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SUPREME COURT
STATE OF WASHINGTON
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NO. 97576-1

SUPREME COURT OF THE STATE OF WASHINGTON

DUANE YOUNG,

Petitioner,

v.

TOYOTA MOTOR SALES, U.S.A., INC.,

Respondent.

AMICUS BRIEF OF THE ATTORNEY GENERAL FOR THE STATE OF WASHINGTON

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I. INTRODUCTION

Washington case law is clear that proving deception is a question of law for the courts, and courts need not make a separate finding of materiality in order to find a particular act or practice deceptive under the Washington Consumer Protection Act (CPA), RCW 19.86. The Attorney General opposes the Court of Appeals' analysis of deception under the CPA to the extent the court suggests that Toyota's practice could not be deemed deceptive if the practice was "financially immaterial" to the consumer's purchasing decision. The appeals court's erroneous analysis would only serve to limit the reach of the Attorney General's CPA enforcement authority while encouraging a race-to-the-bottom marketing strategy for businesses. These outcomes are anathema to the CPA's purpose "to protect the public and foster fair and honest competition." RCW 19.86.920. The Court of Appeals' analysis is in conflict with this Court's decisions as well as other published decisions of the Court of Appeals applying this Court's rulings, and it involves an issue of substantial public interest. RAP 13.4(b)(1)-(2), (4).

II. INTEREST OF AMICUS CURIAE

Amicus Curiae is the Attorney General for the State of Washington. The Attorney General is specifically authorized under the CPA to bring actions on behalf of the State of Washington to protect consumers from

unfair and deceptive acts or practices in trade or commerce. Private parties may also bring actions under the CPA. RCW 19.86.090. Legitimate actions by private litigants supplement the Attorney General's efforts and vindicate consumers' rights. The Attorney General has a significant interest in ensuring that the CPA is properly construed in all actions.

The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). The legislature intended for the Attorney General to have the opportunity to participate in private-litigant CPA cases, as evidenced by the statutory requirements that the Attorney General be served with any complaint for injunctive relief under the CPA and with any appellate brief that addresses any provision of the CPA. RCW 19.86.095.

The Attorney General respectfully submits this amicus curiae brief to provide the Court with additional briefing to address the proof necessary to establish deception under the CPA.[1]

III. ISSUE PRESENTED BY AMICUS

In determining whether an act or practice is deceptive under the CPA, must the court make a separate finding of materiality?

[1] The Attorney General limits his brief to the issues presented and does not take a position on the merits of this action.

IV. ARGUMENT

A. The Court Should Accept Review Because the Court of Appeals' Requirement of a Separate Finding of Materiality to Establish a Deceptive Act or Practice Under the CPA Conflicts with Washington Jurisprudence.

Under the CPA, "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. Washington courts may be guided by final decisions of the federal courts and final orders of the Federal Trade Commission (FTC) in construing the CPA, RCW 19.86.920, but federal decisions are not binding authority. *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 275, 501 P.2d 290 (1972) (this Court noting that "the question of what constitutes . . . an 'unfair or deceptive act or practice' under RCW 19.86.020 is for us, rather than the federal courts, to determine"); *see also Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009). As discussed below, because Washington courts have already established a standard for what deception is under the CPA, and because the FTC standard differs in requiring a separate showing of materiality, this Court need not and should not adopt the federal framework.

In the years since the state legislature enacted the CPA, "Washington has developed its own jurisprudence regarding application of Washington's CPA." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295

P.3d 1179 (2013). Under Washington jurisprudence, deception is a question of law for courts to decide. *Panag*, 166 Wn.2d at 47, 48 ("Given that there is 'no limit to human inventiveness,' courts . . . must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purpose of the CPA.").

This Court has firmly established that neither intent to deceive nor evidence of consumer reliance is required to establish a deceptive practice under the CPA. "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. The purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co*., 105 Wn.2d 778, 785, 719 P.2d 531 (1986) (citations omitted) (emphasis in original).

Because the court is focused on the capacity to deceive, "[a] claimant need not prove consumer reliance" to establish deception under the CPA. *State v. Ralph Williams' North West Chrysler Plymouth, Inc*., 87 Wn.2d 298, 317, 553 P.2d 423 (1976). Rather, in cases where this Court has found deception under the CPA, it has looked for information that *could be* of importance to a reasonable consumer – and hence material – without focusing on any evidence of actual consumer reliance. *See Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc*., 162 Wn.2d

59, 74-75, 170 P.3d 10 (2007) (practice was deceptive when it had a capacity to deceive consumers that the surcharge was FCC-regulated and -required and "could be of material importance to a customer's decision to purchase the company's services"); *Panag,* 166 Wn.2d at 47 (notices were deceptive because they "may induce people to remand payment under the mistaken belief they had a legal obligation to do so"); *Bowers v. Transamerica Title Ins. Co*., 100 Wn.2d 581, 592, 675 P.2d 193 (1983) (insurer's unauthorized practice of law conduct "certainly has the capacity for such deception" since "[p]otential clients might readily and quite reasonably believe" the agents were qualified). As borne out by these cases, "the implicit understanding of deception under the CPA is that 'the actor *misrepresented* something of material importance.'" *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011) (quoting *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998)) (emphasis in original). Even so, this Court had never required plaintiffs to present evidence that consumers considered and relied upon the misrepresentation in making their purchasing decisions in order to establish deception under the CPA, as the Court of Appeals has done here.

Rather than focusing on the "capacity to deceive," or what a reasonable consumer could find important, the Court of Appeals stated, "We need address only materiality to affirm the [trial] court's conclusion

that Mr. Young failed to prove a deceptive act or practice . . . . [T]he [trial] court rejected Mr. Young's assertion that he, personally, was induced by the mistake to buy the limited package. Mr. Young produced no evidence that the mistake would have been material to others." *Young v. Toyota Motor Sales, U.S.A*., 9 Wn. App. 2d 26, 35-36, 442 P.3d 5 (2019).

The Court of Appeals' decision was incorrect on this point. This Court had never separately required a plaintiff to prove materiality by demonstrating how the deceptive act or practice factored into the plaintiff's overall purchasing decision, nor had any other court, since, as noted, consumer reliance is not a required element of deception under the CPA. Washington jurisprudence has not required a separate finding of materiality in determining deception under the CPA.

The Court of Appeals cited *In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 1984 WL 565319 (1984), as support for its decision. *Cliffdale*, an FTC decision from 1984, noted that "[t]he [FTC] will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third the representation, omission, or practice is material." *Id*. at 1984 WL 565319 at *37 (citing FTC's 1983 Policy Statement on Deception).

The FTC's deception standard and the deception standard established under longstanding Washington CPA case law feature subtle yet important differences. While section 5 of the FTC Act, 15 U.S.C.A. § 45(a)(4)(A)(ii), specifically requires a finding of "material" representations, omission, or practices, neither the Washington legislature nor this Court has included that in the state's framework. Rather, in 1986 – in the years following *Cliffdale* and the FTC's 1983 Policy Statement on Deception – this Court set out its own specific, five-factored analysis with respect to private CPA actions:

> We hold that to prevail in a private CPA action and therefore be entitled to attorney fees, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. . . . A successful plaintiff is one who establishes all five elements of a private CPA action.

Hangman Ridge, 105 Wn.2d at 780, 795. The *Hangman Ridge* analysis establishes the five required elements of a private CPA claim. *See, e.g., Panag*, 166 Wn.2d at 37; *Indoor Billboard*, 162 Wn.2d at 74. Since *Hangman Ridge*, the legislature has not taken it upon itself to amend the CPA to include any other elements, including materiality.

Materiality does not appear as a separate element in *Hangman Ridge* nor is it discussed at all. To require a separate showing of materiality now would seem to go outside the *Hangman Ridge* analysis. This Court had

previously rejected a call to adopt a sixth element beyond the five-factored *Hangman Ridge* analysis. *See Panag*, 166 Wn.2d at 38 (declining request to add proof of a consumer transaction between parties as a required element of a private CPA claim, noting "a 'successful plaintiff' is 'one who establishes all five elements of a private CPA action'" under *Hangman Ridge,* and "[w]e will not adopt a sixth element"). For similar reasons, with respect to materiality, this Court should reject the call now.

B. This Court Should Accept Review Because the Court of Appeals' Focus on Financial Materiality Would Limit the Scope of the CPA, Contrary to Legislative Intent.

The Attorney General urges this Court to reject the appeals court's "financial materiality" analysis, which serves only to limit the reach of the CPA in cases where misrepresentations have been made but only in small-dollar amounts. The appeals court made the following determinations with regard to the mislabeling on the Monroney label on Mr. Young's truck:

> Toyota's mistake was found to be financially immaterial because purchasers of the limited package were never charged for the $10 temperature gauge. We will not presume that a $10 part for which the consumer was not charged was material to purchase of the $7,525 model 2014 limited package. . . . Mr. Young presented no credible evidence that the temperature gauge error was material to him, and no evidence whatsoever that it was material to other consumers.

Young, 9 Wn. App. 2d at 38.

The appeals court's analysis is erroneous. Deception is not based on actual evidence that consumers were induced to make purchases based in part to the deceptive statement[2]—with good reason, as it would otherwise encourage companies to fill their marketing with "financially immaterial" misrepresentations, limited only by the reach of "human inventiveness." *Panag*, 166 Wn.2d at 48; *see Young*, 9 Wn. App. 2d at 42 (Fearing, J., concurring) ("Some people cannot help themselves from repeatedly acting and speaking deceptively even when their conduct and speech lacks materiality."). If financial materiality were the predicate for establishing deception under the CPA, could a company lie about some small fee that it was charging to hundreds of consumers, if those consumers could not otherwise present evidence that the misrepresentation was material to their purchasing decisions? Could a company slip in a misleading statement about a service offered to consumers for free as part of a much larger and expensive package?

To be clear, the Attorney General does not suggest that *any* deceptive statement alone establishes a private CPA claim; to the contrary, every element of the five-factor *Hangman Ridge* analysis must be satisfied

[2] Additionally, what was supposed to be a question of law for the courts would devolve into questions of fact about whether and to what extent a misstatement could be financially material to a consumer in inducing him or her to make a purchase. Proof of actual consumer reliance is not required, whether for Mr. Young or for any other consumers impacted by the erroneous Monroney label. *Ralph Williams*, 87 Wn.2d at 317.

before a plaintiff may establish a viable CPA action. A deceptive statement for which a plaintiff suffered no injury would not suffice. *See Young*, 9 Wn. App. 2d at 43 (Fearing, J., concurring) ("A lack of materiality will generally preclude recovery under the [CPA] because of the act's fourth and fifth elements of injury and causation.").

When the Attorney General brings a CPA action, he does so on behalf of the State and must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact. *Kaiser*, 161 Wn. App. at 719. To forgive deceptive yet "financially immaterial" statements would be to allow certain deceptive practices to evade CPA enforcement by the Attorney General. This could not have been the intent of the legislature when it enacted the CPA to protect the public and foster fair and honest competition. RCW 19.86.920. It would also not allow the CPA to "be liberally construed [in such a way] that its beneficial purposes may be served." *Id.*

V. CONCLUSION

Contrary to the Court of Appeals' ruling, in determining whether an act or practice is deceptive under the CPA, the court need not make a separate finding of materiality, and further, that financial materiality does not preclude recovery under the CPA. For these reasons, the Attorney General respectfully urges this Court to grant the petition for review.

RESPECTFULLY SUBMITTED this 21st day of October, 2019.

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The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the date below, I caused a true and correct copy of the foregoing to be served on the following:

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DATED this 21st day of October, 2019 at Seattle, Washington.

s/ Angelina Boiko
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October 21, 2019 - 4:08 PM

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Appellate Court Case Title:	Duane Young, et al v. Toyota Motor Sales, USA
Superior Court Case Number:	15-2-01859-5

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