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SUPREME COURT OF THE STATE OF WASHINGTON

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MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

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BRIEF OF *AMICUS CURIAE*  
ATTORNEY GENERAL OF WASHINGTON

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## I. INTEREST OF AMICUS

Amicus curiae is the Attorney General of Washington. The Attorney General filed an amicus curiae brief in this matter before the Court of Appeals. The Attorney General submits this further brief to supplement its arguments in light of this Court's decision in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*,<sup>1</sup> which this Court decided subsequent to the Court of Appeals' decision below.

The Attorney General has the power to file amicus curiae briefs in matters that affect the public interest, such as this case.<sup>2</sup> The Attorney General has express authority to enforce the Consumer Protection Act (CPA).<sup>3</sup> Further, the Attorney General has an interest in the development of CPA caselaw in Washington.<sup>4</sup>

## II. ISSUE PRESENTED BY AMICUS

How does the proximate cause standard set forth in *Indoor Billboard* affect the analysis causation analysis in private CPA actions?

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<sup>1</sup> 162 Wn.2d 59, 170 P.3d (2007).

<sup>2</sup> See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

<sup>3</sup> RCW 19.86.080.

<sup>4</sup> RCW 19.86.095 (plaintiffs must serve the Attorney General with any CPA complaint for injunctive relief and with any appellate brief that addresses the CPA).

### III. ARGUMENT

This appeal involves certain businesses practices of defendant-petitioner AT&T Wireless Services, Inc. (AWS), a wireless telecommunications provider. The plaintiffs-respondents are consumers who sued AWS pursuant to the CPA, alleging that AWS did not disclose that it would charge them a Universal Connectivity Charge (UCC) in addition to the advertised price, and that AWS improperly included the UCC on their bills under the heading "Taxes, Surcharges, and Regulatory Fees."

The Legislature has provided consumers, like the plaintiffs-respondents, with the ability to bring a private action pursuant to the CPA.<sup>5</sup> To bring a successful private action, a consumer must demonstrate five elements: (1) an unfair or deceptive act or practice, (2) that occurs in trade or commerce, (3) that affects the public interest, (4) injury to the consumer's business or property, and (5) a causal link between the unfair or deceptive practice and the consumer's injury.<sup>6</sup> With respect to the elements of a CPA claim, this appeal involves only how consumers must prove the causation element.

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<sup>5</sup> RCW 19.86.090.

<sup>6</sup> *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

**A. Under the CPA and this Court's Decision in *Indoor Billboard*, Consumers Do Not Have to Prove Individual Reliance In Order to Satisfy the Causation Element. The Trial Court's Decision to Require the Consumers to Prove Individual Reliance Was Error.**

One of the issues before the Court of Appeals was whether consumers must prove actual reliance in order to prove the causation element of a private CPA case.<sup>7</sup> At the time the Court of Appeals issued its decision, this Court had yet to define the proof required to establish causation in a private CPA claim.<sup>8</sup> However, this Court has since elaborated on the level of proof required to meet the causation requirement. In *Indoor Billboard*, this Court did not establish reliance as a requirement to prove causation; rather, the Court announced the standard that a consumer must prove that the defendant's unfair or deceptive proximately caused the injury.<sup>9</sup>

At issue before the Court of Appeals was whether the trial court had applied the proper causation standard.<sup>10</sup> The trial court held that each plaintiff must "show that AWS' alleged misrepresentation about the plaintiff's obligation to pay a UCC affected the plaintiff's decision to

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<sup>7</sup> *Schnall v. AT&T Wireless Servs., Inc.*, 139 Wn. App. 280, 285, 161 P.3d 395 (2007), review granted 163 Wn.2d 1022, 185 P.3d 1194 (2008).

<sup>8</sup> See *Indoor Billboard*, 162 Wn.2d at 79 (citing *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 196-97, 35 P.3d 351, cert. denied sub nom *Bebrick v. Holland America Line-Westours, Inc.*, 536 U.S. 941 (2002)).

<sup>9</sup> *Id.* at 84.

<sup>10</sup> *Schnall v. AT&T Wireless*, 139 Wn. App. at 285, 289-292.

choose AWS as a wireless provider.”<sup>11</sup> Actual reliance was implicit in this ruling because it meant that each consumer in the class would be required to prove individually that he or she relied on information (or lack of information) provided by AWS in choosing service from AWS. By framing causation in terms of reliance, the trial court improperly re-defined the injury as the consumer’s decision to make the purchase, rather than their payment of more than the advertised price for the service. In reversing the trial court, the Court of Appeals held that “reliance is not the only means by which causation can be proven in CPA cases.”<sup>12</sup> This interpretation of the causation element is consistent with *Indoor Billboard*.

In adopting the proximate cause standard in *Indoor Billboard*, this Court explained that proximate cause in a CPA case can be established by showing a causal link between the unfair or deceptive act and injury in different ways.<sup>13</sup> This ruling is consistent with the Legislature’s mandate that the CPA be liberally construed.

*Indoor Billboard* made plain that consumers may sustain a prima facie private CPA claim under RCW 19.86.090 with evidence that they paid an invoice, when payment of that invoice was the causal link between

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<sup>11</sup> CP 422.

<sup>12</sup> *Schnall v. AT&T Wireless*, 139 Wn. App. at 292.

<sup>13</sup> *Indoor Billboard*, 162 Wn.2d at 84.

an unfair or deceptive act or practice and the consumer's injury.<sup>14</sup> The Court held that such evidence "may or may not be sufficient to demonstrate a causal connection between the misrepresentation of fact and damages, but payment of the invoice may be considered with all other relevant evidence on the issue of proximate cause."<sup>15</sup> This ruling makes sense given that, under the CPA, causation is meaningful only in relation to the deceptive act or practice and the injury sustained.

The proximate cause standard would not defeat class certification where the elements of a CPA violation, including the causal link, are common to the class.<sup>16</sup> However, imposing an individual reliance standard for each consumer in a class would threaten the viability of consumer class actions under the CPA. This result would be contrary to the public policy favoring enforcement of the CPA through private class actions:

Courts have previously held that class actions are a critical piece of the enforcement of consumer protection law. The reason is clear. Without class actions, many meritorious claims would never be brought. Class actions are vital where the damage to any individual consumer is nominal....Thus, we conclude that without class actions,

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g., Smith v. Behr Process Corp*, 113 Wn. App. 306, 319-23, 54 P.3d 665 (2002). The fact that class members eventually may have to make an individual showing of damages does not preclude class certification. *Id.* at 323.

consumers would have far less ability to vindicate the CPA.<sup>17</sup>

In reversing the trial court's imposition of a reliance requirement, the Court of Appeals' properly construed the CPA and ruled consistently with this Court's holding in *Scott v. Cingular Wireless* that consumer class actions should not be curtailed in violation of public policy.

**B. The Court of Appeals' Decision to Reverse the Trial Court's Imposition of a Reliance Requirement Is Not Affected By Its Reliance on *Pickett v. Holland America Line-Westours*.**

The Court of Appeals issued its decision below before this Court issued its decision in *Indoor Billboard*. The Court of Appeals relied on *Pickett v. Holland America Line-Westours*<sup>18</sup> as authority for its ultimate conclusion that the trial court erred in ruling that the consumers must prove individual reliance in order to demonstrate causation.<sup>19</sup> This conclusion is consistent with *Indoor Billboard*. However, in *Indoor Billboard* this Court held that the *Pickett* causation analysis went too far in deciding that payment of an invoice is "per se sufficient to establish the proximate cause" of the consumer's injury.<sup>20</sup>

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<sup>17</sup> *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853-54, 161 P.3d 1000 (2007).

<sup>18</sup> 145 Wn.2d 178, 35 P.3d 351, cert. denied sub nom *Bebdrick v. Holland America Line-Westours, Inc.*, 536 U.S. 941 (2002).

<sup>19</sup> *Schnall*, 139 Wn. App. at 292.

<sup>20</sup> *Indoor Billboard*, 162 Wn.2d at 83-84. See also *id.* at 81 (rejecting *Pickett's* holding that "[c]ausation inheres in the fact that the plaintiffs purchased cruise tickets"); *Pickett* involved a class action against a cruise line alleging that the cruise line had misrepresented that certain charges were mandatory fees or taxes. *Id.* at 76.

While *Indoor Billboard* expressly rejected the argument that whenever a consumer pays invoice he has per se proved causation, the Court recognized that the payment of money could be the proximate cause of the consumer's injury:

We reject Indoor Billboard's per se rule because mere payment of an invoice may not establish a causal connection between the unfair or deceptive act or practice and plaintiff's damages. Proximate cause is a factual question to be decided by the trier of fact. Payment of an invoice *may or may not* be sufficient to establish a causal connection between the misrepresentation of fact and damages, but payment of the invoice may be considered with all other relevant evidence on the issue of proximate cause.<sup>21</sup>

The Court of Appeals' reversal of the trial court's ruling that individual reliance is necessary to prove causation is consistent with *Indoor Billboard*.

#### IV. CONCLUSION

Consumers are not required to prove actual reliance in order to meet the causation requirement of a private CPA case. Rather, as this Court held in *Indoor Billboard*, consumers must show that a defendant's unfair or deceptive act or practice was the proximate cause of their injury.

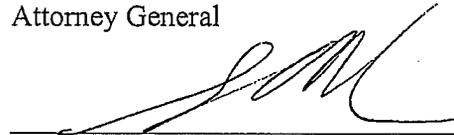
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<sup>21</sup> *Id.* at 84 (emphasis added).

RESPECTFULLY SUBMITTED this 26 day of September,

2008.

ROB MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read 'S.E. Smith', written over a horizontal line.

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