unfair practice when committed "in the course of trade or commerce." RCW 49.60.030(3). Therefore, the express language, structure and clear intent of both the CPA and WLAD, leads to the conclusion that this is and remains a CPA action. RCW 19.86.920 (Purpose statement and instruction that the CPA "shall be liberally construed that its beneficial purposes may be served."); *see also*, RCW 49.60.010 (purpose statement); *and see*, RCW 49.60.020 ("[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."). Because this case is brought under the CPA, the AG has the authority to bring the action, and thus the Court has subject matter jurisdiction to hear the case. *See Ralph Williams' (I)*, 81 Wn.2d at 744 (confirming AG's authority under RCW 19.86.080 and 19.86.140 to bring CPA action).

Existing case law supports this result. In *Tacoma-Pierce County MLS v. State*, several boards of realtors argued that the AG's CPA complaint violated the doctrine of exhaustion of remedies and the doctrine of primary jurisdiction. *Tacoma-Pierce County MLS v. State,* 95 Wn.2d 280, 622 P.2d 1190 (1980). The defendant's argued that, because the unfair practices alleged were subject to regulation by the Real Estate Commission and the Department of Licensing, those administrative bodies must first have the opportunity to render decisions before the AG could act. *Tacoma-Pierce Co.*

MLS, 95 Wn.2d at 284. The Court there disposed of the exhaustion argument, and began as follows:

> [w]e disagree. This is an action under RCW 19.86 and involves violations of the Consumer Protection Act.

Id. at 284. While the case involved a claim of failure to exhaust and did not involve a *per se* violation of another statute, the rational is equally applicable: an action plead under RCW 19.86 is a CPA action, no matter its underlying subject matter. Furthermore, the AG has pled this case in the alternative, both as a per se violation of the WLAD and as a generic violation of the CPA. *See AG's Complaint* (13-2-00871-5), pg. 4, para. 5.8. Thus, even if Court were persuaded by the Defendants' argument as to the *per se* claim, the generic CPA claim would survive. The Defendants' affirmative defense as to the *per se* violation of the CPA fails as a matter of law.[9]

2. Standing Of The AG To Bring The Case

The Defendants' next affirmative defense reads:

> 6.2 Lack of Standing: Standing under RCW 19.86 cannot be used by the State to apply to an alleged violation of RCW 49.60, without undermining the intent of the legislature's grant of enforcement power to the Washington State Human Rights Commission. While adjudication of a violation under RCW 49.60 becomes a *per se* violation of RCW 19.86 once proved, it is improper for the State to prosecute a violation of RCW 49.60 claiming standing under RCW 19.86, without doing an "end run" around the enforcement provision of RCW 49.60. Moreover, Defendants allege that the Washington Attorney General's Office does not have police power with respect to either RCW 49.60, or RCW 19.86. Therefore, the Washington Attorney General's Office has no authority to act on behalf of the State in any civil capacity absent a complaint having been filed with the Attorney General's Office, or some other State agency. Upon information and belief, no complaint was ever filed in this case, with any agency of the State of Washington, including the Attorney

[9] The AG argues in the alternative that, even if this were a WLAD claim, the Court would have subject-matter jurisdiction, citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 98-99, 864 P.2d 937 (1990). This solves one problem while creating another, because the AG disclaims a right to file a complaint before the HRC. The next question would then be how the AG would have the right to bring its own WLAD claim on these facts. *See, e.g.*, RCW 49.60.230(1) (stating who may file a complaint), RCW 49.60.020 (reservation of civil and criminal rights of a person), *and see* RCW 49.60.040(19) (definition of "person"). As indicated above, the Court concludes this is not a WLAD claim, but rather a *per se* CPA claim.

> General's Office. For these reasons, Plaintiff lacks standing to bring this action.

Defendants' Answer, pgs. 5-6, para. 6.2. The AG asserts that the Defendants have mislabeled the defense as one of standing, and that the Defendants are in fact arguing 1) that the AG's action undermines the enforcement provision of the HRC, and 2) the AG cannot bring this action under the CPA without the filing of a consumer complaint. Before addressing these two arguments, it is clear the AG has standing to bring CPA actions, either as generic action or *per se* action alleging a violation of the WLAD. *See City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985) (basic test for standing "whether the interest sought to be protected by the complainant is arguably within the zone of interested to be protected or regulated by the statute"); *see also, Ralph Williams(I)*, 81 Wn.2d at 744 (confirming AG's authority under RCW 19.86.080 and 19.86.140 to bring CPA action); *and see* RCW 49.60.030(3) (violation of WLAD in trade or commerce is per se violation of CPA).

As to the first argument, that the AG's action here undermines the enforcement provisions of the HRC, the AG properly points out the Legislature drafted the WLAD to have multiple avenues to address discrimination and is to be liberally construed. *See* RCW 49.60.010, .020, *and* 030(3). As indicated above, an individual may seek redress through the commission, an action under the WLAD, or a CPA[10] action alleging a *per se* violation of the CPA due to a violation of the WLAD. This CPA action by the AG, based on a violation of the WLAD, which has as its purpose the elimination of discrimination in trade or commerce, is consistent with and furthers the intent of both statutes.

The AG points out that both the elements of a CPA action, and the potential remedies, are different from those available under a WLAD action and a HRC

[10] While the AG also filed a generic CPA action, the Individual Plaintiffs appear to have relied on the *per se* violation of the WLAD in their CPA action.

enforcement action. *Compare* RCW 19.86.080(1), *with both,* RCW 49.60.030(3), *and,* RCW 49.60.250(3). The AG is correct. The Court further concludes that if RCW 49.60.020 (confirming the absolute right of an individual to seek criminal or civil remedies in lieu of resort to the HRC) does not undermine the enforcement provisions of the HRC, it is difficult to see how the AG's action here undermines the HRC either.

As to the portion of the affirmative defense alleging that the AG lacks standing or authority to file its CPA action in the absence of a consumer complaint, because it lacks police power under the statutes in the first instance, both assertions fail as a matter of law. First, both statutes make clear that they are an exercise of police power. *See* RCW 49.60.010 (WLAD is an "exercise of the police power of the state"), *see also,* RCW 49.60.030(3) (violation of WLAD in trade or commerce is per se violation of CPA), *and see* RCW 19.86.090 (unfair or deceptive acts or practices declared unlawful). Second, there is no language within the CPA conditioning the AG's ability to prosecute upon the presence or absence of a consumer complaint. To hold as Defendants suggest, particularly in the absence of any such language in the statute, would be to construe the statute against its purpose without any basis. *Burnside*, 123 Wn.2d at 99 (purpose of WLAD is "to deter discrimination."). The Defendants' affirmative defense fails as a matter of law.

3. Failure To State A Claim Upon Which Relief May Be Granted

The Defendants next assert as follows:

> 6.3 Failure to State a Claim Upon which Relief can be Granted: For the reasons articulated in paragraphs 6.1 and 6.2 above, Plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed under Civil Rule 12(b)(6).

Defendants' Answer, pg. 6, para. 6.3. Defendants accurately cite the rule. CR 12(b)(6). That said, the AG correctly points out that this affirmative defense is, by its

express terms, derivative of the first two affirmative defenses. Because the Court concludes the first two affirmative defenses fail as a matter of law, this affirmative defense must fail as well.

4. Exhaustion Of Remedies By AG

The Defendant's fourth affirmative defense alleges:

6.4 Failure to Exhaust (or even initiate) Administrative Remedies.

Defendants' Answer, pg. 6, para. 6.4. As indicated above, this is an action under the CPA, not the WLAD. *Tacoma-Pierce Co. MLS*, 95 Wn.2d at 284. For an alleged violation of the CPA, the Court need not address exhaustion, because alleged violations of the CPA are matters for the courts, not administrative bodies. *Id.* (declining to address the elements of exhaustion because "[v]iolations of the [CPA] are not cognizable by either the Department of Licensing or the Real Estate Commission, but rather by the courts").

The Defendants' construction of the case is based on the assumption that the AG's CPA action is a WLAD action, which *Tacoma-Pierce Co. MLS* flatly rejects. Defendants contend that by pleading the CPA by way of a *per se* violation of the WLAD, there is a preliminary requirement to have fact finding done by the HRC before the AG can pursue an action in court. The Defendants reach this conclusion because the AG is not specifically mentioned in RCW 49.60.030(2) as a person with a retained right of a private action.

The answer to the Defendants' observation is that the Legislature only clarifies that a conciliatory remedy (here, resort to the HRC) does not limit other rights when it provides that conciliatory remedy in the first instance. The logical construction of the statute is that the AG is not mentioned because the remedy of the HRC as a complainant is not available to the AG in the first instance. This is the case because

the AG has independent authority to bring this action under the CPA, not as a private action but rather on behalf of the public. *See Ralph Williams (I)*, 81 Wn.2d at 746. As with the discussion of standing above, to do as the Defendants suggest would be to construe the statutes against their purpose of deterring discrimination in trade or commerce, without any textual support. *Burnside*, 123 Wn.2d at 99 (purpose of WLAD is "to deter discrimination.").

Furthermore, it makes no sense to require such a step when, for both the AG and the Individual Plaintiffs, this Court is to determine as a matter of law, based on the facts before it, "[w]hether a particular act or practice is 'unfair or deceptive'". *Panag*, 166 Wn.2d at 47. Creating such a cumbersome, delay-inducing and ultimately irrelevant predicate fact-finding requirement for the HRC from statutory silence would again be contrary to the purpose statements and directions for the construction to be given to the CPA and the WLAD.

It bears repeating: Defendants' assertion that the Legislature expressed concern that the AG might subvert the HRC appears nowhere in either statute. *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) ("...a court must not add words where the legislature has chosen not to include them."). The HRC's own rulemaking belies such a concern, deferring broadly to all matters filed in court addressing an issue before it. *See* WAC 162-08-062(2) (Abeyance – General Rule). Surely, even if the Legislature had failed to express such a concern, the HRC could and would have done so in their own rules. The Defendants' citations to other portions of the WLAD, such as RCW 49.60.350, in which the AG assists the HRC in its mission, do not compel the conclusion that the AG has a dependent or secondary role to the HRC. It simply confirms, given the purpose of the statute, that the AG has multiple roles to play. By the same token, Defendants' citation to the portion of the WLAD that grants authority to the HRC cannot be read to strip the AG of its power to

pursue this *per se* violation: both in light of the delineation of those functions, powers and duties in RCW 49.60.120 and elsewhere in the WLAD, and again remaining consistent with the purpose and liberal construction to be given both statutes.

Even assuming, for the purposes of argument, that the elements of exhaustion should be addressed (perhaps because *Tacoma-Pierce Co. MLS* did not involve a *per se* CPA claim), the result is the same. The test for the application of the doctrine, requiring a party to exhaust administrative remedies before a court will intervene, is as follows:

> (1) "when a claim is cognizable in the first instance by an agency alone"; (2) when the agency's authority "'establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties'"; and (3) when the "relief sought ...can be obtained by resort to an exclusive or adequate administrative remedy".

Tacoma-Pierce Co. MLS, 95 Wn.2d at 284 (further citation omitted). Here, the first part of the test is not satisfied, as the AG's CPA[11] claim is not cognizable in any agency at all, much less the HRC in the first instance or alone[12]. Because this is the case, the second part of the test is not satisfied either. As to the third part of the test, as the AG points out, civil penalties are not available under the WLAD, thus the third part of the test is not satisfied either. *See* RCW 49.60.250(5) (remedies available upon Administrative Law Judge finding of violation of WLAD). Failure to satisfy any part of the test prohibits application of the doctrine of exhaustion. The primary case relied upon by the Defendants in their argument is distinguishable in that it discusses administrative remedies available through the City of Lakewood in the context of a dispute regarding taxes paid by a corporation, not an action under the CPA or WLAD.

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[11] The AG argues in the alternative that if this matter is cognizable under the WLAD, there is no requirement for exhaustion under that statute, either, citing to *Cloer*. *Cloer v. United Food & Commercial Workers Int'l Union*, C05-1526JLR, 2007 WL 601426, at *3 (W.D. Wash., Feb. 22, 2007). As the Defendants rightly point out, even assuming that this case is properly considered at all by the Court, it deals only with exhaustion of individual plaintiffs. Further, it is a Federal District Court ruling, and would have no precedential value upon other Federal District Courts on this issue. By analogy, it would be as if the AG cited another Superior Court's Memorandum Order to this Court. As indicated earlier, the Court concludes this is a CPA action.

[12] Even WLAD claims are not "cognizable in the first instance by [the HRC] alone" due to the individual right of action.

Cost Management Services, Inc. v. City of Lakewood, 178 Wn.2d 635, 310 P.3d 804 (2013).

The Defendants' attempt to invoke the doctrine of "primary jurisdiction," is similarly unavailing. First, the Defendants did not plead it in their affirmative defenses. Second, as will be discussed in the Defendants' First Motion below, they fail to meet this test. *See Tacoma-Pierce Co. MLS*, 95 Wn.2d at 285 (discussing three-part test); *and see, e.g., Washington State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn.App. 174, 202, 293 P.3d 413 (2013) ("no reason for lower court to apply the primary jurisdiction doctrine and defer to the [HRC]" in individual WLAD action).

Finally, the Defendants produced correspondence that purports to be an admission by the AG that it lacks the power to institute this action. Many of these statements are clearly taken out of context (such as when speakers or writers were discussing the WLAD not the CPA). One item was a letter by a non-lawyer member of the AG's Office, which was modified from the approved form without permission. These items are not material facts. This is because "agencies do not have the power to amend unambiguous statutory language." *Caritas Services, Inc. v. Department of Social and Health Services*, 123 Wn.2d 391, 415, 869 P.2d 28 (1994). Said another way, the AG himself could not defeat the existence of a legislatively granted power by denying its existence publicly. This affirmative defense fails as a matter of law.

5. AG's Frustration Of Purpose Of HRC By Bringing The Case

The Defendants' fifth affirmative defense states:

> 6.5 Frustration of the Purpose of the enforcement provisions of RCW 49.60.

Defendants' Answer, pg. 6, para. 6.5. As addressed in discussion of the Defendants' second affirmative defense above, given the purpose statements of the CPA and

WLAD, it is difficult to see how the AG's action here undermines the HRC, when an individual's election to "bypasses" the HRC is made part of the law itself. Statutes designed to combat a legislatively declared harm are furthered, not frustrated in their purpose, by allowing more avenues for more parties to address and combat that harm. The affirmative defense fails as a matter of law.

6. Failure To Join HRC As An Indispensable Party

The final non-constitutional affirmative defense addressed in this motion is the last one listed by Defendants:

> 6.10 Failure to Join Indispensable Party: The only grant of original jurisdiction to the Superior court for violation of RCW 49.60, although inapplicable here, articulates that a claim may be brought in Superior Court by the Washington Human Rights Commission *via* the State Attorney General as counsel. Therefore, it seems appropriate that any action brought by the State Attorney General to enforce the provision of RCW 49.60 should be brought on behalf of the Washington Human Right Commission.

Defendants' Answer, pg. 7, para. 6.10 (italics in original). CR 19 requires that:

> **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a part in the action if (1) in his absence complete relief cannot be accorded among those already parties....

CR 19(a). Again, because the Court finds that this is an action brought under the CPA in which the HRC plays no role, the HRC is not an indispensable party under the rule. The presence or absence of the HRC in no way limits this Court's ability to provide relief pursuant to the statute. *See* RCW 19.86.080 (discussing available relief upon finding of violation of the statute). The rule further provides that a party is indispensable when their absence prevents them from protecting their interest in the subject matter, or creates a risk of multiple or inconsistent obligations as a result of proceeding without them. CR 19(a). Here, the HRC remains free to initiate or pursue an action. Further, the HRC has developed its own broad rule reflecting a policy of

deference to the filing of a claim such as this by suspending HRC proceedings. *See* WAC 162-08-062(2) (Abeyance – General Rule) (HRC proceedings "will be held in abeyance during the pendency of a case in federal or state court litigating the same claim, whether under the law of discrimination or a similar law…") . Again, any arguments as to the danger of inconsistent decisions between the AG and the HRC are belied by the HRC's rule and the fact that this "danger" was clearly embraced by the Legislature as to the Individual Plaintiffs. This final affirmative defense fails as a matter of law.

B. Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington

Also in Benton County Cause Number 13-2-00871-5, the Defendants have moved for summary judgment alleging that, for the same reasons listed in two of their non-constitutional defenses, the AG's Complaint must be dismissed. Again, either party may move for summary judgment. CR 56(a). Where there is a factual dispute that is material to the resolution of the motion, the Court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn.App. at 161 (1994). Where there are no disputed facts, or the factual dispute is not material and only issues of law remain to be determined, summary judgment is appropriate. *See State Farm Ins. Co. v. Emerson*, 102 Wn.2d at 480; *see also, Clements v. Travelers Indemnity Co.*, 121 Wn.2d at 249 ("A material fact is one upon which the outcome of the litigation depends."). The Court concludes that this matter is appropriate for summary judgment. To the extent that there are disputes regarding the effect of the AG's actions and written documents upon its authority to bring this

action, they are not material factual disputes in light of existing case law, and only questions of law remain.

This Court must interpret the relevant statutes "to discern and implement the intent of the legislature." *Estate of Bunch v. McGraw Residential Center*, 174 Wn.2d at 432. When interpreting a statute, courts "look first to the statute's plain meaning." *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 494, 256 P.3d 321. "Where the plain language of a statute is unambiguous and legislative intent is apparent, [the court] will not construe the statute otherwise." *Lowy v. PeaceHealth*, 174 Wn.2d at 778-79. The Legislature has directed that both the CPA and the WLAD are to be construed liberally. *See* RCW 19.86.920. (the CPA "shall be liberally construed that its beneficial purposes may be served."); *see also,* RCW 49.60.020 ("[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."). This Court is to "adopt the interpretation which best advances the legislative purpose." *Bennett*, 113 Wn.2d at 928. Here, as is the case in the motion above, rather than addressing all six of the affirmative defenses in its answer to the AG's complaint, the Defendants address two of the six, and raise a third.

1. Standing Of The AG To Bring The Case

The Defendants assert that the AG has, for over 30 years, "refused to address discrimination complaints," and has instead deferred to the HRC. The Defendants further assert that this deference is required by the WLAD. As to the assertion that the AG has never filed a CPA action premised on a *per se* violation of the WLAD, the AG concedes the point. However, as the AG correctly points out, the fact that this is the first such action filed by the AG is not a bar to the present action. Whether the argument is that the failure to exercise a power results in it being lost, or that that failure leads those who may be in violation of the law to believe the law will not be

enforced, the result is the same: the power remains. In *Longview Fibre*, that company made just such an argument, saying this long history of operating scrubbers with holes "lulled" them into believing that they were "satisfying [their] legal obligation." *Longview Fibre Co. v. Department of Ecology*, 89 Wn.App. 627, 636, 949 P.2d 851 (1998). The Court then stated:

> [b]ut the holes that DOE had discovered earlier were substantially smaller than those at issue here, and Longview Fibre had promptly repaired them. *Further, an administrative agency's acquiescence at an earlier time does not estop it from enforcing the law at a later date.*

Longview Fibre Co., 89 Wn.App. at 636-37 (italics added); *see also, Good v. Associated Students Of University Of Washington*, 86 Wn.2d 94, 765-66, 542 P.2d 762 (1975) ("Failure to exercise a power which is statutorily vested in a body…does not mean that the power does not exist."). Were this not the rule the acts (or non-action) of one AG could defeat the intent of the Legislature to grant of authority to that AG as well as to his or her successor. The rationale is the same as not allowing a legislative granted power to be destroyed by the statements of the holder of that power. *Caritas Services, Inc.*, 123 Wn.2d at 415. Further, as the AG observes, this enforcement authority delegated to it by the Legislature is given great deference in when and where it is exercised. *See, e.g., State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) (discussing prosecutorial discretion). Said another way, the fact that this is the first such CPA action, when the AG has declined to take action on other similar complaints since sexual orientation discrimination was added to the WLAD in 2006[13] has no legal significance: the AG gets to pick when and if to file based on the AG's determination of the public interest and the AG's assessment of the strength of each case.

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[13] While the failure of past AGs to file this type of action are not legally significant, it is worthy of note that the current AG assumed office on January 16, 2013. While sexual orientation has been part of the WLAD since 2006, same-sex marriage was approved on November 2, 2012, so this particular cause of action was only factually available for approximately five months before these charges were filed. In fact, the Defendants employ the recent change in the state of the law in their argument regarding personal liability for Stutzman, below.

The Defendants cite to four AG opinions from prior AGs, ranging from 1975 to 2002, asserting that they demonstrate the AG's deference to the HRC's role in defining and determining what constitutes discrimination under the WLAD. When read in context, none of the opinions support such a conclusion.[14] But assuming for the purposes of argument that they did, this would still not raise an issue of material fact, because the holder of a legislative grant of power cannot destroy it through his or her own statements. *Caritas Services, Inc.*, 123 Wn.2d at 415.

The Defendants also assert that the AG is required to defer to the HRC in a *per se* CPA action where discrimination is alleged. The Defendants cite to RCW 49.60.120(4), for the proposition that the Legislature has "established the WHRC to review and pass upon a discrimination claim on behalf of the State as an 'unfair act or practice' as defined in the WLAD." RCW 49.60.120(4) (stating among HRC powers "[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter."). As indicated above, the Defendants read the HRC's separate conciliatory role as defeating the AG's independent enforcement role, and in this the Defendants are mistaken. The AG has independent authority to bring an action under the CPA based on a *per se* violation of the WLAD, consistent with the required liberal constructions of both statutes to achieve their purpose of deterring discrimination in trade or commerce. RCW 19.86.080(1) gives the AG authority to file the CPA action, while RCW 49.60.030(3) declares discrimination in trade or commerce a per se violation of the CPA. As the AG points out, had the Legislature wanted the WLAD to limit the AG's authority in what it had announced was "a matter of state concern," surely it could and would have done so in RCW 49.60.030(3). Clearly it did not.

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[14] Further, as the AG notes, the language in one of the cases cited therein, *Loveland v. Leslie*, 21 Wn.App. 84, 88, 583 P.2d 664 (1978) doesn't stand for the proposition that the HRC's "reconciliatory efforts" are jurisdictional, preventing the AG from acting. Rather, it holds that the HRC itself needs to follow its own rules requiring good faith efforts at reconciliation and those rules are jurisdictional as to the HRC's own decisions.

The cases cited by the Defendants do not hold otherwise. *Hegwine v. Longview Fibre Co.*, is limited in pointing out the degree of deference that is given by this Court to regulations (WACs) created by the HRC. *Hegwine v. Longview Fibre Co.,* 162 Wn.2d 340, 349, 172 P.3d 688 (2007). There deference is given only when the HRC's interpretations do not conflict with the Legislature's intent in enacting the WLAD. *Hegwine,* 162 Wn.2d at 349 ("Moreover, so long as the Commission's interpretations do not conflict with the legislative intent underlying the WLAD, this court will often give 'great weight' to those interpretations."). The case says nothing about restricting the AG. The WLAD grants general jurisdiction to the HRC, but does not grant it exclusive jurisdiction, with powers, but not the sole power to combat discrimination. *See* RCW 49.60.010. The Legislature's scope of powers granted to the HRC are consistent with that of an administrative body charged with, among other powers, investigation, mandatory efforts toward conciliation, administrative fact finding and administrative remedies. *See* RCW 49.60.050 *et. seq*. Nowhere therein is there any indication express or implied, that the HRC gets to order the AG to do anything, particularly when it acts under its CPA authority. By way of example, the Defendants cite to RCW 49.60.340(1) and (2), as an example of how the AG's role is to validate the HRC's action. Therein, an aggrieved individual in a real estate transaction, where the HRC has found "reasonable cause" for discrimination may institute a civil action by providing notice to the HRC. The Defendants make much of the fact that, upon election by the aggrieved person, the AG "shall" commence a civil action on that person's behalf. *See* RCW 49.60.340(2). The Defendants fail to recite that the HRC also "shall" act upon notice by the aggrieved person, and authorize the action within 30 days. *See* RCW 49.60.340(2). No timeframe is given for the AG to act. *Id.* These provisions simply stand for the proposition that when an individual has

gone through the HRC's process in a real estate matter, and has a finding in their favor, that person can require both the HRC and the AG to institute an action in court.

The HRC has no independent authority to file a case in court. It is dependent upon the AG to get it there, and it only gets to go to court where the Legislature had deemed it necessary. Nothing in this structure of the WLAD implies that the HRC controls the AGs actions when the AG brings a CPA case with an allegation of discrimination. The Defendants make the AG's point when they observe that "[n]othing about this conciliatory administrative process, which the Legislature entrusted to the WHRC, is even remotely similar to the general prosecutorial function that the Legislature assigned to the Attorney General under the CPA." For these reasons, and those relating to the purpose and construction of both statutes indicated above, the Defendants' affirmative defense fails as a matter of law.

2. Exhaustion Of Remedies By AG

As indicated above, this is an action under the CPA, not the WLAD, and thus the doctrine of exhaustion of remedies is inapplicable. *Tacoma-Pierce Co. MLS*, 95 Wn.2d at 284. The Defendants next attempt to invoke the doctrine of "primary jurisdiction." There are two barriers to applying this doctrine in this case.

First, the Defendants did not plead primary jurisdiction in their affirmative defenses. *See Defendants' Answer (13-2-00871-5)*, pgs. 5-7, paras. 6.1-6.10. Second, they fail to meet this three-part test. To apply the doctrine the court must find:

> (1) The administrative agency has the authority to resolve the issues that would be referred to it by the court. In the case of antitrust actions, the statutory authority of the agency in some [w]ay must limit the applicability of the antitrust laws;
> (2) The agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and

> (3) The claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme so that a danger exists that judicial action would conflict with the regulatory scheme.

Tacoma-Pierce Co. MLS, 95 Wn.2d at 285 (citations omitted). Again, as with the discussion of exhaustion, the HRC has no authority to resolve a CPA claim and only the AG is empowered to act. For the same reason, the second and third parts of the test are not satisfied either. Finally, even if this were a WLAD action, primary jurisdiction would be unavailable. *See, e.g., Washington State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn.App. 174, 202, 293 P.3d 413 (2013) ("no reason for lower court to apply the primary jurisdiction doctrine and defer to the [HRC]" in individual WLAD action).

It makes no sense to have the AG's exercise of police power dependent upon the HRC's distinctly different conciliation process. At argument, Defendants did not commit to whether the AG had independent power to access this HRC fact-finding process and did not describe how the AG would get approval from the HRC to institute an action. Their argument that the existence of the HRC completely vindicates the State's interest in this area is belied by the purpose and construction of both the CPA and the WLAD.

C. Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman In Her Personal Capacity

Where there are no disputed facts and only issues of law remain to be determined, summary judgment is appropriate. *See Emerson*, 102 Wn.2d at 480; *see also, Clements*, 121 Wn.2d at 249. In both Benton County Cause Numbers 13-2-00871-5 and 13-2-00953-3, claims are made against Defendant Barronelle Stutzman in her personal capacity. In Benton County Cause Number 13-2-00953-3, Individual Plaintiffs' Second Cause of Action, alleges "aiding and abetting" a violation of the

WLAD. As to both claims addressed in this motion, the parties agree that summary judgment is appropriate. The parties agree that Defendant Barronelle Stutzman is the president, owner and operator of Defendant Arlene's Flowers, Inc. d/b/a Arlene's Flowers and Gifts. The parties also agree that Ms. Stutzman and her husband are the sole corporate officers and that the company was and is licensed to do business in the State of Washington. Further, the parties agree that Stutzman has maintained the corporate form. Finally, the parties also agree that, on March 1, 2013, it was Stutzman who informed Ingersoll that because of her beliefs, she could not do the flowers for his wedding. There are no material factual disputes and only questions of law remain.

The duty of the Court remains the same: "to discern and implement the intent of the legislature.'" *Estate of Bunch*, 174 Wn.2d at 432. The legislature has directed that both the CPA and the WLAD are to be construed liberally to fulfill their purposes. *See* RCW 19.86.920; *see also,* RCW 49.60.020.

1. Personal Liability of Defendant Barronelle Suzan

The Defendants observe that Washington law provides broad protection for corporate officers in their personal capacity, honoring the corporate form and prohibiting suits against corporate officers absent exceptional circumstances, such as when a corporate officer knowingly engages in fraud, misrepresentation, or theft. Because there is no such claim on behalf of the AG or the Individual Plaintiffs, Defendants argue that Stutzman cannot be found personally liable as a corporate officer of Arlene's Flowers as a matter of law. Therefore, Defendants' argue that, while the claim against Arlene's Flowers survives, the claim against Stutzman herself must be dismissed.

The rule regarding respect for the corporate form is well-settled:

> [w]hen the shareholders of a corporation, who are also the corporation's officers and directors, conscientiously keep the affairs of the corporation

> separate from their personal affairs, and no fraud or manifest injustice is perpetrated upon third-persons who deal with the corporation, the corporation's separate entity should be respected.

Grayson v. Nordic Construction Co., 92 Wn.2d 548, 552-53 (1979). Further, as the Court in *Grayson* observed, "a corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person." *Grayson*, 92 Wn.2d at 552. The corporate form will be disregarded, and the court will "pierce the corporate veil," in several instances: when the corporate form is disregarded, such that it can be said that the corporation ceases to exist (the "alter ego" theory), or the above mentioned manifest injustice/fraud exception. *Id.* at 552-53. The Defendants argue that, because there is no "fraud, misrepresentation, or some form of manipulation of the corporation," the corporate form should be respected. *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410 (1982). Defendants argue that, because the AG and the Individual Plaintiffs cannot show that Stutzman knowingly violated the law (in part because same-sex marriage was only approved by Measure 74 on Nov. 6, 2012, less than four months before these events) personal liability is improper.

Both the AG and the Individual Plaintiffs respond that this argument misses the point: "piercing the corporate veil" is unnecessary, because the relevant statutes impose liability based on Stutzman's participation in the conduct. They both observe that the Defendants' own case, *Grayson*, makes this point:

> [a]lthough the trial court improperly pierced Nordic's corporate veil on the alter ego theory, we nonetheless find that personal liability was properly imposed on Bergstrom under the rule enunciated in *State v. Ralph Williams' North West Chrysler Plymouth Inc.[Ralph Williams' III]*, 87 Wash.2d 298, 553 P.2d 423 (1976). If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, was well as the corporation, is liable for the [illegible] *supra*; *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wash.2d 745, 489 P.2d 923 (1971). In *Ralph Williams*, this court considered a deceptive practice in violation of the Consumer Protection Act to be a type of

> wrongful conduct which justified imposing personal liability on a participating corporate officer.

Grayson, 92 Wn.2d at 553-4. Both in *Ralph Williams' (III)* and in *Grayson*, piercing the corporate veil was unnecessary to find individual liability. This is the case because of the structure of the CPA, which by definition imposes liability upon the corporation and the individual as alleged in these actions. The WLAD is also similarly broad in scope.

The CPA includes both individuals and corporations within its reach. *See* RCW 19.86.080 (AG may bring action "against any person"); *see also,* RCW 19.86.010(1) ("'Person' shall include, where applicable, natural persons, corporations…."). The scope of liability in the WLAD is also broad. *See* RCW 49.60.040(19) (defining "person" to include "*one or more individuals… corporations…it includes any owner, lessee, proprietor, manager, agent or employee…*") (italics added); *see also,* RCW49.60.215(1) ("It shall be an unfair practice for *any person or the person's agent or employee* to commit an act which directly or indirectly results in any distinction, restriction, or discrimination…") (italics added). The liberal construction to be given these terms to eliminate all forms of discrimination is driven home by case law: as where the term "employer" was broadly construed to include "both the individual supervisor who discriminates and the employer for whom he or she works." *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 354-57, 20 P.3d 921 (2001) (holding individual supervisor liable under WLAD).

Further, both Plaintiffs respond that knowing or intentional discrimination is not necessary for liability under either statute. Plaintiffs are correct. *See Wine v. Theodoratus*, 19 Wn.App. 700, 706, 577 P.2d 612 (1978) (CPA "does not require a finding of an intent to deceive or defraud," and "good faith on the part of the [violator] is immaterial"); *see also Lewis v. Doll*, 53 Wn.App. 203, 210, 765 P.2d 1341 (1989) ("Nor is the fact that [defendant] did not intend a discriminatory effect relevant.")

(WLAD cause of action). Finally, as admitted by Stutzman, she not only participated in the conduct alleged, her own personal actions (in defining corporate policy and in her interaction with Ingersoll) constitute the sum total of the conduct complained of by Plaintiffs. The Defendants' motion for partial summary judgment is denied in part as to Plaintiffs' claims against Barronelle Stutzman in her personal capacity.

2. Aiding and Abetting Liability of Defendant Barronelle Stutzman

As to Benton County Cause Number 13-2-00953-3, Defendants contest the validity of the Individual Plaintiffs' Second Cause of Action, which alleges "aiding and abetting" an act in violation of the WLAD. As Defendants observe, the only act alleged therein is the refusal[15] to sell flowers to the Individual Plaintiffs by Stutzman:

> 27. Because she refused to sell flowers to Mr. Ingersoll and Mr. Freed for their wedding, defendant Barronelle Stutzman aided Arlene's Flowers in violating the Washington Law Against Discrimination by discriminating against the Plaintiffs on the basis of their sexual orientation.

Individual Plaintiffs Complaint, pg. 5, para. 27. Defendants respond that RCW the references in 49.60.220:

> to "aid, abet, encourage, or incite" and to "prevent any other person from complying" show that the statue applies only where the actor is attempting to or has involved a third person in conduct that would violate the WLAD.

Jenkins v. Palmer, 116 Wn.App. 671, 675-76, 66 P.3d 1119 (2003). The WLAD's aiding and abetting language does not apply to an individual "acting alone." *Jenkins*, 116 Wn.App. at 676. The Individual Plaintiffs concede the point, as they must. The Defendants' motion for partial summary judgment is granted in part as to the Individual Plaintiffs' Second Cause of Action.

[15] The Defendants characterize this as "declining" to provide services. While each party is free to choose its own descriptors, legally this is a distinction without a difference: the focus is on the actual conduct of the parties.

IV. CONCLUSION

The Defendants' non-constitutional affirmative defenses, and their motion to dismiss the claims against Barronelle Stutzman in her personal capacity fail because they ask for less: less liability on behalf of Stutzman and Arlene's Flowers. The Legislature, through its purpose statements and directions for construction of the WLAD and the CPA clearly demands more: more avenues to address claims of discrimination in trade or commerce through allowing both individuals and the AG to institute the present actions, and more liability through a broad definitions extending liability to both corporations and individuals. Because the Defendants' affirmative defenses and motions to limit personal liability run contrary to the express intention of the Legislature as well as the Legislature's direction for how these statutes are to be constructed, they must fail as a matter of law.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's (State of Washington's) Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses is **GRANTED.**
2. Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington is **DENIED.**
3. Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman In Her Personal Capacity is **DENIED IN PART** and **GRANTED IN PART.**

IT IS SO ORDERED.

DATED this 7th day of January, 2015.

Alexander C. Ekstrom

ALEXANDER C. EKSTROM
Benton County Superior Court Judge